ORIGINAL

IN THE SUPREME COURT OF OHIO

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	: : :	Case No.: 2012-0184 2012-0214 On Appeal from the Court of Common Pleas, Stark County, Ohio Case No.: 2011CV03947

BRIEF OF APPELLANT "CITIZENS FOR THE LAKE TOWNSHIP POLICE, BOB MOSS, TREASURER"

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STATEMENT OF FACTS

On November 8, 2011, 5,577 Lake Township voters cast their vote in favor of Issue 6, and 5,087 opposed, resulting in a plurality of 490 votes. (Transcript of Proceedings, January 6, 2012, 11:9-17). Through their affirmative votes, the voters expressed their choice to expand the Uniontown Police District township wide, and to levy a tax of 4.5 mills. (Tr 1-6-12, 11:11-18).

R.C. § 505.481(b), which is the only statute with such a requirement, specifies that the millage shall be stated as a dollar valuation per one thousand dollars of taxable valuation. The ballot correctly read 4.50 mills for each $1.00 of tax valuation, and complied with all other relevant statutes and laws. (Tr 1-6-12, 12:21-13:2). However, the ballot language contained an irregularity: it stated forty-five cents per thousand dollars of tax valuation instead of $4.50 per each thousand dollars of valuation. (Id.).

The irregularity was published well in advance of the November 8, 2011, General Election. (Tr 1-6-12, 12:21-13:2.). The June 27, 2011 Resolution, which contained the miscalculation, was first published July 11, 2011 on the Lake Township web page—nearly four months prior to the election. (Transcript of Proceedings, January 23, 2012, 23:24-24:3). The ballot language was published in the Hartville News, a newspaper of general circulation within Lake Township on October 21— more than two weeks before the election, and October 28, 2011— more than one week before the election. (Tr. 1-23-12, 9:15-22.). The ballot language was also published in articles in the Canton Repository, another newspaper of general circulation within the township. (Tr 1-6-12, 14:1-14; 16:22-17:22. See also the exhibits attached to the Citizen's Committee Memorandum in support of Summary Judgment and the Lake Township Board of Trustees exhibits 1 through 40, inclusive). The Board of Elections' legal notice and web site also published the ballot language containing the irregularity. (Tr 1-6-12, 15:14-18).

The voters received extensive information about Issue 6, which all contained a calculation of the correct tax amount. (Tr 1-6-12, 15:6-16:1,; 16:22-17:5; 18:16-20; 19:4-16.). All other articles, statements, brochures, flyers and other materials and information sent to prospective voters did not contain the irregularity and had an appropriate and correct calculation of the impact of this tax on a property owner. (Id.). All of the campaign materials prepared and disseminated by Citizens for Lake Township Police, the Stark County Auditor's website, and numerous articles in the two local newspapers of general circulation, the Canton Repository and the Hartville News, gave the correct millage, the correct dollar valuation and the correct calculation for the cost of the tax levy based upon a real property valuation of $100,000. (Tr 1-6-12, 15:10-18; Affidavit of Mary A. Kamerer, Chairwoman, Citizens for Lake Township Police.).

The Lake Township Newsletter, which contained the correct information, was mailed to every household in Lake Township (Tr 1-6-12, 28:4-5; 39:12-25). In addition, any elector within Lake Township could receive an accurate calculation of the cost of the levy for that elector's parcels or real property at the Stark County Auditor website. (Tr 1-6-12, 27:2-14).

Contestors claim that an irregularity resulted from the use of ballot and petition language that violated the statutory requirements of R.C. § 505.481(b), and was inaccurate and misleading so as to nullify the majority approval of the ballot issue. (Contestors' Pre-Trial Brief, 5; Tr 1-6-12, 20:21-25:1; Tr 1-23-12, 96:1-7). However, the time in which it would have been permissible for Contestors' protest has come, and gone. Despite knowing about the irregularity weeks, if not months, in advance of the election, Contestors took no action. Contestors had ample opportunity to file a pre-election protest, yet did not act within the proper timeframe for doing so. Contestors are a minority of voters, dissatisfied with the results of a lawful election, who now attempt to

overcome their defeat, by improperly using the judicial system to nullify the will of the electorate.

STATEMENT OF STIPULATED LAW AND FACTS

At the direction of the Court during the January 6, 2012 evidentiary hearing the parties entered into twelve (12) stipulations of law and fact:

1. The five (5) signers of the Petition all voted in the November 8, 2011 General Election. (Tr 1-6-12, 7:20-25)

2. As required by the statute, Twenty-five of the signers of the Petition were voters in the November 8, 2011 General Election. (Tr 1-6-12, 8:12-16).

3. As required by the statute, a bond was set by the Clerk of Courts. (Tr 1-6-12, 8:12-16).

4. The Petitioner's election contest was timely filed. (Tr 1-6-12, 12:5-9).

5. On November 28, 2011, Lake Township Issue Number 6, to expand the Uniontown Police District township wide and to levy a tax of 4.5 mills was certified by the Stark County Board of Elections as having passed with 5,577 votes in favor, 5087 votes opposed, a majority approval of 490 votes. (Tr 1-6-12, 11:11-18).

6. The ballot language contained the irregularity reading 4.50 mills for each $1.00 of tax valuation, thereafter stating forty-five cents per thousand dollars of tax valuation instead of $4.50 per each thousand dollars of valuation. (Tr 1-6-12, 12:21-13:2).

7. The irregularity first occurred in the June 27, 2011 resolution approved by the Lake Township Board of Trustees. (Tr 1-6-12, 13:18-23).

8. The irregularity was published by the Stark County Board of Elections in the Hartville News, a newspaper of general circulation in Lake Township, on October 21, 2011 and again on October 28, 2011. (Tr 1-6-12, 14:1-7, 12).[1]

9. Only the board resolution and the two newspaper publications contained the irregularity. All other articles, statements, brochures, flyers and other materials and information sent to prospective voters did not contain the irregularity and had an appropriate and correct calculation of the impact of this tax on a property owner. (Tr 1-6-12, 15:6-16:1; 16:22-17:5; 18:16-20; 19: 4-16.).

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[1] There is a proffer to the trial court that the publication of the irregularity was also published on the Lake Township Board of Trustees ' web site from July 11, 2011 and on the Board of Elections web site from October 3, 2011. (Tr 1-23-12, Pp 23, Ll 23, P. 24, L.10.).

10. Except for the irregularity the proponents complied with the election statutes. (Tr 1-6-12, 25:5-11).

11. The Stark County Auditor maintained a website where any elector within Lake Township could receive an accurate calculation of the cost of the levy for that elector's parcels or real property. (Tr 1-6-12, 27:2-14).

12. An election contest is a statutory proceeding but vests the reviewing court with limited equitable powers. (Tr 1-6-12, 17:23-18:1).

Having so stipulated the parties were not further obligated to present any testimony or evidence on these stipulated matters.

ARGUMENT

I. The trial court improperly applied the law of laches to the facts and circumstances before it on the issue of the election contest.

The threshold question before the Court is whether the petition is barred by the Doctrine of Laches. The proper method for the Contestors' claim is a pre-election protest. Contestors failed to timely make a pre-election protest. Contestors improperly waited until receiving an unfavorable election result to bring their claim. Contestors' inaction constitutes a lack of due diligence, and therefore the Petition is barred by the Doctrine of Laches. A pre-election protest is not excused because the ballot irregularity is not so substantial as to mislead the voters.

A. Contestors were required to assert this claim in a pre-election protest, and Contestors failed to make such a protest.

"Election contests may not be used as a vehicle for asserting an untimely protest." *Portis v. Summit Cty. Bd. of Elections* (1993), 67 Ohio St.3d 590, 592. Generally, the proper "vehicle" where Contestors claim an election irregularity resulted from the use of ballot and petition language that was "violative" of statutory requirements and "inaccurate and misleading," is a pre-election protest to the language. R.C. 3501.39(A). A pre-election protest is essential where the Contestors are aware, or should be aware, before the election, of the alleged error or inaccuracy. *Smith v. Scioto County Bd. of Elections*, 2009-Ohio-5866, at ¶13; citing to *Maschari v. Tone*, 2004-Ohio-5342 and *In re Contested Election of Nov. 2, 1993* (1995), 72 Ohio St.3d 411.

1. Contestors claim an irregularity resulted from the use of ballot language that violated the requirements of R.C. § 505.481(b), is inaccurate, and is misleading so as to nullify the majority approval of the ballot issue.

R.C. § 505.481(b)[2] specifies that the millage shall be stated as a dollar valuation per one thousand dollars of taxable valuation. The irregularity was published, well in advance of the November 8, 2011, General Election as forty-five cents per one thousand dollars of taxable value when it should have read four dollars fifty cents per one thousand dollars of taxable value. (Tr 1-6-12, 12:21-13:2). The June 27, 2011 Lake Township Trustees' resolution, its web site, the Board of Elections legal notice, its web site, and the actual ballot language all contained the irregularity. (Tr 1-6-12, 15:14-18). On this basis, Contestors claim that an irregularity resulted from the use of ballot and petition language that violated the statutory requirements of R.C. § 505.481(b), and was inaccurate and misleading so as to nullify the majority approval of the ballot issue. (Contestors' Pre-Trial Brief, 5; Tr 1-6-12, 20:21-25:1; Tr 1-23-12, 96:1-7).

Fortunately, all other published and disseminated campaign materials correctly stated the dollar amount of the ballot issue and true cost of the millage, as both a cost per day, and annual cost per $100,000 of taxable valuation. (Tr 1-6-12, 12:23-13:2; Lake Township Board of Trustees' Ex. 1-40).

2. The proper method for Contestors' claim was a pre-election protest, because Contestors were aware of the irregularity before the election.

As is the lawful and statutory requirement, the ballot language was published in a newspaper of general circulation for all to read. (Tr 1-6-12, 14:1-14; 16:22-17:22). However, the published language included the irregularity. The ballot language was published in the Hartville News, a newspaper of general circulation within Lake Township on October 21, and

[2] This is the only township taxation statute that specifies the dollar valuation be expressed per one thousand dollars of taxable valuation. All other township taxation statutes specify that the dollar value shall be expressed per one hundred dollars of taxable value.

October 28, 2011. (Tr. 1-23-12, 9:15-22). The ballot language was also published in articles in the Canton Repository, another newspaper of general circulation within the township. (Tr 1-6-12, 14:1-14; 16:22-17:22; Citizen's Committee Memorandum in support of Summary Judgment, Exhibits; Lake Township Board of Trustees' Ex. 1-40).

The Lake Township Board of Trustees' June 27, 2011 resolution, containing the irregularity, was first published July 11, 2011 on the Lake Township web page. (Tr 1-23-12, 23:24-24:3). The legal notice originally published in the Hartville News was republished, with the irregularity, on the Board of Elections website on October 3, 2011. (Tr 1-23-12, 24:6-9).

Unequivocally and without doubt Contestors knew that the ballot language contained an inaccuracy or an error. Contestors had, at the least eighteen days and at the most seventeen weeks, prior to the election to file a pre-election protest. (Tr 1-6-12, 14:1-14; 16:22-17:22). Clearly notice of the irregularity was available weeks, if not months, in advance of the November general election. Regardless, Contestors did not timely file any pre-election protest; instead Contestors unlawfully and improperly rested on their claim. It was not until after the election results were tabulated and Contestors learned that they were on the losing side of their anti-levy campaign that they filed their petition. The proper vehicle for Contesors' claim was a pre-election protest to the language pursuant to R.C. 3501.39(A).

In the *Smith* case, the irregularity was a heading placed above ballot language that had previously been published in a petition. *Smith*, at ¶2-5. Although language similar to the heading was included in the ballot language, the heading had not been published publicly prior to the election. *Id*, at ¶4. So, voters in the *Smith* case, did not have an opportunity to view the "irregular" ballot language prior to stepping into the ballot box. Nevertheless, in *Smith* this

Court held Contestors "should have raised their claims in a pre-election protest or proceeding rather than in a post-election contest." *Id*, at ¶17-18.

The trial court improperly dismissed *Smith v. Scioto Cty. Bd. of Elections* on the basis of the nature of the publication chosen. The trial court, disregarding the fact that the statutory notice requirements for a ballot issue were fully followed, asserted that "to find otherwise would place too much of a burden on the Contestors." (Judgment Entry, docketed January 25, 2012, at 4.). The trial court characterized the burden as "the additional responsibility of noticing an error in both the legal notice and the ballot itself." (JE, 4.). The burden is on Contestors and that is the very nature of the publication requirements—to place the general public on "notice". The trial court should be reversed to properly apply the judicial principal set down in *Smith*.

Contestors here had more and greater opportunity than the contestors in *Smith* to view and challenge the irregular language. Contestors simply failed to act diligently or timely.

Before the election, a vast amount of information was made available to the voters in Lake Township about Issue 6, including the proposed ballot language with the miscalculated irregularity. (Tr 1-6-12, 13:18-25; 14:1-14; 16:22-17:22.). This information put Contestors on notice of the irregularity so as to estop them from contesting the results by an election protest. These notices not only complied with all of the election statutes' mandatory publications but went beyond those minimum requirements.

Contestors stated that "[t]he legal notice published by the Stark County Board of Elections on or about October 21 and October 28, 2011, for Issue 6, contained the same error as the ballot language for such issue in the Election." (Verified Petition for Election, docketed December 9, 2011, at ¶5, Exhibit B). Contestors admit that they had an opportunity to view the language weeks before entering the ballot box. Regardless, the trial court erroneously found that

the extensive publication and dissemination of the correct information was inadequate. (JE, 3.). Under the facts and circumstances in this case, keeping the burden upon Contestors to assert a pre-election protest; when Contestors have the opportunity to view the faulty language, in two separate legal notices, and at least more than two weeks before the election, is not too onerous a burden, and should remain the law of Ohio.

Contestors' sole claim is that a wording irregularity on the ballot violated the statutory requirements of R.C. § 505.481(b), and was inaccurate and misleading. Contestors were aware before the election of the irregularity. Contestors knew the correct information regarding Issue 6. The precedent of *Smith*, at ¶13, citing to *Maschari*, 2004-Ohio-5342 and *In re Contested Election of Nov. 2, 1993,* 72 Ohio St.3d 411, must be upheld. This Honorable Court, as a matter of law, must hold that the proper vehicle for Contestors' claim was a pre-election protest and that their petition is barred under the Doctrine of Laches.

B. The trial court unlawfully determined that the ballot irregularity is substantial, and that the ballot is fatal on its face, requiring the rejection of the election results.

Generally, contestors must adhere to the rule, and assert a pre-election protest when claiming that an election irregularity resulted from the use of ballot and petition language that was either "violative" of statutory requirements or "inaccurate and misleading." *Smith*, at ¶12. However, this Court did formulate a limited exception to *Smith*: contestors who challenge ballot language after the election are not estopped from raising their claim if the error in the ballot language is of such a substantial nature as to void the results of the election. *Beck v. Cincinnati* (1955), 162 Ohio St. 473, 476.

Again, the general principle of election contests applies in considering whether an irregularity is of such a substantial nature as to require rejection of the election results. Although all provisions of election laws are mandatory in the sense that they impose the duty of obedience

upon those who come within their purview, irregularities, which were not caused by fraud, did not mislead voters, and which have not interfered with a full and fair expression of the voters' choice, should not affect a disfranchisement of the voters. *In re Sugar Creek Local Sch. Dist.* (1962), 185 N.E.2d 809; citing *Moore* v. *Thompson* (1954), 161 Ohio St. 339.

Beck did not consider the issue of laches. *Smith,* at ¶15. Instead, *Beck* was concerned with persuasive substantive language inserted into a ballot that was not authorized by law. *Id.* The statute at issue in *Beck* required a ballot to contain a brief title descriptive of the question or issue to which it pertains, together with a brief statement of the percentage of affirmative votes necessary for passage. R.C. 3505.06. This Court determined that the statute did not authorize the insertion of the words, "if levy passes there will be no city income tax in 1955 or 1956," in the caption of the ballot. *Beck*, at 474.

This Court held that that the language was an irregularity of such substantial nature as to void election results. *Id.* The language at issue constituted a violation of the statute. *Id.* Further, the language was substantively inaccurate and misleading, because it incorrectly stated that there would be zero income tax in the relevant years, and exceeded the authority of the city Council. *Id.* As a result, the contestors were not estopped from raising their claim. *Id.* at 476.

Beck should be properly limited as an example of a ballot irregularity so egregious as to excuse a pre-election protest; and does not provide direct guidance on whether a claim is barred by laches. The facts and circumstances in this case do not run parallel to those of *Beck.* As a result, a pre-election protest is not excused in this case.

This error did not interfere with a full and fair expression of the voters' choice. Through their affirmative vote, the voters were able to express their choice that they desired a township wide police district, and to create the Lake Township Police Department. Such a choice cannot

be dismissed lightly, and this case exhibits no extreme circumstances that clearly affect the integrity of the election. This irregularity in this case is not of the nature of the error in *Beck*, because it is not asserting that there will be no tax. Rather, this is an error that is not so substantial that it should invalidate the entire election results, such as was the situation in *Smith*. An informed voter was able to easily and readily ascertain the true cost of the tax.

In *Smith*, this Court denied an election contest determining: "[t]he alleged irregularity in this case is not so substantial that realtors should be permitted to sleep on their rights until after an adverse election result." *Smith*, at ¶16. In *Smith*, language from a petition that requested the submission of a proposed amendment to a vote of the electors of the city of Portsmouth was repeated on a ballot. *Id*, at ¶2-5. The final sentence in the proposed language read, "This amendment shall become effective immediately upon passage by a majority of the electors of the City of Portsmouth, Ohio." *Id*, at ¶4 (emphasis omitted). However, on the ballot, "Approval of a majority of the electors of the City of Portsmouth needed for Passage" was included as a heading above the language included in the petition. *Id*, at ¶5. Contestors "claimed an election irregularity resulting from the use of ballot and petition language that was 'violative' of statutory requirements and 'inaccurate and misleading.'" *Id*, at ¶12. The Court held that the Contestors "should have raised their claims in a pre-election protest or proceeding rather than in a post-election contest," and because they did not, and because the irregularity was not substantial enough to excuse a pre-election protest, "laches barred [Contestors'] election contest." *Id*, at ¶17-18.

In *In re Sugar Creek Local Sch. Dist.*, the court held that *Beck* did not require invalidation of the election because irregular language contained in the caption on the ballot was not unauthorized, argumentative, or coercive. 185 N.E.2d 809. The court further found that the

language at issue was ambiguous, but that this was not grounds for reversal under *Beck* because "irregularities in the form of the ballot which were not caused by fraud and which neither misled voters nor interfered with the full and fair expression of the voters should not affect a disfranchisement of the voters." *Id*, citing *Moore*, 161 Ohio St. 339. The irregular ballot language was an ambiguity which prevented voters from determining whether the resolution was that of the Putnam County Board of Education or the Board of Education of the Sugar Creek Local School District. *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d 809. Therefore, even though the voter would be unable to tell whether the resolution was proposed by the County Board of Education or the local school district, the irregularity was not so flagrant, substantial and misleading as to void the will of the majority of the electors. *Id.* The court pointed out that "[t]here could be no doubt in any voter's mind that they were voting on an issue as to whether the Sugar Creek Local School District should be transferred to the Columbus Grove District. The only ambiguity was just exactly what steps were taken to bring this about." *Id.* In other words, the substance of the measure was clear: whether to transfer one district to the control of another district. See, *Id.*

Here, as in *Smith*, the language is not so flagrant, substantial and misleading as to void the will of the majority of the electors within Lake Township. Just as in *In re Sugar Creek Local Sch. Dist.*, the substance of the measure was clear, and did not contain such a substantial irregularity rising to the level required for invalidation under *Beck*. The purpose of the ballot issue—to expand the Uniontown Police District township wide and to create the Lake Township Police Department—was correctly stated. (Memorandum in Support of Motion for Judgment, docketed January 3, 2012, at 5.). The length of time the levy is to run, commence, and first be due were all correctly stated. (Id.). Most importantly, the millage of the new property tax to be

levied in the new township police district was correctly stated, "...at a rate not exceeding four and one-half (4.50) mills for each one thousand dollars of valuation..." (Id.). However, the reference to millage was followed by an incorrect statement, "...which amounts to *forty-five cents ($0.45) for each one thousand dollars of valuation...*" (emphasis added) (JE, 1-2.).

To apply the *Beck* standard to a two issue ballot; to expand a limited police district to the entire township, and to fund that township police department by a 4.5 mill levy, is against the fundamental principles of Ohio election laws so as to deny the will of a majority of the electors.

Like *Smith*, Contestors had an opportunity to review the language they claim constitutes an irregularity, prior to the election. However, Contestors "slept on their rights" and never asserted a pre-election protest to contest the results. Further, the error does not rise to the level required by *Beck*, that the error be "substantial." Therefore, the failure to make a pre-election protest is not excused; and Contestors failed to utilize the proper vehicle for asserting their claim.

C. The Doctrine of Laches bars Contestors' claim because Contestors failed to act with the requisite due diligence required.

The Doctrine of Laches bars an action for relief in an election-related matter if the persons seeking this relief failed to act with the requisite due diligence. *State ex rel. Stoll v. Logan Cty. Bd. of Elections* (1993), 117 Ohio St. 3d 76. Contestors in election-related matters are required to act with "extreme diligence and promptness." *State ex rel. White v. Franklin Cty. Bd. of Elections* (1992), 65 Ohio St. 3d 45, 49; *Blankenship v. Blackwell*, 2004-Ohio-5596. Contestors failed to act with the requisite due-diligence because they were aware of the irregularity before the election, yet delayed making their claim until after the majority of the voters approved the issue. *Smith*, at ¶13, citing to *Maschari*, 2004-Ohio-5342 and *In re Contested Election of Nov. 2, 1993*, 72 Ohio St.3d 411.

Contestors "have the burden of proving that they acted with the requisite diligence." *Smith*, at ¶14, citing *State ex rel. Vickers v. Summit Cty. Council* (2002), 97 Ohio St. 3d 204. Contestors failed to meet this burden at trial.

The legal notice was published, as is standard practice, two times, in two separate newspapers, weeks before the election. (Tr 1-6-12, 14:1-14; 16:22-17:22). Contestors had more than two weeks to make a pre-election protest. (Id.) Yet Contestors failed to do so. Under *Smith*, Contestors' failure is fatal to their claim.

Contestors here had much greater opportunity than the contestors in *Smith* to view the language they claim is irregular. Contestors stated that "[t]he legal notice published by the Stark County Board of Elections on or about October 21 and October 28, 2011, for Issue 6, contained the same error as the ballot language for such issue in the Election." (Petition, at ¶5, and in Ex. B). Contestors admit that they had an opportunity to view the language prior to entering the ballot box. Keeping the burden on Contestors to assert a pre-election protest where they know about an irregularity prior to the election is not too onerous a burden.

Contestors cannot be allowed to use the Petition to assert an untimely protest. Contestors should have asserted a pre-election protest, since they knew more than two weeks in advance of the alleged error. Contestors sat on their rights waiting until receiving an unfavorable election result, a result approved by the will of a majority of the voters, before raising their issue. The Doctrine of Laches must serve to bar the Petition since Contestors failed to act with the due diligence required of them. To decide otherwise will undermine voters' confidence in the election system, and be contrary to the well-established laws and policy of Ohio to safeguard the determination of a majority of the voters and to not allow a vocal minority to steal the election.

II. <u>The trial court applied an incorrect standard of review to evaluate whether the irregularity made the result of the election uncertain.</u>

A. Under the law of Ohio, the Court should not undermine citizens' confidence in their vote, by disturbing the results of an election that does not involve extreme circumstances warranting interference.

This Court has "adopted stringent standards for granting relief in election contests." *In re Election of November 6, 1990 for Office of Attorney Gen.* (1991), 58 Ohio St. 3d 103, 105. "The public policy of this state and this country is to indulge every reasonable presumption and intendment in favor of the validity of an election instead of holding it void." *Beck*, at 473; *Copeland v. Tracy* (1996), 111 Ohio App.3d 648, 655. "[C]ourts should be very reluctant to interfere with elections, except to enforce rights or mandatory or ministerial duties as required by law." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1998), 81 Ohio St.3d 480, 481; *MacDonald v. Bernhard* (1982), 1 Ohio St.3d 85, 86. "[T]he 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 that clearly affect the integrity of the election." *In re Election of Nov. 6, 1990*, 58 Ohio St.3d, at 105; *State ex rel. Billis v. Summers* (1992), 76 Ohio App. 3d 848, 850.

This law has been regularly and consistently reaffirmed by this Court. "The survival of our system of government requires that proper respect be given to the will of the people as expressed at the ballot box." *MacDonald*, at 86. Here there is no great public outcry, or extreme circumstance, but simply the Petition of a few disgruntled individuals who did not support the levy.

B. The proper standard of review requires Contestors to prove, by clear and convincing evidence, that there was fraud or irregularity at the election, and the fraud or irregularity was so great and flagrant as to render the election results invalid.

From these basic premises of Ohio policy on election law, this Court formulated a test to evaluate whether to reach a decision to overturn a vote, that will result in the disfranchisement of the voters. Under this test, "[w]here irregularities in an election are so great and so flagrant in character as to render it impossible to separate the illegal from the legal votes and raise a doubt as to how the election would have resulted had such irregularities not occurred, they must be deemed fatal to the validity of the election and warrant the rejection of the entire vote of the election district." *Otworth v. Bays* (1951), 155 Ohio St. 366.

Subsequent to *Otworth*, a two-step process evolved. Under this inquiry, Contestors bear the burden of proof to establish by clear and convincing evidence "(1) that one or more election irregularities occurred, and (2) that the irregularity or irregularities affected enough votes to change or make uncertain the result of the election." *In re Election of November 6, 1990*, 58 Ohio St. 3d, at 105.

1. The trial court, improperly, failed to evaluate whether Contestors met the burden to prove, by clear and convincing evidence, that that the irregularity or irregularities affected enough votes to change or make uncertain the result of the election.

Clear and convincing evidence means, "[t]hat measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, at ¶3 of the syllabus. In application to election contests, the "evidence must show that the election result was contrary to the will of the electorate, or the result will not be disturbed." *Portis,* 67 Ohio St. 3d. 590, citing, *In re Election of November 6, 1990*, 58 Ohio

St. 3d. at 105; *Mehling v. Moorehead* (1938), 133 Ohio St. 395, 408. Further, the clear and convincing standard refers back to the general principles of election contests, "every reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void." *Copeland*, 111 Ohio App. 3d, at 655.

The trial court did not use this test. Rather, the trial court stated:

> "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... 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." (JE, 5.)

In reaching its decision, the trial court stated only that "the result of the election was uncertain." (Id.). In allowing witnesses who were not previously disclosed on the answers to interrogatories nor on the supplement provided approximately two weeks before trial, to testify over Appellant's objection, the court stated:

> "This is all a compressed period of time. The Court was required to have – well, first of all the contest had to be filed within the specified period of time, the initial hearing had to be held within a required period of time, and the Court's decision has to be made within a statutorily defined period of time, all of which makes it difficult for counsel on either side to do what they typically would do in terms of discovery and preparing for a hearing. I recognize that... I recognize the compressed period of time so I'm overruling your objection." (Tr 1-23-12, 65:21-66:7; 13-15)

However, the burden on Contestors is not to merely prove that "the result of the election was uncertain." The burden on Contestors is to prove *beyond a preponderance of the evidence* and *establish a firm belief or conviction in the factfinder* that the irregularity was *so great and flagrant as to render the election results invalid.* The trial court improperly used an incorrect standard of review to evaluate Contestors' claim.

The trial court expressed its confusion on this issue during the first hearing on January 6, 2012. The trial court specifically requested a stipulation that an election contest is an equitable proceeding (Statement of Stipulated Facts # 13). The trial court stated its improper application of the law:

> "I will want to know when they [issue proponents] knew or discovered this, which, again, I'm calling irregularity; I would want to know -- we can ascertain this morning -- when the proponents, ah, those that were pushing for passage, ah, knew of this irregularity and if, in fact, they knew of it, what, if anything, was done to advise the electorate that there was a mistake in the ballot language." (Tr. 1-6-12, 21:3-10)
>
> "That's not, that's not gonna stand. Versus, we have proponents of an issue who knew or should have known that there was a mistake and did nothing to inform the electorate of that mistake and how does that balance versus this argument against the contestors, clean hands doctrine. So, if this is an equitable procedure, I have to consider both of those. And part of that is knowing who knew what when, what, if anything, was done to correctly inform the electorate." (Tr 1-6-12, 22:13-24)

It is only after the Stark County Board of Elections, the Lake Township Board of Trustees, and the Citizens Committee filed briefs educating the trial court that it was improperly shifting the burden of proof from Contestors to Respondents that the trial court facially backed away from these pronouncements. However, the trial court continued to apply an improper and unlawful legal standard to that evaluation.

This Court must properly evaluate the case under the correct legal standard.

2. <u>The trial court, improperly, cited the compressed time period for election contests in determining that Contestors met their burden of production.</u>

The trial court cited "the compressed time period for hearings on elections" as support for Contestors meeting their burden to prove the election results invalid. (JE, 5.). That reliance was wholly improper, and goes against the well-established principles of election contests. The standard, "evidence must show that the election result was contrary to the will of the electorate,

or the result will not be disturbed" makes absolutely no reference to the exceptional time constraints of election contests. *Portis,* 67 Ohio St. 3d. 590, citing, *In re Election of November 6, 1990*, 58 Ohio St. 3d, at 105; *Mehling*, 133 Ohio St., at 408. If anything the time constraints further demonstrate what high hurdle must be crossed before an election result will be set aside. It is not for the trial judge to insert his own opinion on a certain ballot issue—but to apply that high standard to uphold the will of the majority of the electorate.

Under the standard, "every reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void," courts are required to evaluate the evidence on its merits; not make concessions for parties who are unable to meet the burden of proof due to time constraints. *Copeland*, 111 Ohio App. 3d, at 655. This Court mandated: courts "must be restrained in invalidating elections." *In re Election of November 6, 1990*, 58 Ohio St. 3d, at 105. The trial court did not exercise this restraint; it unilaterally applied its own standard of review, and made an improper determination based on the time constraint of election contests – by definition, a feature of every single election contest. This Court must properly evaluate the case under the correct legal standard, reverse the decision of the trial court and reinstate the passage of the issue.

III. The record does not prove, by clear and convincing evidence, that there was fraud or irregularity at the election, and the fraud or irregularity was so great and flagrant as to render the election results invalid.

As stated, the correct standard of review is that Contestors bear the burden of proof to establish by clear and convincing evidence that (1) there was fraud or irregularity at the election, and (2) the fraud or irregularity was so great and flagrant as to render the election results invalid. *In re Election of November 6, 1990*, 58 Ohio St. 3d, at 105.

A. The "irregularity" was not so great and flagrant as to render the election results invalid.

There is no dispute that the ballot language for Issue 6, to expand the police district to include all of Lake Township, contained an irregularity stating" . . . at a rate not exceeding four and one-half (4.50) mills for each one dollar of valuation, which amounts to forty-five cents ($0.45) for each one thousand dollars of valuation, . . ". (Tr 1-6-12, 12:23-13:2.). There is no dispute that the ballot language should read: " . . . at a rate not exceeding four and one-half (4.50) mills for each one dollar of valuation, which amounts to four dollars and fifty-cents ($4.50) for each one thousand dollars of valuation, . . "

There is no dispute that in all other respects; the purpose of the ballot issue—to expand the Uniontown Police District township wide and to create the Lake Township Police Department, the millage of the new property tax to be levied in the new township police district, the length of time the levy is to run, and when the levy will commence and first be due–were all correctly stated and strictly complied with the Ohio election statutes. (Tr. 1-6-12, 24:20-25.).

This is not simply an issue of an additional tax or a renewal or replacement of an existing tax levy. More importantly, Lake Township Issue 6 is the question of expanding a limited jurisdiction police district to a township wide police district. To reject the will of a majority of the voters to expand police protection solely on the basis of the taxation component's irregularity does not serve the purposes of preserving the validity of an election instead of holding it void. *Beck*, 162 Ohio St. 473; *Copeland*, 111 Ohio App.3d, at 655. "[C]ourts should be very reluctant to interfere with elections, except to enforce rights or mandatory or ministerial duties as required by law." *State ex rel. Taft*, 81 Ohio St.3d, at 481; *MacDonald*, 1 Ohio St.3d, at 86. "[T]he 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 that

clearly affect the integrity of the election." *In re Election of Nov. 6, 1990,* 58 Ohio St.3d, at 105; *State ex rel. Billis v. Summers,* 76 Ohio App. 3d, at 850. The trial judge misapplied the law to the facts before it.

B. The irregularity in the ballot language is not so great and flagrant as to render the election results invalid.

Under the correct standard of review, once it is established that an election irregularity has occurred, it must be determined whether the irregularity was so great and flagrant as to render the election results invalid.

Here, Contestors do not allege that they were mislead into voting for the issue. There is no allegation of fraud. The issue before the Court is whether the misstatement of the dollar amount of the millage, by itself, is so great and flagrant as to render the election results invalid. *Otworth v. Bays* (1951), 155 Ohio St. 366.

1. <u>The record does not establish, by clear and convincing evidence, that the irregularity affected enough votes to change or make uncertain the results of the election.</u>

The trial court cited the correct legal standard that Contestors must clearly and convincingly prove that the irregularity affected enough votes to change or make uncertain the result of the election. (JE, 2.). Then the Court correctly distinguished *Beck* writing:

> "While this Court agrees that the irregularity was substantial and in theory could be a basis for rejection of the result, the Court is reluctant to find that the *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. (Id., 4-5.).

Then the Court jumped past logic and made the conclusion:

> "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 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 elections was uncertain due to the irregularity contained in the ballot language." (Id., 5.).

This Court has held that even when it is "obvious" that an alleged irregularity led to voter confusion, a contestor must nevertheless demonstrate, by clear and convincing evidence, **how many votes were actually affected** by the irregularity, or how the irregularity might have affected the outcome of the election. *McMillan v. Ashtabula Cty. Bd. of Elections* (1993), 68 Ohio St. 3d 31, 35. (emphasis added). Contestors must prove by clear and convincing evidence that the irregularity affected enough votes to change or make uncertain the results of the election. *Maschari,* 2004-Ohio-5342; *In re Election of November 6, 1990*, 58 Ohio St. 3d, at 105. *See*, also, *Moss v. Bush*, (2004), 104 Ohio St.3d 1442. In other words, Contestors must demonstrate that the irregularity affected enough votes to change or make uncertain the results of the election, in order to prove that the irregularity was so great and flagrant as to render the election results invalid.

The trial court simply got it wrong.

Here, there were 5,577 ballots cast in favor of Issue 6, and 5,087 opposed, making a difference of 490. (Tr 1-6-12, 11:9-17). The burden of proof was on Contestors to establish that at least 246 electors voted on November 8, 2011 for Issue 6 only because of the "forty-five cents per thousand dollars of valuation" language. Contestors did not meet their burden.

Contestors presented testimony from 13 witnesses. 10 testified that they voted "yes" and upon learning of the irregularity would change their vote to "no". One testified that he voted

"yes" and even after learning of the irregularity would still vote "yes". (Tr 1-23-12, 34:5-7). One offered perjured testified that he voted "yes" when in fact he did not even vote so that the trial court struck his testimony. (Testimony of Michael Brown, Tr. 1-23-12, 81:14-82:6.). That combined with Contestors affidavits[3] was the sum and total of the testimony concerning the votes in the record.[4]

Contestors simply did not meet the burden of production of witnesses, testimony or evidence to clearly and convincingly prove that the election results will change. In addition, the trial court declined the Respondents an opportunity to present evidence or testimony from those who voted for the election that they either knew of the irregularity and voted in favor or that, if they did not know of the irregularity, upon being informed would still support it.

2. The miscalculation was a clerical error that does not amount to an error so flagrant as to render the election results invalid.

In all of the cases examined where the Courts of Ohio have invalidated elections, there was a complete omission of some vital and jurisdictional condition to be performed. Here, the ballot complied to the statute, and the miscalculation that appeared in the publications and on the ballot was no more than a clerical error. As such, the result of the election should not be disturbed.

Where a mistake of the mill amount is published in the notice of election and on the face of the ballot, such mistake does not disenfranchise voters in election proceedings to approve bonds. *State ex rel. Bd. of Edn. v. Allen* (1955), 102 Ohio App. 315, at syllabus ¶3. A mistake in the mill amount is properly considered a clerical error, which is not insufficient to invalidate a bond. In *Allen*, an incorrect figure for the average annual tax levy of 3.5 mills per dollar to pay

[3] Offered and accepted over objections from all three respondents.
[4] Contestors distributed 500 flyers asking voters who voted "yes" to come forward and offer that they would change their vote to "no". This generated only 25 responses. (Tr. 1-23-12, P.84, Ll19-25, P. 85, Ll1-2; Contestors Affidavits, Exhibit 50.

the principal and interest on school district bonds was carried in the text of the published notice of election and on the face of the ballot instead of the correct figure of 4.2 mills per dollar. *Id.* at 316. Despite this clerical error, the Court declined to invalidate the bonds.

Allen relied in part on *State ex rel. Bd. of Edn. of Springfield Local Sch. Dist., Summit Cty. v. Maxwell* (1945), 144 Ohio St. 565, 569, wherein the Court explained: "[i]t has been generally held that defects, variances and irregularities in the several steps relating to the issuance of bonds should be material, harmful or both before the proceeding may be successfully attacked. . . . It has also been held that unsubstantial irregularities in the resolution of a political subdivision inaugurating an election on a bond issue which do not prejudice anyone will be disregarded, especially where the proposed bond issue as submitted was approved by considerably more than the requisite number of electors."

Although *Allen* dealt with a bond issue, its standard is important to consider in this case, because the court followed the guiding principle of election contests – avoiding disenfranchisement of voters by overturning election results. Under *Allen*, the test was whether the voters were misled by the mistake. *State ex rel. Bd. of Edn. Southeastern Local School Dist. Ross Cty. v. Allen*, supra, at 317. "To determine this, . . . it is proper to consider the degree of the error, the nature of the calculation and the closeness of the vote." *Id.* The court further noted that "[t]he burden is on the one claiming that the affirmative result of the bond issue election was affected by a misleading statement in the notice of election amounting to no more than an irregularity, to establish that the result of the election was affected by such statement." *Id*, at 318.

In contrast, a tax levy described as a "renewal," although it is an "additional levy" substantially misleads the voter. *State ex rel. Thomas v. Conkle* (Mar. 30, 1978), Holmes App.

No. CA 308, cited by *Bratton v. Couch*, 2006-Ohio-6799, at ¶33-38. In *Conkle*, the court held that a tax levy placed on the ballot for the purpose of providing and maintaining roads, road construction, and maintenance equipment in the amount of two mills was misleading because it was presented as a renewal levy when in fact it was not. *Id*, at ¶3.

Where a clerical error in language does not mislead voters, the error is minor and does not affect the election. *Bratton,* at ¶33-38. In *Bratton*, the alleged error was that the authorizing resolution cited the incorrect statute of the Ohio Revised Code. *Id.* Although the resolution contained an entirely different statute than was correct, the court held that the voters were not mislead, and emphasized that the voters of the County had passed the levy by a two to one margin. *Id.* The court further emphasized that the appellant failed to present any evidence that the result of the election was affected by the clerical error. *Id.*

In this case, as in *Bratton*, Id., the clerical error was minor and should have had no true impact upon an informed voter. As in *State ex rel. Bd. of Edn. Southeastern Local Sch. Dist. Ross Cty. v. Allen, Id.*, the slight clerical defect in the notice of election and on the ballot is not sufficient to invalidate the levy.

3. <u>The informed voter was not mislead, because a vast amount of information was published, which contained the correct dollar valuation and calculation for the cost of the levy.</u>

All of the campaign materials prepared and disseminated by the Contestee, Citizens for Lake Township Police, the Stark County Auditor's website and numerous articles in the two local newspapers of general circulation, the Canton Repository and the Hartville News, gave the correct millage, the correct dollar valuation and the correct calculation for the cost of the tax levy based upon a real property valuation of $100,000. (Tr 1-6-12, 15:10-18; Affidavit of Mary A. Kamerer, Chairwoman, Citizens for Lake Township Police.). The Lake Township Newsletter,

which contained the correct information, was mailed to every household in Lake Township (Tr 1-6-12, 28:4-5; 39:12-25).

Any elector, who attempted to inform himself prior to stepping into the ballot booth, had the correct information to make an informed decision prior to casting his ballot. The informed elector knew that Issue 6 was to expand the Uniontown Police District to encompass the entirety of the unincorporated area of Lake Township and would become known as the Lake Township Police Department. The informed elector knew that the millage was a 4.50 mills continuous levy commencing in 2011 and first due and payable in calendar year 2012. The informed elector knew that 4.50 mills will cost four and one-half cents per each ten dollars of taxable valuation, $0.45 for each one hundred dollars of taxable valuation, $4.50 for each one thousand dollars of taxable valuation.

The burden of proof, to a clear and convincing evidence standard, must remain on Contestors to prove that the irregularity was more than a clerical error, and is of such a substantial irregularity as to nullify the will of the voters.

This Court should reverse the trial court and hold that Contestors have not met their burden. The substantive provisions of the statute have been complied with and the clerical irregularity in the notice of election and on the ballot is not sufficient to invalidate the expansion and funding of the Lake Township Police Department.

IV. The trial court improperly considered affidavits contrary to the Ohio Rules of Evidence.

"Hearsay" is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R.801(C). Hearsay is generally inadmissible. Evid.R.802. However hearsay may be admissible where there is an

exception providing for its admissibility. However, no such exception exists here, and Contestors did not assert that one exists at trial.

The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right, made obligatory on the States by the Fourteenth Amendment. United States Constitution, Amendment 6. *Pointer v. Texas* (1965), 380 U.S. 400, 403. Although the Confrontation Clause is inapplicable in civil proceedings, it was intended to prevent "trial by affidavit." Griswold, *The Due Process Revolution and Confrontation,* 119 *U. Pa. L. Rev.* 711, 712 (1971); See *In re Burchfield* (1988), 51 Ohio App. 3d 148, 154. Further, "proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable..." R.C. 3515.11.

Here, the trial court admitted into evidence, affidavits of people who did not testify at trial, over Appellants' objections. (Petitioner's Exhibit 5 – affidavits; Tr 1-23-12, 21:15-24; Tr 1-23-12, 74:19-25). The trial court did so in violation of the Ohio Rules of Evidence, because the affidavits were out-of-court statements, offered to prove that the voters voted yes, but would have voted no but for the incorrect ballot language.

Further, the trial court expressly relied on the hearsay affidavits in making its determination: "Based on ...the affidavits...Contestors have met their burden." (JE, 5.). This reliance was contrary to the Ohio Rules of Evidence, and the Due Process rights of Appellant.

Contestors simply could not meet the burden of production of witnesses, testimony or evidence to clearly and convincingly prove that the election results will change. Contestors did not prove "that more than 246 people who voted for would now vote against" Issue 6. (Tr 1-23-12, 106:1-4). In addition, the trial court declined the Respondents an opportunity to present evidence or testimony from those who voted for the election that they either knew of the

irregularity and voted in favor, or that, if they did not know of the irregularity, upon being informed would still support it.

This Court must reverse the decision of the trial court, reinstate the vote by the majority of the electors and uphold Lake Township Ballot Issue 6.

V. **The trial court improperly and unlawfully disregarded the ballots cast by 5,577 electors in favor of the ballot issue resulting in a plurality of 490 votes.**

In application to election contests, the "evidence must show that the election result was contrary to the will of the electorate, or the result will not be disturbed." *Portis,* 67 Ohio St. 3d. 590, citing, *In re Election of November 6, 1990*, 58 Ohio St. 3d. at 105; *Mehling*, 133 Ohio St. 395, 408.

The trial court improperly determined that Contestors' failure to assert a pre-election protest did not constitute a lack of due diligence, and that therefore Contestors' claim was not barred by the Doctrine of Laches. (JE, 4.).

As a result, the court should have proceeded with the analysis of whether there was fraud or irregularity at the election, and whether the fraud or irregularity was so great and flagrant as to render the election results invalid. *Otworth v. Bays* (1951), 155 Ohio St. 366. However, the trial court did not use the proper standard of review in making its determination: Contestors did not meet their burden to prove that the irregularity affected enough votes to change or make uncertain the results of the election, the miscalculation was a clerical error rather than a flagrant substantive error, and the informed voter was not mislead.

If a contestor meets the clear and convincing standard, the proper remedy is to void the election. However, the trial court's only conclusion was that "the result of the election was uncertain due to the irregularity contained in the ballot language." (JE, 5.). The trial court did not determine that Contestors met their burden to prove that the irregularity affected enough

votes to change or make uncertain the results of the election. Therefore, the trial court improperly disregarded the ballots cast by 5,577 electors in favor of the ballot issue, resulting in a plurality of 490 votes. The trial court improperly accepted Contestors' argument that one may "extrapolate", from the minimal evidence presented, that enough other voters were confused as to make the vote uncertain.

That is not the standard. This Court must apply the correct legal standard and reverse the decision of the trial court. This Court must find that the irregularity does not clearly convince the Court that the evidence shows that the election result was contrary to the will of the electorate, and that the result will not be disturbed. *Portis,* at 590, citing, *In re Election of November 6, 1990*, at 105; *Mehling*, at 408.

5,577 votes must not be simply ignored and the majority of the voters disenfranchised. The will of the majority of the voters is much more than simply funding a local police department. Here the will of the majority of the voters was to expand and enlarge the former Uniontown Police District to encompass the entirety of Lake Township and to newly create a Lake Township Police Department.

Contestors acknowledge that Issue 6 was approved by a majority of the electors with the margin of votes, 490 in favor and the election percentages 52.630% in favor and 47.70% opposing Issue 6. This is well outside of the margin for an automatic recount by the Board of Elections (RC 3515.011) and far beyond what any recount would change if requested by Contestors (RC 3515.02, et. seq).

This margin of approval when combined with the information published by the Citizens Committee giving the true and accurate cost to the Lake Township property owners serves to nullify any irregularity in the ballot language. All of the Citizens Committee publications, as

well as every newspaper article, Board of Trustees' newsletter and the Stark County Auditor's website, show the true costs to the taxpayer.

Although the ballot language may have been irregular the true costs were properly and consistently published by the proponents of Issue 6. Every reasonable effort was made to disseminate the correct information. No informed elector was mislead.

If Contestors want to reverse the *status quo* and return to a Uniontown Police District or to force a contract with the Stark County Sheriff or some other local police department, the proper method is by *initiative and referendum* and not by an election contest.

This Court, as a matter of law, must reverse the Judgment Entry of the trial court and reinstate the will of the majority of the voters on Lake Township Issue 6 at the November 8, 2011 General Election.

CONCLUSION

The trial court failed to correctly apply the law of laches to the facts and circumstances before it. Contestors knew about the irregularity over two weeks before the election, yet failed to act with the requisite due diligence. Further, the irregularity is a miscalculation, which is properly characterized as a clerical error, and is not so great and flagrant as to render the results of the election void. The Doctrine of Laches serves to bar the Contestors' claim.

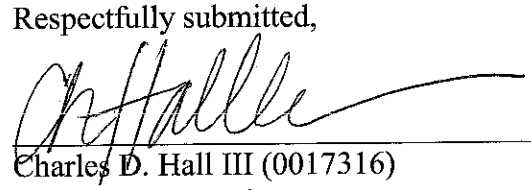
In an election contest, contestors bear the burden to prove, by clear and convincing evidence, that there was fraud or irregularity at the election, and the fraud or irregularity was so great and flagrant as to render the election results invalid. However, the trial court did not use this standard of review in making its determination. Instead, the trial court utilized an improper and incorrect standard of review, and improperly ordered that the result of the election as to Issue 6, be set aside.

An irregularity contained in ballot language does not justify nullifying the will of the electorate, where contestors do not prove that the results of the election would have been different without the irregularity, the irregularity is merely a miscalculation, and a vast amount of information is published, and disseminated to the electorate. A miscalculation on the ballot does not constitute such an extreme circumstance that clearly affects the integrity of the election.

The trial court unlawfully admitted affidavits of non-testifying individuals. The affidavits were statements by non-testifying individuals, and Respondents had no opportunity to cross examine the witnesses. Further, the trial court denied Respondents an opportunity to present witnesses of their own, who would testify that they either knew of the irregularity and voted in favor, or that if they did not know of the irregularity, upon being informed, would still support the issue..

Finally, the standard for election contests is not met by the facts and circumstances in this case. A majority of voters in a district approved a measure expanding a police district to an entire township. The trial court unlawfully disregarded the will of the electorate, when it ordered that the results of the vote on issue 6 be set aside. This Court, as a matter of law, must reverse the Judgment Entry of the trial court and reinstate the will of the majority of the voters upholding the majority approval or Lake Township Issue 6 at the November 8, 2011 General Election.

Respectfully submitted,



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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:

CASE NO.: 12-0184

THE CONTEST OF THE ELECTION HELD ON STARK COUNTY ISSUE 6 (LAKE TOWNSHIP POLICE DISTRICT) IN THE GENERAL ELECTION HELD NOVEMBER 8, 2011

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT
"CITIZENS FOR THE LAKE TOWNSHIP POLICE, BOB MOSS, TREASURER"

Appellant, Citizens for Lake Township Police, Bob Moss, Treasurer, hereby gives notice of its appeal as of right, pursuant to R.C. 3515.15, to the Supreme Court of Ohio, from a Judgment Entry of the Stark County Court of Common Pleas, docketed on January 25, 2012, in the case captioned, 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, case number 2011CV03947, Judge Haas. A true copy of the Judgment Entry being appealed is attached hereto and incorporated herein by reference.

Appellant complains and alleges that the Stark County Court of Common Pleas' Judgment Entry docketed January 25, 2012 is unlawful, unjust and unreasonable in the following respects:

The trial court improperly applied the law of laches to the facts and circumstances properly before it on the issue of the election contest; and,

The trial court unlawfully determined that the ballot irregularity is substantial, the ballot is fatal on its face and requires the rejection of the election results; and,

The trial court applied an incorrect standard of review to determine that the irregularity made the result of the election uncertain; and,

The trial court improperly considered affidavits contrary to the Ohio Rules of Evidence; and,

The trial court improperly and unlawfully disregarded the ballots cast by 5,577 electors in favor of the ballot issue resulting in a plurality of 490 votes; and,

WHEREFORE, this Appellant respectfully submits that the Judgment Entry docketed January 25, 2012, is unlawful, unjust and unreasonable and should be reversed. This Court should

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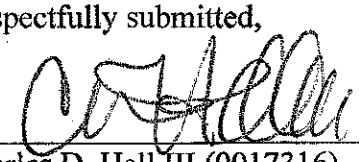
CLERK OF COURT

reinstate the ballot issue as approved by the Lake Township, Stark County, voters at the November 8, 2011 General Election.

Respectfully submitted,



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Chairman

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by electronic correspondence and by ordinary U.S. mail to all parties to the proceedings before the Stark County Court of Common Pleas in Case Number 2011CV03947.

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Counsel for Citizens in Support of
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Chairman

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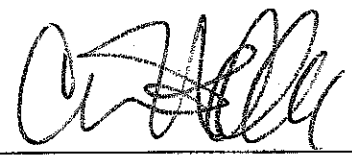

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Hall Law Firm

Rec'd 1/20/2012
CDHH

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

IN RE:	)	CASE NO. 2011CV03947
	)	
THE CONTEST OF THE ELECTION HELD ON STARK COUNTY ISSUE 6 (LAKE TOWNSHIP POLICE DISTRICT) IN THE GENERAL ELECTION HELD NOVEMBER 8, 2011,	)	JUDGE HAAS
	)	JUDGMENT ENTRY

FILED
JAN 25 2012
NANCY S. REINBOLD
STARK COUNTY, OHIO
CLERK OF COURTS

This case is an election contest under R.C. § 3515.08, et seq., in which certain Contestors who voted in the election of November 8, 2011 filed a verified petition contesting the validity of the result for Issue 6. Hearings were conducted pursuant to statute on January 6, 2012 and January 23, 2012. The Court incorporates herein all the stipulations and exhibits admitted into evidence at said hearings.

Issue 6 proposed to extend the boundaries of the present Uniontown Police District to all the unincorporated territory in Lake Township and levy a tax for that purpose pursuant to R.C. § 505.481. An affirmative result would create a township police district encompassing all of the unincorporated territory of Lake Township. The results of the election have been certified by the Board of Elections in favor of the issue. The Issue 6 certified results showed an affirmative vote of 5,577 and a negative vote of 5,087, resulting in a plurality of 490 votes.

There is no dispute that the initial resolution of the Board of Trustees, the Notices published in the Hartville News, and the ballot language for Issue 6 erroneously stated "...4.50 mills for each one dollar of valuation which amounts to forty-five cents ($0.45)

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

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[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

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[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

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[6] (2009) 123 Ohio St.3d 467.
[7] See, *Beck v. city of Cincinnati* (1955), 162 Ohio St. 473.

Beck case is dispostitive. 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.

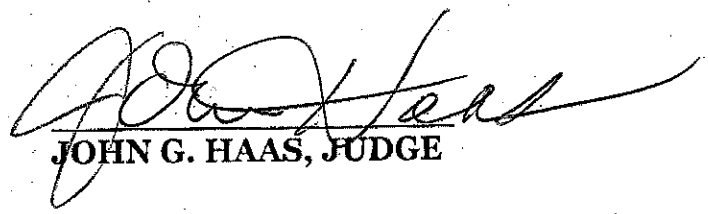
Contestors are not required to show that a different result would have been certain. Their burden is to show that the irregularity made the result uncertain. This they have done. Contestors are not required to bring into court 246 voters who voted "yes" to say they would have voted "no". Based on the 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

Ohio Revised Code § 505.481

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

[irrelevant portion omitted]

(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.

United States Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[irrelevant portions omitted]