

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Fred Billiter,

Relator,

v.

IHS Supervisor, NCI,

Respondent.

Case No. 2010-2161

ORIGINAL ACTION IN MANDAMUS

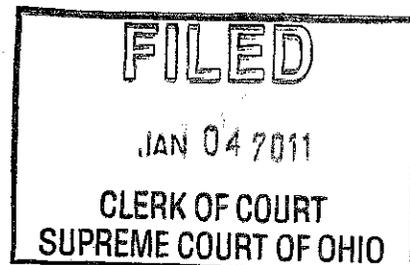
MOTION OF THE STATE OF OHIO TO
DISMISS RELATOR'S PETITION FOR WRIT OF MANDAMUS

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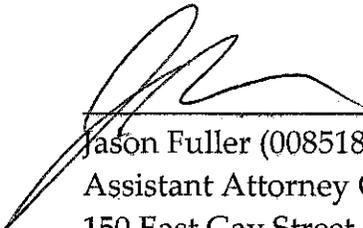


MOTION TO DISMISS RELATOR'S PETITION FOR WRIT OF MANDAMUS

The State of Ohio moves the Court to dismiss the relator's *Petition for Writ of Mandamus* for failure to: be made in the name of the state, comply with the statute of limitations, and allege whether administrative remedies were exhausted. *Cf.* S.Ct. Prac. R. 10.5(A), 14.4(A). The State of Ohio also moves the Court to charge costs against the relator. *Cf.* R.C. 2731.12; S.Ct. Prac. R. 10.1(A). A brief in support is attached.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE STATE OF OHIO'S MOTION TO DISMISS

1. Introduction

Relator Fred Billiter is an inmate at Noble Correctional Institution (Noble). [Cf. Petition, at memo]. He claims that a civilian hospital recommended surgery for him in October 2005, but that he never got the surgery because he was transferred to Noble. *See id.* Since then, he has "SOUGHT TO GO AHEAD AND OBTAIN THE SURGERY ** * ." *See id.* And Noble has allegedly refused to accommodate his request. *See id.*

Now Billiter is asking this Court for a writ of mandamus ordering the supervisor of Inmate Health Services (IHS) to take him for surgery. *See id.* Billiter's petition should be dismissed for any of 3 reasons: (a) it is facially defective for not being made in the name of the state, (b) it is barred by the statute of limitations, and (c) Billiter failed to allege whether he exhausted his administrative remedies.

2. Federal mandamus statutes do not govern Ohio mandamus actions.

Billiter seeks relief under R.C. 2731, as well as under 28 U.S.C. 1651 and 1361. [See Petition, at caption]. But the federal statutes do not apply here.

First, 28 U.S.C. 1651 explicitly applies only to the "[U.S.] Supreme Court and all courts established by Act of Congress * * * ." *See* 28 U.S.C. 1651(a). This Court does not meet these criteria. *Cf. Section 1, Article IV, Ohio Constitution.*

Second, 28 U.S.C. 1361 explicitly applies only to federal “district courts,” and it only gives such courts mandamus jurisdiction over federal officers, employees, or agencies. IHS is not a federal agency, the IHS supervisor is not a federal officer or employee, and this Court is not a federal district court. *Compare Section 1, Article IV, Ohio Constitution, with 28 U.S.C. 115.*

Thus, the federal statutes that Billiter relies on do not apply here.

3. The petition should be dismissed for any of 3 procedural defects.

a. Petition not made in the name of the state.

“Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.” R.C. 2731.04. Billiter’s petition does not satisfy this statute, because he did not bring this action in the name of the state. He simply brought it on the relation of Fred Billiter. *See* Petition, at caption (“Ex Rel: Fred Billiter”). Thus, his petition should be dismissed. *Cf. Martin v. Woods*, 121 Ohio St. 3d 609; 2009-Ohio-1928, ¶ 1.

b. Statute of limitations has passed.

Among other things, every mandamus petition should allege that the respondent has a clear legal duty to do something. *Cf. State ex rel. Turner v. Eberlin*, 117 Ohio St. 3d 381, 2008-Ohio-1117, ¶ 6. Accordingly, the statute of limitations that applies in mandamus is the one that addresses that alleged legal duty. *Cf. State ex rel. R.T.G., Inc.*

v. State, 98 Ohio St. 3d 1, 2002-Ohio-6716, ¶ 31 (the 6-year limitation in R.C. 2305.07 applies to a mandamus action seeking state appropriation proceedings); *State ex rel. Gingrich v. Fairfield City Sch. Dist. Bd. of Educ.* (1985), 18 Ohio St. 3d 244, 245 (similar); *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St. 3d 449, 2010-Ohio-606, ¶ 37 (similar, involving the 4-year limitation in R.C. 2305.09(E)).

In this case, Billiter is alleging that prisons have a duty to “CARE FOR THE WELL-BEING OF [HIS] MEDICAL NEEDS * * * .” See Petition, at memo (citing *Clemets v. Heston* (1985), 20 Ohio App. 3d 132, presumably for its discussion of the custodial negligence rule at page 136).

The statute of limitations regarding such a duty has expired. R.C. 2305.10(A) says that an action for bodily injury “shall be brought within two [2] years after the cause of action accrues.” And if that statute does not apply, then virtually every other tort claim “shall be brought within four [4] years after the cause thereof accrued.” See R.C. 2305.09(D) (unless the tort claim arises on contract or is enumerated in certain other statutes that do not apply here).

Billiter filed his mandamus petition on December 13, 2010—over 5 years after October 2005, when IHS allegedly breached its custodial duty. So, regardless of whether the applicable statute of limitations is 2 or 4 years, it has expired in this case.

Compare R.C. 2305.09(D), with *Nickoli*, 124 Ohio St. 3d 449, above ¶ 37 (applying the 4-year limitation in R.C. 2305.09(E) to a mandamus action).¹

c. Failure to allege exhaustion of administrative remedies.

When administrative remedies are available, a relator must allege in a mandamus petition “that he exhausted or attempted to exhaust his administrative remedies.” See *State, ex rel. Foreman v. City Council* (1965), 1 Ohio St. 2d 132. This is because there can be no mandamus relief when administrative remedies were not exhausted. See, e.g., *id.*; *State, ex rel. Schindel v. Rowe* (1971), 25 Ohio St. 2d 47, 48.

¹ This Court has never recognized the “continuous violation doctrine” as something that can toll statutes of limitations. Cf., e.g., *Nickoli*, above at ¶ 33 (“Even if we accept the idea that a continuous violation may toll the statute * * * .”). But even if the Court were to recognize such a doctrine, it is not satisfied here.

First, courts that have recognized the continuous violation doctrine have been “extremely reluctant” to apply it outside the context of Title VII of the 1964 Civil Rights Act. *Id.* at ¶ 31. And in any event, the doctrine is only triggered by “new discrete acts,” not by a mere “continuation of the effects of [a] solitary event * * * .” Cf. *id.* at ¶ 33.

Billiter does not allege new discrete acts. Since he was allegedly denied surgery in 2005, all that has happened is that he has now “SOUGHT TO GO AHEAD AND OBTAIN THE SURGERY.” [See Petition, at memo].

To start, this indicates that in 2005 either Billiter had some say in whether he got surgery, or he did not dispute the alleged denial of surgery. But more importantly, he is just trying again to get the same surgery that he was allegedly denied 5 years ago.

If this satisfied the continuous violation doctrine, then anyone could avoid a statute of limitations. Just ask the prospective respondent again to fulfill its alleged duty. And when the duplicative request is (of course) denied, file the complaint.

So, if Billiter is again being denied the same surgery that he was allegedly denied in 2005, this is a mere continuation of the effects of 2005. He cannot create a new discrete breach of a duty by deciding to try again for the same surgery. Thus, even if the continuous violation doctrine existed in Ohio, it would not toll the statute of limitations in this case. Cf. *Nickoli*, above at ¶ 33.

An inmate may use the prison grievance system to seek an administrative remedy for “any aspect of institutional life that directly and personally affects the grievant.” Ohio Adm. Code 5120-9-31. Billiter made no allegation of exhausting or attempting to exhaust the prison grievance system. [See generally *Petition*]. This is another independent reason that his petition should be dismissed. Cf. *Foreman*, above.

4. Conclusion

For any of the reasons stated in Part 3 above, the State of Ohio respectfully asks the Court to (1) dismiss the relator’s *Petition for Writ of Mandamus*, and (2) charge costs to the relator, as is required by R.C. 2731.12 (“If judgment in a proceeding for a writ of mandamus is rendered for the defendant, all costs shall be adjudged against the relator.”). Cf. S.Ct. Prac. R. 10.1(A) (stating that R.C. 2731 applies in this Court).

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



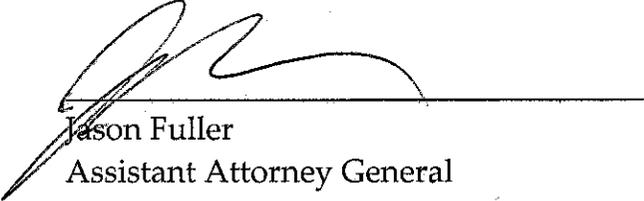
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Counsel for the State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION OF THE STATE OF OHIO TO DISMISS RELATOR'S PETITION FOR WRIT OF MANDAMUS has been placed in the United States Mail, postage prepaid, on January 4, 2011, addressed to:

Fred Billiter (383-177)
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Caldwell, Ohio 43724



Jason Fuller
Assistant Attorney General