

IN THE SUPREME COURT OF OHIO

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| PROGRESSOHIO.ORG, INC. et al., | : | Case No. 2012-1272 |
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| Plaintiffs-Appellants, | : | On Appeal from the Franklin County |
| | : | Court of Appeals, Tenth Appellate District |
| v. | : | |
| | : | Court of Appeal Case No. 11AP-1136 |
| JOBSOHIO, et al., | : | |
| | : | |
| Defendants-Appellees. | : | |

**MEMORANDUM OF STATE DEFENDANTS-APPELLEES IN
OPPOSITION TO APPELLANT PROGRESSOHIO'S MOTION TO CONSOLIDATE**

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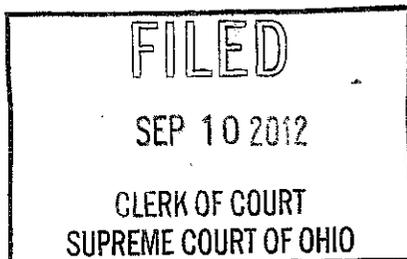
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MEMORANDUM OF LAW

I. INTRODUCTION

On July 27, 2012, Michael J. Skindell, Dennis E. Murray, and ProgressOhio.org. filed a Notice of Discretionary Appeal with this Court, along with a Memorandum asking the Court to accept the discretionary appeal. (Case No. 2012-1272, hereinafter “the *ProgressOhio* case”). Appellant ProgressOhio now seeks to have this case consolidated with *JobsOhio v. Goodman*, Case No. 12-1356 (hereinafter “*JobsOhio* mandamus”), an original action pending before this Court. Appellants Murray and Skindell are not parties to the Consolidation Motion.

The State Defendants-Appellees respectfully submit that the Motion to Consolidate has no merit and should be denied. The Motion does not satisfy or even articulate the requirements for consolidation and overlooks a serious procedural obstacle to consolidation of the two cases.

II. LAW AND ANALYSIS

A. Applicable legal standard

In all original actions (such as the *JobsOhio* mandamus), the Ohio Rules of Civil Procedure apply except insofar as they are clearly inapplicable or in conflict with the Rules of Supreme Court Practice. Ohio Sup. Ct. Prac. R. 10.2. Undersigned counsel has found no specific provision in the Supreme Court Rules of Practice pertaining to consolidation in discretionary appeals. To the extent that this Motion to Consolidate is governed by Rule 42(A) of the Ohio Rules of Civil Procedure, that rule provides that the court may order a joint hearing or trial on some or all of the issues “[w]hen actions involving a common question of law or fact are pending before a court.” However, consolidation is not warranted here under Civ. R. 42 or any legal standard and should be denied for two reasons.

B. *ProgressOhio* and *JobsOhio* are dissimilar types of actions that do not admit of consolidation.

First, consolidation is not available here where *ProgressOhio*'s discretionary appeal, filed as a declaratory judgment action and the *JobsOhio* mandamus are by very their two completely different types of actions. An original action in mandamus is an entirely different form of action from a declaratory judgment action. See Ohio Constitution, Article IV; see also R.C. 198.09(D). There is simply no truth to *ProgressOhio*'s contention that the Defendants are engaging in "gamesmanship" or showing disrespect for the court and the Ohio Constitution (Motion, p. 6) where the Ohio Constitution treats discretionary appeals and mandamus actions as two completely different types of actions.

Moreover, consolidation is not automatically granted where two different types of actions may share some overlapping facts. See, e.g., *Roop v. Floodplain Regulations Variance Bd.*, 2003-Ohio-5522, 2003 Ohio App. LEXIS 4949 (4th Dist. 2003). The Fourth District Court of Appeals' decision in *Roop* is instructive for this case.

Roop unsuccessfully asked the trial court to consolidate two closely-related cases. The first case was *Roop*'s administrative appeal of a decision by the Ross County Commissioners to deny him a variance from county Flood Regulations. The second case was an action filed by the Ross County Commissioners against *Roop* seeking an injunction to stop his on-going violation of the Flood Regulations. The two cases unquestionably implicated common questions of law (the scope and enforceability of the Flood Regulations) and common questions of fact (the actual impact of *Roop*'s building on flood levels). Nevertheless, the trial court denied consolidation because it recognized that it had a different role in each case and different questions to answer. In the administrative appeal, the role of the court was to review the administrative record, not to act as an independent finder of fact. In the injunction case, on the other hand, the court's role

was to hear and weigh evidence as to whether Roop had in fact violated the Flood Regulations. Based on this distinction, the trial court found “no commonality of issues existed” between the two cases, and the appellate court affirmed. *Id.* at ¶ 26.

Roop is quite similar to this case. While on the surface, *ProgressOhio* and *JobsOhio* relate to the establishment of the JobsOhio program, the legal issues are quite dissimilar, as is the role of the Court in each case. As much as *ProgressOhio* wants to argue the merits of its Complaint at this stage, the only issue in the *ProgressOhio* discretionary appeal – and the only issue decided by courts below-- is standing.

ProgressOhio’s Motion to Consolidate ignores the fact that this Court has not granted discretionary review of this case and may decline to do so. The trial court dismissed *ProgressOhio*’s Complaint on the grounds that *ProgressOhio* lacks standing to challenge Governor Kasich’s job-promotion initiatives. A unanimous panel of the Tenth District Court of Appeals affirmed. *ProgressOhio* has sought discretionary review in this Court. But rather than awaiting this Court’s decision on whether to hear the discretionary appeal, *ProgressOhio* has chosen to try to intervene in the *JobsOhio* mandamus action (despite *ProgressOhio*’s unresolved standing problem) and now asks—without legal basis-- for consolidation of an appeal the Court has not agreed to hear.

The Court should therefore deny this Motion to Consolidate as wholly lacking in basis.

C. The *ProgressOhio* suit is not “pending” before this Court and lacks sufficient common questions of law or fact with the *JobsOhio* mandamus.

To the extent that Ohio Civil Rule 42 applies, consolidation is not proper here under the rule because the *ProgressOhio* case is not “pending” before this Court and the two cases do not share sufficient “common questions of law or fact.” Until and unless this Court accepts the discretionary appeal, the *ProgressOhio* case is not truly “pending” before the Supreme Court

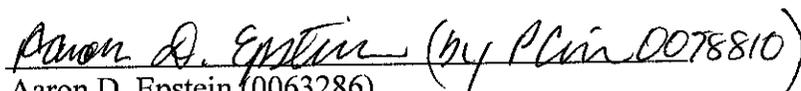
within the meaning of Civil Rule 42(A). See Civ. R. 42(A)(1) (consolidation of actions may be allowed “when actions involving a common question of law or fact are *pending* before a court”) (emphasis added). Any other conclusion would create a new avenue of appeal to the Supreme Court, one not contemplated by the Rules of Practice. Allowing consolidation under these circumstances would also allow parties to get their discretionary appeals before this Court without first meeting the threshold requirement of showing their appeals concern matters of great public importance.

CONCLUSION

For the reasons set forth herein, the State Defendant-Appellees in the *ProgressOhio* litigation respectfully submit that there is no lawful basis for consolidating the two actions, and ask that the Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on September 10, 2012, by U.S. mail and electronic mail to the following:

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