

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.,
 LEVERT ERVIN, #A420-633, : Case No. 2013-0331

Relator-Appellant : On appeal from the Court of Appeals
 for Cuyahoga County, Ohio Eighth
 -vs- : Judicial Appellate District

JUDGE PAMELA BARKER, : Court of Appeals No. 98704

Respondent-Appellee. :

MERIT BRIEF OF APPELLANT LEVERT ERVIN

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APPELLANT'S BRIEFI. Statement of the Case:

On July 24, 2012, the appellant, Levert Ervin, hereinafter Ervin, commenced an action in mandamus against appellee, Judge Pamela Bakker, to compel the judge to vacate the April 25, 2001 order of the acting administrative judge, Chris Boyko allowing the taking of a testimonial deposition during trial in the underlying case, State v. Ervin, Cuyahoga County C.P. No. CR-400774. Mr. Ervin maintained that the acting administrative judge lacked jurisdiction to order the deposition because the requisites for allowing reassignment were not shown. Furthermore, the trial court's record fails to demonstrate that Judge Chris Boyko was, in fact, reassign to the case to rule on the State's motion to take the testimonial deposition of its witness. Thus, that order is null and void, and mandamus will lie to compel the appellee judge to vacate the order. Upon considering the respondent's motion to dismiss, the 8th District Court of Appeals considered matters outside of the complaint. However, the Court of Appeals failed to convert the motion to dismiss into a motion for summary judgment and give notice pursuant to the civil rules, but dismissed the petition under Civ.R. 12, on February 4, 2013.

II. Statement of the Facts:

On April 25, 2001, state's attorney, Kestra Smith, allege that she sought out, and filed a motion to take the testimonial deposition of state's witness, Ian Lucash, with then assistant deputy administrative judge Chris Boyko, who was acting as the administrative judge. (Petition Exhibit #1 transcr. p. 141-142). The state's attorney failed to allege or made the requisite shown in the motion to take the testimonial deposition that the assign judge was not available to

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rule on the motion in a timely manner. (Petition Exhibit #2). Judge Chris Boyko was not reassigned to State v. Ervin, Cuyahoga County C.P. No. CR-400774 to rule on the State's motion as the assign judge or in the capacity of a substitute judge. (Relator's Mtn. for Summ. Judgment Exhibit #5 p. 1-9).

The State's motion was not a preliminary matter and was requested after trial had commenced on April 23, 2001. (Petition Exhibit #1 transcript p. 37-38).

On May 8, 2012, Mr. Ervin filed a motion with appellee to vacate the order of Judge Chris Boyko, which granted the testimonial deposition of the State's witness, on April 25, 2001. (Petition Exhibit #4). The respondent denied Mr. Ervin's motion to vacate the order granting testimonial deposition on June 22, 2012. (Petition Exhibit #4).

On July 24, 2012, Mr. Ervin commenced an action in mandamus against Judge Pamela Barker, to compel the judge to vacate the order of the acting administrative judge Chris Boyko. (Petition p. 1).

On or about August 6, 2012, appellee, in lieu of an answer, filed a motion to dismiss alleging that Mr. Ervin had an adequate remedy in appeal in which to raise his claim. (Motion to Dismiss p. 5). Appellee essentially argued that Mr. Ervin's claim is one of an impropriety of a procedural irregularity associated with the transfer of a case. That, furthermore, the fact that Judge Boyko, at Administrative Judge Richard McMongale request, granted the motion to take the deposition of the State's witness did not render Judge Boyko's ruling void, as he was operating as a substitute judge. (Motion to Dismiss p. 4).

On August 15, 2012, Mr. Ervin filed a memorandum in opposition to the State's motion to dismiss, arguing that the motion raised unsubstantiated argument for summary judgment. (Memorandum in Opposition p. 1). Mr. Ervin argued that an

appeal was not an adequate remedy where a court lacked jurisdiction to act. Additionally, the trial court's record was devoid of any entry of the unavailability of the assign judge and of any entry transferring State v. Ervin, supra, to the docket of Judge Chris Boyko. (Memorandum in Opposition p. 2). Mr. Ervin invited the respondent to move for summary judgment in support of its Civ.R. 56 arguments. (Memorandum in Opposition p. 2).

On September 10, 2012, pursuant to Civ.R. 56(C), Mr. Ervin filed a motion for summary judgment. (Motion for Summary Judgment). The appellee did not file a brief in opposition. (C.A. Opinion ¶ 1).

On February 4, 2013, the 8th District Court of Appeals entered judgment granting the respondent judge's motion to dismiss, denied relator's motion for summary judgment, and dismissed relator's writ for mandamus based on matters outside of the complaint. (C.A. Opinion).

Mr. Ervin filed his notice of appeal to the Supreme Court of Ohio on February 25, 2013, under Supreme Court No. 2013-331.

The 8th District Court of Appeals transferred the record in Supreme Court No. 2013-331, on March 1, 2013.

III. Argument:

Proposition of Law:

The lower court erred as a matter of law by failing to apply the correct standard of review when granting respondent's motion to dismiss relator's petition for mandamus based upon allegations and assertions contained outside the pleadings, and which motion was not properly supported by affidavits, exhibits or attachments as required by Civ.R. 56(c).

The standard of review of a court's granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is de novo. Tisdale v. Javitch, Block & Rathbone, 8th Dist. No. 83119, 2003-Ohio-6883. When ruling on a motion to dismiss for failure to

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state a claim, the court must assume that all factual allegations in the complaint are true, and it must appear beyond a reasonable doubt that the plaintiff can prove no set of facts warranting recovery. Tulloh v. Goodyear Atomic Corp., 62 Ohio St.3d 541, 584 N.E.2d 729 (1992).

In the case at bar the court of appeals erred in dismissing the petition for mandamus pursuant to Civ.R. 12(B)(6), when construed most favorably to Mr. Ervin the petition states a claim upon which relief can be granted. The court of appeals considered matters outside of the pleadings to conclude that the alleged April 25, 2001 order of Judge Boyko, allowing for the testimonial deposition of the State's witness was voidable rather than void. The court of appeals considered that Judge Boyko was acting as a substitute judge rather than as a reassigned judge, making his order voidable rather than void. (C.A. Opinion ¶ 8). Yet, the subject of a substitute judge was not raised in the petition for mandamus. (Petition). The court of appeals considered the 10 assignments of error raised by Mr. Ervin in his initial appeal of his criminal convictions in State v. Ervin, 8th Dist. No. 80437, 2003-Ohio-4093. (C.A. Opinion ¶ 4). The court of appeals concluded that Mr. Ervin had an adequate remedy by way of a direct appeal of his criminal convictions. (C.A. Opinion ¶ 9). Yet, there is no mention of State v. Ervin, 8th Dist. No. 80437, 2003-Ohio-4093 in the petition for mandamus. (Petition).

Civil Rule 12(B) does not expressly provide for the defense of res judicate to be raised by motion to dismiss. Under Fed.R.Civ.P. 12(b) a defendant may raise an affirmative defense by motion to dismiss for failure to state a claim. If the defense appears plainly on the face of the complaint itself, the motion may be disposed of under this rule. But, if the affirmative defense is based

upon matters outside the complaint, and is raised by a motion under Rule 12(b), then the court must consider the motion as one for summary judgment under Ohio Civ.R. 56 in order to consider evidentiary matters outside the complaint. And, then, only if there is no genuine issue of fact as to the affirmative defense, can the court sustain the motion to dismiss.

In the case at bar Mr. Ervin did not submit on the face of the petition for mandamus that he had exhausted his remedy by way of an appeal, as the court of appeals indicates. (C.A. Opinion ¶ 7). In fact, Mr. Ervin set forth in the petition that he had moved the respondent judge to vacate the void order of Judge Boyko, by motion, and that motion was denied. (Petition ¶ 18). Mr. Ervin, further, requested that the court of appeals find that an appeal of the matter was an inadequate remedy, whereas, Judge Boyko patently and unambiguously lacked jurisdiction to enter the April 25, 2001 order. (Petition ¶ 19). See, State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998); See also Eisenber v. Peyton, 56 Ohio App.2d 144, 148, 381 N.E.2d 1136 (8th Dist. 1978). If a court acts without jurisdiction, then any proclamation by the court is void. See Patton v. Diemer (1988), 35 Ohio St.3d 68, 518 N.E.2d 941. In the case of Romito v. Maxwell, Warden (1967), 10 Ohio St.2d 266, at 267, 227 N.E.2d 223, 224, the Supreme Court stated, "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity." (Tari v. State [1927], 117 Ohio St. 481, 498, 159 N.E. 594.). Given the fact that Judge Boyko's April 25, 2001 order is void as alleged in the pleadings, there is no appellate jurisdiction to review an issue that did not happen. Romito, supra. Therefore, an appeal is not an adequate remedy for purposes of a Civ.R. 12(B)(6) review. Tulloch, supra.

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Likewise, the court of appeals found that Mr. Ervin had an adequate remedy in an appeal after the trial court denied his motion to vacate. (C.A. Opinion ¶ 9). The same legal principle in Romito applies to an appeal of the denial of the motion to vacate, whereas, there is no appellate jurisdiction to review a void order. Additionally, and more significant, the trial court order denying Mr. Ervin's motion to vacate does not meet the statutory definition of a final appealable order under R.C. § 2505.02(B), because it neither affects a substantial right in an action that in effect determines the action and prevents a judgment. It is not an order from a special proceeding, an order that vacates or sets aside a judgment or grants a new trial, and it is not an order that grants or denies a provisional remedy.

Clearly then, the court of appeals could not have properly granted the respondent's motion to dismiss as a failure to state a claim under Civ.R. 12(b)(6). Thus, in order to justify the granting of the motion to dismiss, the court of appeals must have considered evidentiary matters outside of the complaint, treating the motion as a motion for summary judgment under Civ.R. 12(B) and Civ.R. 56. However, the only documents before the court of appeals in the record containing any information concerning the defense of res judicata or adequate remedy is the journal entry denying Mr. Ervin's motion to vacate Judge Boyko's order and the respondent's motion to dismiss. Neither document is accompanied by any exhibits or other evidentiary matter as might be the basis for a motion for summary judgment under Civ.R. 56.

When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleadings and such matters are not excluded by the court, the motion shall be treated as a motion for summary

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judgment and disposed of as provided in Civ.R. 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Civ.R. 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Civ.R. 56.

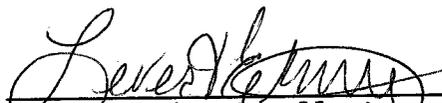
Here, the claim that Judge Chris Boyko acted as a substitute judge and the defense that Mr. Ervin had an adequate remedy involved consideration of matters outside the complaint. Accordingly, the court of appeals was obligated to convert the motion to dismiss into a motion for summary judgment. The "shall" language in the text of Civ.R. 12(B) is mandatory. A court can only go beyond the averments in the complaint if it converts the motion to dismiss into one for summary judgment. Petrey v. Simon (1983), 4 Ohio St.3d 154, 156, 447 N.E.2d 1285. A review of the record indicates that the court of appeals did not convert the motion to dismiss to a motion for summary judgment. Nor does the judgment entry itself indicate such a conversion. Because the record does not reflect a conversion, the court of appeals was confined to the averments of the complaint, which were sufficient to state a claim. Indeed, Ervin, in his brief in opposition to the motion to dismiss denied having an adequate remedy in which to present his claim because of Judge Boyko's lack of jurisdiction.

When a court converts a motion to dismiss into one for summary judgment, it must notify all parties. Federated Dept. Stores Inc. v. Lindley (1987), 30 Ohio St.3d 135, 137, 507 N.E.2d 1114, Petrey, supra at 156, 447 N.E.2d 1285. In the case at bar the court of appeals failed to give notice to parties that it was converting the motion to dismiss into a summary judgment motion. State ex rel. Boggs v. Springfield Local School Dist. Bd of Bdn (1995), 72 Ohio St.3d 94, 647 N.E.2d 788.

IV. Conclusion:

Therefore, for the reasons stated above Mr. Ervin requests that this Honorable Court reverse the decision of the 8th District Court of Appeals denying his motion for summary judgment, and dismissing his petition for writ of mandamus under Civ.R. 12(B). Mr. Ervin requests that the Court remand this cause to the 8th Dist. Court of Appeals with instructions for that court to convert appellee's motion to dismiss into one for summary judgment and to give parties notice as mandated by the Civil Rules. In as much as Mr. Ervin's motion for summary judgment is properly before the court, to instruct the appellee to respond pursuant to Civ.R. 56, and give Mr. Ervin a date and time for his rebuttal.

Respectfully submitted,



Levert Ervin, Appellant pro se

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of the Appellant Levert Ervin was sent by ordinary U.S. Mail to counsel for the appellee, James E. Moss, Assistant Cuyahoga County Prosecutor, 9th Floor Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113. On this 8th day of March, 2013.



Levert Ervin

APPENDIX

IN THE SUPREME COURT OF OHIO

13-0331

STATE OF OHIO EX REL.,
LEVERT ERVIN, #A420-633,

Relator-Appellant,

-vs-

JUDGE PAMELA BARKER,

Respondent-Appellee.

: On Appeal From The Court of Appeals
For Cuyahoga County Ohio Eighth
: Judicial Appellate District

: Court of Appeals No. 98704

:

:

NOTICE OF APPEAL OF APPELLANT
LEVERT ERVIN

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ATTORNEYS FOR RESPONDENT-APPELLEE
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FEB 25 2013

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SUPREME COURT OF OHIO

FILED

FEB 25 2013

CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT LEVERT ERVIN

Appellant Levert Ervin hereby gives Notice of Appeal to the Supreme Court of Ohio From the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 98704 on this 4th day of February, 2013.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
Levert Ervin, pro se



Levert Ervin

FOR RELATOR-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Notice of Appeal was forwarded by regular U.S. Mail to the Cuyahoga County Prosecutor's Office at: 9th Floor Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 17th day February, 2013.



Levert Ervin, #A420-633
Grafton Correctional Institution
2500 South Avon-Belden Road
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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98704

STATE, EX REL. LEVERT ERVIN

RELATOR

vs.

JUDGE PAMELA BARKER

RESPONDENT

**JUDGMENT:
WRIT DISMISSED**

Writ of Mandamus
Motion Nos. 457438 and 458454
Order No. 461949

RELEASE DATE: February 4, 2013

KATHLEEN ANN KEOUGH, J.:

{¶1} On July 24, 2012, the relator, Levert Ervin, commenced this mandamus action against the respondent, Judge Pamela Barker, to compel the judge to vacate an order of the acting administrative judge allowing the taking of a testimonial deposition during trial in the underlying case, *State v. Ervin*, Cuyahoga C. P. No. CR-400774. Ervin maintains that the acting administrative judge lacked the jurisdiction to order the deposition because the requisites for allowing reassignment were not shown. Thus, that order is null and void, and mandamus will lie to compel the respondent to vacate it. On August 6, 2012, the respondent moved to dismiss, and on August 15, Ervin filed his brief in opposition and followed with his own motion for summary judgment on September 10, 2012. The respondent did not file a brief in opposition to the summary judgment motion. For the following reasons, this court grants the judge's motion to dismiss, denies Ervin's motion for summary judgment, and dismisses the application for a writ of mandamus.

{¶2} In the underlying case, the grand jury indicted Ervin on one count of attempted rape and 13 counts of rape of his eight-year-old daughter. On April 23, 2001, the assigned trial judge commenced voir dire. While voir dire was continuing on April 24, 2001, the prosecutor learned that the social worker would be unavailable for testimony during trial because he was scheduled for surgery on April 26. Therefore, the prosecutor sought to take his testimonial

deposition. For reasons that are not explained, the prosecutor sought permission from the acting administrative judge, not the trial judge. The acting administrative judge gave permission for the deposition to proceed but did not issue a journal entry on the matter.

{¶3} On April 25, 2001, the parties took the video deposition of the social worker. The defense attorney was present, objected to notice, but participated in the deposition and cross-examined the social worker. The deposition was subsequently used during trial. The jury found Ervin guilty of attempted rape and 11 counts of rape. The trial judge found Ervin to be a sexual predator and sentenced him to ten years imprisonment on the attempted rape count and to life sentences on the rape counts, all to run consecutive.

{¶4} On appeal, *State v. Ervin*, 8th Dist. No. 80437, 2002-Ohio-4093, appellate counsel raised ten assignments of error, including several attacking the social worker's testimony. These included that the trial judge erred in allowing the social worker to testify what the child told him, that the trial judge erred in allowing the social worker to testify after he had destroyed his interview notes with the child, that the social worker improperly opined that sexual abuse had occurred and vouched for the child's credibility, and that the trial judge erred in allowing the social worker's video deposition to be used at trial. This court overruled all of the assignments of error. Specifically, this court ruled that the use of the deposition was proper because the social worker would be

unavailable because of sickness or infirmity, and because both Ervin and defense counsel were present during the deposition and defense counsel was able to subject the witness to full cross-examination.

{¶5} In May 2012, Ervin moved to vacate the acting administrative judge's order allowing the deposition. On June 22, 2012, the respondent judge denied the motion to vacate on the grounds of res judicata, lack of abuse of discretion in allowing the deposition, and harmless error because disallowing the deposition would not have changed the outcome of the trial. Ervin now brings this mandamus action to compel the respondent judge to vacate the order allowing the deposition.

{¶6} The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 631 N.E.2d 119 (1994); and *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in

the course of a case. *State ex rel. Jerningham v. Gaughan*, 8th Dist. No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Furthermore, if the relator had an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108, and *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 564 N.E.2d 86 (1990). Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

{¶7} Ervin relies upon *Berger v. Berger*, 3 Ohio App.3d 125, 443 N.E.2d 1375 (8th Dist. 1981), and *Rosenberg v. Gattarello*, 49 Ohio App.2d 87, 359 N.E.2d 467 (8th Dist. 1976), for the proposition that an administrative judge does not have the authority to rule on a motion unless it is shown that the assigned trial judge is unavailable and that delay on ruling on the motion would be prejudicial. Indeed, this court in *Rosenberg* stated that because the administrative judge did not have authority to grant the motion, “the order granting said motion was null and void.” 49 Ohio App.2d at 93. Ervin argues that because the record does not show the unavailability of the trial judge, the acting administrative judge was without jurisdiction to allow the deposition and his order was null and void. Ervin continues that a lack of jurisdiction is never waived and can be raised at any time. Moreover, he submits that because he

has exhausted his remedy by way of appeal, he now no longer has an adequate remedy at law.

{¶8} However, *Berger* does not hold that a substitute judge's order is void, if there is no proper reassignment. The actual holding is: "where the record fails to show proper reassignments of the case to the judges making those rulings, they are voidable and must be vacated on a timely motion or appeal by a party that has not waived his objection to such irregularity." 3 Ohio App.3d at 125. Furthermore, the courts of Ohio have consistently followed this principle. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 451 N.E.2d 225 (1983) — a party possesses an adequate remedy at law by way of appeal to contest the issue of an improper assignment; *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004; and *Morgan v. Morgan*, 5th Dist. No. 99-CA-0136, 2000 Ohio App. LEXIS 693 (Feb. 22, 2000). In *Rolfe v. Galvin*, 8th Dist. No. 86471, 2006-Ohio-2457, ¶ 67, a prohibition action, various judges were assigned, removed, reassigned and served as judges in the underlying cases. Rolfe claimed Judge Galvin's latest orders were void because she had not been properly reassigned to the case. This court rejected the argument because it ignored "the distinction between void and voidable. A void judgment is a mere nullity, and can be attacked at any time, while a voidable judgment is fully effective and valid unless and until it is challenged through direct appeal, thus precluding a collateral attack, such as an extraordinary writ." Thus, because the acting

administrative judge's order was voidable, mandamus will not lie to compel its vacation.

{¶9} In summary, Ervin's argument that the acting administrative judge lacked subject matter jurisdiction to issue the ruling is ill-founded. Ervin's proper remedy was to appeal this issue in his initial appeal or after the trial court denied his motion to vacate. The fact that he had an adequate remedy law now precludes a writ of mandamus. *McGrath and Boardwalk Shopping Ctr., supra.*

{¶10} Accordingly, this court grants the respondent's motion to dismiss, and dismisses this application for a writ of mandamus. Relator to pay costs. This court directs the clerk of court to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).


KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR

KEY WORDS:

Errors resulting from an improper assignment of a judge are voidable and are properly reviewed on appeal, not through an extraordinary writ such as mandamus.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

S/O EX REL., LEVERT ERVIN

Relator

COA NO.
98704

ORIGINAL ACTION

-vs-

JUDGE PAMELA BARKER

Respondent

MOTION NO. 458454

Date 02/04/13

Journal Entry

Motion by Relator, pro se, for summary judgment is denied. See journal entry and opinion of same date.

FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB X 4 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By *[Signature]* Deputy

Presiding Judge LARRY A. JONES, SR.,
Concurs

Judge MARY EILEEN KILBANE, Concurs

Kathleen Ann Keough
KATHLEEN ANN KEOUGH
Judge

Ohio Rules Of Civil Procedure
Title III. Pleadings and motions

Ohio Civ. R. 12 (2013)

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 within twenty-eight days after service of 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 fourteen 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.

Ohio Rules Of Civil Procedure
Title VII. Judgment
Ohio Civ. R. 56 (2013)

Rule 56. Summary judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion for pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion.

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief

asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; Further testimony; Defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable.

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

ORC Ann. 2505.02 (2013)

§ 2505.02. Final order

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
 - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
 - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.
- (5) An order that determines that an action may or may not be maintained as a class action;
- (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code.