

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

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CIRCUIT CLERK
LINCOLN CO., W.V.

TERRY HILL,

Plaintiff,

v.

CIVIL ACTION NO. 06-C-52

GREGORY BRENT STOWERS,

Defendant.

FINAL ORDER:

Granting Rule 12(b)(6) Motion to Dismiss

Procedural Posture

On the 24th day of September, 2007, correspondence was forwarded from Bruce A Kayuha, Chief Counsel for the Supreme Court of Appeals, on behalf of the Chief Justice, Robin J. Davis, in response to this Court's fourth and final request for a review and consideration of the Plaintiff's counsel's Motion for Disqualification, filed in accordance with the applicable provisions of Rule 17.01 of the West Virginia Trial Court Rules. In that correspondence, Chief Counsel advised this Court and the respective parties by separate copy thereof that following the Chief Justice's further review of the most recently submitted materials there was nothing to alter the Court's prior Administrative Order of April 17, 2007, and that as a result thereof, said Order "will stand".

WHEREUPON, with the response from the Supreme Court, the Court has determined that it is necessary and proper to continue and to conclude its review and consideration of the

Defendant's Rule 12(b)(6) Motion, given the Court's determination that the matter is now procedurally mature and ripe for a decision by this Court, all as outlined hereinafter.

Discussion of Facts and Law

On June 6, 2006, the Plaintiff, Terry Hill, filed a Complaint against the Defendant, Gregory Brent Stowers, alleging that the Defendant, Stowers, had engaged in election fraud during the 1996 write-in election for Clerk of the Circuit Court of Lincoln County. The Plaintiff further alleged damages stemming from this alleged fraud. On September 15, 2006, Defendant Stowers moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure stating that it is based upon a claim for which relief cannot be granted. While continuing to process the Plaintiff's WVTCR 17.01 Motion, the Court not only considered the Plaintiff's Motion and the supporting information and materials, the Court contemporaneously at the request of the Plaintiff, considered and forwarded for review by the Chief Justice, the Defendant's Motion to Dismiss the Complaint, together with the accompanying Memorandum of Law in support of such motion; the Plaintiff, Hill's, Response to the Motion to Dismiss; the Defendant's Reply to Plaintiff's Response to the Motion to Dismiss, the Complaint itself, and all relevant case law on the subject matter.

Preliminarily, the Court notes that the standard for reviewing such WVRCP Rule 12(b)(6) Motion(s) is that which is outlined in Collia v. MCjunkin, 178 W. Va. 158, cert. denied, 484 U. S. 944 (1987), wherein the our Supreme Court ruled that a trial court may dismiss a pleading for failure to state a claim upon which relief can be granted, pursuant to subdivision (b)(6) of this rule. The purpose of a motion under subdivision (b)(6) of this rule is to test the formal sufficiency of the complaint. Further, our Court noted in Harrison v. Davis, 197 W. Va. 651 (1996) that such a Rule 12(b)(6) Motion allows the Court to weed out unfounded suits.

There is a tendency, however, during this stage in a proceeding to be tempted to go beyond the initial issues and stray into matters beyond the pleadings. Should such occur, or be argued to have occurred, then the issue is one of whether Rule 12(b)(6) analysis is proper, or in the alternative, whether Rule 56(c) Summary Judgment analysis is proper. On this issue, our Supreme Court has held that when matters outside the pleadings are presented, such as depositions or interrogatories, the Court may consider them and treat them as motions for summary judgment [see Calacino v. McCutcheon, 177 W. Va. 684 (1987), also Hively v. Merrifield, 212 W. Va. 804 (2002)]. Here, the parties have conducted little or no discovery, particularly given the stays, or argument over staying discovery, as a result of the operative provisions of Rule 17.01 and given the impact of the Plaintiff's four (4) respective 17.01 Motions/Requests for review by this Court as well as the Chief Justice. Thus, while the Court has resultingly been aware of all of the information, materials and arguments regarding the nature of the Plaintiff's WVTCR Rule 17.01 Motion, the Court has been, and does hereby, expressly consider ONLY those matters raised and argued in relation to the Defendant's WVRCP Rule 12(b)(6) Motion in making the Court's findings and conclusions, as they are hereinafter set out.

Synoptically, then, the Court notes that it has determined within this WVRCP Rule 12(b)(6) analysis as a matter of law that under these allegations of fact and law: (1) the elected position of Clerk of the Circuit Court is a matter of public domain; (2) the Plaintiff has no constitutionally or legally recognized property interest in such position; (3) there is no recognized private right of action for losing electoral candidates; (4) there is no public policy recognized at law for awarding monetary damages for losing electoral candidates; (5) this Court does not have original jurisdiction to preside over an election recount or election contest; and, (6) the Plaintiff did not

heretofore file a timely notice to recount or to contest the 1996 general election, the results of which he now complains. Accordingly, this Court has determined that it is just and equitable at this time to GRANT the Defendant's Motion to Dismiss, filed pursuant to the controlling provisions of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, the Court based upon those record matters noted herein does hereby make the following findings of fact and conclusions of law:

[1] That this Court has the statutory and Rule-based jurisdiction and venue to issue this decision, based upon the points and authorities cited herein, but does not have statutory or Rule-based jurisdiction and venue to entertain the litigation of this case on the merits any further; and,

[2] That within that context, the Court has further determined that in accordance with WCTCR Rule 22.02, this Court has the discretion to give motions to dismiss priority status, provided that such motions are designated prominently as a motion to dismiss and filed as a separate motion. The present WVRCP Rule 12(b)(6) Motion to Dismiss was filed on September 15, 2006, and it has been fully argued in support of and in opposition to as such a Motion to Dismiss. Not only has it been so treated by the Court, but the information, materials and record for it as such has been forwarded to the Supreme Court, as expressly requested by the Plaintiff's counsel, for the review and consideration of all of such by the Chief Justice. Given its posture as such, it is now necessary and proper for this Court to determine of this issue at this time, particularly in the interests of justice and

the interests of judicial economy; and,

[3] That as alleged in the Complaint, the Plaintiff seeks to collect monetary damages as the losing candidate in the 1996 write-in general election campaign for the Clerk of Circuit Court of Lincoln County, West Virginia. Mr. Hill, the Plaintiff, contends that he has the following legally recognized causes of action:

- (a) The Defendant has deprived him of his constitutional right to run for and hold public office;
- (b) The Defendant has unlawfully deprived him of the office of Circuit Court Clerk;
- (c) The Defendant has been unjustly enriched and has improperly benefitted by the compensation, benefits and emoluments of office, all to the detriment of the Plaintiff; and
- (d) The Defendant is liable to him for money damages resulting from the Defendant's violation of public policy in West Virginia pertaining to free and fair elections.

[4] That within the analytical framework noted above, the Court notes that the law has historically held that public elections and public offices have long been deemed matters of public domain, rather than of private right. As a result, there is no property right vested in the candidates themselves. [e. g. Taylor v. Beckham, 178 U.S. 548 (1900); Snowden v. Hughes, 321 U.S. 1 (1944); and, Shields v. Booles, 238 Ky. 673, 38 S.W.2d 677 (1931)]; and,

[5] That while the law is clear that the Plaintiff does have a constitutional right to run for office, contrary the allegations of the Plaintiff, he does not have a fundamental constitutional right to win. State ex rel. Billings v. City of Point Pleasant, 194 W. Va. 301 (1995). Both winners and losers contribute to the electoral

process, and therefore, it is unnecessary to compensate losers of electoral contests for the natural result of the democratic process; and,

[6] That given such determinations of law as well as public policy, the Plaintiff's allegations of fact and his allegations of law does not support his claim of an injury that rises to the level of an actionable claim in this State; and,

[7] That within the peculiar context of the bases of such a claim or cause of action, the Court notes that the Plaintiff's alleged cause of action does not exist at common law, and this Court does not believe it proper to create such a cause of action, particularly given the historical antecedents. Meisel v. O'Brien, 142 W. Va. 74, 77, 93 S.E.2d 481, 483 (1956) (election to political office unknown at common law), citing, Taylor v. Beckham, 178 U.S. 548 (1900); State ex rel Daugherty. v. Lincoln County Court, 127 W. Va. 35, 31 S.E.2d 321 (1944); State ex rel. Myers v. Garner, 148 W. Va. 92, 133 S.E.2d 82 (1963); State ex rel. Hager v. Oakley, 154 W. Va. 528, 530, 177 S.E.2d 585, 587 (1970); and,

[8] That from the Court's review of the constitutional and statutory framework for addressing such allegations arising from the electoral process, there is no doubt that the appropriate remedy for an unsuccessful candidate for public office to contest any perceived grievances must be found at either constitutional or statutory law. The alleged offense is one that must be redressed by election re-count; or by election contest; or, by subsequent prosecution. {See West Virginia Code §§ 3-7-6 and 3-7-7}; see also Code §§ 3-8-12 and 3-8-13; Shields, 238 Ky. at 679; See also, Hutchinson v. Miller, 797 F.2d 1279 (4th Cir. 1986), cert. denied, 479 U.S. 1088 (1987). There are no allegations whatsoever in the Complaint that the Plaintiff did timely or appropriately demand re-count or contest the 1996 election of which he now complains; and,

[9] That assuming *arguendo* that the Plaintiff had presented an actionable claim, this Court would be required to dismiss this case, given the extraordinary and prohibitive passage of time, this Court would lack original jurisdiction to hear such an election contest or dispute. In that regard, such original jurisdiction to hear an election contest is vested in the County Commission of the County in which the election is held, and in such an instance, the Circuit Court may only sit on appeal of any decision of the County Commission. See West Virginia Code § 3-7-7; Evans v. Charles, 133 W. Va. 463, 474, 56 S.E.2d 880, 885 (1949); Hager v. Oakley, 154 W. Va. 528, 530, 177 S.E.2d 585, 587 (1970); and,

[10] That moreover, assuming *arguendo* that the Plaintiff had presented an actionable claim, and even further assuming *arguendo* that this Court did possess the original jurisdiction to hear it, the Plaintiff has failed to file a proper contest of the election within the statutory time frame as required by the West Virginia Code. (see Code § 3-7-6). Under the statute, Plaintiff was required to give notice of his contest of the election within ten (10) days after the result of the election was certified. *Id.* Because the democratic process necessarily places great emphasis on the finality of elections, this time frame is mandatory and must be strictly satisfied. [see Code § 3-7-6, as well as State ex rel. Staley v. Wayne County Court, 137 W. Va. 431, 439, 73, S.E.2d 827, 832 (1953)]; and,

[11] That this time period must be strictly satisfied, even as to alleged fraud or illegality (see Staley, 137 W. Va. at 439, 73 S.E.2d at 832). The election now complained of by the Plaintiff, i. e. the 1996 general election, occurred more than ten (10) YEARS prior thereto, and NOT ten (10) DAYS prior thereto; and,

[12] That as a result, the Plaintiff has failed to provide the required notice of election contest within the time frame set forth; and,

[13] That within the same context, the Defendant's December 29, 2005, guilty plea regarding the 2004 Election does not afford the Plaintiff more time in which to contest this election. The Plaintiff was required to file a timely notice of election contest, and had he done so, he could have been provided with an opportunity to amend his notice to include any possible allegations arising from alleged misconduct with regard to the 1996 Election (but not the 2004 Election). [see Code § 3-7-6; see also, this Court's and the Supreme Court's ruling in Miller v. County Commission of Boone County, 208 W. Va. 263, 267, 539 S.E.2d 770, 774 (2000); and,

[14] That given these statutory requirements, it is clear that the Plaintiff failed to file timely statutory notice, and as a result, any such claim is obviously now barred; and,

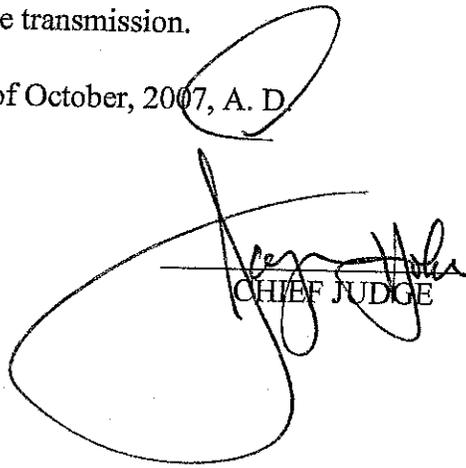
[15] That in regard to the Plaintiff's arguments regarding the public policy considerations supporting this cause of action, the Court has determined that it would be ruling expressly contrary to such public policies should it allow the losing party in an election to collect monetary damages from his opponent. For this Court to permit compensation to a losing party in an election would place undue burden on both the political and judicial processes. (See, e.g., Hutchinson, 797 F.2d 4 1279, 1280. Furthermore, should this Court determine that it is proper under this cause of action to allow courts to award monetary damages to losing candidates, it is without question to this Court that such could also provide systemic incentives for affected candidates to ignore the established procedures for challenging an election, and would thereby achieve the very purposes that the Court's ruling in Hutchinson sought to defeat. Id.at 1286. The legitimization of allowing the losing party to collect monetary damages "would bear very little relationship to the larger public interest in partisan debate and competition undeterred by the prospect of a post-election suit for damages." Id. at 1285. Thereby, such would enhance a negative public policy not the positive public policy arguments articulated by our Courts.

[16] That as a result of all of which, the Court has determined that it is just and equitable, as well as necessary and proper, to **GRANT** the WVRCP Rule 12(b)(6) Motion filed in this matter by the Denfendant; and, correspondingly, it is in the interests of justice as well as judicial economy to **DISMISS** this case at this time, all subject to the **OBJECTIONS AND EXCEPTIONS** of the Plaintiff.

All of which is hereby ORDERED, ADJUDGED AND DECREED.

It is further hereby ORDERED, AJUDGED AND DECREED that the Clerk of this Court shall provide notice of the issuance of this Final Order following its entry by forwarding a certified copy hereof upon all of the respective parties hereto, by counsel as appropriate, in accordance with the applicable provisions of Rules 10.01-12.06, as well as Rule 24.01, of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested; by hand delivery; or by facsimile transmission.

ISSUED on this the 1st day of October, 2007, A. D.



CHIEF JUDGE

CERTIFIED A TRUE COPY OF AN ORDER
DULY ENTERED IN

Order Book # 101 Page 20
Entered even under my hand
Order Book # 101 Page 20
Circuit Clerk Lincoln Co. WV
Term _____, 20____
Charles Brimfield, Clerk