
**IN THE SUPREME COURT OF OHIO
CASE NO. 2009-0403**

ERIKA KLEINFELD,

Plaintiff-Appellant

v.

THE HUNTINGTON NATIONAL BANK, et al.,

Defendants-Appellees.

Court of Appeals No. CA 090916

**DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO
APPELLANT ERIKA KLEINFELD'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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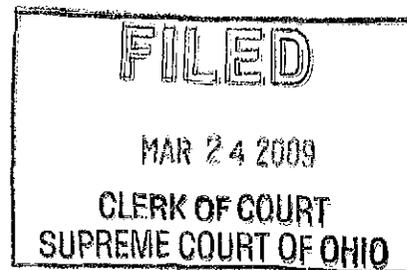


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When presented with a Civ. R. 12(B)(6) motion to dismiss, a reviewing court may not superimpose the evidentiary standards of Civ. R. 56 upon the pleading requirements governing Civ. R. 8, especially where the reviewing court bases its ruling on an improper disregard of summary judgment evidence.13

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Now comes The Huntington National Bank (“HNB”) and for its Brief in Opposition to Appellant Erika Kleinfeld’s (“Kleinfeld”) Memorandum in Support of Jurisdiction states as follows:

I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.

This case involves Two Thousand Dollars (\$2,000) worth of assets upon which the Cuyahoga County Sheriff’s Office executed.¹ There are no legal issues of public or great general interest involved, merely typical summary judgment issues and Civil Rule 15 amendment of complaint issues. The Court of Appeals recited the law as it stands and followed it. Kleinfeld claims that the Court of Appeals made a mistake in its application of the law in its opinion. However, a mistake by a court of appeals is not a matter of public or great general interest – especially when it involves a minimal dollar amount.

Kleinfeld first asks this Court to revisit *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107. This is well settled law and Kleinfeld presents no persuasive reason as to why the court should revisit it and revise it. Kleinfeld fails to cite any cases in which there is confusion about, or objection to, this standard. Her only apparent complaint is that she did not think that the Court of Appeals’ opinion provided enough detail or explanation for her. Her own dissatisfaction with one court opinion does not rise to the level of public or great general interest.

Second, Kleinfeld requests a “clarification” of *Byrd v. Smith* (2006), 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47 regarding the sufficiency of affidavits. *Byrd* is not even three years old. There is no indication of any widespread confusion of its holding or proper

¹ One might wonder why such a minimal claim has risen this far. Kleinfeld’s long-term business associate, Larry Lomaz, is a debtor of HNB and has sought every opportunity to sue and harass HNB. He was ultimately declared to be a vexatious litigator in the case of *Lomaz v. Ohio Dept. of Commerce, et al.*, U.S. Dist. Ct., Northern Dist. Of Ohio, Eastern Div. Case No. 5:03-CV-2609. It is HNB’s belief that this action is a way for Lomaz to circumvent the vexatious litigator designation and continue his harassment of HNB. However, contrary to Kleinfeld’s claim in her brief at p. 5 fn. 5, HNB has not asserted an “alter ego” theory in defending against Kleinfeld’s ridiculous lawsuit.

application. Moreover, *Byrd* was not discussed by the Court of Appeals and there was no issue as to sufficiency of affidavits in this case, so there is simply no controversy on this issue.

Kleinfeld's third reason for this Court to accept jurisdiction is a variation of the alleged "*Byrd*" issue; i.e. to "clarify" that affidavits need not be supported by documentary evidence. The Eighth District's ruling neither attempted to alter, nor actually altered the "well-established rules of summary judgment"² to require additional documentary evidence. There is no need to clarify that which is already clear.

Kleinfeld next claims that a plaintiff should be allowed to evade Civ. Rule 15(A)'s requirement of seeking leave to amend (after service of a responsive pleading) by filing a new action then asking for it to be consolidated with the original action. Kleinfeld claims that because the trial court and the Court of Appeals refused to allow this in this particular case, it is a matter of public and great general interest. Just because the Court exercised its discretion on this issue in this case does not make it a matter of public or great general interest.

Finally, Kleinfeld asks this Court to clarify the standards for a 12(B)(6) motion. However, this standard is well known and as clear as it can be. Contrary to Kleinfeld's claims, the Court of Appeals did not superimpose an evidentiary standard upon the 12(B)(6) dismissal of *Kleinfeld III*. The Court of Appeals properly recited the 12(B)(6) standard and applied it, stating "Huntington has a valid order of possession . . ." and Kleinfeld "can prove no set of facts that give her a legal right to the property." Court of Appeals Opinion at 10-11, Vol. 673, p. 617-618. Again, even if the Court of Appeals somehow misapplied the law to this case, it did not attempt to create new law.

² See Kleinfeld Brief at 1

II. STATEMENT OF FACTS

The initial case underlying this Appeal is the now consolidated, cognovit case of *Huntington National Bank v. Pacific Financial Services of America, Inc.*, No. CV-00-404730 (the “Cognovit Case”). In that case, HNB took judgment against Larry Lomaz personally (“Lomaz”) and his company, Pacific Financial Services of America, Inc. (“Pacific”). Over the next few years, HNB attempted to collect against Lomaz and Pacific in several cases, including two foreclosure cases. During these proceedings, Mr. Lomaz pursued so many evasive and frivolous actions that ultimately he was declared to be a vexatious litigator. (See *supra* at 1, fn. 1.)

In an effort to collect on the judgment awarded in the Cognovit Case, HNB obtained an order in aid of execution (the “Order in Aid”) in August 2003 that authorized the seizure of Lomaz’s personal property at his apartment Cleveland’s Warehouse District: 2249 Elm Street, Apartment 502, Cleveland, Ohio (the “Apartment”). Lomaz admittedly lived in the apartment and had his assets there at that time. The Cuyahoga County Sheriff’s Department (“Sheriff”) attempted execution on four occasions in 2003³ but were unable to gain entry into the Apartment to tag and remove that personal property. There is no dispute that at this point in time Lomaz lived there *and* had an office there. There is also no dispute that all the property there belonged to Lomaz at that time. The Order in Aid created notice to Lomaz and third parties under *lis pendens* that no transfer of the property could be made as against HNB as of August 19, 2003. Kleinfeld claims she took over the lease and purchased the furniture on or about January 1, 2004.

On October 15, 2003, HNB filed a motion in the Cognovit Case for an order for the Sheriff to forcibly enter the Apartment to execute on the Order in Aid (the “Forcible Entry Motion”) on that property. A hearing was set for November 14, 2003. Lomaz sought and

³ August 25, 2003, September 18, 2003, October 9, 2003, and October 14, 2003.

obtained repeated continuances. Lomaz did not file an opposition to the Forcible Entry Motion. The Court then held an evidentiary hearing on HNB's motion on January 5, 2004. At the January 5, 2004, hearing, Lomaz's attorney appeared and claimed that the Forcible Entry Motion should be denied because Lomaz no longer lived there.

Lomaz's counsel presented a lease for the same premises, now in the name of Appellant: "Erika Kleinfeld" (the "Replacement Lease"). While Lomaz was intentionally delaying the hearing date from November 2003 to January 5, 2004, on or about January 1, 2004, Appellant Kleinfeld signed the Replacement Lease to replace Lomaz's lease. Despite this, through at least December 2007, Kleinfeld maintained (1) her drivers license address, (2) her employment address, (3) her voting address, (4) her phone book address, and (5) her criminal record address as 22690 Boston Road, Strongsville, Ohio.

Kleinfeld is a long-time employee and friend of Lomaz's. She had worked for Lomaz at Midwest Fireworks in Conneaut, Ohio from 1998 and at Pacific Fireworks in Kuai, Hawaii for years. She had frequently slept in Lomaz's Apartment prior to signing the Replacement Lease. She purchased adult sex toys for re-sale from Lomaz and her name and phone number appeared on the *sextoys4women.com* website, which website was registered in the name of Mr. Lomaz. Lomaz talked to Kleinfeld daily about business issues. Lomaz and Kleinfeld engaged in a gambling business together known as Wild Cherry Gaming. Moreover, despite the alleged Replacement Lease to Kleinfeld, Lomaz kept a key and was allowed to enter the apartment, have unrestricted access there and keep his clothes there.

At the January 5, 2004 hearing, it was obvious that this Replacement Lease was a sham because (1) if Lomaz did not own the items inside, then he would have no reason to appear and try to protect Kleinfeld's alleged personalty and (2) the timing of the alleged transfer shows that Lomaz was trying to evade the Court's orders. The Court rejected this sham and on January 5,

2004 (as journalized on January 12, 2004) granted the motion for forcible entry and entered a judgment entry to that effect (the “January 5, 2004 Forcible Entry Order.”)

The January 5, 2004 Forcible Entry Order ordered the Sheriff to forcibly enter the Elm Street premises “for the purpose of seizing . . . the property as set forth in the Alias Writ of Execution . . .” That property was the personal property which Lomaz had owned and kept at the leased premises when the execution was ordered on August 19, 2003. There is no dispute that such property belonged to Lomaz on August 19, 2003.

Two Sheriff’s Deputies from the Cuyahoga County Sheriff’s Office (“CCSO”) executed the order on March 9 and 10, 2004, tagging and seizing numerous items of Lomaz’s personal property from the Apartment. The CCSO’s required that a locksmith, movers from Beckett & Chambers (“B&C”), and HNB representatives (HNB’s counsel) accompany the Sheriff’s Deputies to the Apartment for the execution on March 9, 2004.

Kleinfeld admits that the Apartment contained only the property which Lomaz owned as of August 19, 2003, but claims it became hers on December 31, 2003/January 1, 2004, even though she did not pay for it until June 2004 (after the seizure).

Thereafter, Kleinfeld ignored the procedures set forth in the R.C. 2329.091 and 2329.84 to contest the seizure of “her” property.⁴ Instead, she filed a complaint against HNB on April 1, 2004 in the case captioned *Erika F. Kleinfeld v. The Huntington National Bank*, Case No. CV-04-526833 (“*Kleinfeld I*”). Two years later, on September 29, 2006, the trial court dismissed *Kleinfeld I* for failure to prosecute.

⁴ Kleinfeld claims that she was “unable” to obtain relief pursuant to 2329.84, which allowed her a hearing on ownership. *Kleinfeld Br.* at 5. In fact, she was not “unable” to do so, she just never tried. Kleinfeld also suggests that HNB “attorneys, as officers of the court” should have initiated these proceedings. See *Kleinfeld Br.* at 5. Neither the statute nor common sense suggests that HNB had such a duty.

Kleinfeld re-filed her suit shortly thereafter on October 20, 2006 in the case captioned *Erika F. Kleinfeld v. The Huntington National Bank*, Case No. CV-06-604994 (“*Kleinfeld II*”). In that Complaint, Kleinfeld alleged that she – not Lomaz – was the tenant of the Apartment, and that all the personal property seized by the Sheriff belonged to her, not Lomaz. Therein, she asserted causes of action against HNB for (1) trespass, (2) “wrongful entry,” (3) conversion and (4) replevin.

On June 14, 2007, long after the discovery deadline and shortly before the June 25, 2007 dispositive motion deadline, Kleinfeld filed a motion to amend the *Kleinfeld II* complaint to include a new count for abuse of process. HNB opposed this motion because it was untimely and because the count for abuse-of-process failed to state a claim. On June 25, 2007, HNB filed its Motion for Summary Judgment in Case No. 06-604994 (as consolidated with the related cases).

On August 6, 2007, HNB received service of yet another Kleinfeld Complaint in Case No. 07-630879 (*Kleinfeld III*).⁵ In *Kleinfeld III*, Kleinfeld alleged the same facts as in her motion to amend the *Kleinfeld II* complaint and asserted only the same abuse-of-process claim she attempted to add to *Kleinfeld II*.⁶ The Complaint in *Kleinfeld III* was, in reality, an unauthorized attempt by Kleinfeld to amend the complaint in *Kleinfeld II* without leave, in violation of Civ. R. 15(A) and Local R. 8(D). Also, *Kleinfeld III* failed to state a claim. On December 21, 2007, the trial court granted HNB’s summary judgment motion as to *Kleinfeld II* and dismissed *Kleinfeld III*.

⁵ Then, on or about November 16, 2007, *after discovery was closed*, shortly before the scheduled trial date and after HNB had filed its summary judgment motion, Kleinfeld sought to disqualify HNB’s Attorneys. On December 21, 2007, the court denied Kleinfeld’s motion to disqualify.

⁶ *Kleinfeld I, II* and *III* were all consolidated with the Cognovit Case No. 404730.

III. RESPONSE TO KLEINFELD'S PROPOSITIONS OF LAW.

Proposition of Law No. I:

A Court of Appeals, when affirming a trial court's grant of summary judgment, must specifically identify the evidence of the type listed in Civ. R. 56(C) upon which it makes the determination that the moving party has demonstrated the absence of a genuine issue of material fact before it can determine that the requisite burden has shifted to the non-moving party under *Dresher v. Burt*.

As shown below, there are no issues in this case which impact the standard set forth in *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107; 662 N.E.2d 264. But more importantly, *Dresher* is well settled law which the lower courts have had no trouble understanding or following. While the losing party always believes the court misapplied the law in some fashion, this Court cannot review every grant of summary judgment throughout the State of Ohio. Kleinfeld makes no compelling argument why this well understood standard needs to be revised, expanded or changed. If the *Dresher* standard was a problem, there should be numerous cases showing this. Kleinfeld cited none. Thus, there is no issue of public or great general interest here.

In fact, the Court of Appeals did follow *Dresher*. Contrary to Appellant's Brief, the Court of Appeals properly recognized the standard for summary judgment that "the moving party bears the initial responsibility of informing the trial court of the basis for the motion . . ." Court of Appeals Opinion at ¶¶15-17; p. 6; Vol. 673, p. 613. The Court of Appeals recognized the undisputed key facts set forth in HNB's Motion, Brief and evidentiary materials, albeit with a shortened recitation thereof. Court of Appeals Opinion at pp. 1-4; Vol. 673, pp. 608-611. Thus, HNB demonstrated, and Appellant admitted, that the subject personal property belonged to Lomaz on August 19, 2003, the time that the trial court initially ordered the property to be seized by the CCSO.

HNB further set forth facts that showed that any alleged transfer after the August 19, 2003 Court Order was invalid and ineffective pursuant to the doctrine of *lis pendens* (R.C.

§2703.26)⁷ and Ohio's Fraudulent Transfer Act. See R.C. 1336.01; et. seq.⁸ Kleinfeld admitted the underlying facts on this as well. *Thus, Kleinfeld simply could not prove any set of facts under which she was entitled to possession or ownership of the subject property.*

Kleinfeld tried to create an issue of fact by claiming she paid for the property in June 2004, *after* the deputies actually seized the property in March 2004. Kleinfeld's specious affidavit was simply irrelevant to the issues at hand. Since she admits the property belonged to Lomaz when the Court issued the August 19, 2003 execution order, Kleinfeld's subsequent alleged purchase cannot defeat that execution.

In addition to the grounds explicitly stated in the Court of Appeals Opinion, there were several other grounds for affirming the grant for summary judgment. As stated in HNB's brief below, HNB was entitled to summary judgment because Kleinfeld's claims are barred by statutory immunity pursuant to R.C. Chap. 2744 and/or common law. The court in *Smith v. A.B. Bonded Locksmith, Inc.* dismissed claims against a creditor under R.C. 2744.03 in a nearly identical situation. *Smith v. A.B. Bonded Locksmith, Inc.* (2001), 143 Ohio App.3d 321, 757

⁷ "When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title." (R.C. 2703.26.) Ohio's lis pendens statute "operates to protect litigants from the *pendente lite* transfer to third persons a property that is the subject of litigation." *In re Reginald Washington*, (C.A. 6, 1980), 623 F.2d 1169, 1171. Moreover, the Lis Pendens statute applies with respect to personal property. *Id.*

⁸ R.C. 1336.01(A) reads, in part, as follows: "(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, . . . if the debtor made the transfer or incurred the obligation in either of the following ways: * * * (1) With actual intent to hinder, delay, or defraud any creditor of the debtor * * *" To determine actual intent, the court considers "all relevant factors, including, but not limited to, the following: (1) Whether the transfer or obligation was to an insider; (2) Whether the debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the debtor; (6) Whether the debtor absconded; (7) Whether the debtor removed or concealed assets. . ." R.C. 1336.01(B).

N.E.2d 1242. The Ohio Supreme Court reached nearly the exact same conclusion under common law in *Wholesale Electric & Supply, Inc. v. Robusky* (1970), 22 Ohio St.2d 181, 258 N.E.2d 432. Thus, based also on the authority of those cases, the Court of Appeals properly affirmed the granting of summary judgment.

Therefore, the Court of Appeals properly applied *Dresher* and there is no reason to revisit, expand or modify this long standing and well understood doctrine.

Proposition of Law II:

Upon finding that a moving party has satisfied its initial burden under *Dresher*, a reviewing court may not determine the weight or sufficiency of an affidavit submitted by the party opposing summary judgment unless it finds that such affidavit contradicts previous discovery materials submitted by that non-moving affiant, nor can a reviewing court require that such affidavit be supported by additional documentary evidence so as to sufficiently demonstrate the existence of a genuine issue of material fact under Civ. R.56.

Once again, Kleinfeld claims that a non-issue in this case is a matter of public and great general interest. The use of affidavits under Ohio Civil Rule 56 has been well settled by *Dresher* and the other cases cited by Kleinfeld. The Court of Appeals did not claim that the law was different than that or that it should be changed. Kleinfeld does not point to any cases which put this point of law at issue. There is no clammer to change or modify these standards and there is no evidence of any widespread confusion over the use of affidavits in summary judgment motions. Kleinfeld's second proposition of law simply does not raise an issue of public or great general interest.

With respect to the present case, Appellant argues that the Court of Appeals either impermissibly rejected or impermissibly weighed the credibility of Kleinfeld's affidavit. But the Court of Appeals did not claim that it did so. While the Court of Appeals correctly characterized Kleinfeld's affidavit as "self serving," it did not state that it was disregarding it or weighing its credibility. More importantly, the Court in no way claimed to be modifying or changing existing law.

The Court of Appeals recognized that, irrespective of Kleinfeld's affidavit, HNB was entitled to summary judgment as follows:

“The only relevant questions before this court are whether Huntington obtained a valid order of possession authorizing it to seize the property and whether Kleinfeld can demonstrate proof of ownership of the property. The trial court granted Huntington an order of possession on January 12, 2004, which was never challenged. The CCSO executed on that order on March 9 and 10, 2004. Despite the claims in her self-serving affidavit that she purchased the property from Lomaz, absent documented proof of the purchase, Kleinfeld has not established a genuine issue of material fact to defeat summary judgment. . . .”

Court of Appeals Opinion at ¶¶19, 20, p. 7; Vol. 673, p. 614 (emphasis added). This Court properly recognized that in order to avoid summary judgment, Kleinfeld would need to establish a genuine issue of material fact on BOTH of the following issues: (a) that Huntington obtained a valid order of possession authorizing the CCSO to seize the property and (b) that Kleinfeld owned the property at the time the trial court initially ordered the CCSO to seize Lomaz's property on August 19, 2003.

The Court of Appeals recognized that there was no dispute that (a) the March 2000 Judgment Lien was valid, (b) the trial court's August 19, 2003 order of possession was valid, (c) the trial court's January 5, 2004 order of forcible entry was valid and (d) neither Lomaz nor Kleinfeld ever challenged any of the foregoing.

The Court of Appeals also recognized that Kleinfeld did not show, or even attempt to show, that Kleinfeld owned the property at the time of the trial court's initial August 19, 2003 order. Even Kleinfeld's "self-serving" affidavit did not attempt to make this claim. Kleinfeld only argues that she purchased and paid for the property after the first Order in Aid of Possession issued on August 19, 2003. Indeed, she admits she did not even pay the \$1,000 to Lomaz until after the CCSO's March 2004 forcible entry and removal of the property. Kleinfeld simply could not, and did not, prove any set of facts under which she was entitled to ownership of Lomaz's liened property. This is hardly an issue of public or great general interest.

Kleinfeld then spends 3 pages discussing *Aglinsky v. Cleveland Builders Supply Co.* (1990), 68 Ohio App.3d 810, 598 N.E.2d 1365 and *Byrd v. Smith* (2006), 110 Ohio St.3d 24, 2006-Ohio-3455. Kleinfeld's point seems to be that the Court of Appeals should not ignore, or weigh the credibility of Kleinfeld's affidavit, which it did not do. The Court of Appeals also never even mentioned these two cases – it was unnecessary to do so. Therefore, Kleinfeld's Second Proposition of Law has nothing to do with the facts of this case.

Again, this issue does not qualify as a matter of public or great general interest.

Proposition of Law No. III:

Civ. R. 15(A) does not present the sole means with which to bring a viable claim, nor does Civ. R. 15(A) preclude the initiation of a separate lawsuit while a motion to amend regarding the new claim remains pending in a previous case.

Kleinfeld's third proposition is an odd one. The only support she finds for her proposition is (1) a 1943 case which has been explicitly overruled as to the cited syllabus⁹ and (2) an isolated sentence taken out of context from a 1945 Common Pleas Court case. While there might be circumstances where it is appropriate to file a new lawsuit on the exact same facts as a pending one, a broad rule of law *always* allowing it (which Kleinfeld seeks) clearly would be improper. Certainly it is not a significant problem or issue in Ohio jurisprudence. Apparently Kleinfeld is the only litigant to have run into this issue, because she can cite no other cases raising this issue since 1943.

Moreover, as with Kleinfeld's other Propositions of Law, her third one has little to do with what actually happened in this case. Her characterization of the Court of Appeals decision is completely wrong. The Court of Appeals did *not* rule that a party can *never* assert a claim in a separate lawsuit or that "*any* attempt to do so constitutes an impermissible circumvention of Civ.

⁹ Kleinfeld claims that *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 Ohio Op. 240, syllabus 2 remains good law even though *Grava v. Parkman* (1995), 73 Ohio St.3d 379, 382, 1995-Ohio-331 specifically and explicitly overruled that specific part of *Norwood*. This is absurd. Thus, the only law that Kleinfeld claims to support her position has been overruled, leaving her proposition of law with no support at all.

R. 15(A) . . .” (Kleinfeld Br. at 12; emphasis added.) Rather the Court of Appeals determined that in this particular case, Kleinfeld was attempting to circumvent the mandatory requirement to seek leave to amend a complaint to add a claim, by filing a new lawsuit (*Kleinfeld III*) based on the same facts, and the same allegations *after* (1) Kleinfeld had already been litigating the case for over three (3) years in *Kleinfeld I* and *Kleinfeld II*, (2) pleadings were closed, (3) discovery was closed, (4) summary judgment was fully briefed and (5) trial was imminent. Court of Appeals Opinion at ¶¶10, 26, 27; pp. 4, 9, 10; Vol. 673, pp. 611, 616.617.

Civ.R. 15(A) requires that after the period for permissive amendment of pleadings passes, “a party may amend his pleading only by leave of court or by written consent of the adverse party.” Civ.R. 15(A). When the Civil Rules require a party to seek leave before supplementing or amending a pleading, and a party files such a supplemental or amended pleading without seeking leave, such a pleading “was not properly before the court and should be ignored.” *Widder & Widder v. Kutnick* (1996), 113 Ohio App.3d 616, 623, 681 N.E.2d 977. Ohio courts have long held that the character of a pleading is “determined by the averments it contains and not by the name given to the pleading.” *Gardner v. Cooke* (July 31, 1985), Warren App. No. CA84-12-087, 1985 Ohio App. LEXIS 8408, *16-17. Here, the *Kleinfeld III* Complaint, regardless of its label, was in reality an attempt to amend the complaint in *Kleinfeld II*. The allegations in the *Kleinfeld III* Complaint were the same as those in Kleinfeld’s proposed First Amended Complaint in *Kleinfeld II*. In fact, Paragraphs 1 through 15 in each of those pleadings are nearly identical. In essence, the *Kleinfeld III* Complaint was an attempt to amend a pleading without seeking the required leave from the Court.

The Court of Appeals explained that it affirmed the dismissal of *Kleinfeld III* because Kleinfeld “violated Civ. R. 15(A) and Loc.R. 8(D) by circumventing the rules for amending a complaint.” Court of Appeals Opinion at ¶24, p. 8; Vol. 673, p. 615. The Court of Appeals

further explained that “[w]e do not find that the court erred in effectively denying her motion for leave to amend by failing to rule on it. . . . We find that Kleinfeld was attempting to circumvent the civil rules, and her complaint was [*Kleinfeld III*] properly dismissed” Court of Appeals Opinion at ¶¶27, 28, p.9-10; Vol. 673, pp. 616-617. Moreover, the law, which “abhors a multiplicity of suits, will not permit a defendant to be harassed and oppressed by two actions for the same cause where plaintiff has a complete remedy by one of them.” *Ex Rel. Maxwell v. Schneider* (1921), 103 Ohio St. 492, 495-96, 134 N.E. 443. The trial court had the inherent authority to protect the “integrity of the judicial process and to ensure the ‘efficient administration of justice’.” See *B-Dry System, Inc. v. Kronenthal* (June 30, 1999), Montgomery App. Nos. 17130, 17619, 1999 Ohio App. LEXIS 3080, *21.

Thus, because the *Kleinfeld III* Complaint violated Civ. R. 15(D) and Local R. 8(D), the trial court properly dismissed it. Thus, there is no issue of public or great general interest.

Proposition of Law No. IV:

When presented with a Civ. R. 12(B)(6) motion to dismiss, a reviewing court may not superimpose the evidentiary standards of Civ. R. 56 upon the pleading requirements governing Civ. R. 8, especially where the reviewing court bases its ruling on an improper disregard of summary judgment evidence.

Plaintiff’s Fourth Proposition of Law appears to be a convoluted and confusing restatement of the decisional standard for a 12(B)(6) motion to dismiss. That standard, *simply* stated, is “when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584. This is the exact standard cited and followed by the Court of Appeals Opinion at ¶29; p. 10; Vol. 673, pg. 617. Asking this Court to restate the well settled rule for judging 12(B) motions to dismiss is not a matter of public or great general interest.

Indeed, the Court of Appeals properly concluded that the *Kleinfeld III* lawsuit (Case No. CV-630879) asserting abuse of process could not survive a motion to dismiss. This is not because of any evidentiary issues, which is what Appellant claims. Rather the Court of Appeals properly reasoned: “While the factual allegations of the complaint are taken as true, “[u]nsupported conclusions of a complaint are not considered admitted *** and are not sufficient to withstand a motion to dismiss.’ *State ex rel. Hickman v. Cuposa* (1989), 45 Ohio St.3d 324, 544 N.E.2d 639.” Court of Appeals Opinion at ¶30, pp. 10-11; Vol. 673, p. 618. The courts have consistently dismissed abuse of process claims on 12(B)(6) motions when the plaintiff only alleges an “ulterior purpose” or “wrongful motivation,” without alleging actual facts to support such a conclusion. See e.g. *Nosker v. Greene County Regional Airport Authority* (May 23, 1997), Greene App. No. 96 CA 101, 1997 Ohio App. LEXIS 2183, *7 (dismissing claim because allegations that defendant had “wrongful motivation” were mere conclusory allegations with no facts to support the allegations); *Wolfe v. Little* (April 27, 2001), Montgomery App. No. 48718, 2001 Ohio App. LEXIS 1902, *7-8 (dismissing claim because allegation that ulterior purpose was to deprive plaintiff of due process is a “bare allegation” without factual support).

The *Kleinfeld III* Complaint did not allege any facts suggesting an ulterior purpose, what that purpose might be or that the purpose is somehow improper. *Kleinfeld III* only alleged that there was “an ulterior purpose.” Her conclusory statements simply did not state a claim. Thus, the Court of Appeals properly affirmed the dismissal of *Kleinfeld III*.

In addition, one of the key elements of an abuse of process claim is that there is a “wrongful use of process.” *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 270, 662 N.E.2d 9. The *Kleinfeld III* Complaint alleged the existence of the trial court’s August 19, 2003 Order in Aid of Possession and the Court’s January 5, 2004 Order of Possession and did not claim that either one was in any way faulty, invalid or improperly granted. Thus, the

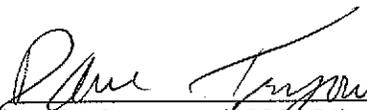
Court of Appeals properly recognized earlier in its opinion that Kleinfeld could not meet the element of a “wrongful use of process” because: “Huntington has a valid order of possession . . .” Court of Appeals Opinion at ¶32, p. 11; Vol. 673, p. 618. See also Court of Appeals Opinion at ¶¶3, 4, 6, 20, pp. 1, 2, 3, 7; Vol. 673, pp. 608, 609, 610, 614. Accordingly, the Court properly noted that “. . . Kleinfeld cannot demonstrate valid ownership of the property at issue.” Court of Appeals Opinion at ¶32, p. 11; Vol. 673, p. 618. Again, the dismissal was properly affirmed.

Kleinfeld’s re-formulation of the 12(B)(6) standards is counter-productive and unhelpful. Neither the court nor the bar is agitating for such a revision. It is best left as is. Accordingly, Kleinfeld’s fourth proposition does not assert a matter of public or great general interest.

V. CONCLUSION

For the foregoing reasons, HNB respectfully requests that this Court deny Appellant Erika Kleinfeld’s Motion Seeking Jurisdiction. HNB further requests that it be awarded costs and any other relief to which it is entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been sent by first class United States mail,
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