

**IN THE TWELFTH DISTRICT COURT OF APPEALS  
BROWN COUNTY, OHIO**

<b>STATE OF OHIO, ex rel</b>	)	<b>CASE NO. CA2009-02-10</b>
<b>DENNIS J. VARNAU,</b>	)	
	)	
Relator/Petitioner,	)	<b><u>RELATOR'S REPLY TO</u></b>
	)	<b><u>RESPONDENT'S RESPONSE IN</u></b>
-vs-	)	<b><u>OPPOSITION TO RELATOR'S</u></b>
	)	<b><u>MOTION TO STRIKE OR DISMISS</u></b>
<b>DWAYNE WENNINGER,</b>	)	
	)	
Respondent/Defendant.	)	

---

Now comes the Relator/Petitioner, by and through counsel, and as his Reply to the Respondent's July 22, 2011, "Reply to Varnau's Motion to Strike," and submits the following Memorandum.

**1. An Objection to Standing is not a challenge to subject matter jurisdiction.**

Lack of standing is a failure on the elements of the cause of action plead. See BAC Home Loans Servicing, L.P. v. Kolenich, 2011-Ohio-3345, ¶ 4 (12<sup>th</sup> Dist.). Subject matter jurisdiction, which cannot be waived, is the power to hear and adjudicate the merits of a case -- not whether a party should or should not prevail *on the merits* (which is what Respondent is arguing). See Rosen v. Celebreeze, 117 Ohio St.3d 241, 2008-Ohio-853, ¶ 45; In re. J.J., 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 11. It does not relate to the *rights of the parties*, but to the *power of the Court*. State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St.3d 70, 75. This Court has subject matter jurisdiction over, and the power to adjudicate, a *quo warranto* action. Ohio Const., Art. IV, § 3(B)(1)(a); O.R.C., Chapter 2733.

Standing on the other hand is a procedural issue, per Civil Rule 17(A) (real party in interest), and here, per R.C. 2733.06. See State ex rel. Tubbs Jones v. Suster, *supra* at 75.

Standing is an affirmative defense that *is and can be waived*. See State ex rel. Tubbs Jones v. Suster, *supra* at 77 ("Unlike lack of subject matter jurisdiction, other affirmative defenses [standing] can be waived."). See also, Adlaka v. Quaranta, 2010-Ohio-6509, ¶ 34-35 (defense of standing waived by not raising on time); Swallie v. Rousenberg, 190 Ohio App.3d 473, 482, 2010-Ohio-4573, ¶ 55-56; National Amusements, Inc. v. Union Twp. Bd. of Zoning Appeals, 2003-Ohio-5434, ¶ 14 (12<sup>th</sup> Dist.) (lack of standing waived by not raising it prior to administrative hearing).

As is so often the case with Respondent's arguments in this case, this one -- standing is equivalent to subject matter jurisdiction and therefore cannot be waived and can be raised at any time -- has been soundly and repeatedly rejected, and again by the Ohio Supreme Court. See State ex rel. Tubbs Jones v. Suster, *supra* at 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); State ex rel. Smith v. Smith (1996), 75 Ohio St.3d 418, 420 ("Issues of . . . standing do not attack a court's jurisdiction . . ."); State ex rel. LTV Steel Co. v. Gwin (1992), 64 Ohio St.3d 245, 251 ("These arguments raise issues of standing . . . ; they do not attack respondent's appellate jurisdiction.").

Nowhere in Respondent's July 12, 2011, Motion to Dismiss is any allegation (or words) raised as to "jurisdiction" of any kind, much less non-waivable subject matter jurisdiction.

**2. This Court has subject matter jurisdiction over this *quo warranto* action.**

Ohio Const., Art. IV, § 3(B)(1)(a); O.R.C., Chapter 2733.

**3. North Carolina *quo warranto* law or procedure is irrelevant.**

If Respondent is correct, no one (in Ohio) could ever succeed in a *quo warranto*

action after an election, and every case cited where that is exactly what happened, in Ohio, is wrong, as anyone who holds the office after receiving the highest number of votes could not be challenged by the next highest vote-recipient.

North Carolina courts have nothing to do with the Ohio Supreme Court's rulings or Ohio Statutes, as applied in State ex rel. Williamson v. Cuyahoga County Bd. of Elections (1984), 11 Ohio St.3d 90, 92, finding that *in a two-person race* the next highest vote recipient, in Ohio (regardless of what they do in North Carolina), is the person entitled to the office in a *quo warranto* action after the "winner" is declared ineligible. Respondent makes no attempt to challenge or even distinguish Williamson. The North Carolina case Respondent relies upon even notes the different rule applied in other states (although not mentioning Ohio). Nonetheless, State ex rel. Williamson is the Ohio rule.<sup>1</sup>

In North Carolina, maybe a "loser" doesn't become a "winner" by disqualifying an ineligible "winner." In Ohio, he does. Disenfranchising of voters is what actually takes place when fraud is present during the voting process, or when an ineligible candidate can get his name on the ballot. The "loser" is the voting public that trusted those with the sworn duty to protect the voting public from ineligible usurpers not entitled to be on the ballot, much less hold office. The voters now have to rely on this Court to correct that error -- Respondent's successive attempts to delay that result notwithstanding -- and it is this Court's power and responsibility to do so.

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

---

**Thomas G. Eagle** (#0034492)

---

<sup>1</sup> As this Court knows, Ohio trial and appellate courts are required to obey the latest ruling from a higher Court. "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 (emphasis added).

Counsel for Relator  
3386 North State Route 123  
Lebanon, Ohio 45036  
Phone: (937) 743-2545  
Fax: (937) 704-9826  
E-mail: [eaglelawoffice@cs.com](mailto: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 27th day of July 2011.

---

**Thomas G. Eagle** (#0034492)