

**IN THE
SUPREME COURT OF OHIO**

STATE EX REL. LUEKIUCIUS AND : Case No. 09-410
SYLVESTER BROWN :

Petitioner :

vs. :

FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO :

Respondent :

ORIGINAL ACTION IN
MANDAMUS AND PROCEDENDO

MOTION TO DISMISS A WRIT OF MANDAMUS/PROCEDENDO

Marlene Penny Manes 0022575
917 Main Street, Suite 400
Cincinnati, Ohio 45202
(513) 977-4214
Fax No. (513) 977-4218
COUNSEL FOR PETITIONER

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

Christian J. Schaefer 0015494
Colleen M. McCafferty 0079858
Assistant Prosecuting Attorneys
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
513/946-3041 (Schaefer)
513/946-3133 (McCafferty)
513/946-3018 (Facsimile)
COUNSEL FOR RESPONDENT

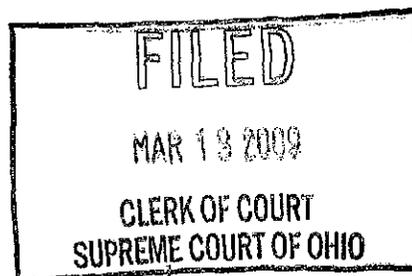


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FIRST DISTRICT COURT OF APPEALS HAMILTON COUNTY, OHIO	:	
	:	<u>MOTION TO DISMISS</u>
Respondent	:	

The Respondent, First District Court of Appeals, Hamilton County, Ohio, through Counsel, moves to dismiss this original action in mandamus and procedendo as provided in S. Ct. R. X, Section 5, for reasons set out in the attached memorandum.

Respectfully,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

Christian J. Schaefer, 0015494
Colleen McCafferty, 0079858
Assistant Prosecuting Attorneys
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
513-946-3041 (Schaefer)
513-946-3133 (McCafferty)
513-946-3018(Facsimile)

MEMORANDUM

A. Statement of the Case

This Original Action seeks to substitute a writ of mandamus or a writ of procedendo for a discretionary appeal to this Court.

The record in Case C-070797, as it existed before the Court of Appeals, shows that the trial date in the Court of Common Pleas was originally scheduled for September 12, 2006, but was continued until October 15, 2007. Six days before the new trial date, Relators requested a continuance because of a “death in the family.” The motion was denied by the Court of Common Pleas. Four days before trial, a motion to reconsider the denial of the continuance was filed making the conclusory statement that it would be an “undue hardship” for Relators to return from Mississippi. *Brown v. Bowers*, unreported decision C-070797 (1st Dist. 2008) ¶4 through ¶7.

No evidence was presented to the Court of Common Pleas at the motion for reconsideration. Instead, Relators’ counsel admitted that her clients had left the jurisdiction before the Court ruled on the initial request for a continuance and were planning to return a day or two after the scheduled trial date. Inexplicably, counsel for Relators cancelled trial deposition of Relators’ expert witnesses, even though no continuance had been granted. *Brown v. Bowers*, unreported decision C-070797 (1st Dist. 2008) ¶4 through ¶7.

The Court of Common Pleas offered to allow Counsel for Relators to begin jury selection without the presence of her clients. After a day or two of jury selection, the Relators could participate in the remainder of the trial upon their return from Mississippi.

Counsel for Relators opted for dismissal for want of prosecution and an appeal, rather than begin jury selection without her client's presence. *Brown v. Bowers*, unreported decision C-070797 (1st Dist. 2008) ¶10 through ¶12, ¶21, and ¶22.

This Court denied discretionary review of the decision of the Court of Appeals determining that the Court of Common Pleas did not abuse its discretion in denying Relators a continuance. *Brown v. Bowers*, 2009-Ohio-278, 120 Ohio St.3d 1490.

Relators then brought this Original Action in Mandamus and Procedendo in this Court. Relators complain of one error by the Court of Appeals and five errors by the Court of Common Pleas.

Relators allege that: (1) the Court of Appeals found an assignment of error dealing with a motion for partial summary judgment to be moot; (2) the record of the Court of Common Pleas did not demonstrate that a dismissal of their case for want of prosecution was warranted; (3) the Court of Common Pleas erred in dismissing the case with prejudice; (4) the Court of Common Pleas erred in finding that attendance of the funeral of a relative is not a sufficient basis to dismiss a case for failure to appear; (5) the Court of Common Pleas erred in determining that it could not continue the case; and, (6) the refusal of counsel for Relators to proceed with jury selection without their presence is not a basis for the Court of Common Pleas to dismiss a case.

B. Argument

PROPOSITION OF LAW I

A petition for a writ of procedendo must be dismissed unless, the relator establishes: (1) a clear legal right to require the Court of Appeals to decide the merits of moot claims; (2) a clear legal duty on the part of the Court of Appeals to decide moot claims; and, (3) the lack of an adequate remedy in the ordinary course of law.

In State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis (2007), 113

Ohio St.3d 410, 414, 865 N.E.2d 1289 the Supreme Court held:

In order to be entitled to a writ of procedendo, the board had to establish a clear legal right to require Judge Davis to retry the unresolved claims, a clear legal duty on the part of Judge Davis to retry these claims, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Weiss v. Hoover* (1999), 84 Ohio St.3d 530, 531-532, 705 N.E.2d 1227.

Therefore, Relators in this case must demonstrate: (1) a clear legal right to require the Court of Appeals to decide on the merits the assignment of error determined to be moot; (2) a clear legal duty on the part of the Court of Appeals to decide on the merits the assignment of error it determined to be moot; and, (3) no adequate remedy at law.

PROPOSITION OF LAW II

Rule 12(A)(1)(c) of the Ohio Rules of Appellate Procedure specifically give authority to the Court of Appeals to refrain from deciding the merits of an assignment of error determined by the Court of Appeals to be moot.

The first claim for relief alleges that the Court of Appeals should have determined the merits of their first assignment of error. Rule 12(A)(1)(c) of the Ohio Rules of Appellate Procedure specifically authorizes a Court of Appeals to refrain from

determining the merits of an assignment of error determined by the Court of Appeals to be moot. Rule 12(A)(1)(c) specifically states: "Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision."

In this case, since the Court of Appeals decided that the first assignment of error was made moot by the resolution of the last two assignments of error, Relators had no legal right to have the first assignment of error resolved on the merits. Further, since the Court of Appeals decided that the first assignment of error was made moot by the resolution of the last two assignments of error, the Court of Appeals had no legal duty to decide the first assignment of error on its merits.

The Request for a Writ of Procedendo must, therefore, be denied because the first two requirements cannot be met by Relators.

PROPOSITION OF LAW III

A discretionary right of appeal to this Court is an adequate remedy at law which precludes the issuance of a writ of procedendo.

Further, Relators had a right to a discretionary appeal to this Court. This Court specifically held in *State ex rel. Neguse v. McIntosh*, 115 Ohio St.3d 216, 217, 2007-Ohio-4788, that:

A writ of procedendo will not issue if an adequate remedy exists in the ordinary course of law. *State ex rel. Non-Employees of Chateau Estates Resident Assn. v. Kessler*, 107 Ohio St.3d 197, 2005-Ohio-6182, 837 N.E.2d 778, ¶18. Neguse had adequate remedies by way of appeal, both from the court of appeals' 2000 dismissal of his untimely appeal of the common pleas court's denial of his petition for postconviction relief and from the common pleas court's denial of his motions for findings of fact and conclusions of law. See, e.g., *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 2002-Ohio-5313, 776 N.E.2d 99, ¶6 (discretionary appeal

from court of appeals' judgment provided adequate remedy at law, which precluded mandamus action).

The fact that these remedies may no longer be available due to Neguse's failure to timely assert them does not render them inadequate. *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-Ohio-5469, 816 N.E.2d 245, ¶9.

Previously this Court, in *State ex rel. Smith v. O'Connor* (1995) 71 Ohio St.3d 660, 663, held that the fact that a discretionary right of appeal was sought and denied does not render it inadequate.

Finally, Smith possessed an adequate remedy by discretionary appeal of the appellate court's prior judgment, which reversed the judgment entered in favor of the hospital but failed to order a new trial limited to the damages issue. Although that appeal was not allowed, extraordinary writs may not be used as a substitute for an otherwise barred second appeal or to gain successive appellate reviews of the same issue. *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 249, 594 N.E.2d 616, 620.

It is clear that Relators had and exercised their right of discretionary appeal to this Court. This right of discretionary appeal precludes issuance of a writ of procedendo in this case.

PROPOSITION OF LAW IV

A petition for a writ of mandamus must be dismissed unless a relator demonstrates that: (1) the relator has a clear legal right to the relief prayed for; (2) respondent is under a corresponding clear legal duty to perform the requested acts; and, (3) relator has no plain and adequate legal remedy.

For a writ of mandamus to issue, a relator must demonstrate that: (1) the relator has a clear legal right to the relief prayed for; (2) respondent is under a corresponding clear legal duty to perform the requested acts; and, (3) relator has no plain and adequate legal remedy. *State ex rel. Ohio Assn. Of Pub. School Emp./AFSCME, AFL-CIO v. State Emp. Relations Bd.* (1992), 64 Ohio St.3d 149, 151.

In this case, Relators, in their second, third, fourth, fifth, and sixth claims for relief contend that the Court of Appeals wrongly decided their case as a matter of law and should have reversed the decision of the Court of Common Pleas to dismiss their case with prejudice for want of prosecution. Since this is a petition for the extraordinary writ of mandamus, not a direct appeal, a mere error of law is inadequate for Relators to prevail. Instead, Relators must show the three elements set out above.

PROPOSITION OF LAW V

A discretionary right of appeal to this Court is an adequate remedy at law which precludes the issuance of a writ of mandamus.

Assuming that Relators can demonstrate that: the Court of Appeals erred as a matter of law in its decision; every litigant has a right to have error free determinations by a court of appeals; and, the court of appeals has a duty to render error free decisions, Relators must still demonstrate that they have no adequate remedy at law.

Relators had a right to a discretionary appeal to this Court. As stated above, this Court has specifically held in *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 2002-Ohio-5313, 776 N.E.2d 99, ¶6 that a discretionary appeal from court of appeals' judgment provided adequate remedy at law, which precluded mandamus action. The fact that Relators sought and were denied a discretionary appeal does not render it inadequate. *Smith* at 663.

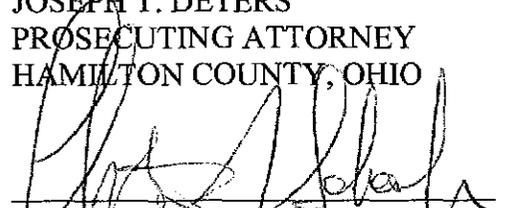
It is clear that Relators had and exercised their right of discretionary appeal to this Court. This right of discretionary appeal precludes issuance of a writ of mandamus in this case.

C. Conclusion

The Petition for Writs of Procedendo and Mandamus should be dismissed.

Respectfully,

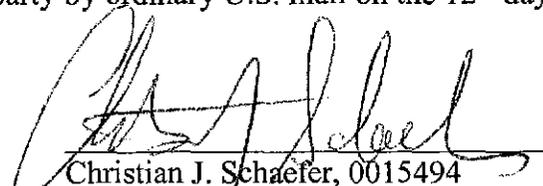
JOSEPH T. DETERS
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513-946-3133 (McCafferty)
513-946-3018(Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party or attorney of record in the proceedings for each party by ordinary U.S. mail on the 12th day of March, 2009.



Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney