

SEP 07 2021

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO
PROBATE DIVISION

JUDGE MARK BARTOLOTTA
PROBATE COURT
LAKE COUNTY, OHIO

TONY LEE MILLER, <i>pro se</i> , et al.,)	CASE NO: 2020 CV 1075
<i>Petitioners,</i>)	JUDGE THOMAS A. SWIFT
v.)	
NANCY FELLOWS,)	JUDGMENT ENTRY
<i>Respondent.</i>)	

This matter came before the Court upon Respondent-Defendant Nancy Fellows' Motion for Summary Judgment. For the reasons stated herein, the Court finds the Respondent-Defendant's motion well-taken, and GRANTS the same.

Statement of the Case and Facts

The Petitioners are five electors of the City of Willoughby Hills and have brought allegations of misfeasance and malfeasance against Fellows, in her official capacity as a council member on the Willoughby Hills City Council. Petitioners have alleged 19 different claims, attempting to remove Fellows from her position as a member of the City Council under R.C. 733.72. Petitioners' complaint is identical to a complaint filed in this Court on August 27, 2019, except for one claim, "Count 18." That complaint commenced the case styled *In the Matter of: Jeffrey Fruscella, et al. v. Laura Pizmoht, et al.*, Case No. 19CV1178, Lake County Court of Common Pleas, Probate Division ("first case" or "*Fruscella* Lawsuit"). The only difference between the *Fruscella* Lawsuit and this one, other than "Count 18," is that Fellows is the only current member of City Council and thus the only named respondent herein. The other respondents from the first lawsuit are no longer serving on City Council.

The claims made in the *Fruscella* lawsuit against Fellows and the five former council members were based on alleged conduct that occurred in 2017 and 2018, which was the subject

of three lawsuits prior to the *Fruscella* Lawsuit: *Robert Weger, et al v. Willoughby Hills City Council*, Case No 17CV0001758, Lake County Common Pleas Court, (*Weger I Lawsuit*); *Robert Weger, et al v. Willoughby Hills City, et al*, Case No. 18CV000964, Lake County Common Pleas Court (*Weger II Lawsuit*), which related to the passage of Ordinance No. 2018-27; and *Willoughby Hills City Council et al vs. Robert Weger et al*, Case No. 18CV001677 (*Weger III Lawsuit*), which related to the Mayor's attempt to remove the Council Members (collectively referred to as the "*Prior Weger Lawsuits*"). The *Prior Weger Lawsuits* were all collectively resolved by a Settlement and Mutual Release Agreement executed in January of 2019.

The majority of Petitioners' claims involve conduct that occurred prior to Fellows' current term as a council member, and therefore are irrelevant for purposes of an action under R.C. 733.72. Additionally, Petitioners' action against Fellows in her official capacity is the equivalent of an action against the City of Willoughby Hills, and therefore cannot satisfy the requirements of R.C. 733.72 for removal of an official from office. Furthermore, Petitioners' claims of misfeasance and malfeasance are insufficient as the conduct alleged involved voting on legislation. Lastly, the City of Willoughby and Fellows are entitled to statutory immunity and legislative immunity.

Legal Analysis

I. Petitioners' Claims Concern Events Prior to the Beginning of Fellows' Current Term in Office.

The Petitioners' complaint cites numerous events as the basis for Fellows' removal from office, relying upon many actions that occurred in 2017. These events include: the September 14, 2017 adoption of Ordinance 2017-63; the September 14, 2017 presentation and December 20, 2017 adoption of Ordinance 2017-64; the September 14, 2017 adoption of Ordinance 2017-65; the September 28, 2017 vote by the Council to pass Ordinance 2017-70; the June 22, 2017 passage of Ordinance 2017-15; the September 28, 2017 passage of Ordinance 2017-70; and the anonymous letters received by Councilwoman Jennifer Greer and Mayor Weger during 2017.

Under R.C. 733.72, "misfeasance or malfeasance 'in office,' is limited to 'the single term in which the offense occurred.'" *Stauffer v. Smith*, 11th Dist. 2015-Ohio-4240, ¶17, quoting *State ex rel. Stokes v. Probate Court of Cuyahoga Cty.*, 22 Ohio St.2d 120, 124 (1970). The Supreme Court provides clear direction in this regard:

In the absence of clear legislative language making conduct in prior terms a ground for removal from office under this section [R.C. 733.72], the misfeasance or malfeasance alleged as a ground for removal must occur during the term from which removal is sought and be subsequent to the exercise of the power to elect vested in the electors of the municipality.

Stokes, 22 Ohio St.2d at 124. In *Stokes*, the Supreme Court therefore held that "[s]ince all conduct alleged as a ground for removal occurred in a prior term of office, and relator has since been reelected to his present term by the electors of the city of Cleveland, the issue presented to the Probate Court is now moot." *Id.*

Here, the Petitioners' own complaint states that Fellows is a duly elected council member since her election on January 2, 2018, and that she serves her current term until January 1, 2022. (Complaint ¶4). As a result, none of the allegations concerning Fellows' conduct prior to the beginning of her current term of office on January 2, 2018, are within the scope of R.C. 733.72.

II. Petitioners' Complaint Fails to Name Fellows in Her Individual Capacity.

The Petitioners' complaint names Fellows in her official capacity as a City Council member. "It is well settled law that an action against a government official in his or her official capacity is not an action against the official, but, instead, is one against the official's office and, thus, is treated as an action against the entity itself." *The State ex. rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 235 (2009), quoting *Kelly v. New Haven*, 275 Conn. 580, 595 (2005). See also *Evans v. Ohio AG*, 4th Dist. 2021-Ohio-1146, ¶21, citing *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985) ("If a government official is sued in an official capacity, the claim is to be treated as a suit against the government entity for which the official is an agent.")

Petitioner's suit against Fellows in her official capacity as a council member on the City of Willoughby Hills City Council is the equivalent of a suit against the City of Willoughby Hills. R.C. 733.72 does not create liability for the municipal corporation, and Petitioners do not seek relief from the City.

III. Fellows Did Not Engage in Misfeasance or Malfeasance by Voting on Ordinances as a Councilmember.

The majority of Petitioners' claims allege that Fellows engaged in misfeasance or malfeasance by voting in support of certain City ordinances that Petitioners disagree with. Willoughby Hills City Council consists of seven members, and Fellows cannot unilaterally pass legislation; it must be passed by a majority vote of Council. Fellows cannot commit misfeasance or malfeasance in office for actions that taken by Council as a whole.

IV. Fellows is Entitled to Statutory Immunity Under R.C. 2744.

Because Fellows was named in her official capacity, the suit is treated as an action against the City of Willoughby Hills itself. Under the statutory immunity framework of R.C. 2744, the City of Willoughby Hills is a political subdivision, and the performance of legislative and quasi-legislative functions are governmental functions. R.C. 2744.01(C)(2)(f).

The City of Willoughby Hills has immunity under the general rule per the first tier of the immunity analysis. R.C. 2744.02(A)(1), and there are no exceptions listed in R.C. 2744.02(B) that create an exception to remove Willoughby Hill's general immunity. Specifically, there is no exception for claims related to misfeasance or malfeasance as it relates to the City. R.C. §733.72 does not expressly impose liability on political subdivisions.

V. Fellows is Entitled to Absolute Legislative Immunity.

"Ohio courts have also long recognized that when a legislator votes on a proposed bill or ordinance, he is performing a quintessentially legislative function and thus enjoys absolute immunity arising out of the casting of that vote." *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 496

(8th Dist. 2001). Additionally, ""local legislators are entitled to absolute immunity as long as they are acting in a legislative capacity."" *Wilkins v. Vill. of Harrisburg*, 10th Dist. 2018-Ohio-759, ¶9, quoting *Curry v. Village of Blanchester*, 12th Dist. 2010-Ohio-3368, ¶ 27, and *Hogan v. South Lebanon*, 73 Ohio App.3d 230, 234-35, (12th Dist.1991).

The issue of legislative immunity has been addressed frequently by the federal courts. "Several circuit courts of appeal have *** held that local legislators are entitled to absolute immunity in Section 1983 suits for conduct undertaken in their legislative capacity." *Hogan v. South Lebanon*, 73 Ohio App.3d 230, 234 (12th Dist. 1991), citing *Haskell v. Washington Twp.*, 864 F.2d 1266, 1277 (6th Cir. 1988). See also *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998), quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'") Furthermore, "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.*

The Sixth Circuit has held legislative immunity extends even in situations where a law was not properly enacted or is subsequently deemed invalid. In *Shoultes v. Laidlaw*, 886 F.2d 114 (6th Cir. 1989), a plaintiff challenged the validity of a zoning ordinance which regulated adult bookstores. Although the ordinance was subsequently deemed invalid, the Sixth Circuit granted absolute legislative immunity to the city council that enacted the ordinance:

The Mayor and Council clearly were acting in their legislative capacities in passing the 1978 zoning ordinance. While the ordinance subsequently was held invalid, it was passed by a properly constituted legislative body, which was empowered to pass zoning regulations. Accordingly, we hold that the Mayor and Council members are shielded from suit by absolute legislative immunity.


Shoultes, at 117-118.

Petitioners claim Fellows committed misfeasance or malfeasance by supporting and voting in favor of certain ordinances in her role as a council member. Voting for ordinances is an

action that Fellows performed in her legislative capacity, for which she is entitled to absolute immunity.

Conclusion

For the foregoing reasons, it is hereby **ORDERED, ADJUDGED and DECREED** that judgment be entered in favor of Defendant-Respondent Nancy Fellows and against Petitioners on all claims in the complaint. The costs are taxed to the petitioners.



Judge Thomas A. Swift
Sitting by Assignment