

ORIGINAL

In the
Supreme Court of Ohio

JOHN D. WALKER, JR.,

Appellee,

v.

PATRICIA J. SHONDRICK-NAU,
EXECUTRIX OF THE ESTATE OF JOHN
R. NOON AND SUCCESSOR TRUSTEE OF
THE JOHN R. NOON TRUST,

Appellant.

: Case No. 2014-0803
:
: On Appeal from the
: Noble County
: Court of Appeals,
: Seventh Appellate District
:
: Court of Appeals
: Case No. 13 NO 402
:
:
:

NOTICE OF ADDITIONAL AUTHORITY
TO BE RELIED ON AT ORAL ARGUMENT

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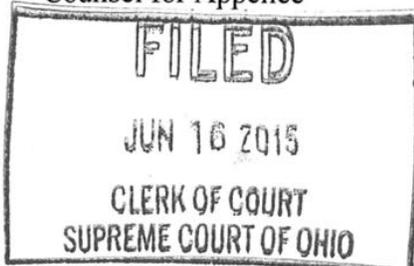
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APPELLEE'S NOTICE OF ADDITIONAL AUTHORITY

In accordance with S.Ct. Prac. R. 17.08, Appellee submits the following citation to relevant authority which may be relied on at oral argument:

State ex rel. Battin v. Bush, 40 Ohio St.3d 236 (1988) (attached).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by U.S. mail this 16th day of June, 2015

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40 Ohio St.3d 236
Supreme Court of Ohio.

The STATE ex rel. BATTIN et al., Appellants,
v.
BUSH et al., Appellees.

No. 87-1903. | Submitted Oct. 26, 1988. | Decided
Dec. 30, 1988.*

* This cause was decided on December 30, 1988, but was released to the public on January 6, 1989, subsequent to the retirement of Justice Locher, who participated in the decision.

Guardian ad litem of county commissioner seriously injured in automobile accident brought action against county to obtain writ of mandamus to command county auditor to issue paychecks to commissioner, and for declarations that amended statute regarding vacancies in office was unconstitutional or was not applicable to commissioner, and that office commissioner was elected to was not vacant. The Court of Common Pleas, Trumbull County, found that statute as amended was constitutional, was validly applied to declare commissioner's seat vacant, and that guardian ad litem had no standing to assert claims on behalf of commissioner, and guardian ad litem appealed. The Court of Appeals found that sole remedy available to guardian ad litem was one in quo warranto, and reversed and remanded for dismissal of guardian ad litem's complaint, and guardian ad litem moved to certify record. The Supreme Court, Holmes, J., held that: (1) trial court had jurisdiction over guardian ad litem's complaint, as there was no need to resort to proceeding in quo warranto; (2) guardian ad litem had standing to bring action on behalf of county commissioner; and (3) amended statute on vacated public offices applied to commissioner injured before effective date of statute only from effective date of statute.

Court of Appeals reversed and cause remanded to trial court.

****302 Syllabus by the Court**

*236 1. R.C. 305.03, as amended, is, by its terms, self-executing. Upon the happening of the enumerated events, the office is then vacant, without resort to any legal proceeding such as quo warranto.

2. R.C. 305.03, as amended, was not intended to be applied other than prospectively. Accordingly, the earliest date from which consecutive days of absence from the performance of official duties may be calculated is the effective date of such amendment, April 15, 1986.

The facts giving rise to the within action begin with the election of Thomas R. Battin to the office of County Commissioner of Trumbull County on November 6, 1984. He took office on January 3, 1985 and was **303 to serve a four-year term. On June 6, 1985, Battin was seriously injured in an automobile accident which left him incapacitated. It was undisputed at trial that at no time after the accident had Battin been able to, nor did he, resume his duties as a county commissioner.

On September 5, 1985, and pursuant to former R.C. 305.03,¹ a physician's certificate was filed with appellee Board of Trumbull County Commissioners, which stated that Battin had been absent because of injury. On February 14, 1986, appellee county auditor refused to give any further paychecks to Battin. Application for a writ of mandamus was filed on February 21, 1986 in the trial court to command the auditor to issue paychecks to Battin. After the auditor asserted that Battin lacked capacity to file the action because of mental incapacity, Karen S. Battin was appointed by the trial court as Battin's guardian *ad litem*. Also, the county prosecutor filed an action in quo warranto in this court, case No. 86-279, on February 25, 1986. Later, on April 30, 1986, the prosecutor filed *237 an application to dismiss the action, which we granted on May 5, 1986.

¹ Former R.C. 305.03 stated as follows:
"Such vacancy shall be filled in the manner provided by section 305.02 of the Revised Code.
"Whenever any county officer is absent from the county because of sickness or injury, he shall cause to be filed with the board of county commissioners a physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of the ninety consecutive days of absence from the county, his office shall be deemed vacant and the board shall declare a vacancy to exist in such office.
"This section shall not apply to a county officer while in the active military service of the United States."

The General Assembly then enacted emergency legislation which amended R.C. 305.03.² This measure

was signed into law by the Governor on April 15, 1986 and was then effective. By letter dated April 15, the county prosecutor advised the auditor that Battin's office should be deemed vacant and that he should be deleted from the payroll. Appellee Trumbull County Democratic Party Central Committee announced its intention to meet on April 24, 1986 for the express purpose of appointing someone to fill the vacancy.

² The amended version of R.C. 305.03, effective April 15, 1986, states as follows:

"(A) Whenever any county officer fails to perform the duties of his office for ninety consecutive days, except in case of sickness or injury as provided in divisions (B) and (C) of this section, his office shall be deemed vacant.

"(B) Whenever any county officer is absent because of sickness or injury, he shall cause to be filed with the board of county commissioners a physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of ninety consecutive days of absence, his office shall be deemed vacant.

"(C) Whenever a county officer files a physician's certificate under division (B) of this section, but continues to be absent for an additional thirty days commencing immediately after the last day on which this certificate may be filed under division (B) of this section, his office shall be deemed vacant.

"Any vacancy declared under this section shall be filled in the manner provided by section 305.02 of the Revised Code.

"This section shall not apply to a county officer while in the active military service of the United States."

The original complaint in mandamus was, on April 17, 1986, supplemented to substitute Karen Battin, guardian, as party plaintiff and to include requests for a declaratory judgment as well as injunctive relief. The declarations sought were that the amended statute was unconstitutional, or not applicable to Thomas Battin, and that the office he was elected to was not vacant. The trial court convened hearings upon the matter on April 18 and 21 before rendering judgment on April 24. The court found that the statute as amended was constitutional, was validly applied to declare the seat at issue vacant, and that the office had been vacated under such statute as of April 15, 1986. Also, the court found that the guardian *ad litem* had no standing to assert claims on behalf of Thomas Battin because the rights asserted were personal to him alone.

According to the parties, the county Democratic Party met on April 24, 1986, and the next day, its appointee,

Christopher S. Lardis, was sworn in to the office declared ****304** vacant. On that date, Karen Battin filed an application for a writ of quo warranto in the court of appeals seeking ouster of Lardis from the office to which he was appointed. This action was ultimately stayed pending appellate review of the trial court's determinations.

Karen Battin filed her appeal in the instant cause on May 15, 1986. On October 1, 1987, the court of appeals reversed the decision of the trial court. The court found that the sole remedy available in an action questioning the right of one to hold public office was one in quo warranto. Since this kind of action may be filed only in the court of appeals or the Supreme Court pursuant to R.C. 2733.03,³ it was concluded ***238** that the trial court was without jurisdiction in the matter and the cause was remanded for dismissal of the supplemental complaint.

³ R.C. 2733.03 states, in pertinent part, as follows:

"An action in quo warranto can be brought only in the supreme court, or in the court of appeals of the county in which the defendant, or one of the defendants, resides or is found ***."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Attorneys and Law Firms

Richards, Ambrosy & Frederika and Charles L. Richards, for appellant.

Anthony J. Celebrezze, Jr., Atty. Gen., and Andrew I. Sutter, for appellee Atty. Gen.,

Dennis Watkins, Pros. Atty., for appellees Board of County Commissioners, Anthony Latell, Arthur Magee and County Auditor Edward Bush.

Comstock, Springer & Wilson and Thomas J. Wilson, for appellee Trumbull County Democratic Party Central Committee.

Thomas C.B. Letson, for appellee William J. Timmins, Chairman, Trumbull County Democratic Party Central Committee.

Opinion

HOLMES, Justice.

The court of appeals found by its opinion that the within action was one which had as its ultimate goal the litigation of one's right to hold a public office. It reasoned, therefore, that the action sounded in quo warranto, over which actions trial-level courts are without jurisdiction. Because we find that the within action was not one to try title to a public office, and for the reasons set forth hereinafter, we reverse the judgment of the court of appeals.

[1] Initially, we shall consider the jurisdiction of the trial court over the subject matter of the within action, and more particularly, whether the appropriate action should have been one in quo warranto or for declaratory judgment. In considering an action for a writ of quo warranto, we note that the authority to hear such an action is granted in Sections 2 and 3, Article IV of the Ohio Constitution.⁴ Jurisdiction is statutorily established under R.C. 2733.03⁵ as exclusively vested in the courts of appeals and the Supreme Court. See, e.g., *State, ex rel. Lindley v. The Maccabees* (1924), 109 Ohio St. 454, 2 Ohio Law Abs. 181, 142 N.E. 888. As pointed out by the court of appeals, the courts of common pleas are without jurisdiction over actions in quo warranto. *State, ex rel. Maxwell, v. Schneider* (1921), 103 Ohio St. 492, 134 N.E. 443.

⁴ Section 2, Article IV of the Ohio Constitution states, in pertinent part, as follows:
“(B)(1) The supreme court shall have original jurisdiction in the following:
“(a) Quo warranto[.]”
Section 3(B)(1)(a) of Article IV sets forth this same jurisdiction for the courts of appeals.

⁵ See fn. 3, *supra*.

[2] [3] The writ itself is a high prerogative writ and is granted, as an extraordinary remedy, where the legal right to hold an office is successfully challenged. *State, ex rel. St. Sara Serbian Orthodox Church, v. Riley* (1973), 36 Ohio St.2d 171, 173, 65 O.O.2d 395, 396, 305 N.E.2d 808, 810; *State, ex rel. Cain v. Kay* (1974), 38 Ohio St.2d 15, 16–17, 67 O.O.2d 33, 34, 309 N.E.2d 860, 862. The actual remedy afforded is that of ouster from the public office. R.C. 2733.14.⁶ Furthermore, quo warranto is ****305** the exclusive remedy by which one's right to hold a public office may ***239** be litigated. *State, ex rel. Hogan, v. Hunt* (1911), 84 Ohio St. 143, 95 N.E. 666, paragraph

one of the syllabus. To obtain such a writ, one must demonstrate that he “is entitled to the [public] office and that the office is unlawfully held by the respondent in the action.” *State, ex rel. Cain, supra*, 38 Ohio St.2d at 17, 67 O.O.2d at 34, 309 N.E.2d at 862.

⁶ R.C. 2733.14 states:

“When a defendant in an action in quo warranto is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and excluded therefrom, and that the relator shall recover his costs.”

[4] [5] A review of R.C. 305.03 demonstrates that an office may be deemed to have been vacated as a matter of law without the need to resort to a proceeding in quo warranto. R.C. 305.03(A), as amended, provides that: “Whenever any county officer fails to perform the duties of his office for ninety consecutive days, * * * his office shall be deemed vacant.” The inquiry established by this statute is not whether one has the right to a particular office but whether, upon certain facts, he has abandoned the office. The focus is upon the office, and whether it is being occupied, and not upon any one person who may be entitled to hold such office. Furthermore, the statute deems the office to be vacant automatically, upon the occurrence of the statutorily determined events. Thus, while one may have been lawfully elected to an office, vested with the authority of the office and fully entitled to occupy it for a set time, nevertheless, an official may abandon his office. In such event, pursuant to the provisions of R.C. 305.03, an action in quo warranto would be unnecessary.

[6] This view is buttressed by our opinion in *State, ex rel. Trago, v. Evans* (1957), 166 Ohio St. 269, 2 O.O.2d 109, 141 N.E.2d 665. In that case, a vacancy was declared pursuant to then effective R.C. 305.03 because the elected sheriff, who was incarcerated in another county, had been absent from the county for ninety consecutive days. The county commissioners, pursuant to the above statute, declared the office vacant and appointed a new sheriff to fill the vacancy. Upon his release from jail, the relator filed an action for a writ of quo warranto to oust such appointed person from the office of sheriff. We upheld the denial of the writ, finding that the vacancy had been created by operation of law, leaving a mere ministerial duty to appoint someone to fill the office. In so holding,

we determined that the occurrence of a vacancy in a public office under R.C. 305.03 has no relation to an action for the removal of an office holder pursuant to a writ of quo warranto. There being authority in the trial court to determine, by declaratory judgment, those matters presented below, including whether a vacancy in the office had occurred, we accordingly reverse the decision of the court of appeals.

II

We now consider whether the trial court had jurisdiction over the person of appellant. Appellees assert, as they did in the trial court, that the guardian *ad litem* had no standing to bring an action in the name of the elected office holder. The trial court agreed with this view, finding that the office and emoluments thereof were personal to the now incompetent ward. No doubt the court was troubled by the anomaly of one bringing various causes of action to perpetuate the term of office for another who is admittedly unable to bring the action himself, or even appear in court, because of incapacity. Nevertheless, R.C. 2111.14 provides that:

“In addition to his other duties, every guardian appointed to take care of the estate of a ward shall have the following duties:

“ * * *

*240 “(E) To bring suit for his ward when such suit is for the best interests of such ward.”

[7] [8] Karen Battin has been appointed guardian *ad litem* for Thomas Battin, her husband. As such, she has standing in her representative capacity to assert by legal action whatever interests her ward may possess, when it is for the best interests of **306 the ward. Obviously, the goal of the within action is to obtain a right to wages and benefits assertedly owed to the ward by the county. This being for the best interest of her husband, she had standing to maintain the action below.

III

[9] Appellant challenges the determination of the trial court that newly amended R.C. 305.03 may be constitutionally applied to events which occurred prior to its effective date. Appellant further contends that to do so

“is violative of Sec. 28, Article II of the Ohio Constitution which prohibits the enactment of retroactive laws.” This constitutional provision states that: “The general assembly shall have no power to pass retroactive laws * * *.” However, before we may embark upon an analysis of whether the General Assembly was permitted under the state Constitution to amend retroactively the statute at issue, and the attendant inquiry of whether such amendment is substantive or merely remedial legislation, it must first be determined whether the legislature intended the law to be retroactive. As stated in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489, 495: “The issue of whether a statute may *constitutionally* be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply. Upon its face, R.C. 1.48 establishes an analytical threshold which must be crossed prior to inquiry under Section 28, Article II.” (Emphasis *sic.*) R.C. 1.48 states: “A statute is presumed to be prospective in its operation unless expressly made retrospective,” which is a rule of statutory construction.

As to the statute at issue, R.C. 305.03, as amended, states in pertinent part:

“(A) Whenever any county officer fails to perform the duties of his office for ninety consecutive days, except in case of sickness or injury as provided in divisions (B) and (C) of this section, his office shall be deemed vacant.

“(B) Whenever any county officer is absent because of sickness or injury, he shall cause to be filed with the board of county commissioners a physician’s certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of ninety consecutive days of absence, his office shall be deemed vacant.”

Clearly, this statute contains no express provision that it be applied retrospectively. Also, its terms are phrased in the present tense and would seem most naturally to look forward in time. Accordingly, we conclude that there was no intent on the part of the General Assembly to apply this statute other than prospectively.

[10] At this point, the additional question presents itself as to whether the trial court in fact gave retroactive application to the statute by its declaration that the office was vacant as of April 15, 1986. Since this was the effective date of the amendment to the statute, it would appear that the trial court’s determination of vacancy in the office was calculated by considering days of absence from the performance of duties which had elapsed prior to

the statute's effective date as part of the *241 requisite ninety consecutive days of absence under the new statute. Of course, the prior version of R.C. 305.03 also allowed for a calculation of a ninety-day period of vacancy as a basis for declaring a vacancy in a county office. However, a review of its terms demonstrates that former R.C. 305.03 defined "absence" as mere physical "absen[ce] from the county." It is admitted that appellant was never absent in such a way.

The amended version, on the other hand, established a definition of "absence" as "fail[ure] to perform the duties of his office." This was an entirely new standard for calculating the requisite ninety consecutive days of absence. More significantly, there was no basis under former R.C. 305.03 for calculating days of absence based upon a failure to perform official duties. Thus, the trial court's action is shown to be a retroactive application of R.C. 305.03 to events occurring before its effective date. See, e.g., **307 *Cassaro v. Cassaro* (1976), 50 Ohio App.2d 368, 372-373, 4 O.O.3d 320, 322, 363 N.E.2d 753, 757, where application of the newly enacted standard to time elapsed prior to the effective date of the statute was determined to be a retroactive application of the statute. In the case here, as previously determined, the General Assembly did not intend to apply the new standard retrospectively. Accordingly, the earliest possible date upon which days of absence, defined as absence from the performance of official duties, may be calculated is the date upon which such definition became effective as law.

The trial court below and appellee Attorney General assert that the time which elapsed prior to the effective date of the statute may be counted in calculating the ninety consecutive days of absence under the new standard, and that such application does not constitute a retroactive application of the amended statute. Great reliance is placed upon *State, ex rel. Bouse, v. Cickelli* (1956), 165 Ohio St. 191, 59 O.O. 261, 134 N.E.2d 834, which is quoted for the proposition that "[legislation] is not retroactive simply because the test involves a time factor extending prior to the effective date of the amendment." *Id.* at 192, 59 O.O. at 262, 134 N.E.2d at 835. In their view, there is no infirmity so long as the test is only applied to cases which are filed on or after the effective date of the statute, such as appellant's.

A closer examination of the *Cickelli* decision reveals that it cannot apply under facts such as those now before us. In that case, the statute at issue expressly required a consideration of how the relator voted in elections held before the effective date of the statute. As such, the statute was clearly intended to have a retroactive application by

the General Assembly, and the primary issue in that case was whether such application was unconstitutional. The case here is distinguishable in that the statute at issue has, by its terms, prospective effect only. Its standard was not intended to apply to events occurring prior to its effective date.

We turn now to the calculation of that time when the office of county commissioner became vacant. It should first be pointed out that newly amended R.C. 305.03 is, by its terms, self-executing. Upon the happening of the enumerated events, the office is then vacant. As to the enumerated terms, subsection (A) set forth above renders the office vacant when the office holder is absent from the performance of his official duties for ninety consecutive days, except when the absence is caused by sickness or injury. Subsection (B) states that if the *242 absence from the performance of duties was caused by sickness or injury, the office holder has ten days after the ninety consecutive days to file a physician's certificate to that effect. If he does so, then subsection (C) gives him an additional thirty days "commencing immediately after" the ten-day period before "his office shall be deemed vacant."

In the present case, a physician's certificate was filed on September 5, 1985. It attested that " * * * Thomas Reed Battin has been absent from his office and duties as county commissioner due to injuries sustained in an automobile accident." Although this certificate fully qualified under the former version of the statute, it may not be utilized for purposes of the amended statute.

[11] The calculation of time to determine the vacancy at issue begins upon the effective date of the amended R.C. 305.03, which is April 15, 1986. As of July 14, 1986, appellant had ten days in which to file a physician's certificate which would explain his absence from the performance of his official duties for the immediately preceding ninety days. This he failed to do, and, accordingly, his office was deemed vacant as of July 14, 1986.

[12] As a final matter, appellant also asserted that any application of the amended statute to divest one who was elected to his office prior to the amendment of the statute is violative of that elected official's constitutional rights to due process. Appellant's precise argument was presented in *State, ex rel. Trago, supra*, 166 Ohio St. at 273-275, 2 O.O.2d at 111-112, 141 N.E.2d at 669, and rejected for the sound reason that there exists no proprietary or individual right in a public office. See, e.g., **308 *State, ex rel. Atty. Gen. v. Hawkins* (1886), 44 Ohio St. 98, 109, 5 N.E. 228, 233; *Mason v. State, ex rel.*

McCoy (1898), 58 Ohio St. 30, 55, 50 N.E. 6, 10.

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings not inconsistent herewith.

Judgment reversed and cause remanded.

MOYER, C.J., and SWEENEY, LOCHER, DOUGLAS,
WRIGHT and HERBERT R. BROWN, JJ., concur.

Parallel Citations

533 N.E.2d 301