

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

GENE A. MULLEN,)	
)	
Plaintiff,)	
v.)	C.A. No. 05C-05-025-JEB
)	
MARK G, SCHAEFFER;)	
THE TOWN OF SMYRNA, DELAWARE;)	
THE MAYOR AND COUNCIL OF THE)	
TOWN OF SMYRNA, DELAWARE;)	
DAVE HUGG, as Town Manager of the Town)	
of Smyrna, Delaware; JAMES MARKOW,)	
Systems Manager of the Town of Smyrna,)	
Delaware; and THE BOARD OF ELECTIONS)	
OF THE TOWN OF SMYRNA, DELAWARE,)	
)	
Defendants.)	

Submitted: August 31, 2005 Decided: December 1, 2005

OPINION

*Defendants' Motion to Dismiss. Granted.
Defendants' Motion for a Protective Order. Moot.*

Appearances:

Stephanie Leigh Hanson, Esquire, Richards Layton & Finger, Wilmington, Delaware and Robert J. Katzenstein, Esquire, Smith Katzenstein & Furlow, LLP, Wilmington, Delaware. Attorneys for Gene A. Mullen.

Richard A. Forsten, Esquire, Klett Rooney Lieber & Schorling, Wilmington, Delaware. Attorney for Defendant Mark G. Schaeffer.

Collins J. Seitz, Jr., Esquire, Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware. Attorney for Town Defendants.

JOHN E. BABIARZ, JR., JUDGE.

On April 25, 2005, The Town of Smyrna held an election for Mayor and part of the Town Council. Two people ran for Mayor – Plaintiff Gene A. Mullen and Defendant Mark G. Schaeffer, who was the incumbent. The Town Board of Elections certified that Mark Schaeffer had been re-elected by a vote of 678 to 676. He was sworn in as Mayor of Smyrna on April 28, 2005.

On May 16, 2005, Plaintiff filed a complaint in this Court, pursuant to Del. Code Ann. tit. 15, § 5941, alleging irregularities in the handling of absentee ballots. In the alternative, Plaintiff petitioned for a writ of *certiorari* to review the Board's decision. The named defendants are Mark G. Schaeffer; Dave Hugg, town manager; James Markow, systems manager of Smyrna; and The Board of Elections of the Town of Smyrna, and The Town of Smyrna.

Defendants move to dismiss the complaint on grounds that (1) § 5941 does not apply to elections other than a City of Wilmington election; (2) the common law writ of *quo warranto* is the sole avenue to challenge election results; and (3) the only proper defendant under Plaintiff's § 5941 claim is Mr. Schaeffer. The Town Defendants also move for a protective order to prevent discovery if the petition for *certiorari* is granted.

As explained below, the Court holds that Plaintiff has no remedy under Title 15 and that the writ of *certiorari* is not available to him either. Defendants' motion

as to these issues is granted, and their motion for a protective order is therefore moot.

Section 5941 of Title 15 provides in part as follows:

Any person claiming to be elected to an office to be exercised in and for any county, district or hundred may contest the right of any person declared to be duly elected to such office for any of the following causes:

(1) For malconduct on the part of the election officers or clerks holding the election, or any one of them. . . .

All parties agree that § 5941 is the only law that conceivably grants jurisdiction to this Court to review the Smyrna election. Because the statute applies only to a “county, district or hundred” office, Plaintiff argues that the word “district” includes a municipality. In support of his argument, Plaintiff first points to a definitional section of Title 15, § 101(11), which provides that

‘Local office’ means any political district smaller than the state including municipal, county, state representative, or state senatorial.

The term “local office,” however, is not used in § 5941, which renders Plaintiff’s argument of dubious value.

Second, Plaintiff argues that since “district” is not defined it must be given its common meaning. Plaintiff finds this meaning in Black’s Law Dictionary, which defines district as

One of the territorial areas into which an **entire** state or country, county, municipality or other political subdivision is divided for jurisdictional,

political, electoral or administrative purposes.¹ (Emphasis supplied.)

This state, in fact no state, is not divided into municipalities. Municipalities are free-standing governmental units, not divisions of the State. Thus a municipality cannot be considered a district under Plaintiff's proffered definition.

In common usage, cities, towns, and municipalities are not referred to as districts. The legislature was obviously aware of this since a separate subchapter of Title 15 deals with municipal elections. Only two sections in this subchapter pertain to municipalities other than the City of Wilmington. Section 7501 prescribes the manner of depositing and counting ballots, and § 7502 permits a sole candidate to assume office without a formal election. The section regarding ballots is "an amendment to all charters granted to any municipality in this State." § 7501 (c). In other words, while the legislature has mandated a uniform means of casting and counting ballots and amended all municipal charters to reflect this mandate, other election issues are left to individual municipal charters. If the General Assembly had wanted to legislate the manner in which municipalities other than Wilmington would conduct elections, it would have done so.

In fact, the General Assembly has made § 5941 applicable to challenges to City of Wilmington elections. Section 7527 provides as follows:

¹Black's Law Dictionary, 330 (6th ed. 1991).

If any candidates for any of the [City of Wilmington] offices before mentioned shall choose to contest the right of any person claiming to have been elected to said office, the causes for such contests and all of the other provisions now set out in §§ 5941-5955 of this title shall be applicable, and all such contests shall be determined pursuant to all of said sections.

There is no such provision for other municipalities, and the Court concludes that the legislature chose to allow other municipalities to include election provisions in their town charters.

This conclusion is confirmed by Delaware law as to home rule for municipal corporations. The home rule enabling statute permits qualifying municipalities to “assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute.”² For all these reasons, the Court holds that Plaintiff has no cause of action under Delaware election law.

Plaintiff also petitions for a writ of *certiorari* to permit this Court to review the Board’s decision declaring Schaeffer to be the winner of the election. The threshold requirements for *certiorari* are that the challenged act or decision is final and that there is no other available basis for review.³ In this case, a writ of *quo warranto* is

²DEL. CODE ANN. tit. 22, § 802. See also *Yacucci v. Tenhoopen* 550 A.2d 327 (Del. Super. Ct. 1998), *aff’d*, 1988 WL 117509 (Del. Supr.).

³*In re Butler*, 609 A.2d 1080, 1082 (Del. 1992) (citing *Shoemaker v. State*, 375 A.2d 431, 438 (Del. 1977)).

not only available, the Delaware Supreme Court has stated that it is the exclusive avenue to determine the right to hold public office in the absence of unusual circumstances. There is nothing unusual about the circumstances before this Court. Plaintiff simply asserts an irregularity in the handling of absentee ballots.

Despite the clarity of the *Hampson* ruling, Plaintiff argues that Delaware courts have recognized other ways of challenging election results. Each of these cases is distinguishable from the case at bar.

In *Democratic Committee of the Town of Elsmere v. Mayor and City Council of the Town of Elsmere*, the plaintiff filed a petition for a writ of *mandamus* to direct the Town Council to alter the ballot for an upcoming election. *Elsmere* does not deal with a final election result and has no bearing on the case at bar.

In *Spencer v. Smyrna Bd. of Education*, the plaintiffs sought declaratory relief from the results of a school tax referendum, conducted pursuant to Del. Code Ann. tit. 14, § 1903. This Court held that it had jurisdiction to review by *certiorari* the school board's actions under Chapter 19, Local School Taxes, of Title 14. This case is not helpful in resolving the case at bar because it does not relate to the right to hold office.

Gebelein ex rel. State v. Nashold is a Chancery Court case in which the State Attorney General and a private citizen sought to have a municipal election enjoined

because of an allegedly unconstitutional provision in the town charter.⁴ It does not pertain to a final election result and is not instructive here.

For all these reasons, Defendants' motion to dismiss is ***Granted***, and the motion for a protective order is rendered ***Moot***.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,Jr./ram/bjw
Original to Prothonotary

⁴406 A.2d 279 (Del. Ch. 1988).