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

REPLY BRIEF OF APPELLANT OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL

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INTRODUCTION

No matter what the Fire Marshal does in this case, he will violate a court order, unless the Court rules in the Fire Marshal's favor and extricates him from this trap. The Fire Marshal has appealed to this Court because the Twelfth Appellate District allowed this ludicrous result: the Jefferson County Court of Common Pleas ordered the Fire Marshal (in the "Jefferson Order") to approve the transfer of certain fireworks licenses; the Fayette County Court of Common Pleas Court enjoined the very same transfers (in the "Fayette Injunction"). Ohio Pyro, appellee here and plaintiff in the Fayette County case, is a business competitor of the licensee that was allowed the transfers by the Jefferson Order. Ohio Pyro created the jurisdictional conflict here by suing the Fire Marshal in Fayette County and by attacking the legality of the Jefferson Order. But the Jefferson Order's validity is not at issue here—the sole issue is whether that Order, or the Fire Marshal's compliance with that Order can be attacked in the Fayette County Court. The Fire Marshal has already been held in contempt in Jefferson County for failing to follow it, now the Fayette Court has also held the Fire Marshal in contempt for following the Jefferson Order. Instead of facing this clash of two courts directly, Ohio Pyro does not even try to explain what the Fire Marshal can do to avoid violating two court orders. The Marshal's view, by contrast, cures the problem, as in our view, the collateral attack doctrine should apply here to avoid this absurd result.

Ohio Pyro's view, which focuses on whether the Jefferson Order was valid, cannot possibly be right, as their view seems to boil down to this proposition of law: A second court may revisit matters already resolved by a first court as long as (1) a new party sues in the second court and (2) the party alleges that the first court was *wrong*. As absurd as this proposition seems, it is indeed the linchpin of Ohio Pyro's argument, as its brief leaves little doubt that the validity of the Jefferson Order is the heart of its case: Ohio Pyro says that the Fayette Order is not a "collateral

attack" because the Jefferson Order "is at loggerheads with the express prohibition on license transfers contained in R.C. 3643.75." Ohio Pyro Br. at 20. In other words, Ohio Pyro claims that the Jefferson Order need not be complied with because it is illegal. But this insistence that the Jefferson Order is wrong misses the point. Even if the Jefferson Order is mistaken (and it is not), it is simply not the business of the Fayette Court, or the Twelfth District Court of Appeals, to review the Jefferson Court's work. Ohio Pyro does not question the jurisdiction of the Jefferson Court; only the merits of its order. As such, this case presents a pure collateral attack on a valid final judgment, and the decision of the Twelfth District, allowing the collateral attack to proceed, should be reversed.

The lower court's decision also threatens to alter dramatically the availability of injunctive relief. Ohio Pyro argues that it need only show that a competitor has moved into its county in order to demonstrate irreparable harm and merit injunctive relief, see Ohio Pyro Br. at 24, and the lower court agreed, see *Ohio Pyro, Inc. v. Ohio Dep't of Commerce, Div. of State Fire Marshall* (12th Dept.), 2006 Ohio App. Lexis 920, 2006-Ohio-1002, at ¶ 27. 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 the standard adopted by the lower court, injunctive relief must only be granted in those cases that involve truly irreparable harm. This standard excludes purely financial losses such as the future lost profits alleged here. 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. 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 and injunctive relief is reserved for preventing wrongs that cannot be compensated through money damages, the Court should reverse the decision below.

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.*

Although Ohio Pyro unconvincingly attempts to deny that it is in any way criticizing the Jefferson Order, Ohio Pyro's complaint in Fayette County in this case expressly alleged that the Order was unlawful. 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. A final judgment may be attacked based upon the issuing court's lack of jurisdiction. In that instance, the attack is direct, rather than collateral, and is therefore allowed. *Kingsborough*, 56 Ohio St. at 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 W. Reserve Bond & Share Co.* (1926), 115 Ohio St. 247, 259-260 (finding creditors with actual knowledge of incorrect judgment entry may not collaterally attack it); *Coe v. Erb* (1898), 59 Ohio St. 259 (holding that a 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). Here, Ohio Pyro never questions the jurisdiction of the Jefferson Court—over either the subject matter or the parties. Accordingly, this case presents a pure collateral attack.

To deflect the Court's attention from its blatant collateral attack, Ohio Pyro instead knocks down a series of straw men by addressing res judicata and intervention, and—in a telling admission about the focus of its appeal—by attacking the *merits* of the Jefferson Order. But in all those tangential attacks, Ohio Pyro but never succeeds in explaining how a case in one court, seeking to enjoin a party from following another court's order, is not a collateral attack. That alone is reason enough for Ohio Pyro to lose. Nevertheless, the Fire Marshal responds below to Ohio Pyro's tangential arguments.

A. This case has nothing to do with res judicata.

Ohio Pyro's case is not preserved by application of the doctrine of res judicata. Ohio Pyro argues that it is not bound by the Jefferson County Order since it was not a party to that order. That is true, and the Fire Marshal is not arguing that Ohio Pyro is precluded from relitigating the case by the doctrine of res judicata. Rather, the collateral attack doctrine applies to strangers to a final judgment, like Ohio Pyro in this case, who attempt to collaterally attack it in another court. *Lewis v. Reed* (1927), 117 Ohio St. 152. Ohio Pyro asserts that the Appellants have cited no authority that would support what it calls a "remarkable extension of the 'collateral attack' doctrine to bar a *stranger* to an *agreed order* . . . from vindicating its rights in a later suit." Ohio Pyro Br. at 10. But nothing about our view is at all remarkable, as it has been well settled since at least 1898 that strangers to a judgment may impeach it only upon grounds of fraud and want of jurisdiction. *Coe v. Erb*, 59 Ohio St. at 271; *State ex rel. Leadingham v. Schisler*, (4th Dist.), 2003 Ohio App. Lexis 6637, 2003-Ohio-7293, ¶ 21, 23. In fact, this scenario occurs frequently in child custody and family law matters. *Lewis v. Reed*, 117 Ohio St. 152; *Snodgrass v. Snodgrass*

(9th Dist. 1948), 85 Ohio App. 285. Even as against third parties with no notice of a judgment, in the absence of fraud or lack of jurisdiction, the judgment may only be challenged in the court that issued the original order. And, the order may be challenged only to correct any irregularity or error. *The George W. McAlpin Co. v. Finsterwald* (1898), 57 Ohio St. 524. Ohio Pyro does not allege that the Jefferson Order was procured by fraud or that the court lacked jurisdiction. Therefore, its challenge does not fall under the exception to the collateral attack doctrine allowing strangers to a judgment to attack it. And as discussed below, Ohio Pyro cannot claim that it was a third party with no notice of the Jefferson County Order.

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: 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.

B. Ohio Pyro submitted to the jurisdiction of the Jefferson Court by moving to intervene.

In another attempt to prevail by criticizing the Fire Marshal for an argument he is not making, Ohio Pyro asserts that the Appellants are advocating a rule of "compulsory intervention" that is nowhere contemplated in the Civil Rules. Ohio Pyro Br. at 12. It is no surprise that Ohio Pyro is arguing strenuously against intervention as a remedy, since it *did try to intervene*, and when intervention was denied, *it did not appeal.* This fact weighed heavily with the Washington County Court of Common Pleas in a similar case:

> In essence, the Plaintiff is seeking to have this Court invalidate the Order of the Jefferson County, Ohio Court of Common Pleas in Washington County, Ohio. The only way this Court can achieve this result is to rule that Jefferson County lacked jurisdiction. The Plaintiff voluntarily submitted to the jurisdiction of Jefferson County by attempting to intervene there. It should have appealed the decision denying intervention.

Eagle Fireworks v. Ohio Dep't of Commerce (April 30, 2003), Washington C.P. No. 020709, unreported (Supp. at 327-329.) Since the Jefferson Court had jurisdiction to rule upon the motion for intervention, even if its decision was erroneous, having not been appealed, it is binding. *Sturgill v. Sturgill* (2d Dist. 1989), 61 Ohio App. 3d 94, 101. Therefore, Ohio Pyro may not attack the Jefferson Order in later litigation. *Id.*

Nor does *Martin v. Wilks* (1989), 490 U.S. 755, support Ohio Pyro here. To be sure, the Supreme Court held in *Martin* that a consent decree settling an employment discrimination case may be collaterally attacked by employees who were not parties to the matter, when those employees' own claims were affected by the consent decree. See *id.* at 768. But the case does not help Ohio Pyro. *Martin* merely allowed a group of employees to litigate their *own claims*, which were not precluded by the consent decree. In our case, Ohio Pyro directly attacks the Jefferson Order itself, in a different court than the court that adopted and journalized it. This kind of direct collateral attack continues to be zealously guarded against by the courts. See, e.g., *Marino v. Ortiz* (2d Cir. 1986), 806 F.2d 1144, 1146 (ruling that to allow a collateral attack contesting consent decree's terms "would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement"); *Indiana Dep't of Envtl. Mgmt. v. Conard* (Ind. 1993), 614 N.E. 2d 916 (ruling that to permitting a collateral attack by the Conards would subject Westinghouse to the real possibility of inconsistent obligations); *Wilson v. Minor* (11th Cir. 2000), 220 F.3d 1297, 1302 (Case does not implicate the potential problems and prejudice that can arise when plaintiffs are permitted to challenge relief entered by one court through a wholly independent action brought in a different court and before a different judge.)

Given these legitimate concerns, the Fire Marshal reiterates the argument made in his initial Merit Brief that the better practice is for a non-party, such as Ohio Pyro, to seek intervention in the Fayette County case. The Fire Marshal did not object when Ohio Pyro sought intervention before; he would not object if Ohio Pyro were to seek intervention in the Jefferson case again.

C. The Jefferson Order is a valid, binding court order.

Nor can Ohio Pyro prevail by treating the Jefferson Order as somehow not binding and less than a true court order. Ohio Pyro tells this court that the Fire Marshal has only himself to blame for being in contempt of a court order, because he made the "inexplicable decision" to settle the Jefferson case. Ohio Pyro Br. at 16. But Ohio Pyro ignores the strong public policy in favor of achieving finality in litigation, under which consent judgments are just as enforceable as any other validly entered judgment. *Gilbraith v. Hixson* (1987), 32 Ohio St. 3d 127, 129 (citing *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 399 and *Ohio State Med. Bd. v. Zwick* (9th Dist. 1978), 59 Ohio App. 2d 133, 139-140). And even Ohio Pyro is forced to acknowledge that the Fire Marshal has been held in contempt of the Jefferson Order in another order issued June 30, 2005. See Ohio Pyro Br. at 15 n.9. That order is stayed pending appeal to the Seventh District Court of Appeals and this case. Despite Ohio Pyro's dismissive view of the Fire Marshal's conundrum of being "trapped" between two courts, if the Twelfth District is upheld in this case, the Fire Marshal will rightfully be held in contempt simply because, in Ohio Pyro's view, the Jefferson Order is not an "adjudication []on the merits," but is merely a settlement. Ohio Pyro Br. at 16. Ohio Pyro's position flies in the face of Ohio's strong public policy as enunciated by the courts since at least 1924. *Sponseller*, 110 Ohio App. at 399.

D. Even though the merits of the Jefferson Order are not before this Court, the Order was lawful under the law then in effect.

Finally, Ohio Pyro urges a mistaken interpretation of the Jefferson Order that would do the opposite of what the order says: require transfers of Safety 4th's licenses. Ohio Pyro asserts that paragraph 15 of the Order should be interpreted to apply R.C. 3743.75 in the manner that it prefers. This argument suffers from two problems. First, Ohio Pyro lacks standing to make it, as it is not an intended third party beneficiary of the Jefferson Order and cannot request enforcement of paragraph 15 to the exclusion of the rest of the Jefferson Order. For a third party to have standing to enforce the Order, there must be "an express manifestation of the intent to create intended third party beneficiaries in the language of the agreement." *Save the Lake Ass'n v. Hillsboro*, 158 Ohio App. 3d 318, 2004-Ohio-4522, ¶¶ 15-16.

The Jefferson Order (Supp. at 1-4) contains no such express language manifesting an intent to benefit Ohio Pyro or any other fireworks wholesaler or manufacturer licensee. In fact, Ohio Pyro complains that it is injured, rather than benefited, by the Jefferson Order. Accordingly, Ohio Pyro cannot request enforcement of paragraph 15 of the Order, to the exclusion of the remaining provisions.

Second, enforcement of the Jefferson Order, either in whole or in part, is not before this Court. Such enforcement relates to the merits of the case. But the issue here is which court is allowed to address the merits of the Jefferson Order: the court that first addressed the issue, and the appeals court above it, or a brand new court that Ohio Pyro prefers. Ohio Pyro is, however, wrong on the merits. Paragraph 15 does not prohibit the geographic transfer of Safety 4th's licenses.

Ohio Pyro erroneously insists that paragraph 15 applies the current version of the fireworks license moratorium as set forth in R.C. 3743.75(A). However, the current version did not apply

at the time. The applicable moratorium on license transfers in effect at the time the parties entered into the Jefferson Order was contained in Section 165 of Am. Sub. H.B. No. 215[1] (attached to Ohio Pyro Br. as Appendix 3). According to this provision, the Fire Marshal could renew an existing license only if it already existed immediately before June 30, 1997 (the effective date of Am. Sub. H.B. No. 215). Pursuant to the Jefferson Order, Safety 4th had its license in place at the new location on the date on which Safety 4th requested to transfer the license: June 27, 1997, which is "immediately prior to the effective date [June 30, 1997] of this section [H.B. No. 215]." Thus, through operation of the Jefferson Order, the Fire Marshal granted Safety 4th a variance to the version of R.C. 3743.17(D) (attached to Ohio Pyro Br. as Appendix 2) that applied on the date of the request, June 27, 1997. Because Safety 4th had its license in place at the new location on June 27, 1997, Am. Sub. H.B. No. 215 allowed a renewal of the license at the new location.

Ohio Pyro is simply mistaken when it tries to rely on R.C. 3743.75 to assert that the Jefferson Order is unlawful. R.C. 3743.75, which codifies the previously uncodified moratorium,

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[1] Section 165 of Am. Sub. H.B. No. 215 explains that the moratorium started on the law's effective date:

> During the period beginning on the effective date of this section [June 30, 1997] and ending on December 15, 1999, the State Fire Marshall shall not do either of the following:
>
> . . .
>
> (B) 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 the effective date of this section;
>
> (C)(1) Except as provided in division (C)(2) of this section, approve the transfer of a license as a manufacturer or wholesaler of fireworks under Chapter 3743 of the Revised Code to any location other than a location for which a license was issued under that chapter immediately prior to the effective date of this section [June 30, 1997].
>
> (2) Division (C)(1) of this section does not apply to a transfer that the Fire Marshall approves pursuant to division (D)(2) of section 3743.17 of the Revised Code.

was not made effective until June 29, 2001; twenty-two days *after* the Jefferson County Court of Common Pleas entered the Jefferson Order. In sum, even though the merits of the Jefferson Order are not before the Court, the Order complied with the law, because geographic license transfers were permitted before June 30, 1997.

Because Ohio Pyro and West Salem may not collaterally attack the validity of the Jefferson Order, the Court should reverse the decision below and order the action to be dismissed.

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. Ohio Pyro has not shown that either element exists in this case, because the harm alleged—lost profits—is speculative. Equally important, even if such lost profits could be proven, such a financial loss would be the proper subject of an action in law, not equity.

A. Ohio Pyro has not shown that it would suffer an irreparable injury for the purposes of a permanent injunction.

At the preliminary injunction hearing, the only harm that Ohio Pyro alleged was the possible loss of future profits. It did not prove specific irreparable harm. Its 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 its future *profits*, rather than some nonmonetary irreversible right, or status.

B. The speculative damages advanced by Ohio Pyro could be satisfied by a legal remedy.

The evidence offered did not even quantify a 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 the previous year resided, and (2) that Ohio Pyro and West Salem might *possibly* lose profits if Safety 4th opened a fireworks showroom in Fayette County.[2] 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.* (8th Dist.), 2004 Ohio App. Lexis 485, 2004-Ohio-488, ¶36 (citing *Cleveland v. Cleveland Elec. Illum. Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 14, to define irreparable harm as one for which there "is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete")); *Basicomputer Corp. v. Scott* (6th Cir. 1992), 973 F.2d 507, 511 (stating that "a plaintiff's harm is not irreparable if it is fully compensable by money damages"). The Court should adopt this rule.

Nor is Ohio Pyro helped by the cases it cites to support its assertion that Ohio courts have consistently recognized that loss of customer base is an irreparable harm. (Ohio Pyro Br. at 24.) All three cases involved contractual covenants not to compete, where irreparable harm was threatened by the loss of a valued employee who had already stolen customers or had knowledge of trade secrets. *Blakeman's Valley Office Equip. v. Bierdeman* (7th Dist.), 152 Ohio App. 3d 86, 2003-Ohio-1074; *Atlantic Tool & Die v. Kacic* (9th Dist.), 1998 Ohio App. Lexis 5485; *Myers Servs. v. Costello* (5th Dist.), 1989 Ohio App. Lexis 2725. Imminent breach of a covenant not to compete is not analogous to mere speculative loss of profits from increased competition—

[2] 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.").

especially where the future competitor has the approval of a court order. A contract with a covenant not to compete is a vested right. No such vested rights exist here, as Ohio Pyro's alleged lost profits, if any, could be calculated and later recovered as money damages. The *possibility* that compensatory damages may be available weighs heavily against a claim of irreparable harm. *Sampson v. Murray* (1974), 415 U.S. 61, 90.

Ohio Pyro has no basis for its complaint that neither the Fire Marshal nor Safety 4th explain theories of relief available under which Ohio Pyro could seek monetary damages. (Ohio Pyro Br. at 29). It is not the Fire Marshal's job to explain theories of relief to Ohio Pyro. The party seeking an injunction bears the burden of proving the injunction is necessary by clear and convincing evidence, including proof that the plaintiff does not have an adequate remedy at law. *Kelly*, 17 Ohio St. 3d at 93.

Because Ohio Pyro has an adequate remedy at law, namely, money damages, it has not proven irreparable harm and 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 Reply Brief of Appellant Ohio Department of Commerce, Division of State Fire Marshal was served by U.S. mail, postage prepaid, this 29th day of January, 2007, upon the following counsel:

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