IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU, Relator/Petitioner, -vs- DWAYNE WENNINGER, Respondent/Defendant.	CASE NO. CA2009-02-10 **RELATOR'S MOTION TO STRIKE and MEMORANDUM IN OPPOSITION TO RESPONDENT'S (NEW) MOTION TO DISMISS**

Now comes the Relator/Petitioner, by and through counsel, and moves the Court to strike and disregard Respondent's newest "Motion to Dismiss" (filed on or about July 12, 2011), or in the alternative to dismiss and deny it. As grounds for this Motion, Relator states that the new Motion is in violation of this Court's scheduling orders and Rules; is a prohibited successive dispositive motion; the argument has been waived; and in addition is meritless, desperate, and frivolous.

A. Respondent's Motion is in violation of this Court's Scheduling Orders and Rules.

Respondent has filed a new Motion to Dismiss. This Court's April 15, 2011, Order set dates and manners for filing "final" arguments on the pending motions. The Civil Rules, which Respondent regularly disregards, also prohibit filing new arguments in the guise of a new Motion. See Ohio R. Civ. P. 15(E) (prohibiting supplemental briefing without leave of court); Ohio R. App. P. 21(H), and 12th Dist. Loc. R. 7 (for scheduling orders for timing of filing arguments), 11(E) (allowing supplement authority only for what couldn't be in original briefs -- and all of Respondent's "new" authority predates his briefs by years and decades), and 12(C) (allowing supplemental authority not cited in briefs only before oral argument);

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

and 20(H) (time for filing arguments in original actions).

Respondent's new Motion violates all that and should be stricken.

B. Respondent's "Standing" argument has been waived.

This Court will find no argument by Respondent to Relator's entitlement to the Writ, if in fact Respondent is ineligible. In fact in various pleadings it could be construed Respondent has conceded that point. Because Respondent did not make this argument when the opportunity was there, it is out of time and was therefore waived. See Goldfuss vs. Davidson (1997), 79 Ohio St.3d 116, 121. It is also *res judicata* and/or the law of this case that Relator is entitled to the office, if Respondent was in fact ineligible. See Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶15; Nolan v. Nolan (1984), 11 Ohio St.3d 1, syl.; Marder v. Marder, 2009-Ohio-3420 (Cler. App.), ¶14.

C. Respondent's Motion is a prohibited successive attempt at dispositive motion practice.

Respondent has filed a motion to dismiss, and multiple motions for summary judgment. He now files another "motion to dismiss." The new Motion is therefore an attempted but successive dispositive motion, and is barred because Respondent has already filed *one* such, and Ohio courts and the Ohio Rules of Civil Procedure do not countenance successive motions for dispositive relief.

Respondent originally filed a motion to dismiss, which the Court converted to summary judgment, and later filed at least two summary judgment motions (all essentially on the same grounds). He now files another one. Although no modern cases in Ohio have been found on this principle, even before the Civil Rules were adopted successive motion practice was not allowed. See, J & F. Harig Co. v. City of Cincinnati (1939), 61 Ohio App. 314; Poplowsky Plumbing Co. v. Rosenstein (Cir. 1912), 32 Ohio Cir. Dec. 501. Generally

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

speaking, Civil Rule 12, 12(G), and 12(H), preclude the raising of Rule 12 defenses (except as specified) that could have been raised in an original motion. See, e.g., Martin v. Moery, 1 F.R.D. 127, 128 (D.C. Ill. 1939); Goodstein v. Bombardier Capitol, Inc., 167 F.R.D. 662 (D. Vt. 1996).[1] Although Rule 12(B)(6) is one of the preserved defenses, the Rule does not provide, and Rule 12(G) in fact prohibits, *successive Rule 12 motions*.[2]

When the Civil Rules first took effect, a defendant was permitted, pursuant to Rule 12(g), to present defenses and objections by motion in two stages. See Wright & Miller, Federal Practice and Procedure, CIVIL 2d, §1384 (1990 Ed.). Subsequent amendments to the Civil Rules though *eliminated* the provision for successive motions. See Advisory Committee Note accompanying the 1948 amendment to Fed. R. Civ. P. 12(g); Wright & Miller, Federal Practice and Procedure, CIVIL 2d, §1384, p. 725-728 (1990 Ed.). The Rule 12(g) ban against successive pre-answer motions extends to Rule 12 defenses as well:

> The right to raise these defenses by preliminary motion is lost when defendant neglects to consolidate them in his initial motion. Consequently, if defendant first moves to dismiss on the ground of lack of jurisdiction over his person, he is not allowed to make a second preliminary motion to dismiss on the ground of failure to state a claim upon which relief can be granted.

Wright & Miller, Federal Practice and Procedure, CIVIL 2d, §1385, p. 728-729 (1990 Ed.) (discussing multiple pre-answer motions). Courts that have allowed exceptions to the Rule are highly criticized by the accepted treatise.[3] The case law, including in this Federal Circuit, is clear that such successive motions are not permitted. In Rauch v. Day & Night Manufacturing Corp., 576 F.2d 697, 701 (6th Cir. 1978), citing to the same above

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[1] Federal cases are relevant to the issue since the Ohio Rules were modeled after the Federal Rules, and the Staff Notes under the Ohio Civil Rules, including Rule 12, regularly reference and cite the Federal Rules and authorities on Federal practice for the interpretation of the Ohio Rules.

[2] A motion to dismiss for lack of standing is a Civ. R. 12 motion. See BAC Home Loans Servicing, L.P. v. Kolenich, 2011-Ohio-3345, ¶ 4 (12th Dist.).

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

treatises, the Court stated: "The rule, so well illustrated by the case at hand, is intended to eliminate unnecessary delays at the pleading state of a case by avoiding the piecemeal consideration of *pretrial* motions." (Emphasis added). See also, Tiernan v. Dunn, 295 F.Supp. 1253, 1255 (D.C. R.I. 1969); United States v. Columbia Gas & Electric, 1 F.R.D. 606 (D. Del. 1941) (second motion under 12(b)(6) barred by prior motion for a more definite statement per Civil Rule 12(e)).

It is of no import that Respondent's successive motions are also phrased under Rule 56. This is the policy that was adopted by the Sixth Circuit in Rauch, *supra*. In that case, a defendant apparently waived the defense of lack of personal jurisdiction, by filing a preceding Rule 12(b)(6) motion, and sought to avoid the waiver/prohibition of Civil Rule 12(g) as to a subsequent motion, by asserting the "technicality" that the subsequent motion was under Civil Rule 56. That notion is rejected:

> Their only response here is a technical one: that the motion filed, though denominated a motion to dismiss, was nevertheless more properly a motion for summary judgment under Rule 56, Fed.R.Civ.P., and was thus technically not within the ambit of Rule 12 and subject to the waiver provisions of Rule 12(h). This position has not commended itself to those authorities who have considered it. [Citations omitted].
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> Rauch, *supra* at 702.

Respondent may have in fact placed all of his proverbial eggs in one basket, considering the previous motion(s), but this Court should not entertain the successive pleading practice that has been so criticized. For that reason alone, the Motion should be stricken or overruled as well. Otherwise, parties (and the Court) could be subjected to an unlimited number of pre-trial allegedly dispositive motions.

D. Relator has standing to bring this Writ.

[3] Wright & Miller, Federal Practice and Procedure, CIVIL.2d, §1385, p. 729-731 (1990 Ed.).

THOMAS G. EAGLE CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
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Fax (937) 704-9826

Regardless of the procedural deficiencies in the Motion, it is substantively without merit. Respondent argues for the first time that Relator should not receive the Writ (apparently even if Respondent is not eligible for the office), for some reason due to not being the "winner" of the election. Relying on other states and misinterpreted and misstated Ohio case law, Respondent argues that just because Relator was the second-highest candidate in votes received, he is not entitled to the office -- although not arguing that *Respondent is*.[4] The other states' decisions have nothing to do with this case. The only Ohio decision cited doesn't either.

" '[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy" as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." ' " State ex rel. Dallman vs. Franklin Cty. Court of Common Pleas (1973), 35 Ohio St.2d 176, 178-179, quoting Sierra Club vs. Morton (1972), 405 U.S. 727, 732, quoting Baker vs. Carr (1962), 369 U.S. 186, 204, and Flast v. Cohen (1968), 392 U.S. 83, 101. One has standing to bring a claim if they are *directly benefited* or injured by the outcome of the case. Shealy vs. Campbell (1985), 20 Ohio St.3d 23, 24. In the *quo warranto* context, the person with standing is the person claiming a right to the office. R.C. 2733.06; State ex rel. Herman v. Klopfleisch (1995), 72 Ohio St.3d 581; State ex rel. Hayburn v. Kiefer (1993), 68 Ohio St.3d 132.

Varnau has that standing as the (undisputed) only other candidate in the election, other than the ineligible Wenninger. Respondent relies on State ex rel. Sheets v. Speidel

[4] The remedy in quo warranto is to remove the ineligible office holder, even if the relator is not entitled to the office. R.C. 2733.14; State ex rel. Handy vs. Roberts (1985), 17 Ohio St.3d 1. Nonetheless, this Court's responsibility is to make sure the appropriate order is issued to ensure the person entitled to the office is

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

(1900), 62 Ohio St. 156, for the proposition that the second highest vote recipient was not allowed to assume the office, when the "winning" candidate died before taking office. Respondent omits the materially different facts in that case, and the subsequent Supreme Court authority explaining why it doesn't apply to this case at all -- or it supports Varnau.

In Speidel, an election was held but the "winning" candidate died on Election Day, and therefore couldn't take office. The County commissioners appointed a successor -- although the incumbent was still alive. The second-highest vote recipient -- one among *several other living and eligible candidates* -- filed for the Writ, saying that he should have the office, because he received more votes than the other eligible (living) candidates. He wasn't challenging the deceased "winner," but the person appointed by the Commissioners; and didn't claim entitlement to the office because the winner was ineligible to run for or hold the office, but because they were dead.

Applying applicable statutes at the time, the Court merely found that because the incumbent's term wasn't filled at all, he never "left" office, and the "vacancy" statutes (Commissioners appointing a replacement for deceased office holder) can't be used unless someone takes office and *then* dies or resigns. So the Court concluded that the *appointed sheriff should not hold the office* -- he wasn't properly placed in office -- and *the incumbent* should be instated to it, since he was never lawfully replaced. The candidate running was not given the office only because the opponent did not take the office, *having died*, and there *were other "eligible" candidates on the same ballot* -- so that relator did not receive the *majority* of votes cast for *eligible* candidates. *Id.* at 157, 159-160. See also, State ex rel. Haff vs. Pask (1933), 126 Ohio St. 633. The case does not even discuss standing. And, it

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actually seated. See Plotts vs. Hodge (1997), 124 Ohio App.3d 508, 512-513; State ex rel. Judy v. Wandstrat (1989), 62 Ohio App.3d 627, 632; R.C. 2733.08, .14, .17. Here that person is Relator Varnau.

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
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Fax (937) 704-9826

did remove the candidate who was not validly holding the office (due to the improper appointment), and instated the one who should have had it -- the incumbent.

On the other hand, between Varnau, and Wenninger, Varnau being *the only lawful candidate*, he *is* entitled to the office. In fact, the Supreme Court has specifically limited the rule of Speidel to cases where there was *more than one* "eligible" candidate, which is not the case here. Where there are only two candidates and the winner is declared ineligible, the only other candidate is to be given the office:

> We reject as unfounded the Secretary of State's contention that Williamson must have received a greater number of votes than Lambros in order to win the election. *The authority relied upon by respondent is misplaced and inappropriate to the facts under review.* Respondent correctly cites the rule that " '[w]here the candidate receiving the highest number of votes is ineligible to election, the candidate receiving the next highest number of votes for the same office is not elected. Only the *eligible candidate* who receives the highest number of votes for the office for which he stands is elected to such office.' " (Emphasis added.) State ex rel. Halak v. Cebula(1979), 49 Ohio St.2d 291, 293, 361 N.E.2d 244 [3 O.O.3d 439]. See also, State ex rel. Haff v. Pask (1933), 126 Ohio St. 633, 186 N.E. 809, paragraph three of the syllabus [relying upon Speidel, as does this Respondent]. *This rule applies only where, at the time of the election, there was more than one eligible candidate but the candidate receiving the highest number of votes was disqualified or otherwise unable to take office following the election.* In the case at bar, *relator was the only candidate and respondents are under a clear legal duty to count only the votes cast for relator* in the November 3, 1983 election for law director.
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> State ex rel. Williamson v. Cuyahoga County Bd. of Elections (1984), 11 Ohio St.3d 90, 92 (emphasis added in part, in original in part).

In Williamson, there were (as here) only two candidates; the "winner" was declared ineligible (as should be the case here); and therefore the only other candidate, who was eligible, was instated to the office (as should also be the case here for Varnau). *Id.* at 93.

A general rule Respondent recites in his Motion to Dismiss comes from the American Law Reports (ALR). As the Court knows, the ALR provides legal analysis of

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
Phone (937) 743-2545
Fax (937) 704-9826

issues from many legal resources and jurisdictions. The general rules there though do not necessarily reflect Ohio law, and in this case definitely do not. The two cases Respondent cites, one from North Carolina, and the other from Washington State, are decided under each of those States' laws, both statutory and case law. North Carolina and Washington State case law is completely different than Ohio case law, therefore the legal reasoning contained within those decisions cannot be directly relied upon to follow or even make any application of Ohio law. Louisiana law is totally different in that it has its roots in French law, not English law as do the other 49 states.

And the general rule Respondent suggests ignores its limited application to multiple-candidate contests, an exception/limitation Ohio law directly recognizes.

The one Ohio case cited by Respondent was decided in 1900, and was expressly limited since. Ohio case law regarding elections has transformed many times over the years, since election statutes have been revised numerous times since 1900. That particular case (Speidel) was a sheriff's election where there were three candidates for the office. The winner of the election died after winning the election, and one of the other two candidates brought suit in *quo warranto*. Under *current Ohio law*, either one of the two remaining candidates could have brought the *quo warranto* suit. If the *quo warranto* writ was granted, with three or more candidates, where the winner is declared ineligible to have been on the ballot, then there would have to be a runoff election between the other remaining candidates to see who would prevail in that special election. Otherwise, there is no resolution of the office. Where there were only two candidates on the ballot and the winner is found to be ineligible after winning the election, his votes do not count and the second highest of the two is the winner, and the only winner, of the election.

THOMAS G. EAGLE
CO., L.P.A.
3386 N. State Rt. 123
Lebanon, Ohio 45036
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Fax (937) 704-9826

Furthermore, all three Courts that have addressed Relator's right have not seen a problem with standing at all. The Common Pleas Court based its *mandamus* decision on the fact that Relator had a *quo warranto* case instead, and this Appeals Court affirmed that legal reasoning. The Supreme Court remanded the first ruling by this Court on the *quo warranto* case, with a mandate for this Court to adjudicate the "merits" of the case. It seems clear that Relator's "standing" is not and never has been an issue in this litigation.

The other states' laws are not like Ohio's. The case (and only Ohio case) relied upon by Respondent does not apply to these facts and the Ohio Supreme Court has said so. The Motion is without any merit. Respondent's July 12, 2011, Motion to Dismiss should be stricken, or in the alternative denied.

THOMAS G. EAGLE CO., L.P.A.

Thomas G. Eagle (#0034492)
Counsel for Relator
3386 North State Route 123
Lebanon, Ohio 45036
Phone: (937) 743-2545
Fax: (937) 704-9826
E-mail: eaglelawoffice@cs.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 18th day of July 2011.

Thomas G. Eagle (#0034492)