IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex rel.
THE TOLEDO BLADE CO.

Relator,

- vs -

SENECA COUNTY BOARD OF COMMISSIONERS

Respondent.

Case Number :07-1694

ORIGINAL ACTION IN MANDAMUS
(Public Records)

RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Fritz Byers (0002337)
824 Spitzer Building
Toledo, Ohio 43604
Phone: 419-241-8013
Fax: 419-241-4215
e-mail: fbyers@accesstoledo.com

Counsel for Relator

Mark Landes (27227)
Mark H. Troutman (76390)
ISAAC, BRANT, LEDMAN & TEETOR
250 East Broad Street
Columbus, OH 43215
Phone: 614-221-2121 (Phone)
Fax: 614-365-9526

Counsel for Respondent

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Respondent has moved to dismiss this action on the remarkable theory that this Court's constitutionally created subject-matter jurisdiction has been ousted by the pendency in a common-pleas court of a statutory public-records action brought by plaintiffs who are wholly unrelated to the Relator in this proceeding.[1]

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[1] This Court's original jurisdiction in mandamus is created by the Constitution. Oh. Const. art. IV, § 2(B)(1)(b). The jurisdiction is self-executing and not subject to abridgement: "No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court." *Id.* § 2(B)(3). *See State ex rel. National City Bank v. Board of Ed. of Cleveland City School Dist.* (1977), 52 Ohio St. 2d 81, 86-88. Even absent a statutory provision for such a remedy, an original action for mandamus in this Court is available to enforce the public's right to inspection and copying of public records. *State ex rel. Patterson v. Ayers* (1960), 171 Ohio St. 369, 372.

By contrast, while the Courts of Common Pleas are established by the Constitution (Oh., Const. art. IV, § 4(A)), their jurisdiction is wholly a creature of statute. *Id.* § 4(B) ("The courts of common pleas and divisions thereof shall have such original jurisdiction *** as may be provided by law."). *See Central Ohio Transit Authority v. Transp. Workers Union of America* (1988), 37 Ohio St. 3d 56, 60 ("the jurisdiction of the common pleas courts is limited to whatever the legislature may choose to bestow."). Pursuant to that principle, the common-pleas courts have no original jurisdiction in mandamus except as authorized by statute. *State ex rel. Sibarco Corp. v. Hicks* (1964), 177 Ohio St. 81, 83. And, even when the legislature has authorized mandamus proceedings in Common Pleas, the

Respondent purports to rest this odd proposition on the time-honored rule of "jurisdictional priority":

> As between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.[2]

Of course, the rule normally applies only when the causes of action and the parties are the same in both cases: "If the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter."[3]

Attempting to evade the jurisdictional-priority rule's requirements of claim- and party-identity, Respondent advances a novel and thoroughly mangled revision of the rule. According to Respondent, the claims raised in the two lawsuits don't really need to be the same; it is enough, rather, if the claims are merely "substantially similar" (a phrase that appears nowhere in this Court's jurisdictional-priority cases). *Motion to Dismiss*, p. 10. And Respondent deals with the requirement of party-identity even more creatively: because both this action and the common-pleas proceeding were commenced in the name of "the State of Ohio on the relation of" the actual litigants, Respondent says, it is really the State of Ohio that is the plaintiff in both cases. Thus, Respondent argues, even though the relators in the two suits are unrelated and wholly different people, they must be treated as identical because they both sued using the state's name. *Id.*, pp. 15-17.

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availability of statutory mandamus cannot divest this Court of its constitutional jurisdiction over such proceedings. *State ex rel. Pressley v. Industrial Comm'n* (1967), 11 Ohio St. 2d 141, 147.

[2] *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, syll. *See also State ex rel. Judson v. Spahr* (1987), 33 Ohio St. 3d 111, 113; *John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349, syll. 2.

[3] *State ex rel. Judson*, note 2, *supra*, 33 Ohio St. 3d at 113, *following State ex rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, 495-496 ("The pendency of another action may be successfully pleaded as a defense only when it is clearly made to appear that such pending action is between the same parties, upon the same cause of action.").

The mere description of Respondent's contentions undoubtedly goes a long way toward demonstrating how meritless those contentions are. This memorandum makes that demonstration more fully and more explicitly. As described below, Respondent's motion must be overruled. Part I, below, briefly describes the claims and parties in the two actions. Part II, below, demonstrates that the jurisdictional-priority rule has no bearing on the present case, first, because the claims raised in the two actions are not the same, and second, because the parties are not the same. Part III is a brief conclusion.

I. The parties and claims in the Common-Pleas proceeding and in the present action.

Respondent argues that this Court's jurisdiction is defeated by the pendency of a civil action in the Court of Common Pleas for Seneca County, *State ex rel. Cook, et al., v. Seneca County Board of Commissioners, et al.* (Seneca C.P. no. 07 CV 0271). The validity of this argument depends on Respondent's assertion that both the parties and the claims in that action are the same as the parties and the claims in this action. The comparison is easy and the results are clear.

State ex rel. Toledo Blade Parties:

The plaintiff-relator in this action is The Toledo Blade Company, an operating division of Block Communications, Inc., an Ohio corporation with offices in Toledo (Lucas County), Ohio. The sole respondent in this action is the Seneca County Board of Commissioners. Respondent has not alleged (and there is nothing of record to even remotely suggest) that there is any relationship of any kind between the *Cook* plaintiffs-relators and the Relator here.

State ex rel. Cook Parties:

The plaintiffs-relators in *Cook* are six named individuals, all of them natural persons, residents and taxpayers of Seneca County. The defendants-respondents in that action are the Seneca County Board of Commissioners, the three commissioners individually, and the clerk of the board.

State ex rel. Toledo Blade Claims:

In this action, The Blade asserts claims only under the Public Records Act, R.C. 149.43; The Blade alleges that Respondent has failed to produce specific public records (e-mail communications) that Relator had requested be made available for inspection and copying under the Act. With respect to the Relator's failure to produce records, in violation of the Act, The Blade alleges further (1) that the Respondent knowingly and unlawfully destroyed certain of the records, in violation of the Act , and (2) that the Respondent has failed to produce records for inspection and copying, even though the records are still in existence, again in violation of the Act.[4] The records that are the subject of the complaint in this action are all of the e-mails received, sent, or deleted by the three members of Respondent Board during the period from January 1, 2006 to the date of the request, including but not limited to those regarding the proposed demolition of the Seneca County courthouse.

Relator's complaint seeks ancillary relief preventing Respondent from reaping the benefits of their wrongful destruction and non-production. As set out in Relator's Complaint, it is reasonable to infer that the violations of the Public Records Act have masked Respondent's violations of the

[4] These are, it bears emphasizing, not merely allegations. In the time since this action was filed, Respondent has produced more than 700 pages of e-mails that Relator requested and did not receive until after the filing of the action. Moreover, Relator has publicly conceded that numerous e-mails were deleted in a manner violative of Respondent's records-retention rules and hence in violation of the Act.

Open Meetings Act, and that the decision to demolish the Seneca County courthouse is void as having been reached in violation of the Meetings Act. Thus, Relator's Complaint seeks temporary injunctive relief to prevent further action until the missing records have been produced or reconstructed and the lawfulness of the demolition decision can be tested in an appropriate forum. Complaint for an Original Writ of Mandamus, p. 10 (Prayer, ¶ C).

State ex rel. Cook Claims:

The Cook plaintiffs advanced a broad array of claims for relief, including charges that the defendants-respondents had violated the Public Records Act and the Open Meetings Act (R.C. 121.22) in the course of deciding to demolish the Seneca County courthouse. In addition, the complaint alleged that the conduct of the defendants-respondents in moving to demolish the courthouse was ultra vires and in breach of their fiduciary duties. The complaint sought relief by way of damages, injunctions, and mandamus. See Plaintiff's Amended Complaint (appx. A to Respondent's Motion to Dismiss in this action)(hereinafter "Cook Amended Complaint").

The Cook plaintiffs' claims under the Public Records Act in particular did not allege that they had made any request to inspect and copy specific records, or that any such request had been denied. Nor did the complaint allege that the Cook defendants had destroyed any records. Instead, the Cook plaintiffs alleged only that the Cook defendants had violated the Act by failing to create and maintain various records of the Seneca County Board's meetings, including adequate minutes and other records setting out the bases of Board actions in understandable form. Cook Amended Complaint, pp. 10-16.[5]

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[5] Respondent claims that the *Cook* complaint includes allegations of a failure to produce records and allegations of unlawful destruction of records. *Motion to Dismiss* p. 11 (table). Respondent supports the first claim with a citation to the original *Cook* complaint, which is not among the

Despite the manifest differences between the two actions, Respondent's motion to dismiss contends that the two actions are really the same suit for purposes of the jurisdictional-priority rule, because the claims are the same (or at least "substantially similar") and the parties are the same (since the State of Ohio is supposedly the real plaintiff in every public-records action). As demonstrated in the section that follows, these contentions are so patently without merit as to suggest that they are raised, not for serious consideration, but merely as a vehicle for further delay.[6]

The urge to delay this Court's action on the Complaint for Writ of Mandamus is not surprising. Indeed, under the circumstances one can fairly infer that the Board hopes to sprint toward the demolition of the courthouse, including the looming execution of the demolition contract, unfettered by any legal constraints, including the nettlesome requirements of open-meetings and public-records law. This conduct, in fact, supports the Petitioner's pending request for immediate injunctive relief to prevent so untoward a result.

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documents accompanying Respondent's motion and which has been, in any event, superseded by an *Amended Complaint* that makes no claim at all of any failure to produce records.

Respondent's contention that the *Cook* plaintiffs alleged a destruction of records is supported by a citation to paragraph 74 of the *Cook Amended Complaint*. In fact, the cited paragraph charges only that the *Cook* defendants had failed to "create or maintain a full and complete record of its public meetings, including the rationale for its decisions that allow the public to understand its decisions." *Cook Amended Complaint* ¶ 74.

[6] Respondent's dilatory approach is perhaps best demonstrated by the very first footnote in its motion, which announces Respondent's intention to advance its defenses piecemeal, one by one, and which purports to reserve any unraised defenses for later use, all – incredibly enough – in the name of "judicial economy." *Motion to Dismiss*, p. 2, n. 1. As the Civil Rules recognize, of course, judicial economy is served by requiring litigants to raise at least some of their claims and defenses together. And whether an unraised defense is preserved is determined, not by a footnoted reservation of rights, but by the terms of the Civil Rules. *See* Civ. R. 12(H).

II. The jurisdictional-priority rule has no application to the present case.

Respondent's motion to dismiss is predicated entirely on the long-standing Ohio rule of jurisdictional priority. Under the rule, when two or more tribunals have concurrent subject-matter jurisdiction of a claim, the first tribunal in which an action on the claim is brought acquires jurisdiction of the action to the exclusion of any other tribunal's power to adjudicate the claim:

> As between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.[7]

Thus, once an action has been brought in one court, no other court of concurrent jurisdiction has the power to entertain a second action on the same claim between the same parties.

By its terms, the rule applies only if the claims and the parties are the same: "If the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter."[8] Thus, the identity-of-claims requirement can ordinarily be satisfied only if the causes of action and relief sought in the two cases are "exactly the same."[9] Indeed, it has been said that the required identity of claims and parties must be such that a judgment in the first proceeding, once entered, would operate as a res-judicata bar in the second proceeding.[10]

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[7] *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, syll. *See also John Weenink & Sons Co. v. Cuyahoga Cty. Court of Common Pleas* (1948), 150 Ohio St. 349, syll. 3 ("When a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of, and no court of co-ordinate jurisdiction is at liberty to interfere with its proceedings.").

[8] *State ex rel. Judson*, note 2, *supra*, 33 Ohio St. 3d at 113, *following State ex rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, 495-496 ("The pendency of another action may be successfully pleaded as a defense only when it is clearly made to appear that such pending action is between the same parties, upon the same cause of action.").

[9] *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St. 3d 115, 117, 1995-Ohio-247.

[10] 20 Am. Jur. 2d, *Courts* § 89, *citing State ex rel. Red Head Brass, Inc. v. Holmes County Court of Common Pleas*, 80 Ohio St. 3d 149, 1997-Ohio-143.

In a few cases, this Court has employed a slightly broader view of claims-identity in applying the rule, focusing on the proposition that the object of the rule is to protect the first tribunal's power "to adjudicate upon the whole issue" raised by the complaint in the first proceeding. In these cases, the second suit involved the same parties, but the causes of action were not precisely the same because the second suit sought a different remedy or because the defendant in the first case had instituted the second action to seek injunctive or declaratory relief regarding the claim in the first action.[11] In such a case, of course, the identity-of-claims requirement is satisfied because the claim for relief that is the subject of the first proceeding is likewise the subject of the second proceeding, the sole difference being that the parties have reversed positions as plaintiff and defendant.[12]

The application of these principles to the present case is plain. In this case, there is neither identity of claims nor identity of parties between the present action and the *Cook* action in the Seneca County Court of Common Pleas.

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[11] *See Polcar*, note 8, *supra*, 50 Ohio St. 2d 279 (first action sought specific performance of contract; second action was brought by the defendant in the first action, seeking rescission of the same contract); *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St. 3d 54, 56 (first action sought injunction against employer's interference with labor picketing; second action was brought by employer to enjoin the picketing); *John Weenink & Sons*, note 8, *supra*, 150 Ohio St. 349 (first actions were garnishment proceedings by creditors seeking funds held by the defendant City of Cleveland; second action was filed by the City seeking a declaratory judgment that it owned the funds in question).

[12] By way contrast, there is no identity-of-claims when the claim in the second proceeding can be resolved without effectively adjudicating the claim raised in the first proceeding. *See Sellers*, note 10, *supra*, 72 Ohio St. 3d 115, 117-118 (jurisdictional-priority rule did not defeat tribunal's jurisdiction of action by attorney against client for defamation, even though the client's action for legal malpractice was already pending in a different tribunal; even if the defamation claim was a compulsory counterclaim in the malpractice action, arising out of the same transaction, the second tribunal nonetheless had jurisdiction to hear it).

A. The two proceedings do not involve an identity of claims.

The claims or causes of action in the present action are plainly not the same as the claims raised in *Cook*. Respondent effectively concedes as much by arguing that the claims do not need to be the same as long as they are "substantially similar." And, respondent says, the present action and the *Cook* proceeding "are nearly mirror images of each other." *Motion to Dismiss*, p. 10. Respondent's contention is wrong both legally and factually.

As to the law, Respondent's "substantially similar" test of claims-identity is entirely Respondent's own invention, created out of whole cloth. As noted above, the phrase appears nowhere in this Court's jurisdictional-priority cases. This Court has repeatedly made clear that the standard is not "substantial" similarity but *identity* of the claims or causes of action to be adjudicated in the two actions. When the two proceedings do not involve precisely the same cause of action, the priority rule divests jurisdiction of the second action only if an adjudication in one proceeding would operate as a res-judicata bar in the other. Respondent does not, and cannot, claim that this standard is even remotely satisfied here.

Even if Respondent's supposed "substantially similar" test were a correct statement of the law, it would be wholly irrelevant here. There is, in fact, no meaningful similarity at all, much less a "substantial" similarity, between the claims in this action and the claims in the *Cook* proceeding in Common Pleas.

In this proceeding, Relator charges that Respondent has violated the Public Records Act by failing to make specified public records – e-mail communications – available for inspection and copying as requested by Relator; Relator further charges that some of the requested records were unlawfully destroyed.

In sharp contrast, in the *Cook* proceeding, the plaintiffs-relators allege only that Respondent violated the Act by failing to keep and maintain full and complete minutes of Respondent's meetings. The *Cook* complaint says nothing about e-mail communications. The *Cook* complaint says nothing about any requests for inspection and copying, or about any failure by Respondent to honor such a request. And the *Cook* complaint says nothing about the destruction of records.

Unable to find support for its argument in the actual pleadings, Respondent instead deploys a table to demonstrate its contention that the public-records claims in the two suits are "substantially similar." *Motion to Dismiss*, pp. 11-12. The table is most notable for the sparsity of its citations to the *Cook* complaint. In fact, the entire table includes only two citations to the public-records claims of the *Cook* complaint, and (as described in note 4, above) one of those citations is to a pleading that has since been superseded and the other is simply false.

Instead of citations to the *Cook* pleadings, the table is larded with references to various motions and discovery requests by the parties in Cook. If those citations are meant seriously, they reflect a remarkable degree of confusion on Respondent's part. The pleadings define the claims raised in an action, and the pleadings in the two cases are markedly different, as shown above. Respondent's resort to the *Cook* relator's <u>discovery demands</u> as a means of supporting the argument that the <u>claims</u> in two cases are "substantially similar" is so far-fetched as to be self-defeating.

The point can be simply stated. The *Cook* relators' public-records claim alleges a failure to create and maintain certain records. The *Toledo Blade* relator's claim alleges failure to produce records for inspection, and it alleges the knowing, unlawful destruction of records. That the *Cook* plaintiffs, in discovery, have requested production of certain records, does not alter the dispositive

differences between the claims. Not surprisingly, respondent has advanced no support whatever for its argument, fabricated out of whole and transparent cloth.

In short, the only similarity between the complaint in this case and the *Cook* complaint is that both invoke the Public Records Act and both name the Board of Commissioners as a respondent.

If, as Respondent appears to contend, that degree of similarity is all that is required to defeat this Court's mandamus jurisdiction, the Court can look forward to a much reduced workload, since the filing of any common-pleas action complaining about any aspect of a public official's public-records performance will then preclude any other public-records complaint against the same official in any other court.

Whether measured against this Court's actual holdings or against Respondent's imaginary "substantial similarity" test, there is no identity between the claims raised in the present action and those raised in the *Cook* proceeding in Common Pleas. For that reason, the jurisdictional-priority rule has no application and this Court plainly has jurisdiction of the present action.

B. The two proceedings do not involve an identity of parties.

Even if the there were an identity of claims in the two proceedings, the jurisdictional-priority rule would divest this Court of jurisdiction only if the proceedings also involved identical parties. Understandably, Respondent does not advance the legally untenable (and metaphysically improbable) proposition that six Seneca County citizens and the Toledo Blade Co. are really the same person. Regrettably, however, Respondent adopts instead the only slightly less silly position that the parties are the same because the State of Ohio is the actual plaintiff in every public-records mandamus action. *Motion to Dismiss* pp. 15-17.

Respondent rests this contention first on the pleading convention that proceedings for the extraordinary writs, including mandamus, are brought in the name of the State "on the relation of" the actual litigant; so that in formal terms the State is the plaintiff. The pleading convention is, of course, just that: a pleading convention. It has no effect on identifying the plaintiff, as the First District Court of Appeals has made clear:

> In original actions such as habeas corpus, mandamus, or prohibition filed by private parties acting *ex relatione*, the state is not the real party in interest. Clearly, relators in such actions would like to believe that they are acting on behalf of the state, but this is often nothing more than a fiction.[13]

Undoubtedly recognizing the weakness of its reliance on a pleading fiction, Respondent ventures further afield by hypothesizing a new version of the party-identity test to apply in public-records actions. Respondent purports to derive this invention from the multiplicity of cases in which this Court has rightly pointed out the great public importance of public access to public records. From this axiom, plaintiff asserts that all public-records cases are the same because, regardless of who the real party in interest is, the relators really are acting only on behalf of the public by enforcing "the public's right to know." *Motion to Dismiss*, p. 16.

Respondent is undoubtedly correct that every private citizen who successfully sues for access to public records is performing a public service by enforcing a public right of access. Indeed, that is true of virtually any successful action against public officials: the public is benefitted at a minimum by every judgment compelling official compliance with the law. But an individual who acts to

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[13] *State ex rel. Portune v. National Football League*, 155 Ohio App.3d 314, 318, 2003-Ohio-6195, at ¶ 12. *See also State ex rel. Hostetter v. Hunt* (1937), 56 Ohio App. 120, 127 ("The mere fact that [an] action *** is required to be instituted in the name of the state does not change the private character of the plaintiff to that of public officer. The same situation arises whenever an action in mandamus or habeas corpus is instituted. Both are *ex rel.* proceedings, but plaintiff is nevertheless acting in the capacity of a private citizen in filing suit.")

enforce a public right or to create a public benefit does not stop being an individual. Indeed, the "public right" being enforced in such an action is the right of individual members of the public, rather than a right of the public in the abstract or in the aggregate. A public-records lawsuit is brought to enforce that specific litigant's right of access as a citizen and member of the public, a right shared with every other citizen, but nonetheless a right of the individual litigant. A citizen no more acts "on behalf of" the State of Ohio or "the public" when he brings a public-records action than he acts on behalf of the State or the public when he votes.

In any event, this Court's precedents cannot be squared with Respondent's view that all public-records actions share an identity of parties because such actions are solely for the enforcement of a public right. As this Court has repeatedly held, a relator who prevails in a public-records action is entitled to an award of attorney fees only if the action accomplished a "public benefit."[14] Necessarily implied by that rule, of course, is the proposition that there can be successful public-records actions that confer only a private benefit, without significant public benefit. And that proposition is in turn incompatible with Respondent's claim that "the public" is always the real party in interest in public-records cases.

There is no identity of parties between this action and the *Cook* proceeding in the Seneca County Common Pleas Court. In the absence of such an identity, the jurisdictional-priority rule has no application and the Respondent's motion to dismiss must be overruled.

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[14] *See State ex rel. Olander v. French*, 79 Ohio St. 3d 176, 179, 1997-Ohio-171.

III. Conclusion.

For the foregoing reasons, Respondent's Motion to Dismiss must be overruled.

Fritz Byers (0002337)
824 Spitzer Building
520 Madison Avenue
Toledo, Ohio 43604-1305
Phone: 419-241-8013
Fax: 419-241-4215
E-mail: fbyers@cisp.com

Counsel for Relator
The Toledo Blade Company

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on the following counsel of record this 26th day of September 2007:

Mark Landes
Mark H. Troutman
ISAAC, BRANT, LEDMAN & TEETOR
250 East Broad Street
Columbus, OH 43215

Fritz Byers / Joelle