

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO, ex rel.  
PHY V. HOANG, et al.**

**CASE NO.: 08-1135**

**Relators**

**v.**

**ORIGINAL ACTION  
PETITION FOR WRIT  
OF MANDAMUS**

**NINTH DISTRICT COURT OF APPEALS**

**Respondent**

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**RESPONDENT'S MOTION TO DISMISS**

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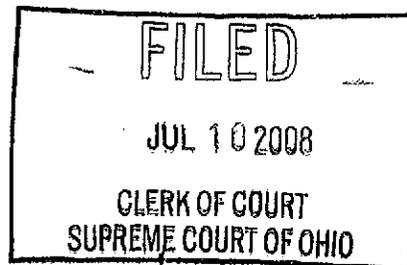
**SHERRI BEVAN WALSH**  
Prosecuting Attorney

**CORINA STAEHLE GAFFNEY, #0056180**  
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600 E. Smith Road  
Medina, OH 44256  
330-721-2889

**COUNSEL FOR RESPONDENT**

**COUNSEL FOR RELATOR**



Now comes Respondent, Ninth District Court of Appeals, by and through undersigned counsel, and respectfully moves this Court for an Order dismissing Relator's Petition for Writ of Mandamus, for reasons set forth in the following Memorandum in support.

### **MEMORANDUM IN SUPPORT**

Dismissal for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations are presumed true and all reasonable inferences are made in Relators' favor, it appears beyond doubt that they could prove no set of facts warranting the requested extraordinary relief in mandamus. See, e.g., **State ex rel. Talwar v. State Med. Bd. of Ohio**, 104 Ohio St.3d 290, ¶ 5. In order to be entitled to a writ of mandamus, the petitioner must have a clear legal right to the relief prayed for, respondent must have a clear legal duty to perform the requested act, and petitioner must not have a plain and adequate remedy at law. **State, ex rel. Westchester Estates, Inc. v. Bacon** (1980), 61 Ohio St.2d 42, paragraph one of the syllabus. Furthermore mandamus cannot control judicial discretion, even if that discretion is abused. **State ex rel. Jennings v. Nurre** (1995), 72 Ohio St.3d 596, 598; **State ex rel. De Ville Photography, Inc. v. McCarroll** (1958), 167 Ohio St. 210.

In the instant matter, the Relators have made no effort to identify their alleged clear legal right to relief, nor any alleged clear legal duty on the part of the Respondent, and have cited to no legal authority in support of the allegations they do make. Moreover, the relief requested by the Relators has already been accorded them (albeit the Relators were not likely aware of this at the time of the filing of their petition). The Ninth District Court of

Appeals issued an order granting the Relators interpreters on June 13, 2008, attached hereto as Exhibit A. Mandamus does not lie to compel an act that has already been performed. State, ex rel. Natl. City Bank v. Maloney (2004), 103 Ohio St.3d 93 (citations omitted).

**WHEREFORE**, Respondent respectfully requests this case be dismissed for all of the above reasons, with all costs to the Relators.

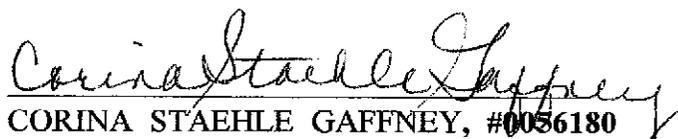
Respectfully submitted,

SHERRI BEVAN WALSH  
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(330) 643-2800  
Counsel for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail service, to: Michael J. Callow, Attorney for Relators, at 600 East Smith Road, Medina, OH 44256, this 1<sup>st</sup> day of July, 2008.

  
CORINA STAEHLE GAFFNEY, #0056180  
Assistant Prosecuting Attorney  
Counsel for Respondent

STATE OF OHIO )  
COUNTY OF MEDINA )

COURT OF APPEALS  
ss: 08 JUN 13 PM 3: 54

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

FILED  
KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

C.A. Nos. 07CA0089-M  
07CA0094-M  
07CA0095-M  
07CA0096-M  
07CA0107-M  
07CA0108-M

Appellee

v.

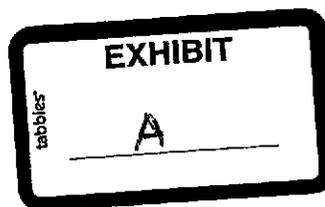
DUNG V. HA  
HUONG T. NGUYEN  
LAN T. VU  
LAI T. VU  
KHUONG V. HOANG  
PHU HOANG

Appellants

**JOURNAL ENTRY**

Appellants have moved this Court for the appointment of an interpreter and translator, arguing that they each lack English proficiency and that such appointments are necessary for their participation in the legal proceedings. Appellee has responded in opposition.

As a preliminary matter, the Court hereby consolidates the appeals in 07CA0089-M and 07CA0096-M with the above appeals for purposes of filing briefs, presenting oral argument and for decision. The parties may file separate briefs for each appeal. The record in this matter is now due on July 6, 2008, for appeals where the record has not yet transmitted. All appeals, however, will follow the same briefing schedule, which will proceed according to the Ohio Rules of Appellate Procedure from the date of the notice



of the record as set forth in App.R. 11(B) and 18(A). Appellant Ha will be permitted to file a new brief within that time if he so chooses.

In addition, this Court's November 6, 2007, order issued in 07CA0089-M is hereby vacated and that matter shall now be determined herein.

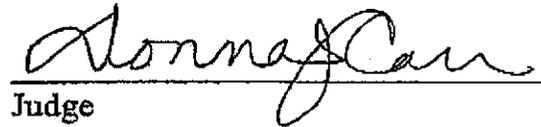
Upon review of appellants' motion, this Court agrees that appointment of an interpreter is warranted. However, appellants have supplied insufficient information for this Court to order appointment at this time. Within ten days of journalization of this order, appellants shall submit to this Court the name of at least one interpreter for appointment, along with documentation of the interpreter's certifications and or relevant training, specialized skills and knowledge, prior experience and contact information. Appellants shall be guided by the Supreme Court publication: "Interpreters in the Judicial System A Handbook for Ohio Judges" in providing sufficient information for this Court's review.

Appellants shall also provide the interpreter's hourly rate and an estimate of hours required. In addition, appellants shall file a financial disclosure statement and affidavit of indigency on the form promulgated by the Ohio Public Defender's Office. The form must have been completed within one year of its filing.

Appellants have also requested the use of a translator to translate the record, including the transcript of proceedings. Appellants and appellee shall each have twenty days from journalization of this order in which to fully brief this issue for the Court's determination.

Appellants have also requested an App.R. 20 pre-hearing conference to address various issues, including the use of an interpreter, the record on appeal, briefing and record deadlines, and the trial transcript. Appellee has responded in opposition. That motion is denied.

The clerk of the appellate court is directed to accept a facsimile filing of this order.

  
Judge