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WILLIAM R. WOHLWEND,CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
CARROLL COUNTY, OHIO

MATTHEW SHELDON, Plaintiff, vs. OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 541- CARROLLTON EXEMPTED VILLAGE SCHOOLS, et al., Defendants.	)	CASE NO: 2025CVH30642 JUDGE MICHAEL V. REPELLA, II PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT STATE EMPLOYMENT RELATIONS BOARD'S RENEWED MOTION TO DISMISS ITSELF AS A PARTY

I. Introduction

Defendant State Employment Relations Board ("SERB") filed its renewed Motion to Dismiss Itself as a Party ("SERB MTD") on March 25, 2025. SERB argues, in sum, that it should be dismissed from this suit because Plaintiff misused Civ.R. 8(E)(2), alternative pleading, and because Plaintiff asks this Court to issue an advisory opinion. SERB's arguments fail for many reasons. First, dropping SERB from this action under Civ.R. 21 is improper because it remains a necessary party per Ohio's declaratory judgment statute. Second, Civ.R. 8(E)(2) expressly permits parties to "state as many separate claims or defenses as he has *regardless of consistency*." (Emphasis added.). Finally, although declaratory judgment actions cannot contravene the rule against advisory opinions, they are appropriate "to decide 'an actual controversy, the resolution of which will confer

certain rights or status upon the litigants.'" *Arnott v. Arnott*, 2012-Ohio-3208, ¶ 10, quoting *Corron v. Corron*, 40 Ohio St.3d 75, 79 (1988).

II. Background

Plaintiff Matthew Sheldon is a member of Defendant Union's bargaining unit. Am. Compl. ¶ 12. After years of dissatisfaction with the Union, Plaintiff resigned his union membership in December of 2023. *Id.* Despite Plaintiff's resignation, Defendant Union has continued to deduct union dues from Plaintiff's paychecks. *Id.* at ¶ 18. Plaintiff filed this suit to recover the dues Defendant Union has illegally taken from him since his resignation and to have this Court declare if it has jurisdiction over the claims set out in the Amended Complaint. *Id.* at ¶ 153.

III. Law and Argument

A. Standard of Review

> In construing a complaint upon a motion to dismiss for failure to state a claim, [the court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. . . . Then, before [the court] may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery.

(Citations omitted.) *Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192 (1988).

B. SERB is a necessary party to this action so Civil Rule 21 is inapplicable.

Ohio's declaratory judgment statute requires that "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." R.C. 2721.12(A). "[O]nly those persons who are legally affected are proper parties to a lawsuit," and "[a] party is legally affected by a cause of action if the party has a legal interest in rights that are

the subject matter of the cause of action." (Citation omitted.) *Rumpke Sanitary Landfill, Inc. v. State*, 2010-Ohio-6037, ¶ 14. Here, SERB has a legal interest in the Court's determination of SERB's jurisdiction.

"[W]hen declaratory relief is sought which involves the validity or construction of a statute and affects the powers and duties of public officers, such officers should be made parties to the action or proceeding in which the relief is sought." *City of Cincinnati v. Whitman*, 44 Ohio St.2d 58, 61 (1975). In *Whitman*, the Ohio Supreme Court held that the Director of Environmental Protection was a necessary party because the action sought to invalidate a fluoridization statute, and another statute required the "environmental protection agency [to] exercise general supervision of the operation and maintenance of the public water supply." *Id.* at 60. Likewise, this case seeks clarification of SERB's jurisdiction under R.C. 4117.02. This action's result will affect and define SERB's power to adjudicate cases like this one. Thus, under *Whitman*, SERB is a necessary party.

Further, Civ.R. 19(A) requires that a party be joined to a suit if "in [its] absence complete relief cannot be accorded among those already parties." Since Rule 12(B)(7) permits the court to dismiss a case if a necessary party is not joined per Rule 19(A), it follows that necessary parties must be brought in either at the pleading stage or after. As explained above, SERB is a necessary party, so Rule 19(A) also requires its presence in this case.

C. Civil Rule 8(E)(2) permits parties to plead in the alternative even when the alternative pleadings are inconsistent.

In Ohio,

> [a] party may set forth two or more statements of a claim or defense alternately….

> When two or more statements are made in the alternative and one of them if made independently would be sufficient, *the pleading is not made insufficient by the insufficiency of one or more of the alternative statements*.

(Emphasis added.) Civ.R. 8(E)(2). In other words, the rules permit parties to advance claims that are inconsistent with one another. *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.2d 88, 91–92 (1975). And Rule 8(A) lets parties demand relief in the alternative.

Here, Plaintiff pled and requested relief in the alternative to ensure that this Court could adjudicate this case regardless of its decision on SERB's jurisdiction. SERB's argument that Plaintiff's use of Rule 8(E)(2) is "erroneous" fails because it misunderstands the rule and its purpose. SERB MTD at 4. First, "[a]n important principle underlying the adoption of the Civil Rules is that the rules 'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" (Citation omitted.) *Iacono*, 42 Ohio St.2d at 91. Alternative pleading gives parties flexibility that is "essential to a full presentation of all relevant facts and legal theories at trial and the final settlement of disputes on their merits." 5 Wright & Miller, Federal Practice and Procedure, § 1282 (4th Ed. 2024).[1] The law is unclear whether this Court or SERB has jurisdiction over Plaintiff's claims. As such, Plaintiff plead in the alternative to preserve all of his potential claims and ensure his case can be adjudicated.

Second, Rule 8(E)(2) specifically contemplates situations like this one. In *Simbo Properties,*

[1] "Though federal law is not controlling with regard to interpretation of the Ohio Rules of Civil Procedure, it can be instructive where, as here, the rules are similar." *First Bank of Marietta v. Mascrete, Inc.*, 79 Ohio St. 3d 503, 508 (1997) discussing Wright & Miller, Federal Practice and Procedure generally.

Inc. v. M8 Realty, L.L.C., 2019-Ohio-4361, ¶ 23 (8th Dist.), the court agreed that the rule permitted the defendant to argue that either the parties did not have a contract, *or*, if there was a contract, that the plaintiff breached first. Those allegations were inconsistent—either one could be true but not both. And the factual foundations necessary for those allegations were also contradictory. Like the defendant in *Simbo*, Plaintiff advances two legal theories—the first that SERB has jurisdiction and the second that SERB does not have jurisdiction. The two theories are mutually exclusive, yes, but remain within Rule 8(E)(2)'s boundaries.

The Supreme Court has even endorsed parties pleading in the alternative when they do not know what claims they have. *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 301, fn. 6 (1994). In *Yaklevich*, the plaintiff brought both a malicious prosecution and an abuse of process claim. *Id.* The primary difference between the two was the presence of probable cause. *Id.*

> Where it is not clear whether there was probable cause to bring the claims in the underlying suit, one who allegedly is injured by the improper use of a civil action would be wise to allege both malicious prosecution and abuse of process in separate counts of his or her complaint.

Id. While Plaintiff knows what his contract-related claims are, Plaintiff cannot discern without a judicial determination if this Court or SERB has jurisdiction to address such claims and, therefore, has included alternate allegations against SERB to obtain that judicial declaration.

"Alternative I" and "Alternative II" reach different results on the same facts because the distinguishing feature is jurisdiction. Jurisdiction, like probable cause, is a legal question that requires judicial intervention. Pleading in the alternative, as Wright and Miller points out, allows

parties to lay out all the facts and legal theories in a case without unnecessarily constraining themselves from the start. Absent this Court's decision on SERB's jurisdiction, Plaintiff can never have his day in court. *See, e.g. Darling v. Am. Fedn. of State, Cnty., and Mun. Employees*, 2024-Ohio-2181, *appeal not allowed sub nom*. *Darling v. Am. Fedn. of State, Cty. & Mun. Emps.*, 243 N.E.3d 89 (Ohio 2024) and *Littlejohn v. AFSCME*, Case No. 24-03410 (Hamilton Cty. 2024).

When courts have rejected a party's attempt to plead in the alternative, it is often because the party attempted to use alternative pleading to recover twice. *See, e.g., Zoar View Wilkshire, LLC v. Wilkshire Golf, Inc.*, 2023-Ohio-2848, ¶ 26 (5th Dist.) (holding that a party cannot recover for both unjust enrichment and breach of contract). That is not the case here. Here, Plaintiff seeks to recover once—the only question in Plaintiff's alternative pleading is who should adjudicate the other claims in the Complaint. Plaintiff indicated clearly his intent to plead in the alternative by including two separate sections in the Amended Complaint marked "Alternative I" and "Alternative II." Yet the relief demanded on this issue is singular—declaratory judgment on SERB's jurisdiction.

Finally, both Defendant SERB and Defendant Ohio Association of Public School Employees/American Federation of State, County and Municipal Employees, Local 541-Carrollton Exempted Village Schools (the "Union") seek dismissal. *See* Union's Motion to Dismiss dated April 1, 2025. SERB claims it should not be in the case—refusing to admit or deny its jurisdictional authority. The Union claims that SERB, not this Court, has jurisdiction over the matters presented. Union's Motion to Dismiss at 1, 7–9. And as stated in the Amended Complaint, both SERB and other common pleas courts have each declined jurisdiction—telling plaintiffs such as Plaintiff here to seek relief elsewhere. Am. Compl. at ¶¶ 10, 40, 44. Thus, it is critical that SERB

declare to this Court SERB's jurisdictional position.

D. This case presents an actual case or controversy which requires SERB's participation for adjudication.

SERB correctly states that "[g]enerally, courts will not issue advisory opinions." SERB MTD at 4, citing *Kline v. Newton Falls*, 2023-Ohio-3841, ¶ 11 (11th Dist.). The Eleventh District in *Kline* determined that a petition for writ of prohibition was moot and, therefore, "Kline's writ action is no longer live nor justiciable." *Kline* at ¶ 12. *See also State ex rel. White v. Kilbane Koch*, 2002-Ohio-4848, ¶ 18 (dismissing an appeal as moot and, therefore, any decision thereon would be an advisory opinion). SERB has not claimed that the issues before this Court are moot because they are not. "[A] declaratory judgment is a binding adjudication of the contested rights of litigants, though unaccompanied by consequential relief, whereas an advisory opinion is merely the opinion of a judge or judges of a court, which adjudicates nothing and is binding on no one." *State ex rel. Draper v. Wilder*, 145 Ohio St. 447, 455 (1945). Plaintiff here seeks a binding adjudication on the issues presented, including the jurisdiction of this Court versus the jurisdiction of SERB. Thus, there is a live controversy between the parties.

Ohio's declaratory judgment statute authorizes anyone with an interest in a,

> written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule . . . contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule,

> ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

R.C. 2721.03. Plaintiff now seeks to clarify his rights under the supposed contract with Defendant Union *and* his rights under the statute that controls SERB, R.C. 4117.11.

In *Keller v. Columbus*, 100 Ohio St.3d 192, 196–197 (2003), the plaintiffs asked for a declaratory judgment that their union's collective bargaining agreement's record retention provisions violated state records laws. The Court reasoned that to the extent the CBA was valid, "the complaint states a claim upon which declaratory relief can be granted." *Id.* Now, Plaintiff seeks a judgment that the supposed contract between him and the Union violates Ohio contract law. Further, Plaintiff seeks a declaration of his rights under R.C. 4117.11 to know whether this Court can adjudicate those claims. That is the controversy before this Court.

To bring a declaratory action a plaintiff must have standing, and that "depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy * * *' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Cleaned up.) *Ohio Pyro, Inc. v. Ohio Dept. of Com.*, 115 Ohio St.3d 375, 381 (2007), citing *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178–179 (1973). Plaintiff's rights turn on the declaratory action. While Plaintiff did not bring any claims before SERB, similarly situated plaintiffs have brought similar claims before both SERB and courts of common pleas, only to be turned away. *See, e.g. Darling*, 2024-Ohio-2181 (10th Dist.) and *Littlejohn*, Case No. 24-03410 (Hamilton Cty. 2024). Without a declaration from this Court, Plaintiff and plaintiffs like him may never get their

day in court.[2]

There is an actual controversy over the proper forum to bring these types of claims.

IV. Conclusion

For the above reasons, SERB's Motion to Dismiss Itself as a Party should be denied.

Respectfully submitted,

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[2] SERB has not challenged this Court's authority to determine if SERB has jurisdiction to adjudicate the issues presented in the Amended Complaint and SERB certainly does not question the authority of this court to declare its own jurisdiction.

CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the above brief has been served by e-mail to counsel of record for Defendants this 7th day of April 2025.

/s/ Jay R. Carson
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