

IN THE SUPREME COURT OF OHIO

STATE EX REL. JAMES DEITER et
al.,

Appellants,

vs.

POLICE CHIEF JOHN MCGUIRE,
et al.,

Appellees.

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On Appeal from the Seneca County Court
of Appeals, 3rd Appellate District

Court of Appeals Case No. 13-07-23

Supreme Court of Ohio Case No. 2008-0720

REPLY BRIEF OF APPELLANTS
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CLAYTON MOORE, AND JEFF HUFFMAN

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FILED

JUL 25 2008

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Now come Appellants to Reply to Appellees' Merit Brief as allowed by Ohio Sup. Court Rule VI(4)(A). Appellants incorporate by reference herein the facts and arguments already presented in Appellants' Merit Brief. Appellants reply here only to the arguments presented by Appellees in their Merit Brief.

First, Appellees argue in their Merit Brief for this Court's recognition of a distinction between "allegations of fact" and "conclusory allegations," suggesting that Appellants' petition for quo warranto wrongly included the latter instead of the former. (Appellees Merit Brief p. 4.) Appellees refer to *Mitchell v. Lawson Milk* (1988), 40 Ohio St.3d 190, 192, to suggest that the Appellate Court was not obligated to accept as true, in its Civ. R. 12(B)(6) consideration of the petition, the "conclusory allegations" made by Appellants. (Appellees' Merit Brief p. 4.) Specifically, Appellees identify Appellants' pleading that they are "private persons with a claim of entitlement to the FPD Chief of Police Position" (Supp. 8, Petition ¶44) as a "conclusory allegation" that the Appellate Court did not accept as true.

Appellees' reliance on the *Lawson Milk* holding on this point is inappropriate. *In Lawson Milk*, this Court held that in claims of intentional tort against an employer, under the exclusivity provisions of workers' compensation laws, a complainant must plead facts showing that the employer specifically desired to injure the employee or knew that injury to the employee was certain or substantially certain to result from the employer's act, and despite this knowledge, still proceeded. *Lawson Milk, supra*, paragraph one of the syllabus. The Court found that it would not serve "the interest of employees, employers or the administration of justice in the already over-docketed courts of Ohio" if it allowed cases to be filed for "virtually every injury in the workplace." *Id.* at 193. The workers compensation system, after all, is set up to prevent such litigation. This Court went on to acknowledge:

[T]he more complete consideration afforded under Civ. R. 56 (summary judgment) would avoid problems which arise when it is difficult to distinguish “unsupported conclusions” from “facts” in a pleading. *Lawson Milk, supra*, FN3.

The case presently before this Court is not one involving a claim by an employee of an intentional tort against his employer. The claim is not even a tort claim at all. Instead, this case concerns a petition for quo warranto under R.C. §2733.01 *et seq.* and a request for mandamus under R.C. §2731.01 *et seq.* As set forth in Appellants’ Merit Brief, Proposition of Law No. 1, Appellants properly plead their request for quo warranto and mandamus relief, and the *Lawson Milk* requirement for pleading specific facts to demonstrate an employer’s intent to harm an employee simply does not apply to the causes of action filed in this case. As Appellants indicate below, the Court’s note *Lawson Milk* about using the “more complete consideration afforded” via summary judgment is pertinent to the instant case.

I. Appellants’ Reply to Appellees’ First Proposition of Law:

Appellants Included Factual Allegations Sufficient to Petition for Quo Warranto Relief.

Appellees cite correctly the statutory requirement that an individual who wishes to challenge a public official’s office must “set forth the name of the person claiming to be entitled to the office, with an averment of his right thereto.” R.C. §2733.08. From there, however, Appellees deviate from the legal standard of an “averment of his right thereto” to an argument that the individuals in this case each needed to plead specifically

that, as of the time the promotional examination was administered, or even as of the time that Chief McGuire was permanently appointed to fill the position, the appellant was eligible to take a promotional examination pursuant to R.C. §124.44, and if successful, be placed on an eligibility list for the promotion. (Appellees’ Merit Brief p. 8.)

In arguing this, Appellees confuse pleading requirements with evidentiary issues and legal arguments, and further do not understand that the quo warranto action does not, by itself, ultimately secure any of Appellants the Chief of Police position.

The standard of review on a Civ. R. 12(B)(6) Motion is one that examines whether the complaining party can prove any set of facts warranting a recovery under the complained-of legal theory. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Accordingly, the Appellate Court's examination of the petition in this case was limited, on Appellees' Motion to Dismiss, to consideration of whether Appellants could establish the facts entitling them to the relief sought. The relief of quo warranto is *not* appointment of the complaining party, in this case Appellants, to the position claimed to be unlawfully held. The relief is simply the removal of the offending person from office. So the question the Appellate Court examined in deciding the 12(B)(6) Motion was whether Appellants could establish facts entitling them to the removal of Defendant Chief John McGuire, that is, an "averment" of their right to the Chief's position.

Black's Law Dictionary defines "averment" as "a positive statement or allegation of facts in a pleading as opposed to an argumentative one or one that is based on inference." Appellants plead a positive statement of fact that they are private persons with a claim of entitlement to the Chief of Police position. (Supp. 8, Petition ¶ 44.) Appellees argue that eligibility under R.C. §124.44 to sit for a competitive exam is necessary for claiming entitlement to the position. (Appellees' Merit Brief pgs. 9-11.) But a final determination of whether Appellants were eligible to sit for a competitive examination is both a factual and legal issue that is more appropriately determined in an action for summary judgment. If the case had been permitted to proceed to Motions for Summary Judgment under Civ. R. 56, Appellants *still* would not have to establish an undisputed right to the office. The rule announced in *State ex rel. Halak v. Cebula*

(1977), 49 Ohio St.2d 291, is that “a relator need not prove his own title beyond all doubt. He need only establish his claim ‘in good faith and upon reasonable grounds.’” *Id.* at 293.

The determination of what criteria is necessary for Appellants to prove their claim of entitlement is one of two legal and factual issues that are at the heart of a petition for quo warranto, the second issue being whether the public office itself is unlawfully held by anyone at the time the petition is filed. Appellees assert, without any evidence in the record, that “none of the appellants have, or can, make factual averments demonstrating even a good faith claim of entitlement.” (Appellees’ Merit Brief p. 11.) First, Appellants did make an averment of their right to the Chief of Police position, as required by the statute for pleading a quo warranto petition. Second, the “good faith and reasonable grounds” for Appellants’ averment would have to be established through the discovery process before a court could award Appellants’ claim for relief.

Appellees cannot use legal and factual arguments here, in support of their Motion to Dismiss, that should be made via Motion for Summary Judgment, including their unsupported assertions that no Appellant met an alleged “time in rank” criteria. (Appellees’ Merit Brief pgs. 10-11.) It was not appropriate for Appellees or the Appellate Court to declare judgment on such issues via a Civ. R. 12(B)(6) action.

II. Appellants’ Reply to Appellees’ Second Proposition of Law:

Appellants Do Not Attempt To Relitigate Any Claim But Are Seeking Application of the Law of The Case To Have The Appellate Court’s Ruling Applied.

Appellees argue that *res judicata* prevents Appellants from relitigating two items relative to Appellees’ refusal to hold a competitive examination for the Chief of Police position: (1) “the issue of whether the chief of police position is presently vacant;” and (2) “whether the adoption

of the Fostoria Municipal Charter has obviated the competitive examination procedures...even if the position is subsequently vacated.” (Appellees’ Merit Brief p. 17.) Appellees also assert that privity between the OPBA as Appellants’ Union and Appellants precludes “relitigation” of Appellants’ request for the administration of a competitive examination. Appellees further claim that res judicata prevents the relitigation of Appellants’ claim for quo warranto relief, which Appellees claim to have been twice litigated already. These arguments are both misleading and legally unfounded.

A. The OPBA Successfully Litigated The Question of Whether The Vacant Chief of Police Position in 2005 Needed to be Filled By Competitive Examination Pursuant to R.C. §124.44.

Appellees first offered a competitive examination for the vacant Chief of Police position in September 2004. (Supp. 4, Petition ¶ 15.) Two Captains in the Fostoria Police Department took the exam, precluding all others in the department from testing under R.C. §124.44, and the result of such examination was an eligibility list of one. *Id.* The one successful candidate, Phil Hobbs, served as Acting Chief of Police for 10 months before finally rejecting permanent appointment to the position. (Supp. 4, Petition ¶¶ 17, 18.) Then, instead of starting the R.C. §124.44 process over again, Appellees declared the need to invoke R.C. §124.30 for filling the vacancy. (Supp. 4, Petition ¶¶ 19, 20.) That is when the OPBA initiated its petition for declaratory judgment and injunctive relief to *prevent* Appellees from making such an appointment.

Appellees made the appointment of a Police Chief in February 2006, and the Appellate Court determined the appointment unlawful in August 2006. Specifically, the Third District Court of Appeals noted, “we cannot conclude that [Appellee] Commission has demonstrated the exceptional circumstances necessary to justify a suspension of the competitive examination

pursuant to R.C. 124.30.” (Supp. 27 ¶14.) Accordingly, in its original action, the OPBA prevailed on the issue of whether the Chief of Police vacancy in 2005 had to be filled by process of competitive examination. The Court of Appeals remanded the case for “proceedings consistent” with its opinion. (Supp. 28, ¶14.)

The law of the case doctrine prohibited the trial court, on remand, from disregarding the mandate of the higher court, absent extraordinary circumstances. Nolan v. Nolan (1984), 11 Ohio St.3d 1, syllabus. The doctrine provides that “the decision of a reviewing court in a case remains the law of that case * * * at both the trial and reviewing levels” and, upon remand, a trial court “is bound to adhere to the appellate court’s determination of the applicable law.” *Id.* at 3. In this case, the trial court properly *did not* disregard the mandate of the higher court because it ordered that “if necessary, the Fostoria Civil Service Commission shall conduct competitive examinations required by R.C. §124.44 for any vacancy in the Fostoria Police Department which vacancy occurred prior to January 1, 2007.” (Supp. 32.) The OPBA did not appeal the decision because it had prevailed in the Appellate Court on the question of filling the vacancy with a competitive examination.

B. The OPBA Never Litigated the Issue of Whether The Fostoria Police Chief Position Was Vacant.

Appellees claim that the OPBA’s original action litigated the issue of “whether the position of Fostoria Police Chief is currently occupied by Appellee McGuire and not vacant.” (Appellees’ Merit Brief pgs. 12-13.) This is absolutely not true, as explained above, because the OPBA’s action was filed while the position was vacant and specifically to prevent the position from being filled outside the process of R.C. §124.44.

By the time the appellate court overturned the trial court in the OPBA's litigation, a new Police Chief had been in place for almost six months. By the time the trial court issued its decision on remand, in May 2007, the Police Chief had been in office for more than a year. Only then, upon the trial court's entry of judgment on remand, did the lack of vacancy for the position become an issue. And it was Appellees that raised the issue by refusing in May 2007 to offer the competitive examination for Chief of Police because, at that time, the position was not vacant. (Supp. 7, Petition ¶36.) The OPBA never litigated the issue of whether the position was vacant or not.

C. Appellants Do Not Seek to Relitigate Any Issue That Was Pursued By The OPBA.

Appellees argue, like the Third District Court of Appeals ruled, that privity between the OPBA and Appellants and accepted principles of res judicata prevent Appellees from engaging in what they identify as the "relitigation" of issues. (Appellees' Merit Brief pgs. 13-15.) The argument is made with regard to the quo warranto action and the mandamus action.

Addressing quo warranto first, the OPBA did not litigate the issue in its original action which, again, was filed before Appellees appointed anyone to the then-vacant Chief of Police position. The OPBA sought via its claims for injunctive relief expressly to prevent an unlawful appointment, which Appellees made anyway while the Third District Court of Appeals considered the OPBA's appeal of the trial court's decision. Then, after the appellate court ruled in favor of the OPBA, the trial court on remand stated that it had no authority to remove Appellee McGuire from office. (Supp. 32.)

As noted in Appellants' Merit Brief, the OPBA had no standing to bring an action in quo warranto; only individuals with an "avertment of a right" to the position can file such an action.

Accordingly, the individual officers filed the quo warranto action. Appellants are not looking for a “mulligan” of the OPBA’s original action, and the Appellate Court was wrong to have found so.

With regard to the mandamus action, again, Appellants are not attempting to relitigate the question of Appellees’ offering a competitive examination. Instead, the law of the case doctrine applies, requiring Appellees to test for the Chief of Police position that was vacant in 2005. Appellees have refused to do so, despite a legal obligation under the law of the case to do so, and mandamus is the appropriate claim for Appellants to pursue.

D. Res Judicata Cannot Apply To Prevent Appellants From Seeking Quo Warranto Relief.

Appellees argue that *res judicata* prevents Appellants from pursuing this action in quo warranto (Appellees’ Merit Brief p. 16.) The Third District Court of Appeal found Appellees’ second request for quo warranto relief “duplicative and attempt to usurp the trial court’s discretion and the appellate process,” and that Appellants “have a plain and adequate remedy in the ordinary court of the law sufficient to preclude petitioning for extraordinary relief.” (Supp. 43.) Neither position is legally correct.

Appellants sought quo warranto the first time, in January 2007, after the Third District Court of Appeals ruled in favor of the OPBA’s position but before the trial court issued its decision on remand. Under those circumstances, the appellate court rejected Appellants’ efforts to secure the extraordinary relief of quo warranto:

It is the responsibility of the trial court to conduct further proceedings in that action consistent with the appellate opinion and based upon existing law. We agree with Respondent’s assertion that the instant action is duplicative and, in essence, an attempt to usurp and direct the trial court’s discretion. (Appendix to Appellees’ Merit Brief, A-10 and A-11.)

The trial court, on the same day of the appellate court's decision in what Appellees refer to as "Deiter I," conducted "further proceedings...consistent with the appellant opinion and based upon existing law." The trial court held that Appellees did need to follow R.C. §124.44 for vacancies in the Fostoria Police Department that existed prior to January 1, 2007, but that it, the trial court, did not have authority to remove the person Appellees had appointed to the position during the pendency of the OPBA's original action. The trial court has exercised its discretion and has ruled consistent with the law of the case that is "existing law." Accordingly, the circumstances upon which the Third District Court of Appeals dismissed *Deiter I* are no longer in place because the trial court since then completed its exercise of authority over the OPBA's action, and res judicata cannot prevent Appellants from pursuing the *only* legal claim by which Appellee McGuire can be removed from office.

Quo warranto, as Appellants note in their Merit Brief, is the only mechanism by which an existing public officer can be removed from office. An appeal of the trial court's decision or even a Show Cause Motion to the trial court, both of which would have been pursued only by the OPBA as the only Plaintiff in the original OPBA action, could not accomplish the removal of Appellee McGuire from office. Res judicata cannot apply to prevent Appellants from seeking such extraordinary relief.

III. Appellants' Reply to Appellees' Proposition of Law #3:

The Vacancy Created by The Removal of Appellee John McGuire From The Chief of Police Position Would Be Subject to Being Filled by Application of R.C. §124.44 And Not by The Fostoria Municipal Charter That Was Implemented Almost A Year After Appellee McGuire's Wrongful Appointment.

The Third District Court of Appeals in this case improperly determined that, in the event Appellee McGuire is removed from office, the Fostoria Municipal Charter would control the

selection process to fill a vacancy in the Chief of Police position. (Supp. 44.) But if Appellee McGuire is removed from office as a result of this lawsuit, the reason for his removal would be that he was unlawfully appointed in the first place. The determination by the Third District Court of Appeals in the OPBA action, that Appellees could not circumvent R.C. §124.44 in the selection of its Chief of Police, issued on August 14, 2006, several months before the passage of the Fostoria Municipal Charter. As of August 14, 2006, then, Appellee John McGuire unlawfully held the office of Chief of Police, and Appellants argue that the August 14, 2006, decision should have rendered null and void Appellees' February 2006 appointment of John McGuire.

Appellants' right for quo warranto relief arguably arose at the time of the unlawful appointment, in February 2006, but in any event, Appellants' claim that Appellee McGuire is unlawfully in public office existed as of August 14, 2006, on the appellate court's judgment entry. Because the OPBA's legal action in declaratory judgment and injunctive relief, the judgment of the appellate court regarding the same, and the quo warranto right of Appellants all existed *prior* to the adoption of the City Charter, the Charter's own language protects as a "pre-existing right" Appellants' demand for use of R.C. §124.44 in filling the vacant Chief's position. (See Appellants' Merit Brief p. 17.)

The existing law in this case is that any vacancy that occurred in the Fostoria Police Department prior to January 1, 2007, had to be filled via the process set forth at R.C. §124.44. The Chief of Police position that undisputedly was vacant prior to January 1, 2007, was not filled pursuant to R.C. §124.44, and this Court should not allow Appellees to "undo" their unlawful appointment and refusal to use the competitive examination process by waiting until the Fostoria Municipal Charter had been passed. Appellees should have removed John McGuire from office

consistent with the law of the case and should have re-done the appointment through the R.C. §124.44 process. To allow Appellees to use the passage of time, and to endorse the trial court's refusal to take action on remand until after the Fostoria Municipal Charter had been implemented, would be to condone disrespect for the judicial process.

The OPBA prevailed in its original action on the issue of whether a competitive examination process needed to be used to fill the vacant Chief of Police position. Both the trial court and Appellees sat idle in response to the Third District Court of Appeals decision until after the Fostoria Municipal Charter was passed, and Appellees now argue that passage of the Charter renders Appellants' claim moot. This Court should not allow public officials to exercise such disregard for the law of the case and should not condone such manipulations of the legal process.

Appellants should not unfairly be denied the opportunity to advance to the Chief of Police position that was vacant between August 2004 and February 2006. In *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285, a group of civil service employees sued the city seeking restoration of lost seniority and back pay due to actions taken by the city to delay the employees' promotions. The court, in addressing the employees' rights to retroactive pay and seniority stated,

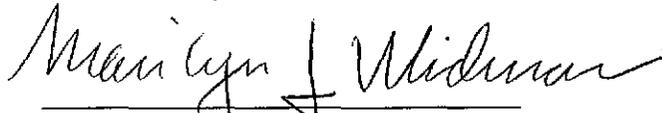
Here, on the other hand, the trial court and court of appeals agree that the municipality actively violated state civil service laws by impermissibly delaying the competitive examination beyond the time required by R.C. 124.44. In such a case, it would be wholly inequitable to deny an employee the pay and seniority he would have been entitled to had the city not acted in contravention of state law. To hold otherwise would permit municipalities to avoid their legal responsibilities without regard to damages suffered by their employees. This is particularly true when the municipality's statutory violations are undertaken, as was found here, in bad faith. Thus, we hold that where a civil service employee shows that a promotion to which he was entitled was delayed as the result of actions taken by a municipality in violation of R.C. 124.44, that employee is entitled to recover back pay and seniority for the period of the delay.

Morgan, 25 Ohio St.3d at 285.

This case is similar in that Appellees acted in contravention of state law in their appointment of Appellee McGuire in February 2006. The appellate court ruled so in August 2006. Both dates precluded the existence of the Fostoria City Charter. It would be inequitable to deny Appellants the opportunity to take office under the law and standards in place at the time of the unlawful appointment, that is, under the provisions of R.C. §124.44. To hold otherwise would not only permit Appellees to avoid their responsibilities under the law without regard to the damages suffered by Appellants, but would also condone Appellees' unlawful action.

Respectfully submitted,

Allotta, Farley & Widman Co. LPA

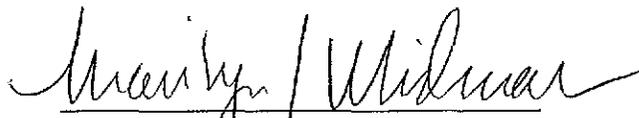


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CERTIFICATE OF SERVICE

A copy of the Appellants' Reply Brief was filed this 24th day of July 2008 and was delivered by Regular U.S. Mail to Lisa E. Pizza and David M. Smigelski, Spengler Nathanson, P.L.L., 608 Madison Avenue, Suite 1000, Toledo, Ohio 43604 attorneys for Appellees City of Fostoria, Police Chief John McGuire, and Fostoria Civil Service Commission; Tim Hoover, City Law Director, 213 S. Main St., Fostoria, OH 44830, attorney for Appellee City of Fostoria Civil Service Commission; and Larry P. Meyer, Manahan, Pietrykowski, Delaney & Wasielewski, 414 N. Erie St., Toledo, OH 43603, attorney for Appellees City of Fostoria and Police Chief John McGuire.



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