

II. FACTS.

Plaintiff Daniel Hughes was a student at Ohio State. See Complaint at ¶ 1. Plaintiffs James David Hughes and Kelley Dawn Hughes are Daniel's parents. Id. at ¶¶ 2-3. Plaintiffs Joshua Michael Hughes, Kaitlyn Elizabeth Hughes and Krysten Marie Hughes are Daniel's siblings. Id. at ¶¶ 4-6.

Plaintiffs claim Daniel Hughes suffered personal injuries on September 5, 2012, when he was struck by a dump truck entering a construction site on Ohio State's main campus located in Columbus, Ohio. Id. at ¶¶ 20, 24-25. The site exists for the purpose of constructing the Chemical and Biomolecular Engineering and Chemistry Building ("CBEC"), a new educational building. Id. at ¶ 9. At the time of the accident, Daniel Hughes was illegally riding his bike on the sidewalk and failed to see the dump truck. See Compston Depo. Tr. at 75-78. Riding a bike on the sidewalk in violation of a city code constitutes negligence *per se*. See Leizerman v. Kanous, 181 Ohio App. 3d 579, 583 (6th Dist. 2009).

Plaintiffs' Complaint in the Court of Claims states three causes of action against Ohio State: 1) Intentional, Willful, Wanton, and/or Negligent Conduct (Count One); 2) Loss of Consortium (Count Four); and 3) Punitive Damages (Count Five).¹ Id. at ¶¶ 19-35. It also contains a section labeled "Damages" which demands, among other things, punitive damages. Id. at ¶¶ 36-37. Additionally, it contains a jury demand. Id. at Caption and Jury Demand. After Ohio State pointed out that punitive damages are not recoverable against it and plaintiffs are not entitled to have a jury hear their claims, plaintiffs dismissed their punitive damages claim and withdrew their jury demand. See Stipulation of Dismissal of Punitive Damages Claim and Jury Demand Only.

¹ Plaintiffs' Complaint contains Counts numbered One, Four and Five. See Complaint at ¶¶ 19-35. The Complaint does not contain Counts numbered Two and/or Three.

Plaintiffs also brought suit against Gilbane Building Company, Gilbane Development Company, Gilbane Inc. (collectively “Gilbane”), Baker Concrete Construction Inc., Baker Concrete Structures, LLC (collectively “Baker”), Monesi Trucking & Equipment Repair, Inc. (“Monesi”), Isaac Hinton (“Hinton”), CT Corporations Systems, Burt, Hill, Pelli, Clarke, Pelli, and McDaniels Construction Corporation, Incorporated. See December 17, 2012 Complaint, Cuyahoga County, Ohio, Court of Common Pleas Case No. CV12 797704. Contrary to plaintiffs’ representation, they did not initiate suit against the non-state defendants in the Court of Common Pleas for Franklin County, but instead, in Cuyahoga County. See December 17, 2012 Complaint, Cuyahoga County, Ohio, Court of Common Pleas Case No. CV12 797704.

The non-state defendants subsequently moved to transfer venue from Cuyahoga County to Franklin County. See Defendants’ Motions to Change Venue and Motion to Strike Documents Attached to Defendants’ Motions or Alternatively to Conduct Discovery on the Issue of Venue, Cuyahoga County, Ohio, Court of Common Pleas Case No. CV12 797704. Plaintiffs opposed the Motion and accused Gilbane of “deceit” in bringing it. See Plaintiffs’ Brief in Opposition to Defendants’ Motions to Change Venue and Motion to Strike Documents Attached to Defendants’ Motions or Alternatively to Conduct Discovery on the Issue of Venue at 4, Cuyahoga County, Ohio, Court of Common Pleas Case No. CV12 797704. When seeking to keep the case in Cuyahoga County, plaintiffs did not claim it should be joined or consolidated with the instant matter. Id.

The Court of Common Pleas for Cuyahoga County granted the non-state entities’ Motion and transferred the case to Franklin County. See 3/28/13 Order, Cuyahoga County, Ohio, Court of Common Pleas Case No. CV12 797704. It is set for trial in Franklin County on May 19, 2014. See Case Schedule, Franklin County, Ohio, Court of Common Pleas Case No. 13CV-

004435. After transfer, plaintiffs filed a Motion in Franklin County seeking to have the case schedule expedited so that the case could be tried in December, 2013 or January, 2014. See Motion to Change Discovery Schedule and Trial Date, Franklin County, Ohio, Court of Common Pleas Case No. 13CV-004435. The Honorable Guy L. Reece, II denied that Motion. See Decision and Entry Denying Plaintiffs' July 7, 2013 Motion to Change Discovery Schedule and Trial Date, Franklin County, Ohio, Court of Common Pleas Case No. 13CV-004435. When seeking to have their claims expedited against the non-state defendants, plaintiffs did not state they should be joined or consolidated with the case at bar.² See Motion to Change Discovery Schedule and Trial Date, Franklin County, Ohio, Court of Common Pleas Case No. 13CV-004435.

III. DISCUSSION.

A. **The Court Of Claims Is A Court Of Limited Jurisdiction And Does Not Have Jurisdiction Over Plaintiffs' Claims Against The Non-State Cuyahoga/Franklin County Defendants.**

The Court of Claims is a statutorily created body. See Steward v. Ohio Dep't of Natural Res., 8 Ohio App.3d 297, 299 (10th Dist. 1983); see also O.R.C. § 2743.03 (creating and detailing the jurisdiction of the Court of Claims). Unlike a Court of Common Pleas, which is a court of general jurisdiction that may hear all matters at law and equity not specifically denied to it, see BCL Enters., Inc. v. Ohio Dep't of Liq. Control (1997), 77 Ohio St.3d 467, 469, "the Court of Claims enjoys only that jurisdiction specifically conferred upon it by the General Assembly." Steward, 8 Ohio App.3d at 299; see also Johns v. Univ. of Cincinnati Med. Assocs., Inc., 101 Ohio St.3d 234, 2004-Ohio-824, ¶ 36 (noting that the General Assembly has the power

² Ohio State disputes many of the purported facts set out by plaintiffs, the majority of which are irrelevant to the issue before the Court. Ohio State will present the actual facts at the appropriate time. The main issue regarding joinder or consolidation, i.e., whether the Court has jurisdiction over plaintiffs' claims now in the Court of Common Pleas for Franklin County, is a legal issue. Ohio State also disputes that any Ohio State employees acted recklessly.

to define the jurisdiction of the Court of Claims). Id.

The General Assembly has expressly limited the original jurisdiction of the Court of Claims to those cases in which the defendant is the state:

The only defendant in original actions in the court of claims is the state.

O.R.C. § 2743.02(E). Additionally, if the state files a third-party complaint, crossclaim or counterclaim in an original case in the Court of Claims, the Court has jurisdiction over such non-original claims. See O.R.C. § 2743.02(E). Similarly, if a defendant in a Court of Common Pleas case files a counterclaim against the state, or, names the state as a third-party defendant, such action may then be removed to the Court of Claims. See O.R.C. § 2743.03(E). ***Significantly, in all of the above circumstances, the state must be a party before the Court of Claims can exercise jurisdiction.*** Stated another way, the Court of Claims has no jurisdiction to hear matters which do not involve the state as a party. See Dalton v. Bureau of Criminal Identification and Investigation, 39 Ohio App. 3d 123, 125 (1987) (“we have held that the state is the only proper defendant in the Court of Claims in an original action”); Wirick v. Transport America, 10th Dist. No. 01AP-1268, 2002-Ohio-3619, *3 (“As a court of limited jurisdiction, the Court of Claims can try claims against the state and claims against other parties that come before it as a result of the state’s third-party complaint in an original action”).

The above long standing rule was the basis for a December 19, 2013 decision by the Court of Appeals for Franklin County affirming that the Court of Claims’ jurisdiction is limited to actions involving the state. In Littleton v. Holmes Siding Contractor, Ltd. et al., 10th Dist. No. 13AP-138, the plaintiffs filed suit in the Court of Common Pleas for Holmes County alleging that Judy Littleton had suffered injuries as a result of an automobile accident. Littleton, at ¶ 2 (attached as Exhibit A). The complaint named two companies, three individuals, and the driver

of the other vehicle at the time of the accident. Id. One of the defendants sought leave to file a third-party complaint against the Ohio Department of Transportation (“ODOT”), but the trial court denied the motion. Id. at ¶ 3. The same defendant then filed a third-party complaint for contribution and indemnification against ODOT and a petition for removal *in the Court of Claims*. Id. at ¶ 4. ODOT filed a motion to dismiss the third-party complaint in the Court of Claims arguing that the Court of Claims did not have jurisdiction because a third-party complaint had not been filed against ODOT *in the Court of Common Pleas for Holmes County*. The motion to dismiss was initially denied, but later granted upon a *sua sponte* review by the Court of Claims. Id. at ¶¶ 4 and 7. On appeal, the Tenth District Court of Appeals upheld the dismissal of the case and found *the Court of Claims did not have jurisdiction because the Holmes County case was “exclusively between private individuals and entities.”* Id. at ¶ 9.

Here, Ohio State has not filed a third-party complaint or a counterclaim in the case at bar. Likewise, the defendants in the Cuyahoga/Franklin County matter have not filed third-party claims against Ohio State. See Franklin County Docket attached as Exhibit B; Cuyahoga County Docket attached as Exhibit C. Thus, the Court of Claims has no basis to exercise jurisdiction over the Cuyahoga/Franklin County defendants. Wirick v. Transport America, 10th Dist. No. 01AP-1268, 2002-Ohio-3619, *3 (“As a court of limited jurisdiction, the Court of Claims can try claims against the state and claims against other parties that come before it as a result of the state’s third-party complaint in an original action”).³ Despite this, plaintiffs argue Civil Rule 20

³ See also Thomas v. Wright State Physicians, Inc., 10th Dist. No. 12AP-839, 2013-Ohio-3338, ¶ 4 (“As the Court of Claims stated in its entry, pursuant to R.C. 2743.02(E), only state agencies and instrumentalities can be defendants in original actions in the Court of Claims.”); Rahman v. Ohio Dept. of Transp., 10th Dist. No. 05AP-439, 2006-Ohio-3013, fn. 1 (“In the complaint, appellants asserted identical claims against ODOT’s contractor, Kenmore Construction Company, Inc. (‘Kenmore’). The court sua sponte dismissed Kenmore as a party pursuant to R.C. 2743.02(E)”); DVCC, Inc. v. Med. College of Ohio, 10th Dist. No. 05AP-237, 2006-Ohio-945, ¶ 8 (“Because SFT, Inc. was not a state agency or instrumentality as required under R.C. 2743.02(E), the Court of Claims by pre-screening entry sua sponte dismissed SFT, Inc. as a party”); Smith v. Ohio Dept. of Rehab. & Corr., 104 Ohio App.3d 210, 212 (10th Dist.1995) (“Pursuant to R.C. 2743.02(E), the individuals named in appellant’s complaint

authorizes the Court to join the Cuyahoga/Franklin County defendants in this matter. Plaintiffs' argument ignores that before the Court can take such action, *it must first be able to exercise jurisdiction over the claims brought against those defendants.* See American Federation of State, County and Municipal Employees v. Blue Cross of Central Ohio, 414 N.E.2d 435, 64 Ohio App.2d 262, 265 (10th Dist. 1979) (finding the Court of Claims can exercise its powers only if it has jurisdiction over a case). The Court of Claims has no such jurisdictional basis, however, and cannot do what plaintiffs ask. See Dalton, 39 Ohio App.3d at 125 (“While plaintiff urges us to permit joinder of a non[-]state defendant in the Court of Claims of Ohio, plaintiff’s argument runs directly contrary to the foregoing authority and we decline plaintiff’s invitation to do so”).

Plaintiffs argue Civil Rules 20 and 21 are not *inconsistent* with Chapter 2743, the Chapter of the Revised Code which created and governs the Court of Claims. See Plaintiffs’ Motion to Order Joinder at 16. Plaintiffs must make this argument because the legislature expressly has stated that Civil Rules *inconsistent* with Chapter 2743 have no applicability: “[T]he Rules of Civil Procedure [] govern practice and procedure in all actions in the court of claims, *except* insofar as inconsistent with this chapter.” See O.R.C. § 2743.03(D)(emphasis added). In support of their position, plaintiffs cite State ex rel. Moritz v. Troop, 44 Ohio St.2d 90 (1975) and Basham v. Jackson, 54 Ohio St.2d 366 (1978), two approximately 35 year old cases which addressed the relationship between Civil Rule 20 and Chapter 2743 prior to significant amendments to Chapter 2743 effective February, 1978. These 1978 amendments changed Chapter 2743 to expressly state that the Court of Claims’ jurisdiction is limited to actions in which the state is a party. See Wirth v. Ohio Department of Transportation, 10th Dist. No. 78AP-

were dismissed inasmuch as only state agencies and instrumentalities can be defendants in original actions in the Ohio Court of Claims’); Bugh v. Grafton Correctional Inst., 10th Dist. No. 06AP-545, 2006-Ohio-6641, ¶ 19 (holding that the trial court did not err by denying plaintiff’s motion to add a private party as a defendant because only the state may be the original defendant in an action filed in the Court of Claims).

838, 1979 WL 209152, *4 (attached as Exhibit D). The amendments were not effective at the time Moritz and Basham accrued, and therefore, were not considered by the Supreme Court when reaching those decisions. See Basham v. Jackson, 51 Ohio App.2d 100 (10th Dist. 1977); Moritz, 44 Ohio St.2d 90 (1975). After the amendments, all of the Civil Rules related to joinder, including Rules 20 and 21, are inconsistent with Chapter 2743. As stated by the Court of Appeals for Franklin County when examining compulsory joinder pursuant to Civil Rule 19:

In the second issue presented by plaintiff's assignment of error, plaintiff argues that even if the common pleas court is not the state for purposes of R.C. Chapter 2743, the common pleas court should be joined in an action against BCI in the Court of Claims under Civ.R. 20(A). Again, this court has addressed the issue of joinder under R.C. Chapter 2743. In so doing, we have held that the state is the only proper defendant in the Court of Claims in an original action.*** While plaintiff urges us to permit joinder of a nonstate defendant in the Court of Claims of Ohio, plaintiff's argument runs directly contrary to the foregoing authority and we decline plaintiff's invitation to do so.

Tiemann v. Univ. of Cincinnati, 127 Ohio App.3d 312, 320 (10th Dist. 1998) (internal citations omitted, abrogated by R.C. § 2743.02(F) on other grounds).

Since the amendments to Chapter 2743, the Court of Claims has repeatedly held it does not have jurisdiction to join non-state entities. See id. (holding that while joinder may be proper in the court of common pleas, joinder of a non-party is not permitted in the Court of Claims pursuant to Rule 19); Wirth, 1979 WL 209152 at *4 (holding non-state defendants may not be joined to an action against the state in the Court of Claims). In Dalton, the plaintiff brought suit against the Bureau of Criminal Investigation and the Court of Common Pleas for Cuyahoga County. Dalton, 39 Ohio App. 3d at 124. The Court of Claims dismissed the Court of Common Pleas defendant for lack of subject matter jurisdiction and plaintiff appealed. Id. The Court of Appeals for Franklin County determined that Common Pleas Courts are "not within the

definition of ‘state’ under the language of R.C. 2743.01,” and therefore, the Court of Claims lacked jurisdiction to hear the plaintiffs’ claims against the Cuyahoga County Court. *Id.* at 125. Due to that lack of jurisdiction, the Court of Appeals also held that the Cuyahoga County Court *could not be joined pursuant to Civil Rule 20. Id.*

In summary, the state must be a party to an action for the Court of Claims to exercise jurisdiction. Ohio State is not a party to the Cuyahoga/Franklin County matter. Plaintiffs are not permitted to circumvent long standing jurisdictional limitations governing the Court of Claims by joining non-state entities from the Cuyahoga/Franklin matter in the instant case. Plaintiffs’ Motion should be denied.

B. Plaintiffs’ Arguments Why Joinder Is Proper Ignore That The Court Of Claims Lacks Jurisdiction To Adjudicate Plaintiffs’ Claims Against the Cuyahoga/Franklin County Defendants.

Plaintiffs advance numerous arguments as to why they are permitted to join the Cuyahoga/Franklin County defendants into the instant action. All of their positions completely ignore, however, the underlying jurisdictional question discussed above. For this reason alone, all fail. They also are incorrect for other reasons. For example, plaintiffs claim that the last sentence of O.R.C. § 2743.03(A) demonstrates that the statute “contemplates circumstances where cases in the Court of Claims would include non-state defendants,” and, that O.R.C. § 2743.11, which relates to jury trials in the Court of Claims, demonstrates non-state parties may be defendants in the Court of Claims. See Plaintiffs’ Motion to Order Joinder at 14. The sections plaintiffs reference are limited to circumstances in which the state itself files a third-party complaint, crossclaim or counterclaim in the Court of Claims, or a defendant in the Court of Common Pleas brings a third-party complaint or counterclaim against the state and removes the case to the Court of Claims. No such procedural actions have occurred here.

Plaintiffs also claim that Ohio State's participation in discovery and attendance at site inspections supports their Motion. That is not so. The fact Ohio State complied with this Court's February 22, 2013 Order to commence *discovery* is irrelevant to the *jurisdictional* issue before the Court. Ohio State had to attend the site inspections because they took place on its campus. In regard to depositions, plaintiffs noticed them in both cases, meaning parties from both cases had no choice but to attend. Related to written discovery, plaintiffs did not send Ohio State the discovery requests served on the Cuyahoga/Franklin County defendants, and to the best of Ohio State's knowledge, did not send the discovery requests served on Ohio State to the Cuyahoga/Franklin County defendants. Further, plaintiffs recently served multiple expert reports on the Cuyahoga/Franklin County defendants, but did not provide any to Ohio State.

Plaintiffs did request that Ohio State file cross-claims against the Cuyahoga/Franklin County defendants. From a procedural standpoint, Ohio State cannot file cross-claims against non-parties. It could only have filed third-party claims. And, although plaintiffs now argue Ohio State's decision to not to bring third-party claims is a "shameless" and "self-serving" attempt to gain a procedural advantage, plaintiffs made no mention of joinder when they originally filed their claims against the non-state defendants in Cuyahoga County and sought to have them tried to a Cuyahoga County jury. In fact, plaintiffs claimed Gilbane was engaging in "deceit" in seeking to have venue transferred to Franklin County. See Plaintiffs' Brief in Opposition to Defendants' Motions to Change Venue and Motion to Strike Documents Attached to Defendants' Motions or Alternatively to Conduct Discovery on the Issue of Venue at 4, Cuyahoga County Case No. CV12 797704. Similarly, after the case was transferred to Franklin County, plaintiffs did not mention joinder when requesting that Judge Reece expedite the case schedule in Franklin County. See Motion to Change Discovery Schedule and Trial Date,

Franklin County Case No. 13CV-004435.

In short, the Ohio Revised Code created the Court of Claims and is clear regarding its limited jurisdiction. The Court of Claims may only hear actions involving the state. The Cuyahoga/Franklin County matter does not involve a claim against the state. See O.R.C. § 2743.02(E). Accordingly, the Court of Claims lacks jurisdiction over the claims in that matter and cannot join the Cuyahoga/Franklin County defendants. Plaintiffs' arguments do not change this fundamental fact and their Motion should be denied.

C. Civil Rule 42 Cannot Be Used To Consolidate The Claims In the Cuyahoga/Franklin County Matter With Those In The Case At Bar.

In addition to seeking joinder pursuant to Civil Rules 20 and 21, plaintiffs also seek to consolidate their claims for trial pursuant to Civil Rule 42. The effect of consolidation is the same as joinder and plaintiffs concede the reasoning used in regard to joinder is "equally applicable to the issue of consolidation." See Plaintiffs' Motion to Order Joinder at 19. Thus, for the reasons discussed above, the Court of Claims' lack of jurisdiction over plaintiffs' claims against the Cuyahoga/Franklin County defendants also is fatal to plaintiffs' request for consolidation. See Third National Bank of Circleville v. Speakman, et al., 4th Dist. Nos. 83 CA 9 & 83 CA 24, 1984 WL 3532, *2 ("We will not consolidate two cases where we have jurisdiction to hear one and no jurisdiction to hear the other")(attached as Exhibit E).

Additionally, plaintiffs' request for consolidation should be denied for other reasons. Plaintiffs say consolidation "does not merge the suits into a single cause ... or make those who are parties in one suit parties in another." See Plaintiffs' Motion to Order Joinder at 20 (quoting Transcon Builders, Inc. v. City of Lorain, 9th Dist. No. 2372, 1976 WL 188750). Thus, if permitted, consolidation would result in the Court of Claims exercising jurisdiction over a case in which the state is not a party. This is in direct contradiction to Chapter 2743 and the limited

jurisdiction it provides.

Plaintiffs also ignore that Civil Rule 42 relates to consolidating cases pending in “a court,” *singular*, and may not be used to consolidate cases pending in different courts, *plural*. See Kocinski v. Reynolds, 6th Dist. No. L-99-1318, 2000 WL 1132778, *5 (“Civ. R. 42 does not provide for consolidation of cases from different courts”)(attached as Exhibit F); Appalachian Power Co. v. Region Properties, Inc., 364 F.Supp. 1273 (W.D. Va. 1973) (Interpreting Federal Rule of Civil Procedure 42 and holding a court “has no authority to consolidate an action of which it has jurisdiction with one of which it does not”). Related to the impropriety of consolidating cases pending in different courts, plaintiffs cite to Clark v. McCauley, 5th Dist. No. 2010CA00131, 2010-Ohio-5137, and claim it stands for the proposition that cases pending in two different courts can be consolidated. In point of fact, Clark did not involve two different courts. Instead, in Clark, a case pending before the Probate Division of the Court of Common Pleas for Stark County was consolidated with a case pending in the General Division of the same court. A county’s “Probate Court” is a *division* of the county’s Court of Common Pleas, and *not* a separate court. See Ohio Const. § 4.04(c) (“there shall be a probate division and such other divisions of the court of common pleas as may be provided by law”). Thus, in Clark, the Probate Division of the Court of Common Pleas for Stark County exercised jurisdiction over claims already pending in the General Division of the Court of Common Pleas for Stark County. See Clark at ¶ 24. No such congruity exists here. The Court of Claims and the Court of Common Pleas for Franklin County are separate courts, with the Court of Claims having been created by the General Assembly and the Court of Common Pleas by the Constitution of the State of Ohio. See Ohio Const. § 4.04(c); see also O.R.C. § 2743.03.

Additionally, contrary to plaintiffs’ claim that consolidation would save time and money,

the opposite is true. If consolidated for trial, confusion and complication will ensue. The Court will be deciding issues as to Ohio State. The Cuyahoga/Franklin County defendants will be entitled to have a jury decide the issues against them. What should be a simple bench trial in the Court of Claims will devolve into two separate trials taking place at the same time which involve differing evidentiary issues, jury instructions for the non-state defendants but not Ohio State, and confusion of the jury as to what they are deciding, to list just a few.

O.R.C. § 2743.02(E) is clear, the Court of Claims has jurisdiction only over actions involving the state and no others. Ohio State is not a party to the Cuyahoga/Franklin County action, and it may not be consolidated with the instant matter for trial. To allow otherwise would result in the Court of Claims improperly exercising jurisdiction over non-state entities.

III. CONCLUSION.

Plaintiffs' arguments were mooted 35 years ago by the amendments to Chapter 2743. The Court of Claims has no jurisdiction over the non-state defendants in the Cuyahoga/Franklin County matter. Accordingly, Plaintiffs' Motion to Order Joinder of Parties or, in the Alternative, to Consolidate Cases for Purposes of Trial should be denied.

Respectfully submitted,

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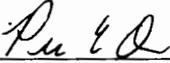
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CERTIFICATE OF SERVICE

I certify that a copy of The Ohio State University's Memorandum In Opposition To Plaintiffs' Motion To Order Joinder Of Parties, Or In The Alternative, To Consolidate Cases For Purposes Of Trial was served this 20th day of December, 2013 by regular U.S. Mail on:

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Judy K. Littleton et al., :
Plaintiffs-Appellees, :
v. :
Holmes Siding Contractor, Ltd. et al., : No. 13AP-138
(C.C. No. 2012-03972-PR)
Defendants-Appellees, : (REGULAR CALENDAR)
Gilliano Motor Transport, Inc. et al., :
Defendants/Third-Party :
Plaintiffs-Appellants, :
Ohio Department of Transportation, :
Third-Party :
Defendant-Appellee. :

D E C I S I O N

Rendered on December 19, 2013

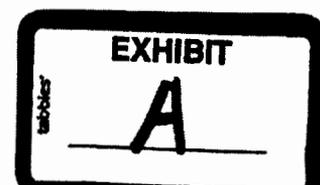
Stark & Knoll Co., LPA, Harry A. Tipping and Christopher A. Tipping, for defendants/third-party plaintiffs-appellants.

Michael DeWine, Attorney General, *Peter E. DeMarco* and *Craig S. Rapp*, for third-party defendant-appellee.

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶ 1} Defendants/third-party plaintiffs-appellants, Gilliano Motor Transport, Inc. ("Gilliano"), and Theodore Glancy, Jr. ("Glancy") (collectively, "appellants"), appeal from a judgment of the Court of Claims of Ohio granting a motion to dismiss filed by third-party defendant-appellee, Ohio Department of Transportation ("appellee"). Because we



conclude that the Court of Claims properly granted the motion to dismiss and remanded the case to the Holmes County Court of Common Pleas, we affirm.

{¶ 2} The litigation leading to this appeal began when Judy and Gary Littleton ("the Littletons") filed suit in the Holmes County Court of Common Pleas. In their complaint, the Littletons asserted that Judy Littleton suffered injuries as a result of an automobile accident involving Glancy. The Littletons claimed that Glancy was operating within the scope of his employment with Gilliano at the time of the accident. The complaint named Gilliano and Glancy as defendants, along with Holmes Siding Contractor, Inc. ("Holmes Siding"), Daniel D. Mast ("Mast"), and two "John Doe" parties.

{¶ 3} Gilliano and Glancy filed a motion for leave to file a third-party complaint against appellee, claiming that appellee negligently failed to place proper signage in the area where the accident occurred and that appellee was liable for contribution and indemnification. The Littletons filed a memorandum in opposition to the motion for leave to file a third-party complaint, arguing that the court lacked jurisdiction over appellee and that appellants were required to file a separate action in the Court of Claims of Ohio. The Holmes County Court of Common Pleas denied the motion for leave "for good cause shown," but without elaborating further on its reasoning.

{¶ 4} Appellants then filed a third-party complaint for contribution and indemnity and petition for removal in the Court of Claims of Ohio. The case was assigned to Judge Joseph T. Clark. The third-party complaint named appellee, the Littletons, Holmes Siding, Mast, and the two John Doe parties as defendants. Appellee filed a motion to dismiss the third-party complaint for lack of subject-matter jurisdiction, arguing that, because appellee was not made a third-party defendant in the Holmes County case, the Court of Claims lacked jurisdiction under the statutory provision defining the court's jurisdiction. Judge Clark denied the motion to dismiss, concluding that the petition for removal was technically flawed, but that removal of the case was within the spirit of the removal statute. The case was later transferred to Judge Patrick McGrath. Following the transfer, Judge McGrath sua sponte revisited the court's prior decision on the motion to dismiss and entered a new judgment granting the motion to dismiss and remanding the case to the Holmes County Court of Common Pleas.

{¶ 5} Appellants appeal from the dismissal order, assigning a single error for this court's review:

The trial court committed reversible error by *sua sponte* revisiting Judge Clark's July 27, 2012 order denying ODOT's motion to dismiss, and concluding that removal was not justified because ODOT was never made a third-party defendant in the Holmes County Court of Common Pleas, and dismissing and remanding the case to the court of common pleas.

{¶ 6} The Court of Claims initially denied appellee's motion to dismiss before *sua sponte* reconsidering that decision and ultimately granting the motion to dismiss and remanding the case to the Holmes County Court of Common Pleas. The initial order denying appellee's motion to dismiss was an interlocutory order and was subject to revision prior to final judgment. *See Gahanna v. Cameron*, 10th Dist. No. 02AP-255, 2002-Ohio-6959, ¶ 38 ("[I]t is well-established that the common pleas court's denial of a motion to dismiss generally constitutes an interlocutory order that is not immediately appealable. * * * Interlocutory orders are subject to change or revision by the trial court any time prior to the issuance of a final judgment.") (internal citations omitted). *See also Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 12AP-647, 2013-Ohio-3890, ¶ 27 ("A court may reconsider and revise an interlocutory decision at any time before the entry of final judgment, either *sua sponte* or upon motion."). Therefore, the Court of Claims did not err by *sua sponte* revisiting its earlier order denying the motion to dismiss. With respect to the court's ruling in the second order, we review *de novo* the decision to dismiss for lack of subject-matter jurisdiction and remand to the Holmes County Court of Common Pleas. *Lucki v. Ohio Dept. of Rehab. & Corr.*, 197 Ohio App.3d 108, 2011-Ohio-5404, ¶ 7 (10th Dist.).

{¶ 7} In the initial order denying appellee's motion to dismiss, Judge Clark acknowledged that appellee had not been made a third-party defendant in the Holmes County case. He concluded, however, that this was merely a technical flaw in the removal petition and that removal of the case to the Court of Claims would lead to an expeditious resolution of all claims and defenses and was within the spirit of the removal statute. In the second order, which granted the motion to dismiss and ordered the case to be remanded, Judge McGrath held that the court was required to remand the case because it

fell outside the jurisdiction of the Court of Claims. Appellants assert that the trial court erred in dismissing the case, arguing that dismissal and remand were permitted, but not mandatory, under the portion of R.C. 2743.03(E)(2) providing that "[t]he court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal."

{¶ 8} The Court of Claims is a court of limited jurisdiction and may exercise only that jurisdiction specifically conferred upon it by the General Assembly. *Steward v. State*, 8 Ohio App.3d 297, 299 (10th Dist.1983). By statute, the Court of Claims "has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code, exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims, and jurisdiction to hear appeals from the decisions of the court of claims commissioners." R.C. 2743.03(A)(1). In this case, appellants sought to invoke the court's jurisdiction through removal of the case they originally filed in the Holmes County Court of Common Pleas. The statute defining the jurisdiction of the Court of Claims provides, in relevant part, that a party who "makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims." R.C. 2743.03(E)(1). The statute further states that "[t]he court of claims shall adjudicate all civil actions removed," but also provides that "[t]he court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that *the state is no longer a party*." (Emphasis added.) R.C. 2743.03(E)(2).

{¶ 9} Appellants sought leave to file a third-party complaint against appellee, but that motion was denied. Accordingly, appellants did not make the state a third-party defendant and, therefore, they were not entitled to file a petition for removal under R.C. 2743.03(E)(1). Because the Holmes County Court of Common Pleas denied appellants' motion for leave to file the third-party complaint, at the time of the petition for removal, this was a case exclusively between private individuals and entities. "The Court of Claims is not the proper forum for an action against private individuals." *Pratt v. Unknown*, 10th Dist. No. 93AP-355 (Aug. 5, 1993), fn. 1. The case was outside the court's jurisdiction, as

defined under R.C. 2743.03(A)(1), and, therefore, the court did not err in concluding it was necessary to remand the case to the common pleas court.

{¶ 10} Appellants also cite to the decisions in *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396 (1992), and *Hitch v. Ohio Dept. of Mental Health*, 114 Ohio App.3d 229 (10th Dist.1996), in support of their assertion that the Court of Claims erred by remanding their case. We conclude that each of these decisions is distinguishable from the present case.

{¶ 11} In *Nease*, the plaintiffs originally filed suit in the court of common pleas against the Medical College of Ohio and its hospital, along with several nurses and physicians of the hospital. *Nease* at 396. The case was then removed to the Court of Claims. Following removal, the plaintiffs entered into a settlement agreement dismissing their claims against the Medical College of Ohio and its hospital, and some of the nurses. *Id.* at 397. The Court of Claims then conducted a trial to determine whether the remaining nurse defendant was entitled to statutory immunity. *Id.* As the Supreme Court of Ohio noted, removal of the case to the Court of Claims was required because the state was a defendant and the Court of Claims had exclusive original jurisdiction over claims against the state. *Id.* at 398. The Supreme Court of Ohio rejected the plaintiffs' argument that the Court of Claims was required to remand the case after the state had been dismissed as a party under the settlement agreement, explaining that, under R.C. 2743.03(E)(2), remand was permissive, not mandatory. *Id.* at 399. The Supreme Court held that the Court of Claims correctly retained jurisdiction over the case until the issue of the remaining nurse defendant's immunity was resolved and then properly remanded the case to the court of common pleas once that issue was determined. *Id.* at 399-400.

{¶ 12} Unlike in *Nease*, the Littletons' filing in the common pleas court did not name appellee, or any other state agency, as a defendant. In this case, appellants were unsuccessful in seeking to add appellee as a third-party defendant in the common pleas court case. The case in *Nease* was within the Court of Claims' removal jurisdiction because the state was a defendant in the original filing; by contrast, this case never fell within the court's removal jurisdiction. Accordingly, we conclude that *Nease* does not require reversal of the trial court's decision in this case.

{¶ 13} Similarly, the *Hitch* decision is distinguishable from the present case. On appeal in *Hitch*, the state agency argued that a third-party complaint against it should not have been tried by the Court of Claims because a petition to remove the third-party complaint was never filed. *Hitch* at 244. However, this court concluded that no reversible error occurred because the state agency was aware of the removal of the case to the Court of Claims and did not challenge the procedural propriety of the transfer. *Id.* By contrast, in this case, appellee has directly opposed removal of the case to the Court of Claims. Additionally, in *Hitch*, the third-party plaintiffs successfully filed their third-party complaint in the common pleas court prior to removal to the Court of Claims; whereas, in this case, appellants' motion to file their third-party complaint was denied.

{¶ 14} Moreover, assuming for the purposes of analysis that appellants are correct that remand in this case was permissive, rather than mandatory, we conclude that they have failed to demonstrate an abuse of discretion by the Court of Claims in remanding the case. If remand was permissive, we would review the trial court's decision to remand the case for an abuse of discretion. *See, e.g., State ex rel. Montgomery v. Columbus*, 10th Dist. No. 02AP-963, 2003-Ohio-2658, ¶ 30 (holding that a trial court's decision to deny discretionary or permissive intervention is subject to abuse-of-discretion review). An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An unreasonable decision is one that is unsupported by sound reasoning; an arbitrary decision is one that lacks adequate determining principle and is not governed by any fixed rules or standard. *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, ¶ 11. An unconscionable decision may be defined as one that affronts the sense of justice, decency, or reasonableness. *Id.* The decision dismissing and remanding this case to the court of common pleas was supported by sound reasoning and based on a determining principle. The court concluded that the case was outside its statutory jurisdiction and, as explained above, we are persuaded by the court's reasoning. Moreover, the decision does not affront the sense of justice. Appellants are not precluded from recovering compensation by the trial court's decision. On remand to the common pleas court, appellants may once again seek to file a third-party complaint against appellee and, if leave to file the complaint is granted, once again seek to remove the case

to the Court of Claims. In the alternative, if appellants are ultimately held liable on the Littletons' underlying claims, they may then seek contribution or indemnification from appellee. Therefore, we conclude that, even if appellants were correct that dismissal and remand in this case was permissive, they have failed to demonstrate that the trial court abused its discretion by granting the motion to dismiss and remanding the case to the common pleas court.

{¶ 15} Finally, appellants argue that the Court of Claims could have construed their third-party complaint for contribution and petition for removal as an original action against appellee. They assert that, if construed as an original action, the filing would have vested the Court of Claims with jurisdiction over the case. The nature of appellants' filing, however, belies this claim. In addition to appellee, the filing named the Littletons and all of the other defendants in the Holmes County case as defendants. None of these parties would be proper defendants in an original filing in the Court of Claims. Under R.C. 2743.02(E), "[t]he only defendant in original actions in the court of claims is the state." *See also Thomas v. Wright State Physicians, Inc.*, 10th Dist. No. 12AP-839, 2013-Ohio-3338, ¶ 4 ("As the Court of Claims stated in its entry, pursuant to R.C. 2743.02(E), only state agencies and instrumentalities can be defendants in original actions in the Court of Claims."). Accordingly, if the Court of Claims had construed the filing as an original action against appellee, all of the other parties would have been dismissed. *See Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, fn. 1 ("In the complaint, appellants asserted identical claims against ODOT's contractor, Kenmore Construction Company, Inc. ('Kenmore'). The court sua sponte dismissed Kenmore as a party pursuant to R.C. 2743.02(E)."); *DVCC, Inc. v. Med. College of Ohio*, 10th Dist. No. 05AP-237, 2006-Ohio-945, ¶ 8 ("Because SFT, Inc. was not a state agency or instrumentality as required under R.C. 2743.02(E), the Court of Claims by pre-screening entry sua sponte dismissed SFT, Inc. as a party."); *Smith v. Ohio Dept. of Rehab. & Corr.*, 104 Ohio App.3d 210, 212 (10th Dist.1995) ("Pursuant to R.C. 2743.02(E), the individuals named in appellant's complaint were dismissed inasmuch as only state agencies and instrumentalities can be defendants in original actions in the Ohio Court of Claims."). *See also Bugh v. Grafton Correctional Inst.*, 10th Dist. No. 06AP-454, 2006-Ohio-6641, ¶ 19 (holding that the trial court did not err by denying plaintiff's motion to add a private party

as a defendant because only the state may be the original defendant in an action filed in the Court of Claims). Under these circumstances, the trial court did not err by declining to construe the filing as an original action against appellee.

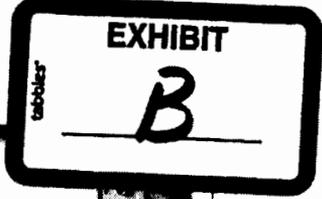
{¶ 16} As explained above, at the time the third-party complaint and petition for removal was filed, this case was not within the jurisdiction of the Court of Claims. Accordingly, we conclude that the court did not err by granting appellee's motion to dismiss and remanding the case to the Holmes County Court of Common Pleas.

{¶ 17} For the foregoing reasons, we overrule appellants' sole assignment of error and affirm the judgment of the Court of Claims of Ohio.

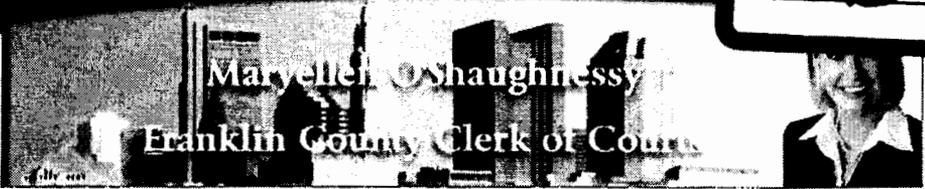
Judgment affirmed.

KLATT, P.J., and GREY, J., concur.

GREY, J., retired of the Fourth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).



Appeals 373 S. High St., 23rd Fl. (614) 525 - 3624
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CIVIL CASE DETAIL

CASE NUMBER 13 CV 004435	TYPE of CASE PERSONAL INJURY	STATUS ACTIVE	DATE FILED 04/22/2013
JUDGE GUY L REECE II	COURTROOM COURTROOM 6A 345 SOUTH HIGH STREET 6TH FLOOR COLUMBUS, OH 43215		

PLAINTIFF(S)	
Name	Attorney
<input type="checkbox"/> JAMES DANIEL HUGHES	MARC G PERA
<input type="checkbox"/> JAMES DAVID HUGHES	MARC G PERA
<input type="checkbox"/> KELLEY DAWN HUGHES	MARC G PERA
<input type="checkbox"/> JOSHUA MICHAEL HUGHES MNR	MARC G PERA
<input type="checkbox"/> KAITLYN E HUGHES MNR	MARC G PERA
<input type="checkbox"/> KRYSTEN MARIE HUGHES MNR	MARC G PERA

DEFENDANT(S)	
Name	Attorney
<input type="checkbox"/> CT CORPORATIONS SYSTEMS	NO ATTORNEY ON RECORD
<input type="checkbox"/> GILBANE BUILDING COMPANY	MICHAEL J VALENTINE
<input type="checkbox"/> BURT HILL	PATRICK C BOOTH
<input type="checkbox"/> PELLI CLARKE PELLI	DARRIN R TONEY
<input type="checkbox"/> MONESI TRUCKING & EQUIPMENT REPAIR INC	DANIEL G TAYLOR
<input type="checkbox"/> MCDANIELS CONSTRUCTION CORP INC	PATRICK M ROCHE
<input type="checkbox"/> BAKER CONCRETE CONSTRUCTION INC	CHRISTOPHER J WEBER
<input type="checkbox"/> BAKER CONCRETE STRUCTURES LLC	NO ATTORNEY ON RECORD
<input type="checkbox"/> ISAAC HINTON	DANIEL G TAYLOR

CASE SCHEDULE

Date	Description
04/22/13	CASE FILED
07/09/13	INITIAL STATUS CONFERENCE
09/17/13	INITIAL JOINT DISCLOSURE OF ALL WITNESSES
11/12/13	SUPPLEMENTAL JOINT DISCLOSURE OF ALL WITNESSES
11/26/13	TRIAL CONFIRMATION DATE
02/04/14	DISPOSITIVE MOTIONS
02/18/14	DISCOVERY CUT-OFF
04/01/14	DECISIONS ON MOTIONS
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05/19/14	TRIAL ASSIGNMENT

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CASE INFORMATION

CV-12-797704 JAMES DANIEL HUGHES - ET AL. vs. CT CORPORATIONS SYSTEMS - ET AL.

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08/28/2013	P1	\$\$	PAYMENT ON ACCOUNT MADE ON BEHALF OF HUGHES/JAMES/DANIEL IN THE AMOUNT OF \$144.97	
05/07/2013	N/A	CS	COURT COST ASSESSED JAMES DANIEL HUGHES BILL AMOUNT 434.97 PAID AMOUNT 290 AMOUNT DUE 144.97	
04/17/2013	N/A	SR	CERTIFIED MAIL RETURN RECEIPT NUMBER 7011 1570 0002 7505 8757 RETURNED BY THE U.S.POSTAL SERVICE ON 04/17/2013 MAIL RECEIVED AT ADDRESS AND SIGNED FOR ON 04/17/2013	
04/08/2013	P1	CS	CLERK FEE POSTAGE ON TRANSFER TO FRANKLIN COUNTY	
04/08/2013	P1	SR	04-08-2013; CASE TRANSFERRED TO FRANKLIN COUNTY COMMON PLEAS COURT, PER JE DATED 03-28-2013, CERTIFIED NO 7011-1570-0002-7505-8757.....	
03/28/2013	N/A	JE	MOTION OF GILBANE BUILDING COMPANY TO TRANSFER FOR IMPROPER VENUE IS GRANTED. THE CLERK OF COURTS SHALL TRANSFER THIS ACTION TO THE COMMON PLEAS COURT OF FRANKLIN COUNTY. COSTS TO PLAINTIFF. COURT COST ASSESSED TO THE PLAINTIFF(S). NOTICE ISSUED	
03/27/2013	N/A	JE	GILBANE DEFENDANTS' MOTION (FILED 3/25/2013) FOR LEAVE TO FILE REPLY IN SUPPORT OF GILBANE'S MOTION TO CHANGE VENUE AND MEMO IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DOCUMENTS ATTACHED TO DEFENDANT'S MOTION TO CHANGE VENUE AND MEMO IN OPPOSITION TO PLAINTIFFS' REQUEST TO CONDUCT DISCOVERY ON ISSUE OF VENUE, IS GRANTED. NOTICE ISSUED	
03/27/2013	D9	MO	D9 BAKER CONCRETE CONSTRUCTION INC MOTION FOR LEAVE TO FILE A REPLY IN FURTHER SUPPORT OF ITS MOTION TO CHANGE VENUE INSTANTER CHRISTOPHER J WEBER 0059270 04/09/2013 - UNKNOWN	
03/26/2013	N/A	JE	3/12/13. PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT BURT HILL PURSUANT TO 41(A)(1)(A) OF THE OHIO RULES OF CIVIL PROCEDURE. OSJ. NOTICE ISSUED	
03/25/2013	D	MO	DEFENDANT(S) GILBANE BUILDING COMPANY(D2), GILBANE DEVELOPEMENT COMPANY(D3) and GILBANE INC(D4) MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF GILBANE'S MOTION TO CHANGE VENUE AND MEMO IN OPPOSITION PLTS' MOTION TO STRIKE DOCUMENTS ATTACHED TO DEFT'S MOTION TO CHANGE VENUE AND MEMO IN OPPOSITION PLTF'S REQUEST TO CONDUCT DISCOVERY ON ISSUE OF VENUE MICHAEL J VALENTINE 0038806 03/27/2013 - GRANTED	
03/18/2013	N/A	JE	PLAINTIFFS' MOTION (FILED 3/8/13) FOR EXTENSION OF TIME UNTIL MARCH 15, 2013 TO FILE OPPOSITION BRIEFS TO DEFENDANTS' MOTIONS TO CHANGE VENUE, IS GRANTED. NOTICE ISSUED	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR VALENTINE/MICHAEL/J ON 03/17/2013 17:00:25	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR EKLUND/PAUL/D ON 03/17/2013 17:00:19	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR TAYLOR/DANIEL/G. ON 03/17/2013 17:00:19	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR TONEY/DARRIN/R ON 03/17/2013 17:00:19	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR CRANDALL/STEPHEN/S ON 03/17/2013 17:00:19	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR BOOTH/PATRICK/C. ON 03/17/2013 17:00:19	
03/17/2013	N/A	SR	SCHEDULE ATTORNEY NOTICE. NOTICE GENERATED FOR WEBER/CHRISTOPHER/J ON 03/17/2013 17:00:19	
03/17/2013	N/A	SC	CASE MGMNT CONFERENCE SET FOR 04/08/2013 AT 09:45 AM.	
03/15/2013	P	BR	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) BRIEF IN OPPOSITION TO DEFTS' MOTIONS TO CHANGE VENUE AND MOTION TO STRIKE DOCUMENTS ATTACHED TO DEFTS' MOTIONS OR ALTERNATIVELY, TO CONDUCT DISCOVERY ON THE ISSUE OF VENUE. STEPHEN S CRANDALL 0063810	
03/14/2013	D	MO	DEFENDANT(S) MONESI TRUCKING & EQUIPMENT REPAIR INC(D7) and ISAAC HINTON(D11) MOTION TO CHANGE VENUE PURSUANT TO CIVIL RULE 12(B)(3) AND IVIL RULE 3) DANIEL G. TAYLOR 0041263 04/09/2013 - UNKNOWN	
03/08/2013	P	OT	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) NOTICE OF VOLUNTARY DISMISSAL OF DEFT BURT HILL PURSUANT TO 41(A)(1)(A) OF THE OHIO RULES OF CIVIL PROCEDURE. STEPHEN S CRANDALL 0063810	
03/08/2013	P	MO	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION BRIEFS TO DEFTS' MOTION TO HANGE VENUE STEPHEN S CRANDALL 0063810 03/18/2013 - GRANTED	
03/05/2013	D7	SR	CERTIFIED MAIL NUMBER 20629019 ADDRESSED TO MONESI TRUCKING & EQUIPMENT REPAIR INC(D7) NOT RETURNED BY THE U.S. POSTAL SERVICE AFTER 60 DAYS. NOTICE MAILED TO PLAINTIFF(S) ATTORNEY.	
03/04/2013	D9	MO	D9 BAKER CONCRETE CONSTRUCTION INC MOTION TO CHANGE VENUE PURSUANT TO CIV R.12(B)(3) AND CIV.R. 3(C) CHRISTOPHER J WEBER 0059270 04/09/2013 - UNKNOWN	
03/01/2013	D1	CM	COMMUNICATION FROM C T CORPORATION SYSTEM (WITH RETURNED POST CARD ATTACHED)	
02/28/2013	D	MO	DEFENDANT(S) GILBANE BUILDING COMPANY(D2), GILBANE DEVELOPEMENT COMPANY(D3) and GILBANE INC(D4) MTN TO CHANGE VENUE PURSUANT TO CIV. R. 12(B)(3) AND CIV. R. 3(B) MICHAEL J VALENTINE 0038806 03/28/2013 - GRANTED	
02/20/2013	N/A	JE	2/19/13. STIPULATION AND DISMISSAL OF DEFENDANT, CT CORPORATION, ONLY, WITHOUT PREJUDICE. OSJ. NOTICE ISSUED	
02/15/2013	P	JE	STIPULATED LEAVE TO PLEAD IS GRANTED 30 DAYS UNTIL MARCH 6, 2013 FOR DEFT PELLI ... OSJ NOTICE ISSUED	
02/15/2013	N/A	JE	2-4-13. PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT PELLI CLARKE, ONLY. OSJ. NOTICE ISSUED	

02/14/2013	P1	OT	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) STIPULATION AND DISMISSAL OF DEFT, CT CORORATION, ONLY, WITHOUT PREJUDICE. STEPHEN S CRANDALL 0063810
02/04/2013	P	OT	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) NOTICE OF VOLUNTARY DISMISSAL OF DEFT PPELLI CLARKE PELLI PURSUAN TO 41(A)(1)(A) OF THE OHIO RULES OF CIVIL PROCEDURE. STEPHEN S CRANDALL 0063810
02/04/2013	D6	OT	D6 PELLI PELLI CLARKE STIPULATED LEAVE TO PLEAD 30 DAYS OR UNTIL MARCH 6, 2013. DARRIN R TONEY 0065590
02/04/2013	D6	OT	D6 PELLI PELLI CLARKE STIPULATED LEAVE TO PLEAD 30 DAYS, OR UNTIL MARCH 6, 2013. DARRIN R TONEY 0065590
02/01/2013	P	JE	AGREED CONSENT TO MOVE OR PLEAD IS GRANTED UNTIL MARCH 1, 2013 FOR DEFTS, GILBANE UILDING COMPANY, GILBANE DEVELOPMENT COMPANY AND GILBANE, INC. ... OSJ NOTICE ISSUED
01/31/2013	D5	OT	D5 BURT HILL STIPULATION PATRICK C. BOOTH 0081229
01/31/2013	D5	OT	D5 BURT HILL NOTICE OF APPEARANCE PATRICK C. BOOTH 0081229
01/24/2013	D9	OT	D9 BAKER CONCRETE CONSTRUCTION INC AGREED CONSENT TO MOVE OR PLEAD. CHRISTOPHER J WEBER 0059270
01/22/2013	D1	SR	CERTIFIED MAIL RECEIPT NO. 20629012 RETURNED BY U.S. MAIL DEPARTMENT 01/22/2013 CT CORPORATIONS SYSTEMS MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/22/2013	D11	SR	CERTIFIED MAIL RECEIPT NO. 20629025 RETURNED BY U.S. MAIL DEPARTMENT 01/15/2013 HINTON/ISAAC/ MAIL RECEIVED AT ADDRESS 01/15/2013 SIGNED BY OTHER.
01/18/2013	N/A	CM	COMMUNICATION FROM C T CORPORATION SYSTEM (NO RETURNED POST CARD ATTACHED)
01/18/2013	N/A	CM	COMMUNICATION FROM C T CORPORATION SYSTEM (NO RETURNED POST CARD ATTACHED)
01/18/2013	N/A	JE	1-15-13. PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT BAKER CONCRETE STRUCTURES, LLC. OSJ. NOTICE ISSUED
01/17/2013	D	AN	DEFENDANT(S) MONESI TRUCKING & EQUIPMENT REPAIR INC(D7) and ISAAC HINTON(D11) ANSWER. DANIEL G. TAYLOR 0041263
01/16/2013	D	OT	DEFENDANT(S) GILBANE BUILDING COMPANY(D2), GILBANE DEVELOPEMENT COMPANY(D3) and GILBANE INC(D4) AGREED CONSENT TO MOVE OR PLEAD. MICHAEL J VALENTINE 0038806
01/16/2013	D8	AN	D8 MCDANIEL'S CONSTRUCTION CORP INC SEPARATE ANSWER TO COMPLAINT. WTH JURY DEMAND PAUL D EKLUND 0001132
01/14/2013	D1	CM	CT CORPORATION SYSTEMS COMMUNICATION. PRO SE (9999999)
01/11/2013	D6	SR	CERTIFIED MAIL RECEIPT NO. 20629018 RETURNED BY U.S. MAIL DEPARTMENT 01/11/2013 CLARKE/PELLI/PELLI MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/11/2013	P	OT	PLAINTIFF(S) JAMES DANIEL HUGHES(P1), JAMES DAVID HUGHES(P2), KELLEY DAWN HUGHES(P3), JOSHUA MICHAEL HUGHES(P4), KAITLYN ELIZABETH HUGHES(P5) and KRYSTEN MARIE HUGHES(P6) NOITCE OF VOLUNTARY DISMISSAL OF DEFT. BAKER CNCRETE STRUCTURES, LLC. STEPHEN S CRANDALL 0063810
01/10/2013	D10	SR	CERTIFIED MAIL RECEIPT NO. 20629024 RETURNED BY U.S. MAIL DEPARTMENT 01/10/2013 BAKER CONCRETE STRUCTURES LLC MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/10/2013	D8	SR	CERTIFIED MAIL RECEIPT NO. 20629021 RETURNED BY U.S. MAIL DEPARTMENT 01/09/2013 MCDANIEL'S CONSTRUCTION CORP INC MAIL RECEIVED AT ADDRESS 01/09/2013 SIGNED BY OTHER.
01/10/2013	D9	SR	CERTIFIED MAIL RECEIPT NO. 20629022 RETURNED BY U.S. MAIL DEPARTMENT 01/09/2013 BAKER CONCRETE CONSTRUCTION INC MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/10/2013	D9	SR	CERTIFIED MAIL RECEIPT NO. 20629023 RETURNED BY U.S. MAIL DEPARTMENT 01/09/2013 BAKER CONCRETE CONSTRUCTION INC MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/10/2013	D7	SR	CERTIFIED MAIL RECEIPT NO. 20629020 RETURNED BY U.S. MAIL DEPARTMENT 01/08/2013 MONESI TRUCKING & EQUIPMENT REPAIR INC MAIL RECEIVED AT ADDRESS 01/06/2013 SIGNED BY OTHER.
01/08/2013	D5	SR	CERTIFIED MAIL RECEIPT NO. 20629017 RETURNED BY U.S. MAIL DEPARTMENT 01/07/2013 HIL/BURT/ MAIL RECEIVED AT ADDRESS 01/07/2013 SIGNED BY OTHER.
01/08/2013	D1	SR	CERTIFIED MAIL RECEIPT NO. 20629013 RETURNED BY U.S. MAIL DEPARTMENT 01/07/2013 CT CORPORATIONS SYSTEMS MAIL RECEIVED AT ADDRESS 01/04/2013 SIGNED BY OTHER.
01/08/2013	D2	SR	CERTIFIED MAIL RECEIPT NO. 20629014 RETURNED BY U.S. MAIL DEPARTMENT 01/07/2013 GILBANE BUILDING COMPANY MAIL RECEIVED AT ADDRESS 01/04/2013 SIGNED BY OTHER.
01/08/2013	D4	SR	CERTIFIED MAIL RECEIPT NO. 20629016 RETURNED BY U.S. MAIL DEPARTMENT 01/07/2013 GILBANE INC MAIL RECEIVED AT ADDRESS 01/04/2013 SIGNED BY OTHER.
01/08/2013	D3	SR	CERTIFIED MAIL RECEIPT NO. 20629015 RETURNED BY U.S. MAIL DEPARTMENT 01/07/2013 GILBANE DEVELOPEMENT COMPANY MAIL RECEIVED AT ADDRESS 01/04/2013 SIGNED BY OTHER.
01/03/2013	D11	SR	SUMS COMPLAINT(20629025) SENT BY CERTIFIED MAIL. TO: ISAAC HINTON 1890 BURLINGTON AVE COLUMBUS, OH 43227-0000
01/03/2013	D10	SR	SUMS COMPLAINT(20629024) SENT BY CERTIFIED MAIL. TO: BAKER CONCRETE STRUCTURES LLC 3300 GREAT AMERICAN TOWER 301 EAST FOURTH ST CINCINNATI, OH 45202-0000
01/03/2013	D9	SR	SUMS COMPLAINT(20629023) SENT BY CERTIFIED MAIL. TO: BAKER CONCRETE CONSTRUCTION INC % ITS REG AGT NATIONAL REG AGTS INC 145 BAKER ST MARION, OH 43302-0000
01/03/2013	D9	SR	SUMS COMPLAINT(20629022) SENT BY CERTIFIED MAIL. TO: BAKER CONCRETE CONSTRUCTION INC 900 NORTH GARVER RD MONROE, OH 45050-0000
01/03/2013	D8	SR	SUMS COMPLAINT(20629021) SENT BY CERTIFIED MAIL. TO: MCDANIEL'S CONSTRUCTION CORP INC 1069 WOODLAND AVE COLUMBUS, OH 43219-0000
01/03/2013	D7	SR	SUMS COMPLAINT(20629020) SENT BY CERTIFIED MAIL. TO: MONESI TRUCKING & EQUIPMENT REPAIR INC C/O ITS REG AGT, MARLENE A MONESI 7851 WINDY HILL COURT DUBLIN, OH 43016-0000
01/03/2013	D5	SR	SUMS COMPLAINT(20629017) SENT BY CERTIFIED MAIL. TO: BURT HILL 3700 PARK EAST DR STE 200 CLEVELAND, OH 44122-0000
01/03/2013	D4	SR	SUMS COMPLAINT(20629016) SENT BY CERTIFIED MAIL. TO: GILBANE INC C/O MR MARK HILL, THE BF KEITH BLDG 1621 EUCLID AVE STE 1830 CLEVELAND, OH 44115-0000
01/03/2013	D3	SR	SUMS COMPLAINT(20629015) SENT BY CERTIFIED MAIL. TO: GILBANE DEVELOPEMENT COMPANY C/O MR MARK HILL, THE BF KEITH BLDG 1621 EUCLID AVE STE 1830 CLEVELAND, OH 44115-0000
01/03/2013	D2	SR	

1979 WL 209152

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

James Wirth, et al., Plaintiffs-Appellants,

v.

Ohio Department of Transportation, et al., Defendants-Appellees.

No. 78AP-838. | June 26, 1979.

Attorneys and Law Firms

TEAFORD, BERNARD & RICH, MR. JEFFREY A. RICH, 100 East Broad Street, Columbus, Ohio 43215, For Plaintiffs-Appellants.

MR. WILLIAM J. BROWN, Attorney General, MR. MELVIN D. WEINSTEIN, Assistant, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, For Defendant-Appellee Ohio Department of Transportation.

LANE, ALTON & HORST, MR. JACK R. ALTON and MR. DAVID WILLIAM T. CARROLL, of Counsel, 155 East Broad Street, Columbus, Ohio 43215, For Defendant-Appellee South Central Power Company.

MR. GEORGE C. SMITH, Prosecuting Attorney, MR. JAMES R. KIRK, Assistant, Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio 43215, For Defendants-Appellees Board of Township Trustees and Board of County Commissioners.

PORTER, WRIGHT, MORRIS & ARTHUR, MR. JAMES S. MONAHAN, of Counsel, 37 West Broad Street, Columbus, Ohio 43215, For Defendant-Appellee Ohio Bell Telephone Company.

Opinion

DECISION

WHITESIDE, J.

*1 Plaintiffs appeal from a judgment of the Court of Claims dismissing their complaint and raise five assignments of error, as follows:

"I. The Court erred in dismissing defendants from subject case.

"II. The Court erred in dismissing plaintiffs' complaint.

"III. The 180-day notice provision of Ohio Revised Code Section 2743.16(A) is unconstitutional unless liberally construed in favor of claimants.

"IV. The Court's decision was against the manifest weight of the evidence.

"V. The Court's decision was contrary to law."

Plaintiffs filed their complaint on October 6, 1978, alleging that plaintiff James Wirth was injured in an accident which occurred May 26, 1977, and was proximately caused by the negligence of the defendants. Joined as defendants were the Ohio Department of Transportation, South Central Power Company, Board of County Commissioners of Franklin County, Board of Township Trustees of Madison Township, and Ohio Bell Telephone Company. Although the trial court in its order stated that service had not been obtained upon the township trustees, the record indicates both service upon the trustees and their entering of an appearance by way of answer. (Service was obtained upon the clerk and two trustees, but attempted service failed as to one trustee, which apparently resulted in the erroneous reference in the Court of Claims decision to a failure of service.)

Accordingly, all defendants filed an answer to the complaint except South Central Power Company, which filed a motion to dismiss upon jurisdictional grounds, contending: (1) that it under no circumstances could be a defendant to this case since the State is the only possible defendant; and (2) that a prior action between the parties upon the same claim was previously commenced in the Common Pleas Court of Franklin County, Ohio. The latter contention does not appear upon the face of the complaint, and no evidence in support of the contention was submitted or received, although there were some exhibits attached to the motion, but the trial court at no time treated the motion as one for summary judgment.

The trial court sustained South Central's motion without indicating the basis therefor, which presumably was upon



the first ground contended since the trial court will not be presumed to have followed an improper procedure.

However, the trial court in other respects did follow an improper procedure in that the court, proceeding without a pending motion and without prior notice to plaintiffs or affording them an opportunity to be heard, dismissed the entire action. As to all other defendants except the State of Ohio, the trial court apparently found the same basis for dismissal to exist as it found with respect to South Central. If the trial court be correct as to the legal issue involved, the error as to manner of procedure would not be prejudicial.

As to the dismissal of the complaint with respect to the State of Ohio, the trial court found that the complaint was not properly filed since no notice of intention to make a claim was filed within 180 days after the accident. The trial court neither made a determination nor afforded any opportunity for a determination to be made as to whether plaintiffs should be entitled to file their complaint pursuant to the provisions of former R. C. 2743.16(D).

*2 Although under former R. C. 2743.16(A) as in effect at the time the cause of action accrued plaintiffs should have either commenced their complaint or filed a notice of intention to file a civil action within 180 days after the accrual, former R. C. 2743.16(D) clearly provides that such limitation is not absolute, but, rather, such failure merely constitutes "grounds for the court of claims in its discretion to grant a motion to dismiss the civil action after commencement of the action." The Court of Claims in this action apparently felt such a dismissal was automatic, despite many decisions of this court to the contrary in the past. As we have previously held, former R. C. 2743.16(D) expressly provides that:

"* * * Upon good cause shown, and upon a showing that the state or its appropriate agents had knowledge of the essential facts constituting the civil action prior to expiration of the one-hundred-eighty-day period, the court may permit a claimant, who has failed to timely file a written notice of intention, to file his action within two years of accrual of the cause of action."

The trial court not only failed to exercise this discretion but denied plaintiffs any opportunity to raise the issue and, accordingly, any opportunity to present evidence upon it.

Although the third defense set forth in the answer of defendant State of Ohio raises the issue as to whether or not the action was commenced within the time required by R. C. 2743.16, no action with respect thereto was required of plaintiff, at least without prior notice and opportunity to be heard.

Civ. R. 7(B)(1) requires that motions be made in writing unless during a hearing or at a trial. The requirement of a writing is satisfied "if the motion is stated in a written notice of the hearing of the motion." Similarly, Civ. R. 6(D) requires that "notice of the hearing" upon a motion "shall be served not later than seven days before the time fixed for the hearing." In short, the rules contemplate notice of hearing, in most instances to be served seven days before the hearing, with respect to all motions except that small limited group of motions which are expressly permitted to be heard *ex parte*. Such requirement for notice of hearing of necessity applies to *sua sponte* motions of the court, as well as to motions by a party, at least where as here the failure to give notice and opportunity to be heard does not comport with due process and is prejudicial. As we have noted, a judgment which is correct as a matter of law but is procedurally erroneous in that it has been entered without complying with procedural requirements will not be reversed for such procedural error because no prejudice has resulted from the error.

In this case, however, the prejudice is apparent. Plaintiffs have had no opportunity to present to the trial court their contentions as to why they believe they should be granted leave to file their complaint notwithstanding their failure to file a notice of intention within 180 days after the accident and, likewise, have been denied any opportunity to present evidence in support of those contentions. They have set forth certain contentions in their brief in this court, which if proved by evidence would constitute good cause within the contemplation of R. C. 2743.16(D) as it formerly read. The action of the Court of Claims in this case is inconsistent with numerous prior decisions of this court. *E.g.* the unreported decision rendered in *Roberts v. State*, No. 76AP-280, August 5, 1976 (1976 Decisions, page 2503), which was reported upon a second appeal as *Roberts v. State* (1978), 57 Ohio App. 2d 77. For this reason, and to this extent, the second and fifth assignments of error are well taken.

*3 The third assignment of error is not well taken, inasmuch as former R. C. 2743.16(A) has consistently been liberally construed and applied by this court in accordance with constitutional principles. It is the error of the Court of Claims in misapplying the statutory requirement, not a defect in the

statute itself, that has given rise to the erroneous dismissal of plaintiffs' complaint. They are entitled to an opportunity to demonstrate good cause for the filing of their complaint within two years after the accident occurred. This is a right granted by the statute but erroneously denied by the Court of Claims. As this court has previously held, the former statute is constitutional if properly applied by the courts. The third assignment of error is not well taken.

As to the fourth assignment of error, there was no evidence before the trial court as to any of the issues involved in this case. The trial court neither required the parties to present evidence nor afforded any opportunity for any type of evidentiary hearing. The attachments to the motion of South Central could not properly be considered unless the motion to dismiss be treated as a motion for summary judgment by the Court of Claims, and even then the attachments were not in such a form as to be considered evidence consistent with Civ. R. 56. Since there was no evidence before the Court of Claims, its decision could not be against the manifest weight thereof. The fourth assignment of error is not well taken.

The first assignment of error relates to the dismissal of all defendants other than the State of Ohio. Only defendant South Central Power filed a motion to dismiss. One of the grounds asserted in support of this motion was the alleged pendency of another action by the same plaintiffs seeking the same relief from South Central (and apparently also the other nonstate defendants) pending in the Common Pleas Court of Franklin County, Ohio. South Central contends that that court has exclusive jurisdiction, necessitating the dismissal of this action as against these defendants in accordance with *State, ex rel. Phillips, v. Polcar* (1977), 50 Ohio St. 2d 279. This may well be the ultimate result in this case. However, at this stage and upon the record on appeal before us there is no evidence or proper basis for applying the *Polcar* principle to this case. A motion for summary judgment supported by appropriate affidavits or other evidence might well reveal and indicate the lack of jurisdiction in the Court of Claims with respect to the action as against the other defendants. It is not necessary to resolve this issue in this case at this time, inasmuch as the record on appeal contains no evidence upon the issue. The pendency of the prior action does not appear upon the face of the complaint, and the mere assertion by South Central of the pendency of such action is insufficient to establish any lack of jurisdiction even when accompanied by attachment of a copy of a complaint, even if we were to accept that copy as evidence. A plaintiff may voluntarily dismiss one action and commence another. Evidence of the filing and continued

pendency of another action between the same parties seeking the same relief must be presented before the *Polcar* principle can be applied.

*4 South Central advanced a second reason in support of its motion to dismiss, which presumably is the basis upon which the Court of Claims dismissed the action as to all nonstate defendants.

Effective February, 1978, R. C. 2743.02(E) was amended to provide that: "The only defendant in original actions in the court of claims is the state. * * *" South Central contends that this provision prevents the joinder of any third persons in the Court of Claims by a plaintiff filing an action. However, the amendment to R. C. 2743.02(E) was part of a more comprehensive amendment to R. C. 2743.02 which provides that the waiver of the State of its immunity from liability is "in exchange for the complainant's waiver of his cause of action against state officers or employees." The section further provides that: "filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee." These provisions were not previously in the statute, but, instead, the state officer or employee involved could be joined as a defendant.

R. C. 2743.02(E) as amended in 1978 sets forth that neither the state agency or department nor the state officer or employee involved is a defendant in an action against the State in the Court of Claims but that, instead, the only defendant is the State. This establishes that the only necessary defendant to be named or joined to the action is the State itself.

On the other hand, R. C. 2743.03(D) provides that the Civil Rules apply to the extent that they are not inconsistent with the statutory provisions. Accordingly, R. C. 2743.02(E) negates any compulsory joinder of anyone other than the State being a necessary party-defendant in an action against the State. To the extent that they might provide otherwise, Civ. R. 19 and 19.1 are inconsistent with R. C. 2743.02(E).

Civ. R. 20(A) provides for permissive joinder, stating that:

"* * *All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any

question of law or fact common to all defendants will arise in the action. * * *

*5 No joint liability is alleged so that we need not determine the intent of R. C. 2743.02(E) in cases where the State may be jointly liable with a party other than an officer or employee of the State. Although the history of the amendment and the continued existence of certain other sections of the Code might give rise to an argument that present R. C. 2743.02(E) is not intended to preclude permissive joinder, the express language itself leaves little room for such conclusion. The provision expressly states that its application is limited to "original actions in the court of claims," thereby distinguishing the situation from that involved in actions removed to the Court of Claims pursuant to R. C. 2743.03(E). The only possible meaning of the use of the term "original actions" in R. C. 2743.02(E) must be to distinguish such an action from a "removed action." Otherwise, the word "original" would be mere surplusage and would have no meaning whatsoever.

Accordingly, we must conclude that it is the intent of R. C. 2743.02(E) to preclude the joinder in an action originally filed in the Court of Claims of any defendant who might be severally liable with the State with respect to the same claim. The apparent intent of this statute is to require a separate action to be filed as against any person severally liable with the State, even though this requirement is inconsistent with the general philosophy of modern practice and of the Civil Rules. It may well be that the Legislature intended to minimize those instances in which the Court of Claims is required to conduct jury trials, inasmuch as R. C. 2743.11 preserves the right to jury trial as to all actions not against the State itself. This may result either in two trials in the Court of Claims upon the same claim or in a single trial, with the court

itself determining the action as against the State and the jury determining the action as against any other defendant.

There would appear to be no greater danger of inconsistent verdicts by the action being conducted in different courts or at different times than there is by having two different triers of facts deciding the same case at the same time.

In any event, giving full weight to the language of R. C. 2743.02(E), we must conclude that the Court of Claims did not err in sustaining the motion of South Central Power and did not commit prejudicial error in dismissing the other nonstate defendants. For this reason, the first assignment of error is not well taken.

For the foregoing reasons, the first, third, and fourth assignments of error are overruled, and the second and fifth assignments of error are sustained; and the judgment of the Court of Claims is reversed insofar as it dismisses plaintiffs' complaint against the State of Ohio and is affirmed insofar as all other parties are dismissed from the action; and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision, with instructions to proceed to a factual determination as to whether good cause exists to allow plaintiffs leave to file their complaint in accordance with the provisions of former R. C. 2743.16(D), and that the costs of this appeal be assessed against defendant State of Ohio.

*6 *Judgment affirmed in part, reversed in part, and remanded with instructions.*

REILLY and STEPHENSON, JJ., concur.

STEPHENSON, J., of the Fourth District Court of Appeals, sitting by Assignment in the Tenth District Court of Appeals.

1984 WL 3532

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Pickaway County.

THIRD NATIONAL BANK OF CIRCLEVILLE, Plaintiff-Appellee

v.

WILLARD L. SPEAKMAN, ET AL, Defendants-Appellants

CASE NO. 83 CA 9 & 83 CA 24. | July 11, 1984.

Attorneys and Law Firms

COUNSEL FOR APPELLANT: John R. Adkins, 432 North Court St., Circleville, Ohio.

COUNSEL FOR APPELLEE: Melody L. Steely, 151 West Franklin St., Circleville, Ohio.

Opinion

JOINT OPINION

ABELE, P.J.

*1 These are two appeals from the same Pickaway County Common Pleas Court foreclosure action. Appellee moved for summary judgment with supporting affidavits. Appellant failed to oppose the motion as required by Ohio Civil Procedure Rule 56(E). See Harless v. Willis Day Warehousing Co (1978) 54 O.St. 2d 64, 66. The Court granted summary judgment on November 2, 1982.

Appellant then moved for a new trial and/or relief from judgment. The Court denied the motion in a journal entry filed January 24, 1983.

The following week, Appellant moved for reconsideration. The Court denied the motion in an opinion dated February 18, 1983, and a journal entry filed March 3, 1983.

On February 28, 1983, Appellant filed a notice of appeal as follows: "from the Judgment Entry entered in this action

November 2, 1982, from the Judgment Entry entered in this action January 25, 1983, and from the opinion dated February 18, 1983." We find no judgment entry in the record dated January 25, 1983; however we assume Appellant intended to appeal the judgment entry dated January 24, 1983.

Ohio Appellate Procedure Rule 3A and 4A provide in part: "(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(A) Appeals in civil cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof . . ."

We note Appellant failed to file his February 28, 1983, notice of appeal within thirty days of the November 2, 1982, entry and the January 24, 1983 entry. As a result, we are without jurisdiction to hear Appellant's appeal from those two judgment entries.

We are also without jurisdiction to review the opinion dated February 18, 1983. First, we recall the old rule "a court speaks through its journal." We cannot review a mere opinion. The February 18, 1983, opinion, however, was journalized on March 3, 1983, after the February 28, 1983 notice of appeal. While it's true a premature notice of appeal is treated as though filed on the date of the judgment entry, we find we must dismiss the appeal for another reason.

The March 3, 1983, judgment entry merely overruled Appellant's motion for reconsideration of the November 2, 1982, judgment entry. The Ohio Supreme Court has held motions for reconsideration are a nullity. The Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment entry. Pitts v. Dept. of Transportation (1981) 67 O.St. 2d 378. One cannot appeal a ruling on a motion for reconsideration, but must instead appeal from the final judgment sought to be reconsidered. The filing of the motion for reconsideration does not stay the running of the

thirty day appeal time. William W. Bond, Jr. and Assoc. v. Airway Development Corp. (1978) 54 O.St. 2d 363.

*2 As a result of Appellant's failure to appeal the November 2, 1982, judgment entry and the January 24, 1983, judgment entry within thirty days, we must dismiss his appeal in Case No. 83 CA 9. Now we must consider Case No. 83 CA 24.

Appellant filed his notice of appeal in Case No. 83 CA 24 on August 19, 1983. The notice states:

"Notice is hereby given that Stephen A. LeMaster hereby appeals to the Court of Appeals of Pickaway County, Ohio, Fourth Appellate District, from the Order of Confirmation and Distribution entered in this action August 15, 1983."

The substance of the appeal, however, relates not to the August 15, 1983, judgment entry, but to the November 2, 1982, judgment entry. Appellant filed the same brief for his two appeals. He assigned the following errors:

ASSIGNMENT OF ERROR I

"WHETHER THE COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFF'S REQUEST FOR SUMMARY JUDGMENT."

ASSIGNMENT OF ERROR II

"WHETHER THERE EXISTS ANY MATERIAL QUESTION OF FACT REGARDING PLAINTIFF'S MORTGAGE."

ASSIGNMENT OF ERROR III

"THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION IN FAILING TO SET ASIDE ITS JUDGMENT."

ASSIGNMENT OF ERROR IV

"WHETHER THE LANGUAGE OF RULE 56 IS SO AMBIGUOUS AS TO DENY APPELLANT A FAIR HEARING."

We overrule all four assignments of error because we find no such error in the August 15, 1983 judgment entry. The August 15, 1983, judgment is hereby affirmed.

On September 7, 1983, Appellant requested us to consolidate Case No. 83 CA 9 and Case No. 83 CA 24. As discussed above, we have no jurisdiction to hear Case 83 CA 9. We will not consolidate two cases where we have jurisdiction to hear one and no jurisdiction to hear the other.

In the "motion in support of Appellant's procedure and/or motion to consolidate", Appellant argues the appeal in Case No. 83 CA 9 should survive despite his failure to follow time limitations in the Ohio Appellate Rules because, "Appellee did not file an 'Order of Confirmation' which is the final appealable order." Appellant thus implies the November 2, 1982, judgment entry is not a final appealable order. This is not true. Ohio Revised Code Section 2505.02 defines final appealable orders:

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

We find the November 2, 1982, judgment entry is a final appealable order.

The August 15, 1983, judgment entry is also a final appealable order, but, of course, is only appealable unto itself. We find no merit to Appellant's contention that the August 15, 1983, judgment entry allows a belated appeal of the November 2, 1983 judgment entry. The first judgment entry granted the foreclosure. The second judgment entry, confirming the sheriff's sale, concerned the execution of the first judgment entry. One cannot wait until execution of a judgment to appeal the judgment.

*3 Appeal in Case No. 83 CA 9 DISMISSED

Judgment in Case No. 83 CA 24 AFFIRMED

Grey, J.: Concur in Judgment & Opinion

Stephenson, J.: Concur in Judgment & Opinion

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2000 WL 1132778

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

Rebecca A. KOCINSKI, et al., Appellants,

v.

Nathaniel REYNOLDS, Appellee.

No. L-99-1318. | Aug. 11, 2000.

Attorneys and Law Firms

Jan H. Stamm, for appellants.

Kevin A. Pituch and Michael A. Bruno, for appellee.

Opinion

DECISION AND JUDGMENT ENTRY

KNEPPER.

*1 This is an appeal from the judgment of the Lucas County Court of Common Pleas granting the motion for summary judgment filed by appellee, Nathaniel Reynolds, and denying the motion for summary judgment filed by appellants, Rebecca A. Kocinski and Frank Kocinski. 1 For the following reasons, we affirm the decision of the trial court.

This matter arose out of an automobile collision between appellee and appellant, which occurred on August 3, 1996. Appellant's minor daughter, Shelby Kocinski, was also present in her mother's vehicle at the time of the accident. On August 3, 1998, "Rebecca A. Kocinski, on behalf of Shelby Kocinski, a minor," filed a small claims petition in the Maumee Municipal Court against Nathaniel Reynolds for payment of Shelby's medical bills. On the same date, appellants filed the present action against appellee in the Lucas County Court of Common Pleas, seeking recovery of damages for appellant's injuries and for Frank's loss of consortium.

In the municipal court case, appellant moved for summary judgment with respect to Shelby's medical bills. In his response to summary judgment, appellee stated that summary

judgment should be denied on the basis that a judgment in favor of appellant in the municipal court case "may operate as res judicata regarding her action brought in the Lucas County Common Pleas Court." On February 3, 1999, the municipal court granted summary judgment in favor of appellant and awarded her \$684.25 for Shelby's medical bills. This judgment was satisfied on May 6, 1999.

Thereafter, on May 11, 1999, appellee filed a motion for partial summary judgment on the basis of res judicata. On August 25, 1999, the common pleas court awarded summary judgment and found that appellant's personal injury action was barred by the doctrine of res judicata because she "had a full and fair opportunity to present her claim for negligence in the initial proceedings." On September 13, 1999, the trial court filed a judgment entry nunc pro tunc to include in the original judgment that there was no just reason for delay, as provided in Civ.R. 54(B). Accordingly, the common pleas court also denied appellants' motion for summary judgment, which was filed on June 29, 1999.

Appellants appealed and raise the following assignments of error:

"I. WHETHER THE LUCAS COUNTY COURT OF COMMON PLEAS, COMMITTED REVERSIBLE ERROR IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT/APPELLEE, NATHANIEL REYNOLDS.

"II. WHETHER THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO, COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFFS/APPELLANTS' MOTION FOR SUMMARY JUDGMENT."

This court notes at the outset that in reviewing a motion for summary judgment, we must apply the same standard as the trial court. Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

Res judicata is not limited to barring only those subsequent actions that involve the same legal theory of recovery as a previous action. Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 382, 653 N.E.2d 226. Rather, "It 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 the first lawsuit' ". *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, citing *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 494 N.E.2d 1387. For purposes of this appeal, it is significant to note that the Ohio Supreme Court stated in a footnote that the phrase "claims which might have been litigated" in the first lawsuit has possible misleading connotations and, therefore, noted that courts instead "prefer to refer instead to 'claims which should have been litigated' in the first lawsuit." *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 133, fn. 2, 712 N.E.2d 713, citing *Wilkins v. Jakeway* (S.D. Ohio 1998), 993 F.Supp. 635, 645.

*2 In *Grava*, an expanded view of claim preclusion was adopted:

"A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. (Paragraph two of the syllabus of *Norwood v. McDonald* [1943], 142 Ohio St. 299, 52 N.E.2d 67, * * *, overruled; paragraph two of the syllabus of *Whitehead v. Gen. Tel. Co.* [1969], 20 Ohio St.2d 108, 254 N.E.2d 10, * * *, overruled to the extent inconsistent herewith; paragraph one of the syllabus of *Norwood, supra*, and paragraph one of the syllabus of *Whitehead, supra*, modified; * * *.)" *Grava* at syllabus.

"Transaction" is defined as a "'common nucleus of operative facts.'" *Grava* at 382, 653 N.E.2d 226, citing 1 Restatement of the Law 2d, Judgments (1982), Section 24, Comment (b), at 198-99. *Grava* further quoted the Restatement as follows: "Comment c to Section 24, at 200, plainly states: 'That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.'" "

In this case, appellants argue that "[t]he essential operative facts to be proven in Rebecca Kocinski's personal injury action, are different from those in the derivative proceeding in the Maumee Municipal Court, and these factual distinctions are such that *res judicata* cannot apply." We disagree.

First it is important to note that although appellant brought the action in municipal court "on behalf" of her daughter, the claim upon which summary judgment was granted was actually a claim belonging to appellant, not Shelby. See *Grindell v. Huber* (1971), 28 Ohio St.2d 71, 275 N.E.2d 614, paragraph one of the syllabus, ("Where a minor child sustains an injury allegedly as the result of negligence of a defendant, two separate and distinct causes of action arise: an action by the minor child for his personal injuries and a derivative action in favor of the parents of the child for the loss of his services and his medical expenses." (Emphasis added.)) See, also, *Blakeman v. Condorodis* (1991), 75 Ohio App.3d 393, 599 N.E.2d 776; *Auchmuty v. Ward* (Aug. 6, 1998), Putnam App. No. 12-98-4, unreported. Furthermore, a parent's cause of action for medical expenses of a minor child, although derivative, is solely that of the parents. *Whitehead*, 20 Ohio St.2d at 115, 254 N.E.2d 10. A minor could be liable in contract for his or her medical bills; however, "this liability is secondary to that of the parents who are charged with the duty to support their minor child, in accordance with R.C. 3103.03(A) and (D)." *Auchmuty, supra*, citing *Children's Hospital v. Johnson* (1980), 68 Ohio App.2d 17, 19-20, 426 N.E.2d 515; and *Blakeman*, 75 Ohio App.3d at 397, 599 N.E.2d 776. See, also, *Univ. of Cincinnati Hosp. v. Cohen* (1989), 57 Ohio App.3d 30, 31-32, 566 N.E.2d 187.

*3 Accordingly, although different evidence had to be offered in order to establish her claim for Shelby's medical expenses, appellant's claim was only one that she had available to her as a result of the collision with appellee. *Grava* clearly required appellant to litigate all her claims in one action, or be forever barred from asserting those claims.

We are troubled by the fact that Rebecca's prayer of \$50,000 for her personal injury claim exceeded the jurisdictional limits of the municipal court. See R.C. 1901.17. This suggests to us that her personal injury claim could not have been litigated in the first lawsuit. Nevertheless, as noted by the Ohio Supreme Court in *Holzemer*, courts have interpreted the phrase "claims which were or might have been litigated" in the first lawsuit to mean "claims which should have been litigated" in the first lawsuit. *Holzemer* 86 Ohio St.3d at 133, fn. 2, 712 N.E.2d 713. Accordingly, we find that appellant should have litigated all of her claims arising out of the collision with appellee in one action.

Hence, because a valid, final judgment was rendered upon the merits in the municipal court and because appellant's personal injury claim arose out of a single occurrence that was the

subject matter of the previous action in the municipal court, we find that *res judicata* bars her negligence action brought in the trial court. See *Grava*, 73 Ohio St.3d at syllabus. It is unfortunate that appellant's more substantial claim in the trial court is barred; however, appellant was imprudent to separate her claims arising out of a single occurrence and raise one in the municipal court.

Appellants argue that appellee waived his right to assert *res judicata* as a defense and acquiesced to the simultaneous suits because he failed to plead it as an affirmative defense in his answers in either court, failed to raise it in a timely manner, and failed to seek consolidation of the two cases. Appellants also argue that they would be prejudiced by the trial court permitting appellee to raise *res judicata* as a defense for the first time in his motion for summary judgment.

*4 Generally, a party can waive the defense of *res judicata* if it was not properly pled as an affirmative defense. It is undisputed that appellee failed to plead *res judicata* as an affirmative defense. We find, however, that appellee could not have properly pled *res judicata* as an affirmative defense in his answers because no prior judgment in a previous action had been entered at the time he was required to answer. Where the defense of *res judicata* does not exist at the time an answer must be filed, the defense may properly be raised by motion when applicable. *Musa v. Gillett Communications* (1997), 119 Ohio App.3d 673, 687, 696 N.E.2d 227. See, also, *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 5, 465 N.E.2d 377. As soon as there existed a basis to assert the defense of *res judicata*, appellee filed his motion in the trial court.²

Appellants argue that they are prejudiced by appellee raising his defense of *res judicata* by motion and, therefore, he should be precluded from raising it. We, however, agree with the trial court that the purpose of pleadings is to provide notice. In this case, appellant had prior notice of appellee's intention to raise the defense of *res judicata*.

Appellee stated twice in the municipal court action that there was a related action pending in the trial court. In an affidavit, filed August 19, 1998, appellee's counsel stated, "Affiant also would indicate that plaintiff Rebecca A. Kocinski has filed suit in the Lucas County Common Pleas Court for her own personal injury claim arising out of the same vehicular accident which occurred on August 3, 1996" and that "Defendant plans to plead all applicable affirmative defenses * * *." Additionally, in his response to appellant's

motion for summary judgment, filed in municipal court on December 29, 1998, appellee stated:

"Third, there is another reason by which summary judgment should be withheld. Although plaintiff has brought this claim on behalf of Shelby Kocinski, a minor, under Ohio law, the claim for medical expenses incurred on behalf of injuries to a minor rests solely with the minor's parents. See, *Bagyi v. Miller*, 3 Ohio App.2d 371, 210 N.E.2d 887, * * *. Thus, although this action is brought in the minor's name, the claim brought in this case actually belongs to Rebecca A. Kocinski. Moreover, a judgment in favor of Rebecca A. Kocinski in this case may operate as *res judicata* regarding her action brought in the Lucas County Common Pleas Court. See, *Painter v. Graley*, 106 Ohio App.3d 770 * * * (the doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action or be forever barred from asserting it). This recovery by plaintiff Rebecca A. Kocinski in the Maumec Municipal Court could act as *res judicata* to her claims brought in the Lucas County Common Pleas Court."

Despite appellee's indication that appellee believed a judgment in the municipal court would bar appellant's claim in the trial court, appellant took no action to dismiss the municipal court action or amend her complaint in common pleas. Accordingly, we find that appellant was not prejudiced by the trial court allowing appellee to present his defense of *res judicata* in a motion for summary judgment. Any prejudice suffered by appellant was due to her own actions and inactions.

*5 Appellants additionally argue that appellee acquiesced to appellant's severance of her claims due to his failure to object. Based on our finding that appellee properly objected to appellant's severance of her claims prior to judgment being rendered in the municipal court, we find that appellant's reliance on *Shaw v. Chell* (1964), 176 Ohio St. 375, 199 N.E.2d 869 is misplaced.

Appellants further argue that appellee waived his right to complain about the splitting of appellant's actions because he did not seek consolidation of the two actions. In *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St.2d 87, 255 N.E.2d 570, the court held that a defendant waived his right to assert the doctrine of estoppel by failing to seek consolidation of two separate cases that were pending before the same court. In this case, however, appellants assert that appellee was required to seek consolidation of cases from different courts. We agree with the Third District Court of Appeals that Civ.R. 42 does not provide for consolidation of cases from different courts:

"We believe that Civ.R. 42(A) only pertains to the consolidation of cases pending in the *same* court, and does not provide a vehicle by which a municipal court may consolidate a case pending before it with a case pending in a common pleas court. A municipal court cannot independently decide to consolidate a case and mandate that a superior court such as a court of common pleas consolidate cases pending before the latter court. Such an infringement on the authority of a common pleas court is not envisioned by Civ.R. 42 or R.C.1901.01 *et seq.*" (Emphasis in original.)

Mason v. Walter (Dec. 5, 1995), Hancock App. No. 5-95-20, unreported. Accordingly, we find that appellee is not barred

from asserting a valid defense because of his failure to make a seemingly futile request.

We therefore find that appellant is barred by the doctrine of *res judicata* and that appellee properly raised his defense by summary judgment. As such, we find appellants' first assignment of error not well-taken.

Appellants argue in their second assignment of error that the trial court erred in granting summary judgment in their favor. Insofar as the trial court properly granted appellee's motion for summary judgment, the trial court correctly denied appellant's motion for summary judgment. With respect to Frank Kocinski's motion for summary judgment, however, we find that the denial of a motion for summary judgment is not a final, appealable order. *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 222 N.E.2d 312. Accordingly, we find appellants' second assignment of error not well-taken.

On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. This matter is remanded to the trial court for further determination of Frank Kocinski's claim for loss of consortium. Appellant is ordered to pay the court costs of this appeal.

***6 JUDGMENT AFFIRMED.**

SHERCK, KNEPPER and PIETRYKOWSKI, JJ., concur.

Footnotes

- 1 Reference to "appellants" refers to Mr. and Mrs. Kocinski collectively. Reference to "appellant" refers to Rebecca Kocinski alone.
- 2 We note that a motion to dismiss would not have been appropriate under the circumstances because the motion required evidence outside of the record to be presented.