

In the  
**Supreme Court of Ohio**

OHIO PYRO, INC., et al, : Case No. 2006-0785  
: :  
Plaintiffs-Appellees, : :  
: : On Appeal from the  
v. : : Fayette County  
: : Court of Appeals,  
: : Twelfth Appellate District

OHIO DEPT. OF COMMERCE :  
DIV. OF STATE FIRE MARSHAL, et al. :  
Defendants-Appellants :  
Court of Appeals Case  
Nos. CA2005-03-009 & CA2005-03-011

**FILED**  
OCT 30 2006  
MARCIA J MENGEL, CLERK  
SUPREME COURT OF OHIO

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**MERIT BRIEF OF APPELLANT OHIO DEPARTMENT  
OF COMMERCE, DIVISION OF STATE FIRE MARSHAL**

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## INTRODUCTION

This case involves two legal issues, each of which could lead to a flood of inappropriate lawsuits if the Court of Appeals' decision is allowed to stand. The first issue concerns collateral attack upon a final judgment. If this Court affirms the Court of Appeals' decision permitting collateral attack on a final judgment from another Court of Appeals, then any litigant unhappy with one court's decision can simply challenge it in another court, leading to a never-ending course of litigation. The second issue concerns the factors necessary to demonstrate irreparable harm when the harm alleged is lost future profits due to increased competition. If this Court affirms the Court of Appeals' decision on this issue, then litigants need only show a threat of increased competition in order to merit injunctive relief that would prohibit a competitor from moving into certain sales territories.

This case illustrates precisely the catch-22 in which a litigant finds himself or herself if a collateral attack on a prior final judgment is allowed. Courts in two different appellate districts have ordered the Fire Marshal to take mutually exclusive actions. One court has ordered him to allow certain license transfers, and contempt proceedings are underway for his refusal to do so. Yet contemporaneously, another court has enjoined him from allowing those same transfers.

This tale of two courts began in the Jefferson County Court of Common Pleas, although this appeal arises from a competing case in Fayette County. In the Jefferson County case, the trial court approved an Agreed Order (the "Jefferson Order") between the Fire Marshal and a fireworks dealer regarding the geographic transfers of three particular fireworks-wholesaler licenses; the licenses were then tied to locations in Carroll and Harrison Counties. In particular, the Jefferson Order says that the Fire Marshal must approve geographic transfers "to any political subdivision in the State of Ohio." The fireworks dealer plans to relocate to Fayette County, but a dealer that is already in Fayette County does not welcome the competition. So the

Fayette County company, Plaintiff-Appellee Ohio Pyro, Inc., sued the Fire Marshal in the common pleas court there, asking that court to *prohibit* the Marshal from allowing the transfers, despite the Jefferson Order saying that he *must allow* the transfers.<sup>1</sup> The Fayette County trial court agreed, and permanently enjoined the Marshal (in the “Fayette Injunction”) from approving the transfers that the Jefferson Order requires. Indeed, the Fayette Injunction did not just order the Marshal to keep the Jefferson County dealer out of Fayette County, but the Fayette Injunction further ordered the Marshal not to allow *any* transfers of the particular licenses outside of the political subdivisions in which the licenses were previously located.

While the Fayette Injunction was pending on appeal, the Jefferson County Court held the Marshal in contempt as he has not yet approved the transfers. That contempt finding is on appeal in the Seventh District, and has been stayed pending this appeal. Once it goes forward, the Marshal will truly be trapped.

Perhaps even more important than the dilemma facing this individual litigant is the lack of finality of judgments that the lower court’s judgment will cause. Although the Twelfth District appears to stand alone in allowing such a collateral attack by a party such as Ohio Pyro, the decision below has immediate statewide impact. That is so because judgments from anywhere in the state can now be challenged by parties in the Twelfth District, regardless of whether that first judgment was in Jefferson County, as here, or anywhere else. And as this Court has explained, “Stability of the law requires finality of decisions of the courts. These fundamental principles can not be questioned.” *Mantho v. Bd. of Liquor Control* (1954), 162 Ohio St. 37, 44-45.

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<sup>1</sup> Ohio Pyro was joined in the litigation by Plaintiff-Appellee West Salem Fireworks, Inc., a Wayne County fireworks dealer. Since then, Ohio Pyro’s parent company has bought West Salem, so we refer to them collectively as “Ohio Pyro.”

Concerning the second issue, irreparable harm, the lower court's decision threatens to alter dramatically the availability of injunctive relief. At the preliminary injunction hearing, Ohio Pyro claimed only that it might suffer lost profits, yet presented no specific evidence of this loss or the amount of loss. The lower court held that this speculative claim amounted to irreparable harm. Contrary to what the lower court's decision would establish, it is instead vitally important to restrict injunctive relief to only those cases that involve truly irreparable harm, and that excludes purely financial losses such as the future lost profits alleged here. That principle is critical for several related reasons. For example, future monetary losses are far more likely to be speculative, as opposed to the concrete harm needed for an injunction. And enjoining commercial activity, whether in a licensing case such as here, or in any garden-variety contractual or other private commercial dispute, deprives the general public of that business activity. It is better to allow individuals or companies to act, and then make them pay any damages later. As the Court has repeatedly held, "injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot." *Garono v. State* (1988), 37 Ohio St. 3d 171, 173, citing *Sternberg v. Bd. of Trustees* (1974), 37 Ohio St. 2d 115, 118.

Because collateral attacks are prohibited actions and injunctive relief is reserved for preventing wrongs not otherwise remunerated with money damages, this Court should reverse the decision below.

## STATEMENT OF THE CASE AND FACTS

- A. The Jefferson County Court of Common Pleas required the Fire Marshal to approve the geographic transfer of three licenses, and the Fire Marshal now faces contempt of court for failing to approve the transfer of one of those licenses.**

Although this appeal is from the Fayette County case, the dispute originated in a Jefferson County case. There, a fireworks dealer, Safety 4th Fireworks, Inc. (“Safety 4th”) sued the Fire Marshal to demand that he allow the geographic transfer of three fireworks wholesaler licenses to locations outside the political subdivision in which they are currently located. The parties settled, and on June 6, 2001, the Jefferson County Court of Common Pleas approved an Agreed Order in *Safety 4th Fireworks, Inc. v. Dep’t of Commerce, Division of State Fire Marshal*, Case No. 99-CV-275 (“Jefferson Order”). See Rule VII Supp. to Briefs (“Supp.”) 1-4. The Jefferson Order requires the Fire Marshal to “consider [Safety 4th’s] requests for transfer of license numbers 55-10-0001, 55-10-0002, and 55-34-002 to any political subdivision in the State of Ohio as if perfected on June 27, 1997 . . . .” Jefferson Order at ¶ 1, Supp. 1.

The Fire Marshal could have complied with this Order, but the Fayette Injunction (detailed in Part B below) ordered him *not* to do so. Safety 4th asked the Marshal to approve the transfer of one of the three licenses, but the Marshal declined, in deference to the Fayette Injunction. Then, on November 12, 2004, the Jefferson County trial court specifically ordered the Marshal to approve the transfer. The Jefferson County court turned up the heat even more on June 30, 2005, when it found the Fire Marshal in contempt of court for not approving the transfer. See June 30, 2005 Judgment Entry, Supp. 330-31. The contempt order is currently on appeal in the Seventh District Court of Appeals.

**B. The Fayette County Court of Common Pleas ordered the Fire Marshal *not* to approve the license transfers, in direct conflict with the Jefferson Order.**

The Fayette County case—the one on appeal here—began when Ohio Pyro, a competing fireworks dealer, asked the Fayette County Court of Common Pleas to second-guess the Jefferson Order. Ohio Pyro sued the Fire Marshal on April 7, 2004, alleging that the Jefferson Order is unlawful. See Verified Complaint for Decl. Judgment and Prelim. and Permanent Injunction at ¶ 71, Supp. 19 (“In settling the litigation commenced by Safety 4th in Jefferson County, Ohio, the Fire Marshal has contractually agreed to perform acts that are outside his statutory authority.”). Ohio Pyro asked the court to (1) permanently enjoin the Fire Marshal from taking “further acts, actions, and activities” relating to the relocation of Safety 4th’s fireworks licenses to anywhere in Ohio, or failing that, to restrict relocation into Fayette County and thirty-three other named counties, and (2) issue a declaratory judgment that the Fire Marshal lacks the authority to allow geographic transfer of any wholesale fireworks licenses to anywhere in Ohio outside the political subdivisions in which the licenses are currently located. *Id.* at ¶¶ 10, 12, 14, and at Prayer for Relief at ¶¶ 1-3, Supp. 10-11, 24. Ohio Pyro alleged several forms of impending financial harm, which it described as irreparable. See *id.* at ¶ 27, Supp. 12 (“immediate and irreparable commercial harm”); ¶ 96, Supp. 23 (“Ohio Pyro will lose some or all of its fireworks market share”). West Salem Fireworks Co. later joined the case as a plaintiff (see above at 2 n.1), and Safety 4th was added as a defendant.

The Fayette County trial court agreed with Ohio Pyro, and it ordered the Fire Marshal to deny the precise license transfers that the Jefferson Order required him to approve. Initially, on May 19, 2004, the trial court granted a preliminary injunction. The court later issued a permanent injunction on February 1, 2005. At that time, it also denied the Fire Marshal’s and Safety 4th’s motions to dismiss and granted Ohio Pyro’s motion for summary judgment. The final order

enjoined the Fire Marshal from approving a geographic transfer of a fireworks wholesaler or manufacturer license to any location other than the political subdivision in which the license is currently located. See Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunction (Exhibit 4).

The Twelfth District Court of Appeals affirmed. It rejected the Fire Marshal's argument that the case was an impermissible collateral attack on the Jefferson Order; it said the Fayette County court "had jurisdiction to hear the matter when steps were taken to build in Fayette County and other specific counties were identified as potential locations for the transfer of the other two fireworks licenses." See *Ohio Pyro, Inc. v. Ohio Dep't of Commerce, Div. of State Fire Marshal*, Fayette App. Nos. CA2005-03-009 and CA2005-03-011, 2006-Ohio-1002, at ¶ 18 (Exhibit 3). The appeals court also held that Ohio Pyro proved irreparable harm with testimony showing (1) "that [Ohio Pyro] could lose a substantial number of customers and corresponding fireworks sales if Safety 4th was permitted to relocate its three licenses into the areas where appellees are located or where they draw their customer base," (2) "that this loss of business could endanger the financial viability of [Ohio Pyro's] applicable showrooms, which could have a detrimental impact on the businesses as a whole," and (3) that Ohio Pyro cannot move its stores, while Safety 4th could move its stores associated with the three licenses. *Id.* at ¶¶ 27-28.

## ARGUMENT

### Appellant Ohio Dept. of Commerce, Division of State Fire Marshal's Proposition of Law No. 1:

*The collateral attack doctrine prohibits a party from using a new case in a new court as a vehicle to attack a judgment rendered in a different court in an earlier case when the party was not a party in the first action.*

Ohio Pyro's complaint in this case attempts to attack the validity of, and defeat the operation of, the Jefferson Order. Yet such a "collateral attack" is barred by law. *Fawn Lake Apts. v. Cuyahoga County Bd. of Revision*, 85 Ohio St. 3d 609, 611, 1999-Ohio-323; *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 458. When a final judgment is attacked based upon the issuing court's lack of jurisdiction, the attack is direct, rather than collateral, and is therefore allowed. *Kingsborough*, syllabus paragraph two. See also *Scholl v. Scholl* (1930), 123 Ohio St. 1, 4. But when the issuing court's judgment is made in the exercise of proper jurisdiction over the subject matter and parties and is not fraudulent, it cannot be collaterally attacked. *Webb v. The Western Reserve Bond & Share Co.* (1926), 115 Ohio St. 247, 259-260 (creditors with actual knowledge of incorrect judgment entry may not collaterally attack it); *Coe v. Erb* (1898), 59 Ohio St. 259 (bona fide purchaser with absolutely no notice of wrongly entered judgment lien may "contest, by pleading and proof," a fraudulently entered *nunc pro tunc* entry).

This Court clarified the distinction between a court's power to adjudicate a particular case and the court's exercise of its jurisdiction over a particular case in *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980. In *Pratts*, a prison inmate filed in the Ross County Court of Common Pleas for a writ of habeas corpus challenging his conviction by the Summit County Court of Common Pleas. Prior to the trial in Summit County, Pratts pleaded guilty to aggravated murder with death-penalty and firearm specifications and aggravated burglary with a firearm specification. At the sentencing hearing, Pratts waived his right to a jury trial and agreed to

submit his plea to a single judge in lieu of a three-judge panel. He then challenged in the Ross County habeas corpus action, the single judge's jurisdiction to accept his plea to a capital offense when R.C. 2945.06 requires a three-judge panel if an accused is charged with an offense punishable by death and has waived a jury trial. This Court addressed the issue of jurisdiction and stated:

“Jurisdiction” means “the courts’ statutory or constitutional power to adjudicate the case.” (Emphasis omitted.) *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210; *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 61 Ohio Op. 2d 335, 290 N.E.2d 841, paragraph one of the syllabus. The term encompasses jurisdiction over the subject matter and over the person. *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, 769 N.E.2d 846, P22 (Cook, J., dissenting). Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002. It is a “condition precedent to the court’s ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.” *Id.*; *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

The term “jurisdiction” is also used when referring to a court’s exercise of its jurisdiction over a particular case. See *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, 769 N.E.2d 846, P20 (Cook, J., dissenting); *State v. Swiger* (1998), 125 Ohio App. 3d 456, 462, 708 N.E.2d 1033. “The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court’s authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.” *Parker* at P22 (Cook, J., dissenting), quoting *Swiger*, 125 Ohio App.3d at 462, 708 N.E.2d 1033. “Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, ‘ \* \* \* the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred \* \* \*.’” *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St. 3d 382, 384, 582 N.E.2d 992, quoting *Sheldon’s Lessee v. Newton* (1854), 3 Ohio St. 494, 499.

102 Ohio St. 3d at 83-84, 2004-Ohio-1980 at ¶¶ 11-12. The Court then held that the sentencing court had jurisdiction to accept the plea and to render the sentence and that the failure of a court to convene a three-judge panel does not constitute a lack of subject-matter jurisdiction rendering

the trial court's judgment void ab initio and subject to collateral attack. *Pratts*, syllabus. Rather, this Court held that the failure constitutes an error in the court's exercise of jurisdiction that must be raised on direct appeal. *Id.*

Relief from an incorrect judgment may be sought only from the court that issued it, via a motion to modify or to dissolve an injunction. When the court "has the power to issue such an order, *i.e.*, power over the subject matter . . . , and its jurisdiction of the persons involved is not questioned, it follows that its order must be obeyed, regardless of whether such power was imprudently or prematurely exercised in a temporary injunction. Although an erroneous exercise of judicial power is a proper ground for a motion to modify or dissolve an injunction, it does not constitute a valid defense to an action in criminal contempt for the disobedience of such injunction." *State ex rel. Beil v. Dota* (1958), 168 Ohio St. 315, 321-322; see also *First Natl. Bank in Wellington v. Hassinger* (1935), 129 Ohio St. 642, paragraphs one and two of the syllabus; *The Union Savings Bank & Trust Co. v. The Western Union Telegraph Co.* (1908), 79 Ohio St. 89, 100. Even if over third parties with no notice, the judgment may only be challenged in the court that issued the original order to correct any irregularity or error. *The Geo. McAlpin Co. v. Finsterwald* (1898), 57 Ohio St. 524, paragraph one of the syllabus ("Where, in good faith and for a firm debt, a judgment has been rendered against the firm, by confession, on a warrant of attorney executed in its name and on its behalf by one partner only, without the assent of his copartner, such judgment cannot be impeached or set aside by a creditor of the firm."); *Arrowsmith v. Harmoning* (1884), 42 Ohio St. 254, 262 ("[T]he probate court had not only jurisdiction of the subject matter, but also the parties. If the judgment or order is erroneous, it may be reversed; if it is irregular or informal, it may be corrected on motion; in neither case, however, is it subject to collateral attack."); *Callen v. Ellison* (1862), 13 Ohio St. 446, 456 ("Had

such an application been made, and it had been shown, that by mistake or inadvertence, a judgment had been rendered against parties who had not executed the power of attorney, or who were married women, there can be no doubt the judgment would have been set aside.”).

Here, it is uncontested that the Jefferson County Court of Common Pleas had personal jurisdiction over both Safety 4th and the Fire Marshal and that it had jurisdiction over the subject matter: that of a constitutional challenge to a state law. Accordingly, Ohio Pyro’s claims are barred in the Fayette County Court and must be brought as direct attacks in the Jefferson County Court.<sup>2</sup>

In an attempt to construe its Complaint as a challenge to the jurisdiction of the Jefferson Order, Ohio Pyro has asserted that the Jefferson Order erroneously extends the jurisdiction of the Fire Marshal beyond that which a court may do, thus unlawfully expanding the Fire Marshal’s authority. That argument is not a challenge to the Jefferson County Court’s jurisdiction to hear the matter; rather it is a challenge to the legality of the Jefferson Order itself. Whether the Jefferson County Court legally and/or correctly effectuated its jurisdiction is not of legal concern to the Fayette County Court. *Pratts*, 2004-Ohio-1980, at ¶¶10-12. The Fayette County Court may only be concerned with the Jefferson County Court of Common Pleas’ jurisdiction to consider Case No. 99-CV-275 in the first place.

Ohio Pyro contends that the Jefferson Order cannot be lawfully enforced. Yet it has steadfastly refused to move the Jefferson County Court to vacate the allegedly unenforceable

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<sup>2</sup> The wisdom and sensibility of the prohibition against collateral attack on an agreed order becomes readily apparent in the divorce context in which court judgments that incorporate agreements are commonplace. Without the doctrine of prohibited collateral attack, a divorce litigant who did not agree with the decree could simply challenge it in another county and keep trying counties until one court rendered a decision to the litigant’s liking. See, e.g., *Rand v. Rand* (1985), 18 Ohio St. 3d 356, 359 (“Mutually agreed-upon provisions, in the context of a

order. Only the Jefferson County Court may determine that its own orders are invalid as applied to the situation. *Beil*, 168 Ohio St. at 318, 321-322. Unless Ohio Pyro's attack is based upon either fraud or lack of jurisdiction, Ohio Pyro is barred from collaterally attacking in a second court another court's final order, even though Ohio Pyro is a third party to the underlying case. *The Geo. McAlpin Co.*, 57 Ohio St. at 554. Any challenges, other than to jurisdiction, must be made directly via intervention by third parties. Civ. R. 24; *Marino v. Ortiz* (1988), 484 U.S. 301, 304 (Rather than filing a separate lawsuit, "[w]e think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable."); see also *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St. 3d 501.

Appellee Ohio Pyro attempted to intervene in the Jefferson County case and was denied intervention by the Jefferson County Court. Supp. 5-8. Ohio Pyro did not appeal this order and thus it and its related corporations are precluded from further attack of the Jefferson Order.<sup>3</sup>

Appellee West Salem asserts that it did not know of and did not participate in the underlying lawsuit and therefore could not have intervened in the Jefferson County case. Yet, even so, West Salem must raise its challenge to the Jefferson Order in the ordering court, *i.e.*, the Jefferson County Court.

Because Ohio Pyro and West Salem may not collaterally attack the validity of the Jefferson Order, they cannot state a claim upon which relief may be granted and this court should reverse the decision below and order the action be dismissed.

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separation agreement incorporated into a divorce decree, although not originally imposed by a court, are ordinarily enforceable by a court.").

<sup>3</sup> Courts are holding that the denial of a motion to intervene is a final appealable order. *Myers v. Basobas* (1998), 129 Ohio App. 3d 692, 696; *Jamestown Village Condominium Owners Assn. v. Market Media Research, Inc.* (1994), 96 Ohio App. 3d 678, 694.

**Appellant Ohio Dept. of Commerce, Division of State Fire Marshal's Proposition of Law No. 2:**

*Injunctive relief may not be awarded when the only harm alleged is monetary loss. Future lost profits amount to monetary damages only, so injunctive relief may not be awarded based solely upon fear of lost profits*

A permanent injunction is warranted only when a plaintiff shows, by clear and convincing evidence, that (1) the injunction is necessary to prevent irreparable harm, and (2) the plaintiff does not have an adequate remedy at law. *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93 & n.1; *Goodall v. Crofton* (1877), 33 Ohio St. 271, 275; see also *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, at ¶ 75. At the preliminary injunction hearing, Ohio Pyro did not prove specific irreparable harm. Instead, it alleged monetary loss; further, the allegations were conclusory, without support from specific facts, evidence or analysis. Ohio Pyro alleges that if Safety 4th comes to Fayette County, Ohio Pyro could lose business. But even if that is true, that would affect their future *profits*, rather than some nonmonetary, irreversible right or status. And again, the evidence offered did not even quantify any such negative financial impact. At the preliminary injunction hearing, Ohio Pyro's and West Salem's witnesses testified only (1) as to the counties in which their customers of last year resided, and (2) that Ohio Pyro and West Salem might *possibly* lose profits if Safety 4th opened a fireworks showroom in Fayette County.<sup>4</sup> This speculative loss in sales would simply result in monetary damages, which could be recouped from a successful trial on the merits. Appeals courts confronting similar situations have reached the conclusion that monetary damages alone cannot support injunctive relief. See, e.g., *Crestmont Cadillac Corp. v. General Motors Corp.*, Cuyahoga App. No. 8300, 2004-Ohio-488, ¶36, citing *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App. 3d 1,

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<sup>4</sup> Ohio Pyro's President testified only as to future lost profits, and even that testimony was not based upon exact figures. See Zoldan testimony, Tr. at 352, Apx. p. 254 ("I, I don't have that information in front of me. I'd be totally guessing.").

14 (“Irreparable harm is one for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete.”). This Court should adopt this rule.

Because Ohio Pyro did not demonstrate any loss other than speculative pecuniary losses, it has not demonstrated a “real interest in the subject matter of the action” and thus lacks the standing to invoke the jurisdiction of the court. *State ex rel. Dallman v. Court of Common Pleas, Franklin Cty.* (1973), 35 Ohio St. 2d 176, paragraph one of the syllabus. The action of which Ohio Pyro ultimately complains is that of an administrative agency carrying out its licensing responsibilities as those responsibilities affect a different licensee from Ohio Pyro. The doctrine of standing “denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.” *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321. Here, Ohio Pyro seeks to air its grievances concerning the conduct of the Fire Marshal, but it does so in the wrong forum. It has no standing to raise objection to, and thus the court has no jurisdiction to consider, the actions of the Fire Marshal regarding the geographic transfer of the three fireworks wholesaler licenses that are not associated with Ohio Pyro. More specifically, Ohio Pyro complains that the Jefferson Order would hurt its profits, yet nothing in R.C. 3743.75 (the statute that Ohio Pyro asserts prohibits the legal execution of the Jefferson Order) speaks to the protection of profit of the fireworks licensees. Accordingly, Ohio Pyro does not have standing to raise the issue before the courts. See, e.g., *Columbia Sussex Corp. v. Missouri Gaming Comm.* (Mo. App. 2006), 197 S.W.3d 137, 143 (holding that competitor casinos do not have standing to challenge approval of new casino site, absent “statutory language that would evince an intent by the legislature to regulate

competition . . . or to otherwise allow a competitor standing to appeal a decision by the Gaming Commission”); *Schulz v. State of Indiana* (Ind. App. 2000), 731 N.E.2d 1041, 1045-1046 (holding that neighbor of casino license applicant lacked standing to bring claim of adverse effects on private property); *Hauer v. BRDD of Indiana, Inc.* (Ind. App.1995), 654 N.E.2d 316, 319 (holding that fireworks dealer lacked standing to challenge application of state’s licensing practices as applied to other dealers). Accordingly, because Ohio Pyro has not shown a “real interest in the subject matter of the action,” it cannot prove that it has standing to raise the issue of irreparable harm. Thus, the court had no jurisdiction to consider the matter.

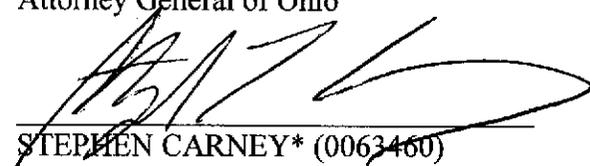
Because Ohio Pyro has an adequate remedy at law, namely, money damages, it has not proven irreparable harm and because it lacks standing, it thus is not entitled to a permanent injunction.

## CONCLUSION

For the above reasons, this Court should reverse the judgment below and remand the matter with instructions to dismiss the action for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant Ohio Department of Commerce, Division of State Fire Marshal was served by U.S. mail, postage prepaid, this 30 day of October, 2006, upon the following counsel:

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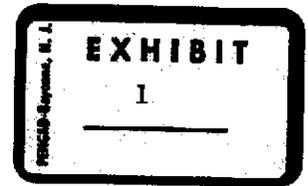
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Stephen Carney  
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In the
Supreme Court of Ohio

OHIO PYRO, INC., et al., : Case No. 2006-0785
Plaintiffs-Appellees, : On Appeal from the
v. : Fayette County
: Court of Appeals,
: Twelfth Appellate District
OHIO DEPARTMENT OF COMMERCE, :
DIVISION OF STATE FIRE MARSHAL, : Court of Appeals Case
et al., : Nos. CA2005-03-009 and CA2005-03-011
Defendants-Appellants. :

NOTICE OF APPEAL OF APPELLANT
OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL

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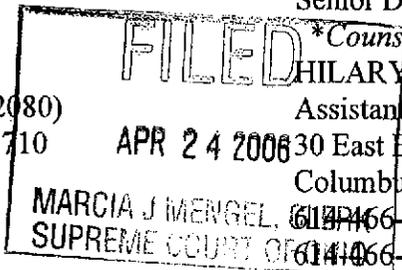
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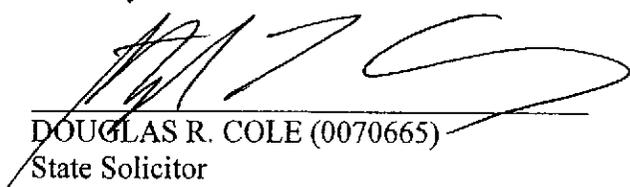
**NOTICE OF APPEAL OF APPELLANT  
OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL**

Appellant Ohio Department of Commerce, Division of the State Fire Marshal, gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Twelfth District Court of Appeals, journalized in Case Nos. CA2005-03-009 and CA2005-03-011 on March 7, 2006. A date-stamped copy of the decision being appealed is attached to Appellant's Memorandum in Support of Jurisdiction as Exhibit 1.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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Division of State Fire Marshal

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant Ohio Department of Commerce, Division of State Fire Marshal was served by U.S. mail, postage prepaid, this 24<sup>th</sup> day of April, 2006, upon the following counsel:

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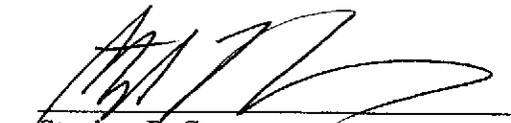
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\_\_\_\_\_  
Stephen P. Carney  
Senior Deputy Solicitor

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
FAYETTE COUNTY

FILED  
COURT OF APPEALS  
FAYETTE CO., OHIO

MAR 07 2006

*Larry L. Long*  
CLERK OF COURTS

OHIO PYRO, INC., et al.,  
Plaintiffs-Appellees,

CASE NOS. CA2005-03-009  
CA2005-03-011

-vs-

JUDGMENT ENTRY

OHIO DEPARTMENT OF COMMERCE,  
DIVISION OF STATE FIRE MARSHAL,  
et al.,

Defendants-Appellants.

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

*Stephen W. Powell*  
Stephen W. Powell, Presiding Judge

*James E. Walsh*  
James E. Walsh, Judge

*H.J. Bressler*  
H.J. Bressler, Judge

6/470

IN THE COURT OF COMMON PLEAS,  
FAYETTE COUNTY, OHIO

FAYETTE COUNTY  
WASHINGTON CATH. CHURCH

OHIO PYRO, INC.,

Plaintiff,

v.

STATE OF OHIO, DEPARTMENT OF COMMERCE,  
Division of State Fire Marshal, et al.

Defendants.

Case No. 2004-142 CVH

2005 FEB -1 PM 12:45

Judge Victor D. Pontious, Jr.

Order Granting Plaintiff's Motion for Summary Judgment  
And Permanent Injunction

This cause came before the Court upon numerous motions including Plaintiff Ohio Pyro, Inc.'s Motion for Summary Judgment served on or about September 17, 2004. The Court has reviewed all of the parties' respective submissions on the pending motions and, based upon the arguments of counsel, the authorities presented, and for good cause shown, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Ohio Pyro, Inc.'s motion for summary judgment is GRANTED in its entirety.

Additionally, IT IS HEREBY ORDERED AND ADJUDGED that Defendant State of Ohio, Department of Commerce, Div. of State Fire Marshal ("State Fire Marshal"), his agents, employees and all persons acting for, with, by, through, or under him, and each of them, are hereby permanently enjoined and restrained from approving geographic transfers of wholesale fireworks license numbers 55-10-0001, 55-10-0002, and 55-34-0002 "to any political subdivision in the State of Ohio \* \* \*" other than to another location within the political subdivision in which each license is currently located.

Each of the pending motions filed by the Defendant State Fire Marshal and those filed by Defendants Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc. are hereby DENIED.

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19-20

Within 30 days of the filing of this Order, the Court will refund the \$23,000.00 bond posted by Plaintiff Ohio Pyro, Inc. on or about May 21, 2004.

Finally, the Court finds that there is no just cause for delay.

IT IS SO ORDERED.

ENTERED this 1 day of February 2005.

  
\_\_\_\_\_  
Judge Victor D. Pontious, Jr.



IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
FAYETTE COUNTY

OHIO PYRO, INC., et al.,	:	
	:	CASE NOS. CA2005-03-009
Plaintiffs-Appellees,	:	CA2005-03-011
	:	
-vs-	:	<u>OPINION</u>
	:	3/6/2006
	:	
OHIO DEPARTMENT OF COMMERCE,	:	
DIVISION OF STATE FIRE MARSHAL,	:	
et al.,	:	
	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS  
Case No. 2004-142-CVH

Bricker & Eckler LLP, T. Earl LeVere, Corey A. Goldsand, 100 S. Third Street, Columbus, OH 43215-4291, for plaintiff-appellee, Ohio Pyro, Inc., and Raymond J. Grabow & Associates, Raymond J. Grabow, Crown Centre, Suite 425, 5005 Rockside Road, Independence, OH 44131, for intervenor plaintiff-appellee, West Salem Fireworks Co., Inc.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Michael L. Close, Dale D. Cook, 300 Spruce Street, Floor One, Columbus, OH 43215, and W. Scott Simon, 37 W. Broad Street, Suite 710, Columbus, OH 43215, for defendants-appellants, Safety 4<sup>th</sup> Fireworks, Inc. and Liberty Fireworks, Inc.

Jim Petro, Ohio Attorney General, Hilary R. Damaser, Executive Agencies Section, 8895 E. Main Street, Reynoldsburg, OH 43068, for defendant-appellant, Ohio Department of Commerce, Division of State Fire Marshal

**POWELL, P.J.**

{¶1} Defendants-appellants, Ohio Department of Commerce, Division of the State Fire Marshal ("SFM"), Safety 4<sup>th</sup> Fireworks, Inc., and Liberty Fireworks, Inc.,<sup>1</sup> appeal the decision by the Fayette County Court of Common Pleas to grant a permanent injunction and summary judgment to appellees, Ohio Pyro, Inc. and West Salem Fireworks Co., Inc., on a matter regarding the transfer of three wholesale fireworks licenses. Judgment is affirmed for the reasons outlined below.

{¶2} Ohio Pyro filed a complaint in Fayette County in 2004, asking for a declaration of rights and an order to enjoin the SFM from approving the geographic relocation or transfer of three specifically enumerated wholesale fireworks licenses as being contrary to law.<sup>2</sup> After taking evidence, the trial court issued a preliminary injunction prohibiting the SFM from approving the transfer of the three licenses.

{¶3} Appellees moved for summary judgment, and the SFM and Safety 4<sup>th</sup> filed motions to dismiss and cross-motions for summary judgment. The trial court denied the motions of Safety 4<sup>th</sup> and the SFM, granted appellees' motion for summary judgment, and issued a permanent injunction prohibiting the relocation of the three licenses.

{¶4} Both the SFM and Safety 4<sup>th</sup> appealed the trial court's decision. A review of the assignments of error presented by both appellants indicates that their arguments and assignments of error are the same and, therefore, will be discussed together in this consolidated appeal.

{¶5} The three assignments of error are couched in terms of error regarding the

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1. For this appeal, we will refer to Safety 4<sup>th</sup> Fireworks, Inc. and Liberty Fireworks, Inc., collectively as "Safety 4<sup>th</sup>."

2. Appellee West Salem Fireworks Co., Inc. later intervened in this case as a plaintiff and Safety 4<sup>th</sup> and Liberty Fireworks were named in the amended complaint as defendants.

grant or denial of summary judgment and motions to dismiss. However, within that framework, the main thrust of appellants' challenge is the trial court's decision to hear this case and to grant a permanent injunction. We will address these challenges accordingly.

{¶6} First, we note that neither side disputes the requisite standards of review for summary judgment or for a motion to dismiss, and therefore, we will dispense with an extended discussion and apply the applicable standards as appropriate for summary judgment and motions to dismiss. See Civ.R. 56; Civ.R. 12 (B)(6); *Towne v. Progressive Ins. Co.*, Butler App. No. CA2005-02-031, 2005-Ohio-7030, ¶7; *Springer v. Fitton Ctr. for Creative Arts*, Butler App. No. CA2004-06-128, 2005-Ohio-3624, ¶12.

{¶7} Under their first assignment of error, appellants argue that the action in Fayette County represented an improper collateral attack on a valid judgment of another common pleas court and, therefore, the trial court below had no jurisdiction to entertain such an action.

{¶8} In a discussion of the respective arguments, it is essential that we briefly identify the applicable statutory chapter and the other judgment to which appellants are referring when they argue that the trial court was permitting a collateral attack by hearing and deciding this case.

{¶9} Ohio Pyro relies upon R.C. Chapter 3743, the chapter that deals with fireworks licensing, for the proposition that the SFM is acting contrary to law by permitting the geographic transfer of the three licenses to other areas of the state because the applicable statutes allow no geographic transfers except those transfers within the same city or township where the license was previously located. See R.C. 3743.75 and R.C. 3743.17.

{¶10} Appellants argue that the SFM can approve the relocation of the three

licenses outside the geographic limitations contained in the language of the fireworks statutes because the SFM and Safety 4<sup>th</sup> settled a lawsuit between them in the Jefferson County Court of Common Pleas by agreeing that the SFM would permit the three geographic license transfers to any political subdivision in Ohio, upon the performance of specific conditions. Under the agreement, if those conditions are met, the SFM would approve only the three license transfers to any area in the state as if all the requirements for the license transfers had been perfected when a variance to permit the transfer was, arguably, available. See *Safety 4<sup>th</sup> Fireworks, Inc. v. Ohio Department of Commerce, Division of State Fire Marshal* (June 6, 2001), Jefferson C.P. No. 99-CV-275.

{¶11} An agreed entry of the settlement between Safety 4<sup>th</sup> and the SFM was signed and entered into the court's record by the Jefferson County Court of Common Pleas in June 2001. The entry also dismissed the complaint with prejudice.

{¶12} A collateral attack on a judgment may be defined as an attempt to avoid, defeat, or evade judgment, or to deny its force and effect, in some judicial proceeding not provided by law for the express purpose of reviewing it. *Hall v. Tucker*, 161 Ohio App.3d 245, 261, 2005-Ohio-2674, ¶42; *In re Guardianship of Titington* (P.C.1958), 82 Ohio Law Abs. 563.

{¶13} After reviewing the record, we cannot agree with appellants' position that the trial court's assumption of jurisdiction over the action seeking declaratory judgment and injunctive relief constitutes a collateral attack on the Jefferson County judgment.

{¶14} Despite requests to linger on the individual components of the Jefferson County agreed entry, we decline to do so. The Jefferson County agreed entry is an entry confirming a settlement between Safety 4<sup>th</sup> and the SFM. Other fireworks companies, including appellee Ohio Pyro, but not appellee West Salem, attempted to intervene in the

Jefferson County action, but were denied.<sup>3</sup>

{¶15} The Jefferson County judgment is referenced here simply because it indicates the SFM's intent to approve the geographic transfer of these three specific licenses.

{¶16} It appears that even the Jefferson County court anticipated, or rather, required other entities to seek their day in court elsewhere. The Jefferson County Common Pleas Court stated in its "Order Overruling Motions to Intervene" that one of the fireworks companies seeking to intervene would not be permitted to do so, but was "free to file its own case in [the county in which it did business]." In denying Ohio Pyro's attempt to intervene, the Jefferson County court stated that Ohio Pyro's interests were "so speculative that it cannot be seriously considered" because Ohio Pyro had not claimed that Safety 4<sup>th</sup> was actually moving into its territories.<sup>4</sup>

{¶17} In addition, we note that the Fourth District Court of Appeals found that a lower court in its district lacked jurisdiction to consider the matter in an action filed in Washington County by a fireworks company that was attempting to stop the SFM from approving the geographic transfer of one of the fireworks licenses at issue. The Fourth Appellate District found that the claim was not ripe in the court below because there was no evidence at that time that Safety 4<sup>th</sup> was attempting to transfer a license to Washington County. *Eagle Fireworks, Inc. v. Ohio Department of Commerce*, Washington App. No. 03CA28, 2004-Ohio-509, appeal not allowed by 102 Ohio St.3d 1472, 2004-Ohio-2830.

{¶18} It is axiomatic that once the locations of the license transfers were identified, the issues set forth by Ohio Pyro and West Salem were ripe. The trial court in the case at

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3. Ohio Pyro did not appeal the denial of their motion to intervene.

bar had jurisdiction to hear the matter when steps were taken to build in Fayette County and other specific counties were identified as potential locations for the transfer of the other two fireworks licenses.<sup>5</sup>

**{¶19}** The trial court in Fayette County had jurisdiction to hear this case and apply state law. It is not necessary to defeat or avoid the operation of the Jefferson County agreed settlement entry for the trial court to address the issues brought forth in this action filed below.

**{¶20}** Keeping within the narrow focus of appellants' first assignment of error, under the applicable standards of review for summary judgment and motions to dismiss, we find that the trial court did not err when it assumed jurisdiction over the case filed in Fayette County. Accordingly, appellees' complaint stated a claim for relief, and construing the evidence most favorably for appellants, reasonable minds could come to but one conclusion and that conclusion is adverse to appellants. Summary judgment was appropriate and it was not error for the trial court to deny appellants' motions to dismiss or for summary judgment, and to grant summary judgment to Ohio Pyro and West Salem on the limited issue of jurisdiction. Appellants' combined first assignment of error is overruled.

**{¶21}** Appellants' second combined assignment of error asserts that the trial court erred in finding that appellees proved irreparable harm and no adequate remedy at law to receive injunctive relief.

**{¶22}** In order to obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss or damage will result to the

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4. In its 2000 entry, the Jefferson County court also found that the SFM would adequately represent the other fireworks companies by "vigorously defend[ing] the Fireworks Code as it now stands."

applicant and that no adequate remedy at law exists. *Franklin Cty. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, ¶25; see, also, Civ.R. 65.

{¶23} A court should exercise great caution regarding the granting of an injunction that would interfere with another branch of government and especially with the ability of the executive branch to enforce the law. *Garono v. State* (1988), 37 Ohio St.3d 171, 173 (injunction would be proper where the police are unwarranted in going beyond their authority or duty).

{¶24} Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *Crestmont Cadillac Corp. v. General Motors Corp.*, Cuyahoga App. No. 83000, 2004-Ohio-488, ¶36.

{¶25} In determining the propriety of injunctive relief, adequate remedy at law "means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete." *Mid-America Tire, Inc. v. PTZ Trading Ltd.* 95 Ohio St.3d 367, 380, 2002-Ohio-2427, ¶81, quoting *Fuchs v. United Motor Stage Co., Inc.* (1939), 135 Ohio St. 509.

{¶26} While the grant or denial of an injunction is solely within the trial court's discretion, and we normally review that determination for an abuse of discretion, *Garano v. State*, 37 Ohio St. at 173, we are also mindful that this matter is before us on both a grant of summary judgment and permanent injunction. Therefore, we choose to proceed on the side of caution and review this matter de novo. See *Premier Health Care Services Inc. v.*

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5. The trial court heard evidence that the areas identified for relocation of the three licenses would impact either Ohio Pyro or West Salem, or both.

*Schneiderman*, Montgomery App. No. 18795, 2001-Ohio-7087.

{¶27} During the hearing on the preliminary injunction, there was testimony that appellees could lose a substantial number of customers and corresponding fireworks sales if Safety 4<sup>th</sup> was permitted to relocate its three licenses into the areas where appellees are located or where they draw their customer base. There was additional testimony that this loss of business could endanger the financial viability of appellees' applicable showrooms, which could have a detrimental impact on the businesses as a whole.

{¶28} An Ohio Pyro officer testified that competition is not unwelcomed, but the "playing field" is not level when Safety 4<sup>th</sup> is permitted to relocate three licenses to presumably favorable locations and no one else is permitted by the law in Chapter 3743 to do so.

{¶29} After reviewing the record under the applicable standards of review, we find that dismissal is not warranted and a grant of summary judgment to appellees is appropriate on the issue of irreparable harm to appellees and no adequate remedy at law. Further, reasonable minds could only conclude that irreparable harm is created and there is no other adequate remedy at law when a governmental agency like the state fire marshal manifests an intent to ignore state law and approve the geographic transfer of these three licenses beyond that permitted by law. See *Garano v. State*, 37 Ohio St.3d at 173 (injunction ordinarily employed to prevent a future wrong); R.C. 3743.75 and R.C. 3743.17; Civ.R. 65.

{¶30} Appellants' combined second assignment of error is overruled.

{¶31} And finally, under their third assignment of error, appellants argue that dismissal was appropriate and summary judgment should not have been granted because

no justiciable controversy exists.

**{¶32}** To maintain an action for declaratory judgment, there must be a real controversy between the parties that is justiciable in character, and speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97. For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Tradesmen Intern., Inc. v. City of Massillon*, Stark App. No. 2002CA00251, 2003-Ohio-2490, ¶32.

**{¶33}** Appellants argue that Ohio Pyro cannot create a controversy with the SFM by attacking the Jefferson County agreed entry when Ohio Pyro did not appeal the denial of their attempt to intervene in Jefferson County. Appellants further argue that no controversy exists because the Jefferson County agreed order places Safety 4<sup>th</sup>'s application for the transfer of the three licenses within the time frame when it was permissible and therefore, the licenses existed at those three new locations before the law changed.

**{¶34}** We disagree with appellants' arguments concerning the lack of a justiciable controversy. Appellants continue to focus the attention of this case on the Jefferson County judgment by settlement. Regardless of the intervention decisions in Jefferson County, neither Ohio Pyro nor West Salem was a party to that settlement agreement.

**{¶35}** A review of the record indicates that the instant case presents a real controversy between the parties that is ripe for judicial resolution and has a direct and immediate impact on the parties. The SFM indicated that it will approve the geographic relocation of three specific fireworks licenses when the applicable law does not permit it. See, e.g., *Shady Acres Nursing Home, Inc. v. Canary* (1973), 39 Ohio App.2d 47, 50

(license is frequently defined as permission to do some act without which the act would be illegal, but license is not a contract, nor does it constitute property in a constitutional sense; it does not confer an absolute right, and governmental authority can impose new burdens, create additional burdens, or revoke the license); see, also, e.g., *Scharff v. State Bd. of Liquor Control* (1955), 99 Ohio App. 139, 142, (there is no vested right in an application for a liquor permit and, therefore, the law in effect at the time of passing on the permit, rather than on the date of filing the application, governed the applicant's right to a permit); *Save the Lake v. Schregardus*, 141 Ohio App.3d 530, 538-539, 2001-Ohio-4377, appeal not allowed by 92 Ohio St.3d 1429, 2001-Ohio-4573; R.C. 3743.75; R.C. 3743.17.

**{¶36}** This case meets the requirements of a declaratory judgment action. Dismissal of the action was not appropriate. Construing the evidence most favorably for appellants, reasonable minds could come to but one conclusion on this issue and that conclusion is adverse to appellants. Summary judgment for appellees is appropriate and the trial court did not err in finding a justiciable controversy exists. Appellants' motion to dismiss is, likewise, not well-taken.

**{¶37}** Appellants' combined third assignment of error is overruled.

**{¶38}** Judgment affirmed.

WALSH and BRESSLER, JJ., concur.

[Cite as *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 2006-Ohio-1002.]

IN THE COURT OF COMMON PLEAS,  
FAYETTE COUNTY, OHIO  
WASHINGTON C.H. OHIO

OHIO PYRO, INC.,	:	Case No. 2004 142 CVH
	:	2005 FEB -1 PM 12-43
Plaintiff,	:	Judge Victor D. Pontious, Jr.
	:	
v.	:	
	:	
STATE OF OHIO, DEPARTMENT OF COMMERCE,	:	
Division of State Fire Marshal, et al.	:	
	:	
Defendants.	:	

Order Granting Plaintiff's Motion for Summary Judgment  
And Permanent Injunction

This cause came before the Court upon numerous motions including Plaintiff Ohio Pyro, Inc.'s Motion for Summary Judgment served on or about September 17, 2004. The Court has reviewed all of the parties' respective submissions on the pending motions and, based upon the arguments of counsel, the authorities presented, and for good cause shown, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Ohio Pyro, Inc.'s motion for summary judgment is GRANTED in its entirety.

Additionally, IT IS HEREBY ORDERED AND ADJUDGED that Defendant State of Ohio, Department of Commerce, Div. of State Fire Marshal ("State Fire Marshal"), his agents, employees and all persons acting for, with, by, through, or under him, and each of them, are hereby permanently enjoined and restrained from approving geographic transfers of wholesale fireworks license numbers 55-10-0001, 55-10-0002, and 55-34-0002 "to any political subdivision in the State of Ohio \* \* \* " other than to another location within the political subdivision in which each license is currently located.

Each of the pending motions filed by the Defendant State Fire Marshal and those filed by Defendants Safety 4th Fireworks, Inc. and Liberty Fireworks, Inc. are hereby DENIED.

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Within 30 days of the filing of this Order, the Court will refund the \$23,000.00 bond posted by Plaintiff Ohio Pyro, Inc. on or about May 21, 2004.

Finally, the Court finds that there is no just cause for delay.

IT IS SO ORDERED.

ENTERED this 1 day of February 2005.

  
\_\_\_\_\_  
Judge Victor D. Pontious, Jr.

OHIO RULES OF COURT SERVICE  
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\*\*\* RULES CURRENT THROUGH UPDATES RECEIVED SEPTEMBER 1, 2006 \*\*\*

OHIO RULES OF CIVIL PROCEDURE  
TITLE IV. PARTIES

Ohio Civ. R. 24 (2006)

Rule 24. INTERVENTION

(A) Intervention of right. --Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive intervention. --Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(C) Procedure. --A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

PAGE'S OHIO REVISED CODE ANNOTATED  
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\* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL  
ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH  
OCTOBER 26, 2006 \*

TITLE 37. HEALTH -- SAFETY -- MORALS  
CHAPTER 3743. FIREWORKS

ORC Ann. 3743.75 (2006)

§ 3743.75. Moratorium concerning manufacturer and wholesaler licenses

(A) During the period beginning on June 29, 2001, and ending on December 15, 2008, the state fire marshal shall not do any of the following:

(1) Issue a license as a manufacturer of fireworks under sections 3743.02 and 3743.03 of the Revised Code to a person for a particular fireworks plant unless that person possessed such a license for that fireworks plant immediately prior to June 29, 2001;

(2) Issue a license as a wholesaler of fireworks under sections 3743.15 and 3743.16 of the Revised Code to a person for a particular location unless that person possessed such a license for that location immediately prior to June 29, 2001;

(3) Except as provided in division (B) of this section, approve the geographic transfer of a license as a manufacturer or wholesaler of fireworks issued under this chapter to any location other than a location for which a license was issued under this chapter immediately prior to June 29, 2001.

(B) Division (A)(3) of this section does not apply to a transfer that the state fire marshal approves under division (F) of section 3743.17 of the Revised Code.

(C) Notwithstanding section 3743.59 of the Revised Code, the prohibited activities established in divisions (A)(1) and (2) of this section, geographic transfers approved pursuant to division (F) of section 3743.17 of the Revised Code, and storage locations allowed pursuant to division (I) of section 3743.04 of the Revised Code or division (G) of section 3743.17 of the Revised Code are not subject to any variance, waiver, or exclusion.

(D) As used in division (A) of this section:

(1) "Person" includes any person or entity, in whatever form or name, that acquires possession of a manufacturer or wholesaler of fireworks license issued pursuant to this chapter by transfer of possession of a license, whether that transfer occurs by purchase, assignment, inheritance, bequest, stock transfer, or any other type of transfer, on the condition that the transfer is in accordance with division (D) of section 3743.04 of the Revised Code or division (D) of section 3743.17 of the Revised Code and is approved by the fire marshal.

(2) "Particular location" includes a licensed premises and, regardless of when approved, any storage location approved in accordance with section 3743.04 or 3743.17 of the Revised Code.