

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel)
DR. JUDITH VARNAU,)

SUPREME CT. CASE NO.

Relator,)

14-1605

vs.)

In an Original Action for Writs
of Prohibition and Mandamus

TWELFTH DISTRICT COURT OF)
APPEALS, and its Judges,)
1001 Reinartz Blvd.)
Middletown, Ohio 45042)

And)

ROBERT A. HENDRICKSON,)
In his official capacity as Administrative)
Judge of the Twelfth District Court of Appeals,)
1001 Reinartz Blvd.)
Middletown, Ohio 45042)

Respondents.)

**RELATOR DR. JUDITH VARNAU'S MOTION FOR PEREMPTORY OR
ALTERNATIVE WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT
OF COMPLAINT FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS**

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STATE OF OHIO ex rel
DR. JUDITH VARNAU,
BROWN COUNTY, OHIO, CORONER,

Relator,

v.

TWELFTH DISTRICT COURT OF
APPEALS, and its Judges,
1001 Reinartz Blvd.
Middletown, Ohio 45042

And

ROBERT A. HENDRICKSON,
In his official capacity as Administrative
Judge of the Twelfth District Court of Appeals,
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Respondents.

Supreme Court Case No.:

RELATOR'S MOTION FOR
ALTERNATIVE OR
PEREMPTORY WRITS OF
PROHIBITION AND
MANDUMUS and/or FOR
STAY OF PROCEEDINGS
BELOW and
MEMORANDUM IN
SUPPORT OF COMPLAINT

Relator hereby moves the Court for an Alternative or Peremptory Writ of Prohibition and a Writ of Mandamus. In the alternative Relators move the court to stay the lower court's proceedings pending resolution of this case. Extraordinary circumstances exist and, if this Court does not act before the lower court does so, Relator will suffer irreparable damage to the extent of being required to litigate outside of the lower court's jurisdiction and place in jeopardy a favorable and legally final verdict and judgment.

Memorandum

I. Introduction, Summary, and Statement of Facts and Procedure

The facts in this case are not disputed, only the construction of the applicable law to those facts, as material to the jurisdiction of the Twelfth District Court of Appeals to

proceed to make a decision on an appeal outside of its jurisdiction due to defects in the content, substance, and timing of an attempted appeal of a decision, judgment, and verdict in Relator's favor by the Brown County Common Pleas Court in a statutory removal action. Supporting documents are attached and incorporated into the Affidavit of Relator attached to the Complaint.

On April 16, 2014, Steve Adamson and others (Appellants in the Twelfth District), through their counsel, filed a complaint to remove the Brown County Coroner Dr. Judith Varnau (Relator) from office. The complaint was not signed by anyone other than their attorney, and instead was accompanied by a petition purported to have been signed by a certain number of Brown County voters.

The matter was tried to the court (without a jury) on May 14 and 15, 2014. On June 23, 2014, the trial court rendered a verdict and judgment finding in the Relator's favor and dismissing the case. The basis for the ruling was stated, in the court's "Conclusion" as:

[T]he court finds that the failures [alleged against Relator] *do not sufficiently make out clear and convincing evidence of gross neglect as defined* – of a gravity and frequency amounting to an endangerment or threat to the public welfare.

* * *

[T]hese actions [the court describing the facts basing the complaints] *do not establish by clear and convincing evidence, grounds to remove Defendant Varnau from her position.*

* * *

The question is whether Defendant is guilty of misconduct in office, and *the court finds that Plaintiffs have failed to prove by clear and convincing evidence that Coroner Varnau has committed violations sufficient to warrant removal* pursuant to R.C. 3.07. The court *is not convinced* that the mistakes Defendant had made in the performance of her official duties *rise to the level* of gross neglect of duty, misfeasance, malfeasance or nonfeasance required by law for her removal.

The court returns a verdict in favor of Defendant, and orders the Complaint

dismissed.

Findings and Decision, June 23, 2014, p. 11-12 (emphasis added). Those plaintiffs did not request findings of fact or conclusions of law. The trial court was just “not convinced” as to the Plaintiff’s case.

On July 23, 2014, those plaintiffs filed a Notice of Appeal, without having leave granted to do so, and at the same time a Motion for Leave to file an Appeal. As of this filing date no hearing has been set or held or noticed to anyone on the Motion. The Appellants’ Motion asserts two issues they want to appeal, both that the trial court was wrong in rendering a verdict for the Relator.

Relator filed a motion to strike the Notice of Appeal and to dismiss the appeal and to deny leave to appeal. No response was filed by Appellants. On September 8, 2014, the Respondent Twelfth District Court of Appeals, by the Honorable Judge Robert A. Hendrickson (as Administrative Judge), and without any hearing, denied Relator’s Motion to Dismiss the Appeal and granted the Motion for Leave to Appeal and on September 10, 2014, issued an accelerated scheduling order.

II. Law and Argument

A. Standard for Writ of Prohibition and Writ of Mandamus

A writ of prohibition is an order under which a court of superior jurisdiction enjoins a court of inferior jurisdiction from exceeding its authority. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73-74, 701 N.E.2d 1002 (1998); *State ex rel. Feathers v. Hayes*, 11th Dist. Portage No. 2006-P-0092, 2007-Ohio-3852, ¶9. A writ of prohibition may be issued where the relator establishes that: (1) a judicial officer or court intends to exercise judicial power over a pending matter; (2) the proposed use of that power is unauthorized

under the law; and (3) the denial of the writ will result in harm for which there is no other adequate remedy in the ordinary course of the law. *State ex rel. Sliwinski v. Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶7; *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶14.

The writ may be invoked against any inferior courts or inferior tribunals, ministerial or otherwise, that possess incidentally judicial or quasi-judicial powers, to keep such courts and tribunals within the limits of their own jurisdiction.

If such inferior courts or tribunals, in attempting to exercise judicial or quasi-judicial power, are proceeding in a matter wholly or partly outside of their jurisdiction, such inferior courts or tribunals are amenable to the writ of prohibition as to such ultra vires jurisdiction.

State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 112 N.E. 1029 (1915), syl. 3, 4.

"[A] court of superior jurisdiction may grant a writ of prohibition to prevent the attempted exercise of ultra vires jurisdiction by a court of inferior jurisdiction. Where the proceedings are void ab initio, ultra vires jurisdiction is invoked and the writ will lie."

Wisner v. Probate Court of Columbiana Cty., 145 Ohio St. 419, 422, 61 N.E.2d 889 (1945).

If an inferior court is without jurisdiction whatsoever to act, *the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial* to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court.

State ex rel. Adams v. Gusweiler, 30 Ohio St.2d 326, 329, 285 N.E.2d 22 (1972) (Emphasis added, citations omitted).

Where there is a total want of jurisdiction on the part of a court a writ of prohibition will be allowed to arrest an order issued by such court, even though the order was entered on the journal of the court prior to the application for the writ of prohibition. *State ex rel. Adams v. Gusweiler*, supra at syl. 2. If the material facts are undisputed and it appears beyond doubt that a relator is entitled to the requested extraordinary relief a peremptory writ

will be granted. *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶14.

Mandamus is also an appropriate remedy in this case. Relator must establish a clear legal right to an order compelling Respondent to grant their Motion to Dismiss the Appeal, a clear legal duty on the part of that court to perform the requested acts, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68. An extraordinary writ is appropriate when the alternate remedy is not complete, beneficial, and speedy. *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2005-Ohio-5469, 816 N.E.2d 245; *State ex rel. Ohio State Racing Comm. v. Walton*, 37 Ohio St.3d 246, 525 N.E.2d 756 (1988); *State ex rel. Starner v. DeHoff*, 18 Ohio St.3d 163, 480 N.E.2d 449 (1985).

This court has jurisdiction over this action and to grant these writs pursuant to Article IV, Section 2(B)(1)(b) and (d), of the Ohio Constitution and R.C. 2731.02. The exercise by a court of jurisdiction it does not have, to adjudicate (and force the litigation and presentation of, and the risks of) review of a favorable verdict and judgment after a trial, justifies such extraordinary actions. The current proceedings, if allowed to proceed before that jurisdictional determination is finally concluded, may be in violation of more than one statute; may result in orders ultimately determined to be made outside of the Respondent's jurisdiction to do so; and may in fact ultimately be final and unappealable (review would be only discretionary, or possibly prohibited entirely, see R.C. 3.09).

Proceeding on the merits of any issue in the case before ultimately making the jurisdictional determination deprives the Relator of the substantial rights under the applicable statutes. Holding off on the merits does nothing other than maintain the status

quo from after the verdict and judgment at trial. This substantial right – not to be subjected to review of a trial court verdict outside of the limits placed on that review by law, where it is potentially outside the jurisdiction of the Appeal court -- is why the writ must be issued.

This court granted both writs in a case involving the exercise of appellate jurisdiction, as here, where an appeal was filed without first obtaining leave to do so and within the 30-day appeal time (by a vexatious litigator) in *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 372-373, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 30-32, and in the process of doing so noting the jurisdictional precedence of R.C. 3.09 over the Appellate Rules, citing to Twelfth District precedent (The “statute requiring leave to appeal decision on removal of public officer was a substantive law that controlled over App.R. 3 and 4, which govern the appellate *procedure*.”) (Emphasis is original).

B. Respondent’s lack of jurisdiction

1. The Twelfth District is without jurisdiction to address an appeal from a complaint to remove a coroner that was not signed by the required voters.

The General Assembly created a special statutory proceeding for removal of an elected official from office, in R.C. 3.07, et seq. These removal proceedings are quasi-penal in nature and therefore *are to be strictly construed*. *2,867 Signers of Petition for Removal of Mack v. Mack*, 66 Ohio App. 2d 79, 82, 419 N.E.2d 1108 (9th Dist. 1979) (citing *McMillen v. Diehl*, 128 Ohio St. 212, 214-215, 190 N.E. 567 (1934)). The Civil Rules do not apply to these proceedings. Civ. R. 1(C)(7); *2,687 Signers*, supra at 84.

R.C. 3.08 provides for the jurisdiction of a court to initiate a proceeding for removal, by a complaint, “signed by” a certain number of electors in the county, not less than 15% of those who cast votes in the last gubernatorial election. The Removal Action was brought in the name of a couple of persons (the named plaintiffs), but is signed only by an attorney.

Signing a petition authorizing a complaint – and who knows which or what document or draft they were “authorizing” – is simply not a complaint “signed by” them.

Because the complaint was not signed in compliance with the Statute the trial court’s jurisdiction – and therefore the Respondent’s jurisdiction – was not properly invoked. Therefore the attempted appeal is also substantively and jurisdictionally defective and the writ should issue preventing it from being addressed at all. By allowing the case to proceed, or be appealed, without observance of this statutory requirement, the courts have essentially voided this statutory requirement.

2. The Twelfth District is without jurisdiction over a notice of appeal from a removal action that was filed prior to leave being granted to do so.

Just as the General Assembly created a special statutory proceeding for a common pleas court to remove an elected official, it created a special right to appeal that, to invoke the appellate jurisdiction of the Respondent. R.C. 3.09 provides (in relevant part): “Such notice of appeal may be filed *only after leave has been granted by the court of appeals* for good cause shown” (Emphasis added). Removal proceedings *are to be strictly construed*. *2,867 Signers of Petition for Removal of Mack v. Mack*, 66 Ohio App. 2d at 82 (citing *McMillen v. Diehl*, 128 Ohio St. at 214-215).

No such leave was granted when the Notice was filed and therefore the July 23, 2014, “notice” was void and a nullity and should have been stricken. Because no *valid* notice of appeal was ever filed, much less in time as provided by R.C. 3.09, the Respondent cannot exercise appellate jurisdiction. By attempting to do so, the Respondent has essentially struck these statutes from the Code.

3. The Twelfth District is without jurisdiction over an appeal from a statutory action to remove a coroner unless within 30 days from the decision a hearing is noticed and held granting a motion for leave to appeal.

R.C. 3.09 also provides (in relevant part):

The transcript of the record and the notice of appeal shall be filed in the court of appeals in *not more than thirty days after the decision is rendered and the journal entry made by the court of common pleas*. Such notice of appeal may be filed *only after leave has been granted by the court of appeals for good cause shown at a hearing of which the attorneys for both the officer and the prosecution have been notified*.

(Emphasis added). This Statute appears to fairly and clearly provide for a four-step prerequisite to invoke the jurisdiction of the court of appeals:

1. A motion for leave to appeal must be filed first, and a “notice” cannot be filed until it is granted.
2. A hearing has to be held on the motion, with notice to the parties’ counsel.
3. Only after the hearing, leave has to be granted.
4. Appellants cannot file a notice of appeal until after leave has been granted.

The non-prevailing party in a removal action is under the obligation to file the motion for leave and obtain a hearing date, and obtain leave, before it can file a notice of appeal. This is the requirement to invoke the jurisdiction of the appellate court that was followed by the Twelfth District itself in a prior case: to have motion for leave heard and granted prior to the expiration of the 30-day time limit. *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 407-408, 420, 2005-Ohio-2373, 830 N.E.2d 1173 (12th Dist.), ¶ 3, 6 (reflecting the judgment removing the official on September 27, 2004, and leave to appeal granted on October 21, 2004, as does the court’s docket, available online, showing the motion for leave to appeal filed within days of the decision being appealed and the hearing set to meet the statutory deadline). This requirement was ignored though in this instant case.

The proper notice of appeal, only after leave is granted, only after a hearing, has to

be filed within 30 days of the decision and entry. Appellants below failed to observe these requirements, and so did the Respondent. Because the statutory requirements were not met, no proper notice of appeal can be filed within the statutory time period. Therefore the Respondent did not and now cannot acquire jurisdiction in this case and the writ should issue to prevent the Respondent from doing so. See *Riverdale Local Board of Education v. Ohio Bureau of Employment Services*, 55 Ohio App.2d 5, 7, 378 N.E.2d 748 (3d Dist. 1977) (“Although it is often said that remedial statutes should be liberally construed statutes and rules dealing with the time in which an appeal may be filed are usually considered jurisdictional requiring strict compliance.”). See also, *In re Removal of Osuna*, 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (12th Dist. 1996) (because the appellant did not “obtain the necessary leave to appeal,” prior to the expiration of the 30-day time limit to file a notice of appeal or otherwise, the appeal of the trial court’s dismissal of a complaint for removal of a public official was dismissed as moot).¹

By allowing the case to proceed, or be appealed, without observance of this statutory requirement, the Respondent has essentially voided the statute.

4. The Twelfth District is without jurisdiction over an appeal from a statutory action to remove a coroner except on issues of law, and a verdict that the party did not prove its case by the required standard of evidence is not an appeal of a question of law but of fact.

The General Assembly also limited the grounds on which an appeal can be taken from a statutory removal action. R.C. 3.09 also provides: “The decision of the court of common pleas in all cases for the removal of officers may be reviewed on appeal on

¹ The Twelfth District, in its Decision allowing this appeal, distinguished that precedent by noting the Appellants here did ask for leave before the 30 days was up – just weren’t granted it. But the statute does not say that is all that is required, it very clearly says that no notice of appeal can be filed without leave, obtaining leave requires a noticed hearing, and only then but before the 30 days is up can a notice of appeal be filed.

questions of law by the court of appeals.” There is no provision for appeals of questions of fact or weight of the evidence.

The Motion for Leave to Appeal clearly challenges the trial court’s findings and conclusions that the Plaintiffs did not meet their burden of proof. This is not a case where the removal was granted, and the removed officer is challenging the legal sufficiency of the evidence that caused him/her to be removed. The Appellant here is challenging nothing but the basis for the trial court’s conclusion that the evidence did not “convince” the trier of fact by the requisite degree of evidence – the one and only finding and conclusion that was dispositive of the case. See Decision and Entry, June 23, 2014, p. 11-12.

To prevail in this appeal, the Respondent would have to re-weigh the evidence, or redetermine facts, which are not questions of law but of fact – a court is not allowed to weigh evidence if it is a question of law presented. See, *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St. 2d 66, 68-69, 430 N.E.2d 935 (1982) (“Weighing evidence connotes finding facts from the evidence submitted;”); *Ross v. Ross*, 64 Ohio St.2d 203, 204, 414 N.E.2d 426 (1980); *Grossman v. Public Utilities Com.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966) (“This case presents a question of fact. The burden of proof rests upon the complainant. He has failed to produce evidence to establish his claim. The order of the Public Utilities Commission is affirmed.”).

Because the appeal the Respondent granted leave to file is only challenging the trial court’s determination that Plaintiff did not at trial meet its burden of proof, it is a question of fact, not of law. Appellant’s entire motion and memorandum challenged the decision of the trial court based on Appellant’s recitation of the evidence, which the trial court disagreed with. A removal action cannot be appealed on such questions of fact. Therefore the

Respondent is without jurisdiction and the writ should be granted, even if only in part, to prevent such an appeal.

5. The provisions for initiation and appeal in a statutory removal action are substantive and not merely procedural and therefore prevail over the Civil and Appellate Rules.

The Respondent in its Decision granting leave to appeal appears to find that the General Assembly's provisions for an appeal in a removal action are not binding on the courts. See Decision, September 8, 2014. But these provisions, which have been ignored to this point, are statutorily created substantive limits of the appeal of a statutorily created remedy (a removal action) and are binding and jurisdictional.

The Ohio Constitution, at Article IV, Section 5(B), the "Modern Courts Amendment," conferred authority on the Supreme Court of Ohio to promulgate rules relating to matters of procedure in courts of Ohio, but the right to establish the substantive law in Ohio remained with the General Assembly. Procedural rules therefore only supersede conflicting statutes that affect procedural matters, but the Rules cannot "abridge, enlarge, or modify any substantive right." See Milligan & Pohlman, "The 1968 Modern Courts Amendment to the Ohio Constitution," 29 Ohio St.LJ. 811 (1968), quoted in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 236, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 2. See also, *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 17 (Ohio Constitution, Article IV, Section 5(B) "expressly states that rules created in this manner 'shall not abridge, enlarge, or modify any substantive right.'"). If a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, but "the statute will control for matters of substantive law." *Id.*

In *Havel* this court pronounced that R.C. 2315.21(B) (bifurcation of compensatory

and punitive damages in tort actions) prevailed over Civ. R. 42(B) on the same subject. "Substantive" in this context means "that body of law which creates, defines and regulates the rights of the parties. . . . The word substantive refers to common law, statutory and constitutionally recognized rights." *Krause v. State*, 31 Ohio St.2d 132, 145, 285 N.E.2d 736 (1972), overruled on other grounds by *Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St.2d 31, 426 N.E.2d 784 (1981), syl. 1. Procedural law on the other hand "prescribes methods of enforcement of rights or obtaining redress." *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶ 34 (citations omitted). A right is a "power, privilege, or immunity secured to a person by law," as well as "[a] legally enforceable claim that another will do or will not do a given act." *Black's Law Dictionary*, 1436 (9th Ed.2009).

Classification of R.C. 3.09 as a substantive law depends upon whether the statutes for removal actions create "a right." It cannot be construed any other way but as a right. There would be no "right" for the public to seek removal by civil action of an elected official without those sections. There would be nothing for any party to appeal from if it weren't for those sections creating the right to do so. Therefore those sections are only, and are *the* "body of law which creates, defines and regulates the rights of the parties" (as to removal actions) and are the only source for those "statutory" and "recognized rights," *Krause v. State*, *supra*, and are therefore substantive.

State v. Hughes, 41 Ohio St.2d 208, 210, 324 N.E.2d 731 (1975), considered R.C. 2945.68, which granted appellate courts the discretion to allow the state to appeal a criminal matter, and found it to prevail over App. R. 4(B), which permitted the state to appeal *as of right* in criminal cases, holding that App. R. 4(B) is invalid insofar as it "enlarges the

statutory right of appeal provided by R. C. 2945.67 through 2945.70,” and that the rule must yield to the statute because, like R.C. 3.09, R.C. 2945.68 granted the state "a substantive right of appeal which did not exist at common law prior to the adoption of Section 6 of Article IV of the Ohio Constitution (now Section 3 of Article IV), and the implementing legislation contained in R.C. 2945.67 through 2945.70." As this court noted in *Havel*, supra at ¶ 20-21, those statutes granted "jurisdiction to appellate courts to hear appeals by the prosecution in criminal cases" as well as created "a substantive right in the prosecution to bring such appeals in the instances permitted by R.C. 2945.70 and the decisions interpreting that section." (Citing to *State v. Hughes*, supra at 210-211).²

Similarly R.C. 3.09 granted "jurisdiction to appellate courts to hear appeals by" the parties in statutory removal actions, as well as created "a substantive right in the [parties to removal actions] to bring such appeals in the instances permitted by R.C. [3.09]." Id. *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 372-373, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 30-31, cited to the Twelfth District in *Osuna*, finding that the "statute requiring leave to appeal decision on removal of public officer was a substantive law that controlled over App.R. 3 and 4, which govern the appellate procedure." This court held that the similar statute requiring leave to appeal *before* the 30-limit by a previously-declared statutory vexatious litigator

is jurisdictional: once relators alerted the court of appeals that Berman had failed to obtain leave of court to file his appeal, the court was required by the statute to dismiss the appeal. *Since by that time the 30-day period to appeal had expired, the*

² The Twelfth District cited to *State v. Hughes* and Article IV Section 5(B) of the Ohio Constitution, in *In re Removal of Osuna*, 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (12th Dist. 1996), which denied an appeal in a removal action because the appellant did not comply with R.C. 3.09. "Here, however, the statutory requirements for leave to appeal go directly to the right to appeal, and the right to appeal is a substantive right which cannot be abridged, enlarged or modified by a rule of procedure." Id. The Respondent appears to be selectively enforcing the text of R.C. 3.09.

court could not consider Berman's belated motion for leave.

(Emphasis added). In *Sapp*, because the appellant did not obtain leave to appeal before the time ran out to appeal, even though he filed an appeal in time,

[t]he court of appeals patently and unambiguously lacks jurisdiction over Berman's appeal. Because the pertinent facts are uncontroverted, we grant the requested peremptory writ of prohibition to prevent the court of appeals from further proceeding in Berman's appeal and grant the requested peremptory writ of mandamus to compel the court of appeals to dismiss the appeal.

Id. at ¶ 32.

This court has consistently enforced the prerogative of the General Assembly to pass such laws, governing how to pursue substantive rights created by statute, and the court's obligation to follow them. *Erwin v. Bryan*, 125 Ohio St.3d 519, 525, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 30, held that Civ. R. 15(D) (amending complaints) could not be construed to extend the statutory time provided for filing complaints. *State v. Slatter*, 66 Ohio St.2d 452, 458, 423 N.E.2d 100 (1981), upheld R.C. 2935.26 (the right of "freedom from arrest" on a minor misdemeanor) over the rights of courts to cause arrests under the Criminal Rules. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, required compliance with R.C. 5501.22 (as to how to pursue actions against the director of transportation, "substantive law") over Civ. R. 13 (as to counterclaims). *In re McBride*, 110 Ohio St. 3d 19, 2006-Ohio-3454, 850 N.E.2d 43, upheld the limitations on petitioning for child custody in R.C. 2151.414(F) and R.C. 2151.353(E)(2) over conflicting provisions in Juv. R. 10. *Boyer v. Boyer*, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976), upheld a child's R.C. 3109.04 right to be committed first to a relative, if in the child's best interests, over Civ. R. 75(P)'s requirement to find the parents unsuitable.

Similarly, this Relator had a statutory right of finality (as did everyone else in Brown

County) to a verdict in her favor in a removal action, if the provisions of R.C. 3.09 are not met to review it, and those provisions were not met here.

Compliance with R.C. 3.09 is also jurisdictional. In numerous cases this court has held that the statutory provisions governing rights of review and appeals are jurisdictional and provide “indispensable prerequisites” to the exercise of review. See *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, 918 N.E.2d 972, ¶ 17, citing *Stanjim Co. v. Mahoning Cty. Bd. of Revision*, 38 Ohio St.2d 233, 235, 313 N.E.2d 14 (1974). In *Hughes v. Ohio Department of Commerce*, 114 Ohio St.3d 47, 52, 2007-Ohio-2877, 868 N.E.2d 246, ¶¶ 17-18, this court held the parties to also “strictly comply” with the provisions of R.C. 119.12 in order to perfect an appeal from an administrative agency, and that failing to do so meant the court “lacks jurisdiction” over the appeal. As one court of appeals stated it:

It has been consistently decided that statutes and rules governing the filing of appeals are jurisdictional. . . . The liberal rules of construction suggested by Civ. R. 1(B) has no application to a statutory requirement for commencing an appeal. . . . The jurisdictional rule involved here in mandatory and has regularly been enforced in this State and by this court. Resort to conditions and rulings in other states do not change this long standing Ohio rule. *This is particularly true of conditions for perfecting an appeal adopted by the legislature.*

Gillette v. Washington Twp. Zoning Commission, 2d Dist. Mont. No. 9039, 1985 Ohio App. LEXIS 6216, at 6-7 (emphasis added).

In *State v. Hatfield*, 48 Ohio St. 118, 119, 357 N.E.2d 379 (1976), this court was presented with an appeal by the State that complied with the Rules (as here), being Cr. R. 12(J) and App. R. 4(B), but not with R.C. 2945.67 through 2945.70 (as the appellants here didn’t comply with R.C. 3.09). The Court of Appeals heard the case anyway and reversed the trial court. This court reversed, finding simply and concisely that the

record in this case discloses that the only procedural steps taken by the prosecution to perfect its appeal were the filing of a notice of appeal and of a certification under Crim. R. 12(J). Under this court's holdings in *Hughes* and *Wallace*, this procedure was insufficient to invoke the jurisdiction of the Court of Appeals, and that court's judgment must accordingly be reversed.

(Emphasis added). “In other words, even though the court of appeals had decided the merits of the appeal, the supreme court held that the court of appeals had been without jurisdiction to do so.” *State v. Weaver*, 119 Ohio App.3d 495, 496, 695 N.E.2d 821 (2d Dist. 1997) (commenting on *Hatfield*).

The right to appeal a removal action by R.C. 3.09 requires leave to appeal be obtained before a notice of appeal can be filed, and only after a hearing, and that must all be done within 30 days. As the Twelfth District stated in *In re Removal of Osuna*, 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (12th Dist. 1996), “the statutory requirements for leave to appeal go directly to the right to appeal, and the right to appeal is a substantive right which cannot be abridged, enlarged or modified by a rule of procedure.” Unless the court were to read (or add) into the Statute that a notice of appeal can be filed before leave is granted, and obtain leave after the fact, and without a hearing, that is exactly what the Respondent is doing in this case – abridging, enlarging, or modifying the statutory procedure for appeal of a removal action. The Respondent has taken the position that as long as leave to appeal is requested before the 30-day limit, even though no hearing was ever set or noticed or conducted as required by the statute, and even though the notice of appeal was filed without leave to do so as required by the statute, the appeal can proceed anyway.

But as this court stated in *State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 372-373, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 30:

Therefore, even if we did find that the statute and the rules conflict, R.C. 2323.52 would control. See also *In re Removal of Osuna* (1996), 116 Ohio App.3d 339, 688

N.E.2d 42 (statute requiring leave to appeal decision on removal of public officer *was a substantive law that controlled over App.R. 3 and 4, which govern the appellate procedure*).

(Emphasis added in part and in original in part). In *Sapp* writs were granted to prevent the Court of Appeals from exercising jurisdiction in an appeal and to dismiss the appeal, when leave was not obtained prior to filing the appeal. In *Osuna* the appeal was just dismissed.

In *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206 (1991), this court notes the use of the extraordinary writ to “direct the public bodies or officials to follow a constitutional course in completing their duties.” A constitutional course in this case requires the Appeal be dismissed and the Respondent not act upon it.

Conclusion

As a result the Respondent is exercising jurisdiction it does not have, to the detriment of the Relator. The court should therefore issue the writs to prohibit the court from doing so and to dismiss the appeal.

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ENDORSEMENT TO THE CLERK

Please issue and serve summons and a copy of the Complaint and this Motion upon the Respondents by certified mail pursuant to S.Ct. Prac. R. 12.02(A)(2).

Thomas G. Eagle (#0034492)

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