

**[J-77-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

IN RE NOMINATION OF GREG	: No. 172 EAL 2007
PAULMIER FOR THE OFFICE OF CITY	:
COUNCIL OF PHILADELPHIA	: Appeal from the Order of the
DEMOCRATIC PRIMARY MAY 2, 2007	: Commonwealth Court entered April 9,
FROM THE 31 <sup>ST</sup> LEGISLATIVE	: 2007 at No. 570 CD 2007, which affirmed
DISTRICT	: the Order of the Court of Common Pleas,
	: Philadelphia County, Civil Division entered
OBJECTION OF: CINDY BASS	: on March 22, 2007 at No. 1172 March
	: Term, 2007.
	:
PETITION OF: GREG PAULMIER	:
	SUBMITTED: APRIL 12, 2007

**CONCURRING OPINION**

**MR. JUSTICE BAER**

**FILED: December 28, 2007**

I join the Majority's Opinion in full. I agree with the Majority's holding that the fatal defect rule contained in Section 1104 of the Ethics Act should be limited to barring from the ballot those candidates who fail to file statements of financial interests or who file them in an untimely manner. Maj. Slip Op. at 8. Further, I agree with the Majority's conclusion that when read together, the Ethics Act, 65 Pa.C.S. §1101, *et seq.*, and the Election Code, 25 P.S. §2600 *et seq.*, permit candidates, who file timely statements of financial interests in good faith, but nevertheless containing facial material defects, the ability to amend timely their statement to correct such defects. I write separately to address why I have taken a somewhat contrary position in prior cases, but now agree with the conclusions set forth by the Majority.

As indicated by the Majority, our Court has dealt with the fatality rule contained in Section 1104 of the Ethics Act in various ways with regard to timely statements of financial interests, depending upon the defect appearing on the form.<sup>1</sup> On the one hand, we have found fatal certain errors of omission contained in a statement and held that such errors are not subject to amendment. See e.g. In re Anastasio, 820 A.2d 880 (Pa. Cmwlth. Ct. 2003), *affirmed per curiam without opinion*, 827 A.2d 373 (Pa. 2003)(finding a fatal defect where a candidate erroneously indicated “none” on his timely filed statement of financial interest in the section of the statement requiring the reporting of any direct or indirect source of income over \$1,300 pursuant to Section 1105(b)(5) of the Ethics Act.); In re Braxton, 874 A.2d 1143 (Pa. 2005)(*per curiam*)(reversing the Commonwealth Court’s order permitting a candidate to amend a timely filed statement of financial interest which did not disclose the sources of his rental income and the names and addresses of creditors holding mortgages on his rental properties in violation of Sections 1105(b)(4) and (b)(5) of the Ethics Act); In re Katofsky, 872 A.2d 1196(Pa. 2005)(*per curiam*)(reversing the Commonwealth Court’s decision permitting a candidate to remain on the ballot where his statement of financial interest failed to disclose sources of income which were not ascertainable from the face of such statement); In re Littlepage, 909 A.2d 1235 (Pa. 2006)(finding candidate’s indication of “none”, in the block of financial interest statement requiring the reporting of direct or

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<sup>1</sup> The fatal defect rule provides:

No petition to appear on the ballot for election shall be accepted by the respective State or local election officials unless the petition has appended thereto a statement of financial interests as set forth in paragraphs (1) and (2). Failure to file the statement in accordance with the provisions of this chapter shall, in addition to any other penalties provided, be a fatal defect to a petition to appear on the ballot.

65 Pa.C.S. §1105(b)(3).

indirect sources of income over \$1,300, fatal to candidate's appearance on the ballot where candidate did, in fact, have such income).

On the other hand, we have concluded that certain errors of omission are subject to amendment where the omitted information is contained elsewhere on the form. See In re Benninghoff, 852 A.2d 1182, 1187 (Pa. 2004)(interpreting the fatal defect rule of the Ethics Act as permitting an amendment to a timely filed financial statement where a candidate has substantially complied with the Ethics Act, in that all of the statutorily required disclosures "can be facially obtained from the information provided on the form as a whole.").

As the author of Littlepage and Benninghoff, I attempted to draw fine distinctions between the different defects contained in the various financial interest statements filed by candidates because I believed the need for full disclosure in accordance with the goals for the Ethics Act was paramount. See 65 Pa.C.S. §1101.1("[T]his chapter should be liberally construed to promote complete financial disclosure as specified in this chapter."). Specifically, it was my belief that permitting candidates to amend errors of complete omission would undermine the Ethics Act's goal of full financial disclosure by allowing those who omitted material information the ability to either wait-out the period for challenge in the hope that they would not "get caught", or, if "caught", simply supply the information on an amended form, rendering their initial omissions harmless error. Accordingly, I viewed the fatality rule as the legislature's harsh attempt to avoid this type of scenario.<sup>2</sup> Nevertheless, in focusing primarily on the Ethics Act's goal of full financial disclosure, and expanding the fatality rule beyond instances of failure to file or untimely filings, I agree with the Majority

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<sup>2</sup> In this regard, in In re Carroll, 896 A.2d 566, 578 (Pa. 2006)(Baer, J. dissenting), I observed that in the years following the legislature's amendment of the Ethics Act to include the fatal defect rule, "the legislature has made no effort to alleviate the more severe effects spawned by the decisions of the Commonwealth Court and this Court...even when those cases set aside nomination petitions due to omissions from timely but incomplete Statements."

that the equally important goals of the Election Code, which is to be liberally construed to protect the voting franchise and a candidate's right to appear on the ballot, have been undermined. Strict interpretation of the fatality rule has resulted in the child's game of "gotcha" through far too many challenges based upon technical omissions, without regard to whether they were made through oversight, misunderstanding of the instructions or simple inadvertence, as opposed to bad faith. This Court's upholding of these challenges has resulted in preventing potential candidates from running for office; a result directly in tension with the Election Code's goals. See e.g. Littlepage, 909 A.2d 1235 (Pa. 2006)(despite trial court finding that candidate's omission on his financial disclosure form did not reflect bad faith, candidate was struck from the ballot based upon strict reading of the fatality rule).

Thus, in my view, as eloquently explained by the Majority, because it is clear that the intent of the Legislature is to encourage both full financial disclosure and protect voter choice, when read together, such intents are best served by a rule that permits a good faith timely filer to amend a statement of financial interest in order to come into full compliance "giving the public both the benefit of full financial disclosure and the broadest choice of representatives." Maj. Slip Op. at 8.

I have noted several times herein my view that good faith remains a prerequisite to any amendment. As the Majority points out, Section 1105(a) of the Ethics Act, 65 Pa.C.S. §1105(a), maintains the requirement that the information contained on a statement of financial interest be provided to the best of the knowledge, information and belief of the person required to file, thereby preserving this standard. Thus, I emphasize that, in my view, omissions found by a court of original jurisdiction to be intentional and, thus, in bad faith, would not be subject to amendment and would, therefore, lead to the removal of a candidate from the ballot. I believe the Majority's decision is fully in agreement with this proposition.

Accordingly, despite my prior expressions to the contrary, I now am able to join the Majority's decision in full, permitting candidates who file timely, and in good faith, statements of financial interests containing material omissions with their nomination petition the ability to amend such statements and to bring them into compliance with the requirements of the Ethics Act.