The Supreme Court of Ohio

CASE ANNOUNCEMENTS

October 26, 2011

[Cite as *10/26/2011 Case Announcements #2,* 2011-Ohio-5478.]

MISCELLANEOUS ORDERS

BEFORE THE COMMISSION OF FIVE JUDGES APPOINTED BY THE SUPREME COURT OF OHIO

In re: Judicial Campaign Complaint	:	
Against Michelle Wagner	:	Case No. 2011-1672
	:	

ORDER OF THE COMMISSION OF JUDGES.

This matter came to be reviewed by a commission of five judges appointed by the Supreme Court of Ohio pursuant to Gov. Jud. R. II, Section 5(D)(1) and R.C. 2701.11. The commission members are: Judge Jan Michael Long, Chair, Judge Cheryl S. Karner, Judge Jeffrey E. Froelich, Judge David A. Basinski, and Judge Richard Warren.

On September 13, 2011, the complainant, attorney Mark Davis, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The complaint alleged that the respondent, Michelle Wagner, had knowingly and or with reckless disregard violated various provisions of Rule 4.3 of the Code of Judicial Conduct by displaying campaign advertisements with the word "for" in a size that was not prominent. Following a review by a probable cause panel of the Board pursuant to Gov.Jud.R. II, Section 5(B) and based on instructions from that panel, the Acting Secretary of the Board filed a formal complaint alleging that the respondent, during the course of a judicial campaign, violated Rule 4.3(D)(2) (a judicial candidate shall not knowingly or with reckless disregard use the term "judge" when the judicial candidate is not a judge unless that term appears after or below the name of the judicial candidate and is accompanied by the word "for,"

in prominent lettering, between the name of the judicial candidate and the term "judge").

Subsequently, on September 28, 2011, a hearing panel appointed by the Board of Commissioners on Grievances and Discipline conducted a hearing on the allegations contained in the formal complaint. On October 3, 2011, the hearing panel issued its findings of fact, conclusions of law, and recommendations in this matter. The hearing panel concluded that by clear and convincing evidence that the Respondent's yard signs, t-shirts, and bumper magnets did not comply with the prominent lettering requirement of Jud.Cond.R. 4.3(D)(2) and that the Respondent violated the canon with reckless disregard.

The hearing panel recommended that the five-judge commission issue an interim cease and desist order. The panel further recommended that the respondent be assessed the costs of these proceedings.

On October 5, 2011, the Supreme Court of Ohio appointed a five-judge commission to review the hearing panel's report pursuant to Gov.Jud.R. II, Section 5(D)(1). The commission was provided with the record certified by the Board of Commissioners on Grievances and Discipline, a complete transcript of the September 28, 2011 proceeding before the hearing panel, and the exhibits presented at that hearing.

The full commission met by telephone conference on October 10 and October 13, 2011; briefs were not requested from the parties.

Pursuant to Gov.Jud.R. II, Section 5(D)(1), we are charged with reviewing the record to determine whether it supports the findings of the panel and that there has been no abuse of discretion. A majority of the Commission holds that the record does not support the findings of the hearing panel that a violation of Jud.Cond.R. 4.3 has occurred.

We note the word "for" is obviously smaller than and of the same color and print as the other words on the Respondent's campaign signs, t-shirts, and bumper magnets and may, therefore, not be prominent within the intent of Jud.Cond.R. 4.3. In that regard, future judicial candidates may possibly avoid a complaint or even a violation, by carefully considering how the words "for" "vote" or "elect" are displayed in campaign material.

In the matter before us, there is no clear and convincing evidence that Respondent knowingly or with reckless disregard displayed campaign advertisements or material that violated Jud.Cond.R. 4.3. The lack of such evidence coupled with the imprecise definition of the word "prominent," directs us to our conclusion.

For the reasons stated above, we hereby reverse the action of the hearing panel and dismiss the complaint.

This opinion shall be published by the Supreme Court Reporter in the manner prescribed by Rule V, Section 8(D)(2) of the Rules for the Government of the Bar.

SO ORDERED.

/s/ Jan Michael Long
Judge Jan Michael Long, Chair

/s/ Jeffrey E. Froelich
Judge Jeffrey E. Froelich

/s/ Cheryl S. Karner
Judge Cheryl S. Karner

Dissents

/s/ David A. Basinski
Judge David A. Basisnki

Separate Dissenting Opinion

This is not "rocket science." The first issue is whether the word "for" between a judge's name and the term "Judge" is "prominent."

Evidence was presented before the hearing panel appointed by the Board of Commissioners on Grievances and Discipline and it found by clear and convincing evidence that Respondent's yard signs, t-shirts, and bumper magnets did not comply with the prominent lettering requirement of Jud.Cond.R. 4.3(D)(2).

This five (5) member commission viewed the same exhibits. It is clear and convincing to me that the word "for" is not prominent. It can hardly be seen by any passing pedestrian/motorist. While the word "prominent" is not precisely defined, it's analogous to pornography, "It's difficult to define, but you know it when you see it." This is not about politics, gender or race. It's about compliance with the Rules as promulgated by the Supreme Court of Ohio on judicial campaigns.

More troubling to our Commission was the second issue or whether the Respondent "knowingly" or "with a reckless disregard" committed the violation.

What Jud.Cond.R. 4.3(D)(2) "seeks to avoid is the potential misrepresentation to the voting public that a judicial candidate is an incumbent judge with previous and relevant experience." The hearing panel who was able to view all the exhibits, listen to all of the testimony, and observe the demeanor of the

witnesses concluded that "any reasonable attorney would conclude that the word "for" in the manner Respondent utilized in her t-shirts, yard signs and bumper magnets was not in prominent letters . . . and has with reckless disregard violated Jud.Cond.R. 4.3(D)(2).

Until such time as the Supreme Court amends the Canon to more definitely define "prominent", it is my belief we have set a dangerous precedent by forgetting "reason" and "common sense" and ignoring the findings of the hearing panel.

While these are difficult decisions, they are no different than difficult decisions we have to make on a daily basis. We have a responsibility to the Supreme Court, judicial candidate (whoever they are) and the bar.

These proceedings have nothing to do with the actual qualifications of either candidate. We were requested and the majority finds no campaign violation. I leave it to the residents and voters of Toledo, Ohio to determine whether the word "for" is prominent.

Therefore, I respectfully dissent.

/s/ Richard Warren
Judge Richard Warren

Dated: October 26, 2011