

IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO

The STATE ex rel. )  
KENNETH GANLEY, Individually )  
c/o his Attorney )  
Morganstern, MacAdams & DeVito Co., L.P.A. )  
623 West Saint Clair Avenue )  
Cleveland, OH 44113 )

CASE NO. 2008-1755

PAUL RAMBASEK, Individually )  
c/o his Attorney )  
Morganstern, MacAdams & DeVito Co., L.P.A. )  
623 West Saint Clair Avenue )  
Cleveland, OH 44113 )

and )

**AMENDED COMPLAINT**  
**FOR WRIT OF MANDAMUS**

BRUNSWICK NISSAN, INC., )  
dba BRUNSWICK SUBARU )  
1633 Pearl Road )  
Brunswick, OH 44212 )

(Instructions for Service via Certified Mail)

Relators, )

vs. )

NINTH DISTRICT COURT OF APPEALS )  
c/o Presiding Judge Donna J. Carr )  
161 South High Street )  
Akron, OH 44308 )

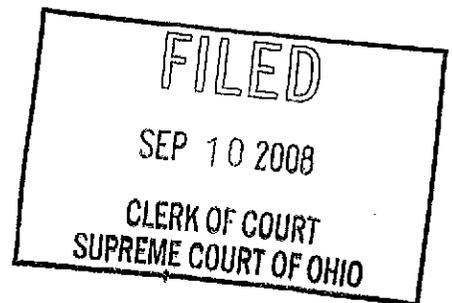
Respondent, )

JUDGE LYNN SLABY )  
161 South High Street )  
Akron, OH 44308 )

New Party Respondent, )

JUDGE CARLA MOORE )  
161 South High Street )  
Akron, OH 44308 )

New Party Respondent. )



## PARTIES AND JURISDICTION

1.1. The Relators Kenneth Ganley ("Ganley"), Paul Rambasek ("Rambasek"), and Brunswick Nissan, Inc., dba Brunswick Subaru ("Brunswick"), are individuals who reside and a corporate legal entity with its principal place of business in the State of Ohio.

1.2. Relators were appellants in the Respondent Ninth District Court of Appeals case captioned *Kenneth Ganley, et al. v. Subaru of America, et al.*, Medina County Court of Appeals, Ninth Appellate District, Case No. 07-CA-0092-M, which resulted in a two-to-one (2-1) July 21, 2008, Decision and Journal Entry.

2.1. Respondent Ninth District Court of Appeals ("Ninth District") is an Ohio appellate district court, consisting of five (5) appeal judges, in which the Relators' appellate litigation from the Medina Court of Common Pleas was commenced, orally argued, and decided.

2.2. New Party Respondent Judge Lynn Slaby ("Slaby") is a Ninth District Court of Appeals Judge who was in the two-to one (2-1) majority of the July 21, 2008, Decision and Journal Entry.

2.3. New Party Respondent Judge Carla Moore ("Moore") is a Ninth District Court of Appeals Judge who was in the two-to one (2-1) majority of the July 21, 2008, Decision and Journal Entry.

2.4. Respondent Donna J. Carr is the Presiding Judge for the Respondent Ninth District Court of Appeals and issued a written **dissent** to the July 21, 2008, Decision and Journal Entry.<sup>1</sup> Presiding Judge Carr is a nominal party and named only in her capacity as the Presiding Judge for the Respondent Ninth District.

3. This Honorable Court has original jurisdiction over this action pursuant to the Ohio Constitution, Article IV, Section 2 (mandamus) and R.C. 2731.04.

4. The averments in this Amended Complaint for Writ of Mandamus are verified by the affidavit of the attorney for Relators, attached hereto, as required by S. Ct. R. X, Section 4(B) and R.C. 2731.04.

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<sup>1</sup> Judge Carr dissented and explained that she "would hold that the trial court improperly granted summary judgment to SOA and would sustain Dealers first three assignments of error and reverse the judgment of the trial court."

## STATEMENT OF FACTS AND LAW

5. On September 28, 2007, Relators Ganley, Rambasek, and Brunswick instituted an appeal from the Medina Court of Common Pleas to the Respondent Ninth District Court of Appeals ("Ninth District").

6. On December 4, 2007, Relators filed their Merit Brief with five (5) assignments of error and corresponding ten (10) issues presented for review, as required by the Appellate Rules.

7. On May 1, 2008, Relators appeared through their counsel for oral argument before Respondent Ninth District Court of Appeals.

8. On July 21, 2008, Respondents Ninth District, Slaby, and Moore issued their Decision and Journal Entry ("Decision") affirming the magistrate and trial court's sua sponte granting of a motion for summary judgment for Defendant Subaru of America, Inc ("SOA").

9. Respondents' Decision failed to address all the assignments of error (and issues presented for review) and give reasons in writing for its decision as required by law. App. R. 12(A).

10. On July 30, 2008, Relators filed the following three motions before the Respondent Ninth District Court of Appeals: (1) Application for Reconsideration Pursuant to Appellate Rule 26; (2) Motion for Hearing En Banc; and (3) Motion to Certify a Conflict.

11. On August 15, 2008, Respondent filed a reply in support of the three pending motions with Respondent Ninth District Court of Appeals.

12. On September 2, 2008, Respondents Ninth District, Slaby, and Moore issued a Journal Entry denying all three (3) of Relators' post-Decision motions.

## COUNT I

(Mandamus to Compel Determination and Written Decision as Required by App. R. 12)

13. Relators incorporate by reference all the averments set forth in paragraphs 1 through 12 above and as verified by attached affidavit of their counsel herein.

14. Appellate Rule 12(A)(1)(b) and (c) requires that every district court of appeal must “determine the appeal on its merits on the assignments of error set forth in the briefs” and “decide each assignment of error and give reasons in writing for its decision.”

15. In this matter, Relators properly raised five (5) assignments of error and ten (10) corresponding issues presented for review and legal determination before the Respondents Ninth District Court, Slaby, and Moore.

16. Respondents have failed to determine the appeal on the merits and decide each assignment of error (and issues presented for review) with reasons in writing as required by the Appellate Rule 12(A).

17. Pursuant to App. R. 12 and the controlling precedent of this Honorable Court, Respondents are legally required to decide all assignments of error and give a written decision. *State v. Kelly*, 103 Ohio St.3d 1461, 815 N.E.2d 677 (Table), 2004-Ohio-5056 and *Insurance Co. of North America v. Automatic Sprinkler Corp. of America* (1981), 67 Ohio St.2d 91, 97-98, 423 N.E.2d 151, 155-156.

18. The Relators have no plain and adequate remedy at law in the order and course of law, except to seek a writ of mandamus.

19. A writ of mandamus is necessary in order to require the Respondents Ninth District, Slaby, and Moore to perform their duties as set forth by App. R. 12(A) and controlling Ohio Supreme Court precedent. *Insurance Co. of North America v. Automatic Sprinkler Corp. of America, supra*.

20. The Relators request and order through a writ of mandamus directing Respondents Ninth District, Slaby, and Moore to determine and issue an opinion in writing regarding the assignments of error and issues presented for review but were never determined.

21.1. The following are the assignments of error and issues presented for review which were not determined by Respondents:

Assignment of Error I: The Trial Court Erred as a Matter of Law by Granting SOA's Motion for Summary Judgment

1. Issue Presented for Review: Whether a Trial Court Errs in Granting Summary Judgment on the Basis of Res Judicata When the Prior Administrative Proceeding Was Not a Determination on the Merits [i.e., Jurisdiction and Mootness]
2. Issue Presented for Review: Whether a Trial Court Errs in Granting Summary Judgment on the Basis of Res Judicata When the Prior Administrative Proceeding Lacked Subject Matter Jurisdiction
3. Issue Presented for Review: Whether a Trial Court Errs in Granting Summary Judgment When the Prior Administrative Proceeding Was Voluntarily Dismissed, Pursuant to Civ. R. 41(A), and Accepted by the Administrative Tribunal Making it a Legal Nullity
4. Issue Presented for Review: Whether a Trial Court Errs in Granting Summary Judgment When the Moving Party Fails to Support its Motion Pursuant to the Mandates of Civil Rule 56(A) as Procedurally Deficient as a Matter of Law

Assignment of Error II: The Trial Court Erred as a Matter of Law by Granting SOA's Motion for Summary Judgment in Lieu of Ruling on the Legal Issue of Election of Remedies Stipulated to be Determined in the Agreed Scheduling Order

1. Issue Presented for Review: Whether a Trial Court Errs in Granting Summary Judgment When the Agreed Scheduling Order Was Limited to the Legal Question of Election of Remedies

Assignment of Error III: The Trial Court Erred as a Matter of Law and Deprived Appellants of Their Constitutional Rights of Due Process and Right to a Jury Trial

1. Issue Presented for Review: Whether a Trial Court Violated the Litigants' Constitutional Rights of Due Process by Failing to Hold a Hearing on the Merits Regarding Claims Which Can Only Be Determined in Common Pleas Court
2. Issue Presented for Review: Whether a Trial Court Violated the Litigants' Constitutional Right to a Jury Trial When it Summarily Disposes Causes of Action Which Can Only Be Determined on the Merits by the Common Pleas Court and Jury

Assignment of Error No. V: The Trial Court Erred as a Matter of Law by Failing to Maintain the Stipulated Temporary Restraining Order, Failing to Hold a Hearing on the Merits for an Injunction, and Failing to Grant an Injunction

1. Issue Presented for Review: Whether a Trial Court Errs in Failing to Hold an Injunction Hearing and to Grant an Injunction after Having a Stipulated Temporary Restraining Order in Place Between the Parties

21.2. Additionally, Relators raised the legal issue of judicial estoppel as another legal ground in support of their appeal before Respondents.

21.3. Relators raised the issue of judicial estoppel in their (1) Reply in Support of Merit Brief, (2) Notice of Supplemental Authority, (3) oral argument, and (4) Application for Reconsideration Pursuant to Appellate Rule 26.

21.4. The Respondents Ninth District, Slaby, and Moore **never** addressed the legal issue of judicial estoppel in their July 21, 2008, Decision and Journal Entry nor their September 2, 2008, Journal Entry denying the Application for Reconsideration.

22. Relators respectfully request that this Honorable Court issue a writ of mandamus requiring Respondents Ninth District, Slaby, and Moore to determine and write a decision and journal entry specifically addressing the enumerated assignments of error, issues presented for review, and the doctrine of judicial estoppel Relators set forth in their appeal, as required by law.

## COUNT II

### (Mandamus to Compel Hearing En Banc)

23. Relators incorporate by reference all of the previous averments in this Amended Complaint for Writ of Mandamus and as verified by the attached affidavit of their attorney.

24. In 2007, this Honorable Court has held that all district courts of appeals should hold a hearing en banc to resolve conflicts within the appellate districts. *In Re: J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484 at ¶ 18 ["Appellate courts are duty bound to resolve conflicts within the district through en banc proceedings."].

25. The Respondents' July 21, 2008, Decision was a two-to-one (2-1) opinion and contained a dissent by Presiding Judge Carr noting an internal conflict of decisions within the Ninth District Court of Appeals.

26. Presiding Judge Carr's dissent identified a conflict within the Ninth District Court of Appeals, regarding a sua sponte granting of a motion for summary judgment, with the decision of *Urda v. Buckingham, Doolittle & Burroughs, L.L.P.*, Ninth Dist. No. 22547, 2005-Ohio-5949, at ¶ 14.<sup>2</sup>

27. On July 30, 2008, Relators timely filed their motion for hearing en banc requesting that all five (5) judges of the Ninth District Court of Appeals review and determine the conflicts existing within the Ninth District Court of Appeals.

28. Relators also set forth two (2) other conflicts within the Ninth District Court of Appeals, which should be heard en banc and determined as required by the Supreme Court's controlling precedent.<sup>3</sup>

29. On September 2, 2008, Respondents Ninth District, Slaby, and Moore denied Relators' motion for a hearing en banc by all five (5) appellate judges in the Ninth District Court of Appeals.<sup>4</sup>

30. The Relators have no plain and adequate remedy in the order and course of law, except to seek a writ of mandamus.

31. The Relators respectfully request an order requiring Respondent Ninth District Court of Appeals to hold a hearing en banc to resolve the conflicts within the Ninth Appellate District, as set forth in Relators' motion for hearing en banc and reply in support of hearing en banc.

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<sup>2</sup> The Respondents' Decision also directly conflicts within the Ninth District on the same legal issue with the case of *Flood Co. v. St. Paul Fire & Marine Ins. Co.*, Ninth Dist. Nos. 21679 and 21683, 2004-Ohio-1599, at ¶ 12.

<sup>3</sup> Relators also identified conflicts between Respondents' Decision within the Ninth District regarding: (1) prior procedural determinations (i.e., jurisdiction and mootness) by another tribunal do **NOT** invoke the doctrine of res judicata because they are not a determination on the merits and (2) a Civ. R. 41(A) dismissal requires the prior action to be treated as if it had never been brought and cannot be used for the purposes of res judicata to bar a subsequent complaint.

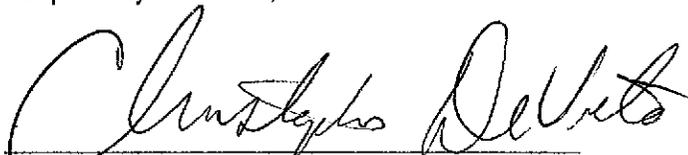
<sup>4</sup> Respondents Slaby and Moore questioned this Honorable Court's controlling precedence mandating an en banc proceeding to resolve internal conflicts within the appellate district courts. The Respondents then compounded their original errors of law and fact by AGAIN arguing that the prior administrative proceeding determination of (1) lack of subject matter jurisdiction and (2) mootness was a determination on the merits. However, NO LEGAL SUPPORT was cited by Respondents in their journal entry and conclusory factual statements.

**PRAYER FOR RELIEF**

WHEREFORE, Relators request this Honorable Court issue an order with the following relief:

- (A) A writ of mandamus compelling Respondents to perform their lawful duty to determine and decide in writing all assignments of error and issues presented for review, pursuant to App. R. 12(A);
- (B) A writ of mandamus compelling Respondents to hold a hearing en banc to resolve the three (3) conflicts within the Ninth District Court of Appeals, as required by the controlling precedence of this Honorable Court; and
- (C) Such other and further relief and remedy as appears to this Honorable Court to be appropriate and necessary to achieve justice.

Respectfully submitted,



Christopher M. DeVito (0047118)

Counsel of Record

Alexander J. Kipp (0081655)

Brian J. Seitz (0076634)

**Morganstern, MacAdams & DeVito Co., L.P.A.**

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Cleveland, OH 44113

(216) 687-1212 or 621-4244

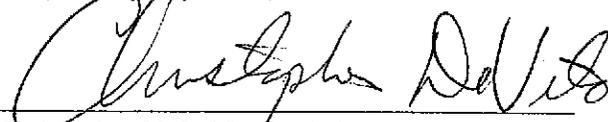
(216) 621-2951 - Facsimile

*Attorneys for Relators*

**INSTRUCTIONS FOR SERVICE VIA CERTIFIED MAIL**

Pursuant to Civ.R. 4.6(D), please issue ordinary mail service upon Judge Lynn Slaby, 161 South High Street, Akron, OH 44308, *New Party Respondent*; Judge Carla Moore, 161 South High Street, Akron, OH 44308, *New Party Respondent*; and Ninth District Court of Appeals, c/o of Presiding Judge Donna J. Carr, 161 South High Street, Akron, OH 44308, *Respondent*, via certified mail, through the Office of the Clerk of Court of the Ohio Supreme Court, with a copy of Plaintiffs' **Amended Complaint for Writ of Mandamus** and a copy of the Summons.

Respectfully requested,



Christopher M. DeVito (0047118)

Counsel of Record

Alexander J. Kipp (0081655)

Brian J. Seitz (0076634)

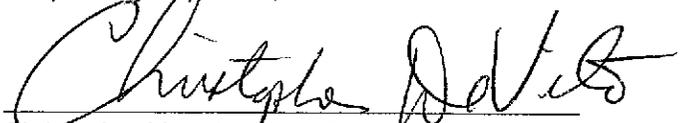
**Morganstern, MacAdams & DeVito Co., L.P.A.**

*Attorneys for Relators*

**PROOF OF SERVICE**

A copy of the foregoing **Amended Complaint for Writ of Mandamus** was sent via U.S. mail this 8<sup>th</sup> day of September, 2008, to the following: Ninth District Court of Appeals, c/o of Presiding Judge Donna J. Carr, 161 South High Street, Akron, OH 44308, *Respondent*.

Respectfully requested,



Christopher M. DeVito (0047118)

Counsel of Record

Alexander J. Kipp (0081655)

Brian J. Seitz (0076634)

**Morganstern, MacAdams & DeVito Co., L.P.A.**

*Attorneys for Relators*

STATE OF OHIO            )  
                                  )  
COUNTY OF CUYAHOGA    )

SS: AFFIDAVIT OF BRIAN J. SEITZ

I, Brian J. Seitz, am one of the attorneys for the Relators seeking an Amended Complaint for Writ of Mandamus against Respondents Ninth District Court of Appeals ("Ninth District"), Judge Lynn Slaby ("Slaby"), and Judge Carla Moore ("Moore").

1. I have personal knowledge of the facts and averments in the Amended Complaint for Writ of Mandamus as one of the attorneys for the Relators and from the public record maintained by Respondent Ninth District through its docket.

2. The Relators have no plain and adequate remedy at law for the relief they are seeking.

3. Respondents Ninth District, Slaby, and Moore are required by law to determine all assignments of error and issues presented for review and issue a decision in writing. App. R. 12(A).

4. Respondents Ninth District, Slaby, and Moore failed to comply with App. R. 12(A) on assignments of errors and issues presented for review during their appellate review and the July 21, 2008, Decision and Journal Entry.

5. Relators, through their counsel, have properly moved for an Application for Reconsideration and a Reply in Support noting the deficiencies of the Respondents and their legal requirement to perform their duties of issuing a written decision on all assignments of error.

6. On September 2, 2008, Respondents denied Relators' application for reconsideration.

7. Additionally, Respondents Ninth District, Slaby, and Moore are required to hold a hearing en banc to resolve internal conflicts within the appellate district, if there exists a panel of more than three (3) judges.

8. The Ninth District Court of Appeals consists of five (5) appellate judges.

9. Relators, through their counsel, timely moved for hearing en banc to resolve the three (3) conflicts within the Ninth District Court of Appeals through their July 21, 2008, Decision and Judgment Entry, as noted by the dissenting opinion by Presiding Judge Donna Carr.

10. On September 2, 2008, Respondents denied Relators' motion for hearing en banc.

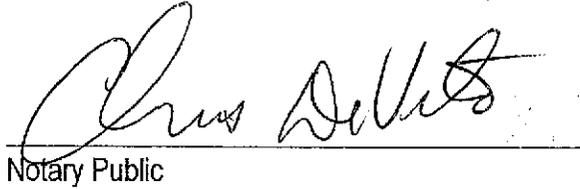
11. Relators have no plain and adequate remedy at law, except for a writ of mandamus to compel the Respondents to perform their duties of (1) determining and issuing a written opinion on all assignments of error and issues presented for review and (2) resolving internal conflicts within the Ninth Appellate District through an en banc proceeding.

FURTHER AFFIANT sayeth naught.



BRIAN J. SEITZ

SWORN TO BEFORE ME, and subscribed in my presence, this 8<sup>th</sup> day of September, 2008.



Notary Public

CHRISTOPHER M. DeVITO, Attorney at Law  
NOTARY PUBLIC — STATE OF OHIO  
My commission has no expiration date.  
Pursuant to O.R.C. 147.03