

IN THE SUPREME COURT OF OHIO

DANIEL E. POLIVKA, et al.	)	Case Number 2021-0243
	)	
Contestors-Appellants	)	On Appeal from the Court of Common
	)	Pleas, Trumbull County, Ohio
v.	)	
	)	Lower Court Case Number
MICHELE NICOLE 'NIKI' FRENCHKO, et al.	)	2020-cv-1327
	)	
Contestees-Appellees	)	

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**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

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## **I. Introduction**

This case is an appeal of an election contest over which this Court is expressly vested with subject matter jurisdiction pursuant to R.C. 3515.15 and Section 21 of Article II of the Ohio Constitution. Appellees' argument to the contrary conflates the distinct concepts of a court's jurisdiction to hear and determine a case with a party's entitlement to relief in that case. This Court has jurisdiction and should proceed with briefing and a decision on the merits.

## **II. Statement of Facts**

Appellant Daniel Polivka was a candidate for the office of Trumbull County Commissioner at the November, 2020 General Election, where he was defeated by Appellee Michelle Nicole Frenchko. After the official results of the election were announced, Mr. Polivka filed a petition to contest the County Commissioner Election, in the main contending the existence of fraud, error or irregularity insofar as Appellee Frenchko is statutorily ineligible to serve as Trumbull County Commissioner because she is a resident of Lake County.

The Petition specifically sought relief pursuant to R.C. 3515.08(C), the election contest statute. *See, e.g.*, Petition at ¶1. The petitioners in the Petition included not only Mr. Polivka as the defeated candidate, but also 66 voters of Trumbull County. Petition at Exhibit 1; *See* R.C. 3515.09 (“A contest of election shall be commenced by...at least twenty-five voters who voted at the last election for or against a candidate for the office...or by the defeated candidate for said...election”). The Petition was filed on November 30, 2020, within “fifteen days after the results of

[the]...election have been ascertained and announced by the property authority..." as required by the election contest statutes. R.C. 3515.09. Contemporaneous with the filing of the Petition, the clerk of the trial court determined that the ordinary filing fees constituted sufficient surety for the costs of the action – a requirement applicable only to election contests. *See* Notice of Compliance, filed December 1, 2020; *See also* R.C. 3515.09 (an election contest petition “shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by [her], to pay all the costs of the contest”).

The contest was heard by the trial court exactly thirty days after the Petition was filed, because that is the timeline imposed by the Revised Code for the hearing of election contests. R.C. 3515.10. During the lower court proceedings, the trial court permitted the Appellants to amend their petition *instanter* to provide written verification of the petition, because the statutes governing election contests require a petition to be made under oath. R.C. 3515.09.

Prior to the hearing, Appellee Frenchko moved to dismiss, arguing that the petition “was clearly brought...pursuant to R.C. 3515.08, which deals only with election contests,” and that a challenge based upon her residency was not cognizable via an election contest. Motion to Dismiss, filed December 14, 2020, at 3. Similarly, the Trumbull County Board of Elections sought pre-trial dismissal of the petition on the basis that Appellants’ challenges were not proper grounds for an election contest. Motion to Dismiss, filed December 21, 2020, at 4 (“The [Appellants’] effort to meld a statutory protest...and a statutory contest...when no protest was timely presented

results in a failure to set forth a claim upon which relief can be granted")<sup>1</sup>. The trial court overruled those motions as moot, choosing instead to deny any relief to Appellants "on the merits." Judgment Entry, filed February 2, 2021, at 2. And when the trial court did so, it assessed costs against the Appellants "pursuant to R.C. 3515.09," a statute governing the procedure in election contests.

Appellants timely appealed, and Appellees now move to dismiss, asserting that this Court lacks subject matter jurisdiction. But in doing so, Appellees would elevate their argument on the merits (that Appellants' claims are not cognizable in an election contest) into one of jurisdictional significance, which is unsupported by any authority and instead flatly contradicted by the Revised Code.

### **III. Law & Argument**

The jurisdiction of this court "connotes the power to hear and decide a case upon its merits." *State ex rel. Novak, LLP v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 209, ¶10 quoting *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. This Court possesses the power to hear and decide direct appeals from trial court judgments in election contest proceedings. This

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<sup>1</sup> Notably, the argument advanced by the Board of Elections for dismissal in the trial court is the same argument it advances now for dismissal of this appeal. In the trial court, the Board took the position that Appellants' claim regarding Ms. Frenchko's ineligibility to hold office was a failure on the merits warranting dismissal for failure to state a claim under Civil Rule 12(B)(6). Now, the Board would elevate that same argument to one of a jurisdictional character. True, a party cannot waive subject matter jurisdiction, but the shifting nature of the Board's arguments is nonetheless telling.

case is a direct appeal from a trial court judgment in an election contest proceeding. As such, this Court has jurisdiction to hear and decide this case.

The Ohio Constitution secures to the General Assembly the power to “determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted.” Art. II, § 21, Ohio Constitution. *See also Hitt v. Tressler*, 4 Ohio St.3d 174, 177, 447 N.E.2d 1299 (1983). Pursuant to this authority, the General Assembly enacted the procedures set forth in R.C. 3515.08 through 3515.16 to govern election contests, including the specific designation of this Court as the exclusive forum for appeals of such contests: “The person against whom judgment is rendered in a contest of election may appeal on questions of law, within twenty days, to the supreme court; but such appeal shall not supersede the execution of the judgment of the court.” R.C. 3515.15; *see also Foraker v. Township of Perry Rural School Dist. Bd. of Ed.*, 130 Ohio St. 243, 246, 199 N.E. 74 (1935) (applying G.C. 4785-172, the predecessor of R.C. 3515.15); *25 Electors of Precinct 13-E v. Franklin County Board of Elections*, No. 94AP-1510, 1995 WL 360241 (10th Dist., June 15, 1995) (“Constitutional authority” for R.C. 3515.15 “is found at Section 21, Article II, Ohio Constitution”). Thus, “[p]lursuant to the power conferred” on it by the Constitution, “the General Assembly...provid[ed] for the prosecution of error directly to this” Court in election contest cases. *Foraker*, 130 Ohio St. at 246.

This authority is dispositive of, and fatal to, Appellees’ assertion that this Court lacks jurisdiction over this appeal. There can be no dispute that this Court has the authority vested in it by the General Assembly to hear and decide an appeal of an

adverse judgment in a statutory election contest. Indeed, Appellees do not really even themselves challenge that this Court possesses jurisdiction to hear an appeal of an election contest. Rather, Appellees real argument is that *these* Appellants are not entitled to relief because their arguments about Appellee Frenchko's ineligibility to hold office are not cognizable in an election contest. But this Court's "subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶19 (citations omitted). Whatever force Appellees' argument may have (and as our forthcoming merits briefing will show, it has none), it is an argument directed to the merits of Appellants' claim, not directed to this Court's power and authority to hear that claim.

The merits of a claim – i.e., whether Appellants are entitled to relief on their claim – and "the court's jurisdiction to grant it are distinct issues." *Bowling Green State Univ. v. Williamson*, 39 Ohio St.3d 131, 141, 529 N.E.2d 1371 (1988). In *Williamson*, the Appellant conceded that a common pleas court possessed jurisdiction to grant mandamus relief, but asserted that the court lacked jurisdiction in that case because the party seeking mandamus had an adequate remedy at law. *Id.* As in *Williamson*, Appellees here acknowledge that this Court possesses jurisdiction over appeals in election contests, but assert that Appelants are not entitled to relief because the nature of their claims are not cognizable in such contests. As this Court rejected the argument in *Williamson*, so too it should here.

Furthermore, *Williamson* is hardly an outlier. “Indeed, there are many cases in which a court lacks the legal authority to grant the relief sought but nevertheless has subject-matter jurisdiction to hear the case.” *Ohio High School Athletic Assn. v. Ruehlman*, 157 Ohio St.3d 296, 2019-Ohio-2845, ¶14. *Ruehlman* identified prior cases explaining that neither lack of standing, nor lack of authority to join a party without personal jurisdiction, nor the expiration of a statute of limitations operate to deprive a court of subject matter jurisdiction – even though any of these would entitle the defending party to a judgment in their favor. *Id.* citing *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 701 N.E.2d 1002 (1998), *State ex rel. Shumaker v. Nichols*, 137 Ohio St.3d 391, 2013-Ohio-4732, 999 N.E.2d 631, ¶31, and *State ex rel. Huntington Trust Co., N.A. v. Franklin County Court of Common Pleas*, No. 98AP-122, 1998 WL 429157, \*3 (10th Dist., July 28, 1998). *Ruehlman* itself recognizes that a substantive rule of law that would bar a plaintiff’s claim does not rise to “a rule of subject-matter jurisdiction...” *Id.*, 2019-Ohio-2845 at ¶12. And to give a final example, even if a particular lender might not have the right to foreclose on a loan, that does not deprive a common pleas court of subject-matter jurisdiction to adjudicate a foreclosure case. *Kuchta, supra.*

Even if Appellees are correct and Appellants are not entitled to relief under the election contest statutes based on fraud, error or irregularity related to Ms. Frenchko’s ineligibility to hold office, the fact remains that this case is an appeal of an election contest pursuant to R.C. 3515.08, over which this Court is unquestionably possessed of jurisdiction pursuant to R.C. 3515.15. The teaching of this Court’s

subject-matter jurisdiction cases such as *Ruehlman* and *Kuchta* is that a party's non-entitlement to relief does not a lack of subject matter jurisdiction make. Application of that principle here mandates denial of Appellees' motion to dismiss.

#### IV. Conclusion

For all of the foregoing reasons, Appellees' motion to dismiss should be denied, and this case should proceed with briefing and decision on the merits.

Respectfully Submitted,

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#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail this 19<sup>th</sup> day of March, 2021, upon the following:

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