STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PAUL J. GAINS,	)	
	)	CASE NO. 09 MA 63
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	AND
JOSEPH PLANEY,	)	JUDGMENT ENTRY
	)	
DEFENDANT-APPELLANT.	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
                               Case No. 08CV2377.

JUDGMENT: Appeal dismissed.

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 19, 2009

<u>APPEARANCES</u>:

For Plaintiff-Appellee:	Attorney Gina DeGenova Bricker Assistant Prosecuting Attorney 21 West Boardman Street, 5th Floor Youngstown, Ohio 44503

For Plaintiff-Appellee:

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(For Intervenor Citi Financial, Inc.)

For Defendant-Appellant:

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PER CURIAM:

¶{1} This matter comes on appeal from a March 26, 2009 judgment of the Common Pleas Court declaring appellant to be a vexatious litigator as defined by R.C. 2323.52(A)(3). Appellees have filed a motion to dismiss this appeal for failure of appellant to file an application for leave to proceed (i.e. to file a notice of appeal) before filing the notice of appeal without prior permission from this Court. For the reasons that follow, the motions to dismiss are granted and this appeal is dismissed.

LEGAL ANALYSIS

¶{2} Under R.C. 2323.52(D)(3):

¶{3} "(3) A person who is subject to an order entered pursuant to division (D)(1) of this section may not institute legal proceedings in a court of appeals, continue any legal proceedings that the vexatious litigator had instituted in a court of appeals prior to entry of the order, or make any application, other than the application for leave to proceed allowed by division (F)(2) of this section, in any legal proceedings instituted by the vexatious litigator or another person in a court of appeals without first obtaining leave of the court of appeals to proceed pursuant to division (F)(2) of this section."

¶{4} Under the referenced (F)(2) section of the statute "The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application." That statutory section also excludes the period of time while the application is pending to not be computed as part of any period of limitation within which an action must be instituted.

¶{5} Finally, pursuant to R.C. 2323.52(I):

¶{6} "Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas or court of appeals to do so under division (F) of this section, the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator."

¶{7} The vexatious litigator statute has been found to be constitutional. *Mayer v. Bristow* (2000), 91 Ohio St.3d 3. The requirement of obtaining leave to proceed does not unlawfully impair access to the courts. *State ex rel. Howard v. Lucas Cty. Court of Common Pleas* (2001), 142 Ohio App.3d 761.

¶{8} It is uncontroverted that in this case appellant did not file an application for leave to proceed. He simply filed his notice of appeal on April 6, 2009 from the order declaring him to be a vexatious litigator.

¶{9} In his opposition memorandum filed on May 7, 2009, appellant argues that the movants are attempting to deny him a legal remedy of access to a higher court to review the judgment appealed. He contends that the Tenth District Court of Appeals acted properly in allowing a late application for leave to proceed where the notice of appeal had been timely filed from an order declaring an individual a vexatious litigator.

¶{10} However, the ruling in *State ex rel. Sapp v. Franklin Cty. Court of Appeals,* 118 Ohio St.3d 368, 2008-Ohio-2367, is diametrically opposed to appellant's argument. In granting peremptory writs of prohibition and mandamus to prevent the court of appeals from proceeding further, the Ohio Supreme Court held that "The court of appeals patently and unambiguously lacks jurisdiction over Berman's appeal". The court reasoned that "The court of appeals also erred in granting Berman's belated motions for leave to proceed, which were filed after his appeal and without leave of court, in contravention of the plain language of R.C. 2323.52(D)(3) and (F)(2). The court was required to dismiss the appeal pursuant to R.C. 2323.52(I) once it knew that Berman had filed his appeal without obtaining leave to proceed." As here, the order in the *Sapp* case involved a declaration of a party as a vexatious litigator.

¶{11} R.C. 2323.52 specifies the requirements for persons declared to be vexatious litigators to file or continue litigation, including their request to challenge their designation as vexatious litigators. There is no distinction based on the order being appealed. *Sapp,* supra.

¶{12} We are bound to follow the law as interpreted by the Ohio Supreme Court. Accordingly, as appellant has failed to follow the statutory requirements after being declared a vexatious litigator, we are mandated by statute and caselaw to grant

the motions to dismiss and hereby dismiss this appeal under R.C. 2323.52(I). Appeal dismissed.

¶{13} Final order. Clerk to serve notice on all counsel of record and any unrepresented party. Costs taxed against appellant.

Vukovich, P.J., concurs.
Donofrio, J., concurs.
DeGenaro, J., concurs.