ORIGINAL

Mel M. Marinkovi c
P.O. Box 311
Reynoldsburg, OH 43068

1/25/2013

Petitioner
Pro se

IN THE SUPREME COURT OF OHIO

THE STATE EX REL. MARINKOVIC,)	Number 2012-2152
)	Related 7th District Petition 12 MA 166
Petitioner,)	Trial Case 12 CV 256
)	
v.)	
)	PETITIONER'S OPPOSITION
MAHONING COUNTY)	TO MOTION TO DISMISS
COURT OF APPEALS,)	MANDAMUS ACTION
)	
Respondent.)	

FILED
JAN 28 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Petitioner opposes as follows:

Respondent argues that no mandamus is allowed for persons declared vexatious, which suggests that the vexatious statute is void, as denying federal 1st and 14th Amendment rights to persons who are not felons, by permitting neither appeal nor mandamus. They base their argument on their rule that mandamus does not lie against an inferior tribunal because no statute allows it.

Although their premise supports one of the arguments that challenges the legality of the statute, their basic argument is widely wrong because the express words of R.C. § 2731.03 permit mandamus against an inferior tribunal. Their own prior cases have also allowed such actions. Since the 7th District so widely errs on a matter of horn-book law, petitioner suggests they have a habit of wide error and that they did so in this case by refusing to vacate, or allow him to file a new action.

I.

BACKGROUND

This petitioner in 2009 first sued medical defendants and county officers for false imprisonment and battery and interference with contract and fraud, for his mother, as her assignee of claims and also tried to add his own claims by motion to amend which was denied. The trial court dismissed with prejudice but the appeals court affirmed on the grounds of lack of standing because a son cannot represent his mother. So the trial court then changed its dismissal to without prejudice because of the rule in *Fed. Home Loan Mortg. Corp. v. Schwartzwald* , 2012 Ohio 5017, ¶ 40 (Oct. 31, 2012)(lack of standing at commencement requires dismissal, but that is "not an adjudication on the merits and is therefore without prejudice").

That also allows the plaintiff to re-file and add allegations of standing. *CTI Audio v. Fritikin-Jones Design Group*, 144 Ohio App.3d 449, 453-54 at [5] (2001)(if dismissed initially for lack of jurisdiction, plaintiff may re-file again and supply the missing "jurisdictional allegation" in the next court); *Wansyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58, 62 at [6](1963)(case previously dismissed for lack of jurisdiction may be refiled within 1 year after appeal ends).

After that prior dismissal, the defendants then drove Mother to California and killed her. Because the death came after the first action was filed and ruled upon, that prior action could not apply to claims that arose after that action. *Ohio v. Houston*, 8th Dist. No. 97628, 2012-Ohio-3569, ¶26 (res judicata excludes subsequent actions that could not have been presented in the first action).

That killing then gave son (petitioner) standing that he may not have had before, and he re-filed the action in Trumbull asserting Mother's claims. And he also added claims of his own like battery and fraud they committed against son. Therefore, in the second filing son's claims were his own.

But the trial court in this second action ignored son's claims entirely.

Additionally, under an express statute, a son may sue in Ohio committed by Ohio residents for wrongful death without any administrator, if he could do so in California where she was killed:

> When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which the right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country . . . and no prior law of this state shall prevent the maintenance of such cause of action.

Ohio R.C. §2125.01.

So son sued for wrongful death.

Additionally, in California son may also assert all claims Mother had on the day before they killed her, as her survivor, without appointment as administrator:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
> (a) The decedent's surviving spouse, domestic partner, children, and issue. . ..

CAL. CODE CIV. PROC. § 377.60. *See also*, *Chavez v. Carpenter,* 91 Cal.App.4th 1433, 111 Cal.Rptr.2d 534 (2001)(child of deceased parent owns the claim of wrongful death even if the child does not act on it before his own death).

That is the entire case. Straight-forward.

Son even filed the death certificate so the date of death is clear.

But the Trumbull trial court here ignored all of that, and dismissed *again* on the grounds that son has no standing to prosecute claims for his own injuries, and also has no standing to represent his Mother, and found son to be vexatious for re-filing the case asserting standing after the first court dismissal because of lack of standing.

Again, the second Trumbull trial court did *not* rule that a dismissal for lack of standing is *res judicata*. Instead, it ruled that son can *never* get standing no matter what he does even for his own personal claims, so he is vexatious for asserting standing to prosecute his own claims. No court in any state has ever made that ruling against any competent plaintiff over the age of minority, ever.

The Mahoning court of appeals then refused to allow son to continues an appeal in force, and refused to allow son to re-file a new action since two courts have now dismissed *without* prejudice.

Since son cannot challenge the refusal of the 11th District to re-open that original Trumbull action or start a new one, he can only come by way of mandamus, as this Court ruled in *Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500.

However, because the Trumbull trial court revoked son's *pauperis* status months before the vexatious ruling, and because son filed an appeal against that denial of *pauperis* status, son also argues that his appeal against the *pauperis* ruling ended the trial court's jurisdiction to issue the vexatious order, so that appeal is still proper. As a result, son has filed appeals (as 12-1678 ; 12-1680), and *also* this mandamus action in an abundance of caution in the event appeal are not allowed.

II.

THE MOTION TO DISMISS OF THE 7th DISTRICT WIDELY ERRS

However, while son followed state statute and case authority to make his filings before the Trumbull courts, the 7th District motion to dismiss here does not follow state law and appears to have been made in bad faith, deliberately. Petitioner can only guess that it was offered as a pretext to supply a vehicle for dismissal because of a direction of this Court in a judicial conference, if Ohio has them, committing to judges that this Court will never reverse a vexatious order no matter how wrong.

The 7th District Misrepresents State Mandamus Law

First, their core argument (at MOT. p. 4) is that no petitioner may name a court as a responding party to a mandamus action, implying there is no statutory authority to allow it. But in doing so they misrepresent the case they rely on: *State ex rel. Cleveland M. Ct. v. Cleveland City Coun.*, 34 Ohio St.2d 120, 121, 296 N.E.2d 544, 546 at [1] (1973). That supreme court dismissed because that case was by a municipal court itself for a money judgment demand, and there was no statutory authority for a court being a plaintiff on a money judgment demand. Since this is not an action by a court against anyone and this petitioner does not seek damages, that does not apply.

Moreover, they misrepresent that no court can be a respondent to a mandamus action because there is no statute that permits it. But that proposition would be recognized as plainly false to any student of law, so the more important question is why they asserted law they knew was false:

> The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to discharge any of its functions.

R.C. § 2731.03.

Under this express statute, mandamus may be brought against the court alone, or a judge alone, or both. *State ex rel. Collier v. Cuyahoga County Common Pleas Court*, 2008 Ohio 788 (Feb. 25, 2008) (denied on merits) [no other respondent]; *Ortiz v. Franklin County Court of Common Pleas,* 2007 Ohio 3221 (June 21, 2007) (inmate's action denied on merits) [no other respondent] ; *State ex rel. Rogers v. Cuyahoga Court of Common Pleas,* 83 Ohio App.3d 684, 615 N.E.2d 689 (1992)(mandamus will not lie to make the lower court hurry and rule faster than 120 days) [no other respondent] ; *Selway v. Court of Common Pleas Stark County,* 2007 Ohio 4566 (Sept. 4, 2007), (mandamus granted against lower court and costs taxed to the respondent court) [no other respondent]; *State ex rel. Howard v. Court of Common Pleas*, 142 Ohio App.3d 761, 757 N.E.2d 1 (2001) (court and judges named).

And *this* Court has also allowed the same type of mandamus actions against courts and no one else. *Torrance v. Court of Appeals, First Appellate Dist.*, 123 Ohio St.3d 1439, 2009 Ohio 5680, 915 N.E.2d 663 (dismissed on the merits).

Moreover, this Court has ruled that a plaintiff designated as vexatious *must* come by way of mandamus because appeal from any lower court is not available. *State ex rel. Office of the Montgomery County Pub. Defender v. Siroki,* 108 Ohio St.3d 334, 2006-Ohio-1065, 843 N.E.2d 778, ¶¶ 6, 10 (mandamus granted to compel court to file a petition of vexatious litigator because he did not have an adequate remedy at law) .

Even If Judges Must Be Parties Marinkovic Could Easily Add Them

Second, in the event this Court now changes its rule and requires naming judges even though R.C. § 2731.03 does not require it, son has a right to amend to add them as respondents, because as the 7th District Court of Appeals recognized in its motion to dismiss, a case cannot be dismissed

without leave to amend if any amendment could save it.

7th District Ignored The References To Appeals Attempted Here

Third, the 7th District Court of Appeals argues that this mandamus action is not proper because Marinkovic has not shown anywhere that he tried to file an appeal, and that a normal appeal is an adequate remedy at law so mandamus is not allowed.

Plaintiff assumes, *arguendo*, in order to make sense of the argument, that the 7th District Court of Appeals meant to argue that in an original action a party must plead in a mandamus action that he has attempted an appeal or that one is not allowed by law. Marinkovic does not need to oppose the presumption that inability to appeal must be pled, because the Court of Appeals misrepresents the record, since he *did* plead lack of ability to appeal it in his mandamus petition.

In the front page of the mandamus action itself he plainly states that this action results from a vexatious label, which prevents appeal, and later that Marinkovic files this action because this Court seems to require a mandamus action for anyone listed as vexatious under its ruling in *Sapp*, *supra.*

Marinkovic also cited this Court for the rule that a plaintiff designated as vexatious *must* come by way of mandamus because appeal is not available, and said plainly that while he challenges the vexatious order as void since issued without jurisdiction, he files the mandamus action in the event the vexatious order was properly entered. MANDAMUS, p. 2.

So no student of law reading any page of the mandamus action would in good faith make the arguments that the 7th District Court of Appeals now makes. That compels the conclusion that the 7th District simply threw gibberish at this Court because of their belief that it does not matter what they say even if it plainly misstates the law, because of their belief that no vexatious label will be reversed in this Court since none has been.

Arguing Merits Is Improper In A Motion To Dismiss

Fourth, at MOT. p. 5, the 7th District Court of Appeals also argues that Marinkovic makes no arguments on his own behalf for why he continued to file actions after he was declared vexatious. But that is not the purpose of a motion to dismiss. The purpose of a motion to dismiss is to show no argument could be made, as all arguments would be outside the court's jurisdiction.

But even if it is proper to argue merits now, Marinkovic did that too. He has just shown here that he already made two arguments in his mandamus action that show the 7th District erred.

One was that the entire vexatious order was void because Marinkovic filed an appeal against revocation of his *pauperis* standing months before the vexatious order was made, and that appeal took away the jurisdiction of the trial court to dismiss and to enter the vexatious order so that order does not exist. *Roberts v. United States District Court for The Northern District of California*, 339 U.S. 844, 70 S.Ct. 954, 955, 94 L.Ed.2d 1326, [3] (1950) (denial of IFP status is immediately appealable order); *Jenkins v. U.S.* , 548 A.2d 102, 108 n. 6 (D.C. App. 1988)(*in forma pauperis* status must be resolved completely before related claims can be pursued). MANDAMUS, p. 23. (He also makes a showing there, that the *pauperis* denial was a final appealable order for other reasons as well.)

Another was that Marinkovic *did* have standing to prosecute his own claims in the Trumbull court and in the Mahoning court which this lower courts here ignored, and that Marinkovic *did* have standing to prosecute wrongful death claims and survivor claims in the Trumbull case because the defendants killed his Mother after the first case was dismissed in 2009. *Galdino v. Brownell*, 255 F.Supp. 930, 931 (S.D. Cal. 1966) (§1983 action can be prosecuted by heir of deceased as survivor action for damages sustained by the deceased during her lifetime, or sustained because of wrongful death); *See also*, *Chavez v. Carpenter,* 91 Cal.App.4th 1433, 111 Cal.Rptr.2d 534 (2001)(personal injury claims may be enforced by survivor actions after death); *Steed v. Imperial Airlines*, 115

Cal.Rptr. 329, 524 P.2d 801, 803, [2] (1974)(heir of parents has standing to pursue their claims without appointment as executor). MANDAMUS, p. 19.

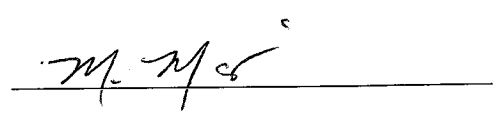
Additionally, at the MANDAMUS, p. 5-12 plaintiff showed why his original action was properly filed in Youngstown against a contractor. The 7th District ignored all of it.

And at MANDAMUS, p. 13 plaintiff shows that the judge dismissed defendants who did not move for judgment at all. So, all the defendants did not move for the relief the court granted. The judge cannot impose motions on them that they did not make, and then grant their motions. Collins v. Experian Credit Reporting Serv., No. 3:04CV1905, 2004 U.S. Dist. LEXIS 26345, at * 7 (D. Conn. Aug. 24, 2005)(if the court finds information to help a party that a party could assert but did not, he acts as a party's advocate, and not as an impartial adjudicator); Khan v. Gutsgell, 55 S.W.3d 440, 441 n. 1 (Mo. App. 2001)(a court as an impartial arbiter cannot be an advocate for a party that declines to argue its own issues); County of Dane v. Every, 131 Wisc.2d 592, 393 N.W.2d 799 (1986)(at Every's Affidavits)(a court finding precedent for a party who fails to do so himself "would transform a court from an impartial decision maker to an advocate for one party . . . and is prohibited").

It compels recusal for the court to pretend it is the counsel for the opposing party, in order punish a plaintiff for receiving a Scarlet Letter "V" for vexatious. It is rather obvious abuse by the judge, relegating all persons with the Scarlet Letter to being felons denied the First Amendment forever, for committing the crime of exercising the First Amendment.

For these reasons the motion to dismiss should be denied.

DATED: January 25, 2013



Mel M. Marinkovic
P.O. Box 311
Reynoldsburg, OH 43068

1/25/13

Petitioner
Pro se

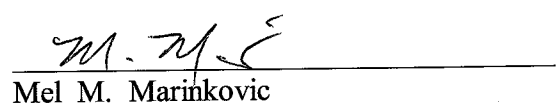
IN THE SUPREME COURT OF OHIO

THE STATE EX REL. MARINKOVIC,	)	Number 2012-2152
	)	
Petitioner,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	OF PETITIONER'S OPPOSITION
MAHONING COUNTY	)	TO MOTION TO DISMISS
COURT OF APPEALS,	)	
	)	
Respondent.	)	

Plaintiff verifies under penalty of perjury that he served this OPPOSITION to the following by U.S. first class mail this day:

MICHAEL DEWINE
A.G.
30 East Broad St., 16th Flr.
Columbus, OH 43215

DATED: January 25, 2013



Mel M. Marinkovic