[Cite as *Norton v. Richards*, 2009-Ohio-3868.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF NORTON, OHIO	
Appellee	C. A. No. 24557
v.	
KARLA RICHARDS, et al.	APPEAL FROM JUDGMENT ENTERED IN THE
Defendants	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
and	CASE No. CV 2008 11 8320
CHARLOTTE WHIPKEY	
Intervenor/Appellant	

DECISION AND JOURNAL ENTRY

Dated: August 5, 2009

WHITMORE, Judge.

{¶1} Intervenor-Appellant, Charlotte Whipkey, appeals from the decision of the Summit County Court of Common Pleas, granting summary judgment in favor of Plaintiff-Appellee, the City of Norton ("Norton"). This Court affirms.

I

{¶2} The facts of the case underlying this appeal are not in dispute. On November 4, 2008, the voters of Norton passed Issue 26. Issue 26 was a voter-initiated amendment to the Charter of the City of Norton, Ohio ("the charter") that sought to reduce the number of at-large Council positions from three to one. Specifically, the amendment sought to modify Section 3.02

in the following manner, with the proposed additions underlined and the proposed deletions shown in strikethrough:

> "SECTION 3.02 ELECTION.
>
> "The Council shall be composed of ~~seven~~ five members, ~~three~~ one of whom shall be elected at large and four of whom shall be elected from wards as provided herein.
>
> "At the regular Municipal election to be held in the year 1965, and every fourth year thereafter, four members shall be elected from wards, one from each ward, for four-year terms.
>
> "At the regular Municipal election to be held in the year ~~1967~~ 2011, and every fourth year thereafter, ~~three members~~ one member shall be elected at large for ~~terms~~ a term of four years. **Effective January 1, 2009, two at large offices shall be eliminated with the remaining at large office to be held by the at large candidate whom received the highest number of votes in the regular Municipal election held in 2007.**
>
> "All members of Council shall assume office on the first day of January following their election."

It is the bolded, underlined statement in the charter amendment ("the contested sentence") that Norton asserts is unconstitutional.

{¶3} Following the November 2008 election and certification of the election results favoring Issue 26, Norton's City Solicitor filed a complaint for declaratory and injunctive relief alleging that the contested sentence is unconstitutional. Norton sought to enjoin the Norton City Council ("Council") from implementing the amendment. Whipkey, a Norton resident and voter who led the petition to place Issue 26 on the November 2008 ballot, sought to intervene, asserting that her interests as a member of the voting public of Norton were not adequately represented by the existing parties. The trial court granted Whipkey's motion to intervene. Norton later filed a motion for summary judgment, which the named defendants and Whipkey opposed.

{¶4} On December 18, 2008, the trial court granted summary judgment in favor of Norton, declaring that the contested sentence was unconstitutionally retroactive in violation of Section 28, Article II of the Ohio Constitution. Consistent with Norton's charter, the trial court severed the contested sentence from the amendment and permanently enjoined Council from implementing it. It is from this judgment that Whipkey appeals, asserting one assignment of error.

II

Assignment of Error

> "TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING SUMMARY JUDGMENT AND PREVENTING IMPLEMENTATION OF A PORTION OF THE ISSUE 26 CHARTER AMENDMENT PASSED BY THE VOTERS IN THE CITY OF NORTON, OHIO, HOLDING THAT SUCH PORTION OF ISSUE 26 VIOLATED ARTICLE II, SECTION 28, OF THE OHIO CONSTITUTION BY ELIMINATING THE OFFICES OF THE TWO (OF THREE) AT-LARGE COUNCIL MEMBERS RECEIVING THE LEAST VOTES AT THE PRECEDING ELECTION."

{¶5} In her sole assignment of error, Whipkey asserts that the trial court erred when it granted Norton's motion for summary judgment and enjoined Council from implementing the contested sentence. Specifically, she asserts that the retroactivity protections afforded by the Ohio Constitution are inapplicable when an office is abolished, as was done by way of the contested sentence. Instead, she asserts that Norton voters approved the contested sentence in the November 2008 election and sought to eliminate offices in January 2009, thus it is prospective in nature and does not run afoul of the Ohio Constitution. She further asserts that the office holders have no "vested right" to hold office and that the public has the constitutional right to abolish an office at any time. Whipkey maintains that the contested sentence does not change the effect of the 2007 election, but instead, changes the office to which those candidates were elected. We disagree.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*. (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides that summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

In the absence of a material dispute over the facts, this Court must determine whether Norton was entitled to judgment as a matter of law based on the interpretation of the charter amendment. *Welfle, Inc. v. Motorist Ins. Group*, 9th Dist. No. 06CA0063-M, 2007-Ohio-1899, at ¶10; *Lorain Cty. Bd. of Commrs. v. United States Fire Ins. Co.* (1992), 81 Ohio App.3d 263, 267.

{¶7} Under Section 28, Article II of the Ohio Constitution, "[t]he general assembly shall have no power to pass retroactive laws." The Supreme Court has determined that the "constitutional prohibition against retroactive laws is equally applicable to charter amendments" imposed upon a municipality. *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections* (1995), 72 Ohio St.3d 69, 73. R.C. 1.48 provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." To determine if a statute is intended to apply retroactively, the reviewing court must undertake a two-part analysis. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶10. First, the reviewing court must determine whether the statute was intended to apply retroactively. *Consilio* at ¶10, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, paragraph two of the syllabus. A statute that "takes away or impairs vested rights acquired under existing laws, or *** imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past" is considered retroactive. *Van Fossen*, 36 Ohio St.3d at 106, quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296,

303. If the statute is intended to apply retroactively, the reviewing court must next determine whether the statute is substantive or remedial in nature. *Consilio* at ¶10; *Van Fossen*, 36 Ohio St.3d at paragraph one of the syllabus. "A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right." *State v. Cook* (1998), 83 Ohio St.3d 404, 411. On the other hand, a statute is remedial if it "merely substitute[s] a new or more appropriate remedy for the enforcement of an existing right." Id. Generally, a statute that relates to procedures is considered remedial. Id.

{¶8} In its motion for summary judgment, Norton argues that the contested sentence was meant to have a retroactive effect because, by operation, it applies to the results of the 2007 at-large election as if the charter amendment was in place at that time. Norton points to *State ex re. Mirlisena v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 597, in support of its assertion that the contested sentence was intended to apply retrospectively. In *Mirlisena*, the Court considered a term limitations amendment retrospective because it sought to include the term limits council members had served before the effective date of the amendment imposing such limitations. *Mirlisena*, 67 Ohio St.3d at 600.

{¶9} Norton also notes that captioning the change as "[e]ffective January 1, 2009," does not mean that the contested sentence was not intended to have a retroactive effect. Despite its prospective date, Norton argues that the contested sentence, as applied, is retroactive because it seeks to apply the substance of its terms – to eliminate two at-large offices – to elections held before its effective date.

{¶10} In response, Whipkey argues that Ohio jurisprudence has long held that an office created by an act of government can be similarly abolished by that same governing body. She

relies on *Knoup v. Piqua Branch of State Bank of Ohio* (1853), 1 Ohio St. 603, for the proposition that "whenever the public interest requires that [an] office should be abolished, or the duties of the office become unnecessary, the incumbent cannot object to the abolition of the office." *Knoup*, 1 Ohio St. at 616. See, also, *State ex rel. Flin v. Wright* (1857), 7 Ohio St. 333. Accordingly, Whipkey asserts that the issue of retroactivity is not implicated by the terms of the contested sentence or more generally by Issue 26 because it "was passed, then the office[s] [were] abolished. [They were] not abolished retroactively." Whipkey agrees with Norton that that retroactivity comes into consideration if a statute impairs a vested right or affects a substantive right, but maintains that based on the historical application of *Knoup*, "there is no individual right to a public office and the public has the right *** to abolish a public office, and *** the incumbent cannot complain." Thus, she asserts that the issue of retroactivity does not exist when an office is abolished.

{¶11} Whipkey further argues that the existence of, and more importantly the removal of, the at-large Council seats is not an individual right, but a public right. As a public right, the public has the authority to change its governing structure and abolish two of the Council positions with the approval of Issue 26, without facing any legal challenge for doing so. Whipkey maintains that the 2007 election results remain intact and that the winners of that election were able to take office and serve as Council members at-large until the existence of that office was extinguished by Norton's voters in November 2009. Under her analysis, there is no retroactive effect from Issue 26.

{¶12} Based on our review of the case law argued by both parties, we agree with the trial court that the contested sentence does implicate constitutional principles of retroactivity, contrary to Whipkey's assertions otherwise. What the contested sentence attempts to do is

reduce the at-large members on Council in January 2009 based on an election that had occurred prior to that point, much like how the voter-initiated amendment in *Mirlisena* sought to apply later-approved term limit criteria to terms that had occurred in the past, before the amendment was passed.

{¶13} In *Mirlisena*, a 1991 voter-initiated amendment sought to limit the number of consecutive terms a person could serve on the Cincinnati City Council. Specifically, it limited a council member's service period to four consecutive two-year terms. After those terms, the council member was required to wait two consecutive terms before being eligible to run for council again. Specifically, the charter amendment stated that, "for the council term commencing December 1, 1993, and that consecutive terms of service on the council to which members were elected *prior to December 1, 1993 shall be counted* in determining eligibility for office[.]" (Emphasis added.) *Mirlisena*, 67 Ohio St.3d at 598-99. Mirlisena had served four consecutive two-year terms and was considered ineligible when he sought reelection in 1993. He then filed a writ of mandamus arguing that the 1991 amendment was unconstitutionally retroactive. On a motion for reconsideration, the Supreme Court determined that basing term limitations on a period of service to which member were elected, prior to there being any such term limitation in place, was "meant to have retroactive effect." Id. at 600. Therefore, the Court severed the retrospective portion of the amendment which sought to base the term limitations effective in December 1993 on consecutive terms of service that had occurred prior to that point. See, also, *State ex rel. Sterne v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 605 (asserting the same claims and requesting the same relief based on a different council member's terms of service). We agree with Norton that, just as in *Mirlisena*, the contested sentence seeks to reduce the at-large members on Council in January 2009 based on an election that had

occurred prior to that point. Thus, when an amendment attempts to apply to an election held before the amendment's effective date, it is retroactive in nature.

{¶14} To the extent Whipkey argues that Norton reserves the right to modify its charter and to reduce the number of, or even eliminate, at-large positions on Council, we agree. The reduction of positions, however, must be done in a manner that does not rely on an event that occurred prior to deciding that such a reduction was necessary.

{¶15} Having concluded that the contested sentence was intended to apply retroactively, we must next consider whether it is substantive or remedial in nature. Norton argues that the contested sentence is substantive, not remedial, because it "changes the law governing the election of at[-]large city [C]ouncil members." Stated differently, Norton complains that the law in effect at the time of the 2007 election, which provided that three at-large members would serve on Council and permitted the voters of Norton to cast their ballots under the impression that they were electing three of the six available candidates, has effectively been changed to permit the election of only one of those six candidates. Additionally, Norton argues that the contested sentence does not seek to create a new remedy for enforcing an existing law; instead, it seeks to "reach back in time and attach new legal consequences to the [2007] election results[.]" Norton argues that, under *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2001), 91 Ohio St.3d 308, Norton voters had a "reasonable expectation of finality" once the November 2007 election results were certified and the three recipients of the highest vote totals were seated to the at-large Council positions available at that time. *Cincinnati School Dist. Bd. of Edn.*, 91 Ohio St.3d at 316-317 (concluding that newly created rules that permitted re-filing of property valuation complaints could not be applied retrospectively as they brought "new burdens" and disrupted the county official's "reasonable expectation of finality" from the

previously adjudicated complaints). Additionally, in *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections* (1995), 72 Ohio St.3d 69, the Supreme Court held that a charter amendment passed by the electorate in the November 1993 general election, limiting the number of terms a member could serve on council, could only apply to those elections after the November 1993 general election and did not apply to those candidates who ran in that same election when the amendment was passed. *Youngstown*, 72 Ohio St.3d at 73-75. Norton argues that, when taken in combination, *Cincinnati School Dist. Bd. of Edn*. and *Youngstown* require us to conclude that Issue 26 can be applied only to elections held on or after its effective date, that is, elections held after January 1, 2009, because to do otherwise, would upset the voters' reasonable expectations of finality.

{¶16} Additionally, Norton asserts that *Mirlisena* also supports a conclusion that the voters of Norton and the two candidates subject to removal from office under Issue 26 have vested rights that will be impaired if the contested sentence is implemented. Norton argues that, as was the case in *Mirlisena*, the voters and the candidates were operating under a different set of rules and expectations when electing officials before the charter amendment was adopted, which the Supreme Court has concluded is unconstitutional. In *Mirlisena*, however, the Supreme Court rejected the argument that there was a substantial impairment to the council members' vested rights, but Norton asserts that the vested rights of both Norton's voters and the at-large Council member are at stake in this case. Norton supports its argument by pointing to Justice Pfeifer's concurring opinion in that case. There, Justice Pfeifer suggests that, if the charter amendment would have "interrupt[ed] a council term that ha[d] already begun[,]" as is the case with Norton, he would have considered that sufficient to having impaired the petitioner's vested rights or having attached a new disability to a past transaction and therefore unconstitutionally retroactive.

Mirlisena, 67 Ohio St.3d at 603 (J. Pfeifer, concurring) (disagreeing with the majority's opinion that charter amendment was unconstitutionally retroactive, but concurring in judgment based on his opinion that two charter amendments at issue were void). Norton asserts that, based on a "read[ing] [of *Mirlisena*] in its entirety[,] [it] establishes that a charter amendment is unconstitutional if it retroactively applies to transactions arising before its effective date, particularly where *** it seeks to 'interrupt a council term that has already begun.'" (Quoting *Mirlisena*, 67 Ohio St.3d at 603).

{¶17} Finally, Norton asserts that R.C. 731.01(B) precludes the very action that the contested sentence attempts to accomplish. It provides, in relevant part, that "[a] resolution that changes the total number of members shall specify the method by which the change in number is to take effect, but no reduction in the number of members shall terminate the term of an incumbent." R.C. 731.01(B). Additionally, R.C. 731.03 establishes a process for altering the length of a Council member's term, but requires that it be done prospectively and applied to future elections. R.C. 731.03(B) (requiring that alterations to length of terms become "effective on the first day of January following the next regular municipal election, except as may otherwise be provided by the legislative authority").

{¶18} Consistent with her contention that the contested sentence does not implicate constitutional issues of retroactivity, Whipkey maintains that it does not impair a vested right, nor does any disability attach to the 2007 election results with the adoption of Issue 26. Instead, Whipkey asserts that "Issue 26 does not effect (sic) the election process of 2007 at all" because "the winners remained the winners [and] the winners took office[;] [w]hat later changed was the office itself." Further, she disagrees that the contested sentence imposes a new burden or disability on a past transaction. She maintains that Issue 26 cannot be viewed as violating those

presently seated at-large members' "expectation[s] of finality," based on her adherence to the position that "there can be no reasonable expectation of an officeholder that his office cannot be eliminated" when Ohio law has permitted such an approach since the 1850's under *Knoup*, supra; *Flin*, supra; *State ex rel. Attorney General v. Jennings* (1898), 57 Ohio St. 415; and *Elyria v. Vandemark* (1919), 100 Ohio St. 365.

{¶19} Whipkey maintains that *Mirlisena*, as a term limitations case, does not address the elimination of an office and is therefore not authoritative on the facts of this case. She further notes that, in Justice Pfeifer's concurrence in that case, he specifically states his disagreement with the majority's holding that the charter amendment at issue was unconstitutionally retroactive, which favors her analysis of Issue 26. Whipkey disagrees with Norton's characterization of the election as having created a vested right for the public or the successful candidates to have the three elected members fill the at-large Council positions for the next term. Similarly, she disagrees with the notion that the contested sentence imposes a new disability to that right, as she contends that neither the public nor the at-large Council members have any reasonable right to expect that the at-large office could not be abolished by voter amendment.

{¶20} To properly determine whether the contested sentence is substantive in nature, we start with the provisions that governed the 2007 election. When the six at-large candidates were campaigning, as well as when Norton voters entered the polls that November, they were operating under the provisions of Section 3.02 of the charter, which required that "three members shall be elected at large for terms of four years." The contested sentence approved in November 2009 attempts to eliminate two of the three at-large positions based on the voting totals from the 2007 election. That is, it acts to now select and seat only one of the six candidates in one at-large position. Accordingly, we consider the contested sentence as being substantive in nature because

it has attached "a new [burden] to a past transaction [which held] *** a reasonable expectation of finality." *Cook*, 83 Ohio St.3d at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281.

{¶21} The Supreme Court first elaborated on this issue in *State ex rel. Matz*, where it concluded that a statute was not unconstitutionally retroactive when it barred persons who had previously been convicted of a felony from applying for compensation as a crime victim at a later point in time. The Supreme Court distinguished its decision in *State ex rel. Matz* from its decision in *Lakengren v. Kosydar* (1975), 44 Ohio St.2d 199, 201, where it held that amendments to the corporate franchise tax was unconstitutionally retroactive if it applied to a taxpayer whose tax year had ended. *State ex rel. Matz*, 37 Ohio St.3d at 281. The *State ex rel. Matz* Court reasoned that:

> "The General Assembly ha[s] the power to enact laws, and *** having enacted laws within certain limitations, and persons having conformed their conduct *** to such state of the law, the General Assembly is prohibited, *** from passing new laws to reach back and create new burdens *** not existing at the time. [Therefore] it is clear that a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration, *if it did not create a vested right, created at least a reasonable expectation of finality*." (Emphasis added.) (Internal citations and quotations omitted.) Id.

The Court explained that "[t]he completion of a tax year is such a transaction [which creates a reasonable expectation of finality]; the commission of a felony is not." Id. The Court reasoned that "felons have no reasonable right to expect that their conduct will never be made the subject of legislation" and asserted that "important public policy reasons" supported such a conclusion. Id. at 282. We find the same rationale applicable here.

{¶22} The voters of Norton, as well as the candidates and their supporters who invested time and money in the at-large Council campaigns, did so seeking to elect three candidates to

Norton's Council in November 2007. They did so with an expectation of finality, assuming that under the election provisions of the charter in effect at the time "three members [were to] be elected at large for terms of four years." Once the results were certified and the at-large members seated on Council, both the voters and the successful candidates had an expectation of finality as to that election. The contested sentence approved in 2009 fundamentally changes the finality of the November 2007 election, in that its effect will be that the voters chose only one candidate for only one at-large position. As was the case in *State ex rel. Matz*, there are also important public policy considerations that need to be taken into account when a statute attempts to disrupt or misapply certified election results which show three of six candidates being seated to three open positions, then later selecting only one of those candidates to complete the term.

{¶23} For the foregoing reasons, we conclude that the contested sentence attaches a new disability or burden to a past transaction, a transaction which held an expectation of finality for both Norton's voters and at-large candidates. In doing so, we note that, while we disagree with Norton's liberal interpretation of Justice Pfeifer's concurrence in *Mirlisena*, we need not determine whether the voters or the Council members have a vested right to office because we have determined that the contested sentence is substantive and not remedial. Accordingly, the trial court did not error as a matter of law in granting Norton's motion for summary judgment.

III

{¶24} Whipkey's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Intervenor/Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS

SLABY, J.
CONCURS IN JUDGMENT ONLY

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

ROBERT W. HEYDORN, and JOHN M. HERRNSTEIN, Attorneys at Law, for Intervenor/Appellant.

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