

IN THE SUPREME COURT OF THE STATE OF OHIO

STATE EX REL. KENNETH GANLEY, ) CASE NO.: 08-1755  
et al. )  
)  
Relators ) ORIGINAL ACTION IN  
) MANDAMUS  
vs. )  
)  
NINTH DISTRICT COURT OF )  
APPEALS, et al. )  
  
Respondents

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RESPONDENTS' MOTION TO DISMISS RELATORS' AMENDED  
"COMPLAINT" FOR WRIT OF MANDAMUS

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Respondents Ninth District Court of Appeals, Hon. Lynn Slaby, and Hon. Carla Moore, by and through undersigned counsel and pursuant to S. Ct. Prac. R. X(5) moves this Court to dismiss Relators' "complaint" for a writ of mandamus for failure to state a claim upon which relief can be granted. The basis for this motion is set forth in the attached memorandum in support.

Respectfully submitted,

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Prosecuting Attorney

*Corina Staehle Gaffney*

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**FILED**  
OCT 01 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

## MEMORANDUM IN SUPPORT

### I. STANDARD OF REVIEW

A court may dismiss a complaint pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted if, after taking all factual allegations contained in the complaint as true and all reasonable inferences made in the non-moving party's favor, it appears beyond doubt that the non-moving party can prove no set of facts warranting the requested relief in mandamus. State ex rel. Gilmour Realty, Inc. v. Mayfield Hts. (2008), 119 Ohio St.3d 11, ¶ 11. Courts may take judicial notice of appropriate matters when considering a motion to dismiss without having to convert the motion to dismiss to a motion for summary judgment. State ex rel. Church v. Court of Common Pleas (Ohio App. 9th Dist.), 1997 WL 72089, \*1; State ex rel. Neff v. Corrigan (1996), 75 Ohio St.3d 12, 16. Courts are permitted to take judicial notice of documents filed in other courts. Church, 1997 WL 72089, \*1.

### III. LAW AND ARGUMENT

#### A. Relator are not entitled to the extraordinary writ of mandamus.

In order to be entitled to a writ of mandamus, the petitioner must have a clear legal right to the relief prayed for, respondent must have a clear legal duty to perform the requested act, and petitioner must not have a plain and adequate remedy at law. State, ex rel. Westchester Estates, Inc. v. Bacon (1980), 61 Ohio St.2d 42, paragraph one of the syllabus.

1. **Relators do not have a clear, legal right to the requested relief.**

Relators aver that they are entitled to have an en banc hearing to resolve three alleged conflicts within the Ninth District Court of Appeals. Relators claim that a conflict exists between the decision entered in the underlying case herein, Ninth District Court of Appeals Case No. 07-CA-0092-M, Urda v. Buckingham, Doolittle & Burroughs, LLP., Ninth Dist. No. 22547, 2005-Ohio-5949, at ¶14, and Flood Co. v. St. Paul Fire & Marine Ins. Co., Ninth Dist. Nos. 21679 and 21683, 2004-Ohio-1599, at ¶12. Relators further claim that a conflict exists in 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.” Amended Complaint, p. 7, fn. 3.

With regard to the first alleged conflict, no conflict exists, as both Urda and Flood Co. stand for the proposition that a court may not sua sponte grant summary judgment. Nothing in the decision issued in the underlying case herein is in conflict with that legal proposition. The majority of the panel of the Ninth District Court of Appeals found that all claims were properly before the trial court for summary judgment consideration. *See* Ganley v. Subara of America, 2008-Ohio-3588; Journal Entry filed Sep. 8, 2008, attached hereto as Exhibit A. Judge Carr disagreed with the majority, believing that Subaru of America had not moved for summary judgment. This was a *factual* determination, not a legal one. Therefore, there is no conflict of law in the Ninth District Court of Appeals on the issue of a trial court granting summary judgment sua sponte.

With regard to the second claimed conflict, the Relators cite absolutely no cases in their “complaint” for writ of mandamus that they claim to be in conflict on the issue of when the doctrine of res judicata applies. However, assuming the Relators were referring to the cases cited in their motion for reconsideration, the decision in the underlying case herein is not in conflict with Perrine v. Patterson, 9<sup>th</sup> Dist. No. 22993, 2006-Ohio-2559; Fraternal Order of Police v. Akron, 9<sup>th</sup> Dist. No. 23668, 2007-Ohio-7033; or Robinson v. Springfield Local School Dist. Bd. of Educ. 9<sup>th</sup> Dist. No. 2006, 2002-Ohio-1382. Relators claimed in their motion for reconsideration that these cases stand for the proposition that res judicata is not applicable to prior jurisdictional determinations by other tribunals. However, as the Ninth District Court of Appeals found in its Journal Entry denying Relators’ motion for reconsideration (Exhibit A), in each of those cases the Court found that a decision had not been issued on the substantive merits. In the underlying case herein, the Court found that a decision on the merits *had been issued* in another tribunal, and that decision had preclusive effect against Relators. See Ganley v. Subara of America, 2008-Ohio-3588; Journal Entry filed Sep. 8, 2008.

Thus, Relators have failed to establish that they have a clear legal right to the relief requested, an en banc hearing, as they have not and cannot establish that a conflict of law exists in the Ninth District Court of Appeals, and therefore, their “complaint” should be dismissed.

**2. Respondents are under no clear, legal duty to perform the requested act.**

For the reasons stated above, the Respondents are under no legal duty to grant a rehearing en banc as there is no conflict of law within the Ninth District Court of Appeals. Therefore, Relators’ “complaint” should be dismissed.

**3. Relators have an adequate remedy at law.**

The Relators request that this Court grant them a writ of mandamus compelling the Ninth District Court of Appeals to “determine and decide in writing all assignments of error *and issues presented for review*, pursuant to App. R. 12(A).” Complaint, p. 8 (emphasis added). However, App. R. 12(A) does not refer to issues presented for review at all. Relators aver that the Respondents did not decide Assignments of Error I, II, III, and V of their appeal in the underlying case herein. Clearly, even if this were true (and it is not), the Relators would have an adequate remedy at law – an appeal – and in fact, the Relators have exercised that right in this Court, Case No. 08-1756.

Furthermore, the Ninth District Court of Appeals did in fact discuss and decide the Relators’ Assignments of Error I, II, and III together. **Ganley v. Subara of America**, 2008-Ohio-3588, ¶¶23-44. Respondents also decided Relators’ Assignment of Error V by finding that said assignment was moot based on its disposition of Assignments of Error I, II, and III, *pursuant to App. R. 12(A)(1)(c)*. **Id.** at ¶49.

Because the Relators have an adequate remedy at law, they are not entitled to a writ of mandamus, and their “complaint” must be dismissed.

**IV. CONCLUSION**

Relators have failed to demonstrate their right to a writ of mandamus. Accordingly, Respondents respectfully requests that the Court dismiss Relator's "complaint".

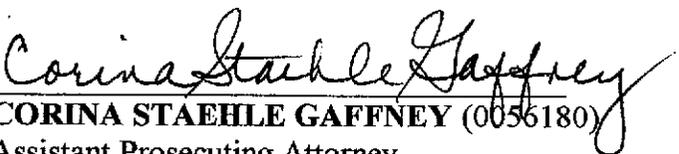
Respectfully submitted,

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Attorney for Respondents

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail Service to:  
**Christopher M. DeVito, Alexander J. Kipp, and Brian J. Seitz, Attorneys for Relators, at**  
623 W. Saint Clair Ave., Cleveland, OH 44113, this 29th day of September, 2008.

  
**CORINA STAEHLE GAFFNEY (0056180)**  
Assistant Prosecuting Attorney  
Attorney for Respondents

COPY  
COURT OF APPEALS, NINTH JUDICIAL DIST - STATE OF OHIO, MEDINA COUNTY, ss  
I hereby certify that this is a true copy of the original on file in said Court.  
Witness my hand and the seal of said Court at Medina, Ohio this 8th  
day of September 2008. Kathy Fortney, Clerk of Courts.

STATE OF OHIO )  
COUNTY OF MEDINA ) ss:

COURT OF APPEALS

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

08 SEP -2 PM 12:16

KENNETH GANLEY, et al.

FILED  
KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

C.A. No. 07-CA-0092-M

Appellants

v.

SUBARU OF AMERICA, et al.

Appellees

JOURNAL ENTRY

Appellants, Kenneth Ganley, Paul Rambasek, and Brunswick Nissan, Inc. (dba Brunswick Subaru) have filed with this Court motions: (1) seeking an en banc hearing; (2) for reconsideration; and (3) to certify a conflict. Appellee, Subaru of America ("SOA") responded to all three motions. Appellants' motions are denied.

With respect to appellants' motion for an en banc hearing, this Court first notes that no mechanism exists in this district to perform such a review. Moreover, while the Ohio Supreme Court has opined that intra-district conflicts should be resolved through en banc proceedings, such a procedure is arguably in tension with the Ohio Constitution. See *McFadden v. Cleveland State Univ.*, 10th Dist. No. 06AP-638, 2007-Ohio-939, at ¶8.

Assuming arguendo that an en banc proceeding is constitutional, we find no intra-district conflict exists. Our opinion in this case is not in conflict with our opinion in *Urda v. Buckingham, Doolittle & Burroughs, L.L.P.*, 9th Dist. No. 22547, 2005-Ohio-5949. In *Urda*, we held that the trial court's opinion was not final and appealable because the trial court did not grant summary judgment on all claims and could not have done so because appellee had not moved for summary judgment on all claims. *Id.* In the instant matter, we found that all claims were properly before the court for summary judgment consideration.

Exhibit A

Likewise, our opinion is not in conflict with *Perrine v. Patterson*, 9th Dist.No. 22993, 2006-Ohio-2559; *Fraternal Order of Police v. Akron*, 9th Dist. No. 23668, 2007-Ohio-7033; or, *Robinson v. Springfield Local School Dist. Bd. of Educ.*, 9th Dist. No. 2006, 2002-Ohio-1382, which appellees purport to stand for the proposition that “res judicata is not applicable to prior jurisdictional determinations by other tribunals.” In each of the cases cited by appellants, we found that a decision had not been issued on the substantive merits. In the instant matter, we found that the OMVDB had issued a decision on the merits and therefore, that decision had preclusive effect against Ganley and those in privity with Ganley, i.e., Rambasek and Brunswick Subaru.

Finally, our opinion is not in conflict with any of the cases cited by appellants for the proposition that 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.” In the instant matter, we acknowledged that appellants Rambasek and Brunswick Subaru had dismissed their actions before the OMVDB and did not base our analysis on OMVDB’s opinion related to Rambasek or Brunswick Subaru. Instead, we held that because appellant Ganley had not dismissed his action before the OMVDB and the OMVDB reached a decision on the merits as to Ganley, the substance of that particular decision barred appellees’ claims before the trial court based on res judicata and/or collateral estoppel. The motion for a rehearing en banc is denied.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117. Upon review of appellants’ motion, we find no obvious error or issue that we did not properly consider.

In their lengthy motion for reconsideration, appellants reiterate the arguments rejected by this Court in our initial decision: (1) that the trial court erred in granting summary judgment on the basis of res judicata where the hearing before the OMVDB was not a hearing on the merits; (2) that the trial court erred in granting summary judgment based on res judicata when the OMVDB did not have subject matter jurisdiction; (3) that the trial court erred in granting summary judgment when Rambasek and Brunswick Subaru had voluntarily dismissed their claims before the OMVDB; (4) that the trial court erred in granting summary judgment when SOA failed to support its motion as required by Civ.R. 56(A); (5) that the trial court erred in granting summary judgment beyond the bounds of the June 26, 2007 scheduling order; (6) that the trial court violated appellants' due process and constitutional rights; and (7) that the trial court erred in failing to hold an injunction hearing after the stipulated restraining order expired. As our decision fully addressed each of appellants' first six arguments and found the seventh argument moot based thereon, appellants have not pointed this Court to an issue we failed to consider or to an obvious error of this Court. Rather, they assert that this Court was simply wrong in its decision. Accordingly, the motion for reconsideration is denied.

Finally, Appellees have requested that this Court certify a conflict. Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment \*\*\* is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. Further, App.R. 25(A) requires that "[a] motion under this rule shall specify the issue proposed for certification."

In their motion, appellants proposed certification on three issues.

1. “Whether a prior ‘evidentiary hearing’ on subject matter jurisdiction and a holding of mootness is a trial on the merits for the purposes of the application of res judicata and collateral estoppel?”

Appellees assert that our decision is in conflict with *Capital One Bank v. Wooten*, 169 Ohio App.3d 13, 2006-Ohio-4848, at ¶8-9 and *State, Dept. of Mental Health v. Reynolds* (Sept. 23, 1982), 10th Dist. No. 82AP-248. We hold that no conflict exists.

In *Capital One Bank*, the Third District Court of Appeals affirmed the trial court’s denial of plaintiff’s right to voluntary dismiss its claim finding that a party’s *absolute right* to voluntarily dismiss under Civ.R. 41(A) requires a written notice of dismissal, not simply an oral motion. In discussing the timing of the plaintiff’s oral motion, the court acknowledged that a party has an absolute right to dismiss before trial and that a “trial commences in a civil trial ‘when the jury is empaneled and sworn, or in a bench trial, at opening statements.’” The Third District then went on to note that plaintiff was entitled to voluntarily dismiss its claims because only an evidentiary hearing took place if proper procedure is followed. This holding is not in conflict with our decision because it relates to timing and means of filing a voluntary dismissal not to when a decision before an administrative board has res judicata effect.

Likewise, *State, Dept. of Mental Health* is not in conflict with our decision. In fact, the Tenth District Court of Appeals disagreed with appellant’s argument that “the prior judgment operated as a dismissal upon jurisdictional grounds, and that the portion of the prior judgment adjudicating the applicability of the statute of limitations was dicta and cannot be the basis for the application of the doctrine of res judicata.” *Id.* at \*2. While the court did acknowledge the general rule that, “the judgment of a court which lacks jurisdiction cannot be utilized to establish the defense of res judicata,” it found that the hearing at issue before the Court of Claims was a hearing on the merits and found “no merit

to appellant's further argument that the adjudication of the applicability of R. C. 2743.16 [statute of limitations] was 'incidental' and not directly before the court and, therefore, not conclusively determined." Id.

2. "When a tribunal determines it lack subject matter jurisdiction, is its judgment void ab initio and prohibits any res judicata or preclusive effect on a subsequent action?"

Appellees assert that our decision is in conflict with *Bungard v. Ohio Dept. of Job and Family Serv.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280, at ¶6, and *In Re Hards*, 175 Ohio App.3d 168, 2008-Ohio-630, at ¶51. We hold that no conflict exists.

In both *Bungard* and *In Re Hards*, the Tenth District Court of Appeals and Eleventh District Court of Appeals, respectively, acknowledge the general rule that "when the trial court lacks subject matter jurisdiction[,] \*\*\*its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable." *In Re Hards* at ¶51, quoting *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶12, quoting *State v. Swiger*, (1998), 125 Ohio App.3d 456, 462. Neither case, however, discusses the impact of this general rule vis-a-vis the application of res judicata. Moreover, we held that the OMVDB had jurisdiction and rendered a decision on the merits as to Ganley's claims, which decision barred Rambasek and Brunswick Subaru claims because they were in privity with Ganley.

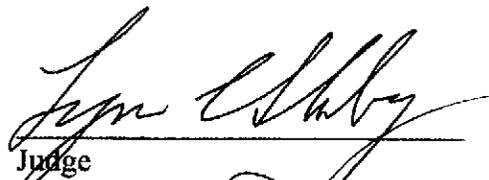
3. "Whether a trial court can sua sponte grant summary judgment on causes of action and remedies not delineated and moved for by the moving party?"

Appellees finally assert that our decision is in conflict with *HomEq Servicing Corp. v. Schwamberger*, 8th Dist. No. 07CA3146, 2008-Ohio-2478, at ¶14; *Patterson One v. Ahmed*, 6th Dist. No. \_\_\_\_\_, 2008-Ohio-362; *S. Cohn and Son Co., Inc. v. Kinstle*, 174 Ohio App.3d 81, 2007-Ohio-6237, at ¶4; *Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc.*, 10th Dist. No. 06AP-329, 2007-Ohio-380, at ¶13; *Ranallo v. FirstEnergy*

*Corporation*, 11th Dist. No. 2005-L-187, 2006-Ohio-6105, at ¶26; and *Eller v. Continental Investment Partnership*, 151 Ohio App.3d 729, 2003-Ohio-894, at ¶16. We find that no conflict exists.

Appellees argue that each of these case stands for the proposition that a trial court cannot grant summary judgment on claims not presented in the motion. As noted above, our decision held that all claims were properly before the trial court for summary judgment determination.

Appellees' motions are denied.



Judge



Judge