

IN THE SUPREME COURT OF OHIO

Case Number 10-1624

William F. Chinnock
8238 Sugarloaf Road
Boulder, Colorado 80302,
Relator

vs.

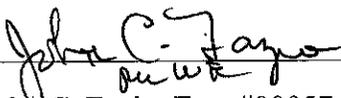
MEMORANDUM OF LAW IN SUPPORT
OF ISSUANCE OF WRIT OF MANDAMUS

Avon Lake Municipal Court
and Judge Darrell A. Bilancini
32885 Walker Road
Avon Lake, Ohio 44012,
Respondents

FILED
SEP 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

NOW Comes Relator who respectfully submits his Memorandum of Law in Support of Issuance of Writ of Mandamus, praying for an Order from this High Court directing Respondents to exercise the forcible entry and detainer jurisdiction conferred upon them by the Ohio legislature and Constitutional Due Process Guarantees under the Ohio Constitution and United States Constitution.

Respectfully submitted,



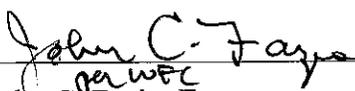
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Certificate of Service

The Clerk of the Ohio Supreme Court is requested to serve copies of this document upon Respondents Avon Lake Municipal Court and Judge Darrell A. Bilancini separately at 32885 Walker Road, Avon Lake, Ohio 44012 by its usual method and/or by U.S. Certified Mail with return receipt requested.



John C. Fazio, Esq.

TABLE OF CONTENTS

MEMORANDUM OF LAW IN SUPPORT OF
ISSUANCE OF COMPLAINT FOR WRIT OF MANDAMUS 1

ISSUE: In Response to Relator’s Demands that Respondents Avon Lake Municipal Court and Its Judge Exercise Their Forcible Detainer Jurisdiction Conferred Upon Them by the Ohio Legislature and State and Federal Constitutional Edicts, They Refused to Do So Upon the Basis that the Mere Existence of the Elective Remedy of Forfeiture in the Land Contract Statute and Land Contract Itself -- Even Though Relator Chose to Not Elect It -- Revokes the Legislative Edicts and Due Process Constitutional Guarantees Which Unequivocally Mandate that the Municipal Courts of Ohio Exercise Their Forcible Detainer Jurisdiction 1

REMEDY: Unless a Writ of Mandamus Issues to Compel Respondents to Exercise Their Forcible Detainer Jurisdiction Enacted for the Public Purpose of Preventing Violence Between Owners and Occupiers of Realty by Motivating Owners to Resort to the Law Alone Rather Than Seek to Recover Possession of Their Property by Force, Respondents’ Refusals to Exercise Their Forcible Detainer Jurisdiction Will Deny to Relator and Other Citizens Who Are Entitled to a Summary and Speedy Determination as to the Right of Possession of Their Private Property Their Legislative and Constitutional Due Process Rights Guaranteed to Them by the State and Federal Constitutions 1

I. Mandamus is the Proper Remedy to Compel Courts to Comply with Statutory and Constitutional Edicts to Exercise the Jurisdiction Conferred Upon Them by the Legislature 1

II. The Essential Elements of a Mandamus Action Are (A) Relator Has a Clear Legal Right to the Relief Sought; (B) Respondents Have a Clear Legal Duty to Perform the Act Requested; and (C) There is No Other Plain, Speedy, and Adequate Remedy Available 2

The “No Adequate Remedy” Element is Inapplicable if “the Issue Is One of Great Public Importance” 2

III. The Ohio Legislature by Multiple Legislative Enactments Has Unequivocally Conferred the Power and Duty to Exercise Forcible Detainer Jurisdiction upon the Municipal Courts of Ohio, Based Upon the Realization that Such Remedy Constitutes the Best Method to Prevent Violence Between Persons Who Claim the Right to Possession of Realty, by Motivating Owners of Property Who are Out of Possession to Resort to the Law Alone Rather Than Seek to Recover Possession of Their Property by Force 2

IV. The Paramount Feature of the Forcible Detainer Remedy is that It is a Summary and Speedy Remedy to Recover the Possession of Realty 4

V. Additional Key Features of the Forcible Detainer Remedy are (A) that It is a Cumulative Remedy, and (B) that It Involves Only the Right to Possession	4
VI. Fundamental Rules of Law Are Applicable to the Enactments of the Ohio Legislature which Mandate that Municipal Courts are Compelled to Exercise Forcible Detainer Jurisdiction, including: (1) The Ohio Legislature is Presumed to Say in a Statute What It Means and Means in a Statute What It Says; (2) Where the Language of a Statute is Clear and Unambiguous, It Neither Needs Nor Allows Any Interpretation to Determine Its Meaning; and (3) a Legal Presumption Exists that the Legislature Does Not Enact Legislation Which Produces Absurd Consequences	6
A. The Ohio Legislature is Presumed to Say in a Statute What It Means and Means in a Statute What It Says	6
B. Where the Language of a Statute is Clear and Unambiguous, It Neither Needs Nor Allows “Interpretation” to Determine Its Meaning	6
C. A Legal Presumption Exists that the Legislature Does Not Enact Legislation Which Produces Absurd Consequences	7
VII. Forcible Detainer Jurisdiction Conferred by the Ohio Legislature Upon the Municipal Courts of Ohio Has as Its Underlying Basis Fundamental Constitutional Guarantees Under the Ohio and United States Constitutions, Including (A) the Constitutional Guarantee that Private Property is Sacred and Unalienable in Our Free Society, (B) the Constitutional Mandate that for Every Wrong There is a Remedy, and (C) the Constitutional Due Process Guarantee that Every Man is Entitled to His Day in Court	8
A. An Underlying Basis of Forcible Detainer Legislation Is the Constitutional Guarantee that in Our Free Society Private Property Is Sacred and Unalienable	8
B. An Underlying Basis of Forcible Detainer Legislation is the Constitutional Guarantee that there is a Remedy for Every Wrong	9
C. An Underlying Basis of Forcible Legislation is the Constitutional Guarantee that Every Man is Entitled to His Day in Court	
VIII. Ohio’s Land Contract Statute Offers the Remedy of Forfeiture Which by Its Plain and Ordinary Language is an Elective Remedy. The Private Property Owner May Chose, But Cannot be Compelled, to Elect It Because He Is the Master of His Pleadings	11

IX-A. In Response to Relator’s *First* Demand, Respondents Refused to Exercise Their Forcible Detainer Jurisdiction Upon the Basis that the *Mere Existence in the Land Contract Itself* of the Elective Remedy of Forfeiture Revokes the Legislative and Constitutional Mandates Which Confer the Power and Duty on the Municipal Courts of Ohio to Exercise Their Forcible Detainer Jurisdiction -- Even Though Relator Chose to Not Elect It 12

IX-B. In Response to Relator’s *Second* Demand, Respondents Refused to Exercise Their Forcible Detainer Jurisdiction Upon the Basis that the *Mere Existence in the Land Contract Statute* of the Elective Remedy of Forfeiture Revokes the Legislative and Constitutional Mandates Which Confer the Power and Duty on the Municipal Courts of Ohio to Exercise Their Forcible Detainer Jurisdiction -- Even Though Relator Chose to Not Elect It 13

X. The Public Interest that is Served by Issuance of the Writ is that It Acts to Prevent Violence Between Parties Both Claiming the Right to Possession of Realty, and the Nature of the Wrong Which Would Result from Denial of the Writ is that It Would Constitute a Denial of the Legislative and Constitutional Due Process Rights Guaranteed by the Ohio and United States Constitutions 14

XI. No Plain, Speedy, and Adequate Remedy Exists Because an Appeal Lacks the Essential “Complete, Beneficial, and Speedy” Elements of an Adequate Remedy 14

XII. Courts Issue Writs of Mandamus Based Upon Equitable Considerations of (A) the Element of Time, (B) Public Policy, (C) Interests of Third Parties, (D) Nature of the Wrong or Injury Which Would Follow a Refusal to Issue the Writ, and (E) whether Granting the Writ Will Promote Substantial Justice. 15

XIII. Summary and Conclusion – The Avon Lake Municipal Court Not Only Has the Right But Also Has the Duty to Exercise Its Jurisdiction and Render a Decision on the Merits in the Instant Case for Forcible Detainer and to Grant Possession of Relator’s Residence to Him Under a Writ of Restitution 17

Certificate of Service 18

EndNotes A & B

TABLE OF AUTHORITIES

Case Law

<u>American Legion Post 25 v. Civ. Rights</u> (2008) 17 Ohio St.3d 441	2
<u>Arbino v. Johnson</u> (2007) 116 Ohio St.3d 468	10
<u>Beane v. Krebs</u> (1945) 75 Ohio App. 427	16
<u>Butler v. Demis</u> (1981) 66 Ohio St.2d 123	13
<u>Central Park Place v McDowell</u> (8 th Dist. Ct. Apps. 1974) 38 Ohio App.2d 29	5
<u>Cotterman v. Fahrig</u> (1971) 28 Ohio Misc. 237	4
<u>Coward v. Fleming</u> (Hamilton County 1951) 89 Ohio App. 485	2
<u>Cuyahoga Metro v. Jackson</u> (1981) 67 Ohio St.2d 129	4
<u>Davey v. Judge Owen</u> (1937) 133 Ohio St. 96	1
<u>Dehler v. Sutula</u> (1995) 74 Ohio St.3d 33	2
<u>Dennison v. Dennison</u> (1956) 165 Ohio St. 146	6
<u>Doe v. Marlinton</u> (2009) 122 Ohio St.3d 12	10
<u>Dreamer v. Mason</u> (2007) 115 Ohio St.3d 190	15
<u>Fenner v. Parkinson</u> (1990 Franklin Cty) 69 Ohio App.3d 211	5
<u>Foster v. Evatt</u> (1944) 144 Ohio St. 65	16
<u>Gianetti v. Cross</u> , 091416 (U.S. 5-18-2010)	9
<u>Gilmour v. Mayfield Hts.</u> (2008) 119 Ohio St.3d 11	2
<u>Groch v. General Motors</u> (2008) 117 Ohio St.3d 192	10
<u>Haas v. Gerski</u> (1963) 175 Ohio St. 327	3
<u>Investors Corp v. Curry</u> (1934) 50 Ohio App. 245	16
<u>Johns v. U. Cincinnati</u> (2004) 101 Ohio St.3d 234	11
<u>Leineweber v. Union Gas</u> (Sup. Ct. 1913) 14 Ohio N.P. (N.S.) 97	1
<u>McDonald v. Chicago</u> , 08-1521 (U.S. 6-28-2010)	9
<u>Merydith v. Dean</u> (1916) 95 Ohio St. 108	15
<u>Miele v. Ribovich</u> (2000) 90 Ohio St. 3d 439	4
<u>Nunlist v. Motter</u> (1946) 50 Ohio L.Abs. 187	4
<u>Ohio Council v. Cincinnati</u> (1994) 69 Ohio St.3d 677	12
<u>Ohio Pyro v. Dept.</u> (2007) 115 Ohio St.3d 375	10

<u>Saunders v. Choi</u> (1984) 12 Ohio St.3d 247	11
<u>Scott v. Masterson</u> (1962) 173 Ohio St. 402	1
<u>Schaefer v. Board</u> (1967) 11 Ohio App.2d 132	13
<u>Southern Ry. v. Painter</u> (1941) 314 U.S. 155	3
<u>State Fire Marshal v. Curl</u> (2000) 87 Ohio St.3d 568	1
<u>State v. Carroll</u> (Supreme Court 1941) 239 Wis. 625	3
<u>Taylor v. Sturgell</u> , 553 U.S. 880 (U.S. 6-12-2008)	10
<u>Turner v. Fisher</u> (1911) 222 U.S. 204	1
<u>Toledo v Tellings</u> (2007) 114 Ohio St.3d 278	9
<u>Turpin v. Court</u> (1966) 8 Ohio St.2d 1	17
<u>Vancleave v. School Emps.</u> (2008) 120 Ohio St.3d 261	9
<u>Vitoratos v. Judge Thomas</u> (1963) 175 Ohio St. 220	2, 17
<u>Zauderer v. Office of Disciplinary Counsel</u> (1985) 471 U.S. 626	11

Legal Encyclopedias

1 Am. Jur.2d 822, Actions, s. 35.	10
17A Am Jur.2d 667, Contracts, s. 709	12
35A Am.Jur.2d 1043, Eviction and Detainer, s. 9	4
36A CJS 476, Eviction and Detainer, s. 4	4
52 Am. Jur.2d 270, Mandamus, s. 2	2
52 Am. Jur.2d 286, Mandamus, s. 19	16
52 Am. Jur.2d 289, Mandamus, s. 22	15
52 Am.Jur.2d 298, Mandamus, s. 31	2
73 Am. Jur.2d 322, Statutes, s. 322	6
1A CJS 234, Actions, s. 33	7
36A CJS 476, Eviction and Detainer, s. 9	4
82 CJS 470, Statutes, s, 380	6
82 CJS 479, Statutes, s. 366	6
82 CJS 466, Statutes, s. 376	5

MEMORANDUM OF LAW IN SUPPORT OF ISSUANCE
OF COMPLAINT FOR WRIT OF MANDAMUS

ISSUE: In Response to Relator's Demands that Respondents Avon Lake Municipal Court and Its Judge Exercise Their Forcible Detainer Jurisdiction Conferred Upon Them by the Ohio Legislature and State and Federal Constitutional Edicts, They Refused to Do So Upon the Basis that the Mere Existence of the Elective Remedy of Forfeiture in the Land Contract Statute and Land Contract Itself -- Even Though Relator Chose to Not Elect It -- Revokes the Legislative Edicts and Due Process Constitutional Guarantees Which Unequivocally Mandate that the Municipal Courts of Ohio Exercise Their Forcible Detainer Jurisdiction

REMEDY: Unless a Writ of Mandamus Issues to Compel Respondents to Exercise Their Forcible Detainer Jurisdiction Enacted for the Public Purpose of Preventing Violence Between Owners and Occupiers of Realty by Motivating Owners to Resort to the Law Alone Rather Than Seek to Recover Possession of Their Property by Force, Respondents' Refusals to Exercise Their Forcible Detainer Jurisdiction Will Deny to Relator and Other Citizens Who Are Entitled to a Summary and Speedy Determination as to the Right of Possession of Their Private Property Their Legislative and Constitutional Due Process Rights Guaranteed to Them by the State and Federal Constitutions

I. Mandamus is the Proper Remedy to Compel Courts to Comply
with Statutory and Constitutional Edicts to Exercise the Jurisdiction
Conferred Upon Them by the Legislature

Mandamus remedies wrongs. 1

Mandamus will lie to compel a court to exercise its jurisdiction in a case properly before it. 2

The basic purpose of a Writ of Mandamus is to compel public officers, including judicial officers, to perform the duties imposed by law upon them as public officers. 3

The Writ of Mandamus, in compelling the exercise of jurisdiction, merely coerces the court to do that which is required by law. 4

Although Mandamus is called a prerogative writ, it calls for no more extraordinary exercise of power than the issuance of a mandatory injunction or a decree of specific performance. 5

Mandamus lies for superior courts to compel inferior courts to perform acts to discharge their clear and present official duties as public officials, and will compel judges to act who refuse to act to exercise jurisdiction conferred upon them by the legislature. 6

Mandamus strives to promote substantial justice in an *expeditious manner*, prevent *unconstitutional conduct*, and override serious public consequences which would attend denying the remedy. 7 (Emphasis added)

II. The Essential Elements of a Mandamus Action Are (A) Relator Has a Clear Legal Right to the Relief Sought; (B) Respondents Have a Clear Legal Duty to Perform the Act Requested; and (C) There is No Other Plain, Speedy, and Adequate Remedy Available 8

The “No Adequate Remedy” Element Is Inapplicable if “the Issue is One of Great Public Importance.” 9

The essential elements of a Mandamus action are: (a) Relator has a clear legal right to the relief sought; (b) Respondents have a clear legal duty to perform the requested act; and (c) there is no other plain, *speedy*, and adequate available remedy. 8

The “no adequate remedy” element does not apply if “the issue is one of great public importance.” 9

The dismissal of a Mandamus action based upon the existence of an adequate remedy in the ordinary course of law is appropriate only if it appears beyond doubt that Relator can prove no set of facts warranting relief. 10

III. The Ohio Legislature by Multiple Legislative Enactments Has Unequivocally Conferred the Power and Duty to Exercise Forcible Detainer Jurisdiction upon the Municipal Courts of Ohio, Based Upon the Realization that Such Remedy Constitutes the Best Method to Prevent Violence Between Persons Who Claim the Right to Possession of Realty, by Motivating Owners of Property Who are Out of Possession to Resort to the Law Alone Rather Than Seek to Recover Possession of Their Property by Force

The fundamental purpose of forcible detainer laws is to avoid violence and breaches of the peace between persons each who claim the right of possession of realty, motivating owners out of possession to respect and resort to the law alone rather than seek to recover possession of their property by force. 11

“As the law provides ample redress for the recovery of the possession of property, the owner who is not in possession, although lawfully entitled thereto, has no right to attempt to take possession by force, and the law will not justify his resorting to violence and the breach of the public peace in attempting to do so. ‘Any other rule would substitute the strong arm of the court of justice, and promote lawbreaking and violence.’” 12

The series of well-established statutory enactments which confer the power and duty upon the municipal courts of Ohio to exercise forcible detainer jurisdiction include:

(1). O.R.C. 1901.18 (A) (8) [Municipal Court Subject Matter Jurisdiction] which specifies that “a municipal court has original jurisdiction within its territory . . . *in any action of forcible entry and detainer.*” (Emphasis added)

(2). O.R.C. 1923.01 (A) [Forcible Entry and Detainer Jurisdiction] which mandates that “if it is found . . . that after a lawful entry, lands or tenements are held unlawfully and by force, a judge shall cause [the owner] . . . to have restitution of the lands and tenement.” (Emphasis added)

(3). O.R.C. 1923.02 (A) (5) [Forcible Entry and Detainer Jurisdiction] which mandates that municipal court exercise forcible detainer jurisdiction “when the defendant is an occupier of lands and tenements, without color of title, and the *Respondents has the right to possession.*” (Emphasis added)

(4). O.R.C. 1923.02 (A) (6) [Forcible Entry and Detainer Jurisdiction] which confers forcible detainer jurisdiction on the municipal courts of Ohio “*in any other case of the unlawful and forcible detention of lands and tenements.*” (Emphasis added)

(5) O.R.C. 1923.02 (A) (7) [Forcible Entry and Detainer Jurisdiction] which confers forcible detainer jurisdiction on the municipal courts of Ohio *even “in cases arising out of Chapter 5313 [Land Contracts] of the Revised Code.”* (Emphasis added)

It is well recognized that “[s]tatutes designed for the protection of rights of property [are mandatory.]” 13

Ohio’s municipal courts possess not just the right, but also the duty, to exercise Ohio’s forcible detainer laws: “When a court is properly appealed to in a case over which it has by law jurisdiction, it is not only the right, but the duty, of that court, to take and exercise jurisdiction.” (Emphasis added) 14

This Ohio Supreme Court has long recognized “the broad grant of jurisdiction to municipal courts to hear and determine ‘any action’ in forcible entry and detainer.” (Emphasis added) 15

The statutory promulgations by the Ohio legislature which mandate that the municipal courts of Ohio have both the power and duty to exercise their forcible detainer jurisdiction when the sole issue is “the right to possession of property” could not be more unequivocal.

IV. The Paramount Feature of the Forcible Detainer Remedy is that It Is a Summary and Speedy Remedy to Recover the Possession of Realty

The paramount feature of the forcible detainer remedy is that it is a *summary and speedy remedy* to recover the possession of realty:

“The purpose of the forcible entry and detainer statutes is to provide a *summary*, extraordinary, and *speedy* method for the recovery of the possession of real property. *It is intended to serve as an expedited mechanism by which an aggrieved [property owner] may recover possession of real estate.*” 16

“The statute governing forcible entry and detainer is brief and simple, avoiding many of the complicated cases especially enumerated by statute.” 17

“The forcible entry and detainer action was set up to permit a landowner to recover possession of his premises *with all possible speed.*” (Emphasis added) 18

“The forcible detainer remedy is intended to serve as an expedited mechanism by which an aggrieved landowner may recover possession of his real property.” 19

This Mandamus action is based upon the paramount feature of the forcible detainer remedy -- that it is a *summary and speedy remedy* to determine who has the right of possession of Relator’s residence.

V. Additional Key Features of the Forcible Detainer Remedy are (A) that It is a Cumulative Remedy, and (B) that It Involves Only the Right to Possession

Another key feature of the forcible detainer remedy is that it is a cumulative remedy “in addition to any and all other remedies provided by law” which the aggrieved party may have:

“A forcible entry and detainer proceeding is *not exclusive*, but is *cumulative* of any other remedy that a party may have.” 20

“The statutory proceeding of forcible entry and detainer is not an exclusive remedy . . . but is *cumulative* of any other remedy the aggrieved party may have.” 21

The United States Supreme Court decision in Marine Terminals is on all fours with this case. It verifies with a simple and basic rule of law that Respondents’ refusals to exercise their forcible detainer jurisdiction are contrary to public policy and law, because the forcible detainer remedy is elective and cumulative and not mandatory and exclusive. *Where a statute (i.e., forfeiture) provides a remedy for an independent and pre-existing right (i.e., possession), the new remedy (i.e., forfeiture) is not exclusive but merely cumulative of other existing remedies, and does not revoke a preexisting remedy.* Marine Terminals v. Shipping Co. (1969) 394 U.S. 404, 422.

Another main and unique feature of the forcible detainer remedy is that it involves a sole issue -- the right to possession of realty:

“A forcible entry and detainer action affects only the question of the present right to possession to the property.” 22

“The action of forcible entry and detainer has long been recognized as an action of a solely possessory nature.” It is an action to obtain possession or repossession of real property which has been transferred from one to another pursuant to a contract, lease, or *installment contract*. 23

Thus, the law is clear that the forcible detainer remedy is a remedy which (a) is *summary and speedy*, (b) is elective and *cumulative*, and (c) involves only the *right of possession*.

VI. Fundamental Rules of Law Are Applicable to the Enactments of the Ohio Legislature which Mandate that Municipal Courts are Compelled to Exercise Forcible Detainer Jurisdiction, including:
(1) The Ohio Legislature is Presumed to Say in a Statute What It Means and Means in a Statute What It Says; (2) Where the Language of a Statute is Clear and Unambiguous, It Neither Needs Nor Allows Any Interpretation to Determine Its Meaning; and (3) a Legal Presumption Exists that the Legislature Does Not Enact Legislation Which Produces Absurd Consequences

A. The Ohio Legislature is Presumed to Say in a Statute What It Means and Means in a Statute What It Says

Black-letter law verifies that the legislature “says what it means and means what it says:”

“It is presumed that the legislature says in a statute what it means and means in a statute what it says.” 24

“It is presumed that the legislature did not insert idle or meaningless verbiage, or superfluous language, or intend any part or provision to be meaningless, redundant, or useless.” 25

The word “shall” means “mandatory,” and the word “may” means “elective” or “discretionary.” 26

The Ohio Land Contract Statute specifically declares that “in addition to any other remedies provided by law . . . the vendor may bring an action for forfeiture.” The plain and simple language of the statute is directly contrary to Respondents’ impermissible “interpretation” that it is mandatory and exclusive. (Emphasis added) O.R.C. 5313.08

B. Where the Language of a Statute is Clear and Unambiguous, It Neither Needs Nor Allows “Interpretation” to Determine Its Meaning

Black-letter law also verifies that where the language of a statute is clear and unambiguous – as with the forfeiture remedy in the land contract statute being elective and cumulative rather than mandatory and exclusive – it neither needs nor allows any “interpretation.” The plain and simple language of the statute is directly contrary to Respondents’ impermissible “interpretation” that it is mandatory and exclusive. (Emphasis added) O.R.C. 5313.08

“If the words of the statute are unambiguous, the judicial inquiry is complete.” 27

“Where the language of a statute is clear and unambiguous, its clear meaning may not be evaded by a court under the guise of construction. In such circumstances, there is no room for judicial interpretation, and the language should generally be given effect without resort” to interpretation. (Emphasis added) 28

Again, the Ohio Land Contract Statute specifically declares that “in addition to any other remedies provided by law . . . the vendor may bring an action for forfeiture.” The plain and simple language of the statute is directly contrary to Respondents’ impermissible “interpretation” that it is mandatory and exclusive. (Emphasis added) O.R.C. 5313.08

C. A Legal Presumption Exists that the Legislature Does Not Enact Legislation Which Produces Absurd Consequences

As noted, black-letter law verifies that: “There is a presumption against the conclusion that any unjust or absurd consequences were intended to result from the enactment of a statute.”

29

Thus, these fundamental applicable rules of law specify that (a) the Ohio legislature is presumed to say in a statute what it means and means in a statute what it says; (b) where the language and meaning of a statute is clear and unambiguous, it neither needs nor allows any interpretation to determine its meaning; and (c) a legal presumption exists that the legislature does not enact legislation which produces absurd consequences

Applying these fundamental applicable rules of law to the case at bar, it is readily seen that if the mere existence of an elective remedy in a statute -- even where Relator does not elect to pursue it -- precludes all additional remedies provided by law (which constitutes a contradiction in terms), a number of *reducium ad absurdum* consequences would naturally result, such as:

1. Where an occupier of realty under a land contract uses the realty for an illegal purpose and the land owner properly files an action for the Remedy of Injunction, the law would refuse to exercise jurisdiction for an Injunction to prohibit the illegal activities, because the land contract statute provides no remedy for Injunction. Absurd consequences!
2. Where an occupier of realty under a land contract wrongfully acquires title to the realty by fraud and the land owner properly files an action for the Remedy of Constructive Trust, the law would refuse to exercise jurisdiction for a Constructive Trust, because the land contract statute provides no remedy for Constructive Trust. Absurd consequences!
3. Where an occupier of realty under a land contract causes the negligent death of the land owner, and the land owner’s estate properly files an action for the Remedy of Wrongful Death, the law would refuse to exercise jurisdiction for Wrongful Death, because the land contract statute provides no remedy for Wrongful Death. Absurd consequences!

These absurd consequences nevertheless parallel the basis upon which Respondents refused to exercise their forcible detainer jurisdiction – because the land contract statute provides no remedy for forcible detainer – even though the forcible detainer statute [O.R.C. 1923.07 (A) (7)] specifically provides forcible detainer jurisdiction in Ohio’s municipal courts “in cases arising out of Chapter 5313 [Land Contracts] of the Revised Code.” (Emphasis added) [Respondents’ 7/22/2010 Order: “The [land contract] statutory scheme [i.e., Chapter 5313] does not provide for an FED action alone.”]

Such absurd scenarios are presented only to emphasize the stark reality that the Ohio legislature does not enact legislation which produces absurd consequences such as revoking the multitude of legislative mandates and constitutional guarantees underlying forcible detainer legislation simply because the land contract statute includes the elective remedy of forfeiture, where the land owner chooses not to elect such remedy.

VII. Forcible Detainer Jurisdiction Conferred by the Ohio Legislature
Upon the Municipal Courts of Ohio Has as Its Underlying Basis Fundamental
Constitutional Guarantees Under the Ohio and United States Constitutions,
Including (A) the Constitutional Guarantee that Private Property is Sacred
and Unalienable in Our Free Society, (B) the Constitutional Mandate that for
Every Wrong There is a Remedy, and (C) the Constitutional Due
Process Guarantee that Every Man is Entitled to His Day in Court

The multiple and unequivocal mandatory enactments by the Ohio legislature need no more authority than the lawmakers’ inherent authority to enact such statutory mandates. But forcible detainer legislation, unique to it, also has the full power and authority of fundamental constitutional guarantees and mandates of the Ohio Constitution and United States Constitution underlying it.

“A right which is created by a statutory or constitutional provision may be enforced by any appropriate common-law or statutory remedy.” 30

A. An Underlying Basis of Forcible Detainer Legislation Is the Constitutional Guarantee that in Our Free Society Private Property Is Sacred and Unalienable

A key supporting pillar of American jurisprudence is that citizens have a sacred and unalienable constitutional right to own, possess, and use private property.

The Supreme Court of the United States recently cherished the right of private property, declaring that:

“The right of private property is a fundamental sacred, natural, inherent, and inalienable right, the protection of which is one of the most important purposes of government. It is a common law right, which existed before the adoption of the federal and state constitutions and is not dependent on them for its existence.” 31

The High Court further declared:

“The constitutional provisions for the protection of property should be liberally construed in favor of the right of property [because] *the right to private property and its incidents is embraced within the guarantee of liberty.*” 31

The Supreme Court of the United States also recently described the constitutional right to own and possess private property as:

"A principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." 32

This honorable Ohio Supreme Court reminds inferior courts that the Ohio Constitution mandates that “[p]rivate property shall ever be held inviolate.” 33

Respondents violate the Constitutional Guarantee that in our free society private property is sacred and unalienable when they refuse to exercise their forcible detainer jurisdiction.

B. An Underlying Basis of Forcible Detainer Legislation is the Constitutional Guarantee that there is a Remedy for Every Wrong

Both the Constitution of Ohio and the Constitution of the United States guarantee the citizens of Ohio and America “a remedy for every wrong . . . with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner.”

“For every vested legal right, there is also a legal remedy for the infringement of that right.” Marbury v. Madison (1803) 5 U.S. 137 (1 Cranch 137)

“The right to open courts and to a remedy is constitutionally required [by the United States Constitution and the Ohio Constitution.]” 34 (Emphasis added)

“Nor shall any state deprive a person of life, liberty, or property without due process of law.” United States Constitution, 14th Amdt. (Emphasis added)

“All courts shall be open, and every person, *for an injury done him in his land*, goods, person, or reputation, shall have *remedy* by due process of law. Ohio Constitution, Article 1, section 16. (Emphasis added)

“[The Ohio Constitution’s “grant of a right to a remedy to an injured citizen.” 35

“Open Courts and the Right to a Remedy. [The Ohio Constitution] guarantees that “all courts shall be open to every person with a right to a remedy for injury to his person, property or reputation *with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner.*” 36
(Emphasis added)

"We have [prohibited laws and decisions] that effectively prevent individuals from pursuing relief for their injuries. When an individual is wholly foreclosed from relief . . . *the rights to "a meaningful remedy and open courts become hollow rights hardly worth exercising."* 37 (Emphasis)

“*Wherever the law gives a right, it also gives a remedy.*” 38

Whenever a wrong is committed, a corresponding remedy arises in our law which bears a direct relationship to the wrong and cures it or offers redress for it.

If an occupier of another person’s realty commits a wrong by using it for an illegal purpose, the law gives rise to the remedy of injunction to prohibit the illegal activities. If an occupier of another person’s realty commits a wrong by acquiring title to the realty through fraud, the law gives rise to the remedy of a constructive trust in favor of the rightful owner. If an occupier of another person’s realty commits a wrong by causing the negligent death of the land owner, the law gives rise to the remedy of wrongful death. *If an occupier of another person’s realty commits a wrong by occupying the realty without payment, the law gives rise to the remedy of forcible detainer placing the owner back in possession of his private property.*

And it is completely irrelevant that any or all of these wrongs are committed in the context of a land contract! The law does not condone and encourage the wrong because it is committed in the context of a land contract, as held by Respondents.

Respondents violate the Constitutional Guarantee that there is a remedy for every wrong when they refuse to exercise their forcible detainer jurisdiction.

C. An Underlying Basis of Forcible Legislation is the Constitutional Guarantee that Every Man is Entitled to His Day in Court

First-year law students on their first day in class are instructed in no uncertain terms that “every man [and woman] is entitled to his [or her] day in court.”

“The deep-rooted historic tradition that everyone should have his own day in court.” 39

“Due process of law assures to every person his day in court.” 40

“A person's right to his day in court is basic in our system of jurisprudence.” 41

Thus, it is not only the explicit legislative enactments which confer forcible detainer jurisdiction upon the municipal courts of Ohio, compelling them to exercise their jurisdiction. It is also the multiple Constitutional Guarantee Edicts which underlie such legislation, which as a matter of clear public policy make it mandatory that the municipal courts do not refuse to exercise their forcible detainer jurisdiction, as do Respondents.

Respondents violate the Constitutional Guarantee that every man is entitled to his day in court when they refuse to exercise their forcible detainer jurisdiction.

VIII. Ohio's Land Contract Statute Offers the Remedy of Forfeiture Which by Its Plain and Ordinary Language is an Elective Remedy. The Private Property Owner May Choose, But Cannot be Compelled, to Elect It Because He Is the Master of His Pleadings

Under certain conditions not present in the instant case, Ohio's Land Contract Statute [Chapter 5313, Ohio Revised Code] *mandates a foreclosure remedy* (ORC 5313.07 - “foreclosure and judicial sale”). [Emphasis added]

It also *offers a forfeiture remedy* (O.R.C. 5313.08 - “in addition to any other remedies provided by law . . . the vendor may bring an action for forfeiture”); (O.R.C. 5313.10 - “the election of the vendor “).

Both parties to the land contract agree that it was in effect for less than five years and that less than twenty per cent was paid on the purchase price, which facts eliminate the foreclosure remedy.

An elective remedy by its very nature need not be elected, of course, because “a plaintiff is the master of his or her cause of action,” and he cannot be forced to “elect” any particular cause of action. 42

Respondents impermissibly “interpreted” the statute where no interpretation is permissible.

“It is not allowable to interpret what has no need of interpretation.” 43

As noted, where a statute provides a remedy for an independent and pre-existing right (i.e., possession), the new remedy (i.e., forfeiture) is not exclusive but merely cumulative of other existing remedies, and does not revoke a preexisting remedy. Marine Terminals, supra.

The United States Supreme Court decision in Marine Terminals, unequivocally setting down the law of the land, is fully dispositive of this case.

IX-A. In Response to Relator’s First Demand, Respondents Refused to Exercise Their Forcible Detainer Jurisdiction Upon the Basis that the Mere Existence in the Land Contract Itself of the Elective Remedy of Forfeiture Revokes the Legislative and Constitutional Mandates Which Confer the Power and Duty on the Municipal Courts of Ohio to Exercise Their Forcible Detainer Jurisdiction -- Even Though Relator Chose to Not Elect It

Respondents’ first refusal to exercise their forcible detainer jurisdiction was based upon the *mere existence* of the elective forfeiture remedy offered in the *land contract* itself [not the statute], despite the undisputable fact that Relator *choose not to elect it as a remedy*. Avon Lake Municipal Court case #CVG- 1000368.

“This matter comes before the Court on defendant’s motion to dismiss this FED action on the basis that relief may not be granted on this cause of action because the parties’ controversy involves a land contract that provides (at page 2) for a forfeiture remedy in the event that the buyers fail to perform. Therefore, the land contract is not subject to this action for forcible entry and detainer. The case is therefore dismissed without prejudice. It is so ordered.” [7/22/2010 Order – Exhibit “C” of Complaint]

But the law is crystal clear – the existence of the elective remedy in the land contract of the remedy of forfeiture is irrelevant:

“Although the parties may, in their contract, specify a remedy for a breach, that specification does not exclude other legally recognized remedies. An agreement to limit remedies must be clearly expressed in the contract.” 44

IX-B. In Response to Relator's Second Demand, Respondents Refused to Exercise Their Forcible Detainer Jurisdiction Upon the Basis that the Mere Existence in the Land Contract Statute of the Elective Remedy of Forfeiture Revokes the Legislative and Constitutional Mandates Which Confer the Power and Duty on the Municipal Courts of Ohio to Exercise Their Forcible Detainer Jurisdiction -- Even Though Relator Chose to Not Elect It

Respondents' second refusal to exercise their forcible detainer jurisdiction was based upon the *mere existence* of the elective forfeiture remedy offered in *the Land Contract Statute*, despite the fact Relator *choose not to elect it as a remedy*. Avon Lake Municipal Court case # 10-CV-167699

“This matter came before the court for hearing on plaintiff's motion for reconsideration of the court's order of 7/22/2010 dismissing plaintiff's complaint. Following oral argument on the motion, the court finds that in a default situation, plaintiff has two options to reclaim his property sold by him to defendants by land contract, (1) foreclosure or (2) forfeiture (but only if contract in effect less than 10 years and less than 20% of purchase price paid). *The statutory scheme does not provide for an FED action alone*. The motion is denied. It is so ordered.” [8/10/2010 Order – Exhibit “D” of Complaint]

But the law is crystal clear - “A vendee under a land contract can be summarily dispossessed of a property he unlawfully detains.” Gvozdanovic v. Woodford Corp. (Hamilton Cty. App. 2000) 139 Ohio App. 11, 28 [citing to O.R.C. 1923.02 (A) (7)].

The United States Supreme Court agrees. Where a statute provides a remedy for an independent and pre-existing right (i.e., possession), the new remedy (i.e., forfeiture) is not exclusive but merely cumulative of other existing remedies, and does not revoke a preexisting remedy. Marine Terminals, supra

Respondents impermissibly “[mis]-interpreted” the forfeiture remedy of the land contract statute as a *mandatory and exclusive remedy rather than an elective and cumulative remedy*. They simply failed to consider its plain and ordinary language which declares it to be an ELECTIVE REMEDY, with its holdings that are patently contrary to law and logic.

Respondents look solely to the land contract law for their authority and duty to exercise their forcible detainer jurisdiction [8/10/2010 Order: “*The statutory scheme does not provide for an FED action alone.*”]. They entirely disregard the unequivocal multiple legislative mandates of Chapter 1901 and 1923, as well as the fundamental Due Process Guarantees of the United

States Constitution and the Ohio Constitution which (a) guarantee that private property is sacred and unalienable in our free society, (b) guarantee that for every wrong there is a remedy, and (c) guarantee that every man is entitled to his day in court.

X. The Public Interest that is Served by Issuance of the Writ is that It Acts to Prevent Violence Between Parties Both Claiming the Right to Possession of Realty, and the Nature of the Wrong Which Would Result from Denial of the Writ is that It Would Constitute a Denial of the Legislative and Constitutional Due Process Rights Guaranteed by the Ohio and United States Constitutions

The public interest that is served by the issuance of a Writ of Mandamus by this High Court compelling the inferior court and its judge to exercise their forcible detainer jurisdiction is that it acts as an alternative to violence between parties engaged in disputes over possession of private property, and motivates property owners to resort to the law alone rather than seek to recover possession of their property by force. 11, 12

The nature of the wrong which would result from a denial to issue the Writ is that it would constitute a denial of the legislative and Constitution Due Process Rights of the state and federal constitutions guaranteed to Relator and other citizens who are entitled to a summary and speedy determination as to the right of possession of their private property. Cody v. Toner (1983) 8 Ohio St.3d 22, 23-24.

XI. No Plain, Speedy, and Adequate Remedy Exists Because an Appeal Lacks the Essential "Complete, Beneficial, and Speedy" Elements of an Adequate Remedy

The element of time can be a compelling consideration making Mandamus the appropriate remedy. Liberty Mills v. Locker (1986) 22 Ohio St. 3d 102, 104.

For an alternative remedy to constitute an "adequate remedy at law," as to preclude Mandamus, it must be "complete, beneficial, and *speedy*." 45

When circumstances require a remedy without undue delay, Mandamus is the appropriate remedy as opposed to a remedy which cannot be invoked with dispatch. 46

"Given its summary nature, the drafters of the Rules of Civil Procedure were careful to avoid encrusting this special remedy [of forcible detainer] with time-consuming procedure tending to destroy its efficiency." 47

Although Relator has filed an appeal from Respondents' refusals to perform their forcible detainer jurisdiction (Ninth District Court of Appeals case #10-CA-009885), the time required for such appeal to be determined is about a year or longer. Thus, an appeal to the Court of Appeals continues to perpetuate the risk of foreclosure by the mortgage holder on Relator's residence because his private residence is in the possession of occupiers who have not made any payments for possession for the months of June, July, August, or September 2010 and who apparently intend to remain in possession of Relator's residence without any future payment, encouraged by Respondents' refusals to exercise their forcible detainer jurisdiction, and resulting in (a) grave financial loss to Relator, (b) unjust enrichment to the occupiers, (c) adverse economic consequences to the citizens of Lorain County in an already economically depressed community, and (d) the denial to citizens of their statutory and constitutional rights resulting from Respondents' refusals to exercise the "summary and speedy remedy" of forcible detainer jurisdiction.

"An appeal is not a sufficient alternative remedy when the party's ability to defend himself has been severely compromised by the trial court's error . . . as when a party has been deprived a *fundamental due process right*" -- *as in the case at bar.* 48

Not issuing the Writ of Mandamus simply would be detrimental to the public interest, and result in a denial of justice.

XII. Courts Issue Writs of Mandamus Based Upon Equitable Considerations of (A) the Element of Time, (B) Public Policy, (C) Interests of Third Parties, (D) Nature of the Wrong or Injury Which Would Follow a Refusal to Issue the Writ, and (E) whether Granting the Writ Will Promote Substantial Justice. 49

Equitable considerations play a significant role in courts issuing Writs of Mandamus:

"The public interest may be an overriding reason for issuing mandamus in view of the serious public consequences which would attend denying the remedy." 50

The issuance of a Writ is largely controlled by equitable principles. 51

The issuance of a Writ of Mandamus is based upon the following equitable factors:

1. The Element of Time: As noted, unless the speedy remedy of Mandamus is issued, the inadequate remedy of appeal regardless of outcome will result in (a) grave financial loss to Relator, (b) unjust enrichment to the occupiers, (c) adverse economic consequences to the

citizens of Lorain County in an already economically depressed community, and (d) denial to citizens whose statutory and constitutional rights are denied to them by Respondents' refusals to exercise the "summary and speedy remedy" of forcible detainer jurisdiction.

2. Public Policy: Public policy dictates that inferior courts do not refuse to exercise the jurisdiction conferred upon them by the Ohio legislature, because for them to do so voids the fundamental remedy for which such legislation was enacted and such jurisdiction was conferred upon them, and denies to citizens their right to due process of law by leaving them without a remedy for the wrong they have and will continue to suffer -- occupiers of their realty not compensating them for its possession and use.

3. Interests of Third Parties: Third party interests include (a) unjust enrichment continued to be enjoyed by the occupiers, (b) adverse economic consequences to the citizens of Lorain County in an already economically depressed community, and (c) the denial to citizens of their statutory and constitutional rights resulting from Respondents' refusals to exercise the "summary and speedy remedy" of forcible detainer jurisdiction.

4. Nature of the Wrong Which Would Follow a Refusal to Issue the Writ: The wrong which would result from denial of the Writ includes not only Relator's continuing monthly difficulty of attempting to pay the mortgage over the next year or more while the occupiers-trespassers enjoy possession of his private property, but even more significantly all other citizens throughout Lorain County and Ohio facing the same inequities and denials of their constitutional due process rights based upon Respondents' refusals to enforce the forcible detainer laws of Ohio.

5. Whether Issuing the Writ Will Promote Substantial Justice: The issuing of the Writ will promote substantial justice because the Mandamus remedy is the sole remedy under these extenuating and extraordinary circumstances which will alleviate the denial to Relator and other citizen's legislative and constitutional due process rights arising from Respondents' refusals to enforce the forcible detainer laws of Ohio.

Each and every one of these equitable considerations upon which Courts issue Writs of Mandamus come down on the side of issuing such remedy in the instant case, because Respondents' refusals to exercise their jurisdiction have denied Relator, and are likely to deny other Ohio citizens, their fundamental legislative and constitutional due process guarantees.

XIII. Summary and Conclusion – The Avon Lake Municipal Court Not Only Has the Right But Also Has the Duty to Exercise Its Jurisdiction and Render a Decision on the Merits in the Instant Case for Forcible Detainer and to Grant Possession of Relator’s Residence to Him Under a Writ of Restitution

This honorable Ohio Supreme Court in a proper case will compel by the remedy of Mandamus a trial court and its judge to exercise the jurisdiction conferred upon them by the Ohio legislature. 52

It is respectfully submitted that the herein specified (a) Statutory Mandates of the Ohio Legislature, (b) the Constitutional Due Process Guarantees under the Ohio Constitution and the United States Constitution, (c) the applicable United States Supreme Court decisions, and (d) the applicable Ohio Supreme Court decisions relied upon in this Memorandum of Law patently verify that (a) Relator has a clear and certain legal right to the relief prayed for; (b) Respondents are under a clear and certain legal duty to exercise their jurisdiction to hear and determine the right of possession under their forcible detainer jurisdiction; and (c) Relator has no plain, speedy, and adequate remedy at law.

“For a writ of mandamus to issue, the Relator must demonstrate (1) that he has a clear legal right to the relief prayed for, (2) that Respondents are under a clear legal duty to perform the acts, and (3) that Relator has no plain and adequate remedy in the ordinary course of the law.” 53

“Where a lower court . . . refuses to act upon a matter within its jurisdiction . . . mandamus will issue at the instance of one entitled to invoke the remedy, to compel such court to assume jurisdiction and proceed to a determination of the cause, to hear and to determine on the merits.” 54

“Although “[M]andamus is not appropriate if there is a plain and adequate remedy in the ordinary course of law,” to be adequate, the alternate remedy must be complete, beneficial, and speedy.” 55

In the case *sub judice*, an appeal is not “complete, beneficial, and speedy” because Relator’s private residence could well be lost in foreclosure by the time the appeal is determined. See Affidavit in Support of Writ of Mandamus, p 4, 1st paragraph

In the case at bar, Respondents twice had a clear and certain legal duty to exercise their forcible detainer jurisdiction conferred upon them by the Ohio legislature because they had a verified complaint before them invoking the applicable statutes and relevant facts verifying (a)

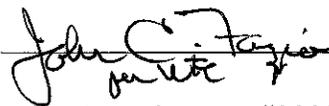
that Relator owns the private property which is possessed by occupiers, and (b) occupiers have failed to pay the monthly \$1,700 installment for the months of June, July, August, and September, 2010 for such unlawful possession.

Nevertheless, Respondents twice refused to exercise their forcible detainer jurisdiction - first upon the irrelevant basis that the land contract itself contains the elective remedy of forfeiture which Relator choose not to elect - and then finally upon the irrelevant basis that the land contract statute contains the elective remedy of forfeiture which Respondents choose not to elect.

For any and all of these reasons, it is respectfully prayed that this honorable High Court issue a Writ of Mandamus directing Respondents to exercise their forcible detainer jurisdiction and proceed to a decision on the merits with all due haste, as decisively ordered by it in Horwitz v. Cuyahoga County Probate Court (1992) 65 Ohio St.3d 323, 328 (“Because an expedited disposition seems required in this case . . . we see no reason for further review and, therefore, grant the writ of mandamus.”

Relator so prays. Let right be done.

Respectfully submitted,



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EndNotes

1. Turner v. Fisher (1911) 222 U.S. 204
2. Davey v. Judge Owen (1937) 133 Ohio St. 96
3. Scott v. Masterson (1962) 173 Ohio St. 402
4. State Fire Marshal v. Curl (2000) 87 Ohio St.3d 568
5. Leineweber v. Union Gas (Sup. Ct. 1913) 14 Ohio N.P. (N.S.) 97
6. Vitoratos v. Thomas (1963) 175 Ohio St. 220; Dehler v. Sutula (1995) 74 Ohio St.3d 33
7. 52 Am. Jur.2d 270, Mandamus, s. 2
8. American Legion v. Ohio Civ. Rights Comm. (2008) 117 Ohio St.3d 441; Dreamer v. Mason (2007) 115 Ohio St.3d 190
9. 52 Am.Jur.2d 298, Mandamus, s. 31, fnt 5.
10. Gilmour v. Mayfield Hts. (2008) 119 Ohio St.3d 11
11. Coward v. Fleming (Hamilton County 1951) 89 Ohio App. 485
12. State v. Carroll (Supreme Court 1941) 239 Wis. 625
13. Haas v. Gerski (1963) 175 Ohio St. 327
14. Cuyahoga Metro v. Jackson (1981) 67 Ohio St.2d
15. Southern Ry. v. Painter (1941) 314 U.S. 155
16. Nunlist v. Motter (1946) 50 Ohio L.Abs. 187, aff'd 81 Ohio App. 506
17. Cotterman v. Fahrig (1971) 28 Ohio Misc. 237
18. Miele v. Ribovich (2000) 90 Ohio St.3d 439
19. 36A CJS 476, Eviction and Detainer, s. 4.
20. 35A Am.Jur.2d 1043, Eviction and Detainer, s. 9
21. Central Park Place v McDowell (8th Dist. Ct. Apps. 1974) 38 Ohio App.2d 29.
22. Fenner v. Parkinson (1990 Franklin Cty) 69 Ohio App.3d 211
23. 82 CJS 466, Statutes, s. 376
24. 82 CJS 479, Statutes, s. 366
25. Dennison v. Dennison (1956) 165 Ohio St. 146
26. 82 CJS 470, Statutes, s, 380
27. 73 Am. Jur.2d 322, Statutes, s. 322
28. 82 CJS 470, Statutes, s. 380
- 29.1A CJS 234, Actions, s. 33

30. Gianetti v. Cross, 091416 (U.S. 5-18-2010)
31. McDonald v. Chicago, 08-1521 (U.S. 6-28-2010)
32. Toledo v Tellings (2007) 114 Ohio St.3d 278
33. Vancleave v. School Emps. (2008) 120 Ohio St.3d 261
34. Doe v. Marlinton (2009) 122 Ohio St.3d 12
35. Groch v. General Motors (2008) 117 Ohio St.3d 192
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39. Johns v. U. Cincinnati (2004) 101 Ohio St.3d 234
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41. Saunders v. Choi (1984) 12 Ohio St.3d 247
42. Ohio Council v. Cincinnati (1994) 69 Ohio St.3d 677
43. 17A Am Jur.2d 667, Contracts, s. 709
44. Liberty Mills v. Locker (1986) 22 Ohio St. 3d 102; Schaefer v. Bd (1967) 11 Ohio App.2d 132 (syl 1); Butler v. Demis (1981) 66 Ohio St.2d 12
45. American Legion v. Civ. Rights, supra; Dreamer v. Mason, supra.
46. Merydith v. Dean (1916) 95 Ohio St. 108
47. Miele v. Ribovich (2000) 90 Ohio St. 3d 439
48. 52 Am. Jur.2d 300, Mandamus, s. 22
49. 52 Am. Jur.2d 286, Mandamus, s. 19; Beane v. Krebs (1945) 75 Ohio App. 427; Investors Corp v. Curry (1934) 50 Ohio App. 245
50. Am. Jur.2s 289, Mandamus, s. 22
51. Foster v. Evatt (1944) 144 Ohio St. 65
52. Vitoratos v. Judge Thomas (1963) 175 Ohio St. 220; Turpin v. Court (1966) 8 Ohio St.2d 1
53. American Legion v. Civ. Rights (2008) 17 Ohio St.3d 441
54. 52 Am. Jur.2d 519 Mandamus, s. 310, citing to Vitoratos, supra
55. American Legion v. Civ. Rights (2008) 17 Ohio St.3d 441