IN THE SUPREME COURT OF OHIO

Betty VanSuch dba Pak 'N Stor Storage Units,	)	**07-1773**
Appellant,	)	**On Appeal from the Mahoning County Court of Appeals, Seventh District**
VS.	)	
David Mangie, et al.	)	
Appellees	)	**Court of Appeals Case No. 07-MA-99**

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
BETTY VANSUCH dba PAK 'N STOR STORAGE UNITS

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SUPREME COURT OF OHIO

STATEMENT OF ERROR

When a Defendant files a Motion for Summary Judgment on the issue of whether the Plaintiff is the real party in interest or has proper legal standing to bring the lawsuit, the burden shifts to the Plaintiff under Rule 56(c) to show that Plaintiff is, in fact, the proper party to bring the lawsuit; conversely, when a Defendant files a Motion for Summary Judgment on such issue and the trial court and/or Court of Appeals can only say that there is a disputed material fact as to whether or not the Plaintiff may or may not have such standing, Summary Judgment should be granted under Rule 56(c) as the Plaintiff would have failed in that burden.

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I. ASSIGNMENT OF ERROR - THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF-APPELLEE, DAVID MANGIE, et al.

The Seventh District Court of Appeals held in a 2006 case:

> "[*P11] * * * Under Civ. R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude no genuine issue as to any [**5] material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 2000 Ohio 186, 738 N.E.21d 1243. A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304, 733 N.E.2d 1186.
>
> [*P12] When moving for summary judgment, a party must produce some facts that suggest that a reasonable fact-finder could rule in her favor. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023. "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 1996 Ohio 107, 662 N.E.2d 264. The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C). <u>The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings.</u> Id. At 293. *Windsor Props. v. Smith*, 2006 Ohio 495, (7th App. Dist. 2006). (emphasis added).

II. STATEMENT OF FACTS - THERE IS NO DISPUTE AS TO A MATERIAL FACT AND THE TRIAL COURT APPLIED AN IMPROPER LEGAL STANDARD.

The Court made this ruling, from which the appeal is taken, in *pari materia*:

> "...the Court finds that genuine issues of material fact exist with regard to the status of Plaintiff, David Mangie as the real party in interest herein and his standing to bring and maintain this action.
>
> Therefore, Defendant's Motion for Summary Judgment is overruled."

While using the "material fact" language of O.R.C.P. 56, the trial court had it backwards.

Defendant had previously moved for Summary Judgment that the Plaintiff-Appellee is not the real party in interest and had no standing to bring this action.

Under *Windsor Props*, "the nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings," *Windsor Props, supra*, p. 4; therefore, the Plaintiff had to show he was the real party in interest and had standing to bring this action.

The trial court found there were issues as to that status; therefore, he did not show he was the real party-in-interest; therefore, the Plaintiff failed to meet his "reciprocal burden of specificity and (could) not rest on mere allegations," *Windsor Props., supra*.

If, then, the Plaintiff could not, in fact, show that he was the proper party to bring this lawsuit, then Summary Judgment should have been granted in favor of the Defendant and this case should have been dismissed with prejudice.

It is respectfully submitted that the trial court's failure to dismiss this entire litigation, together with its affirmance by the Seventh District Court of Appeals, is legally incorrect; granting that motion would have terminated this litigation, which made it, in fact, a final appealable order.

As this Court indicated earlier this year in its description and definition of a final appealable order:

> {§4} Claiming that the forum-selection clause contained in the contracts provided that Butler County Court of Common Pleas with jurisdiction, National City filed suit in that court. Appellants filed motions to dismiss, claiming that Ohio did not have personal jurisdiction over them. The trial court granted these motions to dismiss, and National City appealed. Appellants moved to dismiss the appeal arguing that the trial court's dismissal for lack of personal jurisdiction was not a final, appealable order. The court of appeals denied the motion to dismiss and determined that the trial court's dismissal was a final, appealable order. The court of appeals certified its decision as in conflict with Preferred Captial, 161 Ohio App.3d 346, 2005-Ohio-2607, 830 N.E.2d 403.

{§5} R.C. 2505.02 defines a final order for purposes of appeal. Under R.C. 2505(B)(1), "a[n] order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is *** [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment."

{§6} A "substantial right" is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). For purposes of this case, we will assume that the trial court's dismissal for lack of personal jurisdiction deprived National City of a substantial right – the right to seek enforcement of its contract with appellants.

{§7} To be final, however, "an order must also determine an action and prevent a judgment." *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378,528 N.E.2d 195, syllabus; R.C. 2505.02(B)(1). "For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Hamilton Cty. Bd. of Mental Retardation & Developmental Disbabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153, 545 N.E.2d 1260. See *State ex rel. Downs v. Panioto,* 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶20.

{§8} The trial court ruled that "[n]o evidence had been presented here from which the court may conclude that this defendant is subject to jurisdiction in the Ohio courts pursuant to R.C. 2307.382 and/or Civil Rule 4.3." By rule, a dismissal for lack of personal jurisdiction "operate[s] as a failure otherwise than on the merits." Civ.R. 41(B)(4)(a). Ordinarily, a dismissal "otherwise than on the merits" does not prevent a party from refiling and, therefore, ordinarily, such a dismissal is not a final, appealable order. In this case, however, National City cannot refile. In essence, a final judgment has been rendered against National City because the cause has been disposed of and there is nothing left for the determination of the trial court. See *Hamilton Cty. Bd. of Mental Retardation,* 46 Ohio St.3d at 153, 545 N.E.2d 1260." National City Commercial Capital Corp. v. AAAA At Your Serve Inc., 114 O.S. 3d 82-2007-Ohio-2942 at 82-83. (emphasis added).

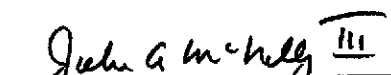
In this instance, the trial court and the Seventh District Court of Appeals held that, because it could not determine whether not the Plaintiff was the property party to bring this litigation, the ambiguity should have been resolved in favor of the Plaintiff as a material fact.

On the contrary, as Defendant raised the issue in her Motion for Summary Judgment, it was the burden of the Plaintiff to show that he, in fact, was the proper party to bring this lawsuit and that he had proper standing.

As either the Plaintiff failed to pursue that avenue or was unable to proceed down that road, and because the trial court and the Seventh Distict Court of Appeals does not state that the Plaintiff was, in fact, such a proper party, the Defendant's Motion for Summary Judgment should have been granted.

It was the Plaintiff's burden to show that he was the proper party and he failed to do so; therefore, summary judgment should have been granted in favor of the Defendant and this matter dismissed, which would be "an order" that would "determine an action and prevent a judgment," *National City*, supra, at 82-83.

RESPECTFULLY SUBMITTED,
McLAUGHLIN McNALLY ATTORNEYS



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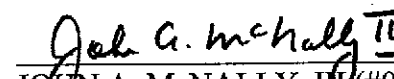
CERTIFICATE OF SERVICE

A copy of the foregoing ***Memorandum In Support Of Jurisdiction Of Appellant Betty Vansuch dba Pak 'N Stor Storage Units*** was served by ordinary U.S. mail this 18th day of September, 2007, upon: **Michael O. Kivlighan, Esquire**, 219 W. Boardman Street, Youngstown, Ohio 44503, Attorney for Appellees.



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CLERK OF COURTS
MAHONING COUNTY, OHIO
AUG 23 2007
FILED
ANTHONY VIVO, CLERK

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STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO

MAHONING COUNTY) SS: SEVENTH DISTRICT

DAVID MANGIE, ET AL.,)
)
PLAINTIFFS-APPELLEES,) CASE NO. 07-MA-99
)
VS.) JOURNAL ENTRY
)
BETTY VANSUCH dba PAK 'N STOR)
STORAGE UNITS,)
)
DEFENDANT-APPELLANT.)

This matter comes on appeal from a judgment entry which recites in part as follows:

> "...the Court finds that genuine issues of material fact exist with regard to the status of Plaintiff, David Mangie as the real party in interest herein and his standing to bring and maintain this action. Therefore, Defendant's Motion for Summary Judgment is overruled.
>
> The Court finds that Defendant failed to comply with the requirements of Chapter 5322 of the Ohio Revised Code in disposing of property allegedly owned by Plaintiff, David Mangie as a matter of law. To that extent only, Plaintiffs' Motion for Summary Judgment is sustained. All other issues contained in Plaintiffs' Complaint and Defendant's Counterclaim remain pending for further adjudication upon the merits."

The overruling of a motion for summary judgment is not a final order. Moreover, in this case, the trial court narrowly granted summary judgment to Plaintiffs as to one issue only, leaving other issues in the complaint and counterclaim pending for adjudication. Moreover, the order is devoid of Civ.R. 54(B) language to present a colorable claim of appealability.

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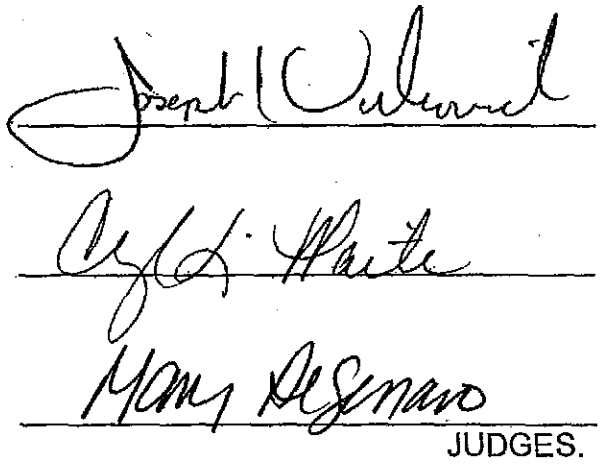
Appeal sua sponte dismissed for lack of a final or appealable order as defined in R.C. 2505.02.

Costs taxed against appellant.



Joseph L. Vukovich

Cyril L. Waite

Mary DeGenaro

JUDGES.

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