Supreme Court of Ohio Clerk of Court - Filed February 26, 2015 - Case No. 2015-0173

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. AYMAN DAHMAN, MD, ET AL.,	)	CASE NO. 2015-0173
Relators,	)	Original Action in Prohibition Arising From Cuyahoga County Common Pleas Court Case No. CV-12-785788
vs.	)	
THE HONORABLE BRIAN J. CORRIGAN, ET AL.,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS

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THE HONORABLE BRIAN J. CORRIGAN, ET AL.,	)	**RESPONDENTS' MOTION TO DISMISS**
Respondents.	)	

Pursuant to S.Ct.Prac.R. 12.04(A)(1), respondents the Honorable Brian J. Corrigan and the Honorable John J. Russo respectfully move this Court for an order that dismisses the Complaint for Writ of Prohibition and this cause. The grounds in support of this motion are that the Complaint does not state any claim for relief in prohibition.

A memorandum in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,

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By: /s Charles E. Hannan

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THE HONORABLE BRIAN J. CORRIGAN, ET AL.,	)	**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS**
Respondents.	)	

STATEMENT OF FACTS AND PROCEEDINGS

This is an original action in prohibition filed by relators Ayman Dahman, MD and Mary Jo Alverson, CNM ("relators") against respondents the Honorable Brian J. Corrigan and The Honorable John J. Russo ("respondents"). Relators contend that a writ of prohibition should issue to forbid Cuyahoga County Common Pleas Court Administrative Judge Russo from reassigning a civil case that was randomly assigned to Judge Corrigan to Visiting Judge Lillian J. Greene for purposes of trial. Contrary to relators' contentions, however, the respondents do not patently and unambiguously lack jurisdiction over this matter and any claim of improper assignment of a judge appeal can be addressed through the plain and adequate remedy of appeal. For the reasons that follow, the respondents respectfully urge this Court to dismiss the Complaint for Writ of Prohibition and Alternative Writ and Affidavit in Support ("Complaint") and this cause pursuant to S.Ct.Prac.R. 12.04(C).

The relevant facts are that relators are defendants in the case captioned, Hastings, et al. v. Southwest General Health Center, et al., Cuyahoga County Common Pleas Court Case No. CV-12-785788. See Complaint at para. 1. That underlying case is an action for medical malpractice

brought on behalf of a minor for the alleged injury suffered by the child at the time of his birth. See Complaint at paras. 12-13. The case was randomly assigned to Judge Corrigan. See Complaint at paras. 2, 14 (including Exhibit A), and 31-32. On June 25, 2014, the trial court scheduled the case for a jury trial to commence on February 2, 2015. See Complaint at para. 16.

At the final pre-trial conference on January 15, 2015, Judge Corrigan informed counsel that the trial would likely be handled by a visiting judge. See Complaint at para. 17. Relators allege that the identity of the judges or the process for selection was not provided. Id.

On January 22, 2015, Judge Corrigan's staff attorney informed all counsel by email that a visiting judge would preside over the trial that was likely to commence on February 2, 2015, identifying the two (2) judges who were then believed to be available to conduct the trial. See Complaint at para. 18 and Exhibit B. Relators' counsel objected to one (1) of the two (2) identified judges and indicated that the other judge was acceptable. Id. According to relators, "there was an expectation" on the part of counsel that the case would be transferred to the judge they deemed acceptable "per agreement of all parties." See Complaint at para. 18.

On January 29, 2015, Judge Corrigan's staff attorney informed all counsel by email that there had been a change in the visiting judge schedule for February 2015 and that Judge Greene, who had seniority, would be hearing the case. See Complaint at paras. 19-20 and Exhibit C. Relators say that "[t]here was no explanation as to the identity of the list" of cases that were to be reassigned to the visiting judges "or any rule, policy, guideline, etc. as to the basis" for saying that the Hastings case was "first on the list" that was being reassigned to the visiting judge with seniority. See Complaint at para. 21. Later that day, relators' counsel replied to the staff attorney's earlier email by indicating an objection to having Judge Greene hear the case, which was based on a case that she had handled ten (10) years earlier, and counsel's understanding that

all parties must agree to have a particular visiting judge preside over the reassigned case before the case could proceed before that judge. See Complaint at para. 22 and Exhibit D.

On January 30, 2015, Administrative Judge Russo conducted a conference call with the parties' counsel. See Complaint at para. 24. When the plaintiffs' counsel indicated that they would not agree to have the Hastings case reassigned to the less senior visiting judge, Judge Russo indicated that the case would proceed before Judge Greene on Monday, February 2, 2015. See Complaint at paras. 24-26.

On January 30, 2015, Judge Corrigan issued an order reflecting that because of a conflict on Judge Corrigan's case docket, the Hastings case was being referred to Judge Russo for reassignment to a visiting judge for trial. See Complaint at para. 27. That same day, Judge Russo issued an order reflecting that due to Judge Corrigan's unavailability, the Hastings case was being transferred to Visiting Judge Greene for trial. See Complaint at para. 28. Later that day, relators filed a notice of objection to the order transferring the Hastings case to a visiting judge and of their intention to seek a writ of prohibition to stop the trial from going forward as ordered before a visiting judge. See Complaint at para. 29.

On February 2, 2015, the relators filed this original action in prohibition in the Supreme Court of Ohio that additionally requested an alternative writ of prohibition. Later that day, the Supreme Court of Ohio denied the relators' motions for emergency stay and for an expedited alternative writ. See *02/02/2015 Case Announcements #3*, 2015-Ohio-375.

Although it is not reflected in the relators' Complaint, relators' counsel additionally filed an affidavit of disqualification against Judge Greene on February 2, 2015, which operated to prevent the trial from proceeding before Judge Greene pursuant to R.C. 2701.03(D)(1). On

February 5, 2015, Chief Justice O'Connor denied the affidavit of disqualification.[1] By that time, however, the case could no longer proceed to trial due to scheduling issues with the parties and their respective expert witnesses who could no longer be available to testify because of the delay in commencing trial.[2]

For the reasons that follow, respondents respectfully move this Court pursuant to S.Ct.Prac.R. 12.04(A)(1) to dismiss the Complaint and this cause under S.Ct.Prac.R. 12.04(C).

ARGUMENT AND LAW

Relators' Complaint in prohibition does not truly contest the respondents' jurisdiction to conduct the underlying proceedings. Instead, they argue that the respondents lacked jurisdiction to have the Hastings case reassigned from Judge Corrigan to Visiting Judge Greene so that the case could proceed to trial as scheduled on February 2, 2015. Contrary to the relators' contentions, however, the respondents did not lack patently and unambiguously lack jurisdiction to have the case reassigned for that purpose. Moreover, appeal is a plain and adequate remedy at law for the relators to raise any claim of an alleged improper judge assignment. Because relators' Complaint fails to establish the grounds necessary to obtain extraordinary relief in prohibition, respondents respectfully urge this Court to dismiss the Complaint and this cause pursuant to S.Ct.Prac.R. 12.04(C).

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[1] According to the relators, the Chief Justice's February 5, 2015 ruling "did not instruct Judge Greene to proceed with the case" because "the Ohio Supreme Court stated that '[t]he case may proceed before Judge Greene.'" (Emphasis sic.) See "Motion to Return This Case to the Docket of Judge Brian J. Corrigan for Ruling on the Motions to Continue, Motions in Limine, Trial and Final Disposition of the Case," filed in the underlying trial court proceedings on February 12, 2015, at p. 4.

[2] The Hastings trial has tentatively been rescheduled to proceed before Judge Greene on April 6, 2015, but the defendants have objected to that new trial date and the relators have maintained their objection to any trial before Judge Greene.

Under Ohio law, an action in prohibition tests only the jurisdiction of the lower court. *See State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265; *State ex rel. Staton v. Common Pleas Court*, 5 Ohio St.2d 17, 21, 213 N.E.2d 164 (1965). To be entitled to the writ, the relators must show that (1) the respondent Court was exercising or about to exercise judicial or quasi-judicial power; (2) the exercise of that power was unauthorized by law; and (3) denial of the writ would cause injury for which no other adequate remedy exists in the ordinary course of the law. See *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, at ¶ 12.

"In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal." *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, at ¶ 12. "Prohibition will not issue as a substitute for appeal to review mere errors in judgment." *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522 at ¶ 28. Thus "[a]ppeal, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction." *Smith v. Warren*, 89 Ohio St.3d 467, 468, 732 N.E.2d 992 (2000).

In reviewing this Complaint, the Court need not determine the merits of the relator's supposed jurisdictional contentions, for its "duty in prohibition cases is limited to determining whether jurisdiction is patently and unambiguously lacking." *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶ 12. *See also State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 431, 751 N.E.2d 472 (2001).

In this case, there is no dispute that the respondents were exercising judicial power in the underlying case. However, because the relators' Complaint fails to plead facts demonstrating

that the exercise of judicial power was unauthorized by law – much less that the respondents patently and unambiguously lacked jurisdiction to exercise such power – or that the relators lack plain and adequate remedies in the ordinary course of the law, the Complaint does not state the grounds necessary for extraordinary relief in prohibition and should accordingly be dismissed.

To begin, the relators do not dispute that the Court of Common Pleas has the basic statutory jurisdiction to hear the underlying action for medical malpractice. Under R.C. 2305.01, Ohio common pleas courts have original jurisdiction in all cases in which the sum or matter in dispute exceeds the exclusive jurisdiction of county courts. As this Court stated in *Schucker v. Metcalf*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986), "The court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it." *Id.* at 34, 488 N.E.2d 210.

Relators nevertheless insist that the respondents lacked jurisdiction to reassign the Hastings case from Judge Corrigan to Visiting Judge Greene for purposes of trial. According to the relators, Rule 36(B)(1) of the Ohio Rules of Superintendence ("Sup.R.") gives parties "an absolute right" to have their case remain assigned to the judge who received the initial random case assignment that "can be altered only upon express waiver of the parties." See Complaint at para. 33. Relators insist that the respondents lacked subject matter jurisdiction pursuant to Sup.R. 36 to reassign the case without their consent. See Complaint at para. 37. For the reasons that follow, the relators' contentions are without merit.

First, Ohio law confirms that an administrative judge has responsibility and control over case assignments within the court. In particular, Sup.R. 4.01(A) provides that an administrative judge of a court is responsible for and shall exercise control over the administration, docket, and calendar of the court. The administrative judge must ensure the observance of the Rules of

Superintendence, including the termination of all cases in the court or division without undue delay and in accordance with the time guidelines set forth in Sup.R. 39. See Sup.R. 4.01(B). The administrative judge must additionally provide for the assignment of cases to individual judges pursuant to Sup.R. 36.

In that regard, Sup.R. 36(B) provides for an individual assignment system for the assignment of cases to judges in a multi-judge division of the court of common pleas. Under that system, the assigned judge becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Sup.R. 36(B)(1). All preliminary matters are to be submitted to the judge to whom the case has been assigned or, if the assigned judge is unavailable, to the administrative judge. Id. According to the July 1, 1997 Commentary for the rule, a case assigned to an individual judge by lot "may be reassigned or transferred to another judge by order of the administrative judge."

In *Brickman & Sons, Inc. v. Nat'l. City Bank*, 106 Ohio St.3d 30, 2005-Ohio-3559, 830 N.E.2d 1151, the Supreme Court of Ohio upheld an administrative judge's reassignment of a case under the authority of the Rules of Superintendence where the reassignment would facilitate the timely processing of the case.

In the matter at hand, relators do not dispute that the Hastings case was randomly assigned to the individual docket of Judge Corrigan, who presided over all case proceedings up to the virtual eve of the February 2, 2015 trial, at which time a case docket scheduling conflict appeared. In order to accommodate the parties who had arranged for witnesses, including expert witnesses, to appear live to give trial testimony beginning on the scheduled February 2, 2015 commencement date and to ensure that the case was completed expeditiously notwithstanding Judge Corrigan's unavailability, Judge Corrigan referred the matter back to Administrative Judge

Russo who promptly reassigned the matter to proceed to trial as scheduled on February 2, 2015 before Visiting Judge Greene. Relators' Complaint does not plead any facts to suggest that Judge Greene was not authorized to serve on active duty as a judge by assignment of the Chief Justice pursuant to Section 6(C), Article IV of the Ohio Constitution. Under these circumstances, relators cannot demonstrate that the respondents patently and unambiguously lacked jurisdiction to cause the Hastings case to be reassigned to a visiting judge for purposes of trial.

Contrary to the relators' contention, nothing in the text of Sup.R. 36(B) confers upon parties "an absolute right" to have their case remain assigned to the judge to whom the case was randomly assigned unless the parties provide an express waiver to a reassignment. And even accepting relators' factual allegations as true for present purposes, there is nothing unreasonable in having a system by which cases are ranked for purposes of priority of reassignment and are thereafter distributed evenly based on a system of judicial seniority. And nothing in Ohio law establishes that a court *patently* and *unambiguously* lacks jurisdiction to reassign a case for the purpose of enabling it to be tried on schedule, notwithstanding that a party would prefer to have the case proceed before some other jurist.

For their part, the relators contend that the reassignment to Judge Greene was invalid because they did not consent to the reassignment. But contrary to relators' contention, consent to a reassignment is required only when the referral is made to a private retired judge pursuant to R.C. 2701.10. Under that law, parties may choose to have an action or specific issues of fact or law referred to a qualifying retired judge, who may thereafter determine the action or specific issue that was referred by agreement of the parties. See R.C. 2701.10(B). In those proceedings, however, the matter is to be determined by the judge, who shall issue findings of fact and

conclusions of law. See R.C. 2701.10(D). Any trial must be to the bench, because jury trials are not allowed. *See State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶¶ 36-56. Indeed, parties who choose to proceed under that section are responsible for contracting with the retired judge for any compensation to be paid by them to the judge. See R.C. 2701.10(C). And the court from which the case has been referred is not even required to provide the retired judge with any court or other facilities, equipment, or personnel. See R.C. 2701.10(C).

The reassignment of the Hastings case plainly was not made pursuant to R.C. 2701.10. There is no dispute that the parties expected to try their case to a jury. They anticipated that the trial would occur in the county courthouse. And they did not contract with any retired judge to hear the case with the judge being compensated pursuant to an agreement between the parties and the retired judge. Thus, this plainly was not a referral under R.C. 2701.10 to which the parties would have to first consent.

So even after accepting the relators' factual allegations as true, their Complaint fundamentally fails to plead any facts suggesting that the respondents *patently* and *unambiguously* lacked jurisdiction to conduct these proceedings.

Moreover, appeal is a plain and adequate remedy that is available in the ordinary course of the law to raise any claim of improper assignment of a judge, thereby precluding any need for relief by extraordinary writ. Indeed, in *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.e.2d 181, the Court stated: "A claim of improper assignment of a judge, however, cannot be cured in an extraordinary-writ action, and the party raising the claim has an adequate remedy by appeal." *Id*. at ¶ 20. *See also State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶

36; *State ex rel. Carr v. McDonnell*, 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004, ¶ 2; *Keith v. Boddy*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶ 14; *State ex rel. Keith v. McMonagle*, 106 Ohio St.3d 61, 2005-Ohio-3669, 831 N.E.2d 433, ¶ 7; *State ex rel. Key v. Spicer*, 91 Ohio St.3d 469, 746 N.E.2d 1119 (2001); *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 30451 N.E.2d 225 (1983).

Prohibition is an extraordinary remedy that requires caution and restraint, a clear and undoubted right to relief, and the absence of any adequate legal remedies. *See State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297 (1981); *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), syllabus at paragraph three; *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.*, 137 Ohio St. 273, 277, 28 N.E.2d 641 (1940).

In this case, the relators' Complaint fails to plead any facts establishing that respondents patently and unambiguously lacked jurisdiction to reassign the Hastings case for purposes of trial. To the contrary, Ohio law establishes that the respondents acted properly under the authority of the Ohio Rules of Superintendence in order to facilitate the timely and expeditious trial of this case without undue delay. Beyond that, appeal would provide a full and adequate remedy at law to determine whether the judicial reassignment was improper.

The relators' actions regrettably frustrated the respondents' efforts to have this case proceed to trial as scheduled. Nevertheless, because their Complaint here fails to establish the grounds necessary to obtain extraordinary relief in prohibition, respondents Judge Corrigan and Judge Russo respectfully request that the Complaint and this cause be dismissed pursuant to S.Ct.Prac.R. 12.04(C).

CONCLUSION

Respondents the Honorable Brian J. Corrigan and The Honorable John J. Russo respectfully requests that this Court dismiss the Complaint and this cause pursuant to S.Ct.Prac.R. 12.04(C).

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11, a true copy of the foregoing Respondents' Motion to Dismiss was served this 26th day of February 2015 by e-mail upon:

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