

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel)	SUPREME CT. CASE NO. 11-1414
DENNIS J. VARNAU,)	
)	
Plaintiff/Appellee,)	
)	On Appeal from the Brown
vs.)	County Court of Appeals,
)	Twelfth Appellate District
DWAYNE WENNINGER,)	
)	Court of Appeals
Defendant/Appellant.)	Case No. CA 2009-02-10

**APPELLANT/CROSS-APPELLEE STATE OF OHIO ex rel DENNIS J. VARNAU'S
COMBINED REPLY BRIEF and
RESPONSE BRIEF TO CROSS-APPEAL**

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FILED
 NOV 14 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

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ARGUMENT

REPLY ON APPELLANT'S PROPOSITIONS OF LAW:

Proposition of Law No. I:

Evidence of opinions or conclusions that a candidate met legal requirements based on an interpretation of a Statute are not admissible in summary judgment proceedings.

Wenninger states that the Court of Appeals only considered Wenninger's affidavit, some of Varnau's documents, and nothing else, and that Wenninger's affidavit by itself justifies the Court of Appeals' Decision; and that it was not conclusory or inadmissible opinion.

A. Wenninger's Affidavit is inadmissible and is insufficient to justify or defeat summary judgment on his qualifications to hold the office of Sheriff.

Wenninger's Affidavit (attached to March 16, 2009, Motion to Dismiss), at paragraph 4, 8, 9, and 10, states each time only one thing: he thinks he complied with the law cited. His paragraphs 4 says he met "all the qualifications" under "Section 3503.01 of the Ohio Revised Code," and also that he "complied with all applicable election laws." He does not say what those "qualifications" are that he met; nor what he did to comply with which election laws. His paragraph 8 says he filed all "necessary" documents "required" by "Section 311.01(B)(7) of the Ohio Revised Code." He doesn't say what documents. His paragraph 9 says his peace officer certificate was "valid," but doesn't say what it is about it to make it "valid." His paragraph 10 says his service as Sheriff caused him to "thus comply" with a supervisory requirement "set forth in Section 311.01(B)(9)." His paragraph 10, and his argument in reliance on it, is a concession that if he ever met the requirements to be a sheriff, it was by holding the office, even if illegally, long enough to cancel a statutory requirement -- a proposition there cannot be precedent for (until now).

These statements in Wenninger's affidavit are all conclusions, without supporting facts, and as to legal -- not lay -- opinion. Bonacorsi v. Wheeling & Lake Erie Ry. Co., 95 Ohio St.3d 314,

2002-Ohio-2220, ¶27-28; Brannon v. Rinzler (1991), 77 Ohio App.3d 749, 756. He was essentially reciting a legal opinion, but without stating the supporting facts. There would be no circumstance where at a trial of the issue, his counsel would be permitted to ask him, "Did you meet the requirements of Revised Code 311.01(B)(9) to be a sheriff?" As opposed to "Did you go to any post-secondary school for two years?" "Was that school accredited by the Ohio Board of Regents?" Etc. If the statements would not be allowed as evidence at a trial, they are not allowed for summary judgment, and Wenninger does not suggest otherwise. See, Tokles & Sons, Inc. v. Midwestern Indemnity Co. (1992), 65 Ohio St.3d 621, 631 n.4; Fisher v. Lewis (12th Dist. 1988), 57 Ohio App.3d 116, 117; Olverson v. Butler (1975), 45 Ohio App.2d 9, 11-12.

That content of his affidavit is exactly the problem, and at least in part what the Court of Appeals relied upon. If as Wenninger says it was *all* the Court of Appeals relied upon, it was error, as without those 4 paragraphs the Court had no evidence to support summary judgment for Wenninger, or deny summary judgment for Varnau.

Those conclusions in Wenninger's affidavit are also contradicted. No where does Wenninger state that he met the educational requirements to ever be a sheriff in Ohio, and the requirements don't just disappear after time. And that determination is based on the application and construction of a Statute, to the undisputed facts that he did not meet those educational requirements, ever. And the other evidence, even that the Court did not strike, and his own deposition, say he did not meet those educational requirements. That statement also contradicts his deposition testimony, that he "didn't know" what the TTI and OBR associations were. Dep. of D. Wenninger, p. 35.

The validity of his ~~peace officer certificate depends upon the construction and application~~ of the Revised Code and Administrative Code. His only claim to his certificate being valid, when he took office in 2008, is the "validation" of it by prior illegal and unqualified service.

And the only claim to any "supervisory" service is that same illegal and unqualified service. The lack of educational credentials, prior to 2001, is why Wenninger's lack of supervisory experience prior to that is relevant, too, contrary to the Court of Appeals' Decision (at ¶38) saying it was irrelevant. It was relevant to demonstrate that Wenninger had to have the educational qualifications, required by R.C. 311.01(B)(9)(b), to take office, because he didn't have sufficient alternative supervisory experience at the time, either.

Even if the Court of Appeals relied only on his affidavit, that affidavit was improper for summary judgment and insufficient to grant his Motion, or to deny Varnau's.

B. Wenninger's, Spievak's, and Callender's Affidavits, are all inadmissible opinion.

The conclusory paragraphs of all three affidavits are an expression of legal opinion: the application of law to stated/unstated fact, with the legal conclusion. That is not "lay" opinion under Ohio R. Evid. 701, which is based on observations of facts, and personal knowledge, such as the value of one's own property, or about an event they witnessed or some incident they are personally familiar with (such as footprints or handwriting or voices). See, e.g., Tokles & Son, Inc., *supra* at 625-626; State v. Jells (1990), 53 Ohio St.3d 22, 28-29; State v. Silverman, 2006-Ohio-3826, ¶ 95-96 (10th Dist.). The Court will find no allowed "lay opinion" that someone complied with a law.

Wenninger doesn't address the other deficiencies in the remaining parts of the Spievak, Callender, or the cited portions of his own affidavit: lack of foundation, hearsay reliance on unstated or unincorporated facts, and purely conclusory nature; all independent reasons to deny their consideration and therefore the entire basis for the Court of Appeals' opinion. See Appellant's Brief, October 3, 2011, p. 8-13.

Proposition of Law No. II:

Objections to evidence submitted in summary judgment proceedings are waived when the objections are not raised until after a ruling is made on the merits of the motions, after an

initial appeal, and only raised for the first time in a reply memorandum on remand from the appellate court.

Wenninger argues that a court can only consider what Rule 56 provides for -- even without a timely objection. Wenninger would have the Court restate the proposition, as: "There can be no waiver of the evidentiary requirements of Rule 56." The logic then would eliminate the entirety of the Courts' jurisprudence on waiver of objections to evidence at trial, waiver of statutory defenses, or waiver of any procedural right or defense -- or provide that Rule 56's requirements are special, although the Rule does not state as much.

The precedent of every other court to consider the issue says otherwise. See Stegawski v. Cleveland Anesthesia Group, Inc. (1987), 37 Ohio App.3d 78, 83 ("Failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering the evidence under Civ. R. 56(C)."); Tye v. Bd. of Educ. of Polaris Joint Voc. School Dist. (1985), 29 Ohio App.3d 63, 66 n.4; Brown v. Ohio Cas. Ins. Co. (1978), 63 Ohio App.2d 97, 90-91. Wenninger submits no authority otherwise, or any authority to support his argument at all. See Appellant's Brief, October 3, 2011, p. 14-15.

It is noteworthy that Wenninger doesn't state that his objections to Varnau's evidence were not waived. He does not argue that his objections were timely. He does not argue that it is a fair application of the law to deny the consideration of evidence that was not subjected to by a timely objection, or without an opportunity to timely cure any deficiency.

Proposition of Law No. III:

Business or public records are "certified" and authenticated for purposes of admissibility in summary proceedings when a custodian of those records states they are the certified records of that business or agency.

Even though waived, and even if not waived, the certified public documents submitted by

Varnau were admissible, and it was error for the Court not to consider them. In Olverson v. Butler, *supra*, the Court considered the nature of a "sworn *or* certified" (emphasis added) document that may be considered for summary judgment:

Rule 56(E), as noted above, requires that such papers, *or parts thereof*, shall be "sworn *or* certified." Although it is not determinative in this case, we held, in *Real Estate Capital Corporation v. Centaur Corporation*, No. 73AP-137, Court of Appeals for Franklin County, August 28, 1973, *that the paper itself need not include the sworn or certified statement*, but it could be incorporated in the body of the affidavit. Therefore, Mr. Dimond's statement is in sufficient compliance with the rule. It, in effect, meets the requirement that an individual in a position to know has either, *by certification or sworn statement*, stated that the copy is true, and, at least by inference, correct.

Id. at 11-12 (emphasis added). All the controverted documents relevant to this Proposition (see Appellant's Brief, October 3, 2011, p. 15-16) were "certified" by their custodian or otherwise sufficiently authenticated to meet the requirements of the Rules of Evidence and therefore Rule 56. Wenninger's assertion that only an affidavit is the proper means to admit a document for summary judgment requires the Court to ignore the "or" and alternative "certified" or "sworn" language of the Rule. The documents here met those tests.

Proposition of Law No. IV:

An opposing qualified candidate for the office of county sheriff is entitled to a writ of *quo warranto* where the elected candidate purported to meet the minimum statutory educational requirements for the office by the length of post-secondary education and by attendance at an institution that at the time was not accredited as required by statute.

Proposition of Law No. V:

An elected candidate for county sheriff who did not meet the minimum statutory requirements for the office, upon first taking office, cannot use the period of unqualified service in that office to support later qualification for the same office, and therefore had a "statutory break in service" of four or more years which cancelled the elected candidate's Ohio Peace Officer Training Academy (OPOTA) certificate, making the elected candidate unqualified for office, and entitles the opposing qualified candidate to the office of sheriff to a writ of *quo warranto*.

- A. The so-called "American Rule" of *quo warranto* does not apply here.
 1. The argument has been waived and was not preserved for appeal.

Wenninger cites what he refers to as the "American Rule," that the result of a judicial determination that an office holder is not qualified for the office may be ouster from the office, but not placement of the other candidate in the office. Not only do the facts basing such a rule not exist here, the rule doesn't either.

In the first place, this argument was waived and was not preserved for appeal to this Court. The argument was first and only raised in Wenninger's new Motion to Dismiss filed July 12, 2011. The Court of Appeals, by Order April 15, 2011, set dates and manners for filing "final" arguments on the pending motions, and the July 12, 2011, Motion exceeded it. The Civil Rules also prohibit filing new arguments in the guise of a new Motion. See Ohio R. Civ. P. 15(E) (prohibiting supplemental briefing without leave of court); Ohio R. App. P. 21(H), and 12th Dist. Loc. R. 7 (for scheduling orders for timing of filing arguments), 11(E) (allowing supplemental authority only for what couldn't be in original briefs). All of Wenninger's "new" authority predates his briefs by years and decades. 12th Dist. Loc. R. 12(C) also only allows supplemental authority not cited in briefs *before* oral argument.

This Court will find no argument by Wenninger to Varnau's entitlement to the Writ, if in fact Wenninger was ineligible, prior to July 12, 2011, based on standing or anything else. In fact in various pleadings it could be construed Wenninger conceded that point. Because Wenninger did not make the argument when the opportunity was there, it is out of time and was therefore waived. See Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121.

Wenninger's new argument was also an attempted but successive dispositive motion, and is barred because Wenninger had already filed *one* such, and Ohio courts and the Ohio Rules of Civil Procedure do not countenance successive motions for dispositive relief. Wenninger originally filed a motion to dismiss, which the Court converted to summary judgment, and later

filed at least two summary judgment motions (all essentially on the same grounds). The "new" one was therefore procedurally barred. Generally speaking, Civil Rule 12, 12(G), and 12(H), preclude the raising of Rule 12 defenses (except as specified) that could have been raised in an original motion. See, e.g., Martin v. Moery, 1 F.R.D. 127, 128 (D.C. Ill. 1939); Goodstein v. Bombardier Capitol, Inc., 167 F.R.D. 662 (D. Vt. 1996).¹ See also, Harpster Bank v. Saker, 1980 Ohio App. LEXIS 10786, at *9 (3d Dist.); J & F. Harig Co. v. City of Cincinnati (1939), 61 Ohio App. 314, 319; Poplowsky Plumbing Co. v. Rosenstein (Cir. 1912), 19 Ohio Cir. Ct. (N.S.) 387.

Although Rule 12(B)(6) is one of the preserved defenses, the Rule does not provide, and Rule 12(G) in fact prohibits, *successive Rule 12 motions*. And a motion to dismiss for lack of standing, which is what Wenninger is arguing, is a Civ. R. 12 motion. See BAC Home Loans Servicing, L.P. v. Kolenich, 2011-Ohio-3345, ¶ 4 (12th Dist.).

And the "standing" argument is not one of subject matter jurisdiction that of course cannot be waived. Lack of standing is a failure on the elements of the cause of action plead. See BAC Home Loans Servicing, L.P. v. Kolenich, *supra* at ¶ 4. Subject matter jurisdiction, which cannot be waived, is the power to hear and adjudicate the merits of a case -- not whether a party should or should not prevail *on the merits* (which is what Wenninger is arguing). See Rosen v. Celebreeze, 117 Ohio St.3d 241, 2008-Ohio-853, ¶ 45; In re. J.J., 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 11. It does not relate to the *rights of the parties*, but to the *power of the Court*. State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St.3d 70, 75. The lower Court had subject matter jurisdiction over, and the power to adjudicate, a *quo warranto* action. Ohio Const., Art. IV, § 3(B)(1)(a); O.R.C. Chapter 2733.

Standing on the other hand is a procedural issue, per Civil Rule 17(A) (real party in

¹Federal cases are relevant to the issue since the Ohio Rules were modeled after the Federal Rules, and the Staff Notes under the Ohio Civil Rules, including Rule 12, regularly reference and cite the Federal Rules and authorities on Federal practice for the interpretation of the Ohio Rules.

interest), and here, per R.C. 2733.06. See State ex rel. Tubbs Jones v. Suster, *supra* at 75. Standing is an affirmative defense that *is and can be waived*. See State ex rel. Tubbs Jones v. Suster, *supra* at 77 ("Unlike lack of subject matter jurisdiction, other affirmative defenses [standing] can be waived."). See also, Adlaka v. Quaranta, 2010-Ohio-6509, ¶ 34-35 (defense of standing waived by not raising on time); Swallie v. Rousenberg, 190 Ohio App.3d 473, 482, 2010-Ohio-4573, ¶ 55-56; National Amusements, Inc. v. Union Twp. Bd. of Zoning Appeals, 2003-Ohio-5434, ¶ 14 (12th Dist.) (lack of standing waived by not raising it prior to hearing).

Again, that standing is not the equivalent to subject matter jurisdiction and therefore can be waived has been repeatedly rejected, and again by this Court. See State ex rel. Tubbs Jones v. Suster, *supra* at 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); State ex rel. Smith v. Smith (1996), 75 Ohio St.3d 418, 420 ("Issues of . . . standing do not attack a court's jurisdiction"); State ex rel. LTV Steel Co. v. Gwin (1992), 64 Ohio St.3d 245, 251 ("These arguments raise issues of standing . . . ; they do not attack respondent's appellate jurisdiction.").

No where in Wenninger's July 12, 2011, Motion to Dismiss, or for that matter any where before that in this case, is there any allegation (or words) raised as to "jurisdiction" of any kind, much less non-waivable subject matter jurisdiction.

2. Varnau has standing to bring the Writ and is entitled to it.

Regardless of the procedural deficiencies in the manner Wenninger tried to raise the issue, the argument is substantively without merit. Wenninger argued for the first time that ~~Varnau should not receive the Writ (even if Wenninger is not eligible for the office), due to Varnau not being the "winner" of the election. Relying on other states and misinterpreted and misstated Ohio case law, Respondent argues that just because Varnau was the second-highest~~

candidate in votes received, he is not entitled to the office. But in Ohio, which is different than other states, the remedy in *quo warranto* is *statutorily* to remove the ineligible office holder, even if the relator is not entitled to the office. R.C. 2733.14; State ex rel. Handy v. Roberts (1985), 17 Ohio St.3d 1. In addition, the Court's responsibility is to make sure the appropriate order is issued to ensure the person entitled to the office *is actually seated*. See Plotts v. Hodge (1997), 124 Ohio App.3d 508, 512-513; State ex rel. Judy v. Wandstrat (1989), 62 Ohio App.3d 627, 632; R.C. 2733.08, .14, .17. Here that person is Relator Varnau.

The other States' decisions have nothing to do with this case. As the case primarily relied upon by Wenninger states: "We view the American Rule applicable here *and in any situation where there is an absence of statutory authority to remove the candidate's name from the ballot before the election.*" Evans v. State Election Board of State of Oklahoma (Ok. 1990), 804 P.2d 1125, 1131 (emphasis added). In this case, there is abundant statutory authority requiring strict compliance with the removal of an unqualified candidate's name from a ballot, both before and after an election. Even *that Court* would not apply the so-called "American Rule" to this case.

The Ohio decisions cited by Wenninger also don't apply here. In Ohio, "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" State ex rel. Dallman v. Franklin Cty. Court of Common Pleas (1973), 35 Ohio St.2d 176, 178-179, quoting Sierra Club v. Morton (1972), 405 U.S. 727, 732, quoting Baker v. Carr (1962), 369 U.S. 186, 204, and Flast v. Cohen (1968), 392 U.S. 83, 101. ~~One has standing to bring a claim if they~~ are *directly benefited* or injured by the outcome of the case. Shealy v. Campbell (1985), 20 Ohio St.3d 23, 24. In the *quo warranto* context, the person with standing is the person claiming a right

to the office. R.C. 2733.06; State ex rel. Herman v. Klopfleisch (1995), 72 Ohio St.3d 581; State ex rel. Hayburn v. Kiefer (1993), 68 Ohio St.3d 132.

Varnau has that standing as the (undisputed) *only other candidate in the election*, other than the ineligible Wenninger. Wenninger relies on State ex rel. Sheets v. Speidel (1900), 62 Ohio St. 156, for the proposition that the second highest vote recipient was not allowed to assume the office, when the "winning" candidate died before taking office. Wenninger omits the materially different facts in that case, and the subsequent Supreme Court authority explaining why it doesn't apply to this case at all -- or it supports Varnau.

In Speidel, the "winning" candidate died on election day and therefore couldn't take office. The county commissioners appointed a successor -- although the incumbent was still alive. The second-highest vote recipient -- one among *several other living and eligible candidates* -- filed for the Writ, saying that he should have the office because he received more votes than the other eligible (living) candidates. He wasn't challenging the deceased "winner," but the person appointed by the Commissioners; and he didn't claim entitlement to the office because the winner was ineligible to run for or hold the office, but because he was dead.

Applying applicable statutes at the time, the Court merely found that because the incumbent's term wasn't filled at all, he never "left" office, and the "vacancy" statutes (commissioners appointing a replacement for deceased office holder) can't be used, unless someone takes office and *then* dies or resigns. So the Court concluded that the *appointed sheriff should not hold the office* -- he wasn't properly placed in office -- and *the incumbent* should be ~~instated~~ to it, since he was never lawfully replaced. ~~The only reason the second candidate~~ running was not given the office was because his "ineligible" (deceased) opponent was not the one who did take the office, *having died*, and there *were other "eligible" candidates on the same*

ballot -- so that relator did not receive the *majority* of votes cast for all *eligible* candidates. *Id.* at 157, 159-160. See also, State ex rel. Haff v. Pask (1933), 126 Ohio St. 633. The case does not even discuss standing. And, it *did* remove the candidate who was not validly holding the office (due to the improper appointment), and instated the one who should have had it -- the incumbent.

On the other hand, between Varnau, and Wenninger, Varnau being *the only lawful candidate*, he *is* entitled to the office. This Court has specifically limited the rule of Speidel to cases where there was *more than one* "eligible" candidate, which is not the case here. Where there are only two candidates and the winner is declared ineligible, the only other candidate is to be given the office:

We reject as unfounded the Secretary of State's contention that Williamson must have received a greater number of votes than Lambros in order to win the election. *The authority relied upon by respondent is misplaced and inappropriate to the facts under review.* Respondent correctly cites the rule that "[w]here the candidate receiving the highest number of votes is ineligible to election, the candidate receiving the next highest number of votes for the same office is not elected. Only the *eligible candidate* who receives the highest number of votes for the office for which he stands is elected to such office." (Emphasis added.) State ex rel. Halak v. Cebula (1979), 49 Ohio St.2d 291, 293, 361 N.E.2d 244 [3 O.O.3d 439]. See also, State ex rel. Haff v. Pask (1933), 126 Ohio St. 633, 186 N.E. 809, paragraph three of the syllabus [relying upon Speidel, as does this Respondent]. *This rule applies only where, at the time of the election, there was more than one eligible candidate but the candidate receiving the highest number of votes was disqualified or otherwise unable to take office following the election. In the case at bar, relator was the only candidate and respondents are under a clear legal duty to count only the votes cast for relator in the November 3, 1983 election for law director.*

State ex rel. Williamson v. Cuyahoga County Bd. of Elections (1984), 11 Ohio St.3d 90, 92 (emphasis added in part, in original in part). In Williamson, there were (as here) only two candidates; the "winner" was declared ineligible (as should be the case here); and therefore the ~~only other candidate, who was eligible, was instated to the office (as should also be the case here~~ for Varnau). *Id.* at 93. The argument Wenninger makes has been expressly addressed, and rejected, by this Court.

The general rule Wenninger recites in this argument comes from the American Law Reports (ALR). As the Court knows, the ALR provides legal analysis of issues from many legal resources and jurisdictions. The general rules there though do not necessarily reflect Ohio law, and in this case definitely do not. Other cases Wenninger cites, from other jurisdictions, are decided under each of those States' laws, both statutory and case law. Therefore the legal reasoning contained within those decisions cannot be directly relied upon to follow or even make any application of Ohio law.

And the general rule Wenninger argues ignores its limited application to multiple-candidate contests, an exception/limitation Ohio law directly recognizes. See, Prentiss v. Dittmer (1916), 93 Ohio St. 314 (4 candidates); State ex rel. Clay v. Madigan (1927), 29 Ohio App. 117, 118 (five candidates). And Wenninger has given no reason that this Court should reject its precedent that already resolves the same issue. Wenninger makes no attempt to challenge or even distinguish Williamson. Other States that Wenninger relies upon even note the different rule applied in other states. Nonetheless, State ex rel. Williamson is the *Ohio* rule.

The Ohio (and other) cases cited by Wenninger also predate Williamson, by decades (almost centuries in some cases), and in any event were expressly limited (by this Court) since. Ohio law regarding elections has transformed many times over the years, and even the election statutes have been revised numerous times since 1900. That particular originating case (Speidel) was a sheriff's election where there were three candidates for the office. Where there were only two candidates on the ballot and the winner is found to be ineligible after winning the election, his votes do not count and the second highest of the two is the winner of the election.

If Wenninger were correct, no one (in Ohio) could ever succeed in a *quo warranto* action after an election, and every case cited where that is exactly what happened, in Ohio, is wrong, as

anyone who holds the office after receiving the highest number of votes could not be challenged by the next highest vote-recipient.

In other States, maybe a "loser" doesn't become a "winner" by disqualifying an ineligible "winner." In Ohio, he/she does. Disenfranchising of voters is what actually takes place when fraud is present during the voting process, or when an ineligible candidate can get his name on the ballot. The "loser" is the voting public that trusted those with the sworn duty to protect the voting public from ineligible usurpers not entitled to be on the ballot, much less hold the office. The voters now have to rely on this Court to correct that error -- Wenninger's successive attempts to delay that result notwithstanding -- and it is this Court's power and responsibility to do so.

In addition, all three Courts that have previously addressed Varnau's quest for the office have not questioned standing at all. The Common Pleas Court based its *mandamus* decision on the fact that Varnau had a *quo warranto* case instead, and the Appeals Court affirmed that legal reasoning. This Court remanded the first ruling by the Court of Appeals on the *quo warranto* case, with a mandate for the Court to adjudicate the "merits" of the case. It seems clear that Varnau's "standing" is not and never has been an issue in this litigation.

B. The "mootness" of a prior unlawful term does not justify or ratify a current term if the same unlawfulness of the service still exists or created a different failure to qualify for a current term.

The repeated reliance of the expiration of a prior term of office, to justify illegally holding a current office, turns the law upside down. It literally requires a court to endorse the legality of holding public office only because someone kept the illegality of taking the office unaddressed long enough.

In each case where the "mootness" of a prior term was raised as a defense to *quo warranto*, it was because the challenged office holder was no longer holding the office, or the

defect was in the selection (election or appointment) process, superceded by a new appointment. See Appellant's Brief, October 3, 2011, p. 37-41; State ex rel. Paluf v. Feneli (1995), 100 Ohio App.3d 461, 464-465. In State ex rel. Zeigler v. Zumbar, 129 Ohio St.3d 240, 2011-Ohio-2939, there had been three other office holders between the relator and the respondent, and still this Court granted the writ removing the current office holder, due to improper usurpation of the office, rejecting the mootness argument, upholding instead the integrity of the process for obtaining the office. *Id.* at 248-249, ¶ 44. The integrity of an election is not upheld by allowing an unqualified office holder to keep the office, merely because of a calendar.

"Mootness" has never defeated a *quo warranto* action where a prior term, alleged to have been *taken unlawfully*, was used, as it is here, to justify *continuing* to hold the office, by the same person, unlawfully. Even where the *quo warranto* remedy as to those prior terms are moot, the continuing qualifications to hold that office are not, and can still be enforced as to a current office holder. In fact it appears this Court long ago rejected such a notion, although in a slightly different context (the challenge being the unconstitutionality of a law creating the particular office).

In State ex rel. Wilmot v. Buckley (1899), 60 Ohio St. 273, the Court was addressing the respondents' argument in an action to remove them from the board of elections, that the alleged defect in their office -- the unconstitutionality of a law creating the office they held -- could not be challenged because the statute of limitations had expired since the office was begun -- and longer than some of them had held the office. The Court addressed (in the context of a demurrer to a limitations defense), that they could not be ousted from the current term, because the defect putting them in office (the unconstitutional statute) happened in a prior term -- and the prior term "tacked" onto the current term to protect them from the limitations defense. The argument was

rejected, and on appropriately indignant grounds:

It thus appears that neither one of the defendants has been in *his present office* for the term of three years, and that section 6789, Revised Statutes, can afford them no shield as against an action of *quo warranto*, *unless one term of office can be tacked upon another*, so that the line of different men holding a certain office under a statute, constitute but one officer for that office for the whole time. *Such a proposition is not tenable, and is absurd upon its face.*

* * *

If it were otherwise the statute of limitations would run, not in favor of the officer, but in favor of the office, and *after three years the constitutionality of the statute creating an office could not be questioned.* The right of the people to protect themselves against unconstitutional laws *would thus become barred within three years after the passage of an act creating an office.*

The statute of limitations in question applies expressly to the officer and not to the office, and when the office is in conflict with the constitution this statute does not prevent the court from so declaring.

It is urged that while the members of the board have not been in office under *their present terms* for three years that *the same board of elections has been in existence more than three years, and that therefore the board cannot be ousted.* This is not sound, for the reason that the statute is by its express terms for the protection only of officers, and says nothing about the ouster of the board of election or other boards. The board of elections is not an officer, but the men composing the board are the officers.

Id. at 276-277 (emphasis added). Similarly, Wenninger here seeks to be shielded from ouster, because the defect in taking office -- whether it be his education or his certificate -- occurred in a prior term of office, from which he cannot be ousted. The argument serves to do what this Court would not allow more than 100 years ago -- the people being stuck with an unconstitutional law then, and here with an unqualified sheriff, merely because they kept their office long enough. This is not only the absurd result disallowed in Wilmot over 100 years ago, but also this year in Zeigler: "~~If this were true, an appointing authority could insulate its improper~~ removal of a public officer by appointing multiple persons to the office in quick succession. [Or here, by being elected to multiple terms before he is challenged]. We decline to interpret the

pertinent law to sanction such an unreasonable result." *Id.* at ¶ 13.

Although this case is uniquely bad, because the term of the office, held illegally to start with, is being expressly used to justify keeping it (the term of office, and therefore "supervisory" experience trumping educational qualification). The Court of Appeals relied upon Wenninger's appointment of himself as sheriff after the election, to validate his holding the office. State ex rel. Varnau v. Wenninger, 2011-Ohio-3904, ¶ 44. But, a person "shall not be *elected* or *appointed* unless he meets all the [statutory requirements]." R.C. Section 311.01(B). Wenninger did not meet the educational requirements, and began a statutory disqualifying break in service either on January 1, 2001, or December 19, 1999, when he went to the Ripley PD. It is therefore that much worse for a court to allow such an appointment.

C. Wenninger's acquittal for "knowingly" falsifying his credentials to hold the office is nether relevant or admissible and does not establish his credentials for continuing to hold the office.

Wenninger frequently refers to his acquittal (although that is not actually proven in this record), as being significant for multiple reasons. But it is irrelevant, factually and legally. As this Court is aware, an acquittal verdict in a criminal case has no bearing on a later civil case even if on the same facts. The parties, rules of decision, rules of procedure, and objectives in a criminal proceeding differ from those in a civil proceeding. Therefore, an acquittal on a criminal charge is not proof of anything, particularly proof of any fact in a civil case. See Schrader v Equitable Life Assurance Soc. (1985), 20 Ohio St.3d 41, 46; Johns v. State (1981), 67 Ohio St.2d 325, 328; Ohio State Bar Assn v. Weaver (1975), 41 Ohio St.2d 97, 99-100.

This is particularly true where the elements of the offense charged included "knowingly" falsifying his credentials, so that the acquittal could be either reasonable doubt that he "knew" he was without the credentials, as much as anything else. And it could just as easily be said that, if

he was qualified to run for the office in 2000, he wouldn't have been indicted at all, nor would that court have had grounds to submit his case to a jury, which it did. See State v. Wenninger, 125 Ohio Misc.2d 55, 58, 2003-Ohio-5521.

In addition, Wenninger's frequent references to the content and events of that case (other than the part that is in the reported public record²), although not in this record at all (see Appellee's Brief, p. 11), should be disregarded in its entirety, as not being proven in the record, but more importantly because Wenninger successfully had those records sealed. See State v. Wenninger, 2010-Ohio-1009 (12th Dist) (affirming order denying Varnau's motion to unseal the records of Wenninger's criminal case). Wenninger should not be permitted to at the same time refer to that "record," and prevent others from being able to do the same. See R.C. 2953.54 (prohibiting in certain situations the disclosure of sealed records). If this case were to be remanded for any reason (such as a trial), the Court should order the unsealing of those records, to confirm or refute the constant unsupported references to it by Wenninger.

D. Wenninger did not prove he was qualified to hold the office and Varnau proved he was not.

Wenninger's only support for his claim that he ever met the qualifications to hold this office is his reference to the conclusory opinions on the result of application of the law to facts related to them, by Spievak and Callender. But to rely on those statements, the Court had to rely on the conclusions. The conclusions though were based on the review of documents that were not provided or attached, and therefore were hearsay, and were stricken. So the Court had to rely on statements that were not stricken, but the factual basis for the statements were. Mere conclusory allegations on behalf of a movant -- which is what this Court of Appeals relied upon (State ex rel. Varnau v. Wenninger, 2011-Ohio-3904, ¶ 35, 43-46) are not sufficient to overcome the

² State v. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521.

burden of proof on summary judgment, and for that reason alone the Judgment cannot stand. Sethi v. WFMJ Television (1999), 134 Ohio App.3d 796.

The statements (referred to by Wenninger) that a "diploma" was a "two-year" diploma, also relies on the "diploma," which says nothing about "two years." And, it couldn't be for two years, as Wenninger didn't attend but for no more than 14 months. During that time (when the diploma was issued), and in fact from Wenninger's high school diploma, June 8, 1986, to TTI "graduation," October 23, 1987, was *a summer and one-year* of school. D.Wenninger p. 4, 7. The Statute doesn't allow merely getting a two-year diploma, but attending post-secondary accredited school *for two years*. It is the time, not the paper that counts. Wenninger conclusively didn't put in the time, much less at the correct school (Wenninger did not meet 311.01(B)(9)(b), because his school of graduation was under R.C. Chapter 3332, not 1713). It is impossible to have complied at the school he attended and he doesn't argue otherwise. Appellant's Brief, Oct. 3, 2011, p. 22-30.

At the very least, the conclusion in the affidavit that the paper was a "two year" diploma, versus Wenninger's own admissions he didn't attend for two years, was a disputed fact that could not result in summary judgment for him.

Again, the entire factual basis for Wenninger's defense, and for the Court of Appeals' sustaining of it, either doesn't exist, is inadmissible, is factually wrong, or is at least disputed.

ARGUMENT IN RESPONSE TO APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW:

Response to Cross-Appellant's Sole Proposition of Law:

An unsuccessful petitioner in an action in *quo warranto* is not automatically liable for reasonable attorney fees in addition to costs.

The Court will find nothing in this Record showing Wenninger ever demanded, or objected to the failure of, the county prosecutor's representation of him in this case. In fact, the County

Prosecutor did participate in this case, in responding to and addressing discovery issues directed to other County offices. See Motion to Quash, June 1, 2009; Withdraw of Motion by Brown County Prosecutor and deposit of records, June 23, 2009; Motion for Emergency Order by Brown County Prosecutor, July 14, 2009.

The representation of a county officer by private counsel is also authorized by law. R.C. 305.14. Whether there was a conflict of interest in defending Wenninger's right to office against a private complaint, after having indicted Wenninger for the same thing, also does not appear of record (one way or the other), but is also justification for private representation. See State ex rel. Corrigan v. Seminatore (1981), 66 Ohio St.2d 459.

Wenninger complains about something the Record provides no support for.

In addition, Wenninger has provided no support for any award of fees, much less error by the Court for not awarding it. As the Court knows, all parties are required to bear their own attorney fees, even if successful in litigation, unless there is *statutory* authority to shift fees to the non-prevailing party. State ex rel. Caspar v. Dayton (1990), 53 Ohio St.3d 16, 21. Wenninger cites R.C. 309.13, relating to taxpayer lawsuits, the application of which to this case is not understood. Wenninger does not assert, much less prove, bad faith, vexatiousness, or wanton, obdurate or oppressive conduct on Varnau's part, and couldn't, considering the authority (factually and legally) for Varnau's positions taken, and an indictment and trial making the same allegations.

The fact that the *quo warranto* statutes provide expressly for an award of compensation to a successful relator (R.C. 2733.14, 2733.18), but not to a successful respondent, merits a determination that distinction was on purpose, barring Wenninger's claim.³ The statute addressing an award in this *specific* context would also override any *generic* statutes that Wenninger mentions. R.C. 1.51.

³ *Expressio unius est exclusio alterius*; see Appellant's Brief, Oct. 3, 2011, p. 22 n.7.

In addition to not demonstrating any statutory authority for a claim of fees⁴, Wenninger presented no proof of any fees to be awarded. He complains about the Court not awarding something he not only did not prove entitlement to, but also did not prove the existence or amount of. The Court was therefore without any ability to award anything. Bittner v. Tri-County Toyota, Inc. (1991), 58 Ohio St. 3d 143 (CSPA case). Even in instances where fees could or should be awarded, the decision to assess or not assess and the amount are within the sound discretion of the trial court. State ex rel. Doe v. Smith, 123 Ohio St.3d 44, 47-50, 2009-Ohio-4149, ¶ 20-32 (public records case); Wiltberger v. Davis (1996), 110 Ohio App.3d 46.

In exercising its discretion in the award of fees the trial court must make an award based upon the *actual value* of the *necessary* services. See Bierlein v. Alex's Continental Inn, Inc. (1984), 16 Ohio App.3d 294. The reasonableness and necessity of fees is to be determined by consideration of the factors set forth in Ohio R.P.C. 1.5 (formerly D.R. 2-106(B)). See, e.g., Bittner v. Tri-County Toyota, Inc., *supra* at 145 (CSPA case); McCoy v. McCoy (1993), 91 Ohio App.3d 570, 583 (divorce case). Without *evidence* on those factors a court is precluded from making any award of fees. McCoy, *supra* at 584. Without such evidence to justify a fee a court is precluded from making a determination of reasonableness and therefore *any fees are unproven*. Disciplinary Counsel v. Farmer, 111 Ohio St.3d 137, 146, 2006-Ohio-5342 ¶ 43 (citations omitted). Wenninger neither proffered nor attempted to present any such evidence.

And, none of Wenninger's arguments suggest an award of fees is mandatory, and therefore the denial is at best an abuse of discretion. The denial of an unspecified, vague, unproven, and ~~unsupported claim for fees would not be an abuse of discretion under the circumstances of this case.~~ See, Reagans v. MountainHigh Coachworks, Inc., 117 Ohio St.3d 22, 32, 2008-Ohio-271, ¶ 39

⁴ Wenninger is barred from raising any new statutory authority for the first time in his Reply. It is not just improper to raise an issue for the first time in a reply, it is "forbidden." State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State University, 129 Ohio St.3d 111, 118, 2011-Ohio-2881, ¶ 40.

(consumer case); Charvat v. Ryan, 116 Ohio St.3d 394, 401, 2007-Ohio-6833 (consumer case).

CONCLUSION

For the reasons previously stated and those stated above, it is respectfully requested that the August 8, 2011, Judgment of the Twelfth District Court of Appeals be reversed, the writ of *quo warranto* issue removing Appellee Wenninger from office and instating Appellant Varnau to it; and/or that Judgment for Wenninger dismissing the case be vacated; and/or to make all other orders necessary and appropriate under the law. It is also requested that the suggested Proposition of Law presented by Cross-Appellant be overruled and the denial of attorney fees to Wenninger be affirmed.

THOMAS G. EAGLE CO., L.P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Respondent, by ordinary U.S. mail this 11th day of November 2011.



Thomas G. Eagle (0034492)

IN THE COURT OF APPEALS OF BROWN COUNTY, OHIO

STATE OF OHIO ex rel. DENNIS J. VARNAU, **FILED COURT OF APPEALS** CASE NO. CA2009-02-010

Relator, **APR 15 2011** : ENTRY GRANTING REQUEST FOR ORAL ARGUMENT AND DIRECTING PARTIES TO FILE WRITTEN ARGUMENTS IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT
vs. :
DWAYNE WENNINGER, **TINA M. MERANDA BROWN COUNTY CLERK OF COURTS**
Respondent. :

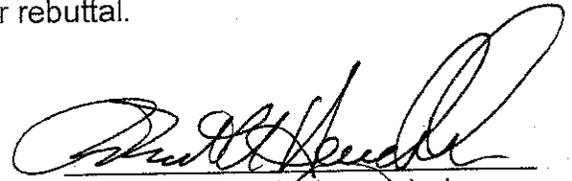
The above cause is before the court pursuant to a request for oral argument filed by counsel for relator, Dennis J. Varnau, on March 9, 2011. This cause was remanded by the Supreme Court of Ohio for further proceedings on February 23, 2011. This case is therefore presently before the court pursuant to cross-motions for summary judgment.

Upon consideration of the foregoing, the court makes the following orders: On or before **May 11, 2011**, the parties shall file written arguments in support of their respective motions for summary judgment. The written arguments shall include citations to evidence in support of their respective positions and shall be no more than twenty (20) pages in length. The parties may file responsive memoranda, if desired, on or before **May 16, 2011**. The responsive memoranda shall not exceed five (5) pages in length.

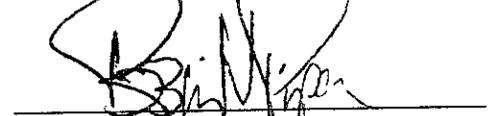
ok

The motion for oral argument is GRANTED. This matter shall be set for argument on **June 14, 2011 at 10:00 a.m.** Since there are competing motions for summary judgment pending, each party shall be permitted twenty (20) minutes for argument and five (5) additional minutes for rebuttal.

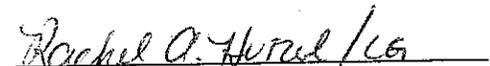
IT IS SO ORDERED.



Robert A. Hendrickson, Judge



Robin A. Piper, Judge



Rachel A. Hutzal, Judge

Review of judgments of courts of appeals

This section grants jurisdiction to the supreme court to review the judgments of the courts of appeals, and while due consideration is given to the opinions of those courts, the supreme court is bound by the judgment, not the opinion: *Trick v. Marion-Reserve Power Co.*, 141 Ohio St. 347, 25 Ohio Op. 467, 48 N.E.2d 103 (1943).

Practices of practice

Article XVI of the Supreme Court Rules of Practice (PracR XVI) is constitutional: *Scott v. Bank One Trust Co.*, 62 Ohio St. 3d 39, 577 N.E.2d 1077 (1991).

Syllabus

A syllabus by the supreme court is limited by the facts: *Columbus Railway, Power & Light Co. v. Harrison*, 109 Ohio St. 526, 143 N.E. 32 (1924).

Unauthorized practice of law

Legal assistance to inmates by a fellow nonlawyer inmate is prohibited, and a charge of unauthorized practice will be dismissed, where the state fails to demonstrate the availability of a reasonable alternative providing adequate access to courts: *Disciplinary Counsel v. Cotton*, 115 Ohio St. 3d 113, 73 N.E.2d 1240, 2007 Ohio 4481, (2007).

District court properly dismissed on Younger abstention grounds a constitutional due process challenge to Ohio Sup. Ct. R. Gov't Bar VII, § 5(a), governing the unauthorized practice of law, which was filed by a corporation that sold memberships in its prepaid legal services plan to residents of Ohio. The ongoing state proceedings were judicial in nature because regulating the unauthorized practice of law was within the constitutionally proscribed jurisdiction of the Ohio Supreme Court under Ohio Const. art. IV, § 2(B)(1)(g), Ohio had an important interest in regulating the unauthorized practice of law, and the corporation failed to meet its burden of showing that its due process challenge would not be resolved in the course of the ongoing judicial proceedings under Ohio law. *Am. Family Prepaid Legal Corp. v. Columbus Bar Ass'n*, 498 F.3d 328 (6th Cir. 2007).

Allegation that an individual or an entity has engaged in the unauthorized practice of law must be supported either by an admission or other evidence of the specific act or acts upon which the allegation is based: *Cleveland Bar Ass'n v. CompManagement, Inc.*, 111 Ohio St. 3d 444, 857 N.E.2d 95, 2006 Ohio 6108, (2006).

Pursuant to RC § 5715.19, a corporate officer does not engage in the unauthorized practice of law by preparing and filing a complaint with a board of revision, and by presenting the claimed value of the property before the board of revision on behalf of his or her corporation, as long as the officer does not make legal arguments, examine witnesses, or undertake any other tasks that can be performed only by an attorney: *Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 111 Ohio St. 3d 367, 856 N.E.2d 926, 2006 Ohio 5852, (2006).

Layperson who presents a claim or defense and appears in small claims court on behalf of a limited liability company as a company officer does not engage in the unauthorized practice of law, provided that the individual does not engage in cross-examination, argument, or other acts of advocacy: *Cleveland Bar Ass'n v. Pearlman*, 106 Ohio St. 3d 136, 832 N.E.2d 1193, 2005 Ohio 4107, (2005).

Interested parties or their non-lawyer representatives appearing at administrative unemployment compensation hearings before the Ohio bureau of employment services and the unemployment compensation board of review are not engaged in the unauthorized practice of law: *Henize v. Giles*, 22 Ohio St. 3d 213, 22 Ohio B. 364, 490 N.E.2d 585 (1986).

Unconstitutionality, finding of

By virtue of amended OConst art IV, § 2, effective May 7, 1968, the language of former § 2 that "no law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges..." having been deleted from the constitution, the supreme court, by simple majority, now is authorized to reverse a judgment of a court of appeals holding a statute to be constitutional and thereby to declare such statute to be unconstitutional: *Euclid v. Heaton*, 15 Ohio St. 2d 65, 44 Ohio Op. 2d 50, 238 N.E.2d 790 (1968).

§ 3 Court of appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

Analogous to former Art. IV, § 6.

A-3

OHIO REVISED CODE GENERAL PROVISIONS

§ 1.48 Statute presumed prospective.

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Adoption
Criminal law
Time limitations

Adoption

Trial court erred by retroactively applying the 2009 amendment to RC § 3107.07: *VanBrëmen v. Geer*, 187 Ohio App. 3d 221, 931 N.E.2d 650, 2010 Ohio 1641, (2010).

Criminal law

Even though RC § 2929.191(A) speaks solely to retroactive application of the statute, that is, to sentences imposed prior to its effective date, the Ohio Supreme Court has concluded that the statute should be prospectively applied to sentences imposed after its effective date, based on the express legislative intent: *State v. Mock*, 187 Ohio App. 3d 599, 933 N.E.2d 270, 2010 Ohio 2747, (2010).

Time limitations

12-year statute of limitations in RC § 2305.111(C) applies to a civil action arising from childhood sexual abuse that occurred prior to the effective date of that subsection, August 3, 2006, if no prior claim has been filed and if the former limitations period had not expired before the effective date of that subsection. Pursuant to RC § 2305.111(C), a cause of action brought by a victim of childhood sexual abuse accrues upon the date on which the victim reaches the age of majority. RC § 2305.111(C) does not contain a tolling provision for repressed memories of childhood sexual abuse. The discovery rule does not apply to toll the statute of limitations while a victim of childhood sexual abuse represses memories of that abuse: *Pratte v. Stewart*, 125 Ohio St. 3d 473, 929 N.E.2d 415, 2010 Ohio 1860, (2010).

§ 1.51 Special or local provision prevails over general; exception.

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Construction
Time limitations

Construction

Township zoning regulation which prohibited "agribusiness," which by the zoning definition included the operation of a dairy farm, was prohibited by RC § 519.21(C), as operators of a dairy farm that was within the definition of "agriculture" pursuant to RC § 519.01 had already obtained the necessary licensing under RC § 903.25 for purposes of a concentrated animal feeding facility and the township board of trustees could not adopt the zoning regulation to prohibit that use; RC §§ 519.21(A) and 903.25 were not in conflict with respect to the township's zoning regulation pursuant to the rules of statutory construction under RC § 1.51.

Meerland Dairy LLC v. Ross Twp., — Ohio App. 3d —, — N.E. 2d —, 2008 Ohio App. LEXIS 1927, 2008 Ohio 2243, (May 9, 2008).

Time limitations

Unjust enrichment claim arising from a UCC transaction that has a specific limitations period must be brought within three years of its accrual: *United States Bank, N.A. v. Graham*, 185 Ohio App. 3d 226, 923 N.E.2d 699, 2009 Ohio 6199, (2009).

§ 1.59 Definitions.

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Person

Pursuant to RC § 1.59(C), "person" in RC § 3999.32 includes a corporation: *State v. Buckeye Truck & Trailer Leasing, Inc.*, 187 Ohio App. 3d 309, 931 N.E.2d 1152, 2010 Ohio 1699, (2010).

§ 1.62 References to officers, authorities and resolutions in county that has adopted a charter.

As used in the Revised Code, unless the context of a section does not permit the following or unless expressly provided otherwise in a section:

(A) References to particular county officers, boards, commissions, and authorities mean, in the case of a county that has adopted a charter under Article X, Ohio Constitution, the officer, board, commission, or authority of that county designated by or pursuant to the charter to exercise the same powers or perform the same acts, duties, or functions that are to be exercised or performed under the applicable section of the Revised Code by officers, boards, commissions, or authorities of counties that have not adopted a charter. If any section of the Revised Code requires county representation on a board, commission, or authority by more than one county officer, and the charter vests the powers, duties, or functions of each county officer representing the county on the board, commission, or authority in fewer officers or in only a single county officer, the county officers or officer shall succeed to the representation of only one of the county officers on the board, commission, or authority. If any vacancy in the representation of the county on the board, commission, or authority remains, the taxing authority of the county shall adopt a resolution to fill the vacancy.

(B) References to resolutions mean, in the case of a county that has adopted a charter under Article X, Ohio Constitution, the appropriate form of legislation permitted by or pursuant to the charter.

HISTORY: 148 v H 549. Eff 3-12-2001; 153 v H 313, § 1, eff. 7-7-10.

Effect of amendments

153 v H 313, effective July 7, 2010, added the last two sentences to (A).

(B), substituted "ninety

in county offices.

of county commis-
sioner, county
common pleas, sheriff,
or coroner occurs
next general election
successor shall be
expired term unless
immediately follow-

on.
shall be filled as pro-
tective shall hold office
unfilled.

cause in any of the
section, the county
party with which the
related shall appoint a
perform the duties
and has qualified,
because of the death,
office of an officer-
an appointment to
of the term shall be
of the political party
affiliated.

than forty-five days
by central committee
ing an appointment
four days before the
person or secretary of
by first-class mail to
committee a written
and place of such
A majority of the
tee present at such
ent.

office or the officer-
ident candidate, the
shall make such ap-
peal occurs, except
of county commis-
sioning attorney and the
majority of them shall

this section shall be
central committee or
members to the county
secretary of state, and the
shall be entitled to
for the offices to

commissioners may ap-
the offices named in
acting officer and to
on the occurrence of
officer appointed by
and takes the office.

(C) A person appointed prosecuting attorney or assistant prosecuting attorney shall give bond and take the oath of office prescribed by section 309.03 of the Revised Code for the prosecuting attorney.

HISTORY: RS §§ 841, 842; S&C 243, 244; 51 v 422, §§ 3, 4, 5; 98 v 272; GC §§ 2396, 2397; 117 v 81; 118 v 574; Bureau of Code Revision, 10-1-53; 126 v 205; 127 v 894 (Eff 8-30-57); 129 v 1365 (Eff 10-12-61); 130 v 191 (Eff 8-26-63); 130 v 190 (Eff 6-28-63); 143 v S 196. Eff 6-21-90; 153 v H 48, § 1, eff. 7-2-10.

Effect of amendments

153 v H 48, effective July 2, 2010, in (A), substituted "fifty-six days" for "forty days"; and made stylistic changes.

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Commission from governor

A person who is appointed under RC § 305.02(B) to fill a vacancy in county elective office becomes entitled to compensation upon giving bond and taking the oath of office. He is ineligible, however, to perform the duties of his office until he receives a commission from the Governor under RC § 107.05. (1981 Op. Att'y Gen. No. 81-085, approved and followed.) Opinion No. 2010-003 (2010).

§ 305.14 Employment of legal counsel.

(A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

(B) The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

(C) Notwithstanding division (A) of this section and except as provided in division (D) of this section, a county board of developmental disabilities or a public children services agency may, without the authorization of the court of common pleas, employ legal counsel to advise it or to represent it or any of its members or employees in any matter of public business coming before the board or agency or in the prosecution or defense of any action or proceeding in which the board or agency in its official capacity, or a board or agency member or employee in the member's or employee's official capacity, is a party or has an interest.

(D)(1) In any legal proceeding in which the prosecuting attorney is fully able to perform the prosecuting attorney's statutory duty to represent the county board of developmental disabilities or public children services agency without conflict of interest, the board or agency shall employ other counsel only with the written consent of the prosecuting attorney. In any legal proceeding in which the prosecuting attorney is unable, for any reason, to represent the board or agency, the

prosecuting attorney shall so notify the board or agency, and, except as provided in division (D)(2) of this section, the board or agency may then employ counsel for the proceeding without further permission from any authority.

(2) A public children services agency that receives money from the county general revenue fund must obtain the permission of the board of county commissioners of the county served by the agency before employing counsel under division (C) of this section.

HISTORY: RS § 845; S&S 89; S&C 244; 74 v 133; 78 v 121; 91 v 142; 97 v 304; 99 v 337; GC § 2412; 108 v PH, 251; Bureau of Code Revision, 10-1-53; 137 v H 316 (Eff 10-25-78); 142 v S 155 (Eff 6-24-88); 148 v H 448. Eff 10-5-2000; 153 v S 79, § 1, eff. 10-6-09.

Effect of amendments

153 v S 79, effective October 6, 2009, deleted "mental retardation and" preceding "developmental disabilities" throughout.

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Foreclosure proceedings
Termination

Foreclosure proceedings

A county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under RC § 323.65-.79, provided the private attorney is employed and compensated in the manner prescribed in RC § 305.14 and RC § 305.17. Opinion No. 2010-010 (2010).

Termination

Common pleas court and the 12 judges who signed the challenged order did not patently and unambiguously lack jurisdiction to terminate the previously authorized employment of special counsel by the board of county commissioners: State ex rel. Hamilton County Bd. of Comm'rs v. Hamilton County Court of Common Pleas, 126 Ohio St. 3d 111, 931 N.E.2d 98, 2010 Ohio 2467, (2010).

§ 305.17 Compensation of employees.

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Employee fitness center
Employee personal vehicles
Private attorneys

Employee fitness center

A board of county commissioners does not have express or implied statutory authority to construct an employee fitness center for county employees. Opinion No. 2009-040 (2009).

Employee personal vehicles

If the personal vehicle of a county employee sustains damage while being driven by the employee in conducting county business, the board of county commissioners has no authority to reimburse the employee for her resulting expenses, including the deductible for which she is responsible under her insurance policy, unless the board is the employee's

State ex rel. McClaran v. City of Ont., E.2d 440, 2008 Ohio 3867, (2008).

proceedings against a person.

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Without jurisdiction to entertain an incorporation where the result of would be to interfere with the operation or the exercise by the board of a discretion vested in them of creation or domicile of the State v. Wisheart, 156 Ohio Misc. 2d 1, 10 1457, (2010).

Official

Official will always be subject to resignation has already been duly given authority or (2) the official has resigned or office. Considering that the resignation would not take effect until a meeting did not indicate an intent to rescind or's filing of a rescission letter with constructive notice to the individual State ex rel. Layshock v. Moorehead, 185 E.2d 210, 2009 Ohio 6039, (2009).

usurpation of office.

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Application for a writ of quo warranto alleging that a police sergeant was in that position because the sergeant's promotion was not accurate, lacked merit, as the sergeant was not on the eligibility list either way and was appointed the sergeant under the process. State ex rel. Tinnirello, — E.2d —, 2008 Ohio App. LEXIS 1468, (2008).

Official

Official will always be subject to resignation has already been duly given authority or (2) the official has resigned or office. Considering that the resignation would not take effect until a meeting did not indicate an intent to rescind or's filing of a rescission letter with

the council clerk acted as constructive notice to the individual council members: State ex rel. Layshock v. Moorehead, 185 Ohio App. 3d 94, 923 N.E.2d 210, 2009 Ohio 6039, (2009).

§ 2733.08 Petition against person for usurpation of office.

CASE NOTES AND OAG

Police chief

Court of appeals erred by dismissing a petition for a writ of quo warranto to oust a police chief. Appellants' potential failure to establish their entitlement to be appointed police chief did not necessarily preclude the writ: State ex rel. Deiter v. McGuire, 119 Ohio St. 3d 384, 894 N.E.2d 680, 2008 Ohio 4536, (2008).

§ 2735.01 Appointment of receiver.

CASE NOTES AND OAG

INDEX

Generally
Compensation of receiver
Standing

Generally

Appointment of a receiver is the exercise of an extraordinary, drastic and sometimes harsh power which equity possesses and is only to be exercised where a failure to do so would place the petitioning party in danger of suffering an irreparable loss or injury. Because the appointment of a receiver is an extraordinary remedy, a party requesting a receivership must show by clear and convincing evidence that appointment of a receiver is necessary for the preservation of the petitioner's rights: Ohio Bureau of Workers' Comp. v. Am. Prof'l Emplr., Inc., 184 Ohio App. 3d 156, 920 N.E.2d 148, 2009 Ohio 2991, (2009).

Compensation of receiver

Trial court failed to adequately explain its departure from its previously ordered hourly rate for the receiver. However, reducing the compensation of the receiver's associates was not an abuse of discretion: Nat'l City Bank v. Semco, Inc., 183 Ohio App. 3d 229, 916 N.E.2d 857, 2009 Ohio 3319, (2009), remanded by 2011 Ohio 172, 2011 Ohio App. LEXIS 139 (Ohio Ct. App., Marion County Jan. 18, 2011).

Standing

Shareholder of a corporation lacked standing to file suit against a court-appointed receiver for the corporation, alleging that the receiver negligently dissipated corporate assets under RC §§ 2735.01(A), (E), and 2735.04, as the shareholder had no contractual relationship with the receiver, and any suit was properly brought by the corporation's trustee in bankruptcy; a bank had obtained a judgment against the corporation for defaulted loans and a judgment against the shareholder based on the personal guarantee thereof, and the receiver had been appointed to dissipate the corporate assets in order to satisfy the judgments: Huntington Nat'l Bank v. Weldon F. Stump & Co., — Ohio App. 3d —, — N.E. 2d —, 2008 Ohio App. LEXIS 1792, 2008 Ohio 2096, (May 2, 2008).

§ 2735.04 Powers of receiver.

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Generally
Liens
Receiver liability

Generally

Under appropriate circumstances, a trial court may authorize a receiver to sell property at a private sale free and clear of liens and encumbrances: Park Nat'l Bank v. Cattani, Inc., 187 Ohio App. 3d 186, 931 N.E.2d 623, 2010 Ohio 1291, (2010), appeal denied by 126 Ohio St. 3d 1546, 2010 Ohio 3855, 932 N.E.2d 340, 2010 Ohio LEXIS 2158 (2010).

Liens

Trial court does not have authority to vest in a receiver the power to take away contractual lien rights in property without the consent of lienholders and without due process: Dir. of Transp. v. Eastlake Land Dev. Co., 177 Ohio App. 3d 379, 894 N.E.2d 1255, 2008 Ohio 3013, (2008).

Receiver liability

Shareholder of a corporation lacked standing to file suit against a court-appointed receiver for the corporation, alleging that the receiver negligently dissipated corporate assets under RC §§ 2735.01(A), (E), and 2735.04, as the shareholder had no contractual relationship with the receiver, and any suit was properly brought by the corporation's trustee in bankruptcy; a bank had obtained a judgment against the corporation for defaulted loans and a judgment against the shareholder based on the personal guarantee thereof, and the receiver had been appointed to dissipate the corporate assets in order to satisfy the judgments: Huntington Nat'l Bank v. Weldon F. Stump & Co., — Ohio App. 3d —, — N.E. 2d —, 2008 Ohio App. LEXIS 1792, 2008 Ohio 2096, (May 2, 2008).

§ 2737.01 Definitions.

CASE NOTES AND OAG

Corporation as defendant

Manager of a corporation was not the proper defendant in a replevin action where the property at issue was bought by the corporation and kept in its warehouse: Hershey v. Edelman, 187 Ohio App. 3d 400, 932 N.E.2d 386, 2010 Ohio 1992, (2010).

§ 2739.01 Libel and slander.

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Directed verdict
Informants
Opinion

Directed verdict

Defendant was entitled to a directed verdict where some of her statements were true, and none of them amounted to defamation per se. In the absence of defamation per se, plaintiff was required to plead and prove special damages: Northeast Ohio Elite Gymnastics Training Ctr., Inc. v.

§ 2733.16 New election.

In a case under section 2733.15 of the Revised Code the court may order a new election to be held at a time and place and by judges it appoints. Notice of the election and naming such judges shall be given as provided by law for notice of elections of directors of the corporation. The order of the court is obligatory upon the corporation and its officers when a duly certified copy is served upon its secretary personally, or left at its principal office. The court may enforce its order by attachment, or as the court deems necessary.

HISTORY: RS § 6776; 70 v 176, § 2; CC § 12319; Bureau of Code Revision. Eff 10-1-53.

CASE NOTES AND OAG

Holdover officers

When a corporate election is subsequently declared invalid, duly elected officers remain as holdover officers until the next valid election: State ex rel. East Cleveland Democratic Club, Inc. v. Bibb, 14 Ohio App. 3d 85, 14 Ohio B. 99, 470 N.E.2d 257 (1984).

§ 2733.17 Rights of person adjudged entitled to an office.

If judgment in an action in quo warranto is rendered in favor of the person averred to be entitled to an office, after taking the oath of office and executing any official bond required by law, he may take upon him the execution of the office. Immediately thereafter such person shall demand of the defendant all books and papers in his custody or within his power appertaining to the office from which the defendant has been ousted.

HISTORY: RS § 6777; S&C 1265; 36 v 68, § 4; CC § 12320; Bureau of Code Revision. Eff 10-1-53.

Cross-References to Related Sections

Action for damages. RC § 2733.18.
Enforcement of judgment. RC § 2733.19.

Comparative Legislation

Forfeiture of office:
CA—Cal Code Civ Proc §§ 803, 806
FL—Fla. Stat. § 80.032
IL—735 ILCS § 5/18-108
IN—Burns Ind. Code Ann. § 34-17-3-5
KY—KRS §§ 415.060, 415.070
MI—MCLS § 600.4515
NY—NY C.L.S. Exec § 63-b
PA—42 P.S. §§ 705, 1722

§ 2733.18 Action for damages.

Within one year after the date of a judgment mentioned in section 2733.17 of the Revised Code, the person in whose favor the judgment is rendered may bring an action against the party ousted, and recover the damages he sustained by reason of such usurpation.

HISTORY: RS § 6778; S&C 1266; 36 v 68, § 6; CC § 12321; Bureau of Code Revision. Eff 10-1-53.

CASE NOTES AND OAG

Generally

An appellant determined not to be entitled to the office of

chief of police cannot recover damages pursuant to RC § 2733.18: State ex rel. Delph v. Greenfield, 71 Ohio App. 3d 251, 593 N.E.2d 369 (1991).

An ousted public official may assert a damage claim for breach of employment contract in a common pleas court, and such action need not await the commencement or conclusion of a separate quo warranto claim: Beasley v. East Cleveland, 20 Ohio App. 3d 370, 20 Ohio B. 475, 486 N.E.2d 859 (1984).

If the office from which defendant was ousted had been a salaried one, the salary would have been recoverable: Palmer v. Darby, 64 Ohio St. 520, 60 N.E. 626 (1901).

Only the salary and emoluments, and not attorney fees in ousting the intruder from office, can be recovered: Palmer v. Darby, 64 Ohio St. 520, 60 N.E. 626 (1901).

§ 2733.19 Enforcement of judgment.

No defendant mentioned in section 2733.17 of the Revised Code shall refuse or neglect to deliver over any book or paper pursuant to a demand made under such section. Whoever violates this section is guilty of a contempt of court.

HISTORY: S&C 1266; 36 v 68, § 5; CC § 12322; Bureau of Code Revision. Eff 10-1-53.

Cross-References to Related Sections

Penalty. RC § 2733.99.

CASE NOTES AND OAG

Contempt

A quo warranto judgment in Ohio is enforceable by contempt proceedings under RC § 2733.19. But contempt proceedings also require personal jurisdiction over defendants to comply with due process requirements: Lapidus v. Doner, 248 F. Supp. 883 (E.D. Mich. 1965).

[DISSOLUTION OF CORPORATION]

§ 2733.20 Judgment when corporation has forfeited its rights.

When, in an action in quo warranto, it is found and adjudged that, by an act done or omitted, a corporation has surrendered or forfeited its corporate rights, privileges, and franchises, or has not used them during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved.

When it is found and adjudged in such case, that a corporation has offended in a matter or manner that does not work such surrender or forfeiture, or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense or the exercise of such power.

When it is found and adjudged in such case, that any application for a license to transact business in this state filed by a foreign corporation, any articles of incorporation of a domestic corporation or any amendment to them, or any certificate of merger or consolidation which set forth a corporate name prohibited by the Revised Code has been improperly approved and

... out of the officer's involvement in that
 ... a prosecuting attorney or the prosecuting
 ... assistants to determine a defendant's eligibil-
 ... enter a pre-trial diversion program established
 ... to section 2935.36 of the Revised Code;
 ... a prosecuting attorney or the prosecuting
 ... assistants to determine a defendant's eligibil-
 ... enter a pre-trial diversion program under division
 ... of section 4301.69 of the Revised Code.
 HISTORY: 140 v H 227 (Eff 9-26-84); 142 v H 8 (Eff 7-31-87);
 143 v H 175 (Eff 6-29-88); 149 v H 17. Eff 10-11-2002.

References to Related Sections

Application to seal official records, RC § 2953.52.

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Sealed record
 Administrative licensing agency
 Evidence
 Return of sealed record

Access to sealed record

The court was required to unseal the record of a conviction where the defendant requested access to the record for purposes of a malicious prosecution action: *City of Akron v. Frazier*, 142 Ohio App. 3d 718, 756 N.E.2d 1258 (2001).

Administrative licensing agency

To the extent that records maintained by the Ohio State Board of Psychology contain information or other data the release of which is prohibited by RC § 2953.35(A), such records are not "public records" within the meaning of RC § 149.43(A)(1). The Board may, therefore, seal such information or data or otherwise segregate it from its public records in order to comply with RC § 2953.35(A): OAG No. 83-100 (1983).

Civil case

—Evidence

Where the official records of a criminal case were sealed by court order, and where there is no indication that the records were unsealed by court order or that an application was made for the records pursuant to RC § 2953.53(D)(1), the trial court erred in relying on purported copies of the criminal complaint and excerpts from the transcript of the proceedings in the criminal case in ruling on a motion for summary judgment in a civil case: *Fafard v. Waxman*, 1998 Ohio App. LEXIS 681 (1st Dist. 1998).

Return of sealed record

Revised Code § 2953.53(D) makes it clear that both RC § 2953.52 and 2953.54 are to be complied with when a record is to be sealed; nothing in RC § 2953.53 provides for official records as defined in RC § 2953.51(D) to be returned to the counsel of record: *State v. Buzzelli*, 2001 Ohio App. LEXIS 4759 (9th Dist. 2001).

§ 2953.54 Disposition and use of specific investigatory work product; divulging confidential information.

(A) Except as otherwise provided in Chapter 2950 of the Revised Code, upon the issuance of an order by a court under division (B) of section 2953.52 of the

Revised Code directing that all official records pertaining to a case be sealed and that the proceedings in the case be deemed not to have occurred:

(1) Every law enforcement officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code shall immediately deliver the records and reports to the officer's employing law enforcement agency. Except as provided in division (A)(3) of this section, no such officer shall knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

(2) Every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section shall, except as provided in division (A)(3) of this section, close the records and reports to all persons who are not directly employed by the law enforcement agency and shall, except as provided in division (A)(3) of this section, treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Except as provided in division (A)(3) of this section, no person who is employed by the law enforcement agency shall knowingly release, disseminate, or otherwise make the records and reports in the possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency.

(3) A law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" contained in division (D) of section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section may permit another law enforcement agency to use the records or reports in the investigation of another offense, if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar. The agency that provides the records and reports may provide the other agency with the name of the person who is the subject of the case, if it believes that the name of the person is necessary to the conduct of the investigation by the other agency.

No law enforcement agency, or person employed by a law enforcement agency, that receives from another law enforcement agency records or reports pertaining to a case the records of which have been ordered sealed

pursuant to division (B) of section 2953.52 of the Revised Code shall use the records and reports for any purpose other than the investigation of the offense for which they were obtained from the other law enforcement agency, or disclose the name of the person who is the subject of the records or reports except when necessary for the conduct of the investigation of the offense, or the prosecution of the person for committing the offense, for which they were obtained from the other law enforcement agency.

(B) Whoever violates division (A)(1), (2), or (3) of this section is guilty of divulging confidential information, a misdemeanor of the fourth degree.

(C) It is not a violation of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

HISTORY: 140 v H 227 (Eff 9-26-84); 146 v H 180. Eff 7-1-97; 153 v S 77, § 1, eff. 7-6-10.

The effective date is set by section 5 of HB 180.

Effect of amendments

153 v S 77, effective July 6, 2010, added (C); and made a stylistic change.

Cross-References to Related Sections

Penalties for misdemeanor, RC § 2929.21.

Order to seal official records; compliance statement, RC § 2953.53.

CASE NOTES AND OAG

Disclosure of information

Pursuant to R.C. §§ 2953.321, 2953.54, and 2151.358, a county sheriff may not disclose to the public information in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. §§ 2953.31 — .61 or R.C. § 2151.358, but the sheriff must disclose information in the report that relates to a defendant, suspect, or juvenile offender who has not had this information ordered sealed or expunged, unless one of the exceptions set forth in R.C. § 149.43(A) applies to the information: Opinion No. 2003-025, 2003 Op. Atty Gen. Ohio 198 (2003).

No provision in R.C. §§ 2953.321, 2953.35, 2953.54, or 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. §§ 2953.31 — .61: Opinion No. 2003-025, 2003 Op. Atty Gen. Ohio 198 (2003).

§ 2953.55 Inquiry as to sealed records prohibited; divulging confidential information.

(A) In any application for employment, license, or any other right or privilege, any appearance as a witness, or any other inquiry, a person may not be

questioned with respect to any record that has been sealed pursuant to section 2953.52 of the Revised Code. If an inquiry is made in violation of this section, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

(B) An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to section 2953.52 of the Revised Code, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

(C) It is not a violation of this section for the bureau of criminal identification and investigation or any authorized employee of the bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation.

HISTORY: 140 v H 227. Eff 9-26-84; 153 v S 77, § 1, eff. 7-6-10.

Effect of amendments

153 v S 77, effective July 6, 2010, added (C); and made a stylistic change.

Cross-References to Related Sections

Penalties for misdemeanor, RC § 2929.21.

Privilege defined, RC § 2901.01.

CASE NOTES AND OAG

Disclosure of information

No provision in R.C. §§ 2953.321, 2953.35, 2953.54, or 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. §§ 2953.31 — .61: Opinion No. 2003-025, 2003 Op. Atty Gen. Ohio 198 (2003).

§ 2953.56 Violation of provisions does not provide basis to exclude or suppress certain evidence.

Violations of sections 2953.31 to 2953.61 of the Revised Code shall not provide the basis to exclude or suppress any of the following evidence that is otherwise admissible in a criminal proceeding, delinquent child proceeding, or other legal proceeding:

A

RULE 21. Oral argument

(A) **Notice of argument** The court shall schedule oral argument in all cases, whether or not requested by a party, unless the court has adopted a local rule requiring a party to request oral argument. In the event of such a local rule, the court shall schedule oral argument at the request of any of the parties. Such a request shall be in the form of the words "ORAL ARGUMENT REQUESTED" displayed prominently on the cover page of the appellant's opening brief or the appellee's brief; no separate motion or other filing is necessary to secure oral argument. Notwithstanding any of the foregoing, the court is not required to schedule oral argument, even if requested, if any of the parties is both incarcerated and proceeding pro se. The court shall advise all parties of the time and place at which oral argument will be heard.

(B) **Time allowed for argument** Unless otherwise ordered, each side will be allowed thirty minutes for argument. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(C) **Order and content of argument** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(D) **Cross and separate appeals** A cross-appeal or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If separate appellants support the same argument, they shall share the thirty minutes allowed to their side for argument unless pursuant to timely request the court grants additional time.

(E) **Nonappearance of parties** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(F) **Submission on briefs** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(G) **Motions** Oral argument will not be heard upon motions unless ordered by the court.

(H) **Authorities in briefs** If counsel on oral argument intends to present authorities not cited in his brief, he shall, prior to oral argument, present in writing such authorities to the court and to opposing counsel.

History: Amended, eff 7-1-75; 7-1-76; 7-1-11.

Law Review

Intermediate appellate court practice — problems and solutions. Samuel H. Bell, et al. 16 Akron L. Rev. 1 (1982).

RULE 22. Entry of judgment

(A) **Form** All judgments shall be in the form of a

judgment signed by a judge or judges of the court which shall be prepared by the court and filed with the clerk for journalization. The clerk shall enter the judgment on the journal the day it is filed. A judgment is effective only when entered by the clerk upon the journal.

(B) **Notice** Notice of the filing of judgment and its date of entry on the journal shall be made pursuant to App. R. 30.

(C) **Filing** The filing of a judgment by the court with the clerk for journalization constitutes entry of the judgment.

History: Amended, eff. 7-1-72; 7-1-08.

Ohio Rules

Perfecting an appeal to the Supreme Court, SCtPracR II.

NOTES TO DECISIONS**Time for application for reopening**

Defendant's application to reopen his appeal lacked merit procedurally where it was filed beyond the 90-day time limit and there was no showing of good cause for the delay in filing pursuant to Ohio R. App. P. 26(B)(1) and (2); the time for filing the application began to run on the date that the court affirmed the trial court judgment, wherein the volume and page number of the journalization of the judgment were indicated pursuant to Ohio R. App. P. 22 and Ohio Eighth Dist. Ct. App. R. 22. *State v. Burnett*, — Ohio App. 3d —, 2007 Ohio 4434, — N.E. 2d —, 2007 Ohio App. LEXIS 4003 (Aug. 24, 2007).

RULE 23. Damages for delay

If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs.

Law Review

Attorney fees as an element of damages. Note. 15 CinLRev 313 (1941).

Intermediate appellate court practice — problems and solutions. Samuel H. Bell, et al. 16 Akron L. Rev. 1 (1982).

NOTES TO DECISIONS

ANALYSIS

Attorney fees
 Burden of proof
 — Reasonable cause for appeal
 Damages
 Failure to brief errors
 — Rejection of appeal
 Fees not awarded
 Findings
 Frivolous appeals
 — Applicability of sanctions
 — Attorney fees
 — Dismissal
 — Monetary limitations
 Interest
 Penalty provisions
 — Attorney fees
 Proper sanctions
 Sanctions

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the surgical assistant, there was no evidence that the filing of the complaint was a willful violation of Ohio R. Civ. P. 11. *Ponder v. Kamienski*, — Ohio App. 3d —, 2007 Ohio 5035, — N.E. 2d —, 2007 Ohio App. LEXIS 4453 (Sept. 26, 2007).

When debtors on a cognovit note moved to vacate a judgment previously entered on that note, after their arguments in opposition to the judgment had already been considered when judgment was entered, there was no evidence that the debtors' counsel willfully violated Ohio R. Civ. P. 11 in filing the motion, but the trial court could impose attorney fees under RC § 2323.51, as "willfulness" was not a prerequisite to awarding sanctions under the statute, it only had to be determined if a party or attorney engaged in "frivolous conduct," and the debtors' misinterpretation of the state of existing law could be frivolous conduct under RC § 2323.51(A)(2)(a)(ii). *Rindfleisch v. AFT, Inc.*, 2005 Ohio 191, 2005 Ohio App. LEXIS 211 (2005).

Time for appeal

The filing of a CivR 11 motion for sanctions before the filing of a final judgment did not, in itself, extend the time for appeal past thirty days from the filing of the final judgment determining the parties' claims: (decided under former analogous section) *Dailey v. State Farm Mut. Auto. Ins. Co.*, 1994 Ohio App. LEXIS 4359 (2nd Dist. 1994).

The taking of an appeal does not deprive the trial court of jurisdiction to grant a motion for sanctions under CivR 36(A), 37(C) and 11. Sanctions under CivR 11 will be upheld on appeal unless they were an abuse of discretion. The court is not required to advise the sanctioned attorney as to the specific conduct constituting the violation: (decided under former analogous section) *Harris v. Southwest Gen. Hosp.*, 84 Ohio App. 3d 77, 616 N.E.2d 507, 1992 Ohio App. LEXIS 5568 (1992).

Violation of rule

When an attorney was retained to seek workers' compensation death benefits for a widow, due to the death of her husband, he violated Ohio R. Civ. P. 11 because he filed a claim for those benefits five months after the widow died, using a form the widow did not sign or date, and he could not claim there was a good faith basis to claim benefits for the time between the death of the widow's husband and the death of the widow because no estate was opened to pursue such a claim, and, even if one had been opened, there was no claim to pursue because the claim was filed after the death of the widow, who was the person who had authority to pursue the claim, under Ohio Rev. Code Ann. § 4123.59. *Baker v. AK Steel Corp.*, — Ohio App. 3d —, 2006 Ohio 3895, — N.E. 2d —, 2006 Ohio App. LEXIS 3854 (July 31, 2006).

— Appropriate action

The "appropriate action" language of CivR 11 may include imposition of the responsibility to pay the attorney fees of the adverse party upon the attorney willfully violating the rule. However, in order to prevail, a party must present evidence of a willful violation of CivR 11: (decided under former analogous section) *Kemp, Schaeffer & Rowe Co., L.P.A. v. Frecker*, 70 Ohio App. 3d 493, 591 N.E.2d 402, 1990 Ohio App. LEXIS 5420 (1990).

Before a court may subject an attorney to "appropriate actions" under CivR 11, the attorney must have willfully violated the rule; in particular, the attorney must have willfully signed a pleading which, to the best of his knowledge, information, and belief, was not supported by

good ground. While the record reveals that the plaintiffs, for whatever reason and to whatever degree, were mistaken in their belief that the complaint they filed was supported by good ground, the record does not contain sufficient evidence to prove plaintiffs signed a pleading which they knew to be false or which they interposed for delay: (decided under former analogous section) *Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons, Inc.*, 57 Ohio App. 3d 22, 565 N.E.2d 1278, 1989 Ohio App. LEXIS 523 (1989).

— Knowing behavior

The attorney violated CivR 11 by signing answers to interrogatories, knowing them to be false: (decided under former analogous section) *Mentor v. Nozik*, 85 Ohio App. 3d 490, 620 N.E.2d 137, 1993 Ohio App. LEXIS 1752 (1993).

— Misinterpreting existing law

"Misinterpreting the state of existing law" is a valid defense against charges of "willful" violations of CivR 11. However, such negligence is potentially subject to RC § 2323.51(A)(2)(b) regardless of whether the party or attorney otherwise acted in good faith: (decided under former analogous section) *Ceol v. Zion Indus., Inc.*, 81 Ohio App. 3d 286, 610 N.E.2d 1076, 1992 Ohio App. LEXIS 640 (1992).

— Motion to strike

While CivR 12(F) provides a 28-day limit for motions to strike, there is no time limit for a motion to strike for noncompliance with CivR 11. An award of attorney fees for a violation of CivR 11 requires a finding of bad faith or willfulness: (decided under former analogous section) *Amiri v. Thropp*, 80 Ohio App. 3d 44, 608 N.E.2d 824, 1992 Ohio App. LEXIS 2540 (1992).

RULE 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on the pleadings

(A) When answer presented.

(1) **Generally.** The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) **Other responses and motions.** A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within four-

teen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) **How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) **Motion for judgment on the pleadings.** After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.

(D) **Preliminary hearings.** The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) **Motion for definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the

order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(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.

(G) **Consolidation of defenses and objections.** A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) **Waiver of defenses and objections.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

History: Amended, eff 7-1-83.

STAFF NOTES

Rule 12 continues the "service" policy established in Rule 4 and Rule 5. Service upon the opposing party rather than filing with the court is the key function. See, Staff Notes to Rule 4 and Rule 5, Rule 12(A)(1) and Rule 12(A)(2) concern the time in which a party must serve a responsive pleading. Rule 12(A)(1) is designed for Ohio practice and has no exact federal counterpart. Rule 12(A)(2) is based on Federal Rule 12(a).

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Third-party defendant**— Assertion of defenses**

CivR 14(A) permits a third-party defendant to assert any defense that a third-party plaintiff has to a plaintiff's claim. Instead, in this case, third-party defendant chose not to be involved except to the extent of putting some pressure upon third-party plaintiff to settle if a reasonable offer were forthcoming. Thus, third-party defendant is bound by the settlement of the claim if it is reasonable and not collusive just as it would be bound by an adverse determination of liability had the claim been tried: (decided under former analogous section) *Ross v. Spiegel, Inc.*, 53 Ohio App. 2d 297, 373 N.E.2d 1288, 7 Ohio Op. 3d 385, 1977 Ohio App. LEXIS 6998 (1977).

— Illustrative case

Where real estate brokers, agents of the vendor, make misrepresentations to the vendee of a house and lot, the vendee as plaintiff may bring an action against the vendor and in turn the vendor as third-party plaintiff may join the real estate brokers as third-party defendants: (decided under former analogous section) *Crum v. McCoy*, 41 Ohio Misc. 34, 70 Ohio Op. 2d 76, 322 N.E.2d 161, 1974 Ohio Misc. LEXIS 143 (MC 1974).

— Venue

A third-party defendant brought into a pending action under CivR 14(A) may pursuant to CivR 12(B)(3) raise the issue of improper venue. That issue will be resolved by examining the venue of the main action. If it has been properly venued pursuant to CivR 3(B), the third-party claim is within the ancillary jurisdiction of the trial court hearing the main action: (decided under former analogous section) *Ohio Bell Tel. Co. v. BancOhio Nat'l Bank*, 1 Ohio Misc. 2d 11, 1 Ohio B. 415, 440 N.E.2d 69, 1982 Ohio Misc. LEXIS 104 (CP 1982).

RULE 15. Amended and supplemental pleadings

(A) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to

conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(C) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

(D) **Amendments where name of party unknown.** When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

(E) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a

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supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore.

STAFF NOTES

RULE 15(A) AMENDMENT OF PLEADING.

The first sentence of Rule 15(A) provides that a party may amend his pleading one time as a matter of right before a responsive pleading is served, or if no responsive pleading is required, he may as a matter of right amend within twenty-eight days after he has served the pleading he wishes to amend unless the action has been listed on the trial calendar. The provision, for amendment without leave of court, is broader than the comparative Ohio statutory provision; i.e., § 2309.55, R.C., permits amendment of a petition as a matter of right before an answer is filed but does not provide for the amendment as a matter of right of an answer or reply.

Rule 15(A) provides further (after amendment without leave of court has expired) that parties may amend pleadings by leave of court (which shall be freely given) and in addition may amend through written consent of the adverse party. The rule is similar to, but broader than, § 2309.58, R.C., which does not provide for amendment through written consent of the adverse party.

It should be noted at the outset that amendment of pleadings under Rule 15 is not limited to the "theory of the pleadings" concept, discussed below, and hence amendment under Rule 15 is treated on a broad functional basis rather than on a narrow conceptual basis. In general, Rule 15 provides a broader scope for amendment than has § 2309.58, R.C.

RULE 15(B) AMENDMENTS TO CONFORM TO THE EVIDENCE.

Rule 15(B) moves toward the problem of amendment of the pleadings during trial in order to accommodate the pleadings to the proof. If an opposing party objects to the admission of evidence at the trial on the grounds that the evidence sought to be introduced is not covered in the pleadings, "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby..." and the objection to the introduction of the evidence will be overcome by amendment of the pleadings. If the opposing party, as a result of the amendment, claims surprise or hardship, the court may grant a continuance. This provision corresponds to § 2309.61, R.C. If the opposing party does not raise an objection to the introduction of evidence outside of the pleadings and continues on the merits, the evidence is treated as if it had been raised by the pleadings whether the pleadings are amended to include such evidence or not.

Rule 15(B) does not limit the evidence introduced at a trial to the narrow concept of the "theory of the pleadings" but permits the introduction of evidence at trial, by amendment if necessary, so long as the evidence sought to be introduced will subserve "the

merits of the action." In short, under Rule 15(B) all of the evidence related to the operative facts of a claim for relief may be introduced at trial, through amendment if objection is raised, in spite of the fact that only one theory of relief has been set forth in the complaint. Thus, if plaintiff pleads operative facts which set forth injury as a result of a negligently manufactured product and at trial seeks to introduce evidence showing that the injury arose through the breach of an implied warranty based on the same operative facts, he would be permitted, under Rule 15(B), to amend his pleadings to conform to his proof even though he had changed his theory based upon the operative facts. If no objection were raised, he would be permitted to continue with his proof without amendment. Or if objection were raised and defendant claimed surprise, plaintiff could amend his pleadings, in the interim a continuance being granted to the defendant. See, *Ross v. Phillip Morris Co.*, 164 F.Supp.683 (W.D.Mo. 1958).

In Ohio, although the several statutes concerning amendments are said to have been liberally construed, the "theory of the pleadings" concept inherent in the statutes has led to inconsistent results in the case law.

In *Steel Sanitary Co. v. Pangborn Corp.*, 38 OApp 65 (1930), defendant was denied the opportunity to amend his cross-petition sounding in breach of implied warranty to a theory sounding in tort, both pleadings being based on the same operative facts. But in *Gorey v. Gregg*, 78 OApp 367, [34 O.O. 107] (1945), plaintiff was permitted to amend her petition from a theory sounding in contract to a theory sounding in implied contract. Both cases cite § 2309.58, R.C., which permits amendment of the pleadings so long as "the amendment does not substantially change the claim or defense." The cases are in apparent confusion as to what constitutes a "substantial" change in the theory of the pleadings.

In addition, the matter of amendment is further complicated by the variance statute, § 2317.49, R.C., and the failure of proof statute, § 2317.51, R.C. These statutes, typical of Field Code statutes, provide that if proof varies "immaterially" from the theory of the pleadings, amendment is not necessary; and if proof varies "materially" from the theory of the pleadings, amendment is permissible; but if proof varies substantially from the theory of the pleadings, the proof "fails," i.e., amendment is not possible, a party being limited to the original theory of his pleadings. What constitutes immaterial or material variance or failure of proof is a morass of conceptual inconsistency as the case notes under the statutes readily indicate. Rule 15(B) permits amendment of the theory of the pleadings provided that the merits of the action will be subserved and provided that the amendment relates to the basic operative facts. Rule 15(B) is not burdened by variance, failure of proof, or the old "theory of the pleadings" concept.

RULE 15(C) RELATION BACK OF AMENDMENTS.

Rule 15(C) concerns itself with the relation back of permissible amendments and in that sense is intimately related to statutes of limitation. The relation back theory of Rule 15(C) involves amendments concerning the pleadings and amendments concerning parties to the action (amendments concerning inadvertent misnomer of a party, for example).

If plaintiff files his complaint, and if the applicable

section) State ex rel. Floyd v. Court of Common Pleas, 55 Ohio St. 2d 27, 377 N.E.2d 794, 9 Ohio Op. 3d 16, 1978 Ohio LEXIS 609 (1978).

— Waiver

Although patient who is party to lawsuit does not waive physician-patient privilege by producing medical reports or hospital records, he does waive provisions of statute relative to privileged communications so far as it pertains to attending physician by calling physician as witness. When waiver of physician-patient privilege by party to lawsuit is inevitable or reasonably probable to occur, trial court, within its discretion, may order physician to submit to discovery deposition, upon express proviso that information discovered or gained from discovery not be used until such time as actual waiver occurs: (decided under former analogous section) Garrett v. Jeep Corp., 77 Ohio App. 3d 402, 602 N.E.2d 691, 1991 Ohio App. LEXIS 4558 (1991).

Specific trial date

A court speaks through its journal; hence where the court sets trial for a given week rather than a given day and also orders a pretrial memorandum to be submitted seven days before trial, such order, for purposes of imposing sanctions, is invalid because no specific trial date has been set: (decided under former analogous section) Reese v. Proppe, 3 Ohio App. 3d 103, 443 N.E.2d 992, 3 Ohio B. 118, 1981 Ohio App. LEXIS 10026 (1981).

Witness lists

Since defendant did not move for an order requiring the state to furnish him with a written list of the names and addresses of the witnesses it intended to call at trial, he waived his right to object to the admission of the evidence. State v. Baker, — Ohio App. 3d —, 2003 Ohio 4637, — N.E. 2d —, 2003 Ohio App. LEXIS 4142 (Sept. 3, 2003).

RULE 16. [Proposed Amendment Effective July 1, 2008] Pretrial procedure

In any action, the court may schedule one or more conferences before trial to accomplish the following objectives:

- (1) The possibility of settlement of the action;
- (2) The simplification of the issues;
- (3) Itemizations of expenses and special damages;
- (4) The necessity of amendments to the pleadings;
- (5) The exchange of reports of expert witnesses expected to be called by each party;
- (6) The exchange of medical reports and hospital records;
- (7) The number of expert witnesses;
- (8) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;
- (9) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production;
- (10) The imposition of sanctions as authorized by Civ. R. 37;

(11) The possibility of obtaining:

- (a) Admissions of fact;
- (b) Agreements on admissibility of documents and other evidence to avoid unnecessary testimony or other proof during trial.

(12) Other matters which may aid in the disposition of the action.

The production by any party of medical reports or hospital records does not constitute a waiver of the privilege granted under section 2317.02 of the Revised Code.

The court may, and on the request of either party shall, make a written order that recites the action taken at the conference. The court shall enter the order and submit copies to the parties. Unless modified, the order shall control the subsequent course of the action.

Upon reasonable notice to the parties, the court may require that parties, or their representatives or insurers, attend a conference or participate in other pretrial proceedings.

History: Amended, eff 7-1-93; 7-1-08.

STAFF NOTES

7-1-08 AMENDMENT

New subsections (8) and (9) are added to clarify that issues relating to discovery of documents and electronically stored information are appropriate topics for discussion and resolution during pretrial conferences. Other linguistic changes, including those made to the subsections (7), (11) and (12) and to the final paragraph of Rule 16, are stylistic rather than substantive.

**TITLE IV
PARTIES**

RULE 17. Parties plaintiff and defendant; capacity

(A) **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution

shall have the same effect as if the action had been commenced in the name of the real party in interest.

(B) **Minors or incompetent persons.** Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

History: Amended, eff 7-1-75; 7-1-85.

STAFF NOTES

1970: RELEVANT EXCERPTS UNAFFECTED BY LATER RULE AMENDMENTS

RULE 17(A) REAL PARTY IN INTEREST.

The first three sentences of Rule 17(A) (based upon Federal Rule 17(a)) set forth the principles included in §§ 2307.05, R.C. and 2307.08, R.C. In short, the real party in interest principles of Rule 17(A) borrow directly the real party in interest principles of the Field Code.

In an action at common law an assignee, for example, could not sue in his own name. The Field Code, with the procedural merger of law and equity changed that, the equitable principle that the party entitled to the benefits of the suit (an assignee), as distinguished from the party with the empty legal title (the assignor), being the proper party to sue, i.e., being the "real party in interest." Of course, the Field Code and Rule 17(A) provide that a party, such as a trustee, who sues for the benefit of another is a real party in interest. Quite logically under the code and the rule if there is a partial assignment or partial subrogation, then the partial assignor and the partial assignee or the partial subrogor and the partial subrogee, both having a beneficial interest in the suit, are the real parties in interest.

The real party in interest principle does not refer to "capacity to sue." Assume that a minor is negligently injured. The minor is a real party in interest, but he does not have the capacity to sue. The minor sues under Rule 17(B) by his next friend, an adult, who does have the capacity to sue.

The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). Assume that an administrator under a void appointment sues in good faith. Under Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until the proper administrator can be substituted in order that justice might be done. The 1966 amendment of Federal Rule 17(a) "codifies" the principle enunciated in *Levinson v. Deupree*, 345 U.S. 648 (1953) and *Link Aviation, Inc. v. Downs*, 325 F. 2d 613 (D.D.C. 1963). A similar result might be accomplished under § 2309.58, R.C., the general amendment statute (*Taylor v. Scott*, 168 Ohio St. 391, [7 O.O.(2d) 243] (1959)); however, Rule 17(A) simply states clearly that

a proper real party in interest may be substituted without the actions being dismissed.

RULE 17(B) MINORS OR INCOMPETENT PERSONS.

Rule 17(B) (quite similar to Federal Rule 17(c)) deals with suits by and against minors and incompetent persons. In effect, the rule enunciates the principles covered by §§ 2307.11 through 2307.17, R.C.

Rule 4.2(1) permits service of process upon an individual sixteen years of age or older and dispenses with additional parent or guardian service. But Rule 4.2(1) does not dispense with parent or guardian protection afforded by Rule 17(B). Hence, if a defendant is sixteen years old, he alone may be served under Rule 4.2(1). But for purposes of trial he would receive the full parent or guardian protection of Rule 17(B). In addition, Rule 55(A) provides that a default judgment may not be taken against a minor or incompetent person unless he has been represented properly by a guardian or other such representative who has appeared in the action.

7-1-85 AMENDMENT

This Publisher's Note, in lieu of a Staff Note, sets forth reasons for the 7-1-85 amendment of Rule 17(B). An official Staff Note was not released with the 7-1-85 amendment. Hence this explanatory note reflects the views of the Publisher only.

RULE 17(B) MINORS OR INCOMPETENT PERSONS.

Prior to 1975 Rule 17(B) properly referred to "subdivision (C) of this rule." In 1975, however, subdivision (C) of Rule 17 was abrogated, but by a drafting oversight Rule 17(B) continued to make the empty reference to subdivision (C). The 1985 amendment of Rule 17(B) simply eliminates the reference to the long-abrogated subdivision (C).

7-1-75 AMENDMENT

RULE 17(C) MINORS.

The amendment, effective July 1, 1975, removed Civ. R. 17(C) from the Civil Rules. It provided, as did predecessor statutes, that persons eighteen years of age or older could commence or defend actions for divorce, annulment, or alimony in their own names without the intervention of a guardian or a next friend. Am. Sub. S.B. 1, 110th General Assembly, effective January 1, 1974, lowered the age of majority from twenty-one years to eighteen years for most, but not all, purposes. Bringing or defending actions in divorce, annulment or alimony were procedures not within any of the exceptions. § 3109.01, R.C., the general provision on majority "... of full age for all purposes..." made the provision of Civ. R. 17(C) obsolete. For that reason it was deleted by amendment.

Law Review

Continuing work of the civil committee: 1966 Amendments of the Federal Rules of Civil Procedure. Benjamin Kaplan. 81 HarvLRev 356 (1967).

Federal Rule 17(a): will the real party in interest please stand? John E. Kennedy. 51 MinnLRev 675 (1967).

Insurance — real party in interest — loan receipts. Note. 12 Ohio St. L.J. 295 (1951).

Negotiable instruments — defenses — real party in interest — when applicable. Note. 12 Ohio St. L.J. 301 (1951).

the caption of each brief, pleading or other paper filed in the case.

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 7 Scheduling order

Upon receipt of the notice of appeal and docket statement, the court will issue a scheduling order of events with respect to the appeal. The scheduling order will be modified only upon written motion establishing good cause or pursuant to Loc.R. 21(D) [Pre-hearing Mediation Conference Procedure]. An unexcused failure to comply with the scheduling order in any respect may result in dismissal of the appeal. No scheduling order will be issued on appeals from orders denying bail (see Loc.R. 22).

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 8 Stays; bail; suspension of execution of sentence

All motions for stay, motions for bond pending appeal and motions for suspension of execution of sentence pending appeal shall be made in the first instance in the trial court as required by App.R. 7 and 8. If any such motion is denied by the trial court, it may be made in the court of appeals. Service shall be made upon all other parties, and absent exigent circumstances, the motion will be decided in accordance with Loc.R. 13.

(Effective August 1, 1995; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 9 Counsel

(A) Every notice of appeal, pleading, motion and brief filed shall have typed or printed thereon the name, Ohio Supreme Court registration number, address, telephone and/or cell phone number, and e-mail address of all counsel (or parties, if not represented by counsel). Where a party is represented by more than one counsel, or by a firm of attorneys, one counsel shall be designated as having primary responsibility for the appeal. Counsel so designated shall be responsible for conducting the appeal, including the filing of briefs and other memoranda, oral argument, and receipt of notices and pleadings from the court and all other parties.

(B) Counsel seeking to withdraw shall, with a written application showing good cause, submit proof of service of the notice of withdrawal upon the client, and the name and address of any substitute counsel, or, if none, the name and address of the client.

(C) In cases where appointment of appellate counsel is necessary, such appointment shall be in the first instance in the trial court.

(D) Admission of an out-of-state attorney pro hac vice will be allowed only on motion of an attorney admitted to practice in Ohio and registered with the Supreme Court of Ohio for active status. The motion shall briefly and succinctly state the qualifications of the attorney seeking admission. It shall be filed with the first pleading or brief in which the attorney seeks to participate or at least thirty (30) days before oral argument if the attorney seeks only to participate in oral argument. The court may withdraw the attorney pro hac vice at any time.

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 10 Filing of the record

(A) If a transcript of proceedings is to be prepared in accordance with App.R. 9(B), a copy of the transcript of the appeal with praecipe shall be served by the appellant upon the court reporter. The appellant is responsible for contacting the court reporter and ordering the transcript of proceedings, and filing the transcript with the clerk of the trial court in accordance with App.R. 9(B). The court reporter shall complete and prepare those portions of the record enumerated in the praecipe, subject to being made secure by payment of fees by the party who ordered the transcript. All testimony presented in the trial court on videotape, audiotape or other like manner shall be reduced to writing in transcript form before being submitted as part of the record.

(B) If a statement of evidence or agreed statement is to be filed in lieu of a transcript pursuant to App.R. 9(C) or (D), the statement of evidence or agreed statement approved by the trial court shall be filed with the clerk of the trial court within the time permitted for transmission of the record pursuant to the scheduling order. A Loc.R. 5 notice shall be filed with the clerk of the court of appeals with the statement of evidence or agreed statement filed pursuant to App.R. 9(C) or (D).

(C) Extensions of time by trial court of appeals.

(1) The appellant is responsible for causing the transmission of the record and for obtaining extensions as are necessary to discharge this responsibility. The appellant shall file with the clerk of the court of appeals a copy of any extension obtained by the trial court.

(2) The trial court shall not extend the time for transmitting the record beyond eighty (80) days after the filing of the notice of appeal, and the court of appeals will not recognize an order of the trial court purporting to do so. Extensions of time for transmitting the record shall not extend the time for filing the notice of appeal, and the court of appeals will not recognize an order of the trial court purporting to do so. Extensions of time for transmitting the record shall not extend the time for filing the notice of appeal, and the court of appeals will not recognize an order of the trial court purporting to do so.

Rule 11

(3) **Argument.** The argument shall comprise the main body of the brief, and shall be organized consistently with the assignments of error and issues presented for review set forth in the table of contents. See Section (B)(1) above. The assignments of error and issues presented for review shall be fully set forth verbatim as in the table of contents. The argument under each assignment of error and issue shall be organized accordingly.

Each assignment of error shall assert precisely the matter in which the trial court is alleged to have erred, e.g., THE TRIAL COURT ERRED IN OVER-RULING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION FROM EVIDENCE. An assignment of error shall not be set forth as a proposition of law as envisioned by Rule V of the Rules of Procedure for the Supreme Court of Ohio. Such a statement is wholly inappropriate at this appellate level. Assignments of error filed by an appellee pursuant to R.C. 2505.22 shall be filed with the appellee's brief in response to the assignments of error raised in the appellant's brief.

The argument portion of the brief shall include citations to the portion of the record before the court on appeal wherein the lower court committed the error complained of, e.g., "The trial court erred in overruling plaintiff-appellant's motion for summary judgment (T.p. 25)," or "(opinion and entry, T.d. 50, p. 3)."

(4) **Conclusion.** The conclusion shall briefly summarize the argument and state the precise relief sought on appeal.

(C) **Citations.** All citations to reported Ohio cases in briefs or memoranda shall recite the date, volume and page of the official Ohio report, (where available), and the Ohio Supreme Court web citation (where available), e.g., *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287; *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419; *State v. Schmidt*, 123 Ohio Misc.2d 30, 2002-Ohio-7462. Citations to United States Supreme Court cases shall appear with citations to United States Reports and parallel citations to the United States Supreme Court Reporter, e.g., *Paul v. Davis* (1976), 424 U.S. 693, 96 S.Ct. 1155, rehearing denied (1977), 425 U.S. 985, 96 S.Ct. 2194. Cases that are not cited in an Ohio official reporter and do not appear on the Ohio Supreme Court website shall be cited as follows: *State v. Beagle* (Mar. 1, 1999), Madison App. No. CA98-03-017; *Justice v. Columbus* (Nov. 14, 1991), Franklin App. No. 91AP-675, 1991 WL 244996; *Edinger v. Bd. of Allen Cty. Commrs.* (Apr. 26, 1995), Allen App. No. 1-94-84, 1995 WL 243438, 1995 Ohio App.Lexis 1974.

(D) **Appendices.**

(1) Every appellant's or cross-appellant's brief shall have attached thereto a copy of the following:

- (a) The final appealable entry or order;
- (b) All entries or orders which are the basis of any assigned error;
- (c) All trial court, magistrate or arbitration decisions or opinions explaining the basis for an entry or order in either (a) or (b);
- (d) All ordinances, local rules and regulations that are in themselves dispositive of an assignment of error or are to be given consideration in connection with any assignment of error.

(2) A cross-appellant's or appellee's brief should not include these items if they are the same as those attached to the appellant's brief. If any of these documents are handwritten and not clearly legible, a typed copy must be attached in addition to the handwritten copy.

(E) **Supplemental Authority.** If counsel wishes to present or call the court's attention to additional authorities not discussed in the briefs, a notice of supplemental authority shall be filed with the court and served upon opposing counsel at the earliest possible opportunity. Absent exceptional circumstances, a notice of supplemental authority shall be filed only when counsel could not, with due diligence, have been aware of the additional authority at the time the brief was filed.

(F) **Place of Filing.** All briefs shall be filed with the clerk of the court of appeals for the county from which the appeal is being taken. Briefs cannot be filed at the court's central office in Middletown.

(G) **Failure to Comply.** Failure to comply with the requirements of this rule may result in the brief or notice of supplemental authority being stricken on motion or *sua sponte*, and/or dismissal of the appeal. (Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 12 Oral argument

(A) **Request for Oral Argument.** No oral argument will be heard on any appeal unless requested by counsel for either party. Oral argument may be requested by filing a request for argument in the clerk's office within the time provided for the filing of the appellant's reply brief. The request for oral argument shall be filed as a separate pleading and not appended to any brief, notice or other paper. If any party fails to appear to present oral argument, the court shall hear argument on behalf of the opposing party, if present. The court may, if it so desires, require oral argument in any case.

(B) **Length of Oral Argument.** Oral argument shall be limited to fifteen (15) minutes per side. In those cases where counsel deems additional time for argument is needed, counsel shall file a motion requesting the additional time setting forth the grounds

upon which the additional time is sought. Any party opposing such motion shall file a response within ten (10) days.

(C) **Supplemental Authority.** A notice of supplemental authority may be filed prior to argument as provided by App.R. 21(H) and Loc.R. 11(F).

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 13 Motions and memoranda

(A) **Content.** All motions must be in writing. All motions must be served upon opposing counsel, or upon the opposing party if not represented by counsel, and filed with proof of service with the clerk of the court of appeals. Every motion shall set forth in detail the relief requested, and shall be accompanied by a memorandum setting forth the reasons and authorities that support granting the requested relief. Every motion and response shall have typed or printed thereon the name, Ohio Supreme Court registration number, address, telephone and/or cell phone number, and e-mail address of counsel, or the party filing the motion or response if not represented by counsel. Any party opposing a motion shall file a written response within ten (10) days or as otherwise permitted by the court or the Ohio Rules of Appellate Procedure.

(B) **Number of Copies/Place of Filing.** The original and one additional copy of all motions and memoranda shall be filed with the clerk of the court of appeals in the county from which the appeal is being taken. No filings of any nature can be made at the court's central office in Middletown.

(C) **Oral Argument.** All motions will be ruled upon without oral argument, except where the court requests such argument and notifies counsel to appear.

(D) **Filing by Facsimile or Other Electronic Transmission.** The filing of pleadings not requiring a security deposit pursuant to Loc.R. 2 may be accomplished by telephonic facsimile or other electronic transmission in compliance with the local rules of the clerk of the court of appeals for the county where the appeal is pending.

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 14 Extensions of time

(A) Except as provided in Loc. R. 21(D) [Prehearing Mediation Conference], applications to the court of appeals for extensions of time to file briefs and other motions and memoranda shall be made by written motion and supported by a memorandum which sets forth facts demonstrating good cause for the extension. Motions for extensions of time filed after the

time sought to be extended has expired will generally not be granted.

(B) All motions for extension of time shall state whether the court has previously granted the movant an extension of time in the case, and the length of the extension of time that was previously granted.

(C) See Loc.R. 10(C) for additional requirements regarding extensions of time for transmitting the record.

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 15 Failure to prosecute

The following shall be deemed good cause for dismissal of an appeal pursuant to App.R. 3(A), 11(C), or 18(C):

(A) Failure to file a docket statement as required by Loc. R. 4.

(B) Failure to file with the notice of appeal the appropriate filings required by App.R. 9(B).

(C) Failure to timely order in writing from the court reporter any necessary transcript of proceedings, or to timely file any necessary statement of evidence or agreed statement pursuant to App.R. 9(C) or (D), or a notice that no transcript or narrative statement will be filed as required by Loc.R. 5.

(D) Failure to cause the record on appeal to be timely transmitted to the clerk of this court.

(E) Failure to timely file a brief and assignments of error presented for review.

(F) Any other non-compliance with the appellate rules or the rules of this court.

For any failure to comply with the appellate rules of procedure or the rules of this court, the court may, at its discretion, dismiss the appeal or issue a show cause order directing the party to show cause for the failure to comply.

(Effective August 1, 1995; amended eff. May 1, 2001; amended eff. January 1, 2004; amended eff. January 1, 2010.)

Rule 16 Judgment entries; reconsideration

(A) Decisions of the court will be announced by way of a judgment entry, usually accompanied by an opinion or decision. Upon filing of the judgment entry, the time for appeal to the Supreme Court of Ohio will begin to run.

(B) Pursuant to App.R. 26 (A), applications for reconsideration in appeal cases may be filed within ten (10) days after the judgment entry is filed. However, the filing of an application for reconsideration does not