

Case No. 15-2061

In the
Supreme Court of Ohio

STATE EX REL. LES CARRIER., *et al.*,
Relators,

v.

HILLIARD CITY COUNCIL,
Respondent.

Original Action in Mandamus

Expedited Election Matter Under S.Ct.Prac.R. 12.08

RELATORS' MOTION FOR ATTORNEY FEES

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Counsel for Respondents

Relators hereby move the Court for an Order finding that Relators are entitled to recover their reasonable attorney fees from Respondent, and ordering a date by which to submit Relators' fees and a memo in support of the reasonableness of the requested amount.

This taxpayer's action was brought after Relators requested Respondent Hilliard City Council's Law Director to file for a writ of mandamus to compel the City Council to approve an ordinance placing a proposed city-charter amendment on the March 15, 2016 ballot. This request was made pursuant to R.C. 733.58 and R.C. 733.781. R.C. 733.58 provides:

In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

R.C. 733.581 provides:

If the village solicitor or city director of law, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by section 733.56, 733.57, or 733.58 of the Revised Code, the taxpayer may be named as a party defendant and if so named shall have the right to assist in presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had.

In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered.

On December 20, 2015, Relators' Counsel transmitted an e-mail to the Law Director for the City of Hilliard requesting that she institute such mandamus action, pursuant to R.C. 733.58 and R.C. 733.581, on or before 4:00pm on December 21, 2015. (Complaint ¶ 28.) On December 21, 2015, the Law Director requested additional time to review the request, and Relators agree to wait an additional day until 4:00pm on

December 22, 2015. (Complaint ¶ 28.) The Law Director did not respond by 4:00pm on December 22, 2015.¹

Following the Law Director's failure to file a mandamus action under R.C. 733.58 and R.C. 733.581, Relators filed their action, pursuant to 733.59, which provides:

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

Relators ultimately prevailed on all counts in their action. (*State ex rel. Carrier v. Hilliard City Council*, Slip Opinion No. 2016-Ohio-155). In its unanimous opinion, the Court repeatedly found that Respondent City Council acted without legal authority. In rejecting Respondent's contention that Relators were required to file the action within 24-hours of Respondent's refusal to place the proposed amendment on the ballot in order to avoid the expedited election briefing schedule, the Court explained:

We have never required litigants to act with such haste merely to beat the expedited deadline.

¹ Please note that despite the Law Director's failure to reply to Relators' Counsel, Respondent hired special counsel who alleged that this action was barred by the doctrine of laches, arguing, in part, that Relators failed to act with the utmost diligence, causing prejudice to Respondent. As discussed *infra*, the Court rejected Respondent's laches argument.

Carrier, Slip Opinion No. 2016-Ohio-155 at ¶ 10 (emphasis added). In rejecting Respondent’s argument that the petition was misleading because it failed to include a title, the Court held:

[Relators’] proposed amendment consists of a mere two provisions, the text of which comprises four brief paragraphs. The entire amendment, including the explanatory captions, fits easily on a single page. We see no risk that the captioning format will “interfere with the petition’s ability to fairly and substantially present the issue [or] mislead electors.”

Carrier, Slip Opinion No. 2016-Ohio-155 at ¶ 13 (emphasis added). In rejecting Respondent’s next contention that the petition failed “alert petition signers to its full nature,” the Court explained:

The city council’s second objection is that the petition fails to indicate whether it would enact entirely new law, amend preexisting law, or repeal existing law. The city council specifically complains that the proposed charter amendment contains no highlighting or underlining to identify new text. However, the city council identifies no statute that requires a petition to include such information.

Carrier, Slip Opinion No. 2016-Ohio-155 at ¶ 14 (emphasis added). In rejecting Respondent’s next argument that the inclusion of the issue committee’s name “Keep Hilliard Beautiful” on each part-petition was misleading, the Court explained:

The city council’s theory appears to be that the committee name is misleading because the measure allegedly has nothing to do with beautification. “Were such practice permissible,” the city council objects, “future petition forms could bear endorsements such as ‘Citizens for Security Against ISIS’ or ‘Citizens for Lower Taxes’ that have no direct correlation to the actual measure being proposed, but is [sic] intentionally added to the form * * * so that electors are more likely to sign the petition.” However, the city council does not identify the source of its alleged authority to police the names of political committees for relevance or accuracy.

Carrier, Slip Opinion No. 2016-Ohio-155 at ¶ 16 (emphasis added). The Court then rejected Respondent’s attempt to twist this Court’s precedent and extend a requirement for *ballot issue language* to the name of a ballot issue committee:

The city council cites this court's statement in *Markus v. Trumbull Cty. Bd. of Elections* that ballot language "ought to be free from any misleading tendency." 22 Ohio St.2d 197, 203, 259 N.E.2d 501 (1970). That rule has always been applied to the actual ballot language, not to peripheral matters such as the name of the circulating committee. *See, e.g., State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 29-31.

Carrier, Slip Opinion No. 2016-Ohio-155 at ¶ 18 (emphasis added).

The Revised Code allows for attorney fees to be awarded to a taxpayer who successfully brings an action under R.C. 733.59. R.C. 733.61 provides:

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.

R.C. 733.61 (emphasis added); *see also, Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 58, 641 N.E.2d 1075 (1994) ("Respondents city council et al. claim that there is no statutory authorization for attorney fees in this type of action. However, R.C. 733.61 provides that the allowance of attorney fees in a taxpayer action is entirely within the sound discretion of the court.") An award of attorney fees in a successful taxpayer action requires the relator to have provided security for costs, and requires that there is a resultant public benefit. *Morris*, 71 Ohio St.3d at 58. Relators have satisfied both of these requirements.

Relators satisfied the statutory requirement of R.C. 733.59 to provide security for costs when it instituted this action and paid the filing fees required by S.Ct.Prac.R. 3.04 and 3.05. S.Ct.Prac.R. 3.04 requires a filing fee of \$100 to institute an original action with the Court, and S.Ct.Prac.R. 3.05 provides, in part, that

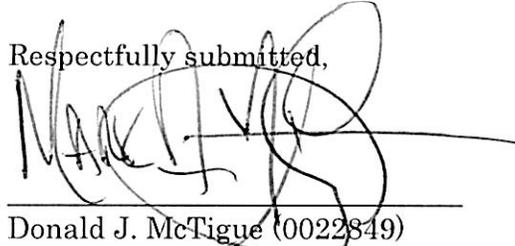
“[o]riginal actions also require a deposit in the amount of one hundred dollars as security for costs.” This Court has consistently found that the posting of the deposit provided for by S.Ct.Prac.R. 3.05 is sufficient to satisfy R.C. 733.59’s requirement. For example, in *State ex rel. Committee for Charter Amendment Petition to Limit the Use of Photo-Monitoring Devices in the City of Maple Heights, Ohio, et al. v. The City of Maple Heights, et al.*, 2014-Ohio-4097, 140 Ohio St. 3d 334, 18 N.E.3d 426, a review of the docket (Case No. 14-1478) reveals that relators sought clarification that the security filed pursuant to S.Ct.Prac.R. 3.05 satisfied R.C. 733.59’s requirement. This Court sided with the relators, waiving any obligation for additional security, and ordered relators to then provide a bill and documentation, in accordance with Prof.Cond.R. 1.5(a), within ten days of the Court’s judgment. 2014-Ohio-4097, 140 Ohio St. 3d 334, 18 N.E.3d 426. Similarly, in *State ex rel. Committee for Charter Amendment Petition v. Avon*, 81 Ohio St.3d 590, 693 N.E.2d 205 (1998) and in *Morris v. Macedonia City Council*, 71 Ohio St.3d 52, 641 N.E.2d 1075 (1994), a review of the dockets shows that relators only posted the \$100 security, as required by S. Ct. Prac. R. 3.05’s predecessor, and, in both instances, the Court found this to satisfy R.C. 733.59. Thus, the precedent of this Court demonstrates that posting security, as required by S. Ct. Prac. R. 3.05, satisfies R.C. 733.59.

A sufficient public benefit exists to warrant an award of attorney fees. This action vindicated the rights of the 946 citizens of the City of Hilliard who signed the petition – an exercise of their constitutional right to initiative, under Article II, Section 1f of the Ohio Constitution, which this Court has described as “one of the most

essential safeguards to representative government,” *State ex rel. Nolan v. Clendenning*, 93 Ohio St. 264, 277-78, 112 N.E. 1029 (1915). This action also guaranteed the right of all electors in the City of Hilliard to weigh in on the proposed amendment to their city’s fundamental, governing document, the Hilliard City Charter. Moreover, this action ensured the submission of the proposed charter amendment at the already-scheduled forthcoming March 15, 2016 ballot, as opposed to necessitating the City to incur the extraordinary expense of providing for a special election. *See*, R.C. 3501.17(D) (“the entire cost of special elections held on a day other than the day of a primary or general election, both in odd-numbered or in even-numbered years, shall be charged to the subdivision”); *see also*, *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St.3d 100, 776 N.E.2d 1041, 2002-Ohio-5302 P46 (2002) (“[w]e award attorney fees because relators' action saved Westlake and its residents the expense of a special election following the regularly scheduled election on November 5, 2002, respondents did not have any reasonable basis for failing to place the charter amendment issue on that ballot, and relators gave security for costs, as required by R.C. 733.59”).

For the foregoing reasons, Relators respectfully move the Court for an Order finding that Relators are entitled to recover their reasonable attorney fees from Respondent, and ordering a date by which to submit Relators’ fees and a memo in support of the reasonableness of the requested amount.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Donald J. McTigue', is written over a horizontal line. The signature is stylized and somewhat illegible due to the cursive nature and overlapping strokes.

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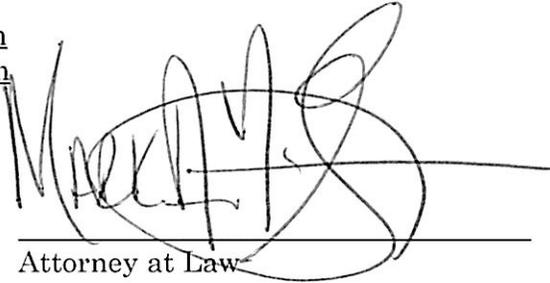
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by electronic transmission and regular mail on January 25, 2016, upon the following:

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