

FAILURE TO PROCEED CORRECTLY AGAINST MINOR DEFENDANTS

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INTRODUCTION

During the last four years the author has served as law clerk to the Court of Common Pleas of Cuyahoga County. During the last two of those years, it was with increasing frequency that cases came to his attention wherein he was required to make recommendations to the judges on motions to quash, motions to dismiss, and demurrers, all directed toward the fact that the defendant in the case was a minor and not properly before the court. In many instances it was his opinion that the minor was using the shield and protection afforded him because of his minority to take undue advantage of the plaintiff by concealing his minority until the statute of limitations in the pending action had passed.

The purpose of this article will be to discuss dangers inherent in not recognizing that a minor may be involved, to suggest methods of avoiding this danger, to recommend solutions to the problem of properly serving and identifying minors, and, finally, to recommend some legislative reforms.

EVERY DEFENDANT IS A POTENTIAL MINOR

It may seem ludicrous to an attorney to suggest to him that in every case there is a possibility that one or more of the defendants may be a minor, but this seems to be the only acceptable approach. Once he is used to accepting the idea that every defendant is a potential minor, and uses the proper discovery procedures, the attorney will avoid the possibility of losing his case on a legal technicality. In this article we will review the results of a number of recent cases on this subject wherein the plaintiff's lawyer did not accept this viewpoint and thereby lost his client's case.

One fairly recent and unreported case is still pending in Cuyahoga Common Pleas Court.¹ The automobile accident which gave rise to the lawsuit occurred on August 9, 1959. The petition was not filed until August 9, 1961, two years later, the last day for the filing of lawsuits under the statute of limitations.² A precipe was issued, and the defendant was served as an adult at his residence on August 11, 1961.

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¹ Holes v. Holley, Cuyahoga County Common Pleas Court, No. 756059.

² Ohio Rev. Code § 2305.10.

Thereafter, on September 1, 1961, a motion to quash was filed. In the motion the defendant stated that he did not intend to enter his appearance and objected to the jurisdiction over his person. He then stated that he was not of age and was improperly served. Attached to the motion to quash was an affidavit wherein the father of the defendant stated that the son was only twenty years old. A brief was submitted. The brief relied upon Revised Code section 2703.13, and the cases of *Fiegi v. Lopartkovich*³ and *Lehman v. Horning*.⁴ The motion to quash was granted by the court on October 26, 1961. Thereafter the plaintiff amended his petition by interlineation to show that the defendant was a minor and requested alias service by filing a precipe with the clerk. The sheriff re-served the defendant on October 20, 1961, as a minor, and served his mother as guardian. The defendant on November 10, 1961, filed a demurrer. His ground was that the statute of limitations had passed before the petition was filed on October 20, 1961. The court sustained the demurrer. However, it would appear the demurrer was not correctly sustained as the face of the petition still showed the original date of filing as August 9, 1961, and not October 20, 1961.⁵ The amendment was merely by interlineation and affected the caption only. Nevertheless, the plaintiff's attorney apparently recognized that the case was lost for he did nothing further. On February 9, 1962, the defendant filed a motion to dismiss for want of prosecution. This motion will undoubtedly be granted.

This case is typical of many. In actuality, the greatest mistake was the delay in filing until the last day. I took the liberty of inquiring of the attorney of the plaintiff as to why he waited until the last day. His reasons were that the client did not consult with him until three days before the statute ran and did not tell him the defendant was a minor. This, of course, presents problems which are extremely difficult to overcome. However, unless it is absolutely necessary, it is suggested that no case be filed less than ninety days before the running of the statute. This should give the parties sufficient time to force answers to the interrogatories which will be discussed later.

The above case is typical of what may and does happen in cases wherein defendant is a minor. The preceding case is unusual in the delay in filing only. The normal case proceeds as follows. The plaintiff files his case approximately one year after the accident. The defendant is not designated a minor and is served as an adult. The defendant then reports the service to his insurance company or his

³ 38 Ohio App. 338, 176 N.E. 670 (1930).

⁴ 100 Ohio App. 19, 135 N.E.2d 475 (1955).

⁵ Ohio Rev. Code § 2309.08.

father's insurance company. An answer is filed. The case pends until the statute of limitations runs. Thereafter, counsel for the defendant immediately files a motion to quash, setting forth in his affidavit the minority of the defendant at the time he was served. He also brings forth a long list of reported decisions supporting his affidavit.⁶ The result: the motion to quash is granted, and the case is lost.

Of course, each case arises a little bit differently. Sometimes the plaintiff's counsel is obviously unobservant. One example of this is a case which came to the attention of the author while recommending a ruling on a motion to dismiss. It was filed on behalf of a minor defendant who had been served as an adult. After service had been obtained on the minor defendant as an adult, he was served with a subpoena to appear at a deposition. During his testimony at the deposition, he stated his age as twenty. This should have rung a bell with the plaintiff's counsel, but it did not. He went blissfully on, asking other questions and obtaining more information. The deposition was transcribed and filed in the case. After several months passed, the defendant became twenty-one and at almost the same time the statute of limitations passed. He immediately filed a motion to quash on the basis that he was improperly served. The court was required to comply with the request, and did so without hesitancy as the counsel had most assuredly been aware of the age of the defendant and had time to remedy his mistake.

The above is not always true. Often, counsel for the plaintiff is intentionally misled. This can happen when the accident report taken by the police officer shows the age of minor defendant to be that of an adult. (In one instance the minor had changed his driver's license so as to be able to be served at a bar.) This obviously misleads counsel for the plaintiff. Thereafter, the minor defendant files an answer as an adult, further misleading him. Counsel for the plaintiff here should have just cause for complaint since the attorney filing the answer knew it was not in compliance with the law.⁷

Another interesting example of what can transpire if a minor is improperly served is reflected in the two *Taplin* cases which arose in the Cuyahoga County Common Pleas Court. One is still pending.⁸ In this instance, the plaintiff himself was a practicing attorney and must have, due to the factual circumstances, noted the youthfulness of the defendant.

⁶ Including *Fiegi v. Lopartkovich*, *supra* note 3 and *Lehman v. Horning*, a minor, *supra* note 4.

⁷ Ohio Rev. Code § 2307.16 requires answers on behalf of minors to be filed by a guardian ad litem.

⁸ *Taplin v. Kotter*, Cuyahoga County Common Pleas Court, Case Nos. 713454 and 759868.

The first *Taplin* case was filed on September 2, 1958. It arose out of an automobile accident which occurred on December 22, 1957. The petition was filed by the law firm of which the plaintiff was a member. A precipe was attached to the petition directed to the clerk asking him to have the sheriff of Cuyahoga County return summons according to law, and endorsed thereon petition for money only. The sheriff made his return on September 3, 1958, stating that he had made residence service upon the defendant. Commencing on October 2, 1958, counsel for the defendant filed several consent to plead slips, and finally, on December 1, 1958, an answer admitting that the accident had occurred but denying all the other allegations. The answer was verified by counsel for the defendant. He stated that he was one of the attorneys for the defendant, and that the defendant was absent from Cuyahoga County. On January 21, 1960, approximately one month after the statute of limitations had run, the defendant came forward with a motion to quash in which he stated that service of summons should be quashed, since service did not comply with the statutes of Ohio providing for service on a minor. The defendant relied upon Revised Code section 2703.13 and upon *Russell v. Drake*.⁹ On January 8, 1960, the court ruled that an alias summons having been issued, the motion to quash service of summons should be stricken. Thereafter on April 27, 1960, an alias summons was served. It was at this point that the arguments of the plaintiff switched from the fact that there had been good service to the fact that the defendant had been out of the jurisdiction of the court and of the state and, thus, that the statute of limitations had tolled.¹⁰ Counsel also stated that it was his opinion that there was a sharp practice and that certainly there was no legislative policy favoring such a practice under the guise of protecting an innocent minor. The plaintiff went on to argue that the parties were on actual notice and the defect as to service had not been raised until months after the answer had been filed and notices as to taking depositions had been filed. A motion to quash the service of the alias summons was filed. New complications arose for the sheriff had served the summons by attaching it to the doorknob and there was no question but that service should have been quashed.¹¹ The court appeared to ignore this issue and overruled the motion to quash alias service of summons. Thus, the defendant was required to take additional action and on June 24, 1960, filed a motion to dismiss. The court found that the motion to dismiss was well taken. On September 7, 1960, a final journal entry was filed.

⁹ 164 Ohio St. 520, 132 N.E.2d 467 (1956).

¹⁰ Ohio Rev. Code § 2305.15.

¹¹ *Sours v. State Director of Highways*, 82 Ohio L. Abs. 594, 167 N.E.2d 139 (1959).

The journal entry states that the court found the record in the case disclosed the minority of the defendant at the time service was initially made and the same was void. The court further found that the defendant was not properly served with summons before the statute of limitations had run. The court dismissed the case.

The case was appealed,¹² but the court of appeals found no error prejudicial to the plaintiff and affirmed the judgment of the lower court on April 28, 1961. On October 11, 1961, the supreme court refused to certify the record.

The plaintiff, Mr. Taplin, was persistent. On November 8, 1961, he brought an entirely new case.¹³ In this petition he set forth the entire background as heretofore set out and then stated that the time for the commencement of the action had expired on October 4, 1961, that the action failed on other than its merits, and that the new action was commenced within one year afterwards, all pursuant to the provisions of Revised Code section 2305.19. Thereafter plaintiff set forth his cause of action in negligence. The defendant was served. The defendant demurred and relied upon *Bobo v. Bell*.¹⁴ On March 8, 1961, the demurrer was sustained. It would appear that the plaintiff, though persistent, still has not met the true issue in this case, which is whether his action would be saved because the minor was out of the jurisdiction for such a time as to toll the statute of limitations.¹⁵

Clarifying the question as to the unresolved issue raised above, it would appear that the minor defendant was a student in a university located outside Ohio, that he was a resident of Ohio, normally living with his parents, but spending much time out of the State. Thus, the statute of limitations during the time he was outside Ohio would be tolled the same as it would for an adult.¹⁶ In the proper case, these facts could be raised by a petition. The petition could be served upon the minor in a proper manner and he would be before the court, even though it was filed long after the two years statute of limitations for tort actions.¹⁷

From time to time it may appear that the author is displeased with some of the results or rulings in the cases set forth. This, in

¹² Cuyahoga County Court of Appeals No. 25397.

¹³ Common Pleas Court of Cuyahoga County, Case No. 759868.

¹⁴ *Bobo v. Bell*, 171 Ohio St. 311, 170 N.E.2d 730 (1960).

¹⁵ Ohio Rev. Code § 2305.15.

¹⁶ *Ibid.*

¹⁷ Ohio Rev. Code § 2305.15; *Stanley v. Stanley*, 47 Ohio St. 225, 24 N.E. 493 (1890). The reason the Taplin case may not be the proper case is that the time spent in a college out of the state may be within the purview of the statute. *Lindsay v. Maxwell*, 4 Ohio N.P. 354, 7 Ohio Dec. 273 (1897). Even though the proposed defendant is temporarily absent from the state, residence service may be obtained.

substance, is true. This is not meant to be a criticism of the particular judges who made the decisions in the cases; it is merely a feeling on the part of the author that in some instances technicalities were used to achieve unjust results while in other cases these technicalities were overlooked.

The former is true of a case now pending in the Cleveland Municipal Court.¹⁸ There, the plaintiff sued a minor. The correct spelling of the minor's name was "McBay." In the attorney's petition, a typographical error changed the name to "McBoy." The minor was served as a minor. The guardian ad litem was appointed as provided for by statute. The guardian ad litem filed an answer in which he admitted nothing except that the minor's name was McBay rather than McBoy. The judge of the court, on his own motion, held that the guardian ad litem did not have it within his power to admit anything and that the admission as to the name was improper and struck the answer. This seemed to be an extremely technical defense of the minor by the court and, in actuality, unnecessary. This holding is not unusual. Cases have held it is necessary to sue and serve the minor in his correct name,¹⁹ but where there is merely a typographical error the guardian should be able to admit the correct spelling. Ohio Revised Code section 2309.20 clearly holds that the guardian may not make admissions which are prejudicial to the minor. The admission of a misspelling of a name should not be held to be prejudicial. In the usual case by relying on the provisions of Revised Code section 2309.58 the parties may amend the pleadings to correct the spelling of a name before or after judgment. Nevertheless, counsel for the plaintiff, having brought his action timely, retyped and reserved an amended petition upon the minor defendant as a minor and correctly spelled her name.

The above cases are only a few of the recent unreported decisions in Cuyahoga County wherein the plaintiff had not obtained proper service upon a minor defendant and lost his action by reason of this technicality. The lawyers of Cuyahoga County are not alone in making these errors and in waiting until the statute of limitations has virtually run out.

In one case²⁰ plaintiff's counsel waited until three days before the statute of limitations had run before filing his action in personal injuries. In that case he knew the defendant was a minor and named him as such. Unfortunately, as in *McBay*, there was a misnomer, and the sheriff made a return stating that he could not find the minor in

¹⁸ *Royalton S. Burns v. Lou Marce McBay*, Cleveland Municipal Court No. A-64478.

¹⁹ *Lehman v. Horning*, a minor, *supra* note 4.

²⁰ *Ibid.*

his county. It was not until some time after the statute of limitations had passed that the plaintiff was able to amend his petition and serve the minor in his correct name. Under the facts and circumstances set out above, the court held that Ohio Revised Code section 2703.13 must be strictly observed before jurisdiction over the person of the minor can be acquired. Thus, service of summons upon the minor in the manner provided for by the Revised Code was not correct and the trial court was correct in rendering judgment for the defendant. The court also relied upon the case of *Feigi v. Lopartkovich*.²¹

In the latter case, as in almost every case dealing with minors, the court said that the minor cannot waive compliance with the statutes which have been passed to protect him, that he can only be sued and served in the manner set forth by the statutes of Ohio, and that the suit is not deemed "commenced" until the date of the issuance of summons, which is thereafter properly served. So long as the minors are afforded this protection, the attorney instituting a suit must be vigilant in seeing whether or not a minor is a party defendant and, if so, that he does acquire jurisdiction over the minor by correctly serving him. Not only must the minor be correctly served, but any action he takes in a civil case must be in strict compliance with the law. Thus, he may not proceed without the appointment of a guardian²² nor may he make any admissions.²³ It is necessary to distinguish as between civil cases and criminal cases because apparently the courts are not so strict in protecting the rights of a minor as to technicalities of procedure when he is charged with a crime.²⁴ The criminal cases recognize that the juvenile, or minor, has always received considerable protection in law, but generally get over the technical niceties of the law by stating that the objections are to jurisdiction of the person and not the court. Thus, in the case of *Mellott v. Alvis, Warden*,²⁵ the court said that even a minor can waive jurisdiction of the person. Every civil case reported herein, however, has held that the minor cannot waive proper service and that jurisdiction over his person can only be acquired by proper and complete service.

The only laxity, if it be that, is that the statutes as to service on the minor and his father or guardian have at least been given a

²¹ There is a good general discussion of this subject in 28 Ohio Jur. 2d *Infants*, §§ 63 and 64.

²² *Combs v. Combs*, 94 Ohio App. 509, 116 N.E.2d 601 (1950); *Evans v. Evans*, 81 Ohio L. Abs. 255, 161 N.E.2d 401 (1959); Ohio Rev. Code § 2307.16 and § 2307.17.

²³ Ohio Rev. Code § 2309.20.

²⁴ *Mellott v. Alvis, Warden*, 109 Ohio App. 486, 162 N.E.2d 623 (1959).

²⁵ *Ibid.*

reasonable interpretation so that the minor can be served in one county and the father in another.²⁶ No court to date has solved, to the author's knowledge, the more difficult problem of service on the minor when he is emancipated, married to another minor, living in a single family house, and both parents, his landlord, and his employer all reside outside the state. This problem was almost raised here in Cuyahoga County, but since the minor was not living at his home and was in the Army, the court accepted service upon his commanding officer as properly being the person having charge of the minor.

Of course, the shoe can be on the other foot and the attorney for the minor defendant may make mistakes in technicalities which will bring his defendant before the court even though he did not intend it. This generally occurs by making a general entry of appearance after the minor has reached majority. At least one case has held that this voluntary appearance, even if it occurs after the action is barred by the statute of limitations, will be deemed to have cured the defect of service unless the issue is raised by demurrer or answer.²⁷

Filing a suit at the last minute or even within the last month can be dangerous. This is true whether counsel knows the defendant is a minor or not. It is advisable for counsel to exercise caution with any defendant; but immediately upon learning that the defendant is a minor, some action should be taken. In *Webb v. Chandler*,²⁸ for example, plaintiff learned in May that the defendant was a minor and did nothing about it until September. This, obviously, was too long a period to wait. When dealing with minors you must act immediately or your case may be lost, and when you lose a case against a minor for the reason of improper service you cannot recommence the action on the basis that it has failed otherwise than on the merits within the one-year period provided for by Revised section 2305.19.²⁹ Again, it should be noted that minority is the distinguishing feature in these cases, and it is the language in Revised Code section 2703.13 which the court says is mandatory. In other cases where minors are not involved the language of the Revised Code is not construed so strongly in favor of the defendant, the saving's clause and the manner of service are not given such a tenuous and technical an interpretation.³⁰

We, therefore, must conclude that it is most advisable for counsel to assume that every defendant is a minor and take the necessary

²⁶ Paeltz, a minor, v. Leonher, 78 Ohio L. Abs., 103, 151 N.E.2d 804 (1958).

²⁷ Russell v. Drake, 164 Ohio St. 520, 132 N.E.2d 467 (1956).

²⁸ 110 Ohio App. 193, 168 N.E.2d 906 (1959).

²⁹ Juhasz v. Corson, 171 Ohio St. 218, 168 N.E.2d 491 (1960).

³⁰ Moriarty v. Westgate Center, Inc., 172 Ohio St. 402, 176 N.E.2d 410 (1961).

precautions to avoid improper service should it turn out that the defendant is a minor.

RECOMMENDATIONS

A. Recommendations Under Present Law

The strongest recommendation possible has just been made above. Always assume that the defendant may be a minor and then take the necessary steps to protect the interests of the plaintiff. For example, if the claim arose out of an automobile collision, obtain the police automobile accident report and from it attempt to discern the age of the minor, if it is given there. Second, as with any other defendant, do not hesitate to make inquiry of your client, the prospective plaintiff, as to the defendant's correct residence and general physical characteristics. This information may be used to assist the sheriff in making service upon a minor defendant or upon any defendant. Ask your client: what did the person driving the car, holding the gun, etc., look like? Approximately how old was he? What color was his hair? How was he dressed? Could any special physical characteristics be noted? Did the plaintiff know the defendant before the action was commenced? What did he know of him? Did he know of his residence? Who did he live with, etc.?

It is advisable to attempt to take the statement of a potential defendant unless you know he is represented by counsel. Often this step is ignored because there is insurance in the case, and counsel for the plaintiff and the insurance company carry on negotiations relative to settlement before suit. There is an inherent danger in this. The negotiations may cover a considerable period of time during which counsel is lulled by the potential offers of the insurance company to settle the case, and, thus, he does not give the file adequate attention from the investigative standpoint. Insurance companies generally give as little information as possible and attempt to continue the negotiations as long as it is thought that a settlement may be arrived at without the hiring of defense counsel. Therefore, even during these negotiations, plaintiff's counsel should conduct his investigation thoroughly and learn all he can about the potential defendant.

It is then suggested that with every case counsel file interrogatories. It is suggested that these interrogatories be filed pursuant to Revised Code section 2317.07 which permits the interrogatories to be filed separate and apart from the pleadings and requires that the answers be given as though on cross-examination. Thus, the broadest interpretation will be given of them. If the defendant is over the age of ten, he will be required to answer under positive oath.³¹ The

³¹ *Olenik v. Calo*, 80 Ohio L. Abs. 263, 7 Ohio Op. 2d 321, 158 N.E.2d 574 (1958).

interrogatories may ask, and should ask, the defendant's correct name, his correct residence, his age, and then may go on to ask a myriad of questions which are relevant to the lawsuit. It is these first three questions which concern us, and these are questions which should not be forgotten. The same questions should be asked if a deposition is taken.

As noted earlier, minors, on the advise of insurance defense attorneys, have tended in the past to conceal their age by filing answers when not named as adults and by not following the statutes relative to pleading by and through a guardian ad litem.³² It is impossible to answer what rights a plaintiff might have if the minor lies in answering the interrogatories. Certainly the minor would be guilty of perjury, but it is questionable as to whether or not counsel or the parties would have any other rights as against the minor. One thing that counsel can do is to insist that the interrogatories be answered by the party and not by the counsel for the party, all as required by statute.³³ It should be further recalled that the interrogatories must be signed by the party, and not by counsel, that they must be answered under oath, and that the oath must be positive and not as the affiant verily believes. This is because the interrogatories may be used as testimony in the case, and testimony in a given case may be given only under positive oath and not as a person verily believes.

Unfortunately, obtaining the answers to interrogatories takes time, at least thirty days.³⁴ Thus, if counsel is to reply on the answers to the interrogatories to determine whether the defendant is a minor, he not only has to have the thirty days given by statute for the filing of the answers, but he also has to have sufficient time in which to enforce the answers which generally is at least another forty to forty-five days. Thus, if service is not properly obtained, there is little that counsel can do if the statute has run. It has, therefore, been suggested above that counsel always file suit at least ninety days before the statute runs so as to give him sufficient time to obtain the answers to these interrogatories and thereby have sufficient time to amend and issue alias summons if service is not proper.

Once counsel has discerned from the answers to the interrogatories, or from answers given upon deposition, that the defendant is a minor and that he has not been properly served, counsel should immediately file an amended petition or amend his petition by interlineation setting forth the minority of the defendant and cause a precept to be issued directing the clerk to have the sheriff re-serve the

³² Ohio Rev. Code §§ 2307.16 and 2307.17.

³³ Ohio Rev. Code §§ 2309.43, 2309.45, and 2317.07.

³⁴ Ohio Rev. Code §§ 2309.44 and 2317.07.

minor defendant and his father or mother or person under whose care or custody he is. Counsel should also insist that a minor's answer be filed by a guardian ad litem. As stated above, failure to appoint the guardian ad litem and failure to have an answer filed as required by Revised Code sections 2307.16 and 2307.17 has consistently been held to be prejudicial error and negates the entire case.³⁵

B. Legislative Reforms

It has long been the author's contention that the protections afforded the minor by reason of the Revised Code should be used to protect the minor and not be used as an unfair means of defeating a plaintiff's rights. Often counsel for the minor takes unfair advantage of this protection by filing an answer on behalf of a defendant who is a minor and by filing the answer as though the minor were an adult. In so doing the defendant's counsel is misleading the other side to its detriment, that it is taking unfair and what should be construed as an illegal advantage. Counsel for the defendant and for defense firms have countered this argument by saying that the law requires them to afford every protection possible to the minor and to any defendant, that they did not improperly serve the minor, that this was done by the plaintiff's counsel, that their filing the answer is proper and normal, that it is only misleading to the extent that the service upon the defendant was misleading, and that all this was caused by plaintiff's counsel and not by them. They vehemently deny that there is anything unethical or improper in verifying and filing an answer in behalf of a minor when they know he is a minor. However, the opposite would appear patent to anyone disinterested in the proceedings. Furthermore, the statutes require that the answers only be filed by guardians ad litem.³⁶ Thus, counsel for the defendant by filing them ignores the statute.

It would seem that certain legislative reforms are necessary so long as defense counsel continue to ignore these niceties and the courts continue to strictly construe the statutes affording the minor's protection.

It is suggested that the Revised Code be amended to contain a provision tolling any statute of limitations when an answer is filed on behalf of a minor by other than a guardian ad litem or when the minor answers any interrogatories or questions on deposition by giving a false age. This would avoid any future unfair decisions. After all, the minor is not required to bring his action until he is an adult, and, thus, the statute of limitations is in substance tolled against an adult

³⁵ Evans v. Evans, *supra* note 22.

³⁶ Ohio Rev. Code §§ 2307.16 and 2307.17.

when a minor does not bring his action until he reaches his majority.³⁷ Why shouldn't the statute also be tolled as against a minor who files an answer other than by a guardian and solely to continue the concealment of his age? Obviously, it should.

During the 1961 session of the legislature, the author wrote to the judiciary committee and pointed out this problem and said that it was unfair for the minor to use the shield of minority as a sword, that by being able to file an answer he was misleading the plaintiff to his detriment, and that the answer was not filed by a guardian ad litem as required by statute.

It was then suggested that the legislature amend certain statutes and thereby equalize the parties, taking away the undue benefits granted to the minor. The legislature took no action. It appears that the entire Bar or at least those who have suffered by reason of these actions will have to take more affirmative action during the next session of the legislature if anything is to be done to remedy this situation.

³⁷ Ohio Rev. Code § 2305.16.