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In the Supreme Court of Ohio

STATE OF OHIO, EX REL. ELIZABETH A. KOBLY ROBERT A. DOUGLAS, JR. ROBERT P. MILICH Judges of Youngstown Municipal Court Relators -*vs*- YOUNGSTOWN CITY COUNCIL, et al., Respondents	}	Case No. 2009-0866

RELATORS' MOTION TO STRIKE EXHIBITS FROM ANSWER AND TO STRIKE RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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COME NOW THE RELATORS, through the undersigned counsel, and, moves for an order striking pursuant to OHIO CIV. R. 12(F) the Exhibits attached to the Answer of the Respondents and striking Respondents' Motion for Judgment on the Pleadings. As demonstrated in the attached memorandum, made a part hereof by this reference, Respondents' motion for judgment on the pleadings relies upon extraneous materials that are not properly classified as pleadings. While ordinarily under Ohio law, the Court could either disregard those materials or convert the Respondents' motion, upon proper notice, to one for summary judgment, this Court's practice rules prohibit a party from filing a motion for summary judgment. Accordingly, Relators move to strike the Respondents' motion

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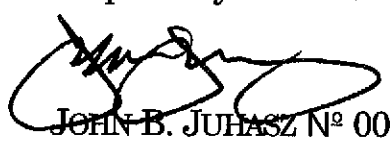
for judgment on the pleadings, as it relies upon matters not properly part of the pleadings and deprives Relators a meaningful opportunity to respond thereto.

WHEREFORE, the Relators pray for an order of this Court pursuant to OHIO CIV. R. 12(F), striking the Respondents' motion for judgment on the pleadings; or, should the Court fail to strike the motion, for a motion overruling the same and entering an order issuing an alternative or a peremptory writ, if a writ has not already been issued.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing [✓] sent by regular United States Mail, postage prepaid, [___] hand delivered to counsel or counsel's office; [___] sent by telecopier this 12 day of June, 2009 to Iris T. Guglucello, Esq., and Anthony Farris, Esq., Counsel for Respondents, 26 South Phelps Street, Youngstown, Ohio 44503.

JOHN B. JUHASZ

MEMORANDUM IN SUPPORT OF MOTION

Introduction and Summary of Relators' Argument. Relators commenced this action for mandamus on May 13, 2009. On June 5, 2009, Respondents filed an answer and a separate motion for judgment on the pleadings. This Court's practice rules permit the filing of a motion for judgment on the pleadings. The rules also prohibit the relators from filing "a response to an answer." See, OHIO S.CT. PRAC. R. X, §5. The Relators are permitted to "file a memorandum in opposition to a motion to dismiss or a motion for judgment on the pleadings within ten days of the filing of the motion. Neither party may file a motion for summary judgment." *Id.*

Respondents have attempted to circumvent these provisions by attaching extraneous documents to their Answer to the Complaint. Respondents then in turn rely upon those extraneous documents as "pleadings" in support of a motion for judgment on the pleadings. In doing so, Respondents have unfairly attempted to circumvent the purpose of the rules; and, at the same time, by relying upon materials when Relators are precluded from offering their own materials, Respondents seek to have their cake, and eat it, too. They wish to file a motion for summary judgment, relying upon materials outside the pleadings, while denying Relators the opportunity to respond in a meaningful fashion.

Ohio law permits, and in some cases requires, the attachments of documents to a pleading. OHIO CIV. R. 10 provides in pertinent part:

> **(C) Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.
>
> **(D) Attachments to pleadings.**
>
> **(1) Account or written instrument.** When any *claim or defense is founded on an account or other written instrument,* a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(Italics emphasis added.) However, those documents must support a claim or a defense. Although perhaps theoretically an affidavit or indeed any written or printed document could be called a written instrument, the cases suggest to the contrary. Clearly, there must be a rule of relevance in terms of claims or defenses. Otherwise, there are few limits on what can be made part of the pleadings.

OHIO CIV.R. 10(C), like its federal counterpart, makes reference to the attachment of "any written instrument." The decisional law from the federal courts that interpret the federal rule makes quite plain that the attachment of the January 20, 2009 letter from this Court's Administrative Director, Steven C. Hollon (see, Answer of Respondents, "Exhibit A"), the Memorandum to the Chief Justice and Mr. Hollon from Dr. David Sweet (see, Answer of Respondents, "Exhibit B"), and

Youngstown City Ordinance 09-128 (see, Answer of Respondents, "Exhibit C") is plainly barred.

The more persuasive federal authorities hold that an affidavit does not qualify as a "written instrument" for purposes of analogous FED. R. CIV. PROC. 10(c). The United States District Court for the Northern District of Ohio held that the use of an affidavit attached to the complaint does not fit the definition of "written instrument" for purposes of FED. R. CIV PROC. 10(c). The court found instead that the affidavit contains extraneous or evidentiary material that should not be attached to the pleadings. See, *In re: Empyrean Biosciences, Inc. Securities Litigation* (N.D. Ohio 2003), 219 F.R.D. 408, Fed. Sec. L. Rep. ¶92, 629, at 413.

While the Sixth Circuit appears not specifically to have addressed this issue in any detail, other federal courts have issued decisions which compel the relief sought here. For example, in *Rose* v. *Bartle* (3rd Cir. 1989), 871 F.2d 331, the Third Circuit analyzed whether an affidavit constitutes a "written instrument" for purposes of FED. R. CIV. PROC. 10(c). There, two of the plaintiffs attached an affidavit to their amended complaint. The court held that the affidavit could not be considered as part of the pleading. The court reasoned that the types of exhibits incorporated within pleadings consist largely of documentary evidence, specifically contracts, notes, and other writings on which a party's action

or defense is based. The court concluded that lengthy exhibits containing evidentiary matter should not be attached to the pleadings. The court also said that an affidavit is not a "written instrument" as that term is used in FED. R. CIV. PROC. 10 (c), and that to hold otherwise would elevate form over substance by drawing a distinction between an affidavit filed with an answer and an affidavit filed with a motion to dismiss under FED. R. CIV. PROC. 12(b)(6)—or, as Relators submit here, a motion for summary judgment, whether filed as such or "converted" into one from a motion for judgment on the pleadings.

Relying on that case, the Western District of New York held that plaintiffs' affidavits and their attorney's affirmation were not "written instruments" for purposes of FED. R. CIV. PROC. 10(c) in *Murphy* v. *Cadillac Rubber & Plastics, Inc.* (W.D.N.Y. 1996), 946 F.Supp. 1108. There, the court cited to the definition of "written instrument" contained in *Black's Law Dictionary*, and resolved that a "written instrument" is a "document evidencing legal rights or duties or giving a formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement." *Id.*, at 1115. Because an affidavit does not fall into this category of document, the court determined that it could not properly be considered part of a pleading. The court also properly concluded that to hold otherwise would "blur the distinction between

summary judgment and dismissal for failure to state a claim upon which relief may be granted." *Id.*, quoting *Rose, supra.*

In *DeMarco* v. *DepoTech Corp.* (S.D. Cal. 2001), 149 F.Supp.2d 1212, the plaintiffs brought a securities fraud action and alleged that the defendant made material misrepresentations about, *inter alia*, the efficacy of certain pharmaceuticals. The plaintiffs attached an expert affidavit to their complaint that offered an opinion about the FDA data generated by clinical trials. Upon motion, the court struck the affidavit, and held that an expert affidavit does not meet the definition of "written instrument" under FED. R. CIV. PROC. 10(c). The court properly characterized the affidavit as "a piece of evidentiary matter generated by a retained expert." The court went on to note that consideration of the affidavit would blur the distinction between summary judgment and dismissal—a point not to be overlooked here.[1]

Northern District of Ohio federal Judge Patricia Gaughan found in *In re Empyrean Biosciences, Inc. Securities Litigation, supra*, that the affidavit offered by plaintiffs there did not satisfy the definition of written instrument. She also held that the plaintiffs essentially asked her "to transform the evidentiary support offered in the form of an affidavit from

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[1] But *cf. Schnell* v. *City of Chicago* (7th Cir.1969), 407 F.2d 1084; *Branch* v. *Tunnell*, (9th Cir. 1994), 14 F.3d 449, overruled on other grounds, *Galbraith* v. *County of Santa Clara* (9th Cir. 2002), 307 F.3d 1119.

... counsel into substantive allegations based on Rule 10(c)." Judge Gaughan found the affidavit to be the type of "exhibit containing extraneous or evidentiary material that should not be attached to the pleadings." *Id.*, at 413, citing *Bowens* v. *Aftermath Entertainment* (E.D. Mich. 2003), 254 F.Supp.2d 629, 640, in turn citing one of the most respected texts, 5 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE §1327 (2nd ed.1990 & supp. 2002).

What the Ohio courts have had to say likewise supports striking the documents attached to the Answer. In *Hamrick* v. *DaimlerChrysler Motors*, Lorain App. No. 02CA008191, 2003 Ohio 3150, 2003 Ohio App. LEXIS 2809, the appellants filed a "record filing of evidence of Defendant DaimlerChrysler Corporation's knowledge of product defects before issuance of recall notice." Attached to that filing was a letter, and further attached to that letter was a report that apparently contained details of a recall concerning trailer hitch brackets. DaimlerChrysler filed a motion to strike pursuant to OHIO CIV.R. 12(F), and asserted that the filing was unsupported by the Ohio Rules of Civil Procedure and was an improper offer of evidence. The trial court granted the motion to strike. *Hamrick, supra*, at ¶9. The Court of Appeals upheld the trial court's striking of that

filing. *Id.*, at ¶13. See, also, *Smith* v. *Nagel*, Summit App. No. 23551, 2007 Ohio 2894, 2007 Ohio App. LEXIS 2678, ¶22 (CARR, J., dissenting).[2]

In this case, among the documents attached by the Respondents is a letter from Steven Hollon, this Court's Administrative Director. That letter plainly indicates that the concerns of the Relators are "genuine and compelling" and that the Youngstown Municipal Court has "legitimate issues that need to be addressed." Mr. Hollon went on to say that:

> The citizens of your community need to know that when they come to your court to have their legal matters addressed those matters will be considered in a safe and protective environment where their due process rights for a fair and open hearing are protected, and where they will receive the advice of counsel in a reasonably private location.

Mr. Hollon also said that the "city leaders realize that something needs to be done regarding the *provision of adequate facilities* for the operation of your court, and that *the current arrangement is not suitable*." (Emphasis added.)

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[2] Judge Car in her dissent noted the dangers of expanding too far the rule that permits instruments to be attached to pleadings.

> ... Although the majority is correct that an exception exists under Civ.R. 10(C) for written instruments attached to the complaint, in my opinion the exception does not apply here. Although Civ.R. 10(C) does not define a written instrument, case law has defined its parameters in terms of an account or a written contract. A transcript is more in the form of evidence attached to the complaint. Evidence should not become part of the complaint just because it is attached or incorporated by reference. Evidence other [**15] than written instruments needs to be examined within Civ.R. 56. I dissent and would reverse.

Ohio law cautions that when a party attaches documents to his filing, those documents become part of the pleadings, and, those documents may, as appropriate, either be used to help or to hurt the position of the party who attached them. OHIO CIV. R. 10(C) provides that "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading *is a part of the pleading* for *all* purposes." (Emphasis added.) Thus, Respondents have taken the curious position that the facilities are suitable accommodations, by denying the allegations of the Relators that the facilities are not suitable; while at the same time attaching a document that concludes precisely the opposite.

The pleading presently being discussed is just that—a pleading. The answer is not a motion for judgment on the pleadings or summary judgment. See, *e.g., Gruener* v. *Ohio Cas. Co.* (S.D. Ohio 2005), 416 F.Supp.2d 592, 599. To allow the exhibits to remain is to adopt evidence as opposed to a document which states the legal rights and liabilities of parties. The Respondents' action is an attempt to convert the *pleading* function of the case into *motions* practice and a contest of oaths. The separate motion for judgment on the pleadings, discussed *post*, is "procedural and tests the sufficiency of the complaint." *State ex rel.*

Hanson v. *Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378.

In any event, the documents which Respondents have attached to their answer purport to show that the parties were engaged in negotiations prior to the Relators commencing this lawsuit. There is no legal defense, the essence of which is that a lawsuit cannot be filed because the parties were discussing settlement but just quite hadn't gotten there.[3] Thus, the documents attached by Respondents to their answer, even if one adopts a licentious definition of written instrument, do not relate to any legal cognizable claim or defense.

There is almost no rule of law that cannot be stretched beyond its logical and equitable foundations, given enough effort. And so it is with the rule that permits documents to be attached to pleadings. Documents are permitted to be attached to pleadings to substantiate a cause of action or a defense. If, for example, a claim is based upon contract or an account, it is only fair to attach the contract or the account to the complaint. Likewise, if a defense was based upon release, attaching the release would certainly be proper. An attached written instrument is more

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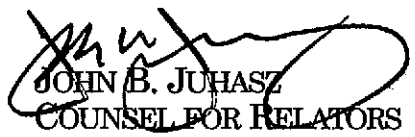
[3] Even if there were such a legal defense known to the law, the allegations in this case would clearly show that judgment on the pleadings is improper, as the Relators and their predecessors in office have been attempting to obtain suitable accommodations for 12 years.

comprehensible than a detailed description of that instrument in the body of the complaint or answer. The law provides that because a claim or defense is based on the instrument, the instrument itself should be construed as much a part of the pleading as any descriptive paragraph within the pleading. See, *e.g.*, *Oxford Sys. Integration* v. *Smith-Boughan Mech. Servs.*, 159 Ohio App.3d 533, 2005 Ohio 210, 824 N.E. 2d 586. Here, however, Respondents have stretched the rule well beyond its intended limits and attached documents not only that do not support the claim made by Respondents factually, but the claim that Respondents make is not a legal defense.

To be sure, Respondents attach no documents to their motion for judgment on the pleadings, but by stretching the rule concerning the attachment of documents well beyond its limits, the effect is the same. Relators are placed in a position of being unable to respond to the Respondents' arguments, supported as they are by materials extraneous to the pleadings.

This Court should find that Respondents have by attaching extraneous materials to their Answer, attempted to convert their motion for judgment on the pleadings to a motion for summary judgment. Accordingly, the attachment should be stricken from the answer or the

motion for judgment on the pleadings relaying as it does upon the materials attached to the answer, should itself be stricken.



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