

ORIGINAL

SUPREME COURT OF OHIO

STATE EX REL., GARY D. ZEIGLER,
STARK COUNTY TREASURER
6631 Candlestick Avenue, N.E.
North Canton, OH 44721

CASE NO. 10-1570

Relator

vs.

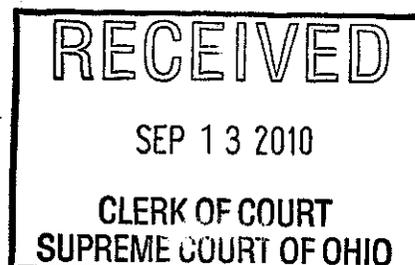
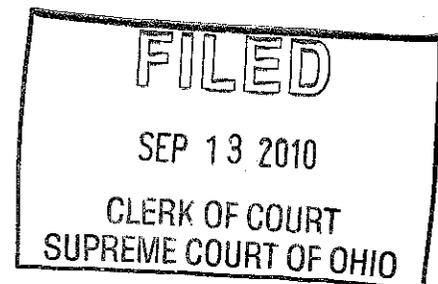
JAIME ALLBRITAIN
ACTING STARK COUNTY TREASURER
110 Central Plaza South, Suite 250
Canton, OH 44702

Respondent

* * * *

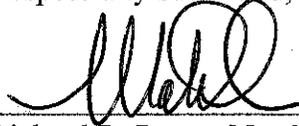
MOTION TO APPOINT COUNSEL

Richard D. Panza, Esq., Counsel of Record
(No. 0011487)
Joseph E. Cirigliano (No. 0007033)
Matthew W. Nakon (No. 0040497)
Wickens, Herzer, Panza, Cook & Batista Co.
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Attorney for Relator, Gary D. Ziegler, Stark
County Treasurer



NOW COMES Relator, Gary D. Zeigler, Stark County Treasurer (hereinafter "Relator"), by and through undersigned counsel, and hereby moves this honorable Court for an order appointing Richard D. Panza, Joseph E. Cirigliano, and Matthew W. Nakon, of Wickens, Herzer, Panza, Cook & Batista Co., as counsel for Relator. A memorandum of law in support of this motion is attached hereto and incorporated by reference herein.

Respectfully submitted,



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ATTORNEYS FOR RELATOR, GARY D. ZIEGLER,
STARK COUNTY TREASURER

MEMORANDUM IN SUPPORT

Statement of Facts

This case involves the highly publicized theft of public funds by Vincent Frustaci, who, with at least one other co-conspirator, stole what has been purported to be nearly \$3,000,000.00 from the Stark County treasury after the money was deposited into the treasury. A collateral lawsuit, in the Stark County Court of Common Pleas (2010CV03025) seeking recovery from Relator and others was filed as the first official attempt by the Stark County Board of Commissioners (hereinafter "Board") to recover the stolen funds.

Relator sought a temporary restraining order and a preliminary injunction to prevent the Board from exercising an unconstitutional statute that provided for his arbitrary and unlawful removal. The Stark County Court of Common Pleas appointed Joseph E. Cirigliano, Matthew W. Nakon and Amy L. DeLuca, of Wickens, Herzer, Panza, Cook & Batista Co., as counsel for Relator in those matters, finding that a conflict existed as to the duty of the local prosecutor and the Board, which warranted independent counsel for Relator at county expense.

Relator in turn brought a declaratory action (2010CV02773) seeking to have Ohio Revised Code § 321.38 declared unconstitutional, as the Board was relying on that provision as authority to remove Relator from his official position. Said case was consolidated with the case brought by the Board, and the trial court judge declared the statute constitutional. From that judgment, the Board held a meeting and removed Relator from office.

Both cases and this original action concern the Relator in his official capacity as the Stark County Treasurer. Further, the Board and the Stark County Prosecutor (hereinafter "Prosecutor") have filed a verified complaint in prohibition and mandamus in the Fifth District Court of Appeals, 2010CA00237, seeking to have the appointment in the lower case overturned.

In all cases, the Prosecutor is either an adverse party or opposing counsel to the Relator. The Board is the opposing party in the action from which this appeal is taken.

Due to the foregoing, Relator now requests that this Court appoint Richard D. Panza, Joseph E. Cirigliano, and Matthew W. Nakon, of Wickens, Herzer, Panza, Cook & Batista Co., as counsel for Relator, as independent counsel is necessary.

ARGUMENT

A. Stark County has a duty to defend Relator in this action, and the appointment of independent counsel is necessary due to the absolute conflict of interests of the Stark County Prosecutor and the Stark County Board of Commissioners.

Under *Whaley v. Franklin County Bd. Of Comm'rs* (2001), 92 Ohio St. 3d 574, the Supreme Court required a legal defense by a political subdivision, even where, as here, outside counsel was appointed to prevent a conflict of interest. The court in *Whaley* found that R.C. §2744.07 sets forth when a political subdivision's duty to defend one of its employee is triggered. *Id.* The *Whaley* court reasoned that under R.C. §2744.07(A)(1), a political subdivision must provide a legal defense for an employee whenever the underlying complaint, or subsequent pleadings, either allegedly or reasonably imply that the employee was acting not plainly or obviously outside the scope of his employment or official responsibilities. *Id.* Specifically, the Court set forth a two-prong test to determine when the political subdivision's duty to defend is triggered. The first prong provides that a duty attaches if the "act or omission *actually* occurred while the employee was acting in good faith and not manifestly outside the scope of his employment * * *. The second prong of the test provides that the political subdivision's statutory duty to defend is triggered if the act or omission is *alleged* to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities." *Id.* at 576 (emphasis in original).

The facts of the cases and the allegations against Relator satisfy both prongs of this test. By the very nature of the allegations made by Respondents, they acknowledge that Relator's actions, which they contend are the basis for his liability, are plainly within the scope of his employment and official responsibilities — in fact, liability would not attach to Relator under Respondents' allegations or theories in the lower cases if he was not acting in his official capacity as Stark County Treasurer. Moreover, the Prosecutor has acknowledged that Relator acted in good faith and without misfeasance or malfeasance when carrying out his duties as county treasurer. Thus, under *Whaley*, there is an absolute obligation for a defense to be provided for Treasurer Zeigler.

Furthermore, it is clear that R.C. §309.09 recognizes that it is the duty of the prosecuting attorney to defend all actions in which any county officer is a party. *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459, 465. However, when a prosecuting attorney brings an action against a county officer, "it is ordinarily in the best interests of the county that separate, independent counsel be appointed to defend such county officer or board in order to assure that there is no conflict of interests and that the county receive proper representation on both sides of the issues involved," *Id.* at 465; See also, *State ex rel. Hillyer v. Tuscarawas Cty. Bd. Of Commrs.* (1994), 70 Ohio St.3d 94; *State ex rel. Jefferson Children Serv. Bd. V. Hallock* (1986), 28 Ohio St.3d 179.

Normally, submission of an application by both the prosecuting attorney and the board of commissioners is a prerequisite to a decision of the Court authorizing appointment of other counsel to represent a county officer, except where the prosecuting attorney has a conflict of interest, and where to do otherwise would represent a conflict of interest. See, *State ex rel. Corrigan*; *State ex rel. Hamilton Cty. Bd. Of Commrs.* (2010) 126 Ohio St.3d 111; *Whaley v. Franklin Cty. Bd. Of Commrs.* (2001), 92 Ohio St.3d 574.

It is quite clear that these actions involve the Relator in his official capacity as Stark County Treasurer and in furtherance of the public functions of said office rather than for his own benefit. It is also quite clear that the Board and the Prosecutor maintain an absolute conflict of interest, as said parties have instituted the above reference action against Relator. In addition, the Prosecutor and Board have brought an action in this Court seeking writs of prohibition and mandamus to effectively overturn the appointment of counsel in the lower case. Furthermore, the Board removed Relator, even though they found no wrongdoing of any kind on his part. The conflict of interest is so absolute that the normal procedures of appointment of counsel found in R.C. §305.14, which calls for the application by the Prosecutor and the Board, are unnecessary and this Court may appoint independent counsel for the Relator. Thus R.C. § 309.09 and §2744.07(A)(1) apply, and furthermore, that the Court may appoint counsel without the application of the Prosecutor and Board. See, *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459; *State ex rel. Hillyer v. Tuscarawas Cty. Bd. Of Commrs.* (1994), 70 Ohio St.3d 94; *State ex rel. Jefferson Children Serv. Bd. V. Hallock* (1986), 28 Ohio St.3d 179.

Furthermore, R.C. § 2733.07 states:

When the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action in quo warranto, or disabled, the court, or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action.

Under that statute, this Court has the discretion to appoint counsel for Relator.

In the instant case, the Prosecutor is interested in the action in quo warranto. The Prosecutor initiated the lower court action which led to Relator's removal and Respondent's appointment. Moreover, Prosecutor would be charged (pursuant to the above law and statutes) to defend the Respondent in this action as Respondent is now a public official. Independent counsel must be appointed to protect Relator in this quo warranto, and said appointment should

be undertaken pursuant to the above detailed law whereby the County should be charged with the responsibility to provide the cost of that defense. Relator is forced to bring this action in defense of his right to office. Even though Relator has brought this original action, he is doing nothing more than protecting his right to public office, to which the County must provide a defense. See, *State ex rel. Thomas v. Kane* (1989), 43 Ohio St.2d 164; *State ex rel. Morris v. Soltez* (2002), 2002 WL 1626780 (Ohio App. 11 Dist.)(Not reported).

B. The appointment of Richard D. Panza, Joseph E. Cirigliano, and Matthew W. Nakon, of Wickens, Herzer, Panza, Cook & Batista Co., as counsel for Relator, is necessary and not unreasonable given the complexity of the case and the number of counsel representing the Respondents.

Three attorneys is not an excessive number of counsel for Relator in the present case. This appeal represents the complex undertaking of challenging a statute's constitutionality. The Ohio Supreme Court has held that, "our inquiry begins with a fundamental understanding: a statute enacted in Ohio is presumed to be constitutional." *State v. Ferguson*(2008), 120 Ohio St.3d 7, 9, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161. ". . .[E]very reasonable presumption will be made in favor of its validity. Accordingly, any doubt as to constitutionality is resolved in favor of the validity of the statute." *State ex rel. Haylett v. Ohio Bur. of Workers Comp.* (1999), 87 Ohio St.3d 325, 328. Parties seeking to overcome this presumption of validity must show a clear constitutional infirmity beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142.

This is a very difficult burden to prove, and a level of intimacy with the applicable law and underlying facts of the case is necessary in order to provide Relator with proper representation. As Joseph E. Cirigliano, Matthew W. Nakon were appointed counsel in the lower proceedings, their knowledge and familiarity with the law and facts not only provides for proper representation, but further assists in the expeditious adjudication of this matter. If other counsel

is appointed, the time necessary to familiarize new counsel with the complexity of this matter would only hinder Relator's rights and constitutional protections.

In addition, no less than three (3) members of the Prosecutor's office have been present and participating in every hearing and/or conference conducted in the lower proceedings. It would be fundamentally unfair and an act of prejudice to Relator if other counsel was appointed, or if fewer than the requested number of attorneys were appointed on his behalf.

Furthermore, having three attorneys appointed for Relator does not mean that three attorneys will be billing for the same work. Relator and his counsel understand that only fees which are reasonable and necessary for the adjudication of this matter will be paid, and only after a review of those fees by the Court.

WHEREFORE, Relator respectfully requests that this Court issue an order appointing Richard D. Panza, Joseph E. Cirigliano, and Matthew W. Nakon, of Wickens, Herzer, Panza, Cook & Batista Co., as counsel for Relator, as independent counsel is necessary, and said appointment is proper given the underlying complexities of this matter and the number of counsel representing Respondents.

Respectfully submitted,



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STARK COUNTY TREASURER

PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion to Appoint Counsel has been sent by ordinary United States mail, postage prepaid, on this 9th day of September, 2010, to:

Jaime Allbritain
Acting Stark County Treasurer
110 Central Plaza South
Suite 250
Canton, OH 44702-1410



Richard D. Panza
Joseph E. Cirigliano
Matthew W. Nakon

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