



# *for the* **RECORD**

**NEWS FOR THE OHIO COURTS**

## Judging - Stable but Adaptable

“Are you a good judge?” queried “James Madison” at the OJC 2021 Annual Meeting. How would your community answer that question? What about your colleagues? Your staff? Attorneys appearing in your courtroom? What qualities define a good judge? When you wear a robe a certain level of intelligence, equanimity, and mastery of the law are presumed. Stability and adaptability are the hard-to-balance qualities that define a really good judge.

The expected stability of judges requires being fair, evenhanded, and even somewhat predictable in the resolution of matters you decide each day. Adaptability never comes easily. The administration of justice must constantly adjust to ever-evolving community expectations. Law school and the practice of law did not prepare judges to become social workers nor mental health and substance recovery experts. Managing appropriate outcomes for people in crisis - quality judging - requires constant application of your adaptability skills.

Judicial adaptability is not natural, it is acquired with experience, education, and the kindness of others - those with specialized training in your community. The dynamic challenges of judging well are rarely fully understood by those who hold the reins of political power. Judges hold soft power and you should use it to build community confidence in your efforts to craft outcomes that strive to eventually restore broken lives. Your chambers should not just be a place that education, business, religious and community leaders walk or drive past. Invite them in regularly. Make it a two-way relationship and visit their chambers as well. All have a common interest in enhancing the wellbeing of your community. Be a leader in that effort - and a really good judge!

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Pay to Stay Ordinances  
Patrick Carroll, retired judge

There can be no dispute that people living at the lower end of the economic level have been adversely impacted financially by the pandemic over the past two years. Jobs in the service industry, particularly restaurants and entertainment, have either been eliminated or hours drastically reduced. Many of the people hit hardest are renters facing eviction. To address this situation, the U. S. Congress passed the Coronavirus Aid Relief and Economic Security (C.A.R.E.S.) Act in March 2020, preventing eviction for nonpayment of rent for any federally subsidized property or rental property with a mortgage that was federally backed

Following the expiration of the C.A.R.E.S. Act the CDC issued two separate, successive orders that applied to all residential rental property to prevent eviction for non-payment of rent. Both of those orders were held invalid as exceeding its authority to issue a nationwide eviction moratorium.<sup>1</sup> In addition to these efforts massive federal, state, and local funds, as well as from private charities and other organizations, provided rent to assist people to remain in their homes. All of these efforts have the common recognition that evictions are more than civil cases, affecting people's homes and lives.

Recently, there has been a movement by local city councils to provide assistance to tenants by enacting "pay to stay" ordinances. While the ordinances may vary, they generally provide for a tenant to pay current rent to the landlord after the complaint for eviction has been filed.<sup>2</sup> If the landlord refuses to accept the rent, the offer to pay may be raised as an affirmative defense.<sup>3</sup> For either situation, the court must find in favor of the tenant and either dismiss the case or enter judgment in favor of the tenant.

The purpose of the ordinance is to allow the tenant to remain in the rental unit while paying the landlord the balance of accrued rent. The problem is not purpose of the ordinance, but that it exceeds a municipality's home rule authority by the Ohio Constitution by its impact on the court's jurisdiction.

Forcible entry and detainer is a statutory proceeding governed by Ohio Revised Code Chapter 1923. One of the jurisdictional requirements is the service of a minimum

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<sup>1</sup> See, *Skyworks, LTD v. Centers for Disease Control and Prevention*, Case No. 5:20-cv-2407, decided March 10, 2021 (N.D. Ohio) and *Tiger Lily v. United States Department of Housing and Urban Development*, 992 F.3d 518 (6th. Cir. 2021). See also, *Alabama Ass'n of Realtors v. Dept. of Health and Human Services*, Case No. 20A169, \_\_\_ U.S. \_\_\_, 141 S. Ct. 2485 (2021).

<sup>2</sup> See, e.g. Cleveland Cod. Ord. 375.13.

<sup>3</sup> *Hudson v. Ernst & Young, LLP*, 189 Ohio App.3d. 60, 10<sup>th</sup>. Dist. 2010-Ohio-2731. (An affirmative defense is a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's claim, even if all of the allegations in the complaint are true.)

three-day notice for the tenant to vacate the rental premises. R.C. 1923.04. Any deviation is grounds for dismissal on jurisdictional grounds.<sup>4</sup> When an eviction complaint is filed, a landlord may accept past rent and still proceed with the eviction.<sup>5</sup> Acceptance of current or future rent, however, is inconsistent with the mandatory three-day notice to vacate required by R.C. 1923.04. When a landlord accepts current rent in a pending eviction case, whether voluntarily or imposed by ordinance, the case must be dismissed.<sup>6</sup>

Under existing case law, a landlord has the right not to accept an offer of current rent and proceed instead with the eviction case. The operation of the ordinance removes any discretion by the trial court and effectively gives the tenant complete control over the litigation. Under the ordinance, when back rent is paid, offered, or with some ordinances, guaranteed payment, the plaintiff/landlord, and the judge, cannot go forward with the eviction case. Consequently, an ordinance requiring the landlord to accept current rent divests the court of jurisdiction.<sup>7</sup>

### **Constitutional issues.**

Municipalities have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws. Sec. 3, Art. XVIII of the Ohio Constitution. The right of a municipality to control a court's jurisdiction, however, is a matter of statewide concern, not a local government. A municipality's home rule authority may not abridge the sovereignty of the state regarding the operation of courts. The legislature has the exclusive power to create courts inferior to the courts of appeals, which includes the power to define the court's jurisdiction.<sup>8</sup>

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<sup>4</sup> *Mularcik v. Adams*, 7<sup>th</sup>. Dist. Jefferson, No. 03 JE 17 (March 18, 2004). (Dismissal required when paraphrased notice did not track the required statutory language.)

<sup>5</sup> *Urban Partnership Bank v. Mosezit Academy*, 8<sup>th</sup>. Dist. Cuyahoga, No. 100712, Dist. 2014-Ohio-3721.

<sup>6</sup> *Presidential Park Apts. v. Colston*, 10<sup>th</sup>. Dist. Franklin, No79AP-602, 17 Ohio. Op. 3d 220 (1980). See also, *FMJ Props. v. Hinton*, 8<sup>th</sup>. Dist. Cuyahoga, No. 50314 (April 10, 1986)(payment of partial rent at hearing for eviction required the court to dismiss the case.)

<sup>7</sup> *Ryals v. Lynch*, 10<sup>th</sup>. Dist. Franklin, No. 96APG02- 157 (July 23, 1996), relying on *Associated Estates Corp. v. Bartell*, 24 Ohio App.3d 6 (8<sup>th</sup>. Dist.1985).

<sup>8</sup> *State ex rel. Ramey v. Davis*, 119 Ohio St. 596 (1929) (Syllabus of the Court, Par. 2-4). See also, *Cupps v. Toledo*, 170 Ohio St. 144, 151 (1959) (Authority for municipalities to exercise all powers of local self-government does not include the power to regulate the jurisdiction of courts.)

When local ordinances restrict a court’s authority, it results in a patchwork of different court procedures. For courts with multiple municipalities, it also mandates different results by the same court based on whether a pay to stay ordinance has been adopted. As such, the ordinance undermines statewide uniform court procedures and application of state law. Although there is a strong public interest in permitting tenants to remain in their rental premises, especially when the tenant is willing and able to pay accrued rent, enabling legislation must be done by the properly authorized governmental entity.<sup>9</sup> In Ohio, the authority to enact a pay to stay law resides with the State of Ohio, not individual municipalities.

### **Statutory Issues.**

R.C. 5321.20 was recently enacted, providing regulation of rent control and stabilization for residential rental premises is a matter of statewide concern and preempts any control imposed by any other political subdivision.<sup>10</sup> Although this statute is directed at rent control, the statute further makes clear that “it is the intent of the general assembly to preempt political subdivisions from regulating the rights and obligations of parties to a rental agreement that are regulated by [R.C. Chap.5321]. . .” With the exception of rental property owned by a local government, it may not effect regulate how rent is charged or paid for residential premises.<sup>11</sup>

The statute recognizes that R.C. Chap. 5321 is a statewide and comprehensive legislative enactment regulating all aspects of the landlord-tenant relationship with respect to residential premises. R.C. 5321.19 states that a municipal charter provision, ordinance or township resolution in conflict with R.C. Chap. 5321 may not be enacted or continued to exist if previously adopted.

From this statutory language the General Assembly clearly preempts any local control over landlord/tenant and eviction cases. In *Shaker House, LLC v. Daniel*, 8th. Dist. Cuyahoga, No. 111183, 2022-Ohio-2778, the court invalidated a local rule that required a lead free certification to be filed with an eviction complaint, finding that R.C. Chap. 1923 governs eviction proceedings and a local court rule could not add additional requirements to a claim for eviction. Similar to a municipal ordinance, a court does not have the authority, however well intentioned, to create a piecemeal eviction system in the Ohio.

### **Conclusion.**

By either constitutional or statutory standards, it is unlikely that a pay to stay ordinance would survive a court challenge. Under current law, when an eviction is pending, the landlord may chose to accept current rent or proceed with the eviction. Under the pay to stay ordinance, the tenant controls the course of the litigation. Under

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<sup>9</sup> *Alabama Ass’n of Realtors v. Dept. of Health and Human Services*, 141 S. Ct. at 2490.

<sup>10</sup> H.B. 430, Effective September 23, 2022.

<sup>11</sup> R.C. 5321.19.

either procedure, the parties control, leaving little if any discretion to the court. Perhaps a better course of action would be to provide the trial court with discretion to weigh the equities, allow the court to impose conditions to avoid repeat occurrences, and determine the case to serve the interest of justice.

The Landlord Tenant Act was adopted in 1974 to ensure equitable dealings between landlords and tenants due to the greater power traditionally held by the landlord. As the Act approaches its fiftieth anniversary, it may be an appropriate time for the General Assembly to review and amend procedures to reflect the severe economic conditions witnessed over the past few years and recognize and balance the rights of both landlords and tenants, with the goal of maintaining stability for both the local housing market and the community.

## House Bill 430: A Legislative History

In recent years, local governments in Ohio have taken a role in refereeing the relationship between landlords and tenants. Municipalities across the state have enacted pay to stay ordinances, protections for tenants who use housing vouchers, and even pilot programs to provide indigent tenants with legal counsel during an eviction.

While there has been minimal opposition both locally and statewide to policies such as pay-to-stay ordinances, opponents of municipal rent control and rent stabilization measures pushed for an amendment to House Bill 430 that would explicitly preempt political subdivisions from enacting local rent control policies. H.B. 430 was a bill regulating interstate hazardous liquid or gas pipelines, orphaned well plugging, and PUCO service withdrawal proceedings that had already passed the House.

Representatives from Ohio REALTORS, Ohio Real Estate Investors Association, Ohio Mortgage Bankers Association, and Ohio and National Apartment Association testified in support of an amendment to H.B. 430 that would clarify that “it is the intent of the general assembly to preempt political subdivisions from regulating the rights and obligations of parties to a rental agreement that are regulated by this chapter, including through the imposition of rent control and rent stabilization in any manner.” H.B. 430 was moved out of committee that same day and approved by the General Assembly on June 1. It was signed by the Governor on June 24, and went into effect 90 days later.

## **Judicial Hotline Serves as a Lifeline for Ohio Judges**

By Charles Schneider, Isaac Wiles

Ohio's judges deliberate and decide on thorny legal questions every day. But sometimes, even they are stumped by the myriad of issues that can confront their courtrooms and courthouses.

Who do they call? The Judicial Hotline that was established by the Ohio Supreme Court. The hotline is part of the Ohio Judges' Liability Self-Insurance Program which is operated by the Ohio Department of Administrative Services. Each court is entitled to ten hours of legal advice each policy year. Each justice or judge is granted an additional five hours of hotline time each year for his or her own judicial ethics questions.

Isaac Wiles is currently under contract to provide judges and senior court personnel of the 5<sup>th</sup>, 7<sup>th</sup> and 10<sup>th</sup> appellate districts with critical advice on everything from workplace law to personnel matters. Montgomery Johnson is currently under contract to provide advice to judges and senior court personnel within the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> appellate districts. The hotline is open to courts at all levels, from municipal to all division of common pleas and appeals.

It is important to note judges should not be calling the Judicial Hotline for help on legal research or rulings on evidentiary matters. The hotline is not a substitute for a judge's duties on the bench.

The Judicial Hotline can help a judge with those issues not on trial in front of them. Calls to the hotline are dominated by questions regarding human resources issues, particularly from courts that may not have their own in-house HR specialist.

The questions judges ask via the hotline are similar to those posed by public employers in Ohio. Common topics are employee rights, obligations of the court under the law regarding, say, when an employee becomes disabled, and if an employee has done something to warrant termination.

Difficult personnel decisions are the bane of any employer's existence, and courts are no exception. The hotline can help. Sometimes, courts unable to reach an agreement among judges on a personnel issue turn to the hotline as their outside counsel. For them, the hotline can be a consensus-builder.

Also, in some smaller counties, personnel issues can become personal. The hotline can help remove that element from the matter.

The hotline can also tackle issues beyond human resources. Judges can ask about their ethical obligations under Ohio's Code of Judicial Conduct, for example.

Most issues can be resolved in a few phone calls, but some complex cases may require more time with the client. While attorneys working within the Ohio Judges' Liability Self-Insurance Program are not required to confirm their advice with legal authority in writing, they have done so on occasion and, when requested, have provided a formal written response with their recommendations.

The hotline is a legal resource for a variety of issues judges may confront that have nothing to do with trying cases. But these issues often are a distraction for the judge performing their duties on the bench.

For courts in the 5<sup>th</sup>, 7<sup>th</sup> and 10<sup>th</sup> appellate districts, the hotline is 614-340-7451 or contact can be made via email at [judges@isaacwiles.com](mailto:judges@isaacwiles.com).

For courts in the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> appellate districts, the hotline is 512.241.4722 or contact can be made via email at [judicialhotline@mojolaw.com](mailto:judicialhotline@mojolaw.com).

For situations in which a judge you know is experiencing problems with alcohol or substance abuse, mental health, stress and burnout, or with meeting standards of professional conduct, contact the Judicial Advisory Group (JAG). JAG consists of a group of judges who work with the Ohio Lawyers Assistance Program (OLAP) to provide peer-based assistance to judges with personal and professional issues. Contact an OLAP or JAG member at 800-348-4343.

*Charles Schneider, an Of Counsel at Isaac Wiles, spent more than 20 years as a trial judge, most recently as a Franklin County Common Pleas Judge.*

The 8th Annual Lean Forward Veterans Summit will be held on November 17th at Villa Milano in Columbus, Ohio. The program has been approved for 6.5 hours of CLE credit, including 2.25 hours of Professional Conduct and is free to attend.

For more information, and to register:  
<https://www.veteransummit.mightycrow.com/>



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# OJC TIPS AND TRICKS

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*This is a fluid list that will constantly change. We will always be adding items as they become frequent questions, but if you have anything to add, please feel free to contact [Justin Long](#).*

- Feel free to submit any articles you would like to have added to the quarterly For the Record in the future.
- The [Judicial Advisory Group \(JAG\)](#) is available for judges who need a group to extend its ability to provide confidential assistance to judges.
- Please fill out a "[Who Do You Know](#)" form to let the OJC know who you know in the legislature or the administration.
- For help signing into the Ohio Judicial Conference's website, [www.ohiojudges.org](http://www.ohiojudges.org), please see this [document](#).
- Annually, the OJC hosts a Judicial-Legislative Exchange program, which allows a day for judges to come to Columbus to shadow legislators, hopefully from their districts. The idea is for the legislators to then shadow the judges in their court for the day.
- Did you know that if you log in to the Judicial Conference website and go to [associations](#), you can choose your judicial association and see the summer and winter meeting dates?
- The Judicial Conference Jury Instructions Committee posts [recently revised jury instructions](#) on the Judicial Conference website.
- The website was recently updated with a few notable changes. One of those changes was the addition of a [calendar](#) which is matched up with our list of events.
- Another addition is the "[Outreach that Works](#)" link, which allows judges to submit any recommendations that help them to reach out to the public, whether it be publications, websites, suggestions on events, etc.
- A notable connection to help all judges is the [National Center for State Courts](#), or the NCSC. This site helps to promote the rule of law and improves the administration of justice in state courts and courts around the world.
- [Judicial Diversity: A Resources Page](#)

# Judicial College Offerings

The Judicial College CLE schedule has been upgraded starting this year. To view the calendar and sign up for courses, please visit this [site](#).

# VISIT THE OHIO JUDICIAL CONFERENCE WEBSITE!

WWW.OHIOJUDGES.ORG

CONTACT JUSTIN LONG AT THE OHIO JUDICIAL CONFERENCE FOR LOGIN ASSISTANCE

[justin.long@sc.ohio.gov](mailto:justin.long@sc.ohio.gov)

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#### WEEKLY FYI:

##### NATIONAL NEWS:

- Arkansas's Cruel and Unusual Killing Spree
- I Went to a Town Hall Meeting in a County Ravaged by Opioids. What I Saw Broke My Heart.
- OxyContin Maker Asks Judge to Toss Case Brought by City
- Gorsuch Might Be Tough to Predict on Criminal Justice Cases

##### STATE NEWS:

- Justice Insider: Murderer's Attorney Tries Punctuation Defense in Sentencing
- Summit Prosecutor Campaign Reaches out to Victims in Different Languages
- Drunken Driver Gets 180 Days After Coroner's Office Says Crash Victim Died of Cancer
- Retired Stark County Family Court Judge Michael Howard to Speak at 2017 LEAD Conference at Georgetown University



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