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

APPELLEE'S PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

The questions presented are:

I. Did the opinion decide an important question of law which has not but which should be decided by this court? The question is when a notice of caucus to fill a ballot vacancy is a day late and a challenge to the candidacy sustained by the county election board, is the party precluded from renaming the same person to fill the vacancy.

II. Did the opinion contravene controlling precedent of this court and conflict with other opinions by the court of appeals by holding that Mr. Foyst was not a candidate even though Mr. Thomas stipulated and made a judicial admission that Mr. Foyst had satisfied one of the three criteria to be a candidate?

III. Is the opinion contrary to the settled law of this state against thwarting the will of the electorate on the basis of merely technical objections?

TABLE OF CONTENTS

QUESTIONS PRESENTED ON TRANSFER. 2

BACKGROUND AND PRIOR TREATMENT OF ISSUES 4

ARGUMENT 5

QUESTION I: 5

QUESTION II: 9

QUESTION III: 10

CONCLUSION. 14

WORD COUNT CERTIFICATE 14

CERTIFICATE OF FILING AND OF SERVICE 14

BACKGROUND AND PRIOR TREATMENT OF ISSUES

Mr. Thomas, on July 26, 2023, filed a challenge to the candidacy of Mr. Foyst because the Call for Caucus was not sent to committee people and was not filed with the County Clerk by statutory deadlines (Appellant's App. Vol. 2 p. 16-9).

At the August 18th hearing before the County Election Board it sustained the challenge to the candidacy (Appellant's App. Vol. 2 p. 23). At that hearing the Republican Party County Vice Chair announced they intended to fill the empty slot with Mr. Foyst (Tr. p. 94, 130, 134). Mr. Foyst, on August 24, 2023, put the Democratic County Chairman and all voters in Bartholomew County on notice of his candidacy when he filed his Declaration of Candidacy and Written Consent to Fill a Ballot Vacancy for a City or Town Office in 2023 the "CAN-48" form with the Bartholomew County Clerk (Exh. Vol. p. 9).

Mr. Foyst on August 30, 2023 filed his Certificate of Candidate Selection to Fill an Early Ballot Vacancy for a City or Town Office in 2023 the "CAN-49" (Exh. Vol. p. 13). The filing also showed that he was selected by a duly called meeting of the Republican Party Committee on August 29, 2023.

Mr. Thomas filed a challenge on September 6, 2023. It was rejected (Appellant's App. Vol. 2 p. 28). He then filed a complaint for declaratory judgment on September 6, 2023 (Appellant's App. Vol. 2 p. 20). He alleged Mr. Foyst was not eligible to be renamed since he missed the original filing deadline and therefore not a candidate who could be renamed after a challenge to him was sustained (Appellant's App. Vol. 2 pp. 33-4).

Mr. Foyst won the election for Council District 6 by 454 votes to 309 votes for the opposing candidate (Exh. Vol. p. 19).

The trial court ruled in favor of Mr. Foyst on January 17, 2024 (Appellant's App. Vol. 2 pp. 168-72).

Mr. Thomas appealed. In an opinion issued July 26, 2024 the Court of Appeals held:

> On appeal, Thomas argues that Foyst's candidacy should be nullified because the notice of caucus was not timely submitted. Based on the relevant statutes and well-settled precedent from the Indiana Supreme Court and this Court, we agree. Therefore, we reverse and remand with instructions to declare Muñoz the winner of the 2023 general election. (Opinion p. 2)

ARGUMENT

QUESTION I

The opinion held:

> Thomas directs us to precedent from both the Indiana Supreme Court and this Court that holds that a failure to meet a statutory deadline for filling a vacancy on a general election ballot resulting from a primary election ballot vacancy makes a nomination "void and of no effect." . . .
>
> Foyst offers no persuasive rationale for reaching a different result in this situation, where the Clerk was barred by statute from receiving both the notice of caucus and the certificate of candidate selection because both documents were not timely filed. The Clerk's actions in violation of the applicable statutes were, by definition, ultra vires, and thus Foyst's candidacy never existed in the eyes of the law. Consequently, Indiana Code Section 3-13-1-7(b)(7) could not be used to place Foyst on the general election ballot; the statute presumes that a vacancy exists due to the successful challenge of a duly selected candidate, and Foyst was never a candidate. Accordingly, we reverse and remand with instructions to declare Muñoz the winner of the 2023 general election for the District 6 seat on the Columbus City Council. (Opinion pp, 8-9)

The opinion cited nothing to support the conclusion that the statute "presumes" the vacancy existed due to the challenge of a "duly selected candidate". It is respectfully submitted that a vacancy, no matter the cause, is a vacancy which may be filled under the statute. In *Bradford v. Frankfort, St. L. & T.R. Co.,* 142 Ind. 383, 40 N.E. 741 (1895) in discussing de facto officers said:

> In the last cited case Lord Ellenborough gave the following definition: "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." In the present case the corporation, upon the letter of the statute, elected five directors, and turned over to them its affairs, and permitted them to transact its business without denial or question. They were de facto officers, even if we were required to hold the law of June 17, 1852, unconstitutional. 40 N.E. at 744.

The first selection made Mr. Foyst a de facto candidate. When the election board rejected his first

selection it should be held that his de facto status as a candidate was sufficient to invoke the provisions of Ind. Code § 3-13-1-7(b)(7) to allow him to be renamed as the candidate for the seat.

The opinion cited *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985) and *Wilhite v. Mohr*, 485 N.E.2d 131 (Ind. Ct. App. 1985) for the conclusion that the candidacy of Mr. Foyst was null and void (opinion pp. 8-9). In *Higgins* there was not a selection of a candidate to fill a ballot vacancy which was disallowed by the local election board and the same person was then selected a second time to fill the ballot vacancy and was elected. “The doctrine of stare decisis states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. (citation omitted)” *Emerson v. State*, 812 N.E.2d 1090, 1099 (Ind. Ct. App. 2004). The different procedural posture of this case should prevent reliance on *Higgins* to void the election results.

Almost a century ago the Kentucky Supreme Court in *Lewis v. Mosely*, 215 Ky. 573, 286 S.W. 793 (1926) made comments that apply equally here:

> We see no reason to depart from the conclusions reached on the hearing of those motions, and we now hold that when a nominated candidate fails to file his certificate until after the expiration of the minimum time provided therefor he in effect resigned his nomination and thereby creates a vacancy that may be filled by the committee as provided in the statute, and that the negligent candidate may be so nominated. 286 S.W. at 796.

This Court should follow that eminently sensible reasoning. In this case after the election board sustained the challenge to the selection of Mr. Foyst a vacancy on the ballot was created. Calling the initial selection void and of no effect because the notice of caucus was filed a day late should not prevent reselection of Mr. Foyst to fill the ballot vacancy.

3 *McQuillin Municipal Corporations*. § 12:27 (3d ed.) in discussing municipal elections says:

> But whether or not the provisions are mandatory or directory, the rule usually applied is that informalities or irregularities in an election which do not affect the

> result will not invalidate it,1[1] for the courts prefer to give effect to the popular will whenever possible.

That was not done by the opinion in this case.

Election laws are discussed in 3B *Sutherland Statutory Construction* § 57:20 (8th ed.).

That treatise says:

> Election statutes seek generally to help realize the majority's will and to avoid disfranchising legal voters. Consequently, they usually are mandatory where the failure to comply might influence an election's outcome, as when, for instance, their purpose is to secure a complete and enlightened vote, or to prevent fraud.1 The obverse is true, as well, and they normally are directory when it comes to inconsequential deviations that do not affect election results, such as deviations from provisions intended primarily to secure timely and orderly conduct. In light of these essential policy goals, the timing of an action to enforce compliance with an election law may affect the answer about mandatory or directory effect. Alaska explained that. . .

It is respectfully submitted that the fact the first filing of notice of caucus was a day late should not be used to prevent the reselection of Mr. Foyst

The opinion in footnote 4 said:

> According to the Clerk, the courthouse was closed on Monday, July 3, the day before the July 4 legal holiday. Tr. Vol. 2 at 17. Indiana Code Section 33-32-2-4(b) provides,
>
> > The [circuit court] clerk shall keep the [clerk's] office open on every day of the year except on Sundays and legal holidays. . . .
>
> The record is silent as to why the courthouse was closed on July 3. To state the obvious, July 5 is later than July 3 for purposes of Indiana Code Sections 3-13-1-2 and 3-13-1-15(C). (Opinion p. 5).

It is respectfully submitted that the opinion overlooked Ind. Trial Rule 6(A) which says in computing a time period the last day of the period is to be excluded if "(4) a day the office in which the act is to be done is closed during regular business hours."

When there is a conflict between a statute and a rule of this court the rule prevails. *Matter of M.S.*, 140 N.E.3d 279, 1284 (Ind. 2020) The statute relied on by the Opinion and T.R. 6 could

[1]The online versions of the treatises cited in the petition do not give page references. Footnote numbers have been left in the quotations as the best available substitute for a pin point citation.

not both apply as to when the candidacy filing was required. The opinion improperly ignored the Trial Rule and applied the statute.

A number of federal cases have considered the consequences of there being a filing deadline and the clerk's office was closed on that day due to a nonlegal holiday. They are collected in sections 17 and 18 of an annotation. Eric Surette, *Annotation When Is Office of Clerk of Court Inaccessible for Purpose of Computing Time Period for Filing Papers Under Rule 6(a)(3) of Federal Rules of Civil Procedure and Similar Federal Procedural Rules* 66 A.L.R. Fed. 3d Art. 2 (2021). The cases cited held that filings were timely when made the next day the clerk's office was open.

In *Gaddis v. McCullough*, 827 N.E.2d 66 (Ind. Ct. App. 2005), *trans. denied*, the Court of Appeals quoted this statement from an opinion by this court:

> "[S]tatutes providing for contesting elections 'should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections.' " Pabey v. Pastrick, 816 N.E.2d 1138, 1148 (Ind.2004) (quoting Tombaugh v. Grogg, 146 Ind. 99, 44 N.E. 994, 995 (1896)), reh'g denied. 827 N.E.2d at 70.

There was nothing but formal or technical objection relied on to overturn the election in this case.

This Court has referred to the "eminently practical doctrine" formally know as " 'de minimis non curat lex' ... proclaims that the law does not redress trifles." *D & M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 900 (Ind. 2003). "[I]t is the courts' way of saying 'So what?' " Id. If there is no "what" and no practical consequences flowing from the technical violation of some law, the courts do not provide relief to ordinary litigants. Id. Filing a notice on the next day after July 3rd when the office was open is a trifle and should not be held to invalidate the election of Mr. Foyst.

QUESTION II

In footnote 9 the opinion rejected the argument of Mr. Foyst that in the second issue it was shown that the notice of candidate selection was not late. Mr. Thomas had stipulated that Mr. Foyst was a candidate on the ground that the issue was whether he was a candidate "in the eyes of the law, and the answer to that question is no." (Opinion p. 9).

Ind. Code § 3-5-2-6 says in part:

> (a) Except as provided in subsections (b) and (c), "candidate" means an individual who:
> (1) has taken the action necessary to qualify under Indiana law for listing on the ballot at an election or to become a write-in candidate;
> (2) has publicly announced or declared candidacy for an elected office; or
> (3) otherwise seeks nomination for or election to an elected office, regardless of whether the individual wins election to the office.
> (b) As used in IC 3-9, an individual becomes a "candidate" when the individual, the candidate's committee, or a person acting with the consent of the individual:
> (1) receives more than one hundred dollars ($100) in contributions; or
> (2) makes more than one hundred dollars ($100) in expenditures.

Subsections (a)(1) through (a)(3) are in the disjunctive which means that satisfying any of them satisfies the definition of candidate. *Bourbon Mini-Mart, Inc. v. Comm'r, Ind. Dep't of Envtl. Mgmt.*, 806 N.E.2d 14, 20-21, (Ind. Ct. App. 2004).

During Mr. Foyst's testimony the county 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 county chairman's unconditional admission that Jay Foyst was a candidate was both a stipulation and a judicial admission.

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). An attorney's clear and unequivocal admission of a fact is a judicial admission which binds the client. *Saylor v. State*, 55 N.E.3d 354, 363 (Ind. Ct. App. 2016), *trans. denied*.. "Finally under the judicial admission doctrine, such an admission is conclusive and no evidence may be offered to contradict it". *Id*. citing *Lutz v. Erie Ins. Exch*., 848 N.E.2d 675, 678 (Ind. 2006). The county chairman was improperly allowed to argue that Mr. Foyst was not candidate in the general election for the council seat for District 6 in the face of his stipulation and admission to the contrary.

If a party in a contract dispute who claimed there was no agreement stipulated in court that there was a contract between the parties, the fact that in the eye of the law there was no contract would not permit the stipulation to be disregarded.

QUESTION III

In *White v. Indiana Democratic Party ex rel. Parker*, 963 N.E.2d 481 (Ind. 2012) this Court held:

> Even where facts are alleged that might if later proven render a candidate ineligible, "[t]he existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it." Those voters who are lawfully qualified to participate in our democratic process "may not be disenfranchised except by their own willful or deliberate act to the extent that one who did not receive the highest vote cast may still be declared elected." (Internal citations omitted) 963 N.E.2d at 486.

In that case the candidate was facing allegations of criminal action involving registration. This court held:

> Here, the allegations of White's registration impropriety arose before the election and were made public by private citizens, the media, and by the Osili campaign and by the Democratic Party. It is likely that the average voter was aware that there were concerns about White's voter registration history at the time of the

> election, but we will not, on the basis of the present petition, judicially disenfranchise voters who went to the polls aware of what were at that moment only allegations. The fact that criminal charges were filed after the election and resulted in convictions (appeals still pending) does not alter that conclusion. 963 N.E.2d at 489–90.

Here, the voters in council district 6 were aware of the pending challenge to the candidacy. The newspaper published in Columbus Indiana is called The Republic. On August 8th it reported a hearing was set before the election board on the first challenge to Mr. Foyst's candidacy:

> The Bartholomew County Election Board on Thursday set a hearing for 1:30 p.m. Aug. 18 to determine whether Republican Joseph Jay Foyst will remain a candidate in the November election for the newly created Columbus City Council District 6.
>
> Bartholomew County Democratic Party chairman Ross Thomas filed a challenge to Foyst's candidacy on July 26. The challenge claimed that the candidate had failed to follow state law requiring proper paperwork be filed with the Bartholomew County Clerk's office at least 10 days prior to the Republican Party caucus that selected him to run in the general election for Columbus City Council District 6.

www.therepublic.com/2023/08/03/hearing-date-set-in-challenge-to-district-6-city-council-candidate/ (viewed 8/14/24)

On October 7th it reported the status of the second challenge:

> The legal battle over the candidacy of GOP nominee for Columbus City Council District 6 Joseph Jay Foyst, which is still pending in Bartholomew Circuit Court under the jurisdiction of a special judge, could have implications for some 4,093 voters in the district, which covers portions of central and north Columbus.
> The lawsuit challenging Foyst's candidacy, filed in September by Bartholomew County Democratic Party Chair Ross Thomas, seeks court orders for Foyst to be deemed ineligible for the Nov. 7 municipal election and removed from the ballot. . . .
> The outcome of the legal fight could determine which party wins the District 6 council seat. . . . And depending on how long the case drags out, people could wind up casting votes for a candidate who may later be ruled ineligible and ordered removed from the ballot.

www.therepublic.com/2023/10/07/council-ballot-challenge-suit-continued-to-start-of-early-voting/ (viewed 8/14/24).

On November 2nd the newspaper repeated that "A lawsuit regarding the validity of a candidate for city council will not be resolved before next week's municipal election."

Joseph Foyst petition to transfer

www.therepublic.com/2023/11/02/foyst-candidacy-lawsuitn day-will-continue-past-election-day/ (viewed 8/14/24).

The voters in district 6 should not be disenfranchised on the basis of allegations that there was a claimed flaw in the initial selection of Mr. Foyst which prevented his being selected a second time to fill the ballot spot.

Mr. Thomas was unable to answer the trial court's questions for authority for his complaint when he was about what statutory authority he relied on:

> Court:
> Okay, but I'm gonna stop you there because you, you emphasize several times, strict following of the rules. Where in that rule does it allow the Election Board to remove a candidate or for there to be a challenge filed? That's the statute I'm looking for. If we're not using 16.5, which one are we using? Because that one doesn't allow it. Anywhere. (Tr. pp. 146-7)
> . . .
> Court:
> Okay, so which statute allows then, the Election Board to remove him as a candidate? If it's not 16.5, which one is it?
> Mr. Thomas:
> . . .So the question is, the ultimate question, which I think the Court sees, is when, when they seek to replace him, on the ballot, is he a candidate who has been removed? And our argument is that he is not. So even if we use 16.5 as the apparatus, he is still not a candidate who's been removed. He is a person who should not have been a candidate, as the case law says, null and void.
> Court:
> Okay. Court notes that you were unable to answer my question. Very good. Now let's move on to the next one then. The, as we know and walk me through this, 3-13-1-7 applies to a candidate on the ballot as of July 3rd, if I understand your points correctly? Is that right? (Tr. pp. 147-8)
>
> Court:
> Okay, yeah. Alright, so if you have a candidate that's placed on the ballot after July 5, what statutory procedure allows that candidate to be challenged?
> Mr. Thomas:
> I don't know that there is one Judge. (Tr.p. 148).
>
> Court:
> I understand that, but you just indicated that the only way to challenge that after July 5, is by way of a lawsuit. Correct?
> Mr. Thomas:
> I don't see any application to CAN-1 as it relates to the circumstance we have here.
> Court:
> I take that as a no. (Tr. pp. 150-1)

The plaintiff, a lawyer and the county chairman, could not answer the trial court's questions as to the basis for challenging the candidacy. How could voters be any more informed so it could be said they chose to throw their votes away.

This Court in *Lumm v. Simpson*, 207 Ind. 680, 194 N.E. 341 (1935) said:

> The purpose of all election laws is to secure a free and honest expression of the voter's will. Statutes controlling the activities of political parties, party conventions, and primaries, and providing for the manner in which the names of candidates may be put upon the ballots, have for their only purpose the orderly submission of the names of candidates for office to the electors to the end that the electors may know who are candidates and have a free opportunity to vote for their choice,. . . The election commissioners are public officers. In an action against them, brought before an election, involving the names of the candidates to be placed on the ballot by them, the statutory provisions referred to are treated as mandatory, and they will be enjoined from placing a name upon the ballot that has not been submitted to them pursuant to the statute, but, after the election commissioners have acted and placed a name upon the ballot, and after the election, the provisions of the statute are considered directory only, and the names of candidates will be treated as having been legally placed upon the ballot by the election board, 'unless an essential element of the election is affected, or there is an express declaration in the statute that the act is essential to a valid election, or that its omission will render the election void. The purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.' (citations omitted) 194 N.E. at 342.

There was no claim of fraud in this case.

This Court concluded:

> There was no finding of fraud, nor does it appear that any essential element of the election was affected. The electors apparently had an opportunity to freely and fairly cast their ballots. To disfranchise them because of a mere irregularity or a mistaken construction of the law by a party committee or election commissioner would defeat the very purpose of all election laws. 194 N.E. at 342–3.

Mr. Foyst won. The opinion improperly gave the defeated candidate the council seat by holding that the winning candidate could not be renominated for the council seat because the first notice of caucus was filed a day late. The opinion, if allowed to stand, would serve only to thwart the will of the 454 voters who chose Mr. Foyst to represent them on the Columbus City Council.

Joseph Foyst petition to transfer

The opinion in this case relied on what was nothing but a formal or technical objection.

CONCLUSION

The petition to transfer should be granted and the decision of the Court of Appeals vacated and the judgment of the trial court affirmed.

Respectfully submitted,

/s/ David W. Stone IV

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WORD COUNT CERTIFICATE

I verify that this petition contains no more than 4,200 words.

/s/ David W. Stone IV
David W. Stone IV

CERTIFICATE OF FILING AND OF SERVICE

I hereby certify that on August 30, 2024 I electronically filed the foregoing Petition to Transfer using the Indiana Electronic Filing System (IEFS).

I also certify that on August 30, 2024 the foregoing document was served on the following person, Appellant, via IEFS:

Ross Thomas

/s/ David W. Stone IV
David W. Stone IV