

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Kelly L. Mettler, et al.

Court of Appeals No. L-13-1122

Appellants

Trial Court No. CI0201204505

v.

Jon Husted, etc., et al.

Defendants

**DECISION AND JUDGMENT**

[Lucas County Board of  
Elections, et al.—Appellees]

Decided: June 6, 2014

\* \* \* \* \*

R. Kevin Greenfield, for appellants.

Julia R. Bates, Lucas County Prosecuting Attorney, Kevin A.  
Pituch and Karlene D. Henderson, Assistant Prosecuting  
Attorneys, for appellees.

\* \* \* \* \*

**JENSEN, J.**

{¶ 1} Appellants, Kelly L. Mettler and Dennis C. Lange, appeal from a decision of  
the Lucas County Court of Common Pleas granting summary judgment in favor of the

appellees, the Lucas County Board of Elections and its then members, Ron Rothenbuhler, Jon Stainbrook, Anthony DeGidio, and Keila Cosme. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} The following facts are relevant to the disposition of this appeal.

{¶ 3} On August 2, 2011, four members of the Lucas County Board of Elections met at a regularly scheduled meeting. Motions were made to terminate the employment of five board employees, including a motion to terminate appellant Mettler<sup>1</sup> and a motion to terminate appellant Lange.<sup>2</sup> When each question was called, two board members favored termination and two board members opposed termination. The tie votes were submitted to the secretary of state to decide the question, pursuant to R.C. 3501.11(X).

{¶ 4} In a letter dated August 8, 2011, the Assistant Secretary of State, Scott Borgemenke, informed the board “the Secretary breaks the ties in favor of the motions to terminate Kelly Mettler and Dennis Lange \* \* \* and breaks the ties against the motions to terminate Lori Jacek, Timothy Reynolds, and Matthew Ward.”

{¶ 5} On July 26, 2012, appellants filed a complaint against Ohio Secretary of State Jon Husted, Assistant Secretary of State Scott Borgemenke, and appellees. An amended complaint was filed August 1, 2012. In their first claim for relief, appellants

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<sup>1</sup> Kelly L. Mettler was formerly employed by appellee board of elections in the unclassified position of elections manager.

<sup>2</sup> Dennis C. Lange was formerly employed by appellee board of elections in the unclassified position of Republican booth official.

allege that the assistant secretary did not possess the legal authority to break the tie votes. Appellants seek a declaration that the assistant secretary's actions are "void and unenforceable." In their second claim for relief, appellants seek a writ of mandamus to compel appellees to restore them to their former positions of employment because of the "illegal actions" of Secretary Husted and Assistant Secretary Borgemenke. In their third claim for relief, appellants assert a wrongful discharge claim against appellees for implementing the assistant secretary's "void and unenforceable" decision to terminate their employment with the board.

{¶ 6} In August 2012, Secretary Husted and Assistant Secretary Borgemenke filed a motion to dismiss.<sup>3</sup> In January 2013, appellees filed a motion for summary judgment. In May 2013, the trial court denied the motion to dismiss, but granted the motion for summary judgment. Appellants' allegations against Secretary Husted and Assistant Secretary Borgemenke were stayed pending the outcome of "whistle-blower" appeals filed with the State Personnel Board of Review.<sup>4</sup> All claims asserted against the

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<sup>3</sup> In their motion to dismiss, Secretary Husted and Assistant Secretary Borgemenke alleged the claim asserted in appellants' first claim for relief was not ripe for review. In the alternative, Husted and Borgemenke alleged that the appellants' claim did not present a justiciable controversy.

<sup>4</sup> *Kelly L. Mettler and Dennis Lange v. Lucas Cty. Bd. of Elections*, State Personnel Bd. of Review, Case Nos. 11-WHB-08-0302, 11WHB-09-0317.

appellees were dismissed, with prejudice.<sup>5</sup> Appellants filed the instant appeal, raising two assignments of error for our review.

### Summary Judgment Standard

{¶ 7} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). A motion for summary judgment may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 8} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293,

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<sup>5</sup> On May 22, 2013, appellants filed a notice, pursuant to Civ.R. 41(A)(1)(a), dismissing their claims against Secretary Husted and Assistant Secretary Borgemenke, without prejudice.

662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R, 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E. N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

### **First Assignment of Error**

{¶ 9} In their first assignment of error, appellants assert:

The Trial Court Erred in Granting Summary Judgment in Favor of Appellees by Ruling That the Board of Elections Neither Terminated The Appellants Nor Implemented The Termination Decision of The Secretary.

{¶ 10} R.C. 3501.11 sets forth the duties of the boards of elections. Division (D) specifically provides that “[e]ach board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code \* \* \* and shall \* \* \* [a]ppoint and remove its director, deputy director, and employees \* \* \*.” Division (X) provides

In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the director or chairperson shall submit the

matter in controversy, not later than fourteen days after the tie vote or the disagreement, to the secretary of state, who shall summarily decide the question, and the secretary of state's decision shall be final. R.C. 3501.11(X).

{¶ 11} Chapter 111 of the Ohio Revised Code sets forth the duties of the secretary of state. R.C. 111.03 grants to the secretary the authority to appoint an assistant secretary of state. In turn, R.C. 111.04 provides:

In case of the absence or disability of the secretary of state, the assistant secretary of state shall have the power to perform the duties of the secretary of state. The general duties of the assistant secretary of state shall be such as the secretary of state assigns him.

{¶ 12} Here, the members of the board of elections tied on five motions to terminate individual employees of the board. At some time and in some manner, the tie-votes were submitted to the secretary of state. Six days after the tie votes were cast, the assistant secretary of state issued, on secretary of state letterhead, a decision breaking the tie-votes.

{¶ 13} The parties do not dispute the questions before the board resulted in a tie, nor do they dispute that the tie-votes were submitted to the secretary of state. Thus, the crux of the matter is whether the assistant secretary acted within his authority when he issued the tie-breaking decision terminating appellants Mettler and Lange.

{¶ 14} In their motion for summary judgment, appellees argue that Assistant Secretary Borgemenke was authorized to issue the tie-breaking decision because the matter was urgent and required immediate attention and the secretary was absent. In support, appellees refer to the assistant secretary's responses to interrogatories that were propounded to him in the action pending before the State Personnel Board of Review. The responses were attached to appellants' amended complaint. Relevant portions of the assistant secretary's responses follow:

Interrogatory No. 4: Who at the Secretary of State's Office, made the decision to break the tie and terminate Kelly Mettler and Dennis Lange's employment?

Answer: I made the decision.

Interrogatory No. 5: If you made the decision to terminate \* \* \* what factors did you base the decision on?

Answer: The decision was based on the fact that each of them were at-will employees and that they appeared to not be cooperating with the management of the board.

Interrogatory No. 6: If you made the decision to terminate \* \* \* under what legal authority did you have to make that decision?

Answer: The power of the Secretary of State to break the tie votes and disagreements of a board of elections, pursuant to R.C. 3501.11(x), which the Secretary of State delegated to me pursuant to R.C. 111.04

\* \* \*

Interrogatory No. 8: Were you delegated the authority under Ohio Revised Code §111.04? If your answer is “yes,” who delegated the authority to you to terminate Kelly Mettler and Dennis Lange?

Answer: Yes. Secretary of State Husted delegated the authority to me to break the tie vote.

Interrogatory No. 9: \* \* \* please state the absence or disability of the Secretary of State, necessitating you being delegated the authority to make the decision.

Answer: The decision required urgent attention, and the Secretary was absent from the office when the decision was made.

{¶ 15} Appellants introduced no evidence contrary to the assistant secretary’s averments. Thus, the trial court did not err when it determined that no questions of material fact remain as to the assistant secretary’s authority to determine the questions presented to the secretary of state. The plain language of R.C. 111.04 clearly and unambiguously provides that the assistant secretary of state “shall have the power to perform the duties of the secretary of state” in the secretary’s absence. Accordingly, appellants’ first assignment of error is not well-taken.

## **Second Assignment of Error**

{¶ 16} In their second assignment of error, appellants assert:

The Trial Court Erred in Granting Summary Judgment in Favor of Appellees Because Should the Trial Court Determine That The Assistant Secretary of State Acted Improperly, Appellants Would be Left Without a Proper Adequate Remedy.

{¶ 17} Appellants' Civ.R. 41(A)(1)(a) dismissal of the declaratory judgment action alleged against the secretary of state and the assistant secretary of state renders the argument set forth in appellants' second assignment of error moot.

## **Conclusion**

{¶ 18} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
*See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

James D. Jensen, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.