IN THE FIFTH DISTRICT COURT OF APPEALS
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,	)	CASE NO: 23 CAE 04 0028
	)	
Plaintiffs-Appellees,	)	
	)	On Appeal from the Delaware
vs.	)	County Court of Common Pleas
	)	CASE NO: 23-cv-H-02-0089
CITY OF COLUMBUS, et al.,	)	
	)	
Defendants-Appellants.	)	
	)	

REPLY OF PLAINTIFFS-APPELLEES TO DEFENDANTS-APPELLANTS' MEMORANDUM CONTRA TO MOTION FILED MAY 22, 2023

Now come Plaintiffs-Appellees, and in reply to Defendants-Appellants' Memorandum Contra Plaintiffs-Appellees' Motion to Dismiss ("Memo Contra") state as follows:

Defendants-Appellants ("Appellants") have ignored the relevant Fifth District precedents, mischaracterized Ohio Supreme Court cases, cited inapposite federal law, and mischaracterized what constitutes the status quo. They then improperly argue the merits of the case and introduce new evidence on appeal. Their arguments are unavailing.

I. The Delaware County Court of Common Pleas' order is not a final appealable order under R.C. 2505.02.

An order is only considered a final appealable order if it comports with R.C. 2505.02.[1] While the trial court's order disposed of several motions, Appellants' docketing statement and

[1] That statute, in relevant part, provides:
An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
* * *
(4) An order that grants or denies a provisional remedy and to which both of the following apply:
(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.
* * *
R.C. 2505.02(B).

Memo Contra only address the preliminary injunction. Accordingly, Appellants have waived any arguments regarding the appealability of the rest of the trial court's order. *See* App.R. 3(D)–(E).

The Fifth District has explained that "Ohio courts have found that 'a preliminary injunction which acts to maintain the status quo pending a ruling on the merits is not a final appealable order under R.C. 2505.02.'" *McHenry* v. *McHenry*, 5th Dist. Stark No. 2013CA00001, 2013-Ohio-3693, ¶ 18, quoting *Hootman* v. *Zock*, 11th Dist. Ashtabula No.2007–A–0063, 2007-Ohio-5619, ¶ 16. Appellants do not contest or even respond to this binding authority. Nor do they dispute or attempt to distinguish numerous other cases Appellees cite. *See* Mot. to Dismiss at 6–7. Further, Appellants do not dispute that the burden is on the appealing party to "demonstrate that it 'would have no adequate remedy from the effects of that [interlocutory] order on appeal from final judgment.'" *McHenry* at ¶ 16, quoting *Empower Aviation L.L.C.* v. *Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009-Ohio-6331, 924 N.E.2d 862, ¶ 18 (1st Dist.).

Appellants focus on *Preterm-Cleveland* v. *Yost*, 1st Dist. Hamilton No. C-220504, 2022-Ohio-4540, ¶ 21, *appeal allowed*, 169 Ohio St.3d 1457, 2023-Ohio-758, 204 N.E.3d 564. Appellants do not contest that under *Preterm-Cleveland* the "status quo" is the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Id.* In *Preterm-Cleveland*, a case challenging changes to Ohio's abortion laws, the court explained that the appropriate "status quo" point was the statutory status quo immediately before enactment of the challenged statute. *Id.* at ¶ 23. In this case, the Plaintiffs-Appellees challenged the City of Columbus' newly passed ordinances. The Delaware County Common Pleas Court recognized this and enjoined Appellants from enforcing the regulations enacted by the City of Columbus Ordinance No. 3176-2022 (the "Ordinance") to preserve the status quo. The Ordinance conflicts with R.C. 9.68 and disrupts the status quo by violating "a longstanding statute, which had the stated purpose of promoting clarity

and uniformity of regulation of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws." Decision, *City of Columbus* v. *State*, 10th Dist. No. 22AP-676, at 10 (Jan. 24, 2023).[2]

Rather than responding to this, Appellants argued that since the Tenth Circuit accepted jurisdiction of the appeal of the preliminary injunction issued in the Franklin County case (No. 22AP-676), the preliminary injunction in this case must also be appealable. But the opposite is true. First, in that case, the Ordinance is not at issue. Second, the common pleas court in that case upset the status quo by ruling the long-standing R.C. 9.68 to be unconstitutional. That law was the status quo and the common pleas court struck down the status quo—it did not maintain it. Decision, *City of Columbus* v. *State*, 10th Dist. No. 22AP-676, at 10 (Jan. 24, 2023) ("By enjoining not only the portions of HB 228 amending R.C. 9.68, but the entire statute, the trial court's preliminary injunction undoubtedly altered the status quo."). The Franklin County case disproves Appellants' argument. *See* Mot. to Dismiss at 8–9.

The Fairfield County Court of Common Pleas is even more inapplicable. The State of Ohio appealed the dismissal of the State's R.C. 9.68 challenge on jurisdictional grounds, not the grant—or denial—of a preliminary injunction. Op. & Entry Regarding Defs.' Mot. to Dismiss, *State* v. *City of Columbus*, Fairfield C.P. No. 2022-cv-00657 (Jan. 5, 2023).

Appellants other cases do not show otherwise. In *Almasoodi*, this Court determined that a judgment granting a motion for sanctions was a final appealable order. *Almasoodi* v. *J. Harris Construction Inc.*, 5th Dist. Delaware No. 22 CAE 06 0053, 2023-Ohio-895, ¶ 51. A preliminary

[2] The Ohio Supreme Court and numerous Ohio courts of appeals have upheld R.C. 9.68, and it has continued to be the status quo. *Ohioans for Concealed Carry, Inc.* v. *City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967; *City of Cleveland* v. *State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370; *see also Kellard* v. *Cincinnati*, 2021-Ohio-1420, 171 N.E.3d 868 (1st Dist.); *Ohioans for Concealed Carry, Inc.* v. *Oberlin*, 2017-Ohio36, 72 N.E.3d 676 (9th Dist.).

injunction, however, is not the same as a motion for sanctions. As the Delaware County Common Pleas Court's order indicates, the preliminary injunction is an ongoing issue. J.E. at 30 ("[T]his preliminary injunction will remain in effect until it is dissolved or modified by me or until this case is resolved on the merits."); *see also Cherry Lane Dev., L.L.C.* v. *Walnut Twp.*, 5th Dist. Fairfield No. 10-CA-28, 2011-Ohio-425, ¶ 19-20 (These notations "indicat[e] the trial court recognized it had not disposed of all of the claims."). The court left open the opportunity for dissolving or modifying the preliminary injunction. Contrary to the trial court's actions on the preliminary injunction, this Court noted in *Almasoodi* that "[t]here was nothing left to be determined on the question of sanctions * * *." Id. at ¶ 49.

In *Lewis* v. *Ohio High School Athletic Assn.*, 5th Dist. Stark No. 2015CA00009, 2015-Ohio-3459, ¶ 28, this Court did not assume—as Appellants put it—that a preliminary injunction meets the first provision of 2505.02(B)(4). The court did not address the first provision of 2505.02(B)(4) because 2505.02(B)(4)(b) resolved the appeal. The court found that "[t]he [preliminary injunction] judgment entry is not final and appealable to the extent it enjoins appellants from taking action against the Plain Local School District, as they have an adequate remedy at law on appeal from final judgment. The judgment is moot as to appellee [ ] Lewis." *Id.* at ¶ 31. There was no need for the court to address the first provision of 2505.02(B)(4).

In *N.L. Const. Corp.*, the common pleas court denied the preliminary injunction motion and "held that its order was a final appealable order and that there was no just cause for delay." *N.L. Constr. Corp.* v. *Freed Hous. Corp.*, 5th Dist. Stark No. 2011CA00192, 2012-Ohio-350, ¶ 13; *see* Civ.R. 54(B). In this case the common pleas court did not include 54(B) language and the court contemplated ongoing review of the injunctive relief.

The Ohio Supreme Court in *Village of Newburgh Heights* v. *State*, 2022-Ohio-1642, 168

Ohio St. 3d 513, 200 N.E.3d 189, recognized without explanation that the court of appeals found jurisdiction in the context of an order granting in part and denying in part a motion for a preliminary injunction. Since it did not analyze the issue of appealability this case is unhelpful in analyzing jurisdiction in this case. However, apparently the appeals court found R.C. 2505.02(B)(4) applicable because appellants there—unlike Appellants here—argued "that they will sustain losses not recoverable following final judgment *in the form of funds and personnel.*" (Emphasis added.) J.E., *Newburgh Hts.* v. *State*, 8th Dist. No. 109106 (Nov. 13, 2019).

Further, Appellants have not met their burden to "demonstrate that it 'would have no adequate remedy from the effects of [an interlocutory] order on appeal from final judgment.'" *McHenry* 2013-Ohio-3693, at ¶ 16, quoting *Empower Aviation L.L.C.* v. *Butler Cty. Bd. of Commrs.*, 185 Ohio App.3d 477, 2009–Ohio–6331, 924 N.E.2d 862, ¶ 18 (1st Dist.). Appellants claim that the City of Columbus will be irreparably harmed if it cannot immediately appeal the preliminary injunction but point to nothing in the record to support that.

Appellants point to federal cases, which are neither controlling nor applicable. Federal law on the appealability of preliminary injunctions diverges from Ohio case law. Under federal law, orders granting a preliminary injunction are always appealable. 28 U.S.C. 1292(a)(1) ("[T]he courts of appeals shall have jurisdiction of appeals from * * * interlocutory orders * * * granting * * * injunctions."). Ohio's corresponding statute allows such appeals in only limited situations.

In any event, the Appellants' claim that the Supreme Court stated that any "court order that enjoins the enforcement of a law always inflicts irreparable harm on the sovereign * * *," Memo Contra at 6, is misleading. Appellants' cited cases do not say that. The Supreme Court actually stated that "*[u]nless that statute is unconstitutional*, this would seriously and irreparably harm the State * * * ." (Emphasis added.) *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018). In this case, the

Delaware County Court of Common Pleas found that the enjoined regulations are—in fact—unconstitutional. This court may eventually address the merits of that decision, but this is not the time for that argument.

Appellants other inapplicable federal cases only provide guidance in the context of stays of orders, not appealability of preliminary injunctions. This Court is better served looking to relevant Ohio state cases, which show that the preliminary injunction here is not appealable. *See Preterm-Cleveland*, 2022-Ohio-4540, at ¶ 16 ("find[ing] the federal cases relied upon by [Appellants] inapposite, as they shed no light on Ohio's statutory regime[,]" and finding that the court of appeals did not have jurisdiction over the appeal of a preliminary injunctions).

II. Appellants argument on the merits is premature.

Appellants next argue the merits of the case, apparently with the belief that the court should examine the merits in deciding what constitutes the status quo. The cases cited above show that is not so. The status quo prior to the enactment of the Ordinance is not based on the validity of the Ordinance; the status quo here is the state of the law before the city enacted the Ordinance.

In any event, Appellants fundamentally misunderstand the trial court's decision regarding *Arnold* and *Arnold* itself. Contrary to Appellants' arguments, the trial court did not "determine[] on its own that *Arnold* no longer applies * * * ." Memo Contra at 7. But the common pleas court followed *Arnold's* directive that "[i]n the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall." (Emphasis added.) *Arnold* v. *Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). The *Arnold* court commanded that Article I, Section 4 could not be interpreted to provide less protection than the Second Amendment once it was incorporated. *Id.*; *see also Stolz* v. *J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 30 (Ohio's constitutional right to bear arms grants greater protection than the Second Amendment).

Therefore, the common pleas court was obligated to apply the holding and reasoning of *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 142 S.Ct. 2111, 2190–130, 213 L.Ed.2d 387 (2022)—which it did. Appellants' other cases on the topic of Article I, Section 4 are equally irrelevant to the appealability of the Mot. to Dismiss and ultimately will not help them on the merits either.

III. Appellants efforts to submit new evidence should be denied.

Finally, Appellants seek to introduce new evidence never submitted in the trial court to support a claim that a preliminary injunction in this case "causes irreparable harm to the City" because the city cannot enforce its "safe storage ordinance." This supposed evidence of irreparable harm is neither admissible or probative. Appellants never submitted this evidence in the common pleas court to support a claim of irreparable harm before that court issued its decision. "Ohio law is clear that [an appellate court] must limit [its] review on appeal to the record before the court at the time of judgment: 'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings and then decide the appeal on the basis of the new matter.'" *Baker* v. *Senior Emergency Home Repair EOPA*, 6th Dist. Lucas No. L-14-1203, 2015-Ohio-3083, 2015 WL 4600521, ¶ 11, quoting *State* v. *Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. See Appellees' Memorandum Contra of Defendants-Appellants' Motion for Leave to Manually File Flash Drive, filed concurrently herewith.

IV. Conclusion

The Delaware County Court of Common Pleas order granting a preliminary injunction is not a final appealable order and Appellees request that this Court dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Reply of Plaintiffs-Appellees has been served via e-mail this 8th day of June 2023 upon the following counsel:

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