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

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

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ARGUMENT

Contestors' Cross-appeal is simply another in a series of "red herring" arguments intended to deflect their failure to exercise due diligence, to timely file an election protest, and to shift the burden of proof from Contestors to the proponents of Lake Township Issue 6.

There was no fraud by any Appellant:

Contestors now claim fraud for Appellants' failure to disclose an e-mail from the Ohio Secretary of State to the Stark County Board of Elections. An e-mail that was not disclosed to either appellant the Lake Township Board of Trustees or to the Citizens for Lake Township Police, Bob Moss, Treasurer until October 13, 2011. (Tr 1-23-12, P 17).

This Court has consistently and repeatedly defined the elements of fraud as:

> (1) a representation or, where there is a duty to disclose a concealment of a fact,
> (2) which is material to the transaction at hand,
> (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> (4) with the intent of misleading another into relying upon it,
> (5) justifiable reliance upon the presentation or concealment, and
> (6) a resulting injury proximately caused by the reliance.
>
> *Williams v. Aetna Fin. Co.*, (1998), 83 Ohio St.3d 464, 475, quoting *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55, citing *Burr v. Stark County Board of Commissioners* (1986), 23 Ohio St.3d 69.

The irregularity of which Contestors complain was made known to them weeks if not months before the November 8, 2011 General election. (Tr 1-6-12, 12:21-13:2.). Contestors recitation of the representation that they allege is fraudulent was contained in an e-mail from a staff attorney with the Ohio Secretary of State to an employee at the Stark County Board of Elections:

> "A 4.5 mill levy yields $0.45 per $100, but $4.50 per $1,000. Board of Elections may want to confirm millage with the taxing authority." (Tr 1-23-12, 16:1-17. Plaintiff's Proffered Exhibit 4).

None of the elements of fraud are present. The trial court correctly rejected the fraud argument and correctly denied Contestors' attempt to amend the pleadings to make this spurious allegation.

First, the representation was not made by either of the Appellants. (Tr 1-23-12, 16:1-17. Plaintiff's Proffered Exhibit 4). Neither the Lake Township Board of Trustees nor the Citizens Committee made the representation. Neither did they conceal it.

The further proffer to the trial court was: (1) the Board of Elections never communicated the Secretary of State's e-mail to the Lake Township Board of Trustees, (2) the first time that the irregularity was communicated to the Board of Trustees was October 12, 2011, and (3) on October 13, 2011, the Stark County Board of Elections employee also informed the Lake Township Trustees that it was too late to correct the irregularity since the absentee ballots had already been mailed and the regular ballots were certified. (Tr. 1-23-12, 17:17-25, 18:18).

The representation is also non-actionable in and of itself. The representation --"Board of Elections may want to confirm millage with the taxing authority" -- merely suggests that the Board of Elections should confirm the millage with the Board of Trustees. (Tr 1-23-12, 16:1-17. Plaintiff's Proffered Exhibit 4). The e-mail was meant to inform the Board of Elections what was later published and stipulated as an irregularity; the ballot language has a dollar valuation that does not conform to the stated millage. Depending upon the intended millage the dollar calculation may be incorrectly stated; however, there was no failure to disclose or attempt to conceal -- and no fraud.

Second, the question before this Court is the materiality of the irregularity. The Court must ask: was the irregularity so "material" as to set aside the will of a majority of the electorate and render the ballot issue contrary to the vote? *Portis v. Summit County Board of Elections* (1993), 67 Ohio St.3d, 590; *In re Election of November 6, 2000 for the Office of Attorney*

General (1991), 58 Ohio St.3d. 103; *Mehling v. Morehead* (1938), 133 Ohio St.395, 408. In this case, the irregularity was not so material as to justify invalidating an election, where the voters expressed their affirmative choice to expand the Uniontown Police District township wide and to accept a tax of 4.5 mills. (Tr 1-6-12, 11:11-18).

Third, there is no falsity. The statement merely restates factual information—the known and stipulated irregularity. Significantly, this e-mail communication was between two parties who are neither proponents of the local township issue nor parties to this appeal.

Fourth, this statement does not prove that proponents of the police district expansion issue intended to mislead the voters. This conclusion is arrived at through simple logic: one cannot conceal that which one does not know exists.

Fifth, there was no justifiable reliance on the representation by Contestors, because they already knew of the irregularity. As Contestors state in their brief: "When they filed their petition on December 9, 2011, Contestors knew that the ballot language for Issue 6 contained an irregularity."[1] Already, knowing that there was an irregularity -- *an irregularity that prompted Contestors to file an election contest when they should have filed a pre-election protest* -- Contestors could not have justifiably relied on the representation even if disclosed. They already knew what the e-mail indicated to the Stark County Board of Elections -- the dollar figure was inconsistent with the stated millage.

Sixth, there is no direct and proximate damage to Contestors from the representation. It is black letter law that proof of damage must be directly and proximately caused from the alleged fraud. *Williams*, 83 Ohio St.3d at 475, quoting *Cohen*, 10 Ohio St.3d at 169; *Gaines*, 33 Ohio St.3d at 55, citing *Burr*, 23 Ohio St.3d 69. Contestors have no damage claim other than a complaint that the election outcome was not what they desired: they now have a police

[1] Brief of Contestors / Cross-Appellants, first full sentence of the second paragraph at page 6.

department that is township wide and they are subjected to a 4.5 mill levy that is, without dispute, the millage intended by the proponents.

The trial court was correct to reject Contestors' request to amend the pleadings to assert a claim of fraud and to deny depositions of representatives from the Board of Elections or the Lake Township Board of Trustees. To do so would only have served to incite an already contentious claim and when the elements of fraud are applied to these facts -- the result will be no different. This Court must deny Contestors' cross-appeal and must reverse and overturn the Judgment Entry setting aside the majority vote in favor of Lake Township Issue 6. This Court must, as a matter of law, uphold the will of the majority of the voters in Lake Township and declare that Issue 6 is approved.

Contestors' inconsistent "red herring" arguments:

Contestors created a brochure informing readers about the ballot irregularity, asking voters who oppose the levy's passage to come forward. (Tr 1-23-12, 71:14-72:3; Plaintiff's Ex. 34). Contestors stated that they "prepared and distributed [the notice] randomly to 500 mailboxes in the voting district where we saw precincts that looked like may have gone more, yes." (Tr 1-23-12, 84:19-22; Plaintiff's Ex. 34). Out of 500 notices distributed to Contestors' methodically chosen neighborhoods, only 25 people came forward. (Tr 1-23-12, 85:1-2). From those 25 people Contestors offered testimony from 13 witnesses, offered affidavits of 10 more, and stated that the other 2 were not available.

Of the 13 witnesses at trial, one testified that he voted "yes" and even after learning of the irregularity would still vote "yes". (Tr 1-23-12, 34:5-7). A second offered what is probably perjured testimony that he voted "yes" when in fact he did not even vote. The trial court struck this witnesses' testimony. (Testimony of Michael Brown, Tr. 1-23-12, 81:14-82:6.). The ten affidavits were improperly considered by the trial court. (As discussed in this Appellant's Merit

Brief docketed March 16, 2012, at p. 26-28). So, truly there are only twelve witnesses who testified that they would have changed their vote. Only testimony from these 12 witnesses should be admissible and properly considered by the trial court.

Contestors misdirect the trial court, asserting that; "These witnesses were offered as a sample but should not be taken by the Court as any type of limitation. They're not the only witnesses we could find; they are simply a sample offering for the Court. That is, that is the light in which they are offered." (Tr 1-23-12, 74:5-11). Contestors argue that the number is only a sample offering for the Court, yet according to Contestors' own admission, there would have been only two other potential witnesses to present at trial. Those who testified, the two who did not and the affidavits improperly considered, total the 25 persons who came forward in response to the Contestors brochure.

Issue 6 passed by a majority of 490 votes. The burden of proof is on Contestors to prove by clear and convincing evidence that the results of the election would have been different. Simply stated the Contestors must prove that 246 people would have voted differently. Contestors' "sample" of 25 witnesses, from a pool of 500 voters, does not come close to meeting this burden. Contestors attempt to reverse the will of over five thousand Lake Township voters, on the testimony of twelve actual witnesses, two potential witnesses and improper affidavit "testimony". This Court should find 25 responses to Contestors' notice as further evidence that through their affirmative votes, a majority of the Lake Township voters expressed their choice to expand the Uniontown Police District township wide and to approve the 4.5 mill levy.

CONCLUSION

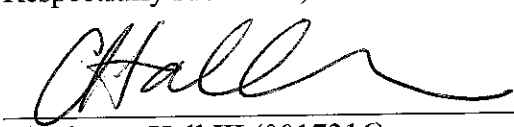
Contestors attempt to reverse the will of over five thousand Lake Township voters, on the testimony of twelve actual witnesses, two potential witnesses and ten inadmissible affidavits.

Contestors' inconsistent statements regarding how many witnesses they may have found, and how many people might have testified, misleads the Court and are grossly exaggerated.

Contestors' assertion of fraud, is a baseless, losing argument. None of the elements of fraud are present. The representation was not made, and there was no concealment, by either of the Appellants. There is no falsity, and there was no intent by the Lake Township Board of Trustees or the Citizens Committee to mislead the voters. There was no justifiable reliance by Contestors since they already knew of the irregularity when they initiated this election contest. Contestors can show no direct and proximate damage to Contestors from the representation.

This Court must not be misdirected by Contestors' repeated attempts to deflect their failure to exercise due diligence, timely file an election protest, and their inability to meet the burden of proof that is properly placed upon them. This Court must deny Contestors' cross-appeal and must reverse and overturn the Judgment Entry setting aside the majority vote in favor of Lake Township Issue 6. This Court must, as a matter of law, affirm the will of the majority of Lake Township voters, and declare that Issue 6 is approved.

Respectfully submitted,



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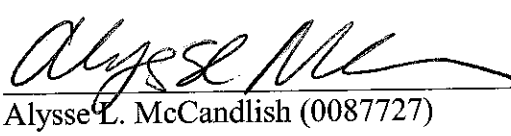

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