

IN THE SUPREME COURT OF OHIO

Barbara Andersen, et al.,)	CASE NO. 2015-0393
)	
Relators,)	RESPONDENT'S RESPONSE TO
vs.)	RELATORS' MOTION FOR
)	CLARIFICATION OF THE
The City of Cleveland,)	SUPREME COURT OF OHIO'S
)	DECISION TO DISMISS
Respondent.)	RELATORS' ORIGINAL
)	ACTION AND COMPLAINT
)	

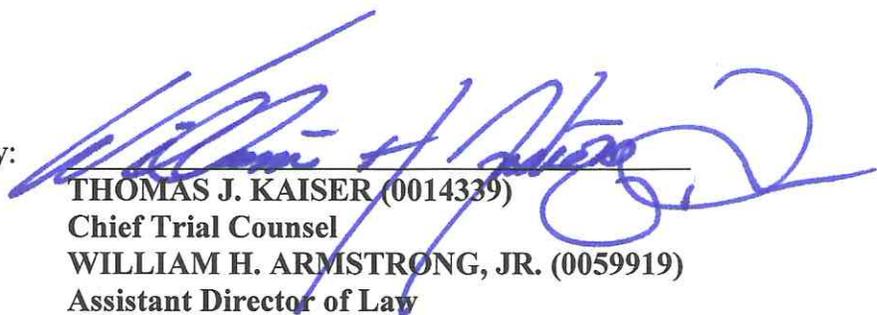
**RESPONDENT'S RESPONSE TO RELATORS' MOTION FOR CLARIFICATION OF
THE SUPREME COURT OF OHIO'S DECISION TO DISMISS RELATORS'
ORIGINAL ACTION AND COMPLAINT**

The City of Cleveland, by and through counsel, responds to Relator's Motion for Clarification of the Supreme Court of Ohio's Decision to Dismiss Relators' Original Action and Complaint and deny all claims for relief. As this Court held in its Decision, Relators' Original Action and Complaint lack subject-matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. The grounds for Respondent's Motion are more fully set forth in the attached Memorandum in Support, which is hereby incorporated by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

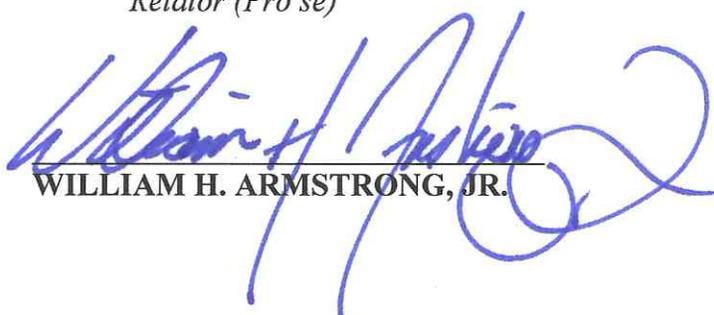
I certify that a true and accurate copy of Respondent's Response to Relators' Motion for Clarification of the Supreme Court of Ohio's Decision to Dismiss Relators' Original Action and Complaint was served via U.S. Mail and the Clerk of Court's e-filing system on October 8, 2015 to:

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Relator (Pro se)

Relator (Pro se)



WILLIAM H. ARMSTRONG, JR.

MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

On March 9, 2015, Relators Barbara Andersen and Michael McCarthy filed their Original Action with this Honorable Court. On May 4, 2015, Respondent the City of Cleveland filed its Motion to Dismiss in which it argued that Relators' Original Action and Complaint lack subject-matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. On June 24, 2015, this Court granted Respondent's Motion to Dismiss and dismissed Relators' case.

More than ten days after June 24th, Relators served on the undersigned a copy of a Motion for Reconsideration, which they admittedly entitled a Motion for Delayed Reconsideration. The certificate of service stated that it was sent on July 21, 2015, which is almost a month after this Court's decision. As this Motion was past the ten-day-filing period prescribed in Supreme Court Practice Rule 18.02(A), and in accordance with Subsection (D) of that rule, the Supreme Court's Clerk could not accept the motion for filing as it was untimely. Subsequently, on September 28, 2015, Relators filed the pending Motion for Clarification, which, as will be argued below is, in essence, a time-barred Motion for Reconsideration.

II. LAW AND ARGUMENT

A. Relators' Motion for Clarification is actually a time-barred Motion for Reconsideration.

Although it is captioned as a Motion for Clarification, Relators' Motion is actually a Motion for Reconsideration. Relators may not file a Motion for Reconsideration more than ten days after the issuance of this Court's order dismissing their action. Thus, this Court must overrule Relators' Motion for Clarification.

In their Motion for Clarification, Relators, go beyond a request for clarification and actually ask this Court to address the issues raised in their complaint. Indeed, at Page 7, they specifically ask this Court to, “clarify its decision to dismiss the Original Action and reconsider the issue of original jurisdiction.” This Court has already addressed these issues and dismissed the action. Furthermore, the time for Relators to ask the Court for reconsideration has passed.

Supreme Court Practice Rule 18.02(A) provides that a Motion for Reconsideration must be filed within ten days after the Supreme Court issues an order or an entry is filed. The Supreme Court’s decision dismissing this case was issued on June 24, 2015. Therefore, the last possible day to file the Motion for Reconsideration would have been July 6, 2015. Relators did not file a Motion for Reconsideration on or before July 6, 2015. Thus, they can no longer file a Motion for Reconsideration. The Relators’ Motion for Clarification that they filed September 28, 2015 is really a Motion for Reconsideration since they specifically asked this Court to reconsider its decision regarding original jurisdiction. Relators cannot file such a motion, however, because the ten-day period elapsed several months ago. Consequently, this Court must overrule Relators’ Motion for Clarification, which is a barely-concealed Motion for Reconsideration, and affirm the dismissal of this case.

B. Relator’s Complaint lacks subject-matter jurisdiction.

The Relators Motion for Clarification, which is masquerading as a Motion for Reconsideration, does not alter the fact that their Complaint lacks subject-matter jurisdiction. Consequently, this Court must overrule Relators’ Motion for Clarification and affirm the dismissal of this case.

Under Section 2(B)(1), Article IV of the Ohio Constitution, the Court has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on

review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 450, 2011-Ohio-4101 , 953 N.E.2d 329. Neither the Rules of Civil Procedure nor statutes can expand the Supreme Court's original jurisdiction and require it to hear an action not authorized by the Ohio Constitution. *State ex rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 63 Ohio Op. 2d 199, 296 N.E.2d 544 (1973).

The original action did not fall into one of the explicitly stated categories in Article IV. Furthermore, the instant case does not qualify as a “cause for review.” Thus, the Court was correct in dismissing it because it did not have original jurisdiction See *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 133 Ohio St. 3d 561, 565, 2012-Ohio-4837, 979 N.E.2d 1193, (finding that the Court did not have original jurisdiction over claims for declaratory judgment; see also *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3, 640 N.E.2d 1136, (finding that the Court did not have original jurisdiction in prohibitory injunction). Consequently, this Court must overrule Relators’ Motion for Clarification and affirm the dismissal of this case.

C. Relator’s Original Action and Complaint is barred under the doctrine of res judicata.

The filing of Relators’ Motion for Clarification, which is, in essence, a time-barred Motion for Reconsideration, does not alter the fact that res judicata bars Relators’ Original Action and Complaint through issue and claim preclusion. Therefore, this Court must overrule Relators’ Motion for Clarification and affirm the dismissal of this case.

The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). See *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226, 228; see also

Whitehead v. Gen. Tel. Co. (1969), 20 Ohio St.2d 108, 254 N.E.2d 10; *Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062 (1989); 46 American Jurisprudence 2d (1994) 780, Judgments, Section 516. “A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.”

Norwood v. McDonald, 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67 (1943), paragraph one of the syllabus. The parties are co-owners of the home and therefore are in privity. Privity is also found through the two underlying suits. Furthermore, “[i]t has long been the law of Ohio that ‘an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit’.” *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 978, 986 (1983) (quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388 (1986)) (“We also declared that ‘[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.’”).

Through Relators’ own admissions, many of the issues brought forth in the Original Action and Complaint are barred by res judicata. Issue preclusion bars each of the claims that were already litigated. These barred claims include: resolution of the matters with the City of Cleveland, Municipal Housing Court and Eighth District Appeals Court, See Relators’ Original Action and Complaint at pg. 1; issues regarding improper site grading, *Id.*; misrepresentations of the law, regulations and physical facts, *Id.* at 6; and willful ignorance and negligence of proper application of City codes, *Id.* at 8. All other issues, including but not limited to allegations of false prosecution and conviction, *Id.* at 0; the failure to dispatch a credible assessor, *Id.* at 9; impropriety of influence, *Id.* at 13; and due process considerations regarding a fair hearing, *Id.* at

30, are barred by claim preclusion, as they could have and should have been raised in the appropriate actions before the previous courts.

Relators' Original Action and Complaint requests a fair hearing and uniform enforcement and application of law and regulation in its ad damnum clause. See *Id.* at 30. These issues, as well as the underlying claims referenced above, were brought before the Eighth District in 2013. If, however, Relators had any disagreement with the decision of the Eighth District, their only recourse was through timely appeal to this Court prior to December 9, 2013. "To perfect an appeal or right [sic], the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed." S.Ct.Prac.R. 6.01 (A)(1). "The time period designated in this rule for filing a notice of appeal is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal* * *." S.Ct.Prac.R. 6.01 (A)(3).

Furthermore, the Respondents did not file 2506 administrative appeals of the Board of Building Standards and Appeals decisions. Consequently, they did not exhaust their administrative remedies. A party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court. *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980), citing *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951). Therefore, all claims are barred by res judicata or are otherwise time-barred and this honorable Court is without jurisdiction to hear the claims.

The issues that Relators ask this Court to address in their Motion for Clarification, which is actually a time-barred Motion for Reconsideration, are also barred by res judicata. They state at page four of their Motion that the issue regarding their right of reasonable property use under City, State, and Constitutional laws has not been previously litigated. Even if that were correct,

they are issues that could have been raised in the Housing-Court criminal trials, the appeals of those trials, the appeal to the Cleveland Board of Building Standards and Appeals, and any appeal that they did not file stemming from the BBS appeal. Because Relators failed to raise these issues during the previous judicial cases, they are now estopped from raising them again. Furthermore, Relators are estopped from asking this Court to reconsider its decision regarding this issue because they did not timely file a Motion for Reconsideration. Consequently, this Court must overrule Relators' Motion for Clarification and affirm the dismissal of this case.

D. The Relators' Complaint failed to attach an affidavit specifying the details of the claim.

The Relators' Motion for Clarification is really asking this Court to reconsider its dismissal of this case. The Motion, however, does not alter the fact that their Original Action and Complaint fails to comply with Supreme Court Rule of Practice 12.02 (B)(1). Therefore this Court should overrule the Motion for Clarification.

The Supreme Court Rules of Practice govern the procedure and form of documents in all original actions before the Court. See S.Ct.Prac.R. 12.01 (A)(2)(a). Therefore, any and all of the Court's Rules are binding on the parties to this original action. Under S.Ct.Prac.R. 12.02 (B)(1), "[a]ll complaints * * * shall be supported by an affidavit specifying the details of the claim, and may be accompanied by a memorandum in support of the writ." (emphasis added).

The only case interpreting this rule is inapplicable to the instant case because in that case affidavits were filed with the complaint, *State ex rel. Comm. for Charter Amendment Petition v. Maple Hts.*, 140 Ohio St. 3d 334, 337, 2014-Ohio-4097, (reviewing whether the affidavits were made with personal knowledge). Ample case law exists interpreting the rule under its identical predecessor. Effective June 1, 1994, S.Ct.Prac.R. (X)(4)(B) was renumbered. The language in S.Ct.Prac.R. 12.02 (B) was retained in its entirety. The only change to the Section was its

numbering. Failure to comply with S.Ct. Prac.R. X(4)(B), and through S.Ct.Prac.R. 12.02 (B) as renumbered, warrants dismissal of the original action. See *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 442, 2006-Ohio-5439, 857 N.E.2d 88. In fact, the Supreme Court has “routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge.” *Id* at 443 (citing *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050; *State ex rel. Tobin v. Hoppel*, 96 Ohio St.3d 1478, 2002-Ohio-4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324, 750 N.E.2d 167). In the instant case, no affidavit was filed at all. Consequently, this Court must overrule Relators’ Motion for Clarification and affirm the dismissal of this case because Relators’ underlying Complaint did not contain the required affidavit.

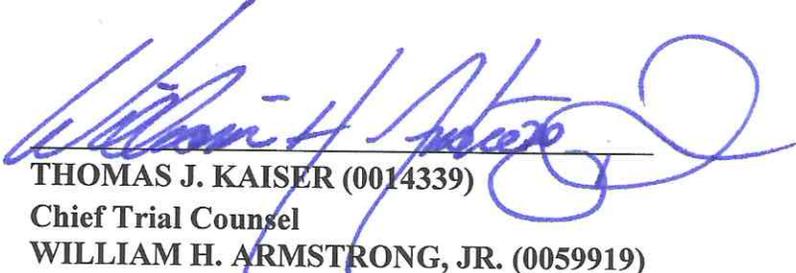
III. CONCLUSION

Relators’ Motion for Clarification is actually a Motion for Reconsideration. Indeed, Relators admit as much when they ask this Court to reconsider the issue of original jurisdiction. Relators may not file a Motion for Reconsideration because considerably more than ten days have passed since the issuance of this Court’s dismissal of Relators’ case. Moreover, this Court does not have jurisdiction to hear Relators’ claims. Additionally, Res judicata bars Relators from asserting their claims because they could have brought them in the preceding cases. Finally, Relators’ Complaint does not meet this Court’s Rules of Practice by not attaching an affidavit. Consequently, this Court must overrule Relators’ Motion for Clarification and affirm the dismissal of this case.

Respectfully submitted,

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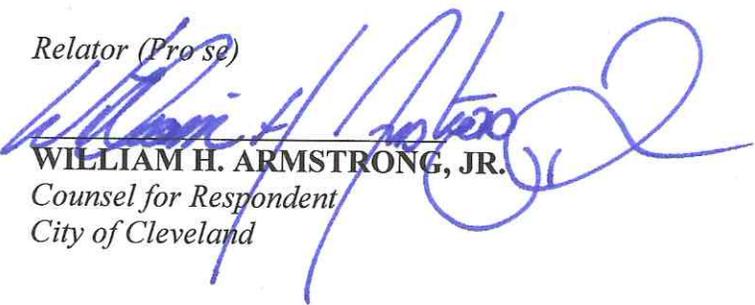
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