

IN THE SUPREME COURT OF OHIO

BERNARD NIEDERST)

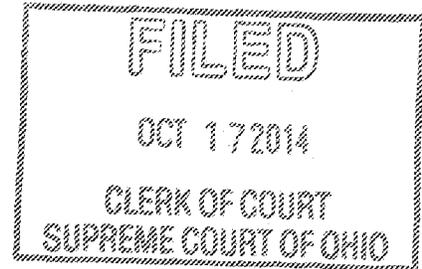
Case No. 2014-1119

Relator,)

vs.)

RICHARD J. MCMONAGLE)

Respondent.)



MOTION TO STRIKE OR, ALTERNATIVELY, BRIEF IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Relator Bernard Niederst ("Relator" or "Niederst"), by and through his undersigned counsel, respectfully requests this Court strike Proposed Interveners' Motion for Judgment on the Pleadings.

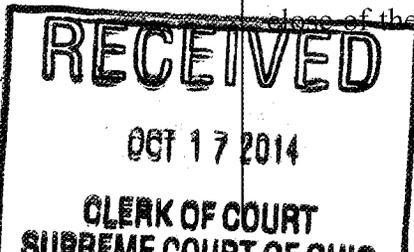
I. INTRODUCTION

The facts have been adequately set before this Court in Niederst's Brief in Opposition to Respondent's Motion to Dismiss. For reasons unknown, the Proposed Interveners have erroneously asked this Court to grant a judgment on the pleadings despite the fact that the pleadings are still open. As a threshold matter, the Proposed Interveners are not even before this Court so they do not even have standing to file the motion. Additionally, how can this Court grant a judgment on the pleadings when the pleadings have yet to be closed? The simple answer is, it cannot. As such, Niederst respectfully requests that this Court strike and/or deny the Proposed Interveners' Motion.

II. LAW AND ARGUMENT

A. The Pleadings are not closed

As this Court knows, a motion for a judgment on the pleadings can only be filed upon the close of the pleadings. In other words, both the Complaint and the Answer must be filed. Rule



12.04 of the Supreme Court Rules of Practice specifically states, “[t]he respondent may file a motion for judgment on the pleadings **at the same time an answer is filed.**” See S.Ct.Prc.R. 12.04(B)(1)(emphasis added); see also *State ex rel. Johnson v. Richardson* (2012), 131 Ohio St.3d 120. Even the Proposed Interveners’ correctly state that a motion for judgment on the pleadings is only appropriate “after the close of the pleadings.” See Proposed Interveners’ Motion, p. 4.

The pleadings in this case are still open and no answer has been filed. Currently, this Court has before it the Complaint, Respondent’s Motion to Dismiss and Niederst’s Brief in Opposition to the same. This Court has yet to rule on Respondent’s Motion to Dismiss. As such, the pleadings in this case are still open and no answer has been filed. Thus, as matter of law, no motion for judgment on the pleadings can be filed by any party (let alone a non-party). Supreme Court Practice Rule 12.04(B)(4) also states that the Clerk of the Supreme Court is directed to refuse filing of any response which is prohibited. In this matter, the Clerk should have refused this untimely filing by a non-party, which as set forth above, is prohibited by rule. The Proposed Interveners’ Motion is procedurally defective and improper. The Motion should be stricken and/or summarily denied.

B. Proposed Interveners have No Standing

It should also be noted that the Proposed Interveners have no standing to file anything in this case. While the Proposed Interveners have sought to intervene in a case involving the improper conduct of a common pleas court judge, their motion to intervene has not been granted. Moreover, as set forth in the past briefing, they should not be allowed to intervene in this matter. It is the Proposed Intervener's counsel's improper ex parte communications and actions with the

Respondent that caused the underlying case. The Motion for Judgment on Pleadings is untimely and a nullity since the movants have no standing to file a motion.

C. Respondent is Acting in Contradiction of the Eighth District Mandate

Despite Proposed Interveners' repeated, inaccurate assertions to the contrary, the Eighth District did not remand the matter back to the trial court. The Court of Appeals reversed the decision of the trial court and entered judgment in favor of Niederst. The Court of Appeals did not remand the case to the trial court. Because of this, the trial court was divested of jurisdiction and had no ability to interfere with the judgment. The Eighth District Court of Appeals has directly addressed this issue recently. In *Edwards v. Lopez*, 2013 -Ohio- 571, ¶ 13 (8th Dist.) the Court of Appeals held that:

...this court did not “remand” the matter for further proceedings, so jurisdiction was not returned to the trial court. Accordingly, the trial court was without jurisdiction to “remand” the matter to itself, and was without jurisdiction to “reconsider” the motion[.]

Absent an explicit remand, a trial court has no jurisdiction and “jurisdiction [is] not returned to the trial court.” *Id.*; see also Baldwin's Ohio Handbook Series, Ohio Appellate Practice, November 2013, Judge Mark P. Painter, Chapter 7 Consideration and Decision (emphasis added).

This Court holds that **“an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.”** *Nolan v. Nolan*, 11 Ohio St.3d 1, 5 (1984) (emphasis added). A trial court is bound by the decision of the Court of Appeals and has no ability to impair that judgment. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29 (1979); *Enyart v. Columbus Metro. Area Comm. Action Org.*, 1996 WL 660918 (Ohio App. 10th Dist.). In this case, the trial court acted in contravention of the law by staying a superior court's

judgment, issuing a stay with no bond, ignoring the superior court's mandate, and allowing Proposed Interveners to improperly seek relief from judgment a year later.

Proposed Interveners' reliance on *In re D.S.* is misplaced and inapposite to this case. *In re D.S.* concerned a criminal suppression motion which was granted **prior** to a final judgment. In reversing the trial court, the case returned to proceed to judgment. In this case, there already was a final judgment. That fact, coupled with the fact that the Eighth District intentionally and expressly omitted remand language is consistent with the Eighth District precedent of *Lopez*. By reversing the order vacating the judgment, the Eighth District reinstated the judgment against the Proposed Interveners.

The Eighth District purposefully and intentionally refused to remand the case to Respondent. In fact, the Proposed Intervener filed a Motion for Reconsideration/Clarification begging the Court of Appeals to add remand language to its decision. When given an opportunity to clarify its decision and state that it actually intended to remand, the Eighth District absolutely refused to do so. The Court of Appeals' actions and intent could not have been more clear. The Court of Appeals intended to reverse - not remand - and it said so twice. The Court meant exactly what it said - reversed, not remanded. *See Niederst Brief in Opposition to Motion to Dismiss*, pp. 3; 6-8, incorporated herein by reference. Without such a remand, the Respondent does not have jurisdiction over the matter and cannot interfere with the superior court's mandate or Niederst's rights. *Nolan v. Nolan*, 11 Ohio St.3d 1, 5 (1984). A trial court is bound by the decision of the Court of Appeals and has no ability to impair that judgment. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29 (1979).

D. Respondent does not have Jurisdiction to Consider the 60(B) Motion

Proposed Interveners appear to believe that they can take multiple bites at the same apple. As Proposed Interveners admitted at oral arguments, their counsel called Respondent, **ex parte** and asked him to vacate the judgment. No written motion was filed. No evidence was presented. No 60(B) motion was ever filed. No hearing was ever held. Nothing demonstrated that the Proposed Interveners were entitled to relief from the judgment entered against them on October 2, 2013. Because of the suspicious and highly improper actions at the trial court level, the Eighth District reversed Respondent and reinstated the judgment, but refused to remand. Now, almost one year after the final judgment was entered against them, Proposed Interveners have filed an actual 60(B) motion asking Respondent to vacate the judgment. However, because the Eighth District did not remand the matter, and refused to add remand language, the Respondent is without jurisdiction to consider the motion or take any action whatsoever but carry the judgment to execution. *Nolan*.

The Supreme Court specifically holds that once a matter is appealed the trial court cannot consider a 60(B) motion for relief from judgment. *Howard v. Catholic Social Serv. of Cuyahoga Cty.*, 70 Ohio St.3d 141 (1994). A trial court is bound by the decision of the Court of Appeals and has no ability to impair that judgment. *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29 (1979); *Enyart v. Columbus Metro. Area Comm. Action Org.*, 1996 WL 660918 (Ohio App. 10th Dist.). The trial court here is acting in contravention of the law by staying a superior court's judgment, issuing a stay with no bond and ignoring the superior court's mandate.

As this Court held in *Potain*, when a litigant "failed to follow the procedural avenues open to her, the dismissal with prejudice became the law of the case, and the trial court was bound to follow the mandate, whether correct or incorrect, of the Court of Appeals." *Potain*, 59 Ohio St.2d at 32. "The doctrine of law of the case is necessary, not only for consistency of result [but also for] the

termination of litigation.” *Id.* The Proposed Interveners had an opportunity to properly seek relief by timely filing an actual 60(B) motion a year ago - they failed to do so. For reasons unknown, the Proposed Interveners instead chose to file nothing. No motion. No affidavit. No evidence. Nothing. Now, Proposed Interveners want another opportunity to file a motion, but the case is over and the court of appeal's decision is final. Just as in *Potain*, the Proposed Interveners failed to follow the procedural avenues available to them at the time. That failure resulted in the Eighth District reinstating the judgment against them and directing the Respondent to carry the judgment into execution. Proposed Interveners' Motion should be summarily denied.

III. CONCLUSION

As set forth herein above, Bernard Niederst requests that this Court strike Proposed Interveners' Motion for Judgment on the Pleadings. Alternatively, in the event this Court does not strike the Motion, Niederst respectfully requests that the Motion be denied.

Respectfully submitted,

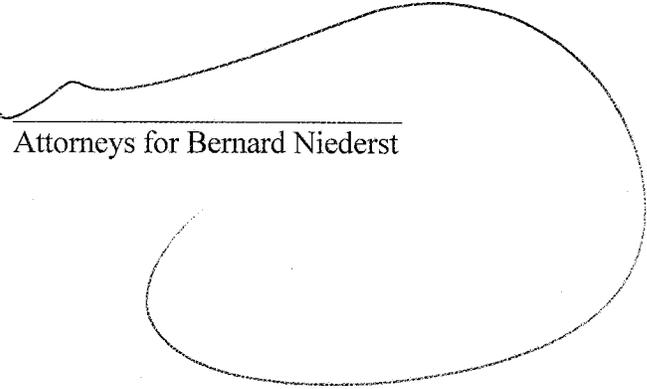
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 16th day of
October 2014, via U.S. regular mail upon the following parties:

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