

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Daniel L. Rittner, :

Relator : Case No. 2014-0271

-vs- :

Judge James E. Barber, :

Respondent :

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CONSOLIDATED MOTIONS TO DISMISS

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Relator:

Daniel L. Rittner, Sr.  
 Pro Se  
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 Lima, Ohio 45802

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MAR 13 2014

CLERK OF COURT  
 SUPREME COURT OF OHIO

FILED

MAR 13 2014

CLERK OF COURT  
 SUPREME COURT OF OHIO

**RESPONDENT'S CONSOLIDATED MOTIONS TO DISMISS PURSUANT TO O.R.C. §2969.25(C) ON THE BASIS THAT THE RELATOR, WHO IS AN INMATE, HAS FAILED TO FILE THE REQUIRED AFFIDAVIT, AND IN ADDITION, OR IN THE ALTERNATIVE TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, PURSUANT TO CIV. R. 12(B)(6).**

Respondent, Judge, Fulton County Court of Common Pleas, Fulton County, Ohio, respectfully requests that this Court, pursuant to Civ. R. 12(B)(6), dismiss Relator's petition for a writ of procedendo or in the alternative a writ of mandamus because he has failed to state a claim upon which relief can be granted. Additionally, Respondent further moves this Court to dismiss Relator's request for a writ of procedendo or in the alternative a writ of mandamus on the basis that, pursuant to O.R.C. §2969.25(C), the Petitioner has failed to file a suitable affidavit of indigency. The reasons for these motions are set forth in the accompanying memorandum in support.

Respectfully submitted,



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T. LUKE JONES (0079788)  
COUNSEL OF RECORD  
Assistant Prosecuting Attorney  
152 S. Fulton St., Ste. 240  
Wauseon, Ohio 43567

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

On February 20, 2014, Relator, Daniel Rittner, filed a petition in this Court requesting a writ of procedendo or in the alternative a writ of mandamus be issued against Judge James E. Barber, Judge of Fulton County Common Pleas Court, Fulton County, Ohio. Relator requests this court to order Judge Barber "to render a judgment in the matter of *Haselman v. Rittner*, 11-0269 in the court of the Respondent in a motion by the Relator titled 'Leave to Proceed in a Civil Action R.C. 2323.52(F)(1)' pursuant to R.C. 2323.52(F)(1)."

On January 3, 2014, Relator, who has been declared a vexatious litigator in that court, submitted a "Motion for Leave to Proceed xxx" to the Fulton County Clerk of Courts.

On January 13, 2014, the Clerk returned the pleadings to Relator having rejected them for filing for the reasons stated in a notice sent by the Clerk to Relator (Relator's Exhibit C).

On January 17, 2014, Relator mailed the pleadings directly to Judge Barber instead of the Clerk.

On February 6, 2014, Judge Barber sent Relator a letter informing him that the

pleadings he sent directly to the Judge "cannot be processed in their present condition."  
(See Relator's Exhibit F).

On February 7, 2014, and prior to receiving Judge Barber's response dated February 6, Relator again submitted his proposed pleadings to the Fulton County Clerk of Courts, unchanged from the previous submission that was rejected by the Clerk. Relator now submits that he cannot determine if these pleadings were ever filed by the Clerk of Courts.

It is upon this chain of events that Relator seeks this court to order Judge Barber to rule on the "Motion for Leave to Proceed xxx" he submitted to the Fulton County Clerk of Courts.

## **II. LAW AND ARGUMENT**

### **A. Relator's petition should be dismissed for failure to comply with R.C. 2969.25(C).**

Ohio Revised Code §2969.25(C) says:

(C) If an inmate who files a civil action or appeal against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed, the inmate shall file with the complaint or notice of appeal an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency. The affidavit of waiver and the affidavit of indigency shall contain all of the following:

(1) A statement that sets forth the balance in the inmate account of the inmate for each of the preceding six months, as certified by the institutional cashier;

(2) A statement that sets forth all other cash and things of value owned by the inmate at that time.

On February 20, 2014, Relator filed a petition in this Court requesting a writ of procedendo or in the alternative a writ of mandamus be issued against Judge James E. Barber, Judge of Fulton County Common Pleas Court, Fulton County, Ohio. Along with the petition for a writ of procedendo, Relator submitted a preacipe to the Clerk, an affidavit of waiver of indigency containing a list of prior civil actions within the prior five years, an affidavit of variety, an affidavit of authenticity, and an affidavit of indigency that notably does not include a statement that sets forth the balance in the inmate account for each of the preceding six months, as certified by the institutional cashier.

Relator apparently realized his mistake because on March 3, 2014, he file a "Motion to Stay Proceedings" in order to get an opportunity to file the missing statement of his inmate account. However, dismissal is the appropriate remedy for failure to file the appropriate documents required by §2969.25. See *State ex rel. Brooks v. Warden of S. Ohio Corr. Facility*, 2012 Ohio App. LEXIS 4339, 2012 Ohio 4952, (Oct. 25, 2012) (where, at the time an inmate filed a mandamus action, the inmate failed to comply with the mandatory requirements of R.C. 2969.25(C) which required him to file an affidavit, the inmate's request for an alternative writ was denied, and, because his failure to comply with the mandatory requirements of R.C. 2969.25(C) could not be cured, the complaint was dismissed); *State ex rel. Smith v. Sheward*, 2012 Ohio App. LEXIS 4151, 2012 Ohio 4734, (Oct. 11, 2012) (Where an inmate asked the court to grant writs of prohibition and mandamus ordering a judge to refrain from taking certain

action and ordering the judge to take certain action in his underlying criminal case concerning his sentence, the inmate failed to file an affidavit of indigency which complied with R.C. 2969.25(C); thus, the petitions had to be dismissed); and *State ex rel. Taylor v. Mohr*, 2012 Ohio App. LEXIS 1144, 2012 Ohio 1312, (Mar. 27, 2012) (where an inmate's action in mandamus was dismissed because the inmate failed to comply with R.C. 2969.25(C) in that the inmate did not file an affidavit of indigency including a statement of the amount in the inmate's account for the preceding six months as certified by the institutional cashier and a statement of all other cash and things of value owned by the inmate).

Further, the statute requires the properly certified affidavit be filed "with the complaint" and therefore Relator's "Motion to Stay Proceedings" along with any subsequent filings will not remedy the deficient complaint. See *State ex rel. Hazel v. Bender*, 2012 Ohio App. LEXIS 320, 2012 Ohio 374, (Feb. 2, 2012) (where the inmate was not entitled to leave to amend his complaint, because allowing the inmate to amend his complaint by adding the affidavit of indigency would not satisfy R.C. 2969.25(C)'s requirement which called for the filing of the affidavit with the complaint; at the filing of the complaint, the inmate failed to file a proper affidavit of indigency that set forth all other cash and things of value owned by the inmate, and failed to file a certified institutional cashier's statement regarding his inmate account).

For the foregoing reason, Relator's complaint should be dismissed with prejudice.

**B. As a matter of law, Relator has failed to state a claim upon which relief can be granted because he cannot meet the requirements for any writ to issue.**

**1. Standard of Review**

Dismissal under Civ. R. 12(B)(6) is appropriate if, after all factual allegations are presumed true and all reasonable inferences are made in the relator's favor, it appears beyond doubt that there are no set of facts that could warrant the requested extraordinary relief in mandamus. *State ex rel. Rittner v. Bumb*, 6<sup>th</sup> Court of Appeals No. F-07-017, 2007 Ohio 5319, 2007 Ohio App. LEXIS 4682.

**2. Relator cannot meet the requirements for a writ of procedendo to issue.**

In order for a relator to be entitled to a writ of procedendo, the relator must establish that he has a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Rittner v. Barber*, 6<sup>th</sup> Court of Appeals No. F-05-05-020, 2006 Ohio 592, 2006 Ohio App. LEXIS 522.

In his prayer for relief, the Relator seeks "to compel the Respondent James E. Barber, Judge, Fulton County Court of Common Pleas to render a judgment in the matter of *Haselman v. Rittner*, 11-0260 in the court of the Respondent in a motion by

the Relator titled 'Leave to Proceed in a Civil Action R.C. 2323.52(F)(1)' pursuant to R.C. 2323.52(F)(1)." Relator cannot establish that he has a clear legal right to that request.

Granting Relator all reasonable inferences, and relying upon his own recitation of the events preceding this action, there are two possible scenarios: (1) the "Motion for Leave to Proceed xxx" submitted to the Clerk for filing was never actually filed by the Clerk, in which case Judge Barber could not be compelled to rule on a motion that is not in front of him for his consideration; or (2) Relator's "Motion for Leave to Proceed xxx" was filed by the Clerk upon receipt of his second mailing on February 7, 2014. Even assuming light-speed transmission of the documents by the U.S. Postal Service, the motion was at most before Judge Barber for 14 days before the present request was filed in this Court on February 20, 2014. The Rules of Superintendence, in Sup.R. 40(A)(3), impose on trial courts a duty to rule on motions within 120 days. *State ex rel. Culgan v. Collier*, 135 Ohio St. 3d 436, 2013-Ohio-1762, 988 N.E.2d 564, ¶ 11. Although the Rules of Superintendence do not provide litigants with a right to enforce Sup.R. 40, "procedendo and mandamus will lie when a trial court has refused to render, or unduly delayed rendering, a judgment." *Culgan* at ¶ 10. It can hardly be said that 14 days without ruling is an undue delay.

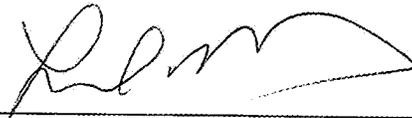
Consequently, the Relator cannot meet the requirements for the desired writ to issue. Therefore, as a matter of law, this complaint should be dismissed pursuant to Civ. R. 12(B)(6).

**III. CONCLUSION**

Relator's action warrants dismissal pursuant to O.R.C. §2969.25(C) as he has not filed a suitable affidavit of indigency. Additionally, or in the alternative, Respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted should be sustained, as a matter of law, as Relator cannot show that he is entitled to a writ of procedendo for all of the preceding reasons.

Therefore, the Respondent respectfully requests that Relator's petition be dismissed at his costs.

Respectfully submitted,



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T. LUKE JONES (0079788)  
COUNSEL OF RECORD  
ASSISTANT PROSECUTING ATTORNEY

**IV. CERTIFICATE OF SERVICE**

This is to certify that on March 12, 2014, a copy of the foregoing was sent by regular U.S. mail directed to: Daniel L. Rittner, Sr., pro se, 268-188 3B, 2338 North West Street, P.O. Box 4501, Lima, Ohio 45802.



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T. Luke Jones  
Assistant Prosecuting Attorney