

**IN THE SUPREME COURT OF OHIO**

STATE EX REL. LES CARRIER, et al., :  
: Case No. 2015-2061  
Relators, :  
: ORIGINAL ACTION IN MANDAMUS  
v. :  
: EXPEDITED ELECTIONS MATTER  
HILLIARD CITY COUNCIL, : PURSUANT TO S. CT. R. PRAC. 12.08  
: Respondent. :

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**BRIEF IN OPPOSITION TO RELATORS' MOTION FOR ATTORNEY FEES**

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## I. INTRODUCTION & PROCEDURAL HISTORY

This matter arose from a complaint in mandamus seeking a writ to require Hilliard City Council (“Council” or “City Council”) to forward an initiative petition seeking to amend the City’s Charter to the Franklin County Board of Elections for placement on the March 15, 2016, Primary Election Ballot. Briefs were filed by Relators and by legal counsel representing City Council, and on January 19, 2016, this Court granted the writ compelling City Council to pass legislation forwarding the initiative petition to the Franklin County Board of Elections. As a result, City Council considered and passed Ordinance No. 16-03 on January 25, 2016.<sup>1</sup> On that same date, Relators filed a Motion for Attorney Fees with this court.

## II. LAW & ARGUMENT

### A. Relators’ Failure to Pay a Security Deposit Prohibits the Award of Attorney Fees under R.C. 733.59.

R.C. 733.59 states:

If \* \* \* [a] city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make an application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name.

This section also provides that if a suit is brought, “[n]o such suit or proceeding shall be entertained by any court until the taxpayer gives **security** for the cost of the proceeding.” *Id.* (emphasis added). In interpreting this section, this Court determined that “R.C. 733.59 unequivocally withholds jurisdiction to bring a statutory taxpayer action unless such security is given.” *The State, ex rel. Citizens for a Better Portsmouth v. Sydnor*, 61 Ohio St.3d 49, 54, 572 N.E.2d 649 (1991). See also, *The State, ex rel. Commt. for Charter Amendment Petition v. Maple*

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<sup>1</sup> City Council Legislative News, *Council Sends Charter Initiative to Voters* (Jan. 26, 2016), <http://blog.hilliardohio.gov/city-council-sends-charter-ballot-initiative-to-voters/> (accessed Feb. 3, 2016).

*Heights*, 140 Ohio St.3d 334, 2014-Ohio-4097, 18 N.E.3d 426, ¶ 25 (“providing security for the cost of the proceeding is a prerequisite to a taxpayer suit”).

This Court also adopted a rule regarding deposit of security for the cost of the proceedings. S.Ct.Prac.R. 3.05 requires a deposit in the amount of one hundred dollars (\$100.00) for all original actions filed with the Court.

Relators argue that their payment of the filing fee of one hundred dollars (\$100.00), pursuant to S.Ct.Prac.R. 3.04, satisfies this requirement. This argument by Relators is not well founded and contrary to law. The payment of the filing fee does not equal, take the place of, or stand in the position as being payment of the security deposit, which is required for statutory taxpayer suits. These two one hundred dollar (\$100.00) payments are distinct and required under two separate code sections, and payment of one does not equal payment of the other.

Relators rely on three different cases to support their position that their payment of the filing fee satisfies the security deposit requirement: *The State ex rel. Commt. for the Charter Amendment v. City of Avon*, 81 Ohio St.3d 590, 1998-Ohio-598, 693 N.E.2d 205; *Morris v. City Council of the City of Macedonia*, 71 Ohio St.3d 52, 641 N.E.2d 1075 (1994); and *Maple Heights*, 2014-Ohio-4097. However, a closer examination of these cases show they are clearly distinguishable to Relators’ position. In *Avon*, a review of the public docket shows that relator posted a security deposit on March 16, 1998, the same date that the case was filed.<sup>2</sup> Similarly, in *Morris*, the public docket also shows that a security deposit was posted by the relators the day that case was filed, September 19, 1994.<sup>3</sup> In both of these cases, the security deposit of one hundred dollars (\$100.00) was paid separately from the filing fee, meaning relators paid one

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<sup>2</sup> The Supreme Court of Ohio Case Information, Case No. 1998-0519, <http://www.supremecourt.ohio.gov/Clerk/ecms/#!/caseinfo/1998/0519> (accessed Feb. 3, 2016).

<sup>3</sup> The Supreme Court of Ohio Case Information, Case No. 1994-1996, <http://www.supremecourt.ohio.gov/Clerk/ecms/#!/caseinfo/1994/1996> (accessed Feb. 3, 2016).

hundred dollars (\$100.00) for the filing fee and another one hundred dollars (\$100.00) for the security deposit. A review of the docket in the instant action shows no separate security deposit was posted by Relators on the day this case was filed or any time after. Relators filed only a one hundred dollar (\$100.00) filing fee.

Additionally, Relators reliance on *Maple Heights* is misguided. In *Maple Heights*, when relators initially filed the case, they also filed a motion seeking guidance on the amount of security that must be posted. *Maple Heights*, 2014-Ohio-4097 at ¶ 25. In this case now before the Court, Relators never sought guidance from this Court regarding the amount of the security deposit. Rather, Relators moved for attorney's fees without posting a security deposit.

Consequently, by not filing a security deposit pursuant to S.Ct.Prac.R. 3.05 or requesting guidance on the amount of security deposit required, Relators never properly filed a statutory taxpayer action. Relators filed a common-law taxpayer action and attorney fees are not permitted in a common-law taxpayer action. *Citizens for Better Portsmouth*, 61 Ohio St. at 54 (denying attorney fees because not all statutory prerequisites, including a security deposit, for a statutory taxpayer action were complied with). Case law clearly supports denial of Relators' motion for attorney fees by this Court.

**B. The Award of Attorney Fees Serves No Public Benefit and Council's Position was Reasonable.**

Even if this Court were to conclude that the statutory requirements of R.C. 733.59 were met, Relators' motion should be denied because the award of attorney fees in this case will serve no public benefit and Council's position was reasonable. R.C. 733.61 provides that if judgment is entered in a taxpayer's favor, "he may be allowed \* \* \* reasonable compensation for his attorney." In interpreting this section, this Court has stated "an award is entirely within the discretion of this court." *The State ex rel. Hirshler v. Frazier*, 63 Ohio St.2d 333, 335, 410

N.E.2d 1253 (1980). See also, *The City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 408, 1996-Ohio-174, 659 N.E.2d 781 (“award of attorney fees to a successful plaintiff in an R.C. Chapter 733 taxpayer suit lies entirely within the trial’s court discretion”). “In exercising this discretion, courts consider whether the case resulted in a public benefit and if respondents had a reasonable basis to support their position.” *The State ex rel. Miles v. McSweeney*, 96 Ohio St.3d 352, 2002-Ohio-4455, 775 N.E.2d 468, ¶ 29.

**1. This Case does not Result in a Sufficient Public Benefit to Warrant an Award of Attorney Fees.**

Relators argue a public benefit exists in the case to order an award of attorney fees for three reasons: 1) this action vindicated the rights of the 946 Hilliard citizens who signed the part petitions; 2) this action guaranteed the right of all electors to weigh in on the proposed amendments to the charter; and 3) this action ensured the submission of the proposed charter amendment at the March 15, 2016, election, which means the City does not have to incur the expense of providing for a special election.<sup>4</sup>

Although these three reasons appear to serve a public benefit, ultimately, this case does not serve a public benefit if an award of attorney fees is granted. If attorney fees are granted, it will have a chilling effect on other charter municipalities that are faced with similar circumstances. Under the law, City Councils are required to determine the sufficiency of the petitions and to undertake their due diligence to uphold the law in this regard. Throughout Ohio, city councils must be allowed to perform their duties without fear that if their ultimate determination does not prevail in court, they will be faced with paying attorney fees. This

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<sup>4</sup> Relators rely on a 2002 case to support their position that saving the expense of a special election itself is a basis for an award of attorney fees. *The State ex rel. Comm. for the Charter Amendment, City Trash Collection v. City Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041. However, it should be noted that the relators in that case paid the security deposit as required by R.C. 733.59, which was not done in this instant action, and the Court found that respondents did not have a reasonable basis for failing to place the charter amendment on the ballot, which in this action, as explained later, Council did have a reasonable basis for its position. *Id.* at ¶ 46.

Council took its duties seriously and vetted the petitions in a public hearing, where Council members heard the views of outside legal counsel hired to specifically advise them in these matters. If a judgment of attorney fees is awarded, future city councils will be hesitant to undertake their statutory duty to determine the sufficiency of the petitions and may automatically forward every initiative petition to its board of elections in fear of receiving an order to pay the relator's attorney fees. *State ex rel. Polcyn v. Burkhart*, 33 Ohio St.2d 7, 2092 N.E. 2d 883, (1973); *Citizens for a Better Portsmouth*, 61 Ohio St.3d at 53. In order to avoid this chilling outcome that public officials may choose to not avail themselves of the legal process, attorney fees should not be awarded in this case.

**2. Council had a Reasonable Basis to Support Their Position.**

The apparent argument from Relators that Council had no reasonable basis for its position is that this Court determined in a 7-0 decision to grant the writ. However, a decision which is judged to be “ultimately erroneous” should not alone determine that Council had no reasonable basis for its not passing an ordinance certifying the charter amendment to the board of elections due to the petitions not being in strict compliance with the law. *The State ex rel. North Main Street Coalition v. Webb*, 106 Ohio St.3d 437, 2005-Ohio-5009, 835 N.E.2d 1222, ¶ 50 (attorney fees not awarded merely because village clerk's position after seeking guidance from the common pleas court was erroneous). See also, *McSweeney*, 2002-Ohio-4455 at ¶ 30 (“even though respondents' position is incorrect, an award of attorney fees is not warranted” because their interpretation of law and precedent was not irrational.)

On November 23, 2015, City Council introduced and held the first reading of Ordinance No. 15-61, which proposed to submit the initiative petition to the electors on the March 15, 2016,

ballot. The ordinance was given a second reading on December 7, 2015, and after public comments, was held over for a third and final reading on December 14, 2015.

At third reading, counsel retained by the City with experience in these matters, advised that each part petition was defective in three respects. Counsel advised that these three defects were important because “it followed that the [legislative] authority need not make submission unless satisfied of the sufficiency of the petitions and that all statutory requirements are fairly met.” *The State ex rel. Semik v. Bd. of Election of Cuyahoga Cty.*, 67 Ohio St.3d 334, 335-336, 617 N.E.2d 1120 (1993) (internal quotations omitted). Additionally, Council was advised that “the settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly permits it.” *State ex rel. Phillips v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 535, 539, 2001-Ohio-1627, 757 N.E.2d 319. Finally, Council was advised that it is Council’s duty to determine the sufficiency of the form of the petition. *Polcyn*, 33 Ohio St.2d 7; *Citizens for a Better Portsmouth*, 61 Ohio St.3d at 53.

Relying on this advice that presence of the three defects on the part petitions resulted in them not being in strict compliance with the law, a vote by the majority of City Council determined that it could not certify the initiative petition to the Franklin County Board of Elections, and Ordinance No. 15-61 was not passed.

While this Court ultimately ruled to issue the writ sought by relators, this Court’s ruling does not mean that Council’s position was unreasonable. Similar to the position of the village clerk in *North Main Street Coalition*, attorney fees should not merely be awarded because City Council’s reliance on the advice of counsel did not result in a positive outcome for Relators.

2005-Ohio-5009 at ¶ 50. Also, Council’s interpretation of current law and precedent from this Court was not irrational. *McSweeney*, 2002-Ohio-4455 at ¶ 30.

For example, as counsel advised, R.C. 731.31 states that each part petition “shall contain a full and correct copy of the title and text” of the proposed measure. Reasonable minds can differ as to whether the proposed initiative petition contained a title. There was a “captioning format” as stated by this Court, to each section proposed to be added to the Charter, however, there was not one title which explained the amendments fully to any member of the public that was being asked to vote on these important amendments to the City’s Constitution – its Charter. Because there was no title, Council made the determination that a title was lacking, as it was its duty, and as result, strict compliance was not met and by a majority vote of Council, it did not forward the initiative petition to the Franklin County Board of Elections.

This determination was reasonable and clearly not irrational, regardless of this Court’s ultimate decision to issue the writ. City Council did not act in bad faith and believed that due to Relators failing the strict compliance standard in three distinct ways, it should vote to not forward Ordinance No. 15-61 to the Board. *Id.*

Additional persuasive support for Council’s determination that lacking a title was a reasonable decision occurred when a subsequent ordinance, Ordinance No. 16-03, was in fact passed by City Council at the direction of this Court, and which Ordinance contained a Title for the Franklin County Board of Elections to put on ballot for this initiative. Relator Les Carrier voted to certify the initiative petition to the Franklin County Board of Elections by voting “yes” on Ordinance No. 16-03 that did include a title.<sup>5</sup> The Franklin County Board of Elections rejected that title and the Board simply forwarded the “captioning format” (as originally included

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<sup>5</sup> City Council Legislative News, *Council Sends Charter Initiative to Voters* (Jan. 26, 2016), <http://blog.hilliardohio.gov/city-council-sends-charter-ballot-initiative-to-voters/> (accessed Feb. 3, 2016).

on the part petitions) to the Ohio Secretary of State, for which the City protested. The Board ultimately approved of the City's title language included in its protest, for which Relator Carrier agreed that the new title was fine and neutral.<sup>6</sup> This confirms Council's stance that a title was lacking in the part petitions signed by Hilliard electors, and that its actions were not unreasonable or irrational. One can conclude, with a clear conscience and in reliance on the law, that City Council's position on the initiative petition was reasonable and its actions do not merit an award of attorney fees. While reasonable minds can always differ on matters of the law, an award of attorney fees in this case is clearly not warranted.

### **III. CONCLUSION**

Relators did not file a proper statutory taxpayer action because it failed to provide security for the cost of the proceeding as required by R.C. 733.59, therefore an award of attorney fees is not available. Additionally, attorney fees are not warranted because this case will not result in any public benefit and Council had a reasonable and rational basis to support its position.

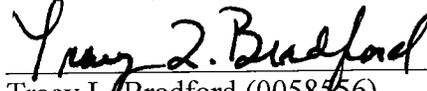
Wherefore, Respondent Hilliard City Council respectfully requests this Court deny Relators' Motion for Attorney Fees.

SIGNATURE PAGE FOLLOWS

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<sup>6</sup> Corvo, *Ballot Language approved for Hilliard charter changes* (Jan. 28, 2016), <http://www.thisweeknews.com/content/stories/hilliard/news/2016/01/26/Board-of-elections-approves-charter-amendment-ballot-language-WB-KC.html> (accessed Feb. 3, 2016).

Respectfully submitted,



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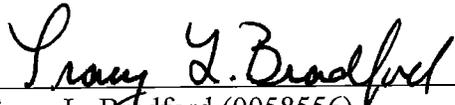
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Brief in Opposition to Relator's Motion for Attorney Fees* was served via e-mail pursuant to S.Ct.Prac.R. 12.08(C) on this 4th day of February 2016, upon the following:

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