

IN THE SUPREME COURT OF OHIO

08-0022

THE STATE OF OHIO EX REL.
STEVEN A. BOZSIK
Inmate Number 389-250
1001 Olivesburg Road
P.O. Box 8107
Mansfield, Ohio 44901

Relator

vs

HONORABLE LYNN SLABY, Judge
Ninth District Court of Appeals
504 Ocasek Government Building
161 S. High Street
Akron, Ohio 44308-1671

and,

HONORABLE CLAIR DICKINSON, Judge
Ninth District Court of Appeals
504 Ocasek Government Building
161 S. High Street
Akron, Ohio 44308-1671

Respondents

Case No. _____

ORIGINAL ACTION IN MANDAMUS

MEMORANDUM IN SUPPORT

FILED
JAN 03 2008
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION

The state legislatures have put a law on the books preventing a labeled vexatious litigator from filing frivolous and malicious civil actions in Ohio's courts. This will prevent the labeled vexatious litigator from abusing Ohio's courts and harassing other civilians or government agents with unnecessary lawsuits. See, O.R.C. § 2323.52.

The Relator was labeled a vexatious litigator by judgment entry on March 17, 2005 from the Honorable James L. Kimbler, Judge of the Medina County court of common pleas. The judgment entry orders Relator to seek leave pursuant to O.R.C. § 2323.52(F)(1) before commencing a civil action in Ohio's trial court.

After obtaining leave by Judge Kimbler the Wayne County court of common please issued a judgment entry against Relator and the Respondents refuse to permit Relator his substantial rights to appeal the final order issued on September 5, 2007 when genuine issues of material facts remain to be litigated.

II. STATEMENT OF FACTS

On December 3, 1999 Relator purchased two burial plats through a written purchase agreement from the City of Rittman Cemetery in Rittman, Ohio for a purchase prices on \$1,300.00.

On or about February 15, 2000, Relator rendered full payment of \$1,300.00 satisfying his responsibility with the purchase agreement/contract.

On or about March 1, 2000, the Director of Public Service for the City of Rittman, Ohio issued a Certificate of Burial Rights from the purchase agreement to Ms. Karen Jordon.

The City of Rittman Cemetery refuses to honor the purchase agreement and continues to refuse to re-issue a new burial plat deed as written in the purchase agreement/contract.

On December 12, 2006 Realtor moved the Honorable James L. Kimbler, Judge of the Medina County Court of Common Pleas for leave to commence a breach of contract civil action pursuant to O.R.C. § 2323.52(F)(1).

On December 13, 2006 the Honorable James L. Kimbler, Judge of the Medina County Court of Common Pleas granted Relator leave to commence the civil complaint for breach of contract against the City of Rittman Cemetery in the Court of Common Pleas, Wayne County, Ohio.

On December 18, 2006 Relator commenced the approved civil complaint against the City of Rittman Cemetery with the Wayne County Court of Common Pleas and the complaint was served upon the City of Rittman Cemetery on June 7, 2007.

On June 12, 2007 the City of Rittman Cemetery answered the complaint with one defense "the complaint fails to state a cause for action where relief can be granted and one counter claim seeking Relator declared a vexatious litigator pursuant to O.R.C. § 2323.52(A)(3).

On June 19, 2007 Relator moved the City of Rittman Cemetery with his first request for interrogatories, production of documents and request for admissions as part of discovery.

On June 22, 2007 Relator moved the Wayne County court of common with a motion to dismiss the counter-claim by the cemetery pursuant to Civil Rule 12(B)(6).

On July 19, 2007 the City of Rittman Cemetery defaulted the Realtor's first set of admissions filed on June 19, 2007 admitting the City of Rittman Cemetery has breached the contract between the parties.

On September 5, 2007 the Wayne County trial court issued a succinct judgment entry that granted the City of Rittman Cemetery motion for summary judgment and denied the Relator's motion for summary judgment when genuine issues of material fact remain to be litigated.

On September 13, 2007 Relator filed a motion for leave with the court of appeals pursuant to O.R.C. § 2323.52(F)(2) since the court of appeals will not accept any proceedings or filings by Relator without leave of the court.¹

On November 15, 2007 Respondents Judge Slaby and Judge Dickinson issued a judgment entry that denied Relator his right to an appeal after Judge Kimbler granted leave pursuant to O.R.C. § 2323.52(F)(1).

III. STANDARD OF REVIEW

In *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 90, 637 N.E.2d 306, 307, this Court addressed the standard for a writ of mandamus. In order to be entitled to a writ of mandamus, the relator has to establish (1) that he possess a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the requested acts; and (3) that the relator has no plain and adequate remedy at law. *See also, State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 45, 693 N.E.2d 794, 795; *State ex rel. Askew v. Goldbart* (1996), 75 Ohio St.3d 608, 665 N.E.2d 200; *State ex rel. Leach v. Schotten* (1995), 73 Ohio Sy.3d 538, 539, 653 N.E.2d 356, 357. A failure to show any one of these prerequisites requires the court to deny the petition or complaint. *State ex rel. Karmasir v. Tate* (1992), 83 Ohio App.3d 199, 614 N.E.2d 827.

1. DOES MANDAMUS LIE-COMPELLING RESPONDENTS TO ALLOW RELATOR A RIGHT TO AN APPEAL?

a. CLEAR LEGAL RIGHT AND CLEAR LEGAL DUTY TO AN APPEAL

Section 16, Article I of the Ohio Constitution states the following:

“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

1. As a side note Relator was not ordered by the March 17, 2005 judgment entry to seek leave with the court of appeals pursuant to O.R.C. § 2323.52(F)(2)

Section 16, Article I of the Ohio Constitution protects the right to seek redress in Ohio's courts when one-is-injured-by-another. *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425, 430. So-called "access-to-the-courts" provisions are found in many state constitutions and have their roots in the Magna Carta. See, *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 290, 363 N.E.2d 717, 732-733 (Douglas, J. concurring). A right or action existing at common law at the time the Constitution was adopted is constitutionally protected by the access-to-courts provision from subsequent legislative action that abrogates or impairs that right without affording a reasonable substitute. *Id.* at 291-292 at 364-365, 503 N.E.2d at 733-734 (Douglas, J., concurring).

This Court has held the "due course of law" provision in Section 16, Article I is the equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 422-23, 633 N.E.2d 505, 510-11, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 38 N.E.2d 70, 72.

As for the specific constitutional provision at issue herein, Section 16, Article I, states when the Ohio Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and a meaningful manner. *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62, 609 N.E.2d 140, 143-43, citing *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60, 514 N.E.2d 709, 715-16.

It has been previously determined by this Court, the Supreme Court of the United States has long held that a right to appeal is not found in the Constitution, where a state provides a process of appellate review, the procedures used must comply with constitutional dictates of due process and equal protection. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 84, 523 N.E.2d 851, 855-56 (citing *Mckane v. Durston* (1894), 153 U.S. 684, 14 S.Ct. 913; *Griffin v. Illinois* (1956), 351 U.S. 12, 18, 76 S.Ct. 585, 590. The State of Ohio has adopted appellate rules that make every litigant entitled to an appeal as of right by filing a notice of appeal within the time allowed. *Atkinson* at 84-85, 523

NE2d at 855-56, citing App.R. 3(a); see also *Moldovan v. Cuyahoga Cty Welfare Dept.* (1986) 25 Ohio St.3d 293-94, 496 N.E.2d 466.

In *Moldovan*, this Court cited Section 16, Article I of the Ohio Constitution and stated that it is well established that every injured party shall have remedy by due course of law and shall have justice administered without denial or delay. Hence the rights protected in Section 16, Article I extend to the rights of an appeal. *Id.* The *Moldovan* court stated the opportunity to file a timely appeal is rendered meaningless when reasonable notice of an appealable order is not given. The Respondents judgment order that denied leave after the original screening court granted leave clearly breaches the United States and Ohio Constitution. It is indisputable the September 5, 2007 judgment entry by the Wayne County Court is a final appealable order since the original screening court granted Relator leave to file his complaint. The Wayne County trial court did not dismiss the complaint pursuant to Civ.R. 12(B)(6) or stated the complaint was frivolous and malicious. In fact, the Wayne County court granted Relator's motion to dismiss the counter claim. Accordingly, Relator has satisfied the first two prongs allowing a mandamus action to lie.

b. NO OTHER REMEDY OF LAW AVAILABLE

According to O.R.C. § 2323.52(G) Relator is not permitted to appeal the Respondent's judgment entry that denied leave.

Thus, in this specific situation, under this particular statute, an original action in mandamus is an appropriate means by which the vexatious litigator could effectively challenge arbitrary denials of leave.

See, *Mayer*, 740 N.E.2d at 666.

Since the Respondents denied Relator leave pursuant to O.R.C. § 2323.52(F)(2) and O.R.C. § 2323.52(G) prevents rights to an appeal² Accordingly, the third prong of mandamus is satisfied.

2. IS RELATOR REQUIRED TO SEEK LEAVE PURSUANT TO O.R.C. § 2323.52(F)(2)?

It is a standard maxim of law a court of record always and only speaks through its journal entry. *Bell v. Thompson*, 125 S.Ct. 2825, 2832 (2005) (Emphasis added) (“Basic to the operation of the judicial system is the principle that a court speaks through its judgment and orders.” (Citations omitted.)) *U.S. v. Eisner*, 329 F.2d 410, 412 (6th Cir. 1964) (“A court of record speaks only through its records.”), *Goldman v. C.I.R.* 388 F.2d 476, 478 (6th Cir. 1967)(“... a court speaks only through its orders.”); *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 382, 667 N.E.2d 1194, 1196; *Hernandez v. Kelly* (2006), 108 Ohio St.3d 395, 844 N.E.2d 301, 306 2006-Ohio-126 (“It is axiomatic that a court of record speaks only through its journal entries.” [Internal quotation marks omitted]); *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d 454, 455, 727 N.E.2d 907, 908; *State ex rel White v. Junkin* (1997), 80 Ohio St.3d 335, 337, 686 N.E.2d 267, 269; and *Schenley v. Kauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625, ¶ 2. of the syllabus..

This Court recently addressed a similar application through this maxim of law and language in the journal entry concerning any mandatory requirements in statute. *Hernandez v Kelly, supra*. See, Also *Cruzado v. Zaleski* (2006), 111 Ohio St.3d 353; 856 N.E.2d 263; 2006-Ohio-5795 (citing *Hernandez*).

The *Hernandez* Court held the following in pertinent part:

“[I]n order to properly impose sentence in a felony case, a trial court must consider and analyze numerous sections of the Revised Code to determine applicability and **must provide notice to offenders at the sentencing hearing and incorporate that notice into its journal entry.**”(Citing *State v. Jordan* (2004), 104 Ohio

² It is surmised all orders issued using O.R.C. § 2323.52(F)(1) and (F)(2) are not final appealable order's.

St.3d 21, 817 N.E.2d 864, ¶ 9, 2004-Ohio-6085)³ (Emphasis added).

More pertinently, “[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post release control and is further required to incorporate that notice into its journal entry imposing sentence. *Id.* 844 N.E.2d at 303, ¶ 15, and paragraph one of the syllabus

The deciding factor of law in the instant case has the similar application with the maxim of law, as it was applied in *Hernandez* and *Cruzado*.

In *Hernandez*, the Warden (Respondent) tried to justify his defense claiming the parole board has the authority to impose post release control because it is statutory mandated.

The March 17, 2005 judgment order states the following in pertinent part:

4. Unless [Appellant] first obtains leave of **this court**, [Appellant] is prohibited from: (Emphasis added):
 - a) Instituting any legal proceedings in the court of claims, or in a court of common pleas, municipal court, or county court;
 - b) Continuing any legal proceedings that he has instituted in any of the aforesaid courts prior to the entry of this Order; and[.]
 - c) Making any application, other than an application for leave to proceed under R.C.2323.52 (F)(1), in any legal proceeding instituted by the [Appellant] or another person in the court of claims, or in a court of common pleas, municipal court, or county court[.]

The March 17, 2005 judgment order is unambiguous, Appellant is only required to seek leave pursuant to the above listed requirements before commencing or continuing civil action's in Ohio's trial courts. Under the unambiguous language of the March 17, 2005 entry and the language in sub-section (F)(1), Appellant only needs to seek leave before Ohio's courts of common pleas, municipal courts, county courts or court of claims. (Hereinafter “trial courts”): *Id.*

³ *Id.* 844 N.E.2d at 303, ¶ 14.

at 844 N.E.2d 303-304. Even though *Hernandez* addressed a criminal case and the instant case is civil, the application of law has, and does not change. See, *State ex rel. White v. Junkin*, 686 N.E.2d at 269. The Ohio Constitution does not distinguish the difference with a court's jurisdiction and application of law. See, Crim.R. 32 and Civ.R. 58(A) Bottom line, either criminal or civil, a court must always speak through its journal entry. *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 551 N.E.2d 183, 185 (citing *Stugard v. Pittsburgh, C.C. & St. L. Ry. Co.* (1915), 92 Ohio St. 318, 110 N.E. 956). See, also *San Filipo v. San Filipo* (9th Dist. 1991), 81 Ohio App.3d 111, 610 N.E.2d 493.

III. CONCLUSION

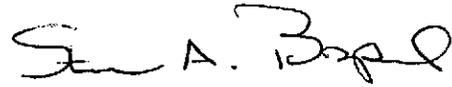
Even though the Court of Common Pleas for Medina County issued a judgment entry on March 17, 2005 that does not mandate Relator to seek leave pursuant to ORC § 2323.52(F)(2) the Respondents refuse to allow Relator to appeal a final order by the Wayne County court of common pleas. As ordered by Judge Kimbler of the Medina County court of common pleas, relator obtained leave pursuant to O.R.C. § 2323.52(F)(1) before commencing a civil action with the Wayne County court of common pleas.

The Wayne County court adjudicated the complaint from the record and issued a final order against Relator when genuine issues of material facts remain to be litigated contrary to Ohio Civil Rule 56. Since the Respondent will not permit Relator to commence or continue any case in the Ninth District Court of Appeals, relator moved the court of appeals and the Respondents refused to grant leave; even though, a final order was issued by the Wayne County trial court.

Allowing the Respondent's journal entry to stand would prejudice Relator's right to an appeal a final order and the Ohio Constitution's guarantee of due process would not exist to protect Relator's substantial rights.

Wherefore, a writ of mandamus will lie compelling the Respondents to allow Relator permission to perfect his direct appeal according to Ohio law.

Respectfully submitted,



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