

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

December 29, 2004

MOTION AND PROCEDURAL RULINGS

2004-1979. Chase Manhattan Mtge. Corp. v. Frazier.

Knox App. No. 2003-CA-31, 2004-Ohio-5523. This cause is pending before the court as a discretionary appeal and claimed appeal of right. Upon consideration of appellants' motion for stay of the decision of the court of appeals,

IT IS ORDERED by the court that the motion for stay of the decision of the court of appeals be, and hereby is, denied.

2004-1997. Natl. City Bank v. Frazier.

Knox App. No. 2003-CA-30, 2004-Ohio-5562. This cause is pending before the court as a discretionary appeal and claimed appeal of right. Upon consideration of appellants' motion for stay of the decision of the court of appeals,

IT IS ORDERED by the court that the motion for stay of the decision of the court of appeals be, and hereby is, denied.

2004-2031. In re C.R.

Cuyahoga App. No. 82891, 2004-Ohio-4465. This cause is pending before the court on the certification of a conflict from the Court of Appeals for Cuyahoga County. Upon consideration of appellant's motion for stay of the court of appeals' judgment,

IT IS ORDERED by the court that the motion be, and hereby is, granted.

Lundberg Stratton, J., dissents.

2004-2088. Moss v. Bush.

On Petition to Contest Election. This cause originated in this court on the filing of a petition to contest an election under R.C. 3515.08 et seq. Upon review of contestors' motion for emergency expedited hearing and emergency expedited relief to prevent spoliation of evidence and to preserve documentary and electronic

evidence, and upon review of the response of contestees Blackwell and the Presidential Electors filed pursuant to S.Ct.Prac.R. XIV(4)(B) and (C), I conclude that the motion lacks merit for the following reasons:

The contestors rely on three exhibits attached to their motion. Their first, and principal, exhibit is claimed to be an affidavit of Hocking County Board of Elections Deputy Director Sherole Eaton. This exhibit states that a representative of Tri Ad, a computer company that maintains the voting machines and vote tabulators in Hocking County, manipulated the computer and tabulation machine on December 10 just prior to the start of the recount of the presidential election in Ohio.

This exhibit, however, does not qualify as an affidavit. Although the exhibit contains the signature of both Eaton and a purported notary public, there is no specification that the statement is made under oath by Eaton or is based on her personal knowledge. In fact, much of the document is a recitation of statements purportedly uttered by someone else and thus is inadmissible hearsay. Nor is there any statement that the alleged notary witnessed Eaton's signature. See R.C. 2319.02 ("An affidavit is a written declaration under oath"); *State ex rel. Ditmars v. McSweeney* (2002), 94 Ohio St.3d 472, 475, 2002-Ohio-997, 764 N.E.2d 971 (ordinary and common meaning of affidavit is a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths"); *State ex rel. Evergreen Co. v. Franklin Cty. Bd. of Elections* (1976), 48 Ohio St.2d 29, 2 O.O.3d 126, 356 N.E.2d 716 (statement that instrument was acknowledged before notary public without any evidence that notary placed person signing instrument under oath insufficient to make the instrument a valid affidavit in election case). In fact, even if a proper affidavit by Eaton were before the court, it remains unclear whether the purported actions of the Tri Ad employee amounted to ballot tampering.

The contestors' second exhibit is an excerpt from a deposition of Catherine L. Buchanan. Neither the exhibit nor the contestors' motion, however, specifies who Buchanan is, where she works, or whether her excerpted testimony relates to the presidential election. Buchanan testifies that an employee was going to reprogram a machine. Even assuming the specified machine was an electronic voting machine that was used in the presidential election, however, there is no evidence in the deposition excerpt concerning how this would necessarily affect the recount — or more important — this election-contest case.

The contestors' final exhibit is an unsworn, December 2, 2004 response by the Shelby County Board of Elections to a public-records request in which the board notes, "Tabulator test deck reports were discarded after election, to reduce paper-work and confusion with official results." From the exhibit itself, there is no indication whether this relates to the presidential election. Further, there is no

evidence that these particular reports would be required or helpful to a recount, or whether other county boards of elections are preparing to discard similar records, so as to warrant the requested emergency relief.

Clear and convincing evidence is required to invalidate a contested election. R.C. 3515.08; *Maschari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, 816 N.E.2d 579, ¶ 21. The contestors have proffered nothing suggesting that Ohio election officials are engaging, or will engage, in illegal conduct. The motion filed by contestors, and attachments thereto, are woefully inadequate to cause me, at this time, to order the boards of elections of all 88 counties to engage in any conduct not already required by R.C. 3599.34. Accordingly, IT IS ORDERED that the contestors' motion for emergency expedited hearing and emergency expedited relief to prevent spoliation of evidence and to preserve documentary and electronic evidence be, and hereby is, denied.

Moyer, C.J., in Chambers.

2004-2088. Moss v. Bush.

On Petition to Contest Election. This cause originated in this court on the filing of a petition to contest an election under R.C. 3515.08 et seq. Upon consideration of contestors' emergency motion to disqualify Chief Justice Thomas J. Moyer,

IT IS ORDERED that the contestors' motion be, and hereby is, denied. See opinion at 2004-Ohio-7120.

Moyer, C.J., in Chambers.