

IN THE SUPREME COURT OF OHIO

State of Ohio <i>ex rel.</i> ,	:	
Estate of Miles, <i>et al.</i> ,	:	
	:	
Relators,	:	Case No. 08-0782
-v-	:	
	:	Original Action in Mandamus
Village of Piketon, Ohio <i>et al.</i>	:	
	:	
Respondents.	:	

MEMORANDUM IN OPPOSITION TO
RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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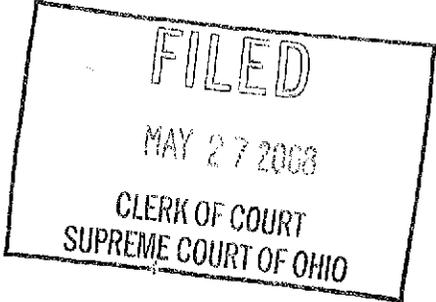


TABLE OF CONTENTS

I. FACTUAL AND PROCEDURAL BACKGROUND.....1

II. LAW AND ARGUMENT.....2

A. STANDARD FOR S.Ct.Prac.R. X, SECTION 5 AND OHIO R. CIV. P. 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS.....2

B. RESPONDENTS’ MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE DENIED AS A MATTER OF LAW BECAUSE PURSUANT TO RESPONDENTS’ ANSWER AND EVIDENCE ATTACHED THERETO, RESPONDENTS FAIL TO ESTABLISH THAT RELATORS CAN PROVE NO SET OF FACTS IN SUPPORT OF THEIR CLAIM THAT WOULD ENTITLE THEM TO RELIEF.....3

1. Respondents fail to plead or set forth evidence proving that Relators can prove no set of facts in support of their claim that (1) Relators have a clear legal right to satisfaction of the Judgment, including judgment interest; (2) Respondents have a clear legal duty to pay the Judgment, including judgment interest; and (3) Relators have no plain and adequate legal remedy in the ordinary course of the law to enforce the Judgment and judgment interest.....4

2. Contrary to Respondents’ first affirmative defense, Relators have no plain and adequate remedy in the ordinary course of law to enforce their judgment against the VOP.....6

a. Respondents are erroneous in stating that Relators have an adequate remedy at law because they previously filed and dismissed a lawsuit against the VOP.....8

b. Respondents are erroneous in their assertion that Relators’ mandamus action is a re-litigation of issues.....9

3. Relators’ Complaint for a Writ of Mandamus was timely filed. Respondents cite incomplete and misleading statutory authority in asserting that Relators’ Complaint is time barred.....11

a. Respondents cite incomplete and misleading statutory authority in support of their claim that Relators’ complaint for a writ of mandamus is time barred.....12

b. Depending on the circumstances, Relators had between at least six years, and ten years to commence the case *sub judice*, and thus, Relators’ complaint for writ of mandamus was timely filed.....13

TABLE OF CONTENTS

c. Respondents are not prejudiced by the timing of Relators' complaint for a writ of mandamus.....15

4. Relators' judgment collection action in the case *sub judice* is not barred by res judicata or claim preclusion.....17

5. Respondents' fifth affirmative defense relates to the merits of Case No. 519-CIV-01 of the Pike County Court of Common Pleas, and is not properly before this Court.....18

6. Ohio Rev. Code Ch. 2744 does not bar Relators' cause of action, or provide a basis for granting Respondents' Motion for Judgment on the Pleadings.....18

C. IT IS WELL SETTLED IN OHIO THAT WHEN A JUDGMENT IS RENDERED AGAINST AN OFFICER OF A MUNICIPAL CORPORATION IN HIS OFFICIAL CAPACITY, IN MATTERS TO WHICH HE IS ENTITLED TO REPRESENT IT, THE JUDGMENT IS BINDING AGAINST THE MUNICIPAL CORPORATION, OR ANOTHER OFFICER REPRESENTING THE MUNICIPAL CORPORATION.....19

III. CONCLUSION.....22

I. FACTUAL AND PROCEDURAL BACKGROUND

The Pike County Court of Common Pleas granted Relators a judgment against the Village of Piketon, Ohio ("VOP") through its Chief of Police (the "Judgment"). See Ex. A to Complaint. The Judgment was rendered against Nathaniel Todd Booth individually, and in his capacity as Chief of Police of the VOP. The VOP has failed to pay the Judgment.

On February 6, 2008, counsel for Relators issued a demand upon Respondents that they pay the Judgment in full, including judgment interest, or that arrangements for payment be made, by close of business on February 22, 2008. (Relators' Affs., Ex. D, E, and F of Complaint.) A copy of the demand is attached as Ex. B to the Complaint. Because Respondents failed and/or refused to pay the Judgment, including judgment interest, and failed to make arrangements for payment to Relators, on April 24, 2008, Relators filed with this Court a Verified Complaint for Writ of Mandamus¹ seeking a writ of mandamus ordering officials of the VOP to satisfy the Judgment, plus judgment interest. In response, on May 15, 2008, Respondents filed an Answer, and a Motion for Judgment on the Pleadings.

As described in greater detail below, Respondents' Motion for Judgment on the Pleadings must be denied as a matter of law because Respondents fail to establish that it is beyond doubt from the Complaint that Relators can prove no set of facts entitling them to relief after construing all material factual allegations in the Complaint and all reasonable inferences therefrom in Relators' favor.

¹ Respondents incorrectly refer to Relators' initial pleading as a "Writ of Mandamus." Relators assert that the proper name for their initial pleading is "Verified Complaint for Alternative and/or Peremptory Writs of Mandamus," which Relators refer to in this memorandum contra as their "Complaint," or "Complaint for a Writ of Mandamus." The writ would be issued by this Court, not Relators, and is the desired result of Relators' Complaint. The writ is not Relators' initial pleading.

II. LAW AND ARGUMENT

A. STANDARD FOR S.Ct.Prac.R. X, SECTION 5 AND OHIO R. CIV. P. 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS.

Respondents filed their Motion for Judgment on the Pleadings pursuant to S.Ct.Prac.R. X, Section 5, and Ohio R. Civ. P. 12(C). Pursuant to S.Ct.Prac.R. X, Section 5, which applies to all actions within the original jurisdiction of the Court (except for habeas corpus actions), Respondents may file a motion for judgment on the pleadings at the same time an answer is filed. Pursuant to S.Ct.Prac.R. X, Section 2, the Ohio Rules of Civil Procedure shall supplement the Rules of Practice of the Ohio Supreme Court unless clearly inapplicable. Ohio R. Civ. P. 12(C) provides that any party may move for judgment on the pleadings. This Court has held, however, that **motions for judgment on the pleadings are generally improper in mandamus actions because “these motions call for a decision on the merits of the controversy,” instead of attacking the sufficiency of the complaint.** *State ex rel. Yiamouyiannis v. Taft* (1992), 65 Ohio St. 3d 205, 206; 602 N.E.2d 644 (emphasis added); see also *Ass'n for the Def. of the Washington Local Sch. Dist. v. Kiger* (1989), 42 Ohio St. 3d 116, 117; 537 N.E.2d 1292 (holding that respondents' motion to dismiss is “ill-conceived because it argues the merits of relators' request for a writ of mandamus instead of attacking the sufficiency of the complaint.” *Limited by State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Educ.* 1995-Ohio-251; 72 Ohio St. 3d 106, 109 (holding that “Civ. R. 12(B)(6) dismissal based upon the merits is unusual and should be granted with caution . . .”)).

“[A] determination of a Civ.R. 12(C) motion is restricted **solely** to the allegations in the pleadings and any writings **attached** to the [pleadings].” *State of Ohio ex rel. Montgomery v. Purchase Plus Buyer's Group, Inc.*, 2002-Ohio-2014, ¶7 (emphasis added); see also, *Peterson v.*

Teodosio (1973), 34 Ohio St. 2d 161, 166; 297 N.E.2d 113. **Thus, in ruling on a motion for judgment on the pleadings, this Court is without authority from considering evidence outside the pleadings, including evidence that is solely attached to Respondents' motion for judgment on the pleadings.** See *State of Ohio ex rel. Montgomery*, 2002-Ohio-2014, at ¶7-8; See also, *Peterson*, 34 Ohio St. 2d at 166.

The "pleadings must be liberally construed and in a light most favorable to the nonmoving party." *Elkin v. JB Robinson Jewelers*, 2005-Ohio-1414, ¶8. Motions for judgment on the pleadings are a means for resolving questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 1996-Ohio-459; 75 Ohio St. 3d 565. This Court has set forth the following standard for deciding a motion for judgment on the pleadings:

dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the [relator] could prove no set of facts in support of his claim that would entitle him to relief. Thus, Civ. R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.

Id. at 570. See also *Peterson*, 34 Ohio St. 2d at 165-66; *State ex rel. Pirman v. Money*, 1994-Ohio-208; 69 Ohio St. 3d 591, 593; 635 N.E.2d 26.

B. RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE DENIED AS A MATTER OF LAW BECAUSE, PURSUANT TO RESPONDENTS' ANSWER AND EVIDENCE ATTACHED THERETO, RESPONDENTS FAIL TO ESTABLISH THAT RELATORS CAN PROVE NO SET OF FACTS IN SUPPORT OF THEIR CLAIM THAT WOULD ENTITLE THEM TO RELIEF.

- 1. Respondents fail to plead or set forth evidence proving that Relators can prove no set of facts in support of their claim that (1) Relators have a clear legal right to satisfaction of the Judgment, including judgment interest; (2) Respondents have a clear legal duty to pay the Judgment, including judgment interest; and (3) Relators have no plain and adequate legal remedy in the ordinary course of the law to enforce the Judgment and judgment interest.**

Pursuant to the Complaint, and the evidence attached thereto, Relators state a valid claim for a writ of mandamus. As plead in their Complaint, and supported by evidence attached thereto, Relators are entitled to the requested writ of mandamus because: (1) Relators have a clear legal right to satisfaction of the Judgment, including judgment interest; (2) Respondents have a clear legal duty to pay the Judgment, including judgment interest; and (3) Relators have no plain and adequate legal remedy in the ordinary course of the law to enforce the Judgment and judgment interest. See *State ex rel. Shimola v. City of Cleveland*, 1994-Ohio-243; 70 Ohio St. 3d 110, 112; 637 N.E.2d 325; see also Ohio Rev. Code § 2731.05.² **Respondents fail to plead or set forth evidence proving that Relators can prove no set of facts in support of their claim that would entitle them to relief.**

First, Respondents' Answer fails to address Relators' assertion that Relators have a clear legal right to satisfaction of the Judgment, including judgment interest, and is entirely void of any evidence to the contrary.

Second, as further explained in Section C below, while it appears that pursuant to Paragraph 7 of Respondents' Answer, their fifth affirmative defense, and Section A of their Motion, Respondents attempt to address Relators' assertion that Respondents have a clear legal

² Respondents agree that for this Court to issue a writ of mandamus compelling the VOP to pay the Judgment, Relators must establish that they have a clear legal right to satisfaction of the Judgment, Respondents have a clear legal duty to pay the Judgment, and Relators have no plain and adequate remedy at law. (See Resp't Motion, p. 8).

duty to pay the Judgment, they do so inadequately by making conclusory statements, while failing to provide evidence in contravention of Relators' assertion. Moreover, Respondents' arguments solely address the merits of the Judgment award itself, and the original cause of action in the underlying case, *Miles et al. v. Booth*, Case No. 519-CIV-01 of the Pike County Court of Common Pleas, which is irrelevant to the pending action. Not only is it improper to seek a decision on the merits of the pending proceeding pursuant to a motion for judgment on the pleadings, it is incomprehensible that Respondents would move this Court for a decision on the merits of Case No. 519-CIV-01 of the Pike County Court of Common Pleas. A Judgment was rendered in Case No. 519-CIV-01, and Relators have filed the case *sub judice* to collect the Judgment. **A decision on the merits of Case No. 519-CIV-01 of the Pike County Court of Common Pleas is not properly before this Court.** Therefore, Relators respectfully request that this Court refrain from making a determination on the merits of Case No. 519-CIV-01, and from allowing Respondents' irrelevant and moot arguments relative to the merits of Case No. 519-CIV-01 distract the Court from the sole issue at hand – Judgment collection.³

³ Notwithstanding the foregoing, certain averments in Paragraph 7 of Respondents' Answer, and in Respondents' Motion are blatantly false. Specifically, Respondents aver that the Judgment was entered against Nathaniel Todd Booth solely in his individual capacity. A review of the Judgment Entry that is attached as Ex. A to the Complaint, however, indicates that the Judgment was rendered against Nathaniel Todd Booth **individually, and in his capacity as Chief of Police of the VOP**. Additionally, Respondents aver that the September 9, 2002 Judgment Entry granting summary judgment was only a judgment against Nathaniel Todd Booth in his individual capacity. Similarly, a review of the Judgment Entry attached as Ex. C. to the Complaint indicates that the Judgment Entry granting summary judgment was rendered against Nathaniel Todd Booth **individually, and in his capacity as Chief of Police of the VOP**. (“[T]he Court hereby finds that there is no genuine issue as to any material fact and that [Relators] are entitled to judgment as a matter of law as to the issue of liability against Nathaniel Todd Booth, both **individually and in his capacity as the Chief of Police of the [VOP]**.”)

Third, Respondents aver in Paragraph 14 of their Answer, and assert in their first affirmative defense and in their Motion that Relators had an adequate remedy of law to enforce the Judgment against the VOP. As explained in greater detail in Section II(B)(2) below, Relators have no plain and adequate legal remedy to enforce the Judgment against the VOP, because the VOP is immune from execution pursuant to Ohio Rev. Code § 2744.06.

Moreover, none of Respondents' affirmative defenses, each of which are addressed below, establish that it is beyond doubt from the Complaint that Relators can prove no set of facts entitling them to relief after construing all material factual allegations in the Complaint and all reasonable inferences therefrom in Relators' favor.

2. Contrary to Respondents' first affirmative defense, Relators have no plain and adequate remedy in the ordinary course of law to enforce the Judgment against the VOP.

Contrary to Respondents' first affirmative defense, and argument in Section C of their Motion, Relators have no plain and adequate legal remedy to enforce the Judgment against the VOP because the VOP is immune from execution pursuant to Ohio Rev. Code § 2744.06. Pursuant to Ohio Rev. Code § 2744.06, "[r]eal or personal property, and moneys, accounts, deposits, or investments of a political subdivision **are not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment** rendered against a political subdivision in a civil action to recover damages for injury, death, or loss to person or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function." (emphasis added).

In *State ex rel. Shimola*, a case that is both factually and procedurally parallel to the case at bar, this Court held that the relator, Shimola, had no adequate legal remedy to enforce three

judgments he held against the City of Cleveland because the city was immune from execution pursuant to Ohio Rev. Code § 2744.06. 70 Ohio St. 3d at 112-13. In 1990, Shimola obtained three separate judgments against the City of Cleveland. Shimola made several requests for payment; however, the city failed to satisfy the judgments. Accordingly, in 1994, Shimola filed a complaint in mandamus requesting that this Court compel the City of Cleveland to pay all money necessary to satisfy the outstanding judgments, plus all accrued interest. *Id.* Quoting Ohio Rev. Code § 2744.06, this Court held that the Relator “ha[d] established his right to a writ of mandamus by satisfactory evidence” and granted Relator’s complaint for a writ of mandamus compelling the City of Cleveland to pay the principal amounts of the judgments plus accrued postjudgment interest. *Id.* at 113.

It is undisputed that Ohio Rev. Code § 2744.06 is applicable to the case at bar. Looking to the pleadings, Relators allege and Respondents admit that the VOP is a political subdivision. *See* Complaint ¶¶2, 23; Answer ¶¶3, 15. Pursuant to the statute, as a political subdivision, the VOP is “not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment.” Ohio Rev. Code § 2744.06; *see also*, *State ex rel. Shimola*, 70 Ohio St. 3d at 112-13. Accordingly, Relators are statutorily prohibited from utilizing alternate remedies that may otherwise be available to a party attempting to collect on a judgment.

Failing to take into consideration Ohio Rev. Code § 2744.06 and *Shimola*, Respondents attempt to argue that Relators have an adequate remedy at law because: (1) a lawsuit was previously filed and voluntarily dismissed by Relators; and (2) Relators abandoned their claims and are now attempting to re-litigate them. As discussed below, Respondents’ arguments are fatally flawed.

a. Respondents are erroneous in stating that Relators have an adequate remedy at law because they previously filed and dismissed a lawsuit against the VOP.

In Section C of their Motion, Respondents erroneously state that Relators “had an adequate remedy at law to enforce payment of the Booth judgment and, in fact, availed itself of those legal remedies by filing a subsequent lawsuit against the [VOP]” Respondents’ argument is misplaced. Filing a lawsuit does not in and of itself provide a plain and adequate remedy at law. If that were the case, an action in mandamus would never ensue because there would always be an available remedy, as anyone can file litigation.

A remedy is defined as a means of enforcing a right. See Black’s Law Dictionary 1296 (7th ed. 1999). Filing a lawsuit does not necessarily provide the filer with the means to enforce a right. The question of enforceability is a question of law to be determined by the court. In the case at bar, Relators do not have a means of enforcing their right to collect on the Judgment, because the VOP is immune pursuant to Ohio Rev. Code § 2744.06. It is axiomatic that because the VOP is “not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment,” absent a writ of mandamus, the Relators are without means to enforce their right to collect on the Judgment against the VOP.

In *State ex rel. Merydith Constr. Co. v. Dean* (1916), this Court held that an adequate remedy in the ordinary course of the law which will render it unnecessary to issue a writ of mandamus is one which gives relief which is as complete, beneficial, and speedy as the relief which would be obtained by such proceedings in mandamus. 95 Ohio St. 108, 122-23; 116 N.E. 37. A review of case law suggests that an adequate remedy at law, sufficient to overcome a mandamus petition, includes: (1) the ability to file an appeal (See, e.g., *State ex rel. Middletown*

Bd. of Educ. v. Butler County Budget Comm'n (1987), 31 Ohio St. 3d 251, at syllabus; 510 N.E.2d 383 (mandamus was denied where it was determined that the relator has a plain and adequate remedy in the ordinary course of the law by way of appeal)); and (2) the availability of statutory remedies (See, e.g., *State ex rel. Webb v. Bryan City Sch. Dist. Bd. of Educ.* (1984), 10 Ohio St. 3d 27, 32; 460 N.E.3d 1121 (mandamus was precluded because Ohio Rev. Code § 3319.16 provided administrative and judicial remedies to review a teacher's claim of wrongful discharge, amounting to an adequate legal remedy)).

In the instant case, Relators have no adequate remedy in the ordinary course of the law. An appeal would not be proper—Relators are trying to collect on a judgment, not seek reconsideration of the decision in the underlying case, Case No. 519-CIV-01 of the Pike County Court of Common Pleas. Also, this matter cannot be resolved by statutory provision because the statutory provision that is directly applicable actually prohibits an alternate remedy.

Respondents make a blanket statement in their Motion that Relators have a plain and adequate remedy at law; however, they fail to cite any legal or equitable remedy available to Plaintiff. Because Ohio Rev. Code § 2744.06 expressly immunizes the VOP from execution, judicial sale, garnishment, and attachment – litigation to enforce a judgment against it will fail.

b. Respondents are erroneous in their assertion that Relators' mandamus action is a re-litigation of issues.

Although Respondents' argument lacks cohesion, clarity, and substance, it appears that they attempt to argue that Relators had a legal remedy available to it, that Relators abandoned that legal remedy by voluntarily dismissing its case in *Miles Estate v. Village of Piketon, et al.*, Pike Cty Court of Comm. Pleas Case No. 171-CIV-03, and that Relators are now trying to re-litigate the matter by way of mandamus. (See Resp't Motion at p. 11). In support of their

argument, Respondents cite *Gannon v. Gallagher* (1945), 145 Ohio St. 170; 60 N.E.2d 666, for the proposition that “[w]hen a party had an adequate remedy at law and has availed himself or herself of that remedy, he/she is not entitled to re-litigate the same issues by way of mandamus.” (See Resp’t Mot. at p. 11). Respondents’ argument is without merit.

First, as stated in detail above, Respondents do not have a remedy available to it in the ordinary course of the law because the VOP is statutorily immune from execution, judicial sale, garnishment, or attachment to satisfy a judgment. Ohio Rev. Code § 2744.06. Accordingly, Relators never had a legal remedy available to them. Relators cannot abandon a remedy they never had.

Second, Relators’ petition for a writ of mandamus can in no way be construed as re-litigation, as there is nothing to re-litigate. A voluntary dismissal is not an adjudication on the merits of a case. In fact, upon dismissal, the action is considered as if it were never commenced. “Once a plaintiff files a notice of dismissal, the trial court is deprived of further jurisdiction over the case. . . . Indeed, plaintiffs’ voluntary dismissal renders the action as if it had never been commenced.” *Briggs v. Fedex Ground Package Sys.*, 2004-Ohio-332, ¶8; 157 Ohio App. 3d 643. The Miles Estate voluntarily dismissed its case pursuant to Ohio R. Civ. P. 41(A)(1)(a). Accordingly, there was no judgment and nothing that the Miles Estate could be re-litigating by way of mandamus.

Respondents’ reliance on *Gannon* is also misplaced. In *Gannon*, the Relator sought a peremptory writ of mandamus restoring him to his former position as chief of police. Upon being removed from his position as chief of police, appeal was taken to the civil service commission which affirmed the action. Appeal was then taken to the Common Pleas Court

which also affirmed the action. The Relator then petitioned for a Writ of Mandamus to be restored to his former position; however the writ was denied. *Gannon*, 145 Ohio St. at 171. This Court reasoned that the relator had a remedy at law by way of appeal, and that he had exhausted that remedy. A writ for mandamus could not thereafter be used to overcome an unfavorable result on appeal. In contrast to *Gannon*, an appeal is not a remedy available to the Relators in the case at bar because they are attempting to enforce a judgment, not overcome a lower court's decision. Respondents' argument is wholly without merit.

3. Relators' Complaint for a Writ of Mandamus was timely filed. Respondents cite incomplete and misleading statutory authority in asserting that Relators' Complaint is time barred.

Respondents assert in their second affirmative defense, and Section B of their Motion that Relators' Complaint for a Writ of Mandamus is barred by a two-year statute of limitations pursuant to Ohio Rev. Code § 2744.04(A). Furthermore, Respondents assert in their third and fourth affirmative defenses and in their Motion that Respondents' Complaint should be denied for allowing an unreasonable amount of time to lapse, thus filing the Complaint to the prejudice of Respondents, and on the basis of waiver, estoppel, and laches. In asserting the foregoing, Respondents make an incomplete and misleading citation to Ohio Rev. Code § 2744.04(A), and distort the facts of this matter in making the flawed equitable argument that they are prejudiced by delay. As further explained below, (1) Ohio Rev. Code § 2744.04(A) is not the applicable statute of limitations for this case, (2) Relators' complaint for a writ of mandamus was timely filed, and (3) Respondents are not prejudiced by the timing of Relators' complaint for a writ of mandamus.

a. Respondents cite incomplete and misleading statutory authority in support of their claim that Relators' complaint for a writ of mandamus is time barred.

Respondents cite Ohio Rev. Code § 2744.04(A) claiming that “**all actions**” against an Ohio political subdivision must be filed within two years after a cause of actions accrues. Respondents have omitted from their rendition of Ohio Rev. Code § 2744.04(A) the salient qualifying language that causes it to be inapplicable to the case *sub judice*. In reality, Ohio Rev. Code § 2744.04 states as follows:

[a]n action against a political subdivision *to recover damages for injury, death, or loss to person or property* allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code.

(Emphasis added). At one time, Relators had a tort action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function as contemplated by Ohio Rev. Code § 2744.04(A). Relators timely pursued that action as an original action in the underlying case, Case No. 519-CIV-01. Pursuant to an exception to the general immunity of political subdivisions (i.e., acting in a reckless manner as set forth in Ohio Rev. Code § 2744), the result of that tort case is the Judgment on which Relators seek to collect in this case. This case is not a direct action to recover damages for injury, death, or loss to person or property. Rather, this case is an action in mandamus to collect on a judgment already obtained against a political subdivision, which procedure is specifically provided for in Ohio Rev. Code § 2744.06. Because Respondents have failed to perform their duties as set forth in Ohio Rev. Code §

2744.06, Relators have been forced to file this action in mandamus. The statute of limitations cited by Respondents, Ohio Rev. Code § 2744.04(A), has no application to the case *sub judice*.

b. Depending on the circumstances, Relators had between at least six years, and ten years to commence the case *sub judice*, and thus, Relators' complaint for writ of mandamus was timely filed.

“Mandamus actions are subject to statutes of limitations.” *State ex rel. R.T.G., Inc. v. State* (2001), 141 Ohio App. 3d 784, 792 (citing *State ex rel. Gingrich v. Fairfield City Bd. of Ed.* (1985), 18 Ohio St. 3d 244, 480), *partially overruled on other grounds by State ex rel. R.T.G., Inc. v. State*, 2002-Ohio-6716. However, “[c]hapter 2731 (mandamus) [does not] contain[] a statute of limitations.” *State ex rel. R.T.G., Inc. v. State*, 2002-Ohio-6716 at ¶27, *partially overruling State ex rel. R.T.G., Inc. v. State* (2001), 141 Ohio App. 3d 784, 792. Therefore, “[i]n determining which statute of limitations applied to the particular mandamus action . . . , the Supreme Court looked for the most analogous statute of limitations.” *State ex rel. R.T.G., Inc.*, 141 Ohio App. 3d at 792. The most analogous statute of limitations to this judgment collection case is Ohio Rev. Code § 2325.18, which provides a ten year limit on the revivor of judgments.

“While . . . there are no statutes prescribing limitations on the enforcement of judgments or actions thereon, there are statutes prescribing when judgments of courts of record become dormant and how and within what period of time such judgments may be revived. These are in the nature of statutes of limitation on the judgments to which such statutory provisions apply.” *De Camp v. Beard* (1953), 94 Ohio App. 367, 371. “Ohio courts have held that, in order to bar the revivor of a judgment, the debtor must show ‘the judgment has been paid, settled or barred by the statute of limitations.’” *Dillon v. Four Dev. Co.*, 2005-Ohio-5253, ¶17 (6th Dist. Ct.

App.) (citations omitted). The statutorily prescribed period for filing a revivor action is ten years. See Ohio Rev. Code § 2325.18. In other words, so long as the judgment is valid (i.e., not dormant and not beyond the time for revivor), the judgment holder may pursue collection. The January 2, 2003 judgment from *Miles et al. v. Booth*, Case No. 519-CIV-01 of the Pike County Court of Common Pleas, which is the subject of this collections case, has never gone dormant, and is well within the time to be revived if that were to later become necessary.

There are two additional statutes of limitation that are potentially analogous to the case *sub judice*, and the timing of the filing of Relators' complaint complies with both. First, Ohio Rev. Code § 2305.07 states that "an action upon . . . a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Relators' Complaint for a Writ of Mandamus is based upon Ohio Rev. Code § 2744.06, which establishes the method for collecting tort judgments against political subdivisions, which are otherwise immune from traditional methods of collection. Upon Respondents failing to comply with Relators' demand to comply with Ohio Rev. Code § 2744.06, Relators commenced this action in mandamus. Relators cause of action did not accrue until February 22, 2008, which is the date Respondents failed to comply with Relators' request for payment pursuant to Ohio Rev. Code § 2744.06. See Ex. B to Complaint. Nevertheless, the earliest date possible for Relators' cause of action to accrue is the date judgment was rendered against Respondents, which was January 2, 2003. Relators' mandamus action was filed well within six years of January 2, 2003.

Second, Ohio Rev. Code § 2305.14 provides a ten-year limit when no other statute of limitations applies. In the event the limitations period for the revivor of judgments is not the most analogous statute of limitations, and in the event the limitations period for liability created

by statute (in this case the statutorily prescribed procedure for collecting judgments against political subdivisions set forth in Ohio Rev. Code § 2744.06) is not the most analogous statute of limitations, the default limit is Ohio Rev. Code § 2305.14. Again, Relators' Complaint for a Writ of Mandamus was filed well within ten years of their cause of action accruing, even if the earliest possible trigger date is used in calculating. Relators' complaint for writ of mandamus was timely filed.

c. Respondents are not prejudiced by the timing of Relators' complaint for a writ of mandamus

Respondents assert in their third and fourth affirmative defenses that Relators' complaint should be denied for allowing an unreasonable amount of time to lapse before filing the complaint, which Respondents generally claim prejudices them. Accordingly, Respondents claim the affirmative defenses of waiver, estoppel, and laches. However, Respondents fail to articulate how the timing of the filing of Relators' complaint prejudices them. This is because Respondents are in no way prejudiced by the timing of the filing of Relators' Complaint for a Writ of Mandamus.

Respondents acknowledge that they have had notice of Relators' underlying claim and their ongoing efforts to collect their Judgment. (Resp't Mot. at p. 5 and 6). Yet, Respondents occasionally feign having no knowledge of Relators' attempts to collect their judgment. (Resp't Mot. at p. 10). While the specific methods utilized by Relators in collecting their Judgment have changed, and previous attempts may have been abandoned, it is patently clear that Respondents have had actual and constructive knowledge of Relators' claim and attempts at collection since the date their complaint was filed in the underlying case, *Miles et al. v. Booth*, Case No. 519-CIV-01 of the Pike County Court of Common Pleas.

In support of their allegation that too much time has passed since the date of judgment to the filing of Relators' complaint for mandamus, Respondents cite *State ex. rel. Smith v. Witter*, an Ohio Supreme Court case from 1926. *State ex. Rel. Smith v. Witter*, is easily distinguishable from the case *sub judice*. In *State ex. Rel. Smith v. Witter*, the relator was fired from his position as director of the Department of Industrial Relations. 114 Ohio St. 357. The relator waited over two years after his last communication with the respondent to file his mandamus action. Furthermore, the relator attempted to take advantage of his own delay by seeking back-pay for the full amount of his salary during the period of time that he was discharged from the Department. *Id.* at 358. The Court held that the Department would be prejudiced if relator was permitted to use a judgment ordering restoration as a basis for recovering compensation that had accrued for over two years as a result of relator's own delay in bringing the mandamus action. *Id.* at 359.

Contrary to *State ex. Rel. Smith v. Witter*, Relators in the case *sub judice* have had no significant gaps or delays in their assertions that Respondents are responsible for satisfying the Judgment. In the case at bar, Relators obtained a judgment with Respondents' full knowledge, and have brought this mandamus action to collect on the Judgment. In fact, Respondents acknowledge in their motion that Relators have been continuously attempting to collect on their Judgment with much resistance by Respondents.

This Court has previously approved of a mandamus action to collect on judgments when the mandamus action was filed several years after the underlying judgment was filed. *See State ex rel. Shimola*, 70 Ohio St. 3d. In *State ex rel. Shimola*, the relator obtained his judgment from the trial court in 1990, and then successfully brought his mandamus action in 1994.

Respondents claim that Relators' timing in filing their complaint for writ of mandamus precludes them from filing a motion to set aside the judgment pursuant to Ohio R. Civ. P. 60(B)(1). Relators' Complaint for a Writ of Mandamus is the enforcement of a right that has existed since the date the trial court entered judgment against Respondents. Relators have made clear to Respondents their position that Respondents are responsible for the Judgment. Respondents have vehemently opposed Relators' attempts at collection. Respondents have had the ability to seek an order setting aside the judgment pursuant to Ohio R. Civ. P. 60(B) since the date the Judgment was entered. Respondents' suggestion that Relators should have assisted them in realizing this before the time ran for Respondents to file a motion pursuant to Ohio R. Civ. P. 60(B) is absurd.

4. Relators' judgment collection action in the case *sub judice* is not barred by res judicata or claim preclusion.

Respondents also assert in their fourth affirmative defense the defenses of res judicata and claim preclusion, without explanation or evidence in support. Relators' judgment collection action in the case *sub judice* is **not** barred by res judicata or claim preclusion. Relators have **not** obtained a judgment against the VOP subsequent to the underlying Judgment, and have **not** previously collected any money towards the satisfaction of the Judgment. While Relators deny that res judicata or claim preclusion bars their action to collect the Judgment from the VOP, it is apparent that Respondents plead the affirmative defenses of res judicata and claim preclusion solely as a means of preserving such affirmative defenses, and Respondents did **not** intend to obtain a motion for judgment on the pleadings based upon res judicata or claim preclusion.

5. Respondents' fifth affirmative defense relates to the merits of Case No. 519-CIV-01 of the Pike County Court of Common Pleas, and is not properly before this Court.

Respondents' fifth affirmative defense states that Relators' Complaint is barred by failure of service on the VOP Police Department in the underlying matter. Such affirmative defense solely address the merits of the Judgment award itself, and the original cause of action in the underlying case, *Miles et al. v. Booth*, Case No. 519-CIV-01 of the Pike County Court of Common Pleas, which is irrelevant to the pending action. **A decision on the merits of Case No. 519-CIV-01 of the Pike County Court of Common Pleas is not properly before this Court.**

6. Ohio Rev. Code Ch. 2744 does not bar Relators' cause of action, or provide a basis for granting Respondents' Motion for Judgment on the pleadings.

In Respondents' sixth affirmative defense, Respondents assert an immunity defense pursuant to Ohio Rev. Code Ch. 2744, the Political Subdivision Tort Liability Act. To the extent Respondents are asserting such affirmative defense relative to the original cause of action in the underlying case, Case No. 519-CIV-01, it is improperly before this Court. Nevertheless, Respondents have waived the affirmative defense of statutory immunity in the original cause of action in the underlying case, Case No. 519-CIV-01. "Statutory immunity is an affirmative defense, and if it is not raised in a timely fashion, it is waived." *Turner v. Cent. Local Sch. Dist.* (1998), 85 Ohio St. 3d 95, 97; *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St. 3d 427. Nathaniel Todd Booth, on behalf of the VOP, did not raise immunity as an affirmative defense, and thus, it is waived.

Statutory immunity pursuant to Ohio Rev. Code Ch. 2744 may be asserted as an affirmative defense in the case at bar, however, it does **not** bar Relators' cause of action, or

provide a basis for granting Respondents' motion for judgment on the pleadings. In fact, as explained in greater detail above in Section II(B)(2), pursuant to Ohio Rev. Code § 2744.06, the VOP is statutorily immune from execution, judicial sale, garnishment, and attachment to satisfy the Judgment, which is the reason why Relators have no plain and adequate remedy in the ordinary course of the law to enforce their Judgment against the VOP, and why Relators' action for a writ of mandamus is the appropriate means of collecting the Judgment.

Because Respondents fail to establish in their Answer and documents attached thereto that it is beyond doubt from the Complaint that Relators can prove no set of facts entitling them to relief after construing all material factual allegations in the Complaint and all reasonable inferences therefrom in Relators' favor, Respondents motion for judgment on the pleadings must be denied as a matter of law.

C. IT IS WELL SETTLED IN OHIO THAT WHEN A JUDGMENT IS RENDERED AGAINST AN OFFICER OF A MUNICIPAL CORPORATION IN HIS OFFICIAL CAPACITY, IN MATTERS TO WHICH HE IS ENTITLED TO REPRESENT IT, THE JUDGMENT IS BINDING AGAINST THE MUNICIPAL CORPORATION, OR ANOTHER OFFICER REPRESENTING THE MUNICIPAL CORPORATION.

Contrary to Respondents' unsupported argument in Section A of their Motion that Relators "did not obtain a judgment against the VOP in Case No. 519-CIV-01," Relators were granted a judgment against the VOP through its Chief of Police on January 2, 2003. *See* Ex. A to Complaint. It is "well settled in Ohio . . . that when a judgment is rendered . . . against an officer of a municipal corporation in his official capacity, in matters to which he is entitled to represent it, the judgment is binding against the [municipal] corporation, or another officer representing the [municipal] corporation. *State, ex rel. Gill v. Winters*, (1990), 68 Ohio App. 3d 497, 504; *Ohio Fuel Gas Co. v. City of Mt. Vernon* (1930), 37 Ohio App. 159, 169. The foregoing "is in

accordance with the great weight of authority.” *State, ex rel. Gill*, 68 Ohio App. 3d at 504. “It will not do to allow parties in interest to fight their legal battles over the shoulders of a public officer and then claim that the judgments are not binding upon them because they were not parties nor privies.” *Ohio Fuel Gas Co.*, 37 Ohio App. at 168.

In *State, ex rel. Gill*, an individual was granted a peremptory writ of mandamus against the Mayor of the City of Wellston ordering the Mayor to appoint the individual relator to the position of Second Assistant Fire Chief, and that the Mayor pay the individual the amount of damages sustained and costs. 68 Ohio App. 3d at 500. On appeal, the Mayor argued that because the Mayor was the only one sued, neither the City of Wellston nor the City’s other officers were bound by the order granting the peremptory writ of mandamus. *Id.* at 504. The court disagreed and held that, contrary to the Mayor’s argument, “it appears well settled in Ohio . . . that when a judgment is rendered . . . against an officer of a municipal corporation in his official capacity, in matters to which he is entitled to represent it, the judgment is binding against the [municipal] corporation, or another officer representing the [municipal] corporation.”

The Judgment was rendered against Nathaniel Todd Booth **individually, and in his capacity as Chief of Police of the VOP**. See Judgment Entry attached as Ex. C. to the Complaint (“the Court hereby finds that there is no genuine issue as to any material fact and that [Relators] are entitled to judgment as a matter of law as to the issue of liability against Nathaniel Todd Booth, both **individually and in his capacity as the Chief of Police of the [VOP]**.”) Furthermore, the Judgment was rendered against the Chief of Police of the VOP based upon matters to which he was entitled to represent the VOP. See Judgment Entry attached as Ex. A to the Complaint; Judgment Entry attached as Ex. C. to the Complaint (“the Court finds that while

[the Chief of Police of the VOP] was acting within the course and scope of his employment, [the Chief of Police's] acts or omissions in the investigation of this matter were conducted in a reckless manner, and reflected a reckless indifference to the rights of the families involved.”

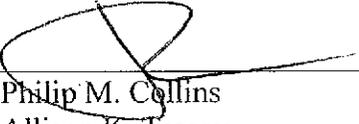
Because the Judgment was rendered against the Chief of Police of the VOP based upon matters to which the Chief of Police was entitled to represent the VOP, the Judgment is binding against the VOP, and Respondents have a clear legal duty to pay the Judgment, including judgment interest.

In an attempt to further support their argument that Relators have not obtained a judgment against the VOP, Respondents opted for a shotgun approach, setting forth alleged issues that have absolutely no relevance to the pending action. Essentially, Respondents set forth two arguments in support. The first argument relates to service of process of the complaint and summons in the underlying case, Case No. 519-CIV-01 of the Pike County Court of Common Pleas, and the second argument relates to immunity of the VOP relative to the original cause of action in the underlying case, Case No. 519-CIV-01. Respondents' arguments, however, attack the substance of the Judgment award, and the original cause of action in Case No. 519-CIV-01, rather than the sole issue pending before the Court – Judgment collection. Respondents are seeking a determination by this Court as to the merits of the underlying cause of action, wherein Relators obtained the Judgment. Consistent with this Court's holding that it is improper to seek a decision on the merits pursuant to a motion for judgment on the pleadings in a mandamus action, as opposed to attacking the sufficiency of the Complaint, Respondents are certainly prohibited from seeking a decision on the merits of the underlying case, Case No. 519-CIV-01 of

the Pike County Court of Common Pleas. See *State ex rel. Yiamouyiannis*, 65 Ohio St. 3d at 206.

III. CONCLUSION

For the reasons set forth above, Respondents' Motion for Judgment on the Pleadings must be denied as a matter of law because Respondents fail to establish that it is beyond doubt from the Complaint that Relators can prove no set of facts entitling them to relief after construing all material factual allegations in the Complaint and all reasonable inferences therefrom in Relators' favor.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the original foregoing *Memorandum in Opposition to Respondents' Motion for Judgment on the Pleadings* was duly served upon the following via regular U.S. mail, postage pre-paid, this 27th day of May, 2008:

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