

ORIGINAL

SUPREME COURT FOR THE STATE OF OHIO

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

Relator,

vs.

CASE NO. 09-2128

Tenth District Court of Appeals
Attn: Administrative Judge G. Gary Tyack
373 South High Street
Columbus, Ohio 43215,

Respondent.

*Original Action for Writ of
Mandamus*

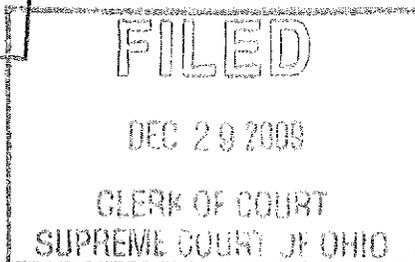
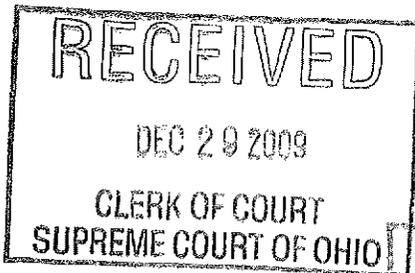
**MEMORANDUM CONTRA OF RELATOR TO RESPONDENT TENTH
DISTRICT COURT OF APPEALS MOTION TO DISMISS and in the alternative
RELATOR'S MOTION FOR LEAVE TO JOIN PARTIES**

Relator responds to Respondent's Motion to Dismiss on the basis of improper parties.

Secondly, Respondent seeks dismissal alleging Relator's failure to meet the elements of whether mandamus lies in this matter.

The Court must first address the issue of appropriate parties, and if deemed appropriate, then proceed to address the merits of whether mandamus lies in this matter. Should the parties not be deemed appropriate, the Court should reach no further.

The basis of Relator's Memorandum Contra to Respondent's Motion to Dismiss is more fully set forth in the following Memorandum in Support incorporated herein by reference.



Respectfully submitted,

Charles R. Evans, Relator
1892 Rear Oakland Park Avenue
Columbus, Ohio 43224

MEMORANDUM in SUPPORT

The standard of review in considering a motion to dismiss for failure to state a claim must construe all material allegations in the Complaint, and all inferences must be reasonably drawn in favor of the nonmoving party. Relator argues that Respondent has not met their burden where the legal authority addressing improper parties is not on point.

Where the appellate court is a state court {*Cf. Sailing, Inc. v. Pavarini*, 2007-Ohio-6844}; the judges who comprise the court are elected officials of the state court. In the case caption, Relator specifically named a public official cloaked in judicial authority who was a member of the panel in Case No. AP-467 to read and address Relator's original complaint for a writ of mandamus.

Additionally, upon determination of the sufficiency of the parties, Respondent has not met their burden alleging a failure to state a claim where Relator has met the elements addressed in *State ex rel. Manson v. Morris*, 66 Ohio St.3d 440, 441 (1993) and/or additionally/in the alternative in *Truman v. Village of Clay Center*, 160 Ohio App. 3d 78 (2005).

A. Proper Parties- Legal Authority Cited is Not on Point

Lack of Distinction- a Point of Reference

Respondent Tenth District Court of Appeals said in its Motion to Dismiss @ page 4, "The decision that the Tenth District Court of Appeals found in *Evans v. Davis* (Tenth Appellate District Case No. AP-467)..."

Respondent's counsel, Mr. Colon, expressly states that the *Tenth District Court of Appeals* made the decision, further perpetuating the lack of distinction he attempts to make as to proper officers who administer justice through judicial power. Relator understands the prosecuting attorney's contention, however, Relator points out that Mr.

Colon uses *the broad name of the Respondent to address the same issues he argues against* in his Motion to Dismiss. Such inconsistency by an attorney leads to confusion.

Arguendo, in Case No. AP-467, the Tenth District Court of Appeals is comprised of a panel of judges.

Mr. Colon's additional request for dismissal of the merits of whether mandamus lies is premature where the party issue takes precedence and must first be resolved. It appears that Mr. Colon is attempting to influence the Court to issue a decision on the merits of whether an action for mandamus *also* lies. This Supreme Court should not proceed beyond the party issue to preclude Relator from refiling the same claim against a different party. Relator is cognizant of Mr. Colon's attempt to "hit 2 targets with 1 stone".¹

Does the prosecuting attorney meet the standard of review to dismiss the case due to improper parties?

Case Caption-a Relevant Fact

Specifically, Relator did caption the original complaint for writ of mandamus to the attention of an individual judge, *i.e.*, administrative judge Gary Tyack for the Respondent court. It is relevant to note that Judge Tyack was also one of the three members of the panel in Case No. AP-467 {Exhibit A}.

Is the express caption sufficient, *i.e.*, "proof" enough (of Relator's intent of having Judge Tyack review and respond to the complaint) to pass the "naming of a proper officer"?

¹ Collateral *estoppel* and *res judicata* do not apply to a new case naming an entirely different party(ies) where the merits have not been previously addressed.

An Alternative Remedy that Addresses Relator's Intent and Respondent's Concern

In the interests of judicial economy to reach the merits of the elements for a writ of mandamus to be issued, *in the alternative*, Relator respectfully requests leave to join Judge Tyack, Judge French, and Judge Bryant in their official capacities as judges of the panel comprising the Tenth Appellate District Court in Case No. AP-467.

If dismissed on the basis of improper parties, and where the instant complaint did not reach the merits, Relator will have no alternative but to file a new original action where his claims are not precluded, collaterally or by *res judicata*, against entirely different parties.

This Court must first address the sufficiency of the parties before it can proceed to the merits of whether mandamus lies in this matter.

Wherein, there is no harm or delay to either party in permitting leave.

Legal Authorities Cited Do Not Appear Directly on Point

Interestingly, Mr. Colon, asserts the United States Supreme Court's legal authority of *Todd v. United States* (1895), 158 U.S. 278, 284 which decision is also cited in his 2 other examples. The U.S. Supreme Court in *Todd* concludes:

"Further discussion is unnecessary. As a preliminary examination before a commissioner cannot be considered a case pending in any court of the United States, it follows that the indictment is fatally defective and charges no offense against the laws of the United States."

The *Todd* decision holds that judicial power must be exercised by those cloaked with judicial authority, as opposed to other public officials, and in "a place which justice is judicially administered." *Todd, id.*

Relator believes that the *Todd* decision does not reach the sole issue of whether a court can or cannot be sued; but instead addresses whether the decision made by a state

official *who is not cloaked with proper judicial authority* can be used as the basis for a claim filed *against a court*.

Unless Relator missed the conclusion in *Todd*, this case is not on point and dismissal is not warranted for improper parties.

B. *Relator Meets the Elements Required for a Writ of Mandamus to Issue and in the alternative to Compel the Exercise of Discretion or to Correct a Gross Abuse of Discretion*

Should the Supreme Court dismiss based upon improper parties, this Court has no basis to address paragraph B in Respondent's Motion to Dismiss.

This is a case of first impression.

Relator has met the established requirements for a writ to be issued:

- (1) Relator has a clear legal right to the relief prayed for;
- (2) Respondents have a clear legal duty to perform the acts requested;
- (3) Relator has no plain and adequate remedy in the ordinary course of law.

Cf. State ex rel. Manson v. Morris, 66 Ohio St.3d 440, 441 (1993).

Additionally, a writ may be issued to compel the performance of ministerial act, to compel the exercise of discretion, or to correct a gross abuse of discretion. *Truman v. Village of Clay Center*, 160 Ohio App. 3d 78 (2005).

(1) Relator has properly pled the elements for a writ of mandamus to issue and specifically points this Court to paragraphs 31, 32, 33, 34, 35, and 36 of the Complaint.

-Realtor has a clear legal right for Respondent to impartially adjudicate his appeal where Relator was *not* subject to the express language in R.C. § 2323.52 (F)(2) in the *May 8, 2009 Final Appealable Order* requiring Relator to file a motion for leave to proceed in an appeal.

(2) Relator has a clear legal right for Respondent to impartially adjudicate his appeal where Realtor was denied leave “for not demonstrating reasonable grounds for this appeal pursuant to R.C. 2323.52” {EXHIBIT B} where Relator is not required to file for leave.

In the alternative, Realtor has a clear legal right for Respondent to permit Relator to perfect his appeal where there are plain errors of law, judicial misconduct, impropriety, and evidence of bias in the final appealable order in Franklin County Court of Common Pleas Case No. 07CVH-10-14634. The *only* way to address the merits is to brief the matters raised on appeal.

Without leave to proceed to brief the merits of the trial court errors, the appellate court cannot delve into a situation where a trial court has exhibited bias and judicial misconduct, and which trial court is therefore, predisposed toward a litigant. The denial of a right to proceed is a denial of access in an appeal because there is no way to address the issues without permission to brief the issues.

Summarizing Relator’s grounds, *i.e.*, Richard Sheward’s exhibited bias and judicial misconduct, the Respondent’s arbitrary refusal to permit leave denies Relator’s *reasonable* grounds to brief his appeal. Relator should have the opportunity to appeal a trial court’s vexatious designation, which decision in and of itself, should be reasonable grounds for appeal. Whether the appeal has merit or not is subject to determination by the appellate court, but that is not the issue before this Supreme Court.

The issue in this case is the right to appeal a trial court’s decision, and in Relator’s case a predisposed trial court’s decision.

The Tenth Appellate Court’s June 11, 2009 Journal Entry of Dismissal in AP-467 {Exhibit B} merely stated that Appellant did not demonstrate reasonable grounds for the appeal-nothing more. However, Relator asked for leave to appeal so that he could

address trial court judge Sheward's recorded bias and abuse of his discretion when he designated Relator a vexatious litigator in Case No. 07 CVH 10-14634, which judicial misconduct is substantiated in the filed transcript of the proceedings.

There is nothing unreasonable about Relator requesting leave to review Richard Sheward's express statements on the record. Relator was entitled to a neutral arbiter, as all litigants are entitled.

However, where Respondent refused leave to address the issues raised by Relator in the motion for leave, there is no possible way to discern *the merits* of Relator's assignment of errors.

There is no access to the Appellate Court under this scenario-the exact predicament that Relator is in.

(3) Where there is no plain and adequate remedy in the ordinary course of law {*State ex rel. Manson v. Morris*, 66 Ohio St.3d 440, 441 (1993)}. Relator has no remedy in the ordinary course of law other than the extraordinary writ of mandamus. *Mayer, id.* @ 17.

Mr. Colon is also counsel in the collateral Case No. 09-2127 pending before this Court. Relator requests that this Court take judicial notice that Mr. Colon asserts *Mayer v. Bristow*, 91 Ohio St. 3d 3, (2000), 2000-Ohio-109 was held to be constitutional in toto by this Court in his Answer of Respondents.

With that said, Relator was denied leave to proceed with the appeal in Case No. AP-467. In *Mayer, id.* this Supreme Court held: "an original action in mandamus is an appropriate means by which a vexatious litigator could effectively challenge arbitrary denials of leave." See *State ex rel. Glass, Molders, Pottery, Plastics, & Allied Workers Internatl. Union, Local 333, AFL-CIO v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 157,159.

Relator was arbitrarily denied leave by Respondent. In plain language, this Supreme Court held that mandamus is appropriate to challenge denials of leave.

Finally, Relator is not attempting to dictate judicial discretion-it is the abuse of discretion that Relator is entitled for a writ to be issued under *Truman v. Village of Clay Center*, 160 Ohio App. 3d 78 (2005).

Conclusion

Relator was not subject to file for leave to appeal pursuant to the order in Franklin County Court of Common Pleas Case No. 07CVH-10-14634 where the trial court did not include R.C. § 2323.52(F)(2) in Richard Sheward's final appealable order {Exhibit A}.

However, where Relator was designated a vexatious litigator by the trial court, Respondent required Relator to file for leave to file an appeal, which leave was arbitrarily denied {Exhibit B}.

Relator meets the elements of *State ex rel. Manson v. Morris*, 66 Ohio St.3d 440, 441 (1993) for a Writ of Mandamus to issue.

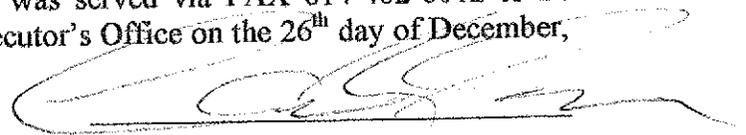
Respectfully submitted,



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Certificate of Service

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra to Respondent's Motion to Dismiss was served via FAX 614-462-6012 to R. Matthew Colon of the Franklin County Prosecutor's Office on the 26th day of December, 2009.



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