

IN THE SUPREME COURT OF OHIO

ROBERT GRUNDSTEIN )  
 )  
 Relator )  
 )  
 v. )  
 ) Supreme Court No.: 09-0178  
 JUDGE BRIAN J. MELLING, )  
 BEDFORD MUNICIPAL )  
 COURT )  
 )  
 Respondent )  
 )

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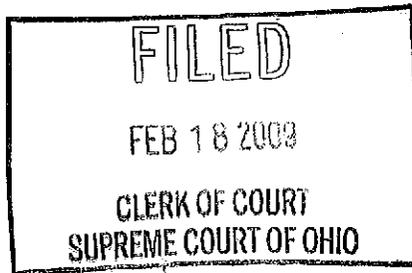
**MOTION TO DISMISS OF RESPONDENT  
BRIAN J. MELLING, JUDGE BEDFORD MUNICIPAL COURT**

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## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

### I. INTRODUCTION.

Now comes Judge Brian J. Melling of the Bedford Municipal Court and pursuant to Rule 12(b)(6) of the Ohio Rules of Civil Procedure hereby moves this Honorable Court to dismiss Relator's "Request for Writ of Mandamus" for failure to state a claim upon which relief may be granted.

The Relator, Robert Grundstein, seeks the extraordinary writ of mandamus from this Court:

"to compel J. Melling to record Satisfaction of Judgment for 05 CVI 01057 in Bedford Municipal Court". (See Relator's "Request for Writ of Mandamus").

Relator repeats this request for a writ of mandamus in that portion of his pleading which he has fashioned as: "Arguments at Law".

That section of his "Request" states as follows:

"Therefore Relator seeks the following relief:

1. For an order by which Respondent is compelled to have the Bedford Clerk file a satisfaction of lien and judgment in all relevant county courts;
2. For costs and filing fees of this action;
3. For any other legal and equitable relief this Court finds appropriate, including damages for slander of credit." (Relator's pleading, fifth unnumbered page).

It is clear that Relator is seeking to overturn Judge Melling's denial of Relator's motion to record satisfaction of judgment. Specifically, Relator alleges that:

"On October 31, 2007, Relator moved to record satisfaction of judgment and have his credit report reflect his compliance with the law. ("Affidavit of Relator, fourth unnumbered paragraph).

Relator further alleges that on June 26, 2008, Respondent Judge Brian J. Melling denied said

motion. (Affidavit of Relator, fifth unnumbered paragraph). Relator did not appeal Judge Melling's denial of his motion to record satisfaction of judgment. Instead, Relator has filed the instant mandamus action asking this Court to order Respondent Judge Melling to compel "the Bedford Clerk [to] file a satisfaction of lien and judgment in all relevant county courts". Respondent Judge Brian J. Melling respectfully submits that mandamus does not lie in the instant case for the reasons further indicated below. Accordingly, Relator's alleged "Request for Writ of Mandamus must be dismissed for failure to state a claim under Rule 12(b)(6) of the Ohio Rules of Civil Procedure.

## II. LAW AND ARGUMENT.

### A. THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT BE GRANTED WHEN RELATOR HAS AN ADEQUATE REMEDY AT LAW AND FURTHERMORE, SAID WRIT CANNOT SERVE AS A SUBSTITUTE FOR APPEAL.

In *The State ex rel. Ahmed v. Costine, et al.*: 103 Ohio St. 3d 165 (2004) this Honorable Court affirmed the dismissal of a mandamus action by the Belmont County Court of Appeals and stated:

"We affirm the judgment of the court of appeals because "[n]either prohibition nor mandamus will issue if appellant ha[s] an adequate remedy in the ordinary course of the law."

In *State ex rel. Pressley v. Industrial Commission*; 11 Ohio St. 2d 141 (1967), the Court stated:

"When a petition stating a proper cause of action in mandamus is filed originally in the Supreme Court or in the Court of Appeals, and it is determined that the relator has a plain and adequate remedy in the ordinary course of the law by way of appeal, neither the Supreme Court nor the Court of Appeals has authority to exercise jurisdictional discretion but those courts are required to deny the writ." (Syll. No. 3). (See also, *State ex rel Keenan v. Calabrese*; 69 Ohio St. 3d 176, 631 N.E. 2d 119 (1994); and *State ex rel Daggett v. Gessaman*; 34 Ohio St. 2d 55, 295 N.E. 2d 659 (1973)).

Thus, in the case *sub judice*, the operative facts alleged on the face of the "Request" show that the Relator could have taken an appeal from the decision of the Respondent Judge Melling

denying his motion to satisfy the record. Relator's failure to avail himself of his adequate remedy at law *i.e.*, an appeal from Judge Melling's decision, is fatal to his alleged right to a writ of mandamus. Relator's alleged action in mandamus must be denied.

B. MANDAMUS CANNOT BE GRANTED WHEN THE PUBLIC OFFICER HAS NO CLEAR LEGAL DUTY TO PERFORM THE ACT SOUGHT BY THE RELATOR

A recent opinion of the 11<sup>th</sup> District Court of Appeals further summarizes the standards a relator must meet in order for a writ of mandamus to issue. In that case, the Court stated:

A mandamus is a civil proceeding, extraordinary in nature since it can only be maintained when there is no other adequate remedy to enforce clear legal rights. *State ex. Rel Brammer v. Hayes* (1955), 164 Ohio St. 373. Mandamus is a writ issued to a public officer to perform an act that the law enjoins as a duty resulting from his or her office. R.C. 2731.01. **For a writ of mandamus to issue, the relator must establish a clear legal right to the relief prayed for; the respondent must have a clear legal duty to perform the act;** and the relator must have no plain and adequate remedy in the ordinary course of the law. *State ex. rel. National Broadcasting Co., Inc. v. Cleveland* (1988) 38 Ohio St. 3d 79,80. A dereliction of duty must be established before the writ will be issued. *State ex. rel. Spellmire v. Kauer* (1962), 173 Ohio St. 279, 280. A writ of mandamus will not issue to compel an act that has already been performed. *State ex. rel. Lee v. Montgomery*, 88 Ohio St. 3d 233, 2000-Ohio-316. **A writ of mandamus cannot be used to control the exercise of discretion.** *State ex. rel. Sinay v. Soddors*, 80 Ohio St. 3d 224, 232, 1997-Ohio-344. The discretion of an individual, officer, or corporation cannot be controlled or limited by a writ of mandamus. *State ex. rel. Benton's Village Sanitation Service, Inc. v. Usher* (1973), 34 Ohio St. 2d 59, 61. Further a writ of mandamus cannot be used as a substitute for an administrative appeal. *State v. Chuvalas v. Tompkins*, 83 Ohio st. 3d 171, 173, 1998-Ohio-114. The Supreme Court of Ohio has held that a writ of mandamus will be denied when the relator has an adequate remedy in the ordinary course of the law by way of an administrative appeal. *Id.*"; *State ex. rel. Widmar v. Mohney*; (unreported, (2008-Ohio-1028, 11<sup>th</sup> Dist., Geauga County, Case No. 2007-G-2776) (attached hereto as Ex. "1")

There is no mandatory duty on Respondent Judge Melling to issue an order to the Clerk of Courts to satisfy the docket in this case. On the contrary, Judge Melling exercised his legitimate judicial discretion and denied Relator's motion requesting that relief. Without a clear legal duty, mandamus simply does not lie. Moreover, Relator seeks a writ of mandamus to order Respondent Judge Melling to order the Bedford Municipal Court's Clerk of Court to "file a satisfaction of lien and judgment in all relevant county courts". There is no clear legal duty on Respondent Judge

Melling to order the Clerk of Court to file anything since Judge Melling has already denied Relator's motion and Relator failed to appeal this denial.

C. RELATOR HAS NEITHER COMPLIED WITH THE REQUIREMENTS OF R.C. 2731.04 NOR PROPERLY FILED A COMPLAINT IN THE CASE SUB JUDICE.

The Second District Court of Appeals recently denied a writ of mandamus and dismissed the petition for same on the basis that the relator failed to comply with the requirements of R.C. 2731.04. As stated by the Court:

“ Furthermore, as pointed out by Respondent, Norman has failed to comply with the requirements of R.C. 2731.04 and R.C. 2969.25. Under R.C. 2731.04, an ‘application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.’ Relator’s failure to properly caption his original action petition is grounds for denying the writ and dismissing the petition.” *State of Ohio v. Jimmy Norman*; Unreported, Montgomery Co. Court of Appeals; 2009-Ohio-165; 2<sup>nd</sup> District Case No. 23106. (attached, Ex. “2”).

Similarly, in *State of Ohio, ex. rel Foster v. A. Dean Buchanan*, the Eighth District Court of Appeals stated:

“Foster also styled his pleading as a ‘motion for writ of mandamus’. A party may only commence an original action by way of filing a complaint. Dismissal of the ‘motion for writ of mandamus’ is therefore, appropriate”. Unreported, Cuyahoga Co. Court of Appeals; 2008-Ohio-4366; Eighth District Court of Appeals No. 91703. (attached, Ex. “3”).

In the case, *sub judice*, the Relator did not file the instant action “in the name of the state on the relation of the person applying” as required by R.C. 2731.04. Also, as in the *Foster* case, Relator did not file a Complaint commencing the action. Instead, Relator filed a “Request for Writ of Mandamus”, an affidavit, and “Arguments of Law”. For the additional reasons cited herein Relator’s action must be dismissed.

D. CONCLUSION.

Respondent Judge Brian J. Melling respectfully submits that he is entitled to a dismissal of Relator's "Request for Writ of Mandamus" pursuant to Rule 12(b)(6) of the Ohio Rules of Civil Procedure. The Relator's Complaint has failed to allege a clear legal duty on the Respondent to grant the relief requested. In addition, Relator has no legal right to the relief he seeks. Relator had an adequate remedy at law from the denial of his motion to satisfy judgment. Finally, Relator has failed to meet the requirements of R.C. Sec. 2731.04 in regard to filing his action in the name of the state on the relation of the person applying. Finally, Relator failed to file a proper complaint in this action. Rather, Relator file a "Request for Mandamus". For all of the above reasons, Respondent respectfully submits that he is entitled to dismiss of the instant action at Relator's costs.

Respectfully Submitted:

Reddy, Grau & Meek Co., L.P.A.

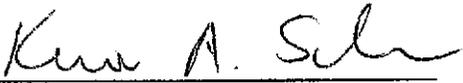
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SERVICE

A copy of the foregoing "Motion to Dismiss of Respondent Judge Brian J. Melling, Bedford Municipal Court was forwarded to Relator Robert Grundstein, at P.O. Box 131, Eden, Vt., 05652 by Regular U.S. Mail this 17 day of February, 2009

  
\_\_\_\_\_  
Kenneth A. Schuman, Esq.  
Attorney for Respondent  
Judge Brian J. Melling,  
Bedford Municipal Court

**2008-Ohio-1028**  
**State ex rel. Widmar v. Mohney**

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2008-Ohio-1028

[Cite as State ex rel. Widmar v. Mohney, 2008-Ohio-1028]

STATE OF OHIO ex rel. ROBERT WIDMER, Relator-Appellant,  
v.  
DONALD MOHNEY, AS CHARDON TOWNSHIP ZONING INSPECTOR,  
Respondent-Appellee.

CASE NO. 2007-G-2776

11th District Court of Appeals of Ohio, Geauga County  
Decided on March 7, 2008

Civil Appeal from the Court of Common Pleas, Case No. 06 M 000096.

Judgment: Affirmed.

Robert Widmer, pro se, 9782 Ravenna Road, Chardon, OH 44024 (Relator-Appellant).

David P. Joyce, Geauga County Prosecutor and Sheila M. Salem, Assistant Prosecutor, 231 Main Street, Chardon, OH 44024 (For Respondent-Appellee).

OPINION

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert Widmer, appeals the summary judgment on his complaint for a writ of mandamus and injunction entered by the Geauga County Court of Common Pleas in favor of Donald Mohney, Chardon Township Zoning Inspector. At issue is whether the zoning inspector failed to discharge his duties. For the reasons that follow, we affirm.

{¶2} Appellant resides on Ravenna Road in Chardon Township. In or about April, 2004, appellant's next-door neighbor Wesley S. Holder applied for an area variance to build an addition to his house. At the hearing before the Chardon Township Board of Zoning Appeals ("BZA"), Mr. Holder presented a map or plan which purported to show the common property boundaries of Mr.

Holder and appellant's lots.

{¶13} Appellant objected to the variance on the ground that Mr. Holder's map was not accurate. Despite his objection, the BZA granted Mr. Holder's variance request. Appellant did not file an administrative appeal from the BZA's decision.

{¶14} In or about November, 2004, appellant's suspicions concerning the accuracy of the map increased. Between December, 2004, and April, 2005, he therefore wrote several letters to then Chardon Township Zoning Inspector Frank Holy complaining that because the variance granted to Mr. Holder was based on this allegedly inaccurate map, the variance was improperly granted. He stated that Mr. Holder's home violated township sideyard setback requirements. Mr. Holy investigated appellant's complaints, inspected the site, and concluded that no zoning violations existed.

{¶15} On January 30, 2006, appellant filed a complaint for mandamus and injunctive relief against Mr. Holy. Appellant alleged that Mr. Holder's application for a variance contained errors, and that he had violated zoning by submitting an altered map in support of his zoning request that was not prepared by a professional engineer or surveyor. He alleged the BZA granted the variance based on this map, which did not accurately show the boundaries of his and Mr. Holder's lots. He further alleged appellee had failed to discharge his duty to inspect his complaints and to discover zoning violations. He prayed for a writ of mandamus and an injunction ordering appellee to discharge his duties. While this action was pending in the trial court, the current Zoning Inspector Donald Mohney was substituted as the defendant in this case.

{¶16} On March 8, 2006, appellee filed a motion to dismiss. On April 17, 2006, the trial judge filed a judgment entry, converting appellee's motion to dismiss into a motion for summary judgment, noting that both parties had submitted matters outside the pleadings in support of their respective positions.

{¶17} On April 28, 2006, appellant filed with the Ohio Supreme Court a request that the trial judge, the Honorable Forrest W. Burt, be disqualified with an affidavit in support based in part on Judge Burt's alleged attendance on April 15, 2006, at a meeting of various public officials, including the Chardon Township Trustees and appellee's counsel the Geauga County Prosecutor, to discuss "zoning issues."

{¶18} On May 9, 2006, Judge Burt wrote a response to the Supreme Court, stating that on Saturday, April 15, 2007, he was one of several speakers at a local government/zoning seminar and pancake breakfast hosted by the Geauga County Prosecutor, the Geauga County Sheriff, and the Geauga County Engineer. Judge Burt stated he was the second speaker and did not stay to hear the presentations of the assistant prosecutors. He said that his presentation was directed to members of the various administrative agencies in attendance and concerned the requirements for making a proper record for appeal purposes. He said he never discussed appellant's litigation with any Chardon Township zoning officials or any assistant prosecutor.

{¶19} In a judgment entry, dated May 18, 2006, Chief Justice Thomas J. Moyer found there was no evidence of bias or prejudice on the part of Judge Burt and denied appellant's request that he be disqualified.

{¶10} On August 24, 2006, the trial court overruled appellee's motion to dismiss on the ground that the assistant prosecutor representing appellee had failed to sign it. The court ordered appellee to file his answer to the complaint within 14 days of his receipt of the court's order. On September 7, 2006, appellee filed his answer.

{¶11} On November 13, 2006, appellant filed a motion for summary judgment, arguing in effect that he was entitled to default judgment because appellee's unsigned motion to dismiss was ineffective to toll the time in which to file an answer. On December 6, 2006, appellee filed a brief in opposition and his own motion for summary judgment, arguing appellee had discharged his duties. On January 30, 2007, the trial court overruled appellant's motion for summary judgment, and on March 20, 2007, granted appellee's motion for summary judgment.

{¶12} In its summary judgment entry the court noted that Mr. Holy had stated in affidavit that upon receipt of appellant's complaints, he investigated them, visited the site and determined there were no zoning violations. Appellant presented no evidence in opposition other than his requests for admissions which the court had previously deemed admitted due to the failure of appellee to respond to them. The court found the requests for admissions to be inconsistent with one another and thus useless for summary judgment purposes. For example, in one request for admission, appellant asked Mr. Holy to admit he had failed to discharge his duties in investigating his complaints and in another request for admission, he asked Mr. Holy to admit that he had

discharged these same duties. The court found that "if all of the requests for admissions are deemed admitted and the admissions are contradictory, those admissions are useless for evidentiary purposes." The court concluded there was no evidence that appellee had failed to perform his duties. The court further found that appellant had an adequate remedy by way of appeal of the BZA's decision on the Holder variance request and an action under R.C. 519.24 to prevent zoning violations, the latter of which appellant was then pursuing. The court entered summary judgment in favor of appellee. Appellant appeals the trial court's judgment asserting seven assignments of error. For his first assignment of error, appellant states:

**{¶13}** "THE TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR BY ALLOWING APPELLEE'S UNSIGNED INTENDED MOTION TO DISMISS FILED 16 DAYS BEFORE SERVICE TO APPELLANT TO CONTROL PROCEEDINGS [SIC]."

**{¶14}** Under his first assignment of error, appellant simply states that appellee filed a motion to dismiss that was not signed by his counsel who is an assistant prosecuting attorney.

**{¶15}** There is nothing in the record to indicate this omission was anything other than an inadvertent oversight. We note that the memorandum filed in support of the motion to dismiss was signed by the assistant prosecutor.

**{¶16}** In any event, the trial court subsequently overruled the motion to dismiss because it was not signed. Consequently, we hold that any error in this regard was harmless. Civ.R. 61 provides: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for \*\*\* disturbing a judgment \*\*\*, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

**{¶17}** Appellant also states that the motion to dismiss was served on March 24, 2006, 16 days after it was filed. Appellant stated in his motion for summary judgment, filed on November 13, 2006, that it had been mailed by mistake to a non-party.

**{¶18}** In any event, on March 23, 2006, appellant moved for an enlargement of time to April 5, 2006, in which to file his opposition to appellee's motion to dismiss. In support of his motion appellant argued he never received a copy of the state's motion.

**{¶19}** On March 23, 2006, prior to considering appellant's motion for enlargement, the trial court entered a scheduling order, requiring appellant to respond to the state's motion to dismiss by April 10, 2006. As a result, on April 2, 2006, in a marginal judgment entry, the trial court denied appellant's motion to enlarge as "moot."

**{¶20}** Appellant has failed to articulate any grounds for the suggestion that he was somehow prejudiced by the late service of the state's motion. We therefore hold that any error from the late service is harmless. Civ.R. 61.

**{¶21}** Finally, appellant argues that the court committed prejudicial error by allowing the motion to dismiss to control the proceedings. There is no evidence in the record to support this argument. Moreover, the court's denial of the state's motion to dismiss completely refutes this argument.

**{¶22}** Appellant's first assignment of error is without merit.

**{¶23}** For his second assignment of error, appellant states:

**{¶24}** "TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

**{¶25}** Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95. Summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 268, 1993-Ohio-12.

**{¶26}** The party seeking summary judgment on the ground that the nonmoving party cannot prove his case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on

the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Material facts are those relevant to the substantive law applicable in a particular case. *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 827, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

**{¶27}** The moving party must point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim. *Dresher*, supra, at 293.

**{¶28}** If this initial burden is not met, the motion for summary judgment must be denied. *Id.* However, if the moving party has satisfied his initial burden, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

**{¶29}** Since a trial court's decision whether or not to grant summary judgment involves only questions of law, we conduct a de novo review of the trial court's judgment. *DiSanto v. Safeco Ins. of Am.*, 168 Ohio App.3d 649, 655, 2006-Ohio-4940. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App.3d 704, 711.

**{¶30}** In his complaint appellant seeks a writ of mandamus and an injunction to compel appellee to discharge his "inspection/investigation duties \*\*\* with respect to [appellant's] zoning violation complaints."

**{¶31}** A mandamus is a civil proceeding, extraordinary in nature since it can only be maintained when there is no other adequate remedy to enforce clear legal rights. *State ex rel. Brammer v. Hayes* (1955), 164 Ohio St. 373. Mandamus is a writ issued to a public officer to perform an act that the law enjoins as a duty resulting from his or her office. R.C. 2731.01. For a writ of mandamus to issue, the relator must establish a clear legal right to the relief prayed for; the respondent must have a clear legal duty to perform the act; and the relator must have no plain and adequate remedy in the ordinary course of the law. *State ex rel. National Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 80. A dereliction of duty must be established before the writ will be issued. *State ex rel. Spellmire v. Kauer* (1962), 173 Ohio St.

279, 280. A writ of mandamus will not issue to compel an act that has already been performed. *State ex rel. Lee v. Montgomery*, 88 Ohio St.3d 233, 237, 2000-Ohio-316. A writ of mandamus cannot be used to control the exercise of discretion. *State ex rel. Sinay v. Soddors*, 80 Ohio St.3d 224, 232, 1997-Ohio-344. The discretion of an individual, officer, or corporation cannot be controlled or limited by a writ of mandamus. *State ex rel. Benton's Village Sanitation Service, Inc. v. Usher* (1973), 34 Ohio St.2d 59, 61. Further, a writ of mandamus cannot be used as a substitute for an administrative appeal. *State ex rel. Chuvalas v. Tompkins*, 83 Ohio St.3d 171, 173, 1998-Ohio-114. The Supreme Court of Ohio has held that a writ of mandamus will be denied when the relator has an adequate remedy in the ordinary course of the law by way of administrative appeal. *Id.*

**{¶32}** An injunction is also an extraordinary remedy. It will not issue if the movant has an adequate remedy at law. *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St.2d 51, 56.

**{¶33}** Our review of appellee's motion for summary judgment and appellant's brief in opposition compels us to conclude that the trial court was correct in granting appellee's motion. Former Zoning Inspector Frank Holy stated in affidavit that he had investigated the allegations in appellant's letters, visited the site, and determined that no zoning violation existed.

**{¶34}** Appellant offered no affidavits or depositions in opposition. He concedes on appeal that the only evidence he had in support of his opposition to summary judgment was that: (1) the state's answer was untimely filed, and (2) the state failed to respond to his requests for admissions which the trial court had previously deemed as admissions.

**{¶35}** Appellant suggests that because appellee was late in filing his answer, the allegations in the complaint must be considered as admitted. However, the trial court in its August 24, 2006 judgment entry overruling the state's motion to dismiss, ordered appellee to file his answer to the complaint within 14 days of receipt of that judgment. Thereafter, appellee timely filed his answer on September 7, 2006.

**{¶36}** Further, as noted *supra*, the trial court in its summary judgment entry noted that appellant's requests for admissions contradicted each other and stated, "deeming all of the admissions admitted results in irreconcilable conflicts among the various admissions." The court thus found the admissions

to be "useless for evidentiary purposes." In so finding, the trial court in effect revised its previous judgment entry of December 5, 2006, in which it had deemed appellant's requests for admissions admitted. Until final judgment is entered, a trial court is free to revise its prior decisions at any time. Civ.R. 54 (B). Since the court's December 5, 2006 judgment entry was not a final order, the court was free to revise it and to decide, as it did, that the admissions could not be used for evidentiary purposes on summary judgment.

**{¶37}** Based upon Mr. Holy's uncontradicted affidavit that he discharged his duties as zoning inspector, we agree with the trial court that there are no genuine issues of material fact and appellee was entitled to summary judgment.

**{¶38}** Appellant' second assignment of error is without merit.

**{¶39}** Appellant states for his third assignment of error:

**{¶40}** "TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR BY RETROACTIVELY ORDERING THE FILING OF APPELLEE'S ANSWER TO APPELLANT'S COMPLAINT 169 DAYS AFTER THE EXPIRATION OF THE TIME PERIOD PRESCRIBED UNDER THE CIVIL RULES."

**{¶41}** Appellant argues the trial court erred in giving appellee leave to file his answer. Appellant had filed his complaint on January 30, 2006. Appellee filed his motion to dismiss on March 8, 2006. On August 24, 2006, the trial court overruled appellee's motion to dismiss on the ground that the assistant prosecutor had failed to sign the motion. In that same order the court gave appellee leave to file his answer and it was thereafter filed by the date set in the order.

**{¶42}** A trial court has broad discretion to grant leave to file an answer beyond the time limits established by the Civil Rules. Civ.R. 6(B) provides in pertinent part:

**{¶43}** "When by these rules \*\*\* an act is required \*\*\* to be done at or within a specified time, the court for cause shown may at any time in its discretion \*\*\* upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect \*\*\*."

**{¶44}** The staff notes under Civ.R. 6(B) provide:

{¶145} "Rule 6(B) relieves parties to an action from the niceties of time computation, and yet gives the court discretionary control over any time extensions. \*\*\* And if, under Rule 6(B)(2), a party requests an extension of time after the expiration of a period of time, the court will exercise its discretion in its favor only if 'excusable neglect' is shown. \*\*\*"

{¶146} In *Marshall v. Bender* (1935), 54 Ohio App. 36, the court held that those rules and statutory provisions granting the trial court the authority to extend the time for filing any pleading must be liberally construed.

{¶147} In *Price v. Cox* (1975), 104 Ohio App. 251, the appellate court upheld the decision of the trial court to permit a defendant to file an answer on the day of trial, 14 months after the filing of the complaint, where the evidence demonstrated the delay in filing was caused by an attempt to settle the controversy. The court justified such result by stating "[t]he record discloses no error prejudicial to the rights of the plaintiff \*\*\*." *Id.* at 253.

{¶148} In the instant case appellee did not file an answer within the time allowed because he had filed a motion to dismiss for failure to state a claim, pursuant to Civ.R. 12(B). Civ.R. 12(A)(2) provides in part: "The service of a motion permitted under this rule alters these periods of time as follows \*\*\* (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action \*\*\*."

{¶149} The record demonstrates a good faith attempt to comply with the rules of procedure. Appellee did not timely file an answer because he filed a motion to dismiss under Civ.R. 12. We hold that in these circumstances excusable neglect was shown. The fact that appellee's counsel inadvertently did not sign the motion does not affect his good faith in filing it. Further, the record is devoid of any showing of prejudice to appellant arising from the delay in filing the answer.

{¶150} Appellant's third assignment of error is without merit.

{¶151} For his fourth assignment of error, appellant states:

{¶152} "TRIAL JUDGE F.W. BURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE FILING OF AND LATER SUSTAINING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WITHOUT APPELLEE REQUESTING NOR JUDGE BURT GRANTING LEAVE TO FILE SAID MOTION."

{¶153} Appellant next argues that because a pretrial had been set when appellee filed his motion for summary judgment, he was required to move for leave to file his motion before filing it, and that he was prejudiced by the court's granting the motion for summary judgment without appellee first having obtained leave to file it.

{¶154} Initially, we note that in the court's pretrial conference order, filed on September 15, 2006, the court stated that "Summary judgment \*\*\* motions may be filed without leave of Court on or before January 15, 2007." Appellee filed his motion for summary judgment on December 6, 2006. Thus, appellee was not required to obtain leave of court before filing his motion.

{¶155} We observe that appellant failed to object or move to strike the answer on this basis. He therefore waived the issue for purposes of appeal. A reviewing court will not consider questions that could have been, but were not, brought to the trial court's attention. *State ex rel. Porter v. Cleveland Dept. of Pub. Safety*, 84 Ohio St.3d 258, 259, 1998-Ohio-539. Issues that are not raised before the trial court may not be raised for the first time on appeal. *State ex rel. Martin v. Cleveland* (1993), 67 Ohio St.3d 155, 157, 1993-Ohio-192. If issues are raised for the first time on appeal, the reviewing court need not consider them. *Id.*

{¶156} It does not escape our attention that appellant also filed a motion for summary judgment on November 13, 2006, without first asking leave to do so. Therefore, appellant is hardly in a position to argue, as he does, that the court should not have considered appellee's motion for summary judgment without having first asked for leave to file his motion.

{¶157} Civ.R. 56(B) requires a party to obtain leave of court before filing a motion for summary judgment once an action had been set for pretrial. However, it is well-settled that a trial court may in its discretion consider a motion for summary judgment that has been filed without express leave of court, after the action has been set for trial. *Lachman v. Weitmarschen*, 1st Dist. No. C-020208, 2002-Ohio-6656, at ¶6. Further, since the acceptance of a late motion is by the grace of the court, the decision to accept is itself "by leave of court." *Id.*; *Juergens v. Strang, Klubnik and Assocs., Inc.* (1994), 96 Ohio App.3d 223, 234.

{¶158} It has been held that even if a pretrial has already been set, trial courts may implicitly grant leave of court to file a motion for summary

judgment by entertaining the motion. *State Farm Mut. Auto Ins. Co. v. Loken*, 5th Dist. No. 04-CA-40, 2004-Ohio-5074, at ¶34.

{¶159} In the instant case the trial court considered and granted appellee's motion for summary judgment. Leave of court was not necessary as the court had previously given leave to file such motions. However, if leave was required, by considering appellee's motion, it implicitly granted leave to appellee to file his motion.

{¶160} Appellant's fourth assignment of error is without merit.

{¶161} Appellant asserts for his fifth assigned error:

{¶162} "THE TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR INTERPRETING A FEW OF APPELLEE'S CONTRADICTORY ADMITTED ADMISSIONS RELATING TO THE SAME MATERIAL ACT AS SELF-CANCELING, THUS NULLIFYING ALL ADMITTED ADMISSIONS AS EVIDENCE CONSTRUED MOST FAVORABLY FOR APPELLANT."

{¶163} Under this assigned error, appellant states that some inconsistencies in his requests for admission "maybe [sic] interpreted as something other than nullities, e.g., bearing on the source's lack of credibility." Appellant appears to argue that some of the requests for admission should have been deemed admitted and permitted to be used for summary judgment purposes.

{¶164} To the extent that appellant is arguing that the inconsistencies in the requests for admission might bear on Mr. Holy's credibility, the argument lacks merit. Appellant misconstrues the significance of the contradictory nature of his requests for admission. The inconsistent nature of his discovery requests does not bear on the deponent's credibility because the inconsistencies were not with the responses but rather with the requests for admissions themselves.

{¶165} Moreover, appellant does not cite any inconsistencies in his requests that, in his view, might have been relevant to appellee's credibility. Since appellant does not cite even one example of such inconsistency, there is nothing for us to consider.

{¶166} Further, we note that appellant has failed to offer any examples of his requests for admissions which, according to him, were not contradicted by

other requests for admissions. For this additional reason, there is nothing for us to consider under this assigned error.

**{¶67}** We therefore cannot say the trial court abused its discretion in determining that the inconsistencies among appellant's requests for admissions made them useless for evidentiary purposes on summary judgment.

**{¶68}** Appellant's fifth assignment of error is without merit.

**{¶69}** Appellant asserts for his sixth assignment of error:

**{¶70}** "TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR IN HIS FAILURE TO FULLY CONSIDER ORC 4733.23, WITH ITS IMBEDDED, REFERENCED STATUTES, AND OAC 4733-37, WITH ITS SUBSECTIONS IN COMBINATION WITH ORC 519.02(A)."

**{¶71}** Under this assigned error, appellant argues the BZA erred in accepting a map or plan that was not prepared by a professional engineer or surveyor in considering Mr. Holder's zoning permit application.

**{¶72}** Appellant argues that R.C. 153.65(A) and 4733.23 prohibit townships from accepting any engineering or surveying plan prepared by any person not registered in Ohio as a professional engineer or a professional surveyor. While appellant's argument may have been germane to an appeal from the BZA's decision, it is irrelevant to appellant's mandamus action. This action is aimed at seeking an order to compel appellee to discharge his duties to investigate appellant's complaints and to determine the existence of any zoning violations. It cannot be used to collaterally attack the BZA's decision. Because appellant failed to appeal that decision, this argument is waived on appeal.

**{¶73}** In any event, we observe that appellant's argument is incorrect. None of the statutory or administrative code sections he cites prohibit a township from considering a plan or map not prepared by a professional engineer or professional surveyor in connection with a property owner's variance request.

**{¶74}** R.C. 153.65(A) concerns the "procurement of professional design services" by a public authority. It does not prohibit a township BZA from considering a map or plan prepared by someone other than a professional

engineer or professional surveyor on an application for a variance.

**{¶75}** Further, R.C. Chapter 4733 is the chapter of the Code concerning "Professional Engineers and Professional Surveyors." R.C. 4733.22 prohibits a person from practicing the profession of engineering or the profession of surveying without being registered as a professional engineer or a professional surveyor in the state of Ohio. R.C. 4733.23 prohibits a public authority from accepting or using any engineering or surveying plan prepared by any person not registered. OAC 4733-37-1 provides that the rules are intended to be the basis for all surveys relating to the establishment or retracement of property boundaries in the state of Ohio.

**{¶76}** As the trial court so aptly noted:

**{¶77}** "\*\*\* Neither R.C. 4733.23 nor OAC 4733-37 prohibit townships or any other political subdivisions from allowing submissions of plans or maps drawn to scale by persons who are not surveyors or engineers if those plans or maps are part of a zoning certificate application. A township is not precluded from accepting a sketch or plan prepared by a property owner when that sketch or plan is part of a zoning certificate application. Chardon Township does not mandate that applications for zoning certificates include plans or maps that have been prepared by a surveyor or engineer; consequently, Relator's objections to the zoning application and any attachments or exhibits thereto in the within matter are without merit."

**{¶78}** Appellant's sixth assignment of error is without merit.

**{¶79}** For his seventh and final assignment of error, appellant states:

**{¶80}** "TRIAL JUDGE FORREST W. BURT COMMITTED PREJUDICIAL ERROR AND FRAUD UPON APPELLANT AND THE OFFICE OF OHIO'S SUPREME COURT BY FALSELY STATING A FACT MATERIAL TO THIS ACTION."

**{¶81}** Appellant argues that because the trial court made a misstatement to the Ohio Supreme Court in his letter of May 9, 2006, i.e., that the court's copy of appellee's motion to dismiss was signed by appellee's counsel, this amounted to fraud on appellant and the Ohio Supreme Court and the trial court "should no longer be considered an impartial adjudicator of Appellant's claims and issues."

**{¶82}** Appellant is in effect asking this court to disqualify the trial judge

after the Supreme Court refused to do so. If appellant believed the trial court attempted to mislead the Supreme Court by his letter, it was incumbent upon him to bring this matter to the Court's attention while the trial court still had jurisdiction of the matter. The record below does not disclose that appellant did so, and he therefore waived the issue. With respect to appellant's argument that the trial court committed fraud, we note that appellant did not assert a claim for fraud in his complaint. This matter was pending for some ten months after Judge Burt wrote his letter to the Supreme Court, yet during this period appellant never attempted to amend his complaint to assert a claim for fraud. Further, appellant did not raise this issue in his motion for summary judgment and there is no evidence in the record supporting such claim. Because there is no fraud claim before us, there is nothing for us to address.

{¶183} Appellant's seventh assignment of error is without merit.

{¶184} For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, P.J.,

COLLEEN MARY O'TOOLE, J., concur.

OH

Slip Opinions

**2009-Ohio-165**  
**STATE v. NORMAN**

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2009-Ohio-165

State of Ohio, Respondent,  
v.  
Jimmy Norman, Petitioner,

Appellate Case No. 23106, Trial Court Case No. 02-CR-1470.  
Court of Appeals of Ohio, Second District, Montgomery County.

January 16, 2009

Walter F. Ruf, Attorney for Respondent, 301 W. Third Street, 5th Floor,  
Dayton, Ohio 45422.

Jimmy Norman, #445-581, Petitioner, *Pro Se*, Lebanon Correctional  
Institution, P.O. Box 56, Lebanon, Ohio 45036.

**DECISION AND FINAL JUDGMENT ENTRY**

PER CURIAM:

{¶ 1} On November 20, 2008, Relator, Jimmy Norman, filed with this Court a petition for a writ of mandamus, seeking an order that compels Respondent, the Clerk of the Montgomery County Common Pleas Court, to disclose certain public records, pursuant to R.C. 149.43, that demonstrate an appeal has been filed and ruled upon in Norman's underlying criminal case, 2002-CR-1470. On December 16, 2008, Respondent filed a motion to dismiss the instant petition on the following grounds: 1) Relator has not demonstrated that he has a clear legal right to the performance of the act requested; 2) Relator has not complied with R.C. 2731.04, where he failed to caption

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the petition in the name of the state on the relation of the person applying; 3) Relator did not comply with R.C. 2969.25, where he failed to file an affidavit with his petition that contains a description of each civil action or appeal of a civil action that he has filed in the previous five years in any state or federal court; and 4) Relator is barred by the doctrine of res judicata, as he filed an identical petition for a writ of mandamus in the trial court on August 21, 2008.

To date, Relator has not filed a response to Respondent's motion. Upon due consideration, this Court finds Respondent's motion to dismiss well-taken.

{¶ 2} Preliminarily, we note that Relator filed a notice of appeal on March 11, 2003 from the conviction and sentence in his underlying criminal case, 2002-CR-1470. This Court affirmed the judgment of the trial court on January 9, 2004. See *State v. Norman*, Montgomery App. No. 19811, 2004-Ohio-75.

{¶ 3} On August 21, 2008, Relator filed a similar petition for a writ of mandamus in the trial court. In his complaint, Relator specifically asked for the following documents in order to determine whether a direct appeal of his criminal conviction had transpired: the docket sheet, any judgment entries, and the parties' briefs. On August 28, 2008, the trial court overruled Relator's petition.

{¶ 4} A writ of mandamus is an extraordinary remedy that only applies in a limited set of circumstances. *In re State ex rel. Watkins*, Greene App. No. 07-CA-80, 2008-Ohio-3877, at ¶6, quoting *Davenport v. Montgomery Cty.*, Montgomery App. No. 21196, 2006-Ohio-2909, at ¶4. To be entitled to the requested writ of mandamus, Norman must establish a clear legal right to having the clerk disclose the documents he

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requests, a clear legal duty on the part of Respondent to provide said documents, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Blandin v. Beck*, 114 Ohio St.3d 455, 2007-Ohio-4562, 872 N.E.2d 1232, at ¶13.

{¶ 5} In the present matter, this Court need not consider whether Norman has a clear legal right to demand the requested action by the clerk, or whether the clerk has a clear legal duty to perform. Ultimately, this Court finds that Norman had an adequate remedy in the ordinary course of law by way of an appeal from the trial court's August 28, 2008 decision and entry.

{¶ 6} It is well established that an action in mandamus is not a substitute for an appeal. See *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57, 63 O.O.2d 88, 295 N.E.2d 659. Here, Norman could have appealed from the trial court's August 28, 2008 entry denying his petition for writ of mandamus in that court. His failure to appeal that order precludes mandamus relief, as the appellate process was available. See *State ex rel. Rittner v.*

*Barber*, Fulton App. No. F-05-020, 2006-Ohio-592, at ¶40. Accordingly, we find that Relator has failed to make even a threshold showing that he is entitled to the relief requested.

{¶ 7} Furthermore, as pointed out by Respondent, Norman has failed to comply with the requirements of R.C. 2731.04 and R.C. 2969.25. Under R.C. 2731.04, an "[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit." Relator's failure to properly caption his original action petition is grounds for denying the writ and dismissing the petition. *Kenard v. Tucker*, Montgomery App. No. 21378, 2005-Ohio-6834, at ¶7, citing

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*Maloney v. Court of Common Pleas of Allen Cty.* (1962), 173 Ohio St. 226, 19 O.O.2d 45, 181 N.E.2d 270.

{¶ 8} R.C. 2969.25 provides, in part, that "[a]t the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court." The Supreme Court of Ohio has held that "[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." *State ex rel. Norris v. Giavasis*, 100 Ohio St.3d 371, 2003-Ohio-6609, 800 N.E.2d 365, at ¶4; see, also, *Watson v. Foley*, Montgomery App. No. 20970, 2005-Ohio-2761, at ¶5. For these additional reasons, Relator's petition must be dismissed.

{¶ 9} In conclusion, this Court finds that Norman has not demonstrated a sufficient basis to justify extraordinary relief. Accordingly, Respondent's motion to dismiss is hereby SUSTAINED. Norman's petition for a writ of mandamus is DENIED and this matter is DISMISSED.

SO ORDERED.

Donovan, Presiding Judge, Brogan, Judge, Wolff, Jr., Judge.

OH

Slip Opinions

**2008-Ohio-4366**  
**STATE EX REL. FOSTER v. BUCHANAN**

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2008-Ohio-4366

State of Ohio, Ex Rel., Ronald Foster, Relator,  
v.  
A. Dean Buchanan, Judge, Respondent.

No. 91703.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

August 22, 2008

Writ of Mandamus Order No. 412308.

Complaint Dismissed.

Ronald Foster, pro se, 3808 East 123rd Street, Cleveland, Ohio 44105, For Relator.

John H. Gibbon, Director of Law, By: Laurie A. Wagner, First Assistant Director of Law, City of Cleveland Heights, 40 Severance Circle, Cleveland Hts., Ohio 44118, Attorneys for Respondent.

JOURNAL ENTRY AND OPINION

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MARY J. BOYLE, J.:

{¶ 1} In his "motion for writ of mandamus," relator - Ronald Foster - avers that: he is a party to several actions which respondent judge has consolidated; the underlying actions involve a landlord and tenant; and Foster is the tenant. Foster requests that this court issue a writ of mandamus compelling respondent "to decide the motions which were fully submitted on June 5, 2008. Alternately, Plaintiff-Relator requests that the case be reassigned to a different judge." Motion for Writ of Mandamus, at 3. Additionally, Foster complains that: 1) respondent has deprived him of the opportunity to prepare fully; 2) respondent has denied Foster compulsory process; 3) respondent consolidated discovery without Foster's knowledge; 4)

" 3 "

respondent is openly hostile toward Foster; 5) respondent must transfer the landlord's eviction action to the court of common pleas, because the amount in

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controversy under a counterclaim exceeds the monetary jurisdiction of the municipal court; 6) respondent has lost jurisdiction over the underlying cases "through various illegal actions," Motion for Writ of Mandamus, at 18; 7) plaintiff in the forcible entry and detainer action did not properly execute service of process on Foster; 8) service of notice of a pretrial on Foster was insufficient; and 9) respondent has abused his discretion.

{¶ 2} In *State ex rel. Foster v. Buchanan*, Cuyahoga App. No. 85962, 2006-Ohio-2061 [*Foster I*], appeal dismissed *State ex rel. Foster v. Buchanan*, 11 Ohio St.3d 1450, 2006-Ohio-4085, 852 N.E.2d 196, Foster asserted essentially the same claims against respondent. "The relator, Ronald Foster, commenced this 'Motion for a writ of mandamus' against the respondent, Judge A. Deane Buchanan of the Cleveland Heights Municipal Court, to obtain the following relief: (1) to compel Judge Buchanan to recuse himself; (2) to compel Judge Buchanan to rule on motions submitted on December 2, 2004; (3) to compel the assignment of Foster's underlying case (s) to a different judge; (4) to compel the transfer of the underlying case(s) from the municipal court to the common pleas court because the amount in controversy exceeds the monetary jurisdiction of the municipal court; (5) to compel transfer or dismissal of the underlying case(s) because Judge Buchanan has lost jurisdiction through various illegal actions; (6) to compel the payment or release of the award in one of the underlying case(s); (7) to compel making certain records available to

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**4**

Foster; (8) to compel discovery; and (9) to compel protection of Foster's rights." Id. at ¶1.

{¶ 3} Initially, we note that this action was filed on June 25, 2008. Yet, Foster requests relief in mandamus to compel respondent to rule on motions filed on June 5, 2008. "Sup.R. 40(A)(3) provides that motions shall be ruled upon within 120 days from the date of filing. Thus, a complaint in mandamus to compel a ruling on a motion which has been pending less than that time is

premature. *State ex rel. Rodgers v. Cuyahoga Cty. Court of Common Pleas* (1992), 83 Ohio App.3d 684, 615 N.E.2d 689 and *State ex rel. Byrd v. Fuerst* (July 12, 1991), Cuyahoga App. No. 61985." *State ex rel. Smith v. Suster*, Cuyahoga App. No. 89031, 2007-Ohio-89, at ¶2. Obviously, the filing of this action is premature.

{¶ 4} Clearly, this action raises claims that are identical to those which Foster raised in *Foster I*. "It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit' (emphasis sic) (quoting *Rogers v. Whitehall* [1986], 25 Ohio St.3d 67, 69, 25 Ohio B. 89, 494 N.E.2d 1387, 1388). We also declared that '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'" *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995 Ohio 331, 653 N.E.2d 226 quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, 1180 (quoted in *State ex rel. Mun. Constr. Equip. Operators' Labor Council v.*

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## 5

*Cleveland*, Cuyahoga App. No. 86263, 2006-Ohio-4273, at ¶12). To the extent that Foster did assert or could have asserted his claims in this action in *Foster I*, res judicata bars this action.

{¶ 5} Regardless, all of the remaining issues raised by Foster in this action are not appropriate for an original action. Rather, Foster's claims are only appropriate as issues on appeal. "[M]andamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 295 N.E.2d 659; and *State ex rel. Pressley v. Industrial Commission of Ohio* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph three of the syllabus." *Foster I*, at ¶2. Clearly, relief in mandamus is not appropriate because Foster is merely attempting to use this action as a substitute for an appeal.

{¶ 6} Foster also styled his pleading as a "motion for writ of mandamus." A party may only commence an original action by way of filing a complaint. Dismissal of the "motion for writ of mandamus" is, therefore, appropriate. *Foster I*, at ¶12. Additionally, as was the case in *Foster I*, Foster's "motion" does not clearly set out a basis for relief in mandamus. *Id* at ¶13.

{¶ 7} Accordingly, we dismiss this action sua sponte for failure to state a claim upon which relief can be granted. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

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Complaint dismissed.

Sean C. Gallagher, P.J., and Anthony O. Calabrese, Jr., J., concur

OH

Slip Opinions

st decide without exercising discretion, and the supreme will not control the judicial discretion of an inferior court. State ex rel. Steckhan v. Common Pleas Court, 140 Ohio St. 28, 23 Ohio Op. 230, 42 N.E.2d 160 (1942).

A writ of mandamus will not issue to control judicial action or where there is a plain and adequate remedy in the ordinary course of law by appeal. State ex rel. McCamey v. Common Pleas Court, 137 Ohio St. 566, 19 Ohio Op. 316, 1 E.2d 683 (1941).

A writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion. State ex rel. n v. Floyd, 138 Ohio St. 253, 20 Ohio Op. 304, 34 N.E.2d (1941).

A writ of mandamus will not issue to control the exercise of discretion by the trial court or to substitute the writ for an appeal. State ex rel. Smith v. Young, 137 Ohio St. 319, 18 Ohio Op. 348, 29 N.E.2d 564 (1940).

#### Judisdiction of lower court

A writ of mandamus will lie without jurisdiction to render a judgment, mandamus will lie to compel the court to vacate its judgment and findings. State ex rel. Ballard v. O'Donnell, 50 Ohio St. 3d 192, 553 N.E.2d 650 (1990).

#### Mayor's courts

A mayor and a city did not have a clear legal duty to turn on a recording system in the mayor's court, and thus, the law officer's petition for a writ of mandamus seeking an order compelling the mayor to do so was denied, because the mayor's court is not a court of record, and Ohio Mayor's R. B)(2) does not require a recording system. State ex rel. n Office of the Pub. Defender v. Rosencrans, 2005 Ohio App. LEXIS 5997, 2005 Ohio 6681, (2005), affirmed by 111 Ohio St. 3d 338, 2006 Ohio 5793, 856 N.E.2d 250, 2006 Ohio App. LEXIS 3262 (2006).

#### Outness

An inmate's mandamus petition was dismissed because the petition was moot, in that the relief requested in the petition had already been granted, and because the inmate had an adequate legal remedy by way of an appeal of the judge's decision. Finally, the petition was deficient because it was not accompanied by the affidavit required by Ohio Rev. Code Ann. § 2969.25. State ex rel. Hess v. Bruzzese, 2006 Ohio App. LEXIS 5409, 2006 Ohio 5409, (2006).

An inmate's application for a writ of mandamus compelling a judge to rule on the inmate's motion to clarify whether his sentence was mandatory was denied because the judge's journal entry established that the judge had fulfilled her duty to rule on the subject motion and that defendant had received the requested relief. Thus, the mandamus action was moot. State ex rel. Vaughn v. Greene. — Ohio App. 3d —, — N.E.2d —, 2006 Ohio App. LEXIS 1780, 2006 Ohio 1937, (Apr. 8, 2006).

A criminal defendant's mandamus petition pursuant to Ohio Rev. Code Ann. § 2731.03 was dismissed pursuant to a motion by a criminal court judge, as the relief sought was moot where the criminal defendant had requested that the judge rule in favor of his motions in the underlying matter and such motions had been denied. The relief sought was improper because the criminal defendant could not seek to control the criminal court's discretion, and there was an adequate remedy at law through an appeal or a delayed appeal in the criminal matter. Cunningham v. Lucci, 2006 Ohio App. LEXIS 4593, 2006 Ohio 4666, (2006).

#### Pending action

A writ of mandamus does not lie against judges where the journal of a court of record discloses that the cause is still

pending on rehearing. State ex rel. Schunk v. Hamilton, 127 Ohio St. 555, 190 N.E. 199 (1933).

#### Petition denied

Petitioner's mandamus or prohibition petition challenging a judge's decision to issue a bench warrant and a license and registration block was properly denied because there was no indication that the judge had refused to enter judgment on petitioner's pending motions to remove the block and set aside the warrant or that the judge had unnecessarily delayed ruling on the motions in light of the fact that, at the time that the mandamus petition was filed, the motions had been pending less than four months, and no response had been filed by the State. The direction in Ohio Superintendence Ct. R. 40(A)(3) that trial courts should rule on a pending motion within 120 days from the date that the motion was filed did not automatically entitle petitioner to a writ of mandamus as there had not been an unreasonable delay in ruling on the motions when the mandamus petition was filed. Powell v. Houser, 2007 Ohio App. LEXIS 2660, 2007 Ohio 2866, (2007).

#### Res judicata

Since a court had already determined that a judge's decision to stay the underlying case brought by a litigant against a lender pending arbitration did not constitute an abuse of discretion, the court's decision constituted res judicata relative to the litigant's action for writs of mandamus and procedendo inasmuch as the litigant sought to compel the judge to hear the matter on the merits and permit discovery. State ex rel. Pyle v. Bessey, 2006 Ohio App. LEXIS 1872, 2006 Ohio 2047, (2006), affirmed by 112 Ohio St. 3d 119, 2006 Ohio 6514, 858 N.E.2d 383, 2006 Ohio LEXIS 3558 (2006).

#### Supreme Court of Ohio

Litigant was denied mandamus requesting that the deputy clerks of the Supreme Court of Ohio accept his pleading for filing where he failed to follow the applicable rules of practice related to pleadings and the deputy clerks thus were under no duty to perform the act requested. State ex rel. Fuller v. Mengel, 2003 Ohio App. LEXIS 3260, 2003 Ohio 3558, (2003), affirmed by 100 Ohio St. 3d 352, 2003 Ohio 6448, 800 N.E.2d 25, 2003 Ohio LEXIS 3429 (2003).

## § 2731.04 Application for writ.

Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice.

**HISTORY:** RS § 6743; S&C 1127, 51 v 57, § 573; GC § 12286; Bureau of Code Revision, Eff 10-1-53.

#### Comparative Legislation

Application for:  
CA—Cal Code Civ Proc § 1086  
IL—735 ILCS § 5/14-102  
MI—MCLS § 600.4401

#### Practice Forms

General Form of Complaint in Mandamus Containing Prayer for Peremptory or Alternative Writ of Mandamus in the First Instance, 9 OH Forms of Pleading & Practice — Civil Procedure Form 6:1

General Form of Complaint in Mandamus Containing Prayer for Peremptory or Alternative Writ in the First Instance 1, 18 Ohio Forms of Pleading and Practice Form SP1:1

teen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) **How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) **Motion for judgment on the pleadings.** After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.

(D) **Preliminary hearings.** The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) **Motion for definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the

order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) **Motion to strike.** Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

(G) **Consolidation of defenses and objections.** A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) **Waiver of defenses and objections.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

**History:** Amended, eff 7-1-83.

#### STAFF NOTES

Rule 12 continues the "service" policy established in Rule 4 and Rule 5. Service upon the opposing party rather than filing with the court is the key function. See, Staff Notes to Rule 4 and Rule 5. Rule 12(A)(1) and Rule 12(A)(2) concern the time in which a party must serve a responsive pleading. Rule 12(A)(1) is designed for Ohio practice and has no exact federal counterpart. Rule 12(A)(2) is based on Federal Rule 12(a).