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STATEMENT IN SUPPORT OF DENYING JURISDICTION

In April 2004, following extensive public discussion and review, Defendant City of Avon Lake, Ohio (the “City”) opened a section of an existing park for in-line skating, skateboarding, and biking (the “skate park”) for the benefit of local citizens.

In September 2011, Plaintiff James Pietrangelo, II moved to a townhouse across the street from the skate park. He does not own the property. After Plaintiff had lived in that townhouse without complaint for nearly two years, he brought an action in the Lorain County Court of Common Pleas seeking a declaratory judgment declaring the skate park a nuisance, and an injunction permanently closing that park.

On October 8, 2013, Plaintiff moved for a preliminary injunction closing the skate park entirely during the pendency of this action. Thereafter, the trial court held a four-day hearing on Plaintiff’s motion and accepted post-hearing briefs from the parties. Ultimately, the trial court held that Plaintiff had failed to establish he was entitled to a preliminary injunction. Plaintiff appealed. On October 23, 2014, the Ninth District Court of Appeals dismissed his appeal holding that his interlocutory appeal was not a final order under R.C. 2505.02(B)(4). That is, the appeals court correctly held that it lacked jurisdiction because “relief will still be available in an appeal after final judgment,” and that “a delay in obtaining relief will not render a remedy after final judgment ineffective or moot.” Ninth Dist. Journal Entry, at 3.

Plaintiff now seeks review here, arguing that discretionary review is necessary to correct the purported holding of the appellate court—namely, that “because Pietrangelo seeks a *permanent* injunction in the case, he automatically has, on/after final judgment, a ‘meaningful or effective remedy’ of the trial court’s denial of a *preliminary* injunction.” Pl. Mem. at 1.

Unlike an order requiring disclosure of trade secrets, or denying a legal privilege, here Plaintiff can pursue the permanent injunctive relief he seeks, and still have a meaningful review on appeal of a final judgment on the merits. Since a post-trial review will provide a meaningful remedy on appeal, this is not a case where delay will render a remedy after a final judgment

ineffective.

Therefore, the Ninth District Court of Appeals properly dismissed Plaintiff's appeal for lack of jurisdiction, a decision consistent with R.C. 2505.02(B)(4) and case law throughout the state interpreting that statute. Accordingly, there is no reason for this Court to accept review.

STATEMENT OF THE CASE AND FACTS

The sole question before this Court is one of law: Whether the Court of Appeals properly dismissed Plaintiff's interlocutory appeal of an order denying him a preliminary injunction for lack of jurisdiction.¹ That is, whether Plaintiff's interlocutory appeal is a final order under R.C. 2505.02(B)(4).

The facts relevant to this appeal follow. On September 25, 2013, Plaintiff filed suit in the Lorain County Court of Common Pleas seeking an order declaring the skate park a nuisance, and an injunction permanently closing that skate park. On October 8, 2013, Plaintiff requested a preliminary injunction closing the skate park pending the trial court's final merits determination. The trial court held evidentiary hearings on Plaintiff's motion on November 12, 20, and 26, and December 10, 2013 and then set a post-hearing briefing schedule.² At Plaintiff's request, the trial court stayed the case for a month, extending the deadline for all post-hearing briefing to February 18, 2014.

While his preliminary injunction motion was pending, Plaintiff filed three other motions, seeking a new hearing, sanctions, and to disqualify the City's counsel, which were ultimately denied. Before the trial court ruled on his motion for a preliminary injunction, Plaintiff filed a notice of appeal, claiming that his motion for a preliminary injunction had been "constructively denied." The Court of Appeals dismissed that premature appeal on June 26,

¹ Plaintiff spends a substantial portion of his jurisdictional memorandum elaborating facts irrelevant to the jurisdictional question pending in this Court. Both the trial court and the City addressed these perceived facts below. *See* July 16, 2014 Order of the Lorain County Court of Common Pleas at 3 ("July 16, 2014 Order").

² On November 25, 2013, Plaintiff filed a motion seeking reconsideration of an earlier evidentiary ruling excluding certain evidence, which the City opposed. The court refused the request to reconsider on December 20, 2013.

2014, for lack of a final order under R.C. 2505.02(B)(4).

On July 16, 2014, the trial court denied Plaintiff's motion for preliminary injunction.³ Plaintiff filed a second notice of appeal on August 12, 2014. The appeals court then ordered the parties to submit briefs addressing whether the court had jurisdiction to consider the appeal.

On October 23, 2014, the appeals court dismissed the appeal. In particular, the Court of Appeals found that an interlocutory order is appealable only if "the appealing party [is] unable to obtain a meaningful or effective remedy absent an immediate appeal, " observing that an interlocutory appeal is only permissible if "[t]he proverbial bell cannot be unrung[.]"Ninth Dist. Judgment Entry at 2.(citation omitted). The Ninth District held that "[u]nlike the situation in which trees would be cut down or confidential information revealed, here, relief will still be available in an appeal after final judgment. Furthermore . . . , a delay in obtaining relief will not render a remedy after final judgment ineffective or moot." *Id.* at 3.

Plaintiff subsequently filed a motion to reconsider and for reconsideration *en banc*, which the appeals court denied on January 15, 2015. On January 21, 2015, Plaintiff filed notice of appeal to this Court, with a memorandum in support of jurisdiction asking the Court to accept jurisdiction.⁴ He contends that his appeal involves a substantial constitutional question and a matter of great general interest.

The decision denying Plaintiff's motion for a preliminary injunction closing a skate park that has been open for 10 years does not satisfy R.C. 2505.02(B)(4). Therefore, the City requests that this Court decline jurisdiction and remand this matter for further proceedings.

³ Plaintiff's assertion that the trial court "summarily denied" his motion, Pl. Mem. at 9, is belied by the trial court's careful consideration of his arguments and evidence and its conclusion that Plaintiff failed to show with clear and convincing evidence that he was entitled to a preliminary injunction. *See* July 16, 2014 Order.

⁴ Plaintiff served a jurisdictional memorandum on the City in connection with what appeared to be an appeal of that order, but there is no record that brief was submitted to the Court. The City attached Plaintiff's January 5 memorandum to this opposition as Appendix 1. The only differences between Plaintiff's January 5 and January 21 jurisdictional memoranda filed with this Court appear to be (1) a reference on page 10 to the appeal court's denial of Plaintiff's motion for reconsideration, and (2) attachment of the order denying reconsideration.

ARGUMENT OPPOSING PLAINTIFF-APPELLANT’S PROPOSITION OF LAW

This case does not present a substantial constitutional question or concern a matter of great general interest.⁵ Article IV of Ohio Constitution; Sup. Ct. Prac. R. 3.1(B)(2).

I. This case does not involve a substantial constitutional question relating to Article I, § 16 of the Ohio Constitution.

Plaintiff asserts that refusing his appeal violates Article I, Section 16 of the Ohio Constitution, which states that “every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law[.]” Pl. Mem. at 2. First, Plaintiff did not raise this argument in the court of appeals, which makes this argument unreviewable by this Court. *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St.3d 350, 352, 474 N.E.2d 295 (1984).

Next, Plaintiff makes only a cursory argument in support of this claim. He does not reference Article I, Section 16 in the analysis section of his memorandum, and he failed to cite case law interpreting that provision. Accordingly, Plaintiff has not validly presented this argument to this Court. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶121 (“Because this claim is wholly conclusory, we summarily reject this argument.”).

Moreover, denial of an appeal in the absence of a statutory right to appeal does not constitute a violation of the right-to-remedy provision of Article I, Section 16. “[T]he right-to-remedy provision applies only to existing, vested rights,” and “the legislature determines what injuries are recognized and what remedies are available.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶13.

Here, the legislature determined that appeal of a provisional remedy is limited to cases that satisfy R.C. 2505.02(B)(4). Therefore, the appellate court’s application of this statutory limit does not violate Plaintiff’s right to due process.

⁵ Whether a case concerns a matter of great general interest is within this Court’s discretion. *Williamson v. Rubich*, 171 Ohio St. 253, 253-54, 168 N.E.2d 876 (1960). This case is not a matter of great general interest because it does not “affect[] a good many people and [has not] aroused general interest.” Paul M. Herbert, *Cases of Public or Great General Interest*, Ohio State Bar Assn. Rep. 981, 985 (Sept. 12, 1966).

II. This case does not involve a substantial constitutional question or a question of great general interest relating to R.C. 2505.02(B)(4) or Article IV, Section 3(B)(2) of the Ohio Constitution.

Plaintiff also asserts that the Ninth District's order violates R.C. 2505.02(B)(4) and Article IV, Section 3(B)(2) of the Ohio Constitution.

The appeals court's decision is consistent with R.C. 2505.02(B)(4) and case law interpreting it. In general, denial of a preliminary injunction is not a final order. *Jacob v. Youngstown Ohio Hosp. Co.*, 7th Dist. No. 11-MA-193, 2012-Ohio-1302, ¶5 (Mar. 20, 2012). Rather, a preliminary injunction is only a final order if "[t]he 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." R.C. 2505.02(B)(4)(b). This occurs only in limited situations where "there is no meaningful ability to appeal the decision if a provisional remedy is denied." *Neighbors for Responsible Land Use v. City of Akron*, 9th Dist. No. 23191, 2006-Ohio-6966, ¶11 (Dec. 29, 2006).

As this Court has stated, interlocutory review is only appropriate in situations where "the proverbial bell cannot be unrung." *State v. Muncie*, 91 Ohio St.3d 440, 451, 746 N.E.2d 1092 (2001). For example, if a court compelled production of documents that included trade secrets, once "such [secrets] are disclosed, the party resisting discovery will have no adequate remedy on appeal." *Gibson-Myers & Assoc. v. Pearce*, 9th Dist. No. 19358, 1999 Ohio App. LEXIS 5010, at *6-7 (Oct. 27, 1999). Similarly, an interlocutory order denying temporary injunctive relief in a construction dispute may also be appealable "because after construction begins, the damage has already been done; the land has been permanently altered," and "a permanent injunction preventing construction is virtually useless." *Neighbors*, 2006-Ohio-6966, ¶11.

Likewise, in *Wimmer Family Trust v. FirstEnergy Corp.*, the court denied a preliminary injunction seeking to prevent a defendant from cutting trees on plaintiff's land. The court found the denial of the preliminary injunction to be a final, appealable order because once the trees were removed, plaintiff would be deprived of a meaningful appeal. 9th Dist. No. 08CA9392,

2008-Ohio-6870, ¶7 (Dec. 29, 2008), *vacated on other grounds*, 123 Ohio St.3d 144 (2009).

In each of these situations, denial of a preliminary injunction would permanently alter the positions of the parties, such that the party seeking relief could obtain no meaningful relief on appeal after a final merits decision. Accordingly, an interlocutory appeal was warranted.

Here, Plaintiff can still obtain the relief he seeks in the trial court—closure and dismantling of the skate park.⁶ And, if he does not prevail, Plaintiff may still appeal after a final decision on the merits and, if his appeal is successful, obtain the same relief he seeks as a preliminary matter. The Ninth District reached this same conclusion and correctly dismissed Plaintiff’s appeal. *See* Ninth District Order, at 3 (“Unlike the situation in which trees would be cut down or confidential information revealed, here, relief will still be available in an appeal after final judgment. Furthermore, . . . a delay in obtaining relief will not render a remedy after final judgment ineffective or moot.”).⁷

Plaintiff argues that without an immediate appeal, he will suffer irreparable harm to his health that cannot be remedied afterwards. *See* Pl. Mem. at 7. Even if Plaintiff may suffer harm while this matter is pending, that alleged harm does not establish that the denial of his request for preliminary relief is a final order under R.C. 2505.02(B)(4). *See Empower Aviation, LLC v. Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶24 (1st Dist.) (“[T]he possibility of an irreparable injury that would render injunctive relief appropriate cannot—on its own—satisfy the second requirement of R.C. 2505.02(B)(4), because this requirement also embodies the judicial interest in avoiding piecemeal litigation.”).

⁶ *See* subsection (b) of Plaintiff’s Prayer for Relief in the Complaint.

⁷ Because the Ninth District applied the correct legal rule, there is no split in the Ohio courts of appeals as Plaintiff alleges. *See Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 613 N.E.2d 1032 (1993), at syllabus ¶1, 596 (a conflict only exists where there is an “actual conflict” between appellate districts, and the allegedly conflicting cases must address the same question of law, involve similar facts and the issue decided must be central to the cases); *Sprung v. E.I. DuPont de Nemours & Co.*, 16 Ohio Op. 352, 366 (1939), *appeal dismissed*, 136 Ohio St. 94 (to certify an appellate split, the allegedly conflicting pronouncement must be “so material to the judgment [of the allegedly conflicting cases] that it is determinative”).

Moreover, Plaintiff cites no authority stating that a party may immediately appeal denial of a preliminary injunction because he contends he cannot later obtain all of the relief he seeks. Rather, the law permits an interlocutory appeal only if the appealing party would have “no adequate remedy on appeal.” *Gibson-Myers*, 1999 Ohio App. LEXIS 5010, at *6-7; *see also Wimmer*, 2008-Ohio-6870, ¶7; *Neighbors*, 2006-Ohio-6966, ¶11.

Further, Plaintiff has not provided competent expert medical testimony establishing a causal connection between the skate park noise and his alleged ill health as is required by law. See July 16, 2014 Order of, at 3 (“[S]ince all of the testimony given on behalf of the plaintiff was from the plaintiff himself without corroboration by appropriate expert testimony (sound level measurements, causation of various alleged medical conditions), it is difficult at this point to conclude that the plaintiff will prevail at trial. . . . Indeed some of plaintiff’s alleged injuries in an attempt to show irreparable harm such as physical injuries from the noise were not supported by necessary expert testimony.”); *Schoenberger v. Davis*, 8th Dist. No. 45611, 1983 Ohio App. LEXIS 12345, at *17-18 (June 23, 1983) (holding that plaintiff failed to demonstrate causation between alleged nuisance caused by a neighbor and her suffering colitis, miscarriage, and ill temper where she failed to provide expert medical testimony demonstrating causation). Plaintiff has provided only his own testimony that his cardiologist “attributed” his symptoms to skate park noise (Plaintiff’s cardiologist has not provided any affidavits or testimony in this case), and an affidavit from his brother.⁸ Neither qualifies as expert medical testimony within the meaning of Evid. R. 702.

Plaintiff also argues that the Ninth District misinterpreted the nature of the “status quo” between the parties. Pl. Mem. at 14-15. The appeals court’s discussion of the status quo was not essential to its central holding that Plaintiff still had an effective remedy on appeal from a final merits determination. *See* Ninth District Journal Entry at 2-3.

⁸ Although Plaintiff’s brother purports to be a physician, he does not claim to be Plaintiff’s treating physician, or to have reviewed Plaintiff’s medical records. Nor has he provided a medical expert opinion to a reasonable degree of medical certainty.

At most, Plaintiff's argument suggests the trial court *could have* granted a preliminary injunction without upsetting the status quo—but this proposition does not logically entail that the trial court's decision *not to* grant a preliminary injunction is a final order under R.C. 2505.02(B)(4).⁹

CONCLUSION

Plaintiff failed to show that the appeals court had jurisdiction to hear his interlocutory appeal, or that there is a split of authority to resolve. Nor has he shown that there exists any public or great general interest that would require this Court to overrule years of consistent precedent interpreting R.C. 2505.02(B)(4) in the same manner that the appeals court did here. Therefore, the City respectfully requests that this Court reject Plaintiff's request that it accept jurisdiction and asks the Court to remand this case to the trial court for further proceedings.

⁹ Plaintiff's cited authorities both involved the issue of whether *grants* of preliminary injunctive relief were final orders under R.C. 2505.02(B)(4) because they altered the status quo. *See Obringer v. Wheeling & Lake Erie Ry.*, 3d Dist. No. 3-09-08, 2010-Ohio-601, ¶¶17-20 (Feb. 22, 2010) (analyzing whether preliminary injunction removing a concrete barrier from a rail crossing merely maintained the status quo, and thus was not a final order under R.C. 2505.02(B)(4)); *Aquasea Group, LLC v. Singletary*, 11th Dist. No. 2013-T-120, 2014-Ohio-1780, ¶¶11-14 (Apr. 28, 2014) (considering whether affirmative relief under preliminary injunction altered status quo and was a final order under R.C. 2505.02(B)(4)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent via regular U.S. Mail this 3rd day of February, 2015, to the following:

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/s/ Tracey L. Turnbull
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Attorney for City of Avon Lake, Ohio