

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO ex rel. ROBERT MERRILL, TRUSTEE, et al.	:	Case No. 2009-1806
	:	
Appellees and Cross-Appellees	:	
	:	On Appeal from the Lake
	:	County Court of Appeals,
v.	:	Eleventh Appellate District
	:	Court of Appeals
	:	Case No. 2008-L-007
STATE OF OHIO. DEPARTMENT OF	:	Case No. 2008-L-008
NATURAL RESOURCES, et al.	:	Consolidated
	:	
Appellants and Cross Appellees,	:	
	:	

**SUPPLEMENTAL RESPONSE MEMORANDUM OF APPELLEES L. SCOT DUNCAN
AND DARLA J. DUNCAN TO SUPPLEMENTAL JURISDICTIONAL
MEMORANDUMS OF STATE OF OHIO AND OHIO DEPARTMENT OF NATURAL
RESOURCES, AND SEAN LOGAN, DIRECTOR OF NATURAL RESOURCES**

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INTRODUCTION

On December 23, 2009, the Court requested the parties to brief the following two issues:

1. Does the Attorney General have standing to appeal a judgment against the state of Ohio if that appeal is contrary to the directive of the Governor, and the Attorney General is not representing an administrative agency?

2. If the answer to the first question is “Yes,” is the record in this matter sufficient for this court to resolve the appeals and cross-appeal, if they are accepted, even though the state of Ohio’s assignments of error and briefs were stricken by the court of appeals?

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Based on a review of the pertinent sections of the Ohio Constitution and the Ohio Revised Code, as well as applicable case law, the answer to the first question is “No”. Since the record from the lower courts was completed with the full participation of the Attorney General, including oral arguments in the court of appeals, the answer to the second question is “Yes”.

A careful reading of the Ohio Constitution and the Ohio Revised Code reveals the following:

- The Constitution vests the “supreme executive power” in the Governor. Section 5, Article III, Ohio Constitution. As such, the Governor is required to “see that the laws are faithfully executed.” Section 6, Article III, Ohio Constitution.
- Furthermore, the General Assembly has designated the Department of Natural Resources, which reports to the Governor, as the state agency in all matters pertaining to the care, protection, and enforcement of the state’s rights in Lake Erie, including the Lake Erie boundary lines. R.C. 1506.10
- While the Attorney General is an independent executive officer and does not directly report to the Governor, there is no constitutional provision or statute that allows the Attorney General to represent the state, or the people of the state,

independent of authority vested in the Governor and the Department of Natural Resources. Indeed, there is case law that specifically holds that the policy judgment of any executive officer charged with an area of responsibility is not subject to review or second guessing by any other executive officer. *State ex rel. S. Monroe & Son Co. v Baker* (1925), 112 Ohio St. 356, 366-367. In other words, the Attorney General cannot second guess the Governor, any more than the Governor can overrule the other executive officers in matters where the responsibility has been clearly established by the General Assembly

- Finally, while the Attorney General claims to trace his power to serve as *parens patriae* (Latin - “parent of the state”) back to early English common law and the historic role of the Attorney General in England, it is clear the English common law was rejected by the Ohio General Assembly in 1806 and that there have been no such powers developed under the common law of Ohio since that time. In short, the only thing the Ohio Attorney General has in common with the Attorney General of the 13th century is the title. It is abundantly clear that having the title alone does not automatically carry with it the powers of the Attorney General in 13th century England or any right to challenge the “supreme executive power” of the chief executive officer. While the United States government also has an Attorney General, no such powers are claimed for that office.

In developing the arguments regarding Question 1, the author reviewed two law journal articles that provided valuable insights into the case law surrounding the core issue of how a divided executive branch should function. Both articles were advocacy documents but provided valuable guidance for navigating through the statutes and case law on the subject. These were:

- Marshall, *Break Up the Presidency?: Governors, State Attorney General, and Lessons from the Divided Executive* (2006), 115 *Yale L.J.*2442. Marshall explores the pros and cons of the divided executive branch, recommending that it might be appropriate for adoption by the federal government as well as the state governments where it is widely used. By and large, the treatment is a balanced one. Several of the cases reviewed in the article, including some from both Ohio and foreign jurisdictions, are discussed below.
- Miller and Miller, *The Constitutional Charter of Ohio's Attorney General* (1976), 37 *Ohio St. L.J.* 801. Miller and Miller, who were both Assistant Ohio Attorneys General at the time, explored the divided executive branch in Ohio and the common law powers of the Ohio Attorney General, advocating for greater common law authority. The authors noted that their views did not necessarily represent the posture of the Office of the Attorney General at the time and freely admitted that some past office holders had "been content to occupy a restricted role" and infrequently demonstrated "innovative zeal." *Id.* at Footnote * and 819.

Key cases mentioned in the above articles are discussed below. In addition it is recommended that the reader review the source documents themselves for a more detailed treatment of the subject of the divided executive branch from multiple perspectives.

With regard to Question 2 as posed by the court, it is clear from the lower court records that the Attorney General fully participated in the briefs at both the trial court and appeals court levels. In addition, the Attorney General also fully participated in the oral arguments in the appeals court. The ruling from the appeals court denying the Attorney General standing came

only after the completion of the oral arguments and full consideration of the Attorney General's position on standing.

ARGUMENT

1. The Attorney General Does Not Have Standing To Appeal A Judgment Against The State Of Ohio If That Appeal Is Contrary To The Directive Of The Governor And The Attorney General Is Not Representing An Administrative Agency.

Ohio, like forty-seven other states, has a divided executive branch that apportions executive powers among multiple officers which have a degree of independence from gubernatorial control. Marshall, 115 Yale L.J.2442. This contrasts with the federal model in which the Attorney General is chosen by the President with the advice and consent of the Senate. 28 U.S.C. §503. The degree of independence given to other executive officers varies widely from state to state. Most state constitutions, like Ohio's, vest the "supreme executive power" in the Governor. Section 5, Article III, Ohio Constitution. As such, the Governor is required to "see that the laws are faithfully executed." Section 6, Article III, Ohio Constitution.

The original Ohio Constitution made no provision for an Attorney General. The role of the Attorney General in Ohio was first defined in its present form by the legislature in 1846 and the office was first described in the Constitution of 1851. Steinglass and Scarselli, *The Ohio State Constitution: A Reference Guide* (2004) at 25,27. However, neither the 1851 Constitution, nor any of the subsequent changes, addressed the powers of the Attorney General in any detail. The duties of the Attorney General are described in R.C. 109 that defines the responsibilities of the office in considerable detail. The most general description of the Attorney General's duties as the chief law officer is in R.C. 109.02 that reads as follows:

"The attorney general is the chief law officer for the state and all its departments..... The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested."

In addition, the balance of R.C. 109 includes numerous specific situations such as anti-trust, child protection, consumer protection and other areas of law in which the General Assembly has vested authority for the protection of the State's interest in the Attorney General.

R.C. 109.07 allows the Attorney general to appoint special counsel to represent the state in civil cases as follows:

Except under the circumstances described in division (E) of section 120.06 of the Revised Code, the attorney general may appoint special counsel to represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested.

It was under the authority of R.C. 109.07 that Porter Wright was substituted as attorney for ODNR during the trial court proceedings of this case. No separate statutory authority was found to allow the Attorney General to continue to provide independent representation for "the state" or "the people" once the substitution was made. On the contrary, it is clearly the responsibility of the Governor to protect the interest of the state and its citizens in this instance under Article III, Section 6, of the Ohio Constitution and R.C. 1506.10 as discussed in the following paragraph.

Just as the General Assembly has assigned specific duties to the Governor and the Attorney General, it has assigned responsibility for the care and protection of Lake Erie to the Department of Natural Resources. The Ohio Revised Code specifically addresses the Lake Erie boundary lines in R.C. 1506.10 which reads as follows:

1506.10 Lake Erie boundary lines. - It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and

Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section. (Emphasis added)

Any order of the director of Natural Resources in any matter pertaining to the care, protection, and enforcement of the state's rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

Since the Director of the Department of Natural Resources reports to the Governor, and not the Attorney General, it is clear that it is the Governor, and not the Attorney General, who bears the ultimate responsibility for protecting the interests of the State of Ohio and its citizens in matters pertaining to the boundary lines of Lake Erie.

Ohio's form of government with a "split executive" branch has its historic roots in the attitude of early Ohioans who had an extreme distaste for an omnipotent governor based on their experience under Governor St. Clair during the territorial period preceding statehood. The split executive form of government that exists, in one form or another in a majority of states is seen by some as superior to the Federal model of a unitary executive branch. Some have argued for breaking up the Federal executive branch. (See, for example, Marshall, (2006), 115 Yale L.J. 2442) In the unitary model, the Attorney General is clearly under the control of the chief executive. However, the split model provides both incentives and opportunities for conflict between the chief executive and the Attorney General as has developed in this case. Even the

advocates of the split executive model recognize that it creates inherent conflicts whenever one executive overreaches. This problem is much more pronounced in states where the Attorney General's role has not been clearly defined by the legislature and depends more heavily on English common-law. Florida is an example of such a jurisdiction. See, for example, *State of Florida ex rel. Shevin v. Exxon Corp.* (5th Cir. 1976) 526 F.2d 266

Ohio's General Assembly specifically did away with the English common law in 1806. 4 Ohio Laws 38. In its place, an Ohio common law has developed through the years. While the Attorney General claims that his actions in this case are justified in part because the title of Attorney General can be traced to 13th century England, the United States Attorney General can clearly trace his title to the same roots and yet he clearly has no such general power to operate independently of the President. As an interesting historical note, a footnote in 1 S. Chase, Statutes of Ohio and the Northwest Territory (1833) 190 reveals that, at the time, there was substantial disagreement as to whether the adoption of English common-law by the territorial government violated the U.S. Constitution and the congressional legislation which authorized the Northwest Territory.

Advocates for the split executive and the common law authority of the Ohio Attorney General erroneously point to *State of Ohio v. United Transportation, Inc.* (S.D. Ohio 1981), 506 F. Supp.1278 for the proposition that common law powers allowed the Ohio Attorney General to bring that case to federal court. In fact, *United Transportation* was a federal anti-trust case and the actions taken by the Attorney General in that case had been specifically authorized by Ohio statute as the federal court recognized and explained in detail.

There do not appear to be any Ohio cases other than this one in which the Attorney General has attempted to go against an Ohio Governor's directive regardless of whether he was

representing an administrative agency or not. However, a directly applicable case from another jurisdiction comes from Arizona. In *Arizona State Land Department and Obed M. Lassen v. McFate*, (1960) 348 P.2d 912, the Arizona Attorney General attempted to enjoin the Land Department and the Governor from selling, pursuant to state law, several parcels of land belonging to the state of Arizona. The Arizona Supreme Court refused to allow the Attorney General's petition, holding as follows:

“The Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed.

We recognize that in initiating the instant proceeding the Attorney General sought to have the courts review a matter vitally affected with the public interest, and we commend his vigilance and public spiritedness in that regard. *His standing to institute such action, though predicated on the interest of the State and public generally, must, however, be supported by statute.* We find no such support in this case.” (Emphasis added)

The parallels to the case at bar are obvious.

Another related case from a foreign jurisdiction is the West Virginia case of *Manchin v. Browning* (1982) 296 S.E.2d 909, in which the West Virginia Supreme Court held that the Attorney General had an obligation to provide legal representation to defend public policy determinations by other state executive officers. The *Manchin* court cited the *Arizona State Land Department* case with approval and further held that:

*“In summary, the Attorney General's statutory authority to prosecute and defend all actions brought by or against any state officer simply provides such officer with access to his legal services and does not authorize the Attorney General "to assert his vision of state interest." *** His authority to manage and control litigation on behalf of a state officer is limited to his professional discretion to organize legal arguments and to develop the case in the areas of practice and procedure so as to reflect and vindicate the lawful public policy of the officer he represents. The Attorney General is not authorized in such circumstances to place himself in the position of a litigant so as to represent his concept of the public interest, but he must defer to the decisions of the officer whom he represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in court.”* (Emphasis added)

In *State ex rel.S. Monroe & Son Co. v Baker*(1925), 112 Ohio St. 356, the Court reviewed the ability of the Governor to dictate the actions of other state directors. In this case, the Governor had ordered the director of finance not to perform certain ministerial duties required by statute and had been supported by the Attorney General. The court reviewed the difference between those duties which were strictly ministerial and those which were made subject to the Governor's approval by statute.

“It is the policy and the spirit of our institutions that every executive officer is invested with certain power's and discretion, and within the scope of the powers granted and discretion conferred his dictum is supreme and his judgment is not subject to the dictation of any other officer.” *State ex rel.S. Monroe & Son Co. v Baker*(1925), 112 Ohio St. 356, 366-367

Finally, it is worthwhile to briefly examine two Ohio cases cited in the Miller law article (supra.at 826-828) and a subsequent case which examined the holding in those two cases. In *State v. City of Bowling Green*(1974), 38 Ohio St.2d 281, the State sued the city of Bowling Green for damages for negligent operation of a municipal wastewater plant and the resultant fishkill. In analyzing the case, Miller correctly stated that the Supreme Court of Ohio had never acknowledged that the Attorney General actually held the full powers of his (English) common-law predecessor. Miller then characterized the case as a challenge of the state's standing to sue and, by implication, the Attorney General's standing to sue. The Court found in favor of the State. However, the court's opinion characterized the controlling question as one of (the City's) sovereign immunity and not one of the Attorney General's or the State's standing. *Id.* at 283.

The next case of interest is *State ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47 Ohio St.2d 76. In *Rockside Reclamation*, the Attorney General claimed authority to prosecute a common-law nuisance on behalf of the people of Ohio rather than as the attorney for the Director

of Environmental Protection, who was charged with environmental enforcement relative to landfills under R.C. 3734.10. The Court held that the Attorney General had no common-law authority to pursue the nuisance claim in this instance except as the attorney for the Director of Environmental Protection as required by the Ohio Revised Code and the Ohio Administrative Code. The parallels to the case at bar are obvious. Miller predicted that the holding in *Rockside* was a narrow one limited only by the statutory construction of R.C. 3734. Seventeen years later, Miller was proven correct by the result in the following case.

The final case was heard by the Court 17 years after *Rockside Reclamation* and suggests what the Attorney General should do if he seeks authority to prosecute future Lake Erie territory cases under a common-law authority in opposition to the existing delegation of authority under the Ohio Revised Code. Namely, get the law changed. In *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill* (1993), 67 Ohio St.3d 293, the Court held that the Township could bring a common-law nuisance claim against the landfill. The difference from the outcome *Rockside Reclamation* was that four years after the decision in *Rockside*, R.C. 3734.10 was significantly amended. The Court opined in *Atwater* in 1993:

“Four years after our decision in *Rockside*, R.C. 3734.10 was significantly amended. Am.S.B. No. 269,138 Ohio Laws, Part I, 892. A paragraph was added to the end of the statute which expressly provided that R.C. Chapter 3734 was not to be read to abridge the equitable or common-law rights of the state, municipal corporations, or "person[s]" to "suppress nuisances or to abate pollution." (fn3) This paragraph was amended again in 1984. Am.Sub.H.B. No. 506,140 Ohio Laws, Part II, 4010-4011. The 1984 amendments broadened the ability to pursue waste disposal site operators by permitting nuisance actions as "provided by statute" in addition to common-law and equitable nuisance actions. After the amendments, the last paragraph of R.C. 3734.10 now reads:

"This chapter does not abridge rights of action or remedies in equity, under common law, or as provided by statute or prevent the state or any municipal corporation or person in the exercise of their rights in equity, under common law, or as provided by statute to suppress nuisances or to abate or prevent pollution."

We believe that the 1980 and 1984 amendments to R.C. 3734.10 supersede our decision in Rockside and render its holdings of no present effect. Accordingly, the common pleas court erred in relying on that decision.”

While the responsibility for the protection of the Lake Erie public trust currently rests with the Governor and the Director of Natural Resources under R.C. 1506.10, there is certainly no reason that R.C. 1506.10 cannot be changed by the legislature if they so desire just as they twice amended the similar statute in R.C. 3734.10. Alternatively, if the Attorney General feels that the Governor and the Director failed to fulfill their responsibilities to make reasonable policy decisions and “see that the laws are faithfully executed” under either the Constitution or the Revised Code, there are remedies available. However, the available remedies do not include appealing the Court’s decision on the basis of the common-law.

It is clear that, when the Governor announced that he and ODNR had agreed on the policy that ODNR should honor valid deeds of lakefront owners, it was incumbent on the Attorney General to revise his position to reflect that of his client. When Porter Wright was substituted as counsel, the Attorney General was no longer authorized to continue to represent the State of Ohio in a direction which had become inconsistent with the position of ODNR and the Governor. Rather than advocate for the wishes of his client, the Attorney General substituted Porter Wright under RC 109.07 to represent ODNR. However, under the express wording of 109.07, Porter Wright then represented “the state” as well as the Governor and ODNR. As the result, the Attorney General was left with no standing as the Appeals Court correctly determined.

2. If The Court Determines That The Answer To The First Question Is “Yes”, The Record In This Matter Is Sufficient For The Court To Resolve The Appeals And Cross Appeal If They Are Accepted.

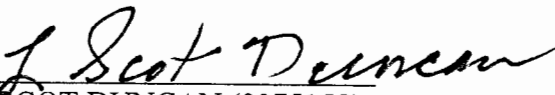
As all parties seem to agree, there is no need to remand to the Appeals Court since the Attorney General fully participated in the briefing and oral arguments in the Appeals Court.

CONCLUSION

The Attorney General does not have standing to represent the State under the facts of the case and the Court should issue a summary judgment upholding the Appeals Court decision. On the other hand, if the court decides to accept jurisdiction over the substantive issues of the case, the record from the courts below is sufficient.

In the event that the Court accepts the case, the Attorney General can participate under S.Ct.Prac.R VI, Section 6.

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Certificate of Service

I hereby certify that copies of the foregoing SUPPLEMENTAL RESPONSE MEMORANDUM OF APPELLEES L. SCOT DUNCAN AND DARLA J. DUNCAN TO SUPPLEMENTAL JURISDICTIONAL MEMORANDUMS OF STATE OF OHIO AND OHIO DEPARTMENT OF NATURAL RESOURCES, AND SEAN LOGAN, DIRECTOR OF NATURAL RESOURCES were served by first class U.S. Mail on this 21st day of January, 2010, upon all parties by serving their respective counsel of record addressed as follows:

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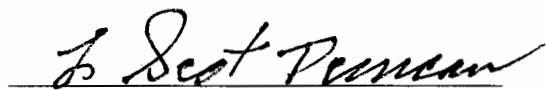
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