

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND

Appellant,

-v-

WASHINGTON MUTUAL BANK, A
DIVISION OF JP MORGAN
CHASE NA

Appellee

) Case No. 2009-0441
)
) On Appeal from the
) Cuyahoga County Court of Appeals
) Eighth Appellate District

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APPELLANT CITY OF CLEVELAND'S REPLY BRIEF

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INTRODUCTION

In its response to the City of Cleveland's (hereinafter, City) and Office of the Attorney General's (hereinafter AG's Office) briefs, Appellee Washington Mutual Bank has done an excellent quickstep around the most salient points in order to bolster an argument that belies the plain language of the statutes involved.

By its plain language, O.R.C. §2941.47 specifically sets out a procedure that allows a court to proceed with arraignment when no one from the corporate organization, neither an officer or attorney, is present to represent the corporation. The statute further provides that once that arraignment, in absentia, is held, despite the fact that no representative was present, the corporation is before the Court until the matter is disposed of.

The 8th District Court of Appeals decision that §2941.47 does not apply to misdemeanors filed by complaint ignores the existence of O.R.C. §2941.35. Appellee attempts to limit the decisions of the various court findings with respect to that section by stating that those decisions only ruled on the determination of the sufficiency of a complaint by using the same standard as that for an indictment or information. Ironically, they ask for strict reading of §2941.47 while attempting to limit the reach of §2941.35 by ignoring the plain language of that code section.

Appellee suggests that both the City and the AG's office are asking this Court to create law by "judicial fiat" (Appellee's brief at p. 1). In fact, the City is simply asking this Court to apply decades old standards for statutory construction and interpretation to give full affect to statutes that have been underutilized in this state and as a result, lack the support of the weighty analysis of the courts due to their lack of use.

ARGUMENT

In its zeal to absolve itself from responsibility for its properties in the City of Cleveland, and presumably elsewhere in the State, Appellee has failed to accurately analyze the application of §2941.47 and attempts to limit its application by bootstrapping interpretations of the Appellate Courts argument never stated by the 8th District Court of Appeals in order to bolster its argument.

I. Appellant’s Reply to Appellee’s Response to Proposition of Law II

Appellee argues that §2941.47 must be strictly interpreted based on the plain language of the statute, however, in interpreting §2941.35 Appellee argues that an entire sentence be ignored in order to support its contention that §2941.35 does not apply to this case.

A. 2941.47 Does Apply to Prosecutions Initiated by Complaint

In its attempt to derail the application of §2941.35 to this case, Appellee suggests that the City “crafted” an “in pari materia” analysis to bolster its case (Appellee’s brief at p. 7). The doctrine of “in pari materia” is well settled in Ohio.¹ This Court has found in reviewing two related statutes that:

(“They”) must be read in pari materia. *Maxfield v. Brooks* (1924), 110 Ohio St. 566, 144 N.E. 725, paragraph two of the syllabus. In reading statutes in pari materia and construing them together, this court must give a reasonable construction that provides the proper effect to each statute. *Id.* All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable. *Couts v. Rose* (1950), 152 Ohio St. 458, 461, 40 O.O. 482, 90 N.E.2d 139.²

¹ A search for “in pari materia” on Westlaw resulted in 1,956 cases, the oldest cases existing in the mid 1800s.

² *State ex. rel. Cordray v. Midway Motor Sales Inc.* (2009), 122 Ohio St.3d 234, 238, 910 N.E.2d 432, 436.

As a well settled doctrine, the Court *must* consider related statutes together. It is not a whim to do so, it is not creating law to do so; it is required by the law. Appellee's suggestion that the City essentially created the argument out of whole cloth misstates the law and how it should be applied.

Having dismissed the doctrine of "in pari materia", Appellee goes on, in its response to the City's argument to argue that §2941.47 must be held to the "textual" limitations of the section and cannot rely on other statutes to broaden its reach. Specifically, they argue that §2941.35 does not apply to the case at hand because there are no cases saying that it does.

§2941.35 states:

Prosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or such other method as is provided by law in such courts as have original jurisdiction in misdemeanors. Laws as to form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof apply to such affidavits and warrants issued thereon.

Appellee jumps to the conclusion that because there is no case law specifically extending the reach of §2941.47 by virtue of the existence of §2941.35 to misdemeanor prosecutions that the law will not allow such an action. Appellee misunderstands the City's purpose in citing the cases addressing §2941.35. The intention was to show the court that numerous courts, in fact, almost every appellate district within the state, has analyzed §2941.35 in such a way as to extend several statutes in Chapter 2941 of the Revised Code to prosecutions by complaint in Municipal Courts. In its ruling in the case below, the 8th District Court of Appeals failed to consider this important fact and thus, looking solely at the language of §2941.47 found it inapplicable to the case at hand. Both

the appellate court and Appellee, have too narrow a view of the relevant code sections. Appellee further makes the error of assuming that because no Court has been asked to review whether §2941.35 applies to extend §2941.47 to municipal court cases, that therefore, §2941.35 does not apply. This is a specious assumption not supported by law.

O.R.C. §2941.35 specifically states that “(l)aws as to form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof apply to such affidavits and warrants issued thereon.” By its plain language, §2941.35 extends the reach of statutes, ordinances, legislative actions, case law, i.e. anything that falls into the definition of the word “law” to the items listed in the section. If this Court would accede to Appellee’s interpretation, §2941.35 would only extend to those situations where an Appellate Court has had an opportunity to review it and no others. It is clearly not the intent of the legislature that statutes only be given effect when challenged. It is presumed that the entire statute is intended to be effective on enactment.³ A good portion of §2941.47 deals with the service of summons on indictment or information to a corporation. By its plain language §2941.35 would extend laws that deal with the service of indictments to misdemeanors in courts that have original jurisdiction over misdemeanors. Whether the remainder of the statute with respect to the arraignment is intended to apply to complaints in municipal court, is clear. Pursuant to O.R.C. §1.47(B), when a statute is enacted it is the intention of the legislature that the entire section be effective. If, as the City and Ag’s Office argue, §2941.47 applies to complaints in municipal court with respect to service, it is presumed that the intent of the legislature is for the entire statute to be effective.

³ O.R.C. §1.47(B)

Despite the City's argument that the statutes must be considered in pari materia, the reference to numerous Court cases that have used a similar analysis, and that the plain language of the §2941.35 at minimum required the 8th District Court of Appeals to more thoroughly review whether §2941.35 extends the reach of §2941.47, Appellee argues that the "City offers no reason why this Court should ignore the plain statutory language and substitute an alternative public policy view" (Appellee's brief at p. 11). Given the several reasons given by the City in support of its argument, Appellee's statement is a gross mischaracterization of the City's argument.

B. O.R.C. §2941.47 Does Authorize a Corporate Defendant's Trial In Absentia.

Appellee next argues that the "plain language" of §2941.47 does not allow for a trial in absentia of a corporation. Appellee places too much reliance in the concept of an "express" directive allowing a trial in absentia. O.R.C. § 2941.47 states:

When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion, demurrer, or plea, and **upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of "not guilty."** **Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of.** On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information. (emphasis added)

The statute clearly states that if a corporation fails to appear in the form of an attorney or officer, the court may proceed with arraignment, i.e. accepting the plea of the corporation as given by the clerk of courts, even though no one from the corporation is present. If, as Appellee argues, the state intended O.R.C. §§2945.12, 2938.12 and Crim.R. 43 to apply to corporations with respect to the presence of a defendant at every critical stage, it is baffling that the legislature would create §2941.47 which clearly allows for a trial in absentia for a corporate entity. Furthermore, given that §2941.47 allows for a trial in absentia for a corporate defendant, the language that follows makes clear that once that occurs, the corporation is before the Court until the case is disposed of.

Appellee makes much of the change in the language in versions of §2941.47 from “continuously present” to “before the court”, however, this is a distinction without weight. Black’s Law Dictionary defines the word “before” as follows: “prior to; preceding; in front of; at the disposal of; in a higher position. In the presence of; under the official purview of; as in magistrat’s jurist: “before me presently appeared”, etc.” It is a reasonable interpretation that if properly served a Court may proceed to a trial in absentia when a corporate defendant fails to appear. It is also important to note that the mere existence of this section makes clear that the legislature had the intention of treating a corporate defendant differently than an individual one.

Appellee further argues that the enactment of O.R.C. §2938.12 is instructive⁴. Appellee’s reliance on the enactment of this statute is misplaced. As §2941.47 clearly

⁴ Appellee also cites §2945.12, however, since that section specifically addresses misdemeanors filed by indictment, the City is only responding to Appellee’s argument with respect to §2938.12.

provides that a corporation is not required to be present, §2938.12 does not apply. In fact, as the AG's office noted, the fact that §2938.12 specifically creates an exception for a defendant who flees or voluntarily absents themselves from the proceedings, behavior that is uniquely applicable to an individual and not a corporation, is additional evidence in support of a finding that the legislature recognizes a distinction between a corporate defendant and an individual one.

C. The Service and Pleading in this Case are Not Properly Before the Court as Appellee Never Raised this Issue before the Municipal or Appeals Court.

For the first time on appeal, Appellee seeks to have this Court determine whether the service and pleading requirements of §2941.47 were met in the trial court. It is well settled that this Court is barred from considering issues that a party failed to raise in the Courts below.⁵ For that reason, this issue is not properly before the Court and should not be heard.

II. Appellant's Reply to Appellee's Response to Proposition of Law III: O.R.C. §2938.12 and Crim.R. 43 are not Dispositive and Do Not Undermine the Application of O.R.C. §2941.47 in this Case.

A. Criminal Rule 43 cannot enlarge a substantive right and to the extent that the 8th District found that it does, the 8th District erred.

Appellee again mischaracterizes the arguments of the City and the AG's Office in order to make its point. The City's argument is simply that §2941.47 *does* apply to misdemeanor cases in municipal courts and that the analysis conducted by the 8th District

⁵ *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457, 462-463.

is incomplete when it suggests that §2938.12 and Crim.R. 43 are the only laws that must be considered when analyzing the Housing Court's procedure.⁶

By its plain language, §2941.47 creates a basis for a corporate trial in absentia. Even if one ignores, as Appellee has done, the law with respect to substantive and procedural laws, §2941.47 clearly flies in the face of the idea that *all* defendants including corporate defendants have an unassailable right to be present at all critical stages of the proceedings. Because Crim.R. 43 cannot be found to confer a substantive right pursuant to Section 5(B), Article IV of the Ohio Constitution, Appellee is simply wrong when it states that Crim.R. 43 mandates the presence of the defendant. Unless there is a substantive right to be present, Crim.R. 43 does not apply.

Having argued that Crim.R. 43 essentially creates a substantive right to be present contra to law, Appellee then argues that a corporate defendant has a constitutional right to be present at all critical stages of the proceedings. Appellee cites numerous cases involving individual defendants in support of this proposition but no cases that support the proposition that a corporate defendant has the same right. (Appellee's brief at pp. 20-21). While the lack of case law is not dispositive of this issue, it clearly suggests that this is an area of the law that is not well settled and in need of clarification.

By its very language, §2941.47 supports a finding that these cases do not apply to a corporate defendant. If, as Appellee argues, a corporation has a constitutional right to be present, then the existence of §2941.47 is baffling because by its **express language** it creates a situation where a corporation's presence can be bypassed entirely at arraignment and allows for the continued jurisdiction of the court from that point forward. This is

⁶ The City will rely on its argument in the above sections and in its merit brief rather than readdress its reasoning for the applicability of §2941.47 to complaints in municipal court.

clearly an area of Ohio law that needs to be further analyzed as neither Appellee or the City have found any cases that directly address whether these constitutional protections apply to corporate defendants. The City would argue that logic would preclude a one for one application of rights that accrue to individuals to a corporation. Courts have analyzed the application of constitutional rights to corporations and have chosen to circumscribe those rights in certain situations because applying a constitutional right to a corporation would result in manifest injustice. For instance, a corporation cannot prevent its employees from testifying against it or the production of documents on the basis that it would violate the 5th amendment prohibition against self-incrimination.⁷

Both Appellee in this case and Appellant in *City of Cleveland vs. Destiny Ventures*, supra, would have this Court assume that constitutional rights that accrue to individuals accrue to a corporate defendant. There is no basis in the law to support that contention. Furthermore, the basic nature of a corporation calls for this Court to analyze whether protections for individuals can be applied to a corporation, and if those rights do apply, how do those rights manifest themselves in a court of law and how does one determine the waiver of the right. The ability of the law to effect an individual and a corporation differ, consequently, common sense dictates that the way the law applies to the two would reflect the unique ways in which the Court must deal with each type of defendant.

⁷ *Braswell v. U.S.* (1988), 487 U.S. 99, 108 S.Ct. 2284 at syllabus, stating that a corporation does not have a 5th Amendment right against self-incrimination.

B. §2941.47 is a Specific Statute. The Type of Case involved does not impact the nature of the statute.

As previously noted, Appellee completely ignores the fact that §2941.47 calls for an in absentia arraignment and for the corporate defendant to be before the Court from that point forward. While the statute does not say specifically that the corporation may be tried in its absence, it does state explicitly that the corporation is “before” the court. As stated above, this language clearly allows for a trial in absentia. Where the due process requirements are met, i.e. the defendant has notice and has an opportunity to be heard by appearing and presenting its case, §2941.47 by its explicit terms authorizes a trial in absentia. To the extent that §2938.12 contradicts §2941.47, it is inapplicable. There is a difference between a corporate and individual defendant which the Ohio legislature has clearly recognized. Appellee’s attempts to bootstrap decisions that do not apply to corporations to the corporate form cannot stand when §2941.47 is given its proper recognition.

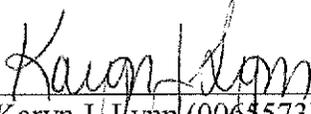
Appellee finally argues that §2941.47 is not a specific statute. §2941.47 creates a procedure for a limited class of defendants, i.e. corporations. It also creates a situation where a corporation may be arraigned and subsequently tried in absentia. §2938.12, on the other hand, presumes the presence of the defendant, where the defendant is a general term, and only allows proceeding in the absence of the defendant in certain circumstances. The two statutes are clearly irreconcilable unless it is recognized that one applies to corporations and one does not.

Conclusion

The 8th District Court of Appeals erred in finding that §2941.47 does not apply to complaints filed in municipal court. By failing to consider §2941.47 properly, the Court's decision to overturn the Housing Courts decision was incorrect. Appellee would like to characterize this argument as the City asking the Court to make new law, however, it is actually Appellee who is asking this Court to "assume" rights to a corporate defendant that have not been explicitly stated in the law. The City is merely asking this Court to analyze the law as it currently exists in Ohio.

Respectfully submitted,
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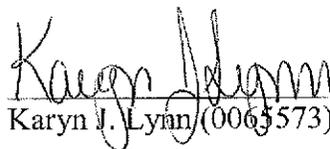
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Certificate of Service

It is hereby certified that a copy of the foregoing was sent to the following by regular mail on this 9th day of October, 2009:

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