

ORIGINAL

In the
Supreme Court of Ohio

CITY OF CLEVELAND,	:	Case No. 2009-0441
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
WASHINGTON MUTUAL BANK, A	:	
DIVISION OF JPMORGAN CHASE N.A.	:	Court of Appeals Case
	:	No. 91379
Appellee.	:	

**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL RICHARD CORDRAY
IN SUPPORT OF APPELLANT CITY OF CLEVELAND**

ROBERT J. TRIOZZI (0016532)
Law Director
Karyn J. Lynn* (0065573)
**Counsel of Record*
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
216-664-4504
216-420-8291 fax
klynn@city.cleveland.oh.us
Counsel for Appellant,
City of Cleveland

VLADIMIR P. BELO* (0071334)
**Counsel of Record*
Nelson M. Reid (0068434)
Bricker & Eckler LLP
100 S. Third Street
Columbus, Ohio 43215
614-227-2300
614-227-2390 fax
vbelo@bricker.com
Counsel for Appellee,
Washington Mutual Bank

RICHARD CORDRAY (0038034)
Ohio Attorney General

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*,
Ohio Attorney General Richard Cordray

FILED
AUG 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

BENJAMIN J. CARNAHAN (0079737)

Shapiro & Felty, LLP
1500 West Third Street
Suite 400
Cleveland, Ohio 44113
216-373-3131

Counsel for Appellee,
Washington Mutual Bank .

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	2
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT.....	2
<u>Amicus Curiae Ohio Attorney General’s Proposition of Law:</u>	
<i>R.C. 2941.47 authorizes a misdemeanor trial in absentia for a corporation that fails to appear in response to a criminal summons.</i>	
	2
A. The plain language of R.C. 2941.47 authorizes the misdemeanor trial of a corporation in absentia.....	3
B. R.C. 2938.12 does not apply to corporations.....	4
C. The legislative history of R.C. 2941.47 demonstrates that the statute authorizes a misdemeanor trial in absentia for a corporation that fails to respond to a criminal summons.	5
D. Ohio Crim. R. 43(A) does not prevent the trial of a corporation in absentia under R.C. 2941.47 where the corporation has failed to respond to a criminal summons.	6
CONCLUSION.....	7
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Cincinnati v. Thomas Soft Ice Cream, Inc.</i> (1977), 52 Ohio St.2d 76	4
<i>City of Canton v. Imperial Bowling Lanes, Inc.</i> (1968), 16 Ohio St.2d 47	4
<i>City of Cleveland v. Destiny Ventures, L.L.C.</i> , 2008-Ohio-4587	1
<i>City of Cleveland v. Destiny Ventures, L.L.C.</i> , Case No. 2008-2230.....	2
<i>Proctor v. Kardassilaris</i> , 115 Ohio St.3d 71, 2007-Ohio-4838.....	6
<i>State v. Frost</i> (1979), 57 Ohio St.2d 121	4
Constitutional Provisions, Statutes, and Rules	
Ohio G.C. § 12372	5
R.C. 109.02	2
R.C. 2938.12	3, 4
R.C. 2941.47	<i>passim</i>
Section 5(B), Article IV, Ohio Constitution	6

INTRODUCTION

Because of the inchoate nature of corporations—that is, the fact that they cannot be arrested and physically brought to justice—the Ohio General Assembly enacted R.C. 2941.47, which allows a corporation to be tried in absentia if it fails to respond to a criminal summons. The statute is one of the only tools available to deter corporations from avoiding legal accountability and to hold corporations accountable when they do flout the justice system.

Two cases are currently pending before this Court regarding the trial-in-absentia statute. Both cases arise from Ohio's foreclosure crisis and involve neglectful corporate owners that failed to respond to the criminal summonses that were issued against them for housing code violations. In both cases, the companies were tried in absentia in Cleveland's Housing Court after failing to appear for their criminal trials. In the first case, *City of Cleveland v. Destiny Ventures, L.L.C.*, 2008-Ohio-4587, a real estate wholesale company has challenged the constitutionality of R.C. 2941.47, alleging that trials in absentia violate a corporation's Sixth Amendment right to be present at trial. This case, by contrast, presents two statutory questions—one narrow, the other broader. The narrow question is whether R.C. 2941.47 allows a corporation to be tried in absentia where it has been charged by a complaint, rather than by information or indictment. The broader question—which is the focus of this amicus brief—is whether the trial-in-absentia procedure set forth in R.C. 2941.47 applies only to felony prosecutions, as Washington Mutual wrongly contends, or whether it operates in both misdemeanor and felony cases.

For the reasons discussed below, there is no basis for the Eighth District's conclusory ruling that R.C. 2941.47 is restricted to felony prosecutions. The statute authorizes both misdemeanor and felony trials in absentia for corporations that fail to appear in response to a criminal summons. Accordingly, the Eighth District's decision should be reversed.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General is Ohio's chief law officer and therefore has a strong interest in ensuring that Ohio's laws are properly applied. R.C. 109.02. The Ohio Attorney General also has a strong interest in ensuring that state and city officials have the tools necessary to hold corporations accountable for their criminal conduct. The fact that corporations cannot be arrested and physically brought to justice should not allow them to flout Ohio's criminal justice system. The Ohio Attorney General's interest in these matters is particularly acute in cases like this one, where the corporation's behavior exacerbates the damage caused by Ohio's foreclosure crisis.

STATEMENT OF THE CASE AND FACTS

The Ohio Attorney General adopts the statement of the case and facts presented by the Eighth District and in the brief of Appellant, the City of Cleveland.

Also relevant to this case is a broader constellation of facts regarding Ohio's foreclosure crisis and the role that corporate owners have played in the deterioration of Ohio's cities. These facts were set out in detail in the Ohio Attorney General's amicus brief in the *Destiny Ventures* case and are incorporated by reference here. See Brief of Amicus Curiae Ohio Attorney General Richard Cordray in Support of Appellee City of Cleveland, at 2-5, *City of Cleveland v. Destiny Ventures, L.L.C.*, Case No. 2008-2230.

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law:

R.C. 2941.47 authorizes a misdemeanor trial in absentia for a corporation that fails to appear in response to a criminal summons.

As noted above, this case involves a narrow question and a broader one. The narrow question is whether R.C. 2941.47 applies to prosecutions initiated by complaint. For the reasons

set forth in the City of Cleveland's brief, which the Attorney General adopts and incorporates here, it does. This amicus brief focuses on the broader question: whether R.C. 2941.47 is restricted to felony prosecutions. For the reasons discussed below, the statute is not restricted to felonies, but rather allows a corporation to be tried in absentia in both felony *and* misdemeanor cases.

By incorrectly limiting corporate trials in absentia to felony prosecutions, the Eighth District has gutted the application of R.C. 2941.47 in ways not contemplated by the General Assembly and has taken away a vital tool for holding corporations accountable for misdemeanor violations.

A. The plain language of R.C. 2941.47 authorizes the misdemeanor trial of a corporation in absentia.

The statutory language of R.C. 2941.47 makes clear that corporations can be tried in absentia for misdemeanors. The statute states that “[w]hen an indictment is returned or information filed against a corporation . . . [s]uch corporation shall appear by one of its officers or by counsel on or before the return day of the summons.” R.C. 2941.47. If the corporation fails to appear, the clerk shall enter a plea of “not guilty,” at which point, the corporation is considered to be “before the court until the case is finally disposed of.” *Id.*

Even if this Court finds that the statute applies only to prosecutions commenced by “indictment” or “information,” these prosecutions clearly include misdemeanors, since Ohio Crim. R. 7(A) plainly states that “[a] misdemeanor may be prosecuted by indictment or information.” There is no question, then, that the plain language of R.C. 2941.47 authorizes corporate trials in absentia for misdemeanor violations.

B. R.C. 2938.12 does not apply to corporations.

A different statute—R.C. 2938.12—does nothing to trump the plain language of R.C. 2941.47 or to preclude corporate trials in absentia for misdemeanors. R.C. 2938.12 describes when courts may conduct a trial in absentia in certain misdemeanor cases. *But the statute does not apply to corporations.* The statute provides that a trial in absentia can proceed only where the defendant made a written request for the trial to proceed in his absence. As the statute provides:

A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present.

R.C. 2938.12.

This statute—which is a general provision pertaining to misdemeanor trials—was enacted seven years after R.C. 2941.47—which is a *specific* statute pertaining to the trial of corporations in absentia and which plainly contemplates corporate trials in absentia for misdemeanors without any requirement that the corporation request to be absent. As this Court has long held, a subsequent general statutory provision prevails over a special provision “only if [a] court determines that the ‘manifest intent’ of the General Assembly is that the general provision shall prevail.” *Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76; see also *State v. Frost* (1979), 57 Ohio St.2d 121, 124 (“It has been a long-standing rule that courts will not hold prior legislation to be impliedly repealed by the enactment of subsequent legislation unless the subsequent legislation clearly requires that holding.”). The Eighth District offered no basis for concluding that the General Assembly manifestly intended for R.C. 2938.12 to trump R.C.

2941.47 as to corporate misdemeanor trials in absentia—and indeed, no basis exists for excluding misdemeanor trials from the corporate trial-in-absentia statute.

Moreover, it is well settled that a statute should not be interpreted to be absurd or unreasonable. *City of Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47, 53. Section 2938.12 contains provisions regarding a person who “escapes” or “departs without leave”—provisions that make no sense as applied to corporations.

C. The legislative history of R.C. 2941.47 demonstrates that the statute authorizes a misdemeanor trial in absentia for a corporation that fails to respond to a criminal summons.

Although the plain language of R.C. 2941.47 is dispositive, making it unnecessary even to resort to legislative history, the legislative history of the statute nevertheless confirms that R.C. 2941.47 authorizes a misdemeanor trial in absentia for a corporation that fails to respond to a criminal summons.

When the corporate trial in absentia statute was originally promulgated, corporations could *only* be charged with misdemeanors. The General Code defined felonies as “those crimes that may be punished by death, or by imprisonment in the penitentiary.” Ohio G.C. § 12372. All other offenses were considered misdemeanors. Because a corporation cannot be sentenced to death or imprisonment, it follows logically that corporations could only be indicted for misdemeanors—and that, therefore, from the outset, R.C. 2941.47 was intended to authorize misdemeanor trials in absentia for corporations. Nothing in the statute’s subsequent history has changed that.

D. Ohio Crim. R. 43(A) does not prevent the trial of a corporation in absentia under R.C. 2941.47 where the corporation has failed to respond to a criminal summons.

The Eighth District's reliance on Ohio Crim. R. 43(A) is also misplaced. That rule does not apply to a corporation that has already waived its right to be present at trial by failing to respond to a criminal summons.

Ohio Criminal Rule 43(A) provides that a defendant must be physically present at trial unless, among other things, the defendant "waive[s], in writing or on the record, the defendant's right to be physically present." The Eighth District seems to suggest that Rule 43(A) creates a substantive right to be present. That is wrong. Pursuant to the Modern Courts Amendment of the Ohio Constitution, the Ohio Rules of Criminal Procedure are exactly that—rules of *procedure*—and they cannot "abridge, enlarge, or modify any *substantive* right." Section 5(B), Article IV, Ohio Constitution (emphasis added). This Court has defined "substantive" as law that "creates, defines and regulates" the rights of a party. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶ 17. And where a procedural rule conflicts with a statute, the rule will control for procedural matters, but the statute controls for matters of substantive law. *Id.*

Here, R.C. 2941.47 defines the substantive rights of corporations to be present at trial. Pursuant to the statute, a corporation does not have a substantive right to be present if it fails to appear on or before the return day of the summons. Because a corporation has no substantive right to be present if it fails to appear at the outset of a case, Rule 43(A)(3)—the procedure for waiving "the defendant's right to be present"—does not apply to that corporation. That is, having failed to appear, the corporation no longer possesses a substantive right to be present, and so the procedural rule governing waiver of such a right is inapplicable.

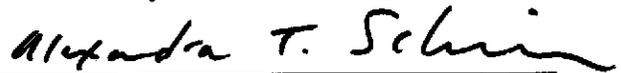
Accordingly, Rule 43(A) does not overcome R.C. 2941.47 and does not prevent the trial of a corporation in absentia where the corporation has failed to respond to a criminal summons.

CONCLUSION

For the reasons above, R.C. 2941.47 authorizes a misdemeanor trial in absentia for a corporation that fails to appear in response to a criminal summons. The Eighth District's decision should therefore be reversed.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Ohio Attorney General



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

ALEXANDRA T. SCHIMMER (0075732)
Chief Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*,
Ohio Attorney General Richard Cordray

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Appellant City of Cleveland was served by U.S. mail this 21st day of August, 2009, on the following counsel:

Robert J. Triozzi
Law Director
Karyn J. Lynn
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

Counsel for Appellant,
City of Cleveland

Vladimir P. Belo
Nelson M. Reid
Bricker & Eckler LLP
100 S. Third Street
Columbus, Ohio 43215

Counsel for Appellee,
Washington Mutual Bank

Benjamin J. Carnahan
Shapiro & Felty, LLP
1500 West Third Street
Suite 400
Cleveland, Ohio 44113

Counsel for Appellee,
Washington Mutual Bank



Alexandra T. Schimmer
Chief Deputy Solicitor General