The Supreme Court of Ohio

State of Ohio, ex rel., John Paul Gomez

v.

Judge Dan Favreau, John W. Nau, Clerk Karen Starr, Judge David Bennett, Travis Stevens, Magistrate Erin Welch, Judge Eric Martin, and Allen Bennett

Case No. 2024-0624

IN MANDAMUS, PROHIBITION, AND PROCEDENDO

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus, prohibition, and procedendo.

Upon consideration of the motion to declare relator a vexatious litigator of respondents Morgan County Court of Common Pleas Judge Dan W. Favreau, Noble County Court of Common Pleas Judge John W. Nau, and Noble County Clerk of Courts Karen Starr, it is ordered by the court that the motion is granted and John Paul Gomez is found to be a vexatious litigator under S.Ct.Prac.R. 4.03(B). Accordingly, it is ordered that John Paul Gomez is prohibited from continuing or instituting legal proceedings in this court without first obtaining leave. Any request for leave shall be submitted to the clerk of this court by delivery service, by mail addressed to the Clerk of the Supreme Court, or in person for the court's review.

It is further ordered by the court that respondents' motions to dismiss amended complaint are granted.

Accordingly, this cause is dismissed.

Sharon L. Kennedy
Chief Justice

Appendix A

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

John Paul Gomez,
Plaintiff

v.

David Ryan et al.,
Defendant

Civil Action No. 2:23-cv-1058

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☒ other: pursuant to the Order signed by Chief Judge Sarah D. Morrison.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☒ decided by Judge Sarah D. Morrison on a motion for _____ .

Date: 09/19/2024

CLERK OF COURT

s/Maria Rossi Cook

Signature of Clerk or Deputy Clerk

App AA 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN PAUL GOMEZ,

Plaintiff,

v.

DAVID RYAN, *et al.*,

Defendants.

Case No. 2:23-cv-1058
Judge Sarah D. Morrison
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

John Paul Gomez filed this suit, without assistance of counsel, alleging that various individuals within Ohio's law enforcement and judicial institutions interfered with his constitutional rights as a parent. On review of his Amended Complaint, two things become clear: Mr. Gomez is a prolific litigant, and Mr. Gomez loves his children. But the law provides little recourse for the pain of a parent watching their child struggle through life.

Eleven motions are now ripe and pending, including motions to dismiss by six of the eight named Defendants. For the reasons below, those motions to dismiss are **GRANTED**. Mr. Gomez's motions for leave are **DENIED**, as is his motion for preliminary injunction.

I. BACKGROUND

Mr. Gomez filed individual- and official-capacity claims against Patrolman David Ryan, Probation Officer Travis Stevens, Judge Dan Favreau, Clerk of Court Karen Starr, Judge John Nau, Judge David Bennett, and Magistrate Erin Welch,

App
AA2

along with claims against the Cambridge Police Department. (Am. Compl., ECF No. 8, ¶ 1.) He alleges that these Defendants, "individually and/or collectively," acted under color of law to deprive him of his constitutional rights to parent and raise his children, to due process, and to effective assistance of counsel. (*Id.*, ¶ 4.) The Amended Complaint spans nearly 70 pages, includes 145 pages of exhibits, and references several state-court dockets and decisions. For purposes of the pending motions, the Court accepts as true the factual allegations in Mr. Gomez's Amended Complaint. *See Gavitt v. Born*, 835 F.3d 623, 639–40 (6th Cir. 2016). Those allegations are summarized below.

Mr. Gomez and his ex-wife, Dagmar Williams, have two children together—E.G. and N.G. (Am. Compl., ¶ 3.) Mr. Gomez and Mrs. Williams litigated their divorce and child custody cases in Noble County (OH) Court of Common Pleas. (*Id.*, ¶ 19.) But there have also been judicial proceedings in the Guernsey County (OH) Court of Common Pleas Juvenile Division, Muskingum County (OH) Court of Common Pleas Juvenile Division, Ohio Fifth District Court of Appeals, Ohio Seventh District Court of Appeals, Ohio Supreme Court, and Allegheny County (PA) Court of Common Pleas Family Division. (*Id.*, *passim*.)

Judge Nau of Noble County granted Mr. Gomez and Mrs. Williams a divorce on February 17, 2006. (*Id.*, ¶ 19.) He awarded Mrs. Williams custody of the children. (*Id.*) Concerned about his ex-wife's ability to care for the children, and certain that they would be better off living with him in Pennsylvania, Mr. Gomez appealed the custody determination. (*Id.*; *see also id.*, ¶¶ 63–64.) The Seventh District affirmed

Judge Nau's decision. (*Id.*, ¶¶ 19–20.) Judge Favreau, a visiting judge in Noble County, later took over the case. (*Id.*, ¶ 39.)

For years, Mr. Gomez pursued custody in litigation and appeals. Custody of E.G. was before a court as recently as 2019. (*Id.*, ¶ 12(t).) Judge Kathryn Hens-Greco, of Allegheny County, issued a Protection from Abuse Order ("PFA") against Mrs. Williams on October 1, 2019. (*Id.*, ¶ 12(r).) Mrs. Williams was later arrested for violating the PFA. (*Id.*, ¶ 12(x).) After one such arrest on October 30, 2019, Judge Bennett of Guernsey County (in consultation with Judge Favreau) released E.G. to Mrs. Williams, despite the PFA. (*Id.*, ¶ 164.)

Adding to Mr. Gomez's legal troubles, delinquency proceedings began against E.G. in December 2019. (*Id.*, ¶ 143.) Judge Bennett presided over the case and adjudicated E.G. delinquent. *See In the Matter of E.G.*, Nos. 20CA12, 20CA16, 2021 WL 1100694, at ¶ 3 (Ohio Ct. App. Mar. 22, 2021). Mr. Gomez appealed to the Fifth District, which affirmed. *Id.* ¶ 32. A second delinquency case was filed against E.G. in March 2021. (Am. Compl., ¶ 107.) Judge Bennett first heard the case, but later transferred it to Muskingum County. *See In the Matter of E.G.*, No. CT2022-0058, 2023 WL 3018258, at ¶ 4 (Ohio Ct. App. Apr. 19, 2023). Magistrate Welch then presided over the action, where she received E.G.'s guilty plea and sentenced him to 119 days of time served. *Id.* ¶ 5. (*See also* Am. Compl., ¶ 202.) E.G. then appealed to the Fifth District, which dismissed the appeal. 2023 WL 3018258, at ¶ 15. The Ohio Supreme Court declined review. (Am. Compl. ¶ 224.) Mr. Gomez tried to help his

son in the litigation—he was ultimately accused of engaging in the unauthorized practice of law. (*Id., e.g.*, ¶ 178.)

Mr. Gomez asserts that E.G.'s constitutional rights were violated during these proceedings, including that he was deprived of due process and effective assistance of counsel. (*Id.*, ¶ 116.) Mr. Gomez also asserts that several defendants colluded to charge E.G. after a series of events set off by a 9-1-1 call—the substance of which Mr. Stevens allegedly mispresented to Judge Bennett. (*Id., e.g.*, ¶ 177.) A recording of the 9-1-1 call was made available to Mr. Gomez in February 2023. (*Id.*, ¶116.) Soon after, he filed this action.

II. PROCEDURAL MOTIONS

Three of Mr. Gomez's pending motions are procedural. First, Mr. Gomez moves for leave to exceed 21 pages. (ECF No. 64.) Because there is no rule or Court order limiting the number of pages for response briefs, the motion is **DENIED as moot**. Next, Mr. Gomez moves for leave to file sur-replies. (ECF Nos. 71, 75.) The Court has discretion to deny leave to file a sur-reply when the opposing party's reply did not raise new legal arguments or introduce new evidence. *Modesty v. Shockley*, 434 F. App'x 469, 472 (6th Cir. 2011) (citing *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481–82 (6th Cir. 2003)); *see also* S.D. Ohio Civ. R. 7.2(a)(2). Defendants' reply briefs do not raise new legal or factual arguments. Thus, there is no reason for a sur-reply. Mr. Gomez's motions are **DENIED**.

III. MOTIONS TO DISMISS

A. Legal Standards

Though the specific arguments presented in the motions to dismiss vary by Defendant, they all invoke Rules 12(b)(1) and 12(b)(6).

1. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal when a court lacks subject matter jurisdiction. Without subject matter jurisdiction, a federal court lacks authority to hear a case. *Thornton v. Sw. Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir. 1990). "Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack "questions merely the sufficiency of the pleading"—thus the trial court takes the allegations of the complaint as true. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A factual attack challenges the factual existence of subject matter jurisdiction, such that no presumption of truth applies to the alleged facts. *Ritchie*, 15 F.3d at 598. When subject matter jurisdiction is challenged, "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A motion to dismiss under the *Rooker-Feldman* doctrine is a facial attack on subject matter jurisdiction. *See Tropf v. Fid. Nat. Title Ins. Co.*, 289 F.3d 929, 936–37 (6th Cir. 2002); *King v. CitiMortgage, Inc.*, No. 2:10-CV-01044, 2011 WL 2970915, at *5 (S.D. Ohio July 20, 2011) (Graham, J.). The *Rooker-Feldman* doctrine originates from two Supreme Court decisions: *Rooker v. Fid. Tr. Co.*, 263

U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In each case, the Court held that federal district courts lack appellate jurisdiction over state court decisions. *Rooker*, 263 U.S. at 415–16; *Feldman*, 460 U.S. at 482.

The Supreme Court revisited the *Rooker-Feldman* doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). In *Exxon*, the Supreme Court stated that the *Rooker-Feldman* doctrine

> is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

Id. at 284. Further, "[i]f a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.* at 293 (internal quotations and citations omitted) (cleaned up). The Sixth Circuit thus applies *Rooker-Feldman* "only when a plaintiff complains of injury from the state court judgment itself." *Coles v. Granville*, 448 F.3d 853, 858 (6th Cir. 2006). In its view, "[t]he key point is that the source of the injury must be from the state court judgment itself; a claim alleging another source of injury is an independent claim." *McCormick v. Braverman*, 451 F.3d 382, 394 (6th Cir. 2007).

2. Rule 12(b)(6) – Failure to State a Claim

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the claim is and

the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal alteration and quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Supreme Court has explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555.) "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In reviewing a motion to dismiss, the Court "construe[s] the complaint in the light most favorable to the plaintiff[.]" *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

These standards apply equally when the plaintiff is *pro se*. Although a *pro se* litigant is entitled to a liberal construction of his pleadings and filings, he still must do more than assert bare legal conclusions, and the "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a

recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

B. Analysis

1. This Court lacks subject-matter jurisdiction to hear the claims against the Judicial Officer Defendants.

Four of the named Defendants are judicial officers within the Ohio state courts. David Bennett[1] is a Guernsey County Juvenile Court Judge; Erin Welch[2] is a Magistrate in the Muskingum County Court of Common Pleas, Juvenile Division; John Nau[3] (now retired) was a Noble County Court of Common Pleas Judge; and Dan Favreau[4] (also retired) was a Morgan County Court of Common Pleas Judge. Judges Nau and Favreau took part in Mr. Gomez's divorce and custody litigation. Judge Bennett and Magistrate Welch took part in E.G.'s delinquency case. The Court will call them the Judicial Officer Defendants.

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[1] Mr. Gomez alleges that Judge Bennett improperly released E.G. to Mrs. Williams (Am. Compl., ¶ 100); appointed counsel that did not diligently represent E.G. (*id.*, ¶¶ 102–04, 110); and unlawfully discriminated against Mr. Gomez by ruling in Mrs. Williams's favor (*id.*, ¶¶ 115–17, 122, 194).

[2] Mr. Gomez alleges that Magistrate Welch improperly detained E.G. (*id.*, ¶ 202); violated E.G.'s speedy trial rights (*id.*, ¶ 205); and appointed counsel and a guardian ad litem for E.G. that were ineffective (*id.*, ¶ 204).

[3] Mr. Gomez alleges that Judge Nau unlawfully discriminated against him by ruling in Mrs. Williams's favor. (*See, e.g.*, *id.*, ¶¶ 7–8.) He also alleges that Judge Nau "handpicked Judge Favreau to continue the pattern" of unlawful discrimination. (*See, e.g.*, *id.*, ¶ 24(h).)

[4] Mr. Gomez alleges that Judge Favreau improperly heard his case (*id.*, ¶ 12(a)) and unlawfully discriminated against him by ruling in Mrs. Williams's favor. (*Id.*, ¶¶ 10, 12(a), 37, 58.)

Mr. Gomez's claims against the Judicial Officer Defendants are all based on contentions that they erred in their rulings in the state court proceedings before them. Those rulings are the source of Mr. Gomez's alleged injury.[5] Though styled as § 1983 claims vindicating his parental rights, Mr. Gomez functionally seeks appellate review of the Judicial Officer Defendants' judgments in state-court proceedings. This Court lacks jurisdiction to do so. Because the claims fall under *Rooker-Feldman*, they must be **DISMISSED**. The Judicial Officer Defendants' Motions to Dismiss (ECF Nos. 44, 45, 55, 56) are **GRANTED**.

2. The Court Employee Defendants are immune from suit.

Mr. Stevens and Ms. Starr also move for dismissal.[6] They are both state-court employees: Mr. Stevens as a Guernsey County Juvenile Court Probation Officer, and Ms. Starr as Noble County Clerk of Courts. The Court will thus refer to them as the Court Employee Defendants. Though the claims against Mr. Stevens and Ms. Starr are factually unrelated, they fail for the same legal reasons.

a) Statute of Limitations

First, parts of Mr. Gomez's claims are barred by the statute of limitations. An individual may sue for a violation of his constitutional rights under 42 U.S.C.

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[5] Even if this Court were to find that *Rooker-Feldman* poses no jurisdictional bar to Mr. Gomez's claims, the Judicial Officer Defendants are each entitled to absolute judicial immunity. *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988) ("It is well established that judges and other court officers enjoy absolute immunity from suit on claims arising out of the performance of judicial or quasi-judicial functions.").

[6] Mr. Stevens filed an amended motion to dismiss clarifying that he seeks to dismiss the Amended Complaint. His original Motion to Dismiss (ECF No. 10) is thus **DENIED as moot**.

§ 1983. "Section 1983 claims brought in a federal court in Ohio are subject to the two-year statute of limitations period set forth in Ohio Rev. Code § 2305.10." *Ewing v. O'Brien*, 115 F. App'x 780, 783 (6th Cir. 2004); *see also Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989). Mr. Gomez filed this action on March 24, 2023. (ECF No. 1.) His claims against the Court Employee Defendants are thus **DISMISSED** to the extent that they arose before March 24, 2021.

That leaves Mr. Gomez's allegations that:

- Mr. Stevens mischaracterized a 9-1-1 call during a December 9, 2019 detention hearing. (Am. Compl., ¶¶ 124, 126.) Arguably, Mr. Gomez did not discover the alleged misrepresentation until he received a recording of the call in February 2023. (*See id.*, ¶¶ 130–31.) *See Dibrell v. City of Knoxville*, 984 F.3d 1156, 1162 (6th Cir. 2021) (noting that Sixth Circuit § 1983 caselaw generally applies the "discovery rule: that the claim accrues when the plaintiff knows of, or should have known of, that cause of action").
- Ms. Starr failed to immediately provide Mr. Gomez with certain public records in May 2023 (after this action was filed, but before the operative Amended Complaint). (*Id.*, ¶¶ 84–92.)

b) Eleventh Amendment Immunity

Next, the Eleventh Amendment bars Mr. Gomez's official-capacity claims against the Court Employee Defendants. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. CONST. Amend. XI. "This immunity is far reaching. It bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, by citizens of another state, foreigners or its own citizens." *Thiokol Corp. v. Dep't of Treas.*, 987 F.2d 376, 381 (6th Cir. 1993) (internal

citations omitted). The prohibition extends to official-capacity claims because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Sixth Circuit has held that Ohio courts "are arms of the state for purposes of § 1983 liability and the Eleventh Amendment." *Williams v. Leslie*, 28 F. App'x 387, 389 (6th Cir. 2002). And so are those courts' clerks and probation officers, "at least when they conduct the business of the court or other duties mandated by state law." *Id.*; *see also Beckham v. City of Euclid*, No. 1:14 CV 696, 2015 WL 9480682, at *7 (N.D. Ohio Dec. 29, 2015).

Mr. Gomez's official-capacity claims against the Court Employee Defendants are thus **DISMISSED**.

c) Qualified Immunity

Finally, the Court Employee Defendants are entitled to qualified immunity against the individual-capacity claims. Courts ask two questions to determine whether a defendant is entitled to qualified immunity: first, whether the facts alleged "make out a violation of a constitutional right" and, second, whether that right was "'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). It does not matter which question is addressed first; both must be satisfied for immunity to attach. *Id.* at 236. When a defendant raises qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the defense. *Baker v. City of Hamilton*, 471 F.3d 601, 605 (6th Cir. 2006). At the motion-to-dismiss stage, the relevant inquiry is whether the plaintiff has alleged "facts which, if true, describe a violation of a

clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known." *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986).

(1) Clearly Established Constitutional Right

Mr. Gomez alleges that the Court Employee Defendants deprived him of the right to parent his children.[7] The right of parents to raise their children is a due process right which is clearly established. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (explaining that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *but see Kottmyer v. Maas*, 436 F.3d 684, 690 (6th Cir. 2006) (noting that, while "the Supreme Court has yet to articulate the parameters of this right[,]" it is "clear that the right to family integrity, while critically important, is neither absolute nor unqualified").

(2) Violation Thereof

The rights at issue are Mr. Gomez's rights as a parent. The Sixth Circuit recently held that "substantive due process claims based on the right to family integrity require that the [defendant] state official act with a culpable state of mind directed at the family relationship." *Chambers v. Sanders*, 63 F.4th 1092, 1100 (6th

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[7] It is unclear whether Mr. Gomez seeks to vindicate another due process right as against Ms. Starr. (*See* Am. Compl., ¶ 96 ("As I litigate this cause, Ms. Starr cannot continue to deny me access to record and information including all named Defendants herein. This trend of depriving me information I am entitled denies me due process.").) It is also unclear whether that other due process right is substantive or procedural. In any case, there are no facts alleged that support an inference that Ms. Starr violated Mr. Gomez's substantive or procedural due process rights.

Cir. 2023). "[A]ctions that collaterally impact the family relationship" will not support a claim to vindicate those rights. *Id.*; *see also id.* at 1101 ("[M]erely negligent conduct cannot give rise to a due process violation. *A fortiori*, a mere incidental harm cannot give rise to due process violation.") (citations omitted). None of the facts alleged in Mr. Gomez's Amended Complaint support an inference that Ms. Starr or Mr. Stevens *directed* their actions *at* the relationship between Mr. Gomez and his son. Their actions may have affected Mr. Gomez in his capacity as E.G.'s father—but, if they did, it was incidental to their purpose. Thus, the Amended Complaint fails to allege a violation of Mr. Gomez's clearly established constitutional rights.

The Court Employee Defendants enjoy qualified immunity from the individual-capacity claims alleged. Those claims must be **DISMISSED**. Ms. Starr's Motion to Dismiss (ECF No. 51) and Mr. Stevens's Amended Motion to Dismiss (ECF No. 15) are **GRANTED**.

IV. MOTION FOR PRELIMINARY INJUNCTION

Mr. Gomez filed a Motion for Preliminary Injunction seeking to compel Magistrate Welch to produce court recordings. (ECF No. 57.) Federal Rule of Civil Procedure 65 governs preliminary injunctions. "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "The purpose of a preliminary injunction, unlike a permanent one, is to prevent any violation of the plaintiff's rights before the district court enters a final judgment." *Resurrection*

Sch. v. Hertel, 35 F.4th 524, 528 (6th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 372 (2022) (quotation and citation omitted). To determine the propriety of a preliminary injunction, the Court examine four factors: (1) whether the plaintiff has established a strong likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury if a preliminary injunction did not issue; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served if the court were to grant the requested injunction. *Overstreet*, 305 F.3d at 573. "These factors are not prerequisites, but are factors that are to be balanced against each other." *Id.*

Given the Court's determination that it lacks subject-matter jurisdiction over Mr. Gomez's claims against Magistrate Welch, *see* § III.B.1, *supra*, his motion for this extraordinary relief against her is unavailing. Mr. Gomez's Motion for Preliminary Injunction is **DENIED**.

V. CONCLUSION

For the reasons above, Judge Bennett's Motion to Dismiss (ECF No. 44) is **GRANTED**; Magistrate Welch's Motion to Dismiss (ECF No. 45) is **GRANTED**; Judge Nau's Motion to Dismiss (ECF No. 55) is **GRANTED**; and Judge Favreau's Motion to Dismiss (ECF No. 56) is **GRANTED**. Further, Mr. Stevens's Motion to Dismiss (ECF No. 10) is **DENIED as moot** and his Amended Motion to Dismiss (ECF No. 15) is **GRANTED**. Finally, Ms. Starr's Motion to Dismiss (ECF No. 51) is **GRANTED**.

As to Mr. Gomez, his Motion for Preliminary Injunction (ECF No. 57) is **DENIED**; his Motion for Leave to file Excess Pages (ECF No. 64) is **DENIED as moot**; and his Motions for Leave to File Sur-Replies (ECF Nos. 71, 75) are **DENIED**.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN PAUL GOMEZ,

Plaintiff,

v.

DAVID RYAN, *et al.*,

Defendants.

Case No. 2:23-cv-1058
Chief Judge Sarah D. Morrison
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

John Paul Gomez filed this suit, without assistance of counsel, alleging that various individuals within Ohio's law enforcement and judicial institutions interfered with his constitutional rights as a parent. This Court dismissed Mr. Gomez's claims against six of the eight Defendants in a January 31, 2024 Opinion & Order. (Jan. 31 Order, ECF No. 77.) The matter is back before the Court on several motions, including the remaining Defendants' Motion for Judgment on the Pleadings (MJOP, ECF No. 78) and Mr. Gomez's Motion for Joinder (Mot. Joinder, ECF No. 91). For the reasons below, Defendants' Motion is **GRANTED** and Mr. Gomez's is **DENIED**.

I. BACKGROUND

Mr. Gomez filed suit against Patrolman David Ryan, the City of Cambridge, and six others.[1] (Am. Compl., ECF No. 8, ¶ 1.) He alleges that these Defendants,

[1] The Amended Complaint names the Cambridge Police Department as a defendant, rather than the City of Cambridge. But the Cambridge Police Department is not a proper defendant to a § 1983 claim. *See Sargent v. City of*

App
AA3

"individually and/or collectively," acted under color of law to deprive him of his constitutional rights to parent and raise his children, to due process, and to effective assistance of counsel. (*Id.*, ¶ 4.) For purposes of the pending motions, the Court accepts as true the factual allegations in Mr. Gomez's Amended Complaint. *See Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). The Court's January 31 Order summarized the allegations at length. That summary is incorporated here by reference.

Mr. Gomez's claims against the two remaining Defendants arise from the December 7, 2019 arrest of Mr. Gomez's son, E.G. That day, an anonymous caller told a Cambridge 9-1-1 dispatcher that he saw three teenagers coming out of his neighbor's house, where he suspected they had purchased drugs or illegal firearms. (*Id.*, ¶ 132.) The caller described the teens as a heavy-set female in a white hoodie carrying a backpack and two others. (*Id.*, ¶¶ 130, 133.) Officer Ryan was en route to the area when he observed three young men walking down the street, two of whom matched the descriptions read over the radio. (ECF No. 22[2], PAGEID # 311.)

Toledo Police Dep't, 150 F. App'x 470, 475 (6th Cir. 2005) (explaining that "police departments are merely sub-units of the municipalities they serve and therefore are not proper §1983 defendants") (citation and quotation omitted). The Department recognizes that principle and offers argument assuming that Mr. Gomez's claims are against the municipality. (MJOP, PAGEID # 1145.) The Court thus construes Mr. Gomez's claims against the Department as claims against the City of Cambridge.

[2] ECF No. 22 is Patrolman Ryan's Incident/Offense Report from December 7, 2019. The Amended Complaint excerpts the Report, though it is not attached in full. The Report is nevertheless properly considered. *See Weiner v. Klais & Co., Inc.*, 108 F.3d. 86, 89 (6th Cir. 1997) (concluding that attachments to a motion to dismiss "are considered part of the pleadings if they are referred to in the plaintiff's complaint

Patrolman Ryan and his partner approached and asked if they could speak to the boys. (*Id.*) They also asked V.M., the boy carrying the backpack, to place it on the ground, which he did. (*Id.*) Patrolman Ryan then asked V.M. for permission to search the backpack, which he granted. (*Id.*) E.G. was not carrying the backpack, but "objected to the search." (Am. Compl., ¶ 135.) Patrolman Ryan's Incident/Offense Report describes what followed:

> As I was walking towards to bag, in order to search it, one of the other males, later identified as [E.G.], walked towards the bag, threw something on the ground, and began to pick the bag up. I gave several commands to [E.G.] of "no." However, he ignored my commands and continued to pick up the bag. Patrolman Castor then reached for the bag, and [E.G.] pulled the bag away from Patrolman Castor. However, Patrolman Castor was able to maintain control of the bag. [E.G.] yelled, "you're not touching the bag!" At this point, due to the original call, the inconsistent answers by V.M., and now [E.G.]'s reaction to me wanting to search the bag, I believed it was likely that there was a firearm inside the bag. At that point, I rushed forward, and as Patrolman Castor was able to remove the bag from [E.G.], I also pushed [E.G.] away from . . . Patrolman Castor, who now had the bag. I then advised [E.G.] to place his hands on top of his head, as I was going to pat him down for weapons, due to the totality of the circumstances. When I gave [E.G.] the command to place his hands on his head, he said, "no" and pulled a cell phone from his pocket. I then took physical control of [E.G.], by interlocking my arms through his, and maintaining control. Patrolman Castor then assisted me in placing [E.G.] in handcuffs. While we were placing [E.G.] in handcuffs, he was yelling towards [V.M.], stating that we were not allowed to search the backpack without permission. [V.M.] replied to [E.G] by stating, "I said they could look." [E.G.] was then placed in the back seat of a cruiser.

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and are central to [his] claim"), *overruled on other grounds, Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002).

(ECF No. 22, PAGEID # 311.) Footage from Patrolman Ryan's body-worn camera shows the same. (*See* ECF No. 24[3], video manually filed.) E.G. was charged with obstruction. (Am. Compl., ¶ 135.)

Mr. Gomez received a copy of the 9-1-1 call in February 2023. (*Id.*, ¶ 116.) He asserts that Patrolman Ryan "misrepresented" and "mischaracterized" the call (as reporting three *boys* leaving the neighbor's house, and not three *girls*), thus infringing on Mr. Gomez's constitutional right to parent his child. (*See id.*, *e.g.*, ¶¶ 137, 145.)

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. Legal Standard

A motion for judgment on the pleadings made under Federal Rule of Civil Procedure 12(c) is analyzed in the same manner as a motion to dismiss under Rule 12(b)(6). *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). To overcome such a motion,

> a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Id.* (citing *Twombly,* 550 U.S. at 555.) "Threadbare recitals of the

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[3] Mr. Gomez's Amended Complaint also incorporates Patrolman Ryan's body-cam footage. (*See* Am. Compl., ¶¶ 146–149.)

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A motion for judgment on the pleadings should be granted when there is no material issue of fact, and the moving party is entitled to judgment as a matter of law. *Tucker*, 539 F.3d at 549.

Although a *pro se* litigant is entitled to a liberal construction of his pleadings and filings, he still must do more than assert bare legal conclusions. *See Martin v. Overton*, 391 F.3d. 710, 714 (6th Cir. 2004). Indeed, his "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

B. Analysis

Patrolman Ryan and the City of Cambridge move for judgment on the pleadings. (MJOP.) Mr. Gomez responded. (Resp.) Three days later, he moved for leave to file a supplement *instanter*. (Supp., ECF No. 82.) The remaining Defendants moved to strike the supplement. (ECF No. 84.) Because the Court prefers to decide matters on their merits, Mr. Gomez's motion for leave is **GRANTED** and Defendants' Motion to Strike the supplement is **DENIED**. The Court now turns to the substance of Defendants' Motion.

1. Patrolman Ryan

Mr. Gomez brings official- and individual-capacity claims against Patrolman Ryan. (*See* Am. Compl., ¶ 193.) But it is well-established that "[a] suit against an individual in his official capacity is the equivalent of a suit against the governmental entity." *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994) (citing

Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989)); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Mr. Gomez's official capacity claims against Patrolman Ryan will thus be considered as claims against the City of Cambridge.

Patrolman Ryan raises a qualified-immunity defense to Mr. Gomez's individual-capacity claims. Qualified immunity is intended to "give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Accordingly, it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

An official is entitled to qualified immunity so long as he has not violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citation omitted). The analysis is two-pronged: Courts must determine first whether the facts make out a violation of a constitutional right and, second, whether that right was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

a) Clearly Established Constitutional Right

Mr. Gomez alleges that Patrolman Ryan deprived him of the right to custody of E.G. The right of parents to raise their children is a clearly established due process right. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (explaining that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *but see*

Kottmyer v. Maas, 436 F.3d 684, 690 (6th Cir. 2006) (noting that "the right to family integrity, while critically important, is neither absolute nor unqualified").

b) Violation Thereof

The constitutional rights at issue are Mr. Gomez's rights as a parent.[4] The Sixth Circuit recently held that "substantive due process claims based on the right to family integrity require that the [defendant] state official act with a culpable state of mind directed at the family relationship." *Chambers v. Sanders*, 63 F.4th 1092, 1100 (6th Cir. 2023). "[A]ctions that collaterally impact the family relationship" will not support a claim to vindicate those rights. *Id.* None of the facts alleged in Mr. Gomez's Amended Complaint support an inference that Patrolman Ryan *directed his actions at* the relationship between Mr. Gomez and his son. His actions may have affected Mr. Gomez in his capacity as E.G.'s father—but any such effect was incidental to their purpose. Because the Amended Complaint fails to allege that Patrolman Ryan violated Mr. Gomez's clearly established constitutional rights, Patrolman Ryan is entitled to qualified immunity.

2. The City of Cambridge

The scope of Mr. Gomez's claim against the City of Cambridge is entirely unclear from his papers. In certain instances, he argues that the City wronged him

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[4] Despite the myriad references to other constitutional rights in his papers (*see e.g.*, Resp., PAGEID # 1170 (discussing First, Fourth, Fifth, and Fourteenth Amendment rights)), Mr. Gomez does not assert a valid claim against Patrolman Ryan for violation of any other right. For example, Mr. Gomez references the Fourth Amendment right against unreasonable search and seizure. But the Amended Complaint does not allege that Patrolman Ryan infringed upon Mr. Gomez's Fourth Amendment rights—and he lacks standing to vindicate his son's.

by allegedly concealing the 9-1-1 call, despite a purported duty to disclose. (*See, e.g.*, Supp., PAGEID # 1207.) Elsewhere, he asserts that "the focus here is . . . Cambridge Police's failure to train Ryan and its participation to cover up Ryan's intentional violation of my constitutional rights as a parent[.]" (*Id.*, PAGEID # 1172.) Nevertheless, § 1983 does not "incorporate doctrines of vicarious liability." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). Accordingly, "[a] plaintiff raising a municipal liability claim under § 1983 must demonstrate that the alleged federal violation occurred because of a municipal policy or custom." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). Thus, "[n]o constitutional violation means no municipal liability." *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 367 (6th Cir. 2017) (citation omitted). Because Mr. Gomez has not alleged a violation of his constitutional rights, his claims against the City of Cambridge also fail.

* * *

Defendants' Motion for Judgment on the Pleadings is **GRANTED**.

III. MOTION FOR JOINDER

Mr. Gomez also filed a motion seeking leave to join three new defendants based on an event that took place in 2019. (Mot. Joinder.) Although styled as a motion for leave to file supplemental pleadings under Rule 15(d), the motion is properly construed as seeking leave to amend his complaint under Rule 15(a). *See* 6A Fed. Prac. & Proc. Civ. § 1504 (3d ed.) (explaining that amended pleadings relate to matters that occurred before the original pleading was filed, while supplemental pleadings relate to matters that occurred after).

The Federal Rules of Civil Procedure generally allow a party to amend its pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). "The thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) (citations omitted). "Nevertheless, leave to amend should be denied if the amendment . . . would be futile." *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 495 (6th Cir. 2011) (internal citation and quotation omitted). An amendment is futile if it could not withstand a motion to dismiss. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

Mr. Gomez seeks to amend his complaint to allege that an error in a 2019 police report operated to deprive him of his constitutional right to parent. The proposed amendment is a perfect analog to the allegations against Patrolman Ryan and the City of Cambridge: Here, Patrolman Ryan, an officer of the City of Cambridge, "misrepresented" the 9-1-1 call as alerting to boys—instead of girls. There, Deputies Braniger and Rogers, officers of Guernsey County, "misrepresented" Mr. Gomez's ex-wife as having a warrant out of Athens County—instead of Allegheny County. There are still no facts giving rise to an inference that the error was intentionally directed at Mr. Gomez's relationship with E.G. Thus, the amendment would fail to survive a motion to dismiss and is futile.

Mr. Gomez's Motion for Leave of Court is **DENIED**.

IV. NOTICE OF OHIO SUPREME COURT ACTION

Finally, Mr. Gomez notified this Court that he was recently declared a vexatious litigator by the Ohio Supreme Court. (ECF No. 96.) "Federal courts have

recognized their own inherent power and constitutional obligation to protect themselves from conduct that impedes their ability to perform their Article III functions and to prevent litigants from encroaching on judicial resources that are legitimately needed by others." *Johnson v. University Housing*, No. 2:06-cv-628, 2007 WL 4303728, at *12 (S.D. Ohio Dec. 10, 2007) (Holschuh, J.) (citing *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986)). The Sixth Circuit Court of Appeals has upheld the imposition of prefiling restrictions on vexatious litigators. *Id.* (collecting cases). Given Mr. Gomez's demonstrated willingness to file repetitive and baseless actions that strain judicial bandwidth, the Court finds it appropriate to follow the Ohio Supreme Court in declaring him a vexatious litigator.

Mr. Gomez is **DEEMED A VEXATIOUS LITIGATOR** and is **ENJOINED** from filing any new actions without either (i) submitting a statement from an attorney licensed to practice in this Court certifying that there is a good faith basis for the claims Mr. Gomez seeks to assert, or (ii) tendering a proposed complaint for review by this Court prior to filing. He is further **ORDERED** to include the captions and case numbers of all of his prior actions with any complaint filed in this Court or any other court.

V. CONCLUSION

For the reasons above, Mr. Gomez's motion for leave to file a supplemental response (ECF No. 82) is **GRANTED** and Defendants' motion to strike the supplement (ECF No. 84) is **DENIED**. Defendants' Motion for Judgment on the Pleadings (ECF No. 78) is **GRANTED**. And Mr. Gomez's Motion for Joinder is **DENIED**.

Mr. Gomez is **ENJOINED** from filing any future action in this Court without first seeking leave or obtaining the endorsement of a licensed attorney.

The Clerk is **DIRECTED** to **TERMINATE** this case.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
CHIEF UNITED STATES DISTRICT JUDGE

Gomez, John

From: Customer Service - Legal Printers LLC <cs@legalprinters.com>
Sent: Thursday, October 31, 2024 2:21 PM
To: Gomez, John
Cc: John Paul Gomez
Subject: [External] Re: Journal Entries/Orders and Opinions
Attachments: Estimate 4155r.pdf

Okay, this is a lot. Of the 13 attachments to your last email, 12 of them seem to be right for filing, 'Muskingum County Entries' is the only one that does seem necessary. Adding up the number of pages we believe those 12 documents will become after formatting along with Apps. A and B that you sent earlier, we believe the formatted Appendix will be approximately 182 pages. Formatting those will be approximately $4550, that's in addition to the printing, binding, service, filing, etc. Please note this does *NOT* include any of the documents we received at 2:10 pm ET after this estimate had been prepared. Including those will increase the costs, we'll go over them while you're digesting this email.

Allowing for a 50-page Brief portion, I've attached an estimate for a 232-page Petition, including the formatting of those Appendix documents. It's a lot of money but I don't have a workable suggestion on how to reduce it, it seems that each of those attachments is necessary so it's a lot to format and a thick book to print. And there's not much time to decide. For filing on Tuesday, we need clearance to print on Monday, meaning everything is good -- the Argument, the Appendix, the formatting. It's going to take dozens of hours to format the Appendix so we need to assign people immediately and payment for the formatting before we start.

I completely understand why you'd choose not to continue with a longshot project that is likely to cost more than $10,000 but if you do, we need approval to start immediately and credit card payment for $4550 for most of the formatting with the balance due before filing. Let us know how you'd like to proceed and, if you want to continue, we'll need the following credit card information:

Number on the card
Expiration date on the card
CVV for the card (3-digit code on the back of Visa or MC, 4-digit code on the front of Amex)
Exact name on the card
Billing address for the card, including zip code

Thank you,
Jack

Jack Suber, Esq.
Legal Printers LLC
5614 Connecticut Avenue, NW
#307
Washington, DC 20015
202-747-2400

On 10/31/2024 1:15 PM, Gomez, John wrote:

Hello Jack,

App AA 4

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

August 7, 2024

[Cite as *08/07/2024 Case Announcements*, 2024-Ohio-2937.]

MERIT DECISIONS WITH OPINIONS

2022-1419 and 2023-0126. Kyser v. Summit Cty. Children Servs., Slip Opinion No. 2024-Ohio-2898.
Summit App. No. 30080, 2022-Ohio-3467. Judgment vacated and cause dismissed.

Kennedy, C.J., and Fischer, DeWine, Byrne, and Deters, JJ., concur.

Donnelly, J., dissents, with an opinion joined by Stewart, J.

Matthew Byrne, J., of the Twelfth District Court of Appeals, sitting for Brunner, J.

MERIT DECISIONS WITHOUT OPINIONS

2024-0381. Spence v. Acting Under Color of Law Corp.
In Mandamus and Prohibition. On motion to dismiss of respondents Franklin County Court of Common Pleas Judge Dale Crawford, Office of the Clerk of Courts, and David DeVillers. Motion granted. Sua sponte, cause dismissed as to Gerald Sunbury. Cause dismissed.

Kennedy, C.J., and Fischer, DeWine, Donnelly, Stewart, Brunner, and Deters, JJ., concur.

2024-0624. State ex rel. Gomez v. Favreau.
In Mandamus, Prohibition, and Procedendo. On respondents' motions to dismiss. Motions granted. Respondents Morgan County Court of Common Pleas Judge Dan W. Favreau, Noble County Court of Common Pleas Judge John W. Nau, and Noble County Clerk of Courts Karen Starr's motion to declare relator a vexatious

Appendix B

litigator granted. Relator, John Paul Gomez, found to be a vexatious litigator under S.Ct.Prac.R. 4.03(B). Accordingly, John Paul Gomez prohibited from continuing or instituting legal proceedings in this court without first obtaining leave. Any request for leave shall be submitted to the clerk of this court for the court's review. Cause dismissed.

Fischer, Donnelly, and Deters, JJ., concur.

Kennedy, C.J., and Stewart, J., concur in part and dissent in part and would deny the motion to declare relator a vexatious litigator.

DeWine, J., concurs in part and dissents in part and would deny respondent Allen Bennett's motion to dismiss and would issue an alternative writ as to him.

Brunner, J., concurs in part and dissents in part and would sua sponte dismiss the cause as to respondent Karen Starr, deny respondent Allen Bennett's motion to dismiss and issue an alternative writ as to him, and deny the motion to declare relator a vexatious litigator.

2024-0730. State ex rel. Brown v. Sackett.

In Mandamus. On respondent's motion to dismiss. Motion granted. Relator's motion to consolidate with case Nos. 2024-0336, 2024-0562, and 2024-0715 and motion for mediation denied.

DeWine and Donnelly, JJ., concur.

Deters, J., concurs but would deny the motion for mediation as moot.

Kennedy, C.J., and Stewart, J., concur in part and dissent in part and would deny the motion to dismiss and issue an alternative writ.

Fischer, J., concurs in part and dissents in part and would grant the motion to consolidate and deny the motion for mediation as moot.

Brunner, J., concurs in part and dissents in part and would deny the motion to dismiss and issue an alternative writ as to relator's first records request.

2024-0732. State ex rel. Smith v. O'Shaughnessy.

In Mandamus. On respondent's motion to dismiss. Motion granted. Cause dismissed.

Kennedy, C.J., and Fischer, DeWine, Donnelly, Stewart, Brunner, and Deters, JJ., concur.

2024-0748. State ex rel. Spears v. DeWine.

In Mandamus. On respondent's motion to dismiss. Motion granted. Cause dismissed.

Kennedy, C.J., and Fischer, DeWine, Donnelly, Stewart, Brunner, and Deters, JJ., concur.

The Supreme Court of Ohio

In re: John Paul Gomez

ENTRY

On August 7, 2024, this court found John Paul Gomez to be a vexatious litigator under S.Ct.Prac.R. 4.03(B) in Case No. 2024-0624, *State of Ohio, ex rel., John Paul Gomez v. Judge Dan Favreau, John W. Nau, Clerk Karen Starr, Judge David Bennett, Travis Stevens, Magistrate Erin Welch, Judge Eric Martin, and Allen Bennett.* This court further ordered that Gomez was prohibited from continuing or instituting legal proceedings in this court without first obtaining leave.

On October 21, 2024, Gomez submitted a request to the clerk for leave of court to move.

It is ordered by the court that the request is denied.

Sharon L. Kennedy
Chief Justice

App.
AB

The Supreme Court of Ohio

In The Matter of: E. G.

Case No. 2022-1653

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2022-0057)

Sharon L. Kennedy
Chief Justice

Appendix C

The Supreme Court of Ohio

State of Ohio ex rel., John Paul Gomez

v.

Hon. Judge Eric D. Martin, Muskingum County Juvenile Court

Case No. 2022-1631

IN MANDAMUS AND PROCEDENDO

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and procedendo.

Upon consideration of respondent's motion to dismiss, it is ordered by the court that the motion to dismiss is granted. Accordingly, this cause is dismissed.

Sharon L. Kennedy
Chief Justice

Appendix D

The Supreme Court of Ohio

In the Matter of E.G.

Case No. 2022-0217

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2021-0070)

Maureen O'Connor
Chief Justice

Appendix E

The Supreme Court of Ohio

In the Matter of E.G.

Case No. 2022-0217

ENTRY

This cause came on for further consideration upon the filing of appellant's motion for stay of execution and emergency motion for intervention. It is ordered by the court that the motions are denied as moot.

(Muskingum County Court of Appeals; No. CT2021-0070)

Maureen O'Connor
Chief Justice

Appendix F

The Supreme Court of Ohio

State of Ohio ex rel. John Paul Gomez

v.

Hon. Magistrate Erin Welch and Muskingum County Juvenile Court

Case No. 2021-1583

IN MANDAMUS AND PROHIBITION

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of respondents' motion to dismiss amended complaint, it is ordered by the court that the motion to dismiss amended complaint is granted. Accordingly, this cause is dismissed.

It is further ordered that relator's amended motion for stay of execution and amended motion for issuance of a peremptory writ are denied.

Maureen O'Connor
Chief Justice

Appendix G

The Supreme Court of Ohio

In the Matter of: E.G.

Case No. 2021-1302

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Guernsey County Court of Appeals; Nos. 20CA12 and 20CA16)

Maureen O'Connor
Chief Justice

Appendix
H

The Supreme Court of Ohio

State of Ohio ex. rel. John Paul Gomez

v.

Hon. Magistrate Erin Welch

Case No. 2021-1137

IN MANDAMUS AND PROHIBITION

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of respondent's motion to dismiss, it is ordered by the court that the motion to dismiss is granted. Accordingly, this cause is dismissed.

It is further ordered that relator's motion for temporary injunction, preemptive writ, and order for filing of the juvenile court's certified record, and exhibits is denied as moot.

Maureen O'Connor
Chief Justice

Appendix
I

The Supreme Court of Ohio

John Paul Gomez,
Biological Father of E.G., minor

v.

Judge David B. Bennett and Hon. Magistrate Erin Welch

Case No. 2021-0668

IN HABEAS CORPUS

ENTRY

This cause originated in this court on the filing of an amended petition for a writ of habeas corpus and was considered in a manner prescribed by law.

Upon consideration of the motion to dismiss of respondent, Judge David B. Bennett, it is ordered by the court that the motion to dismiss is granted.

It is further ordered by the court, sua sponte, that the cause as to Magistrate Erin Welch is dismissed. Accordingly, the cause is dismissed.

Maureen O'Connor
Chief Justice

Appendix 重
J1

GOMEZ *v.* BENNETT, JUDGE, ET AL.

[Cite as *Gomez v. Bennett*, 166 Ohio St.3d 11, 2021-Ohio-2797.]

Habeas corpus—Petition defective for petitioner's failing to provide a copy of the commitment or cause of detention as required by R.C. 2725.04(D), failing to name a proper respondent under R.C. 2725.04(B), and failing to state a valid claim for habeas relief—Cause dismissed.

(No. 2021-0668—Submitted August 6, 2021—Decided August 17, 2021.)

IN HABEAS CORPUS.

Per Curiam.

{¶ 1} On May 24, 2021, petitioner, John Paul Gomez, filed a petition for a writ of habeas corpus on behalf of his minor son, E.G.[1] Gomez filed an amended petition the next day, naming Guernsey County Juvenile Court Judge David Bennett and Muskingum County Juvenile Court Magistrate Erin Welch as respondents. We have not ordered a return on the writ. Nonetheless, Judge Bennett filed a motion to dismiss the action against him. We grant Judge Bennett's motion and dismiss this action sua sponte as to Magistrate Welch because the amended petition is procedurally defective and fails to state a claim for relief.

I. Allegations in the Amended Petition

{¶ 2} Gomez is E.G.'s biological father. The amended petition contains numerous allegations regarding a 2020 juvenile-delinquency adjudication against E.G. in the Guernsey County Juvenile Court and the juvenile-court proceedings

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1. Gomez is not an attorney. However, as E.G.'s biological father, he is arguably authorized under R.C. 2725.04 to file a writ of habeas corpus on behalf of E.G. to obtain E.G.'s release from confinement. *See Cuyahoga Cty. Bar Assn. v. Spurlock*, 96 Ohio St.3d 18, 2002-Ohio-2580, 770 N.E.2d 568, ¶ 11-15. We assume, without deciding, that Gomez is so authorized.

Appendix J2

before Judge Bennett, the appeal that followed, and related probation-violation proceedings. In the most recent proceeding before Judge Bennett in March 2021, E.G. was placed under house arrest for a probation violation.

{¶ 3} Gomez alleges that E.G. was arrested in Muskingum County in April 2021 on felony charges of assaulting law-enforcement officers, resulting in a detention hearing before Magistrate Welch. The amended petition alleges that E.G. is detained in Muskingum County as a result of those charges. And Gomez states that Judge Bennett granted his request to transfer the Guernsey County delinquency proceedings to Muskingum County.

{¶ 4} Gomez asserts that, because E.G. is presumed innocent until the Muskingum County charges against him are proved to be true, E.G.'s current detention is illegal and he asks for a writ of habeas corpus ordering E.G.'s immediate release.

II. Analysis

{¶ 5} Dismissal of this action is appropriate if, after all factual allegations are presumed true and all reasonable inferences are made in Gomez's favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested extraordinary relief in habeas corpus. *Goudlock v. Voorhies*, 119 Ohio St.3d 398, 2008-Ohio-4787, 894 N.E.2d 692, ¶ 7.

{¶ 6} We dismiss this action for three reasons. First, the amended petition is defective for failure to satisfy R.C. 2725.04(D), which requires that a habeas petition contain a "copy of the commitment or cause of detention." Gomez has not provided any documentation showing that his son is currently detained or the reason for the alleged detention. This noncompliance with R.C. 2725.04(D) is fatal to Gomez's habeas claim. *E.g.*, *Day v. Wilson*, 116 Ohio St.3d 566, 2008-Ohio-82, 880 N.E.2d 919, ¶ 1, 4 (petition for a writ of habeas corpus that failed to include copies of all pertinent commitment papers was fatally defective).

{¶ 7} Second, Gomez fails to name a proper respondent. Under R.C. 2725.04(B), a petition for a writ of habeas corpus must specify "the person by whom the prisoner is so confined or restrained." Gomez names Judge Bennett and Magistrate Welch, but neither of them is alleged to be E.G.'s custodian. Failure to name a proper respondent is a sufficient basis for dismissal of a habeas petition. *See State ex rel. Sherrills v. State*, 91 Ohio St.3d 133, 742 N.E.2d 651 (2001).

{¶ 8} Finally, Gomez's amended petition fails to state a valid claim for habeas relief. A writ of habeas corpus is available when a court's judgment is void for lack of jurisdiction. *Leyman v. Bradshaw*, 146 Ohio St.3d 522, 2016-Ohio-1093, 59 N.E.3d 1236, ¶ 9. In this case, Gomez alleges that Judge Bennett denied both him and E.G. of their rights to due process and the effective assistance of counsel in the Guernsey County Juvenile Court proceedings. But habeas does not lie to contest such nonjurisdictional errors or irregularities; an appeal is an adequate remedy in the ordinary course of law to raise those types of issues. *See, e.g.*, *Jackson v. Johnson*, 135 Ohio St.3d 364, 2013-Ohio-999, 986 N.E.2d 989, ¶ 3 (alleged due-process violation not cognizable in habeas corpus); *Bozsik v. Hudson*, 110 Ohio St.3d 245, 2006-Ohio-4356, 852 N.E.2d 1200, ¶ 7 (claim of ineffective assistance of counsel not cognizable in habeas corpus). Moreover, the amended petition alleges that E.G.'s *current* confinement stems from his arrest on felony charges in Muskingum County and subsequent proceedings before Magistrate Welch. And Gomez has not alleged a defect in the Muskingum County proceedings that implicates the juvenile court's jurisdiction over E.G.'s case.

{¶ 9} For these reasons, we grant Judge Bennett's motion to dismiss and sua sponte dismiss this action as to Magistrate Welch.

Cause dismissed.

O'CONNOR, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, and BRUNNER, JJ., concur.

KENNEDY, J., concurs in judgment only.

John Paul Gomez, pro se.

Lindsey Angler, Guernsey County Prosecuting Attorney, and Jason R. Farley, Assistant Prosecuting Attorney, for respondent Judge Bennett.

The Supreme Court of Ohio

State of Ohio ex rel. John Paul Gomez

v.

Judge David B. Bennett and Dagmar D. Dyer

Case No. 2021-0561

IN MANDAMUS AND PROHIBITION

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of the answer of respondent Judge David Bennett and pursuant to S.Ct.Prac.R. 12.04, it is ordered by the court that this cause is dismissed.

Maureen O'Connor
Chief Justice

Appendix
K

The Supreme Court of Ohio

State of Ohio ex rel., John Paul Gomez

v.

Magistrate Teresa Liston and Myra Scheurer

Case No. 2021-0510

IN MANDAMUS AND PROHIBITION

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of the answer of respondents and pursuant to S.Ct.Prac.R. 12.04, it is ordered by the court that this cause is dismissed.

Maureen O'Connor
Chief Justice

Appendix
L1

2021-0489. State ex rel. Cleveland v. Gallagher.
In Prohibition. On respondent's motion to dismiss. Motion granted. Lieutenant Paul Baeppler's motion for leave to intervene as respondent and motion to dismiss denied as moot. Cause dismissed.

O'Connor, C.J., and Kennedy, Fischer, DeWine, Donnelly, Stewart, and Brunner, JJ., concur.

2021-0499. State ex rel. Porterfield v. McKay.
In Mandamus. On respondent's motion to dismiss. Motion granted. Relator's emergency motion to strike denied as moot. Cause dismissed.

O'Connor, C.J., and Kennedy, Fischer, DeWine, Donnelly, Stewart, and Brunner, JJ., concur.

2021-0506. State ex rel. Patterson v. Mathew.
In Mandamus. On respondent's motion to dismiss. Motion granted. Cause dismissed.

O'Connor, C.J., and Kennedy, Fischer, DeWine, Donnelly, Stewart, and Brunner, JJ., concur.

2021-0510. State ex rel. Gomez v. Liston.
In Mandamus and Prohibition. Sua sponte, cause dismissed.

O'Connor, C.J., and Kennedy, DeWine, Donnelly, and Brunner, JJ., concur.

Fischer and Stewart, JJ., dissent and would grant an alternative writ as to the request for a writ of mandamus.

MOTION AND PROCEDURAL RULINGS

2020-0748. Griffin v. Sehlmeyer.
In Mandamus. On relator's motion for clarification. Motion denied.

2021-0422. State v. Bothuel.
Lucas App. No. L-20-1053, 2021-Ohio-875. On review of order certifying a conflict. The court determines that a conflict exists. Sua sponte, cause held for the decision in 2020-1266, *State v. Maddox*, and briefing schedule stayed.

2021-0531. J.P. Morgan Mtge. Acquisition Corp. v. Baker.
Ashland App. No. 20-COA-021, 2021-Ohio-1024. On appellants' motion for stay. Motion denied.

Donnelly and Brunner, JJ., dissent.

Appendix L2

The Supreme Court of Ohio

State of Ohio ex rel. John Paul Gomez	Case No. 2021-0493
v.	IN MANDAMUS AND PROHIBITION
Judge Dan Favreau and Dagmar D. Dyer	ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of relator's application for dismissal, it is ordered by the court that the application for dismissal is granted. Accordingly, this cause is dismissed.

Maureen O'Connor
Chief Justice

Appendix M

The Supreme Court of Ohio

State of Ohio ex rel. John Paul Gomez	Case No. 2021-0426
v.	IN PROCEDENDO
Judge David B. Bennett	ENTRY

This cause originated in this court on the filing of a complaint for a writ of procedendo.

Upon consideration of the answer of respondent and pursuant to S.Ct.Prac.R. 12.04, it is ordered by the court that this cause is dismissed.

It is further ordered that relator's motion for leave of court to file amended complaint is denied.

Maureen O'Connor
Chief Justice

Appendix N

The Supreme Court of Ohio

State of Ohio, ex rel., John Paul Gomez

v.

Judge Dan Favreau and Dagmar Dyer

Case No. 2019-1390

IN MANDAMUS AND PROHIBITION

ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of relator's motion for temporary injunction and request for oral argument, it is ordered by the court that the motion and request are denied.

Upon consideration of respondent Judge Dan Favreau's motion to dismiss, it is ordered by the court that the motion to dismiss is granted. Accordingly, this cause is dismissed.

Maureen O'Connor
Chief Justice

Appendix
01

The Supreme Court of Ohio

State of Ohio, ex rel., John Paul Gomez	Case No. 2019-1390
v.	IN MANDAMUS AND PROHIBITION
Judge Dan Favreau and Dagmar Dyer	ENTRY

This cause originated in this court on the filing of a complaint for writs of mandamus and prohibition.

Upon consideration of relator's motion to expedite, it is ordered by the court that the motion is denied as moot.

Maureen O'Connor
Chief Justice

Appendix
02

The Supreme Court of Ohio

Dagmar Gomez

v.

John Paul Gomez

Case No. 2011-1590

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Noble County Court of Appeals; No. 10-NO-375)

Maureen O'Connor
Chief Justice

Appendix P1

[Cite as *Gomez v. Gomez*, 2011-Ohio-2843.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAGMAR GOMEZ, PLAINTIFF-APPELLEE, VS. JOHN PAUL GOMEZ, DEFENDANT-APPELLANT.	)	CASE NO. 10-NO-375 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas, Domestic Relations Division of Noble County, Ohio
Case No. 205-0135

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee: Dagmar D. Gomez, pro-se
513 Spruce St.
Caldwell, Ohio 43724

For Defendant-Appellant: John P. Gomez, pro-se
1 Ridenour St.
Pittsburgh, PA 15205

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

App. P2

Dated: June 9, 2011

[Cite as *Gomez v. Gomez*, 2011-Ohio-2843.]
DONOFRIO, J.

{¶1} Defendant-appellant, John Paul Gomez, appeals from a Noble County Common Pleas Court judgment denying his motion to reallocate parental rights and responsibilities to be designated the residential parent of the two children he shares with his ex-wife.

{¶2} Appellant and plaintiff-appellee, Dagmar Gomez, a.k.a. Dagmar Dyer, were divorced in February 2006. Appellee received custody of their two children who were both under three years old at the time.

{¶3} This case was first before this court on appeal from the divorce judgment that allocated parental rights and responsibilities to appellee after making a finding that it was in the children's best interests. *Gomez v. Gomez*, 7th Dist. No. 06-NO-330, 2007-Ohio-1559 (*Gomez 1*). We affirmed that decision.

{¶4} After we affirmed the divorce judgment, appellant filed a motion to reallocate parental rights and responsibilities based on appellee's failure to facilitate visitation, appellee's change of residence, and appellee's husband's negative involvement. The trial court commenced a hearing on appellant's motion on August 30, 2007. This hearing was then continued. On appellant's request, the judge later recused himself. A visiting judge reconvened the hearing on April 23, 2008.

{¶5} The trial court issued its decision denying appellant's motion to reallocate parental rights and responsibilities on September 10, 2008. It found that there had been no change in circumstances significant enough to warrant modification. Therefore, the court did not move on to consider the best interests of the children or whether the harm likely to be caused by a change of environment was outweighed by the advantages of the change of environment to the children.

{¶6} This decision led to another appeal. *Gomez v. Gomez*, 7th Dist. No. 08-NO-356, 2009-Ohio-4809 (*Gomez 2*). Here we found that there was a sufficient change in circumstances to require the trial court to address the children's best interests. Consequently, we reversed that decision and remanded the case with orders for the court to continue applying the modification statute.

{¶7} On remand, the trial court held another hearing to determine the

children's best interests. Both parties appeared pro se. The hearing began on January 11, 2010. When appellant objected because he had not had an opportunity to review the guardian ad litem's report, the court continued the hearing in order to give appellant time to review the report and prepare to question the guardian ad litem (GAL). The hearing reconvened on April 16, 2010, again with both parties appearing pro se. Appellant called several witnesses and testified on his own behalf.

{¶8} The trial court noted that a change in circumstances had already been found. It then concluded that a change in custody was not in the children's best interests and the harm likely to be caused by a change of environment was not outweighed by the advantages of a change of environment. Consequently, the court denied appellant's motion to be designated the residential parent. It stated that appellant's visitation was to continue. Finally, the court noted, "[d]espite his problems, Appellant is a loving, caring parent and a shared parenting plan should be filed by the parties."

{¶9} Appellant filed a timely notice of appeal on July 7, 2010.

{¶10} Appellant raises a single assignment of error, which states:

{¶11} "THE TRIAL COURT ERRED IN RULING CONTRARY TO THE ORDERS SET FORTH ON REMAND IN GOMEZ V. GOMEZ, * * *; AS SUCH, ERRONEOUSLY ABUSED ITS DISCRETION UNREASONABLY, ARBITRARILY, AND UNCONSCIONABLY BY NOT APPLYING THE MODIFICATION STATUTE IN R.C. 3109.04 F BASED ON THE SUFFICIENT WEIGHT OF EVIDENCE ADDUCED DURING THE HEARINGS HELD ON AUGUST 30, 2007 AND APRIL 28, 2008. THUS, DECIDED TO HOLD NEW EVIDENTIARY HEARINGS TO APPOINT A GAL AND RETAIN PLAINTIFF-APPELLEE AS CUSTODIAL PARENT ADVERSE TO THIS COURT'S PRECEDENTIAL RULING ON SEPTEMBER 11, 2009."

{¶12} Appellant first spends a great deal of time rehashing events that occurred in 2006 and which were brought out at the August 2007 and April 2008 hearings, apparently in an attempt to show that the evidence demonstrated it was in the children's best interest to be placed with him.

{¶13} Appellant then goes on to argue that on remand, the trial court failed to obey the orders of this court. He goes through the R.C. 3109.04(F)(1) best interest factors and describes why they weigh in favor of granting custody to him. He argues that on remand the trial court, pursuant to this court's orders, should not have held another hearing to determine best interests but instead should have relied on the evidence presented at the August 30, 2007 and April 23, 2008 hearings and determined from this evidence that it was in the children's best interest to grant custody to him.

{¶14} We must first address appellant's argument that the trial court exceeded the scope of the remand. In *Gomez 2*, we ordered: "[T]he judgment of the trial court is hereby reversed, and this case is remanded for continued application of the modification statute." *Gomez 2*, at ¶34.

{¶15} If an appellate court remands a case for a limited purpose, the trial court must accept all issues previously adjudicated as finally settled. *Cugini & Capoccia Builders, Inc. v. Ciminello's, Inc.*, 10th Dist. No. 06AP-210, 2006-Ohio-5787, ¶ 32, citing *Blackwell v. Internatl. Union, U.A.W.* (1984), 21 Ohio App.3d 110, 112.

{¶16} In this case, we determined that a change in circumstances had occurred. Thus, the trial court was required to accept this issue as finally settled. The court expressed its acceptance at the beginning of the January 11, 2010 hearing:

{¶17} "I found that there was not a significant change of circumstances. The Appellate Court, however, indicated that I was in error; that there was a change of circumstances and that we should proceed to take a look at what is in the best interest of the child. So, that's the hearing that we are here for today." (Jan. 11, 2010 Tr. 5).

{¶18} Upon appellant's objection to the hearing, the court then responded:

{¶19} "Mr. Gomez, I'll be happy to use the information that is the transcript [from the August 30, 2007 and April 23, 2008 hearings] but I did not want to do that

without having a hearing and give you the opportunity to present anything else that you may want presented * * * in the interim period." (Jan. 11, 2010 Tr. 10).

{¶20} The court then acknowledged that it was going to consider all of the testimony and exhibits from the previous hearings in addition to anything else appellant wished to present in determining the best interests of the children. (Jan. 11, 2010 Tr. 10-11).

{¶21} Thus, the trial court was well aware of our prior decision and the remand order.

{¶22} Furthermore, the trial court did not exceed the scope of the remand. Appellate courts determine the appropriate scope of their remand orders. See *State ex rel. Mullins v. Curran*, 7th Dist. No. 10-MA-76, 2011-Ohio-1312, at ¶14, citing *State ex rel. Smith v. O'Connor* (1988), 71 Ohio St.3d 660 (the Ohio Supreme Court relies on an appellate court's interpretation of its own mandate); *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 5 ("[T]he rationale authorizing reviewing courts to order a limited remand implicitly recognizes the need for appellate courts to carefully exercise their discretion to determine the appropriate scope of remand.")

{¶23} Here we intended our remand order to include a further hearing given the nature of appellant's motion. Appellant moved for reallocation of parental rights and responsibilities in April 2007. The first two hearings on his motion were held in August 2007 and April 2008. We remanded the case in September 2009, for the court to continue applying the modification statute. The next step in the modification statute was to determine the children's best interests. R.C. 3109.04(E)(1)(a). The trial court held the next hearing in January 2010, and continued it to April 2010, at appellant's request. Over two years passed from the time of the first hearing until the case was remanded back to the trial court. In order to determine what was in the children's best interests the court needed some current evidence in addition to that evidence that was over two years old. Thus, the trial court did not exceed the scope of our remand when it held the January and April 2010 hearings.

{¶24} Next, we must move on to consider the merits of the trial court's decision.

{¶25} R.C. 3109.04 guides a trial court's discretion in a custody modification proceeding. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. A trial court's decision regarding the custody of a child which is supported by competent and credible evidence will not be reversed absent an abuse of discretion. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus; *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 603. A trial court has broad discretionary powers in child custody proceedings. *Reynolds v. Goll* (1996), 75 Ohio St.3d 121, 124. This discretion should be accorded the utmost respect by a reviewing court in light of the gravity of the proceedings and the impact that a custody determination has on the parties involved. *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13. An abuse of discretion connotes an attitude on the part of the court that is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶26} R.C. 3109.04(E)(1)(a) provides:

{¶27} "(E)(1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶28} "* * *

{¶29} "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶30} In *Gomez 2*, we already determined that a change in circumstances occurred in this case. Thus, we need not readdress that prong of the R.C.

3109.04(E)(1)(a) test.

{¶31} Instead, we must consider whether modification is necessary to serve the best interests of the children and, if so, whether the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the children.

{¶32} In determining the best interests of the children, a court is to consider all relevant factors, including, but not limited to:

{¶33} "(a) The wishes of the child's parents regarding the child's care;

{¶34} "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶35} "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶36} "(d) The child's adjustment to the child's home, school, and community;

{¶37} "(e) The mental and physical health of all persons involved in the situation;

{¶38} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶39} "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶40} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child [or certain other offenses involving children or domestic violence];

{¶41} "(i) Whether the residential parent * * * has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶42} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state." R.C. 3109.04(F)(1).

{¶43} The trial court made detailed findings as to the applicable best interest factors as follow.

{¶44} Appellant alleged abuse of the children and he submitted the affidavit of a Pennsylvania physician who found reasonable cause to believe that abuse had occurred. The matter was referred to the Noble County Department of Job and Family Services (NCDJFS), who investigated the accusations and found them to be unsubstantiated. Appellant testified and offered numerous photographs showing that the children enjoyed being with him, that his residence is suitable, and that they enjoy a good relationship with his fiancée. Appellant recently learned that he has a seven-year-old daughter who lives in Florida and is in the process of developing a relationship with her. Appellant has a strained relationship with appellee's new husband, Tim Dyer. Hostilities continue between appellant, appellee, and Dyer and while Dyer is a major source of the hostility, appellant's overall attitude exacerbates the problem. Appellant's psychological evaluation was insufficient to draw conclusions about mental health issues, although appellant has anger management problems. Appellant is current in his child support, resides in an adequate although one bedroom home, and is willing to find larger quarters if he is awarded custody. The children are well adjusted in their current residence.

{¶45} The court further found that appellant was not forthcoming in providing information to the GAL, was disrespectful toward the GAL, and accused her of having predetermined the outcome of her report and having been coached by the court. The GAL indicated that the children are well adjusted, happy children who get along well with their younger sibling and have friends through school. The GAL also found a lack of cooperation and communication between the parties. And she found that appellant was controlling, demanding, and exhibited behavior problems when she failed to respond as he wished. The GAL recommended that the children remain in appellee's custody and that designating appellant as the residential parent would not

be in their best interest.

{¶46} The court went on to find that throughout the hearings, appellant was disrespectful to the court, the court personnel, and witnesses. Appellant was found in direct contempt during the April 2010 hearing and placed in the sheriff's custody until he apologized. Appellant apologized 15 minutes later and was released from custody.

{¶47} The trial court then concluded that a change in custody was not in the children's best interests.

{¶48} The trial court did not abuse its discretion in reaching this decision. The evidence revealed the following.

{¶49} Regarding the allegations of abuse, two separate accusations were made concerning the parties' daughter.

{¶50} First, appellant made an allegation in 2006 that the children were mimicking sexual acts. Kelly Clark, a caseworker at NCDJFS, testified that she was ordered by the trial court to complete an assessment of the children's residential home. (Aug. 30, 2007 Tr. 89-90). As part of this 30-day assessment, Clark went to appellee's home two or three times. (Aug. 30, 2007 Tr. 95-96). During the assessment, Clark stated allegations were made against appellant that he sexually abused his daughter. (Aug. 30, 2007 Tr. 90). Clark stated that she concluded that the allegations of sexual abuse were unsubstantiated. (Aug. 30, 2007 Tr. 91).

{¶51} Jennifer Schilken, a children's services caseworker in Pennsylvania, testified that she received a referral from NCDJFS to interview appellant and his daughter regarding allegations that he sexually abused her. (Aug. 30, 2007 Tr. 70). Schilken stated that she completed the requested interviews of the matter. She stated that during the interview, the daughter told her that Dyer was the one who had sexually abused her. (Aug. 30, 2007 Tr. 72). However, she stated that the daughter was very young and inconsistent in her statements. (Aug. 30, 2007 Tr. 73). Appellant then presented a letter from NCDJFS stating that the allegations of sexual abuse against him were unsubstantiated and the case was closed. (Aug. 30, 2007

Ex. 19). Clark also testified that the allegations were unsubstantiated. (Aug. 30, 2007 Tr. 93).

{¶52} Second, in July 2007, appellant raised allegations that Dyer had hit his daughter on the back with a belt. He testified that he saw belt prints on her back so he took her to the emergency room. (Apr. 23, 2008 Tr. 87). Appellant stated that the doctor who examined his daughter reported suspected abuse to the sheriff's department and NCDJFS. (Apr. 23, 2008 Tr. 88).

{¶53} As to the alleged abuse, appellee testified that the parties' daughter had always lived with her and she was unaware of any type of abuse directed at her daughter. (Apr. 23, 2008 Tr. 122-23).

{¶54} Schilken testified that she once again interviewed the daughter and the daughter stated that Dyer beat her. (Aug. 30, 2007 Tr. 81).

{¶55} Clark testified that she saw the injuries to the daughter's back. (Aug. 30, 2007 Tr. 98). And she testified that she interviewed the daughter who stated that Dyer hit her with a belt. (Aug. 30, 2007 Tr. 104). Clark further stated, however, that the daughter changed her story several times and Clark determined her not to be a reliable source of information. (Aug. 30, 2007 Tr. 104-105). Clark stated that this case was closed because NCDJFS was not able to gather enough evidence to substantiate physical abuse. (Aug. 30, 2007 Tr. 99).

{¶56} Mindy Harding, another NCDJFS employee, testified that NCDJFS received a faxed affidavit from a Pennsylvania doctor indicating that the parties' daughter was abused. (Apr. 23, 2008 Tr. 22). Harding stated that NCDJFS had conversations with law enforcement regarding the accusation. (Apr. 23, 2008 Tr. 22-23).

{¶57} And Christine Shoepner, another NCDJFS employee, also investigated the allegation. Shoepner testified that she went to appellee's house with law enforcement and also went several times on her own. (Apr. 16, 2010 Tr. 14). She stated that she talked to the children, observed the home, and talked to the family. (Apr. 16, 2010 Tr. 15). She testified that while the daughter initially stated that Dyer

caused the injury to her back, she also told Shoepner numerous times that he did not abuse her. (Apr. 16, 2010 Tr. 12, 25). Shoepner also acknowledged receiving an affidavit from a Dr. Misja from Pennsylvania who averred that after examining the parties' daughter he had reasonable cause to believe that she had been abused. (Apr. 16, 2010 Tr. 18; Ex. 97). Shoepner opined that the daughter appeared to be free from any physical injuries at any given time, that there was no indication that she was fearful of her mother, father, or stepfather, and that both she and her brother were happy children. (Apr. 16, 2010 Tr. 28).

{¶58} As part of her investigation, Schilken visited appellant's home and found it to be clean and appropriate with plenty of food and clothes and toys for the children. (Aug. 30, 2007 Tr. 82). She also testified that both children appeared happy at appellant's home. (Aug. 30, 2007 Tr. 83). At the time of the January 2010, hearing, appellant lived in a one-bedroom apartment. (Jan. 11, 2010 Tr. 84). But by the time of the April 2010 hearing, appellant had moved into a five-bedroom house. (Apr. 16, 2010 Tr. 36).

{¶59} Bridgeport Police Sergeant Mike Hendershott testified that on one occasion Dyer came to the police station to report that appellant had assaulted him by slapping the glasses off of his face. (Apr. 23, 2008 Tr. 46-47). The alleged assault occurred during a visitation exchange. (Apr. 23, 2008 Tr. 47).

{¶60} Appellant testified that appellee denies him telephone contact with their daughter. (Apr. 23, 2008 Tr. 84). He further stated that when he calls, Dyer gets on the phone and calls him names. (Apr. 23, 2008 Tr. 85). And he stated that appellee makes it difficult for him to exercise visitation. (Apr. 23, 2008 Tr. 84). Appellant additionally testified that when appellee moved with the children from her grandparents' house to Dyer's house, she did not inform him. (Apr. 23, 2008 Tr. 86).

{¶61} Appellee testified that after the divorce, she and the children moved from her grandparents' house to live with Dyer. (Apr. 23, 2008 Tr. 62). She also admitted she was found in contempt for violating the visitation order. (Apr. 23, 2008 Tr. 126). As a result, the court ordered her to serve 30 days in jail with the

opportunity to purge by abiding by the standard order of visitation for one full year and permitting and aiding telephone contact between appellant and their daughter. (Apr. 23, 2008 Tr. 126-27). Appellee testified that she complied with the purge conditions and never went to jail. (Apr. 23, 2008 Tr. 127). She stated that for the past two years since the contempt finding, she had complied with all court orders. (Apr. 23, 2008 Tr. 128). Appellee testified that she facilitates phone contact between appellant and their daughter even when appellant calls past his scheduled time. (Apr. 23, 2008 Tr. 129-30).

{¶62} Appellee also testified as to appellant's visitation. She stated that at that time, appellant was to have visitation at a local agency from 4:00 p.m. to 6:00 p.m. on Mondays. (Apr. 23, 2008 Tr. 131). She stated he had failed to attend these visits. (Apr. 23, 2008 Tr. 131). Additionally, she testified that in the fall of 2007 and winter of 2008, appellant's visits were sporadic and that he would say he had car trouble or could not get off from work. (Apr. 23, 2008 Tr. 132). Often times, she stated, appellant would simply not show up at the exchange location where he was to pick up the children for weekend visitation. (Apr. 23, 2008 Tr. 135). Appellee stated that the parties were to exchange the children in Bridgeport, which was an hour-and-a-half from her home. (Apr. 23, 2008 Tr. 134). She testified that when appellant did not call, she and the children would wait awhile for him and then turn around and drive the hour-and-a-half back home. (Apr. 23, 2008 Tr. 135-36).

{¶63} As to appellant's phone calls with the children, appellee testified that sometimes the phone calls are very short. (Apr. 23, 2008 Tr. 68).

{¶64} Appellant testified that he has never missed a child support payment, that he provides medical insurance for the children, and that he purchases clothing for the children. (Apr. 23, 2008 Tr. 96). Appellee agreed that appellant paid his child support. (Jan. 11, 2010 Tr. 36-37).

{¶65} Appellant testified that he currently does not work, but attends school in the evenings. (Jan. 11, 2010 Tr. 88). He stated that if he was granted custody of the children, he had friends who would babysit while he was at school. (Jan. 11, 2010

Tr. 88-89).

{¶66} Appellant submitted numerous photographs that show the children with him engaging in everyday activities and appearing happy. (Apr. 16, 2010 Exs. 1-93).

{¶67} Appellant further testified that he recently learned he has a seven-year-old daughter who lives in Florida with her mother. (Jan. 11, 2010 Tr. 89). He later testified that he reconnected with the child's mother and they planned to marry in May at which time she would move in with him. (Apr. 16, 2010 Tr. 36).

{¶68} Amy Graham, the GAL, recommended that it was in the children's best interests to remain in appellee's residence. (Apr. 16, 2010 Tr. 96). She further opined that the children were happy, accelerating at school, and were in a stable environment. (Apr. 16, 2010 Tr. 97). As to the parties, Graham opined they should both attend anger management counseling. (Apr. 16, 2010 Tr. 97). Additionally, Graham stated the children have a young sibling at appellee's house to whom they are very much attached. (Apr. 16, 2010 Tr. 105). She also testified that while she did not visit appellant's home because of the distance, she requested pictures from him and tried to arrange a visit to see his interaction with the children but he was uncooperative. (Apr. 16, 2010 Tr. 99-101).

{¶69} Applying this evidence to the best interest factors reveals the following.

{¶70} Both parents wished to have custody of the children. R.C. 3109.04(F)(1)(a).

{¶71} The children's wishes and concerns were not expressed to the court, presumably due to their young age. R.C. 3109.04(F)(1)(b).

{¶72} The children appear to have a good relationship with both of their parents. R.C. 3109.04(F)(1)(c). The GAL reported that the children were happy and well-adjusted in their home with their mother. And appellant's testimony and photographs showed that the children appear happy and at home when visiting with him. Additionally, the GAL found that the children have a younger sibling at appellee's house (appellee's and Dyer's child) to whom they are very much attached.

{¶73} As reported by the GAL, the children are well-adjusted at home and at

school where they have many friends. R.C. 3109.04(F)(1)(d).

{¶74} No testimony was presented to indicate that the parties are in anything but good overall health. There was some mention of mental evaluations for both parties, but it does not seem that any mental issues were brought to light for either party. The only possible issue here was anger management problems for both parties. R.C. 3109.04(F)(1)(e).

{¶75} The testimony was conflicting as to which parent was more likely to honor and facilitate visitation. R.C. 3109.04(F)(1)(f). Appellant testified that appellee and Dyer made telephone contact with his daughter difficult. Appellee, however, indicated that she allowed their daughter to talk with appellant even when he does not call at his scheduled time. Appellant further testified that appellee did not cooperate with visitation. This fact was substantiated as it applied in 2006, because the trial court found appellee in contempt for failing to abide by the visitation schedule. R.C. 3109.04(F)(1)(i). However, after the contempt finding, appellee has complied. The court's purge condition was for appellee to comply with the visitation schedule for one year. And she never had to serve her 30-day sentence because she complied with visitation. Additionally, appellee testified that appellant has failed to attend numerous visitations with the children, sometimes causing her to drive an hour-and-a-half to the meeting place just to turn around and drive back home with the children when appellant does not show up.

{¶76} The evidence showed that appellant is current in his child support. R.C. 3109.04(F)(1)(g).

{¶77} There was no evidence that either party or member of their household has ever been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child or domestic violence. R.C. 3109.04(F)(1)(h). However, as the evidence detailed, allegations were made against both appellant and Dyer regarding abuse. All allegations were unsubstantiated and NCDJFS closed the cases after thorough investigations.

{¶78} Finally, appellant has established a residence in Pennsylvania. R.C.

3109.04(F)(1)(j). The trial court found that he was residing in a one-bedroom apartment. But although that was the case at the January 2010 hearing, by the time of the April 2010 hearing, appellant was residing in a five-bedroom house with his fiancée.

{¶79} Given the evidence and the best interest factors, we cannot conclude that the trial court abused its discretion in finding that it was in the children's best interest to remain in appellee's custody. Many of the factors weigh evenly as to both parties. And while the parties may each have their flaws, both can provide adequate, loving homes for the children. When reviewing a case under the abuse of discretion standard of review, even if this court may have reached a different conclusion, we are required to defer to the trial court's judgment unless it was arbitrary, unreasonable, or unconscionable. Based on this court's standard of review and because the trial court's decision was based on competent, credible evidence, we have no choice but to affirm it.

{¶80} Accordingly, appellant's sole assignment of error is without merit.

{¶81} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P.J., concurs.

DeGenaro, J., concurs.

[Cite as *Dyer v. Gomez*, 2022-Ohio-1127.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

DAGMAR D. DYER,

Plaintiff-Appellee,

v.

JOHN PAUL GOMEZ,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 NO 0484

Domestic Relations Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 205-0135

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part, Reversed and Remanded, in part.

No Brief filed for Plaintiff-Appellee and

John Paul Gomez, pro se, 3313 Kathy Drive, Pittsburgh, PA 15204 for Defendant-Appellant.

Dated: March 31, 2022

App. P3

Robb, J.

{¶1} Appellant John Paul Gomez (the father) appeals the decisions entered by the Noble County Common Pleas Court on his child custody motions. In his first assignment of error, he argues the trial court should have granted his 2019 motion to modify parental rights and responsibilities. His motion was denied in 2020, and the findings of fact and conclusions of law were issued in 2021 (on this court's instruction due to the father's timely motion). The father sets forth other complaints under this assignment of error as well, such as a contention the case should not have been heard in Ohio based on his belief the home state of both children had changed to Pennsylvania. The judgment denying the father's 2019 motion to modify parental rights is affirmed.

{¶2} In his second assignment of error, the father argues the trial court should have relieved him of the obligation to pay child support to Appellee Dagmar Dyer (the mother) when the court granted his 2021 motion for custody of the parties' son. The September 21, 2021 judgment granting the father's 2021 motion is reversed to the extent it modifies custody in his favor *without* addressing his continuing child support obligation. The case is remanded for the trial court to address termination of the father's monthly child support obligation corresponding to the son and other matters related to child support.

STATEMENT OF THE CASE

{¶3} When the parties divorced in 2006, the mother was named the residential parent of both children (a daughter born in August 2003 and a son born in March 2005). *Gomez v. Gomez*, 7th Dist. Noble No. 06 NO 330, 2007-Ohio-1559. The father's initial motion to reallocate parental rights was denied, and that decision was eventually affirmed. *Gomez v. Gomez*, 7th Dist. Noble No. 10-NO-375, 2011-Ohio-2843 (after we reversed the finding on changed circumstances and remanded to address the children's best interest).

{¶4} On May 16, 2019, the father filed a motion to modify parental rights and responsibilities, and a motion to terminate child support as the son started living with him in Pittsburgh in April 2018 and the daughter started living with him in February 2019. A

hearing was conducted on July 26, 2019. On the same day, the father filed a motion to transfer the case to Allegheny County, Pennsylvania. The court denied the motion, finding jurisdiction and venue were proper. (8/8/19 J.E.; 9/10/19 J.E).

{¶5} The next hearing included an *in camera* interview with the children. As the father wished to present more evidence than time permitted, the hearing was continued. (8/30/19 Tr. 67-68). The daughter started staying at the mother's residence in mid-August. The court issued an order confirming the mother's custody of the daughter and ordering enrollment at a school in Ohio (pending a ruling on the father's modification motion). (9/10/19 J.E.). On September 23, 2019, the mother filed a motion seeking to confirm her legal status as the custodian of the son and to obtain physical custody of him.

{¶6} The father filed more motions protesting the case proceeding in Ohio. He asked the court to reconsider his motion to transfer the case to Allegheny County, disclosing he obtained a protection order against the mother and filed a motion for custody in that county's family court. He also moved to dismiss, claiming Ohio lacked jurisdiction and was an inconvenient forum.

{¶7} On October 30, 2019, the mother filed a motion to show cause for failing to comply with the original custody order and an emergency motion for physical custody of the son disclosing new issues (with school, running away, and the father's wife ejecting the son from the home). The mother attached an entry showing the court in Allegheny County dismissed the father's custody motion on October 17, 2019, as the court found the father "failed to establish proper jurisdiction/venue exists" in Pennsylvania. The court granted the mother's motion to obtain physical custody of the son and ordered the father to immediately surrender him. (11/4/19 J.E.).

{¶8} On November 22, 2019, the father filed motion to hold the mother in contempt for violating the Allegheny County protection order, which contained a provision granting him temporary custody of the son. The same day, the father filed a "renewed" motion for modification of parental rights and responsibilities. He said the children lacked stability and supervision, pointing to the time the son spent living with him (5/4/18-10/30/19) and the time the daughter spent living with him (2/7/19-8/16/19).

{¶9} There were delays in setting a further hearing after the father filed an original action in this district against the trial judge (and the mother), which the father

voluntarily dismissed weeks later. *State ex rel. Gomez v. Favreau*, 7th Dist. Noble No. 19 NO 0469 (filed 9/4/19). Soon after that dismissal, he filed a similar action in the Ohio Supreme Court, which was dismissed on December 13, 2019 on the judge's motion. *State ex rel. Gomez v. Favreau*, 157 Ohio St.3d 1508, 2019-Ohio-5152, 136 N.E.3d 493.

{¶10} The next hearing proceeded on January 17, 2020 but was continued after the father's presentation of his case took longer than expected; the court pointed out the mother was entitled to an opportunity to present evidence. The scheduling of the continued hearing was delayed after the father filed a notice of appeal from various orders entered between August and November of 2019. *Dyer v. Gomez*, 7th Dist. Noble No. 20 NO 0471. The appeal was dismissed in June 2020.

{¶11} The final day of the hearing proceeded on July 17, 2020. The trial court denied the father's motion and maintained the mother as the residential parent. (7/21/20 J.E. 1). Hours later, the court rejected the father's motion for findings of fact and conclusions of law, which had been filed the previous day. (7/21/20 J.E. 2). The father appealed from those entries. This court dismissed the appeal but instructed the trial court to issue findings of fact and conclusions of law. *Dyer v. Gomez*, 7th Dist. Noble No. 20 NO 0476, 2021-Ohio-1168.

{¶12} Less than three weeks after our April 1, 2021 decision, the father filed an original action in the Supreme Court seeking to compel the trial judge to issue findings of fact and conclusions of law. The judge's response pointed out: he acted as a visiting judge in this case; he retired when his term ended in February 2021; the regular common pleas court judge recused himself from this case years ago (and then retired in April 2021); the new common pleas court judge recused herself on April 28, 2021; and a visiting judge was recently assigned to this case. The Supreme Court dismissed the father's action on June 2, 2021. *State ex rel. Gomez v. Favreau*, 163 Ohio St.3d 1437, 2021-Ohio-1870, 168 N.E.3d 1192.

{¶13} While the new judge was reviewing the record in order to issue findings of fact and conclusions of law, the father filed a motion for temporary custody of the son. This August 24, 2021 motion explained a new development: a Muskingum County juvenile court placed the son in his custody as part of a plea agreement to avoid further juvenile incarceration. The father's motion said the mother agreed with the placement

and would visit on Sundays. The court held a hearing on the motion and conducted an *in camera* interview of the son.

{¶14} On September 21, 2021, the trial court issued two judgments. Both are encompassed in the father's notice of appeal. First, in order to comply with the instructions of this court in the prior appeal, the trial court issued findings of fact and conclusions of law in support of the July 21, 2020 decision denying the father's 2019 motion to modify parental rights and responsibilities. The father's first assignment of error on appeal contests this decision denying his 2019 motion.

{¶15} In the other judgment issued on September 21, 2021, the court granted the father's 2021 motion related to the son's custody. The judgment set forth conclusions of law, recited new facts learned at the latest hearing, and referred to the prior situation in the case by incorporating the other findings of fact and conclusions of law (which were filed the same day). In addition to the father's testimony on the juvenile delinquency adjudication and the mother's agreement with the placement, the court cited the latest *in camera* interview of the child and the exhibits.

{¶16} An hour later, the father filed a Civ.R. 52 motion for findings of fact and conclusions of law, expressing a belief it was "procedurally necessary" for him to do so but observing "To the extent that this Honorable Court has satisfied this request in the combined Journal Entry dated September 21, 2021, the Court may render said motion moot." On September 27, 2021, the court found the motion moot pointing to the findings of fact and conclusions of law in the entry granting him custody (including the incorporated findings and conclusions on the other decision). The father's second assignment of error on appeal contests the failure to terminate child support while granting his 2021 custody motion.

ASSIGNMENT OF ERROR ONE

{¶17} The father's first assignment of error provides:

"The trial court erred by denying my Civil Rule 52 motion, abused its discretion failing to find change of circumstances and considering the best interests of the children; and that the harm likely to be caused by a change of environment was outweighed by the advantages of the change. Thus, failed to modify allocation [of] parental rights and responsibilities violating my due process and right to raise my children unreasonably,

arbitrarily, and unconscionably to my prejudice against the manifest weight of the evidence."

{¶18} As to the assignment of error's reference to the denial of his Civ.R. 52 motion, the father points out the original judge denied his July 20, 2020 motion for findings of fact and conclusions of law. He believes the judge who was assigned the case after this court instructed the trial court to issue findings of fact and conclusions of law misinterpreted this court's instruction and the rule as constraining the trial court to maintain the July 21, 2020 judgment. He says the trial court was not required to support the "irrational" decision denying his 2019 motion.

{¶19} However, the trial court did not believe the denial was irrational. Furthermore, reconsideration of a final judgment is a nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379-381, 423 N.E.2d 1105 (1981), fn. 1 (consistent with Civ.R. 54(B), only an interlocutory order is subject to revision). Relief from a judgment is only available by rule, such as Civ.R. 59 (motion for new trial) or Civ.R. 60(B) (motion for relief from judgment). *Id.* at 380. App.R. 4(B)(2) tolls the time for appealing an "otherwise final" judgment when there is a pending timely motion for findings of fact and conclusions of law.

{¶20} The fact that a ruling is pending on a motion for findings of fact and conclusions of law does not mean a court can reconsider the otherwise final judgment. *Perfection Graphics Inc. v. Sheehan*, 11th Dist. Geauga No. 93-G-1776 (Mar. 3, 1995) (a motion seeking reconsideration is not proper merely because the time for appealing was tolled by a motion for findings and conclusions). It has been observed:

> Filing a Civ.R. 52 motion means the judgment is not final for purposes of appeal, pursuant to App.R. 4, but that does not mean that it is not final for other purposes. * * * There is no provision in Civ.R. 52 to permit the trial court to reconsider or change its judgment pursuant to a request for findings of facts and conclusions of law. Civ.R. 52 provides a vehicle for a trial court to clarify its judgment, not to modify an otherwise final judgment.

Vanderhoff v. Vanderhoff, 3d Dist. Seneca No. 13-09-21, 2009-Ohio-5907, ¶ 12. Upon pointing out the divorce judgment was final under R.C. 2505.02, Civ.R. 54, and Civ.R. 75(F), the Third District concluded the court could not reconsider the judgment,

notwithstanding the pending motion for findings of fact and conclusions of law. *Id.* at ¶ 14-16. *See also Hein Bros. v. Reynolds*, 7th Dist. Belmont No. 21 BE 0017, 2021-Ohio-4633, ¶ 42 (where the court asked for proposed findings and conclusions, we held: "after a court announces its decision, the chance to file proposed findings of fact and conclusions of law is not meant to be a reconsideration procedure").

{¶21} In any event, the trial court specifically opined the father failed to meet his burden to present sufficient evidence to support a modification of parental rights and responsibilities under R.C. 3109.04. This leads to the father's argument that the trial court abused its discretion in denying his 2019 motion for modification of parental rights and responsibilities.

{¶22} A trial court's custody modification decision is reviewed for an abuse of discretion. *Davis v. Flickinger*, 77 Ohio St.3d 415, 416, 421, 674 N.E.2d 1159 (1997). Pursuant to statute:

> The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child.

R.C 3109.04(E)(1)(a). This statute then states the court shall retain the previously designated residential parent unless one of the following applies: (i) the residential parent agrees to change the residential parent; (ii) the child has been integrated into the other parent's family with the residential parent's consent; or (iii) the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child. R.C 3109.04(E)(1)(a)(i)-(iii). The father relies on subdivision (iii), arguing any harm from a change of environment would be outweighed by the advantages to the child.

{¶23} The father complains the original judge described the children's time living with him as "extended visitation" accomplished without motion or court order and found "there had been an agreement that the children should remain in the custody of their

mother in Ohio * * *." However, the comments were making the point that the court's prior designation of the mother as residential parent was not changed by the children's relocation to Pittsburgh with the mother's consent. The mother testified that after the house was burglarized and she suffered an accident in the same weekend, they agreed the son would move to Pittsburgh with the father temporarily; she said they did not agree it was a permanent move. (7/26/19 Tr. 7, 9). This was explained in ¶ 5 of the court's findings of fact. (9/21/20 J.E.1).

{¶24} As for a change of circumstances, the father's May 2019 motion said the son began living with him in Pittsburgh in the spring of 2018 and attended school there for the 2018-2019 school year and the daughter moved into his residence and began school there in February 2019. The daughter returned to the mother's residence in August 2019, and the son returned to the mother's residence in November 2019. The father's brief points out the son also lived with him for a time in 2012 and the daughter lived with him for a time in 2015. He also points to the mother's many moves since the prior order and says she was unavailable to supervise the children as she has three jobs.

{¶25} A change of circumstances must be a "change of substance, not a slight or inconsequential change"; however, the change need not be substantial. *Davis*, 77 Ohio St.3d at 418 (taking no issue with the appellate court requiring the change to be "substantiated, continuing, and have a materially adverse effect upon the child"). A court is not bound by a child's status at the time a motion is filed and may consider later events in ascertaining changed circumstances, as the hearings may take time to conduct and important developments may have occurred. *Hagan v. Hagan*, 5th Dist. Delaware No. 18 CAF 03 0030, 2019-Ohio-51, ¶ 35

{¶26} The father criticizes ¶ 7 of the conclusions of law where the trial court said the parties' various alterations in the children's living arrangements do "not necessarily constitute a change of circumstances pursuant to R.C. 3109.04." Although they had moved in with their father, they then moved back to their mother. In the next sentence, the court proceeded to discuss various behavioral issues that have arisen with the children. By the time of the final hearing on the 2019 motion, each child had experienced an adverse change (Guernsey County juvenile adjudication with probation for one and pregnancy for the other).

{¶27} Assuming the totality of evidence sufficiently evinced a change of circumstances, we move to the remaining modification provisions. "[I]f the threshold test of changed circumstances is not met, then a court is prohibited from granting the non-residential parent's motion to reallocate parental rights (by finding a change of custody would be in the child's best interest). Yet, this does not mean a court cannot make alternative holdings in support of its denial of modification." *Chick v. Chick*, 7th Dist. Columbiana No. 19 CO 0021, 2020-Ohio-4431, ¶ 30-31 ("Even where a trial court finds a lack of changed circumstances, the trial court is permitted to make alternative holdings on the best interest test and the harm versus advantage test.").

{¶28} In outlining the behavioral problems, the trial court found issues arose in both households and the prior agreements to relocate the children were not necessarily in each child's best interest at the time. The court then said it considered the best interest factors in R.C. 3109.04(F)(1) and listed the factors considered. The court concluded the modification proposed by the father was not in either child's best interest and the harm from another change in environment was not outweighed by the advantages of the change of environment to each child. To the contrary, the father urges the modification would have been in each child's best interest and the benefits of the modification would outweigh any harm.

{¶29} We review the best interest factors. The father moved for modification of parental rights and responsibilities, and the mother wished to maintain her residential parent status. *See* R.C. 3109.04(F)(1)(a) (wishes of parents). Notably, the father essentially withdrew his request for custody of the daughter at the final hearing where he declared: "I will grant [the daughter's] wishes to stay here with her mom in Cambridge * * *." He pointed out she was just turning 17, was pregnant, and the baby's father lived near her. (7/17/20 Tr. 33). At the time of the final hearing on the 2019 motion, the son was 15 years old. The children's wishes and concerns were considered, and the court conducted *in camera* interviews. *See* R.C. 3109.04(F)(1)(b).

{¶30} The father emphasized the mother was working three jobs at once: she owned a salon; she sold items for a beauty supply company; and she bartended three to four nights a month (while the father had the children). The father complained the mother moved many times in the past ten years. We note the moves were all within the same

area. At the time of the August 2019 hearing, the mother lived in a two-bedroom apartment above her salon in Cambridge. By the time of the final hearing in July 2020, she had moved with the children to a three-bedroom house, still in Cambridge.

{¶31} The father lived with his wife and their four children in Pittsburgh. *See* R.C. 3109.04(F)(1)(j) (residence out of state). As acknowledged by the mother, the children at issue here missed their four half-siblings. *See* R.C. 3109.04(F)(1)(c) (relationship with those who may significantly affect child's best interest).

{¶32} Yet, the daughter was prohibited from visiting the father's residence due to a civil protection order which his wife obtained against the daughter in Pennsylvania. (1/17/20 Tr. 141; 7/17/20 Tr. 31). There was also a physical incident between the father's wife and the son; according to the mother's testimony, Children Services was involved. (7/17/20 Tr. 7, 15). The father acknowledged his wife attempted to hit the son for being disrespectful and he had to calm his wife. They then had a disagreement, prompting him to move with the son to another location for a month. (7/17/20 Tr. 26-27). The father also acknowledged there were incidents of each child running away while in his care. (7/17/20 Tr. 35). The father's witness found the daughter at a bus stop in downtown Pittsburgh after she jumped out of her father's car; the witness said the daughter wanted to go home as she missed her mother and friends. (8/30/19 Tr. 25). The father accused the mother of encouraging the children to run away.

{¶33} The father presented evidence on his parenting style and his dedication to the children's upbringing and their participation in an after-school program conducted by a non-profit run by his wife. *See* R.C. 3109.04(F)(1)(d) (adjustment to home, school, and community). The father urged the children received much-needed supervision and stability after the son moved to his residence in May 2018 and the daughter moved to his residence in February 2019 (until the mother sought their return).

{¶34} At the time of the final hearing, the daughter was about to be a junior in high school in the district where she lived with her mother; they were considering an online option which became available due to the pandemic. She worked at the salon owned by the mother. (7/17/20 Tr. 10, 12).

{¶35} The son adjusted to his prior charter school in Pennsylvania where he attended eighth grade for the 2018-2019 school year. However, that entity had no high

school. The mother wanted the son to come home to start ninth grade, but the father enrolled him at the Catholic high school in Pittsburgh which the daughter attended the prior spring. The son then moved back to the mother in November 2019 and suffered issues with school. In the summer of 2020, the son was working full-time at a fast food restaurant. The mother believed this was beneficial to him while the father said he would disallow work once school started (and allow 15 hours in the summer). (7/17/20 Tr. 37).

{¶36} The trial court said it considered the mental and physical health of all involved. *See* R.C. 3109.04(F)(1)(e). The father testified about attending family therapy. The daughter was approximately six months pregnant.

{¶37} The mother facilitated visitation in the past, and there was no indication the father would not facilitate visitation if he was granted custody. *See* R.C. 3109.04(F)(1)(f),(i). It seemed the father's more recent lack of visitation was attributable to the dynamic with the father's wife (and her protection order against the daughter). After the father's May 2019 motion was filed, the mother complained he was keeping custody of the children contrary to the court's designation of the mother as the residential parent. The father pointed out he initially relied on their verbal agreement about custody; the mother said they agreed it was temporary. He claimed she only cared that the children wanted to return to her because she feared she would lose the child support he was paying.

{¶38} On the best interest factor related to past child support, the father paid child support as ordered and did not seek termination until a year after the son began living with him in May 2018. *See* R.C. 3109.04(F)(1)(g). After the daughter also moved in with him in February 2019, the mother provided him with her child support debit card. He then filed a motion to terminate support in May 2019 along with the motion to modify parental rights.

{¶39} As the court pointed out, there was no evidence either parent acted in a manner resulting in an abused or neglected child. *See* R.C. 3109.04(F)(1)(h). As to this factor, the father points to the Pennsylvania protection order issued against the mother with regards to her threats against him and his wife.

{¶40} In reviewing a custody modification decision for an abuse of discretion, we do not substitute our judgment for that of the trial court. See *Davis*, 77 Ohio St.3d at 416,

421; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In evaluating a case under the abuse of discretion standard, the court determines whether the decision was arbitrary, unconscionable, or unreasonable. *Blakemore*, 5 Ohio St.3d at 219. "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAA Ents. Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Id.*

{¶41} With these standards governing and pointing to our review of the best interest factors conducted above, we hereby conclude the decision denying the father's 2019 motion to modify parental rights and responsibilities was not arbitrary or unconscionable, and there exists a sound reasoning process that would support such a decision.

Delay

{¶42} The father complains about the delay between his 2019 motion and the July 2020 final hearing and ruling on the motion. Our review of the record indicates the father was the cause of delay during this time, as supported by our above Statement of the Case. As a recap, the case was promptly heard in July and August 2019 on a May 2019 motion. Because the father wished to present more evidence than time permitted, the August hearing was continued. The hearing was not held until January 2020 due to the original actions filed by the father against the judge. That is, he filed an original action against the judge in this court on September 13, 2019. Soon after that action was dismissed, he filed an original action against the judge in the Ohio Supreme Court on October 11, 2019, which was dismissed on December 13, 2019.

{¶43} The hearing convened on January 17, 2020 but went longer than expected, and the court commented a further date was required to allow the mother to present a defense. The father complains about this comment along with a statement in the findings

of fact and conclusions of law referencing his claim of racial discrimination[1] and his slow presentation. Yet, the court was merely reviewing the history of the case and explaining the judge can properly encourage the parties to move along when they start repeating themselves. *See* Evid.R. 403(B) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."). The hearing was not rescheduled until July 17, 2020 because the father decided to file an untimely notice of appeal in January from interlocutory orders issued between August and November of 2019. The appeal was dismissed in June 2020, after which the final hearing was promptly scheduled. Accordingly, the delay between the first and last hearings on his 2019 motion was not caused by the trial court's inaction.

Ohio Court Maintaining Jurisdiction

{¶44} In the recitation of the issues presented and in the argument section under this assignment of error, the father briefly argues the trial court should have found Pennsylvania was the home state of both children. Although the father sets forth a lengthy and specific assignment of error arguing why the court erred in failing to modify custody, the text of the assignment of error does not mention or relate to his argument on jurisdiction.

{¶45} At the first hearing in the case, where the father's argument under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was initially addressed, he said the son began living with him in Pennsylvania a year before he filed his motion to modify custody and the daughter began living with him around February 8, 2019 which he calculated to be six months as of the date of the July 26, 2019 hearing. (7/26/19 Tr. 16-17). However, the father's argument on the time the daughter spent in Pennsylvania was mathematically incorrect. As the mother and the court pointed out, the period he referred to (2/8/19 - 7/26/19) was less than six months.

[1] We note the father claims racism is evidenced by the original judge using German to repeat a remark initially made in English. However, this was not random linguistic usage with some underlying malicious intent but was clearly the product of earlier banter after the mother explained her first name was German and she was born in Germany; the court also repeated a comment in Spanish after the mother noted she grew up in Spain. (8/30/19 Tr. 3; 1/17/20 Tr. 140).

{¶46} Moreover, even assuming the home state issue was relevant to the modification proceedings, it would have been the time prior to the *filing* of his May 16, 2019 motion that would be relevant, not the time passing after his motion. "Home state" is defined in the UCCJEA as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months *immediately preceding the commencement of a child custody proceeding* * * *." (Emphasis added.) R.C. 3127.01(B)(7). "Commencement" is specifically defined as "the filing of the first pleading in a proceeding." R.C. 3127.01(B)(5). The daughter was only with him for three months at the time of his motion.

{¶47} In any event, the father relied on R.C. 3127.15(A)(1) in making his transfer argument about the home state of the children. (7/26/19 Tr. 28). However, this statute applies to the court's "jurisdiction to make an *initial* determination in a child custody proceeding * * *." (Emphasis added.) R.C. 3127.15(A)(1). This statute can also be relevant when an Ohio court is determining whether there is jurisdiction to modify a custody order *of a different state*. R.C. 3127.17 ("a court of this state may not modify a child custody determination made by a court of another state" unless certain conditions exist), citing R.C. 3127.15.

{¶48} However in this case, *the prior initial determination in the child custody proceeding was made by an Ohio court*. Therefore, the pertinent statute is R.C. 3127.16. *See Slaughter v. Slaughter*, 10th Dist. Franklin No. 11AP-997, 2012-Ohio-3973, ¶ 22.[2] The statute relating to Ohio's continuing jurisdiction over its own custody orders provides:

> a court of this state that has made a child custody determination consistent with section 3127.15 or 3127.17 of the Revised Code has exclusive, continuing jurisdiction over the determination until the court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

R.C. 3127.16 (with exception for temporary emergency custody in R.C. 3127.18).

[2] The case cited in the father's brief did not involve continuing jurisdiction upon a motion to modify an Ohio custody order; rather, it involved an initial determination of custody. *See Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420 (where the mother moved with the children to Ohio from West Virginia four months before filing her complaint for legal separation).

{¶49} We emphasize to the father the statute pluralizes "parents" and uses "and" (rather than "or") when asking if the child "and" the child's parents do not presently reside in Ohio. As Ohio had jurisdiction to make the initial custody determination, Ohio's continuing and exclusive jurisdiction does not terminate unless *none* of the listed parties still live in this state. R.C. 3127.16; *Slaughter,* 10th Dist. No. 11AP-997 at ¶ 23-25, citing *Lafi v. Lafi*, 2d Dist. Miami No. 2007 CA 37, 2008-Ohio-1871, ¶ 5, 12-13. Similarly, we note the federal Parental Kidnapping Prevention Act (PKPA) provides continuing jurisdiction to the state issuing the initial custody order if that state remains the residence of the child or of a person who claims a custody or visitation right with regards to the child. 28 U.S.C. 1738A (b) (defining contestant), (d) ("The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as [such court had jurisdiction under its state laws] and such State remains the residence of the child or of any contestant.").

{¶50} As modification of a prior Ohio custody order is sought: "the determinative fact in this case was whether either appellant or appellee or any of their children were residents of Ohio at the time [of the] motion to transfer venue. If none of these individuals was a resident of Ohio at that time, the domestic relations court no longer had continuing jurisdiction." *Slaughter,* 10th Dist. No. 11AP-997 at ¶ 27. As the mother continued to live in Ohio, which is the state of the initial custody determination, the father's argument on Pennsylvania's jurisdiction is without merit.

{¶51} Lastly, we note as to venue, "the legislature has entrusted trial courts with the discretion to determine whether their court is an inconvenient forum under R.C. 3127.21." *In re N.R.*, 7th Dist. Mahoning No. 09 MA 85, 2010-Ohio-753, ¶ 28. In that case, the court in Mercer County, Pennsylvania "expressed its willingness to accept jurisdiction in the event that the Ohio court chose to transfer the case." *Id.* at ¶ 5 (where the mother filed a motion in Ohio and the father filed a motion in Pennsylvania). Still, we concluded: "the trial court determined that retaining jurisdiction did not pose an inconvenience. While it is true that certain enumerated factors favored Pennsylvania as a more convenient forum, and others favored Ohio as more convenient, the trial court acted within its discretion in weighing the factors." *Id.* at ¶ 28.

{¶52} Those venue factors include: whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child; the length of time the child has resided outside this state; the distance between the court in this state and the court in the state that would assume jurisdiction; the relative financial circumstances of the parties; any agreement of the parties as to which state should assume jurisdiction; the nature and location of the evidence required to resolve the pending litigation, including the testimony of the child; the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and the familiarity of the court of each state with the facts and issues in the pending litigation. R.C 3127.21(B)(1)-(8).

{¶53} Here, the father initiated the action in Ohio and later asked to transfer the case by claiming Pennsylvania was the children's home state (as discussed supra). There was no compelling evidence at the July 26, 2019 hearing indicating Ohio would be an inconvenient forum besides the location of the children in Pennsylvania, which was said to be contrary to the residential parent's wishes at the time. In any event, the father's brief does not cite R.C. 3127.21 or specify Ohio was an inconvenient forum.

{¶54} On this topic, the brief merely complains the trial court did not provide him with a transcript of a call with the judge in Allegheny County and alleges the Ohio judge should not have told the Supreme Court (in a motion filed in his original action) that the court in Allegheny County found Pennsylvania to be an inconvenient forum. However, on October 17, 2019, the court in Allegheny County found the father "failed to establish proper jurisdiction/venue exists." That entry also indicated the existence of an Ohio order was confirmed by a procedural phone call with the Ohio judge. Pursuant to the relevant statute, a court of this state may communicate with a court of another state on a UCCJEA matter, and a "record need not be made of the communication" where the communication concerned court records and similar matters. R.C. 3127.09(A),(C). The arguments under this section are overruled.

Failure to Hold Mother in Contempt

{¶55} The father's list of issues presented for review contains a query as to whether the trial court's failure to address his November 22, 2019 motion for contempt deprived him of redress. (We note the mother filed a motion to hold the father in contempt of the original custody order a month before he filed his motion, and the court did not issue a specific order in denying that motion either.) Initially, we point out the father's contention on this topic is not briefed in the argument section under the assignment of error as required by App.R. 16(A)(7). In any event, his argument is without merit.

{¶56} He filed the motion in Ohio seeking to hold the mother in contempt for violating a provision of the protection order obtained in Allegheny County, Pennsylvania on October 1, 2019 (after he reported the mother threatened him). That order contained a provision granting him "Temporary primary custody" over the son. Yet, his custody motion was thereafter dismissed by the court in Allegheny County in a final order issued on October 17, 2019. Contrary to the father's contention, the temporary custody provision in the earlier order did not remain effective.

{¶57} Moreover, after the Pennsylvania court found a lack of jurisdiction and venue, the trial court in the case at bar issued a decision ordering the father to immediately surrender physical custody of the son to the mother. (11/4/19 J.E.). Also, the court's findings of fact and conclusions of law cited the Pennsylvania court's November 20, 2019 decision, which dismissed his contempt request upon citing Ohio's November 4, 2020 custody order.

{¶58} Under such circumstances, a trial court can reasonably exercise its discretion to refrain from holding a hearing on a motion for contempt that the court intends to deny. Due process and statutory protections protect the *accused* by providing an opportunity to explain *before being held in contempt*. *Anderson v. Fleagane*, 7th Dist. Belmont No. 21 BE 0020, 2022-Ohio-___, ¶ 59-60 (and the movant cannot appeal on grounds of failure to hold a hearing without showing prejudice in that the motion would have been granted).

{¶59} In any event, there was a hearing. The court issued a summons on the father's motion and set a hearing for December 2, 2020, the same day as the continued

hearing on modification was scheduled to proceed. As already noted, the hearing was then continued until January due to the father's original action pending in the Ohio Supreme Court. Two evidentiary hearings were eventually held after the motion for contempt was filed, and the court thereafter implicitly denied the father's motion.

{¶60} "Ohio law is well established that where the court fails to rule on an objection or motion, it will be presumed that the court overruled the objection or motion. Generally, when the trial court enters judgment without expressly determining a pending motion, the motion is also considered impliedly overruled." *Portofe v. Portofe*, 153 Ohio App.3d 207, 2003-Ohio-3469, 792 N.E.2d 742, ¶ 16 (7th Dist). *See also Batten v. Batten*, 5th Dist. Fairfield No. 09-CA-33, 2010-Ohio-1912, ¶ 82 (finding "silence on the issue of contempt to be an implicit denial of the motion"); *Bond v. Frank*, 2nd Dist. Miami No. 00CA55, 2001 WL 468386 (May 4, 2001) (rejecting the argument the court erred in failing to rule on the contempt motion and finding contempt motion was implicitly denied where the court entered judgment without mentioning the motion). Accordingly, Appellant was provided the right to redress his allegations and failed to show his contention had merit.

{¶61} For all of the foregoing reasons, the father's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶62} The father's second assignment of error alleges:

"The trial court erred by failing to relieve me of child support obligation and not providing adequate findings of fact and conclusions of law against the manifest weight of the evidence."

{¶63} As set forth in our Statement of the Case, the court issued two judgments on September 21, 2021: (1) the findings of fact and conclusions of law to support the July 20, 2020 denial of the father's 2019 motion to modify parental rights; and (2) the judgment granting of the father's 2021 motion seeking custody of the son. In the second judgment, the court expressed its findings and conclusions drawn from the new evidence. The court also incorporated its findings of fact and conclusions of law supporting the first judgment issued the same day. This assisted in reviewing the

history of the proceedings and the fact the situation existed prior to the most recent occurrences.

{¶64} We note one of the judgments listed in the father's notice of appeal was the September 27, 2021 denial of findings of fact and conclusions of law (which he requested as to the second September 21, 2021 judgment, the one granting his motion). Yet, the father does not specify an argument on the September 27, 2021 decision. We simply point out further findings of fact and conclusions of law are not required, even on a timely motion, where the judgment was not general. Civ.R. 52. *See also Saadi v. American Family Ins. Co.*, 7th Dist. Mahoning No. 20 MA 0083, 2021-Ohio-2360, ¶ 43 (a decision is not general merely because an appellant believes the court missed the point of a certain argument); *Shrock v. Mullet*, 7th Dist. Jefferson No. 18 JE 0018, 2019-Ohio-2707, ¶ 58 (request for findings and conclusions was moot where judgment was not general). The father recognized this when he acknowledged to the trial court that his request may be moot.

{¶65} Related to this assignment of error, the father contends the trial court abused its discretion in failing to relieve him of child support in the second September 21, 2021 judgment, which granted his 2021 motion for custody of the son. (Apt.Br. 21).[3] To review, the father's August 2021 motion said the mother agreed to transfer custody and said she would visit on Sundays. The motion was instigated by an August 19, 2021 Muskingum County juvenile court order releasing the child to the father's temporary custody to avoid juvenile incarceration.

{¶66} The trial court set the matter for an emergency hearing on September 1 in a judgment specifying the child had been released to the father's custody by a juvenile court and the son was living in Pennsylvania with the apparent consent of the mother. The father filed a parenting proceeding affidavit. Before the hearing, the court conducted an *in camera* interview with the son.

{¶67} The court found the mother had notice of the hearing by regular mail, certified mail, and telephone contact by a court employee (who spoke at the hearing).

[3] The father also incorporates his arguments under his first assignment of error and suggests child support would be terminated if we reversed the denial of his 2019 motion to modify parental rights. Because we affirmed that judgment under the first assignment of error, this argument fails.

The court noted the emergency hearing was required to ensure the father could enroll the child in school or therapy. The sixteen-year-old received his high school diploma and was about to start college in Pittsburgh. The juvenile court judgment was marked as an exhibit, and the father submitted other exhibits as well. The father testified in support of his motion. He also noted there was no longer any issue between his wife and his son, referring to successful therapy.

{¶68} The court cited R.C. 3109.04 as governing its custody decision and R.C. 3109.051 as governing its visitation decision. (9/1/21 Tr. 4). The court concluded there was a change in circumstances, the child's best interest would be served by a grant of custody to the father, and the harm from the change was outweighed by the advantages. (9/1/20 Tr. 19). These findings were reiterated in the September 21, 2021 judgment designating the father as the residential parent and legal custodian under R.C. 3109.04 and providing parenting time to the mother (on Sundays) under R.C. 3109.051. The entry noted the court was treating the father's motion as a motion to modify parental rights and responsibilities (J.E. at 3) and to modify the designation of residential parent and legal custodian (J.E. at 1). The mother did not appeal from this order granting the father's motion, but the father did.

{¶69} As the father complains, the trial court's judgment made no mention of child support. (Apt.Br. 19). He argues the court should have terminated the prior order obligating him to pay child support to the mother for the son because he was granted custody and named the residential parent. The father asks this court to modify the trial court's judgment by terminating his child support obligation; he is not seeking child support from the mother. (Apt. Br. at 40). The mother did not file a brief.

{¶70} Although the father filed a motion to terminate child support when he filed his 2019 motion to modify custody, he did not file a motion to terminate child support when he filed his 2021 custody motion addressing the new circumstances. The question is whether the court erred in failing to sua sponte terminate child support for a child when the court was granting a parent's motion to modify parental rights and thereby designating the child support obligor as the residential parent and legal custodian of that child.

{¶71} We note the father could have notified the child support enforcement agency of the existence of a statutory reason for which the child support order should terminate. *See* R.C. 3119.87 (stating a residential parent and legal custodian shall and an obligor may notify the agency of a reason for termination). One of the statutory "[r]easons for which a child support order should terminate through the administrative process" is a "[c]hange of legal custody of the child." R.C. 3119.88(A)(9).

{¶72} Although R.C. 3119.88(A) speaks of the administrative process for termination due to a change of legal custody, division (B) then states: "A child support order may be terminated by the court or child support enforcement agency for any reasons listed in division (A) of this section. A court may also terminate an order for any other appropriate reasons brought to the attention of the court, unless otherwise prohibited by law." R.C. 3119.88(B). Therefore, the trial court could properly terminate the child support order while it was changing legal custody, regardless of the lack of a specific motion or the non-utilization of the administrative process under R.C 3119.87.

{¶73} We also point out the custody statute applied by the trial court initially states "in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child" (where neither party seeks shared parenting):

> the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, *the responsibility to provide support for the children* and the right of the parent who is not the residential parent to have continuing contact with the children.

(Emphasis added.) R.C. 3109.04(A)(1). As set forth supra, division (E)(1) provides the restrictions on modification of a prior allocation.

{¶74} Although, division (A) is generally viewed as applying to an initial allocation, it would still apply to a subsequent modification order issued after the

dictates of the modification standard in (E)(1) are found to apply. That is, when parental rights and responsibilities are modified and re-allocated to the other parent, the court is to "designate that parent as the residential parent and the legal custodian of the child" as set forth in R.C. 3109.04(A)(1). Likewise, if a new residential parent and legal custodian is designated, the court should "divide between the parents the other rights and responsibilities, including, but not limited to, the responsibility to provide support for the children * * *". *See* R.C. 3109.041(A)(1). The father's motion seeking custody invoked the court's jurisdiction to rule on other parental responsibilities which would necessarily be impacted by the court's modification of the prior custody order. *See generally* Civ.R. 75(J). For instance, the court addressed parenting time and provided the mother with visitation of every Sunday.

{¶75} In any event, as set forth above, a court may terminate child support when the legal custodian is changed to the obligor. R.C. 3119.88(B). As the trial court granted the father's 2021 motion and issued a decision modifying parental rights and responsibilities and naming the father as the residential parent and legal custodian of the son, it was unreasonable to refrain from addressing the father's continuing obligation to pay child support to the mother for a child for whom she was no longer the residential parent or legal custodian.

{¶76} As such, we reverse the September 21, 2021 judgment but only to the extent it fails to address the father's monthly child support obligation corresponding to the son. We must remand on this issue as it is for the trial court in the first instance to address child support termination and related matters. *See, e.g.*, R.C. 3119.30 (health care); R.C. 3119.82 (tax dependent).

CONCLUSION

{¶77} For the foregoing reasons, we affirm the July 21, 2020 judgment (with September 21, 2021 findings of fact and conclusions of law) denying the father's 2019 motion to modify parental rights. As to the separate September 21, 2021 decision granting the father's 2021 motion and naming him the residential parent of the parties' son, we reverse this judgment to the extent it fails to address the father's child support

obligation related to the son and remand for the trial court to address the issue of child support termination and any related matters.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, we affirm the July 21, 2020 judgment (with September 21, 2021 findings of fact and conclusions of law) denying the father's 2019 motion to modify parental rights. As to the separate September 21, 2021 decision granting the father's 2021 motion and naming him the residential parent of the parties' son, we reverse this judgment to the extent it fails to address the father's child support obligation related to the son and remand for the trial court to address the issue of child support termination and any related matters according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as *Dyer v. Gomez*, 2021-Ohio-1168.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

DAGMAR D. DYER,

Plaintiff-Appellee,

v.

JOHN PAUL GOMEZ,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 NO 0476

Civil Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 205-135

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Dismissed.

Dagmar D. Dyer, *Pro Se,* 1602 Clairmont Avenue, Cambridge, Ohio 43725, Plaintiff-Appellee and

John Paul Gomez, *Pro Se,* 3313 Kathy Drive, Pittsburgh, Pennsylvania, 15204, Defendant-Appellant.

App.
P4

Dated: March 31, 2021

D'APOLITO, J.

{¶1} Appellant, John Paul Gomez, acting pro se, appeals two judgment entries of the Noble County Court of Common Pleas: The first judgment entry, time stamped 10:22 a.m. on July 21, 2020, summarily overrules Appellant's motion for modification of parental rights and responsibilities with respect to the children he shares with Appellee, Dagmar Dyer, N.G. (d.o.b. 8/6/2003) and E.G. (d.o.b. 3/2/2005). The second judgment entry, time stamped 3:19 p.m. that same day, overrules Appellant's Civil Rule 52 motion for findings of fact and conclusions of law. The motion was filed one day earlier on July 20, 2020.

{¶2} The second judgment entry reads, in pertinent part, "Since the Judgment Entry in this case deciding the case has been filed prior to receiving the Motion of Findings of Fact and Conclusions of Law by the visiting judge, this motion is denied." However, Civil Rule 52 reads, in relevant part:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.

{¶3} The Civ.R 52 motion was filed on July 20, 2020, one day prior to the entry of judgment overruling the motion for modification of parental rights and responsibilities on July 21, 2020. Because Civ.R. 52 permits a party to file the motion prior to the issuance of the judgment entry, the trial court was obligated to issue findings of fact and conclusions of law.

{¶4} We have previously recognized that "Civ.R. 52 applies to change of custody proceedings which involve questions of fact tried and determined by the court without a jury." *In re Aldridge*, 7th Dist. Jefferson No. 98-JE-53, 2000 WL 126601, *2, citing *State*