

ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

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

CASE NO. 10-1570

Relator,

-vs-

ORIGINAL ACTION IN
QUO WARRANTO

ALEXANDER A. ZUMBAR,

Respondent.

MOTION FOR RECONSIDERATION OF RESPONDENT
ALEXANDER A. ZUMBAR

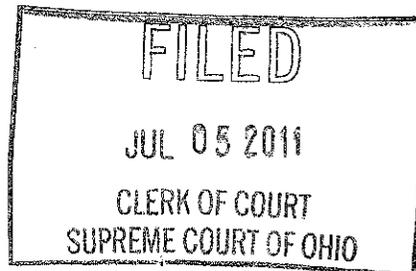
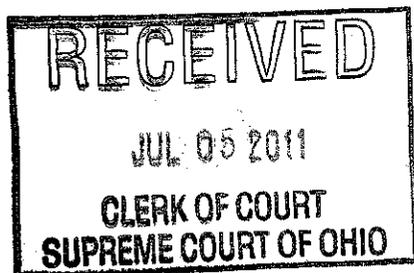
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INTRODUCTION

In accordance with Supreme Court Practice Rules 11.2 and 14.4, Respondent respectfully moves this Court to reconsider its decision released on June 23, 2011, *State ex rel. Zeigler v. Zumbar*, ___ Ohio St.3d ___, 2011-Ohio-2939, ___ N.E.2d ___. Respondent does not seek to reargue the issues raised. Rather, Respondent seeks to raise an issue that was either not considered at all or was not fully considered when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, 143, 450 N.E. 2d 278.¹ Moreover, this court has “invoked the reconsideration procedures set forth in S.Ct.Prac.R. XI to correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995); *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E. 2d 917 (“Colon I”); *State v. Colon*, 119 Ohio St. 3d 204, 2008-Ohio-3749 (“Colon II”). Still, this Court has granted reconsideration based on issues previously briefed. *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St. 3d 249, 2007-Ohio-4916, 874 N.E. 2d 1162. And finally, the majority has adopted the reasoning of the dissenting opinion pursuant to a motion for reconsideration. *State ex rel. Mirlisena v. Hamilton Cty. Bd. Of Elections* (1993) 67 Ohio St. 3d 597, 622 N.E. 2d 329.

This Court’s decision, ousting respondent Zumbar from the office of Stark County Treasurer and returning relator Zeigler to the office, has raised collateral issues not discussed in the majority opinion, which found R. C. 321.38 unconstitutional on its face but left intact its companion statute, R.C. 321.37. The impact of this Court’s decision is to reinstate a treasurer

¹ The majority opinion also contains an obvious error in the facts. The opinion states that a complaint was filed in the Summit County Court of Common Pleas rather than the Stark County Court of Common Pleas, *Zeigler v. Zumbar*, 2011-Ohio-2939 at ¶4.

who is personally liable to the taxpayers of the county for a \$1.5 million deficit in the treasurer's account and has invalidated an election wherein the voters elected Zumbar - an election Zeigler chose not to contest or stop - and to leave those taxpayers with no remedy to remove Zeigler prior to the expiration of his term in office.

Respondent respectfully submits that the majority opinion in this case warrants reconsideration because the majority opinion did not consider the Ohio statutes holding relator Zeigler personally and strictly liable for public funds. Alternatively, respondent requests that the Court adopt the position of the dissenters and modify *Zeigler* so as to restrict its effect to prospective cases. Such a remedy will allow the elected Zumbar to lawfully hold the office of county treasurer.

DISCUSSION

This Court has reinstated a public officer who is strictly liable for the loss of \$2.94 million in public funds and who cannot repay it.

The facts here are not in dispute. Over a period of several years, Zeigler's chief deputy treasurer, Vincent Frustaci, stole up to \$2,964,560 from the Stark County treasury during Zeigler's tenure, as found by the state auditor. Indeed, Zeigler does not dispute such loss, which occurred on his watch, and despite demands he did not repay. *Jt. Ex. J.*

The Stark County Commissioners filed suit pursuant to R.C. 321.37 to recover the almost 3 million dollar deficit resulting from the theft.

Because Zeigler was the treasurer at the time of the thefts by his deputy auditor, he is liable for the loss of those public funds. *Cordray v. International Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136, 941 N.E.2d 1170, ¶12 ("That public officials are liable for the public

funds they control is firmly entrenched in Ohio law.”). Liability for the loss of public funds is strict, irrespective of blame or malfeasance. *State v. Herbert* (1976), 49 Ohio St.2d 88, 96, 3 O. O. 3d 51, 358 N.E.2d 1990 (“Over the years, this court has held public officials liable for the loss of public funds, even though illegal or otherwise blameworthy acts on their part were not the proximate cause of the loss of public funds.”); R.C. 321.04 (“Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office.”). The failure of a county treasurer to account for public moneys is particularly egregious given his mandatory requirements under Ohio law. See e.g., R. C. 321.07 (requiring a county treasurer to keep an accurate account of all moneys received by him and all disbursements made by him); R. C. 321.09 (requiring the county treasurer to make daily statements to the county auditor for all moneys received, account balances and total amounts on deposit).

This Court found that Zeigler has satisfied the burden to establish that R.C. 321.38 is unconstitutional on its face, that the removal of Zeigler violates Section 38, Article II of the Ohio Constitution, and that he is entitled to serve the “remainder of his elected term, set to expire in September 2013.” *Zeigler*, 2011-Ohio-2939 at ¶43. Accordingly, the majority opinion of this Court has reinstated Zeigler to the position of Stark County Treasurer at the same time he is strictly liable to the county for loss of county funds in a sum exceeding one million dollars.²

Still, by declaring R.C. 321.38 unconstitutional on its face, this Court’s opinion has left

² A \$1.5 million deficit remained after sources of repayment has been exhausted, *Zeigler v. Zumbur*, 2011-Ohio-2939, at ¶3.

Stark County as well as the other counties throughout the State with no means to remove county treasurers liable and accountable for the “proceedings and misconduct in office” of their deputies, R. C. 321.04.

The county prosecutor is placed in the unenviable position of representing the county treasurer by statute at the same time that it is suing him for recoupment of public funds, for it is the mandatory duty of the county prosecutor to recoup county funds not paid into the county treasury. In short, this Court’s opinion has placed back into office a county treasurer who cannot be removed under R.C. 321.38 and who cannot be removed pursuant to any fault-based provision of law, but who is nevertheless strictly liable for the loss of county funds which this Court has firmly deemed his personal responsibility.

This is the collateral consequence of this Court’s opinion that Zumbar should be ousted from office and Zeigler reinstated because R.C. 321.38 did not provide the authority - a complaint and hearing - to remove Zeigler from office.

It is unclear whether the Court’s opinion intended this result. If it did, the respondent seeks guidance from this Court on how it can collect the funds owed the taxpayers of Stark County from its sitting treasurer. Indeed, if Zeigler cannot obtain the requisite bond, how much time should the commissioners leave the office of the treasurer vacant while a bond is sought.

This Court's majority opinion found R.C. 321.38 unconstitutional on its face yet left R.C. 321.37 untouched.

This Court analyzes two types of constitutional challenges to a statute - facial challenges and as-applied challenges. In *Zeigler*, this Court took the drastic step of finding that R.C. 321.38 is unconstitutional on its face, finding that there is no set of circumstances in which the statute would be valid because the statute lacked "due process." Relying on *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479, 138 N.E. 230, a case which examined G.C. 2713, this Court found that because R.C. 321.38 does not require a complaint and hearing before a board of county commissioners is authorized to remove a county treasurer, it is unconstitutional per se. *Zeigler*, 2011-Ohio-2939 at ¶24, ¶33. ³

The Court then discussed R.C. 321.37, a statute which did not exist at the time of *Hoel*. Under R.C. 321.37, "[i]f the county treasurer fails to make a settlement or to pay over moneys as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business." *Zeigler*, 2011-Ohio-2939 at ¶29. In discussing R.C. 321.37, the Court noted that the complaint against Ziegler under R.C. 321.37 did not request his removal from office. Still, this Court noted that the commissioners' two notices for meetings did not mention removal and the final

³G.C. 2713:

On examination of the county treasury, if it appears by the report of the examiner or examiners that an embezzlement has been committed by the county treasurer, the county commissioners shall forthwith remove the treasurer from office, and appoint some person to fill the vacancy thereby created. The person so appointed shall give bond, and take the oath of office prescribed for county treasurers.

notice which did mention removal gave Zeigler only a few days' notice. The Court then rejected respondent's argument that Zeigler received the requisite complaint and hearing finding that it lacked merit.

It is unclear whether the Court would have reached a different conclusion - that the statute applied in some circumstances is constitutional - if it had found that Zeigler was given a hearing based on a complaint, as in *Stebbins*.⁴ This distinction is important. Because this Court left R.C. 321.37 untouched, it remains the mandatory method to recover funds from a county treasurer who fails to pay over monies earmarked for the public treasury regardless of fault. However, its companion statute - R.C. 321.38 - has been erased from Ohio law under this Court's holding. Does this mean, then, that the county auditor or county commissioners may file a lawsuit against a treasurer who fails to pay over county funds but when he fails or refuses to pay, must keep him in office for the remainder of his term absent commission of a crime or malfeasance? Or may such a treasurer be removed by a complaint and hearing compatible with Section 38, Article II of the Ohio Constitution if the lawsuit instituted under R.C. 321.37 requests his removal?

And finally, the Court's opinion leaves unclear the standard for removing a county treasurer during his term in office now that it has eviscerated R. C. 321.38. The majority opinion cites *State ex rel. Corrigan v. Hensel*, 2 Ohio St.2d 96, 31 O. O. 2d 144, 206 N. E. 2d 563 for the general proposition "[a]n elective public official should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful

⁴*Stebbins v. Rhodes* (1978), 56 Ohio St. 2d 239, 10 O.O.3d 387, 383 N.E. 2d 605.

to the public welfare.”⁵ Perhaps the Court is saying that the *Corrigan* standard is not present here because there was no crime or malfeasance. It does not follow, however, that the *Corrigan* standard contemplates solely the commission of a crime or malfeasance as grounds for removal.

In *Corrigan*, the prosecuting attorney of Cuyahoga County requested a writ in quo warranto to remove respondent, a member of the Richmond Heights Board of Education from an elected office. The ouster was sought on the allegation that the respondent had a conflict of interest between his duties as a board member and the management of a teacher’s employment agency. The writ was granted and respondent appealed to this Court. This Court reversed the granting of the writ finding that the writ could not be granted based upon a possibility or opportunity to commit some wrongful act. *Corrigan*, 206 N.E. 2d at 565. The *Corrigan* Court said:

An elective public official should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful to the public welfare.

Corrigan, 2 Ohio St. 2d at 100.

While Zeigler was not removed for committing a crime or malfeasance, he was removed because he failed to appear at the hearing and be heard about procedures he had implemented to restore the public’s confidence that their tax dollars are protected in the future, Commissioners’ Hearing , Jt. Exh. K, Jt. Ex. G-2.

Such a “*Corrigan*” finding was given short shrift in the Court’s opinion. Indeed, Zeigler’s further presence in office would be harmful to the public welfare, a

⁵*Zeigler v. Zumbar*, 2011-Ohio-2939 at ¶26, ¶41.

finding that constituted a reason for removal from office. Zeigler is legally responsible for the loss of more than two million dollars from the county treasury and failed to appear at a hearing to explain the procedures he had implemented to restore the public's confidence, which clearly constitutes substantial reasons that his "presence in office would be harmful to the public welfare."

This majority of this Court should adopt the position of the dissenting opinion or modify *Zeigler* so as to restrict its effect to prospective cases. Zeigler left his office, creating a vacancy, which Zumbar filled after a general election.

The facts, again, are not in dispute. After the trial court found that R. C. 321.38 when read *in pari materia* with R. C. 321.37 did not violate Article II, Section 38 of the Ohio Constitution, it lifted the temporary stay and denied Zeigler's motion for injunctive relief, Jt. Ex. L. On the day of the trial court's ruling, the county board of commissioners conducted an evidentiary hearing and removed Zeigler from office. Zeigler did not attend that meeting. Indeed, as noted by the dissent, Zeigler left his office, creating a vacancy. *Zeigler v. Zumbar*, 2011-Ohio-2939 at ¶47.

Once the board of commissioners removed Zeigler from office, pursuant to existing law and armed with the trial court's finding that the law was constitutional, it was faced with a vacancy in the office. It had no other choice but to promptly fill the vacancy - otherwise it would have been derelict in its duties. The deputy treasurer was then appointed to act as acting county treasurer until Kenneth Koher was appointed by the Stark County Democratic Central Committee to fill the vacancy until a general election.

A general election was scheduled to fill Zeigler's unexpired term, and Koher was defeated by Zumbar. The Stark County Board of Elections certified the ballots and Zumbar was

certified as the winner of the election for position of Stark County Treasurer, Jt. Ex. I.

As noted by the dissent, Zeigler did nothing to attempt to prohibit the election from occurring. *Zeigler*, 2011-Ohio-2939 at ¶47. He took no action to enjoin any of the elections or file suit against the county Board of Elections to prohibit it from certifying the results of the general election.

This Court has consistently held in election cases that relators must act with the requisite diligence and promptness or risk being barred under the doctrines of mootness and laches. *State ex rel. Manos v. Delaware Cty. Bd. of Elections* (1998), 83 Ohio St.3d 562, 563, 701 N.E.2d 371, 372 (“Extreme diligence and promptness are required in election-related matters,” quoting *In re Contested Election of November 2, 1993* (1995), 72 Ohio St.3d 411, 413, 650 N.E.2d 859, 862); *State ex rel. Ascani v. Stark Cty. Bd. Of Elections* (1998), 83 Ohio St. 3d 490, 493, 700 N.E.2d 1234, 1236 (“If a party seeking extraordinary relief in an election-related matter fails to act with the requisite diligence and promptness, laches may bar the action.”).

True, the majority of this Court considered the issue of mootness and laches and rejected it. In doing so, it warned of the perils of an appointing authority insulating an improper removal of a public officer by appointing multiple persons to the office in quick succession, *Zeigler*, Id at ¶13. This is not the case here. Zeigler left his office of county treasurer on August 23, 2010 and did nothing to stop the three successor treasurers from taking office. He did nothing to stop the certification of the general election which occurred more than two months after he left office. And finally, he did nothing to expedite the writ of mandamus he filed with this Court.

This Court’s election law cases consistently hold that relators in election cases act with

the utmost diligence. *Blankenship v. Blackwell*, 103 Ohio St. 3d 567, 2004-Ohio-5596, 817 N.E. 2d 382, at ¶19; *Bona v. Village of Orange*, 85 Ohio St. 3d 18, 1999-Ohio-431, 706 N.E. 2d 771. This court has held that a delay as brief as nine days can preclude consideration of the merits of an expedited election case. *State ex rel. Landis v. Morrow Cty. Bd. Of Elections* (2000), 88 Ohio St. 3d 187, 189, 724 N.E.2d 775. *State v. Manos*, supra (writ barred when relators waited 28 days after a referendum petition was filed).

Zeigler cannot sit on any legal claim he may have, including the constitutional one he ultimately prevailed on, and let election after election go by, including one in which the voters of the county elect a treasurer, and then seek to trump that election via an extraordinary writ after the fact.

This Court's election law prescribes the application of laches against Zeigler for his dilatory actions to contest his removal. Zeigler should have acted to stop any one of the elections which took place. That is where the dissenting opinion has correctly noted this case should have concluded.

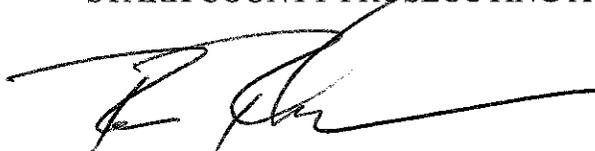
The majority of this Court has the authority, on a motion for reconsideration, to adopt the reasoning contained in a dissenting opinion. Respondent respectfully requests that this Court revisit *Zeigler* and adopt the dissenting opinion.

CONCLUSION

For these reasons, respondent Zubar respectfully asks that this Court reconsider its grant of the Zeigler writ of quo warranto to oust Zubar from the office of Stark County Treasurer and reinstate Zeigler to his former position.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion for Reconsideration has been sent by ordinary mail, postage prepaid, and via e-mail (mnakon@wickenslaw.com) on this 2nd day of July, 2011 to Matthew W. Nakon, Wickens, Herzer, Panza, Cook and Batista Co., 35765 Chester Road, Avon, Ohio 44011, counsel of record for Relator.



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