

ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE EX REL. GARY D. ZEIGLER,
STARK COUNTY TREASURER,

Relator,

CASE NO. 10-1570

ORIGINAL ACTION
IN QUO WARRANTO

-vs-

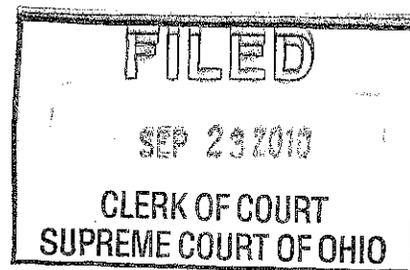
JAIME ALLBRITAIN,
ACTING STARK COUNTY TREASURER,

Respondent.

**RESPONDENT'S OPPOSITION TO RELATOR'S MOTION FOR
APPOINTMENT OF COUNSEL**

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Counsel for Respondent

Respondent opposes the motion of Relator for appointment of counsel filed September 13, 2010. In this quo warranto action, Relator, Gary D. Zeigler (Zeigler), the former Stark County Treasurer, seeks reinstatement to a position he held prior to August 23, 2010. Zeigler was removed from his position by the Stark County Commissioners pursuant to R. C. 321.38 when he failed to account for public funds in the amount of nearly three million dollars entrusted to his care while he was the Treasurer of Stark County. Such moneys were stolen by the Chief Deputy Treasurer who was appointed by Zeigler pursuant to R. C. 321.04 and for whose actions Zeigler is liable and accountable.

Relator requests the appointment of not one but three private attorneys who claim expertise in this area of the law by virtue of their interest in this case because they represented Zeigler in pending actions in the courts below. Relator is requesting that the taxpayers of Stark County pay for these three attorneys, without limitation.

Respondent opposes the motion for appointment of counsel for a number of reasons. First, there is no statutory authority for the appointment of counsel in a personal action seeking to declare a state statute unconstitutional. Second, it is unprecedented for any former county office holder to self-select three attorneys to be paid from a county treasury to assist him in his quest for his former job, particularly without any accountability for reasonableness of fees. Third, the taxpayers of Stark County are already burdened by a loss of nearly three million dollars in public funds because of the actions of Zeigler's deputy treasurer and can ill afford to pay the bill for three attorneys of Zeigler's choice to proceed on an action by a private citizen claiming some right to his former position, in avoidance of his responsibility under law.

A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

BACKGROUND

This quo warranto action filed by Zeigler is the latest in a series of lawsuits which arose when a former Chief Stark County Deputy Treasurer, Vincent Frustaci, stole, embezzled and/or obtained by fraud nearly three million dollars in public funds during the period from at least January 2003 through on or around March 31, 2009. His criminal actions took place while Relator Zeigler was the elected official in charge of the office and entrusted with those public funds by the taxpayers of Stark County.

As a result of the criminal actions of the chief deputy treasurer, the Auditor of the State of Ohio issued a finding that public moneys totalling nearly three million dollars were missing from the public treasury. Stark County Prosecutor, John D. Ferrero and Stark County Board of Commissioners, filed an action pursuant to a number of statutory provisions including R. C.

321.37 against Zeigler, demanding an accounting for these public moneys entrusted to his care.¹ The Prosecutor sought recovery against Zeigler premised upon his position as a public official liable for the audited shortfall as moneys received or collected by him or his subordinates.

The trial court appointed no fewer than five attorneys to represent Zeigler including the three attorneys, Richard D. Panza, Joseph E. Cirigliano and Matthew W. Nakon, now seeking appointment from this Court.² That action of the trial court is the subject of a complaint in prohibition and mandamus now pending in the Fifth District Court of Appeals [Stark County], Case No. 2010CA00237.³

On August 17, 2010, Zeigler filed a complaint for declaratory relief, along with a request for a temporary restraining order and preliminary and permanent injunction. The complaint sought to declare R.C. 321.38 unconstitutional. That case was consolidated by the trial court with the pending action of the Prosecutor to collect public funds missing from the treasury.⁴

On August 23, 2010, after a hearing, the trial court denied Zeigler's request for a preliminary injunction finding that he was unlikely to succeed on the merits, i.e., finding the

¹Stark County Court of Common Pleas, Case No. 2010CV02773. In addition to Zeigler, the former deputy treasurer and certain bonding companies were named as defendants.

²Stark County Court of Common Pleas, Case No. 2010CV02773, Order August 17, 2010.

³Zeigler moved for appointment of counsel in that action, which motion was denied by the Court of Appeals on September 22, 2010.

⁴Stark County Court of Common Pleas, Case. No. 2010CV03025.

statute [R. C. 321.38] constitutional. As a result, the Stark County Commissioners proceeded with a planned public hearing to inquire of Zeigler how he intended to make payment of public moneys missing from the treasury.

Zeigler did not appear and after taking evidence, he was removed from office by the Stark County Board of Commissioners.

Zeigler now asks this Court to oust the acting Treasurer, reinstate him to his office and appoint three attorneys to represent him at taxpayers' expense.

ARGUMENT

TAXPAYERS ARE NOT OBLIGATED TO PAY ATTORNEY' FEES FOR FORMER ELECTED OFFICIAL SEEKING TO DECLARE A STATE STATUTE UNCONSTITUTIONAL AND REINSTATEMENT TO HIS FORMER POSITION .

A. R. C. 2744.04 only applies when a political subdivision has a duty to defend an employee or public official.

Zeigler claims a right to bring this action in quo warranto under R. C. 2733.06 which allows a person claiming entitlement to a public office to bring an action against a person holding that office. The issue here is whether Stark Taxpayers have a duty to pay for counsel fees for a former public official affirmatively seeking to declare a state statute unconstitutional - a statute used by the Stark County Board of Commissioners to remove him from office - and then reinstate him to his former county office.

In this action, Zeigler is not in the position of defending himself from tort liability. Instead, he is affirmatively challenging the board's right to statutorily remove him. This action does not trigger Ch. 2744.04 of the Ohio Revised Code. Yet, Zeigler relies on R.C. 2744.07 as interpreted by the Ohio Supreme Court in *Whaley v. Franklin County Bd. Of*

Comms, 92 Ohio St.3d 574, 2001-Ohio-1287, 752 N.E.2d 267 for the proposition that R.C. 2744.07 somehow entitles him to counsel. *Whaley*, however, is not applicable to this quo warranto action. The issue presented for review in *Whaley* was whether a political subdivision had a duty to defend an employee in any state or federal civil action to recover damages for injury, death or loss to persons or property allegedly caused by an act or omission of the employee in connection with work, R.C. 2744.07(A)(1). *Whaley* involved a county deputy sheriff sued by an arrestee for false arrest. When the board of county commissioners refused to defend the sheriff, he filed a declaratory judgment action claiming the board had a statutory duty to provide him with a legal defense at no cost to him. The *Whaley* court found that indeed the board did have a statutory duty to defend the sheriff. In doing so, it developed a test to determine when a political subdivision's duty to defend is triggered - the duty attaches if the act or omission occurred while the employee was acting in good faith and not manifestly outside the scope of his employment.

Whaley and R.C. 2744.04 have no application here where a former county official is affirmatively seeking to reclaim his position as Treasurer of Stark County. R.C. 2744.07(A)(1) provides for defense or indemnification of an employee in any civil action "which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee." It does not establish a "duty to defend" a former public official in the lawsuit that he is *prosecuting* to reclaim a county office by seeking to have a state statute declared unconstitutional.

Moreover, the "duty to defend" envisioned by R.C. 2744.07 expressly excludes actions which are by or on behalf of a public official to enforce a public right, which would apply to

the County's actions to recover funds.

Because R.C. 2744.07 does not provide a basis for appointment of counsel in this quo warranto action, Zeigler's argument must be rejected.

B. No duty to defend in a quo warranto action under R.C. 309.09 and R.C. 309.14.

Zeigler next argues that he is entitled to counsel at taxpayers' expense under R.C. 309.09 which states the general rule that the prosecuting attorney is legal counsel for all county officers (including the county treasurer) and R.C. 305.14 which, in a proper case, provides for a joint application by the board of county commissioners and the prosecuting attorney, requesting that the court of common pleas appoint an attorney in a particular matter.

The Ohio Attorney General has considered whether and under what circumstances the authority under R.C. 309.09 can be used to provide a defense to a county official who is being sued by or on behalf of the county, the state, or some other public body.

[I]t is the duty of the prosecuting attorney to examine carefully all the facts and circumstances to which the action [against the public official] is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position. If the prosecuting attorney following such evaluation concludes that there was such a well intentioned attempt to perform an official duty by the defendant he is authorized to defend such action.

O.A.G. No. 77-039, citing 1954 O.A.G. No. 4567, at 570.

First, and most obvious, Zeigler cannot expect appointed counsel in this quo warranto action under this theory because he is no longer a county officer, having been relieved of that position when he failed to account for missing public funds and failed to appear at the public hearing thereafter.

Second, Zeigler is not a defendant who has been acting from a “good faith, well-intended attempt to carry out official duties or responsibilities.” While there is no finding that Zeigler acted in bad faith or was not well intentioned, such evidence is not required and is irrelevant to the County’s position. The county treasurer is liable personally for funds under his control simply as a consequence of holding the office. He is accountable for all public moneys that come into his possession, R.C. 321.37.

R.C. 309.09(A) provides that “no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.” Zeigler’s reliance on R.C. 309.14 for appointment of his three hand picked attorneys is misplaced. The statute clearly sets forth the procedure to follow when a conflict arises between the prosecuting attorney and the county official. No separate counsel may be appointed unless initiated by the county commissioners and the prosecuting attorney prior to appointment of separate counsel. The statute does not contemplate reimbursement after the fact for retaining separate counsel. The reasons for such a legislative policy are obvious.“ Application by the board of county commissioners is necessary because it is that board that not only must fix the compensation to be paid for the person so appointed but also must provide the necessary funds for that purpose.”⁵

Recognizing these mandates, Zeigler relies on *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459, 423 N.E.2d 105 for the proposition that a court may appoint counsel without the application of the prosecutor and board when there is an obvious conflict of interest. In *Corrigan*, the county prosecuting attorney filed an action against individual

⁵*State ex rel Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459, 463. 423 N.E.2d 105.

members of the county board of mental retardation to recover \$2,972 for newspaper advertising which set forth details of a salary proposal to striking employees authorized by board members. *Corrigan*, however, can be easily distinguished. Despite an obvious conflict of interest, the prosecuting attorney refused to cooperate in the procedure to appoint new counsel under R.C. 305.14. Meanwhile, the trial court appointed the board counsel. The case reached the Ohio Supreme Court on the trial court's decision to appoint new counsel. The Supreme Court first concluded that under "ordinary" circumstances, a common pleas judge should never appoint new counsel for a county official unless the application procedure under R.C. 305.14(A) is met. And if there was a refusal by the prosecutor to cooperate, then a mandamus action was the appropriate remedy.

The *Corrigan* court, however, concluded that in that particular case the appointment of counsel would be upheld because failure to follow the 305.14(A) procedure was not prejudicial.⁶

This is not the case here. Not only have the three attorneys now seeking appointment failed to meet the requirements of R.C. 305.14, but they have failed to demonstrate that their appointment is not prejudicial as required by the *Corrigan* court.⁷ They have demonstrated no effort to explain why Zeigler is entitled to three hand picked attorneys working with no maximum fee schedule and no stated hourly rate other than to profess their familiarity with the

⁶The *Corrigan* holding has been limited by courts of appeals to the particular facts. See, e.g., *State ex rel. Sartini v. Yost*, (Aug. 24, 2001), Ashtabula App. No. 2000A0034, 2001 WL 965034, unreported.

⁷Not even a capital defendant is entitled to the appointment of three attorneys let alone three hand-picked attorneys at county expense.

facts and that “three members of the Prosecutor’s office” are participating in the Zeigler litigation.⁸

Stark County is already cash-strapped because of the economy and shares this dilemma with other counties. But unlike other counties, Stark County is now missing three million dollars from its public funds because of the actions of the chief deputy treasurer hired by Zeigler.

In sum, Stark County does not have the resources to pay three appointed attorneys who have offered no hourly rate or maximum fee to assist its former treasurer to declare a state statute unconstitutional so that he can seek reinstatement to his county position. And Zeigler has demonstrated no right to such appointed counsel under R.C. 309.09 or R.C. 305.14.

C. Zeigler is not entitled to appointed counsel under R.C. 2733.07.

Zeigler brings his quo warranto action under R.C. 2733.06 challenging Respondent’s right to hold the office of county treasurer.⁹ Yet, for purposes of appointment of counsel, he relies on R.C. 2733.07. 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.

R.C. 2733.07, however, does not apply as the prosecutor has no obligation to assist

⁸This Court may take judicial notice that the hourly rate of the prosecuting attorneys is significantly less than the hourly rate charged by the attorneys at Wickens, Herzer, Panza, Cook & Batista Co.

⁹R.C. 2733.06 A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor by himself or an attorney at law, upon giving security for costs.

Zeigler to claim title to his public office. Zeigler maintains his quo warranto action as a private citizen. *State ex rel. Cates v. North Olmsted* (1994), 69 Ohio St.3d 315, 322, 631 N.E.2d 1048; *Reisig v. Camarato*, 111 Ohio App.3d 479, 676 N.E.2d 594 (holding that only a individual who is personally claiming title to a public office as a private citizen can maintain a quo warranto action). Zeigler has no personal right to county office. *State ex rel. Trado v. Evans* (1957), 166 Ohio St. 269, 274, 141 N.E.2d 665 (holding that in Ohio, the incumbent of an office has no proprietorship or right of property to a public office.).

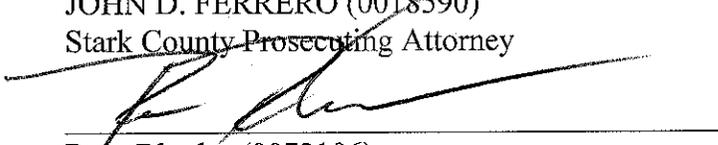
The prosecutor has no statutory duty to represent a private citizen. R.C. 2733.07 contemplates an action where the prosecuting attorney is obligated by statute to bring an action and cannot, due to absence, disability or interest. No such duty arises here and therefore Zeigler's argument fails.

CONCLUSION

Respondent requests that Zeigler's Motion to Appoint Counsel be denied. Zeigler is not entitled to the appointment of three hand selected attorneys at taxpayers' expense to represent him in this quo warranto action seeking to declare a state statute unconstitutional and reinstate him to his former public office.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Respondent's Opposition to Relator's Motion for Appointment of Counsel was served by regular U. S. Mail on this 22nd day of September, 2010 upon:

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