IN THE SUPREME COURT OF OHIO

OHIO PYRO, INC., et al.,	:	**Case No. 2006-0785**
	:	
Appellee,	:	**On Appeal from the Fayette**
	:	**County Court of Appeals, Twelfth**
	:	**Appellate District**
v.	:	
	:	**Court of Appeals Case Nos.**
OHIO DEPARTMENT OF COMMERCE,	:	**CA2005-03-009, CA2005-03-011**
DIVISION OF STATE FIRE MARSHAL,	:	
et al.,	:	
Appellants.	:	
	:	

BRIEF OF APPELLEES OHIO PYRO, INC. AND WEST SALEM FIREWORKS, INC.

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INTRODUCTION

The Appellants in this case seek this Court's imprimatur on a violation of statutory law governing the issuance and transfer of fireworks wholesaler licenses. The Fayette County Court of Common Pleas issued a permanent injunction to enjoin the State Fire Marshal from approving the transfer of fireworks wholesaler licenses because such approval would violate R.C. 3743.75. The Appellants in this case—the Fire Marshal and the fireworks wholesalers who seek the unlawful transfers of their licenses—do not deny that the Fire Marshal's approval of the desired transfers would be unlawful. Rather, the Appellants invoke an "Agreed Order" setting forth the terms of a settlement agreement they entered into with one another in a previous case in Jefferson County. The Appellants contend that the Agreed Order forecloses the injunctive relief that the Appellees sought and received in this case—even though the Appellees were *not* parties to either the Agreed Order or the case that the Agreed Order settled. In effect, the Appellants contend that the Agreed Order allows them to violate statutory law and that there is little (if anything) any other fireworks wholesaler licensee can do to redress the violation.

The Appellants' position cannot be the law in this state. While the Appellants characterize this case as being about the "sanctity of judgments" and the vitality of the "collateral attack doctrine," this Court should not indulge their platitudes. Appellants seek nothing less than a rule that would bind a *non-party* to an "Agreed Order" entered in a prior case to which it was also not a party. Settled principles underlying the collateral order doctrine, as well as notions of due process, do not support adopting the extraordinary rule sought by the Appellants.

In addition, Appellants also ask this Court to assume the role of a court of error in reviewing the lower courts' grant of injunctive relief. Despite the lower courts' finding that the Fire Marshal would violate R.C. 3743.75 by approving the license transfers at issue, Appellants contend that the Appellees failed to show "irreparable harm" that would entitle them to an

injunction. In reality, however, the lower courts did not abuse their discretion in either granting or affirming injunctive relief in the Appellees' favor. The substantial economic harm that the Appellees stood to suffer, coupled with the clear statutory violation that could not be remedied in the ordinary course of law, provide ample basis to justify the permanent injunction in this case.

For the reasons that follow, this Court should affirm the judgment of the Twelfth District Court of Appeals.

STATEMENT OF THE CASE

On April 7, 2004, Appellee Ohio Pyro, Inc. ("Ohio Pyro"), filed a complaint in the Fayette County Court of Common Pleas, naming the Ohio Department of Commerce, Division of State Fire Marshal ("Fire Marshal") as the Defendant. See Appellants' Rule VII Supplement to Briefs ("Supplement"), at 9. Ohio Pyro's Complaint sought a declaratory judgment and a permanent injunction precluding the Fire Marshal from approving the geographic transfer of wholesale fireworks license nos. 55-10-0001, 55-10-0002, and 55-34-002 beyond the transfers currently allowed by the Ohio Revised Code. *Id.* at 12-16. Along with the Complaint, Ohio Pyro filed a motion for a temporary restraining order and a preliminary injunction. Ohio Pyro filed a first amended complaint on May 14, 2004, adding Appellants Liberty Fireworks, Inc. ("Liberty") and Safety 4th Fireworks, Inc. ("Safety 4th") as Defendants. Appellee West Salem Fireworks, Inc. ("West Salem") later intervened in the action as a Plaintiff.[1]

The trial court granted Ohio Pyro's request for a temporary restraining order pending a hearing on the motion for preliminary injunction. On May 19, 2004, after a five-day evidentiary hearing where all parties participated and were represented by counsel, the trial court granted Ohio Pyro's motion for a preliminary injunction. Following the grant of preliminary injunctive

[1] Unless otherwise specified herein, Appellees Safety 4th and Liberty are collectively referred to as "Safety 4th"; Appellants Ohio Pyro and West Salem are collectively referred to as "Ohio Pyro."

relief, the Appellants filed motions to dismiss. Ohio Pyro and the Fire Marshal also filed cross-motions for summary judgment.

On February 1, 2005, the trial court granted Ohio Pyro's motion for summary judgment and denied the dispositive motions of Safety 4th and the Fire Marshal. The trial court permanently enjoined the Fire Marshal from approving the geographic transfers of the fireworks licenses to any location outside of the political subdivision wherein the licenses are currently located. The Fire Marshal and Safety 4th filed separate appeals to the Twelfth District Court of Appeals, which consolidated the cases for argument and decision. In a unanimous opinion, the court of appeals affirmed the trial court's grant of summary judgment in Ohio Pyro's favor and the issuance of the permanent injunction. See *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal* (Mar. 7, 2006), 12th Dist. App. Nos. 2005-03-009, 2005-03-011, 2006-Ohio-1002.

Safety 4th and the Fire Marshal timely sought discretionary review in this Court, which this Court granted on August 2, 2006.

STATEMENT OF THE FACTS

The sale of fireworks in Ohio requires a license issued annually by the State Fire Marshal. Safety 4th and Ohio Pyro each hold fireworks wholesaler licenses issued by the Fire Marshal. On or about June 27, 1997, Safety 4th sent a handwritten telefax to the Fire Marshal requesting permission to relocate wholesale fireworks license nos. 55-10-0001, 55-10-0002, and 55-34-002. The handwritten fax provided no specific information regarding the transfers and disclosed no proposed new locations.

At the time Safety 4th faxed its request to the Fire Marshal, Ohio law had in place a moratorium barring the Fire Marshal from approving any issuance of a fireworks wholesaler license for a particular location "unless that person possessed such license for that location

immediately prior to January 1, 1997." Section 29, Sub. H.B. 670, 146 Ohio Laws, Part IV, 6440, 6866. When the Fire Marshal stated that it would not allow the transfers because they would violate Ohio law, Safety 4th sued the Fire Marshal in the Jefferson County Court of Common Pleas. Safety 4th's suit challenged the constitutionality of the then-existing statutory moratorium on the issuance and transfer of wholesale fireworks licenses.

By the time that Safety 4th filed suit in Jefferson County, the then-relevant statutory law, effective on June 30, 1997, expressly delineated the moratorium on fireworks wholesaler license issuances and transfers:

> During the period beginning on the effective date of this amendment and ending on December 15, 2002, the State Fire Marshal *shall not do any of the following*:
>
> * * *
>
> (B) Issue a license as a wholesaler of fireworks *** to a person for a particular location unless that person possessed such a license for that location immediately prior to June 30, 1997;
>
> (C) (1) Except as provided in division (C)(2) of this section, approve the transfer of a license as a manufacturer or wholesaler of fireworks *** to any location other than a location for which a license was issued *** immediately prior to June 30, 1997.

(Emphasis added.) Section 165, Am.Sub.H.B. 215, 147 Ohio Laws, Part I, 909, 2197. The only exception to this blanket prohibition, which also had become effective on June 30, 1997, permitted the Fire Marshal to approve the geographic transfer of fireworks wholesaler license *only* to another location "within the same municipal corporation or within the unincorporated area of the same township" in which the license was issued and, even then, only upon the satisfaction of certain statutory requirements. See former R.C. 3743.17.[2]

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[2] Though the specific geographic transfer limitations at issue in the Jefferson County litigation became effective on June 30, 1997, evidence adduced below showed that the moratorium has existed in generally identical form since the mid-1980's. Transcript of Proceedings in *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, Fayette C.P. No. 2004-142-CVH ("Fayette County Testimony"), pp. 51-52.

Safety 4th sought a declaratory judgment that it was entitled to relocate its licenses wherever it wanted or, alternatively, requested a writ of mandamus ordering the Fire Marshal to grant Safety 4th's request to transfer its three wholesale fireworks licenses.

Ohio Pyro, Inc., and several other fireworks wholesaler licensees filed motions to intervene in the Jefferson County action. Each of these licensees, like Safety 4th, were subject to the statutory law prohibiting the geographic transfer of their licenses. The Jefferson County court denied these motions, refusing to allow any of the fireworks wholesaler licensees to become parties in the Jefferson County action. See Supplement, at 5-8. Part of the trial court's basis for denying intervention was its observation that the Fire Marshal would uphold the statutory fireworks licensing framework and moratorium and would therefore adequately protect the interests of other fireworks wholesaler licensees. See *id.*

Ultimately, Safety 4th and the Fire Marshal entered into an agreement to settle the Jefferson County litigation, which they filed with the Jefferson County Court in the form of an Agreed Order on or about June 6, 2001. Supplement, p. 1 ("Agreed Order"). As part of the Agreed Order, the Fire Marshal agreed to conditionally approve the geographic transfer of three of Safety 4th's licenses "to any political subdivision in the State of Ohio * * * ." *Id.*, p. 1, ¶ 1. The Fire Marshal also agreed to approve the transfers "as if perfected on June 27, 1997." *Id.* Regardless of when the transfers would actually occur, the Agreed Order provides that the transfers "shall be approved and deemed effective as of June 27, 1997," without regard to whether Safety 4th had actually submitted an application for the geographic transfers as of that date. *Id.* The Agreed Order also provides, however, that "[n]othing in the Agreed Order negates any current or future duty or obligation imposed upon, or discretion granted to, [the Fire Marshal] by the laws of Ohio or the United States." *Id.*, p. 3, ¶ 15.

Just three weeks after the Agreed Order was entered, newly enacted R.C. 3743.75 became effective on June 29, 2001. The statute provides:

> (A) During the period beginning on June 29, 2001, and ending on December 15, 2008, the state fire marshal shall not do any of the following:
>
> (1) Issue a license as a manufacturer of fireworks under sections 3743.02 and 3743.03 of the Revised Code to a person for a particular fireworks plant unless that person possessed such a license for that fireworks plant immediately prior to June 29, 2001;
>
> (2) Issue a license as a wholesaler of fireworks under sections 3743.15 and 3743.16 of the Revised Code to a person for a particular location unless that person possessed such a license for that location immediately prior to June 29, 2001;
>
> (3) Except as provided in division (B) of this section, *approve the transfer* of a license as a manufacturer or wholesaler of fireworks issued under this chapter *to any location other than a location for which a license was issued under this chapter immediately prior to June 29, 2001.*

(Emphasis added.)[3] With the enactment of R.C. 3743.75, the General Assembly continued the statutory moratorium upon the issuance and transfer of fireworks wholesaler licenses. The Appellants' construction of the Agreed Order is in direct contravention of these statutory proscriptions, to the extent that the Appellants here seek to use it to allow the transfer of Safety 4th's licenses outside of the municipalities where they are currently located.

Before initiating the present lawsuit, Ohio Pyro learned that Safety 4th intended to transfer one of the licenses from Carroll County, Ohio, to Fayette County, Ohio. Ohio Pyro owns and operates the only wholesale fireworks showroom in Fayette County. Its status as the only wholesale fireworks licensee in Fayette County is significant: Ohio Pyro has structured its business model, in part, upon the longstanding and established fireworks license moratorium set

[3] As originally enacted in 2001, R.C. 3743.75 listed the ending date of the moratorium as December 15, 2005. The General Assembly later amended the statute to extend the date until December 15, 2008.

forth under Ohio law. Testimony below evidenced that Ohio Pyro would suffer economic harm and loss of customer goodwill if Safety 4th were allowed to transfer one of its licenses to Fayette County. The evidence showed that this harm and loss could be so great as to put Ohio Pyro completely out of business.

ARGUMENT

I. Response to Appellants' Propositions of Law No. 1: The "Collateral Attack" Doctrine Does Not Bar A Non-Party To An Agreed Judgment Entry From Vindicating Its Own Legal Rights In A Subsequent Action.

Appellants seek to use the "collateral attack" doctrine as a sword that purportedly prevents Ohio Pyro and West Salem from asserting their own claims and from vindicating their own legal rights in the Fayette County action. As Appellants tell it, the "sanctity of final judgments" should bar the Fayette County action, even though *neither* Ohio Pyro nor West Salem was a party to the action that resulted in the settlement agreement (the supposed "judgment") allegedly being collaterally attacked. While Appellants try mightily to cast this case as being about the "sanctity of judgments," their characterization fails when examined in proper context.

In reality, the Appellants seek nothing less than an unprecedented and imprudent rule of compulsory intervention. A decision in the Appellants' favor in this appeal would effectively bar a litigant from vindicating and protecting its own legal rights in its own lawsuit on the theory that the litigant is bound by a previous judgment rendered in a different court in a case where the litigant was *not* a party. To make matters worse, Appellants would have this rule apply with equal force to settlement agreements (*i.e.* contracts) entered into between the parties to the earlier action.

The problematic nature of the Appellants' proposed rule is readily apparent in this case. The Fire Marshal and Safety 4th settled a case to which Ohio Pyro and West Salem were not

parties, procured an "agreed entry" delineating the terms of their settlement agreement, and now seek to bar Ohio Pyro and West Salem (and presumably all other fireworks licensees in the State of Ohio) from vindicating their legal rights, on the theory that the non-party's later suit is a "collateral attack" upon the agreed "judgment." The Appellants wish to implement a purported agreement to violate statutory law, without any legal recourse to those aggrieved by the violation. This Court should reject the Appellants' proposal as an affront to well-settled and fundamental principles of res judicata, collateral attack, and due process of law.

A. The "Collateral Attack" Doctrine Does Not Bar A Non-Party To A Prior Judgment From Asserting Its Legal Rights In A Subsequent Action.

The Appellants' first propositions of law rest upon the premise that the Fayette County summary judgment and permanent injunction is incompatible with the Jefferson County Agreed Order; Appellants therefore contend that the judgment below is an impermissible "collateral attack" on the Agreed Order. Notwithstanding that Ohio Pyro and West Salem were not parties to the action resulting in the Agreed Order, the Appellants nevertheless argue that the Agreed Order barred the Fayette County court from entering a judgment in favor of Ohio Pyro and West Salem.

This Court has defined a "collateral attack" as "'an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.'" *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609, 611, quoting *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 458; see, also, *P.A. Geier Co. v. Reliance Elec. & Eng. Co.* (Cuyahoga C.P. 1913), 26 Ohio Dec. 329, 333. The "collateral attack" doctrine is a corollary to the doctrine of res judicata. See, e.g., *Hall v. Tucker*, 161 Ohio App.3d 245, 2005-Ohio-2674, at ¶¶ 42-44 (discussing "collateral attack" within the framework of the res judicata doctrine); *Vecchio v. Sterns* (Oct. 6. 2005), 8th Dist. App. No. 86119, 2005

Ohio 5350, ¶ 19 ("the doctrine of res judicata prohibits a collateral attack on an otherwise final judgment"). An important and well-settled limitation on the res judicata principle, however, is that only *parties* to a lawsuit (and their privies) are barred from bringing subsequent actions based upon any claim arising out of the "transaction or occurrence" that was the subject of the previous action. *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379, 381-382. The same limitation is true for the doctrine of collateral attack and has been so for over a century:

> While it is true that the parties must resort for relief from the judgment, to a direct attack, as by appeal, motion to correct, or proceeding in error, yet strangers to the judgment, not being entitled to impeach it directly, and who if the judgment were given full faith and effect, would be prejudiced in some pre-existing right, are placed upon a different footing.

Coe v. Erb (1898), 59 Ohio St. 259, 268; see, also, *Moffitt v. Litteral* (Sept. 20, 2002), 2d Dist. App. No. 19154, 2002-Ohio-4973, at ¶ 48 (finding the "collateral attack" doctrine inapplicable when plaintiff was not bound by the previous order allegedly being attacked).

The lack of complete mutuality between the parties in the Jefferson County action and the parties in this case forecloses application of the "collateral attack" bar. Recognizing this rule, the Appellants ask this Court to decide that a *non-party* to a prior case may be bound by an *agreed order* entered in that proceeding, just as sure as if the non-party had been joined in the lawsuit, served with process, and been afforded a full and fair opportunity to litigate. Far from an application of the "collateral attack" doctrine, however, Appellants' proposed rule is hopelessly inconsistent with traditional rules of res judicata and due process. While the "sanctity of judgments" certainly has deep roots in Ohio law, so too does the venerable rule that res judicata binds only *parties and their privies* to a judgment and that due process requires notice and an opportunity to be heard in a matter before one may be bound by a decision therein.

The Appellants have cited no authority that would support the remarkable extension of the "collateral attack" doctrine to bar a *stranger* to an *agreed order* (procured by settlement and not adjudication) from vindicating its own rights in a later suit. Safety 4th gives the illusion of supporting authority, citing to the hornbook definition of "collateral attack" and contending that the Twelfth District's holding below "flies in the face of the established definition of collateral attack." See Safety 4th Brief, p. 9, citing 63 O.Jur.3d, *Judgments* (1985), at p. 332. Tellingly, however, Safety 4th does not cite a single appellate case holding that the collateral attack doctrine bars a stranger to a previous judgment from vindicating its legal rights in a separate lawsuit. Moreover, a later edition of the same treatise states: "[W]here the rights of persons not parties or privies to a proceeding are adversely affected by the judgment rendered therein, such persons *are allowed to impeach it* whenever it is attempted to be enforced against them, or whenever, in any suit, its validity is drawn into question." (Emphasis added.) 63 O.Jur.3d § 476 (2003), *Judgments*,at pp. 290-291, citing *Plater v. Jefferson* (1956), 75 Ohio L. Abs. 68, 136 N.E.2d 111, *Law v. Bucyrus City Bank* (1938), 61 Ohio App. 235, and *Lynn v. Laundry Workers Intern. Union* (1950), 62 Ohio L. Abs. 97, 106 N.E.2d 165.

The Fire Marshall's reliance upon *Marino v. Ortiz* (1988), 484 U.S. 301, is also unpersuasive. The Fire Marshal cites *Marino* for the proposition that the exclusive avenue for Ohio Pyro's challenge was through a Civ.R. 24 motion for intervention. Fire Marshal Brief, at p. 11. Quoting *Marino*, the Fire Marshal states: "Rather than filing a separate lawsuit, '[w]e think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.'" *Id.*, quoting *Marino*, 484 U.S. at 304. The reliance on *Marino*, however, is misplaced; a scrupulous analysis of the case shows that it does not stand for the proposition cited by Appellant.

The United States Supreme Court did *not*, as the Fire Marshal's citation implies, cite "intervention for purposes of appeal" as the superior practice to "filing a separate lawsuit." The Supreme Court discussion of "intervention for purposes of appeal" came in the context of analyzing a party's standing to appeal when it was *not* a party to the lawsuit from which the appeal was taken. The Court recited the "well settled" rule that only parties may appeal an adverse judgment. *Marino*, 484 U.S. at 304. The Supreme Court then identified "intervention for purposes of appeal" as being "better" *than recognizing an exception to this general rule and allowing a non-party to appeal.* The Court did not discuss intervention in the context of a "collateral attack" or in the context of the non-party commencing a separate action.

Admittedly, the Court's *per curiam* opinion in *Marino* (which decided two consolidated cases) also involved an appeal from the Second Circuit's dismissal of a lawsuit for being "an impermissible collateral attack" upon a consent decree to which the plaintiffs were not parties. *Id.* at 303-304. But *Marino* is not authoritative on this point, as the Supreme Court was equally divided on the issue and did not render an opinion of the Court. *Id.* at 304. Moreover, since *Marino* was decided, the Court has affirmed the principle that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties. See *Richards v. Jefferson Cty.* (1996), 517 U.S. 793, 794, 797-802; see, also, *Martin v. Wilks* (1989), 490 U.S. 755, 762-763 (rejecting the application of the "collateral attack" as recited in *Marino*). Simply put, there is no authority that would expand the "collateral attack" doctrine to bar Ohio Pyro's lawsuit in this case.

B. Ohio Pyro Was Not Obligated To Appeal From The Denial of Intervention in the Jefferson County Action In Lieu Of Pursuing Relief in Fayette County.

Notwithstanding the undisputed fact that neither Ohio Pyro nor West Salem was ever a party to the Jefferson County suit that culminated in the Agreed Order, Appellants argue that

Ohio Pyro's attempt to intervene in the Jefferson County suit should somehow bar the instant lawsuit as an impermissible "collateral attack" upon the Agreed Order. But the denial of intervention does not transform Ohio Pyro into a "party" to the suit for purposes of applying the collateral attack doctrine. See Restatement of the Law (2d), Judgments, Section 34, comment *a* (would-be intervenor denied intervention "is not by reason of the intervention proceedings bound by or entitled to the benefits of res judicata deriving from the judgment subsequently entered between [the parties]"). Accordingly, the failed attempt to intervene in the Jefferson County case does not bind Ohio Pyro, for purposes of res judicata and "collateral attack" principles, to an Agreed Order to which it was not a party.

Despite these elementary principles, the Appellants make much of the fact that Ohio Pyro could have "appealed" the denial of intervention and thereby mounted a "direct" attack to the Agreed Order. See Fire Marshal Brief, at p. 11; Safety 4th Brief, at p. 12.[4] But an unsuccessful intervenor is not obliged to appeal from the denial of intervention in order to preserve its ability to pursue legal relief in a later action to vindicate its own legal rights. Such a rule would be tantamount to a rule of "compulsory intervention," which is nowhere contemplated in the Ohio Rules of Civil Procedure. That "compulsory intervention" is not contemplated in the Civil Rules is no surprise, as such a rule would implicate considerable due process concerns. Indeed, as the United States Supreme Court has indicated: "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin v. Wilks*, *supra*, 490 U.S. at 765.

[4] In any case, the "appeal" would only be available, if at all, to Ohio Pyro and not to West Salem, which did not move to intervene in the Jefferson County action.

Moreover, it is highly unlikely that Ohio Pyro could have obtained reversal of the Jefferson County court's denial of intervention even if it had attempted to do so. The Jefferson County court insulated its intervention decision from reversal by pointing out (1) that Ohio Pyro did not have a ripe claim in the Jefferson County litigation and (2) that the State Fire Marshal would adequately protect Ohio Pyro's interest in any event. Supplement, at p. 7. Courts review intervention decisions under an abuse-of-discretion standard. See, e.g., *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St. 3d 501, 503. Given this deferential standard of review, the Jefferson County court's facially plausible rationale would have made Ohio Pyro's immediate appeal from the denial of intervention an exercise in futility.[5] Accordingly, the theoretical availability of an appeal from the denial of Ohio Pyro's motion to intervene in the Jefferson County action is of no significance in evaluating whether the present action is a "collateral attack" on the Agreed Order.[6]

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[5] The Twelfth District even specifically observed that the Jefferson County court *contemplated the possibility of other lawsuits* by fireworks licensees in other counties, thus undermining the argument that Ohio Pyro's lawsuit was a "collateral attack" upon the Agreed Order. Court of Appeals Opinion, at ¶ 16; see, also, Supplement, at 5-8.

[6] In any event, Ohio law is not clear as to whether the denial of a Civ.R. 24 motion to intervene is a final appealable order in all cases. Compare *Myers v. Basobas* (1998), 129 Ohio App.3d 692, 696, and *Jamestown Village Condominium Owners Assn. v. Market Media Research, Inc.* (1994), 96 Ohio App.3d 678, 694 (Tenth and Eighth District cases, respectively, holding that denial of motion to intervene is a final appealable order), with *Wilson v. United Fellowship Club of Barberton* (Mar. 8, 2006), 9th Dist. App. No. 22792, 2006-Ohio-1047, at ¶ 5, and *In re Fell* (May 24, 2005), 5th Dist. App. No. 2004-CA-39, 2005-Ohio-2415, at ¶ 15 (holding that denial of motion to intervene is not a final appealable order). This Court is considering the issue in the context of an insurer's motion to intervene. See *Gehm v. Timberline Post & Frame*, 108 Ohio St.3d 434, 2006-Ohio-421 (certifying conflict on the following issue: "Whether the denial of a motion for leave to intervene on behalf of an insurer for purposes of participating in discovery and submitting jury interrogatories is a final appealable order pursuant to R.C. 2505.02"). As of the filing of this brief, this Court had not decided *Gehm*, which was argued on November 15, 2006.

C. Ohio Pyro Is Not Obligated To Seek Civ.R. 60(B) Relief In Jefferson County In Lieu of Vindicating Its Rights in the Fayette County Action.

Appellant Safety 4th also theorizes that Ohio Pyro could have filed (or still could file) a Civ.R. 60(B) motion for relief from judgment, asking the Jefferson County court to vacate the Agreed Order. Safety 4th Brief, at p. 12. In essence, Safety 4th theorizes that Ohio Pyro could seek Civ.R. 60(B) relief to vacate an agreed judgment to which it was not a party.[7]

Tellingly, neither Appellant cites authority for the proposition that a *non-party* to a lawsuit can obtain intervention in a lawsuit *after* it has been settled and dismissed with prejudice via an agreed entry, much less intervene *and* obtain Civ.R. 60(B) relief vacating the agreed judgment entry. As a matter of Ohio law, it is doubtful that such a ploy would succeed. Indeed, obtaining intervention *after* judgment is exceedingly rare. See *First New Shiloh Baptist Church*, 82 Ohio St.3d at 503-504; *Kourounis v. Raleigh* (1993), 89 Ohio App.3d 315, 318. Post-judgment intervention is even less obtainable when the non-party is seeking to intervene for the purpose of vacating a judgment under Civ.R. 60(B). See *State ex rel. Gray Rd. Fill v. Wray* (1996), 100 Ohio App.3d 812, 816.[8]

Accordingly, the argument that the instant lawsuit should be barred because Ohio Pyro had options to "directly attack" the Agreed Order should not sway this Court even slightly. The

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[7] The Fire Marshal raised the Civ.R. 60(B) argument in its Memorandum in Support of Jurisdiction, but does not argue the issue in its Merit Brief.

[8] Ironically, the Civ.R. 60(B) avenue that Appellants trumpet as the preferred procedural option actually undermines one of the arguments asserted by Appellant Safety 4th. Safety 4th complains that it "expended large amounts of money to construct a building and purchase property" in reliance on "a final judgment that was never appealed." Safety 4th Brief, p. 11. Safety 4th contends that it had a "right to rely" upon the validity of the Agreed Order when pursuing its business interests in Fayette County. But if Ohio Pyro could invoke Civ.R. 60(B) to vacate the Agreed Order, as the Appellants argue, Safety 4th is in no different position. For example, if the Jefferson County court were to vacate the Agreed Order, there would no longer be *any* basis upon which Safety 4th could justify its transfer of licenses outside Jefferson County. Thus, such an option, assuming it exists, undermines Safety 4th's so-called "right to rely" upon the Agreed Order just as much as Ohio Pyro's institution of the separation action in Fayette County.

Appellants' allusion to theoretical avenues of "direct attack" are ill-considered attempts to impose nothing less than a rule of compulsory intervention. Such a rule would be remarkable for its unworkability: henceforth, as a practical matter, citizens and business entities would essentially be charged with the duty to monitor lawsuits throughout Ohio that *might* affect their legal rights and intervene in those suits, at peril of being forever barred from asserting claims or defenses in a later suit that might somehow be deemed a so-called "collateral attack" on a judgment to which they were not a party. The additional complication and expansion of litigation that such a rule would generate is staggering. The Appellants have not identified any persuasive authority that would bless such a rule.

D. Appellants' Parade of Supposed Horribles Does Not Justify Reversal of the Judgment Below.

Attempting to bolster the Appellants' proposed extension of the "collateral attack" doctrine, the Fire Marshal emphasizes its conundrum of being "trapped" between the Fayette County order (enjoining the Fire Marshal from approving the transfer of Safety 4th's licenses) and the Jefferson County Agreed Order (allegedly approving the transfers). Fire Marshal Brief, pp. 1-2. While the Jefferson County court has at least temporarily deemed the Fire Marshal in "contempt" of the Agreed Order (Supplement at 330-331), this circumstance does not call for the extraordinary rule of law that the Appellants advocate in this case.[9] With due respect to the

[9] In a judgment entry "approved" by counsel for Safety 4th *and* the Fire Marshal, the Jefferson County Court of Common Pleas found the State Fire Marshal in contempt of the Agreed Order on June 30, 2005, for failing to approve the transfer of Safety 4th's license to Fayette County. *Safety 4th Fireworks, Inc. dba Country Fireworks v. Ohio Dept. of Commerce, Division of State Fire Marshal* (June 30, 2005), Jefferson C.P. No. 99-CV-275 (Judgment Entry granting Safety 4th's motion for contempt). The contempt order is stayed pending the Fire Marshal's appeal to the Seventh District Court of Appeals. See *id.* In turn, the Seventh District stayed briefing in that cause pending the outcome of the Appellants' appeals in this case. See *Safety 4th Fireworks, Inc. dba County Fireworks v. Ohio Dept. of Commerce, Division of State Fire Marshal* (Sept. 22, 2005), 7th Dist. App. Nos. 05-JE-25, 05-JE-27 (journal entry granting parties' joint motion to stay briefing).

Jefferson County Court's contempt order, which remains subject to reversal on appeal, the "contempt" is a problem of the Appellants' own making. This is not a case in which the Fire Marshal is in the crosshairs of two conflicting *adjudications* on the merits from different courts. On the contrary, the Fire Marshal is in this position precisely because of its inexplicable decision to settle the underlying Jefferson County lawsuit rather than execute the will of the legislature and defend the constitutionality of the R.C. 3743.75 moratorium on license transfers. In other words, if the Fire Marshal is in fact in contempt for failing to comply with the Agreed Order, the Fire Marshal *placed itself* in this position by allegedly agreeing to exempt Safety 4th from the express provision of the Ohio Revised Code (assuming that Appellants are correct that this is what the Agreed Order does).[10] While the Appellants have assailed Ohio Pyro for not pursuing Civ.R. 60(B) relief in the Jefferson County court, they fail to explain why *the Fire Marshal*—an *actual party* to the Agreed Order—should not be the party with the onus to pursue its own Civ.R. 60(B) motion for relief if it is truly concerned about being held in contempt.

Likewise unpersuasive is the litany of supposed public policy considerations and rhetorical questions that Safety 4th raises in support of its position in this appeal. For instance, Safety 4th emphasizes the expense it undertook in reliance upon the Agreed Order and asks, "Why would a party enter into such settlements or judgments if they can simply be ignored or attacked?" Like the Fire Marshal's "contempt" problem, however, Safety 4th's expenditure of money "in reliance" on the Agreed Order was an avoidable problem of its own making. Safety 4th could have avoided any doubt as to the effect of any judgment rendered in Jefferson County by joining other fireworks licensees in the Jefferson County suit. Rather than do that, Safety 4th

[10] For reasons stated *post*, there is a substantial argument that Paragraph 15 of the Agreed Order does not forbid the Fire Marshal from abiding by existing law and denying the transfers of Safety 4th's licenses.

opposed the intervention of Ohio Pyro and other companies in the Jefferson County suit, successfully ensuring that none of its competitors would be parties to an action in which it sought to evade the statutory moratorium on license transfers. While Safety 4th tries mightily to cast Ohio Pyro in a negative light by accusing it of "forum shopping" for a "collateral attack" (Safety 4th Brief at p. 11), it is in no position to cast any stones. This Court should not ignore Safety 4th's fault in creating the situation of which it now complains. Ohio Pyro naturally filed its action in Fayette County simply because Safety 4th chose to try to relocate there.

Safety 4th's lament about its "expense" undertaken in "reliance" on the Agreed Order is further undermined in large part by its own unclean hands in delaying Ohio Pyro's commencement of this action. In a case similar to this one, filed in the Mahoning County Court of Common Pleas in 2002, Safety 4th's then president, Sam Abdalla, denied—despite direct questioning on the subject—that Safety 4th intended to transfer one of its licenses to Fayette County pursuant to the Agreed Order. See Supplement, pp. 288-296. The trial court called this testimony "troubling" for its apparent "perjury." *Id.*, p. 307. Indeed, testimony and evidence in this case showed that Mr. Abdalla had already applied for permits to open a fireworks location in Fayette County *before* his Mahoning County testimony. *Id.*, pp. 297-299. Truthful testimony in the Mahoning County action in 2002 would have prompted Ohio Pyro to commence the Fayette County action long before Safety 4th had incurred any of the expenses that Safety 4th now claims are unrecoverable as a result of the injunction issued in this case. Accordingly, due to its own fault in creating the situation of which it now complains, Safety 4th cannot identify an equitable

basis for extending the "collateral attack" doctrine in the extraordinary manner in which it asks this Court to extend it.[11]

Safety 4th also argues that this case "undermines the concept underlying the Civil Rules that encourages the resolution of all issues in one lawsuit"; Safety 4th contends that permissive rules regarding joinder and intervention would, as a practical matter, be nullified because "if a party can collaterally attack a judgment later on, in a potentially more favorable court, there will be no reason to file a motion to join in an action." Safety 4th predicts the dire consequence of "multiple lawsuits in multiple jurisdictions" that will arise because "a party may simply wait until after a judgment is entered and then file a lawsuit attacking the judgment in what the party perceives is a more favorable jurisdiction." Safety 4th Brief, at p. 11. This attempted tug at the public-policy heartstrings also misses the mark.

As an initial, Safety 4th grossly overstates the impact of the Twelfth District judgment. The lower court held simply that Ohio Pyro's action was *not* a "collateral attack" upon the Agreed Order in Jefferson County. The Twelfth District did *not* hold, as the above-quoted excerpt of Safety 4th's merit brief implies, that *a party to a previous judgment* can file a separate lawsuit attacking the judgment in a different jurisdiction. Indeed, the Twelfth District's decision does not even address that issue. As noted previously, the collateral attack doctrine bars *parties* to a judgment from attacking prior judgments in subsequent actions. The Twelfth District's

[11] In any event, Safety 4th's claim that it has had "the rug pulled out from under it" after expending "large amounts of money to construct a building and purchase property" is a dubious proposition from an economic standpoint. See Safety 4th Brief, p. 11. Safety 4th implies that these expenses are irretrievably lost and that it can never recoup the investment it made in supposed reliance upon the Agreed Order. But this argument inappropriately assumes that the land it bought and the building it constructed have no value because Safety 4th cannot use them to sell fireworks. Safety 4th's position is devoid of logic. Safety 4th has bought land and constructed a substantial improvement on it. The land and the building still have value and, given their location, are certainly marketable; indeed, Safety 4th likely chose the location precisely because of its marketability.

opinion does nothing to change that settled rule. Since Ohio Pyro and West Salem were indisputably *not* parties to the Jefferson County action (much less parties to the Agreed Order), the Twelfth District's opinion could not possibly be construed to apply to *parties* to a previous judgment. Safety 4th's implication to the contrary is, at best, a disingenuous mischaracterization of the judgment below.

Likewise, to the extent that Safety 4th's rationale is intended to cover non-parties to a judgment, the argument is unconvincing. If litigants want to avoid "multiple lawsuits in multiple jurisdictions," they can easily control the danger *by joining interested parties in the lawsuit.* Safety 4th's argument turns the operative mode of analysis on its head by placing the onus *on a non-party* to intervene in a lawsuit and is little more than an attempt to conjure a positive spin on what Safety 4th has tried to do in this case—seize an unfair advantage over its competitors by obtaining a collusive judgment in a lawsuit without joining those competitors as parties. Indeed, Safety 4th's emphasis on the virtues of "joinder and intervention" is ironic, considering that it did *not* join Ohio Pyro (or any other competitors) in the Jefferson County lawsuit and instead *opposed* the competitors' attempt to intervene in the suit.

None of the Appellants' public policy considerations justifies an extension of the collateral attack doctrine that would result in a non-party to a judgment being bound thereby.

E. The Lower Courts Correctly Held That The Fayette County Judgment Is Not An Impermissible "Collateral Attack" Upon The Jefferson County Agreed Order.

Even if we indulge the Appellants' view that the "collateral attack" prohibition reaches nonparties to a previous judgment, a reversal of the Twelfth District's decision does not necessarily follow. As noted previously, a true "collateral attack" is "an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved." *Fawn Lake Apts.*, 85 Ohio St.3d at 611 (internal quotations omitted). In

this case, however, Ohio Pyro is simply vindicating its own preexisting rights derived from Ohio statutory law, namely, the rights contemplated by the statutory moratorium on the transfer of fireworks wholesaler licenses. The fact that the relief obtained by Appellees' may have the incidental effect of limiting the actions that Appellants may take under the guise of the Agreed Order does not make the Fayette County action an impermissible "collateral attack." See *id.*

The Appellants rely on the premise that the injunctive relief granted below conflicts with the Agreed Order. Appellants contend that the injunction bars the Fire Marshal from approving the transfer of Safety 4th licenses while the Agreed Order requires such transfers. But if the Appellants' interpretation of the Agreed Order is correct (which interpretation Ohio Pyro disputed and which the lower courts rejected), it is at loggerheads with the express prohibition on license transfers contained in R.C. 3743.75. There is no need here, however, to interpret the Agreed Order in a manner that results in noncompliance with statutory law.

Paragraph 15 of the Agreed Order provides:

> 15. Nothing in this Agreed Order negates any current *or future* duty or obligation imposed upon, or discretion granted to, Defendant [State Fire Marshal] by the laws of Ohio or the United States.

(Emphasis added.) Supplement, p. 3.

By subjecting the Agreed Order to "any current or future duty" of the Fire Marshal, Paragraph 15 necessarily includes current and future versions of the moratorium on the issuance and transfer of fireworks licenses. Without ever acknowledging or explaining the significance of Paragraph 15, Appellants simply assert that the June 6, 2001, Agreed Order excuses the Fire Marshal from respecting the prohibitions of R.C. 3743.75. However, since Paragraph 15 of the Appellants' own Agreed Order requires the Fire Marshal to follow the law existing at the time of

his particular action, Appellants *must* adhere to the Ohio Revised Code as written—including the moratorium on geographic transfers of fireworks wholesaler licenses enacted in R.C. 3743.75.

The parties to this appeal all agree that R.C. 3743.75 expressly precludes the transfer of fireworks licenses from one municipality or township to another. Indeed, the statute states that the Fire Marshal "*shall not* * * * approve the transfer of a license as a manufacturer or wholesaler of fireworks issued under this chapter to any location other than a location for which a license was issued under this chapter immediately prior to the effective date of this section." (Emphasis added) R.C. 3743.75(A). Notwithstanding this express statutory moratorium, the Appellants construe the Agreed Order to compel the Fire Marshal *to violate statutory law* and approve *unlawful* license transfers sought by Safety 4th. But there is no reason to construe the Agreed Order in a manner that would force the Fire Marshal to do something that the General Assembly has forbidden. The Appellants' own negotiated settlement agreement binds them to Paragraph 15 of the Agreed Order and, as a result, by R.C. 3743.75 as it currently reads. *Downey v. Clauder* (S.D.Ohio 1992), 811 F.Supp. 338, 339 (noting that an interpretation of a settlement agreement which gives a "lawful" meaning to all the terms is preferred to an interpretation that leaves a part of the contract "unlawful"). Accordingly, this Court can interpret the Agreed Order consistently with the statutory moratorium on fireworks wholesaler license transfers.[12]

The Fayette County court simply forced the Appellants to honor the terms of their own settlement and the Agreed Order. The Fayette County permanent injunction enjoins the Fire Marshal from "approving geographic transfers of wholesale fireworks license numbers 55-10-

[12] This construction of the Agreed Order is consistent with Ohio case law, which provides that regulatory agencies are bound by the law in effect at the time they seek to act on an application, not by the law in effect when the application was made. See *Save the Lake v. Schregardus* (2001), 141 Ohio App.3d 530, 539.

001, 55-10-0002, and 55-34-0002 'to any political subdivision in the state of Ohio * * *' other than to another location within the political subdivision in which each license is currently located." The injunction simply forbids the Fire Marshal from performing the precise act that the statutory law prohibits. Accordingly, the summary judgment order of the Fayette County court holds Appellants to the express terms of the Agreed Order *and* the Ohio Revised Code, thereby reaffirming the requirement that the Fire Marshal follow the law as enunciated by the Ohio General Assembly. Under this reasonable construction of the Agreed Order, there is no inconsistency between it and the Fayette County order and therefore no colorable "collateral attack" whatsoever.

Further cutting against the Appellants' proposed rule in this case is the practical effect of their desired result. The Fayette County court granted (and the Twelfth District affirmed) a permanent injunction in the instant case based upon an adjudication *on the merits* that it would be a violation of state law for the Fire Marshal to allow transfer of Safety 4th's fireworks wholesalers licenses outside of their current municipalities or townships. Under the Appellants' view, an Agreed Order that does *not* purport to decide the merits of any legal issue would trump an adjudication *on the merits* by a court of competent jurisdiction. Simply put, the Appellants endorse a rule whereby litigants can use an agreed order (*i.e.*, a settlement agreement) as an end run around compliance with statutory law to the detriment of others who are not parties to the action. Appellants have cited no authority for this remarkable extension of the "collateral attack" doctrine.

II. Response to Appellants' Propositions of Law No. II: A state agency's intended violation of statutory law, the effect of which would result in unfair competition, lost customer goodwill, lost market share, lost business opportunity, and prejudice to similarly situated entities, is an irreparable harm which a trial court has discretion to prevent through a grant of injunctive relief.

The Appellants' second propositions of law sound entirely in error-correction: They contend simply that the lower court erroneously applied settled law in finding irreparable harm and granting injunctive relief to Ohio Pyro. But while the Appellants assail the injunction as the grant of extraordinary relief for injury that could be compensated through the award of damages, their analysis is highly simplistic and legally unsound. The trial court did not exceed its authority in issuing an injunction to enjoin the Fire Marshal's intention to violate statutory law. The permanent injunction granted by the Fayette County court effectively prevented Safety 4th and Liberty Fireworks from transferring their fireworks licenses to Fayette County, a result that is entirely consistent with the letter of R.C. 3743.75.

A. Ohio law recognizes that the loss of customer goodwill amounts to irreparable injury for the purposes of an injunction.

The requirements for injunctive relief are well settled: A plaintiff must demonstrate that the requested injunction is necessary to protect a clear right from immediate and irreparable harm for which there is no adequate remedy at law. See, e.g., *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St. 3d 367, 2002-Ohio-2427, at ¶¶ 73-74. An injury is "irreparable" when there could be no plain, adequate, and complete remedy at law for its occurrence and when any attempt at monetary restitution would be "impossible, difficult or incomplete." *Fraternal Order of Police v. Cleveland* (2001), 141 Ohio App.3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (1996), 115 Ohio App. 3d 1, 12; see, also, *Mid-America Tire*, at ¶ 82. Decisions to grant injunctive relief are within the discretion of the trial court and will not be

reversed absent an abuse of that discretion. *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 125; *Garono v. State* (1988), 37 Ohio St. 3d 171, 173.

1. There Was Ample Evidence To Support A Finding Of Irreparable Harm.

The uncontroverted evidence adduced during the five-day hearing on Appellees' motion for a preliminary injunction clearly demonstrated that Appellees will suffer the permanent loss of customer base, goodwill, and fireworks business if the Fire Marshal allows Safety 4th to transfer any of its three licenses into any county that Appellees serve. Ohio courts have consistently recognized that the loss of customer base is an irreparable harm. *See, e.g., Myers Services, Inc. v. Costello* (June 26, 1989), Ashland App. No. CA-917, 1989 Ohio App. LEXIS 2725, *17 (loss of several business customers and loss of business reputation qualified as irreparable harm); *Atlantic Tool & Die v. Kacic* (Nov. 18, 1998), Medina App. No. C.A. 2717-M, 1998 Ohio App. LEXIS 5485, *9 (loss of customers satisfied irreparable harm requirement and injunction was granted); *Blakeman's Valley Office Equipment, Inc. v. Bierdeman* (2003), 152 Ohio App.3d 86, 93.

Bruce Zoldan, the President of Ohio Pyro, testified during the preliminary injunction hearing, based upon his own personal knowledge of the sources of Ohio Pyro's business, that the Fayette County relocation alone could easily result in a loss of fifty percent or more of the sales at Ohio Pyro's Fayette County showroom. Supplement, pp. 131-132. Mr. Zoldan further testified that such a loss would make the Fayette County showroom unprofitable and that the unprofitability of that showroom could easily render Appellees' business as a whole unprofitable. *Id.* at 140. Ohio Pyro could not operate at a loss and survive.

Mr. Zoldan's testimony was not speculative. Indeed, his predictions of lost profit and customer goodwill were substantiated by testimony from Gregory Wells, former general

manager of Eagle Fireworks, Inc., located in Guernsey County. See Supplement, pp. 321-323.[13] Mr. Wells testified that when Safety 4th opened a competing fireworks showroom thirteen miles away from an Eagle Fireworks showroom, Eagle Fireworks lost well over fifty percent of its sales, and, as a result, stopped being profitable. *Id.*

Compounding the harm described above is the fact that Safety 4th was also trying to relocate another of its licenses to a location serviced by Ohio Pyro's Richland County showroom. Mr. Zoldan specifically testified at the preliminary injunction hearing that a relocation to the Mt. Gilead (Morrow County) area could likewise render the Mansfield (Richland County) showroom unprofitable, which would severely harm the overall profitability of Ohio Pyro. Supplement, at 286-287. The compound effect of Safety 4th transferring licenses into Fayette County *and* into Morrow County (Mt. Gilead) would have had the profound effect of completely decimating Ohio Pyro's business. *Id.* The president of Appellee West Salem, Anthony Ciraldo, similarly testified at the preliminary injunction hearing that his one and only facility draws substantial customers from Medina and Wayne Counties and would likely go out of business if a competitor were allowed to relocate and open a showroom where Safety 4th is considering. Supplement, at 318-320. Appellants never offered any evidence to the contrary.

Finally, the hearing testimony of Mr. Samuel Abdalla (former president of Safety 4th and Liberty Fireworks) disclosed that, in addition to the Fayette County and Morrow County relocations, Safety 4th intended to relocate a third license to either Delaware, Medina, or Clark County. Ohio Pyro services each of these counties and derives customers there from. Fayette County Testimony, Plaintiff's Exhibits 3, 9, and 10. Likewise, West Salem draws customers

[13] Ohio Pyro introduced the transcript of Mr. Wells' testimony from a preliminary injunction hearing held in Mahoning County. The trial court's acceptance of the testimony as an exhibit to the proceedings below appears in the transcript of the preliminary injunction proceedings in this case. See Supplement at 26, lines 1-12.

from Medina County and the surrounding areas as well. Supplement at 318-320. Allowing Safety 4th to move a license into any of these counties would exacerbate the irreparable harm resulting from the relocations that Safety 4th is attempting in Fayette and Morrow Counties.

2. A Finding of Irreparable Harm Is Not An Abuse of Discretion Under the Circumstances Presented in this Case.

The Appellants argue that any injury Ohio Pyro will suffer will be in the form of competition or lost income and, as a result, assert that Appellees possess an adequate remedy at law. See Safety 4th Brief, at pp. 13-17; Fire Marshal Brief, at pp. 12-14. This argument flatly ignores the multitude of cases holding that a loss of customer base and loss of goodwill constitute irreparable harm for purposes of an injunction. And as this Court observed just four years ago, "'It is not enough that there is a remedy at law; it must be plain, adequate and complete; or in other words, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity.'" *Mid-America Tire*, at ¶ 81, quoting *Culver v. Rodgers* (1878), 33 Ohio St. 537, 545.

In this case, there was ample testimony in the trial court that Appellees would lose significant market share, business opportunity, and customer goodwill if the Fire Marshal were to grant the statutorily prohibited transfer of Safety 4th's fireworks wholesaler license to Fayette County. See, e.g., *Basicomputer Corp. v. Scott* (N.D. Ohio 1991), 791 F. Supp. 1280, 1293 (loss of goodwill occasioned by unfair competition is an "irreparable injury" warranting injunctive relief), affirmed (6th Cir. 1992), 973 F.2d 507, 511-512. Further, the lower courts could have quite plausibly concluded that it was exceedingly difficult, if not impossible, to calculate the value in "damages" of Appellees' future loss of customer goodwill, market share, and lost opportunity to do business under the universal statutory licensing scheme in place. See *Mid-America Tire*, at ¶ 82. And because of this difficulty in calculating the value of the future harm that would result from the Appellants' violation of statutory law forbidding transfer of fireworks

licenses, the lower courts acted appropriately in granting and affirming the permanent injunction. See *id.* (affirming permanent injunction in fraud action based, in part, on the "near impossibility" of estimating damages); *Basicomputer Corp.*, 973 F.2d at 511 (affirming grant of injunction: "Because of the intangible nature of these injuries, appellees' damages would be impossible to calculate."). Under such circumstances, the injunctive relief granted here was not an abuse of discretion.

B. It Was Proper For The Lower Courts To Enjoin A Violation of State Law That Cannot Otherwise Be Remedied In the Ordinary Course of Law.

It is also significant that the trial court enjoined the Fire Marshal from violating Ohio statutory law. Absent the Fayette County Court's injunction, the Fire Marshal would have approved Safety 4th's geographic transfer of a license to Fayette County, despite the undisputed prohibition on such transfers imposed by R.C. 3743.75.

Without an injunction to prevent the unlawful transfer of Safety 4th's licenses, the transfers would have been a *fait accompli*, resulting in some licensees (*i.e.*, Safety 4th and Liberty Fireworks) obtaining a competitive advantage that was not available to any other fireworks wholesaler in the state of Ohio. Apart from the economic harm that Appellants would inevitably suffer as a result of an illegal transfer of a fireworks license to Fayette County, Ohio Pyro and West Salem would also be deprived of their opportunity to operate their businesses on equal footing with Safety 4th and Liberty Fireworks. While Liberty Fireworks and Safety 4th could have used the transferred licenses to operate in more desirable locations, other licensees do not enjoy the same opportunity. Indeed, at the present time, Ohio Pyro owns and operates the only wholesale fireworks showroom in Fayette County and has structured its commercial survival, in part, upon the understanding that if others could relocate into its areas, it would be free to relocate to better locations as well. Injunctive relief was therefore appropriate to prevent the uniquely irreparable harm of being placed at a statutory disadvantage, contrary to the general framework and specific prohibitions of Revised Code Chapter 3743. Cf. *Sequoia Voting Sys. v.*

Ohio Secy. Of State (Ct. Cl. 2003), 125 Ohio Misc.2d 7, 18 (granting injunctive relief to an aggrieved bidder based on the "irreparable harm" of being deprived "a fair and equal opportunity" to be selected as a vendor).

Licensees under the statutory scheme for issuing fireworks wholesaler licensees possess certain rights that accompany the license itself. Each licensee pays a fee and must meet certain requirements. And, until the Agreed Order purported to change the playing field, all wholesale fireworks licensees received the same rights and were subject to the same limitations. The instant lawsuit for declaratory and injunctive relief was Ohio Pyro's way to restore lawful order to the statutory licensing scheme and to prevent the Fire Marshal and Safety 4th from performing an end run around the licensing limitations duly enacted by the legislature. The harm to Ohio Pyro from the preferential treatment Safety 4th contends it is due under the Agreed Order is real and ongoing and would have continued unmitigated—and irreparably—if the Fire Marshal had been allowed to approve the transfers as it intended. The potential favoritism and unequal treatment alone is sufficient irreparable harm to justify the trial court's permanent injunction.

While Safety 4th maintains that Ohio Pyro sought injunctive relief to prevent "ordinary" business competition in a "free market economy," see Safety 4th Brief at pp. 14 and 17, this is simply not the case. Safety 4th's intended "competition" pursuant to the Agreed Order was anything but ordinary and was grossly unfair. Safety 4th would have enjoyed an unlawful competitive advantage that no other fireworks licensee enjoyed or could replicate. Injunctive relief to prevent the Fire Marshal from effectuating the unlawful transfer of Safety 4th's licenses was entirely proper under these circumstances.

C. Appellants Have Failed To Identify The Existence Of A Damages Remedy In The Ordinary Course of Law.

The consistent theme underlying Appellants' second propositions of law is that Ohio Pyro should pursue a *money damages* remedy and should not be able to obtain *injunctive* relief. See, *e.g.*, Safety 4th Brief, pp. 16-17; Fire Marshal Brief, pp. 12-13. Conspicuously absent from the Appellants' analysis, however, is any explanation of *what* damages remedy is available to Ohio Pyro in the ordinary course of law.

Ohio Pyro's action is *not* one sounding in contract or tort. Rather, it is an action that sought a declaration as to its rights under R.C. Chapter 3743 and as to the Fire Marshal's ability (or inability) to approve a license transfer that would have violated statutory law and resulted in unlawful and unfair competition to the Appellees' detriment. While Ohio Pyro certainly has a viable legal claim to determine its legal rights by way of a declaratory judgment and to obtain accompanying injunctive relief under R.C. Chapter 2721, it is far from clear that Ohio Pyro could sue anyone for damages under the facts present here. In the absence of a statutory right of action for damages or a common-law claim for damages, neither of which appears to apply here, the *only* remedy available to Ohio Pyro was the one they pursued—an action for declaratory and injunctive relief.

While the Appellants say that Ohio Pyro should be limited to a "money damages" remedy, they have not established that such a remedy exists or even posited a viable theory for obtaining such relief. Indeed, it would seem that a damages remedy is nonexistent—and therefore, by definition, inadequate. Declaratory and injunctive relief not only provided Ohio Pyro with the full and complete relief it sought and deserved, those remedies appear to be the *only* remedies available in law or equity to remedy the Fire Marshal's intended violation of statutory law. This is precisely the type of case in which a declaratory judgment and

accompanying injunctive relief is appropriate. This Court should accordingly affirm the lower courts' grant of injunctive relief.

CONCLUSION

Appellants ask this Court to rule that their Agreed Order bars the Appellees (non-parties thereto) from protecting their own rights in an action to enjoin a violation of R.C. Chapter 3743. Given the facts of this case and the procedural history leading to the Agreed Order, Ohio Pyro and West Salem were legally and procedurally entitled to commence another proceeding to enforce the express statutory prohibitions against the conduct contemplated by the Appellants under the Agreed Order. There was no "collateral attack" in this case and no abuse of discretion in the lower courts' grant of permanent injunctive relief. This Court should affirm the judgment of the Twelfth District Court of Appeals.

Respectfully submitted,

T. Earl LeVere By Vladimir P. Belo per authorization, 12/19/2006

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLEES OHIO PYRO, INC., AND WEST SALEM FIREWORKS, INC., was served by U.S. Mail, first-class postage prepaid, on December 19, 2006, upon the following attorneys for the Appellants:

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APPENDIX

1. R.C. 3743.75
2. R.C. 3743.17
3. Section 165, Am.Sub.H.B. 215, 147 Ohio Laws, Part I, 909, 2197
4. Section 29, Sub. H.B. 670, 146 Ohio Laws, Part IV, 6440, 6866

LEXSTAT ORC ANN. 3743.75

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 5, 2006 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 *

TITLE 37. HEALTH -- SAFETY -- MORALS
CHAPTER 3743. FIREWORKS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 3743.75 (2006)

§ 3743.75. Moratorium concerning manufacturer and wholesaler licenses

(A) During the period beginning on June 29, 2001, and ending on December 15, 2008, the state fire marshal shall not do any of the following:

(1) Issue a license as a manufacturer of fireworks under sections 3743.02 and 3743.03 of the Revised Code to a person for a particular fireworks plant unless that person possessed such a license for that fireworks plant immediately prior to June 29, 2001;

(2) Issue a license as a wholesaler of fireworks under sections 3743.15 and 3743.16 of the Revised Code to a person for a particular location unless that person possessed such a license for that location immediately prior to June 29, 2001;

(3) Except as provided in division (B) of this section, approve the geographic transfer of a license as a manufacturer or wholesaler of fireworks issued under this chapter to any location other than a location for which a license was issued under this chapter immediately prior to June 29, 2001.

(B) Division (A)(3) of this section does not apply to a transfer that the state fire marshal approves under division (F) of section 3743.17 of the Revised Code.

(C) Notwithstanding section 3743.59 of the Revised Code, the prohibited activities established in divisions (A)(1) and (2) of this section, geographic transfers approved pursuant to division (F) of section 3743.17 of the Revised Code, and storage locations allowed pursuant to division (I) of section 3743.04 of the Revised Code or division (G) of section 3743.17 of the Revised Code are not subject to any variance, waiver, or exclusion.

(D) As used in division (A) of this section:

(1) "Person" includes any person or entity, in whatever form or name, that acquires possession of a manufacturer or wholesaler of fireworks license issued pursuant to this chapter by transfer of possession of a license, whether that transfer occurs by purchase, assignment, inheritance, bequest, stock transfer, or any other type of transfer, on the condition that the transfer is in accordance with division (D) of section 3743.04 of the Revised Code or division (D) of section 3743.17 of the Revised Code and is approved by the fire marshal.

(2) "Particular location" includes a licensed premises and, regardless of when approved, any storage location approved in accordance with section 3743.04 or 3743.17 of the Revised Code.

HISTORY:

149 v H 161, § 3. Eff 6-29-2001; 150 v H 255, § 1, eff. 3-31-05; 151 v H 66, § 101.01, eff. 9-29-05.

NOTES:

Section Notes

The effective date is set by § 612.03 of 151 v H 66.

See provisions, § 6(B) of HB 161 (149 v --) following RC § 3743.01.

EFFECT OF AMENDMENTS

151 v H 66, effective September 29, 2005, in (A)(3), inserted "geographic"; in (B), corrected internal references, and deleted the last sentence, which read: "Section 3743.59 of the Revised Code does not apply to this section; and added (C) and (D).

150 v H 255, effective March 31, 2005, specified the effective date throughout; substituted "2008" for "2005"; and deleted (C), pertaining to a proposal to provide for the issuance of manufacturer and wholesaler of fireworks licenses based on demographics.

Case Notes & OAGs

TRANSFER OF LICENSE.

When the State Fire Marshal (SFM), in settling a lawsuit, approved the geographic relocation of certain companies' fireworks licenses, despite Ohio Rev. Code Ann. §§ 3743.75 and 3743.17, and their competitors, in another suit, sought a declaration of the parties' rights, a declaratory judgment was proper because the case presented a real controversy between the parties that was ripe for judicial resolution and had a direct and immediate impact on the parties, as the SFM indicated it would approve the geographic relocation of fireworks licenses when the applicable law did not permit it. Ohio Pyro, Inc. v. Ohio DOC, 2006 Ohio App. LEXIS 920, 2006 Ohio 1002, (Mar. 6, 2006).

When the State Fire Marshal, in settling a lawsuit, approved the geographic relocation of certain companies' fireworks licenses, despite Ohio Rev. Code Ann. §§ 3743.75 and 3743.17, another trial court had jurisdiction to enjoin such transfer at the request of the companies' competitors as the second court's assertion of jurisdiction did not collaterally attack the first court's judgment approving the settlement, to which the competitors were not parties, as the second court did not have to defeat or avoid the operation of the first court's judgment to address the issues raised. Ohio Pyro, Inc. v. Ohio DOC, 2006 Ohio App. LEXIS 920, 2006 Ohio 1002, (Mar. 6, 2006).

Where a fireworks company sued the State Fire Marshal and a fireworks competitor, alleging that the Marshal illegally transferred the competitor's license from one county to another in direct contravention of a legislative moratorium pursuant to RC § 3743.75, the Marshal and competitor's motions to dismiss the action, pursuant to Ohio R. Civ. P. 12, were granted upon a finding that the matter was not ripe for adjudication; as the competitor had only made

initial inquiries into taking the steps for transferring its license, there was no showing of the required justiciability required for the trial court to have asserted jurisdiction over the matter pursuant to Ohio Const., art. IV, § 4(B). Eagle Fireworks, Inc. v. Ohio DOC, 2004 Ohio App. LEXIS 465, 2004 Ohio 509, (2004).

LEXSTAT ORC 3743.17

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 5, 2006 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 *

TITLE 37. HEALTH -- SAFETY -- MORALS
CHAPTER 3743. FIREWORKS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 3743.17 (2006)

§ 3743.17. Renewal; alteration of premises; authorized activities; posting; transfer of license; continuing education; liability insurance; expansion or contraction of premises; storage locations

(A) The license of a wholesaler of fireworks is effective for one year beginning on the first day of December. The fire marshal shall issue or renew a license only on that date and at no other time. If a wholesaler of fireworks wishes to continue engaging in the wholesale sale of fireworks at the particular location after its then effective license expires, it shall apply not later than the first day of October for a new license pursuant to section 3743.15 of the Revised Code. The fire marshal shall send a written notice of the expiration of its license to a licensed wholesaler at least three months before the expiration date.

(B) If, during the effective period of its licensure, a licensed wholesaler of fireworks wishes to perform any construction, or make any structural change or renovation, on the premises on which the fireworks are sold, the wholesaler shall notify the fire marshal in writing. The fire marshal may require a licensed wholesaler also to submit documentation, including, but not limited to, plans covering the proposed construction or structural change or renovation, if the fire marshal determines the documentation is necessary for evaluation purposes in light of the proposed construction or structural change or renovation.

Upon receipt of the notification and additional documentation required by the fire marshal, the fire marshal shall inspect the premises on which the fireworks are sold to determine if the proposed construction or structural change or renovation conforms to sections 3743.15 to 3743.21 of the Revised Code and the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code. The fire marshal shall issue a written authorization to the wholesaler for the construction or structural change or renovation if the fire marshal determines, upon the inspection and a review of submitted documentation, that the construction or structural change or renovation conforms to those sections and rules.

(C) The license of a wholesaler of fireworks authorizes the wholesaler to engage only in the following activities:

(1) Possess for sale at wholesale and sell at wholesale fireworks to persons who are licensed wholesalers of fireworks, to out-of-state residents in accordance with section 3743.44 of the Revised Code, to residents of this state in accordance with section 3743.45 of the Revised Code, or to persons located in another state provided the fireworks are shipped directly out of this state to them by the wholesaler. The possession for sale shall be at the location described in

the application for licensure or in the notification submitted under division (B) of this section, and the sale shall be from the inside of a licensed building and from no structure or device outside a licensed building. At no time shall a licensed wholesaler sell any class of fireworks outside a licensed building.

(2) Possess for sale at retail and sell at retail fireworks, other than 1.4G fireworks as designated by the fire marshal in rules adopted pursuant to division (A) of section 3743.05 of the Revised Code, to licensed exhibitors in accordance with sections 3743.50 to 3743.55 of the Revised Code, and possess for sale at retail and sell at retail fireworks, including 1.4G fireworks, to out-of-state residents in accordance with section 3743.44 of the Revised Code, to residents of this state in accordance with section 3743.45 of the Revised Code, or to persons located in another state provided the fireworks are shipped directly out of this state to them by the wholesaler. The possession for sale shall be at the location described in the application for licensure or in the notification submitted under division (B) of this section, and the sale shall be from the inside of the licensed building and from no other structure or device outside this licensed building. At no time shall a licensed wholesaler sell any class of fireworks outside a licensed building.

A licensed wholesaler of fireworks shall sell under division (C) of this section only fireworks that meet the standards set by the consumer product safety commission or by the American fireworks standard laboratories or that have received an EX number from the United States department of transportation.

(D) The license of a wholesaler of fireworks shall be protected under glass and posted in a conspicuous place at the location described in the application for licensure or in the notification submitted under division (B) of this section. Except as otherwise provided in this section, the license is not transferable or assignable. A license may be transferred to another person for the same location for which the license was issued if the assets of the wholesaler are transferred to that person by inheritance or by a sale approved by the fire marshal. The license is subject to revocation in accordance with section 3743.21 of the Revised Code.

(E) The fire marshal shall adopt rules for the expansion or contraction of a licensed premises and for the approval of an expansion or contraction. The boundaries of a licensed premises, including any geographic expansion or contraction of those boundaries, shall be approved by the fire marshal in accordance with rules the fire marshal adopts. If the licensed premises of a licensed wholesaler from which the wholesaler operates consists of more than one parcel of real estate, those parcels must be contiguous, unless an exception is allowed pursuant to division (G) of this section.

(F) (1) Upon application by a licensed wholesaler of fireworks, a wholesaler license may be transferred from one geographic location to another within the same municipal corporation or within the unincorporated area of the same township, but only if all of the following apply:

(a) The identity of the holder of the license remains the same in the new location.

(b) The former location is closed prior to the opening of the new location and no fireworks business of any kind is conducted at the former location after the transfer of the license.

(c) The new location has received a local certificate of zoning compliance and a local certificate of occupancy, and otherwise is in compliance with all local building regulations.

(d) The transfer of the license is requested by the licensee because the existing facility poses an immediate hazard to the public.

(e) Every building or structure at the new location is separated from occupied residential and nonresidential buildings or structures, railroads, highways, or any other buildings or structures located on the licensed premises in accordance with the distances specified in the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code. If the licensee fails to comply with the requirements of division (F)(1)(e) of this section by the licensee's own act, the license at the new location is forfeited.

(f) Neither the licensee nor any person holding, owning, or controlling a five per cent or greater beneficial or equity interest in the licensee has been convicted of or has pleaded guilty to a felony under the laws of this state, any other state, or the United States after June 30, 1997.

(g) The fire marshal approves the request for the transfer.

(2) The new location shall comply with the requirements specified in divisions (A)(1) and (2) of section 3743.25 of the Revised Code whether or not the fireworks showroom at the new location is constructed, expanded, or first begins operating on and after June 30, 1997.

(G) (1) A licensed wholesaler may expand its licensed premises within this state to include not more than two storage locations that are located upon one or more real estate parcels that are noncontiguous to the licensed premises as that licensed premises exists on the date a licensee submits an application as described below, if all of the following apply:

(a) The licensee submits an application to the fire marshal requesting the expansion and an application fee of one hundred dollars per storage location for which the licensee is requesting approval.

(b) The identity of the holder of the license remains the same at the storage location.

(c) The storage location has received a valid certificate of zoning compliance, as applicable, and a valid certificate of occupancy for each building or structure at the storage location issued by the authority having jurisdiction to issue the certificate for the storage location, and those certificates permit the distribution and storage of fireworks regulated under this chapter at the storage location and in the buildings or structures. The storage location shall be in compliance with all other applicable federal, state, and local laws and regulations.

(d) Every building or structure located upon the storage location is separated from occupied residential and nonresidential buildings or structures, railroads, highways, and any other buildings or structures on the licensed premises in accordance with the distances specified in the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code.

(e) Neither the licensee nor any person holding, owning, or controlling a five per cent or greater beneficial or equity interest in the licensee has been convicted of or pleaded guilty to a felony under the laws of this state, any other state, or the United States, after the effective date of this amendment.

(f) The fire marshal approves the application for expansion.

(2) The fire marshal shall approve an application for expansion requested under division (G)(1) of this section if the fire marshal receives the application fee and proof that the requirements of divisions (G)(1)(b) to (e) of this section are satisfied. The storage location shall be considered part of the original licensed premises and shall use the same distinct number assigned to the original licensed premises with any additional designations as the fire marshal deems necessary in accordance with section 3743.16 of the Revised Code.

(H) (1) A licensee who obtains approval for use of a storage location in accordance with division (G) of this section shall use the site exclusively for the following activities, in accordance with division (C)(1) of this section:

(a) Packaging, assembling, or storing fireworks, which shall occur only in buildings approved for such hazardous uses by the building code official having jurisdiction for the storage location and shall be in accordance with the rules adopted by the fire marshal under division (B)(4) of section 3743.18 of the Revised Code for the packaging, assembling, and storage of fireworks.

(b) Distributing fireworks to other parcels of real estate located on the wholesaler's licensed premises, to

licensed manufacturers or other licensed wholesalers in this state or to similarly licensed persons located in another state or country;

(c) Distributing fireworks to a licensed exhibitor of fireworks pursuant to a properly issued permit in accordance with section 3743.54 of the Revised Code.

(2) A licensed wholesaler shall not engage in any sales activity, including the retail sale of fireworks otherwise permitted under division (C)(2) of this section or pursuant to section 3743.44 or 3743.45 of the Revised Code, at a storage location approved under this section.

(I) A licensee shall prohibit public access to all storage locations it uses. The fire marshal shall adopt rules establishing acceptable measures a wholesaler shall use to prohibit access to storage sites.

(J) The fire marshal shall not place the license of a wholesaler of fireworks in temporarily inactive status while the holder of the license is attempting to qualify to retain the license.

(K) Each licensed wholesaler of fireworks or a designee of the wholesaler, whose identity is provided to the fire marshal by the wholesaler, annually shall attend a continuing education program consisting of not less than eight hours of instruction. The fire marshal shall develop the program and the fire marshal or a person or public agency approved by the fire marshal shall conduct it. A licensed wholesaler or the wholesaler's designee who attends a program as required under this division, within one year after attending the program, shall conduct in-service training for other employees of the licensed wholesaler regarding the information obtained in the program. A licensed wholesaler shall provide the fire marshal with notice of the date, time, and place of all in-service training not less than thirty days prior to an in-service training event.

(L) A licensed wholesaler shall maintain comprehensive general liability insurance coverage in the amount and type specified under division (B)(2) of section 3743.15 of the Revised Code at all times. Each policy of insurance required under this division shall contain a provision requiring the insurer to give not less than fifteen days' prior written notice to the fire marshal before termination, lapse, or cancellation of the policy, or any change in the policy that reduces the coverage below the minimum required under this division. Prior to canceling or reducing the amount of coverage of any comprehensive general liability insurance coverage required under this division, a licensed wholesaler shall secure supplemental insurance in an amount and type that satisfies the requirements of this division so that no lapse in coverage occurs at any time. A licensed wholesaler who secures supplemental insurance shall file evidence of the supplemental insurance with the fire marshal prior to canceling or reducing the amount of coverage of any comprehensive general liability insurance coverage required under this division.

HISTORY:

141 v S 61 (Eff 5-30-86); 142 v H 436 (Eff 6-14-88); 147 v H 215 (Eff 6-30-97); 149 v H 161. Eff 6-29-2001; 151 v H 66, § 101.01, eff. 9-29-05.

NOTES:

Section Notes

The effective date is set by § 612.03 of 151 v H 66.

Not analogous to former RC § 3743.17 (GC § 5903-16; 108 v Pt I, 334(344), § 16; Bureau of Code Revision, 10-1-53), repealed 137 v H 590, § 2, eff 7-1-79.

See provisions, § 6(A) of HB 161 (149 v --) following RC § 3743.01.

EFFECT OF AMENDMENTS

151 v H 66, effective September 29, 2005, redesignated (D)(2) as (E) and redesignated the remaining subsections accordingly; in (D), substituted "section" for "division"; rewrote present (F)(1)(e); in present (F)(1)(f) and (F)(2), substituted "June 30, 1997" for "the effective date of this amendment"; and inserted (G) through (I) and redesignated the remaining subsections accordingly.

Related Statutes & Rules

Cross-References to Related Statutes

Conduct of business operation, RC § 3743.19.

Moratorium concerning manufacturer and wholesaler licenses, RC § 3743.75.

Prohibitions, RC §§ 3743.61, 3743.65.

Sales to nonresidents, RC § 3743.44.

Case Notes & OAGs

TRANSFER OF LICENSE.

When the State Fire Marshal (SFM), in settling a lawsuit, approved the geographic relocation of certain companies' fireworks licenses, despite Ohio Rev. Code Ann. §§ 3743.75 and 3743.17, and their competitors, in another suit, sought a declaration of the parties' rights, a declaratory judgment was proper because the case presented a real controversy between the parties that was ripe for judicial resolution and had a direct and immediate impact on the parties, as the SFM indicated it would approve the geographic relocation of fireworks licenses when the applicable law did not permit it. Ohio Pyro, Inc. v. Ohio DOC, 2006 Ohio App. LEXIS 920, 2006 Ohio 1002, (Mar. 6, 2006).

When the State Fire Marshal, in settling a lawsuit, approved the geographic relocation of certain companies' fireworks licenses, despite Ohio Rev. Code Ann. §§ 3743.75 and 3743.17, another trial court had jurisdiction to enjoin such transfer at the request of the companies' competitors as the second court's assertion of jurisdiction did not collaterally attack the first court's judgment approving the settlement, to which the competitors were not parties, as the second court did not have to defeat or avoid the operation of the first court's judgment to address the issues raised. Ohio Pyro, Inc. v. Ohio DOC, 2006 Ohio App. LEXIS 920, 2006 Ohio 1002, (Mar. 6, 2006).

Pursuant to Ohio Rev. Code Ann. § 3743.17(D), a fireworks distributor's license is not transferable; in an action where a fireworks distributor attempted to transfer its license to a different county, the trial court properly dismissed the action because the state fire marshal was not permitted to grant a variance to transfer the firework license. Springfield Fireworks, Inc. v. Ohio Dep't of Commerce, 2003 Ohio App. LEXIS 1926, 2003 Ohio 2030, (2003).

(122nd General Assembly)
(Amended Substitute House Bill Number 215)

AN ACT

To amend sections 3.17, 3.24, 9.06, 101.23, 101.27, 101.35, 102.02, 103.143, 103.21, 105.41, 107.30, 107.40, 111.15, 111.16, 111.18, 117.44, 119.01, 120.04, 120.33, 121.04, 121.08, 121.37, 121.38, 121.40, 121.52, 122.15, 122.151, 122.152, 122.153, 122.154, 122.17, 122.18, 122.29, 122.89, 124.136, 124.15, 124.152, 124.18, 124.181, 124.34, 124.382, 124.383, 124.385, 124.391, 125.04, 125.05, 125.13, 125.15, 125.22, 125.28, 125.42, 125.83, 125.831, 125.87, 126.07, 126.12, 126.21, 126.26, 127.16, 131.35, 131.44, 135.142, 145.73, 149.303, 164.08, 164.09, 169.02, 169.03, 169.05, 169.08, 171.05, 173.02, 175.21, 181.52, 307.86, 321.46, 329.04, 341.25, 715.691, 718.01, 924.10, 991.03, 1309.32, 1309.39, 1309.40, 1309.41, 1309.42, 1309.43, 1310.37, 1503.05, 1503.141, 1506.21, 1506.22, 1506.23, 1513.29, 1513.30, 1515.09, 1517.11, 1557.06, 1703.03, 1703.05, 1703.07, 1703.12, 1703.22, 1703.26, 1703.27, 1707.041, 1707.44, 1731.07, 1785.01, 1901.06, 1907.13, 2151.23, 2151.355, 2151.421, 2744.01, 2744.02, 2744.03, 2744.05, 2941.51, 3113.33, 3301.075, 3301.0711, 3301.0714, 3301.0719, 3301.80, 3307.01, 3309.01, 3311.053, 3311.056, 3313.172, 3313.372, 3313.843, 3313.871, 3313.975, 3316.03, 3316.04, 3317.01, 3317.02, 3317.022, 3317.023, 3317.0212, 3317.0213, 3317.03, 3317.08, 3317.10, 3317.11, 3318.02, 3318.03, 3318.041, 3319.17, 3332.07, 3333.04, 3333.12, 3333.20, 3333.27, 3334.01, 3334.03, 3334.08, 3334.09, 3334.10, 3334.11, 3334.17, 3343.08, 3345.11,

The above boxed text was disapproved June 30, 1997, by Governor Voinovich

SECTION 165. During the period beginning on the effective date of this section and ending on December 15, 1999, the State Fire Marshal shall not do either of the following:

(A) Issue a license as a manufacturer of fireworks under sections 3743.02 and 3743.03 of the Revised Code to a person for a particular fireworks plant unless that person possessed such a license for that fireworks plant immediately prior to the effective date of this section;

(B) Issue a license as a wholesaler of fireworks under sections 3743.15 and 3743.16 of the Revised Code to a person for a particular location unless that person possessed such a license for that location immediately prior to the effective date of this section;

(C)(1) Except as provided in division (C)(2) of this section, approve the transfer of a license as a manufacturer or wholesaler of fireworks under Chapter 3743. of the Revised Code to any location other than a location for which a license was issued under that chapter immediately prior to the effective date of this section.

(2) Division (C)(1) of this section does not apply to a transfer that the Fire Marshal approves pursuant to division (D)(2) of section 3743.17 of the Revised Code.

SECTION 166. There is hereby created the Fireworks Sales Demographics Study Committee consisting of seven members appointed within thirty days after the effective date of this act as follows: two members of the Senate appointed by the President of the Senate, one of whom is a member of the majority party, and one of whom is a member of the minority party; two members of the House of Representatives appointed by the Speaker of the House of Representatives, one of whom is a member of the majority party, and one of whom is a member of the minority party; one employee of the Department of Commerce appointed by the Director of Commerce; one employee of the Department of Commerce appointed by the Fire Marshal; and one employee of the Department of Public Safety appointed by the Director of Public Safety. Vacancies on the Study Committee shall be filled in the same manner as the original appointment. The Office of the Fire Marshal shall provide necessary staff, facilities, supplies, and services to the Study Committee. The Study Committee shall first meet within thirty days after the Governor makes appointments to the Study Committee and shall meet at least every thirty days thereafter until the Study Committee ceases to exist upon submission of the report described in this section.

The Study Committee shall study the feasibility of and legal issues concerning placing limitations upon the number of licensed wholesalers permitted to conduct business in a geographic region of the state on the basis of population within the region. The Study Committee shall publish its findings and recommendations in a report and submit the report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on or before March 1, 1998, after which the Study Committee shall cease to exist.

(121st General Assembly)
(Substitute House Bill Number 670)

AN ACT

To amend sections 101.37, 105.21, 105.22, 105.23, 105.24, 105.25, 105.26, 105.27, 109.71, 109.72, 109.73, 109.74, 109.743, 109.75, 109.751, 109.752, 109.77, 109.78, 109.79, 109.80, 109.801, 109.802, 109.803, 109.91, 121.22, 121.31, 121.32, 121.33, 121.40, 122.151, 122.152, 122.153, 122.154, 122.29, 122.30, 122.31, 122.36, 122.40, 122.41, 122.561, 122.64, 122.97, 122.98, 125.22, 125.24, 149.01, 149.301, 149.302, 149.303, 154.01, 154.22, 166.04, 166.05, 171.01, 171.02, 171.03, 171.04, 171.05, 171.06, 173.14, 173.17, 173.19, 173.23, 173.25, 181.21, 181.22, 181.23, 181.24, 181.25, 306.35, 311.01, 340.02, 742.311, 1121.12, 1121.18, 1121.29, 1123.01, 1123.02, 1123.03, 1123.04, 1181.11, 1501.012, 1501.07, 1501.25, 1503.03, 1506.37, 1509.35, 1509.36, 1509.37, 1513.02, 1513.05, 1513.07, 1513.13, 1513.131, 1513.14, 1513.16, 1513.27, 1513.28, 1513.29, 1513.30, 1513.31, 1513.32, 1513.37, 1514.02, 1514.021, 1514.09, 1514.10, 1533.341, 1541.02, 1553.01, 1553.10, 1557.06, 1702.80, 1711.11, 1711.50, 1711.51, 1711.52, 1711.53, 1713.50, 1901.141, 1901.33, 1905.01, 1905.03, 1905.031, 1905.05, 1907.54, 1907.55, 2301.27, 2923.35, 2933.43, 2933.53, 2933.54, 2933.59, 2933.64, 2933.74, 2935.03, 3301.133, 3304.23, 3304.231, 3304.34, 3113.215, 3319.282, 3335.27, 3335.29, 3337.10, 3337.11, 3357.19, 3701.01, 3701.021, 3701.025, 3701.08, 3701.145, 3701.19, 3701.346, 3701.38, 3701.39, 3701.40, 3701.507, 3702.51, 3702.57, 3702.68, 3704.036, 3704.161, 3704.17, 3705.17,

Waterways Safety Council	1547.73
Welfare Oversight Commission	5101.93
Wildlife Council	1531.03
Women's Policy and Research Commission	121.51
Workers' Compensation System Oversigh Committee	Sec. 10, H.B. 222, 118th GA
Wright-Dunbar State Heritage Commission	149.321

SECTION 28. Section 4765.10 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. S.B. 150 and Am. Sub. S.B. 162 of the 121st General Assembly, with the new language of neither of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

SECTION 29. Until January 1, 1998, the State Fire Marshal shall not do either of the following:

(A) Issue a license as a manufacturer of fireworks under sections 3743.02 and 3743.03 of the Revised Code to a person for a particular fireworks plant unless that person possessed such a license for that fireworks plant immediately prior to January 1, 1997;

(B) Issue a license as a wholesaler of fireworks under sections 3743.15 and 3743.16 of the Revised Code to a person for a particular location unless that person possessed such a license for that location immediately prior to January 1, 1997.

SECTION 30. (A) As used in this section:

(1) "Qualified municipal corporation" means a municipal corporation the legislative authority of which failed to timely certify resolutions proposing the questions of two qualifying property tax levies to the board of elections for appearance on the November 5, 1996, election ballot.

(2) "Qualifying property tax levies" means property tax levies that a qualifying municipal corporation currently is authorized to levy; that expire at the end of 1996; and one of which is for the purpose of the general fund and raises at least $120,000 in revenue, which constitutes at least five per cent of total general fund revenue, and the other of which is for the purpose of a fund used to construct or maintain roads and raises at least $70,000, which constitutes at least 40 per cent of that fund.

(B) A qualifying municipal corporation may adopt resolutions proposing to place the questions of renewing qualifying property tax levies on the ballot at a special election to be held in the municipal corporation on December 10, 1996, and certify those resolutions to the proper county board of elections not later than ten days after the effective date of this section notwithstanding the requirement under section 5705.25 of the Revised Code to certify such resolutions not later than seventy-five days prior to an election.

The county board of elections shall perform all acts otherwise required by section 5705.25 and Title XXXV of the Revised Code to place