

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., ET AL.
Appellants

Case Number 12-1272

v.

JOBSONHIO, ET AL.

Appellees

MOTION TO CONSOLIDATE THIS CASE WITH JOBSONHIO V. GOODMAN 12-1356

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Appellants move this Court to consolidate this case with *JobsOhio v. Goodman*, 12-1356, at least to the extent of making David Goodman a party defendant. Although the *Goodman* case is not a proper mandamus lacks necessary parties and is untimely, it contains concessions relevant to this case. Although appellants believe that the Goodman case should be dismissed entirely, if the Court allows it to remain on its docket, it should be consolidated with this case. That case is not the proper form of action to resolve the issues of JobsOhio and if it is fact it is allowed to go forward, it will result a legal morass and will multiply litigation for years. It can never be a substitute for a declaratory judgment and injunction against proper parties.

PROCEDURAL BACKGROUND

This case has been prosecuted by these appellants for over a year and was previously before this Court in August, 2011. That case was filed within the 90 day limitations period for constitutional challenges to JobsOhio set forth in R.C. 187.09. The Court found at that time that the portion of R.C. 187.09 that attempted to unconstitutionally expand this Court's original jurisdiction to cover a declaratory judgment action was unconstitutional and struck down that portion of the law. The Court held that appellants should file an action for declaratory judgment

and injunction in Franklin County Common Pleas Court, which this Court has long held is the proper form of action and court to determine the constitutionality of new legislation. See *ProgressOhio.org v. Kasich*, 2011-Ohio-4101. After the case was filed in common pleas, rather than addressing the merits, the Kasich administration and JobsOhio blocked the determination of constitutionality with a standing argument that fails to properly apply this court's long established holdings on public interest standing or the obvious intent of R.C. 187.09. Unfortunately, the lower courts allowed this unsupported argument to prevent a hearing on the merits. Now, the Kasich administration and JobsOhio recognize that blocking and delaying judicial consideration of the significant constitutional questions that surround JobsOhio was huge tactical blunder that has served no one's interest. The response by the administration and JobsOhio to their own lack of foresight is to act in concert to bring a spurious and collusive mandamus claim, which is really a declaratory judgment action, between two parties that have no adverse interest.¹ Referring to evidence of collusion as *ad hominem* attacks does not change the fact that evidence of collusion is clear on the record of this litigation.

Although counsel for Director Goodman offered to allow us to appear as amicus, that would not allow the filing of a Motion to Dismiss and as predicted in the Motion to Intervene, that was not filed by respondent.

Since the parties in *Goodman* are failing to follow the rules of constitutional adjudication, the purported mandamus case lacks parties and requests for relief that actually are necessary should JobsOhio be determined to be unconstitutional and will result in chaos and multiply litigation. It is a monumentally bad idea.

¹ Porter Wright, attorneys for David Goodman, are the attorneys for Bob Evans and the Chairman of Bob Evans is a member of the Board of JobsOhio. Former General Counsel of Marathon Oil recently joined Porter Wright and the CEO of Marathon Oil sits on the Jobs Ohio Board. Porter Wright also endows a chair at OSU and Gordon Gee sits on the Board of Jobs Ohio. See Attached.

MEMORANDUM IN SUPPORT

JobsOhio filed their disingenuous mandamus action against Director Goodman in a transparent attempt to preempt the *Progress Ohio* case so its nature as a sham needs to be addressed here.

The purported mandamus complaint in the *Goodman* case seeks to invoke this Court's original jurisdiction to obtain what is in fact a declaratory judgment that R.C. 187, the JobsOhio Act, and R.C. 4313, the Enterprise Acquisition Act, are constitutional. That is a declaratory judgment action pursuant to R.C. 2721.03. JobsOhio is asking this Court to approve the contract that they want Goodman to sign, thereby unmasking that part of the action as a declaratory judgment action pursuant to R.C. 2721.03. Goodman's counsel has filed a Motion for Judgment on the Pleadings in 2012-1356 that does not discuss the fact that it is questionable that this court has jurisdiction since it is really a declaratory judgment action. See *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634, 716 N.E.2d 704, *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 86 Ohio St.3d 629, 634, 716 N.E.2d 704. There is also a statute of limitations problem with this mandamus since R.C. 187.09 placed a 90 statute of limitations on litigation attacking the constitutionality of R.C. 187.09 which is not mentioned in Goodman's motion. If the mandamus were not collusive, that would have been raised in Goodman's filings and they were not.

The state and JobsOhio cite *Duerk v. Donehey*, (1981) 67 Ohio St. 2d216 and other old cases regarding bonding issues, as support for the position that a lawsuit can be brought based upon this sort of set up. Of course this is an old case and this justification ignores the fact that this Court held just last year that issues of JobsOhio's unconstitutionality must be brought as a declaratory judgment action in common pleas court and that is what is required in R.C. 187.09.

There are other problems with this comparison. *Duerk* reported to the Governor and Donahey was the independently elected Treasurer of Ohio. Both JobsOhio and the Department of Commerce are subordinate to Governor John Kasich. (See attached Exhibit 2). Furthermore, there is no evidence whatsoever that *Duerk* had prevented an earlier declaratory judgment action from being determined by the courts or that a declaratory judgment action was currently on this Court's docket at the time of filing the mandamus action in *Duerk, Id.* That case does not support a mandamus in this situation at all and other case cited has similar problems.

Despite JobsOhio's arguments to the contrary, there is an adequate remedy at law available which precludes their mandamus, and it lies in this case. The only way that the Goodman case should be allowed to remain on this courts docket if it is given some measure of legitimacy by consolidating it with this case.

A. The state and JobsOhio have conceded that the fact that JobsOhio is probably unconstitutional is a matter of great public interest and importance and this is sufficient to grant standing to appellants.

In their memoranda contra filed in this appeal, the attorney general and JobsOhio argue that this is a run of the mill standing case and that the underlying constitutional issues are insufficient to trigger public interest standing. Yet the substantive claims in this case are in fact so important to the parties in *Goodman* that they are making an end run around a legitimate declaratory judgment action with a trumped up mandamus. These same parties are claiming that the mandamus case is imperative and this court should make a decision in that sham litigation because public interest demands it. If the public interest demands a decision on the constitutionality of JobsOhio then appellants here have standing because the unconstitutionality of JobsOhio and the threat that it poses to the state are matters of great public interest.

Appellants have always had standing to bring this case pursuant to 150 years of Ohio constitutional law. This is not altered by the fact that the Attorney General's office has mangled this court's holding in *Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3rd 451, 469-470, 1999 Ohio 123 beyond recognition in the lower courts.

Although Director Goodman's counsel may brief the merits of this case in accordance with the issues as laid out by appellants here, it does not change the fact that the *Goodman* action is against the public interest. Ohio's history is remarkable in the consistent attacks that this court has had to endure and the truly never ending battle over separation of powers that is so much a part of this Court's legacy. *Ohio Academy of Trial Lawyers v. Sheward, Id.* This is yet another attack on this court as an institution. A collusive lawsuit designed to invoke this court's jurisdiction in violation of separation of powers injures the public and the government. The *Goodman* cases also fails to serve the public interest since it provides no vehicle for preventing JobsOhio from continuing to function even if it is determined to be unconstitutional. All the mandamus asks this court to order Director Goodman sign the document. The *Goodman* case also fails to join the parties that are necessary to actually adjudicate the case. David Goodman is only a minor player and he was not even necessary party at the beginning of this litigation, whereas this appeal includes all the parties necessary for an actual settlement of the controversy.

The *Goodman* case is essentially a concession by the state and JobsOhio regarding a variety of issues in this case. Due to page limitations and roadblocks created by the Attorney General, appellants here have never had enough pages in previous filings to truly attack the JobsOhio scheme. But even those few pages have convinced two courts that there is something wrong with JobsOhio. Director Goodman's brief, despite its shortcomings regarding Article IV and limitations issues, sets forth the magnitude of the constitutional violations inherent in

JobsOhio that were first presented in this case. Therefore, the preexisting *Progress Ohio* case should now appropriately be classified as an appeal as of right. The parties to the Goodman case have further conceded, that this is a matter of such great public interest and importance as this is the primary argument made throughout their many filings. That triggers public interest standing for the appellants, representing the citizens of Ohio. Lacking truly adverse positions (both the relator and respondent contend that the JobsOhio legislation is constitutional), neither of the parties in *Goodman* would represent the public interest in any way, so the appellants in *Progress Ohio* should be the primary parties to be heard in a challenge to the constitutionality of the JobsOhio legislative scheme.

The Goodman case is a transparent attempt by the current administration to circumvent this Court's jurisdictional limits set forth in Article 4 of the Ohio Constitution. It is an attempt to stop the true representatives of the public from presenting the case they initiated and actually care about as a public issue. It is gamesmanship of the highest order that shows such a manifest disrespect for this Court, separation of powers and the Ohio Constitution that it needs to be addressed by this Court. And as this case is the one that is based upon the proper form of action, legitimately within this court's jurisdiction, was filed within the statute of limitation and allows for oral argument, this is the case that should be determined by this Court as a proper full fledged appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing motion to consolidate was sned by first class mail as well as electronic mail to counsel of record in this case: Aneca Laskey, Squires, Saunders and Dempsey and Douglas Cole, Organ, Cole and Stock, for Jobs Ohio and Pearl Chin and Aaron Epstein for the State of Ohio.

A handwritten signature in black ink, appearing to read "Victoria E. Ullmann", written over a horizontal line.

Victoria E. Ullmann

Attorney for Progress Ohio.org



Fort strengthens Porter Wright's growing oil & gas practice

4/26/2012

With 30 years of legal experience in the oil & gas industry, Jeffrey E. Fort has joined Porter Wright's expanding oil & gas practice group as Of Counsel in the Firm's Columbus office.

Fort has served as general counsel and corporate secretary for Marathon Pipeline Company, as an environmental attorney for Marathon Oil Company, as an oil field attorney and as operations engineer and corporate counsel for KNG Energy, Inc. He has also served as a real estate and environmental attorney for a large law firm in Toledo, Ohio, and previously managed his own private practice in Findlay, Ohio, where, among other things, he assisted clients in oil & gas, environmental and real estate matters.

Before beginning his legal career, Fort, a graduate of the United States Naval Academy, served in the U.S. Naval Reserves for nearly 20 years, achieving the rank of Captain. He also spent five years on active sea duty as an officer in the U.S. Navy.

"Jeff's wide-range of legal, business and leadership experience makes him a great addition to our firm's involvement in the development of the oil & gas industry in the Marcellus and Utica shale formations," said Curt Loveland, Chair of Porter Wright's Corporate Department. "Having previously served as in-house counsel to major corporations, as well as a solo practitioner and law firm partner, we are proud to add Jeff's exceptional perspective and understanding to our oil & gas and environmental practices."

Fort received a law degree from The Ohio State University College of Law and a bachelor's degree in general engineering and political science from the United States Naval Academy, with Merit.

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John has worked in the areas of real estate development and real estate finance since he arrived at Porter Wright in 1969. During his first 20 years with the firm, he worked principally with developers such as Red Roof Inns and Bob Evans Farms in the acquisition, financing and development of sites throughout the country. The emphasis of his practice over the past 15 to 20 years has expanded to include real estate finance with clients such as Nationwide Life Insurance Company and State Farm Life Insurance Company. John is the former Practice Group Leader of the firm's Real Estate Department. He has been recognized in *The Best Lawyers in America*® for more than 10 years; and is recognized by *Ohio Super Lawyers*®. Additionally, John is listed in *Chambers USA* as one of the leading attorneys in Real Estate Law.



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ABOUT US

WE'RE BUILDING BUSINESS IN A STATE KNOWN FOR IT.

WHAT IS JOBSOHIO?

JobsOhio is a private, nonprofit corporation guided by a business-minded Governor and a highly accomplished board of directors, designed to lead Ohio's job-creation efforts by singularly focusing on attracting and retaining jobs, with an emphasis on strategic industry sectors. Using a private-sector approach, JobsOhio speaks the language of business, enabling Ohio to be more nimble, flexible and competitive in its economic development efforts.

STRATEGIC FRAMEWORK

The JobsOhio Strategic Framework for 2012 is a dynamic tool meant to guide our efforts to grow the state's existing jobs base, attract new jobs, and secure investments in Ohio.

Inside the Strategic Framework is information about Ohio's strengths as a place to do business and key strategies for building upon those strengths. It also highlights the strategies for our nine target industries and four business functions, the predominant sectors that drive Ohio's economy.

As we move through the next several months, we will continually measure ourselves against these strategies and refine our efforts to ensure that Ohio is the first place companies consider for new business investments.

[Download PDF \(http://jobs-ohio.com/images/jobsohio_strategic_framework.pdf\)](http://jobs-ohio.com/images/jobsohio_strategic_framework.pdf) (14MB PDF)

EARLY RESULTS

(<http://jobs-ohio.com/images/john-kasich.jpg>)

In 2011, the Kasich Administration and JobsOhio worked with businesses of all sizes to secure 245 new investments, expansions and relocations, creating more than 21,000 new jobs and keeping nearly 62,000 existing ones. Overall, that equals nearly \$4.8 billion in new or saved payroll for the state. According to the U.S. Bureau of Labor Statistics, Ohio is 8th in the nation in job creation, and tops in the Midwest [Jan. – Oct. 2011]. [Learn more. \(http://jobs-ohio.com/images/jobsohio_overview.pdf\)](http://jobs-ohio.com/images/jobsohio_overview.pdf)

Business success and job creation benefits everyone. Let's find a way for you to grow right here in Ohio. Contact JobsOhio at (614) 224-6446 to get started.



Governor Kasich made job creation his top priority when he came into office. By establishing JobsOhio and implementing reforms that make state government more efficient and business friendly, he is helping to create a better environment for job growth.

Video: JobsOhio – Moving Ohio Ahead (<http://www.youtube.com/embed/f1k90n4j5rE?autoplay=1>)

JOBSOHIO TEAM

Mark D. Kvamme, President and Interim Chief Investment Officer
Kevin Giangola, Chief Finance Officer
Kip Wahlers, General Counsel

Managing Directors

John Minor (Financial Services, Agribusiness & Food Processing)
David Mustina (Energy, Chemicals & Polymers)
Mark Patton (BioHealth, Information Services, & Logistics)
Kristi Tanner (Advanced Manufacturing, Automotive, Aerospace & Aviation)

Communications Director
Laura Jones

Human Resources Director
Becky Fair

Accounting Policy Director
Bill Sevens

Legislative & Community Outreach Director
Daryl Revoldt

Marketing Director
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Project Finance Manager
Tracy Allen

Project Management Directors
Kristi Clouse
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Project Managers
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Matt Cybulski
Thomas Seward

Project Coordinator
Kevin Schneider

Site Selection Manager
Sheena Metzger

Foreign Direct Investment Manager
Mindy McLaughlin

Executive Assistants
Renee Colangelo
Haley Kothman

Office Manager

Erin Harper



BOARD OF DIRECTORS

BUSINESS DEVELOPMENT, DRIVEN BY BUSINESS LEADERS.

Makes sense, doesn't it? JobsOhio isn't your typical governmental agency. We're a corporate non-profit, run by people who bring proven experience with America's most successful corporations.



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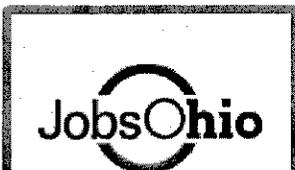


C. Martin Harris, M.D.
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THE BEST WAY TO LEARN ABOUT OHIO IS TO SEE US IN ACTION.



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