# *In the Supreme Court of Ohio*

**APPEAL FROM THE COURT OF APPEALS**
**ELEVENTH APPELLATE DISTRICT**
**LAKE COUNTY, OHIO**
**CASE NO. CA-2020-L-032**

**MICHAEL JOCHUM**

***Appellant,***

**vs.**

**STATE OF OHIO, *ex rel.* CITY OF MENTOR, *et al.***

***Appellees.***

## APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Rules**

## I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The right to a Jury in a civil case is found in the Ohio Constitution. Ohio Civil Rule 8 only requires a short and plain statement of relief. And, the Ohio Supreme Court has stated that dismissal pursuant to Ohio Civil Rule 12(B) is appropriate only if it appears beyond doubt from the Complaint that a party with the burden of proof can prove no sets of facts which warrant relief after all factual allegations of the Complaint are presumed true and all reasonable inferences are made in favor of the non-moving party.

Mr. Jochum attempted to intervene in a closed, settled case in Lake County, to which he was not a party. The Trial Court dismissed his efforts to intervene in that closed case. Mr. Jochum was not given the opportunity to amend.

Mr. Jochum then filed a new Complaint, shortly thereafter, bringing in substantive claims against those parties in an effort to remedy the contaminants that he did not know were below his house, that were put there or allowed by one or more of these Appellees.

The lower Courts have improperly permitted the Appellees, who caused the problems, to avoid responsibility and liability on procedural grounds.

## II. STATEMENT OF THE CASE AND FACTS

Technically there are no facts because the Complaint never proceeded beyond the Motion to Dismiss phase. The contentions are that Mr. Jochum purchased a piece of property that sits on contaminants that one or more of the Appellees dumped into the Mentor Marsh many decades ago. The City of Mentor, at some point, allowed a subdivision that included Mr. Jochum's home to be built on a carve-out from the Mentor Marsh, which included the contaminants. Mr. Jochum discovered these contaminants after purchase and sought redress by intervening in a closed, settled case that involved the Osbournes and the City of Mentor in order for the Mentor Marsh to buy

back his property and to make him whole so that we could avoid all litigation against any other parties.

The Trial Court dismissed the case on the basis of Ohio Civil Rule 12(b)(6) claiming that Mr. Jochum was precluded by *res judicata* because he had sought to intervene in a closed, settled case to which he was not a party. The Eleventh District Court of Appeals affirmed that decision.

## III. ARGUMENTS TO SUPPORT PROPOSITIONS OF LAW

### A. The Lower Courts Abused their Discretion in Granting a 12(B)(6) Motion without a Right to Amend.

#### 1. The Lower Court Abused its Discretion Because it Failed to Apply the Proper Standard of Review Pursuant to Ohio Civil Rule 12(B)(6).

Dismissal by a trial court of a Complaint for failure to state a claim under Ohio Rule 12(B)(6) is an extraordinary order. *See, State ex rel. Davies v. Schroeder* (2020), 2020 WL1427088. This Court stated that "dismissal is appropriate only if it 'appear[s] beyond doubt from the Complaint that the Relator can prove no set of facts warranting relief, after all factual allegations of the Complaint are presumed true and all reasonable inferences are made in the Relator's favor.'" *State ex rel. Davies, Id.* citing *State ex rel. Zander v. Judge of Summit County Common Pleas Court* (2019), 156 Ohio St.3d 466 at ¶ 4.

#### 2. The Lower Courts Misapplied Ohio Civil Rule 8 and Notice Pleading.

"When granting or denying a Motion to Dismiss under Civ.R. 12(B)(6), the principles of notice pleading apply and 'a plaintiff is not required to prove his or her case at the pleadings stage.'" *Goss v. K-Mart Corp.* (11th Dist. 2007), 2007 WL 1810523, citing *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144-145.

Under Civil Rule 8 and longstanding Ohio Supreme Court precedent, all that Mr. Jochum's Complaint had to do is set forth operative facts sufficient to give fair notice of the nature of the claims. Pleadings do not need to carry the full blueprint for the impending trial.

**3. The Lower Court Used a Federal 12(b)(6) Standard.**

The Eighth District Court of Appeals noted in *Tuleta v. Medical Mutual of Ohio* (8th Dist. 2014), 6 N.E.3d 106 that Ohio Civil Rule 8(A) provides that a pleading shall set forth a claim for relief . . . shall contain a short and plain statement of the claims showing that the party is entitled to relief. The averments of the pleadings shall be simple, concise, and direct. "No technical forms of pleading or motions are required." Civil Rule 8(F) "mandates that all pleadings shall be so construed as to do substantial justice." *Id.* Ohio's courts have been applying the "no set of facts" pleading standard for 40 years. *Tuleta, Id.*

*Tuleta* further noted that the Eighth District viewed Motions to Dismiss with disfavor and they should "rarely be granted" because few Complaints fail to meet the liberal standards of Rule 8 and become subject to dismissal. *Tuleta, Id.*, citing *Slife v. Kundtz Properties, Inc.* (8th Dist. 1974), 40 Ohio App.2d 179, 182.

*Bell Atlantic Corp v. Twombly* (2007), 550 U.S. 544 and *Ashcroft v. Iqbal* (2009), 556 U.S. 62 changed how federal courts reviewed Motions to Dismiss. The pleader must set forth enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. Id.* at 570. The Ohio Civil Rules put the emphasis on discovery - - not on the pleadings.

**4. The Trial Court's Dismissal was a Failure to do Substantial Justice.**

The Civil Rules were not meant to do anything more than to put the opposing parties on notice of a dispute. The Plaintiff did that. This dispute is about the City of Mentor approving plans submitted to it by an Osborne related company that carved out a subdivision upon which

Michael Jochum's house sits from the Mentor Marsh after Osborne had dumped the contaminants for which it ended up settling with the State of Ohio in January, 2019 for over $10,000,000.

The lower court's Dismissal Order ignored the fact that this is a highly unusual case. It also ignored the fact that both Osborne related companies, who created the problem under Mr. Jochum's property, and the City of Mentor, whose officials permitted the subdivision, have potential culpability for what occurred before he got involved. What is the name for a cause of action that makes them responsible for what they did and did not do?

Given what we now know occurred under Mr. Jochum's property, which is evidenced by the Ohio EPA and the Lake County Water District, there is no question of damage to Mr. Jochum's property. There is no question who caused the damage to Mr. Jochum's property. There are questions relating to what extent Mentor is culpable because Mentor permitted the subdivision and Mr. Jochum's property to exist as carved out from the Mentor Marsh.

Those questions are all questions of material fact which need to go to discovery and then to, as necessary, summary judgment and trial. But, to dismiss them out of hand, procedurally pursuant to 12(B), without giving Mr. Jochum even the opportunity to file an Amended Complaint is an abuse of discretion.

**5. The Lower Court Abused its Discretion in Requiring a Heightened Pleading Burden through the Defendants' Motions for More Definite Statement.**

The lower court abused its discretion by granting the Defendants' Ohio Civil Rule 12(E) Motion for More Definite Statement and that is not an opportunity for the Defendants to file what amounts to an early summary judgment motion without discovery. Nor is it designed to permit Defendants to end run notice pleadings and apply the Federal heightened burden standard.

As the Court noted in *Columbia Gas of Ohio, Inc. v. Robinson* (Ohio Misc. 1995), 81 Ohio Misc. 2d 15, a motion for more definite statement should not be granted to require evidentiary

detail that may be subject to discovery. This commonsense observation is the law. The lower court abused its discretion in expanding the rule to require the Plaintiff to set forth an evidentiary heightened burden pleading that is not required by Ohio law.

The *Columbia Gas* Court noted "while the defendant desires more specific information concerning the account, in so arguing, however, the defendants failed to acknowledge that the Ohio Civil Rules requires notice pleading rather than fact pleading. *Columbia Gas, Id.* citing *Salamon v. Taft Broadcasting Co.* (1st Dist. 1984), 16 Ohio App.3d 336.

**6. The Trial Court Abused its Discretion by Improperly Dismissing the Complaint Rather Than Providing the Appellant with an Opportunity to Amend.**

The Ohio Supreme Court stated in *State ex rel. Hanson v. Guernsey County Board of Commissioners* (1992), 65 Ohio St.3d 545 that the standard review for Ohio Civil Rule 12(B)(6) is consistent with Ohio Rule 15(A) which allows a pleader to rectify a poorly pleaded Complaint. "If a motion for failure to state a claim is sustained, leave to amend the pleading should be granted unless the court determines that allegations of other statements or facts consistent with the challenged pleading could not possibly cure the defect."

In this case, the trial court assumedly decided that since the Plaintiff/Appellant, Mr. Jochum, had not satisfied his obligations to meet the more definite statement order, which he had attempted to do, that an Amended Complaint would be futile and did not offer than opportunity but instead dismissed the case with a final appealable Order which is inconsistent with not only Ohio jurisprudence but Ohio Civil Rule 15(A) and Ohio Civil Rule 12(B)(6) jurisprudence.

**B. The Lower Courts Abused their Discretion in Misapplying the Doctrine of Res Judicata**

**1. The Lower Courts' Application of Res Judicata to the Claims and Parties in this Case was an Abuse of Discretion.**

Mr. Jochum filed a Declaratory Judgment action seeking to intervene in a previously settled case before another Lake County Common Pleas judge that concluded in January 2019 with a settlement that he thought he should be a part of. That same lower court dismissed all of the parties except for the City of Mentor which was later voluntarily dismissed. Immediately thereafter, Mr. Jochum filed an original claim against. Mr. Jochum was hoping to avoid an all-out litigation. He was looking to be made whole without the need and necessity of bringing an original litigation.

However, the Trial Court decided that that was sufficient to decide the matter on *res judicata* grounds which we think was an abuse of discretion.

Moreover, the fact that Mr. Jochum chose to file an original Complaint after dismissal of the effort to intervene in the previously settled case of which he was not a party, does not create *res judicata* or collateral estoppel.

Mr. Jochum was <u>not</u> a party to the eight-year case that settled in January 2019. In fact, he only became aware of it because of his fraud case against the prior owners. Mr. Jochum firmly believes that the prior owners should have been part of that litigation, but they were not. Additionally, Mr. Jochum was not trying to relitigate the State of Ohio environmental claims against the Defendants. The Defendants in that case made abundantly clear that Mr. Jochum could not bring a Declaratory Judgment against them arising out of a closed, settled case because he had no standing. So, how can it be that Mr. Jochum, who had no standing, did not actually get the opportunity to litigate any of his Declaratory Judgment action and was dismissed out by Judge Lucci be barred by *res judicata* because he did not appeal that decision rather than filing a new set of claims against some of the parties from that case, but certainly not all of them, and certainly not for the claims that were brought in that original case?

"Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." *Grava*, 73 Ohio St.3d at 382. Mr. Jochum's claims could not have been litigated in that prior matter. All of the parties to that litigation and their filings to Judge Lucci made it clear that Mr. Jochum was way off base. Even though Mr. Jochum had the right idea in trying to solve his problems with his home, no one was interested in listening to him. No one wanted to settle with him. No one wanted to pay him. No one wanted to fix the problems. No one wanted to litigate the case.

Furthermore, for claim preclusion to apply, the parties to the subsequent suit must be either the same or in privity with the parties to the original suit. *See O'Nesti, Id.* citing *Johnson's Island, Inc. v. Danbury Twp. Bd. Of Trustees* (1982), 69 Ohio St.2d 241 at 244. Privity is only found to exist when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceedings. Mr. Jochum was not involved in the original proceedings that he sought to intervene in. He was immediately attacked and the case he brought that was dismissed by Judge Lucci because he did not have the right to control the previous proceedings, was not a party to the settlement, the claims were different, the parties were different, and Judge Lucci in his decision in that case made it clear that Mr. Jochum's attempt to intervene was not the proper approach which led to the currently dismissed case which is before this Court.

This is not a case where Mr. Jochum is attempting to bring causes of action which he had the opportunity to litigate in a previous case. The previous case was decided on motions to dismiss. He did not even get to written discovery. The lower court was antagonistic toward his claims from the beginning, apparently the court believing that since he was not a party to the settlement and the claims were by and large those brought by the State of Ohio Environmental Protection Agency that Mr. Jochum had no business trying to intervene in case of which he was not a party in order

to obtain some relief even though his property was carved out of the Mentor Marsh which was the source of the litigation.

So in essence, what the lower court has done is apply the concept of affirmative *res judicata* or claim preclusion which is likewise and abuse of discretion because the effort by Mr. Jochum to seek a right to intervene in a settlement pot already created by a previous litigation of which he was not a party and which he did not bring the claims is not issue preclusion of any stripe.

Issued preclusions serves to prevent litigation of a fact or a point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *See O'Nesti, Id.* citing *Fort Frye,* 81 Ohio St.3d at 395. The only issue that was decided in the previous case was that Mr. Jochum did not have a right to intervene in a previously settled case. There was no judgment on the merits of the claims against these Defendants for the contaminants that were under Mr. Jochum's property. Nor is there any effort to litigate the question of their culpability for any of the contaminants or for the decisions by the City of Mentor in permitting houses to be built on the Mentor Marsh where the contaminants were definitely expected to be found.

**2. It was Improper for the Trial Court to Grant a Motion to Dismiss Based on *Res Judicata* Because Res Judicata is an Affirmative Defense.**

The Eleventh District Court of Appeals in *Smith v. Ohio Edison Company* (11th Dist. 2015), 2015-Ohio-4540 stated that it is not proper for a court to grant a Motion to Dismiss for failure to state a claim based upon *res judicata* since *res judicata* is an affirmative defense and resolution of *res judicata* defenses typically require resort to materials outside the pleading. *Id.* citing *Jefferson v. Bunting* (2014), 140 Ohio St.3d 62, citing *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109. *See also, State ex rel. West v. McDonnell* (2014), 139 Ohio St.3d 115.

### 3. The Application of *Res Judicata* Even if it was not Applicable to a Procedural Dismissal Under Civil Rule 12 was Applied Rigidly as an Abuse of Discretion.

The application of *res judicata* by the lower court can be reviewed by the Eleventh District Court of Appeals *de novo*. *See, Smith v. Ohio Edison Company* (11th Dist. 2015), 2015-Ohio-4540.

In the *Smith* case, the Eleventh District Court of Appeals noted that "the application of the principles of *res judicata* and collateral estoppel is not mandatory in every case." *Smith, Id.* citing *Castor v. Brundage* (6th Cir. 1982), 674 F.2d 531, 536. The Eleventh District stated that the Ohio Supreme Court has recognized that *res judicata* is not a shield to protect the blameworthy. *Smith, Id.* citing *Davis v. Walmart Stores, Inc.* (2001), 93 Ohio St.3d 488, 491.

> The doctrine of *res judicata* is not a mere matter of procedure inherited from a more technical time, but rather a rule of fundamental and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.

*Id.*

Under the doctrine of *res judicata*, this Court held in *Duczman v. Sorin* (11th Dist. 2018), 2018 WL 4063263 that the principles of *res judicata* are not mandatory in every action and case. *Id.* citing *Smith v. Ohio Edison Co.* (11th Dist. 2015), 2015-Ohio-4540 at ¶ 9. "The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of *res judicata* is to be applied in particular situations as fairness and justness require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice." *Duczman, Id.* citing *Davis v. Walmart Stores, Inc.* (2001), 93 Ohio St.3d 488, 491.

## IV. CONCLUSION

WHEREFORE, for the reasons stated herein and for good cause shown, the Supreme Court of Ohio is requested to take jurisdiction over the questions presented herein and reverse the Eleventh District Court of Appeals and remand this matter back to the Lake County Common Pleas Court for a Jury Trial on the merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 6, 2020 a copy of the foregoing *MEMORANDUM IN SUPPORT OF JURISDICTION* has been forwarded via the Court's electronic filing system and/or electronic mail to:

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