

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. DR. JUDITH VARNAU,

Relator,

v.

TWELFTH DISTRICT COURT OF APPEALS, et al.,

Respondents.

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: Case No. 2014-1605
:
: Original Action in Mandamus/Prohibition
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MOTION TO DISMISS OF RESPONDENTS
JUDGES OF THE TWELFTH DISTRICT COURT OF APPEALS

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FILED
OCT 14 2014
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

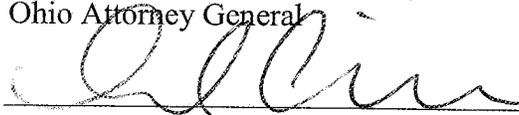
State ex rel. DR. JUDITH VARNAU, :
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 Relator, : Case No. 2014-1605
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 v. : Original Action in Mandamus/Prohibition
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Pursuant to Sup.Ct.Prac.R. 12.04(A)(1) and Civ.R. 12(B)(6), Respondents the Twelfth District Court of Appeals of Ohio, its Judges, and Administrative Judge Robert A. Hendrickson hereby move this Court to dismiss Relator's petition for a writ of mandamus and/or prohibition. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Dr. Judith Varnau, the Brown County Coroner, seeks a writ of mandamus and/or prohibition against Respondents the Twelfth District Court of Appeals, its Judges, and Administrative Judge Robert A. Hendrickson (hereinafter "Twelfth District"). A lawsuit to remove Relator as Coroner was filed against her, and ultimately dismissed by the trial court. The plaintiffs who brought the removal lawsuit filed an appeal in the Twelfth District. In this original action, Relator challenges the Twelfth District's ability to assume jurisdiction over that appeal, requesting either a writ of prohibition to prevent the Twelfth District from assuming jurisdiction, or a writ of mandamus to compel the Twelfth District to dismiss the appeal. As argued below, Relator's complaint states no claim for which this Court may grant relief. Accordingly, the Twelfth District respectfully requests that this Court dismiss the complaint.

II. STATEMENT OF FACTS

Relator serves as the Coroner of Brown County, Ohio. Complaint, ¶ 1. On April 16, 2014, a complaint was filed to remove Relator from her position for misconduct in office, pursuant to R.C. 3.08. *Id.*, ¶ 7; *see also Adamson v. Varnau*, Brown C.P. No. CVH 2014-0267 (June 23, 2014) (attached to Complaint).¹ The Brown County Court of Common Pleas conducted a bench trial and, on June 23, 2014, found for Relator and dismissed the case. Complaint, ¶¶ 9-10.

On July 23, 2014, plaintiffs in the removal action filed both a notice of appeal and a motion for leave to appeal in the Twelfth District, pursuant to R.C. 3.09. *Id.*, ¶ 12. On July 30,

¹ Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6) without converting the motion into one for summary judgment. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). Here, Relator attaches both the trial court's opinion dismissing the removal complaint and the Twelfth District's September 18, 2014 order.

2014, Relator filed a combined motion to strike the notice, deny leave to appeal, and dismiss the appeal. See docket for *Adamson v. Varnau*, 12th Dist. CA 20140716 (entry dated 7/30/14) (attached to Complaint).

On September 8, 2014, the Twelfth District denied Relator's motion to dismiss the appeal and granted the plaintiffs' motion for leave to appeal. Complaint, ¶ 15. Consequently, on September 10, 2014, the Twelfth District issued an accelerated scheduling order for the removal appeal. See docket for *Adamson v. Varnau*, 12th Dist. CA 20140716 (entry dated 9/10/14) (attached to Complaint).

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and the plaintiff must be afforded all reasonable inferences possibly derived therefrom. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Finally, a court must find that the plaintiff's complaint does not provide relief on any possible theory. Civ. R. 12(B)(6); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1999, ¶ 8.

B. The Twelfth District Has Jurisdiction to Hear the Underlying Removal Appeal.

Relator's request for writs of prohibition and/or mandamus rests on a single premise: that the Twelfth District lacks jurisdiction to hear the appeal from the underlying removal action. As discussed below, however, the Twelfth District has jurisdiction because the appellants perfected

their substantive right to appeal by both seeking the leave of the court and filing a timely notice. The remaining procedures in R.C. 3.09 are just that: procedures, not jurisdictional prerequisites. Relator's remaining arguments concerning jurisdiction—the "signature requirement" and "questions of law requirement"—also fail. Because the Twelfth District has jurisdiction to hear the removal appeal, Relator is not entitled to an extraordinary writ.

1. The R.C. 3.09 appeal procedures do not patently and unambiguously divest the Twelfth District of jurisdiction.

Relator argues that the Twelfth District lacks jurisdiction for two primary reasons: 1) appellants did not obtain leave to appeal *before* submitting their notice (the two filings were submitted simultaneously); and 2) the Twelfth District did not hold a hearing on appellants' motion for leave to appeal. Mem. in Support of Complaint at 7-9, 14-17. According to the language of the statute and the authority cited by Relator, however, these two "requirements" are not jurisdictional. Therefore, the Twelfth District does not patently and unambiguously lack jurisdiction to hear the removal appeal, and Relator's current petition for extraordinary relief should be dismissed.

R.C. 3.09 grants the parties to a removal action the ability to appeal the judgment of the trial court. The statute has two requirements for perfecting such an appeal: 1) filing a notice within 30 days of the trial court's decision; and 2) obtaining leave from the court of appeals. *See In re Removal of Osuna*, 116 Ohio App. 3d 339, 341, 688 N.E.2d 42 (12th Dist. 1996) (holding "the right [to appeal in a removal action] does not exist except upon the allowance of leave to appeal by the appellate court"), citing *State v. Leary*, 47 Ohio App.2d 1, 351 N.E.2d 793 (3d Dist. 1975). Here, both requirements were met: leave was granted by the appellate court, perfecting appellants' right to appeal, and their notice was timely filed within 30 days of the trial court's decision. Complaint, ¶¶ 12, 15.

Relator attempts to argue that the additional procedural requirements of R.C. 3.09 (that the motion for leave be filed before the notice and that a hearing be held on the motion, all within 30 days) are jurisdictional. Failure to adhere to these requirements, Relator argues, thereby divests the court of jurisdiction to hear the appeal and requires dismissal. Relator, however, cites no authority to support the contention that these procedures are indeed jurisdictional, or that the Twelfth District patently and unambiguously lacked jurisdiction to proceed with the appeal.

Relator argues that removal proceedings must be “strictly construed.” Memo in Support at 7. However, “[a] statutory provision may warrant strict construction even if it is not jurisdictional.” *State ex rel. Ragozine v. Shaker*, 2002-Ohio-3992, 96 Ohio St. 3d 201, 772 N.E.2d 1192, ¶ 15 (and authorities therein). For example, in *Planck v. Auglaize Soil & Water Conservation Dist.*, Third Dist. No. 2-99-11, 1999 WL 693159 (Sept. 2, 1999), the court was tasked with interpreting the language of R.C. 2506.02:

Within *forty days after filing a notice of appeal* in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the officer or body from which the appeal is taken, *upon the filing of a praecipe by the appellant*, shall prepare and file in the court to which the appeal is taken, a complete transcript

R.C. 2506.02 (emphasis added). Appellants argued that the trial court inappropriately dismissed the case based on appellants’ failure to file a praecipe. The court agreed, finding that “the requirement of a praecipe is ‘*necessary but not jurisdictional.*’” *Planck*, 1999 WL 693159, at *3, citing *Neague v. Worthington City School Dist.*, 71 Ohio App.3d 435, 440, 594 N.E.2d 83 (5th Dist. 1997). That is, even though the requirements of the statute were not specifically met, the trial court was not deprived of jurisdiction to hear the case and erred when it dismissed the matter on jurisdictional grounds. *Id.* In short, not every *procedure* imposed by statute divests a reviewing court of jurisdiction to hear a claim. See *Ramsey v. A.I.U. Ins. Co.*, Tenth Dist.

No. 84AP-317, 1985 WL 10329 (June 18, 1985) (holding that the “procedural requirements” of the federal removal statute “are not jurisdictional [although] they are mandatory and are to be strictly construed against the right of removal”); *Parente v. Day*, 16 Ohio App.2d 35, 40, 241 N.E.2d 280 (8th Dist. 1968) (noting that statutes relating to special or local assessments are strictly construed but are not necessarily jurisdictional and highlighting the “material difference between proceedings void for want of jurisdiction and proceedings erroneous because of a departure from the provisions of the statute or the general rules of law”).

Here, Relator cites no authority holding that the procedure outlined in R.C. 3.09 is jurisdictional in nature. Indeed, case law interpreting another provision of the removal statutes indicates that Relator’s requirements are procedural only, and not jurisdictional. In *State ex rel. Ragozine v. Shaker*, 96 Ohio St. 3d 201, 2002-Ohio-3992, 772 N.E.2d 1192, the court was tasked with deciding whether the trial court judge lacked jurisdiction on a removal petition because he failed to hold a merits hearing within 30 days after the complaint was filed. *Id.*, ¶ 12. In holding that the trial court did *not* lack jurisdiction, the court noted that, “[a]s a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure.” *Id.*, ¶ 13, quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531 (1946). The court further found that R.C. 3.08 “does not include any expression of intent to restrict the jurisdiction of the court for untimeliness.” *Id.*, quoting *State v. Bellman*, 86 Ohio St.3d 208, 210, 714 N.E.2d 381 (1999) (and authorities therein). Therefore, the 30-day requirement was not a jurisdictional prerequisite. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St. 3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 31.

Similarly, R.C. 3.09 contains no expression of intent to limit the jurisdiction of the appellate court according to Relator's implicit timing requirement. In order for Relator's proposed requirements to operate: 1) an appellant would have to file a motion for leave to appeal within 30 days of the trial court's judgment; 2) the appellate court would have to set a hearing and decide the motion within 30 days of the trial court's judgment; and 3) the appellant (if successful) would then have to file a notice of appeal within 30 days of the trial court's judgment. As with R.C. 3.08, there is no indication in the statute that this 30-day timeline for the appellate court to set and hold a hearing on the motion to appeal is meant to restrict the court's jurisdiction to hear that appeal. The timeline proposed by Relator can only be considered directory and not jurisdictional, as in *Ragozine*.

Relator's comparison to the vexatious litigator statute is also inapposite. Relator attempts to equate the procedural framework established by R.C. 3.09 with that of R.C. 2323.52, setting the procedures for an adjudicated vexatious litigator to, among other things, institute an appeal. The two statutes are not comparable, however. The Supreme Court of Ohio has held that, for an adjudicated vexatious litigator, the grant of leave to appeal is a substantive requirement, rather than procedural. *Sapp*, 118 Ohio St. 3d 368, ¶ 30. This is because the substantive right of appeal is, for a vexatious litigator, *expressly contingent* upon the leave of the appellate court. See R.C. 2323.52(D)(3) (a vexatious litigator "may not institute legal proceedings in a court of appeals, . . . without first obtaining leave of the court of appeals to proceed"). The only filing a vexatious litigator can submit, without the appellate court's prior approval, is an application for leave to proceed. *Id.* That is, the very right of an adjudicated vexatious litigator to file an appeal is explicitly predicated on the appellate court's leave—the vexatious litigator cannot file anything other than an application for leave to proceed. Any other filing, other than an

application for leave to proceed, must be stricken. R.C. 2323.52 (I) (“Whenever it appears . . . that a person found to be a vexatious litigator under this section has [filed] without obtaining leave to proceed..., the court in which the legal proceedings are pending *shall dismiss the proceedings or application* of the vexatious litigator.” (emphasis added)).

The language of R.C. 3.09 differs substantially from the vexatious litigator statutes. Parties to a removal action have the substantive right to appeal. R.C. 3.09 (“The decision of the court of common pleas in all cases for the removal of officers may be reviewed on appeal on questions of law by the court of appeals.”). Case law indicates that an appeal is perfected upon grant of leave to appeal by the appellate court, and the timely filing of a notice of appeal. *See In re Removal of Osuna*, 116 Ohio App. 3d at 341 (holding “the right [to appeal in a removal action] does not exist except upon the allowance of leave to appeal by the appellate court”). The appellants below did both. There is simply no authority for Relator’s assertion that the remaining steps in R.C. 3.09 are jurisdictional prerequisites, rather than procedural directives. Therefore, the Twelfth District did not patently and unambiguously lack jurisdiction to hear an appeal from the removal action.

2. Relator’s remaining jurisdictional arguments also fail.

Relator’s remaining arguments concerning jurisdiction also fail. There is absolutely no indication in the removal statutes or interpreting case law that the “signature requirement” divests an appellate court of jurisdiction to hear an appeal. Mem. in Support at 6-7. Such an argument might be maintained on appeal to overturn the trial court’s decision, however. *See, e.g., 2,867 Signers of Petition for Removal of Mack v. Mack*, 66 Ohio App.2d 79, 81-83, 419 N.E.2d 1108 (9th Dist. 1979) (holding, on appeal, that the complaint filed under R.C. 3.08 was legally insufficient under that statute). Similarly, there is no indication that the removal appeal

would require the Twelfth District to make inappropriate factual findings, or that such an appeal would divest the Twelfth District of jurisdiction. Mem. in Support at 9-11. If appellants present issues outside the scope of appropriate appellate review, the Twelfth District can simply dismiss that assignment of error. *See generally In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 180 (12th Dist.) (reviewing factual record to decide fourteen assignments of error and conclude that “[v]iewing the record as a whole, the trial court’s decision to remove appellants is supported by clear and convincing evidence”). Neither argument indicates that the Twelfth District patently and unambiguously lacks jurisdiction to hear the underlying removal appeal.

C. Relator is Not Entitled to a Writ of Mandamus.

Because the Twelfth District has jurisdiction to hear the appeal, Relator is not entitled to a writ of mandamus. Mandamus will only issue when three requirements are met: (1) the relator has a clear legal right to the requested relief; (2) the respondent has a clear legal duty to perform the requested relief; and (3) the relator has no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996).

Relator requests a writ of mandamus to “compel the dismissal of the [underlying] Appeal.” Complaint at 6. As outlined above, Relator has no legal right to this relief, and the Twelfth District does not have a legal duty to perform it. The Twelfth District has jurisdiction to hear and decide the removal appeal; Relator has pointed to no legal authority requiring the Twelfth District to dismiss the appeal. Further, to the extent Relator requests a writ to direct the Twelfth District to find either that insufficient signatures were attached to the original complaint, or that the removal appeal inappropriately requires resolution of factual questions, mandamus is

inappropriate. *State ex rel. Avery v. Union Cty. Court of Common Pleas*, 125 Ohio St.3d 35, 2010-Ohio-1427, 925 N.E.2d 969, ¶ 1, quoting *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 12 (“Mandamus will not lie to control judicial discretion, even if that discretion is abused.”); R.C. 2731.03. For these reasons, Relator does not have a clear legal right to the relief she seeks, and the Twelfth District does not have a clear legal duty to grant it.

Finally, relief in mandamus is precluded by the availability of an appeal. *State ex rel. Ervin v. Barker*, 136 Ohio St.3d 160, 2013-Ohio-3171, 991 N.E.2d 1146, ¶ 10. Here, Relator can certainly seek resolution of these questions in an appeal to this Court, either the denial of her motion to dismiss the appeal or the Twelfth District’s final resolution of the case. Because Relator has an adequate remedy at law by way of appeal, her request for a writ of mandamus should be dismissed.

D. Relator is Not Entitled to a Writ of Prohibition.

Relator also seeks a writ of prohibition preventing the Twelfth District from asserting jurisdiction over the underlying appeal. Complaint at 6. To be entitled to the requested writ, Relator must establish that (1) the Twelfth District is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) the court’s denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Ct. of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 18.

Absent a patent and unambiguous lack of jurisdiction, a party challenging the court’s jurisdiction has an adequate remedy at law by appeal. *State ex rel. Enyart v. O’Neill*, 71 Ohio St.3d 655, 656, 646 N.E.2d 1110 (1995); *State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313,

316, 725 N.E.2d 663 (2000). Prohibition will not issue if the relator possesses an adequate remedy in the ordinary course of law. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997). As outlined above, the Twelfth District does not patently and unambiguously lack jurisdiction to consider the underlying removal appeal. Moreover, when, as here, Relator cannot establish that a court patently lacks jurisdiction to proceed, Relator has an adequate remedy at law by way of challenging the jurisdictional issues on appeal. *See Kreps*, 88 Ohio St.3d at 316. Therefore, because Relator does not meet the requirements for a writ of prohibition to issue, her complaint should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Respondents the Twelfth District Court of Appeals, its Judges, and Administrative Judge Hendrickson respectfully request this Court dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by regular U.S. mail on
October 14, 2014, upon the following:

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