

ORIGINAL

IN THE SUPREME COURT OF OHIO

2009

[State of Ohio ex rel.] Charles Evans,

Relator,

vs.

Case No. 09-2128

Tenth District Court of Appeals,

Original Complaint in Mandamus

Respondent.

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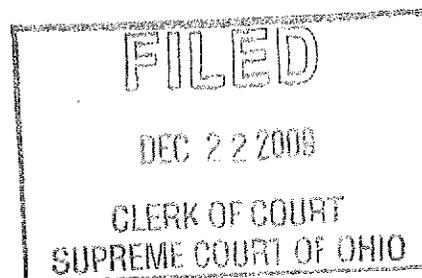
**MOTION TO DISMISS OF RESPONDENT TENTH DISTRICT COURT OF APPEALS**

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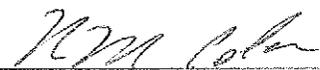
Respondent.

**MOTION TO DISMISS OF RESPONDENT 'TENTH DISTRICT COURT OF APPEALS'**

Now comes Defendant "Tenth District Court of Appeals", by and through undersigned counsel and pursuant to Ohio R. Civ. P. 12(B)(6), and respectfully moves this Court to dismiss all claims against it. Plaintiff has failed to state a claim upon which relief can be granted. The grounds for this motion are more fully set forth in the attached Memorandum in Support which is hereby incorporated by reference.

Respectfully submitted,

**RON O'BRIEN  
PROSECUTING ATTORNEY  
FRANKLIN COUNTY, OHIO**

  
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## MEMORANDUM IN SUPPORT

### I. STATEMENT OF FACTS

This action is before the Court on Relator's complaint in mandamus filed on November 23, 2009. Relator is seeking a directive from this Court to order the Tenth District Court of Appeals to "impartially adjudicate Relator's appeal fo the trial court decision in Franklin County Court of Common Pleas Case No. 07CVII-14634 without requiring leave to proceed under 2323.52." (Complaint, at ¶ 1)

For the reasons that follow, Relator's writ of mandamus should be denied because he did not name an appropriate party, he cannot meet the guidelines for a writ of mandamus to be issued, he is attempting to dictate judicial discretion, and he has an adequate remedy by way of appeal.

### II. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim, the Court must construe all material allegations in the Complaint and all inferences that may be reasonably drawn there from in favor of the nonmoving party. *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that plaintiff can prove no set of facts warranting relief. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St.3d 596; *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143.

### III. LAW AND ARGUMENT

#### A. **Relator has named a non-entity which cannot provide the relief requested.**

Relator has named as Respondent, "Tenth District Court of Appeals," a non-entity which cannot provide the relief requested. In the case of a governmental entity, the

capacity to sue or be sued shall be determined by the law of the state. A court is a place where a proper officer or officers administer justice through use of judicial power. *Malone v. Court of Common Pleas* (1975), 45 Ohio St.2d 245 Citing *Todd v. United States* (1895), 158 U.S. 278, 284; *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 121. Relator does not name a “proper officer or officers” instead naming the entire Tenth District Court of Appeals. Accordingly, this action should be dismissed.

**B. Relator cannot meet the guidelines for a writ of mandamus to be issued.**

This Court has provided guidelines in determining when the issuance of a writ of mandamus is appropriate:

For a writ of mandamus to issue, the relator must have a clear legal right to the relief prayed for, the respondents must be under a clear legal duty to perform the requested act, and the relator must have no plain and adequate remedy in the ordinary course of the law. *State ex rel., Olander v. Ohio Environmental Protection Agency* (1989), 45 Ohio St.3d 28.

Furthermore, as the Court is well aware, mandamus may not be utilized as a substitute for appeal. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57, 295 N.E.2d 659; *State ex rel. Pressley v. Industrial Commission* (1967), 11 Ohio St.2d 141, 163, 228 N.E.2d 631.

Relator does not have a clear legal right to the relief requested and the Tenth District Court of Appeals is not under a clear legal duty to perform the requested act. A cursory review of Relator’s Complaint reveals Relator is unhappy with the decision of the Tenth District Court of Appeals to deny his motion for leave to file an appeal and that he is attempting to utilize an extraordinary writ to dictate judicial discretion. The Tenth District Court of Appeals found in *Evans v. Davis*, (Tenth Appellate District Case No.

09AP-467), that Relator did not demonstrate reasonable grounds for his appeal of the trial court's decision to label him as a vexatious litigator pursuant to R.C. § 2323.52. (See Plaintiff's Complaint, Ex. B)

Relator attempts to argue that there is a clear legal duty pursuant to R.C. § 2323.52 to grant a vexatious litigator leave to continue legal proceedings. This argument is without merit. The statute provides process for those individuals who have been designated vexatious. See R.C. §§ 2323.52(D)(3) and (F)(2). Despite Relator's assertions to the contrary, these code sections do not compel the Court of Appeals to grant leave to file his appeal. Rather, R.C. §§ 2323.52(D)(3) and (F)(2) delineate the process by which a vexatious litigator may seek leave to appeal.

Specifically, pursuant to R.C. § 2323.52(F)(2), the court of appeals "shall not grant \*\*\* leave for the institution \*\*\* of legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application." Thus, while a writ may be issued to compel a performance of a ministerial act or to compel the exercise of discretion, it may not be used in this case to dictate what said decision should be. As such, Relator does not have a clear legal right to the requested relief and the Tenth District Court of Appeals is not under a duty to perform the requested act.

Relator also has an adequate remedy by way of appeal. If Relator does not agree with the designation of being a vexatious litigator, he was free to file for leave to appeal that decision with the Tenth District Court of Appeals as set forth in R.C. § 2323.52. In fact, Relator did appeal the trial court's decision to label him a vexatious litigator. (See

Plaintiff's Complaint, Ex. B) Relator, should he chose to do so, can appeal the decision of the Tenth District Court of Appeals. Relator appears to bring this action as a substitute for an appeal of the decision of the Tenth District Court of Appeals, believing he is entitled to a reversal of the trial court's decision to label him a vexatious litigator. Mandamus may not be used as a substitute for appeal.

There being no right at issue, no duty owed, and because this action is clearly a substitute for appeal, the action should be dismissed.

#### **IV. Conclusion**

For the foregoing reasons, Respondent respectfully requests that the instant matter be dismissed.

Respectfully submitted,

**RON O'BRIEN**  
**PROSECUTING ATTORNEY**  
**FRANKLIN COUNTY, OHIO**



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**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing has been forwarded

by regular U.S. mail, postage prepaid, to:

Charles R. Evans, *pro se*  
1892 Rear, Oakland Park Avenue  
Columbus, Ohio 43224

this 22 day of December, 2009.

  
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R. Matthew Colon 0080230  
Assistant Prosecuting Attorney