**[Cite as *State ex rel. Becker v. Schwart,* 2006-Ohio-6389.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | |
|---|---|
| STATE, EX REL. ROBERT L. BECKER<br><br>Relator-Appellant<br><br>-vs-<br><br>KENNETH L. SCHWART, et al.<br><br>Respondents-Appellees | JUDGES:<br>Hon. John W. Wise, P. J.<br>Hon. W. Scott Gwin, J.<br>Hon. Julie A. Edwards, J.<br><br>Case No. 06 CA 4<br><br>O P I N I O N |

| | |
|---|---|
| CHARACTER OF PROCEEDING: | Civil Appeal from the Court of Common Pleas, Case No. 04 CV 1340 |
| JUDGMENT: | Dismissed |
| DATE OF JUDGMENT ENTRY: | December 4, 2006 |

APPEARANCES:

For Relator-Appellant

KENNETH W. OSWALT
ASSISTANT PROSECUTOR
20 South Second Street, 4th Floor
Newark, Ohio 43055

*Wise, P. J.*

**{¶1}** Appellant Robert Becker, Licking County Prosecutor, appeals from a declaratory judgment in favor of Appellees Kenneth L. Schwart, Nathan Harding, and David Metzger in the Licking County Court of Common Pleas. The relevant facts leading to this appeal are as follows.

**{¶2}** During the summer of 2004, copies of a composite image consisting of a pornographic photograph of a female, along with a copy of a newspaper-published photograph of a uniformed female Pataskala police officer, were mailed to a number of businesses and law enforcement agencies in the Licking County area. The apparent intent of document was to have the viewer draw the conclusion that the female in the pornographic photograph was the police officer seen in the other photograph and named in the text which accompanied the image. Several captions are on the document, including the following: “More pictures of your professional officer Cuming (sic) to a predominant business person near you!!”

**{¶3}** After an investigation, police officials named Appellees Schwart, Harding, and Metzger as suspects in the production or mailing of the document. In an attempt to determine the feasibility of filing certain criminal charges, i.e., those which would require the State to prove the pornographic photograph was “obscene” as an element of the offense, the prosecuting attorney filed a complaint for a declaratory judgment under R.C. 2907.36.

**{¶4}** On July 21, 2005, defendant Harding filed a motion for summary judgment, arguing that the photograph did not depict sexual conduct as defined by R.C. 2907.01(A). In a judgment entry filed December 19, 2005, the trial court granted said

motion for summary judgment in favor of appellees, concluding as follows: "As the photograph distributed in the case herein does not depict sexual conduct as defined by R.C. 2907.01 and the Fifth District Court of Appeals, this Court is bound to grant summary judgment." Judgment Entry at 2.

**{¶5}** On January 17, 2006, appellant filed a notice of appeal and herein raises the following sole Assignment of Error:

**{¶6}** "I. REVERSIBLE ERROR IS COMMITTED WHEN A MATERIAL OR PERFORMANCE IS DETERMINED, AS A MATTER OF LAW, NOT TO BE 'OBSCENE' SOLELY BECAUSE IT DOES NOT DEPICT ACTIVITY THAT MEETS OHIO'S STATUTORY DEFINITION OF 'SEXUAL CONDUCT' AS DEFINED BY R.C. 2907.01(A)."

I.

**{¶7}** In his sole Assignment of Error, appellant contends the trial court erred as a matter of law in finding the document in question not to be "obscene" solely because it does not portray "sexual conduct" as defined by statute.

**{¶8}** Appellant essentially asks us to effectively reconsider the two leading cases from this Court on the issue of the definition of obscenity: *State v. Minard* (December 10, 1990), Stark App.No. CA-8303, and *State v. Shuster* (Dec. 27,1994), Stark App.No. 94 CA 0074. However, for the reasons that follow, we find it unnecessary to reach this analysis.

**{¶9}** Appellant brought this action on October 26, 2004 pursuant to R.C. 2907.36(A)(1), which states that "[t]he chief legal officer of the jurisdiction in which there is reasonable cause to believe that section 2907.31 or 2907.32 of the Revised Code *is*

*being or is about to be violated*" has standing to file a declaratory judgment action to determine whether particular materials or performances are obscene or harmful to juveniles. (Emphasis added.) Paragraph four of appellant's complaint alleges as follows:

**{¶10}** "Defendant/respondents (hereinafter simply "defendants") engaged, as principle (sic) offenders or as accomplices, in certain activity that brought about the creation and/or dissemination of the said photographs, and accordingly violated Ohio Revised Code Sections 2907.31 and/or 2907.32. As a result, the defendants herein are potential defendants in the event plaintiff seeks criminal charges under Ohio Revised Code Sections 2907.31 and/or 2907.32."

**{¶11}** The complaint also alleges that the distribution of the copies of the pornographic document took place "[d]uring the month of July, 2004." As such, the complaint clearly alleges a fait accompli, as opposed to ongoing or future conduct as specifically called for in R.C. 2907.36(A)(1), supra. We find this attempted utilization of the statute in this manner highly questionable, if not impermissible.

**{¶12}** Moreover, appellant presently asserts that he filed the declaratory judgment action to address the question of "whether the pornographic photograph could be the basis for a criminal charge that required, as an element of the offense, that the State prove that the photograph was 'obscene.'" Appellant's Brief at 1. Nonetheless, whether such materials meet the established legal definition of obscenity is an issue properly determined by a future jury. See *State v. Keaton* (1996), 113 Ohio App.3d 696, 700, 681 N.E.2d 1375. "In an obscenity trial, the trier of fact must determine, among other factors, whether the average person applying contemporary community standards

would find that the work taken as a whole appeals to the prurient interest." S*tate v. Williams* (1990), 75 Ohio App.3d 102, 112, 598 N.E.2d 1250, citing *Miller v. California* (1973), 413 U.S. 15, 24. Assuming, arguendo, appellant seeks to pre-adjudicate a particular element of a potential criminal charge via a declaratory judgment pursuant to R.C. 2907.36, we would be unwilling to approve such a maneuver under said statute, as appellees would have the constitutional right to have all the elements of a pandering obscenity charge heard by a jury. It is a well-established rule of construction that statutes are to be interpreted so as to avoid a finding of unconstitutionality. See, e.g., *Hughes v. Registrar* (1997), 79 Ohio St.3d 305, 681 N.E.2d 430.

**{¶13}** Given the procedural history of this case, the judgment entry under appeal simply says what it says. While we understand appellant's wish to have this Court revisit its precedent on the obscenity standard for the purposes of future prosecutions, we are by no means required to render an advisory opinion or to rule on a question of law that cannot affect matters at issue in the present case. See *State v. Bistricky* (1990), 66 Ohio App.3d 395, 397, 584 N.E.2d 75. Therefore, we find no basis for further redress of the obscenity issue set forth in appellant's sole Assignment of Error.

**{¶14}** For the reasons stated in the foregoing opinion, the appeal of the judgment of the Court of Common Pleas, Licking County, Ohio, is dismissed.

By: Wise, P. J.

Gwin, J., concurs.

Edwards, J., dissents.

_____
HON. JOHN W. WISE

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

JWW/d 105

EDWARDS, J., DISSENTING OPINION

**{¶15}** The majority dismisses this appeal because "we are by no means required to render an advisory opinion or to rule on a question of law that cannot affect matters at issue in the present case." (¶13 Majority Opinion) The majority's decision is based on its conclusion that the appellant seeks to have the images in this case declared to be obscene so, that in a future criminal prosecution, appellant would not have to prove beyond a reasonable doubt to a jury that the images were obscene. In contrast, I think that the appellant is only trying to establish a different legal definition for obscenity than the legal definition for obscenity that currently exists in this appellate district. I do not think that the appellant is trying to make it unnecessary for the appellant, in a future criminal case, to prove to a jury beyond a reasonable doubt that the material in question is obscene when that jury applies the law to the facts of the case.

**{¶16}** More importantly, however, is that the appellant's intent in bringing the declaratory judgment in the case sub judice is irrelevant. How, or if, the appellant intends to use a judgment in the case sub judice in a future case is not our concern until that case is before us. The appellant's assignment of error asks us only to determine whether the trial court in the case sub judice committed reversible error, as a matter of law, when it found the material was not obscene because the material did not depict sexual conduct as defined in R.C. 2907.01(A).

**{¶17}** Therefore, I respectfully dissent from the majority's dismissal of this appeal.

**{¶18}** The majority opinion also suggests that the appellant's use of R.C. 2907.36(A)(1) may be impermissible based on the wording of the statute itself. The

statute states that it is to be used when there is reasonable cause to believe that section 2907.31 or 2907.32 of the Revised Code "is being or is about to be violated." The majority finds that since the material in question had already been distributed, then the use of 2907.36(A)(1) was highly questionable, if not impermissible. This is an issue not raised or argued in the briefs of the parties. And, to the extent the majority bases any of its decision on the foregoing interpretation of 2907.36(A)(1), I would find it to be an abuse of discretion by this court to rule on this case without allowing the parties an opportunity to brief the issue raised sua sponte by this court. [1] And that issue is whether 2907.36(A)(1) is the correct vehicle to use in a situation in which the materials have already been distributed.

**{¶19}** For the reasons stated above, I respectfully dissent from the analysis and disposition of this case by the majority.

_____

Judge Julie A. Edwards

JAE/rmn

[1] The Ohio Supreme Court has so stated regarding the constitutionality of a statute raised sua sponte by a Court of Appeals. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 522 N.E.2d 524. The Ohio Supreme Court also has stated that, "[i]n fairness to the parties, a Court of Appeals which contemplates a decision upon an issue not briefed should…give the parties notice of its intention and an opportunity to brief the issue." *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301, fn. 3, 313 N.E.2d 400, 67 O.O.2d 358.

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE, EX REL. ROBERT L. BECKER | : | |
| Relator-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| KENNETH L. SCHWART, et al. | : | |
| Respondents-Appellees | : | Case No. 06 CA 4 |

For the reasons stated in our accompanying Memorandum-Opinion, the appeal of the judgment of the Court of Common Pleas of Licking County, Ohio, is dismissed.

Costs assessed to Appellant State of Ohio.

_____
HON. JOHN W. WISE

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS