

**IN THE SUPREME COURT OF OHIO**

<b>Kida Newell,</b>	)	
	)	<b>Supreme Court Case No. 07-1930</b>
<b>Appellant,</b>	)	
	)	<b>On Appeal from the Jackson County</b>
<b>v.</b>	)	<b>Ct. of Appeals, Fourth Appellate District</b>
	)	
<b>City of Jackson, Ohio, et al.,</b>	)	<b>Court of Appeals</b>
	)	<b>Case No. 06CA19</b>
<b>Appellees.</b>	)	

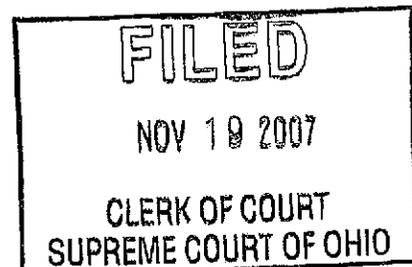
**APPELLEES' MEMORANDUM IN  
RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The present case presents issues that have previously been addressed by numerous courts in Ohio. The sole issue is whether a party may challenge the appointment of a public officer through a declaratory judgment action, after the incumbent of the office has been appointed and served the statutorily-mandated probationary period. As stated by Appellant, Kida Newell (“Newell”), “The question is whether a reviewing court should rule on a declaratory judgment action, and grant relief to the extent possible, where a separate quo warranto action is necessary to unseat a fire chief appointed by a civil service commission in violation of the Sunshine Law, O.R.C. section 121.22.” Fundamentally, Newell is requesting an advisory opinion on an issue that will necessarily be decided in the related quo warranto action that is now before this Court.

Subsequent to the Common Pleas Court’s dismissal of Newell’s declaratory judgment action, she filed a quo warranto action and an appeal in the Court of Appeals for the Fourth Appellate District. The appeal of her declaratory judgment action and the quo warranto action were each decided by the court. Although the cases were clearly related, the Case Information Statement filed in this case inexplicably states that Newell is unaware of “any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case.” Yet, Newell has appealed the quo warranto action to this Court in Case No. 07-1925. Each issue will properly be decided in Case No. 07-1925 pursuant to the original jurisdiction of the Court of Appeals and this Court. Accepting jurisdiction in the present case will be a waste of the Court’s time and resources. Moreover, allowing Newell to split her actions will tread upon the constitutional jurisdiction of the Courts of Appeal and this Court.

Quo warranto, in its broadest sense, is a proceeding to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment, if his claim is not well-founded, or if he has forfeited his right to enjoy the privilege. *State, ex rel. Price v. The Columbus, Delaware & Marion Electric Co.* (1922), 104 Ohio St. 120, 123-124. Normally, quo warranto asks a court to remove a person from office and replace that person with the petitioner who claims the right to hold that particular office. *State, ex rel. DeMint v. Chillicothe* (4<sup>th</sup> Dist. 1991), 76 Ohio App.3d 315, 318. Once an individual has been placed in an office, the exclusive method for removing him is a quo warranto action. *Beasley v. East Cleveland* (8<sup>th</sup> Dist. 1984), 20 Ohio App.3d 370.

In considering an action for a writ of quo warranto, the authority to hear such an action is granted in Sections 2 and 3, Article IV of the Ohio Constitution. Jurisdiction is statutorily established under R.C. 2733.03 as exclusively vested in the Courts of Appeal and the Supreme Court. See e.g., *State, ex rel. Lindley v. The Maccabees* (1924), 109 Ohio St. 454. Since the adoption of Article IV, §§2 and 3 in 1851, Ohio appellate courts have had exclusive jurisdiction over quo warranto actions and have vigorously guarded the original jurisdiction of this Court and the Courts of Appeal. *Levinsky v. Boardman Township Civil Service Commission*, unreported, 2004-Ohio-5931, 2004WL2521398 (Ohio App. 7<sup>th</sup> Dist.); *Plotts v. Hodge* (3<sup>rd</sup> Dist. 1997), 124 Ohio App. 3d 508; *Beasley v. East Cleveland* (8<sup>th</sup> Dist. 1984), 20 Ohio App. 3d 370; *State ex rel Ira Sales Co. v. Voinovich* (8<sup>th</sup> Dist. 1975), 43 Ohio App. 2d 18; *Jones v. Sater* (10<sup>th</sup> Dist. 1960), 110 Ohio App. 125.

Newell suggests that public confidence will be shaken if a decision is not rendered regarding compliance with the "Sunshine Act". She ignores, however, that Case No. 07-1925 will allow this Court to decide those issues. In *State, ex rel. Delph v. Barr* (1989), 44 Ohio St.3d

77, this Court analyzed R.C. §121.22 in determining whether to issue a writ of quo warranto. Each issue regarding the actions of the civil service commission of a municipality were reviewed and specifically decided. Thus, a decision in Case No. 07-1925 will resolve every issue of interest to the public.

### **ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW**

Proposition of Law No. 1: In reviewing a trial court's dismissal of a declaratory judgment action seeking relief for a governmental agency's failure to conform with statutory requirements in appointing a new fire chief, an appellate court should separately decide whether the commission failed to comply and grant relief accordingly, rather than ignore the violations because the complaint asked for relief on other grounds

In order to analyze the jurisdictional issues relative to quo warranto actions, a court must look to the "core of relief" requested. *Hendershot v Conner* (9<sup>th</sup> Dist. 1974), 48 Ohio App.2d 335, 337. Otherwise, any challenge to another's title to public office could be phrased as a declaratory relief action seeking interpretation of some underlying constitutional or legislative provision. *Beasley v. East Cleveland* (8<sup>th</sup> Dist. 1984), 20 Ohio App.3d 370, 371.

In *Jones v. Sater, supra*, the court was faced with a challenge to the appointment of a city councilman by the mayor of the City of Columbus. A restraining order was obtained and the plaintiff requested a temporary and permanent injunction restraining the defendant from performing the duties of a councilman. The court looked to the nature of the claims and determined that the restraining order should be dissolved and the case dismissed. The court specifically stated:

We feel that the basic question in the suit in the Common Pleas Court is the right of Jones to hold the office to which he was appointed, and to say that it is not a trial of his right to hold that office is not supported by the facts or the allegations of the petition, which at page two says "the defendant threatens to usurp and unlawfully hold" the office of councilman and again on the same page, that Jones "has no color of title or right" as such councilman.

*Jones*, at 127.

Thus, for purposes of determining jurisdiction, the court looked to the core of relief requested, rather than to dissect the case and create a multiplicity of suits.

Furthermore, courts may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought. R.C. §2721.07. The actual controversy or uncertainty is whether the Fire Chief must be removed and another examination given. Newell admits that a quo warranto action is necessary. Therefore, all of the issues must be resolved in a quo warranto action.

Quo warranto is a special statutory proceeding. *Beasley v. East Cleveland, supra*. Courts have consistently ruled that declaratory relief, pursuant to Civ. R. 57, is inappropriate where it would result in the by-pass of a special statutory proceeding. *State, ex rel. Iris Sales Co. v. Voinovich* (8<sup>th</sup> Dist. 1975), 43 Ohio App.2d 18; *Beasley v. East Cleveland, supra*. Likewise, injunctive relief is not a proper action for testing the question of title to an office. *State, ex rel. Maxwell, Pros. Atty. v. Schneider, supra*.

As the Court in *Beasley v. East Cleveland, supra* stated:

Virtually every challenge to another's title to public office can be phrased as a declaratory relief action seeking interpretation of some underlying constitutional or legislative provision. If that ploy were allowed counsel could avoid the mandated quo warranto remedy that must be filed in designated appellate courts. By contrast, a court authorized to decide quo warranto cases can order ancillary injunctive relief to maintain existing conditions while it resolves such an action.

*Id.* at 373.

The *Beasley* rationale was specifically adopted by the Court of Appeals for the Seventh District in *Levinsky v. Boardman Township Civil Service Commission*, unreported 2004-Ohio-5931, 2004 WL 2521398 (Ohio App. 7 Dist.). In *Levinsky*, the Court of Appeals *sua sponte* dismissed the appeal of an action for declaratory judgment and injunctive relief because an

element of the relief sought was the removal of a city police lieutenant. The court held that, when dealing with extraordinary writs, it is imperative to look to substance over form. *Id.*, citing *Beasley v. East Cleveland, supra*. The court ruled that declaratory and injunctive relief were improper.

Among the cases cited in *Levinsky* is *Plotts v. Hodge* (3<sup>rd</sup> Dist. 1997), 124 Ohio App.3d 508. In *Plotts*, the court rejected an appellant's claim contending that a trial court should have rendered a declaratory judgment because he first needed the finding from that court that the appellees acted illegally when they voted to remove him from his council seat. The appellant further contended that, after that declaration was made, he would be able to pursue an action in quo warranto to regain his seat, but also argued that he had not yet sought the removal of the person who was appointed to his seat. He only sought declarations that he was illegally removed from the seat and that he remains the rightful holder of the seat. The court rejected this argument and focused on the question of whether an individual had been placed in the position. Just as in the present case, an individual was placed in the position prior to filing of the court action. As noted in *Levinsky*, the *Plotts* court responded that the appellant was correct that, in some circumstances, trial courts can assume jurisdiction to consider a complaint for declaratory judgment or for an injunction when a public office holder is asserting a claim that he or she is the rightful holder of the office. However, the *Plotts* court explained that trial courts are limited to considering actions for declaratory judgment or injunction before a replacement is seated. Once a council person has been ousted and a replacement has been appointed and seated, the proper method for settling the dispute regarding who has a valid claim to the seat is an action for quo warranto. *Levinsky*, at ¶ 29.

The Fourth District Court of Appeals adopted this position when it rejected a quo warranto action in favor of a mandamus action because the office had not been filled. *State ex rel. DeMint v. Chillicothe* (4<sup>th</sup> Dist. 1991), 76 Ohio App. 3d 315. The court explained:

We first turn to DeMint's request for this court to issue a writ of quo warranto. Quo warranto is a limited action designed to prevent a continued exercise of unlawfully asserted authority. R.C. §2733.01. Quo warranto basically asks a court to remove a person from office and replace that person with the petitioner who claims the right to hold that particular office.

The record before us shows that we granted an injunction to DeMint, preventing Chillicothe from filling the fourth vacancy on its police department until this matter is resolved. At the present time the position which DeMint would fill is not occupied. There is no need to remove an individual from the position of police officer in order to put DeMint in her place. Thus, an action in quo warranto will not lie. DeMint's request for such a writ is denied.

*State ex rel. DeMint*, at 318.

Each of these decisions is consistent with the analysis in *Delph*. Where the core relief requested is the removal of an officer from his position, a court of appeals or this Court must decide all issues in quo warranto, even if those issues relate to alleged Sunshine Law violations. *State, ex rel. Delph, supra*. Any other conclusion would create a multiplicity of suits, the possibility of inconsistent decisions, and an infringement on the original jurisdiction of the courts of appeal and this Court.

In the present case, the Fire Chief had held his position for eight months prior to the filing of this action and fourteen months prior to his being made a party to this suit. This matter can only be determined through a quo warranto action. The Court of Common Pleas simply did not have jurisdiction to decide these issues and properly dismissed the case.

**CONCLUSION**

For reasons set forth above, this case does not involve matters of public or great general interest. Moreover, if this Court accepts this matter, it will invite future litigants to split their causes of action and shop for the forum that best serves their purposes.

Finally, the conclusion of Newell's Memorandum in Support of Jurisdiction argues that there must be fundamental fairness for persons like the Appellant who are accused of felonies. Presumably, this statement was inadvertently added to the memorandum in error and requires no response.

Accordingly, the Appellees respectfully request that this Court deny jurisdiction in this case.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum in Opposition to Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, David J. Winkelmann and William R. Biddlestone, at Biddlestone, Winkelmann, Bradford & Baer Co., LPA, 8 North Court Street, Suite 308, Athens, Ohio 45701 this 19<sup>th</sup> day of November, 2007.

  
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