

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Relators, Francesca Steinhart and Legacy Home Care, Inc., initiated this mandamus action to seek to compel the Ohio Department of Job and Family Services, Office of Medical Assistance (“ODJFS/OMA”) to revoke the order placing Relators under “hold and review,” a process of prepayment review of a Medicaid provider’s claims for payment. That process was initiated in this case after allegations of fraud were made against Relators.

The Court should dismiss this mandamus action because: 1) Relators are actually seeking injunctive relief so this Court lacks subject matter jurisdiction, 2) Relators have failed to state a proper claim for relief in mandamus, 3) Relators did not bring this action in the name of the State, and 4) the affidavit attached to the Complaint does not meet the requirements set forth in S.Ct.Prac.R. 12.03.

II. LAW AND ARGUMENT

A. Overview of the hold and review process

“Hold and review” is a process whereby ODJFS/OMA conducts a prepayment review of a Medicaid provider’s claims. Ohio Adm.Code 5101:3-1-27(B)(2). ODJFS/OMA examines client records, medical records, or other supporting documentation to determine appropriate claims payment or reimbursement. *Id.* ODJFS/OMA may place a Medicaid provider’s claim payments on hold and review for various reasons, including in response to allegations of fraud (or other willful misrepresentation of claims submission), or upon request from the Ohio Attorney General’s Office. Ohio Adm.Code 5101:3-1-27.1(A)(1)(a) and (A)(2)(a). When a Medicaid provider is subject to the hold and review process, ODJFS/OMA conducts a prepayment review of each claim for payment that the provider submits to ODJFS/OMA. The

hold and review process does not prevent a Medicaid provider from being paid, it just helps ensure that providers do not receive payments to which they are not entitled.

Once ODJFS/OMA places a Medicaid provider's claims for payment under hold and review, ODJFS/OMA has 120 days from the date each claim for payment is received to forward the claim for adjudication or for denial. Ohio Adm.Code 5101:3-1-27.1(G).² Whether a claim is forwarded for adjudication or is denied depends on whether the documentation the provider submits supports the validity of the claim. *Id.*

There is no time limitation on how long a Medicaid provider's claims submissions can be subject to hold and review. The only time limit imposed on the hold and review process relates to the processing of a Medicaid provider's specific claims, and even then, a denial of a claim for payment would satisfy the time limit. *Id.*

There also is no statute or rule that requires ODJFS/OMA to stop the hold and review process. However, if the conditions that led ODJFS/OMA to impose the hold and review process ceased to exist, and there was no other reason to continue the process, ODJFS/OMA would stop hold and review.

In this case, Relators allege that the hold and review process was implemented after the Ohio Attorney General's Office began investigating Relators for fraud. Compl., ¶ 2. That fraud investigation is apparently ongoing because, in this action, Relators request that the Ohio Attorney General's Office be compelled to stop the investigation. Compl., Prayer for Relief.

² Claims subject to hold and review include any claims for payment received by ODJFS after the effective date of hold and review, even if such claims are for dates of service that occurred prior to the effective date of the hold and review. Ohio Adm.Code 5101:3-1-27.1(C).

B. This Court lacks subject matter jurisdiction because Relators are seeking injunctive relief.

Relators seek a writ of mandamus to compel ODJFS/OMA to stop the “hold and review” process. However, Relator’s complaint is in fact a request for injunctive relief. Therefore, this Court lacks subject matter jurisdiction over this matter.

The Ohio constitution gives original jurisdiction to this Court over mandamus proceedings but not over original actions seeking injunctive relief. *State ex rel. Stine v. McCaw*, 136 Ohio St. 41, 44 (1930); Ohio Constitution, Article IV, Section 2. The distinction between the two is that a mandamus proceeding seeks to compel a person or entity to perform a preexisting legal duty, whereas an injunction seeks to prevent or restrain a person or entity from taking a specific action. *State ex rel. Smith v. Industrial Comm’n.*, 139 Ohio St. 303, 306, 39 N.E.2d 838 (1942). This Court has consistently held that “if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.” *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 84 N.E.2d 1025, ¶ 19; *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999).

In this case, Relators have improperly disguised a request for injunctive relief as a request for writ of mandamus. Relators seek an order to stop ODJFS/OMA from using the hold and review process to determine the appropriateness of Relators’ claims for payment. In other words, Relators seek to prevent or restrain ODJFS/OMA from taking a specific action. Because the real object sought is an injunction, the complaint does not state a cause of action in mandamus and must be dismissed for lack of jurisdiction. *See Evans* at ¶ 19; *State ex rel. Smith*

at 306.³ As a result, this Court should dismiss Relators' Complaint for lack of subject matter jurisdiction.

C. Relators have failed to state a proper claim for relief in mandamus.

This action should be dismissed pursuant to Civ. R. 12(B)(6) because Relators have failed to state a proper claim for relief in mandamus. To be entitled to a writ of mandamus: (1) the relators must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *E.g., State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 118, 515 N.E.2d 914 (1987).

In determining a Civ. R. 12(B)(6) motion to dismiss, a court must presume that all factual allegations in the complaint are true and must make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1989). Dismissal under Civ. R. 12(B)(6) is warranted if "it . . . appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [it] to recovery." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. While a court must accept as true the factual allegations in the complaint, it need not presume the truth of conclusions unsupported by factual allegations. *Schulman v. City of Cleveland*, 30 Ohio St.2d 196, 198, 283 N.E.2d 175 (1972).

A petitioner seeking a writ of mandamus must plead the existence of all necessary facts in support of the claim. *State ex rel. Temke v. Outcalt*, 49 Ohio St.2d 189, 190, 360 N.E.2d 701 (1977). Therefore, a showing of entitlement to mandamus relief must appear on the face of the

³ In *State ex rel. Smith*, the petitioner sought a writ of mandamus to bar the Ohio Industrial Commission from disbursing funds. The Court denied the writ because an order compelling one to desist from some action is an injunction, which is beyond the original jurisdiction of the Court. *State ex rel. Smith* at 308. As the Court observed, "[t]he nature of the writ sought is not to be determined by the label attached thereto by the relator." *Id.*

petition.⁴ The burden is upon the relators to demonstrate entitlement to a writ. *State ex rel. Sekermestrovich v. City of Akron*, 90 Ohio St.3d 536, 537, 740 N.E.2d 252 (2001). Here because Relators have failed to allege facts showing a clear legal right to the relief requested, or a corresponding legal duty on the part of ODJFS/OMA to provide it, the Court should dismiss the Complaint for failure to state a claim.

- 1) **Relators do not have a clear legal right to revocation of the hold and review process, and ODJFS/OMA does not have a legal duty to stop hold and review.**

To establish a legal duty, the duty that is alleged to exist and the violations thereof must be *specifically* pled; unsupported conclusions are not sufficient to withstand a motion to dismiss. *See State ex rel. Smith v. Ohio Adult Parole Auth.*, 61 Ohio St.3d 602, 603, 575 N.E.2d 840 (1991) (*per curiam*). The legal duty that a relator seeks to enforce cannot be created by a court; rather, it must be a duty imposed by the legislative branch of government. *See, e.g., State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 3, 591 N.E.2d 1186 (1992). Thus, Relators must show a clear legal right and a clear legal duty that already exist in the law.

Relators have not made any allegations in their Complaint showing that they have a “clear legal right” to revocation of the hold and review process, nor have they alleged how ODJFS/OMA has a “clear legal duty” to stop the hold and review process. Relators merely set forth a vague assertion that Respondents must “comply with their clear legal duty pursuant to the Ohio Administrative Code as outlined below and in the common laws of the State of Ohio.” Compl., ¶ 1. The necessary “clear legal duty” and “clear legal right” cannot possibly be gleaned from the Complaint.

⁴ Such a showing does not guarantee that a writ of mandamus will issue. A writ of mandamus is a high prerogative writ; its issuance rests with the sound discretion of the court. *See Patton v. Springfield Bd. of Educ.*, 40 Ohio St.3d 14, 15, 531 N.E.2d 310 (1988).

Relators concede that ODJFS/OMA can issue a hold and review order in response to allegations of fraud against the Medicaid provider. Compl., ¶ 11; *see also* Ohio Adm.Code 5101:3-1-27.1(A). Relators admit the Ohio Attorney General is investigating allegations of fraud against them. Compl., ¶ 2, 16.⁵ Therefore, there is no dispute that ODJFS/OMA implemented the hold and review process in accordance with the applicable rules, and Relators have not set forth any reason why that process must stop. According to Relators, they are still being investigated for fraud. *Id.* While that investigation is pending, no law requires ODJFS/OMA to stop the hold and review process; therefore, ODJFS/OMA has no legal duty to do so.

The rule that the Relators cite about ODJFS/OMA forwarding claims seeking payment within 120 days for adjudication or denial does not impose a duty upon ODJFS/OMA to stop the hold and review process in this case. Compl., ¶ 22 (referring to Ohio Adm.Code 5101:3-1-27.1(G)). Relators misinterpret that rule to mean that Relators' claims cannot be subject to the hold and review process for more than 120 days. Compl., ¶¶ 21, 22. However, that rule only requires ODJFS/OMA to forward for adjudication or for denial, within 120 days, claims that a provider has submitted for payment. Ohio Adm.Code 5101:3-1-27.1(G). Relators have not pointed to any statute or rule that limits the amount of time Relators can be subject to the hold and review process.

Relators claim to have suffered financial hardship; however, there is no requirement that ODJFS/OMA pay claims within 120 days – a denial of a claim for payment is sufficient. *Id.* In addition, the hold and review process does not prevent a Medicaid provider from being paid. As long as the claims for payment are supported by documentation that supports the validity of the claims, those claims will be forwarded for adjudication and will be paid according to Medicaid

⁵ Relators allege that ODJFS told Relator Steinhart that there was no basis to the alleged fraud. Compl., ¶¶ 15-17. However, those allegations in the Complaint are not supported even by

reimbursement principles. Ohio Adm.Code 5101:3-1-27.1(G). Therefore, any claimed financial hardship is irrelevant to Relators' request for a writ in this case.

Relators also do not identify any specific claims for payment that were not either forwarded for adjudication or denied within 120 days by ODJFS/OMA.⁶ Even if there were such claims, Relators have not shown that a delay in adjudication or denial of those claims creates a clear legal right to revocation of the hold and review process. Even if ODJFS/OMA does, in fact, have a duty to deny or adjudicate claims for payment within 120 days, Relators would be entitled—at most—to an order compelling ODJFS/OMA to forward claims for adjudication or to deny claims within 120 days. However, that is not what Relators seek. They seek an order directing ODJFS/OMA to stop the hold and review process.

For the reasons explained above, Relators have not shown that they have a “clear legal right” to revocation of the hold and review process while they are under investigation for fraud. Therefore, Relators have failed to set forth a valid mandamus claim, and their request for the writ must be dismissed.

C. Relators did not bring this action in the name of the State.

Relators failed to bring the mandamus action in the name of the state on their relation. Instead, Relators brought the action in their own names. Ohio law requires that an “[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.” R.C. 2731.04. Failure to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition. *Maloney v. Court of Common Pleas of Allen County*, 173 Ohio St. 226, 227, 181 N.E.2d 270 (1962); *Blankenship v. Blackwell*, 103 Ohio St.3d 567; 2004-Ohio-5596, 817 N.E.2d 382, ¶ 36.

Steinhart's affidavit attached to the Complaint.

Relators' failure to properly caption this mandamus action, as required by R.C. 2731.04, warrants dismissal of this action.

D. The affidavit attached to the Complaint is insufficient to meet the requirements of S.Ct.Prac.R. 12.04(B).

The affidavit attached to Relators' Complaint does not meet the requirements of S.Ct.Prac.R. 12.04(B). That rule requires that all complaints shall be supported by an affidavit specifying the details of the claim, and that the affidavit must be based on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit. *Id.*

Relator, Francesca Steinhart's affidavit attached to the Complaint fails to comply with the rule. The affidavit does not affirmatively state that Relator Steinhart is competent to testify to the matters stated in the affidavit, or that the information in the affidavit is based on personal knowledge. And it is not clear that all of the information in the affidavit is based on Relator Steinhart's personal knowledge. For example, the affidavit is internally inconsistent; paragraph 3 refers to a 4-month period since the hold and review order was issued while paragraph 7 refers to a 6-month period. Steinhart Affidavit. In addition, paragraph 7 states that ODJFS/OMA has failed to adjudicate a claim (that has not been identified) to date, but it is not clear that Relator Steinhart, as the manager of Legacy Home Care, would have personal knowledge about whether ODJFS/OMA has adjudicated or denied the unidentified claim.

When a Complaint is not supported by an affidavit as required by the Court's rules of practice, dismissal is appropriate. *State ex rel. Sekermestrovich*, 90 Ohio St.3d at 538-539; *Logan v. Ohio Adult Parole Auth.*, 84 Ohio St.3d 1423, 702 N.E.2d 433 (1998); *Goist v. Seventh*

⁶ There is no mention of how many claims were submitted, when they were submitted, or whether the department denied the claims for lack of adequate documentation.

Dist. Court, 79 Ohio St.3d 1452, 680 N.E.2d 1024 (1997). In this case, the affidavit does not comply with Sup.Ct.Prac.R. 12.04(B), and the Complaint should be dismissed.

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Relators' Complaint for writ of mandamus.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



CHARITY ROBL (0075123)

Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400
(614) 466-8600 phone
(877) 462-0929 fax
charity.robl@ohioattorneygeneral.gov
Attorney for Respondent,
Ohio Department of Job and Family Services,
Office of Medical Assistance

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss was sent
via U.S. Mail this 13th day of February 2013 to:

Richard H. Drucker
700 West St. Clair Avenue, Suite 214
Cleveland, Ohio 44113
Attorney for Relators

Richard Coglianese
Darlene Fawkes Pettit
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Attorneys for Respondent,
Ohio Attorney General, Mike DeWine



Charity S. Robl