

ORIGINAL

IN THE SUPREME COURT OF OHIO

IRVIN W. HUTH, <i>et al.</i> ,	)	Case No. 14-1214
	)	
Relators,	)	
	)	
vs.	)	(Original Action in Prohibition and
	)	Mandamus)
	)	
NEW PHILADELPHIA MUNICIPAL	)	
COURT, <i>et al.</i> ,	)	
	)	
Respondents	)	
	)	
and	)	
	)	
FITZPATRICK ZIMMERMAN &	)	
ROSE CO., LPA,	)	
	)	
and	)	
	)	
STEVEN A. ANDERSON, ESQ.,	)	
	)	
Intervening Respondents	)	

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**INTERVENING RESPONDENTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS**

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Intervening Respondents, Fitzpatrick Zimmerman & Rose Co., LPA and Steven A. Anderson, Esq., by and through the undersigned, move for judgment on the pleadings pursuant to S.Ct.Prac.R.12.04(B) and Civ.R. 12(C) to dismiss the Relators' "Complaint for Writs of Prohibition, Mandamus, Other Writ and Alternative Writs."

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SUPREME COURT OF OHIO

**FILED**  
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SUPREME COURT OF OHIO

A Memorandum in Support of this Motion is attached hereto and fully incorporated herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Todd Hunt", written over a horizontal line.

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ROSE CO., LPA,	)	
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STEVEN A. ANDERSON, ESQ.,	)	
	)	
Intervening Respondents	)	

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**MEMORANDUM IN SUPPORT OF  
INTERVENING RESPONDENTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS**

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**I. STATEMENT OF FACTS**

The Council of the Village of Bolivar (“Village”) enacted Ordinance No. O-88-2014, engaging the Intervening Respondent, the law firm of Fitzpatrick Zimmerman & Rose Co., L.P.A. (“Fitzpatrick”), as legal counsel for the Village for the term of January 1, 2014 through December 31, 2014. (Complaint at ¶ 32; Answer at ¶ 32) Ordinance No. O-88-2014 authorizes a broad scope of legal services that Fitzpatrick, as “Village Legal Counsel,” is to perform for the Village. Specifically, Ordinance O-88-2014 reads, in pertinent part:

SECTION 1. That legal counsel shall be provided for this Village and the legal professional corporation of **Fitzpatrick, Zimmerman & Rose Co., L.P.A.**, of New Philadelphia, Ohio, is hereby contracted as such counsel and **shall be known as “Legal Counsel of the Village of Bolivar”**. Said Legal Counsel is hereby contracted for a term beginning January 1, 2014 and ending on December 31, 2014.

SECTION 2. Said Village Legal Counsel shall be the legal advisor for the Village and the officers thereof **in their official capacity** and as such, attorneys to **prosecute and defend all actions by or against the said Village** or any department or officer thereof, during the term of its contract; to render legal opinions to the said Council or any department or officer of the Village during the term of its contract upon the request in writing.

(Emphasis added.) (Complaint at ¶ 34 and Ex. E; Answer at ¶ 34)

Intervening Respondent, Steven A. Anderson (“Anderson”), is an attorney employed by Fitzpatrick. (Complaint ¶17; Answer at ¶ 17) During the term of the Village’s engagement of Fitzpatrick under Ordinance No. O-88-2014, Anderson prosecuted criminal cases for the Village.

In or about May 2014, the Village of Bolivar Police Department issued Complaints and Summonses in the New Philadelphia Municipal Court, New Philadelphia, Ohio (“Municipal Court”) against Relator Irvin W. Huth (aka William Huth) for menacing (R.C. 2903.22(A)), disorderly conduct (R.C. 2917.11(A)(1)), and disturbing a lawful meeting (R.C. 2917.12 (A)(1)) and against Relator Michela Huth for disturbing a lawful meeting (R.C. 2917.12(A)(1)).<sup>1</sup> (Complaint at ¶ 8 and Ex. A; Answer at ¶ 8) Anderson, acting as prosecutor for the Village of Bolivar through his employment with Fitzpatrick, was assigned to prosecute the criminal cases against Relators. The cases are pending before Respondent, the Honorable Judge Richard D. Reinbold (“Judge Reinbold”), who is a visiting Judge for the Municipal Court.

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<sup>1</sup> New Philadelphia Municipal Court Case Nos. CRB1400643 and CRB 1400642 (Complaint at ¶1)

However, as recognized by the Relators, Anderson was “disqualified” by Judge Reinbold from prosecuting Relators’ pending criminal cases. (Complaint at ¶ 14; Answer at ¶ 14) Thus, at the time of the filing of Relators’ Complaint in this action, Anderson was no longer the Village’s prosecuting attorney on the Relators’ criminal cases.<sup>2</sup>

In Relators’ Complaint, Relators essentially argue that Anderson does not have legal authority to prosecute cases for the Village of Bolivar and, therefore, the Municipal Court and Judge Reinbold have no jurisdiction over Relators’ criminal cases, nor any other prior criminal case instituted by the Village of Bolivar through Anderson. Relators, through this action, seek a writ of prohibition, writ of mandamus, and alternative writs as summarized below:

(A) To restrain Respondent Municipal Court and Judge Reinbold from exercising jurisdiction over all pending criminal cases brought by the Village of Bolivar for which Anderson is the prosecuting attorney;

(B) To restrain Respondent Municipal Court and Judge Reinbold from exercising jurisdiction over Relators’ pending criminal cases;

(C) To order the Respondents not to accept any further criminal cases prosecuted by Anderson on behalf of the Village of Bolivar;

(D) To order the Respondent Municipal Court to dismiss any pending criminal cases prosecuted by Anderson, on behalf of the Village of Bolivar;

(E) To order the Respondent Municipal Court to expunge any past criminal convictions in cases prosecuted by Anderson, on behalf of the Village of Bolivar;

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<sup>2</sup> Respondents do not allege in their Complaint that the current attorney prosecuting the Respondents’ criminal cases for the Village of Bolivar is employed by or affiliated with Fitzpatrick, and, in fact, the current prosecuting attorney on Respondents’ criminal cases is not employed or affiliated with Fitzpatrick.

(F) To order the Respondents to seal all closed criminal cases prosecuted by Anderson on behalf of the Village of Bolivar;

(G) To order the Respondent Judge Reinbold to dismiss Relators' criminal cases; and

(H) To restrain Respondents from continuing to adjudicate Relators' criminal cases.

(Complaint at ¶ 1; Answer at ¶ 1)

## II. LAW AND ARGUMENT

### **A. Judgment On The Pleadings Is Appropriate When The Pleadings Establish That A Complaining Party Has No Right To Recover From The Moving Party.**

Civ.R. 12(C) permits a party to move for judgment on the pleadings. Determination of a motion for judgment on the pleadings “is restricted solely to the allegations in the pleadings” and “any writings attached to the complaint.” *Goscenski v. Ohio Dept. of Transportation*, 10<sup>th</sup> Dist. Franklin No. 13AP-585, 2014-Ohio-3426, ¶ 7, quoting *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166 (1973); *Moore v. Cleveland*, 8<sup>th</sup> Dist. Cuyahoga No. 100069, 2014-Ohio-1426, ¶ 13, citing *Peterson*, at 165.

A motion for judgment on the pleadings presents only questions of law. *Peterson*, at 166. The Court's review is limited to the allegations in the pleadings, which are accepted as true for purposes of the motion. *Lin v. Gatehouse Constr. Co.*, 84 Ohio App.3d 96, 99, 6616 N.E.2d 519 (8<sup>th</sup> Dist. 1992). A motion for judgment on the pleadings may be granted when there are no material issues of fact and the movant is entitled to judgment as a matter of law. See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E. 2d 931 (1996).

As a matter of law, Intervening Respondents are entitled to judgment on the pleadings dismissing Relators' Complaint for the extraordinary relief of a writ of prohibition, writ of mandamus, and alternative writ.

**B. Anderson Has Valid Legal Authority To Initiate And Prosecute Criminal Cases On Behalf Of The Village Of Bolivar.**

The core issue of this case is whether Intervening Respondent Anderson has the requisite legal authority to prosecute criminal actions on behalf of the Village of Bolivar. All of Relators' legal claims and requests for relief hinge on this question. As a matter of law, Anderson *did and does* possess such authority, and there is no basis upon which Relators' request for extraordinary relief can be granted.

The Village of Bolivar is a statutory village operating under the so-called "general plan" of government, pursuant to Ohio Revised Code Sections 705.01 through 705.06. Under the general plan, there is no statutory provision for the creation of the position of "village solicitor" or legal counsel as an "officer" of government. Rather, only *alternative plans* of government under R.C. 705.41 *et seq.* ("Commission Plan"), R.C. 705.51 *et seq.* ("City Manager Plan"), and R.C. 705.71 *et seq.* ("Federal Plan") contain provisions for the creation of a "village solicitor."<sup>3</sup> *Rose v. Village of Wellsville*, 63 Ohio Misc.2d 9, 14, 613 N.E.2d 262 (Columbia Cty. C.P. 1993).

A "general plan" statutory village, such as the Village of Bolivar, may engage legal services only through R.C. 733.48. *Pullin v. Village of Hiram*, 11<sup>th</sup> Dist. Portage No. 2001-P-0146, 2003-Ohio-1973, ¶ 21-22. R.C. 733.48(A) expressly permits statutory villages to retain legal counsel, as follows in relevant part:

(A) ... when it considers it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official of the village, for a period not to exceed two years and shall provide compensation for the legal counsel.

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<sup>3</sup> Note that R.C. 705.11 pertains to "village solicitors" and "city law directors." However, R.C. 705.07 expressly renders R.C. 708.07 to 705.32 (inclusive of R.C. 705.11) *only* applicable to the *alternative plans* of government provided for in R.C. 705.41 through 705.86.

Notably, R.C. 733.48(B) also permits an alternative method of engaging legal counsel whereby the mayor, rather than the legislative authority of the village, appoints legal counsel. This provision specifically clarifies that such an appointment may be “*an attorney or law firm*” as legal counsel for the village. R.C. 733.48(A) reads in relevant part:

(B) A petition may be filed with the village clerk, signed by registered electors residing in the village equal in number to not less than ten per cent of the total vote cast for all candidates for governor in the village at the most recent general election at which a governor was elected, requesting that the question be placed before the electors whether, instead of the legislative authority appointing legal counsel for the village or for any department or official of the village, the mayor shall appoint *an attorney or law firm as the legal counsel* with the advice and consent of the legislative authority....

The nature of the position of legal counsel for the village which is engaged under R.C. 733.48 “is that of contractual employee and not of a public office.” *Pullin*, FN 13.

Moreover, the employment contract under R.C. 733.48 “may be as broad, or as narrow, as the village council and the attorney involved choose to make it.” *Rose*, 63 Ohio Misc.2d 9, at 15, 613 N.E.2d 262. “The attorney may be hired as ‘general counsel’ to represent the village in all its legal matters, or his representation may be limited to certain on-going specific matters..., one single matter or case, or to the village itself as an entity, or to just one single village official.” *Id.*

In the case *sub judice*, the employment contract between the Village of Bolivar and Intervening Respondent Fitzpatrick is authorized by R.C. 733.48, and the scope of the employment contract is determined by the language of Ordinance No. O-88-2014. The language of Ordinance No. O-88-2014 clearly demonstrates that the Village retained Fitzpatrick in the broadest terms possible, akin to “general counsel.” Further, the Ordinance expressly conveyed the authority to Fitzpatrick to “prosecute... all actions by... said Village” which, by its plain language, includes prosecution of criminal actions brought by the Village. Further, the terms of

the engagement inherently permits Fitzpatrick to choose which of its employees will prosecute those criminal actions. (Complaint at ¶ 34 and Ex. E; Answer at ¶ 34)

“Legislative enactments are presumed to be constitutional” and municipal ordinances are “afforded the same presumption.” *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 859 N.E.2d 923, 2006-Ohio-6573, ¶ 18, citing *Jaylin Invests., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, ¶ 18. Thus, the law presumes Ordinance No. O-88-2014 to be valid.

It is undisputed by Relators that Intervening Respondent Anderson is an attorney employed by Fitzpatrick. (Complaint at ¶ 17; Answer at ¶ 17). Thus, Anderson had, and continues to have, the legal authority vis-à-vis Ordinance No. O-88-2014 to prosecute criminal actions on behalf of the Village of Bolivar, including the criminal cases against Relators (until Anderson was “disqualified” from the case).

As Relators point out, R.C. 1901.34 specifies who shall prosecute cases before the municipal court. R.C. 1901.34(A) states, in relevant part:

(A) Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or **similar chief legal officer** for each municipal corporation within the territory of a municipal court shall **prosecute all cases brought before the municipal court for criminal offenses** occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer....

Again, pursuant to R.C. 733.48 Fitzpatrick was appointed by Village Council as “Legal Counsel of the Village” under Ordinance No. O-88-2014 with broad “general counsel” responsibilities. Thus, Fitzpatrick and its attorneys are within the category of “similar chief legal officer” under R.C. 1901.34(A). Therefore, Anderson’s prosecution of criminal cases for the Village of Bolivar, as an attorney employed by Fitzpatrick, is authorized R.C. 1901.34(A).

### **C. Relators Are Not Entitled To A Writ of Prohibition.**

The Ohio Supreme Court has stated that a “writ of prohibition has been defined in general terms as an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions.” *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998). “In other words, the purpose of a writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction.” *Id.*, citing *State ex rel. Barton v. Butler Cty. Bd. of Elections*, 39 Ohio St.3d 291, 530 N.E.2d 871 (1988).

To be entitled to a writ of prohibition, the Relator must establish that: (1) the court or officer against whom the writ is sought is about to exercise power; (2) the exercise of that power is unauthorized by law; and (3) denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex. rel Jones*, at 74; *State ex. rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 740 N.E.2d 265 (2001); *State ex rel. Tollis v. Court of Appeals*, 40 Ohio St.3d 145, 147, 532 N.E.2d 727 (1988).

Relators seek a writ of prohibition in this case to essentially prevent Respondents Judge Reinbold and the New Philadelphia Municipal Court from exercising jurisdiction over Relators’ criminal cases because, as Relators allege, Intervening Respondent Anderson was not properly authorized to act as the prosecutor for the Village (at least prior to his disqualification). Further, Relators seek to prevent the Municipal Court from exercising jurisdiction over any other criminal case instituted by the Village of Bolivar through Anderson as its prosecuting attorney.

As Section B of this Memorandum demonstrates, Anderson, as a matter of law, has legal authority to prosecute criminal cases on behalf of the Village of Bolivar. Thus, Relators’ claims that the Municipal Court’s and Judge Reinbold’s exercise of any judicial power in Relators’

cases, or any other criminal case prosecuted by Anderson, is unauthorized by law are completely meritless.

Relators have not suffered, and will not suffer, any injury. The Village Police, not Anderson, instituted the criminal charges against Relators through the signing of the Complaints and Summonses against them. (Complaint at Ex. A) Although Anderson began handling the prosecution of the Relators' cases for the Village, he is no longer the prosecuting attorney on those cases by virtue of a court order. (Complaint at ¶ 14; Answer at ¶ 14) Therefore, there is no actual injury to Relators.

Further, to the extent that Relators could demonstrate any injury from Anderson's limited handling of the prosecution of their criminal cases, Relators have an adequate remedy in the ordinary course – filing a motion to dismiss in the trial court on the issue of jurisdiction and direct appeal to the Court of Appeals on such motion or on any conviction. A writ of prohibition cannot be used as a substitute for an appeal “absent a patent and unambiguous lack of jurisdiction” of the Municipal Court in this case. *State ex rel. Plant v. Cosgrove*, 119 Ohio St.3d 264, 2008-Ohio-3838, 893 N.E.2d 485, ¶ 5 (stating, “In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal.”) The Municipal Court and Judge Reinbold do not patently and unambiguously lack jurisdiction over the Relators' criminal cases, and Relators have an adequate remedy in the ordinary course of law.

Therefore, Relators' claim for a writ of prohibition must be dismissed.

#### **D. Relators Are Not Entitled To A Writ of Mandamus.**

A writ of mandamus is defined as “a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” R.C. 2731.01. In order for a court to issue a writ of mandamus, a relator must establish: (1) that it has a clear legal right to the relief prayed for, (2) that respondent is under a corresponding clear legal duty to perform the act requested, and (3) that there is no plain and adequate remedy in the ordinary course of law. *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009–Ohio–5327, 915 N.E.2d 1215, at ¶ 8; *State ex rel. Boardwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga County*, 56 Ohio St.3d 33, 34, 564 N.E.2d 86 (1990).

Relators seek a writ of mandamus against Respondents Municipal Court and Judge Reinbold to dismiss Relators’ criminal cases, dismiss any other pending criminal case being prosecuted by Anderson for the Village of Bolivar, and expunge and/or seal the records of past criminal cases prosecuted by Anderson for the Village of Bolivar. (Complaint at ¶ 1; Answer at ¶ 1) There is absolutely **no** clear right on the part of Relators to have their criminal cases be dismissed when, as a matter of law, Anderson’s past handling of the initiated prosecution of those cases and the Municipal Court’s exercise of jurisdiction over those cases was clearly lawful. And, again, there is a plain and adequate remedy in the ordinary course of law – a motion to dismiss the criminal case filed in the Municipal Court and a direct appeal of said case.

Moreover, Relators have no standing to challenge other cases in which Anderson served as prosecuting attorney for the Village of Bolivar. “To have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties.’” *Utility Service Partners, Inc. v. Ohio Public Utilities Commission*, 124 Ohio St.3d 284, 921 N.E.2d 1038, 2009-Ohio-6764, ¶

49, quoting *N. Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586, ¶ 14. Third-party standing is “not looked favorably upon” *Utility Service Partners, Inc.*, at ¶ 49, quoting *Kowalski v. Tesmer* (2004), 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519. Third party standing may nonetheless be granted “when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently “close” relationship with the person who possesses the right, and (iii) shows some hindrance that stands in the way of the claimant seeking relief.” *Utility Service Partners, Inc.*, citing *E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶ 22. Here, Relators, as explained above in this Memorandum, have suffered no injury in fact, Relators have not even alleged any relationship, let alone a sufficiently “close” relationship with the persons who may possess the right to seek relief, and there is nothing hindering any third party from bringing its own action for the relief being sought.

Intervening Respondents are entitled to judgment as a matter of law dismissing Relators’ request for a writ of mandamus.

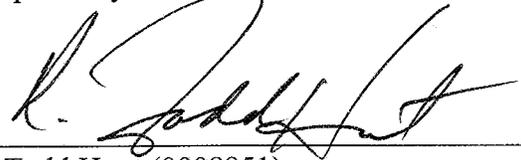
**E. Relators Are Not Entitled To An Alternative Writ.**

Relators are not entitled to an alternative writ of prohibition or mandamus to stay the Relators’ criminal cases. Again, Anderson is no longer the prosecuting attorney on the Relators’ criminal cases; thus, no preservation of the status quo of the criminal proceedings is necessary. Further, as explained above in this Memorandum, Relators have an adequate remedy in the ordinary course of law by motion to dismiss in the trial court and direct appeal of the cases.

### III. CONCLUSION

As a matter of law, Intervening Respondents are entitled to judgment on the pleadings dismissing Relators' Complaint for the extraordinary relief of a writ of prohibition, writ of mandamus, and alternative writ.

Respectfully submitted,



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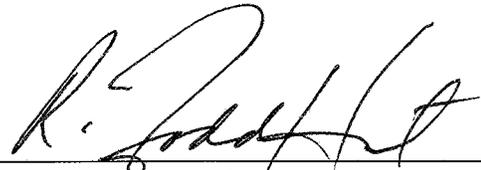
*Attorneys for Intervening Respondents  
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Steven A. Anderson, Esq.*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Intervening Respondents' Motion For Judgment On The Pleadings* has been sent, via regular U.S. Mail, on this 11<sup>th</sup> day of August, 2014 to:

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A handwritten signature in black ink, appearing to read 'S. Anderson', written over a horizontal line.

*One of the Attorneys for Intervening Respondents Fitzpatrick Zimmerman & Rose Co., LPA and Steven A. Anderson, Esq.*