

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.*, Steve R. Maddox., *et al.*,

Relators,

v.

Village of Lincoln Heights, Ohio, *et al.*,

Respondents.

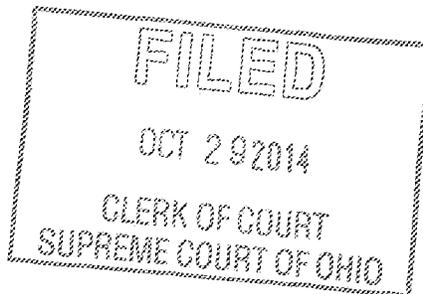
Case No.: 14-1267

RESPONDENTS' MEMORANDUM IN OPPOSITION TO RELATORS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Hans A. Nilges (0076017) (Counsel of Record)
Shannon M. Draher (0074304)
NILGES DRAHER LLC
4580 Stephen Circle, NW
Canton, Ohio 44718
TEL: (330) 470-4428
FAX: (330) 754-1430
hans@ohlaborlaw.com
sdraher@ohlaborlaw.com
Attorneys for Relators

Patrick Kasson (0055570) (Counsel of Record)
Melvin Davis (0079224)
Tyler Tarney (0089082)
REMINGER CO. L.P.A.
65 East State Street, 4th Floor
Columbus, Ohio 43215
TEL: (614) 228-1311; FAX: (614) 232-2410
pkasson@reminger.com
mdavis@reminger.com
ttarney@reminger.com
Attorneys for Respondents

Robert E. DeRose (0055214)
James Petroff (00042476)
Robi J. Baishnab (0086195)
BARKAN MEIZLISH HANDELMAN
GOODIN DEROSE WENTZ, LLP
250 E. Broad St., 10th Fl.
Columbus, Ohio 43215
TEL: (614) 221-4221
FAX: (614) 744-2300
bdrose@barkanmeizlish.com
jpetroff@barkanmeizlish.com
rbaishnab@barkanmeizlish.com
Attorneys for Relators



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I. PRELIMINARY STATEMENT

Relators filed a second non-compliant Affidavit that violates S.Ct.Prac.R. 12.02(B)'s personal knowledge requirement twice. First, they effectively admitted that their counsel—not the affiant—is the one with personal knowledge of the facts motivating their simultaneous removal of a reference to a Village fringe benefit ordinance amendment in October 2012, and drastic two-year expansion of their highest-value claim for a class of over forty. Second, although the Ohio Supreme Court “routinely dismisses” original actions with affidavits that fail to “expressly stat[e] that the facts in the complaint [are] based on . . . personal knowledge,” Relators’ Affidavit fails to comply. Furthermore, Relators’ failure to refute Respondents’ independent bases for dismissing several substantive aspects of their claims shows that their attempt to reassert them would be futile. Given that these issues render Relators’ proposed Second Amended Complaint incapable of withstanding a motion to dismiss—and the fact that this comes on the heels of their initial Affidavit defect and multiple warnings of the Affidavit requirements—their Motion should be denied and their claims should be dismissed.

II. LAW AND ARGUMENT

A. Legal standard under Civ. R. 15

Under Civ. R. 15(A), a party may amend only by leave of court or with written consent. When courts analyze requests for leave to amend, they evaluate the following factors: undue delay; bad faith or dilatory motive; undue prejudice; repeated failure to cure deficiencies through prior amendments; and futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984). A determination that an amendment “could have been advanced previously so that the disposition of the case would not have been disrupted by a later . . . amendment” weighs against granting leave. *Ridenour v. Collins*, 692 F. Supp. 2d 827, 843 (S.D. Ohio 2010); *Grant v. Target Corp.*, 281 F.R.D. 299, 304 (S.D. Ohio 2012). Finally, an amendment should be denied on the basis of futility when it is incapable of surviving a motion to dismiss. *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005).

B. **On the heels of Relators’ initial Affidavit defect and explicit warnings about the requirements, they filed a second non-compliant Affidavit that violates S.Ct.Prac.R. 12.02(B)’s personal knowledge requirement twice.**

1. *Legal standard under S.Ct.Prac.R. 12.02(B)*

All complaints in support of mandamus relief in the Ohio Supreme Court “shall be supported by an affidavit specifying the details of the claim.” S.Ct.Prac.R. 12.02(B)(1). This affidavit “shall be made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit.” S.Ct.Prac.R. 12.02(B)(2). Because the S.Ct.Prac.R. 12.02(B)(2) standard parallels Civ. R. 56(E)’s standard for summary judgment affidavits virtually word-for-word,¹ the Ohio Supreme

¹ Civ. R. 56(E) (“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.”).

Court routinely looks to cases applying the personal knowledge requirement in Civ. R. 56(E) when analyzing the personal knowledge requirement in S.Ct.Prac.R. 12.02(B)(2). *See e.g., State ex rel. Sekermestrovich v. Akron*, 2001-Ohio-223, 740 N.E.2d 252, 254 (2001); *State ex rel. Lanham v. DeWine*, 2013-Ohio-199, 985 N.E.2d 467, 473 (2013) (citing *Bank of Am., Nat'l Ass'n v. Ly*, 2011-Ohio-437, 2011 WL 345946, ¶ 12 (9th Dist. 2011)).

As Respondents showcased in their Motion to Dismiss Relators' First Amended Complaint, the Ohio Supreme Court "routinely dismiss[es]" original actions that fail to fully comply with the requirements in S.Ct.Prac.R. 12.02(B). (MTD 1st Am. Compl. p. 5); *see also State ex rel. Hackworth v. Hughes*, 2002-Ohio-5334, 97 Ohio St. 3d 110, ¶ 24 (2002). Justice Pfeifer warned that violations of these requirements may warrant dismissal with prejudice:

This case should provide prospective relators with sufficient warning regarding the potential consequences of not fully complying with the affidavit requirement . . . Much like an umpire giving a pitcher a warning that the next pitch aimed at a batter's head may lead to his ejection, attorneys are similarly warned here. *State ex rel. Shemo v. Mayfield Hts.*, 2001-Ohio-203, 92 Ohio St. 3d 324, 750 N.E.2d 167, 168 (2001) (Pfeifer, J., concurring) (emphasis added).

Although Relators were indisputably on notice of these affidavit requirements, they submitted a second non-complaint Affidavit.

2. Relators' initial Affidavit defect and unsuccessful attempt to cure

Relators' First Amended Complaint failed to include an affidavit specifying the details of their claims. They merely re-submitted the same July 22, 2014 Antwan Sparks Affidavit from their initial Complaint which—instead of verifying their *Amended* Complaint—states that he read the *initial* Complaint and that “[t]he factual allegations contained therein are true and accurate.” (Am. Compl. at Ex. A, Sparks Aff. ¶ 3; *see also* Compl. at Ex. A, Sparks Aff.). It quite obviously was executed before the initial Complaint was filed, and made no mention of the Amended Complaint or its allegations. (*Id.*). This omission was critical because the affidavit

requirements apply to both initial *and* amended complaints. *See State ex rel. Citizens for Env'tl. Justice v. Campbell*, 2001-Ohio-1617, 757 N.E.2d 366, 367 (2001).

Worse yet, the First Amended Complaint drastically expanded the scope of Relators' fringe benefit claim—which they allege represents \$17,492 in yearly damages for a class of over forty members—for over two years from October 22, 2012 through “the present.” (Compl. ¶ 23 and Prayer ¶¶ 6–7; 1st Am. Comp. ¶ 52 and Prayer ¶ 6). Although the \$17,492 figure represents the yearly insurance premium for family coverage paid by the Village, these are not the damages at stake under both basic compensatory damage principles (*i.e.* it is not as if the Village simply would have cut them a \$17,492 check every year) and the Ohio Supreme Court's binding decision in *State ex rel. Hamlin v. Collins*, 9 Ohio St.3d 117, 120, 459 N.E.2d 520 (1984). Regardless, Relators tacked on the extra two-year period when they simultaneously removed an allegation stating that the fringe benefit ordinance had been amended on October 22, 2012. (Compl. ¶ 22; 1st Am. Compl. ¶¶ 18–22). In response to Relators' failure to support their First Amended Complaint with an affidavit covering the necessary details of their claims, among other shortcomings, Respondents moved to dismiss. (MTD 1st Am. Compl. pp. 5–7).

Relators concede that they expanded the temporal scope of their fringe benefit claim. (Mem. Opp. to MTD 1st Am. Compl. pp. 8–9). They say this stemmed from a revised analysis by their counsel. (Id). Apparently, “[Relators'] counsel initially understood” that the fringe benefit ordinance was amended on October 22, 2012 when drafting the original Complaint. (Id. p. 9). But upon “further legal review” it “became abundantly clear” to Relators' counsel that the fringe benefit ordinance had not actually been amended then. (Id.). Relators then filed this Motion with a new Affidavit from Relator Sparks. (Id. p. 5). Sparks' new Affidavit states that he: (1) has “direct and personal knowledge” of the facts in the Affidavit; (2) is competent to testify

to the matters stated in the Affidavit; and (3) “read” the Second Amended Complaint and that the “factual allegations contained therein are true and accurate.” (Mot. Leave for 2nd Am. Compl., at Proposed 2nd Am. Compl. Ex. A, ¶¶ 1–3).

3. Relators’ new Affidavit fails to comply with the “personal knowledge” requirement in S.Ct.Prac.R. 12.02(B) twice.

It is beyond dispute that “[a]ll complaints . . . shall be supported by an affidavit specifying the details of the claim” based on personal knowledge. S.Ct.Prac.R. 12.02(B)(1)–(2). The Ohio Supreme Court ruled that “[t]he manifest intention of the rule” is to require an affidavit “by either relator or relator’s counsel . . . based on personal knowledge.” *State ex rel. Sekermestrovich v. Akron*, 90 Ohio St.3d 536, 740 N.E.2d 252, 254 (2001).

Through Relators’ explanation for their initial defect, they have now effectively admitted that “undersigned counsel”—*not Sparks*—is the one with personal knowledge of the facts motivating their simultaneous removal of a reference to a Village fringe benefit ordinance amendment in October 2012, and drastic two-year expansion of their highest-value claim for a class of over forty. (Mem. Opp. to MTD 1st Am. Compl. p. 9). In other words, Sparks’ statement that he “read” the proposed Second Amended Complaint and that “factual allegations contained therein are true and accurate” is the expression of a belief of what someone else stated or secondhand information believed to be true—*i.e.* inadmissible hearsay—rather than personal knowledge gained through firsthand observation or experience. *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d 313, 666 N.E.2d 235, 249 (6th Dist. 1995) (“Personal knowledge is knowledge of factual truth which does not depend on outside information or hearsay.”).

Any argument that Sparks has personal knowledge of the new scope of their fringe benefit claims is contradicted by Relators’ counsel’s admissions and should be rejected. *Deutsche Bank Natl. Trust Co. v. Dvorak*, 9th Dist. No. 27120, 2014-Ohio-4652, ¶ 10 (9th Dist.

2014) (“If . . . averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts . . . then . . . something more than a conclusory averment that the affiant has knowledge of the facts [is] required.”). Relators were clearly on notice of their ability to submit an affidavit from counsel in addition to (or in lieu of) the one from Sparks. They did not. Also, while Relators try to disguise these changes as just correcting a “statement of the law” based on counsel’s revised legal analysis, this is nothing more than a veiled and tenuous attempt to argue that these changes fall outside the factual strictures of S.Ct.Prac.R. 12.02(B). (See Mem. Opp. to MTD 1st Am. Compl. pp. 8–9). Further, it ignores that these changes—*removing* a reference to a fringe benefit ordinance amendment in October 2012, and *adding* an allegation that Relators averaged “thirty . . . hours a week or more” for the newly-added two-year period of October 2012 to present—are purely factual and not legal conclusions. (See Mot. Leave for 2nd Am. Compl. at Proposed 2nd Am. Compl. ¶¶ 19–22).

Moreover, Relators’ new Affidavit independently violates S.Ct.Prac.R. 12.02(B)’s personal knowledge requirement because it fails to *expressly* state that the allegations in the proposed Second Amended Complaint are based on Sparks’ personal knowledge. Although Paragraph 1 states that Sparks has “direct and personal knowledge” of the facts in the Affidavit, this refers to the Affidavit itself. (Mot. Leave for 2nd Am. Compl. at Proposed 2nd Am. Compl. Ex. A, Sparks Aff. ¶ 1). And Paragraph 3 merely states that he “read” the allegations in the proposed Second Amended Complaint and that they are “true and accurate”—instead of expressly saying he has personal knowledge of them. (Id. ¶ 3). This is a critical error because the Ohio Supreme Court “routinely dismisses” original actions supported by affidavits that fail to “expressly stat[e] that the facts in the complaint [are] based on the affiant’s personal knowledge.” *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, ¶ 32 (2006).

Much like this case, the non-compliant affidavit in *Evans* stated that “the factual allegations set forth in the complaint ‘are true and correct to the best of [relators’ counsel’s] knowledge.’” *Id.* Similarly, in *Hackworth v. Hughes*—a case that Relators themselves cite—an affidavit stating that “facts in the complaint were ‘true and accurate to the best of her knowledge and belief’” failed to comply. 2002-Ohio-5334, at ¶ 24; (Mot. Leave for 2nd Am. Compl. p. 2).

In the end, Relators’ two independent violations of the personal knowledge requirement in S.Ct.Prac.R. 12.02(B) show that their proposed amendment is futile because it is incapable of withstanding a motion to dismiss. Because their non-compliance comes on the heels of their initial Affidavit defect where they were put on notice of these requirements *and* Justice Pfeiffer’s explicit warning, Relators’ Motion should be denied and their claims should be dismissed.

C. Relators’ failure to refute Respondents’ independent bases for dismissing several substantive aspects of their claims shows that their attempt to reassert them would be futile and further justifies denying their Motion.

In addition to noting Relators’ initial affidavit defect, Respondents’ request for dismissal highlighted several other bases that justified dismissing various parts of their claims—including that their:

- Fringe benefit and holiday pay claims must be dismissed to the extent that they fall outside R.C. 2305.07’s six-year statute of limitations;
- Sick leave claim must be dismissed because R.C. 124.38 and R.C. 124.39 do not apply to Respondents; and
- Misclassification claim fails to state a claim as there is an adequate remedy at law, no clear legal right to the relief, and because the allegations are, in part, time-barred. (*See* MTD 1st Am. Compl. pp. 4–17).

These arguments (which Respondents expressly incorporate), as well as Relators’ failure to refute them, show why it would be futile to reassert them again in the proposed Second Amended Complaint and further warrants denying their Motion.

1. *Six-year statute of limitations under R.C. 2305.07*

Relators' statute of limitations response interestingly concedes that the Village is "not compelled by any statute . . . to offer holiday pay or fringe benefits." (Mem. Opp. to MTD 1st Am. Compl. p. 10). It also argues that "[e]very case cited by the Respondents directly involves a right to compensation derived from a statute and not an ordinance" under R.C. 2305.07. (Id.). But Relators ignore: (1) a 2011 First District appeal—that actually involved a Village of Lincoln Heights police officer believed to be within the scope of the classes at issue in this case—recognizing that "[n]umerous courts have applied the six-year statute of limitations to cases involving public-employee compensation;" and (2) a Twelfth District decision recognizing that "the right of a police officer or firefighter for a municipality to compensation is derived by statute[] and by ordinances enacted pursuant to statutory authority." *Miller v. Lincoln Hts.*, 2011-Ohio-6722, 967 N.E.2d 255, 256–57 (1st Dist. 2011); *Harville v. City of Franklin*, 12th Dist. No. CA91-01-003, 1991 WL 144318, *3 (12th Dist. 1991). And their argument that "[e]very case cited by the Respondents directly involves a right to compensation derived from a statute and not an ordinance," is flat out wrong. *Welch v. City of Lima*, 89 Ohio App. 457, 102 N.E.2d 888, 894 (3rd Dist. 1950) (applying R.C. 2305.07 to police officer suit for salary reductions contrary to what was "prescribed by [the municipality's] salary ordinance"); *State ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmsted*, 64 Ohio St. 3d 530, 597 N.E.2d 136, 140–41 (1992) (applying R.C. 2305.07 in mandamus suit seeking accrued vacation as provided by ordinance).

Further, Relators refused to confront the notion that they are equitably estopped from asserting this position. (*See generally*, Mem. Opp. MTD 1st Am. Compl.). To recap, Relators trumpet the Village's broad discretionary power under the Ohio Constitution's Municipal Home Rule doctrine to implement ordinances governing its benefits—when it comes to the statute of

limitations. (Id. p. 3) (“no federal or state statute requires Respondents to provide fringe benefits or holiday pay to its employees”); (Id. p. 10) (“Holiday pay and fringe benefits are benefits” provided “solely pursuant to . . . constitutional ‘home rule’ authority.”). But once they step outside the statute of limitations they immediately revert to the mutually inconsistent position that the Village lacked discretion to implement ordinances and issue benefits based on its own internal standards and employment classifications. (See Sec. Am. Compl. ¶¶ 14–15, 19–22, 23, 26, 42, 49). Relators cannot have it both ways and they are barred from using a position fundamentally inconsistent with their core theory to dodge R.C. 2305.07. *Rice’s Auto Leasing, Inc. v. Lee Paull Ins. Agency*, No. 85-B-35, 1986 WL 9119, *4 (2nd Dist. 1986) (ruling that a party’s “inconsistent positions . . . permitted the [trial] court to apply the doctrine of equitable estoppel by inconsistent acts.”).

2. Sick leave claim

Respondents showed that Relators’ sick leave claim must be dismissed under First and Ninth District precedent showing that civil service statutes like R.C. 124.38 and R.C. 124.39 do not apply to villages. (See e.g., MTD 1st Am. Compl. pp. 12–13). Relators responded by essentially saying that these cases “just got it wrong.” (Mem. Opp. to MTD 1st Am. Compl. pp. 10–12). But they tellingly fail to identify any cases consistent with their position on this issue—let alone identify ones criticizing the holdings of Respondents’ cases. (Id.). Relators’ sick leave claim should be dismissed for this reason as well as those explained in Respondents’ Motion to Dismiss.

3. Misclassification claim

Relators claim they were misclassified as independent contractors and that Respondents have failed to provide information to OPERS necessary for it to determine whether “the

Misclassification Class may participate in OPERS.” (1st Am. Compl. ¶¶ 41–47; Mot. Leave. for Sec. Am. Compl. at Proposed Sec. Am. Compl. ¶¶ 41–47). But Respondents showed that—assuming they are even eligible for OPERS benefits—their claims must be dismissed because they: (1) have a plain and adequate remedy at law through the OPERS member-determination procedure and appeal process; and (2) seek relief the Village cannot provide, particularly absent a final OPERS member-determination decision. (MTD 1st Am. Compl. pp. 13–17).

Relators responded by simply saying that the Village has “a clear legal duty” to provide certain forms required by OPERS because they are necessary for OPERS to issue a member-status determination. (Mem. Opp. to MTD 1st Am. Compl. p. 12). This comes nowhere close to sustaining their misclassification claim in mandamus for at least two reasons. First, they cite no legal authority in support of the proposition that OPERS cannot make a decision absent the forms at issue. (*Id.*). Unless they identify the lack of a statutory or administrative mechanism to remedy this—much less identify any meaningful efforts they made to explore this issue—they cannot show that they have no adequate remedy at law. (*Id.*). Second, Relators’ statement that Respondents “have failed to provide” the information requested by OPERS is both factually false and tellingly unsupported by citation to the record or otherwise. (*See id.*).

III. CONCLUSION

Given that these Affidavit and substantive issues render Relators’ proposed amendment incapable of withstanding a motion to dismiss—and the fact that this comes on the heels of their initial Affidavit defect and multiple warnings of the Affidavit requirements—Relators’ Motion should be denied and their claims should be dismissed.

Respectfully submitted,

/s/ Pat Kasson

Patrick Kasson (0055570) (Counsel of Record)

Melvin J. Davis (0079224)

Tyler Tarney (0089082)

REMINGER CO., L.P.A.

Capitol Square Building, 4th Floor

65 E. State Street

Columbus, Ohio 43215

Phone: (614) 232-2418

Fax: (614) 232-2410

pkasson@reminger.com

mdavis@reminger.com

ttarney@reminger.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following via email and regular mail on October 29, 2014:

Hans A. Nilges (0076017) (Counsel of Record)
Shannon M. Draher (0074304)
NILGES DRAHER LLC
4580 Stephen Circle, NW
Canton, Ohio 44718
TEL: (330) 470-4428
FAX: (330) 754-1430
hans@ohlaborlaw.com
sdraher@ohlaborlaw.com

Robert E. DeRose (0055214)
James Petroff (00042476)
Robi J. Baishnab (0086195)
**BARKAN MEIZLISH HANDELMAN
GOODIN DEROSE WENTZ, LLP**
250 E. Broad St., 10th Fl.
Columbus, Ohio 43215
TEL: (614) 221-4221
FAX: (614) 744-2300
bdrose@barkanmeizlish.com
jpetroff@barkanmeizlish.com
rbaishnab@barkanmeizlish.com

Attorneys for Relators

/s/ Pat Kasson

Patrick Kasson (0055570)

Melvin J. Davis (0079224)

Tyler Tarney (0089082)