

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.

Case No. 12-1128

WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR,

Relator,

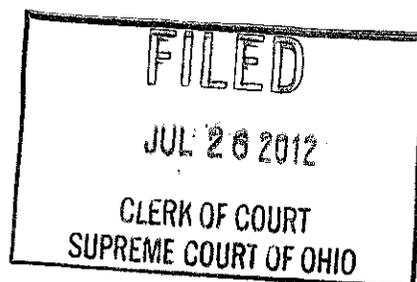
v.

Original Action in Prohibition

HONORABLE NANCY MARGARET
RUSSO, JUDGE, CUYAHOGA COUNTY
COURT OF COMMON PLEAS,

Respondent.

**RESPONDENT'S MOTION TO DISMISS COMPLAINT AND PETITION FOR WRIT
OF PROHIBITION AND ALTERNATIVE WRIT AND MEMORANDUM IN SUPPORT**



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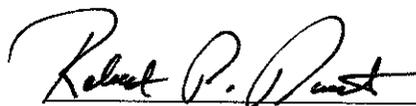
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RESPONDENT'S MOTION TO DISMISS

Pursuant to Ohio Rule of Civil Procedure 12(B)(6) and Ohio Supreme Court Rule X, the Honorable Nancy Margaret Russo, respondent, hereby moves this Court for an order dismissing Relator William Mason's complaint. As set forth below, the relief requested by Relator, a writ of prohibition, is not available under the circumstances of this case. As such, Relator's complaint fails to state a claim on which relief can be granted and dismissal is appropriate.

Dated: July 26, 2012

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS**

The Relator, William D. Mason, Cuyahoga County Prosecuting Attorney, has initiated this action in an effort to prevent Respondent Nancy Margaret Russo from proceeding in two civil cases currently pending in the Cuyahoga County Court of Common Pleas. The cases, which are stayed pending the outcome in this case, involve the construction and interpretation of Ohio laws relating to gambling and sweepstakes. Relator alleges that Respondent is patently and unambiguously without jurisdiction to construe those laws. While the facts set forth in Relator's Complaint, affidavits and exhibits are materially incomplete, even on these partial facts, which Respondent presumes to be true for purposes of this Motion, dismissal is appropriate.

STATEMENT OF THE FACTS AND THE CASE

On May 30, 2012, Relator sent a letter to numerous retail business establishments in Cuyahoga County (referred to by Relator as "Internet Sweepstakes Cafés") directing them to cease "any Internet Sweepstakes Café operations that are currently on-going and permanently close this aspect of your business. Any individual who continues to operate an Internet Sweepstakes Café *will* have their facts presented to a Grand Jury for criminal prosecution and forfeiture." (Compl. ¶ 9 & Ex. 1) (Emphasis added).

On June 4, 2012, J&C Marketing, LLC, one of the entities that had received the cease and desist letter, filed a Complaint for Declaratory Judgment seeking preliminary and permanent injunctive relief, together with a Motion for a Temporary Restraining Order against Relator in his capacity as Cuyahoga County Prosecutor (Case No. CV 12-784234). (Compl. ¶ 11). A preliminary hearing was held on June 5, 2012. (*Id.* ¶ 12). At that hearing, Respondent provided

Relator with the opportunity to provide a written response to the plaintiff's motion and time to decide whether he wanted to proceed with a writ. (*Id.* & Ex. 2 at 24-26).

On June 11, 2012, H.B. No. 386 became law. It included provisions relating to "Sweepstakes" which "means any game, contest, advertising scheme or plan, or other promotion, but does not include bingo, or games or lotteries conducted by the state lottery commission, in which consideration is not required for a person to enter to win or become eligible to receive any prize, the determination of which is based on chance." (Section 12 of H.B. No. 386). In enacting that Section, the Legislature recognized that "[j]udges across the state have issued conflicting rulings regarding the legality of these sweepstakes establishments." (*Id.* at Section 12 ¶ (C)(2)). It placed a moratorium on new retail sweepstakes establishments while further legislation is being considered. (*Id.* at ¶ (C)(3)). It also established a procedure by which owners of such establishments could certify that they were in existence before the effective date of the law. (*Id.*). In addition, it set forth civil remedies that either the Attorney General, or a prosecuting attorney, could pursue if a person conducted sweepstakes through a sweepstakes terminal device that was not conducted before the effective date of H.B. No. 386.

On June 13, 2012, Respondent held a hearing on the Motion for a TRO. (Comp. ¶ 14 & Ex. 4). Mr. Lambert, on behalf of Relator, stated that the defense would not be calling any witnesses and was prepared to go forward. (*Id.* Ex. 4, at 3). He acknowledged that, under H.B. No. 386, "[a] sweepstakes enterprise is not gambling under Ohio law." (*Id.* at 22:15-16). Thus, the legal question was squarely before Respondent: Whether the activity at issue was gambling or a sweepstakes under Ohio law. After the hearing, Respondent issued a Temporary Restraining Order. (*Id.* ¶ 16 & Ex. 5). That Order provided, in part:

None of the plaintiffs herein are subjects of any criminal proceeding; that the businesses/plaintiffs are sweepstakes

establishments operating pursuant to Ohio law; that the business activity is not gambling and is not prohibited by Ohio law; that the individual localities have made a determination that the businesses are lawful enterprises and issued permits and/or licenses to these plaintiffs; that the plaintiffs were operating prior to the enactment of HB386 and are therefore grandfathered in pursuant to that legislation, provided that they comply with the registration requirements; that the plaintiffs were involuntarily closed by law enforcement and have successfully proven they are entitled to the TRO, being a court order that permits them to re-open immediately and to begin compliance with the state's regulations as contained in HB386.

(*Id.*)

Subsequent hearings were held on June 18, 2012, June 22, 2012, and June 25, 2012 regarding requests to intervene and for Temporary Restraining Orders (Compl. ¶ 17 & Exs. 9-10), all of which were granted. (*Id.* ¶ 17 & Exs. 6-8).¹

Written discovery was served based upon an agreed schedule. Relator filed a motion for protective order on June 26, 2012 that was granted in part on July 1, 2012. (Compl. Ex. 13). Two days later, Relator filed the Writ of Prohibition and Application for an Immediate Alternative Writ.

A stay of all proceedings was entered by the trial court on July 10, 2012 pending the outcome of this case.

LAW AND ARGUMENT

I. The Standard For A Writ Of Prohibition

Prohibition is a preventive writ, designed to prevent a judicial tribunal “from proceeding in a matter which it is not authorized to hear and determine, or in which it seeks to usurp or exercise a jurisdiction with which it has not been invested by law.” *Marsh v. Goldthorpe*, 123 Ohio St. 103, 106, 174 N.E. 246 (1930). It is an “extraordinary remedy which is customarily

¹ A second case captioned, *AMA Ventures, Inc., et al. v. Mason, et al.*, Case No. 785188, was filed on June 18, 2012. It was consolidated with case No. 784234.

granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.” *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297 (1981); *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty.*, 74 Ohio St.3d 536, 540, 660 N.E.2d 458 (1996) (“Prohibition is an extraordinary writ and we do not grant it routinely or easily.”).

In addition, a writ of prohibition “tests and determines ‘solely and only’ the subject matter jurisdiction” of the lower court. *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988); *State ex rel. Staton v. Common Pleas Court of Franklin Cty.*, 5 Ohio St.2d 17, 21, 213 N.E.2d 164 (1965). Subject matter jurisdiction is a court’s power to hear and decide a case on the merits. *Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. “Jurisdiction does not relate to the rights of the parties, but to the power of the court.” *Executors of Long's Estate v. State*, 21 Ohio App. 412, 415, 153 N.E. 225 (1st Dist.1926).

In order to be entitled to a writ of prohibition, a relator must prove that (1) the lower court is exercising or is about to exercise judicial power, (2) the exercise of power is unauthorized by law, and (3) the relator possesses no other adequate remedy of law. *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, ¶ 12.

“[A]bsent a patent and unambiguous lack of jurisdiction, ‘a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal.’” *State ex rel. Powell v. Markus*, 115 Ohio St.3d 219, 2007-Ohio-4793, 874 N.E.2d 775, ¶ 8, quoting *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 428-429, 751 N.E.2d 472 (2001). Relator claims that because Judge Russo patently and

unambiguously lacked jurisdiction to: (1) exercise jurisdiction in the case generally and (2) deny a substantial part of his motion for a protective order, a writ of prohibition should issue.

Relator is mistaken. He has not established, and cannot establish, the second and third prerequisites for the issuance of a writ.

II. Respondent Does Not Patently And Unambiguously Lack Jurisdiction And, Therefore, Should Not Be Barred From Conducting Further Judicial Proceedings.

The central issue in the civil cases pending before Respondent is whether the activity at issue is gambling or a sweepstakes under Ohio law. Based on H.B. No. 386, the Legislature has determined that sweepstakes are not illegal under Ohio law. And Relator admits that gambling is illegal while sweepstakes are not. (*See* Compl. ¶ 7(a)). Relator nonetheless argues that a judge sitting in a civil case cannot engage in statutory construction to determine whether an activity is gambling or a sweepstakes without interfering with his prosecutorial discretion. This Court, Ohio appellate courts interpreting this Court's decision, as well as courts in other jurisdictions, disagree. Indeed, in the context of separation of powers, this court has recognized that interpretation of the laws is uniquely a function of the judiciary.

But the [separation of powers] doctrine also recognizes that our government is composed of equal branches that must work collectively toward a common cause. And in doing so, the Constitution permits each branch to have some influence over the other branches in the development of the law. *For example, the legislative branch plays an important and meaningful role in the criminal law by defining offenses and assigning punishment, while the judicial branch has its equally important role in interpreting those laws.*

State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 48. (Emphasis added).

That basic principle includes the judiciary's power to interpret laws in the context at issue here. In *Peltz v. City of South Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967), the Court held:

Where a municipal ordinance imposing criminal penalties upon a contemplated act will be enforced against a person if he proceeds

with that act, such person has standing to test the validity, construction and application of such ordinance by an action for declaratory judgment, and it is unnecessary to demonstrate the existence of an actual controversy for such a person to incur a violation of the ordinance.

Peltz, paragraph 1 of the syllabus.²

In *Peltz*, the plaintiff filed suit against the City of South Euclid, Ohio seeking a declaration that the city's ordinance banning the placement of political signs was unconstitutional. The City argued that the plaintiff, who was never charged with violation of the ordinance, did not have standing to seek a declaration or injunctive relief as a result. This Court rejected the argument, noting that the plaintiff had standing because he was threatened with prosecution under the ordinance:

It was not necessary for the plaintiff, in order to demonstrate the existence of an actual controversy, to place a political sign on his property in violation of the ordinance. ***Plaintiff's intended action was not speculative nor was defendant's threat hypothetical. If plaintiff had acted, the ordinance would have been applied to his disadvantage. Thus, the record establishes the existence of an actual controversy*** 'between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'

Id. at 131. (Emphasis added; citation omitted).

So, too, in this case. Relator specifically threatened the plaintiffs: If they continued to operate, he would prosecute. (May 30, 2012 Letter, attached to Complaint as Exhibit 1).

This Court reaffirmed a party's right to seek a declaratory judgment with respect to the application of a criminal statute in *Pack v. City of Cleveland*, 1 Ohio St.3d 129, 438 N.E.2d 434 (1982). In *Pack*, the Court held:

Any person whose rights, status or other legal relations are affected by a law may have determined any question of construction or

² In the trial court, Relator attempted to distinguish *Peltz* on the ground that it involved First Amendment issues. But, as the syllabus makes clear, the holding is not so limited.

validity arising under such law, where actual or threatened prosecution under such law creates a justiciable controversy. Courts of record may declare rights, status and other legal relations, and the declaration may be either affirmative or negative in form and effect.

Pack, paragraph 1 of the syllabus. In light of *Peltz* and *Pack*, there is a justiciable controversy and Respondent's exercise of jurisdiction was clearly proper. See also *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 70 Ohio St.2d 95, 435 N.E.2d 407 (1982) (deciding, in the context of a declaratory judgment action brought by the owner of Draw Poker machines, whether the machines were gambling devices per se under the Revised Code and therefore violated Ohio law);³ *Chesapeake Amusements, Inc. v. Riddle*, 363 Md. 16, 766 A.2d 1036 (2001) (applying Maryland law) (deciding, in the context of a declaratory judgment action brought by the owner of certain machines, whether the machines were slot machines prohibited under Maryland law); *Diamond Game Enters., Inc. v. Reno*, 9 F.Supp.2d 13 (D.D.C.1998) (applying federal law) (holding that court had jurisdiction to determine whether devices were illegal gambling devices and exercise of that jurisdiction did not interfere with prosecutorial discretion), *rev'd on other grounds*, 230 F.3d 365, 343 U.S.App.D.C. 351 (D.C.Cir.2000).

Moreover, Ohio appellate courts have held, based on *Pack*, that the proper procedure to determine the construction or validity of a statute when a person is under threat of prosecution is a declaratory judgment action.

In *State ex rel. Greater Cleveland Rapid Transit Auth. v. Griffin*, 62 Ohio App.3d 516, 576 N.E.2d 825 (8th Dist.1991), the Transit Authority was purportedly considering whether to provide indemnification for legal expenses for certain of its employees who had been indicted.

³ The specific relief sought was a declaration by the trial court that the Draw Poker machines were not gambling devices per se and that possession of the machines was not a violation of either the laws of Ohio or the regulations of the Liquor Control Commission.

Id. at 517-18. The county prosecutor sent a letter to the Transit Authority, much like Relator's letter to the plaintiffs in the underlying civil cases, stating that indemnification would be "improper" and warning that there were "other legal ramifications and consequences which can result from the unlawful expenditure of public funds." *Id.* at 518. The Transit Authority, like the plaintiffs in the civil cases at issue here, filed a complaint for declaratory judgment seeking a determination as to whether it had the authority, without violating state law, to provide indemnification. Rather than ruling on the request for declaratory relief, the trial court ordered the Transit Authority to decide whether it was authorized under its bylaws to provide indemnification. If it did not do so, the trial court indicated that it would dismiss the complaint. *Id.*

The Transit Authority then filed a writ of mandamus based on the trial court's refusal to rule on its request for declaratory relief. *Id.* at 518-19. The appellate court held that the county prosecutor had created a clear and justiciable controversy by threatening prosecution, and that the trial court had a "clear legal duty to render the requested declaration." *Id.* at 519.

The underlying civil actions at issue in this case are no different than the Transit Authority case. Like the plaintiffs in the cases over which the Respondent exercised jurisdiction, the Transit Authority was threatened by the county prosecutor with legal action. Like the plaintiffs in the cases over which the Respondent exercised jurisdiction, the Transit Authority filed a complaint for declaratory judgment. And like the trial court in the Transit Authority case, Judge Russo is under a clear legal duty to rule on the requested relief. *See also Devon, Inc. v. State of Ohio, Bureau of Motor Vehicles*, 31 Ohio App.3d 130, 508 N.E.2d 984 (1st Dist.1986) (holding that a party who seeks to determine the construction or validity of a statute has a legal remedy through a declaratory judgment action).

Nor do the cases upon which Relator relies support a contrary result.⁴ In two of the cases – *Ensley v. City of Dayton*, 2d Dist. No. 14487, 1995 WL 491116 (Aug. 16, 1995) (see Compl. ¶ 37), and *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N.E.2d 207 (2d Dist.1940) (see Compl. ¶ 37) – the plaintiffs were already the subject of an ongoing criminal proceeding when they instituted an action for equitable relief.

Specifically, in *Ensley*, the plaintiff brought a declaratory judgment *after* the City cited him for housing code violations, *after* the time to appeal those citations had elapsed, and *after* the City had instituted a criminal proceeding against him. Because there was an ongoing criminal proceeding against the plaintiff, the court’s decision is on all fours with the maxim that equity will not enjoin a criminal proceeding. *Ensley*, 1995 WL 491116, at *2. In this case, Relator does not allege that any criminal proceedings have been instituted against the plaintiffs in the underlying civil cases. Nor does he allege that Respondent’s orders enjoin a criminal proceeding against plaintiffs. Thus, *Ensley* is distinguishable.

Similarly, in *Troy Amusement Co.*, 64 Ohio App. 105, the plaintiff had been arrested for running an illegal lottery and the case had been bound over to the grand jury where the matter was pending when the plaintiff brought an action to enjoin the defendants from for any further searches and seizures relating to the lottery. *Id.* at 108-09. Thus, like the *Ensley* case, the *Troy*

⁴ Respondent does not dispute some of the basic legal principles set forth in the Complaint, including separation of powers and prosecutorial discretion. But most of the cases cited by Relator in the Complaint are not relevant to this case. For example, *State v. Hochhausler*, 76 Ohio St.3d 455, 668 N.E.2d 457 (1996) holds that the legislative branch cannot limit the inherent powers of the judicial branch by depriving the courts of their ability to grant stays with respect to administrative license suspensions. *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 858 N.E.2d 472 relates to the relationship between separation of powers and the gubernatorial-communications privilege. (See Compl ¶ 29). Neither case provides guidance with respect to whether the separation of powers doctrine precludes Respondent from exercising jurisdiction in the cases at issue.

The prosecutorial discretion cases are likewise inapposite. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 661 N.E.2d 180 (1996) involved a mandamus action by a private citizen in which Relator requested that the prosecutor be compelled to prosecute a complaint. *Pengov v. White*, 146 Ohio App.3d 402, 766 N.E.2d 288 (9th Dist.2001) likewise was a failure to prosecute case. (See Compl. ¶ 33). There is no allegation in the underlying cases regarding Relator’s failure to prosecute.

Amusement case involved an ongoing criminal proceeding relating to the plaintiff. That is not so in the cases pending before Respondent.

In *Garono v. State*, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), the lower court granted a permanent injunction that prohibited the authorities from “seizing, impounding, or confiscating poker machines owned, leased or operated by Plaintiff” *Id.* On appeal, this Court held that simply owning the machines was not illegal. As such, the previously seized machines had to be returned. However, the Court also determined that that actual use of the machines would be illegal. Therefore, because the permanent injunction would prevent prosecution even if the machines were used (an illegal act), the Court held that the injunction interfered with law enforcement. “This [the injunction] would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find that the injunction is improper in that it is too broad and thereby interferes with law enforcement.” *Id.* at 174.

Once again, that is not this case. Garono sought a determination that even if he used the machines (an illegal act), he could not be prosecuted. In the underlying cases here, the issue is whether the activity is gambling or a sweepstakes. If the latter, it is legal. If the former, it is not. Unlike Garono, the plaintiffs in the underlying cases at issue here are not seeking a declaration that if they do commit an illegal act, they will not be prosecuted.

Finally, in *Quality Care Transport v. Ohio Dept. of Job & Family Servs.*, 2d Dist. Nos. 2009 CA 113, 2009 CA 121, 2010-Ohio-4763 (*see* Compl. ¶ 36), the plaintiff entered into a transport contract with the Ohio Department of Job and Family Services (“ODJFS”). That contract provided that the plaintiff could not provide better rates to other customers than it provided to ODJFS. The underlying issue was whether the plaintiff had provided lower rates in two private contracts. The appellate court held that the trial court should have decided whether

the plaintiff's agreements with the private entities violated the terms of its contract with ODJFS. That "violation or not" determination was key to the second issue: whether the plaintiff could be prosecuted for overcharging Medicaid. That is, if it was determined that there was no violation of the contract, there could be no prosecution and vice versa. Hence, the appellate court's decision in *Quality Care Transport* permitted the very type of clarification being sought by the plaintiffs in the underlying civil cases at issue here.

Even assuming, for the sake of argument, that a breach of the terms of [plaintiff's] contract with ODJFS could have resulted in criminal prosecution, this possibility would not have precluded the trial court from clarifying whether the terms of the contract between [the plaintiff] and ODJFS prohibited the type of contractual agreements that [the plaintiff] had made with [the private entities].

Quality Care Transport, 2010-Ohio-4763, ¶ 25. Therefore, while the appellate court held that the trial court did not err in dismissing that part of the case requesting a declaration that the plaintiff had not violated the Medicaid laws, it required the trial court to determine whether the plaintiff had, or had not, violated the contract which provided the underlying basis for any prosecution.

In the underlying civil cases at issue here, the plaintiffs are seeking clarification of the construction of the gambling statute and section 12 of H.B. 386 relating to sweepstakes. And Respondent's orders provide that clarification. (See Compl., Exs. 5-8). Nothing in the *Quality Care Transport* decision precludes the clarification that the plaintiffs are seeking.

In sum, Respondent is not patently and unambiguously without jurisdiction. The Complaint and Petition for a Writ of Prohibition and Application for an Alternative Writ should be dismissed.

III. Relator Has An Adequate Remedy At Law.

A writ of prohibition is not a substitute for an appeal. *State ex rel. Crebs v. Court of Common Pleas of Wayne Cty. Probate Division*, 38 Ohio St.2d 51, 52, 309 N.E.2d 926 (1974); *State ex rel. Winnefeld v. Court of Common Pleas of Butler Cty.*, 159 Ohio St. 225, 112 N.E.2d 27 (1953). Nor is it a remedy for abuse of discretion. *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988).

‘[A writ of prohibition] is not an appropriate remedy for the correction of errors, and does not lie to prevent an erroneous decision in a case which the court is authorized to adjudicate.’

* * * Therefore, prohibition is not an appropriate remedy to correct alleged errors or prevent an allegedly erroneous decision stemming from such a review.

Barton v. Butler Cty. Board of Elections, 39 Ohio St.3d 291, 292, 530 N.E.2d 871 (1988), quoting *Kelley v. State ex rel. Gellner*, 94 Ohio St. 331, 114 N.E. 255 (1916), paragraph three of the syllabus.

Because Respondent does not patently and unambiguously lack jurisdiction, Relator must show that he has no adequate remedy in the ordinary course of law. He alleges that he does not because “Respondent’s improper decision to grant injunctive relief that enjoins Respondent from pursuing criminal charges is an inadequate legal remedy.” (Compl. ¶ 41). Respondent has not, however, enjoined Relator from pursuing criminal charges, and the instant case clearly does not involve such a “total want of jurisdiction” * * * to warrant dispensing with relator's adequate remedy of appeal.” *State ex rel. Gilla v. Fellerhoff*, 44 Ohio St.2d 86, 88, 338 N.E.2d 522 (1975).

Relator has an adequate remedy in the ordinary course of law. For this reason too, the Complaint and Petition for a Writ of Prohibition and Application for an Alternative Writ should be dismissed.

IV. R.C. 2505.02 Provides Relator An Adequate Remedy With Respect To The Discovery Order

Relator also challenges Respondent's discovery order. (Compl. ¶¶ 21-25). But, as a general matter, "courts have broad discretion over discovery matters." *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224 ¶ 11, quoting *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18. Given the discretionary authority vested in Judge Russo in discovery matters, "an extraordinary writ will not issue to control her judicial discretion, even if that discretion is abused." *Burnside*, 2007-Ohio-5542, ¶ 11, quoting *Berthelot v. Dezzo*, 86 Ohio St.3d 257, 259, 714 N.E.2d 888 (1999), *see also State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 16, 706 N.E.2d 765 (1999) (writ of prohibition will not generally issue to challenge discovery orders).

Therefore, Judge Russo did not patently and unambiguously lack jurisdiction to issue the discovery order.

Moreover, under R.C. 2505.02, Relator may appeal the discovery order to the extent it implicates, as Relator alleges it does, privileged or otherwise statutorily protected information. *See* R.C. 2505.02(A)(3) (discovery of privileged information is a provisional remedy); *see also Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 33 (10th Dist) (an order permitting discovery of privileged and/or confidential information is appealable); *Callahan v. Akron General Medical Ctr.*, 9th Dist. Nos. 24434, 24436, 2009-Ohio-5148, ¶ 17 (order requiring attorney to testify as to matters that are arguably protected by the attorney-client

privilege or work product doctrine is a final, appealable order); *Smalley v. Friedman, Damiano & Smith*, 172 Ohio App.3d 108, 2007-Ohio-2646, 873 N.E.2d 331 (8th Dist.).

And this Court has recognized that prohibition does not lie to prevent a trial court from determining questions of privilege.

[A]s we have consistently held, 'trial courts have the requisite jurisdiction to decide issues of privilege; thus extraordinary relief in prohibition will not lie to correct any errors in decision of these issues.'

State ex rel. Abner v. Elliott, 85 Ohio St.3d 11, 16, 706 N.E.2d 765 (1999) (citation omitted).

Because Relator may appeal the discovery order, he has an adequate remedy at law, which precludes his claim for extraordinary relief in prohibition. See *State ex rel. Corrigan v. Griffin*, 14 Ohio St.3d 26, 27, 470 N.E.2d 894 (1984); *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 34-35, 564 N.E.2d 86 (1990).

Finally, "insofar as Mason might be held in contempt if he does not follow the discovery order, he has an adequate remedy by appeal to challenge any contempt order based on his claim that Judge [Russo's] discovery order is erroneous." *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 15. "[A]ppealing a contempt order is an adequate remedy at law which will result in denial of the writ." *Id.*, quoting *State ex rel. Wellington v. Koby*, 112 Ohio St.3d 195, 2006-Ohio-6571, 858 N.E.2d 798, ¶ 29, quoting *State ex rel. Mancino v. Campbell*, 66 Ohio St.3d 217, 220, 611 N.E.2d 319 (1993).

In sum, Judge Russo did not patently and unambiguously lack jurisdiction to issue the pretrial discovery order and Relator has an adequate remedy in the ordinary course of law by way of appeal to challenge the propriety of that order.

CONCLUSION

For the foregoing reasons, the Complaint and Petition for a Writ of Prohibition and Application for an Alternative Writ should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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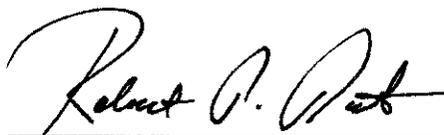
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