[Cite as *Nissan of N. Olmsted, L.L.C. v. Nissan N. Am., Inc.*, 2015-Ohio-2663.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nissan of North Olmsted, LLC,	:	
Appellant-Appellant,	:	No. 14AP-903 (C.P.C. No. 14CV-3167)
v.	:	(REGULAR CALENDAR)
Nissan North America, Inc. et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on June 30, 2015

Weston Hurd LLP, Robert A. Poklar and *Matthew C. Miller*; *Morganstern, MacAdams & DeVito Co., L.P.A.*, and *Christopher M. DeVito*, for appellant.

Taft Stettinius & Hollister LLP, Joseph C. Pickens and *Stephen C. Fitch*; *Dorsey & Whitney LLP, Steven J. Wells* and *Rebecca Weisenberger*, for appellee Nissan North America, Inc.

Michael DeWine, Attorney General, *Rachel Huston* and *James Patterson*, for appellee Ohio Motor Vehicle Dealers Board.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Appellant, Nissan of North Olmsted, LLC, ("Olmsted") appeals from a final judgment of the Franklin County Court of Common Pleas that affirmed on administrative appeal a dismissal by appellee Ohio Motor Vehicle Dealers Board ("Board") of Olmsted's protest against appellee Nissan North America, Inc. ("Nissan"). We find that the jurisdiction of the Board was not properly invoked and affirm the decision of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On appeal, we review the trial court's decision, pursuant to R.C. 119.12, on an appeal of a state administrative decision of the Board. The Board, established pursuant to R.C. 4517.30, adjudicates administrative decisions for the state of Ohio on the licensing and regulation of persons and business entities operating in motor vehicle sales, leasing, and distributing in the motor vehicle salvage industry. The Board's powers include establishing hearing procedures for and conducting hearings on the issuance, suspension, or revocation of licenses of motor vehicle dealers, and adjudicating protests and other hearings regarding the relocation of new car dealership operations, fulfillment, and compensation for warranty and recall obligations, written delivery and preparation obligations of auto manufacturer franchisees and terminations and transfers of dealership franchises in Ohio. *See* R.C. 4517.32, 4517.50, 4517.52, 4517.53, 4517.54, and 4517.56. The particular facts at issue involve the transfer and relocation of an auto dealership in Cuyahoga County, Ohio and its claimed effects on appellant, which filed a protest of this transaction.

{¶ 3} M6 Motors, Inc. ("M6")[1] is an entity that has been operating a Nissan auto dealership in Middleburg Heights, Cuyahoga County. On March 5, 2012, M6 entered into an asset purchase agreement with another existing Nissan auto dealership, North Coast Nissan ("North Coast"), also located in Cuyahoga County at 7168 Pearl Road ("7168 Pearl"), Middleburg Heights, Ohio. M6 proposed to move North Coast's assets and business operation, after purchase, to 13960 Brookpark Road ("13960 Brookpark") in Cleveland, Ohio, which it had an option to purchase. It also planned to operate a car storage facility on an adjacent property at 14080 Brookpark Road ("14080 Brookpark"). Olmsted was already operating a Nissan dealership at 28500 Lorain Road in North Olmsted, Ohio, not far from M6's proposed location of North Coast's assets, after purchasing them.

{¶ 4} On March 14, 2012, Olmsted filed a protest with the Board of M6's proposed asset purchase and franchise relocation to 13960 Brookpark. Shortly thereafter, on April 30, 2012, Nissan approved M6's plans as proposed. Within one week after Nissan

[1] Some materials in the record also refer to M6 as Nissan of Middleburgh Heights.

approved the asset purchase and relocation (on May 4, 2012), it sent notice to Olmsted, in the form of a letter, that it had approved the sale and transfer of North Coast to M6. In its letter Nissan stated that, in its opinion, Olmsted's protest before the Board was baseless. Nissan further stated that R.C. 4517.50, the procedural basis for Olmsted's protest, does not confer the right to file a protest when a new proposed location of a dealership is farther away from the protestor than the dealership's old location. Nissan noted that the new proposed site at 13960 Brookpark was farther from Olmsted's dealership than the then-existing North Coast site at 7168 Pearl.

{¶ 5} Several professional surveys obtained by Nissan supported its assertions in the letter. One particularly detailed survey indicated that Olmsted's dealership was 39,192.76 feet (in straight-line measure) from North Coast's original location at 7168 Pearl and 39,540.40 feet from the new proposed location at 13960 Brookpark. When Olmsted failed to voluntarily dismiss its protest, Nissan moved the Board to dismiss it. On March 27, 2013, a hearing officer of the Board denied Nissan's motion, because the determination of distances between sites was an issue of fact that could not be resolved via a motion to dismiss.

{¶ 6} On May 31, 2013, M6 wrote to Nissan expressing its intent to terminate plans to relocate the assets of North Coast to 13960 Brookpark. In its letter, M6 explained that its option to purchase the property at 13960 Brookpark had expired (citing the fact that Olmsted's protest had, at this point, drawn out for over a year without resolution). In this letter M6 requested permission to relocate the Nissan dealer franchise to property M6 already owned at 13930 Brookpark Road ("13930 Brookpark") (just down the street from 13960).

{¶ 7} Based on M6's letter, counsel for Nissan contacted counsel for Olmsted and discussed (some of which is evidenced by e-mail correspondence in the record) whether the protest was moot in light of the fact that M6 no longer was able to relocate to 13960 Brookpark. Counsel for Olmsted explained that his client would not stipulate to a dismissal of the protest absent promises that Olmsted would be reimbursed for attorney fees and that M6 would not attempt to locate a Nissan dealership at or near the 13960 Brookpark location.

{¶ 8} On June 12, 2013, Nissan sent a letter to M6 denying their request to relocate to 13930 Brookpark in light of expensive delays and protests regarding the 13960 Brookpark proposal and the high probability that similar problems would ensue if a site at 13930 Brookpark were proposed. The next day, June 13, 2013, Nissan filed a motion to dismiss the protest regarding the 13960/14080 proposal for mootness on the basis that M6 was no longer seeking to erect a Nissan dealership at 13960 Brookpark. Simultaneously, M6 filed a declaratory judgment action in the Cuyahoga County Court of Common Pleas ("Cuyahoga County common pleas court") seeking a declaration that the appropriate measure of distance between dealerships for purposes of R.C. 4517.50(C) is a straight-line distance from closest point to closest point (as opposed to, for instance, driving distance) and that the new site at 13930 Brookpark is further from Olmsted's location than the 7168 Pearl dealership owned by M6 (formerly owned by North Coast).

{¶ 9} On November 25, 2013, the Cuyahoga County common pleas court declared that distance is appropriately calculated in this context by straight-line "as the crow flies" measures and that the new proposed site at 13930 Brookpark is further from Olmsted's dealership than the site at 7168 Pearl. On January 27, 2014, Nissan filed a supplemental motion to dismiss the protest based on the Cuyahoga County common pleas court's declaration. Nissan argued that not only was the pending protest concerning 13960/14080 Brookpark moot, but the Cuyahoga County common pleas court's decision showed that it should never have been brought in the first place. That is, it was exempt from notice and protest requirements under R.C. 4517.15(C)(3) because the proper measure of distance in the context of R.C. 4517.50 was "as the crow files," and the site at 13960/14080 Brookpark was farther away from Olmsted's dealership than North Coast's old location at 7168 Pearl.

{¶ 10} On February 13, 2014, the hearing officer recommended that the protest be dismissed as moot. Olmsted filed objections. On March 20, 2014, the Board, which lacked the necessary complement of members to take action, adopted the hearing officer's recommendations by default on the expiration of the period for the Board to take further action. At this point, Olmsted's protest had been pending for two years, and having taken no action on the hearing officer's recommendation, the protest was dismissed. Olmsted

timely appealed to the Franklin County Court of Common Pleas ("Franklin County common pleas court").

{¶ 11} Also on March 20, 2014, Olmsted filed a second protest. This one related to the relocation of the dealership from 7168 Pearl to the new proposed location at 13930 Brookpark that had been the subject of the Cuyahoga County common pleas court's November 25, 2013 declaratory judgment. Three days later, Nissan wrote to Olmsted to express its intention to approve the relocation and transfer of M6's assets and franchise to 13930 Brookpark on or after June 1, 2014. In its letter Nissan also informed Olmsted that it believed Olmsted had no right to protest the 13930 Brookpark proposal in light of the declaration of the Cuyahoga County common pleas court that the proper measure of distance between dealerships was "as the crow flies" and that the new proposed site at 13930 was further away from Olmsted's dealership than the existing site at 7168 Pearl.

{¶ 12} On June 12, 2014, the Eighth District Court of Appeals affirmed the decision of the Cuyahoga County common pleas court. *M6 Motors, Inc. v. Nissan of N. Olmsted, L.L.C.*, 8th Dist. No. 100684, 2014-Ohio-2537. Several days later, on June 18, 2014, the hearing officer in Olmsted's second protest of the 13930 Brookpark proposed location recommended dismissal, and the Board, on July 18, 2014, adopted that recommendation. On July 22, 2014, the Eighth District declined to reconsider its November 25, 2013 decision to certify a conflict or to hear the case en banc.

{¶ 13} On October 15, 2014, the Franklin County common pleas court affirmed the Board's decision to dismiss Olmsted's protest of the 13960/14080 Brookpark proposal. This appeal is from that decision.

{¶ 14} While Olmsted's appeal has been pending, the Supreme Court of Ohio has declined to take jurisdiction of the Eighth District Court of Appeals decision affirming the Cuyahoga County common pleas court's declaratory judgment of November 25, 2013. *M6 Motors, Inc. v. Nissan of N. Olmsted, L.L.C.*, 141 Ohio St.3d 1474, 2015-Ohio-554. In addition, the Franklin County common pleas court, on March 18, 2015, affirmed the Board's dismissal of Olmsted's protest regarding the proposed location at 13930 Brookpark. Our decision in this appeal concerns only the Board's dismissal of Olmsted's first protest regarding locating a Nissan dealership at the 13960/14080 Brookpark location.

II. ASSIGNMENTS OF ERROR

{¶ 15} Olmsted advances two assignments of error for our review:

> 1. The Board erred as a matter of law by granting the manufacturer Nissan's motion to dismiss for mootness and failing to determine whether Nissan had the requisite good cause to give notice to relocate M6.
>
> 2. The Board erred as a matter of law by denying the dealer [Olmsted]'s motion to dismiss and summary judgment because the manufacturer abandoned its claim and failed to prosecute the action, after an adverse ruling by the hearing examiner.

III. DISCUSSION

{¶ 16} When hearing an appeal from an agency decision, a court of common pleas "may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." Otherwise, "it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12. We are also guided in our review of the common pleas court's decision by R.C. 119.12:

> The judgment of the [trial] court shall be final and conclusive unless reversed, vacated, or modified on appeal. These appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

{¶ 17} Thus, our review of a trial court's decision, pursuant to R.C. 119.12, is "more limited than that of the trial court." *Pons v. Ohio State Medical Bd.*, 66 Ohio St.3d 619, 621 (1993). We are to "determine only if the trial court has abused its discretion * * *. Absent an abuse of discretion on the part of the trial court, [we] may not substitute [our] judgment for those of the * * * board or a trial court. Instead, [we] must affirm the trial court's judgment." *Id.*, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992); *Lorain City School Dist. Bd. of Edn. v. State*

Emp. Relations Bd., 40 Ohio St.3d 257, 260-61 (1988). However, "on the question of whether the agency's order was in accordance with the law, this court's review is plenary." *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ¶ 44, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

A. Whether the Franklin County Court of Common Pleas Properly Affirmed the Board's Dismissal of Olmsted's Protest

{¶ 18} As relevant to this case, a franchisee who is a dealer of new motor vehicles (such as Olmsted) may protest a decision by a franchisor (such as Nissan) to relocate another franchisee to within a ten-mile radius of the protesting dealer-franchisee (such as was the transaction proposed by M6 and approved by Nissan) when the two franchisees sell new motor vehicles of the same franchisor. R.C. 4517.50(A) and (B); 4517.01(CC).[2] Specifically, the franchisor is required to give notice to the affected franchisee of the proposed relocation and then the affected franchisee has a right to file a timely protest with the Board. R.C. 4517.50(A); *see also* 4517.31; 4517.32. If, in the course of a protest, the Board finds that "there is good cause for not permitting the new motor vehicle dealer to be * * * relocated," then the franchisor is prohibited from effectuating the contemplated relocation. R.C. 4517.50(B). Violations of the provisions of R.C. Chapter 4517 are generally misdemeanors of the fourth degree and subject the franchisor to liability for double damages, costs, and attorney fees. R.C. 4517.99; 4517.65(A).

{¶ 19} One exception to the franchisor's duty to notify is if the contemplated relocation is "of an existing new motor vehicle dealer" to a location "further from an existing line-make new motor vehicle dealer although the relocation is within the same line-make new motor vehicle dealer's relevant market area." R.C. 4517.50(C)(3). In other words, if a franchisor has two same-line dealerships within a ten-mile radius of each other and wishes to move one dealership, it may do so without notice if the move results in that dealership being located further away from the other, even if the new location is still within a ten-mile radius of the affected franchisee. R.C. 4517.50(C)(3); 4517.01(CC). In

[2] At the times relevant to this case, the definition now contained at R.C. 4517.01(CC) was instead found in division (DD). However, for simplicity, and because the definition has not been altered, we use the current citation.

this type of scenario, because the franchisor need not give notice of the move, the plain language of the statute gives the franchisee no right to protest and, thus, no right to invoke the jurisdiction of the Board. R.C. 4517.50(A) and (B), (C)(3); *M6 Motors* at ¶ 25 ("if the proposed relocation site is 'further' from the existing dealership, notification is not required, and as a result, there is no protest"); *Jack Matia Chevrolet, Inc. v. Gen. Motors Corp.*, 10th Dist. No. 06AP-360, 2007-Ohio-420, ¶ 15 (even a finding that a franchisor "should have sent a notice of relocation" is insufficient, under the plain language of the statute, to create the right to protest and invoke the jurisdiction of the Board if no notice was, in fact, given).[3]

{¶ 20} Olmsted argues that "further" in this context should be given the meaning adopted by the Supreme Court in *Bd. of Edn. of Butler Twp. v. Bd. of Edn. of Village of Eldorado*, 58 Ohio St. 390 (1898), that is, surface travel distance. This conclusion, Olmsted argues, is reinforced by the fact that driving distance is how Nissan defines distance in its dealer sales and service agreement, and that numerous courts in a variety of jurisdictions have accepted and judicially noticed internet driving directions as a way to calculate distance. Olmsted claims that under the driving-distance measure, the proposed locations on Brookpark at 13960/14080 and (while not under consideration in this appeal) 13930 are closer to Olmsted's dealership, not farther.

{¶ 21} But how Nissan chooses to calculate distance in its agreements does not control what the Ohio General Assembly intended by the term "further" when it adopted R.C. 4517.50. Nor does the fact that many courts have accepted internet driving directions as reliable measures of distance mean that such is the appropriate meaning of "further" in this particular context. Moreover, *Bd. of Edn. of Butler Twp.* concerned designating which schools children should attend based on the location of their homes relative to the schools. *Id.* at 394. The paramount concern in that case was the distance

[3] Because the statutory language prevents a protest or the invocation of the Board's jurisdiction absent a notice (even in cases where a notice should have issued) we note that in such circumstances where administrative review cannot be invoked, nothing would stop a franchisee (who had not received the required notice) from taking other legal action. *See* R.C. 4517.65(A) (contemplating damages in a civil action as opposed to a protest as considered in R.C. 4517.65(C) for violations of Chapter 4517); *cf Staffilino Chevrolet, Inc. v. Gen. Motors Corp.*, 86 Ohio App.3d 247 (10th Dist.1993) (holding that generally a protest before the Board, not an original action in court, is the proper vehicle to resolve disputes between automobile-dealing franchisees and automobile-supplying franchisors).

that school children would actually have to travel (most likely on foot, given the nineteenth century date of the case) in order to arrive at the schoolhouse. Olmsted advocates that this case is similar, observing that "retail purchasers of new motor vehicles commute by drive distance and travel time within the local area, not flying in a straight-line from closest-point-to-closest-point between dealerships." (Emphasis deleted.) (Appellant's Brief, 51.) However, we observe and interpret that other provisions in R.C. Chapter 4517 indicate that the concern addressed by R.C. 4517.50 is for preventing a franchisor from oversaturating an area with dealerships to the detriment of the individual dealers. *See, e.g.*, R.C. 4517.01(CC) (defining "relevant market area" as an area within a radius of ten miles of an existing dealer); R.C. 4517.50 (regulating attempts to establish a new dealer or relocate an existing dealer to a location within the "relevant market area" of an existing dealer). The Eighth District held that the concern for "relevant market area" is not how long it takes to drive from one dealership to the other. It therefore affirmed the judgment of the trial court that the appropriate measure of distance is not driving distance, but straight-line distance. *M6 Motors* at ¶ 47-67, *declining jurisdiction*, 2015-Ohio-554.

{¶ 22} The Franklin County common pleas court was not bound by the Eighth District's decision under the principle of stare decisis. We find, however, that the trial court was correct to affirm the Board's dismissal for several reasons. First, Olmsted's protest specifically alleged that Olmsted had not received notice from Nissan. Absent notice, Olmsted could not validly have protested or invoked the jurisdiction of the Board. *Jack Matia Chevrolet* at ¶ 15-16.

{¶ 23} Second, there is uncontroverted evidence in the record that the new location at 13960/14080 Brookpark was farther, if measured "as the crow flies," from Olmsted's dealership than from the prior 7168 Pearl location. Though Olmsted argues that the appropriate measure of distance for purposes of R.C. 4517.50(C)(3) is travel time or driving distance, we find that to be unconvincing in light of the Eighth District's reasoning in *M6 Motors* at ¶ 47-67. Olmsted's protest was without legal basis and appropriately dismissed by the Board for two reasons: first, Nissan did not give notice to Olmsted before Olmsted filed its protest. *Jack Matia Chevrolet* at ¶ 15-16. Second, based on the decision of the Eighth District in *M6 Motors* decided before the Board dismissed Olmsted's

protest, Nissan was not required to give notice. R.C. 4517.50(C)(3); *M6 Motors* at ¶ 47-67. Olmsted had no basis for protest, and the jurisdiction of the Board was not properly invoked. *Id.* at ¶ 25, 47-67; *Jack Matia Chevrolet* at ¶ 15-16.

{¶ 24} Olmsted argues that a franchisor, since it is not the party that initiates a protest, cannot unilaterally dismiss it. We note that Nissan did not unilaterally dismiss Olmsted's protest; it could not. Rather, Nissan moved for dismissal based on the lack of any remaining controversy and the fact that jurisdiction was not properly invoked in the first instance. Once the standard for determining distance between dealerships had been clarified by the Eighth District, the Board's hearing officer could properly recommend to the Board dismissal of Olmsted's protest, and the Board as it constituted at the time, by default, adopted the recommendation and dismissed the protest. Franchisors have no ability to file the equivalent of a Civ.R. 41(A)(1)(a) dismissal. But like any litigant, they may argue for an end to litigation through adversarial motion practice based on any number of grounds including the fact that the Board lacks jurisdiction.

{¶ 25} Olmsted asserts that the requirement that a franchisor have good cause before taking an action that may be adverse to a franchisee (as can be found in R.C. Chapter 4517) means that even if a franchisor abandons its plans to take the adverse action, the Board retains jurisdiction to determine whether the requisite good cause ever existed. Previously, we have decided in the context of new motor vehicle franchisor/franchisee relations, under R.C. Chapter 4517, when good cause is required for issuing a notice of termination, it is appropriate to extend jurisdiction to determine whether good cause existed, even though the franchisor had abandoned its intent to terminate the franchisee. *See Slavin Ford, Inc. v. Ford Motor Co.*, 10th Dist. No. 91AP-354 (Aug. 1, 1991). We also have held that when good cause is not required when issuing a notice of relocation, we have declined to extend jurisdiction after the franchisor abandoned its intent to relocate a franchisee. *Lally v. Am. Isuzu Motors, Inc.*, 10th Dist. No. 05AP-1137, 2006-Ohio-3315. In this appeal, because the Board did not properly have jurisdiction, there is no need to extend its jurisdiction to determine whether or not Nissan had good cause to permit M6 to relocate North Coast's operation from 7168 Pearl to 13960 Brookpark.

{¶ 26} Olmsted also urges us to find that the protest should not have been dismissed by the Board for mootness because Nissan was capable of resuming its plans to relocate the dealership (and did, in fact, do so when it approved the relocation to 13930 Brookpark after M6 sought and received a declaratory judgment from the Cuyahoga County Courts on the appropriate method for measuring distance between dealerships for the purposes of interpreting provisions of R.C. Chapter 4517). We recognize the fact that "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Employees Internatl. Union, Local 1000*, ___ U.S. ___, 132 S.Ct. 2277, 2287 (2012). Moreover, we recognize that 13930 Brookpark is close in proximity to 13960/14080 Brookpark and, thus, the "new" plan to locate a dealer there can be reasonably interpreted to be resumption. However, the record with respect to the basic facts is undisputed. 13930 Brookpark and 13960/14080 Brookpark are not, in fact, the same parcels and the M6's option to purchase 13960 Brookpark (which was a necessary precondition for moving the dealership there) expired during the pendency of the protest. Nissan did not "voluntarily" cease its plans with respect to the 13960 parcel; in fact, it no longer had the option to move forward. Determining the propriety of a move to 13960/14080 Brookpark was a moot issue before the Board, and concerns about 13930 Brookpark are evidentiary only in this appeal and on their merits properly addressed in a different appeal.

{¶ 27} For all the reasons cited herein, Olmsted's first assignment of error is overruled.

B. Whether the Board Should Have Found in Favor of Olmsted Based on the Fact that Nissan Abandoned Plans to Locate a Dealership at 13960/14080 Brookpark

{¶ 28} Olmsted argues that Nissan "failed to prosecute and abandoned its claim[s]." (Appellant's Brief, 44.) We recognize that "[t]he burden of proof to establish the franchisor's good cause shall be on the franchisor in protests and actions instituted under this section and sections 4517.50, 4517.54, and 4517.56 of the Revised Code." R.C. 4517.65(D). Olmsted argues that Nissan's position is similar to that of a plaintiff who has a duty to prosecute and prove his or her claims or suffer dismissal. We find no reason to

sustain Olmsted's second assignment of error on this basis. Nissan (unlike a plaintiff) was not the protestor before the Board. Nissan was anything but a non-participating plaintiff who could suffer dismissal under Civ.R. 41(B)(1) for failure to prosecute. Rather, Nissan vigorously defended the protest action for over one year until M6's option to purchase 13960 Brookpark expired and rendered moot Olmsted's protest. Of the thousands of Ohio appellate court decisions interpreting the application of Civ.R. 41, we find none with holdings that a franchisor is subject to dismissal under Civ.R. 41(B)(1) if it fails to press forward in litigation after the factual preconditions of the plan at issue have failed to eventuate. We note that, in just one of only four decisions in Ohio in which both Civ.R. 41 and any section of R.C. Chapter 4517 were at issue, were litigants who filed Civ.R. 41(A) dismissals or their equivalent granted dismissal, and these litigants were the franchisees, not the franchisors. *Ganley v. Subaru of Am.*, 9th Dist. No. 07CA0092-M, 2008-Ohio-3588, ¶ 7. This indicates that it is the franchisee, not the franchisor, who is most analogous to a plaintiff in protest cases for purposes of Civ.R. 41. Finally, even if Olmsted's Civ.R. 41 arguments could stand, Olmsted is still not entitled to a judgment in its favor in the protest because, for reasons already discussed, the jurisdiction of the Board was never properly invoked. *See id.* at¶ 18-22.

{¶ 29} Olmsted's second assignment of error is overruled.

IV. CONCLUSION

{¶ 30} Accordingly, we overrule Olmsted's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and LUPER SCHUSTER, JJ., concur.