

IN THE SUPREME COURT OF OHIO

IN RE:) CASE NO. 2012-0184

THE CONTEST OF THE ELECTION) CONSOLIDATED
HELD ON STARK COUNTY ISSUE 6) CASE NO. 2012-0214
(LAKE TOWNSHIP POLICE DISTRICT))
IN THE GENERAL ELECTION)
HELD NOVEMBER 8, 2011) On appeal from the Stark
County Common Pleas Court
Case No. 2011 CV 03947

BRIEF OF APPELLEES / CROSS-APPELLANTS

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MAR 16 2012
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STATEMENT OF FACTS

This case arises out of appellees/cross-appellants' ("Contestors") petition contesting the election results for the election held on Stark County Issue 6 (Lake Township Police District) in the November 8, 2011 general election ("Issue 6"). On December 9, 2011, Contestors filed their petition alleging that the ballot language for Issue 6 did not accurately state the millage of the proposed tax levy in dollars and cents. While the tax levy, pursuant to R.C. 505.481, was required to state the mills in dollars and cents per one thousand dollars of valuation, the ballot language incorrectly stated that the 4.5 mills were forty-five cents (\$0.45) for each one thousand dollars of valuation when it should have stated four dollars and fifty cents (\$4.50) per one thousand dollars of valuation. Record, Document 1.

Appellants answered the petition, and on January 6, 2012, the court conducted a hearing. At the hearing, the parties entered into stipulations including that Contestors complied with all of the procedural requirements necessary for bringing an election contest. Tr. 1/6/2012, pp. 7-9 and 12. In addition, the parties stipulated that the Issue 6 ballot language contained an irregularity. Tr. 1/6/2012, pp. 12-13. After agreeing to the above and other stipulations, the court proceeded to question the five voters who verified the petition on the issue of laches. Tr. 1/6/2012, pp. 31-42. In other words, in order to ensure that the Contestors did not fail to act prior to the filing of the December 9, 2011 election contest, the court questioned the five verifiers as to when they learned of the irregularity and what, if anything, they did with that knowledge prior to the election.

During the January 6, 2012 hearing, the court also indicated to the appellants that it wanted to hear from the appropriate witnesses from both Lake Township and the Stark

County Board of Elections as to when they learned of the irregularity and what, if anything, they did to correct it. Tr. 1/6/2012, pp. 22, 28-29, 43. The January 6, 2012 hearing was adjourned and continued to January 23, 2012. Tr. 1/6/2012, p. 42.

Between the January 6, 2012 and January 23, 2012 hearings, the parties engaged in discovery, including the exchange and answer of interrogatories and requests for production of documents. Record, Documents 17, 26 and 27. In addition, Contestors filed notices of deposition pursuant to Civ.R. 30(B)(5) for the depositions of a representative of Lake Township and a representative of the Board of Elections specifically regarding when each party became aware of the irregularity and what actions were taken, if any, to correct the irregularity prior to the election. Record, Documents 21 and 22. In response, Lake Township and the Board of Elections filed a motion to quash and motion for protective order. Record, Document 25. While not indicated in the record, the court granted the motion to quash and denied Contestors the opportunity to depose representatives from Lake Township and the Board of Elections.

In the meantime, the documents disclosed by the Board of Elections included an e-mail from Serena Henderson at the Ohio Secretary of State's office to Kathy Lewis at the Board of Elections which contained a handwritten note from Elections Counsel Gretchen Quinn notifying the Board of Elections that the ballot language was incorrect. Record, Plaintiffs' [Contestors'] Exhibit 4 and Board of Elections, Exhibit 3. Based on the disclosure of that e-mail, Contestors asked the court for leave to amend their petition pursuant to R.C. 3515.11 and proffered plaintiffs' Exhibit 4 in support of that amendment. Tr. 1/23/2012, pp. 13-15. In addition, Contestors again asked for the opportunity to conduct

depositions of representatives of both the Board of Elections and Lake Township based on the evidence contained in the July 27, 2011 e-mail from the Secretary of State to the Board of Elections. Id.

In response to Contestors' proffer, Lake Township also made a proffer, which included the following: that Lake Township learned of the error on the Issue 6 ballot on October 12, 2011; that on October 13, 2011, Board of Elections employee Kathy Lewis informed Lake Township of the ballot irregularity and that it was too late to correct as absentee ballots had been mailed and the regular ballots had been certified. Tr. 1/23/2012, pp. 17-18. Lake Township also proffered that the Board of Elections never sent the approved ballot language back to the Township. Id. at p. 17.

After all parties made an initial proffer, the court proceeded to hear testimony at the January 23, 2012 hearing. Contestors called twelve witnesses who each testified that they voted for Issue 6 based on the ballot language of forty-five cents (\$0.45) per one thousand dollars of valuation, but would now vote no after learning that the ballot stated the amount in dollars and cents incorrectly. Tr. 1/23/2012, pp. 29-72. In addition, Contestors, over objections from appellants, submitted the affidavits of ten additional voters who affirmed that they voted on Issue 6 in the November 8, 2011 election; that they voted yes on Issue 6 based on the ballot language indicating that it would cost forty-five cents (\$0.45) per one thousand dollars of taxable valuation; that they had since learned that the ballot language should have read four dollars and fifty cents (\$4.50) per one thousand dollars of valuation; and that if the ballot included the correct language they would have voted no on Issue 6. Record, plaintiffs' Exhibit 5.

As a result of the January 6, 2012 and January 23, 2012 hearings, the court found in favor of Contestors and set aside the November 8, 2011 results for Issue 6. While Contestors believe that the trial court correctly decided this election contest and that that decision should be affirmed, they present the following proposition of law to preserve the record in the event that this Court disagrees with the trial court and reverses its decision. In such circumstance, Contestors ask that this Court remand the case to the trial court for further proceedings.

ARGUMENT

Proposition of Law

R.C. 3515.11 PERMITS THE AMENDMENT OF AN ELECTION CONTEST PETITION PURSUANT TO EVIDENCE DISCLOSED THROUGH THE DISCOVERY PROCESS.

Contestors' election contest was brought pursuant to R.C. 3515.08 through 3515.15. When Contestors filed their petition on December 9, 2011, they knew that the ballot language contained an irregularity in that the millage was incorrectly stated in dollars and cents as forty-five cents (\$0.45) per one thousand dollars of taxable valuation when it should have read four dollars and fifty cents (\$4.50) per one thousand dollars of taxable valuation. Through discovery, Contestors first learned of the e-mail from the Ohio Secretary of State to the Stark County Board of Elections on or about January 19, 2012, when the Board of Elections responded to Contestors discovery requests. Record, Documents 26 and 27. As such, four days before the January 23, 2012 hearing, Contestors first learned that the Board of Elections was notified that the ballot language was wrong as early as July 2011. Despite this knowledge, neither the Board of Elections nor Lake Township did anything to correct the ballot language.

R.C. 3515.11 states, in pertinent part, that:

The proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, insofar as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, **with power to order and permit amendments to the petition** and proceedings as to form and substance. (Emphasis added.)

In addition, R.C. 3515.12 states that “the court may require any election officer to answer any questions pertinent to the issue relating to the conduct of the election”

The Ohio Supreme Court has held that “in evaluating these claims, we are guided by several well-established principles, none more important than that ‘our citizens must be confident that their vote, cast for a candidate or an issue, *will not be disturbed except under extreme circumstances that clearly affect the integrity of the election.*’” (Emphasis sic.) *In Re Election Contest of December 14, 1999, Special Election for the Office of Mayor of the City of Willoughby Hills*, 91 Ohio St.3d 302, 304, 2001-Ohio-45, 744 N.E.2d 745, citing *In Re Election Contest of Democratic Primary Held May 4, 1999, For Clerk, Youngstown Mun. Court*, 88 Ohio St.3d 258, 263, 725 N.E.2d 271 (2000), quoting *In Re Election of November 6, 1994, Office of Atty. Gen. of Ohio*, 58 Ohio St.3d 103, 105, 569 N.E.2d 447 (1991). Fraud, misrepresentation or failure to act after gaining specific knowledge that ballot language is incorrect constitutes such extreme circumstances to warrant a rejection of the election results. Upon discovering that the Board of Election and/or Lake Township had specific knowledge that the proposed ballot language for Issue 6 was incorrect, Contestors should have been permitted to conduct discovery regarding that issue and present evidence of same at the hearing of this matter.

When they filed their petition on December 9, 2011, Contestors knew that the ballot language for Issue 6 contained an irregularity. What they did not know at that time was that the Board of Elections was notified on July 27, 2011, that there was an error in the ballot language and that nothing was done to correct that error prior to the November 8, 2011 election. Having discovered that evidence of an additional basis under which the election could be rejected only four days prior to the January 23, 2012 hearing, Contestors proffered the evidence to the court at the January 23, 2012 hearing and requested the opportunity to depose representatives from the Board of Elections and Lake Township regarding that

evidence. In addition, Contestors requested leave to amend their petition to include a claim for fraud and/or misrepresentation based not only on the July 27, 2011 e-mail from the Secretary of State's office but also on any additional evidence discovered during depositions of the Board of Elections and Lake Township.

Lake Township proffered evidence it believes resolves this issue in its favor. To the contrary, that evidence raises more questions that could lead to the rejection of the election. Those questions include what did the Board of Elections do with the information in the July 27, 2011 e-mail from the Secretary of State's office; who at the Board of Elections knew about the error; who and when did they tell at Lake Township; and was there time to change the ballot after October 13, 2011? If either the Board of Elections or Lake Township knew that the Issue 6 ballot language was wrong and sat idly by while the voters cast their ballots on a tax issue that the Township and the Board of Elections knew was wrong, that inaction could rise to the level of a fraud and serve as an additional basis to reject the results for Issue 6.

In addition, Lake Township proffered that they learned of the irregularity on October 12, 2011, and that there was no time to correct the ballot language. That proffer has never been challenged and is called into question by a recent similar incident in Medina County. Due to redistricting, voters in several Medina County districts received ballots with the wrong candidates when voting early or absentee in the March 6, 2012 primary election. The error was discovered on February 17, 2012, which gave the Medina County Board of Elections enough time to correct the ballots before the March 6, 2012 primary election and contact those voters who voted early or absentee to have them re-vote. Miller, *Ballot Error Affects About 300 Early Voters in Medina County*, Akron Beacon Journal (February 18,

2012); <http://www.ohio.com/news/local/ballot-error-affects-about-300-early-voters-in-medina-county-1.265456>. If the Medina County Board of Elections could correct that error in eighteen (18) days, could the Stark County Board of Elections correct this error in twenty-six (26) days?

Based on the foregoing, Contestors reiterate that they believe the trial court made the correct decision and that the trial court's decision should be affirmed. However, in the event that this Court disagrees, Contestors respectfully request that the case be remanded to the trial court with instructions that Contestors be permitted to amend their petition and conduct further discovery, including the depositions of appropriate representatives and employees from Lake Township and the Board of Elections based on the July 27, 2011 e-mail from the Ohio Secretary of State's office.

CONCLUSION

After conducting hearings on January 6 and January 23, 2012, the trial court reached the correct decision and set aside the election results for Issue 6. That decision should be affirmed.

In the event that this Court disagrees with the trial court, this matter should be remanded to the trial court for further proceedings. Based on the discovery that the Secretary of State notified the Board of Elections in July 2011 that the ballot language for Issue 6 was wrong, Contestors should be permitted an opportunity to conduct further discovery on that issue and present evidence based on that knowledge at a hearing. Such evidence that the Board of Elections and/or Lake Township knew that the ballot language was incorrect and did nothing to correct the ballot language constitutes an extreme circumstance which would serve as an additional basis to reject the election results for Issue 6.

Based on the foregoing, in the event that this Court disagrees with the trial court, Contestors respectfully request that the case be remanded for further proceedings and specific direction to the trial court that Contestors be permitted to conduct depositions of the appropriate representatives and/or employees of the Board of Elections and Lake Township and that such evidence be presented to the trial court at a subsequent hearing.

Respectfully Submitted,

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APPENDIX

Notice of Cross Appeal filed February 9, 2012 App-2

Judgment Entry filed January 25, 2012 App-5

Ohio Revised Code §505.481 App-11

Ohio Revised Code §3515.11 App-13

Ohio Revised Code §3515.12 App-14

IN THE SUPREME COURT OF OHIO

IN RE:) CASE NO. 12-0184
THE CONTEST OF THE ELECTION)
HELD ON STARK COUNTY ISSUE 6) On appeal from the Stark
(LAKE TOWNSHIP POLICE DISTRICT)) County Common Pleas Court
IN THE GENERAL ELECTION) Case No. 2011 CV 03947
HELD NOVEMBER 8, 2011)
)
)

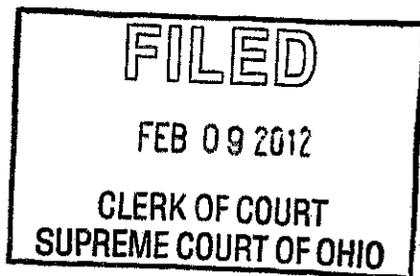
NOTICE OF CROSS APPEAL

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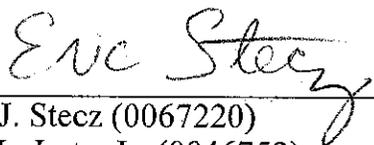
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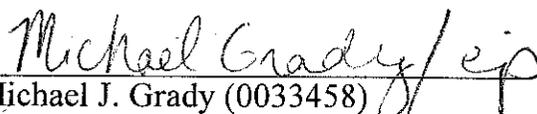
NOTICE OF CROSS APPEAL

Now come appellees/cross-appellants, Contestors James Miller, et al., and pursuant to R.C. 3515.15 and S.Ct.Prac.R. 2.1(C)(2), hereby give notice of their cross-appeal of right to the Supreme Court of Ohio from the judgments of the Stark County Court of Common Pleas entered on January 25, 2012, in the matter of In Re: The Contest of the Election Held on Stark County Issue 6 (Lake Township Police District) in the General Election Held November 8, 2011, being Case No. 2011-CV-03947.

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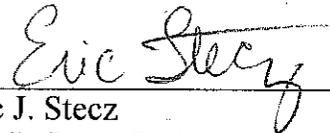
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for each one thousand dollars of valuation...,” when said language should have read “...at a rate not exceeding four and one-half (4.50) mills for each dollar of valuation, which amounts to four dollars and fifty cents (\$4.50) for each one thousand dollars of valuation.”

Election Contests

Grounds for election contests include fraud and various types of irregularities. Contestors have asserted in their petition, and it is stipulated, that the only irregularity is the ballot language which contains a miscalculation in the expression of dollars and cents per one thousand dollars of valuation. In all other respects, the ballot language for Issue 6 was accurate. This is not a case about the merits of Issue 6.

Under Ohio law, a contestor of an election must establish by clear and convincing evidence that (1) one or more election irregularities occurred, and (2) the irregularity or irregularities affected enough votes to change or make uncertain the result of the election.¹ Clear and convincing evidence is the standard because Courts must be restrained from invalidating elections, and the relief sought – the rescission of an election – is equitable in nature.²

“Additionally, every reasonable presumption should be indulged in favor or upholding the validity of an election and against ruling it void.”³ “In sum, the message of the established law of Ohio is clear: our citizens must be confident that their vote, cast for a candidate or an issue, will not be disturbed except under extreme circumstances

¹ *McMillan v. Ashtabula Cty. Bd. Of Elections* (1993), 68 Ohio St.3d 31, 34.

² See, R.C. 3515.11. *In re Election of Nov. 6, 1990 for Office of Atty. Gen. Of Ohio* (1991), 58 Ohio St.3d 103.

³ *Copeland v. Tracy* (1996), 111 Ohio App.3d 648, 655.

that clearly affect the integrity of the election.”⁴ On the other hand, it is axiomatic that for citizens to have confidence in their government, they must be able to have trust in the integrity of the election process.

Equitable Estoppel and Laches

The threshold issue is whether or not the petition is barred by the doctrine of laches. Laches will bar an action for relief in an election-related matter if the persons seeking this relief failed to act with the requisite due diligence.⁵

Contestees argue that Contestors are estopped from attacking the validity of the election because of the vast amount of information made available to the voters in Lake Township about Issue 6, including the proposed ballot language with the miscalculation. In sum, according to the Contestees, the protest is untimely because Contestors knew or should have known the correct information regarding Issue 6, and that the ballot contained an error.

This argument cuts both ways. On the one hand, the Contestees contend that because so much information was available with the correct amounts, any error on the legal notice and ballot does not matter. On the other hand, they attempt to persuade this Court to find that even though all mailings and new articles gave the correct amount, an elector had the additional responsibility of noticing an error in both the legal notice and the ballot itself. Such an obligation on the electors is beyond due diligence.

R.C. § 505.481(B) specifically requires that the mills shall be stated in dollars and cents per one thousand dollars of taxable valuation. The legislature chose to require this

⁴ *In re Election of Nov. 6, 1990 for Office of Atty. Gen. Of Ohio, supra*

⁵ *State ex rel. Stoll v. Logan Cty. Bd. Of Elections* (1993), 117 Ohio St.3d 76.

mandatory language when putting a tax levy on the ballot in conjunction with the expansion of a township police district.

A review of all the material submitted by Contestees demonstrates that other than the June 27, 2011, meeting minutes, the legal notice and the ballot language, none of the campaign materials ever expressed the amount of the ballot issue in dollars and cents per one thousand dollars of valuation as required by R.C. § 505.481(B). Instead, the cost of the levy was either expressed in millage, cost per day, or an annual cost.

Finally, the Court finds that the circulation of the Hartville News, where the legal notice was published, was not adequate to put the Contestors on notice of the irregularity so as to estop them from contesting the results. This case is distinguishable from *Smith v. Scioto Cty. Board of Elections*⁶ because of the nature of the publication chosen. To find otherwise would place too much of a burden on the Contestors. The Court thus finds that the Contestors acted with due diligence.

Outcome Placed in Doubt

The mistake leads a voter to the conclusion that the tax he or she is approving is ten times less than the amount that the Contestees seek to collect. Contrary to the assertions of the Contestees, this error is more than a “clerical error” and the degree of this error is substantial enough to mislead the voters.

Contestors argue that because Issue 6 involved a tax levy, and because the irregularity is substantial, the ballot is fatal on its face and requires the rejection of the election results.⁷ While this Court agrees that the irregularity was substantial and in theory could be a basis for a rejection of the result, the Court is reluctant to find that the

⁶ (2009) 123 Ohio St.3d 467.

⁷ See, *Beck v. city of Cincinnati* (1955), 162 Ohio St. 473.

Beck case is dispositive. There, the court was concerned with the persuasive language inserted into the ballot that was not authorized by law. Here, the ballot contains a miscalculation not a coercive statement. However, it is clear from the *Beck* case that tax issues are to be closely scrutinized. Accordingly, the only issue is whether the irregularity made the result of the election uncertain.

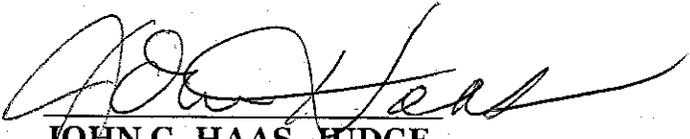
Contestors are not required to show that a different result would have been certain. Their burden is to show that the irregularity made the result uncertain. This they have done. Contestors are not required to bring into court 246 voters who voted “yes” to say they would have voted “no”. Based on the witness testimony, the affidavits, and the compressed time period for hearings on contested elections, Contestors have met their burden. The Court is convinced that the result of the election was uncertain due to the irregularity contained in the ballot language.

This Court is sensitive to the axiom that citizens must be confident that their votes will not be disturbed except under extreme circumstances that clearly affect the integrity of the election, and this Court is reluctant to set aside an election result. However, for the electorate to be confident in their government they must be able to trust in the integrity of the election process.

Accordingly, this Court holds that the relief sought by Contestors is **GRANTED** and the result of the November 8, 2011 election as to Issue 6 is hereby set aside. Costs to be paid by the County per statute.

IT IS SO ORDERED.

This is a final appealable order and there is no just cause for delay.



JOHN G. HAAS, JUDGE

To: Atty. Michael J. Grady
Atty. Eric J. Stecz
Atty. Deborah A. Dawson
Atty. Charles Hall



Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through files 1-69 and 71.
*** Annotations current through January 9, 2012 ***

TITLE 5. TOWNSHIPS
CHAPTER 505. TRUSTEES
TOWNSHIP POLICE DISTRICTS

Go to the Ohio Code Archive Directory

ORC Ann. 505.481 (2012)

§ 505.481. Election on adding remaining unincorporated territory to district and levy of tax throughout district

(A) If a township police district does not include all the unincorporated territory of the township, the remaining unincorporated territory of the township may be added to the district by a resolution adopted by a unanimous vote of the board of township trustees to place the issue of expansion of the district on the ballot for the electors of the entire unincorporated territory of the township. The resolution shall state whether the proposed township police district initially will hire personnel as provided in *section 505.49 of the Revised Code* or contract for the provision of police protection services or additional police protection services as provided in *section 505.43 or 505.50 of the Revised Code*.

The ballot measure shall provide for the addition into a new district of all the unincorporated territory of the township not already included in the township police district and for the levy of any tax then imposed by the district throughout the unincorporated territory of the township. The measure shall state the rate of the tax, if any, to be imposed in the district resulting from approval of the measure, which need not be the same rate of any tax imposed by the existing district, and the last year in which the tax will be levied or that it will be levied for a continuous period of time.

(B) The election on the measure shall be held, canvassed, and certified in the manner provided for the submission of tax levies under *section 5705.25 of the Revised Code*, except that the question appearing on the ballot shall read substantially as follows:

"Shall the unincorporated territory within (name of the township) not already included within the (name of township police district) be added to the township police district to create the (name of new township police district) township police district?"

The name of the proposed township police district shall be separate and distinct from the name of the existing township police district.

If a tax is imposed in the existing township police district, the question shall be modified by adding, at the end of the question, the following: ", and shall a property tax be levied in the new township police district, replacing the tax in the existing township police district, at a rate not exceeding . mills per dollar of taxable valuation, which amounts to . (rate expressed in dollars and cents per one thousand dollars in taxable valuation), for (number of years the tax will be levied, or "a continuing period of time")."

If the measure is not approved by a majority of the electors voting on it, the township police district shall continue to occupy its existing territory until altered as provided in this section or *section 505.48 of the Revised Code*, and any existing tax imposed under *section 505.51 of the Revised Code* shall remain in effect in the existing district at the existing rate and for as long as provided in the resolution under the authority of which the tax is levied.

HISTORY:

150 v H 148, § 1, eff. 11-5-04; 2011 HB 153, § 101.01, eff. Sept. 29, 2011.

NOTES:

Section Notes

This section was formerly codified as *RC § 505.482*.

This section was renumbered as *RC § 505.481* by 2011 HB 153, § 101.01, effective Sept. 29, 2011.

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Ohio Statutes

Title 35. ELECTIONS

Chapter 3515. RECOUNT; CONTEST OF ELECTIONS

Includes all legislation filed with the Secretary of State's Office through 2/3/2012

§ 3515.11. Proceedings at trial of contest of election

The proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable, and shall be under the control and direction of the court which shall hear and determine the matter without a jury, with power to order or permit amendments to the petition or proceedings as to form or substance. Such court may allow adjournments for not more than thirty days, for the benefit of either party, on such terms as to costs and otherwise as seem reasonable to the court, the grounds for such adjournment being shown by affidavit. The hearing shall proceed expeditiously and the total of such adjournments shall not exceed thirty days after the date set for the original hearing.

History. Effective Date: 10-01-1953

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Ohio Statutes

Title 35. ELECTIONS

Chapter 3515. RECOUNT; CONTEST OF ELECTIONS

Includes all legislation filed with the Secretary of State's Office through 2/3/2012

§ 3515.12. Witnesses - subpoenas

The court with which a petition to contest an election is filed may summon and compel the attendance of witnesses, including officers of such election, and compel the production of all ballot boxes, marking devices, lists, books, ballots, tally sheets, and other records, papers, documents, and materials which may be required at the hearing. The style and form of summons and subpoenas and the manner of service and the fees of officers and witnesses shall be the same as are provided in other cases, in so far as the nature of the proceedings admits. The court may require any election officer to answer any questions pertinent to the issue relating to the conduct of the election or the counting of the ballots and the making of the returns. Any witness who voted at the election may be required to answer touching his qualification as a voter and for whom he voted.

History. Effective Date: 06-29-1961

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