

IN THE SUPREME COURT OF OHIO

Prouse, Dash & Crouch, LLP : Case No. 06-0957
:
Appellant, : On Appeal from the
: Cuyahoga County Court
v. : of Appeals, Eighth
: Appellate District
Bruce Anthony Gorcyca, et al. :
:
Appellee.

REPLY BRIEF OF APPELLANT PROUSE, DASH & CROUCH LLP

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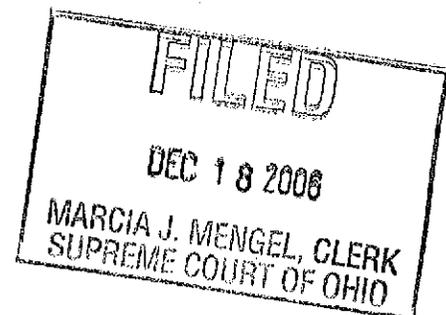


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INTRODUCTION

The Appellees have filed a Merit Brief in the present appeal. It is Appellant's belief that the Appellees have missed the target. This Merit Brief of the Appellees makes over-reaching and incorrect factual conclusions without evidentiary support in the record, never addresses the facts that indicate that Appellees were Ohio residents at all times material, confuses legal principles involving personal jurisdiction, choice of law and *forum non conveniens*, does not address the legal issues and the factual support raised by the Appellant, and raises its own legal objections to the prior proceedings although the Appellee did not file a cross-appeal. In short, it is very difficult, and perhaps unnecessary, to reply to a Brief that does not respond to the Appellant's Merit Brief and that does not properly address the issues at hand in this case.

Appellant stands confident that the facts and legal argument set forth in its Merit Brief warrant a reversal of the Eighth District Court of Appeals. On one issue, however, Appellant believes further clarification would be helpful to this Court in the decision of this case: Appellee's repeated argument that Appellant improperly presented more propositions of law in the appeal than in the memorandum in support of jurisdiction. As will be set forth in the Argument section of this Reply Brief, it is not improper to present differing propositions of law in the Merit Brief than were presented in the jurisdiction brief.

Separate from this incorrect procedural argument by Appellees, because the facts in the record and the law that applies to this case indicate that the Appellees were Ohio residents and subject to the jurisdiction of our Courts, or had sufficient contact with Ohio Due Process to be satisfied by the exertion of jurisdiction over the Appellees, the

Appellant believes that this Honorable Court should find that the Cuyahoga County Court of Common Pleas properly exerted personal jurisdiction over Appellees and hold that the Trial Court's judgment entry should be reinstated.

ARGUMENT

Appellees argue on multiple occasions that the Appellant presented two (2) propositions of law in its Memorandum in Support of Jurisdiction and three (3) propositions of law in its Merit Brief. Appellees further argue that this is an attempt to "expand the record in this appeal" (Appellees' Brief, page 8). These arguments are illogical for numerous reasons: (1) the propositions of law are not part of the record in this appeal, (2) the propositions of law are argument caption headings that could possibly be used as a syllabus for the case, (3) the Memorandum in Support of Jurisdiction and Merit Brief are two (2) separate briefs filed with two (2) distinct purposes and which are governed by two (2) different Rules of Practice, and (4) the propositions of law and the argument contained thereunder have been raised at the lower courts, and, regardless, this appeal is reviewed on a de novo standard of review.

Ohio S. Ct. R. V, Section 1, defines what constitutes the record on appeal:

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with an electronic version of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers. Ohio S. Ct. R. V

Clearly, propositions of law advanced in a Merit Brief are not intended to be viewed as a part of the record. They are argument by counsel.

The procedural rules regarding propositions of law for Memorandums in Support of Jurisdiction and Merit Briefs differ slightly. Ohio S. Ct. R. III governing memorandums in support of jurisdiction provides, in relevant part:

(B) A memorandum in support of jurisdiction shall contain all of the following:

(4) Each proposition of law supported by a brief and concise argument.

Ohio S. Ct. R. VI governing Merit Briefs, provides more detail as to the content and purpose of the propositions of law:

Section 2. Appellant's Brief.

(B) The appellant's brief shall contain all of the following:

(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. See *Drake v. Bucher* (1966), 5 Ohio St. 2d 37, at 39. *If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.* (emphasis added).

The Ohio Supreme Court in *Drake v. Bucher*, 5 Ohio St. 2d 37, 39 (Ohio 1966) explained the purpose of Ohio S. Ct. R. VI:

The purpose of this rule is to present to the court in concise form the legal issues involved in the cause. It means that an appellant shall set forth a statement of the rules of law which he contends are applicable to the facts in the case and which, if appellant were to prevail, could serve as a syllabus of the case. (There is no prohibition against an appellee presenting similar statements containing the propositions of law which he contends control the case.) It may be that in some cases this can be accomplished merely by an abstract statement of the law involved; others will require that controlling facts be interwoven into the statement in order clearly to set forth the precise legal issue. Although there can be no ideal form, the statement should always be concise and unambiguous.

Nowhere in the Supreme Court Rules of Practice is there any requirement that the propositions of law set forth in the Memorandum in Support of Jurisdiction be identical to those set forth in the Merit Brief. It would not make sense to have such a rule since:

1. Both briefs have distinctly different purposes. The jurisdictional memorandum does not necessarily address the merits of the case, but simply why the appeal should be accepted. At the time of drafting the jurisdictional memorandum, the propositions of law for the Merit Brief would not necessarily be fully researched and the arguments not fully formed, as it is a rare privilege to have a discretionary appeal accepted.
2. The propositions of law are argument headings. While they propose definite law, they are still part of the argument of an interested party.
3. The distinction in the procedural requirements between the two briefs indicates that it is not the Supreme Court's intention to cause an appellant to be limited in its Merit Brief to the propositions of law in the jurisdictional memorandum. For example, in the current form of Ohio S. Ct. R. III, there is no requirement that the propositions of law be submitted in a form that could serve as a syllabus in the decision of the appeal. Similarly, the Court's language in *Bucher, supra*, indicates that the form requirements for the propositions of law are indefinite, and that the Appellees could offer differing propositions.

Lastly, Appellees' faulted argument that Appellant is attempting to "expand the record in this appeal" implies that Appellees believe that the Appellant has raised facts or arguments in this appeal that have not been previously addressed. First of all, this implication is not factually true. All facts cited contained specific references to the record, and all legal issues were raised in the lower courts. The propositions of law set forth in the Merit Brief were encompassed, perhaps in different form, in the lower court briefs and in the jurisdictional memorandum.

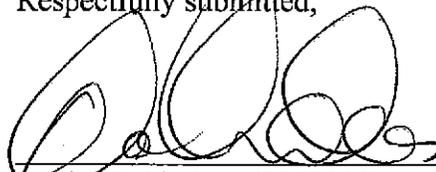
However, if we were to assume that the implication by Appellees was true, it simply would not matter. An appellate court reviews a dismissal for lack of personal jurisdiction under the de novo standard. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479,

2005 Ohio 4930, at P10, 839 N.E.2d 67; *Ricker v. Fraza/Forklifts of Detroit*, 160 Ohio App.3d 634, 2005 Ohio 1945, at P5, 828 N.E.2d 205; *Schafer v. Sunsports Surf Co.*, 2006 Ohio 6002, P9 (Ohio Ct. App. 2006); *Robinson v. Koch Refining Co.* (June 17, 1999), Franklin App. No. 98AP-900, 1999 Ohio App. LEXIS 2682; *Kvinta v. Kvinta*, 2003 Ohio 2884, P74 (Ohio Ct. App. 2003), and dozens more. Accordingly, the Appellees' limited by previous legal arguments raised at the lower courts. Therefore, Appellees' implications or procedural impropriety by the Appellant is simply incorrect.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons discussed above and in Appellant's Merit Brief, the Appellant requests that this Honorable Court reverse the Eighth District Court of Appeals, and find that the Cuyahoga County Court of Common Pleas properly exerted personal jurisdiction over Appellees DiMarco and Yum.

Respectfully submitted,



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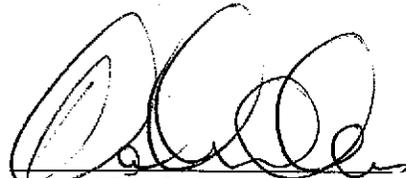
Attorney for the Appellant

CERTIFICATE OF SERVICE

A copy of this Merit Brief of the Appellant was sent by ordinary mail on this 15th day of December, 2006.

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