

IN THE COURT OF COMMON PLEAS OF BROWN COUNTY, OHIO  
GENERAL DIVISION  
GEORGETOWN, OHIO

STATE OF OHIO Ex Rel. DENNIS J.  
VARNAU,

Relator,

v.

BOARD OF ELECTIONS OF BROWN  
COUNTY, OHIO,

Respondent.

CASE NO. CVH-2008-0566

JUDGE R. ALAN CORBIN

MAGISTRATE NATHAN A.  
THOMPSON

JOURNAL ENTRY OF ORDER  
DENYING RESPONDENT'S  
AMENDED MOTION TO DISMISS  
MANDAMUS ACTION  
PURSUANT TO CIVIL RULE  
12(B) AND (D) AND LOCAL  
RULE 9(C)(1)(a) AND (3)

MAGISTRATE'S ORDER  
PURSUANT TO CIVIL RULE  
53(D)(2)(A)(i) AND (ii)

THOMAS J. HANNA  
CLERK OF COURTS

08 AUG 11 PM 4:49

FILED

Pursuant to the Notice of Assignment for Oral Hearing on Respondent's Amended Motion to Dismiss Mandamus Action (hereinafter "Notice of Assignment") issued in this case and dated June 27, 2008, this case came on for the therein assigned Oral Hearing (hereinafter "Hearing") on Thursday, July 31, 2008, at 1:00 P.M. before Magistrate Nathan A. Thompson (hereinafter "Magistrate Thompson") in the Courtroom thereof with the following individuals therein appearing in person:

1. Relator Dennis J. Varnau (hereinafter "Relator").
2. Julie D. Steddom (hereinafter "Ms. Steddom"), Trial Attorney for Relator.
3. Ralph E. Quallen, Member of Respondent Board of Elections of Brown County, Ohio (hereinafter "Respondent").
4. Paul E. Hall, Member of Respondent.

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5. Mary McMullen (hereinafter "Ms. McMullen"), Trial Attorney for Respondent.

Pursuant to Civil Rule 53(D)(7), the Hearing was audio recorded.

Upon Magistrate Thompson convening the Hearing, Ms. Steddom stated that effective immediately and unconditionally Relator was withdrawing both part "2.) that the court declare/classify Petitioner's [Relator's] candidacy as nonpartisan" and part "3.) petitioner [Relator] demands that defendant [Respondent] be held responsible for all expenses and attorney fees for this mandamus action" of Relator's Demand for Judgment set forth on "Page 2 of 2 Pages" of Relator's Petition for Writ of Mandamus filed in this case on May 23, 2008. Thereupon, Magistrate Thompson initially heard argument by Ms. McMullen in support of Respondent's Amended Motion to Dismiss Mandamus Action (hereinafter "Respondent's Amended Motion") filed in this case on June 23, 2008, thereafter heard argument by Ms. Steddom in opposition to Respondent's Amended Motion, and thereafter heard rebuttal argument by Ms. McMullen in support of Respondent's Amended Motion. Relator and Respondent then submitted this case to the Court for ruling upon Respondent's Amended Motion, whereupon Magistrate Thompson announced the ruling of the Court upon Respondent's Amended Motion, such ruling being that Respondent's Amended Motion was found to be WITHOUT MERIT and, therefore, DENIED, and thereupon stated that Magistrate Thompson would promptly prepare and file in this case an appropriate Journal Entry setting forth such ruling of the Court.

Pursuant to the Notice of Assignment, Relator timely filed in this case Relator's Response to Amended Motion to Dismiss Mandamus Action (hereinafter "Relator's Response") on July 10, 2008, and Respondent timely filed therein Respondent's Reply to [Relator's Response] to Amended Motion to Dismiss Mandamus Action (hereinafter "Respondent's Reply to Relator's Response") on July 24, 2008, and, therefore, both Relator's Response and Respondent's Reply to Relator's Response are to be considered by the Court in ruling upon Respondent's Amended Motion.

Upon careful review and consideration of Respondent's Amended Motion, Relator's Response, Respondent's Reply to Relator's Response, such argument of Ms. McMullen and Ms. Steddom and all applicable law, THE COURT HEREBY FINDS AS FOLLOWS:

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1. Pursuant to R.C. 2731.04, Relator filed Relator's Petition for a Writ of Mandamus (hereinafter "Petition"), together with Exhibits 1, 2 and 3 thereto attached and the requisite Affidavit of Relator (hereinafter "Relator's Affidavit"), in this case on May 23, 2008.

2. Pursuant to Civil Rule 4.1(A) and 4.2(K), service of process (Summons and thereto attached copy of Relator's Petition and Relator's Affidavit) was properly made upon Respondent by United States Certified Mail Return Receipt Requested on May 28, 2008, and, therefore, pursuant to Civil Rule 3(A), commencement of this civil action was timely made.

3. Pursuant to Civil Rule 12(B)(6), Respondent filed Respondent's Motion to Dismiss Mandamus Action, together with Respondent's Memorandum in Support thereto attached, in this case on June 19, 2008.

4. Pursuant to Civil Rule 15(A), Respondent filed Respondent's Amended Motion, together with Respondent's Memorandum in Support thereto attached, in this case on June 23, 2008.

5. "[T]he 'fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits.' State ex rel. Becker v. Eastlake (2001), 93 Ohio St.3d 502, 505, 756 N.E.2d 1228. 'Fairness and justice are best served when a court disposes of a case on the merits.' DeHart v. Aetna Life Ins. Co. (1982), 69 Ohio St.2d 189, 193, 23 O.O.3d 210, 431 N.E.2d 644." *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, at ¶33.

6. Civil Rule 12(B)(6) provides in pertinent part as follows: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: \* \* \* (6) failure to state a claim upon which relief can be granted \* \* \*."

7. Civil Rule 12(D) provides as follows: "The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party."

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8. The standard for review on Respondent's Amended Motion is as follows: "A motion to dismiss, filed pursuant to Civ.R. 12(B)(6), is a procedural mechanism which tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In determining whether a complaint states a claim upon which relief can be granted, all factual allegations of the complaint must be presumed to be true and all inferences must be made in favor of the nonmoving party. *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399. [See, *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596, 597, 651 N.E.2d 1006, citing *Perez*.] In order to dismiss a complaint under Civ.R.12(B)(6), it must appear beyond doubt that the relator [party filing complaint or petition] can prove no set of facts warranting relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus." [See, *State ex rel. Jennings* citing *O'Brien*.] *State ex rel. Craig v. Luebke*, 12<sup>th</sup> Dist. No. CA2004-04-011 (Fayette County), 2004-Ohio-6933, at ¶6; see, also, *Knoop v. Orthopaedic Consultants of Cincinnati, Inc.*, 12<sup>th</sup> Dist. No. CA2007-10-101 (Clermont County), 2008-Ohio-3892, at ¶8; see, also, *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10<sup>th</sup> Dist. Nos. 07AP-861 & 07AP-928 (Franklin County), 2008-Ohio-2299, at ¶7.

9. "The court [trial court or appellate court conducting de novo review of a trial court's decision to dismiss a complaint under Civil Rule 12(B)(6)] is confined to the allegations set forth in the complaint [Relator's Petition], and cannot consider outside evidentiary materials. *Castle Hill Holdings, LLC v. Al Hut, Inc.*, Cuyahoga App. No. 86442, 2006-Ohio-1353, ¶43. The court may, however, consider written documents if they are attached to the complaint. *National City Mtge. Co. v. Wellman*, 174 Ohio App.3d 622, 2008-Ohio-207, ¶17." *Knoop*, 2008-Ohio-3892, at ¶9; see, also, *Guillory*, 2008-Ohio-2299, at ¶7.

10. The gravamen of the Petition is that the candidate protest provisions of R.C. 3513.05 ((Relator's) written protest against candidacy of person (Dwayne E. Wenninger (hereinafter "Mr. Wenninger")) filing declaration of candidacy for election to office or position (Sheriff of Brown County, Ohio)(hereinafter "Sheriff")) and R.C. 3513.262 (written protest against nominating petition of independent candidate (Relator) for office (Sheriff) for which candidates may be nominated at primary election), in combination operate to prohibit Relator from protesting the candidacy of Mr. Wenninger for the office of Sheriff at any time, but allow Mr. Wenninger to protest the nominating petition of Relator for the office of Sheriff until 4:00 P.M. on Friday May 30, 2008, in violation of Relator's right to equal protection of the law as guaranteed in Section 2, Article I of the Constitution of the State of Ohio and the Fourteenth Amendment of the Constitution of

the United States of America.

11. "In order to be entitled to the writ of mandamus, relators must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of respondents to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 2002-Ohio-4821, 775 N.E.2d 812, ¶20." *State ex rel. Steele v. Morrissey* 103 Ohio St.3d 355, 2004-Ohio-4960, at ¶16. "A failure to show any of these requisite factors will cause the petition to be denied." *State ex rel. Karmasu v. Tate*, 4<sup>th</sup> Dist. No. 92-CA-2030 (Scioto County), 83 Ohio App.3d 199, 202, 614 N.E.2d 827.

12. "A petition in mandamus will be deemed to state a claim, for purposes of Civ.R. 12(B)(6), so long as it alleges the existence of a legal duty and the want of an adequate remedy at law. *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644; *State ex rel. Alford v. Willoughby* (1979), 58 Ohio St.2d 221, 224, 12 O.O.3d 229, 230, 390 N.E.2d 782, 785." *Karmasu*, 83 Ohio App.3d at 202,

13. As recognized by the Supreme Court of Ohio: "[W]e have at times permitted mandamus actions to test the constitutionality of legislation. *See, e.g., State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack* (1999), 86 Ohio St.3d 293, 297, 714 N.E.2d 917 ('We have recognized, however, that the constitutionality of a statute or ordinance may in certain circumstances be challenged by mandamus'); *State ex rel. Watson v. Hamilton Cty. Bd. of Elections* (2000), 88 Ohio St.3d 239, 242, 725 N.E.2d 255 ('It is appropriate to consider the merits of Watson's constitutional claim in this mandamus action because an action for a declaratory judgment and prohibitory injunction would not be sufficiently speedy in this expedited election case')." *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, at ¶44; *see, also, State Ex Rel. Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St.3d 338, 341, 673 N.E.2d 1351; *see, also, State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 133, 568 N.E.2d 1206.

14. As further recognized by the Supreme Court of Ohio: "Moreover, where this court has found a statute unconstitutional it may direct the public bodies or officials to follow a constitutional course in completing their duties. *See State, ex rel. Park Invest. Co., v. Bd. of Tax Appeals* (1971), 26 Ohio St.2d 161, 55 O.O. 2d 238, 270 N.E. 2d 342 (where this court in a mandamus proceeding directed the Board of Tax Appeals to comply with this court's earlier decision in the same case after finding two tax statutes



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unconstitutional)." *Zupancic*, 58 Ohio St.3d at 133; see, also, *Parker v. Upper Arlington*, 10<sup>th</sup> Dist. No. 05AP-695, 2006-Ohio-1649, at ¶20.

15. At unnumbered page 6 of Respondent's Memorandum in Support of Respondent's Amended Motion, Respondent acknowledges that Relator does not have an adequate remedy in the ordinary course of the law as follows: "Because the Board of Elections did not invalidate Wenninger's Declaration of Candidacy and no protest was filed before January 15, 2008, pursuant to R.C. 3501.39, the Board of Elections must accept Wenninger's candidacy as valid and Varnau does not have a legal remedy at law."

16. Relator may establish the existence of the requisite legal duty of Respondent and, therefore, that Relator has a clear legal right to the relief thereby requested in Relator's Petition, if Relator ultimately proves by clear and convincing evidence that the candidate protest provisions of R.C. 3513.05 and R.C. 3513.262 in combination operate to prohibit Relator from protesting the candidacy of Mr. Wenninger for the office of Sheriff at any time, but allow Mr. Wenninger to protest the nominating petition of Relator for the office of Sheriff until 4:00 P.M. on Friday May 30, 2008, and that in doing so violate Relator's right to equal protection of the law as guaranteed in Section 2, Article I of the Constitution of the State of Ohio and/or the Fourteenth Amendment of the Constitution of the United States of America; and, upon Relator so doing, it is incumbent upon the Court, by an appropriate Writ of Mandamus, to direct Respondent to follow a constitutional course in discharging the statutory duties thereof regarding Relator's written protest of Mr. Wenninger's candidacy for election to office of Sheriff of Brown County, Ohio, in the November 4, 2008, general election filed with Respondent on April 11, 2008.

THEREFORE, pursuant to Civil Rule 12(B)(6) and (D), Local Rule 9(C)(1)(a) and (3) and Civil Rule 53(D)(2)(a)(i) and (ii), THE COURT HEREBY ORDERS AS FOLLOWS:

1. That Respondent's Amended Motion be DENIED.
2. That promptly appropriate further proceedings in this case be scheduled, including without limitation, a Final Hearing on the merits thereof to be held as soon as reasonably possible in the circumstances.

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DATED: August 11, 2008.

  
NATHAN A. THOMPSON  
MAGISTRATE

By Clerk of the Court by Ordinary Mail with Certificate of Mailing Copy Mailed to:

Julie D. Steddom, Trial Attorney for Relator  
Thomas F. Grennan and Mary McMullen, Trial Attorneys for Respondent

August 11, 2008, by Assignment Commissioner Copy Faxed to:

Julie D. Steddom, Trial Attorney for Relator, Facsimile Number 937-392-4208  
Thomas F. Grennan and Mary McMullen, Trial Attorneys for Respondent, Facsimile  
Number 937-378-6529