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I. INTRODUCTION AND SUMMARY

Respondents, in their merit brief, failed to respond to the substantive issues before this Court as set forth in Relators' complaint, memorandum in support of their complaint, and merit brief. Respondents have ignored Relators' the elements necessary for the issuance of a writ in mandamus and instead attempt to distract this Court from the narrow matter before this Court (judgment collection) with incomplete and misleading authority. Respondents' merit brief is a regurgitation of the weak arguments they made in their motion to dismiss Relators' complaint. This Court did not grant Respondents' motion to dismiss, and this matter has proceeded to a determination on the merits.

As to the substantive issues in this case, Relators rely on their complaint, memorandum in support of their complaint, and merit brief, which establish Relators' right to a writ of mandamus. This reply brief is limited to responding to the off-the-mark issues raised by Respondents for the second time. As explained in more detail below, Respondents' arguments again fail because:

- a. A motion for relief from judgment pursuant to Ohio R. Civ. P. 60(B) or otherwise is not properly before this Court.
- b. The VOP made a voluntary appearance in the underlying case via its then Village Solicitor and thus the Judgment is valid and enforceable.
- c. 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.
- d. Ohio Rev. Code Ch. 2744 does not bar Relators' Complaint for a Writ of Mandamus.
- e. Relators have no plain and adequate remedy in the ordinary course of law to enforce the Judgment against the VOP.

For these reasons, and those set forth in Relators' complaint, memorandum in support of their complaint, and merit brief, Relators request that this Court issue a writ of mandamus ordering Respondents to satisfy in full the principal amount of the Judgment (\$837,518.22), plus judgment interest from January 2, 2003 to the date the Judgment is paid, in the manner set forth in Ohio Rev. Code § 2744.06(A).

II. LAW AND ARGUMENT

A. A motion for relief from judgment pursuant to Ohio R. Civ. P. 60(B) or otherwise is not properly before this Court.

Respondents' first and second propositions of law essentially argue that this Court should address the merits of the case underlying the Judgment upon which Relators seek to collect in the case *sub judice*. The merits of the underlying case, which is *Miles et al. v. Booth*, Case No. 519-CIV-01 of the Pike County Court of Common Pleas, are irrelevant to this case. For purposes of judgment collection in the case *sub judice*, the only significance of the underlying case is that the Judgment exists. To set aside the Judgment, Respondents must first affirmatively make that request in the proper form and forum. The Fifth District Court of Appeals has made this clear when it held the following:

a party cannot collaterally attack an underlying judgment in an ancillary action which is instituted to aid in the execution of said judgment. In their Brief to this Court, appellants assert that 'a void court order may be attached [sic] and impeached at anytime, either by a direct or collateral proceeding.' *
*** * In support of this proposition, appellants cite Lincoln Tavern, Inc. v. Snader (1956), 165 Ohio St. 61, 133 N.E.2d 606. Appellants have misread Lincoln Tavern. Lincoln Tavern involved a direct attack upon a final judgment via a petition to vacate. After a careful review of the case, we find appellants' reliance thereon misplaced.**

Saker v. Barton, 1997 Ohio App. LEXIS 5909 (5th Dist. Ct. App. 1997) (emphasis added). Just like the appellants in *Saker*, Respondents have cited *Lincoln Tavern* in their merit brief.

Respondents' reliance on *Lincoln Tavern* fails for the same reason it failed for the appellants in *Saker*. *Lincoln Tavern* involves a direct attack upon a judgment in the form of a petition to vacate, whereas *Saker* and the case *sub judice* involve an ancillary action by the judgment holder in aid of execution. Respondents have not affirmatively petitioned this Court to do anything; instead, Respondents have passively argued the merits of the underlying case as a defense to Relators' attempts at collection. Respondents do not have a claim, complaint, petition, motion, or any other affirmative request for relief pending in the case *sub judice*, nor would it be appropriate.

While it is interesting that Respondents have filed a motion to set aside the Judgment with the trial court in the underlying case, unless the Judgment is set aside,¹ the Judgment remains valid, enforceable, and subject to collection. "A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation." Ohio R. Civ. P. 60(B). Furthermore, as the court made clear in *Saker*, a collateral attack on the judgment based on it being void must be done affirmatively, not as a defense to attempts at collecting on the judgment. *Saker v. Barton*, 1997 Ohio App. LEXIS 5909 at *8.

Furthermore, a motion to set aside a judgment pursuant to Ohio R. Civ. P. 60(B) must be made to the court that issued the subject judgment. "A Civ.R. 60(B) application for relief must be made to the trial court that rendered the judgment from which relief is sought." *State ex rel. Sautter v. Grey*, 2007-Ohio-1831, at ¶31-33 (5th Dist. Ct. App.) (distinguished on other grounds). It is not proper for Respondents to request that this Court set aside the Judgment—this Court did not issue the Judgment, and the Judgment is not before this Court on appeal. The case *sub judice*

¹ It is unlikely that Respondents' Ohio R. Civ. P. 60(B) motion will be granted. Aside from the substantive reasons why the judgment should not be set aside (VOP made an appearance through its then solicitor, Anthony Moreleja), Respondents' motion was not timely filed. Respondents' motion was filed beyond the express one year time limit under Ohio R. Civ. P. 60(B)(1), (2), and (3), and was not filed in a reasonable time under Ohio R. Civ. P. 60(B)(5).

is a collections case that is ancillary to the underlying case in which the Judgment was issued. The only claim before this Court is Relators' complaint in mandamus requesting that this Court order Respondents to comply with their duties under Ohio Rev. Code § 2744.06(A). This Court lacks the authority under Ohio R. Civ. P. 60(B) to set aside the Judgment.

B. The VOP made a voluntary appearance in the underlying case via its the Village Solicitor and thus the Judgment is valid and enforceable.

As set forth above, a motion for relief from judgment pursuant to Ohio R. Civ. P. 60(B) or otherwise is not properly before this Court. However, even if it the matter was properly before the Court, the issue is without merit because the VOP voluntarily made an appearance in the underlying case through its solicitor.

The VOP has asserted that the judgment obtained in the underlying case is void because proper service was never obtained on them. To the contrary, the trial court in the underlying case did have jurisdiction to enter a judgment against the VOP pursuant to this Court's ruling in *Maryhew v. Yova* (1984), 11 Ohio St. 3d 154.

In *Maryhew v. Yova*, this Court held that a court lacks jurisdiction to enter judgment against a defendant where effective service of process has not been made upon that defendant *and* the defendant has not appeared in the case or waived service. *Id.* at 156-57. Specifically, this Court held that

[i]n order for a judgment to be rendered against a defendant when he is not served with process, there must be a showing upon the record that the defendant has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense. *Id.*

The VOP voluntarily submitted itself to the trial court's jurisdiction in the underlying case. This was certified on the record in the Judgment Entry signed by Judge Holt on November 14, 2002. *See Ex. A.* The Judgment Entry filed on November 14th in the underlying case states "[t]he Defendant was

advised on July 8, 2002, at a pretrial conference attended by Mr. Apel, Mr. Moraleja, Attorney for the Village of Piketon, and the Defendant, the Court directed Defendant to discuss the matter of counsel with Mr. Moraleja”

The Judgment Entry demonstrates that the VOP made an appearance in the underlying case through its then Solicitor Anthony Moraleja. Pursuant to this Court's ruling in *Maryhew*, the VOP's voluntary appearance through its solicitor defeats Respondent's argument that the underlying judgment is void. The Pike County Court of Common Pleas had jurisdiction to enter the judgment, and Relator is now entitled to collect on that judgment.

C. Relators' Complaint for a Writ of Mandamus was timely filed.

Respondents assert 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 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.

1. 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 omitted/failed to disclose in 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 an action in tort 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*.

2. 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 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.

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

Respondents assert 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. 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 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. This is, however, further proof that the Judgment must not be set aside pursuant to Ohio R. Civ. P. 60(B) – Respondents admit that too much time has passed on their claim.

D. Ohio Rev. Code Ch. 2744 does not bar Relators' Complaint for a Writ of Mandamus.

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. None of the defendants in the underlying case raised immunity as an affirmative defense, and thus it was waived. Furthermore, the trial court made specific findings of liability pursuant to the exceptions contained in Ohio Rev. Code Chapter 2744.

E. Relators have no plain and adequate remedy in the ordinary course of law to enforce the Judgment against the VOP.

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,**

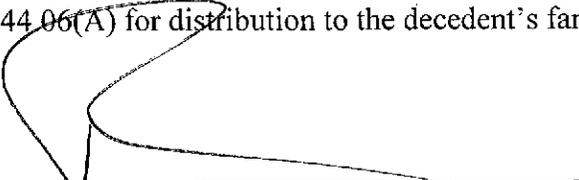
garnishment, or attachment to satisfy a judgment rendered against a political subdivision in a civil action to recover damages for injury, death, or loss to person or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary 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.* In 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 post-judgment 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.

III. CONCLUSION

For the reasons set forth above, and those set forth in Relators' complaint, memorandum in support of their complaint, and merit brief, Relators request that this Court issue a writ of mandamus ordering Respondents to satisfy in full the principal amount of the Judgment (\$837,518.22), plus judgment interest from January 2, 2003 to the date the Judgment is paid, in the manner set forth in Ohio Rev. Code § 2744.06(A) for distribution to the decedent's family.

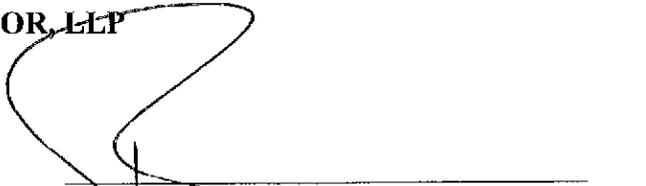


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the original foregoing *Relators' Reply Brief* was duly served upon the following via regular U.S. mail, postage pre-paid, this 5th day of Nov, 2008:

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Douglas C. Boatright
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Columbus, Ohio 43215



Philip M. Collins
Allison K. Tracey

APPENDIX

- I. November 14, 2002 Judgment Entry, Pike County Court of Common Pleas,
Case No. 519-CVI-01Ex. A



IN THE COURT OF COMMON PLEAS
PIKE COUNTY, OHIO

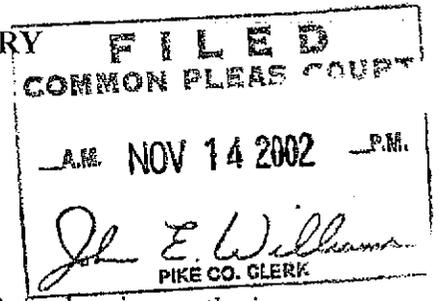
BETTY S. MILES, Individually
and as Administrator of the
Estate of Jerry D. Miles, et al.
Plaintiffs

CASE NO. 519-CIV-01
JUDGE BOLT-MEREDITH

vs

NATHANIEL TODD BOOTH,
Individually and in his
capacity as Chief of Police of
the Village of Piketon, Ohio
Defendant

JUDGMENT ENTRY



This matter came before the Court this 6th day of November, 2002, for hearing on the issue of damages, the Court having previously granted Plaintiffs' motion for summary judgment as to all liability issues against Defendant, Nathaniel Todd Boothe, individually and in is his official capacity as Chief of Police of the Village of Piketon, Ohio, on the 9th day of September, 2002.

Present were the Plaintiffs and their counsel, Margaret Apel Miller and Pat Apel. The Defendant contacted the Court by telephone and stated that he is ill and unable to attend the hearing and is not represented by counsel. The Defendant asked the Court for a continuance in this matter.

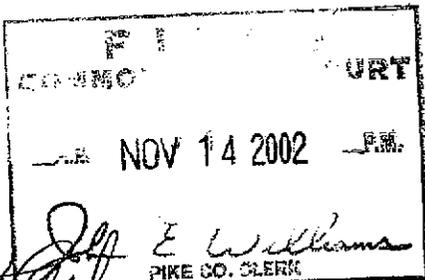
The Defendant was advised that on July 8, 2002, at a pretrial conference attended by Mr. Apel, Mr. Moraleja, Attorney for the Village of Piketon, and the Defendant, the Court directed Defendant to discuss the matter of counsel with Mr. Moraleja and was given thirty days to obtain counsel, either through the Village, the Village's insurer, or at his own expense, and/or file any memoranda contra Plaintiffs' motion for summary judgment, if he so chose. Defendant was further advised that his failing to have done so, summary judgment had been granted in favor of plaintiffs and that the issues to be determined by the Court involved damages. Defendant expressed his

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understanding thereof and advised the Court that he had called Mr. Moraleja's office about the matter but was told that Mr. Moraleja was no longer involved in the case.

Based upon the Defendant's oral motion to continue and the concurrence of the Plaintiffs, the Court finds said motion to be well taken. The motion is, hereby, granted, and the Defendant may obtain counsel if he so chooses. This matter is hereby scheduled for hearing on damages on the 18th day of December, 2002, at 1:15 p.m. All future requests for continuances must be in writing and filed in advance of the hearing date.

It is so ORDERED.



C. Bolt Meredith
JUDGE CASSANDRA S. BOLT-MEREDITH

[Signature]
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MARGARET APEL MILLER, #0041912
Attorneys for Plaintiffs

cc: Nathaniel Booth
Anthony Moraleja

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