

In the Supreme Court of Ohio

THE STATE EX REL., RONALD
A. ZILBERBRAND, et al.,

Relators,

v.

COURT OF COMMON PLEAS OF
HAMILTON COUNTY, OHIO,

and

THE HON. NORBERT A. NADEL,

Respondents,

Case No. 2013-0051

ORIGINAL ACTION IN PROHIBITION

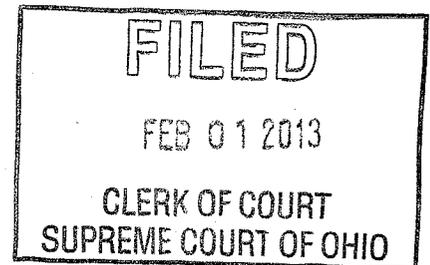
**INTERVENOR-RESPONDENT
PNC EQUIPMENT FINANCE LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

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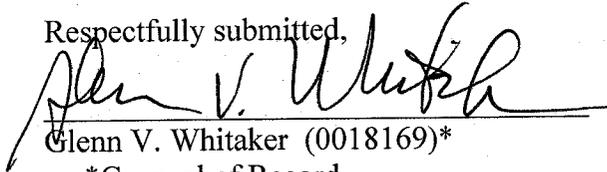
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PNC EQUIPMENT FINANCE LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Intervenor-Respondent PNC Equipment Finance LLC ("PNC") respectfully moves this Court under Rule 12(C) for judgment on the pleadings dismissing Relators' Complaint in Prohibition. The grounds for the motion are set forth in the attached memorandum of law, Relators' Complaint and PNC's Answer.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

Relators' sole assertion in this original action for a writ of prohibition is their claim that they were not properly served with the complaint, rendering the trial court without jurisdiction over them. Judgment on the pleadings should be granted dismissing the Petition, as this Court has repeatedly held that contested allegations of defective service of process are not cognizable in prohibition. *State ex. Rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 28 (citing *State ex rel. Suburban Constr. Co. v. Skok*, 85 Ohio St.3d 645, 646, 1999-Ohio-329, 710 N.E.2d 710 (1999)); *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, 772 N.E.2d 1192, ¶ 21. PNC has maintained the position that Relators invited electronic service of process through email, PNC served Relators via email the date the complaint was filed, and Relators confirmed their acceptance of service by email that same day. (PNC Ans. ¶ 1; Ex. A.) Relators contend that this series of events does not amount to proper service of process. Thus, the issue of whether service of process was effective is contested and not cognizable in prohibition.

In addition, dismissal is appropriate for several independent reasons:

Unripe for Review: The trial court has not yet ruled on Petitioners' motion to dismiss, which motion was only filed in December 2012. Under long-standing precedent of this Court, a trial court is entitled to determine its own jurisdiction in the first instance. The Petition therefore should be dismissed as premature.

Not "Patently and Unambiguously Contrary to Law": Even if the trial court denied Relators' motion to dismiss, such a decision would not meet the "patently and unambiguously contrary to law" standard necessary to sustain a writ of prohibition. Relators' contention that the

trial court “lacks jurisdiction over the Relators because PNC, the plaintiff in the Case, never served Relators and the Case has not been commenced” is contrary to the facts and the law. (Pet. ¶ 18.) At the outset of this case, counsel for Relators was served with the complaint electronically, accepted service of the complaint, and confirmed his acceptance of service by email. Relators admitted in their answer that the trial court had personal jurisdiction over them and that venue was proper—admissions that preclude a court from now hearing the inconsistent position that service was defective and that there is no personal jurisdiction, absent amendment of their answer which Relators did not seek leave to do. (PNC Ans. ¶ 10; Ex. D.) Relators otherwise waived their objection as to defective service of process under Civ.R. 12(H) by filing a pre-answer Rule 12 motion which did not raise the defense of insufficiency of process, and through filing a general “notice of appearance” two months before answering that made no mention of any deficiency of service or any jurisdictional objection.

Adequate Remedy at Law: Relators have not identified and cannot identify how denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. In similar cases, this Court has held relators have had an adequate remedy in seeking redress in the trial court, and in pursuing an appeal. *State ex rel. Suburban Constr. Co. v. Skok*, 85 Ohio St.3d 645, 647, 710 N.E.2d 710 (1999).

Complaint Not Supported by a Proper Affidavit: Relators’ complaint is supported by an affidavit from counsel affirming that the statements in the complaint are true “to the best of his personal knowledge, information and belief.” This Court has held time and again in original actions that affirmations made to the “best” of counsel’s knowledge fall short of S.Ct. Prac.R. 12.02(B)(2)’s requirement that an affidavit be made on “personal knowledge.” This is an independent reason for dismissal.

II. RELEVANT FACTS

When this action arising out of breach of aircraft financing agreements was commenced, counsel for Relators sent counsel for PNC an email offering to accept service of the complaint, counsel for PNC responded, accepting the offer and electronically serving counsel for Relators with the complaint, and counsel for Relators replied confirming receipt of the complaint and their acceptance and waiver of service. (PNC Ans. ¶ 1; Ex. A.) Relators then filed a general notice of appearance and a Rule 12 motion, making no mention of any defect of service or lack of jurisdiction. (PNC Ans. ¶ 8; Exs. B and C.) Two months later, Relators answered the amended complaint, admitting that venue was proper and that the court had personal jurisdiction over them, while lodging 39 boilerplate affirmative defenses, including standard form objections based on improper venue and insufficient service. (PNC Ans. ¶ 10; Ex. D.) In December 2012, over a year after the action was commenced, Relators filed a motion to dismiss, claiming for the first time that they were not subject to the court's personal jurisdiction in that they were not properly served. (PNC Ans. ¶ 12.) Without waiting for the trial court to decide their motion, Relators filed the present Petition for a writ of prohibition on January 14, 2012.

III. ARGUMENT

Judgment on the pleadings or dismissal of a petition for a writ of prohibition should be granted where after all factual allegations of the complaint are presumed true and all reasonable inferences are made in relators' favor, it appears beyond doubt that relator can prove no set of facts warranting relief. *Clark v. Connor*, 82 Ohio St. 3d 309, 311, 695 N.E.2d 751, (1998); *Suburban Constr. Co.*, 85 Ohio St. 3d at 646, 710 N.E.2d 710.

A. The Prohibition Claim Based on Contested Allegations of Defective Service of Process is Not Actionable.

For over 50 years, this Court has consistently held that contested allegations of insufficient or defective service of process are not cognizable in prohibition, if such allegations are “not premised upon a complete failure to comply with the minimum-contacts requirement of constitutional due process. . . .” *Suburban Constr. Co.*, 85 Ohio St.3d at 646, 710 N.E.2d 710 (dismissing writ of prohibition petition where relator alleged he was never served with complaint); *State ex rel. Gelman v. Lorain Cty. Court of Common Pleas*, 172 Ohio St. 73, 74, 173 N.E.2d 344 (1961) (same); *see also Downs*, 107 Ohio St. 3d at 352, 839 N.E.2d 911 (same); *Ragozine*, 96 Ohio St. 3d 201, 2002-Ohio-3992, 772 N.E.2d 1192, at ¶ 21 (same). Relators make no claim as to a lack of minimum contacts; in fact, Relators admit in their answer that the Court has personal jurisdiction over them and that venue is proper. (PNC Ans. ¶ 10; Ex. D.)

These admissions by the Relators should categorically preclude their defective service claims. Yet even if they are not so precluded, the defective service claims are subject to dispute by the parties: Relators allege that they were not served with the complaint, while PNC asserts that it effected service by email, that service was otherwise waived, and that Relators are properly before the court. (PNC Ans. ¶¶ 1, 7-10, 12, 21.) The cases make clear that a prohibition proceeding simply is not an appropriate procedural method for resolving this dispute. The Petition therefore is ill-posed, and must be dismissed.

B. Relators Have Not Alleged the Required Elements for Issuance of a Writ of Prohibition.

Apart from the fact a writ of prohibition action based on defective service is not cognizable, for Relators to prevail on their Petition, they must demonstrate that: (1) the lower court is about to exercise judicial power; (2) the exercise of that power is unauthorized by law;

and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *See State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶ 7. Relators allege no facts showing that any of these elements apply, much less that there is patent and unambiguous application of any of them.

1. The trial court has not yet ruled on Relators' motion, and the Petition should be dismissed as premature.

At the outset, the trial court has not yet ruled on Relators' motion to dismiss for failure of service, which motion was filed in December 2012. This fact alone should compel dismissal of the Petition as premature under long-standing precedent of this Court. *State ex rel. Cuyahoga Cty. Bd. of Comm'rs v. State Personnel Bd. of Rev.*, 42 Ohio St. 3d 73, 74, 537 N.E.2d 212 (1989) (affirming court of appeals' dismissal of writ of prohibition and holding complaint was "premature" because respondent had not yet made final findings related to jurisdictional facts); *State ex rel. B. F. Goodrich Chemical Div. v. Griffin*, 59 Ohio St. 2d 59, 61, 391 N.E.2d 1018 (1979) (affirming court of appeals' dismissal of petition for writ of prohibition, where trial court had yet to rule on facts relating to jurisdiction); *accord State ex rel. Miller v. Gillie*, 24 Ohio App. 3d 121, 493 N.E.2d 327 (10th Dist. 1986) (Moyer, J.) (dismissing petition for writ of mandamus and for prohibition as premature, where trial judge had not yet ruled upon relator's challenges).

In the trial court, Relators filed their motion to dismiss for want of service on December 11, 2012, PNC filed its opposition on December 18, 2012, and Relators filed their reply on December 26, 2012. Rather than allow the trial court time to first decide their motion, Relators filed their Petition in this Court on January 14, 2013. The trial court's holding could moot the relief Relators seek, and make involvement of this Court unnecessary. The Petition should be dismissed as unripe.

2. Assuming the trial court declines to dismiss for lack of personal jurisdiction, Relators have not alleged that jurisdiction is patently and unambiguously lacking.

The only recognized exception to a court's authority to determine its own jurisdiction is when the lower court "patently and unambiguously" lacks jurisdiction. *Suburban Constr. Co.*, 85 Ohio St.3d at 646, 710 N.E.2d 710. "Absent a patent and unambiguous lack of jurisdiction, an appeal from a decision overruling a motion to dismiss based upon lack of personal jurisdiction will generally provide an adequate legal remedy which precludes extraordinary relief through the issuance of a writ of prohibition." *ANS Connect v. Coyne*, 8th Dist. No. 88602, 2006-Ohio-6599, 2006 Ohio App. LEXIS 6534, ¶ 9 (citing *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541 and other cases)). Relators cannot come close to showing a patent and unambiguous lack of personal jurisdiction here.

a. Relators solicited service by email, were served electronically, and then wrote to confirm receipt of the Complaint and acceptance of service.

The trial court should find that the Relators accepted service at the outset of this case. On November 11, 2011, Relators emailed PNC, and made an offer to accept service. (PNC Ans. ¶ 1; Ex. A) ("If you decide to file in the Court of Common Pleas, I will accept service in the new case for the defendants listed in the Motion.") After filing the complaint on December 6, 2011, PNC accepted Relators' offer by emailing counsel the complaint. (*Id.* ("PNC voluntarily dismissed the Federal Court action and have re-filed in the Court of Common Pleas. If needed, please confirm [your] agreement to accept service on behalf of your clients as indicated below.")) Minutes later, Relators responded by email confirming his receipt of the complaint and his acceptance of service. (*Id.* ("Thanks for the copy of the Complaint. This email will confirm my agreement to accept service on behalf of the defendants we represented in the federal action."))

It would not be patently contrary to the law for the trial court to conclude that through this email exchange, Relators accepted service.

b. Relators conclusively admitted that the trial court had personal jurisdiction over them in their answer, thus barring their inconsistent argument now.

Independent of the above, the trial court would not be acting patently and unambiguously contrary to law by holding that the Relators' answer conclusively admits that the court has personal jurisdiction over them and that service was properly effected or waived.

Civ.R. 8(B) states that “[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny the remainder.” Paragraph 2 of the first amended complaint states “[t]his Court has personal jurisdiction over Defendants because the Defendants regularly conduct business in Ohio, the causes of action arose in Ohio, and/or the transactions and occurrences out of which the causes of action arose took place in Ohio.” (PNC Ans. ¶ 10; Ex. D.) Paragraph 2 of Relators' answer contains a general admission, whereby Relators explicitly “admit the allegations contained in Paragraph 2.” (*Id.*) Because Relators admitted that the trial court had personal jurisdiction over them in their answer (which was never amended), it is “axiomatic” that they cannot contradict that admission by claiming that personal jurisdiction is lacking because of allegedly improper service. *Stanwade Metal Prods. v. Heintzelman*, 158 Ohio App. 3d 228, 2004-Ohio-4196, 814 N.E.2d 572, ¶ 21 (11th Dist. 2004) (responses in answer “constitute admissions which he cannot later contradict or challenge via deposition or other testimony, absent an amendment pursuant to Civ.R. 15(A)”); *Caravella v. West-WHI Columbus Northwest Partners*, 10th Dist. No. 05AP-499, 2005-Ohio-6762, 2005 Ohio App. LEXIS 6049, ¶ 19; *Beneficial Mtge. Co. of Ohio v. Leach*, 10th Dist. No. 01AP-737, 2002-Ohio-2237, 2002 Ohio

App. LEXIS 2240, ¶ 46 (holding that a party may not create an issue of fact by contradicting an assertion in its counterclaim with subsequent deposition testimony). Relators would need to first seek leave to amend their answer to assert any objection to personal jurisdiction, something they have never moved to do.

The trial court also might conclude, again without acting patently contrary to law, that the answer's affirmative defenses as to venue and service—including among the 39-boilerplate affirmative defenses—do not enable the Relators to claim ineffective service now. Relators' position in the affidavit accompanying their Petition is "totally inconsistent" with their unqualified admission that they are subject to the trial court's personal jurisdiction. *See Jones v. Hoisington*, 10th Dist. No. 87AP-570, 1988 Ohio App. LEXIS 382, *6-7 (Feb. 2, 1988) ("[W]here an affidavit raises an affirmative defense which is totally inconsistent with a civil defendant's answer, such affidavit must be rejected by the trial court as competent evidence," reasoning that "where . . . the affidavit squarely conflicts with the affiant's prior unambiguous statement or admission, it seems unjust to consider such evidence absent explanation for the discrepancy."). The trial court thus could plausibly hold that the Relators' admissions in their answer (that venue was proper and that the court had "personal jurisdiction over defendants") preclude their affidavit and motion in this Court stating that personal jurisdiction is lacking.

c. Relators' pre-answer conduct indicates that they waived or accepted service.

It also would not be patently and unambiguously improper for the trial court to conclude that Relators waived the defense of insufficiency of service through their pre-answer conduct in this litigation, namely by filing a Rule 12 motion that did not include the defense, and by entering a general appearance in the Court making no mention of allegedly deficient service, months before answering. *Compare Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.

3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶¶ 7-9 (holding no waiver, where appellants did not file a pre-answer motion or general notice of appearance, but instead properly raised the affirmative defense of insufficiency of service of process in their answer, their first filing in the case).

Rule 12 Motion: The Civil Rules are explicit that a party who files a Rule 12 motion which omits a defense of “insufficiency of service of process” forever waives such a defense, regardless of whether the party later seeks to interpose that defense in its answer. Civ.R. 12(G) (“If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.”); Civ. R. 12(H)(1) (“A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (G). . .”).

Relators filed a Rule 12(E) motion for a more definitive statement on December 30, 2011, two months before they filed their answer. That motion made no mention of any alleged failure of service of process or any other personal jurisdictional defenses, but instead identified the complaint’s alleged failure to sufficiently plead claims for breach of contract, and sought discovery as to the contracts at issue. It would not be patently and unambiguously contrary to the law for the trial court to conclude that the filing of this Rule 12 motion waived Relators’ defense as to the insufficiency of service under Civ.R 12(G) and Civ. R. 12(H)(1). *Anderson v. Horizon Joint Venture Corp.*, 10th Dist. Nos. 90AP-665, 90AP-677, 90AP-678, 90AP-673, 90AP-674, 90AP-675, 90AP-676, 1990 Ohio App. LEXIS 5527, *10 (Dec. 11, 1990) (holding,

where counsel filed a pre-answer “motion for a more definite statement under Civ. R. 12(E)” that did not assert insufficiency of service defense, that “[p]ursuant to Civ. R. 12(G) and (H), [party’s] failure to assert lack of personal jurisdiction, insufficiency of process or insufficiency of service of process in that motion is a waiver of those defenses” notwithstanding attempt to rely on affirmative defense in answer); *jurisdictional motion overruled*, 59 Ohio St. 3d 720, 572 N.E.2d 696 (1991).¹

Notice of Appearance: There is a long line of Ohio cases holding the defense of insufficiency of service of process and lack of personal jurisdiction is waived by a party’s failure to lodge such an objection at its first appearance in the case.² The record shows that Relators

¹ See also *Holloway v. Gen. Hydraulic & Mach., Inc.*, 8th Dist. No. 82294, 2003-Ohio-3965, 2003 Ohio App. LEXIS 3554, ¶ 8 (noting that waiver can occur when a defendant engages in discovery prior to filing the answer with the affirmative defense); *State ex rel. Athens County Dep’t of Job & Family Servs. v. Martin*, 4th Dist. No. 07CA11, 2008-Ohio-1849, 2008 Ohio App. LEXIS 1576, ¶ 19-21 (litigant’s actions “amounted to a waiver of the alleged failure to properly serve him,” where litigant filed two motions which “affirmatively sought the protections of the trial court” and “attended a hearing accompanied by counsel before moving to vacate the default judgment many months later”); *Wells Fargo Bank, N.A. v. Sekulovski*, 10th Dist. No. 11AP-795, 2012-Ohio-5973, 2012 Ohio App. LEXIS 5164, ¶ 12 (holding waiver of defense of insufficiency of service of process where “before filing an answer, defendant filed a motion for extension of time, seeking an additional 60 days in which to move or plead to plaintiff’s complaint. In it, defendant did not mention any failure to serve him with the summons and complaint.”); *Kvinta v. Kvinta*, 10th Dist. No. 02AP-836, 2003-Ohio-2884, 2003 Ohio App. LEXIS 2618, ¶ 59 (“Here, because Mary Kvinta filed three written motions with the trial court without including or filing a separate Civ.R. 12(B) motion to dismiss the complaint based on lack of jurisdiction or insufficient service, she waived the jurisdictional defenses and voluntarily submitted herself to the court’s jurisdiction.”).

² See, e.g., *In re A.L.W.*, 11th Dist. Nos. 2011-P-0050, 2011-P-0051, 2011-P-0052, 2012-Ohio-1458, 2012 Ohio App. LEXIS 1296, ¶ 37 (“[A]n objection to personal jurisdiction is waived by a party’s failure to assert a challenge to such jurisdiction at its first appearance in the case.”) (citing *McBride v. Coble Express, Inc.*, 92 Ohio App.3d 505, 510, 636 N.E.2d 356 (3d Dist.1993)); *Michigan Millers Mutual Insurance Co. v. Christian*, 153 Ohio App.3d 299, 2003-Ohio-2455, 794 N.E.2d 68, ¶ 10 (3d Dist.) (“By appearance for any other purpose than to object to jurisdiction, a defendant enters his general appearance to the action and voluntarily submits himself to the jurisdiction of the court, and cannot afterwards claim that the court’s jurisdiction of his person has not been properly obtained.”); *St. Anthony the Great Romanian Orthodox Monastery, Inc. v. Somlea*, 8th Dist. No. 97955, 2012-Ohio-4162, 976 N.E.2d 924, ¶ 16 (“A waiver by appearance is one where the party appears ‘for any other purpose than to object to jurisdiction.’”) (quoting *Slomovitz v. Slomovitz*, 8th Dist. No. 94499, 2010-Ohio-4361, 2010

filed a notice of appearance on December 21, 2011, their first filing in the trial court, which made no mention of any defense based on failure of service or any defect in service. (PNC Ans. ¶ 8, Ex. B.) If the trial court ultimately concludes that the filing of this notice of appearance waived Relators' defense of insufficiency of service defense, it would be well within—not outside—the bounds of Ohio precedent. See *Regional Airport Authority v. Swinehart*, 62 Ohio St. 2d 403, 408, 406 N.E.2d 811 (1980) (holding by filing an answer, appellee made an appearance and therefore consented to the personal jurisdiction of the court); *Maryhew v. Yova*, 11 Ohio St. 3d 154, 156, 464 N.E.2d 538 (1984) (holding two oral requests for extension of time did not amount to a waiver of insufficiency of service of process defense, where “there was not a voluntary entry of appearance on behalf of the defendant by way of an entry of the court, or a responsive pleading to the merits of the case.”); *Compare Schumacher v. Schumacher*, 9th Dist. No. 25411, 2011-Ohio-581, 2011 Ohio App. LEXIS 496, ¶ 13 (holding that the filing of a notice of appearance in party's first appearance with the court did not waive defective service, where party's “notice of appearance ... provided that ‘this appearance is not in lieu of proper service of process’”).

3. Petitioners Cannot Show that An Appeal Provides an Inadequate Remedy.

“Absent a patent and unambiguous lack of jurisdiction, a postjudgment appeal from a decision overruling a motion to dismiss based on a lack of personal jurisdiction will generally provide an adequate legal remedy which precludes the issuance of the writ.” *Fraiberg v.*

Ohio App. LEXIS 3685, ¶ 9); *Joseph v. Lastoria*, 12th Dist. No. CA88-05-040, 1988 Ohio App. LEXIS 4323, *5 (Oct. 31, 1988) (“In the case sub judice, appellee did raise the issue of insufficiency of process in his answer. Prior to this, however, appellee had voluntarily appeared in the action on April 16, 1987 by filing a notification of representation and by filing a request for production of documents. This was one day prior to filing his responsive pleading. By this action appellee showed his clear intent to appear and defend on the merits, thereby waiving his right to complain of insufficient service of process.”).

Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div., 76 Ohio St. 3d 374, 375, 667 N.E.2d 1189 (1996). There has been no decision overruling Relators' motion to dismiss for lack of jurisdiction, much less any showing that such a decision would be patently and ambiguously contrary to law. Moreover, this Court has long held as a categorical matter for cases concerning allegations of insufficient or defective service of process that Relators have an adequate remedy in seeking redress in the trial court, and only thereafter pursuing an appeal. *Suburban Constr. Co.*, 85 Ohio St.3d at 647, 710 N.E.2d 710.

In addition, Petitioners' sole allegation concerning lack of an adequate remedy at law is that "the consequences and costs" of litigation remain pending. (Pet. ¶ 15.) This Court has long declined to find these allegations of harm sufficient to warrant issuance of a writ of prohibition. *State ex rel. Cleveland Trust Co. v. Pethel*, 137 Ohio St. 525, 30 N.E.2d 991 (1940); *State ex rel. Caley v. Tax Comm. of Ohio*, 129 Ohio St. 83, 88, 193 N.E. 751 (1934) ("The principle is well established in Ohio that such writ may not be employed as a convenient short-cut to a final determination of rights of litigants"). Petitioners' suggestion that they lack an adequate remedy at law therefore is meritless and should be rejected.

C. Petitioners' Complaint is Not Supported by a Proper Affidavit.

In the affidavit attached to the Verified Complaint for Writ of Prohibition, Petitioner's counsel affirms that the statements contained in the complaint are true "to the best of his personal knowledge, information and belief." Such language has repeatedly been deemed insufficient by this Court. In *State ex rel. Hackworth v. Hughes, Mayor, et al.*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 24, this Court held:

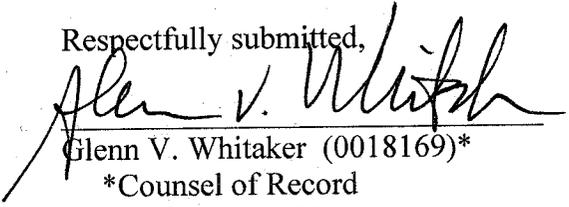
We have routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge. See *State ex rel. Tobin v. Hoppel*, 96 Ohio St. 3d 1478, 2002 Ohio 4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St. 3d 324, 750 N.E.2d 167. The affidavit attached to Hackworth's complaint, in which one of his attorneys stated that the facts in the complaint were "true and accurate to the best of her knowledge and belief," does not comply with S. Ct. Prac.R. X(4)(B).

See also S.Ct. Prac.R. 12.02(B)(2) ("The affidavit required by this division shall be made on personal knowledge. . ."). Because Petitioners have not attached an affidavit asserting personal knowledge as to the allegations of the complaint, the Verified Complaint must be dismissed.

III. CONCLUSION

For the foregoing reasons, Intervenor-Respondents' motion for judgment on the pleadings should be granted, and the Petition should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email this 31st day of January, 2013, pursuant to Rule 5(B)(2)(f) of the Ohio Rules of Civil Procedure and S.Ct.Prac.R. 3.11(B)(1), upon the following:

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