

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL

CHARLES J. SIMPSON
157 Lammes Lane
New Carlisle, Ohio 45344

HUBER HEIGHTS VETERANS CLUB, INC.
4214 Powell Rd.
Huber Heights, Ohio 45424

CASE NO. 2023-0504

Petitioner-Appellant

vs.

HON. KIMBERLY A. MELNICK
Common Pleas Court
41 N. Perry St.
Dayton, Ohio 45422

Appeal of Right from the
Montgomery County Court
of Appeals
Second Appellate District

Respondent-Appellee

Court of Appeals
Case No. CA 29554

APPELLANT'S BRIEF

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STATEMENT OF FACTS

The proceedings concerned herein were instituted as a post final judgment motion in case No. 2018 CV 4157, Montgomery County Ohio Common Pleas Court , The action was originally filed on March 30, 2018 and is captioned Grande Voiture D'Ohio La Societe des 40 Hommes et 8 Chevaux vs Montgomery County Voiture No. 34 La Societe des 40 Hommes et 8 Chevaux and Charles J. Simpson, Defendants vs Voiture Nationale La Societe des Quarante Hommes et Huit Chevaux, Third Party Defendant (co-Plaintiff) The primary defendant in the case is a non-profit corporation formed and organized under the laws of the State of Ohio. Said corporation was formerly known as Montgomery County Voiture No. 34 La Societe des 40 Hommes et 8 Chevaux (Voiture 34) but changed its name to, Huber Heights Veterans Club, Inc (HHVC) on June 18, 2019. Said corporation was previously affiliated with Voiture Nationale La Societe des Quarante Hommes et Huit Chevaux (Nationale) for the purpose of collecting and distributing dues money but terminated that affiliation on June 1, 2015. Said action, 2018 CV 4157, was terminated on April 28, 2019 by the filing of a declaratory judgment order. The order contained an order enjoining defendant Simpson and other unnamed persons from participation as a member or officer in the activities of the 40 & 8 organization.

On May 26, 2022 Plaintiffs, thru counsel, filed a "Supplemental Motion For Contempt against Defendant Charles Simpson".(Apdx No 1) Although designated as a motion it is in form a complaint. It claims that the aforesaid injunction was violated by the filing of actions by the Defendant corporation, thru Simpson as its counsel, attempting to recover real and personal property stolen from the Defendant corporation after April 28, 2019. Plaintiffs claim injury on account of the filing of the actions to recover the corporation's property and asks for compensation in the form of sanctions for contempt in the sum of \$78,000.00. The Respondent, Kimberly A. Melnick is the judge assigned to the case for the determination of the said motion/complaint of May 26, 2022 and all matters arising from same.

On May 27, 2022 Defendants filed a response objecting to Plaintiffs' motion and included with the response a motion to dismiss the Plaintiffs' motion on the basis that the court lacked jurisdiction to proceed by way of motion in this matter. The trial court has disregarded Defendants' motion and has never ruled on it. The court did acknowledge the filing of Defendants response and motion in its decision of August 10, 2022 but made no ruling on it.

On June 1, 2022 Defendants filed an Answer and Counterclaim (Apdx No2) setting up Defendants' defenses to the claims asserted by Plaintiffs and asserting the Defendants claims against the Plaintiffs for fraud and larceny. A jury demand was included with the Answer and Counterclaim. Plaintiffs filed a motion to strike asserting that Defendants were not permitted to file an Answer and Counterclaim to their motion/complaint On July 22, 2022 Respondent entered an order striking

the Defendants' Answer and Counterclaim (Apdx No. 3). Respondent cited Civil Rule 12(F) as the basis for the order to strike the Answer and Counterclaim. On July 25, 2022 Defendants filed a motion to reconsider and vacate the order to strike and on August 3, 2022 Defendants filed a motion requesting leave to file motions for summary judgment on Plaintiffs complaint and on Defendants' counter claim. On August 10, 2022 the Respondent entered an order (Apdx No 4) overruling Defendants' request for leave to file motions for summary judgment. The order included criticism of Defendants counsel on account of his filings on behalf of Defendants and stated that any future motions or pleadings filed by Defendants' counsel will be automatically stricken. The order also indicated an intent of Respondent to proceed to a final determination of the matter based on Plaintiffs complaint alone, without a jury and without any determination of the merits of Defendants' defenses and claims.

On Aug. 15, 2022 Defendant's counsel, on behalf of Defendants, , filed the complaint herein with the Court of Appeals asking for the issuance of writs of prohibition and mandamus directed to Respondent. A writ of prohibition was requested prohibiting Respondent from proceeding without allowing Defendants a jury trial and without consideration of Defendants answer and counterclaim. A writ of mandamus was requested to be issued directing Respondent to proceed to a final determination by jury trial of all of the issues and claims of all of the parties in accordance with law. The Court of Appeals denied Petitioners request for

peremptory writs of prohibition and mandamus and on August 22, 2022 Petitioners filed a motion for the issuance of a preliminary injunction against Respondent

On August 16, 2022 the Court of Appeals issued an order to show cause why the complaint should not be dismissed as to the Defendant corporation on account of the vexatious conduct order issued in case No. 2021 CV 4358 by Judge Skelton . Defendants responded on August 22, 2022 asserting that the vexatious litigator statute does not apply for multiple reasons, including the fact that the litigation concerned was commenced by another party and t he issues concerned involve the Defendant corporations right to a jury trial and right to assert its defenses and counterclaim. Petitioners also asserted that the right to file the complaint herein is established by Article I, Section 16 of the Ohio Constitution and cannot be suspended by the court .

The Court of Appeals overruled the Petitioners responses and determined that the vexatious litigation order in 2021 CV 4538 was effective to bar the filing of the complaint by the Petitioner Huber Heights Veterans Club, Inc. The Court of Appeals found that the show cause order had not been satisfied and, on Aug. 25, 2022, filed its order dismissing the complaint as to the corporate Petitioner, Huber Heights Veterans Club, Inc. The complaint was allowed it to go forward as to the individual defendant, Simpson. An appeal of right to the Supreme Court was filed as to the Court of Appeals Decision Subsequently, the Court of Appeals suspended briefing on the merits of the complaint and motion for preliminary injunction as to Petitioner Simpson pending the appeal to the Supreme Court. Petitioner requested an order restraining the Respondent from proceeding to trial

without a jury during the pendency of the court's order suspending briefing. The Court of Appeals denied the request and the Respondent denied Petitioners request for continuance of the trial, for contempt only, scheduled for October 21, 2022. Over Petitioners objection, Respondent proceeded to trial on Oct. 21, 2022 without a jury and without allowing defenses or claims by the Defendants. On December 7, 2022 Respondent entered a "Decision, Order & Entry Sustaining Plaintiffs Motion For Contempt And Finding Defendant's Motion Pursuant to ORC 2323.51 To Be Moot" (Apdx No. 5) The order finds that Simpson is in contempt on account of his actions in filing actions on behalf of the Defendant corporation. The order directs Simpson to pay to Plaintiffs a sanction in the amount of \$102,612.00 and orders him to comply with orders for an accounting which were directed in the order of April 28, 2019 to the Plaintiffs local voiture. The Respondents order included orders to be performed by Simpson prior to entering a final order and denied Defendants request for hearing on the issue of attorneys fees.

Subsequently the Supreme Court denied Petitioners appeal as to the application of the vexatious litigator status as to the corporation. The Court of Appeals lifted the stay on briefing of the merits of petitioners complaint. Respondent had previously filed a motion to dismiss and after a reply by Petitioner and renewal of petitioners motion for preliminary injunction the court of appeals entered the order of dismissal filed April 10, 2023. Petitioner is prosecuting this appeal to the Supreme Court to obtain a reversal of the Court of Appeals decision.

ARGUMENT

Proposition of Law No.1 - Appellant has a constitutional right to a trial by jury in the matter of the complaint and the answer and counterclaim which cannot be denied by the trial court or the Court of Appeals.

The Constitution and law of the State of Ohio guarantees the Defendants their right to a trial by jury. Article I, Section 5 of the Ohio Constitution provides that:

“The right of trial by jury shall be inviolate except that in civil cases laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three fourths of a jury”.

Ohio Civil Procedure Rule 38 provides:

“(A) Right Preserved. The right to trial by jury shall be preserved to the parties inviolate.”

The Respondent and the Court of Appeals accepted the Plaintiffs' assertion that by labeling their complaint/motion as a “contempt” motion they can avoid Defendants request for a jury trial. This is an evasion of the clear and absolute provision of Article I, Section 5 of the Ohio Constitution and Rule 38 of the Ohio Rules of Civil Procedure. There is no exception stated in the Constitution or in the Civil Rule and the right to a jury trial in this civil action is clear. The exception claimed by Plaintiffs for contempt proceedings is not even arguably applicable. It arises only in the event of a direct contempt in the presence of the court which interferes with the function of the court and requires immediate corrective action. In this case there is no direct contempt. There is no act in the presence of the court. In fact there is no contempt at all. There is only a civil action by Plaintiffs

using a false claim of violation of an injunction as a cover for the Plaintiffs' goal of intimidating and preventing the filing of actions on behalf of the Defendant corporation to recover its stolen property.

Defendants have a clear right to trial by jury. It was timely requested and has not been waived. The trial held on October 21, 2023 over the objection of Defendants before Respondent alone is a violation of that right and exceeds the authority of the court. It is illegal and void and should be declared void and unenforceable.

Proposition of Law No. 2- Appellants have a legal and constitutional right to file and prosecute an answer and counterclaim in response to the complaint which cannot be denied by the trial court or the Court of Appeals

The Court of Appeals also accepted and approved the Plaintiffs' assertion and the Respondents' ruling that the Defendants (appellant-petitioners) are not permitted to file an Answer or Counterclaim. Plaintiffs have disguised their complaint as a contempt motion and claim that an answer and counter claim to their motion is not permitted. This is an incomprehensible assertion which is contrary to law and nature. No matter whether it is a motion or complaint the opposing party always has a right to respond and counter the opposition's claim. It is an inherent and basic part of legal proceedings and due process of law. It is Defendant's clear right under the Constitution and laws of the State of Ohio to

answer the Plaintiffs' filing and to present their claims and defenses and counterclaims. Article I Section 16 of the Ohio Constitution provides that:

" All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay."

Defendants right to answer and counterclaim is confirmed by the Rules of Civil Procedure. Civil Procedure Rule 7 concerning pleadings and motions states "(A) Pleadings. There shall be a complaint and an answer: a reply to a counterclaim denominated as such: an answer to a cross-claim *** a third party complaint and a third party answer." Civil Rule 8 sets forth the mandatory requirements for a pleading "whether an original claim, counterclaim cross-claim or third party complaint. It requires that affirmative defenses be separately set forth and provides that averments in the complaint which are not denied are admitted. Civil Rule 12 provides for how and when the answer is presented.. Civil Rule 13 (A) makes a counterclaim compulsory where it " **arises out of the transaction or occurrence that is the subject matter of the opposing party's claim**". Rule 13(B) provides for a permissive counterclaim on any claim " ** not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim" Rule 13(C) provides that a counterclaim " ** may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party". Additional compulsion to file an answer is provided by Civil Rule 55 which provides for the presentment of defenses by answer and for entry of default judgment against a party who has failed to answer or other wise defend,

The Respondent and the Court of Appeals erroneously referred to Civil Rule 12 (F) as authorization for Respondent's action in striking the Answer and Counterclaim. This is incorrect. Rule 12 (F) only provides the court with authority to "order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." The application of that rule is limited to the material contained in the pleading and not the pleading itself. Nowhere in Rule 12 or any other Rule is there any authority for the court to ignore, disregard or strike an answer or counterclaim without making some determination on the merits of the answer or counterclaim. The Respondent however entered her orders without regard to whether she is authorized by statute or rule to do so. Respondent refuses to consider Defendants Answer and Counterclaim and denies to Defendants due process of law, and equal protection of the laws, in clear violation of Article I, Section 16 of the Ohio Constitution and the Ohio Rules of Civil Procedure

Proposition of Law No. 3- A writ of prohibition may be issued in this matter to correctively arrest the continuing effects of the lower courts orders since there was a total lack of jurisdiction on the part of the Trial court

The Court of Appeals denied the Petitioners application for peremptory writs of prohibition and mandamus and has disregarded Petitioners application for a temporary injunction and restraining order. It concludes in its decision dismissing the complaint that Petitioners have a remedy at law and do not have a right to relief by way of prohibition and mandamus.

The court does not consider the fact that Respondent's actions exceed and violate her jurisdiction and authority. The lack of authority of Respondent is the basis of the complaint against Respondent and should have been taken into consideration by the Court of Appeals. The failure to do so causes a conflict with the Supreme Courts decision in State ex rel V.K.B. vs. Smith, 142 Ohio State 3d 468 In that case at pg. 470 the Supreme Court stated: "If a lower court patently and unambiguously lacks jurisdiction of a cause then prohibition will lie to correct the results of the previous unauthorized actions. * * * Where jurisdiction is patently and unambiguously lacking relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial." See also State ex rel Feltner vs Board of Revision 160 Ohio State 3d 359 wherein the court stated, at pg 360, that "a writ of prohibition may issue correctively to arrest the continuing effects of an order when there was 'a total want of jurisdiction' on the part of the lower tribunal."

As previously noted herein, Respondent exceeded her jurisdiction and authority by denying to Defendants their rights, under the Constitution and laws of the State of Ohio to file and pursue an Answer and Counterclaim and their right to a trial by jury. Respondent also exceeded her jurisdiction and authority by proceeding with a contempt hearing using the Plaintiff's complaint/motion as a citation in contempt without the issuance of a contempt citation by a court. There was no compliance with ORC 2727.12 concerning the enforcement of an injunction and the Plaintiffs complaint/motion concerns matters occurring subsequent to the final order of April 28, 2019. There is no matter set forth in

the complaint/motion which was done in the presence of the court. There is no affidavit to establish contempt and there is no citation to show cause. The Plaintiff's complaint/motion does not qualify as a contempt citation and vested no authority in the trial court to proceed in contempt. The Respondent exceeded her authority by proceeding with a contempt hearing based on Plaintiffs civil complaint.

In the process of the contempt hearing the Respondent further exceeded her authority by altering and changing the injunction order contained in the order of April 28, 2019. The injunction prohibited Simpson from participating in the activities of the 40 & 8 organization. There was no evidence presented and it was admitted by Plaintiffs' witness that there was no evidence that Simpson had done so. The court however enlarged the injunction to include actions by Simpson in filing actions on behalf of the Defendant corporation to recover property stolen from it after the order of April 28, 2019. The courts lack of authority to make this enlargement is stated by the court in its order of August, 10, 2022 (Appx No. 3-Pg. 4) but not adhered to by the court.

The trial court added to the orders in excess of her authority by ordering a penalty (sanction) to be paid to Plaintiff rather than the county and in excess of the \$200.00 limit payable to the county allowed by ORC 2727.12; by awarding attorneys fees to be paid by Simpson to the Plaintiff in the amount of \$102,612.00 as a sanction; and by ignoring Defendants claim for attorneys fees in the amount of \$250,353.00, all without conducting the hearing required by ORC 2323.51 to determine frivolous conduct and amount of award. ORC 2727.12 provides the

authority for enforcement of an injunction and limits the authority for the imposition of a fine to not more than \$200.00 payable to the county. Section 2323.51 provides authority for the imposition of attorney's fees only if the court schedules and conducts a hearing to determine the question of frivolous conduct and the amount. The Respondent exceeded the limitations on her authority imposed by both of these sections. She proceeded to award attorneys fees to Plaintiff as a "sanction" and ignored Defendants a hearing on their competing request for attorney's fees.

Respondents actions in excess of her authority are multiple and exist from the start, finish, beginning with the order striking Defendants Answer and Counterclaim and continuing thru her order of Dec. 7, 2022. Her actions are a proper subject for the issuance of writs of prohibition and mandamus.

Facts Presented to Court of Appeals

These matters were all brought to the attention of the Court of Appeals by the Complaint, by Appellants motion for Preliminary injunction and Appellant's response to Respondent's motion to dismiss. The documents included in Appendix Nos. 1-5 are parts of the record of the trial court and a transcript of the hearing of October 21, 2022 has been prepared and submitted. The facts were not rebutted or denied by Respondent but Respondent simply makes the claim that Appellant has an adequate remedy by way of appeal at some future date. The Respondent's assertions and the Court of Appeals decision ignores the fact that the Respondent's actions exceed Respondents authority and are ongoing and

continuing. The Respondent exceeded her authority by conducting the hearing of October 21, 2022 as a contempt hearing. The Respondents decision and order of December 7, 2023 is expressly states that it is not a final order and is held open for the enforcement of parts of the order which exceed the authority of Respondent. It purports to have prospective and continuing effect and it requires the issuance of the extraordinary writs of prohibition and mandamus to prevent the Respondent from continuing it in effect. Respondents denial of Petitioners right to a jury trial and their right to Answer and counter claim, her lack of authority to conduct a contempt hearing and the non finality of the order of December 7, 2022 are pending matters as to which the Respondent is exceeding her authority. In such matters where the Respondent is acting in a capacity which exceeds her authority the issuance of writs of prohibition and mandamus are proper remedies and may be issued. Petitioners only remedy in this matter is to obtain the writs of prohibition and mandamus. They should have been issued by the Court of Appeals. The Court of Appeals decision should be reversed and the writs should be issued as requested.

CONCLUSION

Defendants have the right provided by the Constitution and laws of the State of Ohio to present, prosecute and obtain a determination of their defenses and claim against the Plaintiffs. Defendants have a right provided by the Constitution and laws of the State of Ohio to a fair and impartial trial by jury to determine their defenses and claims against the Plaintiffs. Defendants have been denied their

rights by Respondent who has refused to allow and consider Defendants defenses and claims and has proceeded to an unauthorized and unjust trial and has expressed an intent to enforce illegal unauthorized orders. In order to correct and re-direct Respondent's actions, writs of prohibition and mandamus must be issued and the trial of October 21, 2022 and the order of December 7, 2022 must be declared null and void.

Therefore, Appellant demand that the judgment of the Court of Appeals be reversed and that there be issued, or the Court of Appeals be directed to issue, with regard to common pleas case No. 2018 CV 1457, a writ prohibiting Respondent: (1) from enforcing or continuing in effect the Decision, Order and Entry of December 7, 2022; (2) from proceeding to trial in that matter without allowing Defendants a jury trial and consideration and determination of the merits of their answer and counterclaim; (3) from striking or refusing to consider motions and pleadings filed by Defendants counsel; and (4) directing Respondent to proceed to a final determination by jury trial of all of the issues and claims of all of the parties in accordance with law. Appellant further demands that the trial of October 21, 2022 and the Decision, Order and Entry of December 7, 2022 be declared null and void ab initio

Respectfully submitted,

/s/ Charles J. Simpson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served upon Anu Sharma, Assistant Prosecuting Attorney, Attorney for Respondent-Appellee, 301 West Third St.- Fifth Floor, Dayton, Ohio 45422 by the Court's electronic filing system on the date of filing and by e-mail on the 23 rd day of May, 2023.

/s/ Charles J. Simpson

Charles J. Simpson
Attorney for Appellant