

IN THE SUPREME COURT OF OHIO

FRANCESCA STEINHART, et al.,

Relators,

v.

**OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES, et al.,**

Respondents.

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:
: Case No. 2013-0102
:
: Original Action in Mandamus
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**MOTION TO DISMISS OF RESPONDENT
OHIO ATTORNEY GENERAL**

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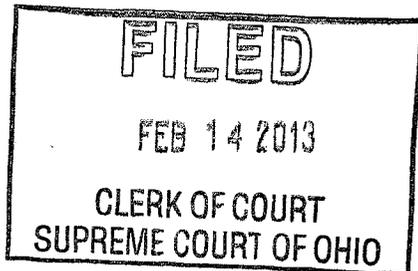
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IN THE SUPREME COURT OF OHIO

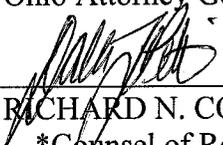
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MOTION TO DISMISS OF RESPONDENT
OHIO ATTORNEY GENERAL

Pursuant to S.Ct.Prac.R. 12.04 and Civ. R. 12(B)(6), Respondent Ohio Attorney General hereby moves this Court to dismiss Relators' petition for a writ of mandamus. A memorandum in support is attached.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF RESPONDENT
OHIO ATTORNEY GENERAL'S MOTION TO DISMISS**

I. INTRODUCTION

Relators, Francesca Steinhart and Legacy Home Care, Inc. initiated this mandamus action to compel Respondent Ohio Attorney General to stop investigating fraud allegations and to compel Respondent Ohio Department of Job and Family Services to revoke its "Hold and Review" notice. Because Relators fail to articulate any facts demonstrating that they are entitled to this relief, Respondent Ohio Attorney General respectfully asks that this Court dismiss the complaint.

II. STATEMENT OF FACTS

Relator Legacy Home Care, Inc., and its manager Relator Francesca Steinhart, provide home health care services. Relators' Complaint, p. 2. On August 17, 2012, Respondent Ohio Department of Job and Family Services (ODJFS) notified Relators that Legacy Home Care was being placed under "Hold and Review" pursuant to O.A.C. 5101:3-1-27.1, affecting Relators' primary source of income of Medicaid reimbursements. *Id.*, pp. 2-3. "Hold and Review" is a "process of prepayment review of a medicaid provider's claims, including client records, medical records, or other supporting documentation, for determination of appropriate claims payment or reimbursement." O.A.C. 5101:3-1-27(B)(2). Since receiving the "Hold and Review" notice, Relators have not received Medicaid reimbursements from Respondent ODJFS. Complaint, p. 3.

Relators also learned that the Ohio Attorney General's Office was investigating Relators' business practices for Medicaid fraud.¹ R.C. 109.85 provides that the Ohio Attorney General's Office shall investigate any criminal or civil violations related to the Medicaid program.

¹ Relators' complaint contains few allegations specific to Respondent Ohio Attorney General. The fact that they are under investigation is inferred from Relators' request that the Ohio Attorney General "drop its allegations of fraud." Complaint, p. 2.

On January 17, 2013, Relators filed this mandamus action to force Respondent ODJFS to remove Relator Legacy Home Care from “hold and review” status and for Respondent Ohio Attorney General to stop its investigation of the allegations of fraud.

III. ARGUMENT

A. Standard of Review

Dismissal under Civ.R. 12(b)(6) for failure to state a claim upon which can be granted of a mandamus action is appropriate “if, after all factual allegations are presumed true and all reasonable inferences made in relator’s favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested writ of mandamus.” *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, citing *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966.

B. Relators are not entitled to relief in mandamus.

A court must find that three requirements are met to grant a writ of mandamus: (1) the relator has a clear legal right to the requested relief; (2) the respondent has a clear legal duty to perform the requested relief; and (3) the relator has no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987); *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951. Because Relators fail to meet these requirements, their mandamus action must fail.

Relators have not identified any legal right to their requested relief of forcing Respondent Ohio Attorney General to close its fraud investigation. A writ of mandamus will issue only where Relator can show a clear legal right to the requested relief. *State ex rel. Bd. of Ed. v. Griffin*, 161 Ohio St. 537, 111 N.E.3d 886 (1954). As Relators do not have a clear legal right to have the Ohio Attorney General’s Office close its investigation, they cannot meet this first requirement for a writ to issue.

Relators also fail to demonstrate that they have a clear legal duty to the requested relief. For a writ of mandamus to issue, “the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty enforceable in mandamus.” *State ex rel. Blandin v. Beck*, 114 Ohio St.3d 455, 457, 2007-Ohio-4562, 872 N.E.2d 1232, ¶15, quoting *State ex rel. Lecklider v. School Emp. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, 819 N.E.2d 289, ¶23. Relators can point to no statutory or other legal duty that Respondent Ohio Attorney General owes to them to cease its investigation, nor does Respondent Ohio Attorney General owe Relators any clear legal duty to cease its investigation of the alleged fraud.

Instead, R.C. 109.85 provides the Ohio Attorney General’s Office with a legal duty to investigate, stating “the attorney general *shall* investigate any criminal or civil violation of law related to * * * the medical assistance program.” (Emphasis added). R.C. 109.85’s instructions for the Ohio Attorney General’s Office to conduct Medicaid fraud investigations contain no time limit. However, both civil charges for Medicaid fraud under R.C. 5111.03(F) and criminal felony charges have a six-year statute of limitations. See R.C. 5111.03(F); R.C. 2901.13(A)(1)(a). A court should dismiss a petition for writ of mandamus if the petition does not demonstrate that the Respondents have a clear legal duty to perform the act which the relator seeks to have the Respondents perform. *State ex rel. Wolfe v. Lorain Co. Bd. Of Elections*, 59 Ohio App. 2d 257, 394 N.E.2d 321 (9th Dist. 1978). Because Respondent Ohio Attorney General does not owe Relators a legal duty to cease its investigation, Relators cannot meet the second requirement for a writ of mandamus to issue.

Relators have failed to allege that they lack an adequate remedy at law. A writ of mandamus will not issue if a plain and adequate remedy in the ordinary course of law is

available. R.C. 2731.05; *State ex rel. ACLU of Ohio v. Cuyahoga Co. Bd. of Commr.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553. If Relators are charged criminally or civilly as a result of Respondent Ohio Attorney General's investigation, they have an adequate remedy of presenting a defense to those actions at that point. Therefore, Relators have not met the third requirement for a writ of mandamus to issue.

Relators' complaint should be also dismissed because it appears that Relators are actually seeking prohibitive relief. When a complaint for a writ of mandamus actually seeks a declaratory judgment and a prohibitory injunction, it does not state a cause of action in mandamus. *State ex rel. Cleveland Police Patrolmen's Assn. v. City of Cleveland*, 8th Dist. No. 90554, 2008-Ohio-325; *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 716 N.E.2d 704 (1999). Relator's complaint in essence asks that this Court order Respondent Ohio Attorney General not to prosecute any allegations of fraud. Because a writ of mandamus cannot prevent official action, Relators' complaint should be dismissed.

Finally, Relators' complaint should be dismissed because the request for relief appears to be moot. In her January 11, 2013 affidavit attached to the complaint, Relator Steinhart indicates that her "personal funds are all but exhausted" and that "Legacy will be run out of business within a month." Complaint, p.5. Additionally, in Relators' Motion to Expedite Emergency Hearing on Original Action in Mandamus, Relators indicated that a failure to hold an "emergency hearing" by January 28, 2013, "will cause Legacy Home care, Inc. to cease operations for lack of funds." Relators' Motion, p.1. Relators also indicate that a failure to adjudicate the request for mandamus relief by January 25, 2013, "will cause Legacy Home Care, Inc. to liquidate and financially ruin Francesca Steinhart." *Id.*, p.2. As these dates have passed,

it would appear, based on the information in Relator Steinhart's sworn statement and Supreme Court filings, that the business has ceased operations and that Relators' request for relief is moot.

C. Relators' complaint does not comply R.C. 2731.04.

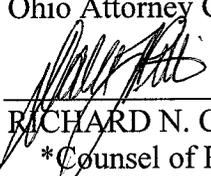
R.C. 2731.04 provides that a complaint for a writ of mandamus "must be in the * * * in the name of the state on the relation of the person applying." In this case, Relators have failed to bring this case in the name of the State on their own relation. Instead, they brought the action in their own names. Dismissal is appropriate when the action is not brought in the name of the state on the relation of the person requesting the writ. *See Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382; *Litigaide, Inc. v Lakewood Police Dept. Custodian of Records*, 75 Ohio St.3d 508, 664 N.E.2d 521 (1996).

IV. CONCLUSION

For the foregoing reasons, Respondent Ohio Attorney General respectfully asks this Court to dismiss Relators' complaint.

Respectfully submitted,

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Ohio Attorney General



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*Counsel for Respondent,
Ohio Attorney General*

CERTIFICATE OF SERVICE

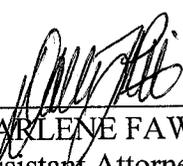
I hereby certify that a true and accurate copy of the foregoing *MOTION TO DISMISS OF RESPONDENT OHIO ATTORNEY GENERAL* was sent by regular U.S. Mail, postage pre-paid, to the following counsel of record, on this 14th day of February, 2013.

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