IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	)	**CASE NO. CA2009-02-10**
Relator/Petitioner,	)	**RELATOR'S MOTION TO VACATE JUDGMENT**
-vs-	)	
DWAYNE WENNINGER,	)	
Respondent/Defendant.	)	

Relator, by and through counsel, pursuant to Ohio R. Civ. P. 60(B)(5), moves the Court to vacate its judgment of August 16, 2010, for the reasons that there are issues of fact, law, and the record, that the Court did not fully or accurately consider or erroneously considered. The further grounds for this Motion are set forth in the following Memorandum.

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MEMORANDUM

I. FACTS AND RELEVANT PROCEDURE

This matter was before the Court on an original Petition for Writ of Quo Warranto. Cross-Motions for summary judgment were filed by the parties. The Court's Judgment grants summary judgment to the Respondent, and denied summary judgment to the Relator,

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essentially for the reason that a letter from the Brown County Board of Elections said it "will conduct" some investigation (although there is no evidence it was ever done, what was done, or to what extent) resulted in the Court drawing an inference, a presumption, in favor of the Respondent and a resolution of that fact in his favor -- that a BOE has already passed on Respondent's qualifications to hold office.

II. APPLICABLE STANDARDS OF REVIEW

In an appellate context a motion for reconsideration calls to the Court's attention an obvious error in its decision, or raises an issue for consideration that was either not considered at all or not fully considered, when it should have been. Mathews vs. Mathews (1981), 5 Ohio App.3d 140, 143. The comparable procedure in an original action in an appellate court is a motion to vacate the judgment pursuant to Ohio R. Civ. P. 60(B)(5). In State ex rel. Pajestka vs. Faulhaber (1977), 50 Ohio St. 2d, 41, the Supreme Court explained:

> In the instant cause, appellants brought a mandamus action in the Court of Appeals, invoking that court's original jurisdiction granted in Section 3, Atricle [*sic,* Article] IV of the Ohio Constitution. Thus the appellants mistakenly attempted to file a motion not prescribed for a court having original jurisdiction.
>
> The proper remedy for appellants in this situation is to file a motion for relief from judgment under Civ. R. 60(B)(5). This rule provides that a party may obtain relief from the final judgment, order or proceeding of a court *for any reason justifying relief from the judgment*, provided that such motion is made "within a reasonable time period."

Id. at 42 (Emphasis added). See also, State ex rel. Pendall vs. Adams County Board of Elections (1988), 40 Ohio St.3d 58, 60-61. An attorney would be remiss in his duties to a party and to the Court to not bring such matters to the Court's attention and promptly.

As the Court is aware, Civil Rule 60(B) is a remedial rule, to be liberally construed. Rose Chevrolet, Inc., v. Adams (1988), 36 Ohio St.3d 17, 21; Hopkins v. Quality Chevrolet, Inc. (1992), 79 Ohio App.3d 578; Neubauer v. Kender (1986), 32 Ohio App.3d 49.

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Therefore, where timely relief is sought from a judgment rendered and the movant has a meritorious issue alleged, doubt, if any, should be resolved in favor of the motion to set aside the judgment, so that cases may be decided on their merits, and not on procedural technicalities. Barksdale v. Van's Auto Sales, Inc. (1988), 38 Ohio St.3d 127, 128; GTE Automatic Electric, *supra*; Doddridge v. Fitzpatrick (1978), 53 Ohio St.2d 9, 13; GMAC v. Deskins (1984), 16 Ohio App.3d 132.

In this case, that doubt -- the benefit of a doubt from an inferred presumption that something happened that there is no *evidence* to prove -- was resolved in favor of the Respondent and without even the opportunity for a trial to do so. The meritorious issue of the applicable law, that a board of elections' action in placing a person on a ballot has no legal significance to the right of that person to actually hold the office, was also misconstrued.

III. LAW AND ARGUMENT

A. INTRODUCTION

The Judgment was pursuant to Civ. R. 56, which does not permit inferences in favor of a moving party, and places the burden on the moving party to show there is no disputed fact. This Court found that, based on a letter indicating an intent by a BOE to do something, that there is not only an inference but a presumption they actually did a full and complete legal investigation, and used that assumption to grant judgment to the moving party.

Further, this Court relied upon cases reviewing *direct challenges* to a board of elections' *placement on a ballot* of a *candidate* for office, after an *actual contested protest hearing* on the qualifications of that candidate, and to disqualify an opposing *candidate*, prosecuted originally and subsequently, on the merits, *by the protester*, a party to the

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hearing. In doing so, this Court disqualified a person (Relator) who was *not even a party to it,* not by an actual protest or actual hearing but only a *presumed* action; and disqualified that non-party because of something they were legally precluded from participating in, from even challenging, in a different procedure (the writ of *quo warranto*), a different condition -- *actually holding the elected office.* The Supreme Court has said though there is no "duty" to undertake the "presumed" action except in a protest hearing; and even then placing a candidate on a ballot has nothing to do with the same person actually holding the office.

Although BOE actions may determine rights of the candidate to be *on a ballot*, and challenged only if a petition is insufficient or a protest is filed and adjudicated, *quo warranto* is the "exclusive" method of challenging that person's right to actually *hold the office, if appointed or elected.* No BOE action can adjudicate that. This case does not challenge the BOE *placing Respondent on a ballot*, but challenges Respondent *holding the office* that he is not qualified for, and that Relator, the only one to run against him, is; and by the exclusive method to do such a challenge. What a BOE did or didn't do is irrelevant.

B. Reasonable time.

There should be no question that this Motion has been filed within a reasonable period of time. The Judgment is barely a week old. See, e.g., Cottrell v. Ohio State Construction (1984), 16 Ohio App.3d; Miami System Corporation v. Drycleaning Computer Systems, Inc. (1993), 90 Ohio App.3d 185 (motion for relief from judgment filed eleven days after receiving notice of default judgment was entered, should have been granted). In Miami System Corporation, *supra*, a judgment was vacated on motion filed over two months later. Id. at 183-185. Considering that this motion has been brought within days of the Judgment, no one should be able to consider that this is not within a reasonable

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period of time. This is especially so considering that no prejudice will be caused to the Respondent merely due to the passage of time. See, e.g., Blank v. Snyder (M.C. 1972), 33 Ohio Misc. 67.

C. Grounds for relief.

Sufficient grounds are alleged under the Civil Rules to obtain relief. The catchall provision of Rule 60(B)(5) is a reflection of the inherent power of a Court to relieve a person from the unjust operation of a judgment, after learning the true facts and authorities meriting against the judgment. See, e.g., Caruso-Ciresi Inc. v. Lohman (1983), 5 Ohio St.2d 64; State ex rel. Gyuresik v. Angelotta (1977), 50 Ohio St.2d 345. Judgments, the basis for which becomes absent, should in fact be vacated. Sperry v. Hlutke (1984), 19 Ohio App.3d 156.

The Court entered this judgment, apparently not fully considering the applicable legal precedent on the import of a board of elections' action in placing a person on a ballot, on that same person later actually holding the office. See this Memorandum, *infra.* Reconsidering a judgment in light of such errors or omissions is entirely appropriate under Civ. R. 60(B)(5). In State ex rel. Gyurcsik vs. Angelotta (1977), 50 Ohio St.2d 345, 347, the Supreme Court looked to the analogous federal rule and found that "it is generally held that court errors and omissions are reasons justifying relief under the 'other reasons' clause [of Civ. R. 60(B)."

Courts frequently grant relief from judgment pursuant to Civ. R. 60(B)(5) based on "errors and omissions." In Bobb vs. Marchant (1984), 14 Ohio St.3d 1, the appellants had petitioned the court of appeals for a writ of prohibition, alleging that Marchant, a trial court judge, lacked the jurisdiction to try a case that was pending before him. The court of appeals dismissed the writ based on the mistaken belief that it was moot because the trial had

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already taken place. The appellants moved to vacate the dismissal pursuant to Civ. R. 60(B)(5). The court of appeals denied the motion. The Supreme Court held in part:

> The court of appeals dismissed the complaint on the ground of mootness. It of course was not moot, because the [trial] was not held. Once this fact was brought to the attention of the court of appeals, it should have granted relief from its earlier dismissal pursuant to the "other reason" provision of Civ. R. 60(B)(5).

Id. at 2. See, also, U.A.P. Columbus JV326132 vs. Plum (1986), 27 Ohio App.3d 293 (finding relief proper under 60(B)(5) when court awards damages for a period of time in which the defendant had mitigated damages by leasing the premises to a new tenant); Fallang vs. Fallang, 1997 Ohio App. LEXIS 5338 (Dec. 1, 1997) (But. App.) (relief proper under 60(B)(5) when trial court *and* this court erred in calculating total income by counting rental income twice); Rowland vs. Finkel (1987), 33 Ohio App.3d 77 (error in calculating damages and also awarding possession of the same property, corrected by 60(B) motion); Reichert vs. Reichert (1985), 23 Ohio App.3d 67, 68 (after judgment had been entered, one of the parties discovered that the trial court had never actually reviewed a medical deposition that had been relied on by both parties, and the losing party obtained relief by 60(B)(5), concluding that "it was an injustice for the trial court not to consider the medical deposition which it was obligated to consider.").

This Court has made a similar error in presuming that a determination that maybe didn't occur justified judgment in favor of the Respondent. There was no way to reasonably anticipate that, in a Rule 56 procedure, such an assumption would be made, considering Respondent's own testimony it never happened. The Court presumed, or inferred an act occurred, in favor of the *moving* party -- the Respondent, which Civil Rule 56 does not allow. "Trial courts should award summary judgment with caution, being careful to *resolve doubts and construe evidence in favor of the nonmoving party.*" Welco Industries, Inc. vs.

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Applied Co.'s (1993), 67 Ohio St.3d 344, 346 (emphasis added); Leibreich v. A. J. Refrigeration, Inc. (1993), 67 Ohio St.3d 266; Davis v. Loopco Industries, Inc. (1993), 66 Ohio St.3d 64; Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 258-59. Summary judgment is *not to resolve inferences* or evidence, nor to make determinations as to the credibility or believability of witnesses. Killilea v. Sears Roebuck & Co. (1986), 27 Ohio App.3d 163; Viock v. Stowe-Woodward Co. (1983), 13 Ohio App.3d 7.

The burden of proof is upon the party moving for summary judgment to establish that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. State ex rel. Baran v. Fuerst (1992), 65 Ohio St.3d 413, 416. "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to summary judgment as a matter of law." AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157, syl. at 2.

With respect to a responding/defendant movant

> seeking summary judgment on the grounds that the nonmoving party cannot prove its case, [movant] bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claims. The moving party cannot discharge its initial burden under Civil Rule 56 simply by making a conclusory assertion that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden the motion for summary judgment must be denied.

Vahila v. Hall (1997), 77 Ohio St.3d 421, 429 (emphasis added); Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. Respondent had the exclusive burden under the Rule to demonstrate that the Relator did *not have* a cause of action, not that he has not *proven* the cause of action. Dresher v. Burt, *supra* at 280. This cannot be done by inferences and

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presuming acts occurred, even if they were relevant. Mere conclusory allegations on behalf of a movant are not sufficient to overcome the burden of proof on summary judgment, and for that reason alone, the Judgment cannot be based on a presumption from an assertion of an intent to do something in the future that it happened. See Sethi v. WFMJ Television (1999), 134 Ohio App.3d 796.

The Court stated, in ¶ 9, that "There is nothing in the record to suggest the Board did not conduct such an investigation prior to accepting Wenninger as a qualified candidate." There is nothing in the record indicating that it *did*, even though both parties presented subpoenaed BOE documents. Although any report or finding of any such investigation is not in those materials, which Respondent could have filed if it existed and didn't (on his Motion), yet the Court assumes it happened, and relies on that inference to grant Respondent's Motion, allegedly unrebutted (but without consideration of Respondent's own testimony, as a principal in any such proceeding).

The failure of Respondent to prove it happened, which would have benefited him, results in a stronger inference *against him than for him*. The law in Ohio has long been that the burden of proof is on the party who wishes to support their case by facts that lie more peculiarly within their knowledge, or of which they are supposed to be cognizant. Adams v. Linn (Ohio App. 1936), 22 Ohio Law Abs. 34, 37. A party is exempted though from the burden to prove facts that lie exclusively within the knowledge of the *opposing* party. Olszowy v. Cleveland Railway Co. (1934), 47 Ohio App. 529.

In one case a plaintiff sued a trucking company for injuries caused by a driver, who was driving a truck in the name of the defendant/employer. The Court held that it was *the defendant* who had the burden to prove, for a driver operating a truck in their name, their

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argument that the truck and the driver were in fact not theirs. The defendant's failure to prove that fact, which was exclusively within their knowledge, allowed the trial court to make the inference that it was in fact their driver. The Court noted:

> It seems to us a great deal may be inferred from the failure of [defendant] to present evidence to show [the truck's owner/driver's employer]. The failure to produce evidence peculiarly within the knowledge of the [defendants] is a rather eloquent fact in itself . . . . [I]t properly becomes the burden of the defendants to furnish the information as to the ownership of the truck and the employment of the driver. Were the rule otherwise it would result in defeating righteous claims resulting from the wrongful acts of [defendants].
>
> Armour Co. v. Yoder (1931), 40 Ohio App. 225, 236-37.

But, particularly, Relator cannot have judgment granted against him, because he didn't *disprove* it: "There is no 'default' summary judgment under Ohio law." Monastra v. D'Amore (1996), 111 Ohio App.3d 296, 308; Csejpes v. Cleveland Catholic Diocese (1996), 109 Ohio App.3d 533, 541; Maust v. Palmer (1994), 94 Ohio App.3d 764, 769; Wooten v. Columbus Division of Water (1993), 91 Ohio App.3d 326, 331. In an abundance of caution, an affidavit is attached setting forth the complete available evidence on that point.

D. Meritorious Issue to Present.

"Under Civil Rule 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense." Rose Chevrolet Inc. v. Adams (1988), 36 Ohio St.3d 17, 20. Relator has issues, and defenses to Respondent's claims, particularly the only one this Court relied upon: that any determination on the merits of Respondent's legal qualifications to be a sheriff was ever made, or that even if a board of elections made such a determination, it would have any legal significance in a later *quo warranto* proceeding. Without a preclusive non-action by a BOE, this Relator is entitled to the writ he requested.

1. There is insufficient factual support to render summary judgment for the Respondent on the ground of any prior determination on the qualifications of Respondent.

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This Court relied upon the role of the Board of Elections in doing nothing other than certifying the candidacy of a candidate, whether after an actual determination of qualifications or not. See Judgment, August 16, 2010, ¶ 7. A board of elections' action in doing that though *has no preclusive effect* because, at least in this context, it was not even quasi-judicial action. "[A] board of elections * * * is a quasi-judicial body *when it considers protests*." State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections (1997), 80 Ohio St.3d 302, 306 (emphasis added). The letter the Court relied upon to find there might have been some determination said the protest was denied due to timeliness and a statute that didn't allow protests by non-party members. The Court found a decision on a protest, for a protest that could not have even been heard at all. See State ex rel. Williams v. Board of Elections of Trumbull Cty. (1963), 175 Ohio St. 253, 254 (board of elections exercises authority to determine the qualifications of a candidate "in a protest proceeding"); State ex rel. Flynn v. Board of Elections of Cuyahoga County (1955), 164 Ohio St. 193, 200 (over'd on other grounds, State ex rel. Schenck vs. Shattuck (1982), 1 Ohio St.3d 272).

In describing the role of a board of elections regarding the qualifications of a candidate, the Supreme Court stated first that a board of elections has authority to determine, if elected, a candidate could successfully assume that office, *in the context of a protest hearing*. Flynn, *supra* at 200. There is no evidence to support Respondent's position, or the Court's presumption, that any protest was actually ever ruled upon on the merits, or that a board of elections did anything other than look at the candidate's *paperwork* to see if the blanks are filled in correctly and under oath. A board of elections not only has no duty to do anything else, but it is not required to do more than that *unless a protest if filed*, and even then only on limited grounds. R.C. 3513.05 ("At the time fixed *such election officials shall*

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hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find such candidate *is not an elector of the state, district, county, or political subdivision in which the candidate seeks a party nomination or election to an office or position, or has not fully complied with this chapter, the candidate's declaration of candidacy and petition shall be determined to be invalid and shall be rejected, otherwise it shall be determined to be valid.*") (Emphasis added.); see also, R.C. 3501.39(B).

One of the cases relied upon by this Court, State ex rel. Shumate vs. Portage County Board of Elections (1992), 64 Ohio St.3d 12 (Judgment, ¶ 9), specifically expressed the "duty" this Court relied upon in presuming the BOE took some action, to apply to protest hearings: "That respondent has not only the authority to review R.C. 311.01(B)'s qualification requirements for the office of sheriff, but also *the duty* to do so *whenever those qualifications are challenged in a protest.*" *Id.* at 16 (granting a writ after a failed protest). A BOE has no duty to do so absent a protest of a candidate's candidacy, as the requirements contained therein "are outside the elections law, and . . .deal with substantive issues of eligibility for candidacy other than technical declaration or petition requirements." *Id.*

The only evidence before the Court is that *there was no such protest ever ruled upon.* One protest was withdrawn before decided. The other, Relator's protest filed with the BOE, on April 11, 2008, was summarily dismissed by the BOE, because the election law did not "allow non-party affiliated persons to challenge the qualifications of a party candidate and essentially disenfranchises independent voters from challenging the qualifications of a party candidate," according to the very letter the Court quoted. See, Appendix A, "BCBE May 8, 2008, letter to Relator," in Respondent's Brief and Response to Relator's Motion for Summary Judgment. It was dismissed on procedural grounds (due to political affiliation and

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who could file a protest), never on the merits of Respondent's qualifications for the office. The Court's Judgment holds a non-party, who could not legally have protested, to the effect of a protest that never happened and determination without a protest that may or may not have ever happened.

Therefore, the only *actual* evidence in the record is that *no such determination on any merits was ever made by anyone*. There never has been any contested proceedings on any protest or challenge on Respondent's qualifications, for any Board to "weigh" or hear anything, and Respondent knows it and admitted it. D.Wenninger, p. 16, 19-21, 22-25 (one protest withdrawn by the complainant, the other, this Relator, dismissed for procedural reasons). Even if there was an inference that some determination was made somewhere, it was countered by Respondent himself, and that is a genuine issue that defeats Respondent's motion. A withdrawn protest, a procedural and probably unconstitutional dismissal on "standing" type grounds, and a jury verdict of not guilty for "knowingly" falsifying one's qualifications, are all far from an endorsement. *Relator could not even have participated*, much less advocated or appealed, any other protest, and yet the Court denies him the right to challenge here, now, because of a procedure he was precluded by law from participating in. See R.C. 3513.263.

The record is absent any evidence supporting Respondent's claim that any board of elections ever ruled on anything in any quasi-judicial capacity or otherwise. Respondent even admitted in his deposition the falseness of the premise that the Board never did officially rule on the merits of his qualifications for this office. D. Wenninger, p. 24.

2. Actions by a board of elections outside of a protest hearing have no preclusive effect on later challenges to the elected official.

Some judicial or quasi-judicial action is necessary for any "determination" to have

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any such preclusive effect. There must be a final determination of facts. See e.g., In Re Burton, 160 Ohio App. 3d. 750, 2005-Ohio-220. If there is no "final order," there can be no issue or fact preclusion. Glidden Co. vs. Lumberman's Mutual, 112 Ohio St. 3d. 470, 2006-Ohio-6553 (partial summary judgment, but then a dismissal after a settlement, results in no issue preclusion from the summary judgment determination).

The issue further must have been *fully litigated* in the prior proceeding and not only final but complete. Alternatives Unlimited–Special, Inc. vs. Ohio Department of Education, 168 Ohio App. 3d. 592, 2006-Ohio-4779. Generally, orders that are preliminary, temporary, a.k.a. interlocutory, are not "final" for preclusion purposes. Kalk vs. Woodmere (1985), 27 Ohio App. 3d. 145, 148-149. It is only final *appealable* orders that have issue preclusion effect. See, e.g., Schoemaeker vs. First National Bank (1981), 66 Ohio St. 2d. 304, 314.

Generally a ruling on a protest is not subject to judicial review at all, see State ex rel. Flynn, *supra* at syl. 1, and certainly not by someone not a party to a protest or otherwise without standing to even make one. See also, Foster vs. Cuyahoga Cty. Board of Elections (1977), 53 Ohio App.2d 213, 223-224 (rejecting the proposition that an administrative appeal is the proper remedy from a board of elections certifying a candidate to be on a ballot, because there is no "quasi-judicial" function in that procedure and therefore no appealable order).

The proposition that a board of elections placement on a ballot means nothing for the candidate's eligibility to *hold* the office was confirmed years ago. In State ex rel. Wolfe v. Lorain County Bd. of Elections (1978), 59 Ohio App.2d 257, the Court noted that under Ohio election laws a candidate generally need not qualify for the prospective office in order to *run for* or *be elected* to that office. He must be qualified when he *assumes that office.*

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These precepts apply to disqualifications imposed by the Constitution, State, ex rel. Fisher, v. Brown (1972), 32 Ohio St.2d 23, *and by statutes*, as is the case here. State, ex rel. Tilden, v. Harbourt (1940), 70 Ohio App. 417.

Examples of a legislative policy against disqualifying candidates from being elected to, as opposed to actually holding office, are found in R. C. 3513.07, which regulates the form for declarations of candidacy in primary elections. Such declarations, if intended to equate running for or being elected to the office, with actually holding it, should state: "if elected to said office or position, I will qualify therefor . . . ," rather than "I do now qualify," or "I will qualify at the time of election." Wolfe vs. Lorain Co., supra at 258. The distinction was also made in State ex rel. Flynn, *supra* at 200, where the Court stated:

> Those decisions clearly establish the authority of a board of elections to have, *upon protest*, a hearing, take evidence and render a decision on the facts, *although the facts are disclosed by testimony not strictly applicable to a technical construction of the nominating petitions*. Section 3513.262, Revised Code, giving *authority* to determine the "validity or invalidity" of the petition of a candidate confers upon the board of elections authority to determine the facts which will disclose whether the candidate may lawfully be elected to the office he seeks.
>
> (Emphasis added).

The Ohio Supreme Court's recent decision in State ex rel. Knowlton vs. Noble Cty. Board of Elections, 125 Ohio St.3d 82, 2010-Ohio-1115, also at least implicitly rejects the argument that a board of elections' action, even on a valid protest, is preclusive of anything. In that case an elected sheriff resigned (under felony indictment), and a temporary appointment of a replacement was made to take his place until the next election. The replacement filed as a candidate for the office and a protest *was filed* claiming he didn't meet the supervisory or educational requirements for the office per Statute. The Board of Elections agreed with the candidate, and denied the protest on the merits. The challenger

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though still filed for a writ of prohibition and a writ of mandamus at the same time, to prohibit the candidate being placed on the ballot. Although the Supreme Court denied the mandamus for procedural reasons, it granted the writ of prohibition against the board of elections -- *even though there was a decision on the merits on a contested protest.*[1] See also, Foster vs. Cuyahoga Cty. Board of Elections (1977), 53 Ohio App.2d 213, 222-223 (the Court expressly rejected the similar argument, that "by virtue of his acceptance by the board of elections as a write-in candidate, [he] must have been found to possess the qualifications of an elector . . . ."); State ex rel. Shumate vs. Portage County Board of Elections (1992), 64 Ohio St.3d 12, 16 (granting a writ, even after an unsuccessful protest).

The cases cited by the Court, in establishing any preclusive effect on anyone of a board of elections' placement on a ballot, Judgment, August 16,2010, ¶ 9-10, were all in the context of a direct action by a protester against a board of elections after an actual protest. For example, State ex rel. Kelly vs. Cuyahoga Cty. Bd. of Elections (1994), 70 Ohio St.3d 413, was a protest case where Kelly was questioning the judicial qualifications of Gallagher to be a judicial candidate. The Board exercised its authority to review a *non-election* statutory provision, like that of 311.01(B) and (C), and in a quasi-judicial protest hearing.

Here, Relator was not permitted to be a protester. There never was a protest ruled upon the merits, and there is no evidence there ever was. Respondent himself says there *wasn't*. This case is a petition after an election to do the only thing a that can be done to challenge the qualifications of an elected official, and can only be done by one who would

[1]This Relator could *not have filed* a writ of prohibition against the board before the election, as he had no standing until the election, per this Court's prior ruling upholding the Statute, and otherwise before the election could not meet the necessary elements to obtain a writ of prohibition, including at that stage the Board was not exercising or about to exercise "judicial power," the exercise of its power (placing a candidate on a ballot) was authorized by law (even if erroneously exercised), and not issuing the writ would not have resulted in injury for which no other remedy existed -- as this Court said, his remedy was in quo warranto if he didn't win the

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hold the office if the elected official is not legally qualified.

Even if the standard of review on a direct appeal would apply, the Board engaged in a "clear disregard of statutes or applicable legal provisions" by certifying a candidate that Relator has proven was not statutorily qualified for the office. State ex rel. Kelly v. Cuyahoga Cty. Bd. of Elections (1994), 70 Ohio St.3d 413; State ex rel. Carr v. Cuyahoga Cty. Bd. of Elections (1992), 63 Ohio St.3d 136. The language, "(s)uch determination shall be final," contained in R.C. 3513.05, 3513.262 and 3513.263, is in reference to a determination by a board of elections of a *protest proceeding*. But the Board, and this Court, have not addressed those qualifications.

3. Quo Warranto is the exclusive procedure to challenge an elected officeholders qualifications and right to the office and is independent of any action by any board of elections.

The Court's Judgment effectively nullifies the concept of a writ of quo warranto, as any elected office holder -- the only persons in office and subject to the writ -- got there by action of a board of elections; and defers the writ's purpose to an administrative board. A writ of *quo warranto* has to be independently available or it has no meaning. The authority to hear such an action is granted in Sections 2 and 3, Article IV of the Ohio Constitution. Jurisdiction is statutorily established under R.C. 2733.03 as exclusively vested in the courts of appeals and the Supreme Court. See, e.g., State, ex rel. Lindley v. The Maccabees (1924), 109 Ohio St. 454. Even the courts of common pleas are without jurisdiction over actions in *quo warranto*. State, ex rel. Maxwell, v. Schneider (1921), 103 Ohio St. 492.

The writ itself is a high prerogative writ and is granted as an extraordinary remedy where the legal right to *hold* an office (not be on a ballot) is successfully challenged. State,

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election by defeat from an unqualified candidate. See generally, State ex rel. Cordray vs. Marshall, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶ 25.

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ex rel. St. Sara Serbian Orthodox Church, v. Riley (1973), 36 Ohio St.2d 171, 173; State, ex rel. Cain v. Kay (1974), 38 Ohio St.2d 15, 16-17. The actual remedy afforded is that of ouster from the public office. R.C. 2733.14.

More importantly, *quo warranto* is the *exclusive remedy* by which one's right to *hold* a public office *may be litigated*. State, ex rel. Hogan, v. Hunt (1911), 84 Ohio St. 143, syl. 1. To obtain such a writ, one must demonstrate that he "is entitled to the [public] office and that *the office is unlawfully held by the respondent* in the action." State, ex rel. Cain, *supra* at 17. If one is barred from that "exclusive remedy" to litigate over one who is allegedly unlawfully holding an office, merely because a board of elections put that person on the ballot, it is no remedy at all. A Court therefore must adjudicate an officeholder's right to the office, regardless of how he got there. The distinction between procedures to get in office, and this writ to get one out of office, was made by the Supreme Court in State ex rel. Battlin vs. Bush (1988), 40 Ohio St.3d 236, 305:

> Furthermore, the statute deems the office to be vacant automatically, upon the occurrence of the statutorily determined events. Thus, *while one may have been lawfully elected to an office*, vested with the authority of the office and fully entitled to occupy it for a set time, nevertheless, *an official may abandon his office*. In such event, pursuant to the provisions of R.C. 305.03, *an action in quo warranto would be unnecessary*.

(Emphasis added). See also, State, ex rel. Trago, v. Evans (1957), 166 Ohio St. 269 (after a vacancy was declared pursuant to then effective R.C. 305.03 because the elected sheriff, who was incarcerated in another county, had been absent from the county for ninety consecutive days, and the Court distinguished the statutory procedure to fill vacancies from the common law writ of *quo warranto*. "In so holding, we determined that the occurrence of a vacancy in a public office under R.C. 305.03 *has no relation to an action for the removal of an office holder pursuant to a writ of quo warranto*.") (emphasis added).

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Similarly, the statutory procedures to fill a ballot, have nothing to do with a subsequent procedure to remove an unqualified person from the same office.

4. Allowing action by a board of elections to preclude a candidate who had no right to protest or participate in a protest from challenging the officeholder's qualifications is unconstitutional.

A board of elections put someone on a ballot, after determining his challenger had no right to protest doing so, a determination upheld by a trial court and this Court, expressly stating, in addressing the exact same "determination," that this Relator had another remedy: this *quo warranto* action. This Judgment now finds that as a result of a presumed determination (that this Relator had no right to protest against, adjudicate, participate in, or present his case), in a non-adversary setting (if it occurred at all), he is barred from a day in court: this petition for this writ; by a proceeding he was barred from participating in.

That result is unconstitutional in violation of the due process or right-to-a-remedy provisions of Section 16, Art. I of the Ohio Constitution, and the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution and Section 2, Article I, of the Ohio Constitution. The first provision, from the Bill of Rights to Ohio's Constitution provides two distinct guarantees: (1) that legislative enactments may abridge individual rights only "by due course of law," see Mominee vs. Scherbarth (1986), 28 Ohio St.3d 270, 274-276, and Gaines vs. Preterm-Cleveland, Inc. (1987), 33 Ohio St.3d 54, 59, a guarantee which is equivalent to that of the Due Process Clause of the Fourteenth Amendment, Direct Plumbing Supply Co. vs. Dayton (1941), 138 Ohio St. 540, 544; and (2) that all *courts* shall be open to every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner. Hardy vs. VerMeulen (1987), 32 Ohio St.3d 45, 47; Gaines, *supra* at 60.

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This Court's application of the statutes governing board of elections procedures, to one who is barred by those same statutes from participating in those procedures (R.C. 3513.05), denies him the right to remedy -- *quo warranto* -- by the BOE action in placing the opponent on the ballot, before he even had the right (the election). It denies him equal protection of the law, and due process, by denying him a fundamental right -- to be elected and to hold a public office over that of an unqualified candidate -- due merely to a statute that prohibited him from protesting that candidacy merely because of his political party, and now even the consideration of his petition for a common law writ because of that same process that he could not participate in. It is unconstitutional to do so. See Brennaman vs. R.M.I. Co. (1994), 70 Ohio St.3d 460, 466-467 (invalidating statute of repose); State ex. rel. OATL vs. Sheward (1998), 86 Ohio St.3d 451, 475-476. The BOE letter the Court relied upon even notes the likelihood of unconstitutionality of what it felt it was required to do, in refusing to hear the protest. This Court is requested to come to the same conclusion.

IV. CONCLUSION

The Court's ruling has the effect of barring any one who cannot file a protest from ever challenging the credentials of a candidate or elected office holder, merely because of a non-appealable board of elections certification of a candidate's paperwork -- even if completely false. In addition, the Court's ruling allows any candidate who can get on a ballot, which requires certification by a board of elections, to keep that office, no matter how unqualified they are for it.

The Judgment also allows that as long as someone, even if totally unqualified by law, gets their name on a ballot, then there is nothing further anyone can ever do to challenge it because the board of elections' decision to put them on the ballot is the final

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word, even if the decision is later revealed to have been erroneous. It is like a statute of repose in favor of unqualified officeholders.

This Motion should be granted, for the reasons that the Court erroneously relied upon an unproven non-judicial action, and bound this person to the presumed but unproven result, with no opportunity for him, this Relator, to challenge that by any judicial process.

The Decision should therefore be reconsidered and vacated for those reasons.

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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 20th day of August 2010.

Thomas G. Eagle (#0034492)

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AFFIDAVIT

STATE OF OHIO,)
) ss:
COUNTY OF WARREN,)

Now comes Dennis Varnau, first being duly cautioned and sworn, and states as follows:

1. I am the Relator in this case. The matters testified to herein are within my personal knowledge and I am competent to testify to them.

2. I have caused to be requested, directly and by subpoena, all records of the Brown County Board of Elections relating to Respondent Wenninger, up to and as of June 29, 2009. All such documents have been received, and exchanged with Respondent's counsel. All documents bearing on the issues before this Court were supplied and filed, by Relator on August 10, 2009 (Exhibit 15A), and by Respondent in his "Brief of Respondent" filed with the Court on or about August 19, 2009 (Appendix A).

3. In none of those documents is there any indication that any protest, hearing, or investigation by any board of elections on the actual qualifications of Wenninger to be sheriff of Brown County, was ever actually conducted. There have been no documents produced ever indicating that happened. As an interested person, I have never received any notice that such was ever done. I was never asked to participate in or notified of such an investigation or any result of any such investigation.

Further, Affiant sayeth naught.

Dennis Varnau

Dennis Varnau

Sworn to and subscribed before me by the said Dennis Varnau this 20th day of August, 2010.

NOTARIAL SEAL STATE OF OHIO
DENISE M. MEECE
NOTARY PUBLIC, STATE OF OHIO
WARREN COUNTY
My Comm. Expires March 24, 2014

Denise M. Meece-Smith

Notary Public