

[Cite as *George v. State*, 2010-Ohio-5262.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Thomas Tony George et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-4 (C.P.C. No. 05CVH-09-10035)
State of Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	
Thomas Tony George et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-97 (C.C. No. 2008-07764)
Department of Public Safety, State of Ohio,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on October 28, 2010

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*The Chandra Law Firm, LLC, Subodh Chandra, and Donald Screen, for appellants.*

*Richard Cordray, Attorney General, Charles E. Febus, Scott A. Longo, and William J. Cole, for appellee State of Ohio.*

*Richard Cordray, Attorney General, Randall W. Knutti, and Emily M. Simmons, for appellee Department of Public Safety.*

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APPEAL from the Franklin County Court of Common Pleas.  
APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} These two consolidated cases before this court involve appeals by three related individuals and their associated business entities. Plaintiffs-appellants Thomas Tony George, Joseph T. George, Robert Thomas George, Jobob, Inc., J S J Klub, LLC, Akron Harry Buffalo, Inc., Harry Buffalo North Olmsted, Inc., and Alfalfa Enterprises appeal from a judgment of the Franklin County Court of Common Pleas dismissing their civil complaint in its entirety. The same parties also appeal from a judgment of the Ohio Court of Claims in a parallel proceeding dismissing some, but not all, of the claims and issues in that matter. All claims are based at heart upon the individual plaintiffs' belief that they have been the object of retaliatory and abusive enforcement of state liquor laws.

{¶2} The defendants-appellees in the common pleas case are Kenneth L. Morckel, in his capacity as Director of the Ohio Department of Public Safety, the State of Ohio, and various other state officials and employees designated in the complaint as John Doe(s) 1-25. The complaint in the common pleas court asserts a wide variety of claims on different theories, each of which will be addressed below.

{¶3} The defendant-appellee in the Court of Claims case is the State of Ohio; that case now also involves a personal immunity determination, pursuant to R.C. 9.86, for the individual state employees.

{¶4} We will first address the appeal from the judgment of the Court of Claims, case No. 10AP-97. We sua sponte find that this matter lacks a final appealable order and that the appeal from the Court of Claims must be dismissed. Ohio appellate courts have jurisdiction to review only final appealable orders of lower courts within their districts.

Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2501.02. If an order is not a final appealable order, the appellate court lacks jurisdiction and the appeal must be dismissed. *Prod. Credit Assn. v. Hedges* (1993), 87 Ohio App.3d 207. Appellate courts have the duty to sua sponte examine any deficiencies in jurisdiction. *Price v. Jillisky*, 10th Dist. No. 03AP-801, 2004-Ohio-1221.

{¶5} An order that adjudicates fewer than all the claims or rights of all parties and does not meet the requirements of R.C. 2505.02 and Civ.R. 54(B) is not a final appealable order. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus. For such a judgment to be appealable, the trial court order must contain the express determination that there is "no just reason for delay." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7.

{¶6} The Court of Claims dismissed, either for lack of subject-matter jurisdiction or for failure to state a claim, various aspects of appellants' complaint: a claim for violation of constitutional rights brought under 42 U.S.C. 1983; claims for violations of various sections of the Ohio criminal code; a claim for violation of the Ohio Public Records Act; a claim for civil conspiracy; and various ancillary claims for declaratory judgment or injunctive relief brought in conjunction with a claim for monetary damages. The Court of Claims did not dismiss, however, the remaining aspect of the proceedings involving a determination of civil immunity for certain of the John Doe defendants, who have been subsequently identified.

{¶7} Pursuant to R.C. 2743.02, the Court of Claims has exclusive, original jurisdiction to determine whether a state employee is entitled to personal immunity under R.C. 9.86 against state law claims; that is, whether the state employee's conduct that

forms the basis for the complaint or action was "manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2743.02(F). While the Court of Claims in this matter found that it lacked jurisdiction over much of the balance of appellants' complaint, and in other instances found that the claims must be dismissed for failure to state a claim pursuant to Civ.R. 12(B)(6), the Court of Claims expressly ruled that it retained jurisdiction over the immunity questions and, thus, did not dismiss that aspect of the matter. The Court of Claims' order does not dispose of all claims and rights as to all parties in the case and does not contain Civ.R. 54(B) final appealable order language. The order of the Court of Claims is therefore not a final appealable order, and this premature appeal in case No. 10AP-97 must be sua sponte dismissed.

{¶8} Turning now to the appeal from the court of common pleas, case No. 10AP-4, appellants bring the following assignments of error:

- (1) The trial court erred in dismissing Appellants' claims for declaratory, injunctive, and other equitable relief.
- (2) The trial court erred in dismissing Appellants' 42 U.S.C. § 1983 claims against the Director of Public Safety.
- (3) The trial court erred in dismissing Appellants' 42 U.S.C. § 1983 claims against John Does 1-25.

{¶9} Before we address the merits of the appeal, we must consider whether we are faced with a final appealable order. Appellees have moved to dismiss the appeal from the Court of Common Pleas on this basis. Appellees cite *Dues v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 08AP-943, 2009-Ohio-1668, ¶9, and *Johnson v. H & M*

*Auto Serv.*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, ¶7, for the proposition that a dismissal without prejudice is generally not a final appealable order.

{¶10} The trial court order in the present case dismissed some claims for failure to state a claim, pursuant to Civ.R. 12(B)(6), and others for lack of subject-matter jurisdiction pursuant to Civ.R. 12(B)(1). The order does dispose of all claims against all parties in the common pleas case, and the trial court declared it a final appealable order. The trial court did expressly note that certain of the dismissals were without prejudice to refiling.

{¶11} Again, this court only has jurisdiction to hear appeals from final appealable orders. However, the trial court's own self-determination that it is issuing a final order does not dispose of the question. *Casey v. Reidy*, 180 Ohio App.3d 615, 2009-Ohio-415.

{¶12} The challenge to the appealability of the court of common pleas' order here hinges on those dismissals designated by the trial court as without prejudice, and whether applicable case law makes these appealable. In both *Dues* and *Johnson*, we held that a case dismissed without prejudice under Civ.R. 41(B)(1), on the basis that the plaintiff had failed to prosecute the matter, was not a final appealable order if the trial court designated the dismissal as without prejudice. Under those narrow circumstances, absent a statute of limitations bar to refiling, we held that a plaintiff so sanctioned for failure to prosecute suffered no permanent resolution of the action on the merits and was without impediment to refiling, thus making the dismissal non-appealable. While *Dues* has been widely cited for the proposition that *any* dismissal without prejudice cannot form the basis for a final appealable order,<sup>1</sup> we expressly do not adopt such a broad view of the precedent set

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<sup>1</sup> See, e.g., our decision in *White v. Unknown*, 10th Dist. No. 09AP-1120, 2010-Ohio-3031, another appeal from a dismissal for failure to prosecute.

therein. We accordingly will examine the dismissals in the present case and determine if they are immediately appealable, whether or not they are styled as without prejudice by the trial court.

{¶13} On the question of whether a dismissal for failure to state a claim pursuant to Civ.R. 12(B)(6) is a dismissal with or without prejudice, regardless of how designated by the trial court, we turn to Supreme Court precedent. In *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶17, the Supreme Court of Ohio stated that "a dismissal for failure to state a claim is without prejudice except in those cases where the claim cannot be pleaded in any other way." The court went on to state that "[i]n this particular case, the dismissal was not on the merits of [plaintiff's] claim. Instead, it merely went towards the sufficiency of the complaint—namely, the complaint's failure to include an affidavit of merit. Thus, the dismissal should have been without prejudice." *Id.* at ¶18.

{¶14} Less than a year later, the Supreme Court held the following in *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, ¶15: "[A] dismissal grounded on a complaint's 'failure to state a claim upon which relief can be granted' constitutes a judgment that is an 'adjudication on the merits.' As a result, *res judicata* bars refiling the claim." While *Arcadia Acres* thus clearly concludes that a dismissal, pursuant to Civ.R. 12(B)(6), is with prejudice to refiling, the opinion does not distinguish nor even mention the conflicting statements in *Fletcher*. Nonetheless, *Arcadia Acres* represents the latest clear pronouncement by the Supreme Court of Ohio on the issue and as such we are bound to follow it. To the extent that the trial court dismissed

certain causes of action because they failed to state a claim, those rulings are appealable.

{¶15} We now turn to those claims that were dismissed by the trial court, pursuant to Civ.R. 12(B)(1), for lack of subject-matter jurisdiction. Civ.R. 41(B)(4)(a) expressly provides that a dismissal for lack of subject-matter jurisdiction "shall operate as failure otherwise than on the merits," that is, without bar to refiling absent some other preclusive circumstance such as expiration of an applicable statute of limitations. Appellees argue that the trial court's dismissal in the present case is thus without prejudice, and for that reason not a final appealable order.

{¶16} While such a dismissal does not bar refiling in a different forum, presumably the correct one with jurisdiction over the matter, it certainly would make futile any attempt by the plaintiff to refile in the same forum the same claims even if the dismissal was labeled without prejudice. Thus, while such a dismissal is nominally without prejudice to refiling, it essentially precludes a refiling in the initial forum. "[A] dismissal without prejudice does not guarantee that a case can be refiled." *Brubaker v. Ross*, 10th Dist. No. 01AP-1431, 2002-Ohio-4396, ¶15. Nor, even if the case could be refiled, does a dismissal without prejudice permit subsequent appellate review of some aspects of the case. If the dismissal is not a final appealable order because it is without prejudice, but the case is refiled in the same forum, it could only, by operation of *res judicata*, be again dismissed on the same grounds, and there would never be the opportunity for subsequent appellate review of such rulings in a final order from that forum. There would be in such cases no mechanism to review the trial court's determination that it lacked jurisdiction over the matter in the first instance; the only remaining appeal would be from a

determination in a refiled matter in another forum, which appeal would likely not permit useful review of the initial court's determination that it lacked jurisdiction. Both judicial economy and fundamental fairness would seem to argue for immediate appellate review of such a dismissal. Even if designated as without prejudice, a dismissal may have "practical consequences," *Mihalcin v. Hocking College* (Mar. 20, 2000), 4th Dist. No. 99CA32, that is, it may in effect determine the action as to those parties and that forum, and we find in the present case that the dismissals for lack of subject-matter jurisdiction are appealable.

{¶17} We accordingly find that, while the trial court labeled the bulk of its dismissals as without prejudice, both the dismissals for lack of subject-matter jurisdiction and the dismissals for failure to state a claim should be reviewed immediately. We accordingly deny appellees' motion to dismiss the appeal.

{¶18} Turning to the merits of the trial court's decision, appellants' three assignments of error present interrelated issues and will be discussed together. We will instead independently address the trial court's dismissal of each cause of action presented in the complaint.

{¶19} Appellants' first cause of action seeks declaratory judgment on various grounds: violation of their civil rights under the Federal Civil Rights Act, 42 U.S.C. 1983; violations of numerous Ohio criminal statutes; violations of the Federal Hate Crime Statute, 18 U.S.C. 245; violation of Ohio law governing destruction of public records, R.C. 149.351 and 2921.12; and violation of Ohio's Liquor License Law requiring that inspections be reasonable, R.C. 4301.10(A)(6)(c). Appellants' second cause of action seeks injunctive relief of various forms, also based upon appellees' regulatory



enforcement actions against the appellant businesses. These grounds for declaratory and injunctive relief largely overlap many of the other independently stated causes of action in the complaint, and we will structure our discussion accordingly to avoid duplicate review of some issues.

{¶20} The trial court dismissed all of these claims for lack of subject-matter jurisdiction, finding that, with the exception of the Section 1983 action over which the Court of Claims could not have jurisdiction, they were ancillary to an eventual claim for money damages in the Court of Claims. To the extent the claim for declaratory and injunctive relief is predicated on a Section 1983 claim against individual defendants, the trial court dismissed the claim only for purposes of allowing a determination of pending immunity proceedings for the individual defendants by the Court of Claims. The court dismissed that aspect of the declaratory judgment claim that relied on a Section 1983 action against the state, ruling that, because such an action must be brought against government officials or employees not against the state itself, the action was not maintainable.

{¶21} To the extent that the claims for injunctive and declaratory relief are brought against the state, the Court of Claims has exclusive original jurisdiction, pursuant to R.C. 2743.03(A)(2), because these claims arise out of the same circumstances giving rise to the civil action for money damages. "If the claimant in a civil action against the state \* \* \* 'also files a claim for declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action.' " *State ex rel.*

*Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶29, quoting R.C. 2743.03(A)(2). We agree with the trial court that much of the declaratory and injunctive relief sought against the state arises out of the same circumstances that gave rise to the civil action for money damages that appellants intend to maintain in the Court of Claims, and, therefore, the Court of Claims has jurisdiction.

{¶22} To the extent that the state law claims for injunctive and declaratory relief are brought against individual defendants, the Court of Claims must make an immunity determination for those individuals.

{¶23} We must, however, reverse that part of the trial court's decision determining that it did not have subject-matter jurisdiction over claims for declaratory and injunctive relief asserting a violation of Ohio's laws governing disposal and transfer of public records, R.C. 149.351. That statute specifically provides that such an action will be brought in the court of common pleas. The court therefore erred in dismissing that claim for lack of subject-matter jurisdiction. The public records claim cannot, unlike the other claims for declaratory and injunctive relief, be considered and decided by the court of claims as ancillary to the claim against the state for money damages.

{¶24} We further reverse the trial court's determination that the declaratory judgment claims based on alleged Section 1983 claims against individual defendants must be dismissed pending an immunity determination by the Court of Claims. Our reasoning on this issue is fully developed in our discussion of appellants' fourth cause of action below.

{¶25} We next turn to appellants' third cause of action, which, in fact, does not state a claim, but merely announces that appellants intend to seek monetary damages in

the Court of Claims. As such, it was essentially a nullity before the court of common pleas, which did not err in dismissing it.

{¶26} Appellants' fourth cause of action states a claim under 42 U.S.C. 1983 for violation of appellants' constitutionally guaranteed rights. The trial court dismissed this as against the state, since a Section 1983 action cannot lie against the state or its agencies, and dismissed it against the individual defendants pending an immunity determination by the Court of Claims. In addition, the court dismissed the action against Kenneth R. Morckel because it concluded that the complaint failed to set forth any theory of liability beyond a bare assertion of respondeat superior responsibility for the acts of Morckel's subordinates. The court found that, as described in the complaint, Morckel, in his capacity as Director of Public Safety, had only a remote supervisory role and was not directly involved with the conduct giving rise to the action.

{¶27} With respect to the immunity proceedings, Section 1983 actions do not involve an immunity determination by the Court of Claims for two reasons. First, such actions are brought pursuant to federal law and may not be abrogated by Ohio's Court of Claims statute or related principles of individual immunity. *Adams v. Cox*, 10th Dist. No. 09AP-684, 2010-Ohio-415 (state immunity is inapplicable to whistleblower action brought under federal statute). Otherwise stated, "[p]ersonal immunity for state officers and employees under R.C. 9.86 is expressly limited to civil action arising under the laws of Ohio, so the exclusive, original subject matter jurisdiction afforded the Court of Claims by R.C. 2743.02(F) does not apply to federal claims." *Staton v. Henry* (Apr. 27, 1998), 12th Dist. No. CA97-10-184. Second, Section 1983 actions necessarily allege that the individual defendant, in his personal or official capacity, committed constitutional

violations "under color of law," which renders irrelevant any attempt to achieve an immunity determination under R.C. 9.86, which hinges on whether the state employee acted within the scope of his employment duties. *Rose v. Ohio Dept. of Rehab. & Corr.*, 173 Ohio App.3d 767, 2007-Ohio-6184, ¶30; *Mullins v. Moore* (Jan. 22, 1992), 3d Dist. No. 1-90-67. " 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or §1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.' " *Howlett v. Rose* (1990), 496 U.S. 356, 376-77, 110 S.Ct. 2430, 2443, quoting *Martinez v. California* (1980), 444 U.S. 277, 284, 100 S.Ct. 553, 558.

{¶28} We accordingly hold that the court of common pleas erred in referring the matter to the Court of Claims for an immunity determination on federal law claims. In continuing to so hold, we acknowledge and expressly disagree with cases such as *Martin v. Henderson*, 5th Dist. No. 07CA28, 2007-Ohio-5467, reaching a contrary conclusion.

{¶29} The court further erred in dismissing the action against Morckel, because the complaint sufficiently articulates a Section 1983 claim against him. To establish a 1983 claim, two elements must be shown: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, citing *Parratt v. Taylor* (1981), 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13. To satisfy the "under color of state law" requirement, a plaintiff must show that the conduct complained

of was taken pursuant to power possessed by virtue of state law and made possible only because the wrongdoer was clothed with the authority of state law. *Roe v. Franklin Cty.* (1996), 109 Ohio App.3d 772, 778. When a defendant occupies a supervisory position, liability under Section 1983 must be based upon allegations that the defendant "either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the [supervising official] at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays v. Jefferson Cty.* (C.A.6, 1982), 668 F.2d 869, 874; see also *Guess v. Wilkinson* (1997), 123 Ohio App.3d 430. Liability under Section 1983 may not be premised on the mere allegation that an individual had a right to control the actions of the individuals who actually committed the constitutional violations. *Hays* at 872.

{¶30} In the present case, the complaint does not present a respondeat superior theory of liability for Morckel. The complaint alleges that the "defendants," and this includes Morckel, engaged in various acts of misconduct that amounted to a constitutional deprivation of the plaintiffs' rights. There is no separate allegation of liability for Morckel based solely on his ultimate supervisory responsibility for the acts of the department's agents. Rather, the complaint alleges active participation in the misconduct. Taking the allegations as true, which we must do for purposes of a Civ.R. 12(B)(6) review, the complaint sufficiently sets forth a claim against Morckel, and the trial court erred in dismissing this claim.

{¶31} As a final aspect of our review of the trial court's disposition on the fourth cause of action, we find that the court did not err in dismissing the Section 1983 action as far as it names the State of Ohio as a defendant. A Section 1983 action may not be

maintained against the state or its agencies. *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170, 171.

{¶32} Appellants' fifth, sixth, eighth, ninth, and eleventh causes of action are premised on violations of criminal statutes, both federal and state. For none of the cited sections have appellants cited any language that causes these criminal statutes to create a private cause of action. In the absence of a specific provision to the contrary, criminal statutes generally do not create a private cause of action, but give rise only to a right of prosecution by the state. *Lewis v. J.E. Wiggins & Co.*, 10th Dist. No. 04AP-469, 2004-Ohio-6724; *McNichols v. Rennicker*, 5th Dist. No. 2002 AP 04 0026, 2002-Ohio-7215; *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280; *White v. Stafford* (Jan. 14, 1993), 8th Dist. No. 61838.

{¶33} While the trial court did not specify on what basis these claims were dismissed, the implied basis of failure to state a claim under Civ.R. 12(B)(6) is supported and the trial court did not err in dismissing these causes of action.

{¶34} Appellants' seventh cause of action is a restatement of the public records claim set forth in the declaratory judgment claim and must be reinstated before the court of common pleas for the same reasons given in our discussion above.

{¶35} Appellants' tenth and twelve causes of action, for civil conspiracy and unreasonable inspections, were properly dismissed for lack of subject-matter jurisdiction as they arise out of the same occurrences as the money claim for damages in the Court of Claims and the Court of Claims properly has exclusive original jurisdiction over them under R.C. 2743.03(A)(2).

{¶36} In summary, appellants' first assignment of error is sustained in part and overruled in part, and appellants' second and third assignments of error are sustained. The trial court's dismissal of all aspects of appellants' complaint is affirmed with the following exceptions. All claims based on 42 U.S.C. 1983 and brought against individual defendants were improperly dismissed. The claim against Kenneth R. Morckel did not fail to state a claim under Section 1983 as pleaded, and referral of the other claims against individuals to the Court of Claims for an immunity determination was improper. All claims related to violations of Ohio Public Records Law were improperly dismissed because the court of common pleas has exclusive, original jurisdiction under R.C. 149.351 to hear such actions. The judgment of the Franklin County Court of Common Pleas is therefore affirmed in part and reversed in part, and these matters are remanded to that court for further proceedings in accordance with law, consistent with this decision.

*Court of Claims' appeal dismissed.  
Court of Common Pleas' judgment affirmed in part  
and reversed in part, cause remanded.*

SADLER and FRENCH, JJ., concur.

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