

In the Supreme Court of Ohio

STATE <i>ex rel.</i> RENEE WALKER, <i>et al.</i> ,	:	Case No. 2015-1371
	:	
Relators,	:	
	:	
v.	:	Expedited Election Case Pursuant to
	:	S.Ct.Prac.R. 12.08
Jon Husted,	:	
	:	
Respondent.	:	
	:	
	:	

**MOTION TO CORRECT THE RECORD REGARDING
MISSTATEMENTS OF LAW IN RELATORS' REPLY BRIEF**

VORYS, SATER, SEYMOUR AND PEASE LLP

Lisa Babish Forbes (0060105)
Aaron M. Williams (0090319)
200 Public Square, Suite 1400
Cleveland, Ohio 44114
Phone: (216) 479-6100
Fax: (216) 479-6060
E-mail: lbforbes@vorys.com
ksbaird@vorys.com
amwilliams@vorys.com

John K. Keller (0019957)
52 East Gay Street
Columbus, OH 43215
Phone: (614) 464-6400
Fax: (614) 464-6350
E-mail: jkkeller@vorys.com

*Attorneys for Amici Curiae,
The Ohio Oil and Gas Association and the Ohio
Gas Association*

NOW COMES Amici Curiae the Ohio Oil and Gas Association and the Ohio Gas Association (collectively the “Gas Associations”) and move this court to correct the record regarding misstatements of law in Relators’ Reply Brief in Support of Verified Complaint filed on September 9, 2013.

1. The Parties Agree: Relators Misstated the Law in their Reply Brief

On September 10, 2015, counsel for the Gas Associations informed Relators’ counsel of the misstatements of law and requested that Relators amend their Reply to correct the misstatements. A true and correct copy the Gas Associations counsel’s letter on September 10, 2015 is attached hereto as **Exhibit A**.

Relators agree that they misstated the law in their Reply Brief. A true and correct copy of Relators counsel’s letter on September 11, 2015 is attached hereto as **Exhibit B**. Given the time pressures of the accelerated expedited elections briefing schedule, Relators’ counsel explained that they will file an amended brief, but may not be able to do so until Monday, September 14, 2015. Counsel for the Gas Associations greatly appreciates Relators counsel’s prompt and professional response to these concerns. However, given the expedited nature of these proceedings, the Gas Associations wish to bring this issue to the Court’s attention promptly given that the briefing in this action is closed and the matter is ripe for decision.

2. Relators Incorrectly Claimed That the *Ebersole* Case Relied on by the Gas Associations had been Reversed. It Was Not.

The specific misstatements that need to be corrected occur where Relators wrongly claim that *State ex rel. Ebersole v. Delaware County Bd. Of Elections*, 140 Ohio St. 3d 678, 2014-

Ohio-4077, 20 N.E.3d 678, was reversed¹ and when they dismiss the Gas Associations' argument. (Relators' Reply, p. 15-16). The Court did not reconsider its decision in *Ebersole*. The Court's decision reported at 140 Ohio St. 3d 678 is undisturbed and remains good law. While the relators in that case did request reconsideration, the Court denied the motion for reconsideration. *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St. 3d 1446, 2014-Ohio-4284, 17 N.E.3d 593.

In a separate case, captioned *State ex rel. Ebersole v. City of Powell*, the Supreme Court heard a dispute between different parties regarding different statutory authority. 141 Ohio St. 3d 9, 2014-Ohio-4078, 21 N.E.3d 267. In the *Ebersole* case against the City of Powell, the relator requested reconsideration, the Court granted the request for reconsideration, and then reversed its prior decision. 141 Ohio St. 3d 17, 2014-Ohio-4283, 21 N.E.3d 274. But, that has no bearing whatsoever on the validity of the Gas Associations' arguments in its amicus brief and is no indication that the case of *Ebersole v. Delaware County Board of Elections* was reversed.

The Gas Associations were right about the continued vitality of the *Ebersole* case they cited. And, they are right about the argument that, "Where the substance or content exceeds the people's initiative power, this Court has 'made clear that such cases, the board of elections is required to withhold the initiative and referendum from the ballot.'" The Court should not disregard the Gas Associations' arguments, as urged by Relators when they mistakenly believed *Ebersole* had been reversed. Rather, this Court should adopt the Gas Associations' arguments.

¹ Relators incorrectly assert in their Reply: "This *Ebersole* holding – and the line of argument which the Gas Associations seek to construct from it – were overruled and superseded by the Ohio Supreme Court days after this decision was published. The *Ebersole* decision cited by the Gas Associations was issued on September 19, 2014. But the relators in the case moved for reconsideration, and the Court took up the matter, and reversed itself." (Relators' Reply, p. 15.)

For the foregoing reasons, the Gas Associations request that this Court grant its motion to correct the record and strike from Relators' Reply brief the incorrect statements identified here.

Respectfully Submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

/s/ Lisa Babish Forbes

Lisa Babish Forbes (0060105)
Aaron M. Williams (0090319)
Vorys, Sater, Seymour and Pease LLP
200 Public Square, Suite 1400
Cleveland, Ohio 44114
Phone: (216) 479-6100
Fax: (216) 479-6060
E-mail: lbforbes@vorys.com
ksbaird@vorys.com
amwilliams@vorys.com

John K. Keller (0019957)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
Phone: (614) 464-6400
Fax: (614) 464-6350
E-mail: jkkeller@vorys.com

*Attorneys for Amici Curiae,
The Ohio Oil and Gas Association and the Ohio
Gas Association*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email upon the following this 11th day of September, 2015:

James Kinsman, Esq.
james@jkinsmanlaw.com

Terry J. Lodge, Esq.
lodgejlaw@yahoo.com

Counsel for the Relators

Kurt A Tunnell
ktunnell@bricker.com
Anne Marie Sferra
asferra@bricker.com
BRICKER & ECKLER LLP

Counsel for Respondent

Michael M. Hollingsworth
mike@mmhlaw.us

Counsel for Intervening Respondent, Joanne Dove Prisley

Curt C. Hartman
hartmanlawfirm@fuse.net

Counsel for Intervening Respondent, Mark Overholt

Charles Saunders
saunderslitigation@gmail.com

Counsel for Intervening Respondents, Saunders, Lumbrezer, and Norman

Chad A. Endsley
cendsley@ofbf.org

Leah F. Curtis
lcurtis@ofbf.org
Amy M. Milam
amilam@ofbf.org

Counsel for Amici Curiae Ohio Farm Bureau Federation, Athens-Meigs Farm Bureau, Fulton County Farm Bureau, and Medina County Farm Bureau

L. Bradford Hughes
lhughes@porterwright.com
Kathleen M. Trafford
ktrafford@porterwright.com
PORTER WRIGHT MORRIS & ARTHUR LLP

Counsel for Amici Curiae, The Ohio Chamber of Commerce, Affiliated Construction Trades of Ohio, and The American Petroleum Institute

Thomas A Luebbers
Thomas.luebbers@dinsmore.com
Michael T. Dean
Michael.dean@dinsmore.com
PECK, SHAFFER & WILLIAMS, a Division of DINSMORE & SHOHL, LLP

Counsel for Amicus Curiae, County Commissioners Association of Ohio

//s/ Lisa Babish Forbes

Lisa Babish Forbes (0060105)

One of the Attorneys for Amici Curiae, The Ohio Oil and Gas Association and Ohio Gas Association

Lisa Babish Forbes
Direct Dial (216) 479-6105
Direct Fax (216) 937-3726
Email lbforbes@vorys.com

Exhibit A

September 10, 2015

VIA E-MAIL

James Kinsman, Esq.
P.O. Box 24313
Cincinnati, OH 45224
james@jkinsmanlaw.com

Terry J. Lodge, Esq.
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
lodgelaw@yahoo.com

Re: *State ex rel. City of Youngstown v.
Mahoning County Board of Elections, et al.*
In the Supreme Court of Ohio – Case No. 2015-1422

Gentlemen:

I am writing to ask that you withdraw or correct the misstatements in Relators' Reply Brief in Support of Verified Complaint served via email on September 9, 2013 at 9:13 p.m.

Specifically, on pages 15 and 16 of the Reply, Relators misstate the legal effect of *State ex rel. Ebersole v. Delaware County Bd. Of Elections*, 140 Ohio St. 3d 678, 2014-Ohio-4077. You incorrectly assert in your Reply at p. 15, "This *Ebersole* holding – and the line of argument which the Gas Associations seek to construct from it – were overruled and superseded by the Ohio Supreme Court days after this decision was published. The *Ebersole* decision cited by the Gas Associations was issued on September 19, 2014. But the relators in the case moved for reconsideration, and the Court took up the matter, and reversed itself." The Court did no such thing.

As even a cursory review of that *Ebersole* case reveals, the Court's decision reported at 140 Ohio St. 3d 678 is undisturbed and remains good law. While the relators did request reconsideration, the Court denied the motion for reconsideration. *State ex rel. Ebersole v. Del. County Bd. of Elections*, 140 Ohio St. 3d 1446, 2014-Ohio-4284, 17 N.E.3d 593.

In a separate case, captioned *State ex rel. Ebersole v. City of Powell*, the Supreme Court heard a dispute between different parties regarding different statutory authority. 141 Ohio St. 3d 9, 2014-Ohio-4078, 21 N.E.3d 267. In the *Ebersole* case against the City of Powell, the relator requested reconsideration, the Court granted the request for reconsideration, and then

reversed its prior decision. 141 Ohio St. 3d 17, 2014-Ohio-4283, 21 N.E.3d 274. But, that has no bearing whatsoever on the validity of the Gas Associations' arguments in its amicus brief and is no indication that the case of *Ebersole v. Delaware County Board of Elections* was reversed.

Under these circumstances, Relators must correct their Reply to retract the false statements about *Ebersole v. Delaware Bd. Of Elections* having been reconsidered and reversed (Reply, p. 15), and to retract the unfounded attack on the Gas Associations' legal argument in its amicus brief (Reply, p. 16).

If Relator has not corrected its brief and retracted the wrong statements by **noon tomorrow, Friday, September 11, 2015**, the Ohio Oil and Gas Association and the Ohio Gas Association will have no choice but to bring the matter to the Court's attention.

Sincerely,



Lisa Babish Forbes

LBF/kjm

Law Office
TERRY JONATHAN LODGE

Exhibit B

316 N. Michigan Street, Suite 520
Toledo, Ohio 43604-5627

Phone (419) 255-7552
Fax (419) 255-8582
lodgelaw@yahoo.com

September 11, 2015

Lisa Babish Forbes, Esq.
Vorys, Sater, Seymour & Pease
Via email only to lbforbes@vorys.com

RE: Request for corrections to Relators' Reply Brief in *State ex rel. Walker v. Husted*,
Case No. 2015-1371

Dear Ms. Forbes:

I've reviewed your September 10, 2015 letter (mistakenly referencing the case of *State ex rel. City of Youngstown v. Mahoning County Board of Elections*). We concur with your criticism. Accordingly, we will file a correct/amended brief which deletes the argument you cite.

The only problem is timing, given the exigencies of our present situation. James Kinsman and I, as you personally know, are committed to filing Relator's Merit Brief in *State ex rel. Goncalves v. Mahoning County Board of Elections* by 5:00 p.m. today, and a reply brief by noon on Monday, September 14, 2015. Because it will be necessary to prepare an explanatory motion accompanying the corrected brief, we cannot get it accomplished today by your noontime deadline, and cannot guarantee precisely when the corrected brief will be filed. I intend to treat Monday afternoon as the outside date, and might be able to address the motion during the weekend. It is in Relators' interests to file the correction sooner rather than later.

Thank you very much.

Very truly yours,

/s/ Terry J. Lodge