

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.)
AMERICAN GREETINGS)
CORPORATION, et al.,)
)
Relators,)
)
vs.)
)
JUDGE NANCY A. FUERST, et al.,)
)
Respondents.)

Case No. 2010-0582

ORIGINAL ACTION IN
PROHIBITION AND MANDAMUS

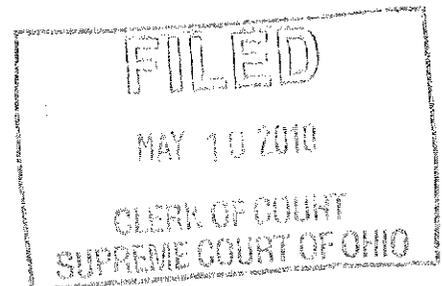
RELATORS' OPPOSITION TO
INTERVENOR'S MOTION TO DISMISS

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INTRODUCTION

Unable to seriously defend the trial court's decision below, Intervenor, a Massachusetts pension fund (the "Pension Fund"), has filed a motion to dismiss based on meritless procedural arguments, a mischaracterization of this Court's decision in *Carr*,¹ and a belittling of this Court's Commercial Rules,² which it dismissively refers to as mere "guidelines" and "housekeeping" provisions. The Commercial Rules are far more than that. They represent a sea change in the way business litigation is handled in Ohio.

Given the significance of the Commercial Rules, and to ensure predictability, certainty, and fairness, this Court mandated the transfer of certain types of cases to the Commercial Docket. Under these Rules, derivative actions like this one "shall" be transferred to the Commercial Docket. (Temp. Sup. R. 1.03(A)). This language does not advise trial courts to transfer this type of case—it commands it.

Faced with this mandatory language, the Pension Fund offers three baseless arguments in its motion to dismiss:

First, the Pension Fund asserts that "there is no dispute that the Cuyahoga Court of Common Pleas has the power to hear this case." (Intervenor's Mem. at 1). The Pension Fund, however, misses the point. Judges within the common pleas court cannot exceed their authority. Only Commercial Docket Judges have authority to adjudicate certain classes of business disputes.

¹ *State ex rel. Carr v. McDonnell*, 184 Ohio App.3d 373, 2009-Ohio-2488, affirmed 124 Ohio St.3d 62, 2009-Ohio-6165 ("*Carr*").

² Temporary Rules of Superintendence 1.01–1.11 are hereinafter referred to in text as the "Commercial Rules." Intervenor's Memorandum in Support of Motion to Dismiss is referred to as "Intervenor's Memorandum" or "Intervenor's Mem." Relators' Memorandum in Support of Writs of Prohibition and Mandamus (filed on April 2, 2010) is referred to as "Relators' Memorandum" or "Relators' Mem."

Thus, non-Commercial Docket Judges who fail to comply with the mandatory transfer provisions and their clear legal duty exceed their authority.

While acknowledging the impact of the mandatory transfer provisions on non-Commercial Docket Judges' authority, the Pension Fund contends that Relators are merely complaining that the Derivative Action was "improperly assigned," as if it was something within the trial court's discretion. It was not. Transfer is mandatory even where the parties do not request it. (Temp. Sup. R. 1.04(B)(3) ("[T]he judge shall sua sponte request the administrative judge to transfer the case to the commercial docket.")).

Second, the Pension Fund argues that Relators have an adequate alternative remedy. This is a puzzling argument, since the Pension Fund admits that Relators have no further right of review. (Intervenor's Mem. at 8). Temporary Rule 1.04(D)(2) provides that "[t]he decision of the administrative judge as to the transfer of a case under division (C) of this rule is final and *not appealable*." (Emphasis added). The Pension Fund is essentially arguing that a trial judge's and administrative judge's patently incorrect decision not to transfer a case to the Commercial Docket cannot be corrected. The Commercial Docket cannot be so easily cast aside.

Third, and finally, the Pension Fund tries to defend the refusal to transfer the Derivative Action by claiming that it falls within the "labor organization" exception. But the Commercial Rules unambiguously limit the labor organization exception to cases where a party's status as a labor organization relates to the "gravamen of the case." (Temp. R. 1.03(B)(7)). The Pension Fund never explains to this Court (nor did it explain to the trial court) how its supposed status as a "labor organization" has anything whatsoever to do with this case, much less how it relates to the "gravamen" of it. Besides that, the Pension Fund put forth no competent or credible evidence that it even is a "labor organization."

In sum, Relators' Complaint presents an important opportunity for this Court to clarify the Commercial Rules, provide guidance in future cases, and vindicate the directive that derivative actions such as this one "shall" be transferred to the Commercial Docket. For the reasons set forth more fully below and in Relators' Memorandum, Relators respectfully request that the Court deny the Pension Fund's motion to dismiss.

LAW AND ARGUMENT

A. Respondents Had a Clear Legal Duty to Transfer the Derivative Action to the Commercial Docket.

The Pension Fund first argues that Relators' Complaint does not relate to the authority of the non-Commercial Docket Judge to hear the case but, instead, only to whether a case was "improperly assigned." However, the provision requiring transfer of a case to the Commercial Docket is mandatory ("shall") and thus removes the authority of a non-Commercial Docket Judge to adjudicate the dispute. (Temp.Sup.R. 1.04(B)(3); *Carr*, 184 Ohio App.3d at 380, 2009-Ohio-2488 ("The facts . . . demonstrate that the transfer of *Acacia II*, to the commercial docket was mandated by Temp.Sup.R. 1.04(B)(3), regardless of the failure of any party to file a timely request for transfer.")).³ Writs of prohibition and mandamus are designed for cases like this one—they are equitable tools to compel action where existing duties have been ignored and to forbid judicial action where judicial authority is absent. (*See* Relators' Mem. at 4-5; *see also State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348, at paragraphs one and two of the syllabus (stating that a writ of mandamus is appropriate to compel an officer to act where the respondent

³ The Pension Fund regrettably tries to cast aspersions on Relators, claiming, among other things, that they have delayed the underlying case. (Intervenor's Mem. at 4). Relators cannot be faulted for removing a case to federal court (which was based on the well-settled principle that federal courts have jurisdiction where state-law claims substantially depend on, or require the interpretation of, federal law). When the case was remanded, Relators promptly filed a motion to transfer to the Commercial Docket, as the Commercial Rules require. There was no delay.

had a clear legal duty to act); *State ex rel. Haylett v. Bur. of Workers' Comp.*, 87 Ohio St.3d 325, 334, 1999-Ohio-134 (stating that the writ of prohibition is appropriate to prevent the exercise of judicial power when it is unauthorized by law)).

To manufacture support for its position, the Pension Fund cites, but repeatedly misconstrues, this Court's decision in *Carr*. (Intervenor's Mem. at 1, 5-8). Unlike in this case, *Carr* involved a derivative action *that was properly transferred to the Commercial Docket*. Both the Court of Appeals and this Court discussed the Commercial Rules in terms of their jurisdictional significance. *See Carr*, 2009-Ohio-2488, at ¶ 18 ("The facts . . . demonstrate that the transfer of *Acacia II*, to the commercial docket was mandated by Temp.Sup.R. 1.04(B)(3) *Carr* has failed to demonstrate that Judge John P. O'Donnell is patently and unambiguously without jurisdiction."⁴ Ultimately, both the Court of Appeals and this Court concluded that the Commercial Docket Judge was not without jurisdiction and thus had authority to hear the dispute.⁵ Thus, if anything, *Carr* undermines, rather than supports, the Pension Fund's position.

⁴ The Pension Fund's reliance on *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Road, L.L.C.* (Franklin C.P.), 151 Ohio Misc. 2d 33, 2009-Ohio-2129 ("*GLIC*"), is also misplaced. There, a non-Commercial Docket Judge granted judgment on a cognovit note. "As is customary with cognovit-note cases, the judgment was entered on the same day that the case was filed." *Id.* at ¶ 2. *The case was then promptly transferred to the Commercial Docket*, a fact the Pension Fund tellingly omits. *Id.* at ¶ 3. Furthermore, the language that the Pension Fund quotes regarding the jurisdictional effect of the Commercial Rules ("The temporary rules of superintendence do not demand that commercial cases only be decided by a commercial judge") is overbroad. The Commercial Rules unquestionably demand that only Commercial Docket Judges decide certain categories of commercial, including "derivative action[s]" involving the liability and obligations of officers and directors. (Temp. Sup. R. 1.03(A)). *GLIC* demonstrates the need for clarification from this Court.

⁵ The Pension Fund further ignores that respondents in *Carr* (several Common Pleas Court judges, including the acting administrative judge) extensively argued in this Court that transfer to the Commercial Docket was not discretionary. (Merit Brief of Respondents-Appellees in *Carr*, at 10, 13, available at <http://www.sconet.state.oh.us/tempx/650746.pdf> (last visited May 10, 2010)).

Nor is there any merit to the Pension Fund's assertion that writs of mandamus must be based on a narrow concept of "jurisdiction." Ohio law is clear that writs are warranted based upon a broader concept of judicial authority. *See State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, at ¶ 27 (granting a writ of prohibition where the Presiding Judge of the Cuyahoga County Court of Common Pleas had transferred a case where the Rules of Superintendence gave only the Chief Justice the power to do so); *see also State ex rel. Lomaz v. Court of Common Pleas* (1988), 36 Ohio St.3d 209, 212 ("Proper assignment, like jurisdiction over the subject matter, is required for the valid exercise of judicial power."). Even assigned judges cannot exceed their authority. Just as in some situations the Administrative Judge has authority to transfer a case to another judge, this Court has authority—through the Commercial Rules—to compel transfer away from the originally assigned judge.

Trial courts, moreover, are obligated to comply with the Superintendence Rules. (*See Sup. R. 77* (stating that the failure to comply with the Rules of Superintendence "may result in sanctions as the court may direct."); *Berger v. Berger* (Cuyahoga App. 1981), 3 Ohio App.3d 125, 128 (stating that Supp. Rule 36, governing transfer of cases generally, "should not be read to mean that . . . the original assigned judge has authority to take action under any circumstances.") (citing former analogous provision), certiorari denied (1982), 459 U.S. 834, overruled on other grounds, 106 Ohio St.3d 30, 34, 2005-Ohio-3559, at ¶ 28); *City of Columbus v. Viereck* (Cuyahoga App.), 1978 Ohio App. LEXIS 8583, at *7 (stating that the Rules of Superintendence are "mandatory and must be complied with").

Even before this Court made the Commercial Rules effective, violating mandatory, versus discretionary, provisions of the Rules of Superintendence created a sufficient lack of judicial authority to warrant writs of prohibition and mandamus. *See State ex rel. Dispatch*

Printing Co. v. Greer, 114 Ohio St.3d 511, 2007-Ohio-4643 (granting writ of prohibition to prevent court from entering future orders without allowing parties to have an evidentiary hearing as required by Rules of Superintendence); *State ex rel. Buck v. Maloney*, 102 Ohio St.3d 250, 2004-Ohio-2590 (granting writ of prohibition and holding that Sup.R. 78(D) restricted a probate court's jurisdiction to bar attorneys to a particular case); *Smith v. Lucas Cty. Common Pleas Court*, Lucas App. No. L-05-1124, 2005-Ohio-1885, at ¶¶ 3, 5 (“With respect to a request for continuance based upon a conflict of trial date assignments, however, the Rules of Superintendence for the Courts of Ohio are mandatory. . . . Accordingly, we hereby grant the petition for writ of mandamus.”); *Foster v. Friedland*, Cuyahoga App. No. 91888, 2008-Ohio-6505 (granting a writ of mandamus and holding that a mandatory provision of the Rules of Superintendence was a clear legal duty); *Selway v. Court of Common Pleas Stark Cty.*, Stark App. No. 2007CA00213, 2007-Ohio-4566 (granting a writ of mandamus where the trial court had failed to fulfill its duty under mandatory Rules of Superintendence).

As prohibition and mandamus have been available for failures to comply with other mandatory Rules of Superintendence, they are certainly available for failures to comply with the mandatory Commercial Rules, which constitute an important subset of the Rules of Superintendence.

Finally, although Intervenors highlight the unremarkable proposition that common pleas courts have general jurisdiction, it is equally true that divisional judges within courts of common pleas cannot exceed their jurisdictional authority. *See State ex rel. McMinn v. Whitfield* (1986), 27 Ohio St.3d 4. Just as only juvenile court judges within the common pleas court can adjudicate certain classes of cases (*see id.*), this Court has mandated that only Commercial Docket Judges within the common pleas court can adjudicate certain classes of business cases.

B. If The Writs Are Not Granted, Relators Will Be Damaged In A Way That is Not Correctable In Any Subsequent Appeal.

In claiming that relators have an adequate remedy, interverors overlook that an alternate remedy “must be complete, beneficial, and speedy.” *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, at ¶ 16 (internal quotation marks and citation omitted). They also overlook that the “question is whether the remedy is adequate under the circumstances.” *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St. 3d 441, 2008-Ohio-1261, at ¶ 19. An “adequate” remedy does not exist here. The Commercial Rules state that “[t]he decision of the administrative judge as to the transfer of a case under division (C) of this rule is final and *not appealable*.” (Temp.Sup.R. 1.04(D)(2) (emphasis added)). Without the right to meaningfully appeal Respondents’ unreasoned and clearly erroneous decision not to transfer the underlying Derivative Action, writs of mandamus and prohibition are both necessary and proper.

More fundamentally, because the trial judge lacks authority to hear the Derivative Action, Ohio law does not even require that Relators demonstrate that they are without an adequate remedy at law. *State ex rel. Hunter v. Summit Cty. Human Resource Comm.*, 81 Ohio St.3d 450, 452, 1998-Ohio-614 (“If, however, the tribunal patently and unambiguously lacks jurisdiction over the matter, prohibition will lie to prevent the unauthorized exercise of jurisdiction.”). Given the equitable nature of writs, a court can grant a writ even where an adequate remedy exists (even though here no such remedy does exist). *See State ex rel. Tempero v. Colopy* (1962), 173 Ohio St. 122, 123 (“This court in the exercise of its discretion will usually refuse to allow a writ of prohibition or of mandamus where the relator has an adequate remedy in the ordinary course of the law. However, it has the power to, and may in the exercise of its discretion, issue such a writ in such an instance.”).

Relying on a few sound-bites from *Carr*, the Pension Fund makes the sweeping (and incorrect) suggestion that writs are unavailable in cases concerning the Commercial Docket. (See Intervenor’s Mem. at 8). The key holding of *Carr* was that the trial judge did not lack jurisdiction *precisely because* the case was properly transferred to the Commercial Docket. The denial of writs in that case (where the trial judge clearly had legal authority) does not preclude the granting of writs in this case (where the trial judge clearly *lacks* legal authority). Although this Court stated in *Carr* that where a court has judicial authority, errors may be brought on direct appeal, it never suggested that direct appeal could remedy a lack of judicial authority in the court below. The right to appeal from particular decisions at trial is inadequate when the case should not have been before a non-Commercial Judge in the first place.

And while this Court has occasionally held that writs are unavailable in cases challenging an administrative judge’s discretionary transfer of a case, *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, those cases are inapposite. In *Berger*, for example, the relator was unable to demonstrate that there had actually been an improper assignment. The Commercial Rules, by contrast, mandate transfer. Furthermore, “[p]roper assignment, like jurisdiction over the subject matter, is required for the valid exercise of judicial power.” *State ex rel. Lomaz* (1988), 36 Ohio St.3d 209, 212.

C. The Pension Fund’s “Labor Organization” Argument Is Unsupported, Wrong, and Would Lead to Absurd Inconsistencies

Finally, the Pension Fund makes a fleeting attempt to defend the trial court’s failure to transfer the Derivative Action to the commercial docket. Relators have already explained why the trial judge’s decision violated his clear legal duty. (See Relators’ Mem. at 8–12). Relators do note that, in addition to ignoring the plain language in Commercial Rule 1.03, the Pension Fund’s argument leads to absurd inconsistencies; namely, a derivative action with the *same* facts

against the *same* defendants brought on behalf of the *same* corporation by an *individual* shareholder would be treated differently than one brought by a pension fund claiming to be a labor organization. (*See also* Relators’ Mem. at 10-11).

Although the Pension Fund acknowledges the well-settled principle that “[a]ll words must be given effect” (Intervenor’s Mem. at 10), it proceeds to ignore it. The so-called “labor organization” exception within the Commercial Rules is preceded by the following language: “the gravamen of the case relates to any of the following” (Temp.Sup.R. 1.03(B)). This language unambiguously limits the labor organization exception to cases where a party’s status as a labor organization actually relates to the gravamen of the action.⁶ While the Pension Fund claims that its (unsupported) status as a “labor organization” is relevant to the Derivative Action (Intervenor’s Mem. at 10–11), it never explains how that is so, because it cannot.⁷ In fact, as demonstrated in detail in Relators’ Memorandum, the Pension Fund’s status is irrelevant; the real plaintiff in interest is American Greetings and the claims are brought derivatively on its behalf. (Intervenor’s Mem. at 10-11; *see also* Relators’ Mem. at 10). Accordingly, in derivative actions, there is no basis under the Commercial Rules or otherwise to treat an out-of-state Pension Fund shareholder differently than an individual shareholder. Transfer should depend on the substance of the claims, not the caption of the complaint.

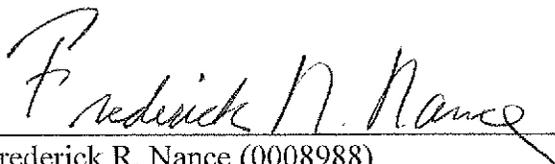
⁶ There are numerous cases where the presence of a labor organization as a party relates to the substance of the case—the “gravamen.” For example, collective bargaining agreements between unions and employers routinely lead to litigation.

⁷ As demonstrated in Relators’ Memorandum, the Pension Fund did not put forth any competent or credible evidence that it qualified as a labor organization within the meaning of the Commercial Rules. (Relators’ Mem. at 12-13).

CONCLUSION

Deciding this case will speed the resolution of future cases by clarifying the meaning of the Commercial Rules as they apply to derivative actions, and it will promote the intent of the Commercial Docket: fairness, predictability and efficiency. Relators respectfully urge this Court to deny Intervenor's Motion to Dismiss and grant Relators' request for writs of prohibition and mandamus.

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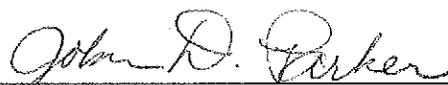
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May 10, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Relators' Memorandum in Opposition to Intervenor's Motion to Dismiss was served by electronic mail this 10th day of May 2010 upon the following:

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