

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	:	Case No. 2008-2230
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
DESTINY VENTURES, LLC	:	
	:	Court of Appeals
Appellant.	:	Case No. CA-08-091018

AMICUS CURIAE BRIEF OF THE CITY OF CINCINNATI
IN SUPPORT OF APPELLEE CITY OF CLEVELAND

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STATEMENT OF FACTS

The City of Cincinnati supports Appellee, the City of Cleveland, in this case and, therefore, respectfully submits the following *Amicus* Brief to this Honorable Court. Like Appellee, the City of Cincinnati seeks to take rightful recourse against absentee corporations, which fail to appear in trial court on housing code charges. In the wake of the Eighth District Court of Appeals decisions in *City of Cleveland v. Destiny Ventures, LLC*, Cuyahoga App. No. 91018, 2008-Ohio-4587 and *City of Cleveland v. Washington Mutual*, Cuyahoga App. No. 91379, 2008-Ohio-6956, the City of Cincinnati's prosecution against non-compliant, absentee corporations has proved to be a futile attempt to provide a sure administration of justice.

ARGUMENT

Proposition of Law No. I:

A trial court does not violate a corporate defendant's constitutional rights by holding a trial in abstentia, wherein the defendant fails to appear in court on criminal charges, after proper notice and issuance of summons, thereby waiving its Confrontation Clause rights.

The Ohio Revised Code and the Ohio Rules of Criminal Procedure provide the guidelines for trials in abstentia. Pursuant to Crim.R. 43(A)(1), a defendant, with limited exceptions, "must be physically present at every stage of the criminal proceeding and trial[.]" Crim.R. 43(A)(1). Moreover, "[t]he defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict." *Id.* At the same time, R.C. 2938.12 describes the circumstances under which a trial in abstentia may be conducted in a misdemeanor case. Such provision essentially calls for either a defendant's leave

of court to remain absent, or for a defendant's voluntary departure without leave of a court, before a trial in abstentia is proper. *See* R.C. 2938.12; *See also* R.C. 2945.12.

Crim.R. 1(B) and R.C. 2901.04(B) provide the requisite guidance and contextual analysis for permitting trials in abstentia against absentee corporations. Pursuant to Crim.R. 1(B), the Criminal “[R]ules are intended to provide for the just determination of every criminal proceeding[,]” and “[t]hey shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.” Crim.R. 1(B). Moreover, according to R.C. 2901.04(B), “[r]ules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.”

An absentee corporate defendant waives its Sixth Amendment right to confrontation when it chooses to not appear before a summoning tribunal. “It is a well-established principle that Confrontation Clause rights, like other constitutional rights, can be waived.” *State v. Pasqualone*, 121 Ohio St.3d 186, 189, 2009-Ohio-315, 903 N.E.2d 270, citing *Brookhart v. Janis* (1966), 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314. Indeed, “[w]aiver is the intentional relinquishment or abandonment of a known right.” *Pasqualone*, 121 Ohio St.3d at 189, citing *U.S. v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508. The particular right at stake determines (1) whether a right is waivable, (2) whether such waiver requires the defendant's personal participation, (3) whether certain procedures are required, and (4) whether the defendant's choice must be informed or voluntary. *Id.*

In the case *sub judice*, Appellant waived its right to confront witnesses and be present for trial. Appellant was afforded ample notice of the date, time, and place of the mandatory court

appearances. Despite the City of Cleveland following proper procedure to notify Appellant, Appellant failed to have an attorney or officer present on the trial date. Like the City of Cleveland, the City of Cincinnati follows proper procedure to notify defendant corporations of court appearances. Despite affording due process, numerous defendant corporations choose to not appear in court to answer criminal charges. On the contrary, the absentee defendant corporations are making an informed, voluntary choice to not appear and confront their accuser and witnesses against them.

Indeed, the willful absence of a corporate defendant from appearing in court is a complete waiver of its presence before the tribunal, thereby constituting a constructive, voluntary absence without leave of court. Therefore, such absence constitutes a complete waiver of confrontation rights. Under such circumstances, a trial in absentia is the *only* vehicle to accomplish the sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay. When a corporate defendant thwarts criminal responsibility by choosing to simply not appear before a summoning tribunal, a municipality is hamstrung in its prosecutorial efforts to seek justice against corporations, which are seemingly rewarded through their absenteeism, while a municipality's resources and taxpayers are left with the insurmountable task and cost of abating life and safety hazards.

The City of Cincinnati is poised to prosecute absentee organizations, which waive their constitutional right to confrontation by refusing to appear in municipal court on housing code charges. Pursuant to its Home Rule Authority, the City of Cincinnati has enacted legislation to address the problem of absentee organizations that fail to appear in municipal court and answer to criminal charges instituted by a criminal complaint, affidavit, and summons. C.M.C. 902-8

provides the necessary relief to the City of Cincinnati by deeming absentee organizations present before the court until final disposition of the case: "Upon failure to make such appearance and answer[,] the court shall enter a plea of not guilty, and upon such appearance being made or plea entered[,] the organization shall be deemed ... continuously present ... until the case is finally disposed of." C.M.C. 902-8. An organization, which refuses to answer a lawful summons on criminal charges, can be held accountable, thereby promoting the Rules of Criminal Procedure's purpose to provide fair, impartial, speedy, and sure administration of justice. *See* Crim.R. 1(B).

Proposition of Law No. II:

The State's public policy interests in the promotion and protection of the health, safety, and welfare of its citizens are advanced through conducting trials in abstentia.

The City of Cincinnati, like other municipalities, seeks to promote and protect the health, safety, and welfare of its citizens. The City of Cincinnati is plagued with land-speculating corporations which simply abandon, neglect, or profit from disastrous properties, while the City of Cincinnati struggles to enforce the law against these opportunistic corporations. To deny trials in abstentia is to turn the protection provided in the Rules of Criminal Procedure on its head. Instead of protecting a defendant's rights, the Rules would be used to hamstring the government by making it impossible to try a corporation for breaking the law, until and unless the corporation considers it in its best interest to appear before the tribunal.

CONCLUSION

Wherefore, the City of Cincinnati supports Appellee, City of Cleveland, and requests that this Honorable Court affirm the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District.

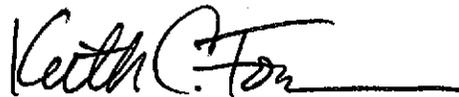
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing *Amicus* Brief was sent by ordinary U.S. Mail to (1) Plaintiff-Appellee's counsel, Robert J. Triozzi, City of Cleveland Law Director, and Karyn J. Lynn, Assistant Law Director, 601 Lakeside Avenue E Rm. 106, Cleveland, Ohio 44114-1015, on this 21st day of May 2009, and (2) Defendant-Appellant's counsel, Michael A. Poklar, 34950 Chardon Road, Suite 210, Willoughby Hills, Ohio 44094-9162, on this 22nd day of May 2009.



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APPENDIX

Sec. 902-8. Summons and Appearance of Organizations.

Whenever an affidavit is filed in the Hamilton County Municipal Court charging any organization with the violation of any ordinance of the City of Cincinnati, the clerk of the municipal court shall issue a summons to the chief of police, or any bailiff of the court, which summons shall read as follows:

"To the chief of police of the City of Cincinnati, or to _____, bailiff: You are hereby commanded to summon _____ to appear in the Hamilton County Municipal Court on the _____ day of _____ A.D. 19_____, at _____ a.m., to answer the charge of

_____ (here set out the charge),

which has been preferred against it in said municipal court, upon the oath and affirmation of _____ and of this summons you will make due return.

"Witness my hand and seal of said court this _____ day of _____, A.D. 19_____."

The summons shall be returnable on the 28th day after its date. The summons, with a copy of the affidavit, shall be served and returned in the manner provided by law for service upon such organization in civil actions in the common pleas court. The organization may, on or before the return day of the summons duly served, appear by one of its officers, or by counsel, and answer to the affidavit by motion or plea. Upon failure to make such appearance and answer the court shall enter a plea of not guilty, and upon such appearance being made or plea entered the organization shall be deemed thenceforth continuously present in said court until the case is finally disposed of. Service shall be such as is provided in Rule 4 of the Ohio Rules of Criminal Procedure. The time and manner of service shall be indorsed on the original summons.

(C.M.C. 902-8; ordained by Ord. No. 287-1974, eff. June 19, 1974)

Analogous to C.O. 903-7; r. Ord. No. 523-1973, eff. Jan. 1, 1974.