

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO EX REL.
OHIO REAL ESTATE AUCTIONS,
LLC d/b/a OHIO SHERIFF SALES, et
al.,

Relators,

-v-

HONORABLE JUDGE FORREST W.
BURT, GEAUGA COUNTY COURT
OF COMMON PLEAS

Respondent.

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: Case No.: 2013-1023
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: Original Action In
: Prohibition and Mandamus
: (Peremptory and/or
: Alternative Writ Requested)
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REVISED RELATORS' MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT

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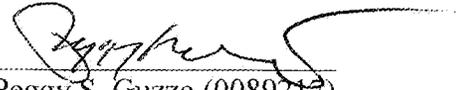
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REVISED RELATORS' MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 3.13 and 18.02 and for reasons fully explained in the memorandum that follows, Relators respectfully requests the Court to reconsider the Court's decision to dismiss Relators' Complaint for a writ of Prohibition and/or Mandamus. Relators originally initiated the Complaint to prevent and/or compel Geauga County Common Pleas Judge Forrest W. Burt from using bias and impermissible local residency requirements in approving the appointment of judicial auctioneers. Because Relators' action is one of first impression it warrants the Court's full consideration of the issues raised in Relators' Complaint, subsequent filings, and the evidence that can substantiate Judge Burt's bias and his impermissible local residency requirement. Even though the scheduled auction for the subject property, in the underlying challenged Order, may have occurred or passed it does not render the issues raised moot because such orders are of short duration and there is a high likelihood that Respondent will repeat the unlawful acts and Relator will be continually denied justice.

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Relators with the right to conduct auctions across the State and is protected by the General Assembly (through R.C. 4707.111¹ preemption statute) from anyone other than the Department of Agriculture from regulating their practice of auctioneering. While this case may be a case of first impression, there can be no doubt that Respondent abused his discretion and exceeded his authority when he disqualified Relator based on lack of local residency when the General Assembly has explicitly preempted Respondent from doing so.

Respondent's conduct was against public policy, pursuant to R.C. 4707.111 preemption statute and, therefore, Relators should be afforded the opportunity to submit evidence and oral arguments in order for this Court to fully consider the issues raised. Pursuant to R.C.2329.151², Respondent had to appoint either an officer of the court or auctioneer for judicial auctions. Once Respondent determined to appoint an auctioneer to conduct the sale his discretion ended or at the very least at the moment Respondent decided to disqualify Relator for lack of local residency he exceeded his authority. Auctions, including judicial auctions, and auctioneers are specifically and exclusively regulated by Chapter 4707 of the Ohio Revised Code.³

¹ Ohio Revised Code 4707.111, titled 'State is sole regulator of auctions' provides, in relevant parts: "The state, through the department of agriculture and in accordance with this chapter, shall solely regulate auctioneers, auction firms, and the conduct of auction sales. **By enactment of this chapter, it is the intent of the general assembly to preempt municipal corporations and other political subdivisions from the regulation and licensing of auctioneers, auction firms, and auction sales. * * ***" (Emphasis added).

² Pursuant to R.C. 2329.151, judicial sales "* * * shall be conducted personally by an officer of the court or by an auctioneer licensed under Chapter 4707 of the Revised Code."

³ See R.C. 4707.111 at footnote 1 and R.C. 4707.02 (A) "No person shall act as an auction firm, auctioneer, apprentice auctioneer, or special auctioneer within this state without a license issued by the department of agriculture. No auction shall be conducted in this state except by an auctioneer licensed by the department. * * * (B) Division (A) of this section does not apply to any of the following: (1) Sales at auction that either are required by law to be at auction, **other than sales pursuant to a judicial order or decree**, or are conducted by or under the direction of a public authority; * * *" (Emphasis added).

Relator has a vested interest in his state-wide auctioneer license to conduct judicial auctions in Geauga County. Relator is licensed under R.C. 4707 and Respondent's removal of Relator, from the Order, for lack of local residency is denying Relator of his protected right to auctioneer state-wide. In other cases where a governing body has appointing or awarding contract authority, the Court has held that erroneous reliance or failing to provide any basis for disqualifying someone was abuse of discretion⁴; why should Respondent (judges) be treated differently? In addition, in Ohio it is common knowledge that even "employees at will" cannot be fired if the reason violates public policy.⁵ Therefore, it is fundamentally unfair for a judge (Respondent) not to be held to similar standards.

II. Statement of Facts and Proceeding

Since this case involves issues of first impression it warrants a review of the facts and proceedings. Relator Ohio Real Estate Auctions, LLC d/b/a Ohio Sheriff Sales is an Ohio limited liability company and is considered an expert in conducting real estate auctions. (Rel. Compl. ¶ 3 and ¶ 9). Relator is licensed by the State to conduct auctions, as well as, judicial auctions throughout the state and has a business address in Grove City, Ohio. (Rel. Compl. ¶¶ 4,5). The Ohio General Assembly enacted R.C. 4707.111 in 2001, amended in 2005, to preempt anyone

⁴ A board's use of unannounced criteria to reject a bid on a public-works contract constitutes an abuse of discretion that is remediable in mandamus. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 550, 605 N.E.2d 378 (1992).

⁵ "An at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny, so long as that employee had fully complied with the statute and was subsequently discharged or disciplined." *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 78 Ohio St.3d 134, paragraph three of the syllabus (1997), citing *Greeley, supra*, approved; *Painter v. Graley*, 70 Ohio St.3d 377, 639 N.E.2d 51, paragraphs two and three of the syllabus (1994), approved; *Phung v. Waste Mgt., Inc.*, 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114 (1986), overruled.

other than the Department of Agriculture from regulating the practice of auctioneering and the conduct of auctions in the state of Ohio. (Rel. Compl. ¶¶ 24 -25).

After two failed attempts to receive any bids from the County Sheriff sale, Huntington National Bank exercised its' rights under Ohio Revised Code 2329.52 and 2329.151 and sought the expertise of Relator to conduct a judicial auction of the commercial parcel. (Rel. Compl. ¶¶ 20-21; Respondent Order). Ohio Revised Code 2329.151 mandates that a judicial sale be conducted by an officer of the Court or a licensed auctioneer. (Rel. Compl. ¶ 21). Huntington National Bank put forth persuasive grounds for Respondent to determine an auctioneer was warranted; however, Respondent crossed out Relator's name from Huntington's Prepared Order and inserted auctioneer Mr. Scott Mihalic, with whom Relator has a business relationship, but provided no basis in the Order for the replacement. (Rel. Compl. attached Respondent Order, first page).

Prior to and shortly after Respondent replaced Relator's name from the Order, Relator received two calls from Mr. Mihalic that Respondent had contacted Mr. Mihalic concerning Relator's residency and that Respondent replaced Relator with Mr. Scott Mihalic because Relator was not a resident of Geauga County. (Rel. Compl. ¶¶ 13-16). Mr. Mihalic scheduled the auction of the underlying subject property for July 11, 2013. (Rel. Compl. ¶ 35). Relator then filed writ of Prohibition and Mandamus action in this Court to protect Relator's right to auctioneer in Geauga County and to prevent and reverse Respondent's infringement on Relator's rights. (Rel. Compl.). Respondent then filed a Motion to Dismiss for failure to state a claim for relief but without proper certification or sworn statements denying Relators allegations. Despite Relators' timely Memorandum in opposition to Respondent's Motion to Dismiss, the Court

granted Respondent's Motion to Dismiss without written explanation. Relator now comes before the honorable Court for Reconsideration.

III. Law and Argument for Reconsideration

A. Relators Complaint Involves Issues of Preemption, Public Policy, Judicial Conduct and Relators Right to Practice, All of Which Are Not Moot and Deserves the Court's Reconsideration of the Merits.

In the instant case, the Respondent exceeded his authority by regulating the practice of auctioneering in Geauga County by requiring local residency in order to be appointed a judicial auctioneer, a fact that has not been disputed by Respondent (i.e., no sworn statement has been given denying the allegation and under the standard for dismissal, the Relators allegations are presumed to be true⁶). Applying the Court's standard for dismissing a claim, Relator's Complaint should not have been dismissed because phone records and depositions could have been easily provided as evidence to support Relators' allegations and because Relators' rights have a strong likelihood of being continually infringed upon by Respondent, the issue is not moot and, therefore, Relators Complaint deserves reconsideration. To not grant reconsideration would open up the judicial process to perceived fundamental unfairness, as there is no other adequate remedy for Relators to protect against Respondent's continual infringement upon relators' state-wide auctioneer license in Geauga County.

⁶ In *State ex rel. Caszatt v. Gibson*, 2013-Ohio-213, 2012-L-107, this Court held "when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." Id., quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 60 (1991). "In order for a court to grant a motion to dismiss for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id., quoting *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975).

If not here (this Court) then where and what court can Relators go for redress that has been assured him by Article 1 Section 16 of the Ohio Constitution⁷. Let us not forget what Relators' complaint is about: Relator was sought out by Huntington National Bank (the underlying Plaintiff in the Respondent's Order), after two failed sheriff auction attempts, for his expertise in selling Ohio real estate and Relators agreed to conduct the auction. (Rel. Compl. ¶¶ 10-12). Huntington National Bank then followed the statutorily prescribed protocol for requesting a new judicial sale and to have Relator appointed as auctioneer.⁸ Respondent then called his friend (Mr. Scott Mihalic) to let him know he does not want another auctioneer coming in from out of Geauga County to do the auction and then scratched out Relators name on Huntington's National City's prepared Order and appointed Mr. Mihalic instead. (Rel. Compl. ¶¶ 13-18).

Respondent was/is preempted by the General Assembly from requiring local residency⁹ and the Respondent's conduct not only revealed complete bias in his decision but exceeded his authority. When a preemption statute is involved it clearly raises the issue of authority and Respondent exceeded his authority when he encroached upon the Department of Agriculture's sole authority in the regulation of auctioneering.¹⁰ When considering the merits of Relators allegation a writ of prohibition and/or Mandamus is warranted when viewed through the prism of

⁷ Constitution, Article 1, Section 16, which states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Id.

⁸ R.C. 2319.151: "* * * shall be conducted personally by an officer of the court or by an auctioneer licensed under Chapter 4707 of the Revised Code." Id.

⁹ See R.C. 4707.111, see footnote 1.

¹⁰ Id.

prior decisions by this Court where court orders are issued that infringes on a non-party's rights and that right is protected¹¹ or when a governing body abuses discretion when they act contrary to public policy¹².

B. Relators' Complaint Deserves Reconsideration for a Writ of Prohibition Because Relators Suffered Economic Loss Due to Respondent's Denial of Relators' Right to Auctioneer in Geauga County for Lack of Local Residency.

To be entitled to the writ of prohibition, Relators must establish that (1) Respondent is about to exercise or has exercised 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. Edwards Land Co., Ltd. v. Delaware Cty. Bd. of Elections*, ___ N.E.2d ___, 129 Ohio St.3d 580, 2011-Ohio-4397, citing *State ex rel. Eshleman v. Fornshell*, 125 Ohio St.3d 1, 2010-Ohio-1175, 925 N.E.2d 609, ¶ 11. In addition, as a preliminary matter, if Relator is not a party it must satisfy a two prong test to have standing to bring the Complaint that includes: (1) Relator must suffer some recognized injury; and (2) the

¹¹ "A writ of prohibition provides an appropriate remedy to prevent the enforcement by a trial court of an order improperly excluding the public and members of the press from pretrial hearings on a motion to suppress evidence." *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457351 N.E.2d 127, (1976).

¹² It is common knowledge that in Ohio an "employee at will" cannot be fired for a reason that is against public policy. See also *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, ¶ 16, where this Court held "[w]e have generally recognized mandamus as the appropriate remedy to correct an abuse of discretion by a public board in a decision that is not appealable." Citing *State ex rel. Morgan v. State Teachers Retirement Bd. of Ohio*, 121 Ohio St.3d 324, 2009-Ohio-591, 904 N.E.2d 506, ¶ 20. This Court went on to hold that mandamus is available as a remedy when there is an allegation of abuse in the discretion of awarding a contract. *Id.* citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 550, 605 N.E.2d 378, citing *State ex rel. Executone of Northwest Ohio, Inc. v. Commrs. of Lucas Cty.* 12 Ohio St.3d 60, 465 N.E.2d 416 (1984).

injury was against a protected right.¹³ Respondent's Motion to Dismiss, on the grounds for failure to state a claim, alleged Relators lacked standing and that the Respondent acted within his jurisdiction of discretion. For the reasons that follow Respondent's legal position is not supported by the facts in this case and the law.

1. Relator Has Standing Because Relators Were Denied the Right to Auctioneer in Geauga County in Violation of Relators' Legally Protected Right to Auctioneer State-Wide.

In the instant case, Relators were removed from Respondent's Order that resulted in economic loss from the loss of business, which satisfies the first prong of the test for standing. Secondly, Relators' right to conduct judicial auctions in Geauga County was guaranteed by his state-issued license by the Department of Agriculture and R.C. 4707.111 preemption statute that prevented anyone other than the Department of Agriculture from imposing any further regulations on Relators' auctioneering practice. Therefore, for the foregoing reasons, Relators have satisfied the standing requirements.

2. Respondent Exceeded His Authority and/or Abused His Discretion When He Removed Relators' Name for Lack of Local Residency

Here, Respondent is a common pleas judge who removed Relator's name from the underlying Order due to the lack of local residency, which is patently and unambiguously impermissible due to R.C. 4707.111 (preemption statute) that governs the regulation of auctioneers and auctions within the entire State of Ohio. Respondent's action of removing

¹³ "The doctrine of standing is well established and has been employed in many instances as a device to deny litigants access to the courts. The Supreme Court in *Data Processing Service v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), enunciated the requirements for a party to have standing. The first requirement, as the Court stated, is that the plaintiff must allege that the challenged action has caused him injury in fact, economic or otherwise. * * * [t]he second requirement as set forth in *Data Processing* is that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 46 Ohio St.2d 457 (Ohio 1976).

Relator was impermissible pursuant to public policy created under R.C.4707.111. Once Respondent used his discretion to approve the judicial sale to be conducted by an auctioneer he was preempted from imposing any further regulations on the auctioneer other than what was prescribed in R.C. 4707, pursuant to R.C.2329.151.¹⁴ Respondent's basis for denying Relators is no different than if he had denied Realtors based on gender or race, both would be against public policy. Therefore, if the Court does not reconsider the merits of Relators' Complaint then the Respondent will continue to abuse his discretion and exceed his authority, leaving a chilling effect on the integrity and fairness of the judicial system. Relators have been harmed and will continue to be harmed if a writ of prohibition is denied, as Relators have no other adequate remedy in the ordinary course of law to prevent Respondent from the continual infringement on Realtors' right to auctioneer in Geauga County.

In further support, this Court held "Prohibition is the appropriate action to challenge trial court orders restricting public access to pending litigation." *State ex rel. Plain Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas, Juv. Div.* 90 Ohio St.3d 79, 82, 734 N.E.2d 1214 (2000). Likewise, in the instant case, Respondent is denying Relators access to be appointed as an auctioneer based on an impermissible reason and in violation of a protected interest of auctioneering state-wide (including of Geauga County).

C. Relators' Complaint Deserves Reconsideration of a Writ of Mandamus Because Relators Has a Legal Right Not to be Subject to Local Residency Requirements, Relators Has No Other Adequate Remedy at Law, and Respondent was Required to Appoint an Auctioneer Once Respondent Decided Not to Use the Sheriff.

To be entitled to writ of mandamus, Relator must have a clear legal right to the requested relief, a corresponding clear legal duty on the part of Respondent to provide it, and the lack of an adequate remedy in the ordinary course of law. See *State ex rel. Gaylor*, 125 Ohio St.3d 407,

¹⁴ See Footnote 2.

¶ 15, citing *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶ 11. Relators satisfy this test, as well, when you compare the issues raised in this case with other cases where the Court has carved out relief when the Relator is not a party to the underlying case. In *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, ¶ 16, this Court held “[w]e have generally recognized mandamus as the appropriate remedy to correct an abuse of discretion by a public board in a decision that is not appealable.” *Id.*, Citing *State ex rel. Morgan v. State Teachers Retirement Bd. of Ohio*, 121 Ohio St.3d 324, 2009-Ohio-591, 904 N.E.2d 506, ¶ 20. This Court went on to hold that mandamus is available as a remedy when there is an *allegation of abuse in the discretion* of awarding a contract. *Id.* citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 550, 605 N.E.2d 378, citing *State ex rel. Executone of Northwest Ohio, Inc. v. Commrs. of Lucas Cty.* 12 Ohio St.3d 60, 465 N.E.2d 416 (1984) (Emphasis added). In Relators’ Complaint, abuse of discretion is asserted, Realtors are not a party to the underlying Order but has been denied a right to conduct judicial sales in Geauga County for an impermissible reason of lack of local residency, and, therefore, the above standard should be equally applicable to Respondent (common pleas judges).

Here, in Relators Complaint, we know what the Respondent’s reason was and that reason was against public policy and encroached upon the Department of Agriculture’s authority in violation of the separation-of-power doctrine.¹⁵ R.C. 4707.111 is a preemption statute that

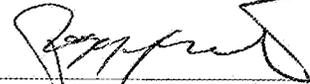
¹⁵ “The separation-of-powers doctrine is applied only when there is some interference by one governmental branch with the constitutional authority of another governmental branch. Pursuant to this doctrine, ‘each of the three grand divisions of the government must be protected from the encroachments by the others, so far that its integrity and independence may be preserved.’” S. *Euclid v. Jemison*, 28 Ohio St.3d 157, 28 OBR 250, 503 N.E.2d 136 (1986), citing *Fairview v. Giffie* 73 Ohio St. 183, 187, 76 N.E. 865(1905).

specifically forbids Respondent from regulating the practice of auctioneering. Unlike similar statutes that govern the appointment of Receivers, the appointment of auctioneers, in judicial sales, are required to be subject to R.C. 4707 which contains a preemption provision that prevents anyone other than the Department of Agriculture from further regulating the right to auction. Therefore, reconsideration is warranted because Respondent failed to adhere to the separation-of-power doctrine when he imposed a local residency requirement and in doing so he violated Relators' right to auctioneer in Geauga County and Relators, as non-parties to the underlying Order, has no other adequate remedy in the ordinary course of law.

IV. Conclusion

Therefore, Relators prays this honorable Court to reconsider Relators Complaint to prevent Respondent from abusing his discretion and exceeding his authority by requiring local residency as a pre-requisite for being appointed to judicial auctions.

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CERTIFICATE OF SERVICE

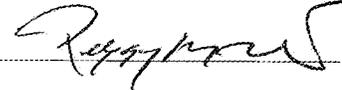
I hereby certify that a true copy of the foregoing Revised Motion for Reconsideration and Memorandum in Support was served by delivery service, United States Postal Service, postage prepaid, on July 22, 2013, upon the following:

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