

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. VARNAU : CASE NO. 2011-1414  
Plaintiff-Appellant :  
Vs : On Appeal from the Brown  
County Court of Appeals,  
Dwayne Wenninger : Twelfth Appellate District  
Defendant-Appellee : Court of Appeals Case No.  
CA 2009-02-10  
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APPELLEE WENNINGER'S RESPONSE TO  
APPELLANT VARNAU'S MOTION FOR RECONSIDERATION

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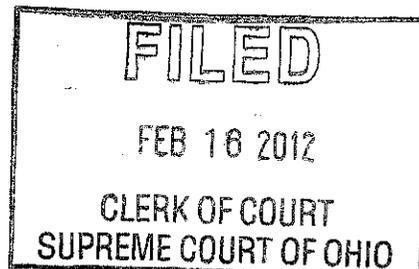
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WENNINGER'S RESPONSE TO  
VARNAU'S MOTION FOR RECONSIDERATION

Given the per curiam nature of the affirmation in this matter, Appellee Wenninger (Wenninger) doubts that he needs to respond to Appellant Varnau's motion for reconsideration. Nevertheless, here we go.

**A. Varnau's argument that laches does not apply to this fact pattern.**

In the decision (Dec.) that was rendered in this case, the Court has accurately cited the authorities for the proposition that a claim of quo warranto must be timely directed to challenge a current term of office. (Dec. ¶ 15). This proposition was stressed by Wenninger in the argument before the court of appeals. Where Varnau was living when Wenninger was initially elected sheriff is irrelevant to the inquiry: Was Wenninger eligible on the qualification date of the election (2008) when Varnau was his opponent? This question must be (and has been) answered in the affirmative. The mischief that might occur if Varnau's argument is given credence could be unbelievable.

This Court accurately states that Wenninger argued the defenses of laches and mootness to the court of appeals. (Wenninger brief as filed in the court of appeals on 8/20/2009, p. 15 et seq.). Wenninger also made the appellate court aware of the statute of limitations for quo warranto actions. (Brief as filed in the court of appeals on 5/11/11, p. 5). This Court has consistently held that relators in election cases must act with utmost diligence. (Dec., ¶ 17). Though Varnau offers, on the one hand, that he has not had an opportunity to challenge Wenninger until the election of 2008, he also states that he has been a resident of Brown County since December of 2003. (Varnau motion, p.3). Varnau, if his position was valid, could have challenged Wenninger in the 2004 election and chose not to do so. Being mindful that there has been some challenge to Wenninger in each of the

elections in which he has run for office (either by having another person vie for the office or by protest), Varnau's argument as to his lack of standing until 2008 is, at the least shallow and, perhaps, spurious.

- B. Varnau's argument that past deficiencies under the qualification statute are not moot. and,
- C. Failure to challenge in the first term does not waive the lack of qualification.

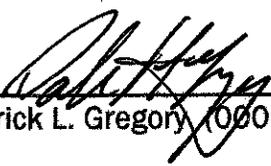
The balance of Varnau's motion revisits or rehashes matters that were the subjects of briefing in this case. The Court has reviewed and decided these issues.

If a factual 'bottom line' is drawn as to this case it is that Varnau made the conscious decision to run against Wenninger as an independent. As such, the law is very clear that Varnau may not lodge a protest as to Wenninger's qualifications. Even if Varnau could have pursued a protest, the result is the same: the challenged first term has expired and the issue is moot. As to Wenninger's second term, Wenninger, as sheriff, had obviously obtained the requisite supervisory experience and the legislature cleaned up the qualification statute a bit so there is no doubt that Wenninger was qualified on the qualification date. Likewise as to the challenged term here, Wenninger's third.

Wenninger offers a closing observation. As Wenninger argued to the court of appeals, there was no need to get into the 'way back' machine but he did so and did establish his factual qualification as to each of his terms. As this Court has noted, the production of evidence was not necessary to resolve this case. (Dec., ¶ 21).

#### CONCLUSION

Varnau's motion for reconsideration should be overruled.

  
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Gary A. Rosenhoffer (0003276)

Counsel for Appelle Wenninger

CERTIFICATE OF SERVICE

I certify that on February 15<sup>th</sup>, 2012, a copy of this response was served by ordinary mail, postage prepaid on Thomas G. Eagle, 3386 N. St. Rt. 123, Lebanon, Ohio 45036.

  
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Gary A. Rosenhoffer