

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. : Case No. 11- 1414
 Dennis Varnau :
 Appellant/Cross Appellee :
 Vs : On Appeal from the Court of Appeals,
 Twelfth Appellate District
 Dwayne Wenninger :
 Appellee/Cross Appellant : Twelfth Appellate District No. 2009-02-10

REPLY OR FOURTH BRIEF OF APPELLEE/CROSS APPELLANT DWAYNE WENNINGER

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ARGUMENT

REPLY TO APPELLANT'S ARGUMENT AS TO CROSS APPEAL

Appellee Wenninger's Sole Proposition of Law:

An unsuccessful petitioner in an action in quo warranto is liable for reasonable attorney fees in addition to costs.

Appellant Varnau accurately summarizes Ohio's application of the American Rule with regard to the request for attorney fees made in its courts: Generally, absent statutory authorization or bad faith, attorney fees may not be awarded to a prevailing party. In his cross appeal, Appellee Wenninger (Wenninger) has offered a statutory basis for the award of attorney fees in this case.

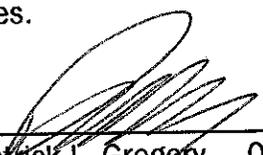
Varnau argues that Wenninger's claim for attorney fees is not supported by the record. Varnau's position is accurate to the extent that Wenninger has not been given the opportunity to support his claim.

A prayer for relief that requests an award of attorney fees is sufficient to put a court on notice of the desire to obtain the same. *Kirkland Crossing, LLC v. Ruth's Chris Steak House, Inc.*, 2011-Ohio-5626 (10th App., ¶¶ 2, 9, *Kirkland Crossing*). However, where the award of attorney fees may be dependent upon the validity of the trial court's conclusions being upheld on appeal, it is appropriate to hold the issue of attorney fees in abeyance until such time as there is a determination of the appeal. *Id.*, ¶ 11. The *Kirkland Crossing* court went on to analogize the situation before it to one where summary judgment has been granted on liability alone, leaving open the issue of damages following appeal. Should this Court uphold the determination of the appellate court in this matter, remand for the determination of attorney fees is appropriate. Wenninger would then be able to file a motion so as to address and otherwise support the request.

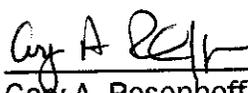
Though Varnau accurately states that the Brown County Prosecutor did participate in this appeal, her role was limited to a singular issue unrelated to the action in quo warranto and she did not actively participate on behalf of her statutory client, Wenninger. Wenninger was left to fend for himself and retain counsel or potentially lose his office.

CONCLUSION

The Court should sustain the Opinion of the Twelfth Appellate District as to Sheriff Wenninger's entitlement to office and remand this matter for a determination of attorney fees.



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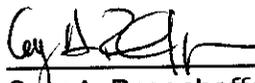


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CERTIFICATE OF SERVICE

I certify that on November 28, 2011, I served a copy of this brief by ordinary mail, postage prepaid upon Thomas G. Eagle, 3386 N. State Rt. 123, Lebanon, Ohio 45036.



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