In the
Supreme Court of Ohio

State of Ohio ex rel. Dave Yost, Ohio Attorney General, Plaintiff-Appellant, v. FirstEnergy Corp., et al., Defendants-Appellees, (Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellees).	:	Case No. 2022-1286 On appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case Nos. 21AP-443, 21AP-444, 21AP-445

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INTRODUCTION

This appeal affords the Court the opportunity to visit Chapter 2715 of the Revised Code. By their nature, prejudgment attachments are rarely requested, rarely granted, and rarely appealed. Despite this, attachments are extremely important tools in the civil justice system when the need arises. The primary purpose of an attachment is to secure assets where fraud, criminal actions, or other specified circumstances indicate the defendant is actively, or is likely to begin, depleting or hiding assets. An attachment is only available when a plaintiff is able to prove at the beginning of the case that it is likely to succeed in getting a judgment and posts a bond.

The facts in this prominent case exemplify a situation when attachments are necessary and proper. Defendant-Appellee Samuel Randazzo ("Randazzo") received a secret $4.3 million bribe from FirstEnergy Corp. ("FirstEnergy") through Randazzo's solely-owned entity, Defendant-Appellee Sustainability Funding Alliance of Ohio, Inc. ("SFAO") in conjunction with a plan they concocted to place Randazzo as chairman of the Public Utilities Commission of Ohio ("PUCO"). The plan worked. While chair of the PUCO, Randazzo exerted his considerable influence in favor of FirstEnergy's interest. In addition to shaping and lobbying for the infamous House Bill 6 ("H.B. 6"), Randazzo used his authority as the PUCO chair to minimize, and even eliminate, scrutiny over the rates charged by FirstEnergy to its millions of customers. After the FBI raided one of his homes as part of its public corruption investigation, Randazzo resigned from the PUCO.

FirstEnergy has admitted in a deferred prosecution agreement ("DPA")[1] entered in U.S. District Court that the $4.3 million paid to Randazzo was a bribe. FirstEnergy agreed to pay a $230 million penalty, which the U.S. Attorney has called the largest penalty of its kind even entered in the United States.[2]

Following the DPA, Plaintiff-Appellant the State of Ohio ("State") amended its civil RICO complaint herein to capture a broader picture of the corruption that had surrounded FirstEnergy by including new counts against, among others, Randazzo and SFAO. Additionally, the State, having seen the significant conversion of assets and movement of funds by Randazzo, approached the trial court for *ex parte* prejudgment attachment.

The attachment was sought because, during the seven months after the FBI raided his home, Randazzo gifted a $500,000 home to his son and sold multiple other properties. These sales included his Akron condo near the FirstEnergy headquarters and his Naples condominium and boat slip, and another Columbus house. These sales generated over $4 million in proceeds, which were deposited into a newly created brokerage account. Despite the fact that these assets had been owned solely by Randazzo, he jointly opened the brokerage account with his wife.

[1] A DPA is the corporate equivalent of a plea bargain.

[2] To underscore the potential monetary value of the bribe to FirstEnergy, its share price skyrocketed on the announcement of the DPA, based on investor consensus that FirstEnergy was getting off easy.

The State sought an *ex parte* attachment because the millions of dollars in now jointly-held brokerage funds were capable of immediate wire transfer anywhere in the world. Further, Randazzo's intent to defraud was evident based on him gifting the $500,000 house to his son, and the underlying criminal conduct. The trial court granted the State's request, issuing the prejudgment attachment. Garnishment orders to relevant financial institutions followed.

In response to the garnishments, it was established that the brokerage account was not intended for use as an investment vehicle, and the concerns about further transfer were justified, because the majority of those funds had just been transferred to a California bank account of a law firm with no presence in Ohio, and to which Randazzo owed no obligation.

As contemplated by R.C. 2715.045(D), Randazzo sought to vacate the attachment order. The trial court held a hearing on Randazzo's motion. Randazzo did not testify, and did not offer substantive evidence. After considering the original evidence alongside additional evidence presented by the State at the contested hearing, the court maintained the attachment. Randazzo appealed.

Although the Tenth District Court of Appeals dismissed most of his arguments, Randazzo found favor in a claim that the trial court failed to adequately explore the "irreparable injury" prong that allows for an attachment to be issued *ex parte*. This factor does not go to the need for the prejudgment attachment itself, and is only relevant for an *ex parte* order.

The Court of Appeals botched its analysis of this aspect of the Attachment Chapter of the Revised Code, along with the appellate standard of review, when it considered this issue at all, and also when it substituted its judgment of the facts for that of the trial court. It also wrongly found the use of the word "judgment" in the garnishments issued to the financial institutions to be a material error.

STATEMENT OF THE FACTS AND CASE

Appellees Randazzo and Randazzo's company, Sustainability Funding Alliance of Ohio ("SFAO"), are Defendants in the underlying civil RICO action brought by the State. (App. Op. ¶ 3.) At the time of the filing of this brief, investigations into decisions and influence by Randazzo while Chair of the PUCO have been on hold due to a request of the United States Attorney, who has recently requested an additional six-month extension because "continued discovery in the PUCO Proceedings may directly interfere with or impede the United States' ongoing investigation." See, Letter from US Attorney Parker to PUCO of Feb. 22, 2023, in PUCO Case Nos. 20-1502-EL-UNC, 17-974-EL-UNC, 17-2474-EL-RDR, and 20-1629-EL-RDR.[3]

The original complaint herein, which was filed in mid-2020, described the corruption surrounding the passage of H.B. 6 of the 133rd General Assembly, a year

[3] https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A23B23B03327I03817

earlier. And, it alleged that FirstEnergy Corp., as well as others, used dark money to route bribes to Householder to unduly influence the political process. (R. 7, Complaint.) Most widely known, H.B. 6 provided billions in a bailout of FirstEnergy's nuclear power plants. This feature caused the bill to be colloquially referred to as the "nuclear bailout bill." The nuclear bailout has been valued at $1.3 billion.

The nuclear bailout was only half of what FirstEnergy got from H.B.6. The second, lesser known, but thanks to Randazzo, highly-valued, gift to FirstEnergy was confusingly called "decoupling." Decoupling provided FirstEnergy's distribution subsidiaries hundreds of millions in guaranteed annual income streams which would make FirstEnergy "somewhat recession proof" according to its then-CEO.[4] (R. 7, Complaint.)

At the time of the passage of H.B. 6, Randazzo was six months into his tenure as Chair of the PUCO; however, unknown to the public, Randazzo, through his company, SFAO, had been paid $4.3 million just a few of weeks before he applied for a position with the PUCO. FirstEnergy admitted this $4.3 million was a bribe to buy Randazzo's favor as the PUCO Chair. (R. 336, Motion to Amend.) It was also unknown by the public that during his employment as a public official, Randazzo helped craft key language of

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[4] Randazzo played a key role in this lesser-known aspect of H.B.6. It was called "decoupling" because it "de-coupled" FirstEnergy's profits from its sales. Decoupling set FirstEnergy's high-water-mark 2018 peak-earnings as the floor amount its customers would have to pay even when energy use declined as it was expected to do. Randazzo, as the PUCO chair, caused this floor to be locked-in for years longer than it otherwise would have by deferring when FirstEnergy would face a rate review.

H.B. 6 and lobbied the Legislature to ensure its passage. From his PUCO pulpit, Randazzo initiated actions to profit FirstEnergy, that are only explained by the bribe. (R. 336, Motion to Amend.)

The arrest of the (then) Speaker of the Ohio House of Representatives and others, as well as FirstEnergy's public outing as the funding source of millions in dark money that pushed for the corrupted H.B. 6 legislation, was just the first in a series of events collapsing toward Randazzo. At the end of October 2020, FirstEnergy fired its CEO, Charles Jones, and the Senior Vice President of External Affairs, Michael Dowling, for violating its policies and code of conduct. (R. 336, Motion to Amend.) These are the two individuals who orchestrated the Randazzo bribe. (R. 336, Motion to Amend.)

FirstEnergy disclosed that the termination of key management was related to a questionable payment to "an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates." (R. 336, Motion to Amend.) Publicly, the gig was up. In mid-November 2020, two weeks after these firings, the FBI raided Randazzo's home. (R. 336, Motion to Amend.) Randazzo resigned from PUCO a few days later. (R. 336, Motion to Amend.)

In February, March, and May of 2021, Randazzo sold or transferred nearly $5 million in real estate in several different transactions for properties in several different cities and states. (R. 336, Motion to Amend, pg. 4.) The gifting of a $500,000-600,000 house to his son, combined with the rapid succession of liquidations by an individual whom a public corporation admitted to bribing, can only be interpreted as part of a plan to intentionally dissipate and deplete assets prior to judgment. In other words, if you can't keep stolen money, then hide it, give it to loved ones, and spend it down trying to save your hide. Whatever you do, don't allow the funds to remain available for easy collection. This is Randazzo's mindset.

On July 20, 2021, one year after the original arrests, the United States and FirstEnergy entered into a Deferred Prosecution Agreement ("DPA") in which FirstEnergy attested sufficient facts of bribing a public official, (i.e., Randazzo) in exchange for favorable treatment. (R. 336, Motion to Amend, Ex. D.)

In this case, on August 5, 2021 the Attorney General filed a motion for leave to amend to add Randazzo, SFAO, and two former FirstEnergy executives as defendants based on the admissions in the DPA. (R. 336, Motion to Amend.) On August 11, 2021, the State filed its motion for prejudgment attachment and request for *ex parte* hearing per R.C. 2715.045. (R. 339, Motion for Prejudgment Attachment.)

Ohio's attachment statutes, R.C. Chapter 2715, permits "[a]n attachment against the property, other than personal earnings, of a defendant, may be had in a civil action for the recovery of money, at or after its commencement," under a number of enumerated grounds. R.C. 2715.01(A). Among those grounds, a plaintiff may seek attachment when the defendant "is about to" "remove," "convert," or "conceal" property or has done so already. R.C. 2715.01(A)(6)-(9). Alternatively, the plaintiff may show that the defendant "has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought." R.C. 2715.01(A)(10).

Orders of attachment can be granted after an evidentiary hearing where both parties have an opportunity to present evidence and be heard. *See* R.C. 2715.03; R.C. 2715.04. The questions at such a hearing are limited to whether there is probable cause to support the motion and whether any of the property of the defendant is exempt from attachment. R.C. 2715.043. If the Court finds it is likely that the plaintiff will obtain judgment against the defendant that entitles the plaintiff to a money judgment, and that judgment can be satisfied out of the property that is the subject of the motion, and one of the trigger factors for an attachment exists, then probable cause is satisfied and the order of attachment should be issued. R.C. 2715.011.

Alternatively, a court may issue an attachment *ex parte* without holding a hearing. The plaintiff may obtain attachment *ex parte* if, in addition to the standard factors, it also establishes that it will suffer "irreparable injury" either because there is a "present danger" that the property will be "immediately" removed, converted, or otherwise concealed, or because the property's value will be substantially impaired by a delay. R.C. 2715.045(B). If an attachment is issued, the court can thereafter hold an evidentiary hearing in which the defendant may contest the entry of the attachment order. *See* R.C. 2715.045(D); R.C. 2715.043.

The trial court took up the State's *ex parte* motion for prejudgment attachment on the basis that Randazzo was already "dispos[ing] of, conceal[ing], or plac[ing]" proceeds of his criminal conduct "beyond the jurisdiction of the court" in an effort to avoid paying penalties from an inevitable civil suit. R.C. 2715.045(A). (R. 339, Motion for Prejudgment Attachment.) The trial court was already familiar with the underlying facts in this prominent case, having previously held several hearings and having ruled upon multiple preliminary injunction motions and motions to dismiss. Although a hearing on the record was not necessary under the statute—the motion could have been entered simply on the papers—the trial court held one anyway. The court reviewed the materials attached to the supporting affidavit prior to the hearing, and the State was prepared to answer any additional inquiry from the trial court. (R. 410, Hrg. I, pgs. 10-11.) The trial court's rulings were memorialized on the docket after the hearing in several orders on subsequent days. (R. 341, 343, 354.)

When an attachment is granted *ex parte*, the defendant can request a full, contested evidentiary hearing, similar to how a preliminary injunction hearing follows the granting of a Temporary Restraining Order. Invoking that provision, Randazzo filed a "Motion to Vacate" the Ex Parte Prejudgment Attachment Orders. (R. 385, Motion to Vacate.) The State supplemented its prior motion with the additional information stating that on August 2, 2021, Randazzo transferred $2.5 million to attorneys in California with no presence in Ohio, and $500,000, in trust, to Ohio attorneys. (R. 386, Supplemental

Affidavit.) To the best of the State's knowledge those transfers appeared to have little purpose beyond placing significant liquid assets beyond the reach of the State.

The court heard the motion per R.C. 2715.04, 2715.043(B), 2715.045(D) and 2715.045(E). (R. 460, Hrg. II, pgs. 4-19.) Randazzo chose not to present evidence or argue the underlying facts which supported probable cause or irreparable injury, instead he spent his time attacking the process and asserting meta-arguments on whether the underlying case was stayed, whether he and his company were procedurally proper "defendants," whether the State was a "creditor," and whether due process existed. (R. 385, Motion to Vacate.) Randazzo, although given the chance, did not present any evidence or testimony to dispute these sales, liquidations, or transfers, or the intent behind them.

The trial court was unpersuaded by Randazzo's form over substance claims, denied the Motion to Vacate and reiterated that the prejudgment attachment was proper even after giving Randazzo an opportunity to contest same. (R. 460, Hrg. II, pg. 35; R. 416.) The trial court did, however, order release of any exempt property to the extent demonstrated and/or agreed by the parties. (R. 416.)

Randazzo appealed the attachment orders and the denial of the motion to vacate to the Tenth Appellate District. (R. 484, Notice of Appeal.) The Court of Appeals reframed Randazzo's lack of jurisdiction claims as "reasons why the attachment order were improperly issued and should be vacated." (App. Op. ¶ 13.) Three alleged procedural defects (which were not cross-appealed) relating to whether Randazzo was a "defendant" at the time of the attachment, the supporting affidavit lacked sufficient verification, and the absence of a bond, were dismissed quickly. (App. Op. ¶¶ 14-22.)

The Court of Appeals did delve into whether during the original *ex parte* hearing there had been a sufficient showing of "irreparable injury" under R.C. 2715.045. "Irreparable injury" can be shown by either demonstrating a "present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court" or that "the value of the property will be impaired substantially if the issuance of an order of attachment is delayed." R.C. 2715.045(B)(1) and (2).

The Court of Appeals faulted the trial court on the brevity of the *ex parte* hearing lasting twelve minutes, and determined that the trial court failed to provide a "real explanation for its ultimate findings…[beyond] merely provid[ing] a recitation of the statute." (App. Op. ¶ 30.) The Court of Appeals determined that this was a proof problem. Namely, there was insufficient evidence the property sought to be attached, being the proceeds of a mass liquidation of real property which were sitting in various cash accounts, would be "impaired substantially" if the orders were delayed. (App. Op. ¶ 30.)

The Court of Appeals diminished the State's justification that conversion of illiquid assets into money being a liquid asset, evidences a "present danger" that the money could be immediately wired or transferred to third parties and be immediately disposed of, concealed, or placed beyond the jurisdiction of the court. (App. Op. ¶ 31.) The Court of Appeals determined that what was necessary was the nearly impossible to obtain "actual evidence that [a transfer] was about to or likely to happen.")[5] (App. Op. ¶ 31.) Without the equivalent of a copy of pending wire-instructions, the appellate court found the issuance of an *ex parte* attachment to be an abuse of discretion. (App. Op. ¶¶ 30-31.)

This factual conclusion was particularly perplexing because the record at the contested hearing showed that Randazzo had in fact transferred millions of dollars to law firms just prior to the attachment being issued. Thus, the record demonstrated that the "present danger" existed because the money was further transferred just as feared.

The Court of Appeals buttressed its reasoning by asserting that a contrary reading would potentially subjugate any civil action in which money damages are sought to *ex parte* prejudgment attachment merely because funds in banks, brokerage accounts, etc. would always be subject to being wired anywhere in the world. (App. Op. ¶ 32.) This grievous legal error ignores the limited grounds for obtaining an attachment, and

[5] Ironically, just days before the *ex parte* hearing, Randazzo had, in fact, transferred $3 million to law firms' accounts, including $2.5 million to attorneys in California with no known presence in Ohio. (R. 386, Supplemental Affidavit.) The Court of Appeals indicated that it was exclusively addressing the *ex parte* hearing on August 11, 2021, and not the hearing on Motion to Vacate, and therefore ignoring the Supplemental Affidavit. (App. Op. ¶ 33.) The court left unanswered why the additional information could not be used to defeat the Motion to Vacate, even in the absence of supporting the *ex parte* motion for prejudgment attachment.

underplays the significance of Randazzo's clear efforts to give away, transfer and spend down his ill-gotten proceeds of public corruption. It is not as though this is a run-of-the-mill civil-suit where insurance might be available. Nor had the brokerage assets been long-held or actually invested. Here, the funds represent criminal proceeds of an admitted bribe in the largest public corruption case this State has ever seen. The funds were liquidated from real property only after the corruption was uncovered, and there is no evidence of other assets available to satisfy an eventual judgment. Simply put, if an *ex parte* attachment isn't available here, the statute is a dead-letter and a corrupt official will be allowed to walk off with his bribe.

Lastly, and most absurdly, the court of appeals sought to place itself into the mind of Randazzo by questioning how Randazzo could have been trying to shield assets "on a claim that did not even exist at the time the transfers took place." (App. Op. ¶ 33.) In other words, the court of appeals appeared to believe that gifting a house and selling off millions of dollars in real estate in the months after the FBI raided Randazzo's home, was not a plausible indicator of an intent to convert funds in an attempt to shield assets, because the court of appeals thought that Randazzo had no idea he might be sued. This is illogical. Wrongdoers know of their misdeeds long before they are uncovered by those who have been harmed. Randazzo knew he took a bribe. Randazzo knew others were criminally charged and civilly sued for their parts in the criminal enterprise.

Randazzo knew that his "H.B. 6 -- Fuck Anybody Who Ain't Us" cohorts at FirstEnergy had been fired.[6] Randazzo knew that FirstEnergy had made various filings with the SEC calling out its payment to him as problematic. In short, Randazzo knew about the potential claims against him, long before they were formalized in the Complaint.

Once the Court of Appeals determined that the "irreparable harm" prong of the *ex parte* nature of the prejudgment attachment could not be supported on the "present danger" or "substantially impaired" grounds contained within the statute, it also invalidated the garnishment attempts by the State that followed thereafter. (App. Op. ¶ 33.)

Thus, the Court of Appeals determined that, although the attachment was justified after a contested hearing (which it invited to occur on remand), the *ex parte* nature of the initial attachment invalidated the entire attachment proceeding below, including the contested hearing—where Randazzo chose not to contest the facts.

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[6] Chuck Jones sent Randazzo an image of Mt. Rushmore with Randazzo's and others faces superimposed over the presidents, with the quoted caption, upon the passage of H.B. 6. (R. 340, Affidavit, Ex. A, pg. 41.)

ARGUMENT

<u>Attorney General's First Proposition of Law:</u>

> *An appeal from the denial of a motion to dissolve an attachment is reviewable only on questions of law. A Court of Appeals is not permitted to review factual findings.*

Ohio's statutory attachment provisions, codified as Chapter 2715 of the Revised Code, provide a thorough set of rules to govern when and how attachments may be had. The Chapter contains its own set of procedural requirements, and its own rules for what can be appealed and when. Here, Randazzo appealed the denial of his motion to discharge the attachment. That is an appealable order, per R.C. 2715.46. ("A party to a suit affected by an order discharging or refusing to discharge an order of attachment may appeal *on questions of law* to reverse, vacate, or modify it as in other cases; and the original action shall proceed to trial and judgment as though no appeal had been taken.") (emphasis added). However, the right to appeal is limited. Only "questions of law" may be appealed. An appellate court lacks jurisdiction to entertain questions of fact.

An attachment is only provisional; it is not a final remedy. It is a means of securing assets for collection. Nothing is transferred, it is simply secured. It is also counter secured by a bond to be available to compensate a defendant should the attachment prove unwarranted.[7] So, the limited question on appeal is whether as a matter of law, not fact, it was properly obtained.

The statute provides guidance in that any challenge to a prejudgment attachment goes to whether it was "'wrongfully obtained' in that there was no probable cause to support one of the grounds for attachment enumerated in R.C. 2715.01(A)." *Thompson v. Summit Pain Specialists, Inc.*, 9th Dist. Summit Nos. 27635, 27638, 2016-Ohio-7030, ¶ 28. The inquiry then on appeal is not a review of the facts upon which the prejudgment attachment was granted, but rather whether the statutory grounds were satisfied. The review court is not to substitute its judgment for that of the trial court, even if it disagrees with the interpretation of the facts; rather the reviewing court is to discern whether one of the enumerated grounds supports the trial court's decision.

The lower court here, however, provided a new role for the reviewing court upon challenges to prejudgment attachment. The Court of Appeals expanded "wrongfully obtained" to be a de novo review of the facts upon which the probable cause was grounded, thereby eliminating all deference to the trier of fact.

This isn't the role of the appellate court in the statutory scheme. If there is a question of the validity of the facts upon which the order is granted, rather than whether the proper legal grounds were asserted, "[a]mple provisions are made for the defendant

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[7] The State, of course, is exempt from posting bonds. This is because the State is presumed to honor its obligations without the need for additional security. This unique grace afforded the sovereign does not diminish the significance of the counter-security.

to question the validity of the order of attachment by Section 2715.44 et seq., Revised Code." *Rice v. Wheeling Dollar Savs. & Trust Co.*, 163 Ohio St. 606, 612, 128 N.E.2d 16 (1955). The referenced statutes are the portion of the Attachment Chapter that afford a defendant the right to file a discharge petition. A hearing can be requested, and the defendant can introduce evidence to have the prior order discharged. *Slabaugh v. Slabaugh*, 5th Dist. Stark No. 2005-CA-00134, 2006-Ohio-1496, ¶ 33. In the case *sub judice*, Randazzo and SFAO chose <u>not</u> to present any evidence of their own to challenge the facts underpinning the original order. Instead, they elected to challenge the legal grounds. However, the State introduced additional evidence which supported the claims that Randazzo continued to transfer and place assets beyond the reach of the court.

The logic behind strictly limiting appellate review of attachments is supported by another unique aspect of attachment appeals. Unlike most other interlocutory appeals, appeals from attachments do not interrupt the flow of the underlying case. R.C. 2715.46 ("the original action shall proceed to trial and judgment as though no appeal had been taken.") Again, this makes sense because the probable cause determination being appealed is not dispositive of the merits, or, in other words, the facts of the case.

Were the appeal not curtailed, issues of fact could be determined by the appellate court while simultaneously being decided to the contrary by the trial court on more detailed facts below. Additionally, it is extremely unlikely than an appeal would ever determine that a trial court lacked probable cause, i.e., a reasonable basis to believe grounds were present to justify a finding of one of the 11 enumerated reasons for granting an attachment. The trial court here found three causes exist. The Court of Appeals did not disagree. But, it dissolved the attachment anyway because it was initially issued *ex parte*.

The Court of Appeals improperly dissolved the attachment order based on its finding that the *facts* did not support issuing the order *ex parte*. Specifically, it held that there was insufficient *evidence* to support the finding of probable cause of an immediate and present danger that the funds in the brokerage account would be moved if the *ex parte* order was not entered. But, this was a factual question which the 10th District lacked jurisdiction to consider in this limited, interlocutory appeal.

<u>Attorney General's Second Proposition of Law:</u>

> *Although not reviewable, when issuing an ex parte order of attachment, a trial court need only find, based on the motion and affidavit, that there is probable cause of a present danger that property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the Court. The gifting of a house, the liquidation of multiple pieces of real estate, and the placement of the proceeds thereof in a brokerage account where they can be wired anywhere in the world on a moment's notice, meet this threshold.*

In some ways, an attachment proceeding is procedurally similar to a temporary restraining order ("TRO") and preliminary injunction. Like preliminary injunctions, attachments are appropriate in certain cases. Like TROs, *ex parte* attachments are available in a subset of cases where immediate relief is necessary. Also, like TROs/preliminary injunctions, only contested attachment decisions are appealable. An *ex parte* attachment, like an *ex parte* TRO, is not appealable.

Because of the "immediate[]" and "present danger" to the plaintiff's interest in the property, the Attachment Statute permits attachment without notice to the defendant in limited, emergency circumstances. R.C. 2715.045(B). In order to obtain *ex parte* attachment, plaintiffs must establish that there is "probable cause" to support an *ex parte* motion and that they will suffer "irreparable injury" either because there is a "present danger" that the property will be "immediately" removed, converted, or otherwise concealed, or because the property's value will be substantially impaired by a delay. R.C. 2715.045(B). An *ex parte* order, like a TRO, is fleeting in nature and is not subject to interlocutory appeal.

Nonetheless, the Court of Appeals ignored the contested hearing that was held, and dissolved the attachment because the initial *ex parte* "hearing" was brief. The intermediate court committed several errors in doing so. First, the *ex parte* decision is not subject to appeal and is not independently reviewable. Akin to a TRO, an *ex parte* attachment order can be contested via an evidentiary hearing held a short time later at the defendant's request. And, like when a preliminary injunction is issued, it is the order issued after the evidentiary hearing that is subject to appeal, not the result of the *ex parte* motion (or TRO). There is no statutory authority to appeal from an *ex parte* attachment order. Randazzo can point to no statute that provides a right to appeal the *ex parte* order.

As discussed above, R.C. 25015.46 is the sole source of authority to appeal, and it does not afford an appeal from an *ex parte* attachment order. The 10th District erred when it dissolved the attachment because it did not think the facts were sufficient to result in attachment being issued *ex parte*. It did not have jurisdiction over that question. Reviewing the *ex parte* order was error. The *ex parte* order essentially ends when the contested hearing occurs and a decision therefrom is issued. Thus, the contested order does not exist any longer and is not subject to appeal. What the appellate court did here is akin to vacating a properly issued preliminary injunction because the appellate court questions whether the underlying facts justified a TRO. The TRO doesn't matter. The only question is whether the preliminary injunction is proper. The same is true here. The question of the need for the attachment to have been *ex parte* isn't relevant. The only question is whether the factors for an attachment were established at the contested hearing.

Moreover, any potential error in conjunction with an *ex parte* order is subject to correction at the contested hearing. And if they were, then the error is no longer present. This is yet another reason the *ex parte* order is not appealable.

Even if the *ex parte* order is reviewable, the 10th District erred in applying the law as it relates to *ex parte* attachments. Specifically, it found the *ex parte hearing* to have been too truncated, not the hearing on the motion to vacate which is a statutory right. But, a hearing is not required at all on whether an *ex parte* attachment should be entered. Rather, the statute provides in relevant portion "[u]pon the filing of a motion for attachment, a court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed *and without conducting a hearing*…" R.C. 2715.045. (Emphasis added.) A hearing that is not required cannot be too short. Its brevity cannot be a basis to dissolve the order.

To grant a motion *ex parte*, all that must be established is probable cause of "a present danger that property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the Court." R.C. 2715.045(B)(1). The Court of Appeals weighed the evidence based on a preponderance of the evidence. It erroneously placed itself in the stead of the trial court, when it should have been considering only questions of law.

Here the trial court was already familiar with many of the facts, having held multiple hearings and ruled on multiple motions for preliminary injunction and motions to dismiss. The trial court reviewed the lengthy and substantial motion and affidavit prior to taking the bench. Additionally, Randazzo's actions of liquidating assets and gifting a house were sufficient on their face for the court to conclude that the funds were likely to be moved further—which is exactly what happened. This is particularly true in a case where the Defendant-Appellee is alleged to have engaged in fraud and accepted illegal bribes. It is no surprise that a criminal will act to deplete the proceeds of the crime. There simply is no way under these circumstances that the trial court abused its discretion in finding probable cause.

Importantly, the Court of Appeals provided its own, stricter, interpretation than required by statute. R.C. 2715.045(B)(1) provides that "irreparable injury" may be found where "[t]here is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court." The Court of Appeals rejected the argument that having funds in a bank account, brokerage account, or any financial institution satisfied the present danger language despite the ease with which wire transfers, by their nature, can facilitate the movement of huge sums of cash nearly instantaneously. App. Op. ¶ 31. However, the immediacy and simplicity of being able to transfer monies beyond the jurisdiction of the court is precisely the "present danger" posed by the way in which the property is held. The Court of Appeals went on to suggest that upholding a contrary ruling would subject any civil action in which money damages are sought to prejudgment attachment on the "mere possibility that funds could be inappropriately diverted." App. Op. ¶ 32. This grasp at alarm bells is misplaced.

The Court of Appeals overlooked that one does not get to an *ex parte* order of prejudgment attachment, as was the case here, without first establishing "probable cause to support the motion." R.C. 2715.045(A). "'Probable cause to support the motion' means that it is likely that a plaintiff who files a motion for attachment pursuant to section 2715.03 of the Revised Code will obtain judgment against the defendant against whom the motion was filed that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion." R.C. 2715.011(A). In other words, the Legislature has already accounted for, and protected general civil litigants against, flippant and meritless prejudgment attachment motions. Second, attachment is only available in the special circumstances stated in R.C. 2715.01. Thus, an attachment is only available where circumstances indicate a defendant is hiding assets or is likely to do so. And it delineated what those circumstances are. The appellate court second-guessed those statutory factors.

Finally, the court of appeals failed to give the trial court deference when determining what factored into the totality of circumstances constituting "present danger." Generally speaking, a defendant who is about to dispose of, conceal, or place property beyond the jurisdiction of the court will not announce such intentions globally, and certainly not to a party who "is likely [to] obtain judgment against the defendant" at the earliest stages of litigation.

Such an overly stringent reading, as applied by the Court of Appeals, ignores all the signs of a defendant positioning himself to immediately move property beyond the State's reach. It is reasonable that factors indicating a present danger to dispose of assets would include the selling of real estate assets, the gifting to family members real property worth hundreds of thousands of dollars, and being sufficiently identified in a plea agreement as having been paid a $4.3 million bribe while being a public official within the weeks and months after a home is raided by the FBI,. To be certain, "present danger" under R.C. 2715.045(B)(1) must mean something more than speculative, but cannot be so narrow as to require near absolute proof as to "immediate disposal." Unlike the appellate court, the trial court correctly used the standard provided by the text of the statute and did not superimpose additional, more stringent requirements of near actual knowledge of the immediacy of disposal of property.

The Court of Appeal's reliance on *Zeeb Holdings, LLC v. Johnson*, 552 F. Supp. 3d 709 (N.D.Ohio 2021) to support a higher than mere possibility threshold and a "heavy burden" standard is inapposite. The motion was denied because no statutory notice of the motion for attachment was provided to defendants and as such raised "significant due process concerns surrounding the attachment of a defendant's assets." *Id*. at 712. Importantly, the court in *Zeeb* went on to explain that alternatively, the motion would be denied because the court "cannot find that it is 'likely' that plaintiffs will obtain a judgment against defendant." *Id*. at 714. There is no analogy to be drawn between a statute that requires notice and one that does not. It is incongruent to apply the "heavy burden" standard for notice in non-*ex parte* statutes to the trial court review of the motion and affidavit to determine satisfaction with the "present danger" requirement.

Attorney General's Third Proposition of Law:

> *When reviewing the refusal to dissolve an order of attachment, a Court of Appeals may not disregard evidence submitted at a contested hearing merely because that evidence was not available at the preceding ex parte hearing.*

After a court issues an *ex parte* attachment, the defendant may request an evidentiary hearing to contest the entry of the attachment order. *See* R.C. 2715.045(D). That hearing must be conducted "in accordance with" the procedures set forth in R.C. 2715.043. And, "[i]f, after hearing, the court finds that there is not probable cause" to support a finding that the plaintiff "will suffer irreparable injury," the order of attachment must be dissolved and the property be returned to the defendant. *Id*.

Given the fast-moving facts that necessitate an *ex parte* attachment, additional facts evincing probable cause or irreparable injury are often discovered post-attachment. At the contested hearing, the court is expressly allowed to consider both affidavits and "evidence submitted at the hearing." R.C. 2715.03(B). Indeed, in conflict with the 10th District, at least two Ohio courts have applied these provisions in this way. *See, e.g.*, *Johnson & Hardin Co. v. DME Ltd.*, 106 Ohio App. 3d 377, 381 (12th Dist. 1995); *Bressi v. Geiger*, 2016 Ohio Misc. LEXIS 18482, *15 (Summit Cty. CP).

The Twelfth District and Summit County give the best reading. If the trial court could not receive additional evidence presented at the hearing, then the second hearing would be hortatory. Applying the 10th District's logic, the trial court would have to ignore new facts that strengthen an inference of "present danger" simply because they were discovered—or arise—after an order of attachment had already been issued. That is an absurd reading of the procedural provisions of the statute that should be rejected.

Even if a trial court erred at the *ex parte* attachment stage, newly discovered evidence that shows a "present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court" supersedes any prior error at the stop-gap *ex parte* attachment stage. Put another way, if the trial court properly finds probable cause on the basis of the newly presented evidence at the hearing, along with the original motion and accompanying affidavit, it does not err in maintaining the status quo by continuing the initial order of attachment. Further, the order continuing the attachment supersedes the *ex parte* order, which no longer exists to be reviewed.

These *ex parte* procedures evoke another familiar area of the law: the issuance of temporary restraining orders and preliminary injunctions. A court may consider evidence presented at a preliminary injunction hearing to decide whether a TRO should be continued. In this process, a "preliminary injunction supersede[s] and subsume[s] the TRO." *Karaha Bodas Co. v. Negara*, 335 F.3d 357, 365 (5th Cir. 2003). By analogy, any disputes about the entry of the *ex parte* attachment are "superseded and subsumed" by the court's leaving an attachment order in place after an adversarial hearing. *Id*. So too here, the final attachment order superseded the *ex parte* order. Thus, the Court of Appeals should not have reviewed the *ex parte* order at all, and erred by not considering the additional evidence admitted at the contested hearing.

Before the evidentiary hearing, the State learned Randazzo had transferred $500,000 to the trust account of his current counsel, and another $2.5 million to attorneys in California who have no presence in Ohio, and who did not receive that money as payment for work performed. The newly discovered transfers were presented as evidence at the post-attachment hearing. "[B]ased upon the evidence presented at the evidentiary hearing, there is even a *stronger*" showing that "that the attachment is necessary to prevent further dissipation of assets" owed by Randazzo to the State. *Bressi*, 2016 Ohio Misc. LEXIS 18482, *15 (emphasis added). The 10th District erred in requiring the trial court to ignore this stronger evidence. Thus, this Court should restore the attachment order.

<u>Attorney General's Fourth Proposition of Law:</u>

> *The trial court does not abuse its discretion when it orders attachment of less than the amount that "may be had" in a civil suit. R.C. 2715.01(A).*

The trial court did not abuse its discretion when it determined that a garnishment of $8 million dollars of Randazzo's assets was appropriate. Ohio law permits "an attachment against the property, other than personal earnings, of a defendant *may be had* in a civil action for the recovery of money." R.C. 2715.01(A) (emphasis added). The ordered attachment amount is simply "to be stated in the order as in the affidavit". R.C. 2715.05(A). This is a question of straightforward statutory interpretation. *State ex rel. Prade v. Ninth Dist. Court of Appeals*, 151 Ohio St. 3d 252, 255 (2017). What "may be had" by the State in a civil suit under the Civil Liability for Criminal Acts and under the OCPA is treble *and* punitive damages. The 10th District inexplicably ignored this easy math.

Under just the Ohio Corrupt Practices Act, Randazzo may be liable for up to treble damages—that is, $12.9 million. *See* R.C. 2923.34(E). The State sought, and the trial court allowed, a garnishment of $8 million, which is less than twice the $4.3 million Randazzo bribe. Without even taking punitive damages into account, the mere $8 million sought by the State is *much less* than the amount that Randazzo could owe under a single count of the State's civil suit. And this excludes his potential joint-and-several liability for the harm he inflicted by accepting the bribe. The trial court did not abuse its discretion by allowing an $8 million attachment. Even if it had, the remedy is to reduce the attachment to $4.3 million, not to vacate it.

In *Thompson, et al., vs Summit Pain Specialists, Inc., et al.*, Summit County Common Pleas, Case No. CV-2013-05-2353, various plaintiffs asserting claims against doctors and their practice that included medical malpractice, personal injury, serious emotional distress and corporate negligence. *Bressi v. Geiger*, C.P. No. CV-2014-04-2198, 2016 Ohio Misc. LEXIS 18269, at *1 (Oct. 11, 2016); *see also*, *Thompson v. Summit Pain Specialists, Inc.*, 9th Dist. Summit Nos. 27635, 27638, 2016-Ohio-7030, ¶ 3. In the companion receivership action, those plaintiffs sought an emergency order for pre-judgment attachment for assets held by the receiver. *Id*. No specified maximum amount of the pre-judgement was ordered. In fact, the order was unlimited. *Id*. at *5-6 ("The Court grants the Motion For Pre-Judgment Attachment as it pertains Corporate Defendants Geiger, Patterson, and Gould. Pursuant to Chapter 2715 of the Ohio Revised Code, the Court orders the Pre-judgment Attachment of the following assets of the Corporate Defendants Geiger, Patterson, and Gould; *any real or personal property*, located within or without the State of Ohio, owned in whole or in part by Corporate Defendants Geiger, Patterson, and Gould., *any tangible or intangible property owned*, including but not limited to, bank accounts, cash, stocks, bonds or other items that he or she has a financial interest and can be converted into cash, *all shares of stock* in the Corporation, Summit Pain Specialists, Inc.") (Emphasis added.) It was likely determined there that all of the property would be needed to satisfy a judgment.

As means of example, supposing the only asset available to secure a $300,000 claim was a $1 million piece of real estate. The statute affords the ability to attach the real estate. It doesn't require a piece of it be carved off, or a lien created. This also prevents disputes over the exact value of the property. And the defendant always has the ability to bond off the attachment.

Here, the stated claim was that Randazzo is liable for the $4.3 million bribe, treble damages, punitive damages, and is jointly and severally liable for the damage caused by the $2 billion benefit FirstEnergy obtained from the scheme. The attachment order was for $8,000,000, which is less than "triple the actual damages" available under R.C. 2923.34(E). The $8,000,000 attachment order is within the amount of the claim. The analysis should end there. The $8 million amount of the attachment should be restored.

Attorney General's Fifth Proposition of Law:

Garnishment orders are properly entered in attachment proceedings. R.C. 2715.091.

In its effort to completely up-end attachment law in Ohio, the Court of Appeals ruled that the use of garnishment orders was improper. This is wrong and directly contrary to the text of the Revised Code.

The first provision of the Attachment Chapter of the Revised Code provides that "[a]n attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished prior to the entry of judgment only pursuant to ***a garnishment proceeding*** under section 2715.091 of the Revised Code and related provisions of this chapter." R.C. 2715.01(D) (emphasis added). The trial court fully complied with the requirements of R.C. 2715.091. Nonetheless, the Court of Appeals ruled the garnishments invalid because there had not been a final judgment.

Some on-the-ground background is helpful here. The Court of Appeals took issue with the fact that in addition to the garnishment papers the State submitted to the clerk of courts, the clerk refused to file the garnishment unless its standard form was also included. The clerk did not have a garnishment form with attachment language. Left with no other option, the State completed the garnishment form the clerk demanded.

The Court of Appeals got bogged down in the use of the term 'judgment' on the clerk's mandated form. The Court of Appeals found the garnishment orders issued to the financial institutions to be fatally flawed because of this clerk-mandated boilerplate. There are several things troubling with the appellate court's reasoning.

First, garnishments are issued to inform a third party holding the assets of another to transfer the assets into the court. Whether this order is pre- or post- final-judgment is of no consequence to the financial institution. It simply pays the money into the court, where claims to the funds can be sorted out. This is no different whether pre-final-judgment attachment or post-final-judgment.

Second, the Court of Appeals places too much meaning on the term 'judgment.' It concludes that 'judgment' must only mean "final judgment." But there is no reason to conclude that 'judgment' in a garnishment order must mean "final judgment." An order of attachment is an interlocutory judgment that probable cause exists to support the complaint and grounds exist to attach property. An interlocutory judgment is a judgement. At the oral argument, the panel quibbled that an attachment "operates as a judgment", but is not a judgment. But, for garnishment purposes, this is a distinction without a difference. Thus, the use of the term "judgment" in the garnishment notices issued to the financial institutions was not error.

Third, appellees have no standing to contest the language of the garnishment order. The garnishments here were issued to a stock brokerage, and several large banks. It ordered them to convey certain funds they held, minus exempt funds, to the clerk of courts. If there was any material issue with the fact that the garnishment orders described the order of attachment that was included in the garnishment packet, then it is an issue for the financial institutions to raise. The Defendant-Appellee has no right to complain.

The argument Randazzo raises shows as much. He does not assert any harm from the wording. He does not claim anything different would have occurred had the garnishment orders used the word 'attachment' instead of 'judgment.' He simply alleges it was a technical error without harm.

Therefore, Ohio law allows for an attachment to be issued before an entry of judgment, so long as R.C. 2715.091 is followed. It was here, and the 10th District erred in ruling otherwise.

CONCLUSION

For these foregoing reasons, the Court should reverse the decision of the Tenth District Court of Appeals and restore the prejudgment attachment and garnishment orders issued by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

EXHIBIT A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dave Yost, Ohio Attorney General, Plaintiff-Appellee, v. FirstEnergy Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-443 (C.P.C. No. 20CV-6281) (ACCELERATED CALENDAR)
City of Cincinnati and City of Columbus, Plaintiffs-Appellees, v. FirstEnergy Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-444 (C.P.C. No. 20CV-7005) (ACCELERATED CALENDAR)
State of Ohio ex rel. Dave Yost, Ohio Attorney General, Plaintiff-Appellee, v. Energy Harbor Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-445 (C.P.C. No. 20CV-7386) (ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 27, 2022, we sustain all three assignments of error. We hereby reverse and vacate the trial court's August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Property Other than Personal Earnings; the trial court's August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Accounts of Property Other than Personal Earnings; and the trial court's August 23, 2021 Order denying Defendants' Motion to Vacate the Attachment Orders and the related garnishment orders. Any outstanding appellate court costs are waived.

BEATTY BLUNT, KLATT &
MENTEL, JJ. concur.

/S/ JUDGE
Judge Laurel Beatty Blunt

Tenth District Court of Appeals

Date:	09-30-2022
Case Title:	STATE OF OHIO EX REL DAVE YOST -VS- FIRSTENERGY CORP
Case Number:	21AP000443
Type:	JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Laurel Beatty Blunt

EXHIBIT C

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 006281 JUDGE CHRIS BROWN
CITY OF CINCINNATI and **CITY OF COLUMBUS,** Plaintiffs, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 007005[1] JUDGE CHRIS BROWN
STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **ENERGY HARBOR CORP., et al.,** Defendants.	Case No. 20 CV 007386[2] JUDGE CHRIS BROWN

ORDER

[1] *City of Cincinnati, et al. v. FirstEnergy Corp., et al.*, consolidated by order filed Dec. 14, 2020.
[2] *State of Ohio ex rel. Dave Yost v. Energy Harbor Corp., et al.*, consolidated by order filed Dec. 14, 2020.

This matter is before the Court on Motion of Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc. ("SFAO") on a Motion to Vacate the August 12, 2021 *ex parte* order of Attachment, as well as a Motion to Quash and Request to Find the State of Ohio in Contempt. A Zoom videoconference was held on August 23, 2021.

The Court finds that Randazzo is a party to case as of August 5, 2021, that the pre-judgment attachment is proper under R.C.2715.01 and R.C. 2715.045, and that garnishment is the appropriate means to secure the property under R.C.2715.09, given the liquid nature of the assets.

For the reasons stated on the record, the Motion to Vacate is **DENIED**. The Motion to Quash is **GRANTED, IN PART**. The subpoenas shall be held in abeyance while the stay is in effect. This is not a final, appealable order.

IT IS SO ORDERED.

JUDGE CHRIS M. BROWN

Franklin County Court of Common Pleas

Date:	08-23-2021
Case Title:	STATE OF OHIO EX REL DAVE YOST -VS- FIRSTENERGY CORP
Case Number:	20CV006281
Type:	ORDER

It Is So Ordered.

/s/s Judge Christopher M. Brown

Court Disposition

Case Number: 20CV006281

Case Style: STATE OF OHIO EX REL DAVE YOST -VS- FIRSTENERGY CORP

Motion Tie Off Information:

1. Motion CMS Document Id: 20CV0062812021-08-2399960000
   Document Title: 08-23-2021-MOTION TO QUASH - NON-PARTY: SAMUEL C. RANDAZZO
   Disposition: MOTION GRANTED IN PART

2. Motion CMS Document Id: 20CV0062812021-08-1799940000
   Document Title: 08-17-2021-MOTION TO VACATE - NON-PARTY: SAMUEL C. RANDAZZO
   Disposition: MOTION DENIED

EXHIBIT E

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 006281 JUDGE CHRIS BROWN
CITY OF CINCINNATI and **CITY OF COLUMBUS,** Plaintiffs, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 007005[1] JUDGE CHRIS BROWN
STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **ENERGY HARBOR CORP., et al.,** Defendants.	Case No. 20 CV 007386[2] JUDGE CHRIS BROWN

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2021 AUG 12 PM 2:48
CLERK OF COURTS

ORDER GRANTING PLAINTIFF'S EX-PARTE MOTION FOR PREJUDGMENT ATTACHMENT OF ACCOUNTS AT PROPERTY OTHER THAN PERSONAL EARNINGS

[1] *City of Cincinnati, et al. v. FirstEnergy Corp., et al.*, consolidated by order filed Dec. 14, 2020.
[2] *State of Ohio ex rel. Dave Yost v. Energy Harbor Corp., et al.*, consolidated by order filed Dec. 14, 2020.

To: levying officer. Please attach the goods, chattels, stocks or interest in stocks, rights, credits, money, and effects of Samuel C. Randazzo, SSN# ; and Sustainability Funding Alliance of Ohio, Inc., TIN# xxx-xx-4519 so much thereof as will satisfy State of Ohio / plaintiff's claim in the amount of $8,000,000.00, and costs of this action, not exceeding one hundred dollars.

Said property can be recovered by filing a bond pursuant to section 2715.10 or 2715.26 of the Revised Code.

IT IS SO ORDERED.

JUDGE CHRIS BROWN 8/11/21

Submitted by:

DAVE YOST
Ohio Attorney General (0056290)

/s/ Charles M Miller
CHARLES M. MILLER (0073844)
Counsel *to* the Attorney General
JONATHAN D. BLANTON (0070035)
Deputy Attorney General for Major Litigation
L. MARTIN CORDERO (0065509)
Assistant Attorney General
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Counsel for the State of Ohio

EXHIBIT D

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 006281 JUDGE CHRIS BROWN
CITY OF CINCINNATI and **CITY OF COLUMBUS,** Plaintiffs, v. **FIRSTENERGY CORP., et al.,** Defendants,	Case No. 20 CV 007005[1] JUDGE CHRIS BROWN
STATE OF OHIO *ex rel.* Dave Yost, Ohio Attorney General, Plaintiff, v. **ENERGY HARBOR CORP., et al.,** Defendants.	Case No. 20 CV 007386[2] JUDGE CHRIS BROWN

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2021 AUG 12 PM 2:47
CLERK OF COURTS

ORDER GRANTING PLAINTIFF'S EX-PARTE MOTION FOR PREJUDGMENT ATTACHMENT OF PROPERTY OTHER THAN PERSONAL EARNINGS

[1] *City of Cincinnati, et al. v. FirstEnergy Corp., et al.*, consolidated by order filed Dec. 14, 2020.
[2] *State of Ohio ex rel. Dave Yost v. Energy Harbor Corp., et al.*, consolidated by order filed Dec. 14, 2020.

Plaintiff's motion for attachment was considered ex-parte at 3:00 p.m. on Wednesday, August 11, 2021. For the reasons in Plaintiff's motion, the motion is sustained. Plaintiff shall submit orders for attachment of the various property, other than personal earnings, of Defendants.

IT IS SO ORDERED.

JUDGE CHRIS BROWN

Submitted by:

DAVE YOST
Ohio Attorney General (0056290)

/s/ Charles M Miller
CHARLES M. MILLER (0073844)
Counsel *to* the Attorney General
JONATHAN D. BLANTON (0070035)
Deputy Attorney General for Major Litigation
L. MARTIN CORDERO (0065509)
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Counsel for the State of Ohio

EXHIBIT B

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dave Yost, Ohio Attorney General, Plaintiff-Appellee, v. FirstEnergy Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-443 (C.P.C. No. 20CV-6281) (ACCELERATED CALENDAR)
City of Cincinnati and City of Columbus, Plaintiffs-Appellees, v. FirstEnergy Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-444 (C.P.C. No. 20CV-7005) (ACCELERATED CALENDAR)
State of Ohio ex rel. Dave Yost, Ohio Attorney General, Plaintiff-Appellee, v. Energy Harbor Corp. et al., Defendants-Appellees, [Samuel C. Randazzo and Sustainability Funding Alliance of Ohio, Inc., Defendants-Appellants].	:	No. 21AP-445 (C.P.C. No. 20CV-7386) (ACCELERATED CALENDAR)

D E C I S I O N

Rendered on September 27, 2022

On brief: *Dave Yost,* Attorney General, *Charles M. Miller, Jonathan D. Blanton, L. Martin Cordero, Margaret O'Shea, and Bradford Tammaro,* for plaintiffs-appellees. **Argued:** *Charles M. Miller.*

On brief: *Roger P. Sugarman*, *Allen Stovall Neuman & Ashton LLP, Richard K. Stovall, Jeffrey R. Corcoran*, and *Tom Shafirstein*, for defendants-appellants. **Argued:** *Roger P. Sugarman.*

APPEALS from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Defendants-appellants, Samuel C. Randazzo ("Randazzo") and Sustainability Funding Alliance of Ohio, Inc. ("SFAO") (collectively, "appellants"), appeal from three orders issued by the Franklin County Court of Common Pleas: the August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Property Other than Personal Earnings; the August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Accounts of Property Other than Personal Earnings; and the August 23, 2021 Order denying the Defendants' Motion to Vacate the Attachment Orders and the related garnishment orders. For the reasons that follow, we reverse and vacate the orders.

I. Facts and Procedural History

{¶ 2} This dispute arises out of litigation initiated by plaintiff-appellee, the State of Ohio ex rel. Dave Yost (the "State"), against multiple defendants in connection with the passage of HB 6 of the 133rd General Assembly. The matters before this court, however, involve discrete issues concerning pre-judgment attachments orders issued ex parte pursuant to R.C. 2715, et seq., and post judgment garnishment orders issued pursuant to Chapter 2716.

{¶ 3} The facts and procedural events pertinent to this appeal are not in dispute. For ease of reference, these are set forth in the following timeline:

- September 23, 2020–The State initiates the first of three cases by filing a complaint against FirstEnergy and multiple other defendants.
- October 27, 2020–City of Cincinnati and City of Columbus file a complaint against FirstEnergy and multiple other defendants.
- November 13, 2020–The State files a complaint against Energy Harbor Corporation and multiple other defendants.
- December 14, 2020–All three of the foregoing cases are consolidated. (Dec. 14, 2020 Order of Consolidation.)
- February 8, 2021–Trial court enters agreed order stating the three consolidated cases are "STAYED in all respects pending final resolution of all criminal proceedings in *USA v. Householder et al.*, Case No. 1:20-cr-00077-TSB (S.D. Ohio)." (Feb. 8, 2021 Agreed Order)
- August 5, 2021–The State files a motion for leave to file a second[1] amended complaint to add appellants and other parties as defendants, attaching as an exhibit a copy of the proposed second amended complaint. (Aug. 5, 2021 Mot. for Leave to Amend Compl.; Ex. A.)
- August 12, 2021–The State moves, ex parte, for an order attaching certain property of appellants in the form of accounts held with various entities. (Aug. 12, 2021[2] Ex-Parte Mot. for Prejudgment Attachment.) The motion was supported by the affidavit of Charles M. Miller, counsel for the State. (Aug. 12, 2021 Aff. of Charles M. Miller.)
- August 11, 2021–Trial court holds hearing on the State's Ex-Parte Motion for Prejudgment Attachment, grants the motion at the conclusion of the hearing, and orders the State to submit a proposed order. (Aug. 11, 2021 Tr.

[1] The State had already filed a First Amended Complaint as of right early in the litigation.

[2] The State did not file its ex parte motion until the day after it was presented to the court and heard.

at 10-12.) Trial court further states it will "permit the Attorney General's Office to file an amended complaint naming Randazzo as a named defendant in the hearings or in the cases that are scheduled in 20-6281 and 20-7386, and allow him to be added as a party in that case, as well." *Id.* at 11. It is undisputed that appellants were not provided notice of the hearing.

- August 11, 2021–Trial court approves and manually signs two orders granting the ex-parte motion for pre-judgment attachment presented by the State: one is titled Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Property Other Than Personal Earnings (hereinafter "Aug. 12, 2021 Attachment Order No. 1") and the other is titled Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Accounts at Property Other Than Personal Earnings (hereinafter "Aug. 12, 2021 Attachment Order No. 2").
- August 12, 2021–Aug. 12, 2021 Attachment Order No. 1 and Aug. 12, 2021 Attachment Order No. 2 are filed with the Clerk of the Franklin County Common Pleas Court. Aug. 12, 2021 Attachment Order No. 2 provides for attachment against the property of appellants to "satisfy State of Ohio/plaintiff's claim in the amount of $8,000,000.00."
- August 12, 2021–Trial court signs three post judgment garnishment orders: one issued to JP Morgan Chase, one issued to Charles Schwab, and one issued to Huntington Bank. Each of the garnishment orders is supported by an affidavit of Charles M. Miller stating that the State as judgment creditor has "recovered or certified a judgment in the Common Pleas Court of Franklin County, Ohio against the judgment debtor named above," with the judgment debtor identified as "First Energy Corp., et al.," and the amount of the judgment as $8,000,000.00. (Aug. 12, 2021 Garnishment Orders.)
- August 12, 2021–Aug. 12, 2021 Garnishment Orders are filed with the Clerk.
- August 13, 2021–Order Granting Motion of Plaintiff State of Ohio ex rel. Dave Yost, Ohio Attorney General for Leave to Amend Complaint *Instanter* is electronically signed by the trial court and is electronically filed with the Clerk. (Order Granting Leave to Amend.)
- August 17, 2021, 10:18 a.m.–State files Second Amended Complaint.

- August 17, 2021, 10:47 a.m.–Appellants' file Motion to Vacate the August 12, 2021 Orders of Attachment and the Order and Notice of Garnishment and Request for Expedited Consideration. (Mot. to Vacate.)
- August 17, 2021, 3:42 p.m.–State files Affidavit Supplementing Plaintiff's Motion for Prejudgment Attachment and Order Entered August 12, 2021. (Aug. 17, 2021 Supp. Aff. of Charles M. Miller.)
- August 23, 2021–Trial Court holds hearing[3] on Motion to Vacate and denies the motion at the conclusion. (Aug. 23, 2021 Tr. at 35.)
- August 23, 2021–Order denying Motion to Vacate is electronically signed by the trial court and is electronically filed with the Clerk. (Order Denying Mot. to Vacate.) The order states, in pertinent part:

> The Court finds that Randazzo is a party to [these] case[s] as of August 5, 2021, that pre-judgment attachment is proper under R.C. 2715.01 and R.C. 2715.045, and that garnishment is the appropriate means to secure the property under R.C. 2715.09, given the liquid nature of the assets."

(Order Denying Mot. to Vacate at 2.)

- September 8, 2021–Randazzo is served with the Second Amended Complaint.
- September 9, 2021–SFAO is served with the Second Amended Complaint.

{¶ 4} On September 7, 2021, appellants filed this timely appeal.

II. Assignments of Error

{¶ 5} Appellants assert the following three assignments of error for our review:

> [I.] The trial court erred in entering the August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Property Other than Personal Earnings.
>
> [II.] The trial court erred in entering the August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Accounts of Property Other than Personal Earnings.

[3] The hearing was conducted via "Zoom," apparently due to ongoing COVID-19 protocols.

> [III.] The trial court erred in its August 23, 2021 Order denying the Appellants' Motion to Vacate the Attachment Orders and the related garnishment orders.

III. Law and Analysis

A. Standards of Review

{¶ 6} Appellants' assignments of error are all interrelated, and we therefore review them together. We review appellants' arguments implicating issues of statutory construction, which are issues of law, under a de novo standard of review. *State v. Hughes*, 10th Dist. No. 19AP-385, 2020-Ohio-3382, ¶ 7, citing *Clark v. State Teachers Retirement Sys.*, 10th Dist. No. 18AP-105, 2018-Ohio-4680, ¶ 16, citing *MA Equip. Leasing I, LLC v. Tilton*, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 18. "When conducting such a review, an appellate court does not defer to the trial court's determination." *Silver Lining Group EIC Morrow Cty. v. Ohio Dept. of Edn. Autism Scholarship Program*, 10th Dist. No. 16AP-398, 2017-Ohio-7834, ¶ 33, citing *Akron v. Frazier*, 142 Ohio App.3d 718, 721 (9th Dist.2001), citing *State v. Sufronko*, 105 Ohio App.3d 504, 506, (4th Dist.1995).

{¶ 7} In contrast, we review appellants' arguments concerning the propriety of the issuance of the attachment orders and garnishment orders, which are premised on factual findings, for abuse of discretion. *See Reywal Co. v. Dublin*, 10th Dist. No. 15AP-635, 2017-Ohio-367, ¶ 9, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 8; *Americare Healthcare Servs., LLC v. Akabuaku*, 10th Dist. No. 12AP-917, 2013-Ohio-3013, ¶ 9 ("While questions of statutory interpretation may be reviewed de novo, the factual findings underlying those determinations are reviewed for abuse of discretion."). An "abuse of discretion" means that the court acted in an " 'unreasonable, arbitrary, or unconscionable' " manner or employed " 'a view or action that no conscientious judge could honestly have taken.' " *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶ 23. Importantly, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, ¶ 34. Nevertheless, we are mindful that no court has the authority, within its discretion, to commit an error of law. *State v. Boone*, 10th Dist. No. 16AP-387, 2017-Ohio-843, ¶ 9, citing *State v. Moncrief*, 10th Dist. No. 13AP-391, 2013-Ohio-4571, ¶ 7. Furthermore, a trial court abuses its discretion when it fails to engage in a " 'sound reasoning process.' " *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990).

B. Discussion

1. Prejudgment Attachment and Garnishment Proceedings

{¶ 8} Prejudgment attachment is a statutory proceeding in rem against tangible property within the territorial jurisdiction of the court where the action is brought. *St. John v. Parsons*, 54 Ohio App. 420 (6th Dist.1936), citing *Oil Well Supply Co. v. Koen*, 64 Ohio St. 422, 429 (1901). Prejudgment attachment is only authorized under certain prescribed circumstances. R.C. 2715.01. "Statutes authorizing prejudgment attachment of property present a careful balance between the need of creditors for a means to enforce their rights and the constitutional protection of debtors against deprivation of property without due process." *Schofield v. Benton*, 10th Dist. No. 92AP-161, 1992 Ohio App. LEXIS 4275, citing *Peebles v. Clement*, 63 Ohio St.2d 314 (1980). "In the usual case, R.C. Chapter 2715 protects debtors by providing a hearing before the attachment of property." *Id.* Thus, prejudgment attachment of a defendant's property or assets without hearing or notice is an extraordinary remedy, "and the plaintiff has a 'heavy burden' in establishing its entitlement" to such relief. *Zeeb Holdings, LLC v. Johnson*, 552 F.Supp. 3d 709, 711 (N.D.Ohio 2021), quoting *Data*

Processing Sciences Corp. v Lumenate Technologies, LP, No. 1:16-cv-295, 2016 U.S. Dist. LEXIS 73385, *3 (S.D.Ohio 2016); *see also Schofield*; R.C. 2715.045.

{¶ 9} R.C. 2715.01(A) governs the procedure for obtaining prejudgment attachment of property other than personal earnings and provides, in pertinent part, as follows:

> (A) An attachment against the property, other than personal earnings, of a defendant may be had in a civil action for the recovery of money, at or after its commencement, upon any one of the following grounds:
>
> * * *
>
> (7) That the defendant is about to convert property, in whole or part, into money, for the purpose of placing it beyond the reach of creditors;
>
> * * *
>
> (9) That the defendant has assigned, removed, disposed of, or is about to dispose of, property, in whole or part, with the intent to defraud creditors;
>
> (10) That the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought;

{¶ 10} Under R.C. 2715.03, a motion for prejudgment attachment shall include an affidavit on behalf of the plaintiff, setting forth the following:

> (A) The nature and amount of the plaintiff's claim, and if the claim is based upon a written instrument, a copy of that instrument;
>
> (B) The facts that support at least one of the grounds for an attachment contained in section 2715.01 of the Revised Code;
>
> (C) A description of the property sought and its approximate value, if known;
>
> (D) To the best of plaintiff's knowledge, the location of the property;
>
> (E) To the best of the plaintiff's knowledge, after reasonable investigation, the use to which the defendant has put the

> property and that the property is not exempt from attachment or execution [and;]
>
> (F) If the property sought is in the possession of a third person, the name of the person possessing the property.

{¶ 11} R.C. 2715.045 governs the issuance of prejudgment attachment orders ex parte, and provides, in pertinent part, as follows:

> (A) Upon the filing of a motion for attachment, a court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing. The court's findings shall be based upon the motion and affidavit filed pursuant to section 2715.03 of the Revised Code and any other relevant evidence that it may wish to consider.
>
> (B) A finding by the court that the plaintiff will suffer irreparable injury may be made only if the court finds the existence of either of the following circumstances:
>
> (1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court.
>
> (2) The value of the property will be impaired substantially if the issuance of an order of attachment is delayed.
>
> (C)(1) Upon the issuance by a court of an order of attachment without notice and hearing pursuant to this section, the plaintiff shall file the order with the clerk of the court, together with a praecipe instructing the clerk to issue to the defendant against whom the order was issued a copy of the motion, affidavit, and order of attachment, and a notice that an order of attachment was issued and that the defendant has a right to a hearing on the matter. The clerk then immediately shall serve upon the defendant, in the manner provided by the Rules of Civil Procedure for service of process, a copy of the complaint and summons, if not previously served, a copy of the motion, affidavit, and order of attachment, and the following notice:
>
> (Name and Address of the Court)
>
> (Case Caption) Case No. ___________________________

> NOTICE
>
> You are hereby notified that this court has issued an order in the above case in favor of (name and address of plaintiff), the plaintiff in this proceeding, directing that property now in your possession, be taken from you. This order was issued on the basis of the plaintiff's claim against you as indicated in the documents that are enclosed with this notice.
>
> * * *
>
> (D) The defendant may receive a hearing in accordance with section 2715.03[4] of the Revised Code by delivering a written request for hearing to the court within five business days after receipt of the notice provided pursuant to division (C) of this section.

{¶ 12} Regarding prejudgment garnishment proceedings, R.C. 2715.01(D) provides as follows:

> (D) An attachment against the property, other than personal earnings, of a defendant may be accomplished prior to the entry of judgment only pursuant to an attachment proceeding under this chapter.
>
> An attachment against the property, other than personal earnings, of a defendant that is in the possession of another person, may be accomplished prior to the entry of judgment only pursuant to a garnishment proceeding under section 2715.091 of the Revised Code and related provisions of this chapter.

In turn, R.C. 2715.091, titled "Leaving notice of attachment and copy of order with garnishee" provides, in pertinent part, as follows:

> (A) When the plaintiff, his agent, or attorney, in the affidavit accompanying a motion for attachment filed under section 2715.03 of the Revised Code, states that he has good reason to believe, and does believe, that a person named in the affidavit has property of the defendant other than personal earnings in his possession, ***and the levying officer attempts to get possession of such property but cannot do so, he shall leave with the person a copy of the order of attachment, with a written notice that he appear in court and answer***, as provided in

[4] This appears to be a typographical error in the code because the code section governing a defendant's request for a hearing is actually R.C. 2711.04.

> section 2715.29 of the Revised Code. The person is the garnishee and the proceeding in relation to the garnishee is a garnishment proceeding * * *.
>
> If the garnishee is a corporation, a copy of the order and notice shall be left with an officer or a managing or general agent of the corporation * * *.

(Emphasis added.) " 'Levying officer' means the sheriff, another authorized law enforcement officer, or a bailiff who is ordered by the court to take possession of property under an order of attachment." R.C. 2715.011(B).

2. Appellants' Arguments

{¶ 13} With the foregoing statutory framework in mind, we turn to appellants' arguments. Appellants assert four reasons why the attachment orders were improperly issued and should be vacated: (1) that pursuant to R.C. 2715.01(A), pre-judgment attachment is only permissible at or after commencement of the action, and in this case the action against appellants had not yet commenced when the attachment orders were issued; (2) that the affidavit submitted in support of the motion was deficient because it was based solely upon information and belief rather than on personal knowledge; (3) that the trial court abused its discretion in finding the requisite "irreparable injury" pursuant to R.C. 2715.045(A) and (B); and (4) the State failed to post a bond with the court as required by R.C. 2715.044. Appellants also assert the trial court erred in failing to follow the proper procedure for prejudgment garnishment and issuing post judgment garnishments orders prior to an entry of judgment.

{¶ 14} We find no merit to the first, second, and fourth grounds presented by appellants for vacating the attachment orders. We agree, however, with appellants' third ground for vacating the attachment orders and further agree with appellants' contention that the garnishment orders were issued in error, all as explained below.

a. Commencement of the Action

{¶ 15} Regarding the issue of commencement of the action, we reject appellants' position that the action against appellants in this case had not yet commenced at the time the attachment orders were issued. As noted previously in our recitation of the procedural history of this matter, on August 5, 2021 the State filed a motion for leave to file a second amended complaint to add appellants as defendants and attached as an exhibit a copy of the proposed second amended complaint. On August 11, 2021, the trial court orally granted the motion for leave to amend at the ex parte hearing on the motion for prejudgment attachment, and on August 13, 2021 the trial court journalized its order granting the motion for leave to amend.

{¶ 16} We observe that several of our sister appellate courts have found that a motion for leave to file an amended complaint that includes the proposed amended complaint as an exhibit or attachment constitutes filing the amended complaint, so long as the motion for leave is ultimately granted. *Scott v. McCluskey*, 9th Dist. No. 25838, 2012-Ohio-2484, ¶ 29 ("an amended complaint that is filed with the clerk of courts as an attachment to a motion for leave to amend is deemed filed as of the date the motion was filed, provided the trial court grants the motion"); *Guerrero v. C.H.P. Inc.*, 8th Dist. No. 78484, (Aug. 16, 2001) (same); *Trosin v. International Harvester Co.*, 6th Dist. No. WD-86-37, 1986 Ohio App. LEXIS 8794 (Oct. 24, 1986) (same). Federal courts have also held that a motion for leave to file an amended complaint with the attached proposed amended complaint constitutes filing the amended complaint. *Mayes v. AT&T Information Sys.*, 867 F.2d 1172 (6th Cir.1989); *Chaddock v. Johns-Manville Sales Corp.*, 577 F.Supp. 937 (S.D.Ohio 1984); *Cannon v. Metcalfe*, 458 F.Supp. 843 (E.D.Tenn.1977).

{¶ 17} We find the foregoing authorities persuasive.[5] Accordingly, we find that the action against appellants commenced on August 5, 2021—the date the motion for leave to amend was filed with a copy of the proposed amended complaint attached—because the trial court orally granted the motion for leave to amend on August 11, 2021. Therefore, when the attachment orders were issued on August 11, 2021 by the trial court manually signing the orders at the conclusion of the ex parte hearing, the action against appellants had commenced as required by R.C. 2715.01(A).

b. Affidavit Submitted in Support of Motion

{¶ 18} Next, we turn to appellants' contention that the affidavit submitted in support of the motion for prejudgment attachment was deficient because it was based solely upon information and belief rather than on personal knowledge. This contention has no merit.

{¶ 19} As set forth above, R.C. 2715.03 provides that a motion for prejudgment attachment "shall include an affidavit on behalf of the plaintiff" setting forth the information designated in R.C. 2715.03(A) through (E). The statute contains no language evincing a requirement that the affidavit be premised on "personal knowledge." Furthermore, the language of three of the sections overtly belies any requirement that the information set forth be based on personal knowledge. Specifically, R.C. 2715.03(C) requires that the affidavit contain "[a] description of the property sought and its approximate value, *if known*"; R.C. 2715.03(D) requires that the affidavit contain "[*t*]*o the best of the plaintiff's knowledge*, the location of the property"; and R.C. 2715.03(E) requires

---

5 This court has not previously spoken directly on this issue, although it was briefly touched upon in *Meeker v. American Torque Rod of Ohio Inc.*, 79 Ohio App.3d 514 (10th Dist.1992). In *Meeker*, a former employee amended his complaint against his former employer alleging work-related chemical exposure to add product liability claims against the manufacturers of the chemicals. We analyzed the application of the discovery rule for purposes of determining the date the statute of limitations began to run. Via footnote, we mentioned that, although the plaintiff had "filed his motion for leave to amend on August 4, [he] did not file his amended complaint until August 8," that is, the day the trial court granted leave to amend the complaint. *Id.* at 520 fn.2. It is not clear from our decision, however, whether the plaintiff had attached his amended complaint as an exhibit to his motion for leave, and we did not engage in an analysis of that question. *Id.* at 515-16.

that the affidavit contain "[*t*]*o the best of the plaintiff's knowledge, after reasonable investigation,* the use to which the defendant has put the property and that the property is not exempt from attachment or execution." (Emphasis added.) There is no material difference between an affidavit premised on "information and belief" and an affidavit premised on "the best of plaintiff's knowledge," which is what is required by the statute. Thus, simply put, the plain language of the statute makes clear there is no requirement that the affidavit submitted in support of a motion for prejudgment attachment be based on personal knowledge.

{¶ 20} In addition, although this court has not addressed this issue as it pertains to the current version of Ohio's prejudgment attachment statute,[6] other courts in Ohio that have addressed it have found that an affidavit submitted in support of prejudgment attachment need not be based on personal knowledge. *See Johnson & Hardin Co. v. DME Ltd.*, 103 Ohio App.3d 377, 388 (12th Dist.1995) (finding no error in denying a motion to vacate an attachment order supported by an affidavit based on affiant's statement that the information submitted was "[t]o the best of [affiant's] knowledge and belief"); *Kalmbach Feeds, Inc. v. Lust*, 36 Ohio App.3d 186, 191 (3d Dist.1987) (affirming the trial court's ex parte prejudgment attachment order despite that "the affidavit sets forth the affiant's belief, as opposed to an affirmative representation" because the affidavit included sufficient facts upon which the affiant based his belief).

{¶ 21} We agree with these authorities on this point and based on the foregoing discussion and the clear language of R.C. 2715.03 itself, we reject appellants' argument that

[6] The previous version of R.C. Chapter 2715 was held to be unconstitutional by the Supreme Court of Ohio in *Peebles v. Clement*, 63 Ohio St.2d 314 (1980), for failing to comply with due process because the attachment process under the previous version did not require judicial supervision. *Id.* at paragraph two of the syllabus. After *Peebles* was decided, R.C. Chapter 2715 was amended to comply with the requirements of due process.

the affidavit submitted by the State in this case was deficient merely because it was based on information and belief.

c. Posting of Bond

{¶ 22} Finally, appellants' contention that the attachment orders are void because the State failed to post a bond with the court as required by R.C. 2715.044 is entirely without merit. This is so because pursuant to R.C. 109.19, "[n]o undertaking or security is required on behalf of the state or an officer thereof, in the prosecution or defense of any action, writ, or proceeding." An " '[u]ndertaking' includes a bond." R.C. 1.02(E). Thus, no bond was required to be posted in this case.

d. Irreparable Injury Under R.C. 2715.045

{¶ 23} Notwithstanding the foregoing discussion, we agree with appellants that the trial court abused its discretion, and therefore erred, in issuing the ex parte attachment orders and garnishment orders, and further erred when it denied appellants' motion to vacate the attachment orders and related garnishment orders. More specifically, as explained below, we find the trial court failed to engage in a sound reasoning process in reaching its conclusion that the State would suffer irreparable injury if the attachment orders were delayed until appellants had been given the opportunity for a hearing, and the trial court further erred in denying appellants' motion to vacate the orders because the State failed to provide sufficient evidence to meet the requirements of R.C. 2715.045.

{¶ 24} As set forth above, an ex parte order for prejudgment attachment may be issued only "if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing." R.C. 2715.045(A). In turn, "[a] finding by the court that the plaintiff will suffer irreparable injury may be made only if the court finds the existence of either * * * (1) present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court" or (2) that "[t]he value of the property will be impaired substantially if the issuance of an order of attachment is delayed." R.C. 2715.045(B)(1) and (2). The term "probable cause to support the motion" as used in R.C. 2715.045(A) "means that it is likely that a plaintiff who files a motion for attachment pursuant to section 2715.03 of the Revised Code will obtain judgment against the defendant against whom the motion was filed that entitles the plaintiff to a money judgment that can be satisfied out of the property that is the subject of the motion." R.C. 2715.011(A).

{¶ 25} In this case, the order granting the State's ex parte motion for prejudgment attachment provided, in its entirety, as follows:

> Plaintiff's motion for attachment was considered ex-parte at 3:00 p.m. on Wednesday, August 11, 2021. For the reasons in Plaintiff's motion, the motion is sustained. Plaintiff shall submit orders for attachment of the various property, other than personal earnings, of Defendants.

(Aug. 12, 2021 Attachment Order No. 1 at 1.)

{¶ 26} In its ex parte motion for prejudgment attachment, the State asserted that prejudgment attachment was appropriate for three independent reasons: (1) the obligations of appellants being pursued by the State arise from criminal conduct; (2) "after the FBI raid, Randazzo simply gave away a house worth over $500,000"; and (3) Randazzo had sold four other parcels of real estate worth 4.8 million dollars, "with the purpose of placing it beyond the reach of creditors." (Aug. 12, 2021 Ex-Parte Mot. for Prejudgment Attachment at 5.) The State further asserted the motion should be granted ex parte because the combination of "Randazzo's criminal conduct, giving away of a house, and liquidating nearly $5 million of real estate, means that 'there is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court,' " so as to meet the requirement set forth in R.C. 2715.045(B)(1). *Id.* Finally, the State argued that the proceeds of the real estate transactions had been transferred to a brokerage account and "[t]hat money can be wired anywhere in the world on a moment's notice to avoid attachment if this Court were to afford him with notice" and/or "could immediately be wired or transferred to accounts of third parties, such as Randazzo's wife, her trust account, or to his son (to whom Randazzo already transferred a house)." *Id.* at 6. In support of the motion, the State submitted the affidavit of Charles M. Miller, who attested that "[t]hese transfers and sales are all being done to shield [Randazzo's] $4.3 million of criminal proceeds and his other assets from collection on the debt to the State of Ohio for being a corrupt public official" and that "I believe the above facts justify attachment, pursuant to at least one ground contained in R.C. 2715.01, which I have reviewed." (Miller Aff. at ¶ 9 and10.)

{¶ 27} The transcript of the ex parte hearing on the State's motion indicates the hearing spanned 12 minutes. At the hearing, counsel for the State made essentially the same arguments it had presented in its motion, but additionally argued that Randazzo had specifically engaged in at least one fraudulent transfer. The following exchange between counsel for the State and the trial court occurred:

> THE COURT: Is the State of Ohio alleging that Mr. Randazzo has conveyed certain property fraudulently or illegally? Is that the concern, I guess, from the State?
>
> MR. MILLER: Yes, Your Honor. There are three concerns with respect to this. And one is that, specifically, that property is 1788 West 3rd Avenue in Columbus. In February of this year, he transferred that - - and his wife transferred that - - to their son without value paid up for that.

(Aug. 11, 2021 Tr. at 4-5.) Counsel for the State also noted that there had been a very recent ("just last week") recording of documents evincing a "transfer on death" of a certain property to "a trust in the name of his wife, as well as a trust in the name of himself." *Id.* at 5. The State further argued "that it's important to do this ex parte to prevent fraudulent transfers from occurring prior to a hearing." *Id.* at 7. The trial court then confirmed with counsel for the State it's understanding that Randazzo had not been indicted with the other codefendants as of the date of the hearing. *Id.* The State then reiterated its request that an order permitting it to attach the accounts in which the proceeds of the real estate sales were deposited be granted. *Id.* at 8-9. Finally, the State requested that the Court grant its motion for leave to file a second amended complaint that was previously filed. *Id.* at 10.

{¶ 28} In granting the State's ex parte motion for prejudgment attachment, the trial court stated as follows:

> I have considered the motion for prejudgment attachment filed in this case - - or submitted in this case. I've also considered the affidavit of Charles Miller and the accompanying exhibits attached to that affidavit.
>
> I do find that there's probable cause to support the motion for prejudgment attachment. I find that the State of Ohio will suffer irreparable injury if the order is delayed. I find that there is a present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the Court. I find that the value of the property will be impaired substantially if the order is not issued or if the order is delayed.
>
> I am going to grant the request for prejudgment attachment of the property. I do find, as I have previously found relating to this case, that there is a likelihood of success, at least at this stage. There is a likelihood of success on the merits.

Id. at 10-11.

{¶ 29} The trial court concluded by granting the motion for leave to file a second amended complaint, stating it would "permit the Attorney General's Office to file an amended complaint naming Mr. Randazzo as a named defendant in the hearings or in the cases that are scheduled in 20-6281 and 20-7386, and allow him to be added as a party in that case, as well." *Id.* at 11.

{¶ 30} A review of the transcript as set forth above shows that the trial court's consideration of the grounds required to find "irreparable injury" under R.C. 2715.045 was cursory at best and the court provided no real explanation for its ultimate findings. Essentially, the trial court merely provided a recitation of the statute. As pointed out by appellants in their brief, the property the State sought to attach consisted of funds and securities held in various accounts. (Miller Aff. at ¶ 11-17.) The State provided no evidence that would have permitted the trial court to find that the value of this property would be "impaired substantially if the issuance of an order of attachment is delayed" as the basis provided for in R.C. 2715.045(B)(2), and neither the hearing transcript nor the order issued by the trial court indicates the trial court engaged in a sound reasoning process in reaching its conclusion. Indeed, the State did not even argue that the ground of "impaired substantially" applied in this case. Thus, there was no basis for finding irreparable injury under this prong and the trial court abused its discretion in making this finding.

{¶ 31} Likewise, there was no evidence that would have permitted the trial court to find irreparable injury predicated on a "present danger" that the property sought to be attached would be immediately disposed of, concealed, or placed beyond the jurisdiction of the court under R.C. 2715.045(B)(1). Although the State contended in its ex parte motion for prejudgment attachment "[t]hat money can be wired anywhere in the world on a moment's notice to avoid attachment if this Court were to afford him with notice" and/or "could immediately be wired or transferred to accounts of third parties, such as Randazzo's wife, her trust account, or to his son (to whom Randazzo already transferred a house)", the State did not provide any actual evidence that this was about to or likely to happen. (Aug. 12, 2021 Ex-Parte Motion for Prejudgment Attachment at 6.) Although the affidavit provided in support of the ex parte motion includes a statement that "[a]fter reasonable investigation, Affiant believes Randazzo will transfer, dispose of, assign, or conceal funds contained in the above referenced accounts for the purpose of transferring and/or hiding assets from creditors including the State of Ohio" no explanation for the basis of this belief is provided, nor are any details of the investigation provided. (Miller Aff. at ¶ 16.) We find that in the context of an ex parte prejudgment proceeding, more than this is required.

{¶ 32} Moreover, this same contention could be made in *any* civil case in which the plaintiff is seeking money damages. Any funds a given defendant might have deposited in banks, brokerage accounts, etc., would always be subject to being "wired anywhere in the world on a moment's notice" and/or "wired or transferred to accounts of third parties" during the pendency of the litigation.[7] As the statutory scheme makes clear, obtaining prejudgment attachment—particularly obtaining prejudgment attachment via an ex parte proceeding—demands a higher threshold than a mere possibility that funds could be inappropriately diverted. *See Zeeb Holdings*, 552 F.Supp.3d at 711.

{¶ 33} Furthermore, although Miller attested in his affidavit that "[t]hese transfers and sales are being done to shield [Randazzo's] $4.3 million of criminal proceeds and his other assets from collection on the debt of the State of Ohio for being a corrupt public official" at the time the real estate sales/transfers occurred the State had not asserted *any* claim[8] against the appellants. (Miller Aff. at ¶ 9.) The State did not provide the trial court with any explanation for how appellants could have been conducting the transfers in order to shield the proceeds from collection by the State on a claim that did not even exist at the time the transfers took place, yet the trial court found the "present danger" prong had been met based on Miller's affidavit. Although the record shows that the State submitted a supplemental affidavit of Miller in opposing appellants' motion to vacate the attachment orders, this supplemental affidavit was neither before nor considered by the trial court when it granted the motion for prejudgment attachment at the ex parte hearing on

[7] In the instances where such transfers are alleged to have occurred, plaintiffs may avail themselves of the remedies provided for under the fraudulent conveyance statutes as set forth in R.C. Chapter 1336.

[8] Nor had Randazzo been indicted by the federal authorities for any alleged crime.

August 11, 2021 and therefore cannot be properly relied upon to support the issuance of the attachment orders after the fact.

{¶ 34} Therefore, based on the foregoing, we find the trial court abused its discretion in issuing the attachment orders and further erred in denying appellants' motion to vacate those orders.

e. Garnishment Orders

{¶ 35} As noted previously, appellant also argues that the garnishment orders were improperly issued and must be vacated, and we agree. First, because the attachment orders were improperly issued, it is axiomatic that the garnishment orders upon which they are based are also defective.

{¶ 36} Moreover, despite the fact that it is undisputed there had been no judgment entered against appellants at the time the garnishment orders were entered in these cases, the State utterly failed to comply with the requirements of R.C. 2715.091 governing prejudgment garnishments proceedings. Specifically, the State failed to instruct the levying officer to "attempt[] to get possession of [the] property[,]" and if unsuccessful, to "leave with the person a copy of the order of attachment, with a written notice that he appear in court and answer, as provided in section 2715.29 of the Revised Code." R.C. 2715.0919(A); *DaimlerChrysler Servs. v. Provident Bank,* N.D. Ohio No. 3:02 CV 7235, 2003 U.S. Dist. LEXIS 16596, *2-3 (Sept. 12, 2003 (concluding that a bank's prejudgment attachment was defective for having failed to satisfy the requirements of R.C. 2715.091 and then having successfully urged the state court to deny the due process benefits that the statute protected). In addition, the State failed to have the garnishee ordered "to appear and * * * answer all questions put to him touching property of every description, and credits of the defendant in his possession or under his control." R.C. 2715.29. Indeed, it is only after "examination of the garnishee" may the court "order the delivery of [the] property * * * into court." R.C. 2715.32.

{¶ 37} Instead of following the requisite proceedings for obtaining prejudgment garnishment orders, the State obtained post judgment garnishment orders under R.C. Chapter 2716 by submitting affidavits signed by its counsel that asserted that the State was a "Judgment Creditor" and had recovered or certified a judgment in the Court of Common Pleas. *See, e.g.,* Aug. 17, 2021 Order and Notice of Garnishment of Property Other Than Personal Earnings and Answer of Garnishee, Aff. Although the State asserts that "the clerk of courts required" the post-judgment garnishment forms submitted by the State and that using these forms "certainly didn't harm Appellants," (*see* Brief of Appellee State of Ohio at 28-29), we find this explanation for use of the incorrect procedure and forms woefully insufficient.

{¶ 38} Furthermore, the State provides no explanation for why it stated on the garnishment form that it had obtained a judgment against appellants in the amount of $8 million dollars. As noted above, the State had not—and still has not—obtained *any* judgment against appellants, and the State fails to adequately explain where this $8 million figure was obtained and why it asserted in the form's affidavit it had a judgment against appellants when it clearly had obtained no such judgment.

{¶ 39} In short, based on the foregoing deficiencies, the trial court committed reversible error in approving and ordering the post judgment garnishments prior to the entry of a judgment against appellants.

{¶ 40} Notwithstanding our findings that the trial court abused its discretion in issuing the attachment orders and therefore erred in issuing same, further erred in denying appellants' motion to vacate those orders, and erred in approving and issuing the post judgment garnishment orders, we wish to make clear that our ruling concerns only the narrow procedural matters implicated in the within appeal and in no way reflects any opinion on the underlying merits of this case.

{¶ 41} Accordingly, for all the foregoing reasons, we sustain all three assignments of error. We hereby reverse and vacate the trial court's August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Property Other than Personal Earnings; the trial court's August 12, 2021 Order Granting Plaintiff's Ex-Parte Motion for Prejudgment Attachment of Accounts of Property Other than Personal Earnings; and the trial court's August 23, 2021 Order denying Defendants' Motion to Vacate the Attachment Orders and the related garnishment orders.

Judgment reversed and orders vacated.

KLATT and MENTEL, JJ., concur.