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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)
GERALD O.E. NICKOLI, et al.,)
)
Relators,)
)
ERIE METROPARKS, et al.,)
)
Respondents.)

CASE NO. 2009-0026
Original Action in Mandamus

RESPONDENTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

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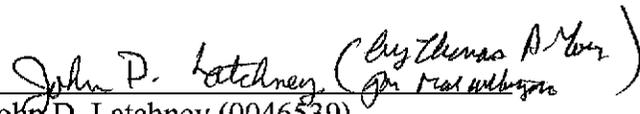
RESPONDENTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

Pursuant to Civ.R.15(A), Respondents move this Court for an order granting them leave to file an amended answer which will add as the Thirteenth Affirmative Defense the affirmative defense that Relators' mandamus action is barred by the applicable statute of limitations. This Motion is supported by the attached Memorandum in Support of Motion, the contents of which are hereby incorporated into this Motion as if fully rewritten here.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF MOTION

This Motion seeks leave to file an amended answer which will include a statute of limitations affirmative defense. Civ.R.15(A) provides, in relevant part, that:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.¹

No responsive pleading is permitted to Respondents' Answer, which was filed and served more than twenty-eight days ago (it was filed and served on February 10, 2009). Therefore, Respondents respectfully seek leave to file the proposed amended answer.

This is a mandamus action to compel the institution of appropriation actions. In *State, ex rel. R.T.G., Inc. v. State* (2002), 98 Ohio St.3d 1, 2002 Ohio 6716, 780 N.E.2d 998, ¶¶27-31, this Court held that the statute of limitations applicable to a mandamus action to compel the appropriation of property is the six-year statute of limitations found in R.C. 2305.07.

Relators claim that since at least 1999, Respondents have been in possession of and have used the real estate at issue herein for a recreational trail. Complaint, ¶¶9, 14, 15, 36. Relators allegedly obtained title to such real estate in 2000.² Complaint, ¶17; Relators' Memorandum in Support of Their Complaint for a Writ of Mandamus, Exhibits A-1 through A-12. However, this action to compel appropriation of such real estate was not filed until January 5, 2009, more than eight years after Relators allegedly obtained title to such real estate and more than eight years

¹S.Ct. Prac. R X (2) provides, in relevant part, that in an original action filed in this Court: "The Ohio Rules of Civil Procedure shall supplement these rules unless clearly inapplicable." Noting in this Court's Rules of Practice make Civ. R.15(A) clearly inapplicable to an original action filed in this Court.

²In Respondents' Motion for Judgment on the Pleadings, Respondents have argued that Relators do not have title to such real estate. That Motion is pending.

after Respondents took possession of and occupied such real estate. Consequently, Relators' claims herein may well be barred by the applicable statute of limitations, which is the six-year statute of limitations found in R.C. 2305.07.

This Court has expressly held that a party may raise a statute of limitations defense by way of an amended pleading filed pursuant to Civ. R.15(A) after the time for amendment as a matter of right has passed. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 2-6, 465 N.E.2d 377. In fact, in *Sumlin* this Court held that it would be an abuse of discretion for a court to deny a Civ. R.15(A) motion for leave to file an amended answer to assert a statute of limitations defense "where the defense is tendered timely and in good faith, and no reason is apparent or disclosed for denying leave," *Id.*, at 5-6.

This Motion meets all of these criteria. The Complaint was filed January 5, 2009, a mere three months ago. Respondents' original Answer was filed February 10, 2009, two months ago. No discovery has occurred in this case, there are no rulings on any of the pending motions herein, and this case is not scheduled for trial.

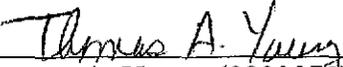
This Motion is clearly filed in good faith. As demonstrated above, a six-year statute of limitations may well apply to this action, and this action was not filed within the required six-year period.

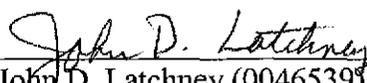
Relators will not suffer any undue prejudice by the granting of this Motion. The granting of this Motion will present no obstacles to Relators which they would not have faced had the original Answer raised the statute of limitations defense, and this Court has recognized in *Sumlin* that such a fact indicates Relators would not be prejudiced by the addition of the statute of limitations defense. *Id.*, at 6. And as mentioned above, this case has been pending for just a few months, and granting this Motion will not prevent either Relators from presenting arguments

why this action is not barred by the statute of limitations found in R.C. 2305.07 or this Court from considering and ruling on the merits of Respondents' statute of limitations defense.

For the reasons stated above, Respondents respectfully request that this Court grant this Motion and grant them leave to file an amended answer to assert as a Thirteenth Affirmative Defense that this mandamus action is barred by the applicable statute of limitations.

Respectfully submitted,

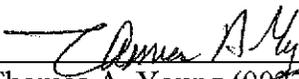

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2009, he served a copy of the foregoing "Respondents' Motion For Leave To File An Amended Answer" on Bruce L. Ingram, Esq., VORYS, SATER, SEYMOUR & PEASE, 52 East Gay Street, Columbus, Ohio 43216-1008, counsel of record for Relators, by mailing said copy to him via ordinary United States mail, postage prepaid.



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