

IN THE SUPREME COURT OF OHIO

CASE NO. 2008-1463

DONALD KRIEGER, et al.,
Plaintiffs-Appellees,

-vs-

CLEVELAND INDIANS BASEBALL CO., et al.,
Defendant-Appellant.

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CASE NO. CA-07-89314, CA-07-89248, AND CA-07-89463

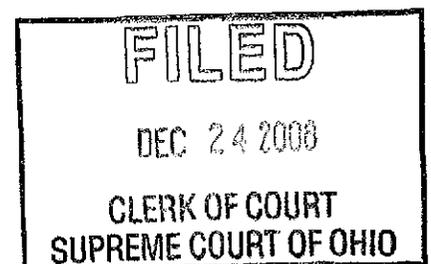
APPELLEES' RESPONSE TO APPELLANT'S MOTION FOR
RECONSIDERATION OF DENIAL OF DISCRETIONARY APPEAL

John J. Spellacy (Reg. No. 065700)
526 Superior Avenue, N.E.
1540 Leader Building
Cleveland, OH 44114
Phone: (216) 241-0520
Attorney for Plaintiff-Appellee Krieger

Joseph F. Scott (Reg. No. 0029780)
Jerome A. Payne, Jr. (Reg. No. 0068586)
601 Lakeside Avenue, Room 106
Cleveland, OH 44114
Phone: (216) 664-4332
Attorney for Defendant-Appellant
City of Cleveland

James Burke, Jr. (Reg. No. 0010306)
John J. Chambers (Reg. No. 0064627)
22649 Lorain Road
Fairview Park, OH 44126
Phone: (440) 777-6500
Attorney for Plaintiff-Appellee Oliver

Sean P. Allan, Esq. (Reg. No. 0043522)
1300 The Rockefeller Building
614 W. Superior Avenue
Cleveland, OH 44113
Phone: (216) 377-0598
Co-Counsel for Plaintiffs-Appellees,
Donald Krieger and Clifton Oliver



BRIEF

Appellant, The City of Cleveland ("the City"), asks this Court to reconsider its December 3, 2008 order accepting the City's discretionary appeal as to Proposition of Law #1. The City argues that this Court should have accepted jurisdiction with respect to Propositions of Law #2 and #3 as well.

As a matter of procedure, Appellees take issue with the propriety of the City's motion in light of S.Ct.Prac.XI §2(D), which mandates that a motion for reconsideration may only be filed with respect to, *inter alia*, the Supreme Court's **refusal to grant jurisdiction** to hear discretionary appeal...." (*Emphasis added*)

In this case, the Supreme Court did not refuse to grant jurisdiction to hear the City's appeal. Instead, this Court accepted jurisdiction, albeit not as to all the Propositions of Law proffered by the City. This being said, it is questionable as to whether this Court has the authority under S.Ct.Prac.R. XI(2) to reconsider an order accepting jurisdiction.

Assuming, *arguendo*, that such authority exists, it should not be exercised under the circumstances of this case. Under S.Ct.Prac.R. XI(2) this Court may grant a motion for reconsideration a jurisdictional order when persuaded "upon reflection" that the original decision has been made in error. State ex rel. Huebner v. W. Jefferson Village Council (1996), 75 Ohio St.3d 381, 383. This Court is not empowered to reconsider a prior decision where the request for the reconsideration is based largely upon claims that have already been made and rejected and constitute nothing more than a reargument of the case. State ex rel. Shemo v. Mayfield Hts., 2002-Ohio-4905.

The majority of City's brief in support of its request for reconsideration is akin to an apple that shows clear evidence of bite marks, *i.e.* a rehash of the City's Memorandum in Support of Jurisdiction as to Propositions #2 and #3.

The only difference between the prequel and the sequel is the reference to Mollette v. Portsmouth City Council, 2008-Ohio-6342(Ohio App., 4th Dist.) and LaNeve v. Atlas Recycling, 2008-Ohio-3921. However, both of these decisions were existent at the time this court issued the order accepting jurisdiction.

LaNeve v. Atlas Recycling, 2008-Ohio-3921 was decided by this Court nearly four months **before** it agreed to accept jurisdiction in this case and presumably was taken into consideration. Moreover, the certified conflict question in LaNeve centered upon whether a Plaintiff who has failed to comply with the personal service requirements of Civ.R. 15(D) after identifying a "John Doe" defendant could nonetheless rely upon the savings provisions of R.C. 2305.19(A). Although this court answered the questioning the negative, the facts of the matter at hand are inapposite.

Mollette v. Portsmouth City Council, *supra* a "split decision" from the Fourth District, involved a factual scenario that bears one similarity to the case at hand, *i.e.* the Mollette plaintiffs sued city department or authority as opposed to the City itself. However, this is where the similarity ends.

The majority in Mollette decision took great pains to point out that because the Portsmouth City Council was the **sole entity** sued, the lawsuit was never commenced or attempted to be commenced against any *sui juris* entity. Mollette at ¶13.

In the case *sub judice*, Appellees filed a lawsuit against the Cleveland Police Department and other *sui juris* entities, including Detective Ralph Peachman, the police officer who perpetrated the acts that gave rise to the jury verdict in favor of Appellees. Unlike in Mollette, Appellees did, in fact, commence the lawsuit against Detective Peachman, a *sui juris* entity, by obtaining valid service within the one year as required by Civ.R. 3(C). See. R. 56, Certified Copies of Docket attached as Exhibit A; *Cf.* Stone v. Adamini (Ohio App. 8th Dist.), 2004 Ohio 4.1

The City continually refuses to acknowledge this court's earlier decision in Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St.3d, that the filing of a lawsuit within the statute of limitations will constitute an attempt at commencement, for purposes of savings statute, despite the fact that a plaintiff may not obtain service of process upon the proper entity within one year of filing as required by Civil Rule 3(A).

In finding in Appellees' favor, the Eighth District addressed the interplay between Ohio Civ.R. 3(A) {commencement} and R.C. 2305.19(A) {the savings statute}. The Eighth District found that Appellees' filing of the lawsuit against the City of Cleveland and Detective Ralph Peachman constituted an "attempt at commencement" to avail Appellees of the benefits of savings statute. *Id* at 2008-Ohio-2183, ¶41

The Mollette decision does not involve or implicate the savings statute but instead analyzes the interdependence between Civ.R. 3(A) {commencement}, and Civ.R. 15(C) {relation back amendments}. Mollette did not address the issue as to

¹ Ironically, Appellees later voluntarily dismissed Detective Peachman in exchange for the City's assurance that it would answer for his actions—an assurance that the City later disavowed after the verdict.

whether a plaintiff can voluntarily dismiss a Complaint filed against a non *sui juris* entity and retain the right to and re-file against the correct legal entity.

Both the majority and the dissent in Mollette recognized this distinction by commenting upon the r Fourth District's earlier decision in Marcinko v. Carson, 2004-Ohio-3850 (Ohio App., 4th Dist.) Like the case at hand, the Marcinko decision involved a situation where the plaintiff attempted to commence a lawsuit against a non *sui juris* entity (a deceased individual), voluntarily dismissed the lawsuit pursuant to C.R. 41(A), and then refiled the lawsuit against the proper entity within the one-year time period provided in the saving statute.

Although the dissent felt that the Marcinko decision should dictate the outcome (¶54), the majority found that Marcinko was not controlling due to the fact that the initial lawsuit was dismissed and the decedent's estate was joined when the case was re-filed. (¶49) *Accord*, Husarcik v. Levi (Ohio App. 8th Dist.), 1999 WL 1024135.

Like Marcinko, Appellees in this case corrected the technical deficiency upon re-filing by amending the complaint to include the City of Cleveland as a party defendant.

Indeed, in an earlier appeal (Mollette went before the Fourth District Court of Appeals on three (3) separate occasions) the Fourth District recognized that the trial court in abused its discretion in denying the plaintiffs the opportunity to amend their complaint to substitute the City of Portsmouth and the individual council members for even though the statute of limitations had expired. Mollette ¶14, *citing* Mollette v. Portsmouth City Council, 2006-Ohio-6289 (Ohio App., 4th dist).

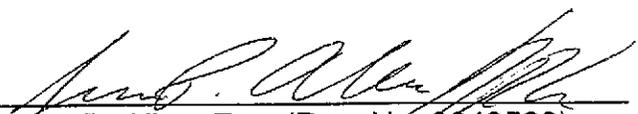
The City also argues that the Fourth District's decision in Mollette is in conflict with the Eighth District's decision in the case at bar. However, as noted above, the legal concepts discussed in these two cases are unique and are not in conflict. Moreover, if a conflict indeed exists, then a motion to certify the conflict would be more properly filed by counsel in the Mollette case, rather than counsel in the case at hand.

The City also argues that this Court should have accepted jurisdiction on Proposition of Law #2, involving the City's waiver of its R.C. 2744 affirmative defenses by failing to raise such defenses in an amended answer. However, this portion of the Motion for Reconsideration is simply a redux of the original Motion in Support of Jurisdiction and raises absolutely nothing new.

The cases cited by Appellees in Response to the City's Memorandum in Support of Jurisdiction are dispositive of the waiver issue. See: Turner v. Central School Dist. (1999), 85 Ohio St.3d 95; Jim's Steakhouse v. City of Cleveland (1998), 81 Ohio St.3d 18.

Based upon the foregoing, Appellees, Donald Krieger and Clifton Oliver, respectfully request this Court to enter an order denying the Appellant, The City of Cleveland's, Motion for Reconsideration.

Respectfully submitted,



Sean P. Allan, Esq. (Reg. No. 0043522)
Additional Counsel for Plaintiffs-Appellees,
Donald Krieger and Clifton Oliver
1300 The Rockefeller Building
614 W. Superior Avenue
Cleveland, OH 44113
(216) 377-0598



John J. Spellacy (Reg. No. 065700)
Attorney for Appellee Donald Krieger
526 Superior Avenue, N.E.
1540 Leader Building
Cleveland, OH 44114
Phone: (216) 241-0520



James Burke, Jr. (Reg. No. 0010306)
Attorneys for Appellee Clifton Oliver
22649 Lorain Road
Fairview Park, OH 44126
Phone: (440) 777-6500

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum has been served by ordinary U.S. Mail, postage prepaid, this 23rd day of December, 2008, upon:

Joseph F. Scott (Reg. No. 0029780)
Jerome A. Payne, Jr. (Reg. No. 0068586)
601 Lakeside Avenue, Room 106
Cleveland, OH 44114
Phone: (216) 664-4332
Attorney for Defendant-Appellant
City of Cleveland


Sean P. Allan, Esq. (Reg. No. 0043522)
Counsel for Plaintiffs-Appellees,
Donald Krieger and Clifton Oliver