IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

UPPER ARLINGTON CITY SCHOOL DISTRICT BOARD OF EDUCATION,	:	APPEAL NO. 20AP000576
Plaintiff-Appellant,	:	REGULAR CALENDAR
v.	:	On Appeal From The Court of Common Pleas of Franklin County, Ohio
CITY OF UPPER ARLINGTON BUILDING DEPARTMENT, *et al.*,	:	
Defendants-Appellees.	:	

BRIEF OF APPELLEE-INTERVENOR JANE DOE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

APPELLANT'S ASSIGNMENTS OF ERROR

1. First Assignment of Error: Trial Court erred in granting motion to intervene of Intervenor Jane Doe, in her individual capacity and on behalf of her minor son John Doe through Trial Court's "Decision and Entry Granting Motion to Intervene of Jane Doe (Filed October 14, 2020) and Order Adding Jane Doe, Individually and on Behalf of her Minor Son, as an Appellee" filed 10/15/20.

2. Second Assignment of Error: Trial Court erred in granting motion to vacate judgment of Intervenor Jane Doe, in her individual capacity and on behalf of her minor son John Doe through Trial Court's "Decision and Entry Granting Appellee's, Jane Doe, Motion to Vacate Summary Judgment, filed October 15, 2020" filed 11/30/20.

ISSUES PRESENTED FOR REVIEW

Appellant's First Assignment of Error

1. Was the Trial Court required as a matter of law to deny Intervenor-Appellee Jane Doe's ("Jane Doe's") Motion to Intervene on the theory that Jane Doe lacked standing to appeal an order issued by the Ohio Board of Building Appeals ("BBA"), when Jane Doe did not seek to appeal the BBA order but instead sought and was granted the right to intervene as an appellee not an appellant?

2. Was the Trial Court required as a matter of law to deny Jane Does' Motion to Intervene solely because Jane Doe did not file an accompanying pleading but instead filed an accompanying Motion to Vacate?

Appellant's Second Assignment of Error

1. Did the Trial Court err as a matter of law in determining that its September 15, 2020 entry of summary judgment was void?

2. Assuming arguendo that the Trial Court committed reversible error in determining that its summary judgment entry was void, should this Court remand for the Trial Court to initially consider, under its discretion, the merits of Jane Doe's Motion to Vacate pursuant to Civil Rule 60(B)?

3. Does Civil Rule 60(B) apply to appeals under R.C. 3781.031 where, unlike R.C. 119.12 appeals, R.C. 3781.031 appeals resemble *de novo* proceedings?

4. Did Jane Doe established a meritorious defense for purposes of her Motion to Vacate pursuant to Civil Rule 60(B), when the she alleged that the Trial Court's summary judgment was based upon a misleading

and uncontested submission that the community was fully informed and supported the School District's requested variance?

5. Did Jane Doe establish entitlement to relief under Civil Rule 60(B)(5) when the September 15, 2020 summary judgment was obtained without any opposition, through a mechanism expressly contradicted by the procedures set forth in R.C. 3781.031, and on the basis of a misleading and uncontested submission that the community was fully informed and supported the unisex bathroom plan.

COMBINED STATEMENT OF THE CASE AND FACTS

Intervenor-Appellee Jane Doe ("Jane Doe") generally agrees with Statement of the Case and Statement of Facts submitted by the Appellant Upper Arlington School District ("School District"), with the following clarifications, additions, and caveats:

1. Jane Doe filed her Motion to Intervene to participate in the administrative appeal below as an appellee not an appellant. *See* Oct. 14, 2020 Motion to Intervene. Consistent with Jane Doe's Motion to Intervene, the Trial Court expressly granted Jane Doe the right to intervene as an appellee. Entry Granting Intervention at 7.

2. While the School District highlights the fact that the Trial Court granted Jane Doe's Motion to Intervene on October 15, 2020 before the School District had an opportunity to file a response (*See* Appellant's Brief at 7), the School District does not argue on appeal that the Trial Court abused its discretion in doing so or challenge the Trial Court's intervention ruling on that basis.

3. In her Motion to Intervene, Jane Doe expressly recognized that "[g]iven that this matter is an administrative appeal pursuant to R.C.

3781.031, there is no 'pleading' to be submitted by Intervenor pursuant to Civil Rule 24(C)" but that she was "contemporaneously filing the equivalent of a 'pleading' in this context, a Motion to Vacate and/or Relief from Judgment pursuant to Civ. R. 60(B)." Motion to Vacate at p. 4, fn 1. In its Entry Granting Intervention, the Trial Court agreed, stating that it accepted the "contemporaneously filed Motion to Vacate and/or Relief from Judgment as being compliant with the rule." Entry Granting Intervention at 6.

4. On October 15, 2020, after granting Jane Doe's Motion to Intervene and after Jane Doe's Motion to Vacate had been filed, the Trial Court issued a separate order at 3:21 p.m. entitled "Order Staying the Court's September 15, 2020 Order of Remand to the Ohio Board of Building Appeals." October 25, 2020 Stay Order. In that Order, the Trial Court stayed its September 15, 2020 summary judgment decision and order of remand "until the motion to vacate is ruled upon." *Id.* at 1. The Court stated that "such stay is necessary to preserve the status quo," and "will promote judicial economy, avoid unnecessary hardship, and will not materially prejudice any party." *Id.*

5. The Trial Court's Decision to vacate its September 15, 2020 summary judgment entry was based solely on its conclusion that the summary judgment entry was void *ab initio* because the parties' Joint Motion for Summary Judgment "circumvented the normal procedure for administrative appeals and the Court's deviance therefrom was procedurally improper." Entry to Vacate at 5. In so doing, the Court expressly declined to decide, and did not decide, whether Jane Doe's Motion to Vacate should be granted pursuant to Civil Rule 60(B). *Id.*

ARGUMENT

I. The Trial Court did not abuse its discretion in granting Jane Doe's Motion to Intervene. [Appellant's First Assignment of Error]

Whether intervention is granted as of right or by permission, the standard of review is whether the trial court abused its discretion in allowing intervention. *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 130 Ohio St. 3d 30, 2011-Ohio-4612, ¶41. A court should liberally construe the requirements of Civil Rule 24 to permit intervention. *State ex rel. SuperAmerica Group v. Licking Cty. Bd. of Elections*, 80 Ohio St.3d 182, 184 (1997). A motion to intervene, even after final judgment, is timely and should be granted where the intervenor has no alternative remedy and intervention is the only way to protect the intervenor's rights. *Greenman v. Greenman*, 5th Dist. Fairfield No. 04CA69, 2005-Ohio-4961, ¶¶18-20 (Sept. 12, 2005).

Here, the School District contends that the Trial Court erred in granting Jane Doe's Motion to Intervene for two alleged legal errors: (1) Jane Doe lacked standing to bring an appeal, and (2) Jane Doe's Motion to Intervene was not accompanied by a "pleading" as required by

Civil Rule 24(C). The School District is wrong on both counts. Jane Doe's alleged lack of standing *to bring an appeal as an appellant* has nothing to do with Jane Doe's standing to participate in the administrative appeal *as an appellee*. Likewise, the "accompanying pleading" requirement under Civil Rule 24(C) may be excused where, like here, the motion to intervene clearly sets forth the purpose for which the party sought to intervene, and as such, the Trial Court did not abuse its discretion in treating Jane Doe's Motion to Vacate as the functional equivalent of the Civil Rule 24(C) pleading requirement.

A. Jane Doe has standing to participate in this administrative appeal *as an appellee*.

In support of its argument that Jane Doe lacks standing to intervene in the School District's administrative appeal, the School District relies on R.C. 3781.031(D) and several cases for the proposition that a non-party to the agency hearing has no right *to file an appeal* to the court of common pleas from an agency's decision. *See* Appellant's Brief at 12-14 (discussing *Alesi v. Board of County Commissioners, Warren County, Ohio*, 12th Dist. Warren No. CA2013–12–123, 2014-Ohio-5192, and

Pinkney v. Ohio Dept. of Indus. Relations, Div. of Factory & Bldg. Inspections, 10th Dist. Franklin No. 74AP-231, 1974 WL 184310 (Sept. 17, 1974). In so doing, the School District however confuses standing *to appeal* an order of the BBA with standing to intervene *as an appellee*.

Here, of course, Intervenor Jane Doe did not appeal the decision of the BBA. In fact, Jane Doe does not challenge the BBA order in any way. Rather, as the Trial Court recognized, the School District appealed the BBA order, and it is the School District that sought to change the BBA order. *See* Order to Vacate at 3-4. Accordingly, the Trial Court's order granting Jane Doe's Motion to Intervene expressly made Jane Doe *an appellee* not an appellant. *See* Oct. 15, 2020 Decision and Entry at 7.

Simply put, neither R.C. 3781.031(D) nor the case law cited by the School District has any relevance to this case or Jane Doe's ability to participate in this matter *as an appellee*. As recently explained by this Court, "'a party *commencing litigation* must have standing to sue in order to present a justiciable controversy.'" *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241, 2020-Ohio-4778, ¶13 (10th Dist.) (quoting *Fed. Home*

Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶41) (emphasis added). Thus, "'[b]efore an Ohio court can consider the merits of a legal claim, the person or entity *seeking relief* must establish standing to sue.'" *Id.* quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶27. Again, it was the School District, not Jane Doe, that sought affirmative legal relief from the decision of the BBA, and it is the School District, not Jane Doe, that had the obligation to establish standing to appeal.

In fact, courts have recognized that an interested non-party may intervene in an administrative appeal *as an appellee* where appropriate. *See, e.g.*, *Wagner v. Miami Cty. Bd. of Zoning Appeals*, 2nd Dist. Miami No. 2003-CA-19, 2003-Ohio-4210 (in administrative appeal by landowner challenging board of zoning appeal's denial of conditional use permit, trial court abused its discretion in prematurely denying motion of township residents to intervene as appellees); *Riebe Living Tr. v. Lake Cty. Bd. of Commrs.*, 11th Dist. Lake No. 2011–L–105, 2013-Ohio-59, ¶1 (the trial court erred in denying motion to intervene as an appellee in administrative appeal as untimely).

While one can certainly recognize that intervention in an administrative appeal (even as an appellee) should not be routine, it makes good sense (and hardly an abuse of discretion) to do so in the rare cases where, like here, the original parties to the appeal are aligned and where, because the BBA is not a proper party to the administrative appeal, there is literally no one present in the Trial Court proceedings to defend the BBA's decision. Absent intervention, the Trial Court would be precluded from the fundamental benefit and the hallmark of an adversarial legal system– the opportunity to hear from opposing sides.

In short, Jane Doe did not and does not lack standing to participate as an appellee in the administrative appeal below, and the Trial Court was not required as a matter of law to deny Jane Doe's motion to intervene as an appellee on that basis.

B. Under the circumstances here, the Trial Court did not abuse its discretion in treating Jane Doe's Motion to Vacate as satisfying the "pleading" requirement of Civil Rule 24(C).

While the School District relies on *City of Whitehall v. Olander*, 10th Dist. Franklin No. No. 14AP–6, 2014-Ohio-4066, ¶35, a case which stands for the undisputed proposition that the failure to file an

accompanying pleading with a motion to intervene as required by Civil Rule 24(C) may be a valid basis for a trial court to deny a motion to intervene, the School District cites *no* case for what it asserts here, *i.e.*, that the absence of an accompanying pleading *mandates* denial of intervention as a matter of law. The reason for that failure is simple – the School District's proposition is a bridge too far and not supported by the case law.

Rather, courts of appeals have consistently found that the absence of an accompanying pleading is *not* fatal to a motion to intervene, and in fact, that denying intervention for that basis amounts to an abuse of discretion where the motion to intervene clearly sets forth the purpose for which appellant sought to intervene, including the filing of a dispositive motion. *See, e.g.*, *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, 8th Dist. Cuyahoga Nos. 85395 & 85452, 2005-Ohio-1993, ¶14 (reversing denial of intervention and finding that the appellant's failure to attach a complaint to its motion was not fatal given that purpose for which appellant sought to intervene "was clearly set forth in its motion and did not include the addition of any new liability or damages issues to the

litigation"); *In re Guardianship Chambers*, 6th Dist. Sandusky No. S-07-014, 2007-Ohio-6881, ¶¶ 5-8 (trial court erred and abused its discretion in denying motion to intervene even though appellant failed to attach a pleading to his motion where it was clear from the motion itself that appellant sought to file a claim to recover the cost of his legal services rendered prior to his discharge); *Korenko v. Kelleys Island Park Dev. Co.*, 6th Dist. Erie No. E-06-029, 2007-Ohio-2145, ¶¶19-22 (trial court abuse its discretion in denying motion to intervene even though appellants did not file a pleading setting forth their claim as required by Civil Rule 24(C) because it was sufficiently clear from their motion and the attached affidavit that they would assert a claim of adverse possession); *Klingman v. Smith*, 6th Dist. Sandusky No. S-76-14, 1977 WL 198363, *2 (Feb. 4, 1977) ("The appellant argues that the motion to intervene should not have been granted in that no answer was filed in the case on behalf of the Board of Tax Appeals. Even though the better procedure might have been to file an answer, the motion to intervene was accompanied by a motion to dismiss which did set forth the claim for relief for which the intervention was sought.").

Likewise here, and consistent with these legal authorities, the Trial Court certainly did not abuse its discretion when it granted Jane Doe's Motion to Intervene and accepted her contemporaneously filed Motion to Vacate as being sufficiently compliant with Civil Rule 24(C). *See* Entry Granting Intervention at 6. As an Appellee, Jane Doe's intervention did not add any new issues to the litigation. Jane Doe's Motion to Intervene adequately explained the purpose for intervention. And like in *Klingman*, *supra*, Jane Doe's Motion was accompanied by a specific motion (the Motion to Vacate), which advanced the purpose for which intervention was sought.

In sum, the Trial Court was not legally required to deny, and did not abuse its discretion in granting, Jane Doe's Motion to Intervene solely because Jane Doe did not file an accompanying pleading.

* * *

Appellant's First Assignment of Error should be overruled.

II. The Trial Court did not abuse its discretion in vacating its September 15, 2020 Entry of Summary Judgment. [Appellant's Second Assignment of Error]

A decision to grant a motion for relief from judgment falls within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Flaugher v. Flaugher*, 2020-Ohio-299, 143 N.E.3d 623, ¶9 (1st Dist.). The abuse of discretion standard of review applies regardless of whether the motion was granted pursuant to Civil Rule 60(B) or pursuant to the Trial Court's inherent authority to vacate void judgments. *Id.* (*citing During v. Quoico*, 2012-Ohio-2990, 973 N.E.2d 838, ¶ 16 (10th Dist.)). An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

The School District spends the bulk of its Brief challenging Jane Doe's alleged failure to satisfy the requirements for relief from judgment pursuant to Civil Rule 60(B). The Trial Court, however, did not vacate its September 15, 2020 entry of summary judgment pursuant to Civil Rule 60(B). Instead, the Trial Court found that its summary judgment entry was void *ab initio*, and as such, expressly declined to address the merits of

Plaintiff' Motion pursuant to Civil Rule 60(B). *See* Entry to Vacate at 5. This distinction is significant as to how this Court should consider and ultimately address the substantive issues presented by the School District's appeal.

First, it is axiomatic that a trial court has the inherent authority to set aside a void judgment *sua sponte*. *Patton v. Diemer*, 35 Ohio St.3d 68 (1988), paragraph four of the syllabus. As such, where a judgment is void, it matters not whether the requirement under Civil Rule 60(B) are otherwise satisfied, or even, whether a motion to vacate has been filed. *See Am. Tax Funding, L.L.C. v. Robertson Sandusky Properties*, 2014-Ohio-5831, 26 N.E.3d 1202, ¶¶41-42 (7th Dist.) (because the trial court properly vacated a void judgment, the appellee need not meet the requirements of Civil Rule 60(B)); *Fisher v. Fisher*, 10th Dist. Franklin No. 01AP-1041, 2002-Ohio-3086, ¶27 (May 21, 2002) ("[T]he court had inherent authority to vacate the judgment, regardless whether defendant moved to vacate the judgment."). Accordingly, because the Trial Court properly found that its prior summary judgment was void, this Court should affirm without the need to address the School District's arguments

concerning the merits of Jane Doe's Motion to Vacate pursuant to Civil Rule 60(B), and it should be affirmed wholly independent of whether the Trial Court abused its discretion in granting Jane Doe's Motion to Intervene.

If, assuming arguendo, this Court were to conclude that the Trial Court erred as a matter of law in concluding that its prior entry of summary judgment was void (rather than voidable), then the proper remedy for this Court is to remand the matter back to the Trial Court for an initial determination of Jane Does' Motion for Relief pursuant to Civil Rule 60(B), so that the Trial Court has an opportunity to exercise its discretion thereunder. Finally, if this Court were to choose to address the propriety of Jane Doe's Motion for Relief pursuant to Civil Rule 60(B), then this Court should affirm on that alternative basis.

A. The Trial Court properly vacated its prior entry of summary judgment as void.

Notably, the School District does not directly challenge the Trial Court's conclusion that it was improper for the Trial Court to grant a variance through a summary judgment procedure under Civil Rule 56.

Rather, the School District merely contends that even if one assumes that the use of summary judgment procedures by the Trial Court in this administrative appeal was improper, that merely rendered the Final Judgment voidable, not void. *See* Appellant's Brief at 27. In so doing, the School District cites several cases for the general proposition that procedural errors render a judgment merely voidable, not void, so long as the Court otherwise possesses jurisdiction over the matter in question. *See* Appellant's Brief at 28-29.

While the cases cited by the School District accurately reflects the general principal, the School District overstates the rule and its application in the administrative appeal context. Notably, none of the cases cited by the School District involved administrative appeals, let alone the use of an unopposed summary judgment motion to by-pass the mandatory statutory scheme governing such administrative appeals.

"The right to appeal an administrative decision is neither inherent, nor inalienable; to the contrary, it must be conferred by statute." *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177 (2001). Accordingly, the Ohio Supreme Court and this

Court have repeatedly recognized that the procedures governing administrative appeals are to be strictly construed, and procedural defects in complying with such statutory requirements are fatal to the validity of an appeal. *See Hughes v. Ohio Dep't of Commerce*, 114 Ohio St. 3d 47, 2007-Ohio-2877; *Berus v. Ohio Dep't of Adm. Servs.*, 10th Dist. Franklin No. 04AP–1196, 2005-Ohio-3384, ¶¶ 7-8; *see also State ex rel. Potten v. Kuth*, 61 Ohio St. 2d 321, 325 (1980) ("The validity of an administrative action is not conditioned on proper procedure, though such action can be rendered void by a showing of procedural defects."). Here, as the Trial Court properly recognized, it had no authority to grant a variance through the mechanism of a summary judgment ruling, and as such, the Trial Court properly found that its September 15, 2020 summary judgment entry was void.

B. Assuming arguendo that this Court finds that the Trial Court erred in concluding that its entry of summary judgment was void, this Court should remand for the Trial Court to initially consider Jane Doe's Motion for Relief pursuant to Civil Rule 60(B).

As noted above, the Trial Court expressly declined to consider Jane Doe's Motion for Relief pursuant to Civil Rule 60(B), finding instead that

that that Motion was moot given the Trial Court's alternative decision that its summary judgment entry was void. As such, the merits of Jane Doe's Civil Rule 60(B) Motion are not properly before this court. *See Bowen v. Kil–Kare, Inc.*, 63 Ohio St.3d 84, 89 (1992) (finding that where the trial court declined to consider one of the arguments raised in a motion for summary judgment, but granted the motion for summary judgment solely on the basis of a second argument, the first argument was not properly before the court of appeals); *Booker v. Beauty Express Salons, Inc.*, 8th Dist. Cuyahoga No. 105456, 2018-Ohio-581, ¶19 ("because the trial court never passed judgment on those issues, it would not be proper for them to be determined in the first instance on appeal").

As such, assuming arguendo that this Court were to conclude that the Trial Court's September 15, 2020 summary judgment entry was not void, then the only appropriate remedy is for this Court to remand for the Trial Court to initially consider, under its discretion, the merits of Jane Doe's Motion pursuant to Civil Rule 60(B). *See, e.g.*, *Baird v. Owens Cmty. Coll.*, 10th Dist. Franklin Nos. 5AP–73 & 76, 2016-Ohio-537, ¶26 ("[S]ince the Court of Claims did not address the substantial issues of

contract formation, scope and breach, but rather, granted summary judgment solely on the alternative ground of damages, it is appropriate that we decline to address those issues further in the first instance and, instead, remand this matter for the Court of Claims to initially consider and decide them."); *Riverside v. State*, 190 Ohio App. 3d 765, 2010-Ohio-5868, ¶58 (10th Dist.) ("Because the trial court here has not decided either the city's standing to maintain an equal protection challenge or the merits of the city's equal protection argument, we decline to address those issues in the first instance and, instead, remand this matter for the trial court to initially consider and decide them."). Simply put, this Court cannot determine whether the Trial Court abused its discretion under Civil Rule 60(B) when the Trial Court itself never exercised such discretion.

C. Civil Rule 60(B) applies to appeals under R.C. 3781.031 because unlike R.C. 119.12 appeals, R.C. 3781.031 appeals resemble *de novo* proceedings.

While the School District argues that Civil Rule 60(B) is "clearly inapplicable" to administrative appeals, it certainly cannot be lost on this Court that the School District's position here is directly contrary to its own reliance on the applicability of the Ohio Civil Rules in obtaining the

Court's September 15, 2020 summary judgment below. The School District obtained its desired result via a motion for summary judgment filed pursuant to Civil Rule 56. Yet, when that judgment is challenged, the School District now asserts that the Court's summary judgment order cannot be vacated pursuant to another civil rule, Civil Rule 60(B). The School District cannot have it both ways, and it should not be heard to complain of an alleged error of its own making. If the Civil Rules are "clearly inapplicable" to the administrative appeal below, then the entire basis upon which the School District obtained summary judgment is equally flawed.

To the legal point, while the School District cites numerous cases for the proposition that Civil Rule 60(B) does not apply to administrative appeals, none of those cases are controlling precedent in this case because all involved appeals *solely* governed by the general standards and procedures contained in R.C. 119.12, not an appeal like that at issue here under R.C. 3781.031. Tellingly, the School District does not cite any (and the undersigned is not aware of any) case holding that Civil Rule 60(B) is clearly inapplicable to an appeal under R.C. 3781.031. The absence of any

such legal authority makes sense because administrative appeals pursuant to R.C. 3781.031 are materially different from those under R.C. 119.12, including: (1) the evidentiary record that the court may review, (2) the applicable standard of review, and (3) the conclusiveness of a trial court's decision.

First, under R.C. 119.12, a reviewing trial court is limited to the evidentiary record as certified to it by the agency unless the court finds that "additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." R.C. 119.12(L). In contrast, under R.C. 3781.031(D), "[t]he court shall not be confined to the record as certified to it by the agency[,] but any party may produce additional evidence and the court shall hear the matter upon the record and additional evidence any party introduces."

Second, under R.C. 119.12(N), a reviewing trial court is bound to uphold the agency's order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St. 3d 619, 621 (1993). In contrast, R.C. 3781.031(D) provides that the court "shall *not* affirm the agency's order unless the

preponderance of the evidence before it supports the reasonableness and lawfulness of the order and any rule of the board of building standards upon which the order is based in its application to the particular set of facts or circumstances involved in the appeal." (emphasis added).

Third, the cases finding Civil Rule 60(B) "clearly inapplicable" to R.C. 119.12 appeals have emphasized that R.C. 119.12 expressly states that "[t]he judgment of the [trial] court shall be final and conclusive unless reversed, vacated, or modified on appeal." R.C. 119.12(O); *see, e.g.*, *Griffin v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 11AP–1126, 2012-Ohio-3655, ¶6 (noting that this provision "renders Civ.R. 60(B) 'clearly inapplicable' to R.C. 119.12 appeals"). Significantly, there is no similar language contained in R.C. 3781.031.

Given the material differences between R.C. 119.12 administrative appeals and those under R.C. 3781.031, courts have recognized that R.C. 3781.031 appeals "in fact resembles a *de novo* proceeding" and that "the function of a court of common pleas in an R.C. 3781.031 appeal differs substantially from that of appellate courts in other contexts." *Copeland Corp. v. Ohio Dep't of Indus. Relations, Div. of Factory & Bldg.*

Inspection, 53 Ohio App. 3d 23, 26 (3rd Dist. 1988). In short, given the nature and scope of a trial court's review in an administrative appeal under R.C. 3781.031, there is simply no basis (and no legal authority) to conclude that the Civil Rules generally, let alone Civil Rule 60(B), are "clearly inapplicable" here.

The School District's superficial contention that "[a]n administrative appeal from the BBA is pursuant to both R.C. Chapter 119 and R.C. 3781.031" (Appellant's Brief at 20) misses the point entirely. While the overlay of R.C. Chapter 119 certainly applies to administrative appeals from the BBA (especially as to the standards of review applicable to this Court in reviewing a decision of the Trial Court), the School District simply ignores the fundamental (and unassailable) point that the procedures and first-level standard of review to be conducted by a Trial Court in a R.C. 3781.031 appeal are substantial and materially different from those set forth in R.C. 119.12.

None of the cases cited by the School District support (let alone compel) a different conclusion. Notably and tellingly, none address the distinction between appeals brought solely under R.C. Chapter 119

appeals and those under R.C. 3781.031. And of course, none stand for the proposition that the Civil Rules generally (let alone Civil Rule 60(B)) do not apply to R.C. 3781.031 appeals.

D. Jane Doe's Motion to Vacate established a meritorious defense.

"A 'meritorious defense' means a defense going to the merits, substance, or essentials of the case." *UBS Real Estate Sec., Inc. v. Teague*, 191 Ohio App. 3d 189, 2010-Ohio-5634, ¶23 (2nd Dist.) (internal quotations and citations omitted). A party seeking relief from judgment is not required to prove that he or she will prevail on the meritorious defense; the movant is merely required to allege the existence of such a defense. *Id.*

The School District contends that Jane Doe's Motion failed to set forth operative facts establishing that the variance requested by the School District would be contrary to the public interest or that the students would not suffer unnecessary hardship if the variance were not granted. In so doing, the School District not only mischaracterizes Jane Doe's Motion, it improperly attempts to address the ultimate merits of their alleged

entitlement to a variance, and wholly ignores the procedural posture and basis by which the School District obtained its variance from the Trial Court in the first place.

First, and contrary to the School District's contention, Jane Does' Motion did not "merely assert that the Court got it wrong" with "nothing more than a citation to the standard of review set forth in Ohio Revised Code § 3781.19." Appellant's Brief at 24. Instead, Jane Doe's Motion explained that by virtue of the parties' joint summary judgment submission, the Trial Court "was simply not presented with a full or accurate evidentiary record prior to it granting summary judgment," and in particular, that the School District's "plans for only unisex bathrooms at the Windermere school were not disclosed or discussed in the community meetings referenced in the testimony of School Superintendent Dr. Paul Imhoff." Motion to Vacate at 2.

While the School District contends that the public's alleged lack of awareness and alleged opposition to the variance would not be a legitimate basis to deny the variance (*see* Appellants' Brief at 25), the School District conveniently ignores that it affirmatively relied on the

opposite assertions as a basis for its contention that the variance should be granted in the first place. In support of its Motion, the School District relied upon a stipulation indicating that Superintendent Imhoff testified at the BBA that the "community" "fully support[s] the proposed bathroom layout." *See* Sept. 15, 2020 Summary Judgment Entry at 10. Significantly, the Trial Court expressly relied upon that stipulation in finding that the variance was not against the public interest. *Id*. Again, the School District cannot have it both ways.

Through her Motion, Jane Doe submitted that this stipulation was not accurate. In fact, the School District's plans for only unisex bathrooms at the Windermere School were not disclosed or discussed in the community meetings referenced in the testimony of Dr. Imhoff. Given that the School District had the burden of proving that there were no genuine issues of material fact entitling it to the variance as a matter of law under Civil Rule 56, Jane Doe submits that if the Trial Court had a full and adequate evidentiary record showing that the community did not "fully support the proposed bathroom layout," the Trial Court would not have found (and in fact could not have found) in favor of the School

District on summary judgment. Such allegations are all that is required to satisfy the meritorious defense requirement of Civil Rule 60(B). *Colley v. Bazell*, 64 Ohio St.2d 243, 247 fn. 3 (1980) ("The movant's burden is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense.").

Finally, the School District's contention that Jane Doe ignores applicable federal law (*see* Appellant's Brief at 26) is equally flawed. Again, the School District not only seeks to improperly inject an argument on the ultimate merits of their variance request, but in so doing, seems to be suggesting that federal law mandates the requested variance, something that the School District never argued below. More to the point, the federal cases cited by the School District simply do not mandate the use of only unisex bathrooms at the Windermere School. In *Board of Education of the Highland Local School District v. U.S. Department of Education*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016), the court held that a school district must treat a transgender student as a girl including allowing her to use the girl's restroom at the elementary school; it did not (and does not) require that an elementary school must use only unisex

bathrooms. In *Ray v. McCloud*, No. 2:18-CV-272, 2020 WL 8172750 (S.D. Ohio Dec. 16, 2020), the court invalidated a state policy prohibiting changes to sex markers on birth certificates to reflect transgender identity and had nothing to do with unisex bathrooms.

E. Jane Doe established entitlement to relief under Civil Rule 60(B)(5).

Relief from judgment may be granted under Civil Rule 60(B)(5) for "any other reason justifying relief from the judgment." Known as the "catch-all provision," the Ohio Supreme Court has recognized that it "reflects the inherent power of a court to relieve a person from the unjust operation of a judgment." *Volodkevich v. Volodkevich*, 35 Ohio St.3d 152, 154 (1988). It is designed to provide the trial court with sufficient discretion to fashion a remedy that is unavailable under any of the other provisions of the Rule. *Wells v. Spirit Fabricating, Ltd.*, 113 Ohio App. 3d 282, 289 (8th Dist. 1996). It is triggered "when the interest of justice necessitates it," *Smith v. Smith*, 2019-Ohio-129, 128 N.E.3d 914, ¶9 (9th Dist.), including the possibility that that the judgment was obtain through a prior misrepresentation to the Court. *See Schaefer v. Mazii*, 2019-Ohio-

3808, 145 N.E.3d 1048, ¶16 (1st Dist.); *see also Fors v. Beroske*, 6th Dist. Fulton No. F–12–001, 2013-Ohio-1079, ¶¶20-25 (the court's violation of the rule that default judgment shall not be different in kind from or exceed the amount prayed for in the demand for judgment presents a basis for relief from judgment under Civil Rule60(B)(5)'s catch-all provision).

According to the School District, Jane Doe simply opposes the variance and wishes to challenge it, none of which amounts to a sufficient basis for relief under Civ.R. 60(B)(5). In so doing, the School District wholly minimizes Jane Doe's position and ignores the fundamental interests of justice present here warranting relief from the Trial Court's September 15, 2020 summary judgment entry.

Again, the September 15, 2020 summary judgment was obtained without any opposition, through a mechanism expressly contradicted by the procedures set forth in R.C. 3781.031 and the Trial Court's normal administrative appeal schedule, and on the basis of a misleading and uncontested submission that the community was fully informed and supported the unisex bathroom plan. Under such circumstances, it would

not be an abuse of discretion to find that the requirements of Civil Rule 60(B)(5) are satisfied.

* * *

Appellant's Second Assignment of Error should be overruled.

CONCLUSION

For the foregoing reasons, the Appellant's Two Assignments of error should be overruled. The Trial Court's Entry granting Jane Doe's Motion to Intervene should be affirmed, and the Trial Court's Entry vacating its September 15, 2020 summary judgment should also be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Appellee-Intervenor Jane Doe was filed electronically this 8th day of February, 2021 through the Court's cm/ecf system, which by its operation will serve notice on all registered parties. Parties may access the filing through that system.

The undersigned also hereby certifies that a copy of same was served via email upon the following parties this date:

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