IN THE SUPREME COURT OF OHIO

RICHARD PLISHKA, Appellant, v. WILLIAM SKURLA et al., Appellees.	Case No. 2023-358 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 111122

MOTION FOR RECONSIDERATION OF APPELLANT RICHARD PLISHKA

Emmett E. Robinson (0088537)
(COUNSEL OF RECORD)
Robinson Law Firm LLC
6600 Lorain Avenue #731
Cleveland, Ohio 44102
Telephone: (216) 505-6900
Facsimile: (216) 649-0508
erobinson@robinsonlegal.org

COUNSEL FOR APPELLANT,
RICHARD PLISHKA

Denise A. Dickerson (0064947)
Robert E. Cahill (0072918)
Sutter O'Connell Co.
1301 East 9th Street
3600 Erieview Tower
Cleveland, Ohio 44114
Telephone: (216) 928-2200
Fascimile: (216) 928-4400
ddickerson@sutter-law.com
rcahill@sutter-law.com

COUNSEL FOR APPELLEE,
WILLIAM SKURLA

Steven E. Seasly (0070536)
Andrew J. Wolf (0091054)
Hahn Loeser & Parks LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: (216) 621-0150
Facsimile: (216) 241-2824
sseasly@hahnlaw.com
awolf@hahnlaw.com

James B. Niehaus (0020128)
Frantz Ward LLP
200 Public Square, Suite 3000
Cleveland, Ohio 44114
Telephone: (216) 515-1660
Facsimile: (216) 515-1650
jniehaus@frantzward.com

COUNSEL FOR APPELLEE,
THE BYZANTINE CATHOLIC DIOCESE
OF PARMA, INC.

Pursuant to Supreme Court Rule of Practice 18.02, Appellant Richard Plishka, a Byzantine Catholic priest, respectfully asks the Court to reconsider its four-to-three decision declining jurisdiction over his first proposition of law, which states that "the doctrine of ecclesiastical abstention does not operate to deprive common pleas courts of subject-matter jurisdiction." In their briefs opposing jurisdiction, Appellees Archbishop William Skurla and the Byzantine Catholic Diocese of Parma asserted that Fr. Plishka had procedurally defaulted this argument and thus "c[ould] not raise th[e] issue" with this Court. (Skurla Memo. Opp. Juris. at 9.) This assertion was legally erroneous, yet because it was raised in memoranda opposing jurisdiction, Fr. Plishka has not yet had the opportunity to address it. Contrary to Appellees' assertions, the issue was and is properly before the Court. Thus, to the extent the Court's decision declining jurisdiction was premised upon Appellees' erroneous procedural-default assertions, Fr. Plishka asks the Court to reconsider.

In his memorandum in opposition to jurisdiction, Abp. Skurla asserted that Fr. Plishka "cannot raise this issue on appeal because he failed to do so in the trial court." (*Id.* at 9.) And in its memorandum, the Diocese similarly argued that "Fr. Plishka never raised this issue with the trial court, so his belated assertion before the Court of Appeals was not properly preserved."[1]

[1] The Diocese also contends that, by addressing Appellees' motion to dismiss on the merits, Fr. Plishka conceded that the doctrine of ecclesiastical abstention does indeed operate to deprive common pleas courts of subject-matter jurisdiction. (Diocese Memo. Opp. Juris. at 6 (by arguing the merits of Appellees' motion, Fr. Plishka "accepted that the ecclesiastical[-]abstention doctrine was properly analyzed under Civil Rule 12(B)(1) [governing 'lack of jurisdiction over the subject matter']").) But engaging with an opponent's arguments does not mean that one concedes the validity of those arguments or the paradigm in which they are presented. The Diocese cites no authority to the contrary. Moreover, the Diocese argument is nothing more than a restatement of the same faulty contention addressed in the body of this motion, namely, that Fr. Plishka failed to assert in the trial court that the ecclesiastical-abstention doctrine does not affect jurisdiction and therefore has waived that issue for all time. In other words, at bottom, the Diocese's real beef with Fr. Plishka is not that he also argued the merits of the motion to dismiss by analyzing it under the

(Diocese Memo. Opp. Juris. at 6.) But Appellees' assertion that failure to raise the issue squarely in his opposition to the motion to dismiss barred Fr. Plishka from raising it with the court of appeals (and, by extension, with this Court) is wrong for at least two reasons.[2] First, it is axiomatic that the issue of subject-matter jurisdiction can be raised at any time. In Ohio, this rule applies to the *presence* of subject-matter jurisdiction in addition to its absence. Second, Fr. Plishka *prevailed* on the motion to dismiss in the trial court, and thus that decision could be defended on any ground on appeal. Indeed, as the *appellants* on that issue in the court of appeals, Appellees explicitly argued in that court that "the trial court erred by finding that it had subject matter jurisdiction over Fr. Plishka's complaint." (Diocese Answer Br. and Br. in Supp. of Cross-Appeal at 49 (capitalization altered). *See also* Skurla Answer Br. and Cross-Appellant's Opening Br. at 48.) It would be truly anomalous, and a violation of due process, to bar Fr. Plishka from opposing that argument before the court of appeals.

Accordingly, the issue of whether the ecclesiastical-abstention doctrine operated to deprive the trial court of subject-matter jurisdiction was properly raised at the court of appeals. To the extent this Court's decision to decline jurisdiction over that issue was based on the contrary understanding advocated by Abp. Skurla and the Diocese, Fr. Plishka respectfully asks the Court to reconsider.

Rule Appellees asserted applied, but that he "failed" to argue that that Rule didn't apply in the first place.

[2] The court of appeals, after all, *did* decide the issue on the merits. (COA Op. ¶ 69, fn. 5 ("After careful consideration [of the argument], we decline to divert from the controlling precedent of this court.").)

ARGUMENT

I. The Issue of Subject-Matter Jurisdiction Cannot Be Waived.

It is, of course, blackletter law that "the issue of subject-matter jurisdiction cannot be waived and therefore can be raised at any time during the proceedings." *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St.3d 37, 40, 693 N.E.2d 789 (1998). Moreover, "[a]lthough most cases addressing this issue deal with an alleged *lack* of subject matter jurisdiction, where[] [a party] . . . asserts the existence of subject matter jurisdiction, we apply the doctrine of waiver equally to both sides of an argument." *NVR, Inc. v. City of Centerville*, 2016-Ohio-6960, 71 N.E.3d 745, ¶ 21 (2d Dist.). That is, in Ohio, the issue of subject-matter jurisdiction cannot be waived, regardless of whether the party seeking to present the issue asserts its absence *or its presence*.[3] Thus, Fr. Plishka properly raised the argument that the ecclesiastical-abstention doctrine does not deprive courts of subject-matter jurisdiction.

This Court has reached the same conclusion, i.e., that the non-waiver doctrine applies both the presence and absence of subject-matter jurisdiction. In *Proctor v. Giles*, 61 Ohio St.2d 211, 212, 400 N.E.2d 393 (1980), the plaintiff employee appealed an unfavorable decision of the Unemployment Compensation Board of Review to the court of common pleas. At issue was

[3] In their oppositions to this motion, Appellees may point to case law from other jurisdictions stating that the non-waiver principle applies only to the argument that subject-matter jurisdiction is absent, not to arguments that is it present. Much of this case law originates from the United States Court of Appeals for the District of Columbia Circuit. *See, e.g., Wilks v. United States Marshals Serv.*, D.C.Cir. No. 92-5287, 1993 U.S. App. LEXIS 12538, at *3 (Mar. 8, 1993) ("we do not consider . . . arguments in favor of subject matter jurisdiction" for the first time on appeal). In addition to the facts that this caselaw is out-of-jurisdiction, is contrary to Ohio precedent, and leads to inequitable results vis-à-vis parties opposing and asserting subject-matter jurisdiction, note also that federal courts are courts of *limited* jurisdiction, while Ohio's courts of common pleas are courts of *general* jurisdiction. Thus, while a thumb on the scale in favor of the *absence* of subject-matter jurisdiction may make sense in federal courts, the same reasoning does not apply here.

whether the appeal to the common-pleas court was timely. The common pleas court held that it was not and thus, pursuant to statute, dismissed the appeal for lack of subject-matter jurisdiction. *Id.* at 211. The court of appeals reversed, holding that then-Civ.R. 6(E)—which provided an extra three days for service by mail—applied, thus rendering the appeal timely and conferring subject-matter jurisdiction on the court of common pleas. *Id.*

But in rendering its decision, the court of appeals rejected another, new argument by the employee, namely, that the date on which the Board of Review mailed its decision (and thus the date on which the clock began to run on the employee's filing with the common pleas court) was never adequately established in the common pleas court and therefore the common pleas court's decision that it lacked subject-matter jurisdiction was invalid on this basis as well. *Id.* at 212. The court of appeals refused to consider this new argument *in favor of* subject-matter jurisdiction, noting that it had not been raised in the common pleas court. *Id.* at 212, fn. 1.

On appeal to this Court, the Court addressed the court of appeals's decision that the employee had waived the date-of-mailing argument by failing to raise it in the common pleas court. This Court acknowledged that this argument in favor of the *presence* of subject-matter jurisdiction "was not raised before the Court of Common Pleas and thus would not normally be subject to review, as the Court of Appeals determined." *Id.* "[H]owever," the Court continued, "the time allotted for filing a notice of appeals [from the Board of Review] is jurisdictional, and issues pertaining to subject matter jurisdiction are non-waivable. Indeed, they are appropriately considered by a court *sua sponte*." *Id.* (citations omitted).

Because the issue of subject-matter jurisdiction—including, as *Proctor* and *NVR* make clear, not only the absence of subject-matter jurisdiction, but also its presence—may be raised for the first time on appeal, Fr. Plishka's first proposition of law—that the doctrine of ecclesiastical

abstention does not operate to deprive a common pleas court of subject-matter jurisdiction—was and is properly before this Court.

II. A Court of Appeals May Consider Any Argument in Support of a Trial Court's Decision.

The subject-matter-jurisdiction argument was also properly before the court of appeals (and therefore this Court) for another reason. Recall that, while Fr. Plishka appealed the jury verdict to the court of appeals based on errors that occurred during trial, it was *Appellees* who cross-appealed and challenged the trial court's decision denying their motion to dismiss for lack of subject-matter jurisdiction. Vis-à-vis that motion to dismiss for lack subject-matter jurisdiction, then, Fr. Plishka was the party defending the trial court's decision.

A court of appeals "must affirm [a] trial court's decision if there is any reason to do so." *Hostein v. Ohio Valley Vulcanizing, Inc.*, 7th Dist. Belmont No. 06-BE-41, 2007-Ohio-3329, ¶ 32. "A corollary of this rule is that the appellee may defend the [decision] below by raising arguments for its correctness for the first time on appeal." *In re Estate of Workman*, 4th Dist. Lawrence No. 07CA39, 2008-Ohio-3351, ¶ 18, fn. 2. That is, "an advocate may employ new legal arguments on appeal to justify a ruling by the trial court," but "an appellate court may not decide the issue on that new ground unless the basis for the argument was adduced before the trial court and was made part of the record." *State v. Pickett*, 1st Dist. Hamilton No. C-424, 2001-Ohio-4022. *See also State v. Peagler*, 76 Ohio St.3d 496, 496, 668 N.E.2d 489 (1996) ("While an appellate court may decide an issue on grounds different from those determined by the trial court, the evidentiary basis upon which the court of appeals decides a legal issue must have been adduced before the trial court and have been made a part of the record thereof.").

These conditions for raising a new argument on appeal were satisfied here. With respect to the motion to dismiss for lack of subject-matter jurisdiction, Fr. Plishka was the "appellee"

(technically, the cross-appellee), *Workman*, 2008-Ohio-3351, ¶18, fn. 2, and sought to "justify a ruling by the trial court," *Pickett*, 2001-Ohio-4022. That is, Fr. Plishka sought to defend the correctness of the decision denying the motion to dismiss for lack of subject-matter jurisdiction. Moreover, the jurisdictional argument raised by Fr. Plishka in the court of appeals did not rely on an "evidentiary basis" not already in the trial-court record. *Peagler*, 76 Ohio St.3d at 496. His argument that the ecclesiastical-abstention doctrine does not operate to deprive common pleas courts of subject-matter jurisdiction is a purely legal argument and, as such, did not require the (prohibited) introduction of new facts at the appellate stage.[4]

For this reason, too, Fr. Plishka's first proposition of law was properly considered by the court of appeals and properly preserved for review by this Court.

CONCLUSION

As explained in Fr. Plishka's Memorandum in Support of Jurisdiction, his first proposition of law presents an issue of public and great general importance. The courts of appeals have uniformly failed to properly address the issue. Courts of last resort in several neighboring states have recognized the importance of the issue in recent years, have taken up the issue, and have all concluded, like Fr. Plishka, that the doctrine of ecclesiastical abstention does not deprive courts of subject-matter jurisdiction. To the extent this Court declined the accept jurisdiction over this

[4] To be sure, Fr. Plishka's argument that the ecclesiastical-abstention doctrine does not divest a court of subject-matter jurisdiction was the logical response to Appellee's affirmative argument—made by them in the court of appeals in their capacity as cross-appellants challenging the decision of the trial court on their motion to dismiss—that "the trial court erred by finding that it had subject matter jurisdiction over Fr. Plishka's complaint." (Diocese Answer Br. and Br. in Supp. of Cross-Appeal at 49 (capitalization altered). *See also* Skurla Answer Br. and Cross-Appellant's Opening Br. at 48.) Due process required that Fr. Plishka be afforded the opportunity to oppose that argument in the court of appeals. *See, e.g.*, *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 427, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957) ("It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them.").

important issue due to concerns that the argument was not properly preserved below, Appellant Richard Plishka respectfully asks the Court to reconsider its decision.

Dated: June 2, 2023

Respectfully Submitted,

/s Emmett E. Robinson
Emmett E. Robinson

COUNSEL FOR APPELLANT,
RICHARD PLISHKA

CERTIFICATE OF SERVICE

I hereby certify that, on June 2, 2023, a copy of the foregoing Motion for Reconsideration, has been served upon opposing counsel via email at ddickerson@sutter-law.com, rcahill@sutter-law.com, sseasly@hahnlaw.com, awolf@hahnlaw.com, and jniehaus@frantzward.com.

/s Emmett E. Robinson
Emmett E. Robinson

COUNSEL FOR APPELLANT,
RICHARD PLISHKA