

IN THE SUPREME COURT OF OHIO

THE STATE, ex rel. ADEN D. FOGEL

CASE NO. 2007-1897

Relator

VS.

EDWARD M. ZALESKI, JUDGE

Respondent

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RELATOR'S MOTION TO STRIKE RESPONDENT'S MOTION TO DISMISS  
PURSUANT TO RULE XIV SEC. 2(D)(1)

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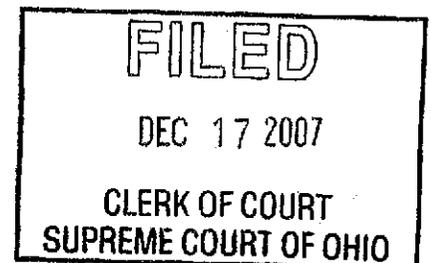
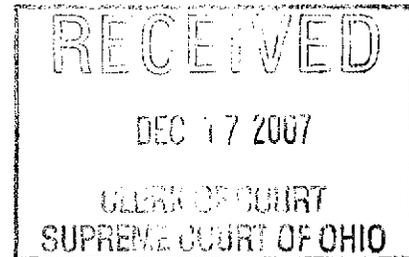
Aden D. Fogel  
4511 Palm Avenue  
Lorain, Ohio 44055

Relator *Pro se*

Dennis P. Will #0038129  
Lorain County Prosecuting Attorney

M. Robert Flanagan #0021726  
Assistant Lorain County Prosecuting Attorney  
225 Court Street, 3<sup>rd</sup> Floor  
Elyria, Ohio 44035

Counsel for Respondent



## MEMORANDUM IN SUPPORT

On November 2, 2007, counsel for respondent, Lorain County Prosecuting Attorney, filed a Motion To Dismiss the Relator's Original Action In Prohibition. The *Proof of Service* (Certificate of Service) that accompanied this Motion was void of any specific date that a copy was served upon the Relator and was not properly endorsed (See Exhibit A attached herein) and although the Relator was released from the custody of the Ohio Department of Rehabilitation and Correction on November 1, 2007, which counsel for the Respondent was well aware (See Transcripts of October 30, 2007 re-sentencing hearing attached to Respondent's Motion to Dismiss) and the Relator served a Notice of New Address to counsel for the Respondent, counsel, as evidenced by the Proof of Service, Respondent served the Motion to Dismiss to the Richland Correctional Institution. Because the Relator had been released on November 1, 2007, he did not receive a copy of the Motion to Dismiss and was unable to timely respond. It was not until November 14, 2007 that the Relator, while randomly checking the status of the Original Action In Prohibition on the Ohio Supreme Court online court docket, that the Relator became aware of any such Motion to Dismiss. Ohio Civil Rule of Procedure 11 states in pertinent part, that:

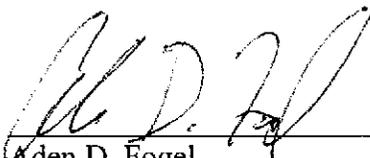
"Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telefax number, if any, and business e-mail address, if any, shall be stated.....if a document is not signed or is signed with the intent to defeat this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served."

In the instant case, the failure of the Respondent to properly endorse, execute and/or indicate proof of service constitutes an impermissible departure from the prescribed modes and forms of law as defined in and under the Ohio Rules of Civil Procedure and reduces the Respondent's Motion to Dismiss to a mere nullity as a matter of law and therefore is not properly before this Honorable Court and should be stricken.

"Striking the answer of a defendant is proper where the answer contains no endorsement of proof of service and opposing counsel denies receiving a copy of the answer."  
See: Amiri v. Thropp (Ottawa 1992), 80 Ohio App. 3d 44, 608 N.E. 2d 824.

Because counsel for Respondent failed to properly serve a copy of the Motion to Dismiss and did not properly endorse the Certificate of Service, this Honorable Court should **STRIKE** the Respondent's Motion to Dismiss and allow the Relator to proceed with his Original Action In Prohibition. For this the Relator forever prays.

Respectfully submitted,

  
\_\_\_\_\_  
Aden D. Fogel  
4511 Palm Avenue  
Lorain, Ohio 44055

**Relator Pro se**

**PROOF OF SERVICE**

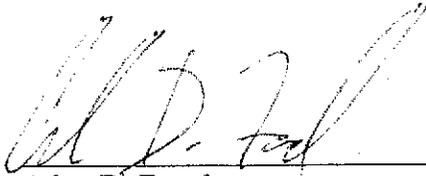
This is to certify that one (1) copy of the foregoing Motion To Dismiss and attached Brief was served upon: Aden D. Fogel, the Relator, *Pro Se*, Inmate Number A451-382, at the Richland Correctional Institution, P.O. Box 8107, Mansfield, Ohio, 44901, by regular United States Mail, this \_\_\_\_\_ day of November, 2007.

**M. Robert Flanagan #0021726**  
Assistant Prosecuting Attorney,  
Lorain County, Ohio  
Attorney For Respondent,  
The Honorable Edward M. Zaleski

(Ex. A)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing document was served by regular U.S. Mail, postage pre-paid, to counsel for the Respondent, Lorain County Prosecuting Attorney, Dennis P. Will, at 225 Court Street, 3<sup>rd</sup> Floor, Elyria, Ohio 44035 on this 10<sup>th</sup> day of December 2007.

  
\_\_\_\_\_

Aden D. Fogel

**Relator *Pro se***