IN THE SUPREME COURT OF OHIO

STATE EX REL. JUNE L. BLANK	)	**CASE NO. 2007-2217**
and	)	
STATE EX REL. ESTATE OF RICHARD L. BLANK	)	
Relators	)	
vs.	)	
JAMES G. BEASLEY, DIRECTOR OHIO DEPARTMENT OF TRANSPORTATION	)	
Respondent	)	

RELATORS' MOTION FOR LEAVE INSTANTER TO AMEND THEIR COMPLAINT FOR WRIT OF MANDAMUS

FILED
JAN 14 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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This Court has granted leave to amend a complaint in mandamus in cases where a relator sought leave to file an amended complaint to comply with the affidavit requirement of S.Ct. Prac.R. X(4)(B). In State ex rel. Hackworth v. Hughes, (2002) 97 Ohio St.3d 110 this Court stated at page 113 of its opinion as follows:

> "{¶25} Relator herein, however, unlike the relators in the case that we dismissed for failure to comply with S.Ct.Prac.R X, sought leave to file an amended complaint complying with the affidavit requirement of S.Ct.Prac.R. X(4)(B)."
>
> "{¶26} Under Civil Rule 15(A), as made applicable here by S.Ct.Prac.R. X(2), leave to amend a complaint following the filing of a responsive pleading 'shall be freely given when justice so requires.' Given the policy favoring liberal amendment of pleadings under Civ.R. 15(A), the lack of prejudice to respondents or the electorate and the preference to resolve cases on their merits, we grant Hackworth's motion for leave to amend his complaint. (Citing State ex rel. Grendell v. Davidson (1999) 86 Ohio St.3d 629, 631; State ex rel. Huntington Ins. Agency, Inc. v. Duryee (1995) 73 Ohio St.3d 530, 533)."

Respondent cites the case of State ex rel. Esarco v. Youngstown City Council 116 Ohio St. 3d 131, 2007-Ohio-5699 for the proposition that the Relators' Complaint should be dismissed but failed to acknowledge that this Court at ¶16 based its dismissal on the grounds that the relator "Esarco failed to timely seek leave to amend his complaint to correct his verification. See State ex rel. Commt. For the Charter Amendment for an Elected Law Dir. v. Bay Village ___ Ohio St. 3d ___, 2007-Ohio-5380 ___ NE 2d ____, ¶14. Therefore, dismissal is warranted Id; see also Evans at ¶34."

Also, in Evans v. Blackwell (2006) 111 Ohio St. 3d 437 cited by Respondent this Court clearly stated at ¶34:

> "In addition, unlike the relator in Hackworth, id. At ¶25-26, Evans, once he was notified by respondents of this defect, did not seek leave to amend

> his mandamus complaint to correct the defective affidavit. Therefore, dismissal is also appropriate on this basis."

This Court, in granting leave to relator to file the amended complaint in Hackworth, cited State ex rel. Huntington Ins. Agency, Inc. v. Duryee, (1995) 73 Ohio St.3d 530 in which case this Court permitted relator to amend the caption of the complaint to specify that the action was brought in the name of the State on relation of Huntington. At page 533 the Court quoted its previous opinions reading:

> "...The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." (Citing Patterson v. V & M Auto Body (1992) 63 Ohio St.3d 573, 577, 589 N.E.2d 1306, 1309 quoting Peterson v. Teodosio (1973) 34 Ohio St.2d 161, 175)...

The Court also stated:

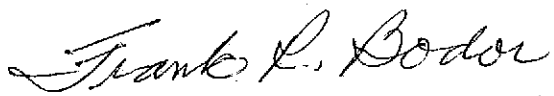
> "...Liberal amendment of pleadings is also favored." (Citing Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co. (1991) 60 Ohio St.3d 120, 121-122)..."

Relators Blank maintain that the motion to amend instanter is not for the purposes of delay and the Respondent will not be prejudiced by the amendment since it will still have an opportunity to respond with an answer. The original case was filed on November 29, 2007. Respondent's motion was filed on December 21, 2007 and Relators have acted timely to file for leave to amend.

Respondent also alleges at page 2 of its "Procedural Posture" that Relators' Complaint does not seek relief for an alternative writ; however, this is not true because the demand clearly asks this Court to issue a preemptory writ or an alternative writ.

The Court is petitioned to grant the request to amend to avoid dismissal based upon a procedural technicality pursuant to O.R.C.P. Rule 15(A) in order that the case may be heard upon its merits.

Respectfully Submitted,



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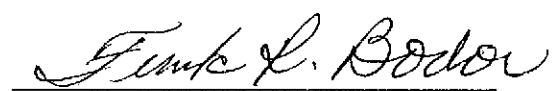
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Relators' Motion for Leave to Amend Their Complaint Instanter For Writ of Mandamus* was served by U.S. mail this 10th day of January 2008, upon L. Martin Cordero, Assistant Attorney General, Transportation Section, 150 East Gay Street—17th Floor, Columbus, Ohio 43215-3130.



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