Supreme Court of Ohio Clerk of Court - Filed August 24, 2016 - Case No. 2016-1235

IN THE SUPREME COURT OF OHIO

State ex rel. Tracy L. Jones, *et al.*,	:	
	:	
Relators,	:	**Case No. 2016-1235**
	:	
v.	:	
	:	
Hon. Jon Husted, Ohio Secretary of State,	:	
	:	
Respondent.	:	

BRIEF OF AMICI CURIAE,
THE OHIO MANUFACTURERS' ASSOCIATION,
THE OHIO CHAMBER OF COMMERCE,
PHARMACEUTICAL AND RESEARCH MANUFACTURERS OF AMERICA,
KEITH A. LAKE, AND RYAN R. AUGSBURGER,
NOT EXPRESSLY SUPPORTING A PARTY

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I. INTRODUCTION AND STATEMENT OF AMICI INTEREST

Relators Tracy L. Jones, William S. Booth, Daniel L. Darland, and Latonya D. Thurman ("Relators" or the "Committee") commenced this action on August 17, 2016 against Respondent Secretary of State, Jon Husted, seeking a writ of mandamus directing the Secretary to restore over 20,000 signatures that the Secretary and several non-party boards of elections struck from the Ohio Drug Price Relief Act Petition (the "Petition") on or before February 4, 2016. This is the third mandamus action brought by the Committee against the Secretary pertaining to the Petition.[1]

Amici Curiae, the Ohio Manufacturers' Association, the Ohio Chamber of Commerce, Pharmaceutical and Research Manufacturers of America, Ryan Augsburger and Keith Lake (collectively the "OMA Parties") have a strong interest in this matter because the issues raised stem from a challenge they filed in *Ohio Manufacturers' Association v. Ohioans for Fair Drug Price Relief Act*, Case No. 2016-0313, and a judgment they obtained on August 15, 2016 in that case (the "Challenge Proceeding") finding the Petition deficient and permitting the Committee to cure the deficiency. *See Ohio Manufacturers' Association v. Ohioans for Fair Drug Price Relief Act*, Slip Op. 2016-Ohio-5377 ("Slip Op."); *see also* Relators' Merits Brief, at 1 ("This case stems from a challenge brought by the opponents of the petition.")[2] The instant action is an improper attack on that judgment.

This new mandamus action is the wrong proceeding, at the wrong time, and seeks the wrong remedy. As the parties who filed the original Challenge Proceeding—the result of which

[1] The Committee filed the first mandamus action (Case No. 2016-0020) on January 6, 2016 and moved to dismiss it on February 5, 2016, one day after the action taken by the Secretary on February 4, 2016, which is the subject of the Committee's second (Case No. 2016-0455) and third (Case No. 2016-1235) mandamus actions.

[2] As referred to herein, "Relators' Merits Brief" is the brief filed by Relators in this mandamus action on August 22, 2016.

is now under collateral attack in the instant action—the OMA Parties appear herein to preserve the judgment obtained in the Challenge Proceeding and to encourage the Court to establish a workable framework for future petition challenges, consistent with well-established litigation principles.

II. STATEMENT OF RELEVANT FACTS

On February 29, 2016, the OMA Parties filed their Challenge Proceeding against the Committee and the Secretary to challenge the validity of thousands of part-petitions and signatures included in that certification. The most prominent and statistically significant issue raised by OMA Parties involved signatures that were stricken by someone other than the circulator, signer, or attorney-in-fact. The Committee filed an answer, but did not challenge or otherwise assert that any part-petition previously invalidated by the Secretary or any county board of elections on this same strikethrough issue should have been reinstated. Despite months of contentious litigation, at no time did the Committee seek, in the Challenge Proceeding, to have any signatures restored to the certification.

The Committee made the calculated decision to not file anything in the Challenge Proceeding to restore stricken signatures. Instead, the Committee filed its second mandamus action against the Secretary and sought to restore previously invalidated signatures in that action relying solely on the exact same strikethrough issue that was raised in the Challenge Proceeding (Supreme Court Case No. 2016-0455). *See* Relators' Merits Brief, at 8 ("In response to the filing of this challenge, Relators' herein filed a mandamus action with the Court on March 25, 2016, to recover the valid signatures of Ohio electors on the part-petitions that the Secretary of State and county boards had unlawfully invalidated * * *.")[3]

[3] The Committee filed a motion to consolidate its second mandamus action with the Challenge Proceeding, but only filed the motion in the mandamus action and did not give notice to Relators

Shortly thereafter, the Committee filed a motion for judgment on the pleadings in the Challenge Proceeding, asserting that this Court lacked jurisdiction to consider the Challenge Proceeding because "there is no cause of action under Section 1g to challenge signatures on a Section 1b petition that asks the General Assembly to adopt a statute." Slip Op., ¶ 11. This Court disagreed and in its May 18, 2016 decision denying the Committee's motion for judgment on the pleadings held, "The language of Section 1g is broad and unequivocal; it confers upon this court original exclusive jurisdiction to hear all petition-signature challenges." *Id.*, ¶ 12.

After the Court made clear that it had exclusive original jurisdiction to determine the validity of the part-petitions and signatures in the Challenge Proceeding, the Committee did nothing in the Challenge Proceeding to seek to restore signatures that had previously been invalidated.

On June 15, 2016, this Court dismissed the Committee's second mandamus action without prejudice. Even then, instead of seeking to have the entire dispute concerning which signatures should be counted resolved in the Challenge Proceeding or a separate challenge proceeding—where the Constitution and this Court says it must be resolved—the Committee did nothing.

On August 15, 2016, this Court decided the Challenge Proceeding and held that the Petition should not have been certified because it did not contain a sufficient number of signatures. Slip Op., ¶ 47. The Court gave the Committee 10 days to submit a sufficient number of signatures to the Secretary to "cure" the deficiency. *Id.*

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in the Challenge Proceeding. The Secretary opposed the motion to consolidate based on arguments asserted in a motion to dismiss the mandamus action.

On August 17, 2016, the Committee filed this third mandamus action against the Secretary, essentially asking this Court to excuse it for not asserting its signature-counting issues in the Challenge Proceeding.

III. LAW AND ARGUMENT

As this Court is aware, for the past six months, the Committee, Secretary, and the OMA Parties have been litigating the Challenge Proceeding in this Court. About nine days ago, this Court agreed that thousands of part-petitions submitted by the Committee contained false circulator attestations, did not comply with Ohio law, and contained an overcounting of signatures that constituted "an open invitation to fraud." Slip Op., ¶ 44. Indeed, this Court held that the Committee's actions were not "a case of minor or negligent miscounts," but rather a series of "systematic overcounts" that left boards of elections with "no way to know how many signatures the circulators actually witnessed" and "no guarantee that someone did not later add the signatures of legitimate electors." *Id.* Ultimately, the Court determined that "OMA has demonstrated that 10,303 signatures that were counted as valid should not have been counted" and found that the Petition was short by 5,044 signatures. *Id.*, ¶ 46. The Committee was permitted 10 days, until August 25, 2016, to "cure" this deficiency. The OMA Parties have a substantial interest in defending the judgment they obtained in the Challenge Proceeding.

Now, in this separate action in which the OMA Parties were not named as parties, the Committee seeks to modify this Court's August 15, 2016 judgment in the Challenge Proceeding by adding back signatures that were rejected by the Secretary and several county boards of elections on or before February 4, 2016. The Committee should not be permitted to do so. First, this mandamus action is an improper vehicle to challenge part-petitions and signatures thereon. Second, even if this mandamus action could be maintained, it fails because the Committee has (or had) an adequate remedy at law. Third, the Committee's claims herein are barred by the

doctrine of laches and/or waiver. And, fourth, this action is an inappropriate attack on a judgment that, in the interest of avoiding piecemeal litigation and preserving finality of judgments, should be rejected.

A. The Committee failed to utilize the only procedure available to restore petition signatures.

The Ohio Constitution was amended, effective November 4, 2008, to bestow original, exclusive jurisdiction to hear all petition-signature challenges involving statewide initiative petitions upon this Court. Prior to that time, challenges (or protests) to the validity or invalidity of part-petitions and signatures thereon could be brought in certain common pleas courts pursuant to statute (R.C. 3519.16) or in extraordinary writ actions. After the constitutional amendment, challenges to signatures on statewide initiative petitions could be brought only in this Court under Article II, Section 1g of the Ohio Constitution.[4] This provision states that any proceeding concerning a statewide initiative petition or signatures thereon must be filed as a ***challenge*** in this Court.

Recognizing that actions challenging part-petitions and the validity and invalidity of signatures thereon could only be brought in this Court under Article II, Section 1g, the OMA Parties pursued their Challenge Proceeding accordingly. In response to the Challenge Proceeding, the Committee filed a mandamus action (*see* Relators' Merits Brief, at 8) – a proceeding wholly distinct from a challenge, involving different standards and burdens of proof. In its mandamus action, the Committee sought to recover signatures that the Secretary and various county boards of elections had invalidated. These claims should have been brought as a challenge under Article II, Section 1g.

[4] In 2010, this Court's Rules of Practice were amended to include procedures applicable to this new constitutional proceeding. Under this Court's Rules of Practice, the "Ohio Rules of Civil Procedure * * * shall supplement these rules unless clearly inapplicable." S.Ct.Prac.R. 14(C)(2).

The Committee then moved for judgment on the pleadings in the Challenge Proceeding, asserting that the Court lacked jurisdiction because "there is no cause of action under Section 1g to challenge signatures on a Section 1b petition that asks the General Assembly to adopt a statute." *Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, Slip Opinion No. 2016-Ohio-3038, ¶ 11. On May 18, 2016, the Court flatly rejected this contention and held that "[t]he language of ***Section 1g*** is broad and unequivocal; it ***confers upon this court original exclusive jurisdiction to hear all petition-signature challenges***." *Id.*, ¶12 (emphasis added).

Thus, there is no doubt that ***all*** petition-signature challenges for statewide initiative petitions must be brought in a challenge action as provided by the Ohio Constitution. The Committee initially failed to bring its claims to restore signatures in this way, instead gambling on its argument that the Court did not have jurisdiction. And, even when this Court's May 18, 2016 decision made it abundantly clear that all petition-signature challenges must be brought under Article II, Section 1g, the Committee still failed to utilize this exclusive mechanism to restore signatures it believed to be improperly invalidated.

When Ohio law provides an exclusive procedure to pursue a particular remedy, such as here, that procedure must be utilized. *State ex rel. Voleck v. Village of Powhatan Point*, 129 Ohio St.3d 299, 2010-Ohio-5679, 939 N.E.2d 819, ¶ 9 (village residents not entitled to use mandamus to protest water quality when comprehensive statutory procedures and remedy exist, which cannot be bypassed). This Court made clear that the proper mechanism to challenge statewide initiative petition signatures is a challenge filed under Article II, Section 1g of the Ohio Constitution. The Committee's failure to use that mechanism is fatal to their claim to restore the signatures requested.

B. Mandamus is unavailable due to an available remedy at law.

Even if a mandamus action were appropriate from a procedural standpoint, this extraordinary relief should not be granted here because the Committee does not satisfy the requirements for mandamus.

A writ of mandamus is an extraordinary remedy that is only available where the relator has no adequate remedy at law. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 2013-Ohio-1471, 987 N.E.2d 650, ¶ 4. The Committee asserts it has no adequate remedy at law on the basis that "when electoral realities create time pressures, extensive litigation in lower courts is not an adequate legal remedy." Relators' Merits Brief, at 18. This statement has no relevance to the facts and does nothing to establish that the Committee lacks an adequate remedy at law.

First, there are no time pressures here that make it difficult or impossible for the Committee to obtain timely relief. The Committee is attempting to put the Ohio Drug Price Relief Act on the ballot in November 2017[5] and litigation challenging part-petitions and signatures was commenced in February 2016.

Second, it has never been suggested that the Committee should have (or could have) pursued litigation in Ohio's lower courts. Instead, the Committee was required to maintain its action in a challenge proceeding, under Article II, Section 1g of the Ohio Constitution, in which the Ohio Supreme Court has original exclusive jurisdiction. The Committee should have asserted its claims in the Challenge Proceeding instead of filing a separate action asserting overlapping claims, but intentionally chose not to. Thus, an adequate remedy at law was available to the Committee, but the Committee chose not to pursue it. *Howard v. Spore*, 91 Ohio St.3d 131, 2001-Ohio-297, 742 N.E.2d 649, 650 (finding extraordinary writ improper to compel

[5] See Notice of Continued Circulation of Supplementary Petition, filed by the Committee on July 13, 2016 in the Challenge Proceeding.

judge to report alleged misconduct in the course of litigation because procedures under Gov.Bar R. V provide an adequate remedy at law); *Fodor v. First Nat'l Supermarkets, Inc.*, 63 Ohio St.3d 489, 491, 589 N.E.2d 17 (1992).

Plainly, the Committee has not demonstrated the lack of an adequate remedy at law. Thus, mandamus is unavailable.

C. The Committee's claims are barred by the doctrines of laches and waiver.

On May 18, 2016, the Committee was clearly advised that this Court has "original exclusive jurisdiction to hear all petition-signature challenges." Slip Op. ¶ 12. Yet, in the three months since that ruling was issued, the Committee has done nothing to properly challenge the Secretary's decision to invalidate part-petitions that exhibited the strikethrough issue. Nor did the Committee properly challenge the actions taken by those county boards of elections that similarly struck part-petitions for the same reasons.

The Committee had ample opportunity, and reason, to raise these issues in a challenge proceeding prior to this point. Yet the Committee did not raise this matter in its answer to the Challenge Proceeding filed almost six months ago or otherwise assert its claims in the Challenge Proceeding. Nor did the Committee bring its own challenge proceeding even after this Court ruled, on May 18, 2016, that it had jurisdiction over a Challenge Proceeding.

Clearly, by May 18, 2016, the Committee was aware that it had an available cause of action and a right to bring a challenge on the exact same grounds it attempts to raise here. Yet the Committee did not do so, even after the Court dismissed its second mandamus action without prejudice. Now, after a decision and judgment in the Challenge Proceeding, the Committee again attempts to improperly raise these claims. As a result of the Committee's extreme delay, the instant matter is barred by laches and waiver its ability to raise the instant challenge.

1. Laches bars the Relators' action.

This Court has often held that laches may bar relief in an election-related matter unless the person seeking relief acts with the "utmost diligence." S*tate ex rel. Monroe v. Mahoning County Bd. of Elections*, 137 Ohio St. 3d 62, 2013-Ohio-4490, 997 N.E.2d 524, ¶ 30; *State ex rel. Fuller v. Medina County Bd. of Elections*, 97 Ohio St. 3d 221, 2002-Ohio-5922, 778 N.E.2d 37, ¶ 7. In fact, in a recent election-related case, this Court applied laches against a petitioner who not only delayed in bringing an election challenge but who, like the Committee here, caused "additional delay by dismissing his first lawsuit in favor of a second." *State ex rel. Duclos v. Hamilton Cnty. Bd. of Elections*, 145 Ohio St. 3d 254, 2016-Ohio-367, 48 N.E.3d 543 ¶ 8.

Each of the four articulated elements of a laches defense are present here: "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." S*tate ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 1995-Ohio-269, 656 N.E.2d 1277 (1995). The Committee asserts no reason for its delay and provides no excuse for failing to raise this issue as a timely challenge or as a claim in the Challenge Proceeding. As a party to that Challenge Proceeding, the Committee clearly had actual knowledge of the purported injury or wrong. By failing to raise these issues ***six months ago*** in the context of the Challenge Proceeding, or ***three months ago*** when it was clear that a challenge was the appropriate procedural mechanism.

Unlike the laches argument that was rejected by this Court in *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119 ¶ 47 (finding that a delay of eight days did not affect the respondents' ability to prepare and defend against that mandamus claim) the instant situation is much more egregious. Not only is the delay considerably longer (three or six months, as opposed to eight days) the OMA Parties, the Secretary, and this Court

spent considerable time and effort to unravel a complex case with a voluminous record. The Committee's delay in raising this issue and attempting to re-open the entire matter in this manner should be rejected.

2. Relators have waived their ability to raise this issue

In the alternative, by waiting for this Court to issue a decision and craft a remedy before bringing this challenge in a separate proceeding, the Committee has waived its ability to raise this issue. A waiver is a voluntary relinquishment of a known right or privilege that can be applied to a litigant who chooses not to enforce his right to a hearing or present defenses that were available to him. *See Chubb v. Ohio Bureau of Workers' Comp.*, 81 Ohio St.3d 275, 690 N.E.2d 1267 (1998); *see also State ex rel. Chavis v. Sycamore City School Dist. Bd. of Ed.*, 71 Ohio St.3d 26, 45, 641 N.E.2d 188 (1994).

The Committee knew on or before February 4, 2016 – the date on which the Secretary transmitted the Petition to the General Assembly – that the Secretary and several county boards of elections had invalidated thousands of petition signatures on the basis of the strikethrough issue. And it knew on or before February 29, 2016 – when the Challenge Proceeding was filed – that the issue of stricken signatures on this very Petition was squarely in contention. And it knew, as of May 18, 2016 – when this Court dismissed its jurisdictional challenge against the Challenge Proceeding – that a challenge to the stricken signatures should have been raised in a challenge action before this Court. By never asserting its claims in the Challenge Proceeding and waiting until after the Court issued a decision and judgment – including calculating a deficiency in the number of signatures required – the Committee waived any right it may have had to bring the claims it now asserts.

Regardless of whether laches or waiver applies, the fact remains that the Committee knew of the alleged problem and was on notice of the proper remedy, but waited for over three

months before raising the issue to this Court. Such dilatory tactics should not be countenanced by this Court.

D. This action is an inappropriate collateral attack on a judgment.

Although the Committee could have asserted its claims to recover petition signatures, at any time in the Challenge Proceeding, it chose not to do so. Instead, it waited until there was a judgment on the merits in the Challenge Proceeding and then filed this third mandamus action. As set forth above, the Committee's challenges to petition signatures herein should have been brought long ago in a Challenge Proceeding. The Committee's failure to do so is fatal to its claims.

This action is an improper attack, or end-run, on the Court's judgment issued in the Challenge Proceeding. Collateral attacks of final judgments are disfavored and succeed only in limited situations – where there is fraud or lack of jurisdiction. *Wymslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 34. Here there is neither. Further, the Committee had every opportunity to present evidence to try to change the outcome in the Challenge Proceeding, but failed to do so. It cannot now attempt to alter a judgment with which it disagrees in a separate proceeding.

Ironically, in the Challenge Proceeding, the Committee asserted: "Piecemeal decision of multiple claims contained in a challenge to the petition is incompatible with this constitutional process because such decisions will fail to resolve all claims that must be decided in order for petitioners to know whether the ten-day cure period will be necessary and, if it will be, the exact extent of any deficiency that must be made up." *See* Petition Respondents' Memorandum in Opp. to Mot. for Partial Summary Judgment (Case No. 2016-0313), at 6 (opining as to why the Court should not address the motion for partial summary judgment on a discrete issue in the

case). This underscores why the Committee is precluded from now asserting, after this Court has already determined a deficiency, its claims in an attempt to alter the judgment.

This Court's decision in the Challenge Proceeding was unequivocal – it determined a deficiency and further ordered that the Committee has ten days to submit additional signatures to cure the deficiency. If the Committee does so and the Secretary certifies a sufficient number of valid signatures, the Petition will be submitted to the General Assembly in accordance with the terms of Article II, Section 1b of the Ohio Constitution. If the Committee does not do so, the Petition fails and can never proceed toward the November 2017 ballot. That is what the Ohio Constitution requires and that is what this Court has previously held in the Challenge Proceeding.

The OMA Parties respectfully urge this Court to deny the Committee's request for the extraordinary writ of mandamus.

Respectfully submitted,

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I hereby certify that a copy of the foregoing document was served via electronic mail on August 24, 2016 upon:

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