

IN THE COURT OF APPEALS FOR BROWN COUNTY, OHIO

STATE OF OHIO ex rel.
DENNIS J. VARNAU,

CASE NO. CA2009-02-010

Relator,

FILED
COURT OF APPEALS

ENTRY DENYING MOTION TO VACATE
JUDGMENT AND MOTION TO CERTIFY

vs.

SEP 30 2010

CONFLICT

DWAYNE WENNINGER,

Respondent. TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

The above cause is before the court pursuant to a motion to vacate judgment filed by counsel for relator, Dennis J. Varnau, on August 20, 2010; a motion to certify conflict filed by counsel for relator on August 20, 2010; a memorandum in opposition to the motion to vacate judgment filed by counsel for respondent, Dwayne Wenninger, on August 24, 2010; a memorandum in opposition to the motion to certify conflict filed by counsel for respondent on August 24, 2010; a reply memorandum in response to the memorandum in opposition to motion to vacate judgment filed by counsel for relator on August 31, 2010; and a reply to the memorandum in response to the memorandum in opposition to the motion to certify filed by counsel for relator on August 31, 2010.

Relator is a Brown County resident who ran as an independent candidate for the Office of Brown County Sheriff in the November 4, 2008 general election. Respondent, who has served as Brown County Sheriff since January 1, 2001, won the election, receiving 62.92% of the vote. On February 27, 2009, relator filed a complaint seeking a writ of quo warranto in this court, seeking to remove respondent from the office of Brown County Sheriff and have himself appointed to that position. The parties then filed opposing motions for summary judgment.

On August 16, 2010, this court granted respondent's motion for summary judgment. The court found it "readily apparent that the Brown County Board of Elections previously determined [respondent] satisfied the necessary requirements of R.C. 3111.01(B) and (C) to be elected sheriff in 2000, 2004, and 2008 ***." The complaint for writ of quo warranto was denied.

Motion to Vacate

Relator claims that this court should vacate its decision granting summary judgment pursuant to Civ.R. 60(B)(5) because "there are issues of fact, law and the record that the court did not fully or accurately consider or erroneously considered." Relator essentially claims that this court made improper inferences, presumptions and assumptions and failed to consider "applicable legal precedent" when granting summary judgment to respondent. In essence, relator argues that this court's decision granting summary judgment was incorrect.

While it is true that a Civ.R. 60(B)(5) motion may be filed to seek relief under the circumstances of this case, it is well-established that a party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal. *First Nat'l. Bank of Southwest Ohio v. Doellman*, Butler App. No. CA2004-06-034, 2005-Ohio-679; *Doe v. Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St.3d 128. In his motion, relator revisits a series of arguments that this court previously found unpersuasive.

Even if this court were to consider relator's arguments, a careful review of the record and the decision reveals that the decision was not based upon improper inferences, presumptions or assumptions as relator suggests, and does not fail to fully consider applicable legal precedent. The opinion is based upon an interpretation of applicable statutory law with which relator does not agree.

Civ.R. 60(B)(5), which relator claims is applicable in this case, is a catch-all provision of Civ.R. 60(B) that reflects the inherent power of the court to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. Relief under Civ.R. 60(B)(5) is to be granted only in unusual or extraordinary circumstances where the interests of justice so demand. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. "The grounds for invoking Civ.R. 60(B)(5) should be substantial." *Caruso-Ciresi* at paragraph two of the syllabus.

Relator has failed to demonstrate unusual or extraordinary circumstances such that the interest of justice demands granting his motion to vacate this court's judgment. The motion to vacate is therefore DENIED.

Motion to Certify

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts of appeal is inconsistent; the judgments of the two courts of appeal must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

Relator contends that this court's decision is in conflict with a decision of the Ninth District Court of Appeals, *State ex rel. Wolfe v. Lorain Cty. Bd. Elections*

(1978), 59 Ohio App.2d 257, and a decision by the Eighth District Court of Appeals, *Foster v. Cuyahoga Cty. Bd. of Elections* (1977), 53 Ohio App.2d 213.

In *Wolfe*, the Ninth District denied Wolfe's petition for a writ of mandamus seeking an order directing the Lorain County Board of Elections, pursuant to R.C. 705.12 and Title 35, to void, cancel and recall the certificate of election declaring the winning candidate as elected, and issue a new certificate to the losing candidate. Denying the writ, the Ninth District stated that R.C. 705.12 and Title 35 imposed no duty upon the board to void, cancel and recall a certificate of election, or issue a new certificate to the losing candidate, as the board's duties "pertain to candidates and elections, not to the qualifications to the officeholder after a legal election."


The decision in the present case was not based upon R.C. 705.12 or Title 35, or the ability of a board of elections to void, cancel or reissue a certificate of election. This court's decision is based upon R.C. 311.01(F)(2), which states in part that each board of elections shall certify whether or not a candidate for the office of sheriff who has filed a declaration of candidacy meets the qualifications specified in Divisions (B) and (C) of R.C. 311. 01. This court's decision is not in conflict with the Ninth District's decision in *Wolfe*.

In *Foster*, the appellant argued that the appellee, a write-in candidate for Cuyahoga County Sheriff, lacked standing to seek a temporary restraining order and mandatory injunction against the board of elections to prevent the appellant from being a write-in candidate at the general election. The Eighth District found that the appellee had standing to seek such an order. *Foster* deals with a wholly separate issue than that presented to this court. The portion of *Foster* that relator claims is in conflict with this court's decision deals exclusively with a write-in candi-

date's standing to seek a temporary restraining order and mandatory injunction against a board of elections prohibiting another individual from being a write-in candidate at a general election. There is no conflict between the present case and *Foster*. The motion to certify conflict is therefore DENIED.

IT IS SO ORDERED.


William W. Young, Presiding Judge


H.J. Bressler, Judge


Robert A. Hendrickson, Judge