

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, et al., )  
 ) CASE NO. 13-1746  
 Plaintiffs-Appellees, )  
 )  
 v. )  
 ) On appeal from the Cuyahoga County  
 GANLEY CHEVROLET, INC., et. al., ) Court of Appeals Eighth Appellate  
 ) District . . . Case No. CA12 098985  
 Defendants-Appellants. )  
 )

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO STRIKE

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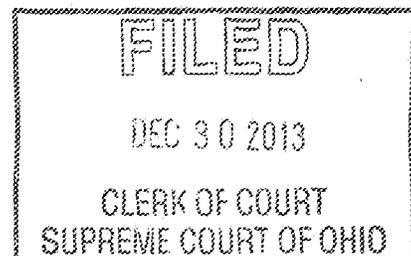
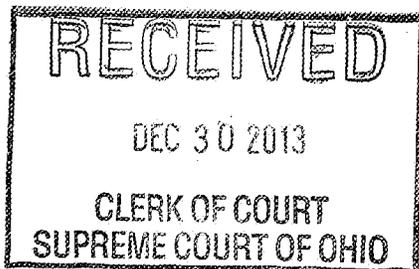
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Appellants Ganley Chevrolet, Inc. and Ganley Management Company (“Ganley”) filed a Motion to Strike elements of Appellees’ Brief in Opposition to Jurisdiction upon grounds that Ganley’s penchant for “lawlessness”—or, at least, Appellees’ argument relative thereto-- is impertinent, immaterial and offensive to due professionalism.

Ganley’s Motion is not well taken for a number of reasons.

In Ohio parties are normally entitled to a single appeal to the Court of Appeals. The Ohio Constitution provides limited instances where a second appeal to the State’s highest court is possible. Acceptance of such an appeal is wholly discretionary and rarely permitted. The issue now before this Court<sup>1</sup> is whether the Ganley has presented a “matter of public or great general interest” as a matter of Constitutional jurisprudence; or, rather, whether Ganley presents questions primarily of interest to the parties. *Williamson v. Rubich*, 171 Ohio St. 253, 168 N.E.2d 876 (1960). Appellants are therefore misguided when they criticize Appellees for raising matters not directly at issue on the merits or in the evidence below. The question at hand is whether this Court shall hear this appeal . . . *not* whether the Courts below were in error based on the record.

Reliance on Rule 12(F) to dilute Appellee’s case for denial of jurisdiction is misplaced. Ganley’s selective quotation from Rule 12(F) omits key language that limits a motion to strike to the *pleadings*. Rule 12(F) does not authorize a motion to strike as to matter, however objectionable, from a motion, memorandum or other paper that is not a *pleading*.<sup>2</sup> See *Herrerra v. Michigan Dept. of Corr.*, 2011 U.S. Dist. LEXIS 98567, 2011

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<sup>1</sup> Ohio Constitution, Article IV, Section 2(B)(2)(e).

<sup>2</sup> “Upon motion made by a party before responding to a *pleading*, or if no responsive

WL 3862426 (E.D. Mich. July 22, 2011) (“ . . . motions, briefs, and affidavits do not constitute 'pleadings' subject to Rule 12(f).” *See also* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380 (3d ed.2004) (citations omitted).<sup>3</sup> Ganley’s sole “authority” for invoking Rule 12(F) in an appellate setting is *Matthews v. D'Amore*, 2006-Ohio-5745 (10<sup>th</sup> Dist. 2006); but *Matthews* is wholly inapposite, does not strike any matter from any pleading or other paper, and is cited for mere obiter dicta.

Ganley fails to acknowledge and address the trial court’s extraordinary finding, left undisturbed by the Panel and the En Banc ruling, that over the course of many years Ganley engaged in “lawlessness aimed primarily at consumers.” Ganley’s lawlessness is in fact the foundation of Appellees’ challenged remarks. Where a public figure and his companies have abused the people of Cuyahoga County with knowledge, forethought and resolution, the public interest demands accountability. This Court must weigh public perceptions.<sup>4</sup> Appellants and Amici Curiae have painted a picture that ignores these important jurisdictional factors, seeking only to parse legal technicalities and, with due respect, defeat the “high aims of justice.” *Cf. Hooffstetter v. Adams*, 67 Ohio App. 21, 32-33 (9<sup>th</sup> Dist. 1941). Appellees will not be bound—indeed, ought not be bound—by

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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.” (emphasis added)

<sup>3</sup> These Federal authorities are persuasive under Ohio precedent. *Viock v. Stowe-Woodward Co.*, 1986 Ohio App. LEXIS 6004 (6<sup>th</sup> Dist. 1986)(“ . . . the parameters of any Ohio rule can be determined in part by examining corresponding applications of the parallel federal rule.”)

<sup>4</sup> “ . . . public figures normally have thrust themselves into the public eye, inviting closer scrutiny than might otherwise be the case. In other words, public figures ‘invite attention and comment.’” *Gertz v. Welch, Inc.* (1974), 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, quoted in *Huntington Trust Co., N.A. v. Chubet*, 1998 Ohio App. LEXIS 5420 (Ohio Ct. App., Franklin County Nov. 10, 1998)

Ganley's sense of Constitutional jurisprudence. See *Williamson v. Rubich*, 171 Ohio St. 253, 255 (1960), citing *Furness, Withy & Co., Ltd., v. Yang-Tsze Ins. Assn.*, 242 U.S., 430, 61 L. Ed. 409, 37 S. Ct. 141 (1917) ("When the real situation is not set forth by the petition, a duty rests on opposing counsel to reveal it in their reply.")

Ganley complains that Appellees advised this Court by way of footnote (even then expressing "regret") that the assumption of the Appellate Bench by the dissenting Judge below was effected in contravention of long established precedent bearing upon judicial impartiality and the appearance thereof. As the docket sheet reflects—and contrary to Ganley's allusion to an "appointment"—there was no "appointment" of that Judge to hear the appeal below. Do Appellants suggest that, given the opportunity for illumination, this Court ought exercise its Constitutional authority on a record that knowingly ignores such facts? Moreover we would ask: does not such a matter suggest the lawlessness which anchored the trial court's decision in the first instance? And finally, should breaches of case assignment protocols be encouraged by striking their mention?

This Court has long afforded advocates an absolute privilege to speak out against parties *and their privies*:

With respect to the fact that the appellee was not a party to the RICO action, we are unpersuaded that this fact should militate against the application of an absolute privilege herein. Courts in other jurisdictions have found that absolute privilege applies to allegations referring to parties and non-parties alike. See *Soter v. Christoforacos* (1964), 53 Ill. App. 2d 133, 141-142, 202 N.E. 2d 846, 851; *Spieler v. Gottesman* (1961), 12 App. Div. 2d 894, 210 N.Y. Supp. 2d 102, affirmed (1962), 11 N.Y. 2d 815, 227 N.Y. Supp. 2d 437; *Viera v. Meredith* (1956), 84 R.I. 299, 301, 123 A. 2d 743, 744. Similarly, we see no compelling reason why the doctrine of absolute privilege should not apply to a non-party under the standards we have set forth today.

*Surace v. Wuliger*, 25 Ohio St. 3d 229, 234 (1986). As is well documented in Appellees' Opposition Brief, all of the alleged lawlessness occurred at the premises of Defendant Ganley Chevrolet, Inc., where Thomas Ganley maintains his office and staff. The "rules of engagement" permit Appellees to bring such a fact to the Court's attention:

A statement made in the course of ... proceeding enjoys an absolute privilege against a civil action based thereon as long as the statement bears some reasonable relation to the proceeding. (*Surace v. Wuliger* [1986], 25 Ohio St.3d 229, 25 OBR 288, 495 N.E.2d 939, approved and followed.)

*Hecht v. Levin*, 66 Ohio St. 3d 458 (1993).

Ganley's Motion to Strike should be denied.

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellees' Opposition to Motion to Strike has been served this 27th day of December, 2013, by first-class mail, postage prepaid, addressed to:

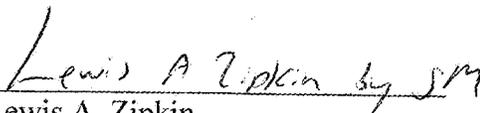
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