

**IN THE SUPREME COURT OF OHIO**

DONALD KRIEGER, et al., )  
 )  
 Appellees, ) Case No. 2008-1463  
vs. )  
 ) On Appeal from the Eighth District  
 ) Court of Appeals, Cuyahoga County  
 ) Case Nos. 89314, 89428, and 89463  
CLEVELAND INDIANS BASEBALL )  
Co., et al., )  
 Appellant. )

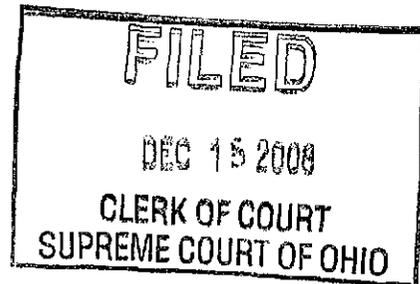
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**MOTION FOR RECONSIDERATION OF DENIAL OF DISCRETIONARY APPEAL OF PROPOSITIONS OF LAW II AND III OF APPELLANT CITY OF CLEVELAND**

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Now comes the Appellant City of Cleveland, by and through its undersigned counsel, pursuant to S. Ct. Prac. R. XI, §2,<sup>1</sup> and moves this Court to reconsider its decision made in this case on December 3, 2008, denying jurisdiction over the City of Cleveland’s propositions of law II and III. For the forthcoming reasons, Appellant therefore requests this Court to reconsider and accept the following issues for review, and for the following reasons that may not have been fully considered.

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<sup>1</sup> **Section 2. Motion for Reconsideration**  
(A) Except in expedited election cases under S.Ct. Prac.R. X., Section 9, a motion for reconsideration, may be filed within 10 days after the Supreme Court’s judgment entry or order is filed with the Clerk. In expedited election cases, a motion for reconsideration may be filed within three days after the Supreme Court’s judgment entry or order is filed with the Clerk and shall be served on the date of filing by personal service, facsimile transmission, or e-mail.  
(B) A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:  
(1) The Supreme Court’s refusal to grant jurisdiction to hear discretionary appeal;  
(2) The *sua sponte* dismissal of a case;  
(3) The granting of a motion to dismiss;  
(4) A decision on the merits of the case.

**A. Appellant's Proposition Of Law III<sup>2</sup> Presents An Issue of Great General Interest Concerning The Validity Of A Judgment Whose Jurisdiction Over A Party Has Never Been Acquired.**

**1. A Valid Judgment Cannot Be Rendered Where The Court Has Not Acquired Jurisdiction Over The Defendant.**

It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant.<sup>3</sup> Personal jurisdiction is obtained through service of process in accordance with Civil Rule 3(A).<sup>4</sup> Civil Rule 3(A) provides that an action is commenced when service has been effected upon a defendant within one year from the filing of the action. It is well-established that no action is commenced against a non-*sui juris* entity.<sup>5</sup> Further, in order for an amended complaint to relate back to an initially filed complaint, the action must be properly and timely commenced pursuant to Civil Rule 3(A).<sup>6</sup>

In this case, Appellees' action was filed against the Cleveland Police Department—a non-*sui juris* entity.<sup>7</sup> Service of summons and process was not accomplished on the Cleveland Police Department within one year.<sup>8</sup> Appellees re-filed their action against the Cleveland Police

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<sup>2</sup> Proposition of Law No. 3: Plaintiff fails to commence an action and is not entitled to the benefit of the savings statute when a plaintiff brings an action against a non *sui juris* division of the City; fails to name the correct legal entity for more than one year after being put on notice that they sued a non legal entity; re-files against the same non *sui juris* division and then seeks to name the City as a defendant without the issuance of a summons or service in accordance with Civil Rule 4(m).

<sup>3</sup> *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 157.

<sup>4</sup> *Id.* at 156-157.

<sup>5</sup> *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 574.

<sup>6</sup> *Mollette v. Portsmouth City Council*, 2008-Ohio-6342 at ¶ 10.

<sup>7</sup> R. 1, Complaint.

<sup>8</sup> R. 56, Certified Copies of Docket at Appendix A.

Department however, because the original action was never properly commenced, Appellees were not entitled to the benefit of Ohio's saving statute.

**2. No Action Is Commenced Where The Named Defendant Is Non-Sui Juris.**

In this case, jurisdiction was never acquired over the City of Cleveland. Appellees filed their first action against a non-*sui juris* entity—the Cleveland Police Department. Appellees were told they had improperly filed against a non-*sui juris* entity. Appellees did not even attempt to perfect service against the non-*sui juris* entity until more than one year after filing their action.<sup>9</sup>

Appellees then voluntarily dismissed their action against the non-*sui juris* entity.<sup>10</sup> They thereafter re-filed their claims again naming the non-*sui juris* entity—the Cleveland Police Department.<sup>11</sup> Appellees were again informed they had sued a non-*sui juris* entity. It was only then that Appellees sought to substitute the City of Cleveland as a defendant.<sup>12</sup> Clearly, jurisdiction was not acquired over the City of Cleveland. The decisions by the appellate and trial courts fail to recognize the fundamental due process requirement necessitating that jurisdiction be first acquired before a valid judgment may be entered. The Eight District's decision is contrary to recent Ohio Supreme Court authority establishing that compliance with Civil Rule 3(A) is a jurisdictional requirement.<sup>13</sup>

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<sup>9</sup> R. 56, Certified Copies of Docket at Appendix A.

<sup>10</sup> *Id.*

<sup>11</sup> R.1

<sup>12</sup> R. 36

<sup>13</sup> *LaNeve v. Atlas Recycling, Inc.*, 2008-Ohio-3921 at ¶¶ 8, 21-23.

**3. Two Published Opinions Have Issued Service Since Briefing Was Completed In This Matter That Address Service And Jurisdiction Issues And Direct A Different Outcome In This Case.**

On November 19, 2008, in *Mollette v. Portsmouth City Council*, the Fourth District appellate court, in a case substantially similar to the instant case, found that plaintiffs who sued an entity without the capacity to be sued and failed to amend and serve their complaint on a party with the capacity to be sued within the one year period, failed to commence the suit as required by Civil Rule 3(A).<sup>14</sup> The City of Portsmouth, as here, raised the defense that that City Council was not *sui juris* within the one-year period of Civil Rule 3(A). The Mollettes failed to amend their complaint and serve the City of Portsmouth within one year.<sup>15</sup> The Fourth District ruled that because the Mollettes did not serve their complaint on a party with a capacity to be sued within one year of filing the original complaint, the Mollettes failed to accomplish service as required by Civil Rule 3(A), and thus, failed to commence their action.<sup>16</sup>

*Mollette* is directly analogous to the present case. Like *Mollette*, Appellant gave actual notice to Appellees that the Cleveland Police Department was a non-*sui juris* entity that lacks the capacity to be sued. Appellees took no action within the one year period to properly name and serve a *sui juris* entity—the City of Cleveland.

Even upon the re-filing of the instant action, Appellees improperly named the Cleveland Police Department. In fact, Appellees did not even complete service on the Cleveland Police Department until more than one year after filing their complaint.<sup>17</sup> Further, Appellees did not

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<sup>14</sup> *Mollette v. Portsmouth City Council*, 2008-Ohio-6342 at ¶ 3.

<sup>15</sup> *Id.* at ¶ 45.

<sup>16</sup> *Id.* at ¶ 50.

<sup>17</sup> R. 56, Certified Copies of Docket at Appendix A.

name and serve an entity with the capacity to be sued (the City of Cleveland) for more than one year after brining the re-filed action.<sup>18</sup>

In *LaNeve v. Atlas Recycling, Inc.*, this Court once again stressed the necessity of complying with Civil Rule 3(A).<sup>19</sup> This Court stated that failing to perfect service “ultimately affects whether a court has personal jurisdiction over a defendant” and that “the obligation to perfect service of process is placed only on the plaintiff, and the lack of jurisdiction arising from want of, or defects in, process or in the service thereof is grounds for reversal.”<sup>20</sup> This Court further added that it is an established principle that that actual knowledge of a lawsuit’s filing and lack of prejudice resulting from the use of a legally insufficient method of service do not excuse a plaintiff’s failure to comply with then Civil Rules.<sup>21</sup>

In *Patterson v. V & M Auto Body*, this Court held that no action was commenced where the defendant was not an actual or legal entity.<sup>22</sup> The Court noted that Civil Rule 3(A) requires service within one year and where service may be initially be made upon an incorrectly named defendant, the name must be corrected.<sup>23</sup> Further, this Court held that that while the case law illustrates the liberality with which Ohio courts will permit amendments to cure defective

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<sup>18</sup> Id.

<sup>19</sup> *LaNeve v. Atlas Recycling, Inc.*, 2008-Ohio-3921 at ¶ 8.

<sup>20</sup> Id. at ¶ 22.

<sup>21</sup> Id. at § 22.

<sup>22</sup> *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 576.

<sup>23</sup> Id.

pleadings, “these holdings do not, however, stand for the proposition that amendments are unnecessary, that where defects appear they may be ignored.”<sup>24</sup>

**4. The Eighth District’s Decision Is In Direct Conflict With Other Ohio Authority Establishing That No Action Is Commenced Where The Named Defendant Is Non-Sui Juris And Is In Direct Conflict With The Authority Set Forth in *Mollette v. Portsmouth City Council* And *LaNeve v. Atlas Recycling, Inc.***

In this case, the Eighth District appellate court held that *attempted* service on a non-*sui juris* entity was a sufficient basis to conclude that Appellees had properly commenced their action. This holding is in direct conflict with the decisions in *LaNeve v. Atlas Recycling, Inc.* and *Mollette v. Portsmouth City Council*.<sup>25</sup>

The decisions in *LaNeve v. Atlas Recycling, Inc.* and *Mollette v. Portsmouth City Council* have both issued since the briefing was completed in this case.<sup>26</sup> Both authorities affirm the need to comply with Civil Rule 3(A) in order to obtain the jurisdiction necessary to support a valid judgment.<sup>27</sup> The decision in *Mollette* further discusses the need to name and serve a *sui juris* entity within the one year period set forth in Civil Rule 3(A).<sup>28</sup> Both decisions direct a different outcome in this case—judgment for Appellant.

The *Mollette* decision is consistent with this Court’s prior rulings and directs a different result than the one reached by the Eighth District. The Eighth District’s application of law and

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<sup>24</sup> Id. at 577.

<sup>25</sup> *LaNeve v. Atlas Recycling, Inc.*, 2008-Ohio-3921; *Mollette v. Portsmouth City Council*, 2008-Ohio-6342.

<sup>26</sup> Id. *LaNeve v. Atlas Recycling, Inc.*, 2008-Ohio-3921 (August 13, 2008); *Mollette v. Portsmouth City Council*, 2008-Ohio-6342 (November 19, 2008).

<sup>27</sup> *LaNeve* at ¶ 22; *Mollette* at ¶¶ 44-45, 50.

<sup>28</sup> *Mollette* at ¶ 44.

analysis of law regarding the interplay between Civil Rule 3(A) and 15(C) is directly at odds with the *Mollette* decision.

Appellant requests that this Court reconsider its decision denying proposition of law III, and take the opportunity to clarify an issue that clearly is of great importance to all civil litigation. This case presents the further opportunity to address the unavailability of Ohio's savings statute, R.C. § 2305.19, under circumstances where, as here, the initial action is never properly commenced by 1) naming a proper legal entity within the one-year requirement contained in Civil Rule 3(A) and 2) properly serving that legal entity within the same one year period.

**B. Appellant's Proposition Of Law II<sup>29</sup> Presents An Issue Of Great General Importance Regarding The Preservation Of Defenses That Are Both Raised In The Answer And Asserted Throughout The Litigation In Other Pleadings.**

Civil Rule 8(F) requires that "all pleading be so construed as to do substantial justice."<sup>30</sup> The record in this case clearly demonstrates that Appellant plead immunity under R.C. 2744 in its original and amended answers and throughout these proceedings.

It is well established, under Civil Rule 15(B), that when issues not raised by the pleadings are tried by express or implied consent, they shall be treated in all respects as if they had been raised in the pleadings. This Court in *State ex. rel. Evans v. Bainbridge Twp. Trustees*, has taken the following in consideration in determining whether the parties impliedly consented to litigate an issue: 1) whether the opposing party had a fair opportunity to address the tendered issue and 2) if the parties recognized the issue entered the case.<sup>31</sup>

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<sup>29</sup> Proposition of Law No. 2: The immunity defenses set forth in R.C. § 2744 et seq. are properly raised and preserved where the defenses are set forth in the answer and argued without objection throughout the case.

<sup>30</sup> O.C.R.P. 8(F)

<sup>31</sup> *State ex. rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, 45-46.

In the instant case, the record is clear that Appellees understood that the City had not waived immunity and in fact continued to argue this defense throughout the case. In the original case and in the instant case, immunity was listed throughout the City and its police officer's answers. Immunity was discussed extensively in the trial court's chambers during the settlement conference and final pre-trial. Immunity was set forth again in Appellant's motion in limine and argued throughout the trial of the case from the opening statements, at the close of Appellees' case and again at the conclusion of Appellant's case in chief.<sup>32</sup> The record reflects that throughout these proceedings Appellees were aware that R.C. Chapter 2744 was an issue. In fact, in response to the Appellant's immunity defense, Appellees never argued or asserted that the City had waived its statutory immunity by failing to plead immunity. To the contrary, Appellees continually argued that they had an exception to immunity.<sup>33</sup>

In light of the foregoing, it is clear from the record that Appellees recognized that the issue of immunity was in the case and Appellees had a fair opportunity to adequately address and argue the issue in the trial court. Civil Rule 15(B) expresses a liberal policy toward the allowance of amendments and was promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.<sup>34</sup>

In *Stafford v. Aces & Eights Harley-Davidson, LLC*, the court found that the defense of trespass was tried by implied consent even though the appellee had dismissed their trespass counterclaim several months before trial; however, a week before trial in its answers to

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<sup>32</sup> Tr. at 152-153, 566, 655-656.

<sup>33</sup> Tr. 157-159. See also, Appellees' Brief in Opposition to City's Motion in Limine.

<sup>34</sup> *Hall v. Bunn* (1984), 11 Ohio St.3d 118, 121.

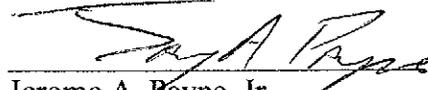
appellant's request for admissions re-raised the issue of trespass in one its responses.<sup>35</sup>

Appellees later brought up the trespass defense in its opening statement and although appellant later claims they were ill prepared to argue the trespass defense, the court indicated that the staff notes following Civil Rule 15(B), allows the court to grant a continuance when surprise or hardship is claimed.<sup>36</sup> In *Stafford*, appellants never asked for a continuance but argued that the trespass defense was a red herring.<sup>37</sup>

Here, there has been no surprise or hardship; rather, there has been a clear understanding by Appellees that the City's immunity was still an issue and that they had an exception to it. The Eighth District sustained the trial court's judgment on a legal theory that was not even argued by the Appellees. The Eighth District's unduly narrow reading of Appellant's defenses resulted in a gross miscarriage of justice and violate the spirit of Civil Rule 8(F). This issue is of obvious great general interest to all civil litigation. Thus, this Court should reconsider Appellant's proposition of law II regarding the preservation of the City's immunity defense.

Respectfully submitted,

Jerome A. Payne Jr., Counsel of Record



Jerome A. Payne, Jr.

COUNSEL FOR APPELLANT CITY OF CLEVELAND

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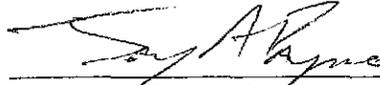
<sup>35</sup> *Stafford v. Aces & Eights Harley-Davidson, LLC* (April 10, 2006), 2006-Ohio-1780 at ¶ 26.

<sup>36</sup> *Id.* at ¶ 30.

<sup>37</sup> *Id.*

**Certificate of Service**

I certify that a copy of the Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, John J. Chambers, Jr., 22649 Lorain Road, Fairview Park, Ohio 44126; John J. Spellacy, 526 Superior Ave., N.E., 1540 Leader Building, Cleveland, Ohio 44144; and Sean P. Allan, 1300 The Rockefeller Building, 614 W. Superior Avenue, Cleveland, Ohio 44113 on December 15, 2008.



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