IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

State of Ohio, ex rel. Varnau : Case No. CA2009-02-10

Relator-Petitioner

FILED
COURT OF APPEALS
JUL 22 2011
TINA M. MERANDA
BROWN COUNTY CLERK OF COURTS

Vs

:

Wenninger

Respondent-Defendant :

WENNINGER'S REPLY TO VARNAU'S MOTION TO STRIKE

Now comes Respondent Wenninger and replies to the motion to strike as filed by Relator Varnau.

1. Reply to Varnau's arguments A (motion to dismiss violates scheduling order), B (standing argument has been waived) and C (motion to dismiss is a successive attempt at dispositive motion).

The reality of Wenninger's recently filed motion to dismiss is that it raises the question of whether the Court has jurisdiction to grant the relief that Varnau requests. Jurisdictional motions are never waived and may be raised at any time. *See, In Re: J. P.*, 2011-Ohio-3332 (12th App., 7-1-11, Hutzel, J.). In fact, courts often raise jurisdictional issues *sua sponte*.[1] Ohio Rule of Civil Procedure 12(H) is captioned 'waiver of defenses and objections'. Civ. R. 12(H)(2) states as follows:

[1] Had the Court raised the matter sua sponte, the Court could have rendered a decision without either party addressing the issue.

> A defense of failure to state a claim upon which relief can be granted ... may be made in any pleading permitted under Rule 7(A), *or by motion for judgment on the pleadings, or at the trial on the merits.*[2]

The motion to dismiss recently filed by Wenninger is a motion for judgment on the pleadings in that, in the event that the Court determines that though Varnau's complaint may be well pled in the legal sense, he may not succeed on the merits based upon substantive law in that a person that has lost an election may not become the winner of that same election and thereby, take office.

2. Whether Varnau has standing to bring this action.

Whether the issue is that of standing or the ability to obtain the relief sought, it appears very clear that Varnau may not obtain the remedy that he seeks: induction into office.[3]

Simply put, Varnau wants to disenfranchise the voters. As this Court has previously noted, Wenninger received 62.92% of the vote in the 2008 general election.[4] Each of the cases that Varnau cites is distinguishable from this case and Wenninger is confident that the Court will draw the distinctions. Wenninger has always (and will continue to) assert that he has always been qualified to be the Brown County Sheriff. However, for the sake of this argument, assuming that he is not, *People v. Beach*[5] notes as follows:

> In this country the great current of authorities sustains the doctrine that the ineligibility of the majority candidate for whom they voted does not elect the minority candidate. And this without reference to the question whether the voters knew of the ineligibility of the candidate for whom they voted. It s considered that in such a case

[2] One could argue that, based upon this Rule, failure to state a claim need not be raised by a pleading or written motion as the Rule provides that it may be raised at trial though never offered in any pleading or motion.
[3] *State ex rel. Sheets v. Speidel* (1900), 62 Ohio St. 156.
[4] ¶ 2, 12th App. Decision of 8/16/10, *State ex rel. Varnau v. Wenninger.*
[5] People v. Beach (1978), 294 N.C. 713, 719, 242 S.E.2d 796

the votes for the ineligible candidate are not void. (cit om). Thus, whether the public had knowledge of defendant Beach's ineligibility is immaterial.

The voters should not be disenfranchised: a loser should not become a winner.

Patrick L. Gregory 0001147
717 W. Plane Street
P.O. Box 378
Bethel, Ohio 45106
513 734-0950
Fax 513 734-7958

Gary A. Rosenhoffer 0003276
302 E. Main Street
Batavia, Ohio 45103
513 732-0300
fax 513 732-0648

Counsel for Wenninger

CERTIFICATE OF SERVICE

I certify that on July 22, 2011, I served a copy of this pleading by ordinary mail, postage prepaid on Thomas G. Eagle, 3386 N. State Road 123, Lebanon, Ohio 45036.