

IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO REAL ESTATE )	CASE NO. 2013-1023
AUCTIONS, LLC, dba OHIO SHERIFF )	
SALES, AND BARRY BAKER )	
)	
RELATORS )	Original Action in
-v.- )	Prohibition and Mandamus
)	(Peremptory and/or
HONORABLE JUDGE FORREST W. )	Alternative Writ Requested)
BURT, GEauga COUNTY COURT )	
OF COMMON PLEAS, )	
)	
RESPONDENT )	

RESPONDENT'S REPLY BRIEF TO RELATOR'S MOTION FOR RECONSIDERATION

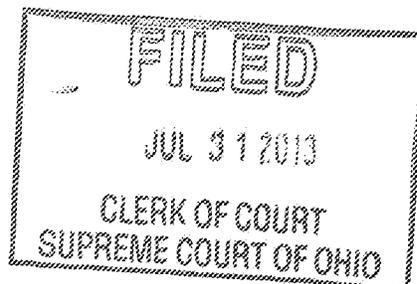
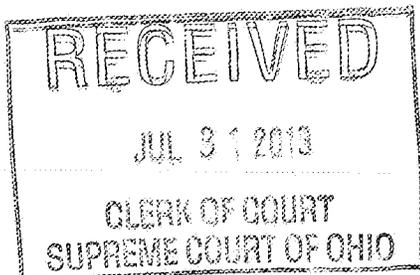
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COUNSEL FOR RESPONDENT



**IN THE SUPREME COURT OF OHIO**

STATE EX REL. OHIO REAL ESTATE ) AUCTIONS, LLC, dba OHIO SHERIFF ) SALES, AND BARRY BAKER ) ) RELATORS ) -v.- ) HONORABLE JUDGE FORREST W. ) BURT, GEAUGA COUNTY COURT ) OF COMMON PLEAS, ) ) RESPONDENT )	)	CASE NO. 2013-1023   Original Action in Prohibition and Mandamus (Peremptory and/or Alternative Writ Requested)
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**RESPONDENT'S REPLY BRIEF TO RELATOR'S  
MOTION FOR RECONSIDERATION**

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**I. Introduction**

Relators filed for Mandamus and/or Prohibition on the tenuous premise that Respondent, the Honorable Judge Forrest W. Burt, substituted one licensed auctioneer for another without authority to do so, and for purposes of requiring local residency. Not one shred of evidence was submitted in support of Relators' outlandish claims of abuse of discretion or exceeding authority. The only "evidence" Relators base the original Complaint and the subsequent Motion for Reconsideration upon is the Affidavit of Relator Barry Baker in which he claims to have been told by a third party, Mr. Scott Mihalic, that the substitution was made purportedly because "he didn't want an auction company coming in from Columbus to do a job in his county" and that he wanted to appoint Mihalic because "they were friends." Baker Affidavit, ¶ 14. As indicated in the Affidavit of Respondent Judge Burt attached hereto as Exhibit A, the basis for the Judge's decision to appoint a different

auctioneer is significantly different than that assumed by Baker, and in no way was done due to any “friendship” the Judge had with Mihalic or with any local residency requirement. Burt Aff., Ex. A, ¶¶ 10, 11, 12, 13 and 17. Simply put, Baker’s own bias and assumption is what drove him to make the fantastical leap that a local residency requirement was being unofficially enforced; there is simply no evidence in the record to substantiate this outlandish claim. Mandamus shall not be granted upon mere conjecture.

## **II. Statement of Facts and Proceeding**

Relators seek this Court’s Reconsideration of the Mandamus and/or Writ of Prohibition it has already decided, in an attempt enjoin the Honorable Judge Forrest W. Burt from exercising his clear judicial authority in appointing Auctioneers of Real Property in foreclosure cases before him. Relators are essentially making the leap that Judge Burt is requiring local residency for all auctioneers in foreclosure matters in his courtroom from a singular offhand remark purportedly made by a third party. Basically, Relators (by and through Barry Baker) have a fear that they are being somehow disqualified based on a lack of local residency, but Relators have failed to proffer any evidence to support this. The Motion for Reconsideration must be denied since the basis for the entire action is mere speculation by Relators.

In this Motion, Relators even go so far as to attempt to persuade this Court that their claims must be accepted as true since Respondent did not dispute same in the Motion to Dismiss this Court ultimately granted. This, despite actual knowledge that Respondent Judge Burt was out of the country during the pendency of the short-lived matter, and therefore it was impossible to submit a sworn statement. See Affidavit of Rebecca F. Schlag, APA,

attached hereto as Exhibit B, ¶5. To make this argument smacks of impropriety and desperation.

Relators have failed to establish satisfactory evidence substantiating mandamus or prohibition be granted in this matter, and their Motion for Reconsideration likewise contains nothing more than argument and assumption. Moreover, these claims are denied by Respondent. Burt Aff., Ex. A. For all of these reasons, Reconsideration should appropriately be denied.

To be entitled to a 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*, 954 N.E.2d 1193, 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. Relators have failed to meet these elements, in that they have failed to establish that Respondent's exercise of judicial authority was unauthorized. In the Affidavit of The Honorable Judge Forrest W. Burt, Ex. A, Respondent makes clear that, while not articulated in the Order, Judge Burt most certainly had grounds for the modification of the proposed Order appointing an auctioneer as submitted by Huntington National Bank. **See Burt Affidavit, Ex. A, at ¶¶ 10-13.** Relators were unknown to Respondent, and no credentials were submitted to the court for consideration in appointing an auctioneer.

While not characterizing his knowledge of auctioneer Scott Mihalic as "friendship" Burt does acknowledge his familiarity with Mihalic's work and his general knowledge of Geauga County activities based upon other cases in which Mihalic was the auctioneer. Burt

Aff., Ex. A, at ¶14 and ¶17. This is a far cry from Relators' outlandish and unsupported claims that Respondent assigned the auctioneer either due to an unspoken residency requirement and/or in light of cronyism stemming from his friendship with Mihalic. Again, Relators are making leaps of assumption based on one conversation (not even with Respondent!) and without any other evidence. Instead, they simply say over and over that Respondent "removed Relators' name from the underlying Order due to the lack of local residency...." (Motion for Reconsideration, page 11, subpart 2). Simply put, there is no evidence before this Court upon which the Court may issue the extraordinary relief requested, nor reconsider its prior decision to dismiss same.

### **III. LAW AND ARGUMENT**

#### **A. Writ of Prohibition**

A writ of prohibition involves an appellate court's supervisory jurisdiction, to prevent an inferior court from exceeding its jurisdiction. *See State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St. 2d 326, 329, 285 N.E.2d 22; *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 78, 701 N.E.2d 1002. In order to be entitled to the requested extraordinary relief in prohibition, Relator must establish three things; (1) that the Judge is about to exercise judicial power, (2) the judicial power is legally unauthorized and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 336, 686 N.E.2d 267, 268.

Ohio law establishes that the writ of prohibition "is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies." *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71, 73, 424 N.E.2d 297, 298-299. A writ of prohibition should not issue unless the right to relief

is clear. See *State ex rel. Kriss v. Richards* (1921), 102 Ohio St. 455, 132 N.E. 23. In *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417, 35 N.E.2d 571, the Court declared:

A writ of prohibition will not be issued unless it clearly appears that the court or tribunal whose action is sought to be prohibited has no jurisdiction of the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction.

*Id.*, syllabus at ¶ 3. In *State ex rel. Merior v. Court of Common Pleas of Tuscarawas Cty.* (1940), 137 Ohio St. 273, 28 N.E.2d 641, the Court stated: “[b]ecause of its nature, the writ of prohibition is to be used with care and caution. The right thereto must be clear, and in a doubtful or borderline case its issuance should be refused.” *Id.* At 277, 28 N.E.2d at 643.

In determining whether relief in prohibition is warranted, the court need not actually decide the underlying jurisdictional issue so long as the court is satisfied that jurisdiction is not patently and unambiguously lacking. See *State ex rel. Shimko v. McMonagle* (2001), 92 Ohio St.3d 426, 431, 751 N.E.2d 472, 477. Relator has failed to present a “patent and unambiguous” lack of jurisdiction in this matter, and as such, this Writ of Prohibition should properly be denied.

#### B. Writ of Mandamus

The Ohio Constitution affords courts of appeals and the Ohio Supreme Court original jurisdiction over writs of mandamus. *State ex rel. Civil Service Employees Association, AFSCME, Local 11, AFLCIO v. State Employment Relations Board* (2004), 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688. To be entitled to a writ of mandamus, Relators must demonstrate that they have the clear legal right to the relief requested, that the Respondent is under clear legal duty to perform the requested action, and that Relators have no plain and adequate remedy in an ordinary course of law. *Id. State ex rel. Natl. City Bank v. Bd. of Edn.* (1977), 52 Ohio St.2d 81, 84, 369 N.E.2d 1200, 6 O.O.3d 288.

In the instant matter, Relators are not entitled to the extraordinary writs they now seek for the simple reason that ORC §2329.52 *permits* but does not mandate a court to make an Order such as forms the basis for this Writ, to wit:

“\* \* \* the court from which the order of sale issued **may, on motion of the plaintiff** or defendant and from time to time until said premises are disposed of, **order a new appraisal and sale** \* \* \* “ (emphasis added).

Further, §2329.151 of the Ohio Revised Code provides that “all public auctions of goods, chattels, or lands levied upon by execution shall be conducted personally by an officer of the court **or by an auctioneer licensed under Chapter 4707** of the Revised Code.” (emphasis added).

Relators would have this Court believe that Huntington National Bank’s submitted order must be granted as *proposed*, and that the trial court abused its discretion and exceeded its authority in making the changes it made in the *proposed* order. This position is untenable and goes against all reasonable legal authority. Chapter 2329 of the Ohio Revised Code speaks to the judicial sale of the property; it is a judicial action which Relators seek to prohibit under the premise that they were *proposed* by Huntington National Bank to conduct the auction. Huntington Bank has no legal right to designate whom conducts the auction; that is a right reserved solely for the Court. Respondent’s granting of the Order was not an abuse of discretion. An abuse of discretion involves more than an error of law or of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable or arbitrary. *State, ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986) 22 Ohio St. 3d 191, 22 OBR 275, 489 N.E.2d 288; *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 52 O.O.2d 376, 262 N.E.2d 685. The granting of the Order by Respondent The Honorable Judge Forrest W. Burt was in no way unreasonable, unconscionable or arbitrary in appointing a different

auctioneer than *suggested* and ensuring that legal notice was duly published in a newspaper of general circulation widely read in Geauga County, Ohio, rather than the newspaper *suggested* by The Huntington Bank. “[A]n abuse of discretion involves far more than a difference in \* \* \* opinion \* \* \*. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. \* \* \*”

*State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264.

Relators would have this court believe that, in exercising his judicial authority, Respondent is in effect, requiring local residency. While Relators may actually believe this to be true, they have submitted no evidence to substantiate this bold claim and no such local residency policy – formal or informal - exists. Burt Aff., Ex. A, ¶12. The argument is a classic “red herring” put forth by Relators to ensnare this Court into believing some untenable dealings are at force when same is simply not the case. Relators have no basis for the relief requested and same must properly be denied.

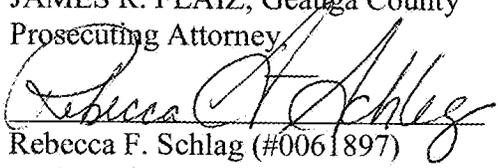
#### **IV. CONCLUSION**

The Complaint for Prohibition and Mandamus was properly dismissed, and Relators’ Motion for Reconsideration must likewise be denied. Relators are not entitled to the extraordinary remedies they seek, nor can Relators demonstrate a clear legal right to the relief requested.

Accordingly, Respondent prays the Motion for Reconsideration be denied.

Respectfully submitted,

JAMES R. FLAIZ, Geauga County  
Prosecuting Attorney

  
Rebecca F. Schlag (#0061897)

Assistant Prosecuting Attorney

Courthouse Annex

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COUNSEL FOR RESPONDENT

**CERTIFICATE OF SERVICE**

A copy of the Respondent's Reply to the Motion for Reconsideration was forwarded via regular U.S. mail, postage prepaid, on this 30<sup>th</sup> day of July 2013, to the following:

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(614) 929-5676

Attorney for Relators

Robert M. Owens (0069866)

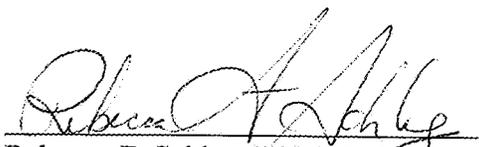
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Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO EX REL. : CASE NO. 2013-1023  
OHIO REAL ESTATE AUCTIONS,  
LLC dba OHIO SHERIFF SALES, et al. :

Relators, :

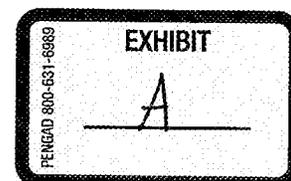
-v- :

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

Respondent :

Forrest W. Burt, having been duly sworn, deposes and says:

1. I am one of the two Judges of the General Division of the Geauga County Court of Common Pleas and am currently the Administrative Judge. I have been a Judge of the Geauga County Court of Common Pleas since January, 1995.
2. I am the Judge assigned to preside over Case No. 11F932; The Huntington National Bank (Huntington) v. Samuel J. Crea, et al, a foreclosure case.
3. The real property that is the subject of the foreclosure case is a single-family residential dwelling located in Newbury Township, Geauga County, Ohio.
4. In the case, default judgment in the amount of \$350,047.05, plus interest, had been entered in favor of Plaintiff Huntington and the real property was ordered to be appraised and sold at Sheriff's sale.



5. The real property was initially offered for Sheriff's sale at an appraised value of \$120,000. Because there were no bids, the real property was next offered for sale at an appraised value of \$120,000. Again, there were no bids.
6. Plaintiff Huntington filed a motion asking that the Court appoint an auctioneer to conduct a public auction of the real property and to establish a minimum price of \$30,000.
7. Plaintiff's Motion also asked the Court to appoint an entity known as Ohio Real Estate Auctions, LLC, dba Ohio Sheriff Sales as auctioneer.
8. Plaintiff Huntington stated in its Motion that Ohio Sheriff Sales specializes in the sale of real estate at public auction, including foreclosed properties and that Ohio Sheriff Sales has experience with accelerated real estate sales, including judicial and non-judicial auctions. Additionally, Plaintiff stated that Ohio Sheriff Sales is a recognized auctioneer with years of experience.
9. Plaintiff Huntington attached to its Motion a copy of the Auctioneer License issued by the Ohio Department of Agriculture to Ohio Real Estate Auctions, LLC.
10. Plaintiff Huntington did not attach or include the names or *curriculum vitae* of any persons associated with Ohio Sheriff Sales, nor did Plaintiff submit a list of references, sales experiences, or courts for whom Ohio Sheriff Sales had performed auctions. Plaintiff's Motion did not state whether Ohio Sheriff Sales had a real estate license, nor was a copy of a real estate license submitted.
11. It is and has been my practice to appoint receivers, real estate agents, appraisers, special masters, mediators, etc., based upon the credentials, experience, expertise, and reputation of the persons to be appointed. I obtain that information either from materials and documentation submitted by parties, interviews of prospective appointees, familiarity with the reputation of the prospective appointees, or a combination thereof.
12. Contrary to Relator's assertions in this action, I do not have a formal or informal policy or practice of appointing only Geauga County residents as auctioneers or for any other

appointment being made by the Court, unless the law clearly requires residency as a qualification. I do prefer appointing persons or entities that have demonstrated familiarity with Geauga County and Northeast Ohio, especially in matters involving real estate sales or management.

13. I had never heard of Ohio Sheriff Sales or Ohio Real Estate Auctions, LLC; nor did Plaintiff submit any information regarding its proposed appointee.
14. I am familiar with Scott Mihalic's skills as an auctioneer, having observed Mr. Mihalic numerous times at charity auctions. I also was aware that experienced counsel had jointly employed Mr. Mihalic to appraise and sell property in a highly contested domestic case in this Court. Mr. Mihalic has the reputation of being an honest and straight forward auctioneer.
15. I telephoned Mr. Mihalic and asked him about his experience with the judicially ordered sale of real property and how he would proceed if he were appointed. I was impressed with Mr. Mihalic's knowledge and his familiarity with the Geauga County and Northeast Ohio real estate market. Mr. Mihalic was willing to accept appointment upon the same terms and conditions as being proposed by Plaintiff for Ohio Sheriff Sales.
16. I did learn in my conversation with Mr. Mihalic that he is not a resident of Geauga County. His lack of residency did not disqualify him from being appointed auctioneer because it was clear that he had the requisite knowledge, familiarity, experience, and reputation to do the job.
17. Also, contrary to Relator's assertions, Scott Mihalic is not a personal friend of mine or of anyone in my immediate family. As I stated earlier, I am aware of Mr. Mihalic's skills and reputation, and I learned more about his experience and expertise in my telephone conversation. Until I talked to him on the telephone, I did not know if he lived in Geauga County or not.
18. It would appear that my appointment of Mr. Mihalic to conduct the auction of the real property was a good choice. Mr. Mihalic sold the property at auction for \$155,000, far in

excess of what it had been advertised for in the prior Sheriff's Sales notices of sale. The persons who purchased the property are Geauga County residents who, according to Mr. Mihalic, came to the auction because of the notices and ads placed by Mr. Mihalic.

Further, affiant sayeth naught.

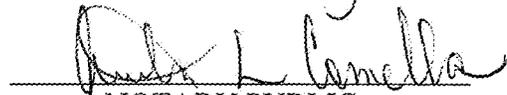
Date: 7/29/2013

  
AFFIANT

State of Ohio

County of Geauga

Sworn to before me and subscribed in my presence this 29<sup>th</sup> day of July,  
2013.

  
NOTARY PUBLIC



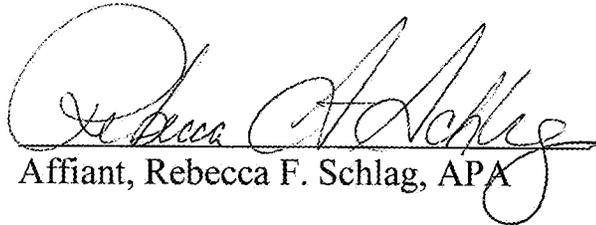
ANITA L. COMELLA  
NOTARY PUBLIC  
STATE OF OHIO  
Comm. Expires  
April 26, 2018  
Recorded in  
Gauga County



my need for an extension of time in which to reply to the Complaint was due in part because Judge Burt was out of the country until approximately July 15, 2013, and that I had no way of getting ahold of Judge Burt before fashioning a reply.

Further affiant sayeth naught.

Date: July 30, 2013

  
Affiant, Rebecca F. Schlag, APA

State of Ohio

County of Geauga

Sworn to before me and subscribed in my presence this 30<sup>th</sup> day of July, 2013.

  
NOTARY PUBLIC

SUSAN T. WIELAND, ATTORNEY  
Notary Public - State of Ohio  
My Commission Has No Expiration Date  
Ohio Revised Code 147.03