

IN THE SUPREME COURT OF OHIO

HEALTHY FAMILIES OHIO, INC., et al.	)	
	)	
Relators,	)	Case No. 2012-0070
	)	
v.	)	
	)	Original Action in Mandamus
OHIO BALLOT BOARD, et al.,	)	and Prohibition
	)	
Respondents.	)	

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**RESPONDENTS PERSONHOOD OHIO, JAMES PATRICK JOHNSTON, FRANK WEIMER, DAVID DAUBENMIRE, AND TOM RADDELL'S RESPONSE TO RELATORS' MOTION TO STRIKE AND REQUEST FOR SANCTIONS**

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Respondents Personhood Ohio, James Patrick Johnston, Frank Weimer, David Daubenmire, and Tom Raddell (hereinafter “Personhood Ohio”), by and through the undersigned counsel, submit the following response in opposition to Relators’ motion to strike Personhood Ohio’s response to the State Respondents’ motion to dismiss and request for sanctions.

**INTRODUCTION**

Relators have moved to strike Personhood Ohio’s response in support of the State Respondents’ motion to dismiss on grounds that the Supreme Court Rules of Practice do not permit such a response by a party that has filed an Answer to the Complaint. In fact, however, the Rules of Practice expressly state that the Ohio Rules of Civil Procedure shall supplement the Rules of Practice “unless clearly inapplicable.” Nothing in S.Ct. Prac. R. 10.5 renders the Rules of Civil Procedure “clearly inapplicable,” and Relators cite no case law whatsoever. In fact, Rule 10.5 is silent as to the right of one respondent where, as here, another respondent files a motion to dismiss. Nowhere does Rule 10.5 explicitly disallow one respondent from filing a response to a motion to dismiss filed by a co-respondent. Accordingly, because co-parties routinely file

responses to motions filed by other parties under the Rules of Civil Procedure, Personhood Ohio's response was appropriate here, and Relators' motion and request for sanctions should be denied.

In any event, given the absence of a single case interpreting Rule 10.5 in the manner construed by Relators, and the complete lack of any showing of bad faith or willfulness by Personhood Ohio, the request for sanctions should be denied out of hand.

## ARGUMENT

### **I. SUPREME COURT PRACTICE RULE 10.5 DOES NOT PROHIBIT ONE RESPONDENT FROM FILING A RESPONSE TO A MOTION TO DISMISS FILED BY ANOTHER RESPONDENT; THEREFORE, PERSONHOOD OHIO'S RELIANCE ON THE RULES OF CIVIL PROCEDURE TO SUPPLEMENT THE PRACTICE RULES WAS APPROPRIATE UNDER PRACTICE RULE 10.2.**

Relators' primary argument is that "this Court's rules describe precisely" what can be filed and by whom. *See* Relators' Motion to Strike at 2. In particular, as Relators note, S.Ct. Prac. R. 10.5(A) states that "*the* respondent shall file an answer to the complaint or a motion to dismiss within twenty-one days of service of the summons and complaint." *Id.* (emphasis added). Rule 10.5(B) further states:

*The* respondent may file a motion for judgment on the pleadings at the same time an answer is filed. The relator may not file a response to an answer. The relator may file a memorandum in opposition to a motion to dismiss or a motion for judgment on the pleadings within ten days of the filing of the motion. Neither party may file a motion for summary judgment.

*Id.* (emphasis added). The rule thus contemplates only one relator and only one respondent. Here, of course, there are multiple respondents. Nowhere does the rule address what response, if any, one respondent may file to a motion to dismiss or for judgment on the pleadings filed by another respondent.

Moreover, Supreme Court Practice Rule 10.2 provides that “[t]he Ohio Rules of Civil Procedure shall supplement these rules *unless clearly inapplicable*.” *Id.* (emphasis added); *see also State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 631, 716 N.E.2d 704, 707 (Ohio 1999) (quoting rule and relying on Rules of Civil Procedure) (citing *State ex rel. SuperAmerica Grp. v. Licking Cnty. Bd. of Elections*, 80 Ohio St. 3d 182, 185, 685 N.E.2d 507, 510 (Ohio 1997)). “The determination of whether the Civil Rules are ‘clearly inapplicable’ to actions is made on a rule-by-rule basis.” *Talley v. Warner*, 99 Ohio Misc. 2d 42, 45, 715 N.E.2d 635, 637 (Ohio Mun. 1999) (citing *Price v. Westinghouse Elec. Corp.*, 70 Ohio St.2d 131, 24 O.O.3d 237, 435 N.E.2d 1114 (Ohio 1982)).

“A Civil Rule is clearly inapplicable only when [its] use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action.” *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St. 3d 361, 370, 691 N.E.2d 667, 674 (Ohio 1998) (internal quotation marks and citation omitted). In light of the silence of S.Ct. Prac. R. 10.5 regarding the propriety of one respondent filing a response to another respondent’s motion to dismiss, and the apparent purpose of the rule to provide this Court with a complete record and briefing within a strict time limit, it cannot be said that the Ohio Rules of Civil Procedure are “clearly inapplicable” here to the extent they permit the filing of a response by a co-respondent.

The Ohio Rules of Civil Procedure do, in fact, permit the filing of responses by one defendant or respondent to a motion to dismiss filed by a co-defendant or respondent, *even after the defendant has filed an answer*. *See, e.g., Saddler v. Kirchmer*, CV-04-03-0877, 2004 WL 5182027 (Ct. of Com. Pleas, 2004) (considering motion to dismiss filed by one defendant after reviewing both plaintiffs’ response in opposition *and* co-defendant’s response, *filed after co-*

*defendant had answered*) (copy attached). Similarly, the Federal Rules of Civil Procedure, which in all material respects mirror the Ohio Rules of Civil Procedure<sup>1</sup>, allow such responses by a co-defendant. *See, e.g., Klein v. Miller*, 2004 WL 1118725 (W.D. Tex. 2004) (deciding motion to dismiss or in the alternative motion for summary judgment filed by one defendant, after considering co-defendant's response thereto, even though the co-defendant had filed an answer<sup>2</sup>); *Martin v. Video Shopping Mall, Inc.*, 1991 WL 209015 \*3 (E.D. Pa. 1991) (deciding motion to dismiss after consideration of both the motion "and plaintiff's and codefendants' responses thereto").

Moreover, the filing of a response by a co-respondent furthers the purpose of the rules not only by providing additional authorities and argument on the issues presented, but also by furnishing a mechanism by which factual errors or omissions may be addressed. Here, Personhood Ohio's response pointed out and corrected the State Respondents' error in incorrectly assuming as true Relators' conclusory and unsupported allegation that Personhood Ohio seeks to amend *two* sections of the Ohio Constitution instead of *one*. *See* Personhood Ohio's response at 3-4. Construing Rule 10.5 to prohibit Personhood Ohio's response would leave this Court with an incomplete or incorrect factual record to the prejudice of the proponent of the proposed amendment at issue, namely Personhood Ohio. Such a result would be

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<sup>1</sup> Ohio R. Civ. P. 7(B)(1) provides: "An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." *Id.* Similarly, Fed. R. Civ. P. 7(b)(1) provides: "A request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought." *Id.* There is thus no substantive difference between the two rules.

<sup>2</sup> Although the opinion itself does not reflect the filing of an answer by the co-defendant, a review of the docket makes clear that an answer had been filed.

inconsistent with both the purpose of this rule as well as the spirit of the Supreme Court Practice Rules themselves, which explicitly allow for the supplementation of the record on a normal appeal on the initiative of the Court itself “or on motion of *a party*.” S.Ct. Prac. R. 5.8 (emphasis added).

Additionally, *Relators fail to cite a single case interpreting Rule 10.5 with respect to the issue presented here, nor for that matter any case interpreting Rule 10.2 and the supplementation of the Practice Rules by the Ohio Rules of Civil Procedure.* Personhood Ohio was unable to find any case law from this Court interpreting Rule 10.5 in this context, either. In light of the absence of any precedent directly deciding this issue, and the wide support for the filing of Personhood Ohio’s response by virtue of the authorities cited above, Relators’ motion to strike should be denied.

## **II. RELATORS’ REQUEST FOR SANCTIONS SHOULD BE DENIED OUT OF HAND.**

“Of course, sanctions are inappropriate if the appeal presents an issue of first impression.” *Coghlan v. Starkey*, 852 F.2d 806, 812 (5th Cir. 1988) (citing *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516, 518 (5th Cir. 1986), *Adult Film Ass’n v. Thetford*, 776 F.2d 113 (5th Cir. 1985), and *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715 (7th Cir. 1981)). *See also Boim v. Quranic Literacy Inst.*, 2003 WL 1956132 (N.D. Ill. 2003) (“Rule 11 sanctions are generally inappropriate when dealing with issues of first impression”) (citing *Hrubec v. National Railroad Passenger Corp.*, 829 F.Supp. 1502, 1507 (N.D.Ill.1993)); *Quets v. Needham*, 198 N.C. App. 241, 256-57, 682 S.E.2d 214, 223-24 (N.C. Ct. App. 2009) (reversing award of sanctions where issue presented was one of first impression).

Relators’ unsupported request for sanctions should therefore be denied out of hand. They utterly fail to provide any authority for their request, thereby tacitly conceding that the question

here is one of first impression. Neither do Relators even pay lip service to the high standard required to attain such an extraordinary award. Ohio R. Civ. P. 11 provides in pertinent part:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. *For a willful violation of this rule an attorney may be subjected to appropriate action.* Similar action may be taken if scandalous or indecent matter is inserted.”

*Id.* (emphasis added). “The purpose of the rule is to deter pleading and motion abuses and to assure the court that a pleading was filed in good faith, with good grounds to support it.”

*Newman v. Al Castrucci Ford Sales, Inc.*, 54 Ohio App. 3d 166, 169, 561 N.E.2d 1001, 1004 (Ohio Ct. App. 1988) (citing *Stevens v. Kiraly*, 24 Ohio App. 3d 211, 213, 24 OBR 388, 390, 494 N.E.2d 1160, 1163 (Ohio Ct. App. 1985)). As already shown above, Personhood Ohio had both good grounds to file its response and acted in the utmost good faith in doing so.

The standard for determining a motion alleging a violation of Rule 11 is well established:

An attempt to invoke Civ.R. 11, which seeks more than a mere striking of the offensive pleading, should be followed by a three-step determination. First, the court must consider whether the attorney signing the document (1) has read the pleading, (2) harbors good grounds to support it to the best of his or her knowledge, information, and belief, and (3) did not file it for purposes of delay. If any one of these requirements is not satisfied, the next question is whether the violation was “willful” as opposed to merely negligent. *Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons, Inc.* (1989), 57 Ohio App.3d 22, 23, 565 N.E.2d 1278, 1279. If so, the court *may* impose an “appropriate action.” Broad discretion is afforded to the determination of what, if any, sanction is to be administered. *Stevens v. Kiraly* (1985), 24 Ohio App.3d 211, 213–214, 24 OBR 388, 390–391, 494 N.E.2d 1160, 1163–1164.

*Ceol v. Zion Indus., Inc.*, 81 Ohio App. 3d 286, 290, 610 N.E.2d 1076, 1078 (1992) (emphasis in original).

The analysis of a Rule 11 motion which seeks “more than a mere striking of the offensive pleading,” as Relators’ motion does, requires three steps. First, the Court must consider whether counsel (1) has read the document, (2) whether he has good grounds to support it, and (3) whether he filed it for purposes of delay. *Id.* There is no suggestion here that counsel for Personhood Ohio failed to read the response, or that it was filed for purposes of delay. Relators argue instead only that Personhood Ohio has shown “flagrant disregard” for this Court’s rules of procedure, presumably suggesting that there were no good grounds to support the filing of the response. *See* Relators’ Motion at 1.

As the argument in section I attests, however, there are in fact good grounds for counsel to support his belief that the filing of a response to the State Respondents’ motion to dismiss was appropriate under the rules. Therefore, Relators fail to satisfy the first prong of the Rule 11 analysis, and their request for sanctions should be denied.

Even if Relators could show that Personhood Ohio’s counsel lacked good grounds to support the filing of a response (which they absolutely cannot show), they would still not be entitled to an award of sanctions. The second step in the Rule 11 analysis is to determine whether the violation was “willful.” *See Ceol, supra.* Here, other than naked and conclusory allegations, Relators have failed to demonstrate that any alleged violation of the rules was willful. On the contrary, the argument and authorities above make plain that any alleged violation was far from willful, and that Personhood Ohio’s response was rather supported by a good faith belief that the Practice Rules as supplemented by the Ohio Rules of Civil Procedure in fact allow the filing of the response. Thus, even if Relators were able to satisfy the first prong of the Rule 11 analysis, they would be unable to satisfy the second prong, and their request for sanctions should again be denied.

Finally, if Relators were somehow able to establish both of the first two prongs of the analysis (which they cannot), then in that case the Court “*may* impose an ‘appropriate action.’” *Ceol* (emphasis in original). In fact, however, a careful consideration of the law of the matter shows that the correct interpretation of the rules is that they permit Personhood Ohio’s response, and the Court should never reach this stage of the Rule 11 analysis. That the issue is one of first impression further showcases the absurdity of Relators’ request for discretionary sanctions.

At bottom, Relators’ rote request for sanctions is wholly unsupported and quite possibly itself in violation of the very Rule 11 which Relators so carelessly have invoked. In any event, the Court should deny the request out of hand.

### CONCLUSION

For all of the foregoing reasons, Relators’ motion to strike Personhood Ohio’s response in support of the State Respondents’ motion to dismiss and request for sanctions should be denied, and Personhood Ohio respectfully requests that the Court award such other and further relief to which it is entitled.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONSE TO RELATORS' MOTION TO STRIKE AND REQUEST FOR SANCTIONS has been served on this 25th day of February, 2012, via email, on the following counsel of record:

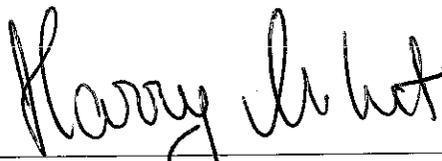
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2004 WL 5182027 (Ohio Com.Pl.) (Trial Order)  
Court of Common Pleas of Ohio.  
Butler County

Craig SADDLER, et al., Plaintiffs,

v.

Brian T. KIRCHMER dba Guardian Inspections aka (sic) Complete Inspections Services, Defendant.

No. CV04-03-0877.  
November 16, 2004.

**Decision**

Wayne Staton, Attorney for Plaintiffs, 110 North Beech Street, Oxford, Ohio 45056.

Robert F. Croskery, Attorney for Defendant Guardian Inspections, 6860 Tylersville Road, Suite 1, Mason, Ohio 45040.

Hanna B. Haddad, Attorney for Defendant Margie Gadd-Madden, 7099 Crown Point Drive, Hamilton, Ohio 45011.

Judge Sage.

**This matter is before the Court on Defendant's (Guardian Inspections, Inc., hereinafter "Defendant") motion to dismiss** or in the alternative to compel arbitration filed in the Butler County Court of Common Pleas against Plaintiffs (Craig Saddler, et al., hereinafter "Plaintiffs") on September 30, 2004. Defendant asks this Court to dismiss Plaintiffs' complaint because they failed to file within one year, or in the alternative, to compel arbitration.

*STATEMENT OF FACTS*

On June 19, 2002, Plaintiffs entered a contract to purchase a home located at 111 Melanie Lane, Oxford Ohio with co-defendant Margie Gadd-Madden (hereinafter "co-defendant"). On June 19, 2002, co-defendant signed a residential property disclosure form, which was later amended on June 27, 2002. Then, on June 21, 2002, Defendant inspected the house for Plaintiffs. Plaintiffs filed a complaint on March 17, 2004 against Defendant and co-defendant. Plaintiffs claim co-defendant failed to list flooding problems and hazardous materials on the disclosure form, and that Defendant not only failed to list those, but also failed to perform a proper inspection.

**Co-defendant filed an answer on April 19, 2004.** Plaintiff then filed a motion for default judgment on May 5, 2004 against Defendant, which this Court signed an entry granting on May 13, 2004. On August 27, 2004, Defendant filed a motion to set aside the default judgment, which this Court granted on October 27, 2004. **Thereafter, Defendant filed its motion to dismiss or to compel arbitration on September 30, 2004,** followed by Plaintiffs' response on October 8, 2004. Defendant then filed a reply brief on October 15, 2004, **and co-defendant filed her response to the motion on October 21, 2004.**

This Court has read all of the motions and memoranda and is now ready to make a decision.

## ANALYSIS

### *Motion to Dismiss:*

According to the Ohio Rules of Civil Procedure there are certain defenses that may be made by motion. Civ.R. 12(B). Civ.R. 12(B)(6) allows for a motion to dismiss based on the defense of failure to state a claim upon which relief can be granted. A Motion to Dismiss pursuant to Civ.R. 12(B)(6) carries a heavy burden. This motion will only be granted when it appears “beyond doubt from the complaint that the Plaintiff can prove no set of facts entitling him to recovery. *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77 at 80. The court must also “presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Mitchell v. Lawson Milk Company* (1988), 40 Ohio St.3d 190, at 192.

In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Million* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. When a motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R.56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 723 N.E.2d 596. However, a trial court may not, on its own motion, convert a Civ.R. 12(B)(6) motion to dismiss to a motion for summary judgment and thus dispose of it without giving notice to the parties on its intent to do so and fully complying with Civ.R. 12(B) and Civ.R.56 in its considerations. *Id.*

Defendant argues that since Plaintiff failed to bring this claim within the one year as required by the arbitration clause in the contract between the parties, the claim must be dismissed. The parties entered into the contract on June 21, 2002, and did not file a complaint until March 17, 2004. On the other hand, Plaintiff argues that the one year time limit is unconscionable because the problems were not noticeable until the Fall of 2003, when they initially brought suit in Area One Court against co-Defendant.

As this Court has stated, a Motion to Dismiss pursuant to Civ. R. 12(B)(6) carries a heavy burden. The movant must show that the non-moving party has failed to state any claim whatsoever upon which relief can be granted. This weighty burden permits the Court to grant a 12(B)(6) Motion to Dismiss only in the most glaring situations. In *Miller v. Progressive Casualty Insurance Company*, the Supreme Court of Ohio held that a provision in uninsured and underinsured motorist coverage of policy requiring insured to demand arbitration or bring action within one year is void as against public policy. 69 Ohio St.3d 619. Since the problems were not noticeable within the one year limitation, and the claims against Defendant were brought shortly after the problems became noticeable, this Court agrees with Plaintiffs and finds the one year limitation to be unconscionable and against public policy. Therefore, Defendant's motion to dismiss is not well-taken and it is hereby *DENIED*.

### *Motion to Compel Arbitration:*

Ohio Revised Code §2711.02(A) reads as follows:

“A provision in any written contract, except as provided in division B of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.”

In its Motion, Defendant cites the agreement to arbitrate provision, which was in the contract entered into between the parties. The arbitration agreement provision reads as follows:

“Should there be any dispute concerning the interpretation of this contract, or concerning the inspection, or concerning the report, all such disputes will be submitted to binding arbitration conducted in accordance with the construction industry rules of the American Arbitration Association, by an arbitrator agreeable to both parties...”

While Plaintiffs do not argue the existence of the arbitration clause, they claim the case is not referable to arbitration because two defendants are involved in the case, one of which who was not a party to the arbitration agreement. There is a long standing policy in the laws of Ohio and other states to favor and encourage arbitration. *Campbell v. Automatic Die & Products Co.* (1954), 162 Ohio St. 321, 329. “An arbitration clause in a contract should not be denied effect unless it can be said with positive assurance that the arbitration clause does not cover the asserted dispute.” *Gibbons-Grable Co. v. Gilbane Building Co.* (1986), 34 Ohio App.3d 170. This Court strongly favors alternative dispute resolutions. In accordance with *Ohio Revised Code* §2711.01(A), this Court often times upholds arbitration agreements as “valid, irrevocable, and enforceable.”

In co-defendant's response to the motion to compel arbitration, she states she does not object to arbitration and will willingly participate in it. Therefore, even though she was not an original party to the contract containing the arbitration clause, she can still partake in the arbitration.

After considering all of the motions and memoranda, this Court finds the arbitration clause to be valid and binding on the parties. Therefore, Defendant's motion to compel arbitration is well-taken and hereby *GRANTED*.

So Ordered,

Craig SADDLER, et al., Plaintiffs, v. Brian T. KIRCHMER dba Guardian Inspections aka (sic) Complete Inspections Services, Defendant., 2004 WL 5182027