

**IN THE SUPREME COURT OF OHIO**

**THE STATE OF OHIO ex rel.** : **CASE NO. 14-2241**  
**DOUGLAS C. BARTON** :  
 :  
**Relators,** :  
 : **ORIGINAL ACTION IN WRIT OF**  
**v.** : **MANDAMUS AND PROHIBITION**  
 :  
**KEESHA A. BARTON, et al.** :  
 :  
**Respondents.** :

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**MOTION TO DISMISS**

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## **MOTION TO DISMISS**

Now comes Respondent David McNamee (“McNamee”), by and through counsel, and respectfully moves this Court for an order dismissing the Verified Petition for Writ of Mandamus and Prohibition against McNamee. The basis for this motion is fully set forth in the Memorandum in Support below.

Respectfully submitted,

*/s/Michael P. McNamee*

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

Relator, State *ex rel.* Douglas C. Barton, has filed a Verified Petition for Writ of Mandamus and Prohibition (“Petition”) against seven Respondents. Against McNamee, the Petition alleges only that he failed or refused to provide a document. The complaint alleges that that constituted spoliation of evidence and violations of the Ohio Rules of Professional Conduct.

None of the allegations against McNamee would be within the original jurisdiction of the Ohio Supreme Court. Even if true, spoliation of evidence is a discovery dispute matter left to the trial court in an underlying action. And any disciplinary accusations must be made to the Board of Professional Conduct.

Because none of the allegations against McNamee fall within the original jurisdiction of this Court, he respectfully requests that the Petition be dismissed against him.

## **II. STATEMENT OF FACTS**

The allegations against McNamee outlined in the Petition are limited, and in fact all seem to stem from what Relator describes as McNamee's failure or refusal to provide a copy of a prenuptial agreement between Relator and his ex-wife, also a Respondent.

From the Petition, it appears that Relator and his ex-wife have been engaged in several different civil and/or criminal disputes, including a divorce action. *Petition*, pg. 3. Presumably as part of one of those disputes, Relator's Petition contends that McNamee failed or refused to provide a copy of a prenuptial agreement. *Petition*, pg. 5, ¶ 5.

That failure to provide a copy of the prenuptial agreement, the Petition alleges, constituted: 1) spoliation of evidence, *Petition*, pg. 5, ¶ 5; 2) a violation of rules 8.4 and 4.1 of the Ohio Rules of Professional Conduct, *Petition*, pg. 8, "Spoliation of Evidence"; and 3) a refusal of discovery, *Petition*, pg. 9, "Spoliation of Evidence."

The only other allegation against McNamee seems to arise from a title to a trailer, which Relator alleges was fraudulently presented as being jointly owned by him and his ex-wife, when in reality it was owned solely by him. *Petition*, pg. 6-7, "Fraud Upon The Court # 1." As it pertains to McNamee, the Petition states that he "participated in the procurement of fraud upon the court by misrepresenting the fraudulent title." *Petition*, pg. 5, ¶ 5. The Petition offers no elaboration on what McNamee's perceived role in that misrepresentation was.

From these allegations, the Petition seeks an order disbaring McNamee for violations of the Ohio Rules of Professional Conduct. *Petition*, pg. 16, "Writ of Mandamus." Further, the

Petition seems to allege that it is asserting its spoliation of evidence claim as “a possible separate tort action with punitive damages.” *Petition*, pg. 14, “Argument & Law r).”

### **III. LAW AND ARGUMENT**

The Ohio Supreme Court’s original jurisdiction of course extends to actions provided for under Article IV, Section 2 of the Ohio Constitution. That jurisdiction includes mandamus and prohibition, as captioned in the Petition.

Yet nothing supports the Petition’s attempt to extend the Ohio Supreme Court’s original jurisdiction to the claims of spoliation and discovery abuse asserted against McNamee. Spoliation of evidence and a refusal to provide discovery are discovery-related disputes addressed by the trial court in the underlying action in which they occur, and subject to the regular appellate review process.

The only other claim asserted against McNamee alleges that the same conduct underlying the spoliation allegations was also a violation of the Ohio Rules of Professional Conduct. Here too, the procedure for asserting disciplinary grievances against attorneys does not include an original action at the Ohio Supreme Court. Jurisdiction over such grievances is vested in the Board of Professional Conduct of the Supreme Court. *Supreme Court Rules for the Government of the Bar of Ohio*, Rule V, Section 2(A).

Without some allegations that would bring the Petition’s claims against McNamee within the mandamus or prohibition jurisdiction of the Ohio Supreme Court, the Petition has no jurisdictional basis. As it pertains to McNamee, that is the case.

#### **IV. CONCLUSION**

None of the allegations against McNamee in the Petition fall within the Ohio Supreme Court's original jurisdiction. As such, McNamee respectfully requests an order dismissing the Petition against him.

Respectfully submitted,

*/s/Michael P. McNamee*

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#### **CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing was served via ordinary U.S. Mail, postage prepaid, this 21st day of January 2015, upon the following:

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