

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

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RELATORS' OPPOSITION TO  
RESPONDENTS' MOTION TO DISMISS

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
LAW AND ARGUMENT .....	2
A.    Under the Commercial Rules, Transfer of the Derivative Action Was Mandatory, Not Discretionary. ....	2
B.    Whether the Court of Common Pleas Is a Court of General Jurisdiction Is Irrelevant to Whether Respondents Failed to Comply With a Mandatory Rule.....	4
CONCLUSION.....	8
CERTIFICATE OF SERVICE .....	10

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Dzina v. Celebrezze</i> 108 Ohio St.3d 385, 2006-Ohio-1195.....	6
<i>Foster v. Friedland</i> Cuyahoga App. No. 91888, 2008-Ohio-6505.....	6
<i>GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Rd., L.L.C.</i> (Franklin C.P.), 151 Ohio Misc.2d 33, 2009-Ohio-2129.....	6
<i>Lisboa v. Karner</i> (Cuyahoga App.), 167 Ohio App.3d 359, 2006-Ohio-3024.....	4
<i>Royal Elec. Constr. Corp. v. Ohio State Univ.</i> (1995), 73 Ohio St.3d 110.....	3
<i>Selway v. Court of Common Pleas Stark Cty.</i> Stark App. No. 2007CA00213, 2007-Ohio-4566.....	6
<i>Smith v. Lucas Cty. Common Pleas Court</i> Lucas App. No. L-05-1124, 2005-Ohio-1885.....	6
<i>State ex rel. Buck v. Maloney</i> 102 Ohio St.3d 250, 2004-Ohio-2590.....	5
<i>State ex rel. Carr v. McDonnell</i> (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488, affirmed 124 Ohio St.3d 62, 2009-Ohio-6165.....	2
<i>State ex rel. Carr v. McDonnell</i> 124 Ohio St.3d 62, 2009-Ohio-6165.....	2
<i>State ex rel. Dispatch Printing Co. v. Greer</i> 114 Ohio St.3d 511, 2007-Ohio-4643.....	5
<i>State ex rel. Dramer v. Mason</i> 115 Ohio St.3d 190, 2007-Ohio-4789.....	3
<i>State ex rel. J.K. &amp; E. Auto Wrecking v. Trumbo</i> (Cuyahoga App., June 11, 1991), 1991 Ohio App. LEXIS 2760.....	5

<i>State ex rel. Kline v. Carroll</i> 96 Ohio St.3d 404, 2002-Ohio-4849.....	5
<i>State ex rel. Law Office Pub. Defender v. Rosencrans</i> (2006), 111 Ohio St.3d 338.....	3
<i>State ex rel. Lomaz v. Court of Common Pleas</i> (1988), 36 Ohio St.3d 209 .....	4, 5
<i>State ex rel. McMinn v. Whitfield</i> (1986), 27 Ohio St.3d 4.....	4
<i>State ex rel. Nalls v. Russo</i> 96 Ohio St.3d 410, 2002-Ohio-4907.....	6
<b><u>Commercial Rules</u></b>	
Temp. Sup. R. 1.03(A)(4) .....	5
Temp. Sup. R. 1.04(B)(3) .....	2
Temp. Sup. R. 1.04(D)(2) .....	8
<b><u>Other</u></b>	
Merit Brief of Respondents-Appellees in <i>State ex rel. Carr v. McDonnell</i> , available at <a href="http://www.sconet.state.oh.us/tempx/650746.pdf">http://www.sconet.state.oh.us/tempx/650746.pdf</a> .....	4

## INTRODUCTION<sup>1</sup>

Despite the Commercial Rules' mandate that "derivative action[s]" like this one "shall" be transferred to a Commercial-Docket Judge, the Trial Judge denied Relators' motion to transfer in a single-sentence judgment entry, which was followed by a single-sentence affirmance by the Administrative Judge. Now, before this Court, Respondents claim that it is "unnecessary" for them to justify their decisions.<sup>2</sup> In fact, there is no justification for failing to transfer the Derivative Action. The Commercial Rules, and Respondents' duty to comply with them, are far too clear.

In seeking dismissal, Respondents do little more than repeat the arguments asserted by the prospective Intervenor. They emphasize, for example, the elementary proposition that courts of common pleas have general jurisdiction, yet ignore the equally elementary proposition that judges within courts of common pleas cannot overstep their judicial authority, as Respondents did here. They similarly overlook that this Court and others have repeatedly held that the failure to comply with *mandatory* rules (including Rules of Superintendence) can—and should—be corrected through a writ of prohibition.

Although Respondents devote little more than a page to addressing mandamus, they acknowledge that such relief is appropriate where a judge violates a legal duty, which is exactly what occurred here. More importantly, Respondents' apparent belief that transferring cases like this one to the Commercial Docket is a matter of "judicial discretion"<sup>3</sup> evidences their fundamental misunderstanding of their duty under the Commercial Rules. The plain language of

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<sup>1</sup> Respondents' arguments significantly overlap those of the proposed Intervenor. Accordingly, Relators incorporate by reference their Opposition to Intervenor's Motion to Dismiss filed on May 10, 2010.

<sup>2</sup> (Respondents' Mem. at 14).

<sup>3</sup> (*Id.* at 16).

those Rules, and the decision in *Carr*,<sup>4</sup> leave no doubt that transfer was *mandatory*, not discretionary. Indeed, Common Pleas Court Judges Nancy McDonnell, Eileen Gallagher, and John O'Donnell recently argued before this Court in *Carr* that transfer of a derivative action to the Commercial Docket “was *not* a matter of judicial discretion.” (Emphasis added). They were right.

For the reasons set forth below, in Respondents’ Memorandum in Opposition to Intervenor’s Motion to Dismiss (filed on May 10, 2010) (“5/10/10 Relators’ Opp’n Mem.”), and in Relators’ Memorandum in Support of Writs of Prohibition and Mandamus (filed on April 2, 2010) (“4/2/10 Relators’ Mem.”), Relators respectfully request that this Court deny Respondents’ motion to dismiss and grant Relators’ request for writs of prohibition and/or mandamus.

### LAW AND ARGUMENT<sup>5</sup>

#### **A. Under the Commercial Rules, Transfer of the Derivative Action Was Mandatory, Not Discretionary.**

Respondents are generally correct that “mandamus cannot be used to control judicial discretion,” but they are clearly wrong that Relators are attempting to do so. (Respondents’ Mem. at 16). To promote uniformity, predictability, and fairness, this Court made the Commercial Rules mandatory, not discretionary, and Relators are simply asking this Court to compel Respondents to comply with their legal duty. (See Temp.Sup.R. 1.04(B)(3) (“If the gravamen of the case relates to any of the topics set forth in division (A) of Temporary Rule 1.03 . . . the judge shall sua sponte request the administrative judge to transfer the case to the commercial docket.”); *Carr* (Cuyahoga App.), 184 Ohio App.3d 373, 2009-Ohio-2488, at ¶ 18 (stating that “transfer . . . was mandated by

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<sup>4</sup> *State ex rel. Carr v. McDonnell*, 184 Ohio App.3d 373, 2009-Ohio-2488, affirmed 124 Ohio St.3d 62, 2009-Ohio-6165.

<sup>5</sup> Relators set forth the facts/background in their 4/2/10 Memorandum. (See 4/2/10 Mem. at 2–4).

Temp.Sup.R. 1.04(B)(3), regardless of the failure of any party to file a timely request for transfer”); 4/2/10 Relators’ Mem. at 7–9; 5/10/10 Relators’ Opp’n Mem. at 3–6). Respondents themselves recognize that mandamus is appropriate “to compel the performance of a present existing duty as to which there is a default.” (Respondents’ Mem. at 15).

There is nothing discretionary in the word “shall.” “[T]he word ‘shall’ establishes a mandatory duty.” *State ex rel. Law Office Pub. Defender v. Rosencrans* (2006), 111 Ohio St.3d 338, 344 (internal quotation marks and citation omitted); *see also Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 115 (stating that the use of the word “shall” eliminates discretion). In urging the Court to deny mandamus relief, Respondents never cite, much less discuss, any Commercial Rule, relying instead on wholly inapposite cases like *State ex rel. Dramer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789. (Respondents’ Mem. at 16). Because trial courts have broad discretion over discovery matters, the Court in *Dramer* refused to issue a writ of mandamus ordering a prosecutor to produce documents. *Id.* at ¶¶ 12-13 (stating that trial judges have extensive discretion over pretrial discovery). In sharp contrast to *Dramer*, this case does not involve discretionary pretrial discovery decisions, but rather a mandatory transfer duty under the Commercial Rules.

Furthermore, as discussed in the brief submitted by the amicus curiae, the Greater Cleveland Partnership, three Cuyahoga County Court of Common Pleas judges (including the then acting Administrative Judge) recently argued in *Carr* that the transfer provisions within the Commercial Rules were mandatory. Contrary to Respondents’ argument here that Relators are “attempting to control judicial discretion,” respondents in *Carr* argued the opposite—that the transfer of the derivative action to the commercial docket “was *not* a matter of judicial discretion.”

(Merit Br. of Respondents-Appellees, at 11 (emphasis added)).<sup>6</sup> They further emphasized that transfer “was *required* by operation of the Temporary Rules of Superintendence. . . . [The case] *had to be transferred to the commercial docket*. . . .The Temporary Rules are written so as to assure that commercial cases are assigned to trained commercial docket judges. . . . [T]ransfer to the Court of Common Pleas’ commercial docket pursuant to Sup. Temp. R. 1.03 is an instance where transfer of the case from the original assigned judge is not only expressly authorized but mandated.” (Merit Br. of Respondents-Appellees, at 10, 11, 15 (emphasis in original)).

Because Respondents failed to comply with their clear and mandatory legal duty under the Commercial Rules, and because Relators have no adequate remedy at law (i.e., one that is complete, beneficial, and speedy), a writ of mandamus compelling transfer is warranted.

**B. Whether the Court of Common Pleas Is a Court of General Jurisdiction Is Irrelevant to Whether Respondents Failed to Comply With a Mandatory Rule.**

Respondents spend most of their brief arguing that the Trial Judge had “basic statutory jurisdiction.” (Respondents’ Mem. at 9). But that argument misses the point. Even common pleas judges with “basic statutory jurisdiction” cannot extend their judicial authority beyond its bounds. *See State ex rel. McMinn v. Whitfield* (1986), 27 Ohio St.3d 4; *State ex rel. Lomaz v. Court of Common Pleas* (1988), 36 Ohio St.3d 209, 212 (granting a writ of prohibition where a case had been improperly transferred to a domestic relations judge because “[p]roper assignment, like jurisdiction over the subject matter, is required for the valid exercise of judicial power”); *see also Lisboa v. Karner* (Cuyahoga App.), 167 Ohio App.3d 359, 2006-Ohio-3024, at ¶ 13 (holding that the domestic relations division of the common pleas court did not have jurisdiction over non-domestic-relations or collateral issues and, because the court was “patently and unambiguously without jurisdiction,” granting a writ of prohibition); *State ex rel. J.K. & E. Auto*

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<sup>6</sup> Available at <http://www.sconet.state.oh.us/tempx/650746.pdf> (last visited May 10, 2010).

*Wrecking v. Trumbo* (Cuyahoga App., June 11, 1991), 1991 Ohio App. LEXIS 2760 (holding that the housing division of the municipal court had exclusive jurisdiction over the underlying cause of action to the exclusion of the general division and therefore granting writ of prohibition against the general division trial court).

Just as limits are placed on common pleas judges' divisional authority, this Court—through non-discretionary Commercial Rules—explicitly limited a non-Commercial Judge's authority to adjudicate certain classes of commercial cases, including a “derivative action[ ]” relating to the “rights, obligations, [and] liability . . . of an officer [or] director . . . of a business entity.” (Temp.Sup.R. 1.03(A)(4)).

Because judges may lack judicial authority despite having “basic statutory jurisdiction,” this Court has looked beyond general statutory jurisdiction when determining whether writs of prohibition are warranted. *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 that power only to the Chief Justice); *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.”). Accordingly, it is well established that violating mandatory Rules of Superintendence can, and should, warrant prohibition or mandamus, just as violating divisional authority would. *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).

Unsurprisingly, even many of the cases Respondents cite looked beyond the narrow confines of statutory jurisdiction. In *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, for example, this Court rejected a claim for prohibition where there was no lack of judicial authority. But after establishing that the magistrate and trial judges had statutory jurisdiction, the Court analyzed whether relators were correct that the trial judge had improperly entered a judgment. In other words, having basic statutory jurisdiction was insufficient. Similarly, in *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, prohibition was sought to prevent a domestic relations judge from ruling on a motion still pending after remand from the court of appeals. The Court did not merely consider whether the Domestic Relations Court (as a division of a common pleas court) had general statutory jurisdiction; it held that the trial court had jurisdiction over the motion under two rules of civil procedure.<sup>7</sup>

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<sup>7</sup> Respondents, like Intervenors, cite the common pleas court’s decision *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Rd., L.L.C.* (Franklin C.P.), 151 Ohio Misc.2d 33, 2009-Ohio-2129. But Respondents overlook that that case “was *formally transferred to . . . a commercial-docket judge*” (*id.* at ¶¶ 7, 8 (emphasis added))—like this case should have been. Thus, the judge complied with his legal obligation after rendering a decision on a cognovit note,

Respondents' flawed analysis originates from their misunderstanding of the *Carr* decisions. Although they cherry pick selected quotations from the opinions, Respondents fail to appreciate the significance of the fact that the underlying derivative action in *Carr* was transferred to the Commercial Docket. Respondents in *Carr* complied with their legal duty and properly exercised judicial authority. While Respondents try to characterize this case as "differing slightly from" *Carr* (because *Carr* was transferred to the Commercial Docket and this case was not),<sup>8</sup> that difference is anything but slight—it is dispositive. A writ of prohibition was inappropriate in *Carr* precisely because respondents complied with their legal duty and transferred the derivative action pursuant to the mandatory Commercial Rules. Consistent with *Carr*, a writ of prohibition and/or mandamus is appropriate here because Respondents did *not* comply with their legal duty and *refused* to transfer the Derivative Action pursuant to the Commercial Rules.

Finally, Respondents also assert that Realtors can raise their claim after judgment and therefore have an adequate remedy. (Respondents' Mem. at 16). But, as set forth in Relators' Opposition to Intervenor's Motion to Dismiss, given that the Trial Judge lacks authority to hear the Derivative Action and had a clear legal duty the transfer it, Ohio law does not require that Relators demonstrate that they are without an adequate remedy at law. (5/10/10 Relators' Opp'n Mem., at 7-8). Furthermore, Respondents never explain how an appeal after final judgment

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which, significantly, allows for an immediate confession of judgment. Nothing in the Commercial Rules prevent a non-Commercial Docket judge from merely entering judgment where the defendant confesses judgment and waives defenses. Furthermore, the court's analysis of the jurisdictional significance of the Commercial Rules flowed from the flawed premise that the "temporary rules of superintendence do not demand that commercial cases only be decided by a commercial judge." *Id.* at ¶ 6. In fact, the Commercial Rules *do* demand that certain classes of commercial cases only be decided by Commercial-Docket judges. Additionally, in framing the Rules of Superintendence as "housekeeping rules," the court relied on a criminal case where the defendant sought discharge of a verdict based upon a provision of the Rules of Superintendence. *Id.* at ¶ 7. Here, Relators are not seeking dismissal of the case, but merely transfer pursuant to mandatory rules impacting the trial court's authority.

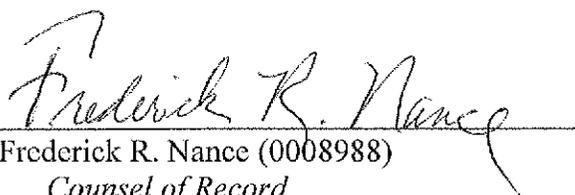
<sup>8</sup> (Respondents' Mem. at 13 (emphasis added)).

could conceivably provide an adequate remedy under these circumstances. (*See id.*) In fact, Relators cannot appeal the decisions to the Court of Appeals. (Temp.Sup.R. 1.04(D)(2)).<sup>9</sup> Thus, the time to rectify the clear errors below—indeed, the *only* time to rectify them in any meaningful way—is now.

### CONCLUSION

Relators respectfully urge this Court to deny Respondents' motion to dismiss and grant Relators' request for writs of prohibition and mandamus.

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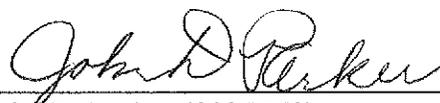
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<sup>9</sup> Additionally, Respondents are incorrect insofar as they suggest that prohibition is not about judicial authority, which is the keystone for jurisdiction. Cases cited by Respondents holding that prohibition was improper often involved judicial discretion. Therefore, judicial authority existed. *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, at ¶ 11 (prohibition improper because courts have broad discretion over discovery).

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May 17, 2010

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Relators' Memorandum in Opposition to Respondents' Motion to Dismiss was served by electronic mail this 17th day of May 2010 upon the following:

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