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**In the  
Supreme Court of Ohio**

The State ex rel., RONALD A. ZILBERBRAND, et al.,	:	Case No. 2013-0051
	:	
Relators,	:	Original Action in Prohibition
	:	
vs.	:	<b>RELATORS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS</b>
	:	
COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Respondents.	:	

**I. STATEMENT OF FACTS**

The only relevant facts properly before this court are those that are included in Relators' Complaint. The undisputed facts show that PNC never perfected service in any manner set forth in Civ.R. 4. No summons was ever delivered, no return of service was ever filed, and more than a year has passed since PNC's filing of its complaint. None of these facts has been disputed, nor could they be.

In an attempt to create an issue of fact, Respondents reference an email (the "Email") attached to PNC's response to Relator's motion to dismiss. While the Email should not be considered at this stage of pleading, Relators must note that Respondents' characterization of the Email is inaccurate. According to Respondents, the Email constitutes a waiver of service. However, the plain language of the Email does not support that interpretation. The Email only discusses acceptance of service of process – not waiver.

## II. LEGAL ARGUMENT

### A. RESPONDENTS' FIRST AND SECOND PROPOSITIONS OF LAW INCORRECTLY RECITE THE STANDARD OF REVIEW APPLICABLE TO A MOTION TO DISMISS.

In their First and Second Propositions of Law, Respondents provide two correct statements of law. Yet, Respondents nonetheless fail to offer the correct legal standard applicable to their Motion to Dismiss. When the correct standard of review is applied to Respondents' Motion, it is clear that Relators' Complaint states a claim upon which relief can be granted. Respondents' Motion should therefore be denied.

At this early juncture of the proceedings, this case is governed by S.Ct.Prac.R. 12.04(C),<sup>1</sup> which provides that “[a]fter the time for filing an answer to the complaint or a motion to dismiss, the Supreme Court will either dismiss the case or issue an alternative or a peremptory writ, if a writ has already been issued.” Dismissal is required only “if it appears beyond doubt, *after presuming the truth of all material factual allegations of [relators'] complaint and making all reasonable inferences in [their] favor*, that [relators] are not entitled to the requested extraordinary relief in [prohibition].” *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 12 (emphasis added).<sup>2</sup>

If, however, after so construing the complaint, it appears that Relators' prohibition claim may have merit, the court must grant an alternative writ and issue a schedule for the presentation

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<sup>1</sup> Effective January 1, 2013, former S.Ct.Prac.R. 10.5(C) was renumbered as S.Ct.Prac.R. 12.04(C).

<sup>2</sup> This heightened standard is the same for PNC's Civ.R. 12(C) motion for judgment on the pleadings—“the court is required to construe as true all material allegations *in the complaint*, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party.” *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001)(emphasis added).

of evidence and brief. *See State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 8; S.Ct.Prac.R. 12.05.

The allegations of Relators' Complaint clearly set forth facts which, if proven, entitle Relators' to the requested relief. Among other facts, Relators have alleged that they are defendants in a civil action in the Hamilton County Court of Common Pleas; that service according to Civ.R. 4 has not been perfected upon them; that more than a year has passed without commencement of the action under Civ. R. 3; and, that the Respondents therefore lack jurisdiction. When this Court accepts the facts alleged in the Complaint as true, and allows Relators the reasonable inferences to be drawn from these facts, it is clear that the Complaint states a viable claim for the extraordinary relief sought.

Respondents' legal argument is no more than a recitation of Relators' ultimate burden of proof in this action, and a conclusory statement that the claim must be dismissed. Respondents' Motion utterly fails to provide this Court with any grounds upon which a Motion to Dismiss could be granted at this stage of the proceedings.

**B. THERE ARE NO "CONTESTED ALLEGATIONS OF DEFECTIVE SERVICE". BECAUSE DEFECTIVE SERVICE IS UNDISPUTED, THE TRIAL COURT THEREFORE LACKS JURISDICTION AND A WRIT OF PROHIBITION IS APPROPRIATE.**

In its Third Proposition of Law, Respondents argue that "contested allegations of defective service" cannot form the grounds for a writ of prohibition. Yet, Respondents make no attempt to show that there are any contested facts that would cast doubt on whether or not Relators were actually served with process in the Case. Indeed, Respondents attach to their Motion a copy of the docket from the Court's website in the Case which establishes unequivocally that all attempts at service upon the Relators failed, and that the Plaintiff in the Case was notified of the failure of service by the Clerk of Courts. Thus, Relators and

Respondents have no contested allegations between them, and agree that Relators were never served with process in a manner provided for by the Civil Rules.

Because this case presents no contested allegations regarding service, it is easily distinguished from *Suburban Constr. Co. v. Skok*, 85 Ohio St.3d 645, 710 N.E.2d 710 (1999) cited by Respondents. Whereas this case is premised on a record that undeniably shows no service ever occurred, *Suburban*, by contrast, arose because of contested allegations as to whether service had been perfected in accordance with the Civil Rules. The facts of the instant case are therefore the precise opposite of the facts that the *Suburban* court considered.

“Proper service of process is a prerequisite for personal jurisdiction.” *During v. Quoico*, 2012-Ohio-2990, 973 N.E.2d 838 (10th Dist.). Since it is undisputed that there has been no service upon Relators as required by the Civil Rules, the trial court patently and unambiguously lacks jurisdiction over the Case. Accordingly, *Suburban* does not require the dismissal of this case because the record is clear and there are no contested allegations: service of process was never perfected or waived.

**C. RESPONDENTS’ ALLEGATIONS IN SUPPORT OF AN AFFIRMATIVE DEFENSE CANNOT FORM THE BASIS FOR DISMISSAL OF RELATORS’ CLAIMS.**

In their Fourth Proposition of Law, Respondents offer allegations in support of a claim that Relators have waived service in the Case, and then ask this Court to accept the allegations as true and dismiss the instant action. Respondents’ argument on this point utterly disregards this Court’s Rules of Practice, and fails to provide grounds for dismissal. Respondents’ Motion should be denied.

The first and most obvious reason that this argument cannot be accepted by this Court is Respondents’ concession that “an evidentiary hearing may be necessary to sort out what

happened.” Respondents’ Motion at 4. If Respondents’ own evaluation of their allegations is to be believed, then this Court should deny the motion and establish a schedule for presentation of evidence. Under S.Ct.Prac.R. 12.04(C) and 12.05, the Court should now issue an alternative writ and a schedule for presentation of evidence.

Respondents’ Motion must be seen for what it is. Although Respondents have styled their argument as a Motion to Dismiss, the pleading in fact presents a Motion for Summary Judgment. Despite the lack of any affidavit authenticating the exhibits, or attesting to personal knowledge of the factual claims offered by Respondents, they seek not a dismissal, but a finding that they are entitled to judgment based on their own set of facts. The standard applicable to a motion to dismiss requires the facts of the complaint to be deemed true, all reasonable inferences be allowed to the relator, and there is no allowance for new, unverified allegations by a respondent. *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶12. Indeed, Motions for Summary Judgment are expressly prohibited by this Court’s rules. *See* S.Ct.Prac.R. 12.04(B)(3). This Court should see through Respondents’ attempt at a procedural shortcut and deny Respondents’ Motion.

**D. THE COURT OF COMMON PLEAS AND THE ASSIGNED JUDGE ARE PROPER RESPONDENTS IN AN ORIGINAL ACTION SEEKING A WRIT OF PROHIBITION.**

In their Fifth Proposition of Law, Respondents assert that a Court of Common Pleas cannot be sued because courts are not sui juris.<sup>3</sup> Respondents’ assertion is wholly meritless and flies in the face of ample precedent including numerous writs of prohibition previously issued by this Court.

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<sup>3</sup> Respondents make no argument that Judge Nadel is not a proper respondent, apparently conceding that fact. Thus, at best, Respondents’ Motion does not argue for dismissal of this case on these grounds, but only for the dismissal of a single Respondent.

The Supreme Court of Ohio has on numerous occasions granted extraordinary relief in prohibition against courts, including the Hamilton County Court of Common Pleas. *See, e.g., State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162 (granting writ of prohibition against a court of appeals); *State ex rel. DeWine v. Court of Claims*, 130 Ohio St.3d 244, 2011-Ohio-5283, 957 N.E.2d 280 (granting writ of prohibition against Court of Claims); *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga County Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 (granting writs of prohibition and mandamus against a court of common pleas); *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299 (granting writ of prohibition against the same two respondents that are in the case *sub judice*).

Respondents offer no argument which would explain the numerous writs in prohibition that have been heard and issued by this Court against both courts and judges. Similarly, Respondents offer no explanation for how the writ of prohibition (which is expressly provided for by the Ohio Constitution, Art. IV, § 2(B)(1)(d)), may be procured if not against the judge and court whose jurisdiction is questioned.

The cases cited by Respondents in support of their argument are inapplicable and factually distinguishable. In *Malone v. Court of Common Pleas of Cuyahoga Cty.*, 45 Ohio St.2d 245, 344 N.E.2d 126 (1976), the language quoted in Respondents' Motion was dicta offered by this Court in reaching the conclusion that the Juvenile Court of a county lacked statutory authority to enter into an employment contract with a labor union separately governing the court's own employees. *Id.* at 248-9. The *Malone* court cited *Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St.2d 120, 296 N.E.2d 544 (1973) which is also factually

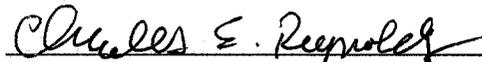
distinguishable. There, this Court held only that a municipal court cannot assert a civil claim against the legislative authority that sets its budget in order to recover disputed operational funds. *Id.* at syllabus.

Neither of these cases casts any doubt on the self-evident proposition that in an action for a writ of prohibition, the proper respondents are the judge and the court whose exercise of jurisdiction are at issue. Respondents' Motion should therefore be denied.

### **III. CONCLUSION**

For the foregoing reasons, Respondents' Motion to Dismiss should be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

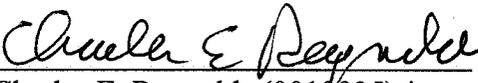
I hereby certify that a true and accurate copy of the foregoing was served via electronic mail this 5<sup>th</sup> day of February, 2013, upon the following:

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