

signed by a certain number of Brown County voters.

The matter was tried 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.

On July 23, 2014, those plaintiffs filed a Notice of Appeal, without having first obtained leave to do so, and at the same time filed a Motion for Leave to file an Appeal. No hearing was ever set or noticed to anyone or held on the Motion for Leave. Those appellants' Motion asserted two issues they wanted to appeal, both that the trial court was wrong in its verdict for the Relator. Relator filed a motion to strike the Notice and dismiss the appeal and to deny leave to appeal. No response was filed by those 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 leave to appeal. On September 10, 2014, an accelerated scheduling order issued.

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 issues 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).

Where there is a total want of jurisdiction in the lower court a writ of prohibition will be granted to arrest an order issued by such court, even if the order was entered 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. Relator must establish a clear legal right to an order compelling Respondents 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 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.

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 initiation of 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 here 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. See, *2,867 Signers of Petition for Removal of Mack v. Mack*, 66 Ohio App.2d at 81-83 (holding that the complaint filed under R.C. 3.08 was legally insufficient under that statute); *Dancy v. Board of Elections*, 9th Dist. Summit No. 10361, 1982 Ohio App. LEXIS 11490, at 1-2 (appeal from dismissal of election complaint for failure to comply with the statute for required signatures, dismissed, although on other grounds). R.C. 3.08 says nothing about a “petition.” The court would have to read into the statute, “signed by qualified electors . . . or by an attorney for them.”

Because the complaint was not signed in compliance with the Statute, the trial court’s jurisdiction, and therefore the Respondents’ jurisdiction, was not properly invoked. If the Legislature meant to allow the Complaint to be signed by anyone other than the required voters, or by an attorney only, or by petition, it could have said so. Not saying so is *on purpose*.¹ An unambiguous statute must be applied consistent with the plain meaning of the statutory language, and a court cannot ignore or *add* words. *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St. 3d 106, 116, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52.

Therefore the attempted appeal is jurisdictionally defective and the writ should issue

¹The expression of one or more persons or things implies the exclusion of those not expressed. *State ex rel. Butler Twp. Bd of Trs. v. Mont. Cty. Bd. of Comm’rs*, 124 Ohio St.3d 390, 394, 2009-Ohio-169, 922 N.E.2d 945, ¶ 21.

preventing it from being addressed at all. By allowing the case to proceed and then be appealed, without observance of this statutory requirement, the courts essentially void this 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 appellate jurisdiction. 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 required by R.C. 3.09, the Respondent has no jurisdiction.

Proceeding in this case requires the court to *read into* the Statute that a notice of appeal *can be filed* before leave is granted, and *obtain leave after the fact*, thereby abridging, enlarging, or modifying the statutory procedure for appeal of a removal action, and assumes the General Assembly meant that although it didn’t say so. If the Legislature meant to allow an appeal to be filed before leave is granted, or leave to be obtained after the fact, it could have said so. Not saying so is on purpose. *State ex rel. Butler Twp.*, 124 Ohio St.3d at 394, 2009-Ohio-169, ¶ 21. An unambiguous statute must be applied consistent with the plain meaning of the statutory language, and a court cannot ignore or *add* words. *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St. 3d at 116, 2006-Ohio-954, ¶ 52.

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 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 at a hearing for that purpose.

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. These requirements, just as those the Respondents (Motion to Dismiss, p. 7) argue are not required, is exactly what were met to invoke the court’s jurisdiction in 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 that 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). These requirements were not met in this instant case. These requirements were also not met, and resulted in dismissal of the appeal, in *In re Removal*

of *Osuna*, 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (12th Dist. 1996).

The proper notice of appeal, only after leave is granted, only at/after a noticed hearing, has to be filed within 30 days of the decision and entry. Appellants below failed to observe these requirements. 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 writs should issue to prevent Respondent from hearing the appeal. This court so much as said so:

[O]nce 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 court could not consider Berman's belated motion for leave.* R.C. 2323.52(D)(3), (F)(2), and (I); App.R. 3(A) and (4)(A).

State ex rel. Sapp, 118 Ohio St.3d at 373 (emphasis added). In both the vexatious litigator statute in *Sapp*, and R.C. 3.09 here (and in *Osuna*), the appeal requires leave before filing, and prohibits filing without leave. In both *Sapp*, analogizing the vexatious litigator provision and finding support from the construction of R.C. 3.09 in *Osuna*, found the combination of the filing of an appeal before obtaining leave and the running of the 30 days before doing so to be fatal.

By allowing the case to proceed, or be appealed, without observance of this statutory requirement, the Respondent has essentially voided the statute. Proceeding in this case requires the court to again *read 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*; or take out “only,” “after,” “at,” “hearing,” and “notice,” thereby abridging, enlarging, or modifying the statutory procedure for appeal of a removal action, and assumes the General Assembly meant that although it didn’t say so. See *State ex rel Sapp*, 118 Ohio St.3d at 372 (“The court of appeals suggests an exception to R.C. 2323.52 when the person declared a vexatious litigator seeks to appeal the judgment initially

declaring him or her to be a vexatious litigator. But the plain language of R.C. 2323.52 recognizes no such exception, and courts cannot add one.”).

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 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 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 appellants here are challenging 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 Respondent would have to re-weigh 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 Respondents 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. Appellants' entire motion for leave challenged the decision of the trial court based on Appellants' recitation of the evidence, which the trial court disagreed with. A removal action cannot be appealed on such fact questions. Therefore the Respondent is without jurisdiction and the writ should be granted, even if only in part, to prevent such an appeal. See, *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, at syl. 4 ("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.") (Emphasis added).

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 and are jurisdictional.

The Respondents in granting leave to appeal appear 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. Respondents' Motion to Dismiss also states that Relator cited no authority that R.C. 3.09 is jurisdictional. Both statements are incorrect. See Relator's Motion, September 17, 2014, p. 6, 9, 12-13, and 15-17, specifically citing authority, both direct and indirect, that R.C. 3.09 is jurisdictional. This court and the 12th District appear to have both said so.

These provisions (including R.C. 3.09) are statutorily created substantive limits of the right of appeal from a statutorily created right (a removal action). The Ohio Constitution, at Article IV, Section 5(B) (the "Modern Courts Amendment") conferred authority on the Ohio Supreme Court 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 conflicts with a statute, the rule will control for procedure but "the statute will control for matters of substantive law." Id.

"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).

As to R.C. 3.09 specifically, whether it is a substantive law depends upon whether it and the statutes for removal actions create "a right." It cannot be construed any other way. 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), construed R.C. 2945.68 (which granted appellate courts the *discretion* to allow the state to appeal a criminal matter) prevailed 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.” In *Havel*, supra at ¶ 20-21, this court noted that 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 *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.* (editing added). *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*, specifically

²The 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 at 341, 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.* (Emphasis added).

addressing the removal statutes, and said 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.” (Emphasis added). This court held that the similar statute (vexatious litigator) requiring leave to appeal *before* the 30-limit

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

(Emphasis added).

This court has consistently enforced the General Assembly’s passage of such laws, governing substantive rights created by statute, and the courts’ obligation to follow them. In *Havel* this court held 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. *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 R.C. 3.09 was not met to review it, and those provisions were not met here. These jurisdictional principles apply as well specifically to R.C. 3.09. The right to appeal a removal action by R.C. 3.09 expressly 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 at 341, specifically addressing R.C. 3.09, “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.”

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 *State ex rel. Sapp v. Franklin County Court of Appeals* stated, specifically addressing these removal statutes:

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*).”

118 Ohio St.3d at 372-373, 2008-Ohio-2637 at ¶ 30 (Emphasis added in part and in original in part). And this court there noted the lack of an exception or ability of the courts to add one. *Id.*

6. Appeal limits are different than trial limits.

Respondents’ Motion to Dismiss argues that because the 30-day time limit to bring a removal action *to trial* has been held to be non-jurisdictional, citing *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, 772 N.E.2d 1192, the Statutes for the *right of appeal* of such an action are also not jurisdictional. The court is aware of the difference in

“speedy trial” and other statutes for actions in the trial courts, which are consistently found to be non-judicial. See, e.g., *State v. Bellman*, 86 Ohio St.3d 208, 210, 714 N.E.2d 381 (1999) (statutory time limit for sexual predator hearing is not jurisdictional); *In re Davis*, 84 Ohio St.3d 520, 522, 705 N.E.2d 1219 (1999) (time for juvenile court dispositional order not jurisdictional); *Montpelier v. Greeno*, 25 Ohio St.3d 170, 171, 495 N.E.2d 581 (1986) (statutory time limits for criminal trials is not jurisdictional). See also, *State ex rel. Lawrence County Child Support Enforcement Agency v. Ward*, 4th Dist. Lawrence No. 95CA40, 1996 Ohio App. LEXIS 5191, at 3 (statutory time limit for court paternity adjudication is not jurisdictional). *State ex rel. Ragozine*, 96 Ohio St.3d at 203-204, made this same point, in that the “time for performance of an official duty” of a trial court to bring the case to trial – as opposed a filing duty of a litigant – is not jurisdictional.³

But appellate statutes are different. 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.”). As one court 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 [sic] 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

³In other contexts, “official duty” has been applied only to actual public “officials” performing their legal duties, not private parties. See, e.g., *State v. Cameron*, 91 Ohio St. 50, 60, 109 N.E. 584 (1914) (as to state treasurer, but not applied to private party aiding misappropriation of state funds because the private party had no “official” duty regarding the state funds); *Gasper v. Washington Twp.*, 10th Dist. Franklin No. 02AP-1192, 2003-Ohio-3750, ¶ 18-19 (construing firefighter’s official duties to mean “duties attendant to an officer’s position”); *In re Pribanic*, 6th Dist. Erie No. E-90-20, 1991 Ohio App. LEXIS 163, at 11 n.1 (police officer not performing any “official duty” when observing activity as a private citizen). Counsel can find no case where “official duty” was applied to the acts or legal obligations of private litigants.

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).

Therefore, "when the right to appeal is conferred by statute, an appeal can be perfected *only in the manner* prescribed by the applicable statute." *Welsh Dev. Co. v. Warren*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, ¶ 14 (emphasis added). 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 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. In numerous other cases this court has held that statutes 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); *Nibert v. Ohio Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 103, 702 N.E.2d 70 (1998) (filing of notice of appeal); *McCruter v. Bur. of Emp. Servs. Bd. of Review*, 64 Ohio St.2d 277, 279, 415 N.E.2d 259 (1980), citing *Zier v. Bur. of Unemp. Comp.*, 151 Ohio St. 123, 84 N.E.2d 746, syl. 1.

There is no reason that R.C. 3.09 is different. In fact, *State ex rel. Ragozine*, 96 Ohio St.3d at 204, relied upon by Respondents, *made this same distinction*, too, and specifically in reference to the *removal statutes*:

Moreover, unlike the cases cited by the board members, this case does not involve statutory requirements that manifestly strike "to the core of procedural efficiency" and are "essential to the proceeding." See, e.g., *Nibert v. Ohio Dept. of Rehab. & Corr.* (1998), 84 Ohio St.3d 100, 103, 702 N.E.2d 70 (*filing of notice of appeal*); see, also, *In re Removal of Osuna* (1996), 116 Ohio App.3d 339, 341, 688 N.E.2d 42 (*leave to appeal*).

(Emphasis added). This court pointed out the distinction in the same context, too:

Finally, the court of appeals' reliance on *State ex rel. Ragozine v. Shaker* [citation omitted] is misplaced. In that case, we held that the statutory requirement for a hearing to be held within 30 days from the date of the filing of a complaint for removal of a public officer under R.C. 3.07 and 3.08 was not jurisdictional. *By contrast, this matter 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 court could not consider Berman's belated motion for leave.* R.C. 2323.52(D)(3), (F)(2), and (I); App.R. 3(A) and (4)(A).

State ex rel. Sapp, 118 Ohio St.3d at 373 (emphasis added).

In *State v. Hatfield*, 48 Ohio St. 118, 119, 357 N.E.2d 379 (1976), this court was also presented with an appeal that complied with the Rules (as here), there being Cr. R. 12(J) and App. R. 4(B), but did not comply 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 fact that a trial time-limit is not jurisdictional does not mean that appeal limits are not substantive law and are not jurisdictional.

C. Relator is entitled to the Writ of Prohibition

The suggestion made by Respondents that the Writ should not be granted because the lower court might make the right decision, or can be reviewed later, and therefore there is an

adequate remedy at law, has already been rejected:

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).

But the remedy Respondents suggest (further appellate review of the 12th District) may not be available at all, and their decision may in fact ultimately be final and unappealable, in that review is possibly prohibited entirely, see R.C. 3.09 (“The decision of the court of appeals in refusing to allow a notice of appeal to be filed, or in the passing upon the merits of the case in the appellate proceedings, shall be final.”), unless this court would find now that this part of R.C. 3.09 is unconstitutional, or doesn’t mean what it appears to say. Even then Relator would be relegated to only the possibility of discretionary review after the Respondent rules (if adverse to Relator on either the jurisdictional issues or on the merits of the appeal).

An extraordinary writ is appropriate when the alternate remedy is not complete, beneficial, and speedy. See this Memorandum, *supra* at 4. That is the epitome of what lies ahead for Relator if the appeal is allowed to proceed – that Respondent have the sole and final say on its own jurisdiction.

In *Sapp* writ was granted when leave was not obtained prior to filing the appeal, even though further review was at least arguable. But because the appellant did not obtain leave to appeal before the time ran out to appeal, even though he filed an appeal in time, and regardless of theoretical further review:

[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.

Sapp, supra at ¶ 32.

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, may be in violation of more than one statute; may result in orders ultimately determined to be made outside of the Respondents' jurisdiction to do so; and may be final and unappealable, even on the jurisdictional question, leaving if the writ is not issued the Respondent to have the last word on its own jurisdiction. 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, to finality of the Judgment below, and observance of R.C. 3.09. 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.

In *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 133, 568 N.E.2d 1206 (1991), this court noted 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 Respondents not act upon it. Issuing the Writ also sets forth all correct procedure for all future attempts at appealing a removal action, statewide.

D. Relator is entitled to the Writ of Mandamus

An extraordinary writ is appropriate when the alternate remedy is not complete, beneficial, and speedy. See this Memorandum, supra at 4. This court in *State ex rel. Sapp*, 118

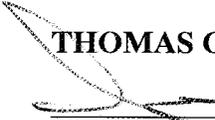
Ohio St.3d at 373, granted *both* writs, to prevent the Court of Appeals from exercising jurisdiction in an appeal *and* to dismiss the appeal, when leave was not obtained prior to filing the appeal, and the exercise of ultra vires appellate jurisdiction was at stake, and as here, where an appeal was filed without first obtaining leave to do so and within the 30-day appeal time:

[O]nce 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 court could not consider Berman's belated motion for leave.*

State ex rel. Sapp, 118 Ohio St.3d at 373 (emphasis added).

Conclusion

As a result the Respondents are exercising jurisdiction it does not have, to the detriment of the Relator. The court should therefore deny the Respondents' Motion to Dismiss this case, and issue the writs to prohibit the court from doing so and to dismiss the appeal.


THOMAS G. EAGLE CO., L.P.A.

Thomas G. Eagle (#0034492)
Counsel for Relator
3386 North State Route 123
Lebanon, Ohio 45036
Phone: (937) 743-2545
Fax: (937) 704-9826
E-mail: eaglelawoffice@cs.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the Attorneys for Respondents, Assistant Attorneys General, Sarah E. Pierce & Tiffany L. Carwile, 30 East Broad St. 16th Floor, Columbus, OH 43215, by ordinary U.S. mail this 20th day of October, 2014.


Thomas G. Eagle (#0034492)