

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

STATE <i>ex rel.</i> SKAGGS, <i>et al.</i>	:	
	:	Case No. C2:08CV-1077
Relators,	:	
	:	
v.	:	Judge Marbley
	:	
JENNIFER L. BRUNNER	:	
SECRETARY OF STATE OF OHIO,	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

DEFENDANT FRANKLIN COUNTY BOARD OF ELECTIONS'
MOTION FOR REMAND

Defendants, Franklin County Board of Elections, respectfully request that this Court remand this case to the Supreme Court of Ohio. The reasons supporting this motion for remand are set forth in the attached memorandum of law which is incorporated here by reference.

Respectfully submitted,
RON O'BRIEN
PROSECUTING ATTORNEY
FRANKLIN COUNTY, OHIO

/s/ Patrick J. Piccininni
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MEMORANDUM IN SUPPORT

I. PLAINTIFF'S CLAIMS ARE RESOLVED UNDER AN INTERPRETATION OF STATE LAW AND FEDERAL JURISDICTION IS NOT INVOKED.

This case turns solely upon the interpretation of state law and federal jurisdiction is not invoked. “The Supreme Court has made clear that, to determine whether a claim arises under federal law, a court, under the “well-pleaded complaint” rule, generally looks only to the plaintiff's complaint If the complaint relies only on state law, the district court generally lacks subject matter jurisdiction and the action is not removable.” *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 552 (6th Cir. 2005) (internal citations omitted). This case arises as an original action in mandamus under Article IV, Section 2 of the Constitution of the State of Ohio and Chapter 2731 of the Ohio Revised Code. The statutes at issue, and upon which this case turns, are in the Ohio Revised Code. This case does not arise under federal law; it arises and turns upon the interpretation of state law. As such, federal jurisdiction is absent.

In a supplemental memorandum in support of removal, Secretary Brunner argues that this Court has jurisdiction over Relators' claims under the All Writs Act. *See generally*, 28 U.S.C. § 1651(a). It should be noted that the party seeking to remove has the burden of establishing that federal subject matter jurisdiction exists. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S.Ct. 780 (1936). “[T]he All Writs Act does not confer federal subject matter jurisdiction and, therefore, it cannot confer the original jurisdiction required to support removal pursuant to [28 U.S.C.] § 1441.” *Neick v. City of Beavercreek*, 255 F.Supp.2d 773, 778 (S.D. Ohio 2003) (citing *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366 (2002)). *See also*, *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476, 118 S.Ct. 921 (1998) (holding that a prior federal court order does not “transform the plaintiff's state-law claims into federal claims”).

The *Neick* court held that based upon the Supreme Court's holding in *Syngenta Crop* – “that the federal district court's retention of jurisdiction over the primary case, *i.e.*, the case in which the consent order was issued, did not confer removal jurisdiction over case before it” – the defendants were precluded from basing removal of the plaintiffs' action on the All Writs Act. *Neick*, 255 F.Supp.2d at 778 (internal citations omitted).

Likewise, this Court's prior orders do not provide a basis for federal question jurisdiction. This case lacks independent federal subject matter jurisdiction. As such, this Court lacks jurisdiction over this case.

II. DEFENDANT FRANKLIN COUNTY BOARD OF ELECTIONS' OPPOSITION TO REMOVAL DEMANDS THAT THIS CASE BE REMANDED.

The Franklin County Board of Elections (“FCBOE”) opposes the removal sought by Secretary Brunner. While a defendant may remove a state action to federal court pursuant to 28 U.S.C. § 1441, there is a rule of unanimity that is established from 28 U.S.C. § 1446. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003). The rule of unanimity “demands that all defendants must join in a petition to remove a state case to federal court.” *Id.* Thus, where defendants are “expressly divided in their desire to remove,” the district court must remand. *Loftis*, 342 F.3d at 517.

The FCBOE has not consented to removal of this case. Because Secretary Brunner has filed a notice to remove, the FCBOE hereby moves for remand. Pursuant to the rule of unanimity, this case must be remanded.

Secretary Brunner has argued that the consent of Defendant FCBOE was unnecessary for removal. In support, the Secretary relies on two exceptions to the rule of unanimity: (1) that the non-joining defendant – the FCBOE – has not been served with service of process at the time the removal petition is filed; and (2) that the FCBOE is merely a nominal or formal party. *See Klein*

v. Manor Healthcare Corp., 1994 WL 91786 *3 (6th Cir. 1994). However, these two exceptions do not apply because (1) counsel for the FCBOE have entered their appearance in this case before the Supreme Court of Ohio and (2) the FCBOE is a real party in interest and is not merely a nominal or formal party.

A. The non-service exception does not apply because counsel for the FCBOE filed an appearance in this case before the Supreme Court of Ohio and demonstrated an intent to defend the lawsuit.

The non-service exception raised by Secretary Brunner should not be employed to preclude the FCBOE from opposing removal. Service should not be an issue in this case because counsel for the FCBOE filed an appearance in this case before the Supreme Court of Ohio. (See Notice of Appearance, attached as Exhibit A.) The appearance of counsel demonstrates an intent to defend the case at bar and precludes the application of the non-service exception. *See, First Independence Bank v. Trendventures, L.L.C.*, 2008 WL 253045 (E.D. Mich. Jan. 30, 2008) (holding that because the attorney for a defendant had appeared in the case, the non-service exception did not apply to excuse the removal-seeking defendant from obtaining consent of all defendants in accordance with the rule of unanimity). Because counsel for the FCBOE has appeared, the non-service exception does not apply. Accordingly, Secretary Brunner was required pursuant to the rule of unanimity to obtain the consent of the FCBOE in order to petition for removal.

B. Consent of the FCBOE was required because FCBOE is a real party in interest and not merely a nominal or formal party.

The FCBOE is not merely a nominal or formal party, and its opposition to removal is fatal to Secretary Brunner's effort to remove this case. A defendant is not merely a nominal party if there is an arguable claim stated against it and it has "a demonstrated interest in the outcome of the case." *Local Union No. 172 v. P.J. Dick, Inc.*, 253 F.Supp.2d 1022, 1026-27

(S.D. Ohio 2003). A defendant is a real party in interest if it “by the substantive law, has the duty sought to be enforced or enjoined.” *Rose v. Giamatti*, 721 F.Supp. 906, 914 (S.D. Ohio 1989) (citation omitted). In contrast, “a formal or nominal party is one who, in a genuine legal sense, has no interest in the result of the suit, . . . , or no actual interest or control over the subject matter of the litigation.” *Id.* at 914-15 (internal citations omitted).

It cannot be said that the FCBOE has no actual interest in the result of this lawsuit. This case concerns the counting of provisional ballots pursuant to state law. The FCBOE is the public body statutorily charged with the obligation of counting ballots. Further, the third prayer for relief in Relators’ complaint requests “a writ of mandamus compelling *Respondents* to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter on the provisional voter affirmation” The FCBOE has the sole authority to accept or reject provisional ballot applications. As such, the FCBOE has an actual interest in the result of the lawsuit and has the duty sought to be enforced by Relators. Accordingly, the FCBOE is a real party in interest and its consent was required for removal.

III. CONCLUSION

Because federal jurisdiction is absent and because the FCBOE expressly opposes removal, this case must be remanded.

Respectfully submitted,

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FRANKLIN COUNTY, OHIO

/s/ Patrick J. Piccininni

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*Counsel for Respondent Franklin County Board of
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon all counsel of record
by means of the Court's electronic filing system this 14th day of November, 2008.

/s/ Patrick J. Piccininni

Patrick J. Piccininni (0055324)

Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* SKAGGS, *et al.*

Relators,

v.

JENNIFER L. BRUNNER
SECRETARY OF STATE OF OHIO,
et al.,

Respondents.

Case No. 08-2206

Original Action in Mandamus

NOTICE OF APPEARANCE

Now comes Patrick J. Piccininni and Anthony E. Palmer, Jr. and hereby enters their appearances as counsel for Respondent, Franklin County Board of Elections, in the above-styled case.

RESPECTFULLY SUBMITTED,

RON O'BRIEN
PROSECTING ATTORNEY
FRANKLIN COUNTY, OHIO

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EXHIBIT
A

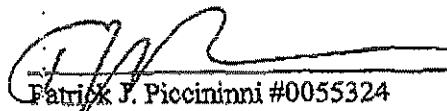
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, has been served via facsimile transmission upon:

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this 13th day of November, 2008.


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