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 REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION TO VACATE JUDGMENT**
-vs-	
DWAYNE WENNINGER,	
Respondent/Defendant.	

Relator, by and through counsel, hereby submits the following Memorandum as his Reply to Respondent's Memorandum in Opposition to Relator's Motion to Vacate Judgment.

1. Respondent's argument is based on unsupported legal principles.

Counsel for Respondent continues on an empty circular path of inaccurate and misleading legal arguments devoid of any evidence, with absolutely nothing in the record supporting them.

Respondent now asserts "this Court's Decision [was] in *quo warranto*." The Court however did not address the merits of the writ, or of any determination of Respondent's actual qualifications for the office, but dismissed the case on the notion that the merits could not be addressed because of presumed but not proven actions of a board of elections. Respondent completely skips the fact of the context of the Decision -- summary judgment based on a presumption in favor of the moving party. The Court addressed no part of the requirements of a *quo warranto* action, testament to the point of its Decision: the merits of the writ were not reached at all.

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Without facts to prove the alleged investigation ever happened, the Court granted a motion presuming it did. The burden of proof though is always upon the moving party for summary judgment to prove its case from the undisputed material facts contained in the record. There is no "default" summary judgment. Respondent cannot rely upon a court to "step into his shoes" and add unsubstantiated assumptions to fill in for facts absent in the record in order to find summary judgment in his favor.

In State ex rel. Huron Cty. Prosecutor v. Westerhold, 72 Ohio St.3d 392, 1995-Ohio-86, the Supreme Court rejected the basis for Respondent's argument, and this Court's Decision:

> While a *de facto* officer is treated as a *de jure* officer, the *de facto* officer's actions are valid *only until* a proper challenge in a *quo warranto* proceeding removes him from office. State v. Staten, 25 Ohio St.2d at 110, 54 O.O.2d at 237, 267 N.E.2d at 125; see, also, State ex rel. Purola v. Cable (1976), 48 Ohio St.2d 239, 242, 2 O.O.3d 410, 411-412, 358 N.E.2d 537, 539, citing People ex rel. Norfleet v. Staton (1875), 73 N.C. 546, 550 (" 'The only difference between an officer *de facto* and an officer *de jure* is, that the former may be ousted in a direct proceeding against him, while the latter cannot be.' "). The court of appeals in State ex rel. Williams [v. Zaleski, Lorain App. No. 3364, unreported, *aff'd sub nom* State ex rel Williams vs. Zaleski (1984), 12 Ohio St.3d 109] also acknowledged the propriety of *quo warranto* to challenge the validity of the appointment of an officer, *despite the presumed validity of* a judicial appointment *under a statute*. Here, Westerhold is at best a *de facto* officer whose appointment was properly challenged in *quo warranto*, *regardless of any presumed validity of his appointment*.

Id. at 396 (emphasis added). Therefore, how the person got in office, even if by judicial appointment (much less the ministerial act of being placed on a ballot), is irrelevant to whether *quo warranto* can get them out of office, especially if they are not legally qualified to hold it.

Pursuant to R.C. Section 2733.06, Relator brought this action for a writ of *quo warranto* against Respondent whom Relator claims is unlawfully *holding* the office of sheriff. R.C. Section 2733.14 states that if a defendant in an action in *quo warranto* is found

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guilty of unlawfully *holding* or *exercising* an office, judgment shall be rendered that he [Respondent] be ousted and excluded therefrom. Boards of elections' decisions are totally irrelevant with respect to actions in *quo warranto*, particularly where there has been a disregard of the law and statutory authority. Furthermore, the "duty" upon which Respondent and the Court base a presumption of actions actually having been taken, do not exist at all in the context presented here: no formal acted-upon protest. See Relator's Motion and Memorandum, August 20, 2010, p. 10-20. Respondent's "unrebutted" claim No. 4 in Respondent's Memorandum (that the board of elections' action precluded this action) begs the question, and points out exactly what is being challenged in the Court's Decision.

2. The Respondent's argument is based upon unsupported factual assertions.

The primary assertion Respondent makes -- "What is unrebutted?" -- is false. The affidavit of Wenninger is not only rebutted but contradicted by his own deposition testimony, admitting there has never been a determination by anyone of the actual merits of his qualifications for office (not to mention the absence of any document supporting it). The Court is aware that one cannot create the appearance of a genuine issue of fact, or defeat one, by contradicting their deposition testimony by affidavit. The Ohio Supreme Court held: "When a party's affidavit in support of a motion for summary judgment contradicts that party's previous deposition testimony, summary judgment in favor of that party is inappropriate because an issue of credibility exists which can only be resolved by the trier of fact." Turner v. Turner (1993), 67 Ohio St.3d 337, 341-342. Courts have extended this same logic to an attempt to *defeat* summary judgment by submitting affidavits contradicting deposition testimony, and disregarding such contradictory affidavits. See Byrd v. Smith, 110 Ohio St.3d 24, 2006-Ohio-3453 (contradictory affidavits cannot be used to oppose

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summary judgment); Linder v. Am. Natl. Ins. Co. (2003), 155 Ohio App.3d 30; McKinley v. Chris' Band Box (2003), 153 Ohio App.3d 387; Pinchot v. Mahoning County Sheriff's Dept, 164 Ohio App.3d 718, 724-725, 2005-Ohio-6593 ¶ 23-26 (self-serving contradictory affidavit cannot be used to defeat a motion for summary judgment). See also, Pettiford vs. Aggarwal, -- Ohio St.3d --, 2010-Ohio-3237, ¶ 22-38 (applying Byrd to non-party expert affidavits); Moore v. Eastgate Seafood, Inc., 1999 Ohio App. LEXIS 2114 (Cler. App.), at *4 ("A party cannot defeat a motion for summary judgment by creating an issue of material fact in his affidavit which contradicts and is inconsistent with his prior sworn testimony"). Yet, Respondent proposes to do just that, and he should not be permitted to do so.

Further, the "affidavits" he relies upon (Spievack and Callendar) were those actually objected to, and moved to be stricken, which this Court found were not necessary to its Decision and did not consider (and rightfully so). Entry, August 17, 2010. Yet, this is what Respondent contends (still) supports his position, and the Court's Decision. In addition, those affidavits have nothing to do with the only issue the Court actually addressed -- the import of a prior board of elections' action.

Respondent's claimed "Unrebutted fact" No. 5 again is notoriously absent any citation to any supporting source, evidence, statement, or document, that any such action/investigation -- that Respondent said didn't happen -- ever occurred.

Respondent instead relies on an ancient proviso, relating to presumptions and inferences, but not after a trial but in support of a proponent's motion for summary judgment. Even so, that alleged legal "duty," upon which the presumption/inference is based, simply does not exist outside of a formal protest, and then has nothing to do with a later action for *quo warranto* See Relator's Motion and Memorandum, August 20, 2010, p.

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10-20. And, there is no principle in the law that "if someone might have done something, or said they were going to do it, that a party is entitled to judgment based on a presumption that that other non-party did in fact do it, and did it correctly and legally." But that is the proviso upon which this Decision and Respondent's case must stand.

But even if that were a reliable justifiable proposition, the fact here is that Respondent himself said it didn't happen, and the thorough work done by both parties to this case did not produce any thing saying it did. And, the Supreme Court and at least two courts of appeals have said, or at the very least decided by necessary implication, in this context it wouldn't matter if they did: a board of elections' action placing a *candidate* on a *ballot*, is irrelevant to any subsequent action challenging an *elected official* actually *holding* the office. Respondent's counsel (either of them) have provided this Court with not one case where a *quo warranto* action was denied because a board of elections placed someone on a ballot, either with or without a protest. To this Counsel's knowledge, there has never been such a case, and could not be, or *quo warranto* would be meaningless. How the person got in the office is irrelevant to the exclusive method of getting them out. State ex rel. Huron Cty. Prosecutor v. Westerhold, 72 Ohio St.3d 392, 1995-Ohio-86.

The Respondent's arguments are repeatedly that because something might have been done, it can't be litigated later by someone else; and even that if something wasn't done, it can't be litigated somewhere else. The arguments require this Court to give judicial protection to one who has been proven, in this case, to be legally unqualified for the office he holds. The fallacy of the argument is demonstrated by Respondent's sole reliance on cases directly appealing, or filed directly against, a board of elections regarding pre-election conduct, and then by a party to it, a context wholly inapplicable to *quo warranto*

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proceedings; but seeking to apply those rulings in this dissimilar context, of post-election office-holding, by a non-party to any prior action by a board. It is that application that creates the unlawful and unconstitutional result here and now.

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 31st day of August 2010.

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