IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	)	**SUPREME CT. CASE NO. 11-1414**
Plaintiff/Appellee,	)	
vs.	)	On Appeal from the Brown County Court of Appeals, Twelfth Appellate District
DWAYNE WENNINGER,	)	
Defendant/Appellant.	)	Court of Appeals Case No. CA 2009-02-10

APPELLANT/CROSS-APPELLEE STATE OF OHIO ex rel DENNIS J. VARNAU'S COMBINED REPLY BRIEF and RESPONSE BRIEF TO CROSS-APPEAL

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TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS, STATUTES:

RULES & REGULATIONS:

ARGUMENT

REPLY ON APPELLANT'S PROPOSITIONS OF LAW:

Proposition of Law No. I:

Evidence of opinions or conclusions that a candidate met legal requirements based on an interpretation of a Statute are not admissible in summary judgment proceedings.

Wenninger states that the Court of Appeals only considered Wenninger's affidavit, some of Varnau's documents, and nothing else, and that Wenninger's affidavit by itself justifies the Court of Appeals' Decision; and that it was not conclusory or inadmissible opinion.

A. Wenninger's Affidavit in inadmissible and is insufficient to justify or defeat summary judgment on his qualifications to hold the office of Sheriff.

Wenninger's Affidavit (attached to March 16, 2009, Motion to Dismiss), at paragraph 4, 8, 9, and 10, states each time only one thing: he thinks he complied with the law cited. His paragraph 4 says he met "all the qualifications" under "Section 3503.01 of the Ohio Revised Code," and also that he "complied with all applicable election laws." He does not say what those "qualifications" are that he met; nor what he did to comply with which election laws. His paragraph 8 says he filed all "necessary" documents "required" by "Section 311.01(B)(7) of the Ohio Revised Code." He doesn't say what documents. His paragraph 9 says his peace officer certificate was "valid," but doesn't say what it is about it to make it "valid." His paragraph 10 says his service as Sheriff caused him to "thus comply" with a supervisory requirement "set forth in Section 311.01(B)(9)." His paragraph 10, and his argument in reliance on it, is a concession that if he ever met the requirements to be a sheriff, it was by holding the office, even if illegally, long enough to cancel a statutory requirement -- a proposition there cannot be precedent for (until now).

These statements in Wenninger's affidavit are all conclusions, without supporting facts, and as to legal -- not lay -- opinion. Bonacorsi v. Wheeling & Lake Erie Ry; Co., 95 Ohio St.3d 314,

2002-Ohio-2220, ¶27-28; Brannon v. Rinzler (1991), 77 Ohio App.3d 749, 756. He was essentially reciting a legal decision, but without stating the supporting facts. There would be no circumstance where at a trial of the issue, his counsel would be permitted to ask him, "Did you meet the requirements of Revised Code 311.01(B)(9) to be a sheriff?" As opposed to "Did you go to any post-secondary school for two years?" "Was that school accredited by the Ohio Board of Regents?" Etc. If the statements would not be allowed as evidence at a trial, they are not allowed for summary judgment, and Wenninger does not suggest otherwise. See, Tokles & Sons, Inc. v. Midwestern Indemnity Co. (1992), 65 Ohio St.3d 621, 631 n.4; Fisher v. Lewis (12th Dist. 1988), 57 Ohio App.3d 116, 117; Olverson v. Butler (1975), 45 Ohio App.2d 9, 11-12.

That content of his affidavit is exactly the problem, and at least in part what the Court of Appeals relied upon. If as Wenninger says it was all the Court of Appeals relied upon, it was error, as without those 4 paragraphs the Court had no evidence to support summary judgment for Wenninger.

Those conclusions in Wenninger's affidavit are also contradicted. No where does Wenninger state that he met the educational requirements to ever be a sheriff in Ohio, and the requirements don't just disappear after time. And that determination is based on the application and construction of a statute, to the undisputed facts that he did not meet those educational requirements, ever. And the other evidence, even that the Court did not strike, and his own deposition, say he does not meet those educational requirements. That statement also contradicts his deposition testimony, that he "didn't know" what the TTI and OBR associations were. Dep. of D. Wenninger, p. 35.

The validity of his peace officer certificate depends upon the construction and application of the Revised Code and Administrative Code. His only claim to his certificate being valid, when he took office in 2008, is the "validation" of it by prior illegal and unqualified service. And the only claim to any "supervisory" service is that same illegal and unqualified service. The

lack of educational credentials, prior to 2001, is why Wenninger's lack of supervisory experience prior to that is relevant, too, contrary to the Court of Appeals' Decision (at ¶38) saying it was "irrelevant." It was relevant to demonstrate that Wenninger had to have the educational qualifications, required by R.C. 311.01(B)(9)(b), to take office, because he didn't have sufficient alternative supervisory experience at the time, either.

Even if the Court of Appeals relied only on his affidavit, that affidavit was improper for summary judgment and insufficient to grant his Motion, or deny Varnau's.

B. Wenninger's, Spievak's, and Callender's Affidavits, are all inadmissible opinion.

The conclusory paragraphs of all three affidavits are an expression of legal opinion: the application of law to stated/unstated fact with the legal conclusion. That is not "lay" opinion under Ohio R. Evid. 701, which is based on observations of facts, and personal knowledge, such as the value of one's own property, or about an event they witnessed or some incident they are personally familiar with (such as footprints or handwriting or voices). See, *e.g.*, Tokles & Son, Inc., *supra* at 625-626; State v. Jells (1990), 53 Ohio St.3d 22, 28-29; State v. Silverman, 2006-Ohio-3826, ¶ 95-96 (10th Dist.). The Court will find no allowed "lay opinion" that someone complied with a law.

Wenninger doesn't address the other deficiencies in the remaining parts of the Spievak, Callender, or the cited portions of his own affidavit: lack of foundation, hearsay reliance on unstated or unincorporated facts, and purely conclusory nature; all independent reasons to deny their consideration and therefore the entire basis for the Court of Appeals' opinion. See Appellant's Brief, October 3, 2011, p. 8-13.

Proposition of Law No. II:

Objections to evidence submitted in summary judgment proceedings are waived when the objections are not raised until after a ruling is made on the merits of the motions, after an initial appeal, and only raised for the first time in a reply memorandum on remand from the appellate court.

Wenninger argues that a court can only consider what Rule 56 provides for -- even without a timely objection. Wenninger would have the Court restate the proposition, as "There can be no waiver of the evidentiary requirements of Rule 56." The logic then would eliminate the entirety of the Courts' jurisprudence of waiver of objections to evidence at trial, waiver of statutory defenses, or waiver of any procedural right or defense -- or provide that Rule 56's requirements are special, although the Rule does not state as much.

The precedent of every other court to consider the issue says otherwise. See Stegawski v. Cleveland Anesthesia Group, Inc. (1987), 37 Ohio App.3d 78, 83 ("Failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering the evidence under Civ. R. 56(C)."); Tye v. Bd. of Educ. of Polaris Joint Voc. School Dist. (1985), 29 Ohio App.3d 63, 66 n.4; Brown v. Ohio Cas. Ins. Co. (1978), 63 Ohio App.2d 97, 90-91. Wenninger submits no authority otherwise, or any authority to support his argument at all. See Appellant's Brief, October 3, 2011, p. 14-15.

It is noteworthy that Wenninger doesn't state that his objections to Varnau's evidence were not waived. He does not argue that his objections were timely. He does not argue that it is a fair application of the law to deny the consideration of evidence that was not subjected to a timely objection, or opportunity to timely cure any deficiency.

Proposition of Law No. III:

Business or public records are "certified" and authenticated for purposes of admissibility in summary proceedings when a custodian of those records states they are the certified records of that business or agency.

Even though waived, and even if not waived, the certified public documents were admissible, and it was error for the Court not to consider them. In Olverson v. Butler, *supra*, the Court

considered the nature of a "sworn *or* certified" (emphasis added) document that may be considered for summary judgment:

> Rule 56(E), as noted above, requires that such papers, *or parts thereof*, shall be "sworn *or* certified." Although it is not determinative in this case, we held, in *Real Estate Capital Corporation* v. *Centaur Corporation*, No. 73AP-137, Court of Appeals for Franklin County, August 28, 1973, *that the paper itself need not include the sworn or certified statement*, but it could be incorporated in the body of the affidavit. Therefore, Mr. Dimond's statement is in sufficient compliance with the rule. It, in effect, meets the requirement that an individual in a position to know has either, *by certification or sworn statement*, stated that the copy is true, and, at least by inference, correct.

Id. at 11-12 (emphasis added). All the controverted documents relevant to this Proposition (see Appellant's Brief, October 3, 2011, p. 15-16) were "certified" by their custodian or otherwise sufficiently authenticated to meet the requirements of the Rules of Evidence and therefore Rule 56. Wenninger's assertion that only an affidavit is proper means to admit a document for summary judgment requires the Court to ignore the "or" and alternative "certified" or "sworn" language of the Rule. The documents here met that test.

Proposition of Law No. IV:

An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate purported to meet the minimum statutory educational requirements for the office by the length of post-secondary education and by attendance at an institution that at the time was not accredited as required by statute.

Proposition of Law No. V:

An elected candidate for county sheriff who did not meet the minimum statutory requirements for the office, upon first taking office, cannot use the period of unqualified service in that office to support later qualification for the same office, and therefore had a statutory "break in service" of four or more years which cancelled the elected candidate's Ohio Peace Officer Training Academy (OPOTA) certificate, making the elected candidate unqualified for the office, and entitles the opposing qualified candidate for the office of county sheriff to a writ of *quo warranto.*

A. The so-called "American Rule" of *quo warranto* does not apply here.

1. The argument has been waived and was not preserved for appeal.

Wenninger cites what he refers to as the "American Rule" that the result of a judicial determination that an office holder is not qualified for the office may be ouster from the office, but not placement of the other candidate in the office. Not only do the facts basing such a rule not exist here, the rule doesn't either.

In the first place, this argument was waived and was not preserved for appeal to this Court. The argument was first and only raised in Wenninger's new Motion to Dismiss filed July 12, 2011. The Court of Appeals, by Order April 15, 2011, set dates and manners for filing "final" arguments on the pending motions, and the July 12, 2011, Motion exceeded it. The Civil Rules also prohibit filing new arguments in the guise of a new Motion. See Ohio R. Civ. P. 15(E) (prohibiting supplemental briefing without leave of court); Ohio R. App. P. 21(H), and 12th Dist. Loc. R. 7 (for scheduling orders for timing of filing arguments), 11(E) (allowing supplemental authority only for what couldn't be in original briefs). All of Wenninger's "new" authority predates his briefs by years and decades. 12th Dist. Loc. R. 12(C) also only allows supplemental authority not cited in briefs *before* oral argument.

This Court will find no argument by Wenninger to Varnau's entitlement to the Writ, if in fact Wenninger was ineligible, prior to July 12, 2011, based on standing or anything else. In fact in various pleadings it could be construed Wenninger conceded that point. Because Wenninger did not make the argument when the opportunity was there, it is out of time and was therefore waived. See Goldfuss vs. Davidson (1997), 79 Ohio St.3d 116, 121.

Wenninger's new argument was also an attempted but successive dispositive motion, and is barred because Wenninger had already filed *one* such, and Ohio courts and the Ohio Rules of Civil Procedure do not countenance successive motions for dispositive relief. The argument was never properly raised or preserved. Wenninger originally filed a motion to dismiss, which the

Court converted to summary judgment, and later filed at least two summary judgment motions (all essentially on the same grounds). The "new" one was therefore procedurally barred. Generally speaking, Civil Rule 12, 12(G), and 12(H), preclude the raising of Rule 12 defenses (except as specified) that could have been raised in an original motion. See, *e.g.*, Martin v. Moery, 1 F.R.D. 127, 128 (D.C. Ill. 1939); Goodstein v. Bombardier Capitol, Inc., 167 F.R.D. 662 (D. Vt. 1996).[1] See also, Harpster Bank v. Saker, 1980 Ohio App. LEXIS 10786, at *9 (3d Dist.); J & F. Harig Co. v. City of Cincinnati (1939), 61 Ohio App. 314, 319; Poplowsky Plumbing Co. v. Rosenstein (Cir. 1912), 19 Ohio Cir. Ct. (N.S.) 387.

Although Rule 12(B)(6) is one of the preserved defenses, the Rule does not provide, and Rule 12(G) in fact prohibits, *successive Rule 12 motions*. And a motion to dismiss for lack of standing, which is what Wenninger is arguing, is a Civ. R. 12 motion. See BAC Home Loans Servicing, L.P. v. Kolenich, 2011-Ohio-3345, ¶ 4 (12th Dist.).

And the "standing" argument is not one of subject matter jurisdiction that of course cannot be waived. Lack of standing is a failure on the elements of the cause of action plead. See BAC Home Loans Servicing, L.P. v. Kolenich, *supra* at ¶ 4. 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 Wenninger 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. The lower Court had 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.

[1]Federal cases are relevant to the issue since the Ohio Rules were modeled after the Federal Rules, and the Staff Notes under the Ohio Civil Rules, including Rule 12, regularly reference and

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 (12th Dist.) (lack of standing waived by not raising it prior to hearing).

Again, that standing is not the equivalent to subject matter jurisdiction and therefore can be waived has been repeatedly rejected, and again by this 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 Oho St.3d 245, 251 ("These arguments raise issues of standing . . . ; they do not attack respondent's appellate jurisdiction.").

No where in Wenninger's July 12, 2011, Motion to Dismiss, or for that matter any where before that in this case, is there any allegation (or words) raised as to "jurisdiction" of any kind, much less non-waivable subject matter jurisdiction.

2. Varnau has standing to bring the Writ and is entitled to it.

Regardless of the procedural deficiencies in the manner Wenninger tried to raise the issue, the argument is substantively without merit. Wenninger argued for the first time that Varnau should not receive the Writ (even if Wenninger is not eligible for the office), due to Varnau not being the "winner" of the election. Relying on other states and misinterpreted and

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cite the Federal Rules and authorities on Federal practice for the interpretation of the Ohio Rules.

misstated Ohio case law, Respondent argues that just because Varnau was the second-highest candidate in votes received, he is not entitled to the office. But in Ohio, which is different than other states, the remedy in *quo warranto* is *statutorily* to remove the ineligible office holder, even if the relator is not entitled to the office. R.C. 2733.14; State ex rel. Handy v. Roberts (1985), 17 Ohio St.3d 1. In addition, the Court's responsibility is to make sure the appropriate order is issued to ensure the person entitled to the office *is actually seated*. See Plotts vs. Hodge (1997), 124 Ohio App.3d 508, 512-513; State ex rel. Judy v. Wandstrat (1989), 62 Ohio App.3d 627, 632; R.C. 2733.08, .14, .17. Here that person is Relator Varnau.

The other states' decisions have nothing to do with this case. As the case primarily relied upon by Wenninger states: "We view the American Rule applicable here *and in any situation where there is an absence of statutory authority to remove the candidate's name from the ballot before the election*." Evans v. State Election Board of State of Oklahoma (Ok. 1990), 804 P.2d 1125, 1131 (emphasis added). In this case, there is abundant statutory authority requiring strict compliance with the removal of an unqualified candidate's name from a ballot, both before and after an election. Even *that Court* would not apply the so-called "American Rule" to this case.

The Ohio decisions cited by Wenninger also don't apply here. In Ohio, "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure 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.'" State ex rel. Dallman v. Franklin Cty. Court of Common Pleas (1973), 35 Ohio St.2d 176, 178-179, quoting Sierra Club v. Morton (1972), 405 U.S. 727, 732, quoting Baker vs. Carr (1962), 369 U.S. 186, 204, and Flast v. Cohen (1968), 392 U.S. 83, 101. One has standing to bring a claim if they are *directly benefited* or injured by the outcome of the case. Shealy vs. Campbell (1985), 20

Ohio St.3d 23, 24. In the *quo warranto* context, the person with standing is the person claiming a right to the office. R.C. 2733.06; State ex rel. Herman v. Klopfleisch (1995), 72 Ohio St.3d 581; State ex rel. Hayburn v. Kiefer (1993), 68 Ohio St.3d 132.

Varnau has that standing as the (undisputed) *only other candidate in the election*, other than the ineligible Wenninger. Wenninger relies on State ex rel. Sheets v. Speidel (1900), 62 Ohio St. 156, for the proposition that the second highest vote recipient was not allowed to assume the office, when the "winning" candidate died before taking office. Wenninger omits the materially different facts in that case, and the subsequent Supreme Court authority explaining why it doesn't apply to this case at all -- or it supports Varnau.

In Speidel, the "winning" candidate died on election day and therefore couldn't take office. The county commissioners appointed a successor -- although the incumbent was still alive. The second-highest vote recipient -- one among *several other living and eligible candidates* -- filed for the Writ, saying that he should have the office because he received more votes than the other eligible (living) candidates. He wasn't challenging the deceased "winner," but the person appointed by the Commissioners; and didn't claim entitlement to the office because the winner was ineligible to run for or hold the office, but because he was dead.

Applying applicable statutes at the time, the Court merely found that because the incumbent's term wasn't filled at all, he never "left" office, and the "vacancy" statutes (commissioners appointing a replacement for deceased office holder) can't be used unless someone takes office and *then* dies or resigns. So the Court concluded that the *appointed sheriff should not hold the office* -- he wasn't properly placed in office -- and *the incumbent* should be instated to it, since he was never lawfully replaced. The only reason the second candidate running was not given the office was because his "ineligible" (deceased) opponent was not the

one who did take the office, *having died*, and there *were other "eligible" candidates on the same ballot* -- so that relator did not receive the *majority* of votes cast for all *eligible* candidates. *Id.* at 157, 159-160. See also, State ex rel. Haff vs. Pask (1933), 126 Ohio St. 633. The case does not even discuss standing. And, it *did* remove the candidate who was not validly holding the office (due to the improper appointment), and instated the one who should have had it -- the incumbent.

On the other hand, between Varnau, and Wenninger, Varnau being *the only lawful candidate*, he *is* entitled to the office. This Court has specifically limited the rule of Speidel to cases where there was *more than one* "eligible" candidate, which is not the case here. Where there are only two candidates and the winner is declared ineligible, the only other candidate is to be given the office:

> We reject as unfounded the Secretary of State's contention that Williamson must have received a greater number of votes than Lambros in order to win the election. *The authority relied upon by respondent is misplaced and inappropriate to the facts under review*. Respondent correctly cites the rule that " '[w]here the candidate receiving the highest number of votes is ineligible to election, the candidate receiving the next highest number of votes for the same office is not elected. Only the *eligible candidate* who receives the highest number of votes for the office for which he stands is elected to such office.' " (Emphasis added.) State ex rel. Halak v. Cebula (1979), 49 Ohio St.2d 291, 293, 361 N.E.2d 244 [3 O.O.3d 439]. See also, State ex rel. Haff v. Pask (1933), 126 Ohio St. 633, 186 N.E. 809, paragraph three of the syllabus [relying upon Speidel, as does this Respondent]. *This rule applies only where, at the time of the election, there was more than one eligible candidate but the candidate receiving the highest number of votes was disqualified or otherwise unable to take office following the election.* In the case at bar, *relator was the only candidate and respondents are under a clear legal duty to count only the votes cast for relator* in the November 3, 1983 election for law director.
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> State ex rel. Williamson v. Cuyahoga County Bd. of Elections (1984), 11 Ohio St.3d 90, 92 (emphasis added in part, in original in part).

In Williamson, there were (as here) only two candidates; the "winner" was declared ineligible (as should be the case here); and therefore the only other candidate, who was eligible, was instated to the office (as should also be the case here for Varnau). *Id.* at 93. The argument Wenninger makes has been expressly addressed, and

rejected, by this Court.

The general rule Wenninger recites in this argument comes from the American Law Reports (ALR). As the Court knows, the ALR provides legal analysis of issues from many legal resources and jurisdictions. The general rules there though do not necessarily reflect Ohio law, and in this case definitely do not. Other cases Wenninger cites, from other jurisdictions, are decided under each of those States' laws, both statutory and case law. Therefore the legal reasoning contained within those decisions cannot be directly relied upon to follow or even make any application of Ohio law.

And the general rule Wenninger suggests ignores its limited application to multiple-candidate contests, an exception/limitation Ohio law directly recognizes. See, Prentiss v. Dittmer (1916), 93 Ohio St. 314 (4 candidates); State ex rel. Clay v. Madigan (1927), 29 Ohio App. 117, 118 (five candidates). And Wenninger has given no reason this Court should reject its precedent that already resolves the same issue. Wenninger makes no attempt to challenge or even distinguish Williamson. Other states that Wenninger relies upon even note the different rule applied in other states (although not mentioning Ohio). Nonetheless, State ex rel. Williamson is the *Ohio* rule.

The Ohio (and other) cases cited by Wenninger also predate Williamson, by decades (almost centuries in some cases), and in any event were expressly limited (by this Court) since. Ohio law regarding elections has transformed many times over the years, and even the election statutes have been revised numerous times since 1900. That particular originating case (Speidel) was a sheriff's election where there were three candidates for the office. Where there were only two candidates on the ballot and the winner is found to be ineligible after winning the election, his votes do not count and the second highest of the two is the winner of the election.

If Wenninger were 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.

In other States, maybe a "loser" doesn't become a "winner" by disqualifying an ineligible "winner." In Ohio, he/she 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 -- Wenninger's successive attempts to delay that result notwithstanding -- and it is this Court's power and responsibility to do so.

In addition, all three Courts that have previously addressed Varnau's quest for the office have not questioned standing at all. The Common Pleas Court based its *mandamus* decision on the fact that Varnau had a *quo warranto* case instead, and the Appeals Court affirmed that legal reasoning. This Court remanded the first ruling by the Court of Appeals on the *quo warranto* case, with a mandate for the Court to adjudicate the "merits" of the case. It seems clear that Varnau's “standing” is not and never has been an issue in this litigation.

B. The "mootness" of a prior unlawful term does not justify or ratify a current term if the same unlawfulness of the service still exists or created a failure to qualify for a current term.

The repeated reliance of the expiration of a prior term of office, to justify illegally holding a current office, turns the law upside down. It literally requires a court to endorse the legality of holding public office only because someone kept the illegality of taking the office unaddressed long enough.

In each case where the "mootness" of a prior term was raised as a defense to *quo*

warranto, it was because the challenged office holder was no longer holding the office, or the defect was in the selection (election or appointment) process, superceded by a new appointment. See Appellant's Brief, October 3,2011, p. 37-41; State ex rel. Paluf v. Feneli (1995), 100 Ohio App.3d 461, 464-465. In State ex rel. Zeigler v. Zumbar, 129 Ohio St.3d 240, 2011-Ohio-2939, there had been three other office holders between the relator and the respondent, and still this Court granted the writ removing the current office holder, due to improper usurpation of the office, rejecting the mootness argument, upholding instead the integrity of the process for obtaining the office. *Id.* at 248-249, ¶ 44. The integrity of an election is not upheld, by allowing an unqualified office holder to keep the office, merely because of a calendar.

"Mootness" has never defeated a *quo warranto* action where a prior term, alleged to have been *taken unlawfully*, was used, as it is here, to justify *continuing* to hold the office, by the same person, unlawfully. Even where the *quo warranto* remedy as to those prior terms are moot, the continuing qualifications to hold that office are not, and can still be enforced as to a current office holder. In fact it appears this Court long ago rejected such a notion, although in a slightly different context (the challenge being the unconstitutionality of a law creating the particular office).

In State ex rel. Wilmot v. Buckley (1899), 60 Ohio St. 273, the Court was addressing the respondents' argument in an action to remove them from the board of elections, that the alleged defect in their office -- the unconstitutionality of a law creating the office they held -- could not be challenged because the statute of limitations had expired since the office was begun -- and longer than some of them had held the office. The Court addressed (in the context of a demurrer to a limitations defense), that they could not be ousted from the current term, because the defect putting them in office (the unconstitutional statute) happened in a prior, unexpired term -- and

the prior term "tacked" onto the current term to protect them from the limitations defense. The argument was rejected, and on appropriately indignant grounds:

> It thus appears that neither one of the defendants has been in *his present office* for the term of three years, and that section 6789, Revised Statutes, can afford them no shield as against an action of *quo warranto, unless one term of office can be tacked upon another*, so that the line of different men holding a certain office under a statute, constitute but one officer for that office for the whole time. *Such a proposition is not tenable, and is absurd upon its face.*
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> * * *
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> *If it were otherwise* the statute of limitations would run, not in favor of the officer, but in favor of the office, and *after three years the constitutionality of the statute creating an office could not be questioned*. The right of the people to protect themselves against unconstitutional laws *would thus become barred within three years after the passage of an act creating an office*.
>
> The statute of limitations in question applies expressly to the officer and not to the office, and when the office is in conflict with the constitution this statute does not prevent the court from so declaring.
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> It is urged that while the members of the board have not been in office under *their present terms* for three years that *the same board of elections has been in existence more than three years, and that therefore the board cannot be ousted*. *This is not sound*, for the reason that the statute is by its express terms for the protection only of officers, and says nothing about the ouster of the board of election or other boards. The board of elections is not an officer, but the men composing the board are the officers.

Id. at 276-277 (emphasis added). Similarly, Wenninger here seeks to be shielded from ouster, because the defect in taking office -- whether it be his education or his certificate -- occurred in a prior term of office, from which he cannot be ousted. The argument serves to do what this Court would not allow more than 100 years ago -- the people being stuck with an unconstitutional law then, and here with an unqualified sheriff, merely because they kept their office long enough. This is not only the absurd result disallowed in Wilmot over 100 years ago, but also this year in Zeigler: "If this were true, an appointing authority could insulate its improper removal of a public officer by appointing multiple persons to the office in quick succession. [Or

here, by being elected to multiple terms before he is challenged]. We decline to interpret the pertinent law to sanction such an unreasonable result." *Id.* at ¶ 13.

Although this case is uniquely bad, because the term of the office, held illegally to start with, is being expressly used to justify keeping it (the term of office, and therefore "supervisory" experience trumping educational qualification). The Court of Appeals relied upon Wenninger's appointment of himself as sheriff after the election, to validate his holding the office. State ex rel. Varnau v. Wenninger, 2011-Ohio-3904, ¶ 44. But, a person "shall not be *elected* or *appointed* unless he meets all the [statutory requirements]." Wenninger did not meet the educational requirements, and began a statutory disqualifying break in service either on January 1, 2001, or December 19, 1999, when he went to the Ripley PD. It is therefore that much worse for a court to allow such an appointment.

C. Wenninger's acquittal for "knowingly" falsifying his credentials to hold the office is nether relevant or admissible and does not establish his credentials for continuing to hold the office.

Wenninger frequently refers to his acquittal (although that is not actually proven in this record), as being significant for multiple reasons. But it is irrelevant, factually and legally. as this Court is aware, an acquittal verdict in a criminal case has no bearing on a later civil case even if on the same facts. The parties, rules of decision, rules of procedure, and objectives in a criminal proceeding differ from those in a civil proceeding. Therefore, an acquittal on a criminal charge is not proof of anything, particularly proof of any fact in a civil case. See Schrader v Equitable Life Assurance Soc. (1985), 20 Ohio St.3d 41, 46; Johns v. State (1981), 67 Ohio St.2d 325, 328; Ohio State Bar Assn v. Weaver (1975), 41 Ohio St.2d 97, 99-100.

This is particularly true where the elements of the offense charged included "knowingly" falsifying his credentials, so that the acquittal could be either reasonable doubt that he "knew" he

was without the credentials, as much as anything else. And it could just as easily be said that, if he was qualified to run for the office in 2000, he wouldn't have been indicted at all, nor would the court have had grounds to submit his case to a jury, which it did. See State v. Wenninger, 125 Ohio Misc.2d 55, 58, 2003-Ohio-5521.

In addition, Wenninger's frequent references to the content and events of that case (other than the part that is in the reported public record[2]), although not in this record at all (see Appellee's Brief, p. 11), should be disregarded in its entirety, as not being proven in the record, but more importantly because Wenninger successfully had those records sealed. See State v. Wenninger, 2010-Ohio-1009 (12th Dist) (affirming order denying Varnau's motion to unseal the records of Wenninger's criminal case). Wenninger should not be permitted to at the same time refer to that "record," and prevent others from being able to do the same. See R.C. 2953.54 (prohibiting in certain situations the disclosure of sealed records). If this case were to be remanded for any reason (such as a trial), the Court should order the unsealing of those records, to confirm or refute the constant unsupported references to it by Wenninger.

D. Wenninger did not prove he was qualified to hold the office and Varnau proved he was not.

Wenninger's only support for his claim that he ever met the qualifications to hold this office, is his reference to the conclusory opinions on the result of application of the law to facts related to them, by Spievak and Callender. But to rely on those statements, the Court had to rely on the conclusions. The conclusions though were based on the review of documents that were not provided or attached, and therefore were hearsay, and were stricken. So the Court had to rely on statements that were not stricken, but the factual basis for the statements were. Mere conclusory allegations on behalf of a movant -- which is what this Court of Appeals relied upon

[2] See State v. Wenninger, 125 Ohio Misc.2d 55, 58, 2003-Ohio-5521.

(State ex rel. Varnau v. Wenninger, 2011-Ohio-3904, ¶ 35, 43-46) are not sufficient to overcome the burden of proof on summary judgment, and for that reason alone the Judgment cannot stand. Sethi v. WFMJ Television (1999), 134 Ohio App.3d 796.

The statements (referred to by Wenninger) that a "diploma" was a "two-year" diploma, also relies on the "diploma," which says nothing about "two years." And, it couldn't be for two years, as Wenninger didn't attend but for no more than 14 months. During that time (when the diploma was issued), and in fact from Wenninger's high school diploma, June 8, 1986, to TTI "graduation," October 23, 1987, was *a summer and one-year* of school. D.Wenninger p. 4, 7. The Statute doesn't allow merely getting a two-year diploma, but attending post-secondary accredited school *for two years*. It is the time, not the paper that counts. Wenninger conclusively didn't put in the time, much less at the correct school (Wenninger did not meet 311.01(B)(9)(b), because his school of graduation was under R.C. Chapter 3332, not 1713). It is also impossible to have complied at the school he attended and he doesn't argue otherwise. Appellant's Brief, Oct. 3, 2011, p. 22-30.

At the very least, the conclusion in the affidavit that the paper was a "two year" diploma, versus Wenninger's own admissions he didn't attend for two years, was a disputed fact that could not result in summary judgment for him.

Again, the entire factual basis for Wenninger's defense, and for the Court of Appeals' sustaining of it, either doesn't exist, is inadmissible, is factually wrong, or is at least disputed.

ARGUMENT IN RESPONSE TO APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW:

Response to Cross-Appellant's Sole Proposition of Law:

An unsuccessful petitioner in an action in *quo warranto* is not automatically liable for reasonable attorney fees in addition to costs.

The Court will find nothing in this Record showing Wenninger ever demanded, or objected

to the failure of, the county prosecutor's representation of him in this case. In fact, the County Prosecutor did participate in this case, in responding to and addressing discovery issues directed to other County offices. See Subpoena to Brown County Prosecutor, May 22, 2009; Motion to Quash, June 1, 2009; Withdraw of Motion by Brown County Prosecutor and deposit of records, June 23, 2009; Motion for Emergency Order by Brown County Prosecutor, July 14, 2009.

The representation of a county officer by private counsel is also authorized by law, R.C. 305.14. Whether there was a conflict of interest in defending Wenninger's right to office against a private complaint, after having indicted Wenninger for the same thing, also does not appear of record (one way or the other), but is also justification for private representation. See State ex rel. Corrigan v. Seminatore (1981), 66 Ohio St.2d 459.

Wenninger complains about something the Record provides no support for.

In addition, Wenninger has provided no support for any award of fees, much less error by the Court for not awarding it. As the Court knows, all parties are required to bear their own attorney fees, even if successful in litigation, unless there is statutory authority to shift fees to the non-prevailing party. State ex rel. Caspar v. Dayton (1990), 53 Ohio St.3d 16, 21. Wenninger cites R.C. 309.13, relating to taxpayer lawsuits, the application of which to this case is not understood. Wenninger does not assert, much less prove, bad faith, vexatiousness, or wanton, obdurate or oppressive conduct on Varnau's part, and couldn't, considering the authority (factually and legally) for Varnau's positions taken, and an indictment and trial making the same allegations.

The fact that the *quo warranto* statutes provide expressly for an award of compensation to a successful relator (R.C. 2733.14, 2733.18), but not to a successful respondent, merits a determination that distinction was on purpose, barring Wenninger's claim.[3] The statute addressing an award in this *specific* context would also override any *generic* statutes that Wenninger mentions. R.C. 1.51.

In addition to not demonstrating any statutory authority for a claim of fees[4], Wenninger presented no proof of any fees to be awarded. He complains about the Court not awarding something he not only did not prove entitlement to, but also did not prove the existence or amount of. The Court was therefore without any ability to award anything. Bittner v. Tri-County Toyota, Inc. (1991), 58 Ohio St. 3d 143 (CSPA case). Even in instances where fees could or should be awarded, the decision to assess or not assess and the amount are within the sound discretion of the trial court. State ex rel. Doe v. Smith, 123 Ohio St.3d 44, 47-50, 2009-Ohio-4149, ¶ 20-32 (public records case); Wiltberger v. Davis (1996), 110 Ohio App.3d 46.

In exercising its discretion in the award of fees the trial court must make an award based upon the *actual value* of the *necessary* services. See Bierlein v. Alex's Continental Inn, Inc. (1984), 16 Ohio App.3d 294. The reasonableness and necessity of fees is to be determined by consideration of the factors set forth in Ohio R.P.C. 1.5 (formerly D.R. 2-106(B)). See, *e.g.*, Bittner vs. Tri-County Toyota, Inc., *supra* at 145 (CSPA case); McCoy vs. McCoy (1993), 91 Ohio App.3d 570, 583 (divorce case). Without *evidence* on those factors a court is precluded from making any award of fees. McCoy, *supra* at 584. Without such evidence to justify a fee a court is precluded from making a determination of reasonableness and therefore *any fees are unproven*. Disciplinary Counsel vs. Farmer, 111 Ohio St.3d 137, 146, 2006-Ohio-5342 ¶ 43 (citations omitted). Wenninger neither proffered nor attempted to present any such evidence.

And, none of Wenninger's arguments suggest an award of fees is mandatory, and therefore the denial is at best an abuse of discretion. The denial of an unspecified, vague, unproven, and unsupported claim for fees would not be an abuse of discretion under the circumstances of this case.

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[3] *Expressio unius est exclusio alterius*; see Appellant's Brief, Oct. 3, 2011, p. 22 n.7.

[4] Wenninger is barred from raising any new statutory authority for the first time in his Reply. It is not just improper to raise an issue for the first time in a reply, it is "forbidden." State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State University, 129 Ohio St.3d 111, 118, 2011-Ohio-2881, ¶ 40.

See, Reagans v. MountainHigh Coachworks, Inc., 117 Ohio St.3d 22, 32, 2008-Ohio-271, ¶ 39 (consumer case); Charvat vs. Ryan, 116 Ohio St.3d 394, 401, 2007-Ohio-6833 (consumer case).

CONCLUSION

For the reasons previously stated and those stated above, it is respectfully requested that the August 8, 2011, Judgment of the Twelfth District Court of Appeals be reversed, the writ of *quo warranto* issue removing Appellee Wenninger from office and instating Appellant Varnau to it; and/or that Judgment for Wenninger dismissing the case be vacated; and/or to make all other orders necessary and appropriate under the law. It is also requested that the suggested Proposition of Law presented by Cross-Appellant be overruled and the denial of attorney fees to Wenninger be affirmed.

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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 11th day of November 2011.

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Thomas G. Eagle (0034492)