IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel*. Dave Yost,
Ohio Attorney General,

Plaintiff-Appellant,

vs.

FirstEnergy Corp., *et al*.,

Defendants,

(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

MERIT BRIEF OF APPELLEES SAMUEL C. RANDAZZO AND SUSTAINABILITY FUNDING ALLIANCE OF OHIO, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

An *ex parte* attachment is only available in the narrowest of circumstances for reasons rooted in the fundamental protection of and rights afforded by the Ohio and U.S. Constitutions to own, possess, control, and enjoy property. "Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides[.]" *Fuentes v. Shevin*, 407 U.S. 67, 83, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). "[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Id.* at 81 & 96 (striking down as unconstitutional two statutes that allowed for prejudgment replevin on an *ex parte* basis.).

The Tenth District's decision respects these principles. The trial court's decision did not.

The Tenth District unanimously reversed and vacated the *ex parte* prejudgment attachment orders and post-judgment garnishment orders (collectively, the "*Ex Parte Orders*") issued by the trial court against the Appellees ("*Decision*"). The Court of Appeals got it right: (1) the trial court abused its discretion when issuing the *Ex Parte Orders* because the movant (here, the Attorney General) had not met the elements of R.C. 2715.045; (2) the trial court erred by refusing to vacate those *Ex Parte Orders*; and (3) the trial court erred when it authorized post-judgment garnishments prior to the entry of a judgment. (*Decision*, ¶ 41.) Effectively, the Court of Appeals concluded that the trial court failed, as a matter of law, to perform its judicial duty as gatekeeper when it rubber-stamped the Attorney General's *ex parte* requests without receiving a shred of admissible evidence, which must be presented before such extraordinary relief—relief that barred the Appellees' access to all of their financial resources—can be granted.

The Decision is well-reasoned and fully comports with established law. Despite the Attorney General's conclusory claim that *this* case creates a need for the Court "to visit Chapter 2715 of the Revised Code[,]" (AG's Merit Brief at 1), there is nothing in Chapter 2715 of the Revised Code to visit, unless, as urged by the Attorney General, the Court were to rewrite existing law so that it can be applied uniquely to the Appellees. The Decision is compliant with Ohio's *ex parte* attachment and post-judgment garnishment law. The Court of Appeals did not substitute its judgment for that of the trial court, nor did it, as the Attorney General claims, "botch[] its analysis of the Attachment Chapter" or "the appellate standard of review." (*Id.* at 4)

A close examination of the record and applicable law reveals a sharply different picture from that presented by the Attorney General. The Merit Brief reveals an Attorney General driven by a preconceived political narrative, bent on a predetermined outcome, content with little to no investigation of the facts, and focused on maximizing media attention for himself. More is required by this Court to succeed on appeal: The Attorney General must show that the "Propositions of Law" he advances are applicable to the facts of the case and could serve as a syllabus for the case if he were to prevail. S.Ct.Prac.R. 16.02(B)(4). He has not made such a showing and cannot do so here.[1]

First, the Attorney General attacks the Tenth District's Decision by asserting that an appellate court cannot review factual findings in an appeal from an attachment order under R.C. 2715.46. This position ignores that attachment orders are also appealable under R.C. 2505.02, and

[1] The Ohio Constitution, Article IV, Section 2(B)(2) and S.Ct.Prac.R. 5.02(A) prescribe this Court's jurisdiction. The Court has said it is not its "role to consider allegations that a lower court has erred in applying established law but, rather, to set forth legal interpretations to guide the lower courts." *Ohio Patrolmen's Benevolent Assn. v. Findlay*, 149 Ohio St. 3d 718, 2017-Ohio-2804, 77 N.E.3d 969, ¶ 33 (O'Connor, C.J., dissenting). While "appellate courts consider assignments of error," this court "considers propositions of law." *Id.*, quoting *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63 (O'Donnell, J., dissenting). "The two are materially and substantively different." *Id.,* quoting *Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63 (O'Donnell, J., dissenting). At their core, the five "propositions of law" advanced by the Attorney General are little more than mislabeled assignments of error challenging the Court of Appeal's application of established law.

there are no limitations on the scope of appeals under this statute. Moreover, when hearing any appeal as to "questions of law" under R.C. 2715.46, an appellate court is entitled to consider "the weight and sufficiency of the evidence." R.C. 2505.01(A)(2). The Attorney General does not even acknowledge this statute, much less attempt to explain away its dispositive language. And this is his first, and presumably strongest, proposition of law. As the Attorney General previously observed, "[l]itigants tend to lead with their best arguments." (R. 398, 2021/08/20 AG's Memo. Opp. at 4.)[2] His first proposition of law speaks volumes as to the lack of merit undergirding this appeal.

Second, the Attorney General argues that an *ex parte* attachment order is not reviewable by an appellate court. But he did not raise this argument below, so the Court should not review this argument now. Even assuming, *arguendo,* that the issue is properly before the Court, the Attorney General's argument is meritless. Courts of appeal have jurisdiction to review attachment orders—*ex parte* or not—under R.C. 2505.02 and R.C. 2715.46. These statutes do not differentiate between *ex parte* attachments and attachments entered after notice has been provided. While the Attorney General suggests that a post-attachment hearing obviates the need for an immediate appeal, "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes*, 407 U.S. at 82. Indeed, as this case demonstrates, appellate review of *ex parte* attachments is necessary given the very real harm caused by such attachments. Had the Tenth District not intervened, the Attorney General may have been able to seize every asset the Appellees own, and thereby prevented the Appellees from paying counsel to challenge the Attorney General's unlawful conduct.

[2] For simplicity, unless otherwise stated, the Appellees are citing to the record for the lead case in the trial court (*State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp., et al.*, Franklin County Common Pleas Case No. 20CV-006281).

Third, even though the Attorney General argues that a court of appeals "is not permitted to review factual findings," his "Third Proposition of Law" contradictorily claims that the Court of Appeals erred by disregarding a "supplemental affidavit" that the trial court did not consider: (1) when it first granted the *Ex Parte Orders;* or (2) when it denied the Appellees' motion to vacate the *Ex Parte Orders*. If adopted by the Court, this "Proposition of Law" would impose upon appellate courts the duty to consider and weigh evidence that was not considered by the trial court. The Attorney General's attempt to claim error because, in effect, the Court of Appeals neglected to consider new or "supplemental" facts that not even the trial court considered is a glaring admission that there was a total lack of the required proof presented at the *ex parte* stage. By assigning, on appeal, significance to new or "supplemental" facts never considered by the trial court or the Court of Appeals, the Attorney General also ignores the legal reality that a constitutional due process violation, such as that which occurred below, cannot be cured after the fact with additional evidence. *See Fuentes*, 407 U.S. at 82. Since the trial court never considered the "supplemental affidavit," neither could nor should the Court of Appeals have considered it when it reviewed whether the trial court's *Ex Parte Orders* were lawful.

Fourth, the plain language of R.C. 2715.05 requires that the amount stated in an attachment order (*ex parte* or otherwise) be the same as stated in plaintiff's attachment affidavit submitted to the trial court. This controlling statute does not provide the Attorney General—or any plaintiff—with discretion to use one amount in the affidavit and then have a different amount inserted in the order. The Attorney General is simply trying to avoid being bound by the plain language of R.C. 2715.05.

The Attorney General's attachment affidavit, an affidavit not based upon personal knowledge, claimed that the State is somehow owed $4.3 million, with no indication of how this

amount represents damages to anybody. He then submitted non-compliant orders containing a mystery $8 million amount and induced the trial court to sign non-compliant orders, thereby offending the statutory mirroring requirement. It was plain error for the trial court to grant the *Ex Parte Orders* with a claim amount different from the claim amount contained in the statutorily required affidavit.

Fifth, the garnishment orders prepared and obtained by the Attorney General were improperly and unlawfully entered by the trial court. Rather than follow the statutory procedure for ***prejudgment*** garnishment provided by R.C. 2715.01 and R.C. 2715.091, the Attorney General instead resorted to the procedure for ***post-judgment*** garnishment under R.C. Chapter 2716. He did so by submitting affidavits falsely stating that he had obtained an $8 million judgment against the Appellees when he "clearly had obtained no such judgment." (*Decision*, ¶ 38.)

Later, to prevent the Appellees from defending themselves in this case, he used post-judgment garnishments to freeze the funds in the IOLTA account of the Appellees' counsel. According to the Attorney General, a plaintiff is entitled to: (1) obtain an *ex parte* attachment without any admissible evidence; and (2) use that *ex parte* attachment to issue post-judgment garnishments to prevent the defendant from retaining counsel to challenge the attachment (or the merits of the case).[3] The Attorney General has developed a blueprint that a plaintiff can use to win a case before the defendant even has a chance to respond. Small wonder that the Court of Appeals vacated the Attorney General's R.C. Chapter 2716 ***post-judgment*** garnishments.

In truth, the Court of Appeals Decision did not go far enough. The Ohio Rules of Evidence apply in attachment proceedings. *See* Evid.R. 101. And under Evid.R. 602, a witness can only

[3] In fact, according to the Attorney General, a defendant's payment of a retainer to counsel supports a plaintiff's request for an attachment. So when a defendant, by paying counsel, attempts to fight an attachment—even an invalid attachment, like the attachments here—the plaintiff has an additional basis to argue for attachment under R.C. 2715.01(A) (at least according to the Attorney General).

testify based on personal knowledge. By contrast, the affidavit submitted by the Attorney General was solely based "upon information and belief." This Court has specifically held that to comply with the Ohio and U.S. Constitutions, an attachment statute must require a plaintiff to submit an affidavit based on personal knowledge. *Peebles v. Clement*, 63 Ohio St. 2d 314, 321, 408 N.E.2d 689 (1980). Consistent therewith, the Court of Appeals should have reached the same judgment by also finding that the *Ex Parte Orders* offend the Ohio Rules of Evidence and the Ohio and U.S. Constitutions.

To mask these fundamental failings, the Attorney General's Merit Brief is replete with what has become, unfortunately, his familiar ad hominem attacks against the Appellees in the hopes that this strategy will cause this Court (like it did the trial court) to miss or overlook the fundamental deficiencies in his legal positions. But the Attorney General's resort to hearsay, speculation, and innuendo does not generate actionable evidence or "facts."

The Attorney General's Merit Brief underscores the need for judicially imposed discipline and meaningful scrutiny in an *ex parte* prejudgment attachment proceeding, a proceeding that rarely yields just results when conducted in secret and without the participation of both sides. *See Connecticut v. Doehr*, 501 U.S. 1, 14, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991). *Ex parte* proceedings are disfavored by the law and courts because they don't allow the court to receive a complete view of the case, even when the case is simple and only involves two parties. *See id.* When a complete view of this complex case is presented, as it was in the Court of Appeals, it becomes clear that the trial court's orders were not just wrong, but legally and factually indefensible.

At present, prejudgment attachment may be "rarely requested" and "rarely granted[.]" (AG's Merit Brief at 1.) But if the statutory protections of R.C. Chapter 2715 are stripped away,

and if the requirements of due process are ignored, prejudgment attachment will be a powerful weapon for plaintiffs all throughout Ohio. The U.S. Supreme Court warned that a similar remedy (a prejudgment asset freeze of the defendant's property) would wreak havoc on defendants:

> [If a party were permitted to obtain an injunction under the circumstances of the case], it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action.

Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 327, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999), quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945). This comparable remedy, the Supreme Court cautioned, "would manifestly be susceptible of the grossest abuse." *Id.* at 330, quoting F. Wait, Fraudulent Conveyances and Creditors' Bills § 73, pp. 110–111 (1884). "A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants." *Id.*, quoting Wait, Fraudulent Conveyances § 73, at 110–111. The Supreme Court ultimately concluded that it had "no authority to craft a 'nuclear weapon' of the law like the one advocated here." *Id.* at 332.

The Attorney General convinced the trial court to deploy the equivalent of a "nuclear weapon of the law"[4] without supplying any admissible evidence to support this remedy. More fundamentally, the extraordinary and rare *ex parte* remedy cannot and must not be available, as a matter of law and justice, unless and until a plaintiff complies with the statutory and constitutional requirements ***and*** until the judicial branch proactively and independently performs its gatekeeper

[4] The injunction at issue in *Grupo* restrained the defendant from transferring certain specific assets, and the dissent in *Grupo* described an asset-freezing injunction as "a less heavy-handed remedy than prejudgment attachment, which deprives the defendant of possession and use of the seized property." *Grupo*, 527 U.S. at 337-338 (Ginsburg, dissenting). The blanket attachment sought by the Attorney General is arguably even more draconian than the "nuclear weapon of the law" rejected by *Grupo*.

function. There should be no mystery why, under the facts and circumstances presented here, the Court of Appeals unanimously reversed and vacated the trial court's *Ex Parte Orders*.

STATEMENT OF THE CASE AND FACTS

More than half of the Attorney General's Merit Brief ignores the determinative legal issues and relevant facts regarding the Five Propositions of Law presented on appeal. Instead, the Attorney General's Merit Brief regurgitates assertions that are neither factual, record-based, nor supported by any claimed personal knowledge. As an example, the Attorney General's Brief is fond of and repeatedly uses the words "bribe" and "criminal" to disparage the Appellees. (AG's Merit Brief at 1, 2, 5-6, 13, 21, 23, 27-29.)

The Attorney General's source for these false, accusatory statements is Attachment A to the Deferred Prosecution Agreement (DPA) between FirstEnergy Corp. and the Department of Justice (DOJ). Mr. Randazzo is not a party to the DPA. The content of the DPA is evidence of nothing,[5] and tellingly, the actual language of Attachment A does not back up the Attorney General's claims. The DPA speaks only to FirstEnergy Corp.'s intent and not some agreement by another party to further FirstEnergy Corp.'s interests. But these, and similar unsupported hearsay assertions litter the Attorney General's Brief. His entire case against the Appellees is a house of cards that comes tumbling down as soon a single card (the DPA) is removed.

The first two sections of the Attorney General's Merit Brief offer nothing more than his ongoing character assassination of the Appellees. In turn, the Appellees are compelled to respond

[5] The DPA, together with Attachment A thereto, appear as Exhibit D to the Attorney General's Second Amended Complaint, (R. 387), as do the Plea Agreements of defendants Longstreth, Cespedes, and Generation Now (Exhibits A, B, and C respectively.) The DPA was filed in *United States v. FirstEnergy Corp.*, No. 1:21-cr-00086 (S.D. Ohio) Doc #: 3. Despite the Attorney General's remarkable suggestion that a deferred prosecution agreement is the equivalent of a plea bargain, (AG's Merit Brief at 2 n.1), his Second Amended Complaint shows otherwise. Among the differences, someone who "bargains" nonetheless pleads guilty, as evidenced by the three plea agreements he attached to his Second Amended Complaint. A party enters into a DPA to avoid prosecution, and the government agrees not to prosecute if the terms of the DPA are met.

and debunk the Attorney General's personal attacks and to highlight for the Court the relevant facts and law germane to this appeal.

I. Mr. Randazzo's Appointment to the PUCO

On January 31, 2019, Mr. Randazzo was one of four names on a list of individuals the PUCO Nominating Council submitted to Governor DeWine, all of whom were recommended for appointment to a PUCO commissioner seat that would come open on April 11, 2019, in accordance with R.C. 4901.021. In Mr. Randazzo's case, the recommendation was unanimous.[6]

On February 4, 2019, Governor DeWine appointed Mr. Randazzo as a commissioner of the PUCO for a term commencing ***April 11, 2019.*** As required by R.C. 4901.02(A), the Governor's appointment of Mr. Randazzo was subject to the advice and consent of the Ohio Senate, and the Senate unanimously confirmed the Governor's appointment of Mr. Randazzo. On the day his PUCO term began, the Governor appointed Mr. Randazzo as the chair of the PUCO. The Governor was obligated to appoint one of the PUCO commissioners as the chair, a position the appointee holds at the pleasure of the Governor. *See* R.C. 4901.02(A).

Mr. Randazzo's appointment as a PUCO commissioner or PUCO chair did not provide him with the authority or the capacity to unilaterally act on behalf of PUCO. On the contrary, any decisional authority vested in the PUCO depends on a majority vote of the five-member administrative agency. As chair, Mr. Randazzo had a single PUCO commissioner vote, just like every other commissioner. *See* R.C. 4901.02; R.C. 4901.08.

II. House Bill 6

There were many versions of House Bill 6 introduced in Ohio House and Senate jurisdictional committees. The Attorney General has never identified which version of House Bill

[6] https://eyeonohio.com/wp-content/uploads/2020/02/nomination-council-meeting-minutes-2019-01-31.pdf.

6 is the target of this civil action. This is not a trivial omission because the enrolled version of House Bill 6 (Amended Substitute House Bill 6) was the version passed by the Ohio Senate in which the House concurred. In both chambers of the Ohio General Assembly, House Bill 6 was passed with bipartisan support. The act was then signed into law by Governor DeWine on July 23, 2019.

The PUCO is not the Ohio General Assembly. While this is obvious to even a casual observer, it is an important truth the Attorney General ignores throughout his Merit Brief and his Second Amended Complaint. The PUCO chair is also not the PUCO. Neither Mr. Randazzo nor the PUCO, an agent of the General Assembly and creature of statute, had, or have, any authority regarding the drafting or content of any bill before or act of the General Assembly. As a single member of the PUCO, Mr. Randazzo could not have compelled, and did not compel, the PUCO to do anything.

Nonetheless, the Attorney General asserts by reference only to the DPA "that during his employment as a public official [which did not commence until April 11, 2019], Mr. Randazzo helped craft key [but unstated and thus unidentified] language of HB 6 [no version identified] and lobbied the Legislature to ensure its [no version identified] passage." (AG's Merit Brief at 5-6.) But as the Court (and the Attorney General) knows, Ohio has established a non-partisan and independent agency that provides the General Assembly with drafting, research, budgetary and financial analysis, training, and other services. That agency has been in place for decades and is known as the Ohio Legislative Service Commission (the "LSC"). R.C. 103.18 requires all state agencies, including the PUCO, to cooperate with the LSC.

While a "bill" or proposed piece of legislation can be requested by any legislator, citizen, or interest group, the content of any bill is drafted by the LSC, and that content remains a proposal

until the bill is passed by both chambers of the General Assembly and presented to the Governor for signature without exercise of the Governor's veto authority. Once the bill has been so presented to the Governor, it can then become an "act."[7]

The Attorney General's claim regarding Mr. Randazzo's role in House Bill 6 is not just inconsistent with the procedure for drafting and passing legislation in Ohio. It also conflicts with assertions in his Second Amended Complaint (at ¶ 66), which credits then-Speaker Larry Householder as the person responsible for crafting the legislation (HB 6), along with two Ohio House members who introduced the legislation:

> It's based on our brains. For me, I look back, ***for two years I've had this in my head,*** and I've had various versions on that white board over the last several months.

(Emphasis sic.) The claim is also at odds with similar assertions in Attachment A to the DPA (at p.26), which states that FirstEnergy Corp. executives and representatives worked directly with Householder in drafting the legislation leading up to the ***introduction of HB 6*** in the Ohio House in April of 2019.[8]

III Decoupling in the State of Ohio

With regard to decoupling, the Attorney General contends (with no evidentiary support) that "Randazzo played a key role in this lesser-known aspect of H.B.6.[,]" which he labels "a highly-valued gift to FirstEnergy." (AG's Merit Brief at p.5 & fn.4.) The misleading suggestion

[7] Ohio Legislative Service Commission, *A Guidebook for Ohio Legislators*, Introduction & Chapter 5 (Enacting Legislation), available at https://www.lsc.ohio.gov/publications/a-guidebook-for-ohio-legislators.

[8] The as-introduced House version of HB 6 died on the vine; it is not what the Ohio House passed.

is that but for HB 6, there would be no decoupling in Ohio. This ignores that decoupling is a decades-old regulatory tool that is hardly unique to Ohio.[9] It is in use in most if not all states.

Decoupling has mainly been used by legislatures and regulators to provide more certainty that utilities (natural gas and electric) will be able to recover the fixed cost incurred to satisfy their public utility duties. There are many forms of decoupling, but they each work to ensure a target level of revenue (not profit, as the Attorney General claims, Merit Brief at 5 n.4) is collected and no more. When a utility collects more than the target level of revenue, decoupling allows customers to receive a refund through a bill credit. When the utility collects less than the revenue target, decoupling allows utilities to make up the difference through the imposition of a charge.

Long before HB 6, the Ohio General Assembly authorized the PUCO to consider and approve utility decoupling mechanisms in no less than four separate statutes.[10] Neither HB 6 (the enacted or any other version), the PUCO, Mr. Randazzo, nor any member of the 133rd General Assembly created decoupling.

But as mandated by HB 6, the five PUCO commissioners acted on an application seeking approval of a decoupling mechanism for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "FirstEnergy

[9] Peter Cappers *et al.*, *The Distribution of U.S. Electric Utility Revenue Decoupling Rate Impacts from 2005 to 2017*, (Feb. 2021) https://eta-publications.lbl.gov/sites/default/files/electricutilitydecouplingmechanismsintheunitedstates_brief_final.pdf; Sandy Glatt *et al.*, *Natural Gas Revenue Decoupling Regulation: Impacts on Industry,* U.S. Department of Energy (July 2010), available at https://www1.eere.energy.gov/manufacturing/states/pdfs/nat-gas-revenue-decoupling-final.pdf; *Update on Revenue Decoupling Mechanisms*, American Gas Association, (April 2007), available at http://www.epa.state.il.us/air/climatechange/documents/subgroups/power-energy/aga-update-on-revenue-decoupling-mechanisms.pdf (discussing the PUCO's approval of a decoupling mechanism for Vectren Energy Delivery of Ohio at page 8); Mark Newton Lowry and Matt Makos, *Review Of Distribution Revenue Decoupling Mechanisms*, Pacific Economics Group Research LLC (March 2010), available at https://www.oeb.ca/oeb/_Documents/EB-2010-0060/Report_Revenue_Decoupling_20100322.pdf (discussion of Ohio case study beginning at page 62).

[10] R.C 4928.66, R.C. 4929.01, R.C. 4929.051, & R.C. 4928.143.

EDUs"),[11] and unanimously approved the application. The PUCO did something else: By a unanimous vote of the PUCO commissioners, and ***over the objections of the FirstEnergy EDUs***, the PUCO imposed a refund obligation on the FirstEnergy EDUs decoupling mechanism.[12] This refund obligation was imposed more than six months before the federal government's investigation became public with the July 30, 2020 indictments.[13]

IV. 2024 Rate Filing

The Attorney General further claims, without any factual support, that from "his PUCO pulpit, Randazzo initiated actions to profit FirstEnergy, that are only explained by the bribe." (AG's Merit Brief at 6.) Again, nothing supports this conclusory assertion. The Attorney General makes such headline-seeking (but factually empty) claims to leave the impression that Mr. Randazzo favored FirstEnergy Corp. by causing a 2024 rate-case-filing requirement by FirstEnergy's EDUs to be lifted from their then-approved electric security plan ("ESP"). (*See* AG's Merit Brief at 1, 6). But as legal counsel to the PUCO, the Attorney General knows that no single PUCO commissioner has such official authority, and he knows full well that no individual PUCO commissioner, including the chair, can, on their own, act or speak for the PUCO.

As the PUCO explained while Mr. Randazzo was chair, and again following an independent review after he left (in response to bias claims directed at him), the rate-case-filing requirement was removed by PUCO order because it was bound up in a provision (the distribution

[11] FirstEnergy Corp. is not regulated by the PUCO. As electric distribution utilities (or "EDUs"), the FirstEnergy EDUs are regulated by the PUCO.

[12] *In The Matter of The Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company For Approval of Tariff Amendments,* PUCO Case No. 19-2080-EL-ATA, Finding and Order, January 15, 2020.

[13] *See United States v. Householder*, *et al.,* No. 2:20-cr-00077 (S.D. Ohio).

modernization rider) that this Court held was beyond the PUCO's power to authorize as part of an ESP.[14]

After Mr. Randazzo's resignation, the PUCO addressed an allegation that the removal of the 2024 filing requirement was the product of Mr. Randazzo's alleged bias. This claim of bias was independently reviewed by the PUCO to determine if the decision to remove the 2024 filing requirement was reasonable, and the PUCO unanimously concluded that it was.[15] This independent-review was not contested by any party through an application for rehearing or an appeal to this Court[16] and is, as a matter of law, now final, non-appealable, and beyond collateral attack by the Attorney General, the PUCO's counsel.

V. The FirstEnergy Corp. Deferred Prosecution Agreement

In July 2020, then-Speaker of the Ohio House of Representatives Larry Householder was indicted for, *inter alia*, conspiring with FirstEnergy Corp. and others to, among other things, pass House Bill 6. FirstEnergy Corp. entered into a DPA on July 20, 2021. Attachment A to the DPA, entitled "Statement of Facts," was signed by Stephen Strah, the then-CEO of FirstEnergy Corp. Mr. Strah did not attest under oath to the truth of the contents of Attachment A, nor did he claim any personal knowledge as to the matters recited in Attachment A. Mr. Strah is another

[14] *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 19-361-EL-RDR, 2019/01/19 Entry at ¶ 1 & 19.

[15] *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 19-361-EL-RDR, 2020/12/30 Entry. Because the FirstEnergy EDUs advised the PUCO that they would not object if the 2024 rate case filing was revived, the PUCO reinstated the filing requirement after finding that its prior decision removing the requirement was fully supported by the record and was based on sound reasoning. *Id* at ¶27.

[16] Only the Supreme Court of Ohio has authority to review a decision of the PUCO or to review or interfere with the performance of any commissioner duties. R.C. 4903.12.

FirstEnergy Corp. individual (see discussion *infra*) with no personal knowledge of the underlying events referenced in the DPA or Attachment A.[17]

A DPA is nothing more, as its name clearly indicates, than "an agreement by the Government not to pursue a criminal case as long as the potential criminal defendant abides by an agreed set of conditions[.]" *BDG Gotham Residential, LLC v. Western Waterproofing Co., Inc.*, No. 19-CV-6386 (CM), 2022 WL 4482310, at *4 (S.D.N.Y. Sept. 27, 2022). "In a nutshell, [a party to a DPA] stands to avoid a criminal conviction if it lives up to its part of the bargain." *United States v. Stein*, 435 F. Supp. 2d 330, 349 (S.D.N.Y. 2006), aff'd, 541 F.3d 130 (2d Cir. 2008). Judges and courts generally have no role in reviewing the agreements, and these agreements have been criticized because "they allow rich corporations to buy their way out of trouble." Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements A Comparative Study*, 60 Colum. J. Transnat'l L. 751, 759 (2022).

Although the Attorney General repeatedly claims that FirstEnergy Corp. has admitted to "bribing" Mr. Randazzo, the DPA does not support this claim. The DPA is at most a confession by FirstEnergy Corp. of its intended purpose, not some indication of an agreement by another person to perform official action in the person's capacity as PUCO chair to do anything to further FirstEnergy Corp.'s interests. No witness has ever attested, upon personal knowledge, to the language in the DPA or its Attachment A referring to a $4,333,333 payment or anything involving the Appellees. And the same is true regarding the proceedings before the trial court where the *Ex Parte Orders* issued.

[17] Mr. Strah's signature to the Attachment follows this proviso: "I am duly authorized to execute this Agreement on behalf of FirstEnergy Corp. I have read the Statement of Facts and have carefully reviewed it with counsel for FirstEnergy Corp. and FirstEnergy Corp.'s Board of Directors. On behalf of FirstEnergy Corp., I acknowledge that the Statement of Facts is true and correct." Since signing the DPA, Mr. Strah abruptly retired from FirstEnergy Corp. and its Board of Directors without public explanation by FirstEnergy Corp. (*See* FirstEnergy Form 8-K, dated September 15, 2022.)

PROCEDURAL HISTORY

I. The trial court authorized the *Ex Parte Orders* in the absence of any admissible evidence supporting the Attorney General's claims.

On September 23, 2020, the Attorney General filed a complaint against FirstEnergy Corp. and others (*Decision*, ¶ 3), asking the trial court to direct the charges billed to and collected from ratepayers to remain with the Treasurer of State, (R. 7, Complaint.) In October 2020, the City of Cincinnati and the City of Columbus filed suit against FirstEnergy Corp. and others, seeking to protect ratepayers, noting that the Attorney General's earlier complaint did not do so. (20CV7005 R. 9, Complaint at ¶ 3-5.) Then, in November 2020, the Attorney General filed another lawsuit against Energy Harbor Corporation and others. (*Decision*, ¶ 3.) All three cases were consolidated in December 2020. (*Id.*)

When the potential for ratepayers paying any charges to fund nuclear support payments was eliminated, any future decoupling charges were eliminated and any decoupling charges collected from ratepayers were refunded with interest, the claims brought by the Cities of Cincinnati and Columbus, on behalf of their ratepayer citizens, were settled and dismissed with prejudice, without objection by the Attorney General. (*See* 20CV7005, 2021/12/02 Stipulated Dismissal.)

On August 5, 2021, the Attorney General filed a motion for leave to file a Second Amended Complaint to join the Appellees (and others) as defendants. (R. 336, AG's Mot. to Amend.) Then, on August 11, 2021,[18] the Attorney General moved *ex-parte* for an "order attaching certain property of [the Appellees] in the form of accounts held with various entities." (*Decision*, ¶ 3.) The *ex-parte* motion was accompanied by an affidavit of the Attorney General's counsel, (*id.*),

[18] The Attorney General's *ex-parte* motion was not filed with the clerk until August 12, 2021, the day after the motion was presented to the trial court. (*Decision*, ¶ 3 n.2.)

consisting of allegations and conclusory statements made wholly "[u]pon information and belief." (R. 340, 2021/08/12 Miller Aff.)

On August 11, 2021, appearing before the trial court *ex parte*, the Attorney General did not provide any testimony or admissible evidence at a perfunctory 12-minute "hearing." (R. 410, 2021/08/11 Tr.) It "is undisputed that appellants were not provided notice of the hearing." (*Decision*, ¶ 3.) The trial court ordered the ***attachment of the specific property*** the Attorney General referenced in his motion and instructed the Attorney General to ***submit proposed orders consistent with the trial court's decision.*** (*See* R. 410, 2021/08/11 Tr. at 8:11-12:7.)

Despite the trial court's order, the Attorney General submitted (again, *ex-parte*) a proposed order providing for attachment of ***all*** the Appellees' property—not just the specific property which was sought in the Attorney General's motion—to "satisfy State of Ohio/plaintiff's claims in the amount of $8,000,000.00[.]" (R. 343, Attachment Order No 2 at 1.) In other words, the Attorney General submitted proposed orders that effectively granted him the "nuclear weapon of the law"—attachment of all the defendants' assets on an *ex parte* prejudgment basis. *See Grupo*, 527 U.S. at 332 (addressing injunction ordering asset freeze).

The $8 million did not appear anywhere until the Attorney General inserted it in the order he submitted for approval by the trial court. The Attorney General's attachment affidavit (which, again, was based on information and belief) claimed that the Attorney General was entitled to recover $4.3 million but didn't identify any actual damages. (R. 340, 2021/08/12 Miller Aff. ¶ 8.)

The trial court approved the Attorney General's non-compliant proposed orders for *ex parte* prejudgment attachment on August 11, 2021. The trial court's orders were entered by the Clerk of Courts on August 12, 2021. (R. 341, Attachment Order No. 1; R. 343, Attachment Order No. 2.)

The Attorney General then executed on the non-compliant prejudgment attachment orders by issuing ***post-judgment garnishments*** that same day (August 12, 2021) to Charles Schwab, Huntington Bank, and JP Morgan Chase. (*Decision*, ¶ 3.) These post-judgment garnishments were accompanied by an affidavit falsely claiming that the Attorney General had secured an $8 million judgment. (*See, e.g.*, R. 369, Affidavit & Order of Garnishment.) As a result, Charles Schwab notified Mr. Randazzo (Mr. Randazzo's first notice of the Attorney General's action) that he no longer had access to or control over his IRA account, including any required mandatory distributions compelled by law.

In addition, Sustainability Funding Alliance of Ohio's ("SFAO's") checking account was seized and its entire cash balance transferred to the Clerk of Courts pursuant to the garnishment order. The claim that the *Ex Parte Orders* simply "secure" assets and did not cause any of the Appellees' property to be transferred (*see* AG's Merit Brief at 15) is false, as documented by the record.[19]

After the Appellees learned of the *Ex Parte Orders*, the Appellees moved to vacate the *Ex Parte Orders*. (R. 385, Mot. to Vacate.) The trial court held a virtual hearing via Zoom to address this motion to vacate, (R. 460, 2021/08/23 Tr.), and entered an order the same day denying the motion, (R. 414, Order), concluding that "Randazzo is a party to this case 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,[20] given the liquid nature of the assets." (*Id.* at 2.)

[19] For September 14, 2021, the docket contains the following entry: "Check #4556932514 in amt of $67,432.44 ***returned*** to JP MORGAN ORC 2716.07." This was from SFAO's checking account and represented the entire amount in the account.

[20] The provision cited by the trial court (R.C. 2715.09) does not address garnishment.

Despite only seeking attachment of specific property in his *ex parte* motion for prejudgment attachment, the Attorney General then moved the trial court to appoint a receiver to take control over "all of the property and assets of the Randazzo Defendants," relying on the non-compliant *Ex Parte Orders* and his claim that the trial court gave him a blanket attachment untethered to the relief he sought in his motion for attachment. (R. 482, 2021/09/02 AG's Proposed Receivership Order at 3). Among other things, his receivership motion asked the trial court to have his receiver seize all the Appellees' books, records, and electronic devices, to take possession and control over ***all*** Appellees' property (including property jointly held by third parties and exempt property), and potentially dispose of such property for the sole benefit of the Attorney General. (*See id.* at 4-18.) The Attorney General's motion to appoint a receiver is ripe for decision before the trial court, where it remains pending.

But the Attorney General's ongoing unlawful overreach did not stop with the motion to appoint a receiver. After the Appellees filed their Notice of Appeal, the Attorney General obtained *ex parte* garnishment orders blocking the use of funds in the IOLTA account of the Appellees' counsel of record in this Court. (*See* App. 21AP-443 R. 105, Mtn. Vacate, Exs. A & B.) The Appellees contested the Attorney General's continued assault on their property. After conducting a contested hearing, a Franklin County Common Pleas Court Magistrate Judge held that there was "no authority for a blanket attachment order" that permitted the Attorney General to garnish or attach the IOLTA account. (2021/12/14 Magistrate's Decision at 8.) The Magistrate Judge voided the two additional garnishment orders. (*Id.*) The Attorney General filed objections with the trial court, to which the Appellees have responded. No action has been taken by the trial court, the issue is ripe for decision, and the Appellees still have no access to the funds frozen in the IOLTA account.

Last, but not least, and despite the absence of any legitimate claim of authority, the Attorney General filed "Affidavits of Fact" with the Franklin County Recorder's Office on November 3, 2021, again falsely asserting his non-existent status as a creditor having rights to the Appellees' property, the property rights jointly held by Mr. Randazzo and his wife, and their son's property. (App. 21AP-443 R. 105, Mtn. Vacate, Exs. C & D.) These specific additional actions taken by the Attorney General against the Appellees have all been, according to the Attorney General, based on the *Ex Parte Orders* relating to prejudgment attachment of specific property.

II. The Court of Appeals vacated the trial court's *Ex Parte Orders*.

In its unanimous Decision, the Court of Appeals reversed and vacated the *Ex Parte Orders*, concluding that the trial court's analysis of irreparable injury was "cursory at best and the court provided no real explanation for its ultimate findings." (*Decision*, ¶ 30.) "Essentially, the trial court merely provided a recitation of the statute." (*Id.*)

For background, a plaintiff seeking to obtain *Ex Parte Orders* under R.C. 2715.045(B) must establish "irreparable injury" by showing: (1) the subject property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court; or, (2) the value of the property will be substantially impaired. The trial court found that funds and securities held in various accounts would be "substantially impaired[,]" even though the Attorney General "did not even argue that the ground of 'impaired substantially' applied in this case." (*Decision*, ¶ 30.) Understandably, the Court of Appeals found that the trial court abused its discretion in making such an unasserted, prejudicial, and unsubstantiated finding. (*Id.*)

The Court of Appeals further found that there was no evidence in the record "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)." (Emphasis added.) (*Id.*, ¶ 31.) The Attorney General did not provide any evidence that the Appellees were about to wire money, and the claim that the Appellees could transfer funds anywhere in the world at a moment's notice repeated a claim that could be made in any civil case. (*Id.*, ¶ 31-32.) The appellate court correctly observed that in "the context of an *ex-parte* prejudgment proceeding, more than this is required." (*Id.*, ¶ 31.)

The Court of Appeals also rejected the Attorney General's baseless claim that by making sales and transfers (including publicly disclosed transfers) as much as six months before any suit was filed against them, the Appellees were attempting to shield their assets from the Attorney General. At "the time the real estate sales/transfers occurred the State had not asserted ***any*** claim against the appellants." (Emphasis sic.) (*Id.*, ¶ 33.) "Nor had Randazzo been [and still has not been] indicted by the federal authorities for any alleged crime" or wrongdoing. (*Id.*, ¶ 33 n.8) "***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*[.]**" (Emphasis added.) (*Id.*, ¶ 33.)

Apparently, the Attorney General maintains that the Appellees have the ability to divine future events, and as a result, the Appellees knew his Second Amended Complaint was going to be filed. Such self-serving speculation advanced by the Attorney General cannot be taken seriously. Moreover, the case had been inactivated by the trial court and stayed in all respects by order of that court and the agreement of all parties, including the Attorney General, nearly six months earlier. (R. 309, 2021/02/08 Order.)

The Court of Appeals also found that the Attorney General "utterly failed to comply with the requirements of R.C. 2715.091 governing prejudgment garnishments proceedings." (*Decision*, ¶ 36.) "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 that falsely stated that the State was a 'Judgment Creditor' and had recovered or certified a judgment in the Court of Common Pleas." (Emphasis added.) (*Id.*, ¶ 37.) The Attorney General blamed the Clerk of Courts for his resort to an unavailable process, an excuse and explanation that court found to be "woefully insufficient." (*Id.*)

The Court of Appeals was also troubled by other misrepresentations made by the Attorney General and said so. For example, the Attorney General provided "no explanation for why [he] stated on the garnishment form that [he] had obtained a judgment against appellants in the amount of $8 million dollars." (*Id.*, ¶ 38.) The Attorney General did not obtain ***any*** judgment against the Appellees and did not and could not 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." (*Id.*)

The Judgment of the Court of Appeals was entered on September 30, 2022, this appeal was filed on October 18, 2022, and this Court accepted jurisdiction on January 17, 2023.[21]

ARGUMENTS AND CONTENTIONS REGARDING THE ATTORNEY GENERAL'S PROPOSITIONS OF LAW

I. Response to First Proposition of Law: In an appeal pursuant to R.C. 2505.02 & R.C. 2715.46, an appellate court does not commit error by reviewing the weight and sufficiency of the evidence in accordance with R.C. 2505.01(A)(2).

The Tenth District had jurisdiction under both R.C. 2505.02 & R.C. 2715.46. The Attorney General's brief does not even address R.C. 2505.02. This alone is a sufficient reason to reject his First Proposition of Law.

[21] The Case Announcements accepting this appeal for review indicated that Justice Fischer would accept the appeal on propositions of law Nos. II and III only, and Justice Brunner would accept the appeal on proposition of law No. II only.

Even if the Tenth District only had jurisdiction under R.C. 2715.46, the Tenth District still properly reviewed the weight and sufficiency of the evidence. This statute provides that 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[.]" The Attorney General's First Proposition of Law ignores that R.C. 2505.01(A)(2) defines an "***appeal on questions of law****"* to mean "a review of a cause upon questions of law, ***including the weight and sufficiency of the evidence***." (Emphasis added.) R.C. 2505.01(A)(2); *Williams-Booker v. Booker*, 2nd Dist. Montgomery No. 21852, 2007-Ohio-4717, ¶ 10.

The Court of Appeals followed established Ohio law. It considered the weight and sufficiency of the evidence in the record when reviewing the trial court's orders. It properly applied the abuse-of-discretion standard when determining whether the Attorney General had shown irreparable injury. (*Decision*, ¶ 7 & 23-34.) The Court of Appeals correctly determined that the Attorney General did not satisfy the statutorily required evidentiary threshold necessary for the trial court to issue the *Ex Parte Orders*.

The Attorney General's first alleged error is based on a misunderstanding of Ohio appellate law. Historically, there were two types of appeals in Ohio: (1) an "appeal on questions of law," which included appeals addressing "the weight and sufficiency of the evidence"; and, (2) "appeals on questions of law and fact," which involved a "rehearing and retrial of a cause upon the law and the facts" by the appellate court. *See* R.C. 2505.01(A)(2) & (3).[22] The second category of appeals was abolished in 1971 through the enactment of Appellate Rule of Procedure 2. *E.g.*, Painter and Pollis, *Baldwin's Ohio Handbook Series, Ohio Appellate Practice*, Sections 1:13 & 1.14 (Nov. 2022 update). Now, ***all*** appeals in Ohio (except for two narrow categories of appeals that are not

[22] An "appeal on questions of law and fact" is also referred to as an "appeal on questions of fact." R.C. 2505.01(A)(3).

relevant here) are appeals on questions of law. *See id.* "Most appeals involve a review of both law and fact, but that does not equate a return to the prior practice of 'appeals on questions of law and fact.' " *State v. DeSalvo*, 7th Dist. Mahoning No. 06 MA 3, 2007-Ohio-1411, ¶ 19-21. Here, the Court of Appeals did not err, after reviewing the weight and sufficiency of the evidence, in finding there was insufficient evidence presented by the Attorney General to the trial court.

The Attorney General claims that an appeal under R.C. 2715.46 can only address "whether the statutory grounds were satisfied[.]" (AG's Merit Brief at 16.) Apparently, his position is that appellate review is confined to whether the trial court parroted the language of the statute in rendering its decision. (*See id.*) He cites nothing that supports his novel position,[23] which is unsurprising given the statute itself places no restrictions on the type of issues that can be appealed and reviewed.

The Attorney General maintains that an appellate court can only address whether the attachment was "wrongfully obtained." (*Id.*). In this case, the Tenth District reviewed whether the attachments were wrongfully obtained in violation of R.C. 2715.045, a scope of review consistent with its statutory mandate.

The Attorney General also incorrectly claims that the procedure for appeals in attachment cases is different. He confusingly argues that "[u]nlike most other interlocutory appeals, appeals from attachments do not interrupt the flow of the underlying case." (AG's Merit Brief at 17.) For support, he cites the portion of R.C. 2715.46 stating that the "original action shall proceed to trial and judgment as though no appeal had been taken."

[23] He quotes *Rice v. Wheeling Dollar Savings & Trust Co.* for the proposition that "ample provisions are made for the defendant to question the validity of the order of attachment by Section 2715.44 et seq." (AG's Merit Brief 16-17.) According to the *Rice* decision, one such provision is found in R.C. 2715.46. *See* 163 Ohio St. 606, 612-613, 128 N.E.2d 16 (1955). If anything, the *Rice* decision supports the Appellees' position that R.C. 2715.46 should not be gutted. If the Attorney General's interpretation of R.C. 2715.46 is adopted, this statute will be pointless.

The Attorney General's position appears to be based on his misunderstanding of Ohio appellate procedure. Previously, when a party filed an appeal on questions of law and fact (the type of appeal abolished in 1971), the lower court lost "all power to do anything in the cause." *State ex rel. Cont'l Cas. Co. of Chicago v. Birrell*, 164 Ohio St. 390, 392, 131 N.E.2d 388 (1955). Since 1971, when a party files an appeal prior to the entry of a final judgment (under R.C. 2715.46 or otherwise), the trial court doesn't lose ***all*** jurisdiction, just as trial courts prior to 1971 didn't lose all jurisdiction in appeals on questions of law. *See Yee v. Erie Cnty. Sheriff's Dep't*, 51 Ohio St. 3d 43, 44, 553 N.E.2d 1354 (1990) (citing *In re Kurtzhalz*, a decision addressing a trial court's jurisdiction after an appeal on questions of laws). An appeal under R.C. 2715.46 is indistinguishable from a typical appeal.

If prejudgment attachment is "rarely requested[,]" as the Attorney General claims, (AG's Merit Brief at 1), then it follows that many trial courts may be unfamiliar with the requirements for this extraordinary remedy, the constitutional issues this remedy poses, and the importance of the court's gatekeeper function. Accordingly, there is a need for a timely and meaningful appeal to ensure that trial courts are properly performing their judicial role. The Court should reject the Attorney General's invitation to rewrite the law of this State in his effort to circumscribe the jurisdiction of courts and eviscerate the right of appeal, both of which have been provided by the General Assembly in R.C. 2505.02 and R.C. 2715.46.

II. <u>Response to Second Proposition of Law</u>: An appellate court does not commit error by reviewing *ex parte* attachment orders to determine whether the trial court committed an abuse of discretion.

A. The Attorney General did not advance the Second Proposition of Law below.

The Attorney General asserts (incorrectly) that an "*ex parte* decision is not subject to appeal and is not independently reviewable." (AG's Merit Brief at 19.) The Attorney General did not

raise this claim before the Court of Appeals, and the Appellees urge the Court to dismiss this proposition of law as improvidently accepted. *See Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 54; *see also State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21-22; *State v. Urbin*, 100 Ohio St. 3d 1207, 2003-Ohio-5549, 797 N.E.2d 985, ¶ 3 (Moyer, C.J., concurring).

B. An *ex parte* attachment order is an appealable order.

"A court's prejudgment order that takes a party's property during the pendency of litigation, even for safekeeping, risks 'the probability of irreparable injury' to the owner of the property." *Cornell v. Shain*, 1st Dist. Hamilton No. C-190722, 2021-Ohio-2094, ¶ 32, citing *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 722, 42 L. Ed. 2d 751 (1975). "Consistent with this basic tenant of the law, Ohio's statutory scheme for prejudgment attachments affords an aggrieved party an immediate appeal for the review of a statutory attachment." *Id.*, citing R.C. 2715.46.

The Attorney General begins by acknowledging that the Tenth District had jurisdiction to review the trial court's order denying the motion to vacate, (AG's Merit Brief at 15), but argues, ***by way of analogy,*** that *ex parte* attachment orders are not reviewable. He claims: "In some ways, an attachment proceeding is procedurally similar to a temporary restraining order "(TRO") and preliminary injunction." (*Id.* at 18.) The analogy fails because the procedure, the timing, and the right of appeal for attachments are all set out in Chapter 2715; no analogy is needed or useful. There is not a single case, treatise, or other legal authority cited to support the ***analogy.*** When the applicable law of R.C. Chapter 2715, not supposedly analogous law, is applied to the facts here, the Attorney General cannot prevail.

R.C. Chapter 2715 details the grounds, procedure, burden, and timing considerations applicable to all attachment proceedings—*ex parte* and otherwise. Civil Rule 65 details the grounds, procedure, burden, and timing considerations applicable to all injunction proceedings—*ex parte* TROs and otherwise, and to preliminary and permanent injunctions. TROs and prejudgment attachments are very different remedies for which the General Assembly has provided two different legal frameworks. And it is by following the law—R.C. Chapter 2715, the Ohio Constitution, and the U.S. Constitution—that "flippant and meritless prejudgment attachment motions" (AG's Merit Brief at 22) will surrender to a proper judicial gatekeeper such as the Court of Appeals.

Interestingly, the Attorney General's Brief cites an appellate decision that reviewed an *ex parte* attachment order. (AG's Merit Brief at 25, citing *Johnson & Hardin Co. v. DME Ltd.*, 106 Ohio App. 3d 377, 666 N.E.2d 276 (12th Dist. 1995).) The *Johnson & Hardin* court analyzed whether the trial court properly found irreparable injury and specifically concluded the "appeal [was] properly before [the] court pursuant to R.C. 2715.46[.]" 106 Ohio App. 3d at 380 n.2. Without pause, the Attorney General then argues that there is no authority for such a review, claiming that "R.C. 25015.46 [sic] is the sole source of authority to appeal, and it does not afford an appeal from an *ex parte* attachment order[,]" (AG's Merit Brief at 19.) However, R.C. 2715.46 does not differentiate between *ex parte* attachments and those entered after notice and an opportunity to be heard.

Ex parte attachments are also appealable under R.C. 2505.02. Under this statute, an order is appealable when the order affects a substantial right in a special proceeding. *See* R.C. 2505.02(B)(2). An attachment proceeding is a special proceeding within the meaning of R.C. 2505.02(B)(2). *Thompson v. Summit Pain Specialists, Inc.*, 9th Dist. Summit No. 27635, 2016-

Ohio-7030, ¶ 10.[24] Further, a party has a "substantial right[] to the due process of law" when property is seized prior to judgment. *Cornell*, 2021-Ohio-2094, ¶ 35; *see also Thompson,* 2016-Ohio-7030, ¶ 10 (concluding that attachment order was appealable). Even where (unlike here) the property deprivation is brief, the defendant still has this substantial right to due process. After all, the "Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day unwarranted deprivations of property." *Fuentes*, 407 U.S. at 86. The *ex parte* attachments in this case easily meet the requirements of R.C. 2505.02(B)(2).

The Attorney General claims that an "*ex parte* order…is fleeting in nature and not subject to interlocutory review." (AG's Merit Brief at 19.) The *Ex Parte Orders* in this case were entered nearly 20 months ago, have not fleeted anywhere, and are still preventing the Appellees from accessing and using their property. The Attorney General's use of the word "fleeting" is, at best, a use not germane to this case.

The Attorney General revises history by claiming that "[n]othing is transferred" based on prejudgment attachment, (AG's Merit Brief at 15), even though the Appellees' funds were transferred to the trial court ***in this case***. The *Ex Parte Orders* are on their way to lasting for years and have emboldened the Attorney General to file his "Affidavits of Fact" against the Appellees' real estate, to move to appoint a receiver, and to deprive the Appellees of access to the IOLTA account that was established to pay the Appellees' legal fees. The prejudice imposed on the Appellees by the Attorney General's unlawful actions cannot be overstated.

The Attorney General posits that any harm caused by an *ex parte* prejudgment attachment order can be rectified by a post-attachment hearing. He does not say how. And, as the U.S. Supreme Court has explained, "attachment ordinarily clouds title; impairs the ability to sell or

[24] This statute also grants a party the right to appeal certain orders relating to "provisional remedies," a term specifically defined to include attachment. R.C. 2505.02(A)(3) & (B)(4).

otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Doehr,* 501 U.S. at 11. No "later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes*, 407 U.S. at 82. The U.S. Supreme Court has never " 'embraced the general proposition that a wrong may be done if it can be undone.' " *Id.*, quoting *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct 1208, 31 L.Ed.2d 551. This Court should not embrace such a proposition either.

The harm caused by a due-process violation does not simply vanish, as the Attorney General suggests. (*See* AG's Merit Brief at 20.) Since an *ex parte* attachment order causes grave harm, the General Assembly has determined that attachment orders—of all stripes, and without stating any exception for *ex parte* orders—are appealable orders under R.C. 2505.02. In addition, when a trial court grants an *ex parte* attachment order and then refuses to vacate that order, the trial court's refusal to vacate the order is appealable under R.C. 2715.46. The Tenth District properly exercised jurisdiction over the appeal below.

C. The Court of Appeals properly found that the Attorney General failed to prove irreparable injury.[25]

1. The Attorney General failed to meet the requirements of R.C. 2715.045(B).

A court's ability to grant *ex parte* prejudgment seizure of property "without prior notice and an opportunity to be heard is severely limited" by the U.S. Constitution. 11A Wright, Miller,

[25] The second portion of the Attorney General's Second Proposition of Law—that 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" constitutes irreparable injury—is not a proposition of law. This is instead an assignment of error over which the Court lacks jurisdiction. *See Ohio Patrolmen's Benevolent Assn.*, 149 Ohio St. 3d 718, 2017-Ohio-2804, 77 N.E.3d 969, ¶ 33 (O'Connor, C.J., dissenting).

& Kane, *Federal Practice & Procedure* Civ. § 2934 (3d ed.). The Ohio General Assembly has accordingly limited the circumstances under which a plaintiff can obtain *ex parte* prejudgment attachment by requiring that a plaintiff show that it "will suffer ***irreparable injury*** if the order is delayed until the defendant…has been given the opportunity for a hearing." (Emphasis added.) R.C. 2715.045(A). To make such a showing, the plaintiff must prove by admissible evidence that either:

> (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.

R.C. 2715.045(B). Both requirements are forward-looking and ask what ***will be*** done. They don't look backwards at what ***may have been done***.

The Court of Appeals determined that the trial court erred in finding that the Attorney General satisfied R.C. 2715.045(B)(2) where the Attorney General submitted no evidence demonstrating that the impaired-substantially prong was even in play in this case. (*Decision,* ¶ 28-30.) Since the trial court's resort to the impaired-substantially prong was plain error, the Attorney General has not attempted to defend the trial court's inexplicable and inexcusable finding.

The Court of Appeals also found that the trial court's analysis under R.C. 2715.045(B)(1) was flawed. The complained-of real estate transfers occurred months before the Attorney General filed suit against the Appellees and were reflected in publicly filed deeds. "The State did not provide the trial court with any explanation for how appellants [Appellees here] 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[.]" (*Decision*, ¶ 33.)

Regarding the proceeds of such transfers, the Attorney General's primary argument—that the defendant could instantaneously transfer the funds anywhere in the world—could be made in virtually every case. (*Id.*, ¶ 31-32.) Further, as the Tenth District observed, in "the instances where such transfers are ***alleged to have occurred*** [rather than will occur in the future], plaintiffs may avail themselves of the remedies provided for under the fraudulent conveyance statutes as set forth in R.C. Chapter 1336." (*Id.* ¶32 n.7.)

And regarding the property transfers themselves, the Attorney General continues to falsely assert that such property was owned by Mr. Randazzo as an individual and the proceeds from the same were deposited in a joint brokerage account. (AG's Merit Brief at 2.) This assertion is contradicted by the documents the Attorney General submitted with his motion for attachment. (R. 339, Mtn. Attachment, Exhibit C (showing the property transferred to Mr. Randazzo's son was jointly owned by Mr. Randazzo and his wife) & Exhibit E (showing the Florida property was jointly owned by Mr. Randazzo and his wife).) Again, these and similar false representations made by the Attorney General's filings throughout this case—which are contradicted by readily available public records—demonstrate why the requirements for obtaining *ex parte* attachment are mandated by statute and the Ohio and U.S. Constitutions to be strictly enforced by judicial gatekeepers. When one party is not given the chance to respond to the baseless claims of the other, a court is significantly more likely to err. *See Fuentes*, 407 U.S. at 81.

The Attorney General failed to show that he would have suffered irreparable injury if he had been required to give notice to the Appellees and provide them with the opportunity to contest the relief before it was granted. The Court of Appeals followed the law and correctly determined that, when applied to these facts, the trial court erred by issuing the *Ex Parte Orders* and then by refusing to vacate the *Ex Parte Orders*.

2. As construed and applied here by the Attorney General, R.C. 2715.045(B) violates the Ohio and U.S. Constitutions.

As this Court has stated, courts "have a duty to liberally construe statutes to avoid constitutional infirmities." *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St. 3d 480, 481, 692 N.E.2d 560 (1998). Consistent therewith, this Court should reject the Attorney General's reading of R.C. 2715.045(B), as this reading is incompatible with the requirements of the Ohio and U.S. Constitutions.

The U.S. Constitution precludes a plaintiff from seeking *ex parte* attachment in all but the simplest cases. *See Doehr*, 501 U.S. at 14. This is because even a detailed attachment affidavit only provides the plaintiff's version of the events. *Id.* In *Doehr,* the plaintiff, who claimed he was assaulted by the defendant, had obtained an *ex parte* attachment based on the plaintiff's affidavit. *Id.* at 6-7. The court observed that "disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits" but that "[t]ort actions, like the assault and battery claim at issue here, do not." *Id.* at 17. The court explained:

> Unlike determining the existence of a debt or delinquent payments, the issue does not concern ordinarily uncomplicated matters that lend themselves to documentary proof. The likelihood of error that results illustrates that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights....And ***no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it***.

(Emphasis added & citations omitted) *Id.* at 14. The court ultimately concluded the Connecticut statute posed too great of a risk of erroneous deprivation of property to pass constitutional muster. *Id.* at 11-18; *see also Santos-Rodriguez v. Viera-Torres*, Civil No. 11-1602, 2011 WL 13350253, *4 (D.P.R. Dec. 30, 2011) ("Most states prohibit or limit prejudgment attachment in tort cases because it is difficult to ascertain the plaintiff's damages and the defendant's liability prior to

trial… This cautious approach is guided by procedural due process concerns that are triggered by this type of property deprivation.").

The complexity of the instant case—the 176-paragraph Second Amended Complaint asserting (among other things) claims under Ohio's RI7CO statute[26] and including some 25 named defendants, not to mention John Doe Defendants—further supports the conclusion that *ex parte* prejudgment attachment was inappropriate and unlawful. The trial court proceeded on the *ex parte* motion as if it was dealing with a straightforward debtor-creditor dispute. And the trial court was only presented with one-sided, evidence-free allegations, used language in a statute that did not even apply, and entered orders granting, according to the Attorney General, an $8 million attachment extending to all the Appellees' property, not just the specific property in the Attorney General's motion.

The Second Proposition of Law, as construed and applied here by the Attorney General, is contrary to both the Ohio and U.S. Constitutions. This Court's precedent compels the rejection of the Attorney General's reading of R.C. 2715.045(B).

III. Response to Third Proposition of Law: The Court of Appeals did not commit error by disregarding the Attorney General's after-the-fact "supplemental evidence."

This proposition and its supporting arguments are predicated upon a false claim—that the trial court conducted an "evidentiary hearing" pursuant to R.C. 2715.045(D) when the Appellees moved to vacate the *Ex Parte Orders*. (*See* AG's Merit Brief at 24-27.) The record confirms that no such evidentiary hearing was held by the trial court, and no such evidentiary hearing was requested by the Appellees per the statute. Indeed, by agreement of the parties and order of the trial court, that evidentiary hearing was deferred. (*See* R. 469, 2021/08/31 Agreed Order at 3)

[26] "RICO is a complex statute," *Jennings v. Emry*, 910 F.2d 1434, 1435 (7th Cir. 1990), and "Civil RICO claims are by their very nature complex and difficult." *In re Lee Way Holding Co.*, 120 B.R. 881, 896 (Bankr. S.D. Ohio 1990).

("All deadlines for the Defendants to contest or file objections relating to the Attachment Proceedings (including, without limitation, by filing a request for a hearing disputing the claim for the attachment) are hereby stayed until further order of the Court.").

Instead, the Appellees moved to vacate the *ex parte* attachment orders as void *ab initio*, and the trial court received oral arguments from the parties on that motion. The trial court said at the time: "We're here today on a motion on behalf of Sam Randazzo to vacate the prejudgment attachment orders that were entered into on August 12th of this year." (R. 460, 2021/08/23 Tr. at 3:11-14.) No witnesses testified, and no exhibits were introduced at this hearing. This was not an evidentiary hearing, as claimed by the Attorney General. *See* R.C. 2715.045(D). In fact, during the argument, the Appellees' counsel specifically explained that "this is not a motion under 2715.045 on probable cause" and that "Mr. Randazzo has never been served with a notice that the State's required to serve by statute." (R. 460, 2021/08/23 Hr. at 29:24-30:2.)[27]

So, the Attorney General's position—that this oral argument on the Appellees' motion to vacate was an evidentiary hearing at which "supplemental evidence" should have been received and considered by the trial court—cannot be reconciled with the actual record. Accordingly, in this context, the cases offered by the Attorney General are wholly inapposite.

For example, unlike *Johnson & Hardin Co. v. DME Ltd.,* (AG's Merit Brief at 25), in which the defendant appealed the trial court's refusal to hold a "trial-type evidentiary hearing," here the trial court did not hold a post-attachment evidentiary hearing. In addition, the Attorney General has simply mischaracterized the *Johnson & Hardin* decision. The Twelfth District did not rely on supplemental, after-the-fact evidence in addressing the trial court's irreparable-injury analysis. Rather, the Twelfth District affirmed the trial court's finding of irreparable injury based

[27] The Attorney General did not request the clerk to serve the attachment orders on the Appellees ***until August 25, 2021, by certified U.S. mail***.

on an affidavit "appended…to the motion for attachment." *Johnson & Hardin*, 106 Ohio App. 3d at 388. Here, the Tenth District properly found that the profound lack of evidence offered by the Attorney General to obtain the *Ex Parte* Orders was enough to reverse and vacate.

The Attorney General's supplemental-evidence argument rests on speculation that an unlawful deprivation of property might be cured if additional evidence is later submitted. "But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes*, 407 U.S. at 82. Indeed, when a plaintiff fails to meet the requirements for attachment, a court "patently and unambiguously" lacks jurisdiction to grant the requested relief. *State ex rel. Goldberg v. Mahoning Cty. Prob. Ct.*, 93 Ohio St.3d 160, 165, 753 N.E.2d 192 (2001). A court cannot retroactively correct a jurisdictional defect. *See, e.g., Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 20-42.

Accordingly, and because of the Attorney General's failure to meet the statutory preconditions for securing *ex parte* prejudgment attachment, the trial court lacked jurisdiction to issue the attachment orders. No amount of after-the-fact "evidence" (e.g., the "Supplemental Affidavit") can retroactively cure this jurisdictional defect or resuscitate the *Ex Parte Orders*. The information in the "Supplemental Affidavit" formed no basis for the trial court's issuance of the *Ex Parte Orders* that are the subject of this appeal.

In any event, the so-called Supplemental Affidavit does not assist the Attorney General in satisfying the statutory requirements of R.C. 2715.01. Typifying the Attorney General's wrongheaded assumptions and guesses, the Supplemental Affidavit offered as statement of facts that "[t]o the best of the State's knowledge, those transfers [retainers paid to counsel for the Appellees before this action was filed] ***appeared to have*** little purpose beyond placing significant

liquid assets beyond the reach of the State." (Emphasis added.) (AG's Merit Brief at 10.) Again, no facts, or personal knowledge support this claim, other than what "appeared" to the Attorney General. Is it any wonder that the Court of Appeals unanimously vacated the *Ex Parte Orders*?

Even were the Supplemental Affidavit considered, it wouldn't help the Attorney General show that "Randazzo's mindset" was to not "allow the funds to remain available for easy collection." (AG's Merit Brief at 7.) Quite the opposite: The Supplemental Affidavit shows the Attorney General is grasping at straws. His apparent position is that the Appellees, for the purpose of evading a maybe-someday ***Ohio creditor*** (the Attorney General) that had ***not even asserted a claim***:

- Sold ***Florida*** real property that was ***exempt from collection*** by that alleged Ohio creditor (because the property was located outside of Ohio, and it was owned by Mr. Randazzo with his wife as tenants by the entirety)[28];
- Transferred, via an ***Ohio-based*** investment adviser, the sale proceeds of the Florida property to Charles Schwab, an institution with a ***significant presence in Ohio*** (rather than some institution located outside of Ohio or overseas);
- Then transferred hundreds of thousands of dollars from the sale proceeds to the IOLTA account of his ***Ohio*** attorney at a bank headquartered in Columbus, Ohio; and
- Kept funds in that ***Ohio*** attorney's IOLTA account, even after the Attorney General signaled his intent to seize the IOLTA account.

The Attorney General's arguments strain credulity. Even had this so-called "supplemental evidence" been considered, it would not have cured the Attorney General's failure of proof or the trial court's failures to properly exercise its gatekeeper function in an *ex parte* prejudgment attachment action.

[28] *E.g., In re Qamar*, No. 3:16-BK-1490-JAF, 2017 WL 8219533, at *2 (Bankr. M.D. Fla. May 19, 2017).

IV. Response to Fourth Proposition of Law: The Court of Appeals did not err by finding that R.C. 2715.05 requires the amount stated in the attachment order to mirror the amount stated in plaintiff's attachment affidavit.

R.C. 2715.03(A) requires the plaintiff's attachment affidavit must state the "nature and amount of the plaintiff's claim[.]" An attachment order must direct the levying officer to seize non-exempt property to satisfy the "***plaintiff's claim, or so much thereof as will satisfy [the plaintiff's claim], to be stated in the order as in the affidavit***, and costs of the action, not exceeding one hundred dollars." (Emphasis added.) R.C. 2715.05(A).[29] Thus, under the plain language of R.C. 2715.05(A), the amount to be attached per a court's order must mirror the amount stated in the attachment affidavit submitted by the plaintiff in the first instance and must be tied to the plaintiff's justiciable claim.

Here, the Attorney General submitted an affidavit claiming (without any support) that the Appellees "owe the State of Ohio $4.3 million[.]" (R. 340, 2021/08/12 Miller Aff. at ¶ 8.) But contrary to the statute, the trial court entered an attachment order directing the seizure of property sufficient to satisfy a claim of $8 million. (R. 343, 2021/08/12 Attachment Order No. 2 at 1.)

The Attorney General's defense of the attachment amount defies common sense and asks the Court to believe something as true just because he says so. He begins by noting that R.C. 2715.01(A) states that an attachment "***may be had*** in a civil action for the recovery of money[.]" (Emphasis sic.) (AG's Merit Brief at 27.) But this unremarkable language—which is found in the portion of the statute addressing potential grounds for attachment—has ***nothing to do with the amount for the attachment***, which again must be tied to a claim for injury to person or property (i.e., a damage claim).

[29] (*See* 2022/01/13 AG's Reply in Support of Objection at 2) ("The 'it' [in R.C. 2715.05(A)] obviously references 'plaintiff's claim'. This reads "so much thereof as will satisfy [plaintiff's claim], to be stated in the order as in the affidavit.").

The Court of Appeals found that the Attorney General failed "to adequately explain where this $8 million figure was obtained…." (*Decision*, ¶ 38.) His brief all but confirms the correctness of this finding and indicates that he is still straining to (but cannot) answer the eight-million-dollar question. Instead of explaining where the $8 million figure was obtained, he resorts to arguing that Ohio's Corrupt Practices Act ("OCPA") allows for treble damages, and as a result, he is entitled to recover $12.9 million. (AG's Merit Brief at 27.) Even if this were true (and it is not), this does nothing to explain where or how the $8 million (the actual dollar amount he used) was obtained, and he still has not connected either the $4.3 million figure or the $8 million figure to damages resulting from injury to person, property, ratepayers, or the State of Ohio.[30]

As already explained above, the mystery created by the Attorney General's claim of $4.3 million in one pleading and then $8 million or $12.9 million somewhere else is no technical defect. The claim is the Attorney General's legal equivalent of a shell game without any pea.[31] R.C. 2923.34(E) does not assist the Attorney General because he hasn't suffered any actual damages. While the provision may provide for treble damages, three times zero is still zero. This "Fourth Proposition of Law" is meritless.

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[30] The Attorney General's RICO claim is advanced by him as a putative representative of ratepayers. But ratepayers have no cognizable claim for RICO-based damages because, among other things, (1) the ratepayers' claims are being settled through a class action; and (2) the establishment of compensation for a utility which is provided by ratepayer charges is a legislative function that is not subject to being second guessed by the judicial branch, ***even in circumstances where the claim that the legislative outcome was secured through a corruption-enabling conspiracy is assumed to be true***. *See e.g.*, *S. Branch LLC v. Commonwealth Edison Co.*, 46 F.4th 646, 647 & 649-652 (7th Cir. 2022) (rejecting RICO claims against utilities that allegedly bribed the Illinois Speaker of the House based on the filed rate doctrine).

[31] As the applicable statute clearly states, the Attorney General is not entitled to treble damages even were he to prevail on the OCPA claims, since a successful plaintiff may seek to recover "triple the ***actual damages*** the [plaintiff] sustained." (Emphasis added.) R.C. 2923.34(E). To pursue treble damages, the Attorney General must show a conspiracy to violate or a violation of R.C. 2923.32 and the amount of ***actual damages*** sustained ***by clear and convincing evidence***. R.C. 2923.34(E). The $4.3 million claimed by the Attorney General is not connected to any actual damages to the State of Ohio or any other person.

V. <u>Response to Fifth Proposition of Law</u>: The Court of Appeals did not err when it found that R.C. 2715.091 does not authorize a court to issue post-judgment garnishments under R.C. Chapter 2716 on a pre-judgment basis.

The Attorney General claims that in "its effort to completely up-end attachment law in Ohio, the Court of Appeals ruled that the use of garnishment orders was improper." (AG's Merit Brief at 29.) This misrepresentation of what the Court of Appeals held and determined as to the improper use of garnishments typifies the misstatements (or worse) that pepper the Attorney General's Merit Brief.

Regarding garnishment orders, the Court of Appeals said "[f]irst, because the attachment orders were improperly issued, it is axiomatic that the garnishment orders upon which they are based are also defective." (*Decision,* ¶ 35.) Then, the appellate court stated clearly: "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 proceeding." (*Id.*, ¶ 36.)

And then, after reviewing what occurred at the trial court, the Court of Appeals determined that "[i]nstead of following the requisite proceedings for obtaining prejudgment garnishment orders [in R.C. 2715.091], the State obtained post judgment garnishment orders under R.C. Chapter 2716…." (*Id.,* ¶ 37.)

So, yes, the Court of Appeals held that the issuance and use of ***post-judgment*** garnishment orders in this case was unlawful. But the Court of Appeals did not upend anything. It just put an end to the Attorney General's improper use of a statutory process that is not available here.

No amount of "on-the-ground background" offered by the AG's Merit Brief (p.30) makes up for the lack of merit of the Attorney General's "Fifth Proposition of Law." Tellingly, not a

single citation of law or precedent accompanies the theories advanced on pages 29 through 32 of the Attorney General's Merit Brief.

Moreover, violations of R.C. Chapter 2715 are not harmless errors. (*Cf.* AG's Merit Brief at 31.) By using the post-judgment garnishment process to seek assets that were not targeted by the Attorney General's motion for attachment, the Attorney General unlawfully expanded the scope of attachment beyond the specific property sought in the motion for attachment. (R. 339, 2021/08/12 AG's Mot. Attachment at 6; R. 340, 2021/08/12 Miller Aff. at ¶ 16.) The trial court only approved the ***attachment of that specific property***. (R. 410, 2021/08/11 Tr. at 8:11-12:7.) A trial court does not have the authority to grant a blanket attachment order of property. *Ohio-Carrier Concrete Cutting, Inc. v. Carrier Concrete Cutting, L.L.C.*, 10th Dist. Franklin No. 09AP-526, 2009-Ohio-6783, ¶ 14-15 (stating a motion for prejudgment attachment must be supported by an affidavit describing the "specific property to be attached"); *Aragonite Cap. Markets, LLC v. Dark Horse Media, LLC,* No. 1:22-CV-00222, 2022 WL 614678, at *9 (N.D. Ohio Mar. 2, 2022) (finding that a general statement that the plaintiff "seeks to attach 'all of the assets and property of the Company'" is insufficient).[32]

After the trial court approved attachment of ***specific property*** of the Appellees, the Attorney General continued to expand, at his will, the scope of the *Ex Parte Orders* to reach other property, including funds held in the IOLTA account of the Appellees' counsel, that have now been frozen since November 2021. He did so by submitting the same post-judgment garnishment

[32] A blanket attachment order would be inconsistent with the statutory scheme for protecting the defendant's exemptions. The attachment statute "places the burden upon the plaintiff to show that the property sought is not exempt from attachment proceedings." Peggy M. Coleman, et al., *Creditor's Rights in Ohio: An Extensive Revision*, 16 Akron L Rev 487, 500 (Winter 1983); *see* R.C. 2715.03(E) (providing that a plaintiff is required to submit an affidavit stating, among other things, that to "the best of plaintiff's knowledge" the "property is not exempt from attachment or execution"). A court can only enter an order against property that is not "exempt by law…." R.C. 2715.05(A).

affidavit struck down by the Court of Appeals, an affidavit that falsely claimed that the Attorney General had obtained an $8 million judgment against the Appellees.

In addition to the damage done by the Attorney General's unlawful seizure of the Appellees' property and property rights, the Appellees have incurred (and continue to incur) substantial attorney fees defending against the Attorney General's ongoing efforts to wrongfully deprive them of their property.

The trial court failed to comply with the requirements of R.C. 2715.091, and as a result, the Court of Appeals properly vacated the erroneously issued *Ex Parte Orders*.

OTHER APPROPRIATE CONTENTIONS AS REASONS FOR AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT (S.Ct.Prac.R. 16.03(B)(1))

I. Even if the Court adopts one or more of the Attorney General's Propositions of Law, the Court of Appeals' judgment is still correct.

This Court reviews "judgments, not reasons." *State v. Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832, 168 N.E.3d 468, ¶ 49 (plurality opinion). The Court has often stated that it "is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten*, 70 Ohio St. 3d 89, 92-93, 637 N.E.2d 306 (1994) (rejecting the reasoning of lower court but affirming dismissal of two of three of prisoner's appeals on alternative grounds); *State ex rel. Cunningham v. Reed*, 117 Ohio St. 3d 184, 2008-Ohio-855, 882 N.E.2d 916, ¶ 2-7 (rejecting appeals court's finding that appeal was moot but dismissing prohibition action because prisoner needed to file for habeas corpus). Therefore, the Court, consistent with its precedent and practice, will consider an argument advanced by an appellee that further supports the court of appeal's decision, despite the fact that the court of appeals rejected the argument.

An appellee need not file a cross appeal to raise such an argument. In a prior case, this Court explained:

> [A]ppellants argue that the Commerce Clause issue is not properly before the court because appellees failed to file a cross-appeal. However, ***appellees received the judgment they sought in the court of appeals***. Consequently, ***there was nothing for them to appeal***. Appeals are from judgments, not the opinions explaining them. R.C. 2505.03. Moreover, S.Ct.Prac.R. VI(2) states that an appellee shall file a brief "answering the appellant's contentions, and making any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." Similarly, R.C. 2505.22 provides that "assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment or decree is reversed in whole or in part."

(Emphasis added.) *Couchot v. State Lottery Comm.*, 74 Ohio St. 3d 417, 423-424, 659 N.E.2d 1225 (1996); *Parton v. Weilnau*, 169 Ohio St. 145, 171, 158 N.E.2d 719 (1959) (explaining that an assignment of error may be used by a non-appealing appellee "as a shield to protect the judgment of the lower court" but not "as a sword to destroy or modify that judgment"); *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St. 3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 29-37 (rejecting appellants' arguments that appellee needed to file a cross appeal to raise assignments of error).

The Tenth District vacated the *Ex Parte Orders*. The Appellees received the judgment they sought in the Court of Appeals, and the Appellees had nothing to appeal. However, the Appellees are entitled nonetheless to raise errors in this brief that, had they not been made, would have also caused the Court of Appeals to reach the same judgment. *See* R.C. 2505.22 (stating that an appellee who does not cross appeal may file assignments of error and that the "time within which assignments of error by an appellee may be filed shall be fixed by rule of court")[33]; S.Ct.Prac.R.

[33] As *Couchot* indicates, R.C. 2505.22 applies to appeals to the Ohio Supreme Court. *See* R.C. 2505.01(A)(1) (defining the term "appeal" to mean "all proceedings in which a court reviews or retries a cause determined by another court, or by an administrative officer, agency, board, department, tribunal, commission, or other instrumentality");

16.03(B)(1) (providing an appellee shall address the appellant's propositions of law and "make any other appropriate contentions as reasons for affirmance of the order or judgment" in the appellee's merit brief).

II. The trial court lacked jurisdiction to enter attachment orders against the Appellees because the Attorney General failed to submit any admissible evidence supporting his claims.

The Ohio Rules of Evidence apply in attachment proceedings. *See* Evid.R. 101; *see also Mayfield v. Crawford*, No. 5:07CV2775, 2008 WL 5705573, at *2 (N.D. Ohio Apr. 28, 2008). Under Evid.R. 602, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

The decision in *Mayfield* is highly instructive here. In that case, the court refused to ignore the rules of evidence when ruling on a motion for prejudgment attachment:

> The one paragraph [in the attachment affidavit] that clearly targets a statutory attachment ground is ***not based upon personal knowledge, and therefore is inadmissible***. Paragraph seven states, "it has come to my [Ziemer's] attention that Plaintiff has withdrawn One Hundred Thousand Dollars ($100,000) from the equity in his home through a home equity loan." This is the only information supplied by Fairmont that even arguably supports attachment under 2715.01(A)(6) or (7). However, Ziemer's use of the phrase "***it has come to my attention***" indicates that ***his knowledge of this alleged fact is not firsthand***. Accordingly, Fairmont's ***motion for attachment pursuant to either 2715.01(A)(6) or (7), unsupported by admissible evidence, is denied***.

(Emphasis added.) *Mayfield*, 2008 WL 5705573, at *2.

By contrast, the Tenth District effectively found that Evid.R. 602 did not apply. The Attorney General has similarly implied that the Ohio Rules of Evidence are inapplicable by relying on the DPA without establishing the admissibility of this document. As explained below, the Attorney General's affidavit submitted with his *ex parte* motion, and the DPA along with

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Morgan v. City of Cincinnati, 25 Ohio St. 3d 285, 290, 496 N.E.2d 468 (1986) (relying on R.C. 2505.22 in rejecting argument that non-appealing appellee had waived right to file assignments of error to preserve judgment).

Attachment A, are inadmissible, have no evidentiary value, and should not have been considered by the trial court.

A. The Attorney General's affidavit is inadmissible because it is not based upon personal knowledge.

The case law addressing the attachment statute does not state or suggest that Evid.R. 602 is inapplicable in attachment proceedings. On the contrary, the relevant authorities suggest that in the attachment context, this personal-knowledge evidentiary requirement is mandated by the Ohio and U.S. Constitutions.

Under *Peebles*, an attachment statute requires "that an ***affidavit*** be filed alleging ***personal knowledge*** of specific facts forming a basis for prejudgment seizure[.]" (Emphasis added.) *Peebles*, 63 Ohio St. 2d at 321, 408 N.E.2d 689; *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 601-608 & n.1, 95 S. Ct. 722, 42 L. Ed. 2d 751 (1975) (finding attachment statute was unconstitutional when, among other things, statute allowed for plaintiff's attorney to submit an attachment affidavit based on "knowledge and belief" rather than based on personal knowledge). Consistent therewith, Ohio's statute requires that a plaintiff provide an affidavit setting forth the "nature and amount of the plaintiff's claim" and the "facts that support at least one of the grounds for an attachment contained in section 2715.01 of the Revised Code." R.C. 2715.03(A) & (B).

This required affidavit must be based on personal knowledge. *E.g.*, *Mayfield*, 2008 WL 5705573, at *2 ("To comport with constitutional due process, the attachment statute, as interpreted by the Ohio Supreme Court, requires, *inter alia*, that an affidavit be filed alleging personal knowledge of specific facts forming a basis for prejudgment seizure. Ohio Rev. Code § 2715.03."); *see also PCA-Corr., LLC v. Akron Healthcare LLC*, S.D. Ohio No. 1:20-CV-428, 2021 WL

1582984, at *4 (Apr. 22, 2021) (refusing to consider allegations in complaints as grounds for attachment because such allegations are inadmissible hearsay).

But in stark contrast, the affidavit supporting the Attorney General's motion for *ex parte* prejudgment attachment is based solely "upon information and belief." (R. 340, 2021/08/12 Miller Aff.) Courts have consistently found that an affiant who relies on information and belief lacks personal knowledge. *See, e.g.*, *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St. 3d 131, 2007-Ohio-5699, 876 N.E.2d 953, ¶ 14-16; *Young v. State*, 10th Dist. Franklin No. 17AP-272, 2018-Ohio-2604, ¶ 19-22; *Hillstreet Fund III, L.P. v. Bloom*, 2nd Dist. Miami No. 09CA12, 2009-Ohio-6583, ¶ 12. The Tenth District did not address any of these cases.

Instead, the Tenth District concluded that 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***." (Emphasis added.) (*Decision*, ¶ 19.) In so doing, the court failed to construe the attachment statute in a manner that comports with the Ohio and U.S. Constitutions. *State ex rel. Taft*, 81 Ohio St. 3d at 481, 692 N.E.2d 560. In fact, the Tenth District did not even acknowledge the personal-knowledge requirement from *Peebles*. The Tenth District relegated its discussion of *Peebles* to a footnote, and in that footnote, limited the *Peebles* decision to its facts. (*See Decision*, ¶ 20 n.6) (suggesting that the *Peebles* decision only addressed whether an attachment statute must require a judge to approve the attachment order).

Rather than following *Peebles*, the Tenth District relied on three provisions from R.C. 2715.03. These provisions state an affidavit must include:

(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.

The Tenth District then found that "there is no material difference between an affidavit premised on 'information and belief' and an affidavit premised on 'the best of plaintiff's knowledge[.]' " (*Decision,* ¶ 19.) Yet none of these three provisions relied upon by the Court of Appeals [(C), (D), or (E)] purports to dispense with the personal-knowledge requirement from *Peebles*. As the statute makes clear, no provision of R.C. 2715.03, other than the matters addressed in subparts (D) and (E), are subject to or qualified by the language "to the best of plaintiff's knowledge." Again, the Court of Appeals failed to construe these statutes to comport with the constitutional requirements for due process.

Furthermore, ***these three provisions from R.C. 2715.03 have no relevance here***. Each of the above provisions relates to the ***defendant's property***. *See* R.C. 2715.03(C), (D), & (E). Here, however, the affiant had no personal knowledge regarding the ***plaintiff's claims***. Nothing in the attachment statute suggests that a plaintiff can prevail on the merits based upon an affiant who has no personal knowledge regarding the "nature and amount of the plaintiff's claim[.]" R.C. 2715.03(A).

Further, without being presented with admissible evidence regarding the plaintiff's claims, a court has no basis for finding that the plaintiff has met the statute by establishing probable cause—i.e., that the plaintiff is likely to obtain a judgment against the defendant. R.C. 2715.045; R.C. 2715.011(A). A court must make this probable cause finding based on admissible evidence. *Enable Healthcare, Inc. v. Cleveland Quality Healthnet, LLC*, No. 1:16 CV 2395, 2016 WL 6821980, at *3 (N.D. Ohio Nov. 18, 2016) (determining plaintiff had failed to establish probable

cause when plaintiff's affidavit was based on "information and belief" rather than personal knowledge).

The Tenth District also relied on two non-binding cases in rejecting the Appellees' position. (*Decision*, ¶ 20.) Neither of these cases held that a court could find probable cause based on an affidavit relying on only information and belief. Neither of these cases address the requirements of Evid.R. 602. And neither of these cases explain how the General Assembly could have eliminated the personal-knowledge requirement of *Peebles* without violating the Ohio and U.S. Constitutions. So, neither of these cases provide guidance here.

If an attachment affidavit need not be based on personal knowledge, then the attachment affidavit would be pointless. An affidavit based on information and belief has no more evidentiary value than a plaintiff's complaint. By requiring a plaintiff to submit an affidavit, the attachment statute compels the plaintiff to come forward with admissible evidence in support of its claim and assertions. Conjecture and speculation are not sufficient to satisfy the attachment statute. While its judgment was correct, the Tenth District erred in rendering this affidavit requirement all but meaningless.

B. The DPA is also inadmissible.

The trial court found probable cause for attachment based on the DPA. (*See* R. 460, 2021/08/31 Tr. 35:2-8.) As already discussed, the content of the DPA and Attachment A do not say what the Attorney General claims they say, and even if they did, they cannot be considered for the truth of the matter asserted therein. Yet the Attorney General's claims regarding his ability to prevail on the merits against the Appellees relies entirely on the DPA and Attachment A, documents that do not provide evidentiary support for the attachment of the Appellees' assets. The trial court erred in concluding otherwise.

A decision in *FirstEnergy Securities Litigation,* No.2:20-cv-3785 (S.D. Ohio) further demonstrates the evidentiary deficiencies and risks associated with treating the DPA as though its contents can be relied upon as factually true. FirstEnergy Corp. was required, pursuant to Fed.R.Civ.P. 30(b)(6), to produce a witness to testify regarding the allegations, conclusions, and innuendo in the DPA and Statement of Facts generally, and, specifically, any consulting agreements between FirstEnergy Corp. and one of the Appellees. But when questioned, the FirstEnergy Corp. witness' "testimony went in circles, always returning to the DPA's and consulting agreements' language." No. 2:20-CV-3785, 2022 WL 3582366, at *3 (S.D. Ohio Aug. 19, 2022). When pressed to do more than recite the allegations and conclusions or read from notes prepared by FirstEnergy Corp.'s counsel, she could not. *Id.* Critically, the witness was unable to explain the basis for the central allegation of the Attorney General that FirstEnergy Corp. bribed Mr. Randazzo. *See id.*

Because of the persistently evasive behavior of the FirstEnergy Corp. 30(b)(6) deponent, the defendants moved to compel FirstEnergy Corp to produce a witness who could do more than read from a script. *Id.* at *1. In granting the motion to compel, the court sanctioned FirstEnergy Corp. for its failure to comply with Federal Rule of Civil Procedure 30(b)(6). *Id.*

The DOJ has also acknowledged that the DPA and Attachment A are not admissible against non-parties to the agreement (such as the Appellees). When a non-party to the DPA moved to exclude the DPA from being introduced in the Householder/Borges criminal trial, the DOJ did not even attempt to argue that the DPA was admissible, saying the "United States does not intend to admit the DPA (or the Statement of Facts attached to it) as an exhibit at trial." *United States v. Householder*, Case No. 1:20-cr-00077, Doc. #: 143, Government's Response Mot. Limine (S.D. Ohio Nov. 28, 2022).

Yet the hearsay-laden DPA (including the attached Statement of Facts) remains the lone document presented by the Attorney General to substantiate his conclusory allegations of criminality, bribery, and other wrongful acts by the Appellees. Since the trial court erred in considering the DPA, the trial court erred in granting the attachments.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Judgment of the Tenth District Court of Appeals that unanimously reversed and vacated the *Ex Parte Orders*. In the alternative, this Court should find that this appeal was improvidently accepted and order its dismissal.

Respectfully submitted,

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