

ORIGINAL

IN THE SUPREME COURT OF OHIO

INTERNATIONAL ASSOCIATION OF HEAT  
AND FROST INSULATORS AND  
ASBESTOS WORKERS, LOCAL  
UNION NO. 45

Case No. 2009-2031

Relator

[ORIGINAL ACTION IN PROHIBITION  
MANDAMUS]

v.

LUCAS COUNTY COURT OF APPEALS

Respondent

RESPONDENT'S MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION TO  
AMEND THE COMPLAINT

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RECEIVED  
DEC 18 2009  
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I. STATEMENT OF THE CASE

On November 6, 2009, Relator International Association of Heat and Frost Insulators and Asbestos Workers, Local 45 filed a Verified Complaint for Writs of Prohibition and Mandamus. The Complaint named as Respondent the Lucas County Court of Appeals, Sixth Appellate District.

The Complaint sought a writ of prohibition based on the Respondent's denial of Relator's motion to dismiss an appeal filed in the underlying case. *Complaint*, ¶¶ 7, 8, 10-12, Exhibit 3. The Complaint also sought a writ of mandamus ordering the Respondent to cease acting on the appeal in the underlying case. *Id.*, ¶¶ 12-15. The Relator filed its Answer on December 3, 2009.

Also on December 3, 2009, the Respondent filed an answer and motion for judgment on the pleadings. The motion was based, in part, on the Relator's failure to correctly caption the complaint.

On December 8, 2009, the Relator filed a motion for leave to file an amended complaint. The proposed amended complaint would attempt to correct the case caption.<sup>1</sup>

The Respondent now files its memorandum in opposition. This opposition is based on the delay in filing the motion to amend

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<sup>1</sup> The Relator has also filed a motion to expedite ruling on the motion to file an amended complaint and a motion for judgment on the pleadings.

and undue prejudice to the Respondent. In addition, the filing of the amended complaint would be futile.

Therefore, the motion for leave to file an amended complaint must be denied.

## II. LAW AND ARGUMENT

Once an answer to a complaint has been served, a party may amend its pleading only by leave of court. Civ.R. 15(A). The rule favors a liberal policy when a court is faced with a motion to amend a pleading beyond the time limit that automatically allows such amendments. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.* (1991), 60 Ohio St.3d 120, 121-22, 573 N.E.2d 622.

However, while the rule allows for liberal amendment, motions to amend pleadings pursuant to Rule 15(A) should be denied if there is a showing of undue delay or prejudice to the opposing party. *Turner v. Central Local School District*, 85 Ohio St.3d 95, 99, 1999 Ohio 207, 706 N.E.2d 1261. In addition, where an amendment to the complaint would have been futile, a court is within its discretion in denying the motion. *Tenable Protective Services, Inc., vs. Bit E-Technologies, L.L.C., et al.*, Cuyahoga App. No. 89958, 2008 Ohio 4233, ¶ 28. Prejudice to an opposing party is the most critical factor to be considered in determining

whether the grant leave to amend. *Frayzer Seed, Inc. v. Century 21 Fertilizer & Farm Chemical, Inc.*(1988), 51 Ohio App.3d 158, 165, 555 N.E.2d 654.

In the present case, in accordance with *S.Ct.Prac.R. X, Sect. 5*, the Respondent filed an answer and motion for judgment on the pleadings. Although this case was filed only 5 weeks ago, under this Court's rules for original actions, a case is decisional with the filing of a motion for judgment on the pleadings. Thus, within the time frames of *S.Ct.Prac.R. X, Sect. 5*, filing a motion to amend the complaint after a motion for judgment on the pleadings has been filed constitutes undue delay.

In addition, the granting of the Relator's motion would require the Respondent to again file a motion for judgment on the pleadings. This would cause undue prejudice to the Respondent.

Lastly, granting the Relator's motion to amend would be futile. Even if the case was properly captioned, the Respondent's pending motion for judgment on the pleadings still establishes that the Relator's complaint must be dismissed.

Therefore, the Respondent has established that the Relator's motion for leave to file an amended complaint must be denied, because of the undue delay in filing the motion and the granting of the motion would cause undue prejudice to the Respondent.

Lastly, even if the Relator was permitted to file an amended

complaint, the complaint still fails to state a cause of action upon which relief can be granted. Therefore, amending the complaint would be futile.

Respectfully submitted,

**JULIA R. BATES**  
**LUCAS COUNTY PROSECUTING ATTORNEY**

BY: John A. Borell  
John A. Borell  
Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Opposition to the Motion to Amend was sent by ordinary U.S. mail on the 17<sup>th</sup> day of December 2009 to:

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