

ORIGINAL

BEFORE THE CHIEF JUSTICE  
OF THE SUPREME COURT OF OHIO

JOSHUA O'FARRELL,

Contestor,

v.

AL LANDIS,

Contestee,

and

TUSCARAWAS COUNTY BOARD OF  
ELECTIONS, et al.,

Respondents.

Case No. 2012-2151

*Election Contest Subject to R.C. 3515.08,  
R.C. 3515.14 and Section 6, Article II,  
Ohio Constitution*

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**CONTESTEE AL LANDIS' MEMORANDUM IN OPPOSITION TO  
CONTESTOR'S MOTION TO COMPEL PRODUCTION OF BALLOTS  
PURSUANT TO RULE 37 AND TO EXTEND DEADLINE IN WHICH TO SUBMIT  
EVIDENCE PURSUANT TO THE OHIO REVISED CODE 3515.146.**

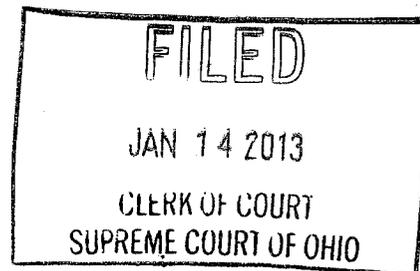
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Contestor Joshua O'Farrell's 11th hour motion seeking to compel documents and extend the deadline to provide evidence to support his claims should be denied. At the heart of this motion is the interplay between the ballot security provisions of Title 35 of the Ohio Revised Code and the discovery rules of the Ohio Rules of Civil Procedure.<sup>1</sup> Contestor concedes, as he must, that his motion to inspect would fail under the Title 35, which does not contemplate that ballots – required to be at all times secured – would be the subject of a private litigant's request for production. Mr. O'Farrell has already filed – and lost – a motion and an amended motion with this Court seeking the very production he seeks now under Title 35.

At 4:00 pm on the last filing day before his evidence is due, Mr. O'Farrell has decided to try again, this time advancing the argument that the Ohio Civil Rules trump, in an election contest, the provisions of Chapter 3515 that set out the process for deciding an election contest. Because that position is contrary to the Ohio Constitution and settled law in this state, the motion should be denied in its entirety.

**1. The Ohio Rules of Civil Procedure are inapplicable to election contests.**

The Ohio Rules of Civil Procedure provide that they are not to apply in “special statutory proceedings.” Civ.R. 1(C) (“These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedures ... in all other special statutory proceedings”). Mr. O'Farrell acknowledges the point, but says, without analysis, that the Civil Rules are not “clearly inapplicable” to election contests and therefore the Civil Rules trump conflicting procedural

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<sup>1</sup> While Contestor waited until January 11 to explore the interplay between the Ohio Civil Rules and the ballot security provisions in Title 35 (and then reached the wrong conclusion), he certainly understood Mr. Landis' position that Rule 34 – insofar as it might have application to ballots – was subordinate to Title 35 from the very first objection Mr. Landis made to Contestor's Rule 34 Request for Production of ballots. See December 28, 2012 letter to Robert Stephenson, attached as Exhibit A to Contestee's Memorandum in Opposition to Amended Motion, filed January 7, 2013.

statutes in an election contest. *See, e.g.*, Memo in Support of Motion, January 11, 2013, at 2 (“the Ohio Rules of Civil Procedure control the procedure for discovery mailers over any conflicting statutory provisions pursuant to Rule 1”); Contestor’s Response to Show Cause Order, January 11, 2013, at 5 (“to the extent any statutory provision is contradictory to the Ohio Rules of Civil Procedure on a procedural matter, the Rules control”).

Contestor’s new-found position is directly contrary to settled Ohio law. *Williams v. O’Neill*, 52 N.E.2d 858, 142 Ohio St. 467 (Ohio 1944) (at paragraph 2 of the Syllabus: “Proceedings to contest an election are special and summary in nature, and the **procedure prescribed by statute** to bring an election contest within the jurisdiction of the specified authority **must be strictly observed**” emphasis added); *McCall v. Board of Ed., Eastern Local School Dist.*, 157 N.E.2d 351, 353, 169 Ohio St. 50, 52 (1959) (“the procedure prescribed by statute to bring an election contest within the jurisdiction of a court must be strictly followed”).

Those cases were both decided prior to Ohio’s adoption of the Civil Rules. But the holdings flow directly from the Ohio Constitution’s grant – to the General Assembly and not to the Courts – of the authority to determine the procedure to be followed in an election contest:

The general assembly shall determine, by law, before what authority, and ***in what manner***, the trial of contested elections shall be conducted.

Ohio Constitution, Art. II, Section 21  
(emphasis added).

*See, e.g., Foraker v. Township of Perry Rural School Dist. Bd. of Ed.*, 199 N.E. 74, 130 Ohio St. 243 (1935) (paragraph 2 of the Syllabus: “The procedure prescribed by the General Assembly for the determination of election contests ... is within the power conferred upon it by the Constitution, and is exclusive”). Those principles remain in place today, as this Court recognized in adopting Supreme Court Practice Rule 14.02 in 2010:

Contests of an election brought pursuant to R.C. 3515.08 shall proceed in accordance with the applicable provisions of R.C. Chapter 3515.

Any other conclusion would not only be Constitutionally impermissible, but it would make no sense. Thus, for example, a foremost goal in election litigation is to reach a final conclusion expeditiously. *Jenkins v. Hughes*, 157 Ohio St. 186, 189 (1952) (“The public interest in having election contests speedily determined requires promptitude”). In recognition of that goal, R.C. 3515.10 requires that a contestee file an answer within “ten days from the time service has been made upon him” and contestor has “five in which to reply to the answer of the contestee.” In contrast, the Civil Rules provide that the “defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him.” Civ.R.12(A)(1). Under Contestor’s logic, because Civil Rule 12 conflicts with R.C. 3515.10, the 28-day period of the Civil Rule would control and the election contest would grind to a halt. Given the speed in which these matters are to be resolved, it is not practical or even possible for the Civil Rules to apply. Those rules are “by their nature ... clearly inapplicable” to an election contest. Ohio Civil Rule 1(C).

In *Sekas v. Wohl*, the Eight District Court of Appeals held that “[g]iven the special statutory nature of election contest proceedings, the trial court was not bound by the formalities enumerated in Civ.R. 41(B)(1). Case No. 52927, 1987 WL 4949, at \* 2 (8th Dist. 1987). At issue in that case was exactly the question of whether the Ohio Civil Rules apply to a statutory election contest under Chapter 3515. The conclusion of the court was a clear no:

The court, however, was not bound by the requirement of Civ. R. 41(B)(1) due to the special statutory nature of an election contest. Specifically, Civ. R. 1(C) provides the civil rules do not apply to special statutory proceedings. Civ. R. 1(C)(7).

*Id.*

Beyond the issue of the applicability of the Civil Rules, Contestor's Motion is nothing more than a motion for reconsideration of this Court's prior ruling and should be summarily dismissed for the reasons that were set out in the pleadings on Contestor's prior motions.

**2. Contestor did not even comply with the Civil Rules he now wants applied.**

Even if the Civil Rules applied, Contestor would still is not entitled to the relief he seeks. Civil Rule 34(B) provides "[w]ithout leave of court, the request may be served upon the plaintiff after commencement of the action *and upon any other party with or after service of summons* and complaint *upon that party.*" (emphasis added). Respondent Tuscarawas Board of Elections had not been served the Complaint at the time Contestor served his Request for Production of Documents pursuant to Civil Rule 34 on December 27, 2012. In fact, as of January 11, the Tuscarawas Board of Election still had not been served with the Petition. Response to Show Cause Order, 4 ("To the date of this writing, no service has yet been made on Respondent Board"). There can be no motion filed under Rule 37 for failure to make discovery when the underlying request for production of document has not even been served properly. And certainly the time for its response has not expired.<sup>2</sup>

Contestor has no basis, under the Ohio Constitution or the law of this state, for his Rule 37 motion. Nor is there any basis for an extension of the time for the filing of Contestor's evidence. Mr. O'Farrell knew on January 3, 2013, that the Tuscarawas County Board of Elections was not going to permit further inspection or copying of the ballots he requested. He knew on January 8, 2013, that the Tuscarawas County Board of Elections had been ordered to "place all ballots under seal, and allow no further inspections of such ballots pending further

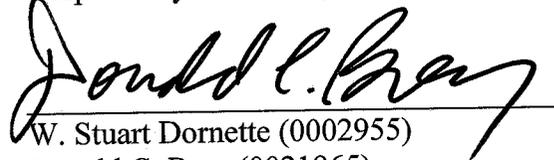
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<sup>2</sup> Contestor makes no attempt even to meet the requirements of the very rule he seeks to enforce. Ohio Civ. R. 37(E) requires pre-filing discussion with counsel before a motion can be filed and a certification as to that discussion in the motion. Neither was attempted.

orders from the Chief Justice.” From the entry of that order, Contestor could not have reasonably believed that the Board would violate that order and allow him to inspect the ballots.

Contestor knew his evidence is due to be submitted to the Court by 5:00 on Monday, January 14. Contestor has taken 18 depositions, all of which have been transcribed. Contestor has not requested any additional discovery since his last deposition was taken on January 7, and has no need for an extension of time to file any of the discovery that has been sought and obtained to date. Since he has no right to compel production of the now sealed ballots, Contestor has no basis for extending the deadline to file his evidence. His untimely and meritless request should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

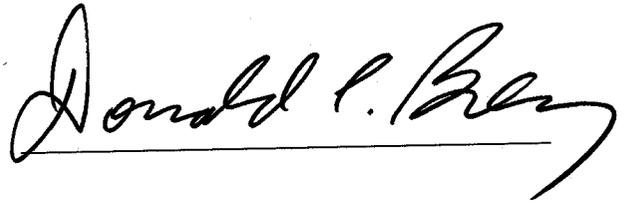
The undersigned hereby certifies that a true and correct copy of the foregoing was served this 14th day of January, 2013 on the following by e-mail:

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A handwritten signature in black ink, reading "Donald L. Berry". The signature is written in a cursive style and is positioned to the right of the typed names. A horizontal line is drawn underneath the signature.