

IN THE SUPREME COURT OF OHIO

Verlean E. Macon,

Relator,

v.

Toledo Municipal Court, et al.,

Respondents.

Case No. 2014-1492

Original Action in Mandamus

**MOTION TO DISMISS
OF RESPONDENT USAA CASUALTY INSURANCE COMPANY**

Rodger L. Eckelberry (0071207)
Counsel of Record
Jacqueline K. Matthews (0086259)
BAKER & HOSTETLER LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616
Email: reckelberry@bakerlaw.com
jmatthews@bakerlaw.com

*Counsel for Respondent
USAA Casualty Insurance Company*

Michael R. Henry (0030386)
CRABBE, BROWN & JAMES LLP
500 South Front Street, Suite 1200
Columbus, OH 43215
Telephone: 614.229.4544
Facsimile: 614.229.4559
Email: mhenry@cbjlawyers.com

*Counsel for Respondents
Progressive Insurance Co. and James Keisser*

Verlean E. Macon
2801 Midwood Avenue
Toledo, Ohio 43606

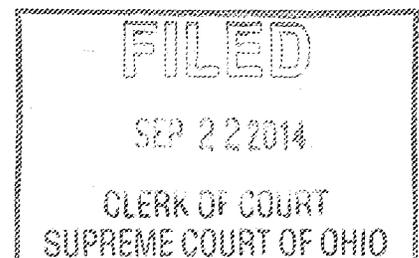
Relator, pro se

Adam W. Loukx (0062158)
John T. Madigan (0023614)
One Govt. Center, Suite 2250
Toledo, OH 43604
Telephone: 614.419.245.1020
Facsimile: 614.245.1090
Email: john.madigan@toledo.gov

*Counsel for Respondent
Toledo Municipal Court*

Rotary Man LTD.
Matthew L. Weisenberger
300 Madison Avenue, Suite 300
Toledo, Ohio 43604

Respondent



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Pursuant to S. Ct. Prac. R. 12.04 and 4.01(A), Respondent USAA Casualty Insurance Company moves this Court for an Order dismissing the Relator's Complaint for lack of subject matter jurisdiction, and, in the alternative, failure to state a claim upon which relief can be granted. Dismissal of the Complaint is warranted because this Court lacks original subject matter jurisdiction over an ordinary civil action for money damages and Relator's claims are not the proper subject of an action in mandamus. A memorandum in support is attached hereto.

Respectfully submitted,



Rodger L. Eckelberry (0071207)

Counsel of Record

Jacqueline K. Matthews (0086259)

BAKER & HOSTETLER LLP

Capitol Square, Suite 2100

65 East State Street

Columbus, OH 43215-4260

Telephone: 614.228.1541

Facsimile: 614.462.2616

Email: reckelberry@bakerlaw.com
 jmatthews@bakerlaw.com

Counsel for Respondent
USAA Casualty Insurance Company

MEMORANDUM IN SUPPORT

I. Introduction

Relator Verlean E. Macon commenced this original action in mandamus in this Court, but the action is in substance an ordinary civil action for money damages. This Court lacks original subject matter jurisdiction over such an action.

Moreover, even if Relator's claims are determined to fall within the Court's jurisdiction, none of her claims satisfy the elements for relief in mandamus. The Complaint requests only money damages as a remedy for alleged breaches of private obligations by private persons, and Relator further has an adequate remedy at law by way of appeal.

Accordingly, Relator's claim must be dismissed.

II. Statement of Facts

Relator is an individual who holds a policy of automobile insurance with Respondent USAA Casualty Insurance Company ("USAA").¹ Compl. p. 3. On October 12, 2012, Relator was in a car accident wherein her vehicle struck a vehicle operated by Respondent James Keisser. (*Id.*) USAA determined that Relator was at fault in the accident due to her failure to yield the right of way when merging. *Id.* at p. 4.

Relator subsequently filed an action in the Toledo Municipal Court seeking \$3,000 in damages from Respondents James Keisser, Progressive Insurance, and USAA. *Id.* Relator's claims in the Municipal Court action were for "intentional negligence," mental distress, and intentional acts by Progressive and USAA "to defraud and victimize by discrimination." *Id.*

A hearing of Relator's Municipal Court claims was held before a magistrate on November 19, 2013. *Id.* The magistrate found in favor of the Respondents. *Id.* at p. 5. Relator

¹ Relator's Complaint incorrectly names "USAA Insurance co." as a Respondent; the proper name of Respondent is USAA Casualty Insurance Company.

filed objections, but the trial judge adopted the decision of the magistrate and entered judgment for the Respondents. *Id.* However, the trial judge neglected to rule on Relator's objections to the magistrate's decision. *Id.*

Relator filed an appeal with the Sixth District Court of Appeals. *Id.* On June 3, 2014, the Sixth District dismissed her appeal for lack of a final appealable order due to the trial judge's failure to rule on Relator's objections to the magistrate's decision. *Id.*

On July 3, 2014, Relator filed a motion with the Toledo Municipal Court for a final appealable order. *Id.* at p. 6. On August 13, 2014, Relator received a judgment entry reading:

Judgment Entry signed March 7, 2014 and journalized March 19, 2014 is confirmed. The Magistrate's Opinion is adopted, the Objections to the Magistrate's Opinion are denied. (Objection filed January 16, 2014 corrected typos on January 14, 2014 Objection.) Judgment is granted in favor of Respondents James Keisser, Progressive Insurance and USAA on the Complaint. Motion #14-1023 for final appealable order is granted. IT IS FURTHER ORDERED that pursuant to Ohio Civil Rule 54(B), this is a final appealable order and there is no just reason for delay.

Id. Apparently believing that the August 13, 2014 judgment entry was still deficient in some way, Relator filed a second motion for final appealable order on August 18, 2014.^{2,3} *Id.*

On August 26, 2014, Relator commenced the present original action in mandamus. Relator seeks \$7 million from Respondents USAA, Progressive, and the Toledo Municipal Court

² Relator filed motions for a final appealable order in both Toledo Municipal Court Nos. CVI-13-14137 (her action against Respondents Keisser, Progressive, and USAA related to the Oct. 12, 2012 car accident) and CVI-07-23355 (an action commenced by Relator in 2007 against Respondent Rotary Man LTD., arising out of water damage that occurred at Relator's home after Rotary Man LTD. performed plumbing services for Relator). The water damage claim has no connection to USAA and will not be addressed in this Motion. *See* Magistrate's Decision, Toledo Municipal Court No. CVI-07-23355, docket entry dated January 18, 2008, available at <http://tmc-clerk.com/caseinformation/>.

³ In her Complaint, Relator states this date as August 19, 2012, but USAA assumes this is a typographic error. A review of the Toledo Municipal Court docket confirms that Relator's motion was filed August 18, 2014. *See* Toledo Municipal Court No. CVI-13-14137 Docket, retrieved on September 22, 2014, available at <http://tmc-clerk.com/caseinformation/>.

for “race and gender bias discrimination, court cost, mental distress, and all other relief that the court deems equitable.” *Id.* at p. 7.

III. Law and Argument

A. Relator’s claims do not fall within the original subject matter jurisdiction of this Court.

This Court’s original subject matter jurisdiction is limited to the writs of quo warranto, mandamus, habeas corpus, prohibition, and procedendo. Ohio Const. Art. 4, § 2(B)(1). Original jurisdiction over actions in mandamus does not extend to claims for money damages. *State ex rel. Timson v. Shoemaker*, 10th Dist. No. 02AP-1037, 2003-Ohio-4703, ¶ 18.

Where a petition filed in the Supreme Court is in the form of a proceeding in mandamus, but the substance of the allegations makes it manifest that the real object of the relator is to obtain a remedy outside the original jurisdiction of the Court, the action must be dismissed for want of jurisdiction. *See State ex rel. Governor v. Taft*, 71 Ohio St.3d 1, 3, 640 N.E.2d 1136, 1137-38 (1994) (dismissing for lack of jurisdiction a mandamus action that was in substance a request for injunctive and declaratory relief).

Here, although dressed in the trappings of a mandamus action, Relator’s claim alleges in substance an ordinary civil action for money damages.⁴ Her claims against USAA are based on its alleged “intentional act to defraud and victimize by discrimination,” for which she claims \$7 million in damages. Relator seeks no order compelling any Respondent to do anything other than to pay her an award of money damages. These claims clearly fall outside this Court’s original subject matter jurisdiction and must be dismissed pursuant to Civ. R. 12(B)(1).

⁴ Relator has also failed to bring this action in the name of the State of Ohio on her relation, which provides an independent basis for dismissal under R.C. § 2731.04. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶¶ 33-37.

B. Relator's claims in mandamus are without merit.

Even if Relator's claims are determined to fall within this Court's original subject matter jurisdiction, Relator's claims should nevertheless be dismissed pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. In the context of actions in mandamus, dismissal of the complaint is warranted if Relator's mandamus claims are obviously without merit. *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 2005-Ohio-4789, 834 N.E.2d 346 (2005), ¶ 11. That is precisely the situation before the Court.

"The basic purpose of the writ of mandamus is to compel a public officer to perform the duties imposed upon him by law." *State ex rel. Scott v. Masterson*, 173 Ohio St. 402, 404, 183 N.E.2d 376, 379 (1962). Mandamus is an extraordinary remedy, to be issued with great caution and discretion and only when the way is clear. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 166, 364 N.E.2d 1, 2 (1977). To prevail on a claim in mandamus, Relator must prove a clear legal right to the requested acts, a corresponding clear legal duty on the part of USAA to perform these acts, and the absence of a plain and adequate remedy in the ordinary course of law. *State ex rel. Woods v. Oak Hill Community Med. Ctr.*, 91 Ohio St.3d 459, 461, 2001-Ohio-96, 746 N.E.2d 1108 (2001). Relator cannot satisfy any of these elements.

1. Relator cannot demonstrate a clear right to the requested acts or a corresponding clear legal duty on the part of USAA to perform these acts.

In mandamus proceedings, the legal duty that a relator seeks to enforce must be a duty created by the legislative branch of government. *Woods*, 91 Ohio St. 3d at 461. More specifically, "[m]andamus will not lie to enforce a private right against a private person." *State ex rel. Longacre v. Penton Publishing Co.*, 77 Ohio St.3d 266, 260-61, 1997-Ohio-276, 673 N.E.2d 1297 (1997), quoting *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 40 O.O.2d 141, 228 N.E.2d 631 (1967), paragraph eight of the syllabus.

In *Longacre*, an employee sought a writ of mandamus to compel her employer, a private company, to execute a settlement of her worker's compensation claim. 77 Ohio St.3d at 260. This Court held that the employee's mandamus claim was properly dismissed because it involved the requested enforcement of alleged private rights against a private person. *Id.* at 260-61.

Here, Relator seeks money damages for alleged claims of discrimination by USAA. This is not an appropriate claim for relief in mandamus because it does not seek the performance of a clear legal duty that is owed to Relator by USAA. USAA is a private entity, not a public official. This is an action to enforce alleged private rights against a private person and is therefore ineligible for relief in mandamus.

2. Relator has an adequate remedy at law by way of appeal.

Further, a mandamus claim is unsustainable where the claimant has an adequate remedy at law. *State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220 (2006), ¶ 6. Specifically, mandamus cannot be used as substitute for the appellate process. *State ex rel. Richfield v. Laria*, 138 Ohio St.3d 168, 2014-Ohio-243, 4 N.E.3d 1040 (2014), ¶¶ 10-11; *Woods*, 91 Ohio St.3d at 462.

Woods is instructive. There, the claimant filed a medical malpractice claim with the Jackson County Common Pleas court, in the course of which he sought disclosure by the defendant hospital of the identities of all patients who had been given a particular blood test during a specific time period. 91 Ohio St. 3d at 459. A verdict was returned in favor of the hospital. *Id.* at 460. The claimant also filed a separate class action in the Common Pleas Court for injunctive relief to compel the hospital to notify all patients who had been given the particular blood test during that time period. *Id.* The class action was dismissed for lack of standing because the claimant already had notice of his blood test result. *Id.*

The claimant then filed an action in mandamus with the Court of Appeals, again seeking an order for the hospital to identify and notify all patients who had been given the blood test during the relevant time period. *Id.* The Court of Appeals dismissed the mandamus action. *Id.* On appeal, this Court concluded that dismissal of the mandamus action was proper because the claimant had a plain and adequate remedy in the ordinary course of the law. *Id.* at 462. Namely, “to the extent that Woods’s mandamus action could be construed as an attempt to challenge the lower courts’ rulings on his identification and notification claims in his previous medical malpractice and injunction cases, mandamus will not lie to relitigate these issues.” *Id.* “Extraordinary writs may not be used to gain successive appellate reviews of the same issue.” *Id.*

Here, Relator has an adequate remedy at law by way of appeal. Relator initially brought the same discrimination claims against USAA in the Toledo Municipal Court. The Toledo Municipal Court issued a final appealable order on August 13, 2014 entering judgment in favor of USAA and the other Respondents. This judgment entry corrected the deficiencies pointed out by the Sixth District in the earlier judgment entry by expressly stating that Relator’s objections to the magistrate’s decision were denied. Accordingly, nothing would have prevented Relator from seeking review of the August 13, 2014 judgment entry in the Court of Appeals.⁵

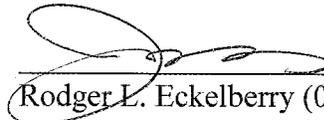
Because Relator cannot satisfy any of the elements required for relief in mandamus, her Complaint must be dismissed.

IV. Conclusion

Relator’s claims fall outside the original subject matter jurisdiction of this Court, and, even when construed the light most favorable to Relator, fail to satisfy the requirements for relief in mandamus. Accordingly, her Complaint must be dismissed.

⁵ The fact that the thirty-day time limit to file her notice of appeal has now expired does not render the remedy inadequate for the purposes of mandamus analysis. *In re Estate of Davis*, 77 Ohio St.3d 45, 46, 1996-Ohio-347, 671 N.E.2d 9 (1996).

Respectfully submitted,



Rodger L. Eckelberry (0071207)
Counsel of Record

Jacqueline K. Matthews (0086259)
BAKER & HOSTETLER LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616
Email: reckelberry@bakerlaw.com
jmatthews@bakerlaw.com

Counsel for Respondent
USAA Casualty Insurance Company

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served on September 22, 2014 via first class U.S. mail, postage prepaid, upon the following:

Verlean E. Macon
2801 Midwood Avenue
Toledo, Ohio 43606

Relator, pro se

Adam W. Loukx
John T. Madigan
One Govt. Center, Suite 2250
Toledo, OH 43604

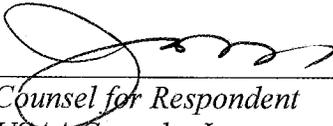
*Counsel for Respondent
Toledo Municipal Court*

Michael R. Henry
CRABBE, BROWN & JAMES LLP
500 South Front Street, Suite 1200
Columbus, OH 43215

*Counsel for Respondents
Progressive Insurance Co.
and James Keisser*

Rotary Man LTD.
Matthew L. Weisenberger
300 Madison Avenue, Suite 300
Toledo, Ohio 43604

Respondent



*Counsel for Respondent
USAA Casualty Insurance Company*