



## MEMORANDUM IN OPPOSITION

### I. INTRODUCTION

Relators' Complaint for Writ of Mandamus arises out of the Respondents' failure to fulfill two (2) of their clear legal duties. First, Respondents failed to determine Relators' separate assignments of error (and issues presented for review) on the merits, with reasons in writing, as required by Appellate Rule 12(A). Second, Respondents failed to hold an en banc hearing, after a conflict of authority within the Ninth District was identified by the dissenting and Presiding Judge Carr of the Ninth District, as required by this Honorable Court's recent and controlling precedent. *In re J. J. infra; McFadden v. Cleveland State Univ., infra.*

Relators' appeal to the Respondent Ninth District arose from the Medina County Common Pleas Court's sua sponte granting of a motion for summary judgment for Defendant Subaru of America, Inc ("SOA") on all of Relators causes of action, when SOA had only moved for summary judgment on Relators remedy for injunctive relief. Respondent Judge Lynn Slaby ("Slaby") and Respondent Judge Carla Moore ("Moore") affirmed the trial court's sua sponte granting of summary judgment in favor of SOA, while Presiding Judge Donna Carr ("Carr") dissented and explained that she "would hold that the trial court improperly granted summary judgment to SOA and would sustain Dealers first three assignments of error and reverse the judgment of the trial court."

Additionally, Respondents Slaby and Moore, in the two-to-one (2-1) decision affirming the trial court's sua sponte granting of summary judgment in favor of SOA, failed to fulfill their duty to decide all assignments of error (and issues presented for review) through a written decision, as required by App. R. 12(A). *State v. Kelly*, 103 Ohio St.3d 1461, 815 N.E.2d 677 (Table), 2004-Ohio-5056 and *Insurance Co. of North America v. Automatic Sprinkler Corp. of America* (1981), 67 Ohio St.2d 91, 97-98, 423 N.E.2d 151, 155-156.

Respondents also failed to hold an en banc hearing to settle the intradistrict conflict that was created by their opinion in the underlying case and the Ninth District's holdings in *Urda v. Buckingham, Doolittle &*

*Burroughs, L.L.P.*, Ninth Dist. No. 22547, 2005-Ohio-5949, at ¶ 14 and *Flood Co. v. St. Paul Fire & Marine Ins. Co.*, Ninth Dist. Nos. 21679 and 21683, 2004-Ohio-1599, at ¶ 12. In her dissent, Presiding Judge Carr recognized that the majorities' affirmation of the trial court's sua sponte granting of summary judgment on all of Relators' causes of action, when only partial summary judgment was sought on the remedy of injunctive relief, is in direct conflict with the *Urda* and *Flood Co.* cases holding that a court cannot, sua sponte, grant summary judgment on causes of action for which summary judgment was not sought. Thus, the dissenting opinion in the underlying case clearly identified an intradistrict conflict of authority. Respondents were therefore duty bound to hold an en banc hearing to settle the conflict within the appellate district.<sup>1</sup>

## II. STANDARD OF REVIEW

Respondents failed to provide this Honorable Court with an accurate and complete summary of the standard of review that is applied by Ohio courts to motions to dismiss. It is true, as Respondents point out, that a court may dismiss a complaint pursuant to Civ. R. 12(B)(6) if, after taking all factual allegations contained in the complaint as true and all reasonable inferences made in the non-moving party's favor, it appears beyond doubt that the non-moving party can prove no set of facts warranting the requested relief in mandamus. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.* (2008), 119 Ohio St.3d 11, ¶ 11.

However, and more importantly, when Ohio courts consider 12(B)(6) motions, the complaint's factual allegations **must** be taken as true and all reasonable inferences **must** be drawn in favor of the non-moving party. *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581, 669 N.E.2d 835; *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182. Furthermore, a motion to dismiss

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<sup>1</sup> Relators also identified two (2) additional conflicts between Respondents' Decision within the Ninth District regarding: (1) prior procedural determinations (i.e., jurisdiction and mootness) by another tribunal do **NOT** invoke the doctrine of res judicata because they are not a determination on the merits and (2) a Civ. R. 41(A) dismissal requires the prior action to be treated as if it had never been brought and cannot be used for the purposes of res judicata to bar a subsequent complaint. These intradistrict conflicts are also identified in Relators Complaint for mandamus and should be determined by this Honorable Court.

can only be granted where the party opposing the motion is unable to prove any set of facts that would entitle the party to the relief requested. *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418, 650 N.E.2d 863, 865-866; *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

In this regard, this Honorable Court's inquiry is limited to the four corners of the complaint. *Loveland Edn. Assn. v. Loveland City School Bd. of Edn.* (1979), 58 Ohio St.2d 31, 387 N.E.2d 1374. However, if after presuming the truth of the assertions in Relators' petition, we must conclude that the claim may have merit, a schedule for the presentation of evidence and briefs should be issued. *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 811 N.E.2d 1130, 2004-Ohio-3701, ¶ 13.

When the factual allegations contained in Relators' complaint are considered as true, and all reasonable inferences are drawn in favor of Relators, it is clear that Relators can prove a set of facts that entitle them to the relief requested in the mandamus complaint. Specifically, Respondents failed to comply with the mandate of Appellate Rule 12(A) requiring that all errors assigned and briefed shall be passed upon by the appellate court, in writing, stating the reasons for the court's decision. Respondents also failed to conduct an en banc hearing to resolve the conflict of authority that was recognized to exist, within the Ninth District, by Judge Carr's dissenting opinion. Therefore, a writ of mandamus should issue from this Honorable Court directing Respondents to (1) decide each assignment of error briefed by Relators, with the reasons for the decision stated in writing, and (2) to hold an en banc hearing to resolve the three (3) intradistrict conflicts which exist.

#### **Motion to Dismiss Procedurally Improper**

Respondents' motion to dismiss, based upon their legal argument that an adequate remedy in the ordinary course of law exists, is procedurally improper. This Honorable Court in *State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 626 N.E.2d 946, 1994-Ohio-520 explained that a respondent's argument that "an adequate remedy in the ordinary course of law is better raised by [a] motion for summary

judgment." *Id.* at 355. Thus, Respondents' motion to dismiss, based upon the defense of an adequate legal remedy, is "ill conceived" and procedurally required to be raised in a motion for summary judgment. *Id.* quoting *Assn. for Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293. The *Birdsall* court held that when a respondent argues in a mandamus action that an adequate remedy at law exists, it is seeking a judgment on the merits of the dispute and procedurally should not be determined in the initial pleading stages through a motion to dismiss. *Id.* quoting *State ex rel. Schneider v. N. Olmsted Bd. of Edn.* (1988), 39 Ohio St.3d 281, 282, 530 N.E.2d 206, 207 ["When a court denies mandamus because an adequate legal remedy exists, the denial is an adjudication on the merits."]. Therefore, Respondents' motion to dismiss should be denied on its face, and as a matter of law, because it asserts that there is an adequate remedy of law argument, which cannot be properly reviewed through a motion to dismiss.<sup>2</sup>

### III. LAW AND ARGUMENT

#### A. Relators are entitled to a writ of mandamus.

To be entitled to a writ of mandamus, Relators must show: (1) a clear legal right to the relief requested; (2) Respondents are under a clear legal duty to perform the act sought; and, (3) Relators have no plain and adequate remedy at law. *State ex rel. Fain v. Summit County Adult Probation Dept.* (1995), 71 Ohio St.3d 658, citing *State ex rel Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. To constitute an adequate remedy at law, the alternative must be complete, beneficial, and speedy. *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 2005-Ohio-4789, at ¶ 21, quoting *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, at ¶ 8, reconsideration denied, 104 Ohio St.3d 1124, 2004-Ohio-7033.

1. **Relators DO have (1) a clear legal right to the requested relief and (2) Respondents are under a clear legal duty to perform the requested act.**

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<sup>2</sup> Additionally, Relators move to strike Respondents' Exhibit "A" because it is not properly before this Honorable Court at this stage of the proceedings.

**(a) Respondents' failure to comply with the mandates of Appellate Rule 12(A).**

Appellate Rules 12(A)(1)(b) and (c) require that every district court of appeals must "determine the appeal on its merits on the assignments of error set forth in the briefs" and "decide each assignment of error and give reasons in writing for its decision." In this matter, Relators properly raised five (5) assignments of error (and ten (10) corresponding issues presented for review) for a legal determination before the Respondents Ninth District Court, Slaby, and Moore. Respondents failed to fully determine the appeal on the merits and decide each assignment of error (and issues presented for review) with reasons in writing as required by Appellate Rule 12(A). Specifically, Respondents failed to determine (and failed to issue their reasons for not doing so) Relators' Assignment of Error I (and its four corresponding issues presented for review); Assignment of Error II (and its corresponding issue presented for review); Assignment of Error III (and its two corresponding issues presented for review); and, Assignment of Error V (and its corresponding issue presented for review). Relators' plead these factual allegations in their complaint, they are true, and this Honorable Court must consider them to be true for purposes of ruling on Respondents' motion to dismiss. *State ex rel. Findlay Publishing v. Schroeder, supra; Vail v. Plain Dealer Publishing Co., supra.* Any further inquiry would be impermissibly going beyond the four corners of the complaint. *Loveland v. Loveland, supra.*

In *Lumbermens Underwriting Alliance v. American Excelsior Corp.* (1973), 33 Ohio St.2d 37, 294 N.E.2d 224, this Honorable Court dealt with a court of appeals' failure to pass upon all assignments of error as required by Appellate Rule 12(A). Citing *Rothfuss v. Hamilton Masonic Temple Co.* (1971), 27 Ohio St.2d 131, 271 N.E.2d 801, the *Lumbermens* court held:

Failure by the Court of Appeals to state its reasons for not passing upon all the assignments of error presented to it precludes this court from determining whether there was any merit to the claims of prejudicial error presented to the Court of Appeals by the assignments of error as a predicate to the appeal presented here.

*Lumbermens* at 40.

In Respondents' motion to dismiss at p. 5, they admit that they did not determine and issue written reasons for their decision on each of Relators' assignments of error (and issues presented for review). Instead, they lumped Assignments of Error I, II, and III together and failed to determine each of those separate assignments of error (and issues presented for review) on their individual merits and to state their reasons in writing for overruling them. By not providing a determination on each assignment of error and stating the reasons why they were overruled, Respondents have constructively precluded Relators from pursuing an appeal with any sort of meaningful basis. *Lumbermens, supra*. Relators have violated the intended purpose of Appellate Rule 12(A) and denied any plain and adequate remedy at law for an appeal. *Criss v. Springfield Tp.* (1989), 43 Ohio St.3d 83, 84, 538 N.E.2d 406 ["holding that the [appellate] court had to comply with the rule [App. R. 12(A)] and state reasons for its decision so that the parties would not have to speculate on legal and other obstacles to be overcome on appeal to this court [Supreme]."]

Just as this Honorable Court is bound to consider the factual allegations of Relators' complaint as true, Respondents were duty bound by the mandates of Appellate Rule 12(A) to determine and give reasons in writing for its decision on each of Relators' separate assignments of error (and issues presented for review). Respondents failed to do so. Therefore, this Honorable Court must issue a writ of mandamus compelling Respondents to comply with the clear legal mandates of Appellate Rule 12(A).

**(b) Respondents' failure to hold an en banc hearing.**

This Honorable Court has held that all district courts of appeals should hold a hearing en banc to resolve conflicts within the appellate districts. *In Re: J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484 at ¶ 18 ["Appellate courts are duty bound to resolve conflicts within the district through en banc proceedings."]. The duty of appellate courts to hold a hearing en banc to resolve intradistrict conflicts was reaffirmed just last week by this Honorable Court in *McFadden v. Cleveland State Univ.*, Slip Opinion No. 2008-Ohio-4914. "If the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict,

they **must** convene en banc to resolve the conflict.” (Emphasis added). *Id.* at Syllabus ¶¶ 2.

As stated above, Presiding Judge Carr’s dissenting opinion in the underlying appeal determined that the majorities’ decision was in conflict with the Ninth District’s decision in *Urda v. Buckingham, Doolittle & Burroughs, L.L.P., supra*. Again, in *Urda* the Ninth District held that a trial court may not sua sponte grant summary judgment. However, in the underlying opinion the majority affirmed the trial courts’ sua sponte granting of summary judgment. Thus, there exists an express conflict of authority within the Ninth District regarding the sua sponte granting of summary judgment. This conflict within the Ninth District has been identified by Presiding Judge Carr, in her written dissent, in the two-to-one (2-1) decision.

Respondents’ motion to dismiss argues that their underlying opinion is not in conflict with *Urda* because they found that all of Relators’ claims were properly before the trial court for summary judgment consideration. This simply was not true and Respondents clearly erred in making this determination. The fact is that Defendants at the trial court level only moved for summary judgment on Relators’ claims for injunctive relief. Presiding Judge Carr correctly recognized this undisputed fact in her dissenting opinion. Relators also plead this factual allegation in their complaint. Thus, this Honorable Court must consider the fact that summary judgment was not sought on all of Relators’ claims to be true when ruling upon Respondents’ Motion to Dismiss. *Vail v. Plain Dealer Publishing Co., supra*. When this fact is considered true, which it is, the intradistrict conflict is clear and there exists the duty to hold an en banc hearing.

Furthermore, only Respondents Slaby and Moore signed the judgment entry denying Relators’ Motion for Hearing En Banc.<sup>3</sup> While this Honorable Court has recently recognized that there is no clear procedure in place for appellate courts to follow when it comes to considering motions for hearing en banc, see *McFadden, supra*, Relators highly doubt that when the procedure is promulgated, it will allow for the two

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<sup>3</sup> Relators again move to strike Respondents’ Exhibit “A” because it is not properly before this Honorable Court at this stage of the proceedings. A motion to dismiss is confined to the four corners of the complaint.

justices who issued the majority opinion (in a two-to-one (2-1) opinion) to be the same judges to determine if a conflict exists within the appellate district.

In light of this Honorable Court's holdings in *In re J.J.* and *McFadden*, it is clear that Relators are clearly entitled, as a matter of law, to an en banc hearing to have the intradistrict conflict resolved. Respondents are duty bound to conduct an en banc hearing once any single judge in an appellate district identifies a conflict within the district court of appeal.<sup>4</sup>

## 2. Relators do NOT have an adequate remedy at law.

Respondents argue that Relators' separate discretionary appeal to this Honorable Court, from the underlying decision of the Ninth District, is an adequate remedy at law that precludes this Honorable Court from granting the relief requested. However, as stated above, to constitute an adequate remedy at law, the alternative must be complete, beneficial, and speedy. *State ex rel. Mackey v. Blackwell, supra*. Furthermore, case law suggests that Respondents' argument that an adequate remedy at law exists, other than a complaint for a writ of mandamus, is procedurally required to be raised by a motion for summary judgment, rather than a motion to dismiss. *State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 355, 626 N.E.2d 946. A summary judgment motion allows this Honorable Court to consider other evidence and documents, beyond the four corners of the complaint, necessary to review the allegation that an adequate and plain remedy exists at law. Nevertheless, there are several reasons why Relators' pending appeal with this Honorable Court, or a subsequent separate discretionary appeal, are not adequate and plain remedies at law for the Respondents' (1) failure to comply with the mandates of App. R. 12(A) and (2) failure to convene an en banc hearing to resolve a recognized intradistrict conflict.

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<sup>4</sup> Relators also identified two (2) additional conflicts between Respondents' Decision within the Ninth District regarding: (1) prior procedural determinations (i.e., jurisdiction and mootness) by another tribunal do **NOT** invoke the doctrine of res judicata because they are not a determination on the merits and (2) a Civ. R. 41(A) dismissal requires the prior action to be treated as if it had never been brought and cannot be used for the purposes of res judicata to bar a subsequent complaint.

First, with regard to Respondents failure to follow the mandates of App. R. 12(A), a discretionary appeal is not an adequate remedy because without specific reasoning and explanation as to why Respondents overruled Relators' assignments of error, Relators have no grounds from which to base their arguments on appeal. *Criss v. Springfield Tp., supra; Lumbermens, supra*. In other words, Relators do not know what they are appealing from. Furthermore, a discretionary appeal under these circumstances deprives this Honorable Court of a meaningful opportunity to review Respondents' decision. *Id.* Thus, the discretionary appeal would not be complete or beneficial. Appellate Rule 12(A) exists so that this very situation does not occur. Unfortunately, Respondents failed to comply with the mandates of App. R. 12(A) and it is necessary for this Honorable Court to issue a writ of mandamus compelling Respondents' compliance. After Respondents perform their required legal duty, then Relators would have the ability to file a discretionary appeal and cogently submit a memorandum in support of jurisdiction.

Second, regarding Respondents' failure to hold an en banc hearing, this Honorable Court recently recognized that there are no uniform rules in place that govern the procedure that appellate courts must follow when determining if a intradistrict conflict exists or the procedure for challenging an appellate court's failure to conduct an en banc hearing. *McFadden, supra*. This Honorable Court did explain that such procedural rules are, however, currently being drafted. *Id.* In the absence of a uniform procedural rule, Relators respectfully submit that under the current state of the law and in light of the circumstances of this case, their complaint for a writ of mandamus is their most adequate remedy. In fact, Relators' complaint for a writ of mandamus is wholly appropriate in this matter because one judge on the Ninth District has already recognized that the underlying opinion is in conflict with at least one other Ninth District case. As stated above, when an appellate court recognizes an intradistrict conflict, the appellate court is duty bound to conduct an en banc hearing to resolve the conflict. *Id.* and *In re J.J., supra*. Thus, Respondents have failed to comply with the mandates of this Honorable Court and a complaint for a writ of mandamus, rather than a discretionary appeal,

is the appropriate procedural mechanism for compelling Respondents' compliance with this Honorable Court's mandates.

Furthermore, unlike cases involving recognized conflicts between different appellate districts, which are automatically reviewed by this Honorable Court upon certification, recognized intradistrict conflicts are not afforded such an automatic review. Thus, under the unique circumstance of this case, where Presiding Judge Carr recognized in her dissent the intradistrict conflict, yet Respondents Slaby and Moore did not (and it was Slaby's and Moore's decision not to hold an en banc hearing), a discretionary appeal is not an adequate remedy. This is true because there is no guaranteed right that the appeal will be accepted, despite this Honorable Court's mandate that recognized intradistrict conflicts must be resolved via an en banc hearing. Clearly, a writ of mandamus is the only mechanism presently available to Relators to completely, beneficially, and expeditiously remedy the Respondents' failure to hold an en banc hearing.

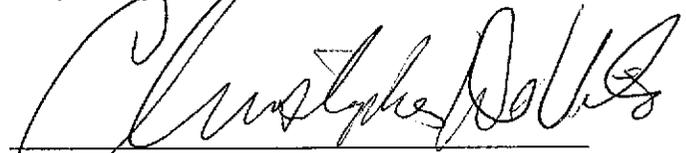
Finally, Relators' appeal below assigned error to, *inter alia*, the trial courts' denial of Relators' request for injunctive relief. Requests for injunctive relief require speedy resolution. See R.C. 3767.04; *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St.3d 382, 582 N.E.2d 992. Discretionary appeals to this Honorable Court are not a guaranteed right of appeal, require a high burden to demonstrate great general or public interest, and are not necessarily speedy. The issuance of a writ of mandamus, compelling Respondents to comply with the mandates of App. R. 12(A) and to resolve the intradistrict conflict created by the underlying decision, will afford Relators a more speedy remedy to have the denial of their request for injunctive relief determined upon its separate merits, reasoned with specificity, and decided pursuant to non-conflicting interpretations of the law.

#### **IV. CONCLUSION**

For all the above set forth reasons of law and facts, Relators respectfully request that this Honorable Court deny in its entirety Respondents' Motion to Dismiss. Furthermore, because the pertinent facts are undisputed and Relators are clearly entitled to the request for relief, a peremptory writ should be issued. *State*

*ex rel. Highlander v. Rudduck* (2004), 103 Ohio St.3d 370, 371, 816 N.E.2d 213. Respondents should be compelled to (1) address on the merits, in writing, each of the separate assignments of error (and issues presented for review) pursuant to App. R. 12(A) and (2) conduct a hearing en banc by all the judges of the Ninth District Court of Appeals in order to rule on the three (3) intradistrict conflicts identified and required to be resolved pursuant to this Court's controlling precedent of *McFadden, supra* and *In re J. J., supra*. See also, *State ex rel. Union Cty. Veterans Serv. Comm. V. Parrott*, 108 Ohio St.3d 302, 843 N.E.2d 750, 2006-Ohio-92 ["Therefore, because the pertinent facts are uncontroverted and, from these facts, it is beyond doubt that relators are entitled to the requested writ, we grant a peremptory writ of mandamus ..."].

Respectfully submitted,



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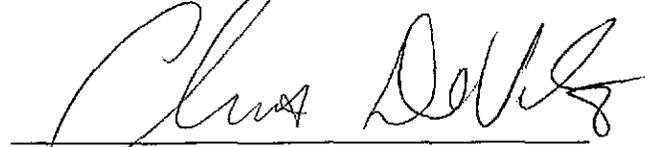
**PROOF OF SERVICE**

A copy of the foregoing **Relators' Response in Opposition to Respondents' Motion to Dismiss Amended "Complaint" for Writ of Mandamus** was sent via U.S. mail this 9<sup>th</sup> day of October, 2008, to the following:

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