ORIGINAL

Case No. 2014-1141

Supreme Court of the State of Ohio

STATE OF OHIO *ex rel.*
OHIO REPUBLICAN PARTY,

Relator,

v.

EDWARD FITZGERALD, County Executive, County of Cuyahoga County,

and

COUNTY OF CUYAHOGA and KOULA CELEBREZZE,

Respondents.

RELATOR'S MOTION TO STRIKE AFFIDAVITS TENDERED WITH RESPONDENTS' MOTION TO DISMISS

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Supreme Court of the State of Ohio

STATE OF OHIO *ex rel.* OHIO REPUBLICAN PARTY,	:	**Case No. 2014-1141**
Relator,	:	
v.	:	
EDWARD FITZGERALD, *et al.*,	:	**RELATOR'S MOTION TO STRIKE AFFIDAVITS TENDERED WITH RESPONDENTS' MOTION TO DISMISS**
Respondents.	:	

The State of Ohio, on relation to the Ohio Republican Party (hereinafter, "Relator"), hereby moves to strike the affidavits and accompanying exhibits improperly submitted in support of the Respondents' Motion to Dismiss, *i.e.*, the Affidavit of Majeed G. Makhlouf and the Affidavit of Koula Celebrezze.

MEMORANDUM IN SUPPORT

"Civ. R. 12(B)(6) motions attack the sufficiency of the complaint and may not be used to summarily review the merits of a cause of action in mandamus." *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 65 Ohio St.3d 323, 325, 603 N.E.2d 1005, 1007 (1992); *accord Hattie v. Anderson*, 68 Ohio St.3d 232, 626 N.E.2d 67, 1994-Ohio-517. And generally, "[a] complaint in mandamus states a claim if it alleges the existence of the legal duty and the want of an adequate remedy at law with sufficient particularity so that the respondent is given reasonable notice of the claim asserted." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378, 381 (1992)(quoting *State ex rel. Alford v. Willoughby*, 58 Ohio St.2d 221, 224, 12 O.O.3d 229, 230, 390 N.E.2d 782, 785 (1979)). But "the lack of an adequate legal remedy does not apply to public-records cases." *State ex rel.*

Gaydosh v. Twinsburg, 93 Ohio St.3d 576, 757 N.E.2d 357, 2001-Ohio-1613; *accord State ex rel. Dist. 1199, Health Care & Soc. Serv. Union, SEIU, AFL-CIO v. Lawrence Cty. Gen. Hosp.* (1998), 83 Ohio St.3d 351, 354, 699 N.E.2d 1281, 1283 ("persons seeking public records under R.C. 149.43 need not establish the lack of an adequate remedy at law in order to be entitled to a writ of mandamus"). Thus, with respect to a public records mandamus action, a motion to dismiss simply raises the question of whether the relator alleges the existence of the legal duty on the part of the respondent with sufficient particularity so that the respondent is given reasonable notice of the claim asserted.

Yet, instead of addressing the sufficiency of the allegations in the complaint, Respondents have improperly sought to submit putatively evidentiary materials with the Motion to Dismiss apparently in an effort to have this Court engage in a summary review of the merits. Such submission of putative evidence – specifically various communications between or on behalf of the parties – is not permissible pursuant to the rules of this Court nor the practice and procedures with respect to motions to dismiss.

S. Ct. Prac. R. 12.04 designates only three permissible responses to a complaint in an original action: an answer, a motion to dismiss, or a motion for judgment on the pleadings coupled with an answer. *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 631, 716 N.E.2d 704, 707, 1999-Ohio-130; *see Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 811 N.E.2d 1130, 2004-Ohio-3701 ¶8 ("[u]nder [former] S. Ct. Prac. R. X(5), an answer, a motion to dismiss, or a motion for judgment on the pleadings constitutes a 'responsive pleading'"). Additionally, S. Ct. Prac. R. 12.04(B)(3) specifically provides that "[n]either party may file a motion for summary judgment." *See State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 1998-Ohio-597, 82 Ohio St.3d 37, 40, 693 N.E.2d 789 ("Civ.R. 56 motions for summary

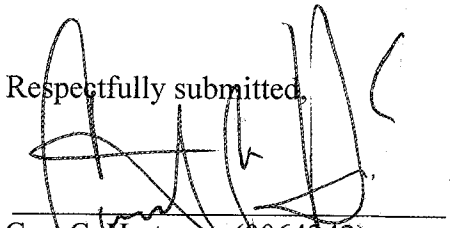
judgment are clearly inapplicable in original actions in this court under the procedure specified in [former] S.Ct.Prac.R. X"). Thus, the rules of this Court clearly forbid the submission of evidence in response to a complaint in an original action. Instead, the time for submission of evidence is only after the issuance of an alternative writ together with a schedule for the presentation of evidence. *See* S. Ct. Prac. R. 12.05. Yet, Respondents have improperly attempted to submit and to have this Court consider evidence when ruling on the Motion to Dismiss.

Arguably, the only basis for the authorized submission of evidence with a motion to dismiss would be to establish that all of the claims are moot. *E.g., Pewitt v. Lorain Corr. Inst.*, 64 Ohio St.3d 470, 472, 1992-Ohio-91 (1992) ("an event that causes a case to become moot may be proved by extrinsic evidence outside the record"). But other than a single page making a broad conclusory assertion of mootness (Motion to Dismiss, at 10-11), Respondents did not develop any arguments concerning mootness. In fact, the Respondents acknowledged the opposite thereof: that "the [requested] key card swipe data for Mr. FitzGerald would not be released." (Motion to Dismiss, at 11.) "Cases are not moot when an actual controversy exists between adverse litigants." *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518, 687 N.E.2d 661, 1997-Ohio-75. And the foregoing admissions that there is still a dispute between the parties over Respondents' continued refusal to produce records responsive to Relator's public records requests belies any claim of mootness. For the submission of the putative evidence with the Motion to Dismiss does not even go to the issue of mootness and, thus, was clearly improper for its submission to the Court with the Motion.

As the foregoing demonstrates, Respondents improperly submitted affidavits and associated exhibits in support of the Motion to Dismiss. There is no legal authority or basis for

the submission of such exhibits at this stage and, accordingly, those affidavits (together with the exhibits) exhibits must be stricken.

Respectfully submitted,



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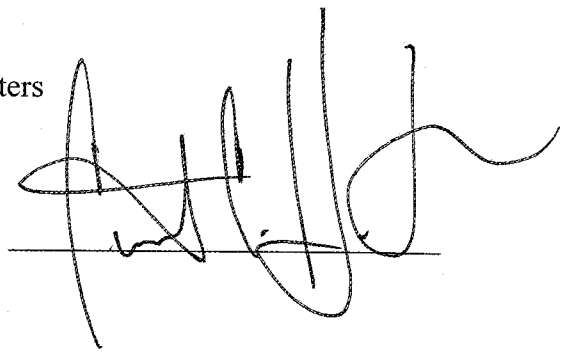
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail on the 19th day of August 2014:

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