IN THE

INDIANA SUPREME COURT

No._____

ROSS G. THOMAS
APPELLANT
(Plaintiff below)

vs.

JOSEPH FOYST
APPELLEE
(Defendant below)

APPEAL FROM THE
COURT OF APPEALS
No. 24A-MI-251

FROM THE BARTHOLOMEW
CIRCUIT COURT
Case No. 03C01-2309-MI-4658

THE HONORABLE
MARK K. LLOYD,
SPECIAL JUDGE

BRIEF OF APPELLEE IN RESPONSE TO DEMOCRAT PARTY AMICUS BRIEF

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AMICUS' STATEMENT OF THE ISSUES

The State Democrate Party in its amicus brief raises three issues:

I. Did Mr. Thomas have private and public standing to challenge the existence of Mr. Foyst's candidacy.

II. Did missing a statutory deadline for submitting a notice make Mr. Foyst's nomination void *ab initio*.

III. Can a person be renominated for an office when his first candidacy was filed a day late.

SUMMARY OF THE ARGUMENT

The county chairman stipulated that Mr. Foyst was a candidate. That stipulation precludes him from claiming that Mr. Foyst was not a candidate for the seat on the Columbus City Council for District 6 under the doctrines of invited error and judicial estoppel.

The doctrines of standing and real party in interest require that a party has a substantive right to enforce the claim that he is making in the case. A party chairman does not satisfy those criteria. It is the defeated candidate who has standing to challenge the election result.

Missing the filing deadline for the first notice of candidacy did not make the nomination void *ab intitio*.

The amicus cites no authority that a party cannot renominate a person for a spot on the ballot when his initial candidacy was only barred because of missing a deadline by 1 day. There are some reasons a candidate is disqualified such as not resident in the district from which election is sought, having a felony record, or not being a United States citizen that cannot be cured by a renomination. The nomination of Mr. Foyst failed for none of those incurable defects.

ARGUMENT

ISSUE I

MR. THOMAS HAD NEITHER PUBLIC OR PRIVATE STANDING TO MAINTAIN ACTION UNDER DOCTRINES OF INVITED ERROR AND JUDICIAL ESTOPPEL

The discussion of the amicus on the claimed standing of Mr. Thomas to maintain his action challenging the candidacy and election of Mr. Foyst ignores a crucial fact which is fatal to its argument. That fact is that he stipulated at the hearing that Mr. Foyst was a candidate. The doctrines of judicial estoppel and invited error prevent him from reversing his position and claiming that Mr. Foyst was not a candidate.

During Mr. Foyst's testimony the country chairman said:

> Your Honor, if I may, I am more than willing to stipulate that Mr. Foyst declared his candidacy publicly, that he ran for office openly and that he campaigned and put himself out to the public as a candidate. I think we've already established, from our perspective that, I don't know that that makes any difference to the argument here, but we certainly don't have any dispute that Mr. Foyst was publicly declared himself a candidate and that he campaigned as such (Tr. p. 96).

The following then occurred:

> Court: Do you accept?
> Mr. Hoffman: I think that's both a stipulation and a judicial admission all at the same time, so yeah, that's fine, it will save us a little bit of time.
> Court: Alright. So stipulated (Tr. pp. 96-7).

The unconditional admission by Mr. Thomas that Jay Foyst was a candidate was not only a stipulation, it was a judicial admission and invited any error by the trial court in regarding Mr. Foyst as a candidate in making the decision at issue.

In *Chapo v. Jefferson Cnty. Plan Comm'n*, 224 N.E.3d 971 (Ind. Ct. App. 2023) the court discussed invited error:

> "A party may not take advantage of an error [the party] commits, invites, or allows to happen as a natural consequence of [the party's] own neglect or misconduct." Hickey v. Hickey, 111 N.E.3d 242, 246 (Ind. Ct. App. 2018). A party who invites the very decision that the party later alleges is void does not

> raise a claim that is subject to appellate review. See Crowl v. Berryhill, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997) (ruling that a party who stipulated to an order could not later claim the judgment was void due to lack of statutory authority); Stolberg v. Stolberg, 538 N.E.2d 1, 5 (Ind. Ct. App. 1989) ("Invited error is not subject to review by this court."). Therefore, we need not address the Chapos' claim that the BZA's treatment of a shooting range as a conditional use violated the Second Amendment and thus rendered the BZA's 2012 decision void. 224 N.E.3d at 981–82.

Mr. Thomas having conceded that Mr. Foyst was a candidate could not properly be allowed to change his position are argue he was not a candidate.

In *City of Hammond, Lake Cnty. v. N. I. D. Corp*., 435 N.E.2d 42 (Ind. Ct. App. 1982) the Court of Appeals said:

> Hammond may not now complain of this joinder. A party must abide by the procedure it has induced the court to follow, Pokraka v. Lummus Co., (1952) 230 Ind. 523, 104 N.E.2d 669, and to which it has given its consent. State ex rel. Randall v. Long, (1957) 237 Ind. 389, 146 N.E.2d 243; Waitt v. Waitt, (1977) 172 Ind. App. 357, 360 N.E.2d 268, 2 Ind. Law Encyclopedia, Appeals, s 496. 435 N.E.2d at 46.

Mr. Thomas agreed that Mr. Foyst was a candidate in the case. The trial court relied on that admission in making its decision. Mr. Thomas should be held bound by his admission.

In *Gatlin Plumbing & Heating, Inc. v. Estate of Yeager*, 921 N.E.2d 18 (Ind.Ct.App. 2010), *trans. denied*, it was said:

> We note, as quoted above, that when Gatlin filed its objection to the trial court's transfer order, it expressly asserted that "the amount of" the Estate's assets was "under $50,000.00." . . .. Judicial estoppel prevents a party from asserting a position in a legal proceeding that is inconsistent with one previously asserted, and it "precludes a party from repudiating assertions in the party's own pleadings." 921 N.E.2d at 24.

Mr. Thomas conceded that Mr. Foyst was a candidate. His amicus is bound by that position.

In *Lumbard v. Farmers State Bank*, 812 N.E.2d 196 (Ind.Ct.App. 2004) this rule was repeated:

> We also note that "a party may not generally assume successive positions in the course of the same litigation with respect to the same fact or set of facts which are inconsistent and mutually contradictory." (citation omitted) 812 N.E.2d at 201.

An amicus should also be barred from taking a position contrary to that taken by the party with whom it is aligned.

A stipulation of fact binds the parties and the court if not set aside or withdrawn. *Ehle v. Ehle*, 737 N.E.2d 429, 433-434 (Ind. Ct. App. 2000). Mr. Thomas agreed that Mr. Foyst was a candidate. His amicus may not seek to repudiate his admission. "[I]t is well established that `[a]n amicus is not permitted to raise new questions but rather must accept the case as it finds it at the time of its petition to intervene.' Indiana Dep't of Transportation v. FMG Indianapolis, LLC, 167 N.E.3d 321, 333 (Ind. Ct. App. 2021) (citing Anderson Fed'n of Tchrs., Loc. 519 v. Sch. City of Anderson, 252 Ind. 558, 254 N.E.2d 329 (1970))." *Blackford v. Welborn Clinic*, 172 N.E.3d 1219, 1222 n. 1 (Ind. 2021).

Under the expansive reading of standing by amicus, even if the defeated candidate took the position that he lost fair and square and accepted the outcome, any third party could challenge the result even though the defeated candidate accepted the election result.

6 Antieau on Local Government Law, Second Edition § 86.10[5] (2nd 2024) in discussing petitions to be a candidate says:

> A resident and registered voter has been held to have no standing to require a local election commission to determine the sufficiency of another person's qualifying petition, absent a showing of special injury.60[1]

The same reasoning should apply to this action.

There was no claim by Mr. Thomas that he lived in the council district for the seat at issue. It would be poor policy for the law to give officious intermedlers standing to fight election results in which they had no personal stake. In *Pence v. State*, 652 N.E.2d 486 (Ind. 1995) this court said:

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[1]The on line version of the treatise does not give page citations. The footnote number has been left in the quotation as the best available substitute for a pin point citation.

> Standing is similar to, though not identical with, the real party in interest requirement of Trial Rule 17. Ind.Trial Rule 17(A). The point of both requirements is to insure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. See State v. Rankin (1973), 260 Ind. 228, 294 N.E.2d 604. 652 N.E.2d at 467.

In an election case the two doctrines give standing and real party in itnerest status to the defeated candidate. Merely being a county chairman should be held to be insufficient to give standing to maintaining litigation which the defeated candidate has shown no interest in pursuing.

ISSUE II

MISSING A FILING DEADLINE BY A DAY DOES NOT MAKE CANDIDACY VOID *AB INITIO*

The amicus claims that:

> This Court has not shied away from strictly enforcing mandatory election laws even if doing so meant certifying the election of the candidate receiving the second highest number of votes, or where the enforcement of an election statute ex ante deprives voters of a choice between two candidates. (Amicus brief p. 10).

It is wrong.

6 Antieau on Local Government Law, Second Edition § 86.11 (2nd. 2024) discusses the effect of the election of a person who is dead or disqualified:

> A dead person, or someone disqualified by law for a local government office, does not take title to the post when chosen by the electorate.1 Where a dead person or another legally disqualified person is chosen by the voters, the courts will declare the office vacant and order another election.
>
> The ineligibility of the candidate receiving the highest number of votes does not entitle the eligible candidate with the next highest number of votes to a certificate of election. Otherwise stated, a person receiving only a minority of the legal votes cast in a local government election is not to be awarded the office when the person receiving the largest vote is legally disqualified. The votes cast for the ineligible candidate prevent the election of other candidates with fewer votes. At times this is known as the "American Doctrine."
>
> Under the "English Doctrine," votes cast for an ineligible candidate are thrown out, and, if a majority of votes are cast for an ineligible candidate, the eligible candidate receiving the next highest number of votes is entitled to be declared elected. This rule has been followed in Indiana, and has been adopted by statute or charter in a few other places.

This Court has retreated from the "English Doctrine". In *Fields v. Nicholson*, 150 N.E. 53 (Ind. 1926) this court said:

> No authorities have been cited, and we know of none, to the effect that a candidate who did not receive the highest number of votes at an election may be declared elected merely because the one who received the most votes was not eligible. And since the evidence in this case failed to show that those voters who cast their ballots for defendant did so with knowledge that he was not eligible for election to the office of trustee, such evidence was not sufficient to establish plaintiff's right to the office, although sufficient to prove that he was a voter of the township and that defendant was "disqualified." 150 N.E. at 56.

The Court of Appeals improperly ordered the losing candidate to be declared elected.

ISSUE III

NOTHING PREVENTS THE RENOMINATION OF A CANDIDATE WHOSE INITIAL CANDIDACY WAS A DAY LATE

The third claim of the amicus ignored the judicial admission and stipulation of Mr. Thomas that Mr. Foyst was a candidate.

There are some situation under which a person could not be a candidate such as not being a resident of the district from which he wants to be a elected, being a convicted felon or not being a citizen. Those disqualifying facts could not be remedied by renomination.

None of those situations exist in this case. The amicus cites nothing which prevents a party from renominating a person as a candidate whose initial candidacy was rejected for missing a technical filing deadline.

As the Attorney General, in its amicus brief clearly points out, *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985) is not controlling here and the appellee will not repeat that argument.

The Democrate Party amicus does not explain why since the vacancy only existed because the original candidacy filing by Mr. Foyst was a day late that vacancy could not be filled by renominating him. The obvious question is why not? There was a vacancy. There is no claim that he did not meet the qualifications for the post.

CONCLUSION

The amicus for the appellant Thomas has failed to establish any proper basis for superseding the will of the electorate in the election at issue. The decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF FILING AND OF SERVICE

I hereby certify that on February 20, 2025, I electronically filed the foregoing Brief of Appellee using the Indiana Electronic Filing System (IEFS).

I also certify that on February 20, 2025 the foregoing document was served on the following person, Appellant, via IEFS:

Ross Thomas

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