

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., ET AL.

Plaintiffs,

v.

JOB SOHIO, ET AL

Defendants.

) Case No.: 2012-1272
)
) On Appeal From the Tenth District
) Court of Appeals
)
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)
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)

MOTION REQUESTING THE COURT TO TAKE JUDICIAL NOTICE
MOTION FOR SUMMARY REVERSAL

VICTORIA E. ULLMANN (0031468)
Attorney at law, *pro se*
113 Bryden Road
Columbus, Ohio 43205
(614) 253-2692
Fax: 253-2692
Victoria_ullmann@hotmail.com
Columbus, OH 43215

Intervener Appellant

MICHAEL J. SKINDELL (0039041), *Pro se*
55 Public Square, Suite 1055
Cleveland, OH 44113
(216)-621-0070
mskindell@aol.com

DENNIS E. MURRAY, JR. (0038509), *Pro se*
111 East Shoreline Dr.
Sandusky, Ohio 44870
(419) 624-3126
dmj@murrayandmurray.com

MICHAEL DEWINE (0009181)
Ohio Attorney General
ALEXANDRA T. SCHIMMER(0075732)
STEPHEN P. CARNEY (0063460)
PEARL M. CHIN (0078810)
Assistant Attorneys General
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
alexandraschimmer@ohioattorneygeneral.gov
pearlchinn@ohioattorneygeneral.gov
Attorney for Defendants
Ohio Governor John R. Kasich et al.

ANECA LASELY (0072366)
SQUIRES, SANDERS DEMPSEY
41 South High Street,
Suite 2000
Columbus, Ohio 43215
(614)365-2830
aneca.lasley@squinessanders.com

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MAURICE THOMPSON
1851 Center for Constitutional Law
208 East State Street
Columbus, Ohio 43215
(614)3409817
Currently listed as on the docket as
Counsel of Record Appellants
Amicus Curiae

DONALD J. MCTIGUE(22849)
McTigue and McGinnis
545 East Town Street
Columbus, Ohio 43215
(614) 263-7000
djmtigue@electionlawgroup.com

DOUGLAS COLE(0070665)
Organ. Cole and Stock
1335 Dublin Road
Columbus, Ohio43215
614-481-0902

drcole@ocslawfirm.com

Attorneys for Jobs Ohio

Movant requests that this court take judicial notice of facts arising since the submission of this case for decision to the Tenth District Court of Appeals. These facts are relevant to this court's determination of whether this case presents a sufficient question of great public interest and importance to qualify for public standing. Once these facts are officially in the record for this court to consider, this case will then fall squarely within this Court's requirements for great public interest standing and be appropriate for summary reversal pursuant to S.Ct. R. Prac. 7.08 (B)(3)

MEMORANDUM IN SUPPORT

When movant first developed this case, she thought that it obviously fell into this court's holdings on great public interest standing. R.C. 187.01 et seq. dismantles the existing economic development structure that has been in place in Ohio since the 1960's. It replaces this open public method of using taxpayer dollars to support private business from a controlled grant process to a secret private entity with no public accountability. In order to maintain secrecy and avoid accountability, JobsOhio was to be funded by the one time gift of a long term lease of the state's wholesale liquor business. This indicates a significant impact on the state, from effecting what businesses locate and expand here to how liquor is distributed throughout the state.

R.C. 186.09 contains a short 90 day statute of limitations to challenge the constitutionality of the law so this case was filed prior to the state undertaking action in furtherance of the statute other than filing the incorporation documents and providing \$1,000,000 in public funding to JobsOhio. The state held other action in apparent abeyance until after the Tenth District decision was issued. The Tenth District found that there was no public interest standing because appellants could not demonstrate that enough people were affected by this

change. However, a variety of actions taken by the state now allow the record to fulfill the requirement set forth in the Tenth District decision as well as the broader established requirements set forth by this court over the years. This qualifies this case for summary reversal pursuant to this Court's procedures. S. Ct. Prac. R. 7.08 (B)(3)

1. Judicial notice can be used to supplement the factual record at any stage of the proceedings.

Although the court has not yet ruled on movant's motion to intervene, it is necessary to make this motion pending that determination due to the current briefing schedule. Notice of these facts provides the court with the opportunity for a summary reversal. Determination of what facts the court will notice effects the composition and argument in the briefs if the court retains the case. Movant thinks that formal judicial notice is necessary to properly proceed on this appeal and the appellants have failed to file this motion. This is yet another reason why movant needs party status not merely amicus.

Ohio Rules of Evidence 201 provides:

RULE 201. Judicial Notice of Adjudicative Facts

(A) Scope of rule. This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ...

(D) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice. *Judicial notice may be taken at any stage of the proceeding.* (Emphasis added)

Movant presents the following facts and requests that the court formally notice them. They are supported by articles from the **Columbus Dispatch**, attached as exhibits.

1. The state of Ohio has leased its entire liquor wholesale business to the private entity JobsOhio and its separate but subsidiary entity JobsOhio Beverage Systems. (Exhibit 1, 2)
2. Jobs Ohio/JobsOhio Beverage System will control the operations and profits of the wholesale liquor business which is a state asset. (Ex. 1, Ex 2)
3. JobsOhio, in cooperation with the state of Ohio, issued \$1.5 billion dollars in bonds and now must pay this significant debt from the profits from the wholesale liquor business. (Ex 1, 2)
4. When JobsOhio issued its required yearly audit, it redacted significant amounts of information.
5. JobsOhio refused to allow Auditor David Yost to audit its books arguing that it was a completely private entity. Auditor Yost, an attorney and long time prosecutor, stated that in his opinion the liquor profits constitute public funds since they are derived from the wholesale liquor business which is a state asset. (Ex 1)
6. A government crisis was averted when Jobs Ohio released the documents, but they said they were not required to do so since they are a private entity. (Ex 1)
8. The Department of Development provided JobsOhio with \$6.5 million dollars in grants during 2012. (Ex 1)
9. JobsOhio has now announced it will return all state funds to avoid any state audits or other public access to its records. (Ex 1)

10. JobsOhio president John Minor warned that Yost could “scare off new job creators and cripple economic development in our state.” Rob Nichols, a spokesman for Kasich, said Yost’s efforts “will kill JobsOhio” and the legislature “must act quickly to prevent a chilling effect on job creation caused by a mistaken, overly-intrusive interpretation of the auditor’s duties.” (Ex. 1)

11. In 2012, American Electric Power gave a donation to JobsOhio Beverage System of \$2,000,000. This was only made public when AEP indicated it had made the donation in its SEC filings. Other donors remain secret. (Ex 2)

Movant also requests this Court notice its own docket in JobsOhio v. Goodman, 2012-1356. In this case, JobsOhio attempted to move this case on to the merits by filing a mandamus action which this court found to be improper. However, the amici that appeared in that case are probative of the great public interest of this case. Amicus briefs were filed by the Ohio Bankers League, Columbus Partnership, Ohio Chamber of Commerce, Ohio Council of Retail Merchants and the Ohio Manufacturers Association. These organizations represent a large segment of the Ohio business community that wants this issue to be determined promptly.

2. This Court should summarily reverse this case based upon established law and the facts presented.

This case clearly falls within this Court’s standards of a great public interest case. This Court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 471, 715 N.E.2d 1062. In *Sheward*, this court held that “[w]here the object of an action ...is to procure the enforcement or protection of a public right,

the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.” Id. at paragraph one of the syllabus. This Court determined in *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers’ Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717 that changes in worker’s compensation law that violate the 4th Amendment rights of injured workers trigger public interest standing for a union.

The impact of JobsOhio is even broader than just injured workers or tort claimants. It affects every distributor or purchaser of spirituous liquors in Ohio. It affects every new business seeking to start in Ohio or established business that want to expand and everyone they may to hire. Its impact is broader than the tort claims in *Sheward, Id.* or the compensation issues in *AFL-CIO, Id.* This is the quintessential public interest case. Every business, every employee and every individual seeking work or to start a business is potentially effected by how economic development funds are distributed in the state.

Billions of dollars of state assets are being manipulated and potentially misused by a private company. The state is now straddled with \$1.5 billion dollars in debt to fund a secret private company. The creation of the subsidiary/companion entity Jobs Ohio Beverage System allows funds to be moved and concealed in ways public funds should never be handled. There is no actual reason for this entity to exist other than as part of a shell game. (See attached Ex. 2)

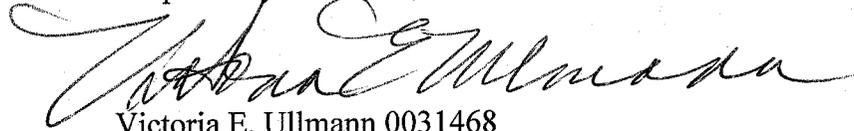
Once these facts are noticed, the requirements of the Tenth District are fulfilled and all this Court’s requirements to set forth a matter of great public interest and importance are clear in the record.

JobsOhio and the governor wail that if the auditor looks at JobsOhio's records, Ohio's entire economy will crash and burn. (See Ex 1) These statements are a concession that this case is a matter public interest and importance. That is in effect, a concession on the standing issue. The entire *Goodman, Id.* proceeding is a form of concession on this issue. The state has virtually no defense that the appellants, and even the movant as merely a citizen of this state, have standing to litigate this issue. JobsOhio only exists as a result of a law passed by the General Assembly and requested by the governor. Its actions and ramifications are a public matter, regardless of the protestations of public officials to the contrary.

R.C. 187.09 requires all courts dealing with JobsOhio to expedite consideration of the case on the docket. Although this probably violates separation of powers, this case now can be expedited with summary reversal fully within this Court's rules and past holdings. This case is before this court only on the procedural issue of public interest standing. A determination on the merits is still potentially years away if this court retains this case on its regular docket. S.Ct. Prac. R. 7.08(B)(3) indicates that this court can grant a summary reversal after determining it has jurisdiction. Leaving the status of JobsOhio unresolved for years will continue to disrupt the function of state government. Grounds for summary reversal exist and the Court should use its power to move this case on to the merits without undue delay. The longer this case lingers without any determination on the constitutionality of JobsOhio the further the state of Ohio is dragged into a quagmire of invalid contracts, unconstitutional debt and secret corporate machinations.

WHEREFORE, movant prays this court to take judicial notice of the new facts in this case and grant summary reversal to allow this case to be heard on the merits.

Respectfully submitted,



Victoria E. Ullmann 0031468
Attorney at law
1135 Bryden Road
Columbus, Ohio 43205
(614)-253-2692

CERTIFICATE OF SERVICE

I here by certify that copy of the above motion was emailed to attorneys for the parties
On date of filing.



Victoria E. Ullmann
Attorney at law

Emphasis added by movant

Dispute over audit lingers even after JobsOhio gives up records, \$7.5 million

By Joe Vardon

The Columbus Dispatch Wednesday March 20, 2013 8:13 AM

The feud over Auditor Dave Yost's authority to inspect JobsOhio's private finances ended yesterday with Yost getting the records he wanted. At the same time, JobsOhio announced it would repay the state the public money it already has received — at least \$7.5 million.

Yesterday's developments set up a much-larger disagreement over the auditor's ability to review the state's privatized development agency, with potentially greater consequences. With JobsOhio now funded by proceeds from its lease of the state's wholesale liquor profits, those on all sides are staking out positions on whether those profits are public dollars — and thus subject to audit.

JobsOhio's announcement that it would pay back the public money caught most people by surprise. Yost had not asked that the money be repaid; rather, he demanded access to the financial records of how the money was spent. The development agency yesterday said "there will be no more public funds in JobsOhio."

Brian Rothenberg, head of the liberal group ProgressOhio, said the move "is likely an attempt to argue that JobsOhio no longer (has) public funds to be audited in the future."

JobsOhio had agreements with the state for grants worth at least \$6.5 million, and lawmakers appropriated \$1 million in 2011 to cover the organization's startup costs.

The agency, created by Gov. John Kasich and lawmakers in 2011 to conduct the state's economic development privately, is now being funded from the proceeds of a \$1.5 billion lease of the state's liquor profits, expected to generate \$100 million annually. JobsOhio has said it plans to use the money largely for loans and grants to businesses.

Without any public money, the auditor's authority to audit JobsOhio is subject to debate. But in a letter to lawmakers yesterday, Yost said JobsOhio's "money comes from the state's liquor profits — a revenue stream that one, and only one, company had the right to buy, conveyed by law."

"But for that public money, there is no JobsOhio," Yost wrote in the letter.

EXHIBIT 1

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A lawsuit filed by Democratic lawmakers and ProgressOhio in 2011 argued that JobsOhio's funding stream from the state's liquor profits was unconstitutional because that money was public. The substance of the lawsuit has never received a ruling in any court and a decision over the group's right to sue JobsOhio has yet to be made by the Ohio Supreme Court.

Kasich and JobsOhio supporters argue that the liquor profits are now private because JobsOhio paid the state to lease them.

However, JobsOhio didn't complete that lease until Feb. 1, and Yost's audit will be of records only through June 30 of last year. In complying with Yost's March 5 subpoena for all of JobsOhio's financial records yesterday, JobsOhio, Kasich, and the governor's partners in the legislature were highly critical of Yost, a fellow Republican.

JobsOhio president John Minor warned that Yost could "scare off new job creators and cripple economic development in our state."

Rob Nichols, a spokesman for Kasich, said Yost's efforts "will kill JobsOhio" and the legislature "must act quickly to prevent a chilling effect on job creation caused by a mistaken, overly-intrusive interpretation of the auditor's duties." Kasich did support JobsOhio's decision to comply with the subpoena, and JobsOhio said it would ask the legislature to "clarify" the law so that Yost could not pursue future audits of JobsOhio's private money.

Speaker William G. Batchelder, R-Medina, called Yost "erratic" and said Yost should be taken to court rather than having lawmakers clarify the Ohio Revised Code.

Yost issued a short statement in which he spoke fondly of Kasich and didn't address any criticisms. But in his letter to lawmakers, Yost urged them "to tread cautiously" when deciding whether to clarify the law.

"I am convinced that JobsOhio will find the process less invasive than feared, and that the predicted problems will not materialize," Yost wrote, addressing fears that its private donors could be made public. "If I am wrong, you will have ample time to consider clarification before the next audit cycle begins."

According to a privately conducted audit of JobsOhio by KPMG that was released on March 2, JobsOhio received \$6.9 million in secret donations and about \$5.3 million in state grants. But KPMG audited JobsOhio's books through June 30, 2012, meaning there has been no public documentation of JobsOhio's full financing since it opened on July 5, 2011.

In addition to the legislature's \$1 million appropriation in 2011, the state signed two extensions of a grant contract with JobsOhio's lone subsidiary worth up to \$6.5 million.

The day *The Dispatch* reported those grants, the state asked Yost to audit them. **Now JobsOhio will reimburse the state, using the proceeds derived from the liquor-profits lease.**

“The idea of paying back public money with public money and saying we’ve made everybody whole is one of the more-ridiculous statements I think I’ve heard this week, and that’s saying a lot around the General Assembly,” said state Rep. John Patrick Carney, D-Columbus.

In an email, JobsOhio spokeswoman Laura Jones said “the company was always intended to be a private organization” and the grant repayment “is in keeping with that.”

“It’s consistent with the vision we always had for JobsOhio — that it be a private company.”

JobsOhio also has a service contract with the state’s Development Services Agency worth about \$2 million. Jones said any money JobsOhio received from that contract would be repaid as well.

Dispatch Reporter Jim Siegel contributed to this story.

AEP gave \$2 million to help JobsOhio

By Joe Vardon

The Columbus Dispatch Sunday January 13, 2013 10:00 AM

A line in a routine financial disclosure form reveals that American Electric Power is one of the big donors helping to fund Ohio's private-development department — to the tune of \$2 million.

The AEP filing with the federal Securities and Exchange Commission also divulges that JobsOhio, the private, nonprofit office set up by Gov. John Kasich to guide jobs and investment expansion in Ohio, has a little-known companion agency that serves as a clearinghouse for its funding.

How the \$2 million donation, JobsOhio and its companion entity are all tied together is confusing. But their relationship sheds new light on Kasich's JobsOhio — an entity hailed by some for its effectiveness in growing the state's economy but that by design operates mostly in secrecy.

Shielded from public-records laws and enabled to keep its dealings with businesses private in a way the now-defunct Ohio Department of Development never could, JobsOhio secured commitments from companies to create or retain 70,000 jobs worth about \$2.3 billion in annual payroll and \$4.5 billion in capital in 2012, officials said.

JobsOhio did it despite missing out on the expected \$100 million annually it would get from a lease of the state's liquor profits. That remains on hold, and the public is in the dark about where most of JobsOhio's operating money has come from.

In a September 2011 federal filing, AEP listed "a \$2 million donation to the Ohio Business Development Coalition for JobsOhio."

It's the only known public disclosure of a donation to JobsOhio, but AEP's donation didn't go directly to JobsOhio. It went to the Ohio Business Development Coalition — a separate, nonprofit organization that changed its name within days of JobsOhio opening its doors in 2011.

The coalition's new name is JobsOhio Beverage System, or JOBS. But it has nothing to do with serving drinks.

EXHIBIT 2

But Kasich and the Republican-controlled legislature formed JobsOhio in 2011 to replace the Department of Development as the state's economic-development engine, not to supplement it. So the Business Development Coalition's board voted to dissolve, two of its three paid employees went to JobsOhio, and the agency was formally renamed as the JobsOhio Beverage System.

"It just made sense not to have two different organizations trying to accomplish the same goal," said Edward M. Burghard, longtime executive director for the Business Development Coalition, who did not transition over to JobsOhio.

Laura Jones, a spokeswoman for JobsOhio, said donations to JobsOhio go to JobsOhio Beverage System, and the Beverage System will be used to house the leased liquor profits from the state once the lease is complete.

When asked why JobsOhio wouldn't simply accept all donations and later store the liquor-profits funding in-house, she said, "We believe it is a good business practice to maintain that function ... as a separate entity within JobsOhio."

By keeping JobsOhio and JobsOhio Beverage System as separate, tax-exempt entities, both will be required to file disclosure forms with the Internal Revenue Service — which detail items such as how much money the agency takes in, how much it spends, what it spends its money on and how much its employees are paid. Additionally, state Auditor Dave Yost's office will audit a yet-to-be-provided financial statement from JobsOhio.

JobsOhio has yet to file with the IRS for its first year of operation. It asked for an extension and has until Feb. 15. The last IRS filing from JobsOhio Beverage System, covering July 1, 2010, through June 30, 2011, shows total revenue of \$3.17 million and expenditures of about \$3.27 million, for a small operating loss. Most of the money came from the Department of Development, Burghard said, while the rest came from donors.

Burghard, who was paid about \$240,000 as executive director for the development coalition, said utility companies and other large corporations with significant footprints in the area typically donate to state or regional development agencies, and "I wouldn't expect it to be any different with JobsOhio."

Melissa McHenry, a spokeswoman for AEP, confirmed the electric company's donation when asked by *The Dispatch*, citing the company's "commitment to supporting economic development" in the 11 states where it operates.

"Economic growth is good for business, so when the request came from JobsOhio, this was something we decided to do," McHenry said.

After pulling out of the Ohio Chamber of Commerce in 2010 when the agency endorsed Kasich for governor against then-Gov. Ted Strickland, AEP has donated some money and opened its doors to support some Kasich causes and welcome some people close to him. AEP chairman

Michael Morris co-chaired a group that raised money in support of Kasich's budget in 2011, and the company has hired Kasich political advisers Donald G. Thibaut, Rex Elsass and Chan Cochran as lobbyists.

Jones, of JobsOhio, would not disclose the identities of JobsOhio's donors but said all funds were raised during 2011, when former chief investment officer Mark Kvamme and his successor, John Minor, approached potential donors. Kasich said he did not actively seek donations for JobsOhio, which also received an appropriation of \$1 million from the General Assembly.

Minor told *The Dispatch* that once JobsOhio's \$1.5 billion lease of the state's liquor profits — intended to generate the \$100 million annually for development — is completed, "I don't think we would seek private donations any longer," although he wouldn't rule them out.