

RESPONSE IN OPPOSITION

NOW COMES Respondent, David M. Lucas, pursuant to S.Ct.Prac.R. 4.01(B), in response and in opposition to Relator's March 18, 2013, motion for leave to amend complaint.

I. CASE HISTORY:

Relator filed this original action in quo warranto on February 8, 2013. Respondent was served via certified mail on February 14, 2013. On February 26, 2013, Respondent filed his answer concurrently with a motion for judgment on the pleadings pursuant to S.Ct.Prac.R. 12.04(B)(1) and Civ.R. 12(C). Thereafter, on March 8, 2013, Relator filed his Response to Respondent's motion for judgment on the pleadings, which included Exhibit 2 (Relator's 2nd Affidavit) and Exhibit 3 (Respondent's Application of Candidacy) as attachments.

Because Relator was not permitted to submit any additional evidentiary materials in response to Respondent's motion for judgment on the pleadings, Respondent filed a motion to strike Exhibits 2 and 3, as well as all references to them, pursuant to S.Ct.Prac.R. 12.04(B)(2) and (B)(3) and Civ.R. 12(F).

In response to Relator's motion to strike, Respondent now seeks a second means to introduce Exhibits 2 and 3 via the instant motion for leave to amend complaint. For the reasons that follow, Respondent respectfully responds in opposition to said motion.

II. STANDARD OF REVIEW:

The initial question this Honorable Court must answer is whether S.Ct.Prac.R. 3.13 is controlling in this matter. If it is, then Relator's motion to amend is not permitted and should be struck. If S.Ct.Prac.R. 3.13 is not applicable, then Respondent acknowledges the motion would proceed under a under Civ.R. 15(A) standard of review.

In this original action, Section 12 of the Rules of Practice of the Supreme Court of Ohio (“Rules of Practice”) initially controls. As the Court well knows, under S.Ct.Prac.R. 12.01(A)(2)(b), the Ohio Rules of Civil Procedure (“Civil Rules”) *supplement* the Rules of Practice unless clearly inapplicable, and where there is a conflict with the Civil Rules, the Rules of Practice control.

Once an original complaint is filed, S.Ct.Prac.R.12.04 takes effect. Pursuant to S.Ct.Prac.R. 12.04(A)(1), a relator has twenty-one (21) days from the service of summons and the complaint to file an answer or a motion to dismiss. However, S.Ct.Prac.R. 12.04(A)(2) states that if an amended complaint is filed under S.Ct.Prac.R. 3.13 and Civ.R. 15(A), then a relator has twenty-one (21) days to file an answer or motion to dismiss from the date the amended complaint was filed.

Because of the way S.Ct.Prac.R. 12.04(A)(2) is written, a review of Civ.R. 15(A) is now necessary. Civ.R. 15(A) states in pertinent part:

*A party may amend his pleading once as a matter of course at any time before a responsive pleading is served ***.* Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. (Emphasis added).

Respondent filed both his answer and motion for judgment on the pleadings on February 26, 2013, which was only twelve (12) days from the date Respondent was served. And, Relator did not seek Respondent’s written consent for leave as Civ.R. 15(A) permits. As such, under Civ.R. 15(A), Relator may not amend his complaint as of right.

The question is whether S.Ct.Prac.R. 3.13 permits or bars Relator’s motion. In full, S.Ct.Prac.R. 3.13 states:

A party who wishes to make corrections or additions to a previously filed document shall file a revised document and copies that completely incorporate the corrections or additions. ***The revised document shall be filed within the time permitted by these rules for filing the original document, except that corrections or additions shall not be made to a motion if a memorandum opposing the motion has already been filed.*** Time permitted by these rules for filing any responsive document shall begin to run when the revised document is filed. The Clerk of the Supreme Court shall refuse to file a revised document that is not submitted in the form and within the deadlines prescribed by this rule.

As the Court will note, the applicable term in S.Ct.Prac.R. 3.13 is “motion.” If, because of its reference in S.Ct.Prac.R. 12.04(A)(2), the term “motion” also encompasses an original complaint in an original action, then S.Ct.Prac.R. 3.13 clearly bars Relator’s motion, as Respondent filed a ‘memorandum’ opposing the original complaint in the form of the motion for judgment on the pleadings.

If the term “motion” as used in S.Ct.Prac.R. 3.13 does not include an original complaint, then the Court must employ a standard Civ.R. 15(A) analysis on the motion for leave to amend. Toward that end, this Honorable Court has said, “[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377, 381 (1984).

III. ARGUMENT:

It is Respondent’s position that S.Ct.Prac.R. 3.13 does indeed bar the motion to amend, given its reference in S.Ct.Prac.R. 12.04. However, in the event the Court determines S.Ct.Prac.R. 3.13 does not bar the instant motion, then Respondent presents the following argument in the alternative, as Relator’s motion should nonetheless be denied, despite the liberal

policy to grant leave normally exercised under Civ.R. 15(A), because of Relator's pattern of both bad faith and undue delay in this matter.

First, as a practical matter, Relator's motion is nothing more than a backdoor attempt to introduce Exhibits 2 and 3. In this regard, the instant motion and Respondent's motion to strike are intertwined. As the Court will recall, Exhibits 2 and 3 were not originally attached to the complaint but were attached to Relator's response to Respondent's motion for judgment on the pleadings. Because the Rules of Practice do not permit a Relator to introduce additional evidence upon the filing of a motion for judgment on the pleadings, Respondent moved to strike both Exhibit 2 and 3. Fearing Respondent's motion would be sustained, Relator now seeks to introduce exhibits it cannot otherwise place into the record without leave to amend.

The real question the Court should ask of Relator is: "If Exhibit 2 and 3 were so vital to your case, why didn't you include them in your original complaint?" This motion is *entirely* representative of the delinquent and haphazard manner Relator has exhibited since he became the Democrat nominee for Sheriff in March 2012. As Respondent asserted in his motion for judgment on the pleadings, Relator has long held both the knowledge of, and access to, the documents he now seeks to bootstrap to his complaint. He had access and knowledge of them following the primary in March 2012. He had access and knowledge of them prior to the general election in November 2012, and he had access and knowledge them prior to filing his original complaint in this matter. Relator's protests to the contrary are simply not credible.

The fact is: Exhibit 3 (Respondent's Application of Candidacy) was filed with the Belmont County Board of Elections in September 2011. It's the same application Relator was required to file, and Relator's complaint establishes he had knowledge of the former sheriff's challenge to Respondent's qualifications in December 2011.

With this reality in mind, it is fairly stated that Exhibit 3 is the *foundational* document of Relator's original complaint – yet it was not attached. Most of the allegations contained in original complaint, and much of his original affidavit, are based upon information Relator claims was misrepresented in Respondent's application of candidacy. Only now, in response to Respondent's motion for judgment on the pleadings and motion to strike, does Relator deem it necessary to include Respondent's application of candidacy – despite the fact that his *entire* complaint is premised on Respondent having filed a 'false' application.

Though Relator's overt failure to attach the application of candidacy is both troubling and puzzling, it pales in comparison to his most blatant act of bad faith buried within the motion for leave to amend complaint. Specifically, Relator's proposed amended complaint maintains allegations Respondent has already proven false.

The Court's attention is directed to paragraph 34 of the proposed amended complaint. There, Relator again asserts that Respondent, "...paid no Ohio State Income Tax during said period (2007-2011)." This claim, unquestionably asserted in bad faith and with an eye toward publicly embarrassing Respondent, remains in the amended complaint despite the fact Respondent's 2007-2011 Ohio tax returns are attached to his answer as Exhibit C, thereby *conclusively* proving the allegation false.

These two (2) items alone clearly demonstrate Relator's undue delay and bad faith.

However, Relator also seeks, via Exhibit 2, to include an affidavit in to insulate himself from the Seventh Affirmative Defense within Respondent's answer. With that affirmative defense, Respondent has raised the issue as to whether Relator was a qualified candidate for

Belmont County Sheriff. Via Exhibit 2, Relator seeks to assert – without substantiating documentation – that the affirmative defense is inapplicable to him.¹

However, that issue will not be addressed unless, and until, the matter is allowed to proceed to a presentation of evidence, which will only occur after Respondent's motion for judgment on the pleadings is decided and in the event the Court issues an alternate writ. Regardless, the bottom line is that Exhibit 2 is immaterial to the issues currently before the Court.

IV. CONCLUSION:

Viewed in context, and viewed in terms of the content Relator seeks to include in his amended complaint, it is clear that justice does not require granting Relator's motion for leave to amend complaint. Instead, even a cursory review of the materials Relator includes in the proposed amended complaint demonstrates that there is no reasonable excuse for Relator not to have included the information in his original complaint. But, again, that fits this Relator's pattern and history.

Of course, Respondent would be remiss if he did not mention Relator's bizarre inclusion of a fax coversheet and pleading in an unrelated this matter which were attached to the proposed amended complaint. While everyone makes mistakes, the level of inattention afforded a pleading submitted to the Supreme Court of Ohio is inexcusable – but representative of Relator's general view that the rules do not apply to him. A view whereby he claims he was not required to bring his challenge to Respondent's qualification at the earliest possible opportunity. A view

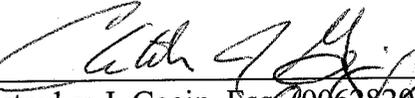
¹ Given that he has asserted a legal conclusion without attaching supporting documentation which forms the basis of his knowledge, such allegations are properly struck from the affidavit even if Relator is granted leave to amend his complaint. See *State ex rel. Varnau v. Wenninger*, 12th Dist. No. CA2009-02-010, 2011-Ohio-3904, ¶ 6.

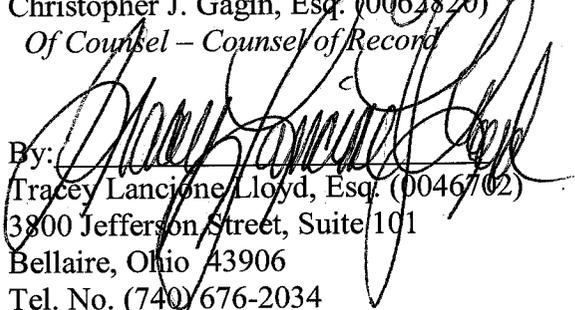
that he was not required to challenge Respondent's qualifications despite his knowledge of alleged deficiencies prior to the election. A view that he is not accountable for filing his *initial* challenge to Respondent's qualifications for over a month *after* his defeat in the general election. A view that he can make wild and outrageous allegations about Respondent's alleged illegality and tax evasion with complete impunity. And, a view that he need not attach the *foundational* document to the allegations contained in an original complaint filed in the Supreme Court of Ohio because he is free to simply submit unsupported affidavits and those documents at will.

Based on the above, and though rare, this Honorable Court should respectfully overrule Relator's motion for leave to amend complaint as Relator's demonstrated bad faith and undue, inexcusable delay establishes that justice does not require acquiescence to an otherwise liberal amendment policy in this matter.

Respectfully submitted,

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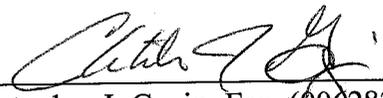
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondent's Answer was served via electronic mail upon Relator's Counsel of Record, Mark E. Landers, Esq., at *mark.landlers.esq.@gmail.com*, pursuant to S.Ct.Prac.R. 3.11(B), on this 21st day of March, 2013.

Respectfully submitted,

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