OPINION NO. 83-075

Syllabus:

1. The county and/or a county officeholder, prior to filing a civil action or commencing legal proceedings, may, pursuant to rule of court, be required by the clerk of courts to provide security for costs, except when the presiding judge pursuant to court rule otherwise orders, or when the defendant in such an action waives the security requirement.

2. The county and/or a county officeholder, when they are parties plaintiff or defendant to civil actions in which they do not prevail, may be liable to the clerk of courts for all costs incurred in the actions, except where the rules of civil procedure or statutes pertaining to costs state otherwise, or where the court otherwise directs.

3. In civil actions in which the county and/or a county officeholder are both plaintiff(s) and defendant(s), the county and/or county officeholder may be required to furnish security for costs and be liable for the payment of costs as stated in paragraphs 1 and 2 above, and such costs are to be paid to the clerk of courts by the method prescribed in R.C. 319.16.

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your request for an opinion of the Attorney General regarding the following questions:

1. Does the county and/or a county officeholder[1] have to provide security for costs when filing civil actions?

2. Is the county and/or a county officeholder liable for the payment of court costs should a judgment be rendered in favor of a non-county defendant?

3. Is the county and/or a county officeholder liable for the payment of court costs should a judgment be rendered against the county and/or a county officeholder as defendants?

---

[1] I assume that, in all of your questions, you are concerned with the county officeholder suing or being sued in his official capacity and not as an individual.

4. In situations where the county and/or a county officeholder are both plaintiff(s) and defendant(s) in the same action, is the county responsible for providing security and/or payment of costs and, if so, how are such costs to be paid?

A representative of your office has informed me that all of your questions pertain to civil actions commenced in the Summit County Court of Common Pleas, including all of its divisions, and in the Akron Municipal Court, and that your second question considers the case where the county and/or a county officeholder is the plaintiff.

With respect to your first question, I note that R.C. 2323.31 states:

> The court of common pleas by rule may require an advance deposit for the filing of any civil action or proceeding. On motion of the defendant, and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or may require personal security to be given. . . .

Pursuant to this statute, the Court of Common Pleas, Summit County, General Division, has adopted a rule requiring parties to deposit with the Clerk of Courts a sum as security for costs before filing civil actions or commencing proceedings. C.P. Summit, Gen. Div., R. 7.06. Cf. Ohio R. Civ. P. 65(C) (security not required of state, its subdivisions, or agencies or officeholders of either prior to moving for injunctive relief). Similarly, the Probate Division of the Common Pleas Court has promulgated a rule requiring a deposit upon the filing of a civil action, R. 2.02, and the Division of Domestic Relations, Bureau of Support, Court of Common Pleas, has by judgment order required complainants in contempt proceedings to make deposits for costs.

Further, with respect to municipal courts, R.C. 1901.26 provides in part:

> (B) The municipal court, by rule, may require an advance deposit for the filing of any civil action or proceeding and publication fees as provided in section 2701.09 of the Revised Code. . . .
> (C) In any civil action or proceeding when a jury trial is demanded, the party making such demand may be required to make an advance deposit, not exceeding ten dollars, as fixed by rule of court. . . .

Pursuant to this statutory authority, the Akron Municipal Court has adopted a rule requiring the deposit of a sum as security for costs and the deposit of a sum when demand is made for a jury, prior to the filing of a civil action or the commencement of proceedings. Akron Mun. Ct. R. 14(A), (C).

I am aware of no statute or established rule in Ohio which would exempt a county or county officeholder from the operation of court rules requiring the deposit of a sum of money as security for costs prior to the filing of a civil action.[2] However, the rules of practice for both the Summit County Court of Common Pleas, General Division, and the Akron Municipal Court require a plaintiff or

---

[2] Cf. R.C. 109.19, which exempts "the state or an officer thereof" from any security requirements in the prosecution or defense of actions. Counties do not share this exemption with the state for the reason that "county" is not synonymous with "state." See, e.g., R.C. 1703.01 (foreign corporations); R.C. 2743.01(A) (court of claims); R.C. 3115.01(B) (reciprocal enforcement of support). But see State ex rel. Meader v. Sullivan, 15 Ohio C.C. 477 (Hamilton County 1897) (where county prosecutor files motion in quo warranto on relation of the state, he is not required to furnish security for costs under statute stating "no undertaking or security is required on behalf of the state, or of any officer thereof in the prosecution or defense of any action, writ or proceeding").

proceeding party to furnish security for costs "unless otherwise ordered by the presiding judge." C.P. Summit, Gen. Div., R. 7.06; Akron Mun. Ct. R. 14(A). Further, the requirement of security imposed upon a plaintiff may always be waived by the defendant to the action. State ex rel. Houghton v. Pethtel, 138 Ohio St. 20, 32 N.E.2d 411 (1941) (construing former G.C. 11616).

I conclude, therefore, in response to your first question, that the county and/or a county officeholder may, pursuant to rule of court, be required by the clerk of courts, prior to filing a civil action, to provide security for costs, except as otherwise ordered pursuant to court rule by the presiding judge, unless defendants to such actions waive the security requirement.

Your second and third questions concern the liability of the county and/or a county officeholder for the payment of court costs in the case where the county or county officeholder unsuccessfully prosecutes a civil cause, and in the case where the county and/or county officeholder is an unprevailing party defendant.

Ohio R. Civ. P. 54(D) was adopted by the Supreme Court of Ohio pursuant to Ohio Const. art. IV, §5(B) to govern all courts of the state. Ohio R. Civ. P. 54(D) provides:

> Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

However, as was stated in White v. White, 50 Ohio App.2d 263, 269, 362 N.E.2d 1013, 1017-18 n. 1 (Cuyahoga County 1977):

> There is a distinction between the taxing and collection of costs by the clerk of courts and the awarding of costs to either party by the trial court in the final judgment. Civil Rule 54(D) governs the awarding of costs by the court. This rule provides that costs generally shall be allowed to the prevailing party unless the court otherwise directs. The taxing and collection of costs concerns the obligation of the parties to the clerk of courts and is wholly governed by statute. R.C. 2335.18 to R.C. 2335.33.
>
> The costs of the parties in all actions, motions and proceedings in any court of this state shall be taxed and entered of record separately. R.C. 2335.18. This means that the primary obligation to pay the costs to the clerk of courts rests on the party on whose order the costs were incurred.
>
> . . . .
>
> In summary, if a party pays his costs and then recovers judgment for his costs, he can collect them from the other party. If a party has not paid his costs, he may collect the costs from the other party and then pay the clerk, or if he does not effect collection, the clerk may execute and make the prevailing party pay the costs he incurred. The prevailing party would then have to recoup his costs from the other party under the judgment. The party incurring the costs, however, remains primarily liable to the clerk of courts for the costs incurred at his instance. (Emphasis added; citations omitted.)

Thus, each party to an action is primarily liable to the clerk of courts for his costs in the action as he incurs them, as a matter of the taxing and collection of costs, a liability which does not, by the operation of Ohio R. Civ. P. 54(D), shift to the unprevailing party. As a practical matter, pursuant to the authority of R. Civ. P. 54(D), a prevailing party may obtain judgment for his costs, execute against the unprevailing party, and proceed with the collection of his costs.

Ohio R. Civ. P. 54(D) governs the award of costs in all civil actions in all courts of the state,[3] but does not apply, in its own words, "when express provision [for costs] is made either in a statute or in these rules. . . ." Other civil rules do apply to the allocation of costs, and therefore control the question as to which party bears the costs mentioned in those rules. See, e.g., Ohio R. Civ. P. 27(E) (costs of deposition); Ohio R. Civ. P. 41(D) (costs of previously dismissed action).

Again, I am aware of no statute or established rule in Ohio which would exempt a county or county officeholder from the operation of a civil rule of procedure that allows costs to the prevailing party to an action.[4] However,

---

3 R. Civ. P. 1(A) provides that the civil rules prescribe the procedure to be followed in all courts of the state in the exercise of their civil jurisdiction, except when the limited circumstances stated in R. Civ. P. 1(C) are present. Joncom Corp. v. City of Bedford, 4 Ohio Op. 3d 327 (C.P. Cuyahoga County 1975) (the civil rules govern procedure in all civil actions, including those involving the state and its component entities). Further, the fact that certain rules make exceptions for governmental entities suggests that, absent such exceptions, the civil rules apply to all litigants, private and governmental. See R. Civ. P. 55(D) (default judgment against the state, a political subdivision, or an officer of either may not be entered unless claimant establishes his right to relief by evidence satisfactory to the court); R. Civ. P. 62(C) (no security required of the state, its political subdivisions, or agencies of either when appeal is taken and judgment is stayed).

4 There exists authority for the proposition that the state, upon principles of sovereign immunity, is not subject to the imposition of costs or statutes of limitation. State ex rel. Board of Education v. Gibson, 130 Ohio St. 318, 199 N.E. 185 (1935); State ex rel. Merritt & Co. v. Morrow, 10 N.P. (n.s.) 279 (C.P. Greene County 1910). It has been held that such immunity does not extend to political subdivisions of the state. Brown v. Board of Education, 20 Ohio St. 2d 68, 253 N.E.2d 767 (1969); State ex rel. Board of Education v. Gibson (paragraph 3 of the syllabus states: "Where a statute does not expressly exempt a subordinate political subdivision from its operation, the exemption therefrom does not exist."). But cf. Schaffer v. Board of Trustees, 171 Ohio St. 228, 168 N.E.2d 547 (1960) (counties are immune from tort liability); Board of Education v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905) (boards of education enjoy immunity from tort liability); 1981 Op. Att'y Gen. No. 81-055 (statutes including persons and corporations within their scope are generally construed as excluding public bodies). Whether or not such subdivisions may, in the past, have enjoyed any such immunity appears, however, to be a moot question, since recent judicial inroads into the concept of sovereign immunity with respect to municipal corporations and political subdivisions of the state cast doubt upon the proposition that counties may avail themselves of any protections of sovereign immunity. See Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, ___ N.E.2d ___ (1983) (claim upon which relief could be granted stated against municipal corporation in complaint alleging negligent maintenance of highway shoulder); Strohofer v. City of Cincinnati, 6 Ohio St. 3d 118, ___ N.E.2d ___ (1983) (in absence of statute granting immunity, defense of sovereign immunity not available to municipal corporation in action alleging negligent placement of traffic signals); Enghauser Mfg. Co. v. Eriksson Engineering Ltd., 6 Ohio St. 3d 31, ___ N.E.2d ___ (1983) (defense of sovereign immunity not available to municipal corporation in action alleging negligent planning, design, and construction of bridge and roadway); King v. Williams, 5 Ohio St. 3d 137, ___ N.E.2d ___ (1983) (stating the doctrine of sovereign immunity was "largely abolished" by Haverlack v. Portage Homes, infra); Haverlack v. Portage Homes, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982) (in absence of statute granting immunity, defense of sovereign immunity not available to municipal corporation in action alleging negligent operation of sewage treatment plant); Schenkolewski v. Cleveland Metroparks System, 60 Ohio St. 2d 31, 426 N.E.2d 784 (1981) (defense of sovereign immunity unavailable to board of commissioners of park district when board exercises proprietary function).

pursuant to R. Civ. P. 54(D), the court may rule otherwise, and since under the provisions of R.C. 2335.18-.33 the party on whose behalf the costs were incurred remains primarily liable to the clerk of courts for the payment of those costs, the court may always, in its discretion, order each party to bear his own costs.

I conclude, therefore, in response to your second and third questions, that the county and/or a county officeholder, when they are parties to civil actions in which they do not prevail, may be liable to the clerk of courts for all costs incurred in the actions, except where the rules of civil procedure or statutes which specifically address the allocation of costs state differently, or where the court directs otherwise.

In your fourth question, you ask whether, in actions in which the county and/or a county officeholder are both plaintiff(s) and defendant(s), the county is responsible for providing security and/or payment of costs and, if so, how such costs are to be paid.

With respect to the furnishing of security in such cases, the fact that the county may be both plaintiff and defendant in the same action does not affect the operation of the rules which control the issue of who may be required to furnish security for the payment of court costs. Therefore, my answer to this part of your fourth question is the same as my answer to your first question—that is, that pursuant to the local rules of practice in effect in your jurisdiction, the county or county entity that files a civil action or initiates legal proceedings may be required to provide security for costs, prior to filing any pleadings. However, since the primary justification for the security requirement is the protection of the clerk of courts and the party defendant(s) from default or insolvency on the part of the plaintiff, the type of case described in your fourth question may be amenable to a waiver of the security requirement on the part of the defendant(s), the defendant(s) and plaintiff(s) both being government units or officeholders. As I noted above, the security requirement imposed upon the plaintiff may always be waived by the defendant. State ex rel. Houghton v. Pethtel. Further, the presiding judges of actions filed in the Summit County Court of Common Pleas, General Division, and the Akron Municipal Court may order that security not be imposed. C.P. Summit, Gen. Div. R. 7.06; Akron Mun. Ct. R. 14(A).

My answer to the part of your fourth question pertaining to liability for costs is the same as my answer above to your second and third questions. Ohio R. Civ. P. 54(D) applies to all civil actions regardless of the nature of the parties. Ohio R. Civ. P. 1(A). Therefore, the party who prevails in the type of action described in your fourth question shall be allowed costs "unless the court otherwise directs." Ohio R. Civ. P. 54(D). The parties may agree, and the court may direct, that each party is to pay his own costs. Such an agreement may be reasonable and practical in a case in which the only parties are the county and a county officeholder. In any event, the county and/or the county officeholder each remain primarily liable to the clerk of courts for the payment of their respective costs in the type of action with which you are concerned, and in the absence of an order or agreement to the contrary, the party who prevails in the action may recover judgment for his costs and collect them from the unprevailing party. Ohio R. Civ. P. 54(D); White v. White.

As to the method of payment of costs, once the costs of the parties have been taxed and entered of record separately, R.C. 2335.18, the clerk of courts or judge of a county court has issued a writ of execution pursuant to R.C. 2335.19, and the clerk or judge has indorsed upon the writ the amount of the costs and directed the writ to an officer of the court for collection, R.C. 2335.20, payment must be made by the condemned party or parties to the clerk of courts. The sequence of events that may occur when the parties do not agree to pay their own costs is described by the court in White v. White, from which opinion I quoted extensively above. 50 Ohio App.2d at 269, 362 N.E.2d at 1017-18 n. 1. The actual method of payment of costs by the county and/or county officeholder is controlled by the provisions of R.C. 319.16, which states in part:

> Except as to moneys due the state which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal so authorized by law. (Emphasis added.)

Thus, when the county and/or a county officeholder[5] is rendered liable to the clerk of courts for costs, a claim is made against the county within the meaning of R.C. 319.16. Certainly, as costs are fixed by law and may be taxed and collected by the clerk of courts pursuant to R.C. 2335.18-.33, the payment of costs by the county and/or county officeholder is within the second exception stated in R.C. 319.16, and there is no need for any allowance or appropriation thereof by the board of county commissioners of the county, or, in the case of Summit County, by the County Executive.[6] Therefore, the costs for which the county and/or county officeholder may be liable to the clerk of courts shall be paid to the clerk by the warrant of the county auditor drawn on the county treasury, upon "presentation [to the auditor] of the proper order or voucher." R.C. 319.16. The "proper order" referred to in R.C. 319.16 may be a judgment entry of the court in which costs are ordered to be paid by one or more parties to an action.

I conclude, therefore, in response to your fourth question, that in an action to which the county and/or a county officeholder are both plaintiff(s) and defendant(s), the parties plaintiff may be required to furnish security for costs unless the parties aligned as defendants waive such security or the presiding judge orders that security not be furnished, the prevailing party may obtain judgment for and collect his costs from the unprevailing party or the parties may agree to pay their own costs, and costs shall be paid to the clerk of courts by the procedure set forth in R.C. 319.16.

In conclusion, it is my opinion, and you are advised, that:

1. The county and/or a county officeholder, prior to filing a civil action or commencing legal proceedings, may, pursuant to rule of court, be required by the clerk of courts to provide security for costs, except when the presiding judge pursuant to court rule otherwise orders, or when the defendant in such an action waives the security requirement.

2. The county and/or a county officeholder, when they are parties plaintiff or defendant to civil actions in which they do not prevail, may be liable to the clerk of courts for all costs incurred in the actions, except where the rules of civil procedure or statutes pertaining to costs state otherwise, or where the court otherwise directs.

---

5 For the purposes of R.C. 319.16 the word "county" necessarily includes the departments, offices, agencies, authorities, boards and commissions which compose county government. See generally State ex rel. v. Brennan, 49 Ohio St. 33, 29 N.E. 593 (1892); State ex rel. Pogue v. Groom, 91 Ohio St. 1, 109 N.E. 477 (1914).

6 Section 2.03 of the Charter of Summit County provides: "The County Executive shall have all powers and all duties of an administrative or executive nature under this Charter and such powers and duties, except as otherwise provided herein, as are vested in or imposed upon boards of county commissioners by general law. . . ."

3. In civil actions in which the county and/or a county officeholder are both plaintiff(s) and defendant(s), the county and/or county officeholder may be required to furnish security for costs and be liable for the payment of costs as stated in paragraphs 1 and 2 above, and such costs are to be paid to the clerk of courts by the method prescribed in R.C. 319.16.