

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)
KATHLEEN DREAMER, ET AL.,)
)
Appellees,)
)
vs.)
)
WILLIAM MASON, CUYAHOGA)
COUNTY PROSECUTOR, ET AL.,)
)
Appellants.)

Case No. 2010-1551
On Appeal from the
Cuyahoga County Court of Appeals
Eighth Judicial District
Court of Appeals Case No. 09 CA 93949

**APPELLANTS' BRIEF IN OPPOSITION TO
APPELLEES' MOTION TO STRIKE APPELLANTS' REPLY BRIEF**

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Contrary to the appellees' contention that the factual recitation contained in the appellants' Reply Brief is not part of the record, the evidence filed with the Court of Appeals showed that during the December 22, 2004 BOE meeting held to certify the results of the Presidential recount, witnesses came forward to report that the ballot containers in which the ballots were to have been stored had been opened prior to the witnesses' arrival for the recount and that the ballots appeared to have been removed from the containers, presorted, and improperly pre-counted before any witnesses were present for the recount. (See "Respondents' Motion for Summary Judgment" at Exhibit A, Lambert Affidavit at para. 2.) The facts recited in the appellants' Reply Brief are wholly consistent with this evidence showing that during the 2004 recount of the Presidential election, Ohio election laws demanding fair, open and transparent processes – the bedrock of our democratic form of representative government – had been secretly but deliberately subverted. That the appellants' Reply Brief identified by name the specific witnesses who so testified and recounted the essence of their sworn testimony substantiating the evidence already of record here controverting the appellees' supposed good-faith performance of their official duties may frustrate the appellees' attempt to present only the

most sanitized version of the facts, but it does not, by itself, provide grounds to strike the appellants' reply brief and the arguments contained therein.

THE STATE OF THE RECORD IN THIS CASE OWES ITSELF TO THE COURT OF APPEALS FAILURE TO FOLLOW THE FUNDAMENTAL REQUISITES OF BOTH DUE PROCESS AND CIVIL RULE 56

Indeed, the appellees' motion to strike actually helps bring to the fore the extremely unusual and irregular manner in which the Court of Appeals decided this case. In the Court of Appeals, the **appellants** moved for summary judgment, setting forth their argument with citation to the supporting evidentiary materials submitted therewith. The appellees opposed the appellants' motion for summary judgment, supporting their brief with evidentiary materials they presumably believed warranted the denial of the appellants' motion for summary judgment.

Appellees did *not* file their own motion for summary judgment. Because the appellees did not move for summary judgment, the appellants had no **opportunity** much less reason to file argument and **evidentiary materials in opposition to the last minute flurry of affidavits submitted by appellees in support of their brief in opposition to appellant's motion.** To grant summary judgment to a party who has not moved for summary judgment violates both Civ.R. 56(C) and the fundamental requirements of due process.

Instead of deciding only the motion that was then before the Court of Appeals, (appellants' motion for summary judgment) the Court of Appeals deviated from proper procedure when it directed the parties to file supplemental affidavits *contemporaneously*. The Court of Appeals did not illuminate in any way the additional facts it apparently believed were necessary to enable it to decide the case. And contrary to the typical summary judgment procedure under Civ.R. 56 in which the moving party files evidence to support the requested judgment **after which the** adverse party has the opportunity to present evidence to contest the

request for judgment, the Court of Appeals' order gave the appellants no opportunity to file evidence to contradict the appellees' evidence – for which they had not even moved for the entry of judgment.

Confounded by the appellate court's order, the appellants initially moved the Court of Appeals to clarify its order or at least hold a guidelines hearing – unaware of the supplemental affidavits that the appellees filed that same day. With no action taken by the Court of Appeals after two (2) months, the appellants filed a motion requesting oral argument. The Court of Appeals took no action on that request and instead proceeded two (2) months later to (1) deny the appellants' motion for summary judgment – without identifying any factual dispute that would warrant the denial – and then (2) enter final judgment in favor of the appellees, **notwithstanding that the appellees had not affirmatively moved for the entry of judgment and**, having failed to do so, the appellants had no opportunity to answer any such request for judgment with Civ.R. 56(C) evidence showing that their claims were disputed as to the facts and as to the law.

Most unfairly, the appellate court's order for contemporaneous factual submissions enabled the appellees to aver for the first time ever in former Deputy Director Dillingham's supplemental affidavit that she supposedly heard Assistant Prosecutor Oradini say during a BOE executive session that the county would only pay the appellees' attorney fees if they were found not guilty, a particularly startling assertion inasmuch as none of the actual BOE members – who themselves filed affidavits in this case and who, according to appellees, fully supported them – offered any such testimony. **And having given the appellants no opportunity to contest that assertion**, the Court of Appeals apparently assumed mistakenly that it was not disputed by the appellants – but that is only because the appellate court's conduct of the case deprived the

appellants of the very opportunity to contest it categorically. In fact, had appellant been given the opportunity to respond, e.g. had appellees moved for summary judgment with supporting affidavits, appellants would have contested many of the critical facts of this case -- facts that the Court of Appeals deemed to be “uncontroverted” when it rendered its decision.

The action of the court of appeals is in direct contravention of Ohio law. In *State ex rel. J.J. Detweiler Enterprises, Inc. v. Warner*, 103 Ohio St.3d 99, 2004-Ohio-4659, 814 N.E.2d 482, the Supreme Court of Ohio held that a court of appeals erred in sua sponte entering summary judgment in favor of the non-moving appellees. *Id.* at ¶ 12. “Civ.R. 56 does not authorize courts to enter summary judgment in favor of a non-moving party.” *Id.* (quoting *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, 472 N.E.2d 335, syllabus). Accord *Taft v. Cuyahoga County Board of Elections*, 110 Ohio St.3d 471, 2006-Ohio-4204, 854 N.E.2d 472, at ¶ 38 (common pleas court erred in entering judgment for non-moving party with factual disputes); *State ex rel. Beacon Journal Publishing Co. v. Radel* (1991), 57 Ohio St.3d 102, 566 N.E.2d 661 (court of appeals erred in summarily granting writ of mandamus when no answer admitting the facts had been filed). For like reasons, this is not a case in which the sua sponte entry of final judgment in favor of the non-moving appellees should fairly be allowed to stand.

Nor is this a case in which all the relevant evidence was before the Court of Appeals. The appellants had no notice that the appellees’ brief *opposing* the appellants’ motion for summary judgment would somehow be treated by the Court of Appeals as an affirmative application *for* the entry of judgment. As a consequence, the appellants had no opportunity or reason to respond to the appellees’ supplemental affidavits – as is contemplated by typical summary judgment motion practice under Civ.R. 56 – by demonstrating that the appellees’

factual assertions were disputed. This lack of notice and opportunity to be heard violates the most fundamental elements necessary for the due process of law.

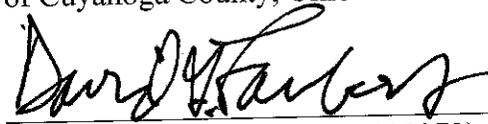
The Court of Appeals gave no indication that it sought to decide this case not on the basis of the *legal* issue of whether its extraordinary supervisory authority should be invoked to compel the employment of special counsel to represent indicted county employees, but rather on the basis of the *factual* issue of whether the conduct of these appellees constituted a well-intended attempt to perform their official duties. Even so, the facts referenced in the appellants' Reply Brief are wholly consistent with and substantiate the evidence submitted by the appellants in the Court of Appeals. Even if this Court elects not to consider those facts, that ought not provide grounds to strike the appellants' Reply Brief and the arguments set forth therein.

Appellants respectfully request that this Court deny the appellees' motion to strike appellants' Reply Brief.

Respectfully submitted,

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PROOF OF SERVICE

A true copy of the foregoing Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Reply Brief was served this 23rd day of February 2011 by regular U.S. Mail, postage prepaid, upon:

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