

IN THE SUPREME COURT OF OHIO

STATE ex rel. WILLIAM D. MASON,  
Cuyahoga County Prosecuting Attorney

Relator,

v.

NANCY MARGARET RUSSO,  
Judge, Cuyahoga County Common Pleas Court

Respondent.

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: Case No. 2012-1128  
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: Original Action in Prohibition  
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MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM IN  
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT AND  
PETITION FOR WRIT OF PROHIBITION AND ALTERNATIVE WRIT AND  
MEMORANDUM IN SUPPORT

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On July 3, 2012, Relator, Cuyahoga County Prosecuting Attorney William D. Mason, filed a Petition and Complaint for Writ of Prohibition and Application for Immediate Alternative Writ against Cuyahoga County Court of Common Pleas Judge Nancy Margaret Russo. In his Petition, Relator alleges that Judge Nancy Margaret Russo violated the separation of powers doctrine when she issued injunctive relief “that interferes with Relator’s prosecutorial discretion to bring criminal charges.” (Complaint, ¶ 1). On July 26, 2012, Respondent filed a Motion to Dismiss Relator’s Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support.

While “an amicus curiae may file a merit brief in an original action without leave of court,” the amicus curiae must first seek leave “to file a memorandum before an alternative writ is granted.” *State ex rel. Duke Energy Ohio, Inc. v. Hamilton County Court of Common Pleas*, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶11 (internal citations omitted). Ohio Attorney General Mike DeWine seeks leave to file a Memorandum in Opposition to

Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support because Respondent violated the doctrine of separation of powers.

The Attorney General should be granted leave because he is the "chief law officer for the state and all of its departments," which bestows upon him, the power to "appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St. 3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶33 (quoting R.C. 109.02). The state has a direct interest in ensuring that common pleas judges do not overstep the confines of their powers conferred by Section 4, Article IV of the Ohio Constitution, such that they run afoul of the separation of powers doctrine. As the chief law officer, it is incumbent upon Ohio Attorney General Mike DeWine to involve himself in civil cases to protect the constitutional separation of powers wherever possible. Based on the events that took place in Cuyahoga County Common Pleas Case Nos. 12-CV-785188 and 12-CV-784234, the Attorney General hereby exercises his power as the chief law officer and seeks leave to file a Memorandum in Opposition to Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support in order protect the integrity of the tripartite government structure ensured by the separation of powers doctrine.

Moreover, in *State ex rel. Duke Energy Ohio, Inc.*, this Court granted a motion for leave to file an amicus curiae memorandum before the alternative writ was granted because the amici was a party to the underlying Hamilton County action. Similarly, the Attorney General was named as a Defendant in *AMA Ventures Inc., et al. v. Mason, et al.*, Case No. 12-CV-785188,

one of the two cases pending before Judge Russo.<sup>1</sup> In fact, Ohio Attorney General Mike DeWine is also subject to the temporary restraining orders issued by Judge Nancy Margaret Russo.

It is likely that Respondent will oppose Ohio Attorney General Mike DeWine's Motion for Leave to File Amicus Curiae Memorandum in Opposition to Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support, just as they opposed the Ohio Attorney General's Motion for Leave to File Memo in Support of Alternative Writ. In their opposition to the Ohio Attorney General's Motion for Leave to File Memo in Support of Alternative Writ, Respondent only argued that leave should be denied because the underlying state court action, which is the impetus for this original action, is currently stayed. (Respondent Memo. Opp. Mot. Leave, p. 1). This does not, however, provide final resolution of the constitutional legal issues, in which the Attorney General has an interest in protecting.

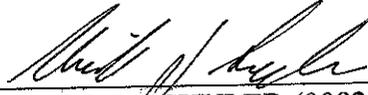
For these reasons, Ohio Attorney General Mike DeWine respectfully requests that he be granted Leave to file a Memorandum in Opposition to Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support, a copy of which is attached to this Motion. A proposed Order is also attached to this Motion for the convenience of this Court.

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<sup>1</sup> On July 5, 2012, AMA Ventures, Inc. dba Internet Galaxy, a plaintiff in the underlying state court action captioned Cuyahoga County Case No. 12-CV785188, filed a notice of voluntary dismissal of defendant, Ohio Attorney General Mike DeWine, pursuant to Ohio Civ.R. 41(a). However, J&C Marketing, LLC, also a Plaintiff in the 12-CV-785188 case, has yet to dismiss the Ohio Attorney General from that action. As such, the Attorney General is still a party to the action and is subject to the TRO issued by Respondent Judge Russo.

Respectfully Submitted,

MIKE DeWINE  
Ohio Attorney General



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**ORDER AND ENTRY**

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Upon consideration and good cause shown, Ohio Attorney General Mike DeWine's Motion for Leave to File Amicus Curiae Memorandum in Opposition to Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support is hereby GRANTED.

ENTERED BY ORDER OF THE COURT

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Kristina D. Frost, Clerk

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**I. INTRODUCTION**

Respondent filed a Motion to Dismiss this action, which should be denied because she exercised jurisdiction that was not authorized by law when she issued the temporary restraining orders in *J&C Marketing, LLC v. William D. Mason*, Cuyahoga County Case No. CV-12-784234 and *AMA Ventures, Inc., et al. v. William D. Mason, et al.*, Cuyahoga County Case No. CV-12-785188. Respondent was patently and unambiguously without jurisdiction to issue the aforementioned injunctive relief because it violated the Separation of Powers doctrine by affecting the discretionary prosecutorial decisions of the Cuyahoga County Prosecutor. Furthermore, Relator has no adequate remedy at law because temporary restraining orders that maintain the status quo are not subject to interlocutory appeal in Ohio.

**II. STATEMENT OF FACTS**

Amicus Curiae, Ohio Attorney General Mike DeWine, ("Attorney General DeWine") hereby adopts and incorporates by reference, the Statement of Facts set forth in Section II of his

Memorandum in Support of Relator's Petition for Immediate Alternative Writ ("Memo in Support of Alternative Writ"), which was attached to his Motion for Leave to File Amicus Curiae Memorandum in Support of Relator's Petition for Immediate Alternative Writ ("Motion for Leave I"), filed in this Court on July 6, 2012. In addition to the facts set forth in the aforementioned document, Amicus Curiae asserts the following subsequent procedural history in this action.

On July 12, 2012, Respondent Judge Russo filed a Motion to Dismiss Relator's Petition for Immediate Alternative Writ, while simultaneously filing a Memorandum Opposing Amicus Curiae Ohio Attorney General Mike DeWine's Motion for Leave I. The next day, Relator filed a Memorandum in Opposition to Respondent's Motion to Dismiss the Immediate Alternative Writ and Amicus Curiae Ohio Attorney General DeWine filed a Motion for Leave ("Motion for Leave II") to file the same. Later, on July 24, 2012, the Ohio Prosecuting Attorneys Association filed a Motion for Leave to File Amicus Curiae Memorandum in Support, and an accompanying Memorandum in Support of Relator's Request for a Writ of Prohibition. After Respondent filed the Motion to Dismiss that is currently at issue, on July 27, 2012, a number of "sweepstakes" companies filed a Motion for Leave to File Amicus Curiae Memorandum in Support of Respondent's Motion to Dismiss.

### **III. LAW AND ARGUMENT**

#### **A. This Court Should Deny Respondent's Motion to Dismiss Because Judge Russo Exercised Judicial Power that was not Authorized by Law.**

Respondent exercised judicial power that is not authorized by law by issuing temporary restraining orders, which interfere with the prosecutor's discretion. In his Memorandum in Support of Relator's Petition for Immediate Alternative Writ, Attorney General DeWine set forth legal arguments explaining why this Court should issue an Alternative Writ in this action. The

arguments set forth in that Memorandum are equally applicable for a denial of Respondent's Motion to Dismiss the Complaint and Petition for Writ of Prohibition. Those arguments are hereby adopted and incorporated by reference. In addition, Attorney General DeWine responds to the arguments set forth in Respondent's Motion to Dismiss.

Respondent argues that she was "not patently and unambiguously without jurisdiction," when she issued the temporary restraining orders in the underlying trial court action. (Respondent Motion to Dismiss, p. 12). In doing so, Respondent relies heavily on the *State ex rel. Greater Cleveland Regional Transit Authority v. Griffin*, 62 Ohio App.3d 516, 576 N.E.2d 825 (8th Dist. 1991). In that case, after receiving contrary advice from the county prosecutor, Greater Cleveland Regional Transit Authority ("GCRTA") filed a declaratory action with the state trial court "seeking a determination by the court of whether the GCRTA had the authority . . . to provide indemnification to its employees" that had been criminally indicted. *Id.* at 518. After the trial court informed the parties that it would dismiss the case without deciding the issues, the GCRTA filed a writ of mandamus to compel the judge to rule on the underlying state court action. *Id.*

Respondent improperly relies on the aforementioned case due to a mischaracterization when she argues 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,'" (Respondent Motion to Dismiss, p. 9), citing *Id.* at 519. There is no indication that the prosecutor in that matter would file criminal charges. Rather, the prosecutor informed the GCRTA that "such expenditures were illegal and threatened that **personal liability** of the board members and other 'consequences' could result." *Id.* at 519 (emphasis added). That had nothing to do with declaring the rights of a potential criminal defendant, enjoining a prosecutor, or

interpreting a criminal statute prior to enforcement. The GCRTA properly sought a declaration of their rights regarding civil liability for wrongfully compensating former employees under R.C. 306.30 *et seq.* and/or the GCRTA bylaws. For these reasons, *State ex rel. Greater Cleveland Regional Transit Authority* is inapposite and without legal relevance to this action.

The remaining cases cited by Respondent are also distinguishable. The plaintiffs in those cases sought declaratory relief by alleging that the penal statutes were unconstitutional; not that the **interpretation** of the penal statutes were unconstitutional or that the statutes were improperly applied by the prosecuting authority. In *Peltz*, the City of Euclid passed a local ordinance, which prohibited the display of “all political signs upon penalty of up to \$500 a day whether on public or private property.” *Peltz v. City of South Euclid*, 11 Ohio St.2d 128, 128, 228 N.E.2d 320. Plaintiff brought a declaratory judgment seeking to declare **the statute** unconstitutional. *Id.* at 131.

Similarly, in *Pack*, upon the prosecution of motion picture operators for violations of obscenity laws, the plaintiffs sought a declaration that a statutory exception, which would exculpate them from criminal liability, did not violate Equal Protection of the Fourteenth Amendment. *Pack v. City of Cleveland*; 1 Ohio St.3d 129, 1130, 438 N.E.2d 434. The Court held that the plaintiff had a justiciable cause to “assert the **validity of a law** in a declaratory judgment proceeding,” irrespective of whether the declaration seeks “affirmative or negative [relief] in form and effect.” *Id.* at 131. Only the facial constitutionality of the law itself was at issue in *Pack*, not whether the prosecutor properly interpreted the meaning of the statute. None of the cases that Respondent cites stand for the proposition that a court has jurisdiction to hear a

collateral civil action seeking a declaration and injunctive relief regarding the discretionary decisions of the county prosecutor.<sup>1</sup>

To the contrary, multiple cases have distinguished *Peltz* and *Pack* because the plaintiffs in those cases sought declarations regarding the constitutionality of the statutes at issue, not the prosecutor's interpretation and/or application of the statute. *Northland Recreation and Social Club v. City of Columbus* ("*Northland II*"), 10th Dist. No. 84AP-2021984 Ohio App. LEXIS 10922, at \*\*4-5 (Sept. 25, 1984) (stating reliance on *Pack v. City of Cleveland*, "is misplaced as that case was brought to determine the constitutionality of the law in question"); *Ohio Skill Games v. City of Columbus*, Franklin County Case No. 05 CVH 04-4063, at p. 6 (Apr. 13, 2006) (distinguishing *Peltz* by stating "plaintiff may challenge the constitutionality of a municipal ordinance or state statute through an action for declaratory judgment but that rule does not fit this Complaint," because "this is not a case challenging a law's constitutionality")

In *Ohio Skills Games v. City of Columbus*, plaintiffs brought an action seeking declaratory judgment and injunctive relief against the City Attorney and the County Prosecutor "to protect against possible future enforcement of R.C. 2915.01 *et seq.* against them." *Ohio Skill Games*, at p. 1. In essence, plaintiff sought "a pre-enforcement court determination of whether Tic Tac Fruit machines are games of chance, or otherwise illegal." *Id.* at p. 3. "The allegations in plaintiffs' Complaint boil[ed] down to apprehension that defendants might someday try to enforce R.C. Chapter 2915 against them, even though Tic Tac Fruit machines are, in their view, completely legal." *Id.* at p. 4.

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<sup>1</sup> Plaintiff also cites to *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 70 Ohio St.2d 95, 435 N.E.2d 407. In that case, however, the jurisdiction of the Franklin County trial court to issue declaratory and injunctive relief was not raised at the trial court level or raised as an assignment of error on appeal. Moreover, the Tenth District Court of Appeals overturned the trial court decision, which was affirmed by the Supreme Court of Ohio.

Citing this Court, the Franklin County Court of Common Pleas stated “[t]he Ohio Supreme Court has held that future criminal prosecutions cannot be the subject of injunctive relief when the statute is constitutional and the party seeking same has a remedy in the defense he may make to the future charge.” *Id.* at p. 6, citing *Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460 (1940). After all, “determining what is legal in the criminal law occurs if, as, and when criminal proceedings are actually brought.” *Ohio Skill Games*, at p. 4. Seeking declaratory and injunctive relief interpreting criminal laws “invites judicial entanglement in discretionary decision belonging to the executive branch.” *Id.* at p. 4. Therefore, “declaratory judgment is only appropriate when the validity or constitutionality of statutes or ordinances are in issue.” *Id.* at p. 4.

The relief that was barred in *Ohio Skills Games* is precisely the type of relief that Respondent granted in the temporary restraining orders she issued in the two underlying state court actions. As Respondent concedes, the plaintiffs in the underlying action are not challenging the constitutionality of a statute “[t]he central issue in the civil cases pending before Respondent is whether the activity at issue is gambling or a sweepstakes under Ohio law.” (Respondent’s Motion to Dismiss, at p. 6). In doing so, Respondent exercised judicial power that was not authorized by law. The injunctive relief issued by the Respondent constituted judicial entanglement in a discretionary decision of the Cuyahoga County prosecutor, which is barred by the separation of powers doctrine. The separation of powers doctrine “requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 372, 2006-Ohio-1825, 858 N.E.2d 472. Respondent, acting in her capacity as the judicial branch of government, was patently and unambiguously without jurisdiction to issue declaratory or

injunctive relief against the Cuyahoga County Prosecutor in his capacity as a representative of the executive branch.

**B. This Court Should Deny Respondent's Motion to Dismiss Because Relator has no Adequate Remedy at Law.**

“In cases of a patent and unambiguous lack of jurisdiction, the requirement of a lack of an adequate remedy at law need not be proven because the availability of alternate remedies like appeal would be immaterial.” *State ex rel. City of Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-50369, 937 N.E.2d 88, ¶25, citing *State ex rel. State v. Lewis*, 99 Ohio St.3d, 2003-Ohio-2476, 789 N.E.2d 195, ¶18. It is unambiguous that Respondent, by enjoining the executive branch from enforcing criminal statutes, exceeded the jurisdiction conferred upon her by Section 4, Article IV of the Ohio Constitution. Therefore, whether Relator is entitled to an adequate remedy at law is immaterial such that a writ of prohibition should issue.

To the extent this Court finds that Respondent was not patently and unambiguously without jurisdiction to issue the temporary restraining orders at issue, Relator is without an adequate remedy at law because he does not have the opportunity for a meaningful appeal. As expected, Respondent argues that Relator had an adequate remedy at law by way of appeal. (Respondent's Motion to Dismiss, at p. 13). It is a well-established general rule that “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. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶10 (internal citations omitted). In this case, however, Relator seeks a writ of prohibition to correct the Respondent's issuance of a **temporary restraining order**.

“A temporary injunction which merely serves to preserve the status quo pending the hearing on a request for a permanent injunction is not a final order appealable under §§ 2505.02,

2505.03.”<sup>2</sup> *State ex rel. Tollis v. Court of Appeals for Cuyahoga County*, 40 Ohio St.3d 145, 148, 532 N.E.2d 727 (1988), quoting *Amalgamated Clothing Workers v. Richmond Bros., Co.*, 348, U.S. 511, 517-518. at fn. 3 (1955); *May, Co. v. Bailey, Co.*, 81 Ohio St. 471, 91 N.E. 183, syllabus; *McGuire v. Zarle*, 9th Dist. No. 26058, 2012-Ohio-2976, 2012 Ohio App. LEXIS 2605, ¶7; *Deyerle v. City of Perrysburg*, 6th Dist. No. WD-03-063, 2004 Ohio 4273, 2004 Ohio App. LEXIS 3882; *Mike Lapin, Inc. v. Cleveland Business Show, Inc.*, 8th Dist. No. 50028, 1986 Ohio App. LEXIS, 6131, at \*4 (Mar. 27. 1986). Despite Respondent’s argument to the contrary, Relator does not have the ability to appeal the Respondent’s decision granting a temporary restraining order. Therefore, Relator does not have an adequate remedy at law by way of appeal in this specific action.

#### IV. CONCLUSION

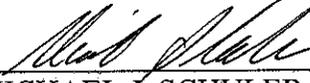
For these reasons, this Court should deny Respondent’s Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support.

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<sup>2</sup> While there is a limited exception whereby the granting of a temporary restraining order is considered a final appealable order, this only exists where “the trial court enters a temporary restraining order that exceeds the preservation of the status quo.” *Farmers Ins. Exchange v. Weemhoff*, 5th Dist. No. 02-CV-26, 2002-Ohio-5570, 2002 Ohio App. LEXIS 5582, ¶4. Not only has Respondent failed to raise this argument (despite Attorney General DeWine addressing this issue in his Memorandum in Support of Alternative Writ), Respondent issued multiple temporary restraining orders, which on their face, proclaim “to return the parties to their respective positions (status quo).” (TRO, attached to Relator’s Complaint as Exhibit 5); (J&C Marketing Complaint, at Prayer for Relief; AMA Ventures Complaint, at Prayer for Relief).

Respectfully Submitted,

MIKE DeWINE  
Ohio Attorney General



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Amicus Curiae's Memorandum in Opposition to Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support* was served by US Mail, postage prepaid, on this 6<sup>th</sup> day of August, 2012, upon the following:

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion for Leave to File Amicus Curiae Memorandum in Opposition to Respondent's Motion to Dismiss Complaint and Petition for Writ of Prohibition and Alternative Writ and Memorandum in Support* and accompanying attachments were served by US Mail, postage prepaid, on this 6th day of August, 2012, upon the following:

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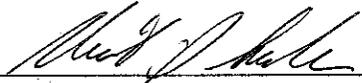
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