IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

FILED
COURT OF APPEALS
OCT 30 2009
TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

STATE OF OHIO,	)	**CASE NO. CA2009-07-026**
Appellee,	)	**ACCELERATED CALENDAR CASE**
-vs-	)	
DWAYNE WENNINGER,	)	
Appellee.	)	

APPEAL FROM BROWN COUNTY COMMON PLEAS COURT
BROWN COUNTY, OHIO

REPLY BRIEF OF APPELLANT, DENNIS VARNAU

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REPLY ON STATEMENT OF THE CASE

Appellee suggests Appellant's Motion to Disqualify is not in this record, at the same time referring to documents demonstrating that it was in fact overruled.[1] A copy of the *time-stamped* Motion to Disqualify, filed June 25, 2009, is attached, to show it *is* a part of the record in this case, in the Court's record, and in Appellant's Counsel's record, whether it is in Appellee's or not.

REPLY ARGUMENT

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DECIDING THE PENDING MOTION WITHOUT RECUSING HIMSELF.

Issue Presented for Review: It is a denial of due process to a litigant for a judge, who has contributed money to or for the benefit of the other party to litigation before the court and when the case challenges the right to hold office by the public official who is also in the same political party of the assigned judge, to decide the merits of the case.

Appellee's arguments are based on authority predating the United States Supreme Court's most recent pronouncement confirming that the right to not only an impartial trier of fact and law, but also the *appearance of such*, is of constitutional magnitude, Caperton v. A.T. Massey Coal Company, Inc., --- U.S. ---, 129 S.Ct. 2252, 173 L. Ed. 2d 1208 (2009), which Appellee does not even attempt to address. "We know that, as a lesser appellate court for purposes of federal questions, we ignore the words of the United States Supreme Court at our peril just as the 'lesser' courts of Ohio ignore our words at their peril as to questions of state law." State v. Storch (1993), 66 Ohio St.3d 280, 291. The basis for the disqualification of judges as not impartial is that a *potential partiality* may render the judge unable to perform the functions of a trier of fact consistent with due process of law. Ex Parte American Steel Barrel Company (1913), 230 U.S. 35. In order for the court to perform its high functions, "justice must satisfy the appearance of

[1] The disingenuousness of Appellee's complaints over what is and what is not in the record is demonstrated by his constant reference to "facts" not in any record and without any proof of it, all of which is objected to (almost the entire Brief), and must be disregarded by the Court. Ohio R. App. P. 9(A); State v. Ishmail (1978), 54 Ohio St.2d

justice." Offett vs. Ohio (1954), 348 U.S. 11, 14.

The statute upon which the Appellee relies cannot overrule rights of constitutional significance. That Statute is therefore not applicable in a situation like this, and a Motion is therefore the appropriate remedy. See Robinson vs. Hartzell (In re Moyer) (1991), 74 Ohio St.3d 1234 (because no statutory authority to disqualify a Supreme Court justice, a motion should be filed). The Statute does not address other reasons for disqualification, including constitutionality, and that statute cannot override the constitutional rights of any litigant.

The action taken by the Supreme Court is also irrelevant, as it was not decided on a determination of bias or prejudice, or the lack of, much less the appearance of that. It was based on the fact that the allegedly partial judge had already decided the case. It is a dangerous precedent to set that it is okay for a judge who may be biased, or prejudiced, or not impartial, or who has the appearance of any of that, to decide a case as long as they do so quickly enough that no one can stop it. Therefore decisions of judges who should be disqualified are null and void. Cuy. County Bd. of Mental Retardation vs. Association of Teachers (1975), 47 Ohio App.2d 28.

The issue is not moot. The Decision on the merits, which was constitutionally infirm, of the Appellant's motion to open or unseal the records is still before this Court. It is the merits of that Decision, in violation of this litigant's constitutional rights, as a result of a judge who may be partial that still must be decided. Alleged bias and prejudice is moot when the disputed judge is no longer on the case *before* the merits of the case are reached. State vs. Centers (In re Crehan), 100 Ohio St.3d 1212, 2002-Ohio-7469; Farley vs. Farley, 2003-Ohio-3185.

Certainly the facts of each case are relevant – like the fact that the financial contribution was made, and the newspaper pronouncement of it, *while this Motion was pending*. If the facts

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402; Ottawa County Commissioners v. Mitchell (1984), 17 Ohio App.3d 208; Hickman v. Ford Motor Co. (1977), 52 Ohio App.2d 327.

basing that claim are incomplete, Appellant should have been afforded a hearing for the presentation of evidence, before casually dismissing his claim.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DENYING THE MOTION TO UNSEAL THE RECORD.

Issue Presented for Review: The interest of the public in having access to the records of a public and officially reported criminal prosecution of a public official for purposes of challenging the official's right to hold the office outweighs the private interests of the public official in maintaining a seal of those records.

The question of standing "depends upon whether the party has alleged such a personal stake in the outcome of the controversy [here, whether the record is unsealed for his use, or not], as to insure 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 [here, a motion]." State ex rel OATL vs. Sheward, 86 Ohio St.3d 451, 469, 1999-Ohio-123 (quotations and citations omitted). Appellant filed a motion requesting a remedy that was relevant to an interest that he had. His requested remedy was denied. That affects him in a negative way. He was a party to the proceeding because of the pleadings he filed. Varnau therefore has standing both to make the request that he made, by motion, and to appeal the result, adverse to him and his motion.

The Statute listing who can unseal a record is not the exclusive list -- as the numerous journalist petitioners in numerous reported and unreported cases making the same requests in similar contexts shows. If it is "exclusive," it is unconstitutional for failure to address the public and private rights of access to court records, who are not so listed.

Appellee also states that the same information is available from "other sources," but of course does not say how the litigants or even the Court are to know that until they see it. In fact, Appellee in another portion of his Brief in fact suggests that just because the facts are in a reported decision, it is not all the facts (at least therefore implying there is more to it than

available in at least that public record).

Even if one can debate whether the facts supporting that the chief law-enforcement officer of a county, who may be unqualified by statute to run for (much less hold) the office, and was therefore illegally elected, that debate raises an issue of public interest, more than just for the person trying to see a legal officeholder serve in that position. That interest cannot be ultimately determined without full light upon the facts and circumstances, and from what would otherwise be a public proceeding. It is difficult to understand how one can argue that the criminal prosecution of an elected official, not for some act that may or may not have occurred, but for the failure of that person's eligibility to hold that office, is not a matter of public interest.[2]

Res judicata has nothing to do with this case. There has never been a determination on the merits. The order denying the merits of this case is still on appeal, and is therefore not "final" for those purposes. It is paramount for the application of *res judicata* or collateral estoppel that there be a final determination of facts. 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. The issue further must have been fully litigated in the previous proceedings, and not only final but complete. Alternatives Unlimited – Special, Inc. vs. Ohio Department of Education, 168 Ohio App. 3d. 592, 2006-Ohio-4779.

In this case an appeal has been filed. It is only non-appealed final orders that receive issue preclusion effect. See, e.g., Schoemaeker vs. First National Bank (1981), 66 Ohio St. 2d. 304, 314 ("The prior decision of the Putnam County Common Pleas Court was never appealed. . . . .Under the principal of *res judicata* this use variance cannot now be collaterally attacked in a declaratory judgment action.") (Footnotes and citations omitted); Sturgill vs. Sturgill (1989), 61

[2] Again, in the same breath that Appellee states that this case only serves Appellant's "private" interest, and therefore doesn't merit unsealing, he argues Appellant has no interest sufficient to confer standing.

Ohio App. 3d. 94, 101 ("It may be reversed on appeal, but if an appeal is not taken, the decision stands, and is binding. The second half of the bootstrap doctrine premises that any unappealed decision is *res judicata* in subsequent litigation."). Something that cannot be appealed also cannot be final and appealable. Something that is on appeal, is not final. At no time has any agency, board, or anyone, made a factual determination in a contested adversary proceeding that Appellee qualified for the office he exercises, much less that the record here should be unsealed. No such "decision" or "judgment" is before this Court because there isn't one.

CONCLUSION

The trial court's judgments should be reversed; the record unsealed even if only for the limited purposes requested; or the matter remanded to a neutral judge to render a decision.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the Brown County Prosecutor's Office, 200 East Cherry Street, Georgetown, Ohio 45121, Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Dwayne Wenninger, by ordinary U.S. Mail this 29th day of October 2009.

Thomas G. Eagle (#0034492)

IN THE COURT OF COMMON PLEAS
BROWN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO, Plaintiff, -vs- DWAYNE WENNINGER, Defendant.	)))))))))	CASE NO. CR 2002 2234 **MOVANT'S MOTION FOR A RECUSAL OF ASSIGNED JUDGE AND MOTION TO VACATE DECISION OR ORDER**

Now comes the Movant, Dennis Varnau, who previously filed with this court a motion to unseal the record in this case for the purposes stated in that motion (filed on May 15, 2009), and moves for a recusal of the judge who has reportedly been appointed or assigned for disposition of that motion.

As grounds for this motion, counsel notes the apparent irregularity of the proceedings in this case. It has come to the undersigned's attention, on information and belief, although unofficially, that a judge has been assigned to this case for the purposes of disposition of this Movant's motion. No official notice of any kind has been received of the request for such an assignment, much less the actuality of such an assignment. Nonetheless, it has been reported, including by the prosecuting attorney for this County, that a judge was assigned for determination of the issue, although no notice has been provided to the undersigned to that effect; and that in fact a judge has denied the undersigned's motion, although no notices were received of such. The said assigned Judge has been reported in newspaper publications as having given financial contributions to the family of the defendant in this case, the opponent on the pending motion. A sample of said public information is attached hereto.

As a result, if true, that one side has access to information from the Judge/Court the other doesn't; and this is a financial connection between one party and the Judge, these circumstances implicate Code Jud. Cond. Canon 3, and it would be appropriate for said judge to recuse himself from any disposition of the issues in this case. See Code Jud. Cond. Canon 3(E). In addition, the appearance implicates basic fairness and due process in Caperton v. A.T. Massey Coal Company, Inc. (2009), --- U.S. ---, 173 L. Ed. 2d 1208, the United States Supreme Court confirmed that even a judge who *may appear to be biased* violates the constitutional rights of litigants. In the absence of actual bias, the Due Process Clause implements an objective standard that does not require proof of actual bias. See Tumey v. Ohio, 273 U. S. 510, 532 (1927); Mayberry v. Pennsylvania, 400 U. S. 455, 465-66 (1971); Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825 (1986). In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow v. Larkin, 421 U. S. 35, 47 (1975).

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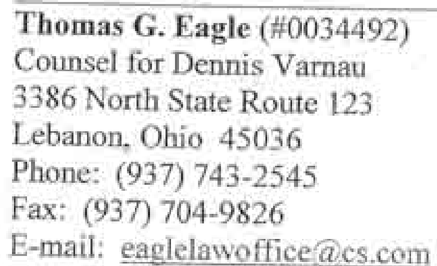
It is therefore requested that, if in fact an assignment has been made to a judicial officer who has in fact had financial contributions made, or other personal knowledge or connection to, the parties to this case, that said officer be recused from this case and a new, public, appointment of such judicial officer be made.

Further, if a Decision has been made, although no notice to the Movant of that, said Decision should be vacated for the due process violation. Further, any decision denying the motion should be vacated for violation of Sup. R. 44-47, including the presumption of public access to court records, and the process for making a determination otherwise. Sup. R. 45(A). There is no motion by anyone to restrict access to it, as required by Sup. R. 45(E)(1).

Further, the weighing of the public interest to that information, in the context of this case, clearly outweighs any private interest in keeping the remaining records private. The "facts" of the case are already public, having been made public by reported decisions still in the public domain. State vs. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521 (Ringland, J., C.P.). The only issue before this Court is the *proof* of the allegations contained in the underlying records. Making them available for the case which is now pending only between these parties, challenging the right of a purported public official to hold office, supports the public interest and does not prejudice the private interest of one person, considering there may be nothing not already available although by other more complicated and diverse means.

It is therefore also requested that any Decision made on the motion, if adverse to this Movant, be vacated, or at least noticed to the Movant (which hasn't yet happened).



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I hereby certify that a true copy of the foregoing was served upon Jessica Little, Prosecuting Attorney, 200 East Cherry St., Georgetown, Ohio 45121 and Dwayne Wenninger c/o Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Dwayne Wenninger c/o Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 26th day of June, 2009.

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Wenninger says thank you to friends

Thank you!

TO ALL MY FRIENDS, CO-WORKERS AND FAMILY MEMBERS

THAT HOSTED THE TAMMY WENNINGER BENEFIT GOLF OUTING ON MAY 9TH, 2009 AT WHITE OAK GULF COURSE

TO MY CO-WORKERS, FRIENDS, & LONG JOHN SILVERS FOR SUPPLYING, PREPARING & SERVING THE WONDERFUL MEAL

A SPECIAL THANK YOU TO THE COMMITTEE MEMBERS:

GAIL & DANNY DECLAIRE, SHANNON & HEATHER UTTER, DANNY & AMY DECLAIRE

CHARLIE & REGINA UTTER, CHARLIE TRUTT, BABE BEASLEY, JIM & TAMMY DILLINGER

JOY YAZELL, RED & RUTH MALONE, TOM JOHNSTON AND ALL THE GOLF TEAMS

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I APPRECIATE ALL THE CARDS, MEALS, CAREPAGE MESSAGES, E-MAILS, PRAYERS & CHURCH PRAYER LISTS

YOUR MANY ACTS OF KINDNESS HAVE GIVEN ME STRENGTH, ENCOURAGEMENT AND COMFORT. I AM SO BLESSED TO HAVE SO MANY FRIENDS SUPPORTING AND PRAYING FOR ME

Thank You,
Tammy Wenninger and Family

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