**[Cite as *J & H Reinforcing & Structural Erectors, Inc. v. Wellston City School Dist.*, 2010-Ohio-2312.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

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| J & H REINFORCING & STRUCTURAL ERECTORS, INC., et al., | : | |
| Plaintiffs-Appellants, | : | Case No: 09CA8 |
| v. | : | |
| | : | **DECISION AND** |
| WELLSTON CITY SCHOOL DISTRICT, et al., | : | **JUDGMENT ENTRY** |
| | : | File-stamped date: 5-20-10 |
| Defendants-Appellees. | : | |

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**APPEARANCES:**

Roger L. Sabo and Patrick A. Devine, Columbus, Ohio, for Appellants.

John S. Higgins and Christopher J. Dutton, Cincinnati, Ohio, for Appellees BBL Maescher DAG, LLC and BBL Construction Services, LLC.

Mark A. Foley, Columbus, Ohio, for Appellee Wellston City School District.

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Kline, J.:

**{¶1}** J & H Reinforcing & Structural Erectors, Inc., and J & H Reinforcing & Structural Erectors, Inc., f/b/o Harris Floor Covering, Inc. (collectively "J&H") appeal the trial court's two rulings on the separate motions to dismiss of the (1) Wellston City School District ("Wellston") and (2) BBL Maescher DAG, LLC and BBL Construction Services, LLC (collectively "BBL").

**{¶2}** This case involves issues arising from the construction of two Wellston schools. Wellston hired BBL to (1) administer the two projects, (2) coordinate the efforts

of the subcontractors, and (3) oversee all claims for payment. J&H was retained to construct the steel structure of the buildings.

**{¶3}** J&H filed a complaint against BBL and Wellston, and the complaint alleged that BBL and Wellston administrated the construction projects in a negligent manner. J&H alleged that this negligence resulted in delays that caused additional costs to J&H. The complaint further alleged that BBL and Wellston wrongly refused to compensate J&H for other additional costs. The trial court granted Wellston's Civ.R. 12(B)(1) motion to dismiss the complaint because the court implicitly found that res judicata applied. In addition, the trial court granted BBL's Civ.R. 12(B)(6) motion to dismiss because it found that J&H did not plead a sufficient nexus of control existed for J&H to recover economic damages against BBL.

**{¶4}** On appeal, J&H contends that the trial court erred when it granted Wellston's Civ.R. 12(B)(1) motion to dismiss. Because Wellston's Civ.R. 12(B)(1) motion involved res judicata (which is an affirmative defense), instead of subject matter jurisdiction, we agree. J&H next contends that the trial court erred by granting BBL's Civ.R. 12(B)(6) motion to dismiss. Because J&H pleaded a sufficient nexus of control existed in order for J&H to recover economic damages, we agree. Accordingly, we reverse the judgment of the trial court and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

**{¶5}** Wellston made plans to construct an elementary and a middle/high school. Wellston hired BBL to (1) administer both projects, (2) coordinate the efforts of the subcontractors, and (3) oversee all claims for payment. J&H was retained to construct

the steel structure of the buildings. Because state funds were involved in the construction of the two schools, the Ohio School Facilities Commission ("OSFC") was involved as well.

**{¶6}** On June 1, 2004, OSFC filed suit ("Case I") in Jackson County Common Pleas Court against the masonry contractor ("C&R") and its surety, alleging that C&R provided defective work and failed to complete its tasks in a timely fashion. After C&R filed a counterclaim against OSFC, Case I was removed to the Court of Claims of Ohio on June 22, 2005. C&R believed that J&H and Wellston were liable to OSFC for some, or all, of any damages C&R might owe OSFC. Therefore, on June 15, 2007, C&R brought J&H and Wellston into Case I as third party defendants pursuant to Civ.R. 14. Wellston filed a cross-claim against J&H. J&H then filed a counter-claim against Wellston, claiming that Wellston was liable to J&H because its agents "failed to properly perform the coordination, management, and contract administration functions for the Project." The parties dispute whether Case I remains pending.

**{¶7}** On July 10, 2006, J&H filed suit ("Case II") in the Court of Claims of Ohio against the OSFC. This action was eventually stayed pending resolution of the present case.

**{¶8}** J&H filed a complaint in the present case ("Case III") in Jackson County on January 3, 2008, against Wellston and BBL. The complaint alleged that Wellston and BBL were negligent in their administration of the two construction projects and alleged that this negligence caused delays and additional costs to J&H. The complaint further alleged that Wellston and BBL wrongly refused to compensate J&H for other additional costs.

**{¶9}** In response to the present complaint, Wellston filed a Civ.R. 12(B)(1) motion to dismiss, claiming that the Court of Claims of Ohio had exclusive jurisdiction over the subject matter. In addition, BBL filed a Civ.R. 12(B)(6) motion to dismiss because the complaint asked for economic damages but failed to demonstrate privity of contract between J&H and BBL. The trial court granted both motions and dismissed the complaint.

**{¶10}** J&H now appeals the decision of the trial court and asserts the following six assignments of error for our review: I. "The lower court erred in granting the Wellston City School District Board of Education judgment on the pleadings premised upon its 12(B)(1) motion." II. "The lower court erred when it ruled J&H lacked standing to pursue this action." III. "The lower court erred in its failure to allow the claims by Plaintiffs in the within action to proceed versus those claims in a second action filed by another party." IV. "The lower court erred in granting the Rule 12(B)(6) motion to dismiss of [BBL]." V. "The lower court erred in failing to find a duty owed by [BBL] to Plaintiffs." And, VI. "The lower court erred in failing to consider whether a sufficient nexus existed between [BBL]."

II.

**{¶11}** Notwithstanding the existence of six separate assignments of error, J&H divides its brief into two major sections involving the two separate motions. Because the resolution of the two motions is dispositive, we shall do the same.

A. Wellston's Civ.R. 12(B)(1) Motion

**{¶12}** J&H first contends that the trial court erred when it granted Wellston's Civ.R. 12(B)(1) motion to dismiss.

**{¶13}** Civ.R. 12(B)(1) states, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter[.]"

**{¶14}** "The standard to apply for a dismissal pursuant to Civ.R. 12(B)(1), lack of subject matter jurisdiction, is whether the plaintiff has alleged any cause of action which the court has authority to decide." *Shockey v. Fouty* (1995), 106 Ohio App.3d 420, 423, citing *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56, 62. "The trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, at paragraph one of the syllabus. If the record reflects that no evidentiary hearing was held, and the court based its decision on the memoranda, arguments of counsel, and the pleadings, then we review the decision de novo. *Info. Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003-Ohio-566, at ¶9. However, if the trial court resolves disputed factual issues in reaching its decision on subject matter jurisdiction, then we review the record to determine whether the trial court's findings were supported by competent and credible evidence. *Wilkerson v. Howell Contrs., Inc.*, 163 Ohio App.3d 38, 2005-Ohio-4418, at ¶10, quoting *Rijo v. Rijo* (Jan. 31, 1995), Hamilton App. No. C-930704.

**{¶15}** Here, the trial court did consider facts outside of the pleadings. However, based on the record before the trial court and the briefs on appeal, we find that those facts are undisputed facts, which concern the nature of prior actions and claims. We therefore review the trial court's judgment de novo. *Wilkerson* at ¶10; *Taylor Winfield Corp. v. Winner Steel, Inc.*, Mahoning App. No. 05 MA 191, 2006-Ohio-4608, at ¶6.

**{¶16}** Wellston argues that the trial court did not err when it granted the Civ.R. 12(B)(1) motion. Wellston maintains that the counterclaim that J&H filed against Wellston in the Court of Claims in Case I is the same as J&H's complaint against Wellston in Case III. Wellston asserts that the Court of Claims had exclusive jurisdiction over the counterclaim in Case I, and therefore the Court of Claims has exclusive jurisdiction over the same claims in the complaint filed in Case III.

**{¶17}** We first must decide if the Court of Claims had exclusive jurisdiction over J&H's counterclaim against Wellston in Case I, which was originally filed in Jackson County but was removed to the Court of Claims.

**{¶18}** R.C. 2743.02(E) states that "[t]he only defendant in original actions in the court of claims is the state." R.C. 2743.03(A)(1) provides that 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. *The court* shall have full equity powers in all actions within its jurisdiction and *may entertain and determine all counterclaims, cross-claims, and third-party claims*." (Emphasis added.)

**{¶19}** Here, based on the plain words of R.C. 2743.03(A)(1), we find that the Court of Claims did not have exclusive jurisdiction over the counterclaim in Case I. The legislature gave the Court of Claims discretion as to its jurisdiction over counterclaims. That is, the Court of Claims "may entertain and determine all counterclaims, cross-claims, and third-party claims." This language indicates that the legislature has allowed the Court of Claims discretion to hear certain claims for relief that may not be against the state. See *Grange Mut. Cos. v. Ohio Dept. of Mental Health* (1985), 27 Ohio App.3d 220, 221 (refusing to construe R.C. 2743.02(E) so narrowly as to prevent a third party impleaded by the state from impleading a second third party defendant). In this case, the Court of Claims apparently used its discretion and allowed the counterclaim. Thus, it had jurisdiction over the counterclaim but it was not exclusive jurisdiction.

**{¶20}** Wellston's argument is merely that this claim (Case III) should have been brought in the prior action (Case I) in the Court of Claims. However, this is a claim that res judicata bars any subsequent lawsuit, and that interpretation is confirmed by the trial court's journal entry.

**{¶21}** The trial court in this matter held as follows: "Upon review, the court finds that although there may be some differences in the claims, the subject matter, i.e., the contracts, is the same. Plaintiff had the opportunity to file its claims against Wellston in the Court of Claims actions." Apparently, the trial court held that J&H's claims were related to the subject matter of the suit in the Court of Claims and, therefore, J&H was obliged to file these claims in that action. But, as we stated earlier, this is merely an argument that these claims are precluded by res judicata. See *Lewis v. Harding*, 182 Ohio App.3d 588, 2009-Ohio-3071, at ¶11-12; *Meyer v. Minister Farmers Coop.*

*Exchange Co., Inc.*, Shelby App. No. 17-09-06, 2009-Ohio-4933, at ¶7, citing *Rettig Ent. Inc. v. Koehler* (1994), 68 Ohio St.3d 274.

**{¶22}** Res judicata is not an appropriate subject for a motion to dismiss under Civ.R. 12(B)(1). *State, ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109. Instead, res judicata is an affirmative defense. Civ.R. 8(C).

**{¶23}** Accordingly, we sustain J&H's assignments of error that involve Civ.R. 12(B)(1).

B. BBL's Civ.R. 12(B)(6) Motion

**{¶24}** J&H next contends that the trial court erred when it dismissed its claims against BBL pursuant to Civ.R. 12(B)(6).

**{¶25}** A dismissal for failure to state a claim upon which relief can be granted is a question of law that we review de novo. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996-Ohio-298. In determining whether a complaint states a claim upon which relief may be granted, all factual allegations are presumed to be true and all reasonable inferences are made in favor of the nonmoving party. *State ex rel. Talwar v. State Med. Bd. of Ohio*, 104 Ohio St.3d 290, 2004-Ohio-6410, at ¶5; *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399; *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. However, unsupported conclusions are not considered admitted and are insufficient to withstand a motion to dismiss. *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. In order for a court to dismiss a complaint pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, it must appear beyond doubt that J&H can prove no set of facts in support of its claim that would entitle it to relief. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, at ¶11;

*York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144; *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, at the syllabus.

**{¶26}** The trial court concluded that the complaint failed to state a claim because the economic loss rule bars recovery under the facts alleged in the complaint. "The economic-loss rule generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgt., Inc., v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, at ¶6. "'[T]he well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.'" *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 44, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W.2d 124, 126. "Under the economic-loss rule, privity or a sufficient nexus that could serve as a substitute for privity may impose only those contractual duties and liability for breach of those duties agreed to by the parties to the contract, and no more." *Corporex* at paragraph one of the syllabus.

**{¶27}** J&H does not contend it was in privity with BBL. Rather, J&H argues that it alleged a sufficient nexus that could serve as a substitute for privity. BBL agrees that a sufficient nexus can serve as a substitute for privity under Ohio law but argues that J&H failed to plead facts sufficient to demonstrate such a nexus existed in the present case. As BBL noted, "[b]ut where is the word 'nexus' in the complaint? Where is 'control?' Where is 'interaction?'" BBL's Brief at 8. Notwithstanding the parties' agreement, Ohio Courts are split on whether a plaintiff may rely upon excessive control as a substitute for privity.

**{¶28}** The Supreme Court of Ohio in the syllabus of its *Floor Craft* opinion held "[i]n the absence of privity of contract no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications." *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n* (1990), 54 Ohio St.3d 1, syllabus. In that case, a flooring subcontractor attempted to sue an architectural firm for negligence in the preparation of the plans.

**{¶29}** The Supreme Court of Ohio quoted material from the Supreme Court of Florida including the following language: "The power of the architect to stop the work is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility." *Floor Craft* at 5, quoting *A.R. Moyer, Inc. v. Graham* (Fla.1973), 285 So.2d 397, 401 (other citations omitted).

**{¶30}** In its conclusion, the *Floor Craft* Court held that the plaintiff contracted directly with the owner, and there was no nexus that could serve as a substitute for contractual privity. *Floor Craft* at 8. Nonetheless, the *Floor Craft* Court left open the question of whether excessive control could satisfy the privity requirement. In its opinion, the Court carefully stated that the issue concerned a plaintiff who merely alleged that the architect had "drafted defective plans and specifications." *Floor Craft* at 3. Ohio courts have been divided on whether the plaintiff may satisfy the privity requirement by demonstrating the defendant exercised excessive control over the plaintiff's work.

**{¶31}** The Ninth District Court of Appeals has rejected the doctrine of excessive control. *Internatl. Fid. Ins. Co. v. TC Architects, Inc.*, Summit App. No. 23112, 2006-Ohio-4869, at ¶8. The Ninth District concluded that the Supreme Court of Ohio rejected

the possibility of liability under circumstances like these in *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202. The Sixth District Court of Appeals has likewise held that *Foster Wheeler* rejected excessive control as a sufficient substitute for contractual privity. *Columbia Gas of Ohio, Inc. v. Crestline Paving & Excavating Co., Inc.*, Lucas App. No. L-02-1093, 2003-Ohio-793, at ¶19-20.

**{¶32}** The Eighth District Court of Appeals by contrast held that where a design professional was "extensively involved in supervision and administration * * * reasonable minds could find that a sufficient nexus existed between the parties to substitute for privity of contract." *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist.* (1993), 90 Ohio App.3d 215, 221. The Tenth District followed the Eighth District Court of appeals and concluded that "a design professional who exercises 'excessive control over the contractor' through the power to stop the work and give orders about the project is liable for such economic damages." *Nicholson v. Turner/Cargile* (1995), 107 Ohio App.3d 797, 806, citing *Clevecon* at 220-21. The First District has characterized *Floor Craft* as strongly suggesting in dicta that a sufficient nexus predicated on excessive control could suffice as a substitute for privity of contract. *E.J. Robinson Glass Co., Inc. v. Pilot Contracting Corp.*, Hamilton App. No. C-010296, 2001-Ohio-4011, slip op. at 4.

**{¶33}** We cannot agree with the Ninth and Sixth District Courts of Appeals. The relevant passage from the *Foster Wheeler* opinion is as follows: "It is sufficient to note that there is no such thing as a cause of action for excessive control. Privity, or its substitute, is not a tort; it serves only to identify an interest or establish a relationship

necessary to allow for the bringing of a tort action for purely economic damages." *Foster Wheeler* at 365-66. From this passage, it is fairly clear that the Supreme Court of Ohio is not actually rejecting excessive control as a substitute for privity. The Court is simply noting that in the absence of proof of an actual tort the existence or nonexistence of privity or its substitute is irrelevant.

**{¶34}** On balance, we find *Nicholson* and *Clevecon* persuasive. The Supreme Court of Ohio relaxed the strict requirements of privity for accountants in *Haddon View Inv. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154. We note that *Haddon View* is limited to its facts and does not by itself stand for an overall trend to abolish privity, nonetheless *Haddon View* does demonstrate that the Supreme Court has relaxed the strict requirements of privity under certain circumstances. The *Foster Wheeler* opinion does not actually close the door on excessive control as a substitute for privity. Finally, the Supreme Court of Ohio in *Corporex*, in paragraph one of the syllabus, noted that a plaintiff may demonstrate a sufficient nexus as a substitute for privity. As a result, we find that excessive control may serve as a substitute for privity under Ohio Law.

**{¶35}** "[A] design professional is not liable for third party economic damages when he or she does not participate in the project or interact with the contractor and signs a standard contract providing the design professional no role in construction means, methods, techniques or procedures; but a design professional who exercises 'excessive control over the contractor' through the power to stop the work and give orders about the project is liable for such economic damages." *Nicholson* at 805-06.

**{¶36}** The complaint filed in this case alleged, among other things, that BBL provided management services which required them to prepare the construction

schedule, provide administration of the project, inspect the work of each contractor for defective work, report all defective work to the OSFC, and properly document and review claims from contractors for additional compensation and equitable adjustment of compensation. Complaint at 3-4, 9(a)-(d).

**{¶37}** A court in reviewing a motion to dismiss under Civ.R. 12(B)(6) must grant the plaintiff all reasonable inferences. Here, notwithstanding the lack of language specifically addressing the issue of privity, J&H's complaint is sufficient in that it alleges BBL is liable because of BBL's misadministration of the worksite. See *McMullian v. Borean*, 167 Ohio App.3d 777, 2006-Ohio-3867, at ¶12-14 (finding the plaintiffs sufficiently pleaded privity by pleading that the defendants owed plaintiffs a duty).

**{¶38}** At oral argument counsel for BBL cited the following case, *Ohio Plaza Assoc., Inc. v. Hillsboro Assoc.* (Jun. 29, 1998), Highland App. No. 96CA898. BBL argued that under *Ohio Plaza*, J&H failed to plead sufficient facts to survive a motion to dismiss under Civ.R. 12(B)(6). We, however, find this case distinguishable. In *Ohio Plaza*, the plaintiff "[did] not allege [the architect] directly interacted with it." Also in *Ohio Plaza*, we considered a trial court's grant of a motion for summary judgment. Thus, we considered whether the plaintiff had brought forward sufficient evidence of its claims.

**{¶39}** Here, we consider the propriety of a Civ.R. 12(B)(6) motion, which tests the sufficiency of the complaint and not the evidence. See *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. Therefore, any findings about evidentiary issues are irrelevant for the present cause. And, in this case, J&H alleged more than the mere fact that BBL had the responsibility of overall management of the project. J&H alleged that BBL failed to appropriately administer the

project, which resulted in delays; that BBL failed to appropriately process and pay J&H's bills; and that BBL failed to correctly inspect completed work in a timely fashion. J&H further alleged that this conduct by BBL resulted in damages in an excess of $25,000. Under these circumstances, a fair reading of the complaint is that J&H alleged that BBL engaged in a pattern of negligent conduct in performing its managerial responsibilities. And, that this pattern of conduct significantly harmed J&H.

**{¶40}** Accordingly, we sustain J&H's remaining assignments of error (involving BBL's motion to dismiss) and reverse the judgment of the trial court. We remand this cause to the trial court for further proceedings consistent with this opinion.

**JUDGMENT REVERSED AND CAUSE REMANDED.**

Harsha, J., concurring in part and dissenting in part:

**{¶41}** I respectfully dissent from Section II(A) of the opinion. Because J&H's claims against Wellston in Case III were compulsory counterclaims in Case I, the Court of Claims possessed exclusive jurisdiction over them. Therefore dismissal for lack of subject-matter jurisdiction was proper.

**{¶42}** Practice and procedure in the Court of Claims is governed by the Rules of Civil Procedure, unless these rules are "inconsistent" with R.C. Chapter 2743. R.C. 2743.03(D); *State ex rel. Moritz v. Troop* (1975), 44 Ohio St.2d 90, 338 N.E.2d 526, at paragraph two of the syllabus. Claims are compulsory and must be asserted or lost when: (1) at the time of serving the pleading the pleader has a claim against any opposing party; (2) the claim arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim; and (3) the claim does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Civ.R. 13(A). Exceptions to this rule exist when: "(1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13." Id.

**{¶43}** Civ.R. 13(A) is consistent with the practice in the Court of Claims. The legislature created a Court of Claims to waive the State's immunity against lawsuits and allow for the centralized filing and adjudication of all claims against the State. *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 86-87, 480 N.E.2d 82. The purpose of Civ.R. 13(A) is to prevent a "multiplicity of actions and to achieve resolution in a single lawsuit

of all disputes arising out of common matters." *Osborn Co. v. Ohio Dept. of Adm. Serv.* (1992), 80 Ohio App.3d 205, 209, 608 N.E.2d 1149, quoting *Warshawsky & Co. v. Arcata Natl. Corp.* (C.A. 7, 1997), 552 F.2d 1257 (interpreting Fed.R.Civ.P. 13(A)).

**{¶44}** In August 2007, J&H became a third-party defendant in Case I (the original case that was transferred to the Court of Claims). Wellston immediately filed cross-claims against it. J&H responded by asserting a related counterclaim. But J&H learned of the claims it later asserted against Wellston in Jackson County prior to August 2007. It explained in its brief that it learned of these potential claims in discovery for Case II, filed in July 2006 (its own Court of Claims case). Therefore, at the time it counterclaimed against Wellston in Case I, J&H had "a claim against any opposing party." Moreover, despite the subject matter of Wellston's cross-claim being limited to "bearing plates," the claims later asserted in Case III arise out of the same transaction or occurrence, i.e., as the trial court put it, "the contracts." The Ohio Supreme Court broadly construed both the "subject matter" and the "transaction or occurrence" language of Civ.R. 13(A) in *Geauga Truck & Implement Co. v. Juskiewicz* (1984), 9 Ohio St.3d 12, 457 N.E.2d 827. Neither of the Civ.R. 13(A) exceptions seem to apply. Thus, the claims filed by J&H against Wellston in 2008 in Case III were compulsory claims that should have been asserted in August 2007 in the Court of Claims in Case I.

**{¶45}** But as the majority opinion correctly asserts, the matter of compulsory counterclaims normally presents a res judicata argument, which is not an appropriate matter for a Civ.R. 12(B)(1) motion. Where I depart from my colleagues is in their interpretation of R.C. 2743.03(A)(1). They emphasize the last sentence of that statute and conclude that the Court of Claims and Jackson County possessed concurrent

jurisdiction over the claims asserted against Wellston in 2008. My focus is on the first sentence of R.C. 2743.03(A)(1):

> The court of claims is a court of record and 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[.]

**{¶46}** The first clause grants the Court of Claims "exclusive, original jurisdiction" over claims against the State. The second clause is a broad grant of exclusive (but not original) jurisdiction to the Court of Claims of the claims of all parties that find themselves, one way or another, in the Court of Claims. Admittedly, this clause suffers from a degree of ambiguity. At issue is whether the phrase "removed to the court of claims" modifies both "causes of action of all parties" and "civil actions", or merely "civil actions." If it modifies both, the grant of exclusive jurisdiction applies only to causes of action in existence at the time of removal (the causes of action also have to be "removed"). This interpretation would preclude jurisdictional exclusivity to claims pled by parties after being brought into the Court of Claims. However, I read "removed to the court of claims" as modifying only "civil actions." This interpretation comports with the rule of the last antecedent. It also makes sense when one considers the purpose of R.C 2743 et seq, i.e., to centralize all claims involving the State, whenever raised, in the Court of Claims. And the Supreme Court has held that any exceptions to the exclusive jurisdiction of the Court of Claims are to be "narrowly construed." *Friedman*, supra, at 88.

**{¶47}** Consequently, the claims asserted by J&H against Wellston in Case III in Jackson County in 2008 were compulsory counterclaims over which the Court of Claims

possessed exclusive jurisdiction. Therefore, the Jackson County Court of Common Pleas lacked subject-matter jurisdiction to entertain those claims in 2008. Accordingly, I would affirm the judgment that dismissed the case against Wellston via Civ.R. 12(B)(1).

**{¶48}** I concur in judgment and opinion in the remainder of the opinion.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE REVERSED and this cause BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellee shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**