

STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

HON. STEVEN R. SERVAAS

Michigan Supreme Court No: 137633

63rd District Court
105 Maple Street
Rockford, MI 49341

Judicial Tenure Commission
Formal Complaint No. 84

**REPLY BRIEF IN SUPPORT OF HON. STEVEN R. SERVAAS'S PETITION
TO REJECT OR MODIFY THE JUDICIAL TENURE COMMISSION'S
RECOMMENDATION FOR ORDER OF DISCIPLINE**

ORAL ARGUMENT REQUESTED

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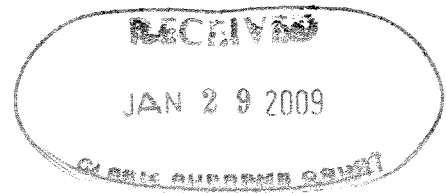


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INTRODUCTION

This case should not be before this Court. Under the Michigan Court Rules, the exclusive method for determining whether Judge Servaas has wrongfully held his judicial seat is through a *quo warranto* action brought by the Attorney General in the Michigan Court of Appeals. The Judicial Tenure Commission lacks subject matter jurisdiction to make that determination; therefore, this Court should dismiss the action.

Even if this case had properly found its way to this Court, it still should be dismissed. Judge Servaas did not vacate his judicial office by owning homes in both divisions of his judicial district and by considering his principal residence to be the home in the division other than where his courthouse is physically located. If this Court were to find that Judge Servaas's residence did not comport with Michigan's cryptic constitutional and statutory residency requirements, it does not follow that this defect constitutes judicial misconduct warranting the extreme sanction of removal from office. The Court should consider Respondent's prompt curing of the alleged defect and the decision of the voters to re-elect Judge Servaas despite their awareness of these proceedings, and conclude that removal is unwarranted and would undermine the democratic process rather than protect the integrity of the system.

LEGAL ARGUMENT

I. THE COMMISSION LACKED SUBJECT MATTER JURISDICTION OVER WHETHER JUDGE SERVAAS VIOLATED ART. 6, § 20 OF THE MICHIGAN CONSTITUTION.

As explained in Respondent's principal brief, the Commission lacked subject matter jurisdiction over whether Judge Servaas vacated his office under Art. 6, § 20 of the Michigan Constitution. Exclusive subject matter jurisdiction lies with the Court of Appeals under MCR 3.306.

On page 9 of its brief the Commission states, “The fact that improper conduct by a judge may be subject to judicial review does not deprive the Commission of subject matter jurisdiction.” Similarly, on page 10 it states, “The potential availability of a *quo warranto* action in no way precluded filing of disciplinary charges against Respondent.” The Commission misses the point. The issue of whether Judge Servaas vacated his judicial office is not merely “subject to judicial review.” Rather, the issue is one that *must* be determined by the Court of Appeals, and the action raising that issue *must* be brought by the Attorney General as a *quo warranto* claim. MCR 3.306. Further, a *quo warranto* action is not merely “potentially available.” It is the *only* proper method of determining whether Judge Servaas unlawfully holds that office. MCR. 3.306; *see also Giannotta v Governor*, 71 Mich App 15, 22; 246 NW2d 357 (1976) (an action to remove a sitting judge must be brought as a *quo warranto* claim); *Layle v Adjutant Gen of Michigan*, 384 Mich 638, 641; 186 NW2d 559 (1971) (“Numerous decisions of the Court hold that *quo warranto* is the proper and exclusive remedy to try title to office finally and conclusively”). The Commission does not have subject matter jurisdiction over this question, nor does the Supreme Court on appeal from the Commission.

The case the Commission cites, *Matter of Laster*, 404 Mich 449; 274 NW2d 742 (1979), has nothing to do with a vacancy in office and does not address the issue of *quo warranto*. It merely stands for the proposition that an *appeal of a judge’s decision out of which the alleged impropriety arose* does not preclude disciplinary proceedings. *Id.* at 461-62. The present case does not involve such a situation.

When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the case, is void. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). A court must acknowledge the limits of its authority and should, on its own

motion, dismiss an action over which it lacks jurisdiction at any stage of the proceedings. *Id.* Therefore, the present case should be dismissed for lack of subject matter jurisdiction.

II. JUDGE SERVAAS'S CONDUCT DOES NOT WARRANT REMOVAL FROM OFFICE.

Assuming, *arguendo*, that the Commission had subject matter jurisdiction over whether Judge Servaas vacated his office and that the issue is now properly before this Court, the Court should decline to remove Judge Servaas from office. For the reasons explained in detail on pages 11 through 16 of Respondent's principal brief, Judge Servaas did not vacate his office.¹ He did not remove his domicile "beyond the limits of the territory from which he was elected" in violation of the Michigan Constitution because the "territory" is the entire 63rd District. The fact that the 63rd District has two divisions is of no consequence, as "[t]he provisions for election divisions of a judicial district have no effect on the administration of a judicial district." MCL 600.8102. Respondent's interpretation of the constitution is consistent with relevant statutes, one of which states that an incumbent district court judge need only be a resident of the "district or election division" in which he seeks office. See MCL 168.467c (emphasis added). Statutes containing residency requirements for judges of the Court of Appeals, circuit courts, and probate courts contain language indicating when an office is vacated, but such language is missing from the comparable statute concerning residency requirements for district court judges. Compare MCL 168.409j (Court of Appeals judges) and MCL 168.422 (circuit court and probate court judges), to MCL 168.4671 (district court judges).

Judge Servaas has been on the bench for over 35 years, and it is undisputed that he has been domiciled in the 63rd District the entire time. He has always maintained one of his

¹ Respondent's legal position has been consistent throughout these proceedings, as evidenced by the earliest briefing on this issue. The Commission's claim that "Respondent went back to the drawing board" after the proceedings before the Special Master and made this argument for the first time before the Commission (Brief, pp. 12-13) is another feeble attempt by the Commission to portray Judge Servaas as dishonest.

homes in the 1st Division. Aside from late 2005 through February 2008, when he used his 1st Division home as a second home and used his 2nd Division home as his primary residence, a house in the 1st Division has always been his primary residence. By living in the 63rd District, Judge Servaas has complied with the constitutional and statutory residency requirements for district court judges.

Even if the Court prefers the Commission's interpretation of the residency requirements over Judge Servaas's interpretation, the legal authority on this subject is sufficiently sparse that a reasonable misinterpretation of the residency requirements cannot constitute judicial misconduct. Importantly, upon understanding the Commission's contrary interpretation and desiring to resolve the issue, on February 22, 2008, Judge Servaas moved his primary residence back into the 1st Division. (Apx. 124a). He promptly changed his voter's registration and driver's license information accordingly. (Apx. 88a). He took these actions to leave no question as to whether he met the residency requirements. Then, he ran for re-election for the 2009-2014 term as an incumbent. The Commission claims that running as an incumbent was "fraudulent" (p. 41)² but ignores the portion of Respondent's brief explaining that Judge Servaas also filed nominating petitions in anticipation of the Commission's argument that he could not run as an incumbent (pp. 34-35). (Apx. 440a-443a). The community's support for him has continued to grow since these highly-publicized proceedings began. (Apx. 350a-415a). Judge Servaas ran unopposed, and was re-elected with 41,454 votes. (Apx. 471a-472a).

Despite the fact that Judge Servaas promptly cured the alleged defect in his residency, fulfilled the requirements to run for re-election, and was re-elected by over 41,000 people stating that they want him to be their judge, the Commission demands his removal *for the*

² The Commission's statement on p. 41 of its brief that Respondent "fraudulently gained access to the ballot" by running as an incumbent is a prime example of the Commission's misguided notion that anything one does that fails to conform to the Commission's idea of how it should be done constitutes "fraud" or "deceit."

upcoming term simply because he, at the worst, may have temporarily lived in the wrong division of his judicial district *during the last term*. Respondent is not arguing that subsequent behavior or an intervening election automatically cures misconduct or precludes this Court from imposing discipline. What Respondent is arguing is that: (1) even if a defect existed in his residency, it does not rise to the level of judicial misconduct; and (2) even if the Court were to view it as misconduct, the sanction of removal is disproportionately harsh to the severity of the conduct alleged and would disrupt the democratic process by depriving the voters of their chosen judge.

III. JUDGE SERVAAS DID NOT PROVIDE FALSE TESTIMONY AND SHOULD NOT BE ORDERED TO PAY THE COMMISSION'S COSTS.

The Commission strains mightily to portray Judge Servaas as dishonest in order to justify the Examiner's treatment of him and the existence of these proceedings, and, perhaps, to try to secure an award of costs. If nothing else, the current focus upon the truthfulness of Judge Servaas's testimony and the absence of any meaningful response to the jurisdictional challenge tacitly acknowledges the lack of any basis to justify the Commission's ham-handed attempt to coerce a resignation. However, instances where the Commission claims Judge Servaas provided false testimony are nothing more than situations where Judge Servaas and the Commission disagreed upon the facts or their interpretation. For example, despite the Commission's contention that Judge Servaas had principally resided in the 2nd Division since 2000, Judge Servaas testified that it was not until late 2005 when he began to consider 201 Honey Creek in the 2nd Division his home. (Apx. 229a, 232a). Before that, it was simply another one of his renovation projects that he likely would have sold upon completion, just like he did with the nearby home at 109 Honey Creek. (Apx. 125a-128a, 229a). He spent a significant amount of time on nights and weekends renovating it, and therefore listed it on the "duty logs" as the place

where he could most likely be found after court hours. (Apx. 125a-126a, 136a). He even temporarily recuperated there after an accident because it had more room for his caregivers than his home did. (Apx. 227a). However, he kept returning to his home in the 1st Division and intended to return there until late 2005, when he decided that 201 Honey Creek would be his next home. (Apx. 229a, 232a). The fact that the Commission views the “duty logs” as conclusive evidence of where a person considers himself domiciled does not make Judge Servaas’s testimony dishonest.

The Commission also pulls testimony out of context and contorts a new meaning to portray Respondent as dishonest. This tactic will become evident if the Court reads the *entire* line of questioning on these issues, as cited in pages 25-28 of Respondent’s principal brief, instead of reviewing only limited portions and accepting the Commission’s twisted interpretation. For example, Judge Servaas did not testify that he had never made a breast doodle, and why would he? He admitted to creating one in his Answer to the Formal Complaint, which he signed. (Apx. 83a). He knew that admission was binding and had no incentive to later deny it. But the Examiner never produced or even described the specific doodle about which Respondent was questioned, and Judge Servaas testified that he did not know whether he drew whatever doodle the Examiner had in mind. (Apx. 138a). The Commission reads an untruth into this testimony that simply does not exist. Similarly, Judge Servaas testified that he does not make sexual comments to his clerks, and the only clerk allowed to testify on this issue, Bobbi Thelen, unequivocally stated that the judge jokes with the clerks “all the time” but never makes sexual or demeaning comments to them. (Apx. 189a). But the Commission ignores the last part of Thelen’s testimony to suggest a contradiction that does not exist.

The case before the Master involved many disputed facts.³ That the Master accepted the Commission's version of some of the facts does not lead to the conclusion that Judge Servaas provided false testimony. The trier of fact is, of course, sometimes wrong. Even where the weight given to differing facts is supportable, the acceptance of one fact over another is not prima facie evidence of dishonesty. If that were so, then perjury charges would follow on the heels of every trial. The Court should reject the argument that Respondent testified untruthfully and refuse to award the Commission its costs.

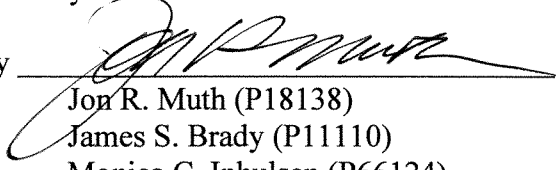
CONCLUSION

For these reasons, and for those stated in Respondent's principal brief, Judge Servaas requests that this Court reject the Commission's recommendation to remove him from office. He further requests an order denying the Commission's request for costs.

Respectfully submitted,

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Dated: January 27, 2009

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³ Very few of these disputed facts were material to the issues raised, so the Commission's motives in trying to paint Respondent as having lied about them are questionable. Whether Judge Servaas began residing in the 2nd Division in 2000 or 2005 is irrelevant to the issue of whether he vacated his office (Count I). If moving was wrongful, as the Commission alleges, it was wrongful no matter when it occurred. Similarly, whether Judge Servaas made jokes to his clerks similar to the sweatshirt joke is irrelevant to the issue of whether the sweatshirt joke constitutes misconduct (Count III).