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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of S.G. Foods, Inc., Pak Yan Lui, and John Summers,	)	
Complainants,	)	
v.	)	Case No. 04-28-EL-CSS
FirstEnergy Corp., American Transmission Systems, Inc., Ohio Edison Company, and The Cleveland Electric Illuminating Company,	)	
Respondents.	)	
In the Matter of the Complaint of Miles Management Corp., Alok Bhaiji, M.D., Inc., Union House Bar & Restaurant, and Regional Therapy, Inc.,	)	
Complainants,	)	
v.	)	Case No. 05-803-EL-CSS
FirstEnergy Corp. and American Transmission Systems, Inc.,	)	
Respondents.	)	
In the Matter of the Complaint of Allianz US Global Risk Insurance Company, Lexington Insurance Company, and Royal Indemnity Company, as Subrogees of Republic Engineered Products Inc.,	)	
Complainants,	)	
v.	)	Case No. 05-1011-EL-CSS
FirstEnergy Corp., American Transmission	)	

Systems, Inc., Cleveland Electric Illuminating Company, Jersey Central Power and Light Company, Metropolitan Edison Company, Ohio Edison Company, Pennsylvania Electric Company, Toledo Edison Company, and The Illuminating Company,

Respondents.

In the Matter of the Complaint of Lexington Insurance Company, Frankenmuth Mutual Insurance Company, Charter Oak Fire Insurance Company, The Automobile Insurance Company of Hartford, The Standard Fire Insurance Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company, Travelers Property Casualty Company of America, Phoenix Insurance Company, St. Paul Mercury Insurance Company, St. Paul Surplus Lines Insurance Company, United States Fidelity & Guaranty, Allied Mutual Insurance Company, and Nationwide Mutual Insurance, as Subrogees of Their Insureds,

Complainants,

v.

Case No. 05-1012-EL-CSS

FirstEnergy Corp., American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Jersey Central Power and Light Company, Metropolitan Edison Company, The Ohio Edison Company, Pennsylvania Electric Company, Toledo Edison Company, and The Illuminating Company,

Respondents.

In the Matter of the Complaint of BMW Pizza, Inc. and DPNY, Inc., et al.,	)	
Complainants,	)	
v.	)	Case No. 05-1014-EL-CSS
FirstEnergy Corp., American Transmission Systems, Inc., Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, Pennsylvania Power Company, American Electric Power, Midwest Independent Transmission System Operator, Inc., PJM Interconnection, LLC, and John Does 1-100,	)	
Respondents.	)	

In the Matter of the Complaint of Triple A Sport Wears, Inc.,	)	
Complainants,	)	
v.	)	Case No. 05-1020-EL-CSS
FirstEnergy Corp. and American Transmission Systems, Inc.,	)	
Respondents.	)	

RESPONDENTS' APPLICATION FOR REHEARING

Respondents FirstEnergy Corp., American Transmission Systems, Inc., Ohio Edison Company, The Cleveland Illuminating Company, and Toledo Edison Company, pursuant to R.C. 4903.10, request rehearing of the Commission's March 7, 2006 Entry in the above proceedings with respect to its finding that these cases should be

consolidated for hearing and ultimate resolution. This Application should be granted for the reasons that follow.

I. INTRODUCTION

In its current state, this matter is the result of a consolidation of seven separately-filed cases. In two separate orders, one dated August 12, 2004 and the other July 13, 2005, the Commission specifically denied class action status in two of the pending matters (*S.G. Foods* and *Miles Management*.) Accordingly, at trial each complainant will have to individually establish inadequate service as to their particular account and will also have to individually establish the level of damages, if any, they may have sustained. While denying class action status, the Commission consolidated the cases for "hearing and ultimate resolution" apparently on the belief that it would save resources. However, rather than aiding or streamlining the litigation, consolidation would actually serve to prejudice all parties, especially the Respondents.

Under widely-accepted procedural rules governing consolidation, the fact that there are multiple cases against the same defendant does not warrant consolidating all of the cases into a single hearing -- even if each matter raises the same legal theory or arises from the same occurrence. In these cases, each Complainant's apparent theory is that the August 14 outage itself, without reference to anything more, constituted inadequate service. Setting aside the fact that one outage does not constitute inadequate service as a matter of law, none of the Complainants can dispute - and indeed some specifically allege - that each customer was affected by the outage

differently. (*E.g.*, Complaint of Lexington Insurance Co., *et al.*, ¶ 3.[1]) To prove that the FirstEnergy Respondents provided inadequate service, each customer must present evidence concerning that customer's specific service. Each Complainant will be required to present evidence about the number of outages, the duration of those outages, the cause of each outage, the Respondents' actions in response to the outage and any damages (including proof of the amount of damages and the cause of such damages). Moreover, if the basis for the Commission's decision to consolidate is the underlying assumption that there was a single massive outage on August 14, 2003, that assumption is simply wrong. Different parts of the systems of the FirstEnergy Operating Companies were affected differently. Some parts were virtually unaffected. Other parts experienced relatively brief outages. The sequence of events that led to outages was different for different parts of the system.

Consolidating these actions will turn the hearing into a series of "mini hearings" to adjudicate each individual customer's claims. Issues relating to the specific experience of each customer will overwhelm any possible common issues relating to the service outages that occurred on August 14, 2003. In short, consolidating these cases for hearing will needlessly consume time and resources rather than conserve them. Consequently, Respondents request that the Commission modify its March 7, 2006 Entry to hear these cases separately.

[1] This paragraph avers, "Complainants' Insureds are business entities and individuals residing in Ohio whose businesses and homes were situated within the geographic area affected by the Blackout and whose electric service was interrupted for varying lengths of time during the course of the Blackout."

II. ARGUMENT

Although the Commission's Rules of Practice do not contain specific standards governing consolidation, the Commission historically has looked to Rule 42 of the Ohio Rules of Civil Procedure to determine whether consolidation is appropriate. *See, e.g., Re: Ohio Bell Tel Co.*, No. 93-343-TP-ATA (Entry on Reh'g of Apr. 29, 1993, at 2.) Rule 42 provides courts the authority to consolidate actions "involving a common question of law or fact." Ohio R. Civ. P. 42(a). In considering whether to consolidate actions, key factors include whether consolidation would save time and resources, *Waterman v. Kitrick* (Franklin Cty. 1990), 60 Ohio App. 3d 7, 14, and whether confusion might result. *Morad v. Task* (Cuyahoga Cty. Ct. App. 1994), 1994 WL 78157 at *5 (attached as Exhibit A) (affirming refusal to consolidate because additional cases would "unnecessarily confuse . . . a somewhat complicated action . . . ."). It is inappropriate to consolidate where there are significant differences in the ultimate issues to be resolved, even if the cases stem from the same event. *Nunn v. Lockformer Co.* (Cuyahoga Cty. Ct. App. 1998), 1998 WL 811352, at *4 (attached as Exhibit B) ("By refusing to consolidate the cases, the trial court could reasonably be said to have avoided the expenditure of a great deal of time and money litigating an issue which may ultimately prove to be irrelevant.").

In interpreting the federal counterpart to Rule 42(a), which is virtually identical to Ohio's Rule, the United States Sixth Circuit Court of Appeals has observed that the decision to consolidate should specifically consider whether consolidation would result in avoidable prejudice or unfair advantage. *Cantrell v. GAF Corp.* (6th Cir. 1993), 999 F.2d 1007, 1011 (affirming trial court's consolidation ruling). That court observed,

"[While] conservation of judicial resources is a laudable goal . . . if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny." *Id.*

In its March 7 Entry, the Commission determined that, for the now-consolidated actions, "the issues . . . overlap to a large extent."[2] (Entry, ¶ 3.) But the Commission has previously recognized, "The fact that similar issues are presented in more than one pending case does not dictate that they be consolidated." *Re: Ohio Bell Tel. Co.*, No. 93-343-TP-ATA (Finding and Order of Mar. 31, 1993, at 3). For example, in *Matter of Artic Express, Inc.*, Nos. 03-1466-TR-CFV, *et al.* (Entry of Sept. 9, 2003), the respondent moved to consolidate three civil forfeiture proceedings pending against it. The claims involved fourteen alleged regulatory violations by eight different company officers. The Staff objected to consolidation, stating that consolidating the cases would lead to "confusion over the issues and force the Commission to address numerous unrelated matters in one decision." *Id.* at 2. The Commission agreed: "It is insufficient to argue that these cases should be consolidated simply because they involve the same respondent and may, according to that respondent, involve similar issues of law. Although all of the cases do involve Artic, the factual circumstances of each case are unrelated." *Id.* at 3.

[2] This statement by the Commission was made without any hearing or any conference with the Attorney Examiner or the parties. Respondents also are not aware of any prior cases where the Commission consolidated actions without any party asking for consolidation. The fact that Rule 42(A) states that an order of consolidation may issue "after a hearing" suggests strongly that a court or agency should not issue a consolidation order unless one of the parties files a motion asking for consolidation. At the very least, the Commission should have held a prehearing conference to have the parties discuss their cases, including the issues and evidence that each party intended to present. Such a hearing would have the benefit of potentially narrowing the issues and providing a realistic assessment of the benefits (if any) and disadvantages of potential consolidation of these matters.

Here, as in *Artic*, although the same Respondents are involved in all of the proceedings, the factual circumstances that will be dispositive of each customer's claims are different. Proving that an outage occurred on August 14, 2003 -- and even that it was caused by an act or omission of one or more of the Respondents[3] -- will not be enough for any customer to prove inadequate service. In addition, each customer will be required to present its evidence concerning the nature, number and duration of outages (and not just the August 2003 outage) regarding that customer's service; Respondents' design, operating and maintenance practices relative to that customer; and Respondents' response to the outages of that customer. *Miami Wabash Paper, LLC v. Cincinnati Gas & Elec. Co.*, No. 02-2162-EL-CSS (Opinion and Order of Sept. 23, 2003, at 7). Further, in order to receive an award of damages, each Complainant would also have to prove that it incurred damages that were caused by a violation of certain statutory or regulatory requirements and the amount of such damages, among other things. *See Santos v. Dayton Power & Light Co.*, No. 03-1965-EL-CSS (Opinion and Order of March 2, 2005).

For example, assume (as Respondents believe is the case) that some customers were without service for a matter of a few hours or less. It seems absurd to suggest that such a customer could maintain an action for inadequate service based on a single outage of an hour or two.

As the Commission has observed, each customer has standing to complain only of their own service, not someone else's. *Haberstro v. Ohio Edison Co.*, No. 98-1312-EL-

[3] Respondents deny that their acts or omissions caused any outages on August 14, 2003.

CSS (Entry of Jan. 26, 1999, at 13). In fact, in these cases, the Commission has rejected a class action representation proceeding where one customer (or one group of customers) can bring an action on behalf of other "similarly situated" customers. (*Miles Management*, Entry of July 13, 2005; *S.G. Foods*, Entry of Aug. 12, 2004, *interlocutory appeal denied* Aug. 26, 2004.) Accordingly, each customer must prove that Respondents violated a specific provision of Title 49, Commission rules or orders or tariffs with respect to service to that customer. (March 7, 2006 Entry, ¶ 47.) Every customer's situation will be different. Consolidating everyone's claims into one hearing simply will not advance the prosecution or defeat of any customer's claims. Consolidating all of the cases will only confuse the issues and require the Commission to address unrelated matters in one decision.

Lumping all of these cases together serves little purpose and, in some respects, may prejudge the merits of the issues presented in the various complaints and certainly prejudices the Respondents' defense. The fact that an outage occurred does not prove inadequate service. Indeed, the events of August 14, 2003 do not show that the outage was even an event that started in a unified way throughout the service area of any FirstEnergy operating company. Not all parts of these territories were affected the same way or at the same time. Further, not all of those customers whose service was affected were affected in the same way: some were not affected; some where affected for only a

few hours; some were affected for a longer period. In addition, there as a different sequence of events that led up to the outages in different areas.[4]

In short, a "global" review of the events of August 14, which is what consolidation suggests, would not further the case of any single Complainant. Rather, such a review would involve the needless expenditure of the parties' time and resources -- especially for Respondents who would be forced to be prepared to put on evidence relating to every part of their respective service territories. The Commission should instead employ a more narrow approach, focused on the events and circumstances surrounding each specific Complainant's service.

In a similar context, courts have rejected the notion that because there was an outage, all of the claims brought by those allegedly affected by the outage should addressed in a single case. More specifically, the requirement of commonality of issues as a prerequisite for consolidation is analogous to the commonality requirement for class certification under Rule 23(B)(3) of the Ohio Rules of Civil Procedure.[5] Under Rule 23(B)(3), a court cannot certify a class unless it finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . ." If "presenting and resolving individual issues is likely to be an overwhelming or unmanageable task . . . then common issues do not predominate."

[4] In fact, to the extent that there is a factual issue regarding whether the outages on August 14, 2003 constitute a single event affecting all customers similarly or a complex series of events with different parts of the FirstEnergy Operating Companies' service territories being affected differently, the Commission's decision to consolidate was premature at the very best.

[5] The federal rule relating to class action reads similarly, as do the class action rules and statutes of many other states. *Compare, e.g.,* Fed. R. Civ. P. 23; Ohio R. Civ. P. 23; N.Y. C.P.L.R. ¶ 901; N.J. R. 4:32-1; Tx. R. Civ. P. 42.

Entergy Gulf States, Inc. v. Butler (Tex. App. 2000), 25 S.W.2d 359, 362 (quotation omitted). *See also Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 313 (affirming denial of class certification where common issues did not predominate over individual issues).

The court in *Tegnazian v. Consolidated Edison, Inc.* (S. Ct. N.Y. 2000), 189 Misc. 2d 152, 730 N.Y.S. 2d 183, denied certification in a putative class action consisting of 300,000 customers in Manhattan who lost power. The court found that it could not certify the class because "many issues must be addressed which are not of general concern to the putative class, but would require individual inquiry. These include which of the putative class members have standing to bring an action, whether there were any legally cognizable damages, and what those damages were." *Id.* at 155, 730 N.Y.S.2d at 186. The court specifically found that these individual issues predominated over the common issue of whether the utility was grossly negligent in failing to provide service. *Id.*

In *Entergy Gulf States,* the plaintiffs sought to bring a class action against an electric utility for outages sustained during a two week period of ice storms. The plaintiffs alleged that the utility negligently maintained its system and exacerbated the length of time customers were without power because of the storms. The trial court granted class certification, but the court of appeals reversed. The court determined that "even if the class could prove that Entergy failed to properly maintain the system, every individual would still have to separately prove both causation and damages, which will assuredly predominate over any issues that are common to the class." 25 S.W.2d at 363.

The court also agreed that the utility's "defenses [will] vary from one individual to the next depending on the individual facts of each claim." *Id.*

The same considerations that have led courts to refuse to certify outage cases as class actions also weigh heavily against consolidation of the present cases. Each customer will be required to present specific evidence of its individual service history and the nature, cause and amount of its damages. Even with regard to the events of August 14, 2003, each customer will be required to show the specific events that led to any outage on the specific system serving that customer. These individual, customer-specific issues will certainly predominate over any common issue regarding the cause of the August 14 outage. If the order of consolidation stands, the hearing will consists of a series - perhaps hundreds - of individual "mini-hearings" to resolve these individual issues. Under the currently contemplated procedure, it is not hard to imagine counsel for many customers needlessly waiting at hearing while individual issues relating to other customers -- such as the cause of each outage experienced on a customer's system or the amount and cause of each item of each customer's damages -- are litigated.

The Commission "should be mindful of the purpose of consolidation, which is the saving of time when a joint trial is used as opposed to separate trials." *Waterman v. Kitrick* (Cuyahoga Cty. 1990), 60 Ohio App. 3d 7, 14. Consolidating the present cases

will unnecessarily complicate and prolong these proceedings rather than simplify and shorten them.[6]

Addressing all of the claims in one proceeding would also be prejudicial to both Respondents and the Complainants. As noted above, the order to consolidate literally prejudices the case against Respondents. The consolidation order ultimately will not achieve any savings in time or resources, and will do exactly the opposite because: (1) the events on August 14, 2003 were not a single, massive outage caused by a single sequence of events; and (2) proving that the Respondents' actions or omissions caused "the" outage is not sufficient for any customer to make out a case for inadequate service. Consequently, resolution of each claim will necessarily be part of an unduly lengthy and complex proceeding.

[6] If these matters should be consolidated for any reason, then they should be consolidated for purposes of discovery only. In *Aktiengesellschaft, Inc. v. Milwaukee Elec. Tool Corp.* (E.D.N.Y. 2004), 2004 WL 1812821, (citing 8 Moore's Federal Practice, § 42.10(2)(a) ("Consolidation may be expressly limited to pretrial proceedings, including pleadings and discovery")).

There is little reason why the parties in these cases should not be able to share and coordinate discovery thereby saving the time and resources of all concerned. This issue, and others, should be discussed in a prehearing conference held for any case that remains after applications for rehearing are decided, any amended complaints and answers are filed, and possible motions to dismiss or strike the amended complaints are ruled upon.

III. CONCLUSION

For the reasons stated above, the Commission should modify its March 7, 2006 Entry by requiring separate hearings for each action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondents' Application for Rehearing was mailed by ordinary U.S. mail to the following persons this 6th day of April, 2006.

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Page 1

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
Estate of Louise MORAD, et al.,
Plaintiffs-Appellees,
v.
Burton TASK, et al., Defendants-Appellants.
No. 64757.

March 10, 1994.

Civil Appeal from the Common Pleas Court Case No. CV-195664. AFFIRMED.

Michael A. Sanson, Cleveland, for plaintiffs-appellees.

Mary V.G. Walsh, Cleveland, for defendants-appellants.

OPINION

SPELLACY, Presiding Judge:

*1 Defendants-appellants Burton Task, Jeanne Task, and Suburban Auto Lease ("appellants") appeal the judgment in favor of plaintiffs-appellees Ida and Patrick Rogers and the estate of Louise Morad for various loans made to the Tasks and Suburban and for compensatory and punitive damages against Burton Task for fraud and breach of fiduciary duties.

Appellants assign the following errors for review:

I. THE VERDICT OF THE JURY IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN NOT CONSOLIDATING CERTAIN OTHER PENDING LITIGATION WITH THIS MATTER.

III. THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE ISSUE OF LACHES.

IV. THE TRIAL COURT ERRED BY EXCLUDING FROM THE JURY'S CONSIDERATION CERTAIN DOCUMENTARY EVIDENCE WHICH WOULD TEND TO SUPPORT DEFENDANT'S CLAIMS OF SET OFFS.

V. THE TRIAL COURT ERRED IN EXCLUDING FROM THE JURY'S CONSIDERATION EVIDENCE AS TO DEFENDANT'S ASSETS AND LIABILITIES, AND ALLOWING SUCH EVIDENCE ONLY AT THE HEARING ON PUNITIVE DAMAGES.

Finding none of the assignments of error to have merit, we affirm.

I.

Burton Task first became acquainted with the Morad family in 1964 when he met Louise Morad. Louise owned a woman's apparel store and Task was a sales representative and retailer in that field. A few years later, Task met Louise's daughter, Evelyn, and a close familial relationship developed. In 1978, Louise and Evelyn loaned $15,000 to Task and his wife. There was a disagreement whether this loan was ever repaid. The Morad family averred no payment was made while Task testified the obligation was discharged although he had no proof evidencing such.

Task began Suburban Auto Lease in 1978. Evelyn became a one-third shareholder in late 1979 or early 1980. Those shares were inherited by Louise upon Evelyn's death in 1980. Task was responsible for running Suburban, functioning as president,

treasurer, director, and owning one-third of the stock. Robert Bakst held the remaining one-third interest.

A series of financial transactions occurred between the Morad family and Suburban Auto Lease. In 1982, Louise loaned $68,000 of which $30,000 was still owed at the time of litigation. Another of Louise's daughters, Ida Rogers, and Ida's husband, Patrick, loaned $30,000 of which $15,000 was repaid. Certificates of Deposit owned by Louise and Ida were applied to satisfy a debt owed by Task to Society National Bank after the certificates of deposit were pledged as collateral. Task did not reimburse Louise and Ida for the $24,000.

Task denied that any obligation was still outstanding to the Morads. He testified the certificates of deposit were collateral for an obligation of Louise's clothing store and not for a personal obligation of his. He stated he repaid Evelyn by selling coins and giving her the proceeds. He later transferred possession of the rest of the coins to Ida to satisfy his obligations. Task testified Ida wanted to be repaid in cash. He would write checks to himself while noting I.R. on these checks and give the cash to Ida. Task also stated he was responsible for the costs incurred in defending a lawsuit brought against Suburban by shareholder Bakst. Task maintained that Louise agreed those costs would satisfy the obligation outstanding on the $68,000 loan. That suit was settled with Bakst's shares being transferred to Task.

***2** For a while, Suburban was a thriving business with approximately six to seven hundred leases at its peak. Suburban's largest account took over twenty vehicles worth about $700,000 to Florida. Soon after, that account stopped paying and then disappeared. The ruined vehicles eventually were discovered in the Nevada Desert.

Further problems arose with the changing nature of the leasing business when dealerships and banks began exploiting the field to the detriment of the smaller independent businesses. Suburban began having difficulty paying its bills.

Task stopped remitting the sales tax collected to the State of Ohio. He testified the money was used to pay the costs of keeping the business operating. The state then prevented Suburban from writing any new leases. The banks took over the administration of Suburban's remaining leases. Task was indicted and convicted for his failure to pay sales tax. Suburban ceased doing business in 1989.

In late 1984, Task founded Executive Auto Lease on the same premises as Suburban. Executive primarily leased automobiles having a peak of thirty-five leases. It also leased a few pieces of other equipment. Ida Rogers denied her family was aware Executive existed although she endorsed a couple of checks from Executive. Ida stated she never looked at the top of the checks. The Rogers testified they would not have loaned money to Suburban if they were aware of Executive.

Task testified Executive was not in competition with Suburban. He further maintained the Morad family was told about Executive before it began and approved. Executive later was liquidated and is no longer in business.

A few days after Suburban ceased operations, Deluxe Auto Lease began at the same location and employed the same personnel. Task began employment with Deluxe shortly after it began and was still working there at the time of trial. Task stated he had nothing to do with the decision to begin Deluxe Auto Lease.

II.

In their first assignment of error, appellants contend the verdict is against the manifest weight of the evidence. In reviewing a question as to the weight of the evidence, the judgment will be affirmed if supported by some competent and credible evidence establishing each element of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. As the weight of the evidence and the credibility of the witnesses are primarily the prerogative of the trier of fact, an appellate court should not substitute its judgment for that of the trial court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

Appellants first argue the award of compensatory damages for breach of fiduciary duty and fraud was unsupported by evidence Louise suffered any damage from a breach of Task's fiduciary duty to Suburban. Further, appellants assert Ida Rogers was owed no duty as she never was a shareholder. Appellants maintain there was no proof of compensatory damages as the jury awarded amounts for the loans made to Task and Suburban by the Morads.

*3 Appellants apparently ignore the evidence Task breached his fiduciary duty as president and director of Suburban thereby causing losses to the Morads. Although Ida Rogers was not a shareholder in Suburban, she represented her mother's estate and, therefore, any interest Louise had as a shareholder could be compensated in damages.

There was evidence Executive did compete with Suburban. Executive was smaller than Suburban and also leased other equipment but, primarily, it was an auto leasing business. The jury was free to believe the evidence that the Morads were unaware of Executive's existence.

There was evidence Task made double payments to himself which increased while his mother and son were on Suburban's payroll at a time Task stated he was doing everything possible to cut overhead to keep Suburban a going concern. Task purposefully failed to remit sales tax to the state causing it to forbid Suburban from entering into new leases effectively bringing to a halt Suburban's viability as a business. There was ample evidence presented for the jury to have found Suburban ceased to do business because of Task's actions and not the economy in general or business decisions made in good faith that went awry. The Morads were damaged by the loss of the worth of their one-third interest in Suburban.

Appellants argue there was no evidence of fraud presented. They contend there was uncontroverted testimony that Louise knew of Executive prior to its inception even though there was no obligation on Task's part to inform her of his plan to form Executive. Appellants also point to the two checks Ida Rogers received from Executive in 1985 although she stated she did not know about Executive until the late 1980's.

In order to maintain an action in fraud, it must be proven that there was:

> (a) a representation or, where there is duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St.3d 54, 55. In *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, the Supreme Court of Ohio reversed the Court of Appeals because there was evidence presented at trial supporting each element of fraud and a judgment of fraud must be afforded a presumption that the findings of the trier of fact are correct.

The Morad family argued Task breached his fiduciary duty to Suburban. As a majority shareholder in a close corporation, Task owed a heightened fiduciary duty to the minority shareholder and could not, without a legitimate business purpose, use his control of Suburban to his advantage without providing the same opportunity to the minority shareholder. See *Crosby v. Beam* (1989), 47 Ohio St.3d 105. The fiduciary duty imposed upon shareholders in a close corporation is akin to that of partners to deal in the utmost good faith. *Estate of Schroer v. Stamco Supply, Inc.* (1984), 19 Ohio App.3d 34. A corporate officer occupies a position of trust in relation to the corporation and is governed by the fiduciary obligations of good faith, loyalty, disclosure, and to refrain from self-dealings. *Wing Leasing, Inc. v. M & B Aviation, Inc.* (1988), 44 Ohio App.3d 178. A corporate director will be held strictly accountable and liable if corporate funds are wasted or mismanaged. Transactions allegedly involving self-dealing will be closely scrutinized. *Apicella v. PAF Corp.* (1984), 17 Ohio App.3d 245, 247.

*4 There was evidence Task began Executive in direct competition with Suburban using the same facility while withholding the knowledge from the Morads. The Rogers both testified neither they nor Louise knew of Executive or of any financial difficulties of Suburban. The Rogers stated they relied on Task's assertions the business was doing well in continuing to loan money to Suburban and in refraining from demanding satisfaction of the financial obligations owed them by Task and Suburban.

Task was duty-bound to reveal his plan to form Executive to the Morads. Both businesses were in auto leasing and at the same location. An officer of a corporation cannot venture into another closely competitive business without informing the other shareholders.

The Rogers testified they did not know of any financial difficulties of Suburban until they saw the notice from the state posted on the door. At that point Task stated the business had been in trouble for some time. The records of Suburban reveal Task increased his compensation during this time period and repaid a loan he made to Suburban while the obligations to the Morads went essentially unpaid.

There was evidence presented for the jury to have believed Task formed Executive in direct competition with Suburban while concealing the knowledge from the Morads. There was evidence the Rogers would not have loaned money to Suburban if they had known of Executive. There was evidence from which the jury could infer Task intentionally mislead the Morads causing them to extend further loans to Task and that they were not repaid. There was credible evidence going to all the elements of fraud.

Appellants also argue the action is barred by the statute of limitations. Appellants base their contention on the two checks Ida Rogers received from Executive in 1985. Appellants assert this proves Ida Rogers knew of Executive then and not later as she testified.

The jury was free to believe the testimony of Ida Rogers as to when she first became aware of the existence of Executive and to discount the checks. Credibility is for the jury to decide.

Appellants argue the award of punitive damages was unwarranted and excessive. Appellants contend there was no showing of malice, ill will or particularly gross or egregious wrongdoing.

Punitive damages may be recovered for tortious acts involving actual malice. Actual malice consists of either a state of mind causing conduct characterized by hatred, ill will or a spirit of revenge or a conscious disregard for the rights and safety of others which results in a strong probability of substantial harm to the affected persons. *Arthur Young & Co. v. Kelly* (1993), 88 Ohio App.3d 343, 352. Gross or egregious fraud may support an award of punitive damages if the fraud contains an element of malice or ill will. *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 602.

There was evidence Task breached his fiduciary duty to the Morads by engaging in self-dealing and misuse of corporate assets. Task criminally withheld sales tax from the state causing Suburban to become defunct. A loan by Task to Suburban was repaid while one to Louise Morad was marginally reduced. During the time period Task claimed to be doing everything possible to keep Suburban afloat, he increased his compensation while maintaining family members on the payroll.

*5 The award of punitive damages was supported by evidence of ill will showing the necessary element of malice and egregious fraud. Further, an award of twice the compensatory damages is not excessive as a matter of law.

Appellant's first assignment of error is overruled.

III.

In their second assignment of error, appellants contend the trial court erred by not granting their motion to consolidate this action with their lender liability cases brought against National City Bank

and Society National Bank. Appellants allege the banks were largely responsible for Suburban's demise by engaging in abusive banking practices.

Civ.R. 42(A) permits a court to consolidate actions involving a common question of law or fact in order to avoid unnecessary costs or delay. The decision to consolidate lies within the court's discretion. *BancOhio Natl. Bank. v. Schieisswohl* (1988), 51 Ohio App.3d 130, 132. It is for the court to determine if there is sufficient commonality of issues and parties to warrant consolidation. *Waterman v. Kitrick* (1990), 60 Ohio App.3d 7, 14.

The parties in the cases are not the same. Only appellants are involved in all the cases. Although appellants argue the banks' actions played a part in the failure of Suburban, the main thrust of the Rogers' allegations were that Burton Task deliberately acted to the detriment of Suburban and their interest in the business. The addition of the cases pending against the banks would have unnecessarily confused a somewhat complicated action involving a dispute over several loans and concerning multiple issues and parties.

The trial court did not abuse its discretion by refusing to consolidate the three cases.

Appellants' second assignment of error is overruled.

IV.

In their third assignment of error, appellants contend the trial court erred by not charging the jury on the issue of laches with regard to the promissory note executed in 1978.

Appellants failed to object to the trial court's instructions as required by Civ.R. 51(A), which states in pertinent part:

> On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds for the objection.

The rationale behind Civ.R. 51(A) is to allow trial courts the opportunity to correct any problem with the instruction at the same trial. *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 33.

One limited exception is set forth in *Presley, supra,* which held an objection will not be deemed waived when the trial court was apprised of the correct law and the appellant unsuccessfully requested the inclusion of that law. *Id.* Far from asking that the jury be charged with laches, appellants requested the trial court determine the issue.

> THE COURT: Well, isn't laches in the contest (sic) of an issue for the jury?
>
> MR. BIRNE: I don't think so. I believe that laches is an equitable document (sic). And the court has discretion as a tool of equity. In other words, it is a discretionary tool on your part to say that this document is barred by laches, based on the evidence that's been presented here.
>
> *6 I believed it's more of an equitable argument for the court, than a fact issue for the jury. Laches, it is a defense that's outside the province of the jury. And what their role is. It's a legal question, not a fact question.

(Tr. 525).

There also is a plain error exception to the rule. Plain error need not be objected to or affirmatively waived but must be obvious and prejudicial to such an extent that it has "a material adverse affect on the character and public confidence in judicial proceedings." *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209. The plain error doctrine is utilized in civil matters only under exceptional circumstances to prevent a manifest miscarriage of justice. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 275 .

The failure to give a jury instruction on laches does not rise to the level of prejudice required by the plain error doctrine. Appellants never requested this charge be given or objected to its exclusion.

Appellants' third assignment of error is without merit.

V.

In their fourth assignment of error, appellants contend the trial court erred by excluding

documents relating to the sale of coins by Task. He testified the proceeds were used to satisfy his obligation on the note payable to Evelyn Morad. Task claimed he later gave additional coins to Ida Rogers to satisfy another obligation. Appellants argue the documents would have bolstered Task's credibility in the eyes of the jury as Ida Rogers denied receiving the coins.

The evidence in question consisted of copies of inventory lists of coins purported to be owned by Task, Evelyn Morad, and Robert Bakst, the notice of the sale of a portion of the coins, deposit slip to Task's account for $21,727, and a note Task made to himself, stating he gave the $21,727 to Evelyn Morad. The trial court excluded the evidence as being self-serving.

Pursuant to Evid.R. 103(A), error may not be predicated upon an evidentiary ruling unless a substantial right of the party is affected. Rulings on whether or not to admit evidence are discretionary and must amount to prejudicial error to warrant reversal. *State v. Lundy* (1987), 41 Ohio App.3d 163, 169.

The documents in question relate to Task's assertion he satisfied his obligation to Evelyn Task by selling a portion of coins of which he averred to own a one-third interest. The only document excluded showing any payment to Evelyn Morad was a handwritten note by Task stating that he gave her the money. There was quite a bit of testimony by Task in regard to the coins and both parties referred to them in closing arguments. The exclusion of copies of inventory lists, the deposit slip and the note was hardly an abuse of discretion. The only evidence tying the sale of the coins to Evelyn Morad was Task's note to himself. This is clearly self-serving. Appellants have demonstrated no prejudice by the exclusion of these documents.

Appellants also argue the complaint in the litigation with Robert Bakst should have been admitted into evidence as Louise Morad was named as a defendant in the suit. Appellants aver that Task's defense of the suit offset his financial debts to Louise Morad. However, it was appellants' counsel who objected to the introduction of the complaint into evidence. He argued it was highly prejudicial and inflammatory with regard to the allegations made within the complaint. It is difficult to see how appellants were prejudiced by the trial court's ruling in their favor by excluding the complaint from evidence.

*7 Appellant's fourth assignment of error lacks merit.

VI.

In their fifth assignment of error, appellants contend the jury should have heard evidence as to Burton Task's assets and liabilities before deciding if punitive damages were appropriate. Appellants argue that, without such evidence, the jury was swayed by sympathy for Ida Rogers and awarded punitive damages.

Under R.C. 2315.21(C)(1), The trier of fact determines whether a defendant is liable for punitive damages. If the trier of fact so determines, the trial court assesses the amount of the damages. R.C. 2315.21(C)(2). The purpose of punitive damages is to "punish and deter conduct resulting from a mental state so callous in its disregard for the rights and safety of others that society deems it intolerable." *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. Consideration of the defendant's net worth is not necessary for the trier of fact's determination of the appropriateness of an award of punitive damages. The focus of the assessment of punitive damages is properly on the defendant's conduct and not his financial situation. The defendant's ability to pay along with his assets and liabilities may be considered by the trial court in deciding the amount of the damages awarded.

Appellant's fifth assignment of error is without merit.

Affirmed.

JAMES D. SWEENEY, and DYKE, JJ., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate

Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Not Reported in N.E.2d, 1994 WL 78157 (Ohio App. 8 Dist.)

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C
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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
Maurice S. NUNN Plaintiff-Appellee
v.
THE LOCKFORMER COMPANY, et al.
Defendant-Appellants
No. 73505.

Nov. 19, 1998.

Civil appeal from Common Pleas Court, Case No. CV-302264. Affirmed.

Richard C. Alkire, Esq., Krembs & Alkire, Cleveland, for Plaintiff-Appellee.

James F. Sweeney, Esq., Gallagher, Sharp, Fulton & Norman, Cleveland, for Defendant-Appellant The Lockformer Co.

Dean C. Nieding, Esq., Nurenberg, Plevin, Heller & McCarthy Co., L.P.A., Cleveland, for Appellee.

Douglas P. Whipple, Esq., Patricia A. Poole, Esq., Baker & Hostetler LLP, Cleveland, for Appellant The Cincinnati Ins. Co.

C. Richard McDonald, Esq., Davis & Young Co., LPA, Cleveland, for Sheet Metal Manufacturing Co.

JOURNAL ENTRY and OPINION

SWEENEY, J.

*1 Defendant-appellant The Cincinnati Insurance Company appeals from the trial court's decision denying its motion to intervene in a products liability and intentional tort action brought by plaintiff-appellee Maurice Nunn against Sheet Metal Manufacturing, The Lockformer Company and various other defendants. For the reasons set forth below, we affirm the decision of the trial court.

In April of 1994, plaintiff-appellee Maurice Nunn suffered a severe injury to his left hand when it became caught in the rollers of a bending machine used during the manufacture of sheet metal heating ducts. On January 25, 1996, Nunn filed a complaint sounding in products liability and intentional tort against his former employer Sheet Metal, the machine's manufacturer The Lockformer Company, and several other companies involved in the marketing, supply, distribution, setup, maintenance, and repair of the machine (Souther Inc., Glavco Inc., Ultimate Technology Inc., Leonard Bluestone, Sheet Metal Sales, Inc., John Doe and/or John Doe, Inc., John Foe and/or John Foe, Inc., John Goe and/or John Goe, Inc., John Hoe and/or John Hoe, Inc., John Joe and/or John Joe, Inc.) Nunn later dismissed his claims against all of the defendants except Lockformer and Sheet Metal.

On September 30, 1997, Sheet Metal's insurer, Cincinnati Insurance Company, filed a motion to consolidate Nunn's action with its pending declaratory judgment action against Sheet Metal (*The Cincinnati Insurance Co. v. Sheet Metal Manufacturing Co. et al*--Cuyahoga County Common Pleas Case No. 335984) in which Cincinnati sought a declaration that it had no duty to defend or indemnify Sheet Metal with respect to Nunn's complaint. Cincinnati also filed a motion to intervene in the *Nunn v. Lockformer* case, arguing that its interest in the action was not adequately represented by the existing parties. Nunn opposed both motions, arguing that the motions were not timely filed. He also argued that granting the motions would inject unrelated contract and

insurance issues into the case and necessitate much additional discovery.

On October 14, 1997, the trial court denied both motions, adding that the motion to intervene was not timely filed as required by Civ .R. 24(A) and (B) . The court noted that a discovery action against Sheet Metal was filed on July 21, 1994 in connection with Nunn's injury. [FN1]

> FN1. The discovery action was dismissed without prejudice on December 28, 1994.

This case was previously filed as Case No. 274197 on July 21, 1994. It was then refiled as the present case (i.e.302264) on or about January 25, 1996. Cincinnati waited until 9/30/97 to file the written motion, over twenty months after it had actual knowledge of plaintiff's claims in case # 302264, and over 3 years after it had notice and knowledge of plaintiff's accident.

Cincinnati filed its notice of appeal from the trial court's decision on November 13, 1997. The trial court denied Cincinnati's motion to stay the *Nunn v. Lockformer* action pending its appeal. However, on November 26, 1997, this court granted a motion to stay the case pending appeal.

*2 The appellant sets forth two assignments of error.

I.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO INTERVENE.

Cincinnati argues the trial court abused its discretion in denying Cincinnati's motion to intervene. Civ.R. 24(A) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A trial court's decision on a motion to intervene will not be disturbed absent an abuse of discretion. *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St.3d 501, 503, 696 N.E.2d 1058; *Kourounis v. Raleigh* (1993), 89 Ohio App.3d 315, 318, 624 N.E.2d 276; *S. Ohio Coal v. Kidney* (1995), 100 Ohio App.3d 661, 666-667, 654 N.E.2d 1017, appeal not allowed (1995), 72 Ohio St.3d 1530, 649 N.E.2d 839; *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352, 505 N.E.2d 1010 . The timeliness of a motion to intervene must be evaluated with reference to both the statute of limitations and the stage of the trial proceedings. *West American Ins. Co. v. Dutt* (1990), 70 Ohio App.3d 422, 425, 591 N.E.2d 356; *Widder & Widder v. Kutnick* (1996), 113 Ohio App.3d 616, 624, 681 N.E.2d 977. A person may not be brought in as a party plaintiff or defendant where the cause of action as to that party is barred by statute of limitations. *Widder* at 625, 681 N.E.2d 977. At the time the motion to intervene was filed, the statute of limitations would not bar Cincinnati from asserting its indemnification claims against Sheet Metal.

Relevant factors in deciding the timeliness of a motion to intervene include the delay that intervention will have on the disposition of the pending case, the point to which the action has progressed, the length of time the applicant knew or should have known about the pending suit, and the reason for the delay in attempting to intervene. See *ICSC Partners, L.P. v. Kenwood Plaza L.P.* (1996), 116 Ohio App.3d 278, 282, 688 N.E.2d 5, rehearing/reconsideration denied (1997), 78 Ohio St.3d 1456, 677 N.E.2d 816; *State ex rel Gary Road Fill, Inc. v. Wray* (1996), 109 Ohio App.3d 812, 816, 673 N.E.2d 198.

When the motion was filed, the existing parties had completed discovery (as of May 15, 1997), filed their dispositive motions (as of July 15, 1997), and filed replies to the dispositive motions (as of August 15, 1997). The motion to intervene was filed just two days before a scheduled settlement conference

that was set for October 2, 1997, and just two months before the set trial date of December 1, 1997. If the motion to intervene was granted, the trial court would have had to allow additional discovery, which would inevitably have delayed the trial date.

Furthermore, a discovery action was filed by Nunn against Sheet Metal in July 1994. In his brief opposing the motion to intervene, Nunn attached a memo dated August 9, 1994 on Sheet Metal's letterhead reading, *inter alia,* "notify Cinci." Nunn argued that the note evidenced an intent by Sheet Metal to notify Cincinnati of Nunn's injury claim. This argument is buttressed by the language of Section IV (Commercial General Liability Conditions; Duties in the Event of Occurrence, Claim or Suit) of Sheet Metal's policy of insurance with Cincinnati which provides:

> *3 If a claim is made or "suit" is brought against any insured, you must: (1) immediately record the specifics of the claim or "suit" and the date received, and (2) notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

In its motion to intervene and in its brief before this court, Cincinnati gave no reason for its delay in seeking intervention. Furthermore, Cincinnati did not dispute Nunn's claim that it received knowledge of Nunn's claims as early as 1994. Under the circumstances, we conclude the trial court did not abuse its discretion in denying Cincinnati's motion to intervene. Accordingly, we overrule Cincinnati's first assignment of error.

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO CONSOLIDATE.

Cincinnati argues the trial court abused its discretion in denying Cincinnati's motion for consolidation. Civ.R. 42(A) provides:

> When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The decision about whether to consolidate cases is within the discretion of the common pleas court. *Jamestown Village Condo. v. MMRI* (1994), 96 Ohio App.3d 678, 687, 645 N.E.2d 1265, appeal not allowed (1995), 71 Ohio St.3d 1444, 644 N.E.2d 406; *McDonnold v. McDonnold* (1994), 98 Ohio App.3d 822, 827, 649 N.E.2d 1236. The court must determine if there is sufficient commonality of issues and parties to warrant consolidation. *Jamestown Village* at 687, 645 N.E.2d 1265.

In order to prevail on its motion to consolidate, Cincinnati had to demonstrate that its declaratory judgment action had common questions of law or fact with Nunn's action. Cincinnati argues that the element of commonality was met because the actions stemmed from the same incident and because both actions involved the establishment of liability for injuries sustained in the incident. Cincinnati cites to *Troyer v. Nationwide Mut. Ins. Co.* (Jan. 24, 1991), Cuyahoga App. Nos. 57935, 57933, unreported, in which the trial court granted an insurance company's motion to consolidate a declaratory judgment action with a tort action involving the company's insured.

Troyer does not require that consolidation be granted in every case involving an insuror's declaratory judgment action and a tort action involving one of its insureds. *Troyer* provides us with no guidance as to the relevant issue raised by this assignment of error--whether the trial court abused its discretion in denying the motion to consolidate. In order to show that the trial court abused its discretion, Cincinnati had to show that the trial court acted unreasonably, arbitrarily, or unconscionably. See *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, 684 N.E.2d 319. In other words, Cincinnati had to show that the trial court's action was unsupported by any sound reasoning process. *Faber v. Queen City Terminals, Inc.* (1994), 93 Ohio App.3d 197, 202,

638 N.E.2d 115 (citing *AAAA Enterprises, Inc. v. River Place Community Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

*4 We conclude the trial court's decision was reasonable under the circumstances. The declaratory judgment action did not involve the same issue of fact as the tort claim. The issue in the tort action was determining who or what proximately caused Nunn's injuries. The declaratory judgment action sought to interpret the contract of insurance between Cincinnati and Sheet Metal. Cincinnati argues that consolidation would save the legal and administrative costs of conducting separate proceedings. However, its argument ignores the fact that, if Sheet Metal is not held liable for Nunn's injuries, then no duty of indemnification arises. By refusing to consolidate the cases, the trial court could reasonably be said to have avoided the expenditure of a great deal of time and money litigating an issue which may ultimately prove to be irrelevant. Having found no abuse of discretion, we overrule Cincinnati's second assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

ROCCO, J., concurs.

O'DONNELL, P.J., dissents, with dissenting opinion attached.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

DISSENTING OPINION

Judge TERRENCE O'DONNELL Dissenting.

The majority opinion sets forth the correct standard of review for an appeal involving denial of a motion to intervene--whether the trial court has abused its discretion. Here, the trial court denied Cincinnati Insurance Company's motion to intervene, alleging the motion had not been timely filed. However, the majority fails to reflect the motion had been filed shortly before the trial court denied Sheet Metal's Motion for Summary Judgment--two months prior to the scheduled trial date. Furthermore, Cincinnati Insurance company did not request either to continue the trial or to extend the time for discovery. Hence, the delay factors cited in the majority opinion are not reasons to deny the motion as being untimely. Conjecture by the majority that, "the trial court would have had to allow additional discovery, which would inevitably have delayed the trial date" is not supported by the record. Even if true, however, this is not a basis to deny a motion to intervene because overriding interests of judicial economy suggest that the decision to deny intervention here is short-sighted. It constituted, in my opinion, an abuse of discretion.

*5 In my view, the court also abused its discretion by denying the motion to consolidate the declaratory judgment case with the underlying tort case. While the majority here has focused on the element of commonality of issues, it ignores the problem created by today's decision: the potential of inconsistent judgments in the two cases where in the

declaratory judgment action, a decision could result in Cincinnati Insurance Company being held obligated to provide a defense, but would have no duty to do so if it prevailed on the merits of the tort claim.

I believe the better practice for a good trial judge is to assume control over all issues, tangential and otherwise, in the matters presented to it, to be in the best possible position to administer justice to all parties affected by its rulings and decisions. For these reasons, I believe the court abused its judicial discretion in denying the motion to consolidate. Therefore, I dissent.

Not Reported in N.E.2d, 1998 WL 811352 (Ohio App. 8 Dist.)

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When the motion was filed, the existing parties had completed discovery (as of May 15, 1997), filed their dispositive motions (as of July 15, 1997), and filed replies to the dispositive motions (as of August 15, 1997). The motion to intervene was filed just two days before a scheduled settlement conference

that was set for October 2, 1997, and just two months before the set trial date of December 1, 1997. If the motion to intervene was granted, the trial court would have had to allow additional discovery, which would inevitably have delayed the trial date.

Furthermore, a discovery action was filed by Nunn against Sheet Metal in July 1994. In his brief opposing the motion to intervene, Nunn attached a memo dated August 9, 1994 on Sheet Metal's letterhead reading, *inter alia,* "notify Cinci." Nunn argued that the note evidenced an intent by Sheet Metal to notify Cincinnati of Nunn's injury claim. This argument is buttressed by the language of Section IV (Commercial General Liability Conditions; Duties in the Event of Occurrence, Claim or Suit) of Sheet Metal's policy of insurance with Cincinnati which provides:

> *3 If a claim is made or "suit" is brought against any insured, you must: (1) immediately record the specifics of the claim or "suit" and the date received, and (2) notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

In its motion to intervene and in its brief before this court, Cincinnati gave no reason for its delay in seeking intervention. Furthermore, Cincinnati did not dispute Nunn's claim that it received knowledge of Nunn's claims as early as 1994. Under the circumstances, we conclude the trial court did not abuse its discretion in denying Cincinnati's motion to intervene. Accordingly, we overrule Cincinnati's first assignment of error.

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO CONSOLIDATE.

Cincinnati argues the trial court abused its discretion in denying Cincinnati's motion for consolidation. Civ.R. 42(A) provides:

> When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The decision about whether to consolidate cases is within the discretion of the common pleas court. *Jamestown Village Condo. v. MMRI* (1994), 96 Ohio App.3d 678, 687, 645 N.E.2d 1265, appeal not allowed (1995), 71 Ohio St.3d 1444, 644 N.E.2d 406; *McDonnold v. McDonnold* (1994), 98 Ohio App.3d 822, 827, 649 N.E.2d 1236. The court must determine if there is sufficient commonality of issues and parties to warrant consolidation. *Jamestown Village* at 687, 645 N.E.2d 1265.

In order to prevail on its motion to consolidate, Cincinnati had to demonstrate that its declaratory judgment action had common questions of law or fact with Nunn's action. Cincinnati argues that the element of commonality was met because the actions stemmed from the same incident and because both actions involved the establishment of liability for injuries sustained in the incident. Cincinnati cites to *Troyer v. Nationwide Mut. Ins. Co.* (Jan. 24, 1991), Cuyahoga App. Nos. 57935, 57933, unreported, in which the trial court granted an insurance company's motion to consolidate a declaratory judgment action with a tort action involving the company's insured.

Troyer does not require that consolidation be granted in every case involving an insuror's declaratory judgment action and a tort action involving one of its insureds. *Troyer* provides us with no guidance as to the relevant issue raised by this assignment of error--whether the trial court abused its discretion in denying the motion to consolidate. In order to show that the trial court abused its discretion, Cincinnati had to show that the trial court acted unreasonably, arbitrarily, or unconscionably. See *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, 684 N.E.2d 319. In other words, Cincinnati had to show that the trial court's action was unsupported by any sound reasoning process. *Faber v. Queen City Terminals, Inc.* (1994), 93 Ohio App.3d 197, 202,

638 N.E.2d 115 (citing *AAAA Enterprises, Inc. v. River Place Community Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

***4** We conclude the trial court's decision was reasonable under the circumstances. The declaratory judgment action did not involve the same issue of fact as the tort claim. The issue in the tort action was determining who or what proximately caused Nunn's injuries. The declaratory judgment action sought to interpret the contract of insurance between Cincinnati and Sheet Metal. Cincinnati argues that consolidation would save the legal and administrative costs of conducting separate proceedings. However, its argument ignores the fact that, if Sheet Metal is not held liable for Nunn's injuries, then no duty of indemnification arises. By refusing to consolidate the cases, the trial court could reasonably be said to have avoided the expenditure of a great deal of time and money litigating an issue which may ultimately prove to be irrelevant. Having found no abuse of discretion, we overrule Cincinnati's second assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

ROCCO, J., concurs.

O'DONNELL, P.J., dissents, with dissenting opinion attached.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

DISSENTING OPINION

Judge TERRENCE O'DONNELL Dissenting.

The majority opinion sets forth the correct standard of review for an appeal involving denial of a motion to intervene--whether the trial court has abused its discretion. Here, the trial court denied Cincinnati Insurance Company's motion to intervene, alleging the motion had not been timely filed. However, the majority fails to reflect the motion had been filed shortly before the trial court denied Sheet Metal's Motion for Summary Judgment--two months prior to the scheduled trial date. Furthermore, Cincinnati Insurance company did not request either to continue the trial or to extend the time for discovery. Hence, the delay factors cited in the majority opinion are not reasons to deny the motion as being untimely. Conjecture by the majority that, "the trial court would have had to allow additional discovery, which would inevitably have delayed the trial date" is not supported by the record. Even if true, however, this is not a basis to deny a motion to intervene because overriding interests of judicial economy suggest that the decision to deny intervention here is short-sighted. It constituted, in my opinion, an abuse of discretion.

***5** In my view, the court also abused its discretion by denying the motion to consolidate the declaratory judgment case with the underlying tort case. While the majority here has focused on the element of commonality of issues, it ignores the problem created by today's decision: the potential of inconsistent judgments in the two cases where in the

declaratory judgment action, a decision could result in Cincinnati Insurance Company being held obligated to provide a defense, but would have no duty to do so if it prevailed on the merits of the tort claim.

I believe the better practice for a good trial judge is to assume control over all issues, tangential and otherwise, in the matters presented to it, to be in the best possible position to administer justice to all parties affected by its rulings and decisions. For these reasons, I believe the court abused its judicial discretion in denying the motion to consolidate. Therefore, I dissent.

Not Reported in N.E.2d, 1998 WL 811352 (Ohio App. 8 Dist.)

END OF DOCUMENT