

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel

Relator,

vs.

Scott Allan Pullins

Respondent,

NO. 10-0851

Before the Board of Commissioners
On Grievances and Discipline
Case No. 09-022

**RESPONDENT SCOTT ALLAN PULLINS' REQUEST TO STRIKE COUNT FOUR
AND FOR SANCTIONS FOR FRIVOLOUS CONDUCT AGAINST RELATOR**

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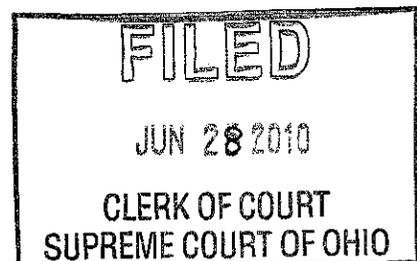
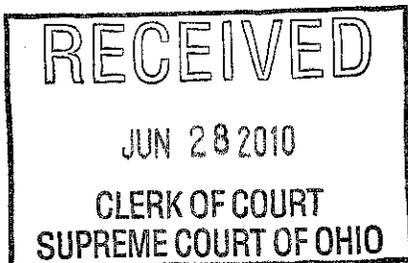
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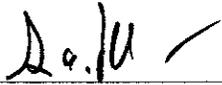
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Counsel for Relator



Now comes the Respondent, pro se, and requests that this Honorable Court strike Count Four of the Board's Report because it is barred by Res Judicata and order sanctions for frivolous conduct against Special Counsel for the Relator. A memorandum in support is provided.

Respectfully Submitted,



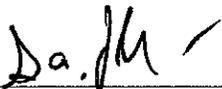
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CERTIFICATE OF SERVICE

A copy of this document was served upon counsel for the Relator, Michael Murman and Edward Kagels, 14701 Detroit Av., Suite #555 Lakewood, OH 44107-4109, and Jonathan Marshall, Secretary, The Board of Commissioners on Grievances and Discipline, the Supreme Court of Ohio, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 via first class, regular mail, this 24th day of June 2010.



Scott A. Pullins (0076809)

MEMORANDUM IN SUPPORT

I. THIS COURT'S AUTHORITY ON THIS MATTER

This Court has authority and discretion to strike a claim that is barred by Res Judicata.

(F) Motion to strike.

Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

Ohio Civ. R. 12

a Ohio R. Civ. P. 12(F) motion to strike based on insufficiency of a claim should only be used to attack individual claims which are not dispositive of the entire action.

State ex rel. Neff v. Corrigan, 75 Ohio St. 3d 12 (Ohio 1996)

Res judicata bars the relitigation of a point of law or fact that was at issue in a former action between the same parties

State ex rel. Washington v. Indus. Comm'n, 112 Ohio St. 3d 86 (Ohio 2006)

II. THE CONDUCT COMPLAINED OF IN COUNT FOUR WAS FULLY KNOWN TO AND INVESTIGATED BY RELATOR AND DISMISSED FOR LACK OF PROBABLE CAUSE

In July of 2007, Relator received a grievance filed by Miriam St. Jean against Respondent detailing the exact same allegations found in Count Four of the amended complaint and the Board's Report. **See Res. Ex. No. 104.**

Relator specifically requested that Respondent explain why he issued subpoenas while the case was held in suspense and respond to the other allegations that were reported in the Mount Vernon News. Respondent replied in great detail to the grievance and included copies of all of the documents in question. **See Res. Ex. No. 106.**

Relator received extensions, requested and received multiple documents from the Knox County Common Pleas Court, conducted a full investigation, and determined that there was not substantial credible evidence that a violation had occurred and dismissed the grievance nearly one year later. **See Res. Ex. No. 107 and Relator's Case File.** There is no appeal from or further review of a decision to dismiss a grievance for lack of substantial credible evidence by the Relator.

If, upon investigation of a grievance, a Certified Grievance Committee or the Disciplinary Counsel determines that the filing of a complaint with the Board is not warranted, the grievant and the judge or attorney shall be notified in writing of that determination, with a brief statement of the reasons that a complaint was not filed with the Board.

No further review or appeal by a grievant shall be authorized.

Ohio Gov. Bar. Rule V

A dismissal of a grievance for lack of substantial credible evidence is a decision on the merits. Such a decision on the merits is barred from relitigation by the doctrine of Res Judicata when the parties involved are the same, the evidence in both actions are identical, and when the standard of proof is identical.

The doctrine of res judicata renders final judgments conclusive only when subsequent actions involve the same parties, or those in privity with them, as in the first action; when the issues to which the evidence is directed are identical in both actions; and when the quantum of proof necessary to render both the original and subsequent judgments is identical.

Ohio State Bar Ass'n v. Weaver, 41 Ohio St. 2d 97 (Ohio 1975)

In this situation, all three factors were identical and present. Disciplinary Counsel was the relator in both actions, the evidence is the same, and the standard of proof is the same because both actions were disciplinary proceedings. Both Relator and the Panel were informed about this issue and elected to proceed. In fact, the Panel Chair denied Respondent's motion to

strike the amended complaint which included Count Four based upon the issue of Res Judicata.

III. KNOWINGLY FILING A CLAIM BARRED BY RES JUDICATA IS A FRIVOLOUS ACT REQUIRING AN AWARD OF SANCTIONS

It is well settled law in Ohio that an attorney that files a claim or complaint barred by Res Judicata, is subject to sanctions for frivolous conduct. The same is true in a disciplinary action, in fact, such an act might even constitute prosecutorial misconduct.

it has been held that filing a claim that is clearly barred by res judicata meets the definition of frivolous conduct in Ohio

Cincinnati Ins. Co. v. Oancea, 2005 Ohio 4872, P22 (Ohio Ct. App., Lucas County Sept. 2, 2005)

Refiling a claim that was or could have been brought in a previous action despite the long-standing doctrine of res judicata meets the definition of "frivolous conduct" in Ohio Rev. Code Ann. § 2323.51(A)(2)(a)(ii).

Sain v. Roo, 2001 Ohio 4115 (Ohio Ct. App., Franklin County Oct. 23, 2001)

Sanctions have been awarded where a party ignores or fails to investigate the doctrine of res judicata.

Stuller v. Price, 2003 Ohio 6826 (Ohio Ct. App., Franklin County Dec. 16, 2003)

In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecutor's actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. A judgment may only be reversed for prosecutorial misconduct when the improper conduct deprives the defendant of a fair trial. The defendant must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different.

State v. Chapman, 2008 Ohio 1452 (Ohio Ct. App., Lorain County Mar. 31, 2008)

IV. RESPONDENT WAS PREJUDICED BY THE PANEL AND THE BOARD'S HEAVY RELIANCE UPON COUNT FOUR OF THE COMPLAINT

The majority of the Panel and the Board heavily relied upon the conclusions of the Relator from Count Four. In fact, a review of the Board's Report shows that Count Four and its related references take up approximately nine whole pages of the twenty six page report, over a

third of the report. It is clear that the Board heavily relied upon this count in their recommendation and report for which Respondent was seriously prejudiced and harmed.

Respondent requests that this Court grant this request to strike Count Four from the Board's Report and Recommendation and set a hearing for the purposes of sanctioning Relator's Special Prosecutor. Thank you.