

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

**MERIT BRIEF OF RESPONDENTS
JUDGES OF THE TWELFTH DISTRICT COURT OF APPEALS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 1

LAW AND ARGUMENT 2

 I. Relator is not entitled to a writ of prohibition or mandamus (Proposition of Law V). 2

 A. Because Relator cannot demonstrate a patent and unambiguous lack of jurisdiction, she is not entitled to extraordinary relief in prohibition. 2

 B. Relator is also not entitled to a writ of mandamus for similar reasons. 4

 II. The Twelfth District did not patently and unambiguously lack jurisdiction to hear the underlying removal appeal. 5

 A. The R.C. 3.09 appeal procedures do not patently and unambiguously divest the Twelfth District of jurisdiction (Propositions of Law I – III). 6

 B. Relator’s remaining jurisdictional arguments also fail (Proposition of Law IV). 11

 III. CONCLUSION..... 12

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>2,867 Signers of Petition for Removal of Mack v. Mack</i> , 66 Ohio App.2d 79, 81-83, 419 N.E.2d 1108 (9th Dist. 1979).....	12
<i>State ex rel. Avery v. Union Cty. Court of Common Pleas</i> , 125 Ohio St.3d 35, 2010-Ohio-1427, 925 N.E.2d 969	5
<i>State ex rel. Barclays Bank PLC v. Hamilton Cty. Ct. Com. Pl.</i> , 74 Ohio St.3d 536, 660 N.E.2d 458 (1996)	2
<i>State ex rel. Cruzado v. Zaleski</i> , 111 Ohio St.3d 353, 856 N.E.2d 263	3
<i>State ex rel. Dannaher v. Crawford</i> , 78 Ohio St.3d 391, 678 N.E.2d 549 (1997)	3
<i>DuBose v. Ct. Com. Pl. of Trumbull Cty.</i> , 64 Ohio St.2d 169, 413 N.E.2d 1205 (1980)	4
<i>Dzina v. Celebrezze</i> , 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 12	3
<i>State ex rel. Enyart v. O’Neill</i> , 71 Ohio St.3d 655, 646 N.E.2d 1110 (1995)	3
<i>State ex rel. Ervin v. Barker</i> , 136 Ohio St.3d 160, 2013-Ohio-3171, 991 N.E.2d 1146	5
<i>State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Ct. Com. Pl.</i> , 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98	3
<i>Hughes v. Calabrese</i> , 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725	4
<i>Humbert v. Borkowski</i> , 6th Dist. Fulton No. F-04-022, 2004-Ohio-4275, ¶ 7	10
<i>State ex rel. Jones v. Farrar</i> , 146 Ohio St. 467, 66 N.E.2d 531 (1946)	8
<i>State ex rel. Jones v. Suster</i> , 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998)	3
<i>State ex rel. Kreps v. Christiansen</i> , 88 Ohio St.3d 313, 725 N.E.2d 663 (2000)	3, 4

CASES (CONTINUED)	PAGE(S)
<i>State ex rel. Orange Twp. Bd. of Trs. v. Delaware Cty. Bd. of Elections</i> , 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441	4
<i>Parente v. Day</i> , 16 Ohio App.2d 35, 241 N.E.2d 280 (8th Dist. 1968).....	9
<i>Planck v. Auglaize Soil & Water Conservation Dist.</i> , 3d Dist. Auglaize No. 2–99–11, 1999 WL 693159 (Sept. 2, 1999).....	9
<i>State ex rel. Ragozine v. Shaker</i> , 96 Ohio St.3d 201, 2002-Ohio-3992, 772 N.E.2d 1192	<i>passim</i>
<i>Ramsey v. A.I.U. Ins. Co.</i> , 10th Dist. Franklin No. 84AP–317, 1985 WL 10329 (June 18, 1985).....	9
<i>In re Removal of Kuehnle</i> , 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 161 (12th Dist.)	12
<i>In re Removal of Osuna</i> , 116 Ohio App.3d 339, 688 N.E.2d 42 (12th Dist. 1996).....	6, 11
<i>State ex rel. Sapp v. Franklin Cty. Court of Appeals</i> , 118 Ohio St. 3d 368, 2008-Ohio-2637, 889 N.E.2d 500	8, 9, 10
<i>State v. Bellman</i> , 86 Ohio St.3d 208, 210, 714 N.E.2d 381 (1999)	8
<i>State v. Leary</i> , 47 Ohio App.2d 1, 351 N.E.2d 793 (3d Dist. 1975).....	6
<i>State ex rel. Taylor v. Glasser</i> , 50 Ohio St.2d 165, 364 N.E.2d 1 (1977)	5
<i>State ex rel. Todd v. Felger</i> , 116 Ohio St. 3d 207, 2007-Ohio-6053, 877 N.E.2d 673	4
<i>State ex rel. Van Gundy v. Indus. Comm.</i> , 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951	4
Statutes	PAGE(S)
R.C. 3.08	1, 7, 8, 12
R.C. 3.09	<i>passim</i>
R.C. 2323.52	9

STATUTES (CONTINUED)

PAGE(S)

R.C. 2323.52(I)10, 11
R.C. 2323.52(D)(3)9
R.C. 2731.035

INTRODUCTION

Relator Dr. Judith Varnau, the Brown County Coroner, challenges the jurisdiction of an appellate court that has issued a decision in her favor. Relator 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”) to prevent the Twelfth District from assuming jurisdiction over an action to remove Relator as Coroner. But the case has been decided in Relator’s favor, and Relator continues to serve as the Brown County Coroner. In any event, Relator points to no authority demonstrating that the Twelfth District did not have jurisdiction over the appeal. Without a patent and unambiguous lack of jurisdiction, the Twelfth District was entitled to answer any jurisdictional questions raised by a party, the very questions Relator raises here. For these reasons, Relator is not entitled to the extraordinary relief of a writ of mandamus or prohibition.

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. Relator’s Ev. Sub., Ex. 1 (*Adamson v. Varnau*, Brown C.P. No. CVH 2014-0267 (June 23, 2014)). The Brown County Court of Common Pleas conducted a bench trial and, on June 23, 2014, found in Relator’s favor and dismissed the case. Relator’s Ev. Sub., Ex. 2.

On July 22, 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. Relator’s Ev. Sub., Ex. 3 (docket for *Adamson v. Varnau*, 12th Dist. CA 20140716). On July 30, 2014, Relator filed a combined motion to strike the notice, deny leave to appeal, and dismiss the appeal. *See id.*

On September 8, 2014, the Twelfth District denied Relator's motion to dismiss the appeal and granted the plaintiffs' motion for leave to appeal. *See id.*; *see also* Relator's Ev. Sub., Ex. 4. Consequently, on September 10, 2014, the Twelfth District issued an accelerated scheduling order for the removal appeal. *See* Respondents' Ev. Sub., Ex. A (complete docket for *Adamson v. Varnau*, 12th Dist. CA 20140716). Relator opposed the accelerated calendar, but was denied. *See id.* (entries dated 9/30/2014 and 10/9/2014).

On December 30, 2014, the Twelfth District issued a decision in the appeal, affirming the trial court's decision in Relator's favor. *See* Respondents' Ev. Sub., Exs. B, C (Judgment Entry and Order, *Adamson v. Varnau*, 12th Dist. No. 2014-0716 (Dec. 30, 2014)). Neither party appealed the Twelfth District's decision to this Court. *See* Respondents' Ev. Sub., Ex. A

LAW AND ARGUMENT

I. Relator is not entitled to a writ of prohibition or mandamus (Proposition of Law V).

Neither a writ of prohibition nor mandamus is appropriate in this case. Relator argues that because the appellants in the underlying removal action did not meet the procedures listed in R.C. 3.09, the Twelfth District was deprived of subject matter jurisdiction over the appeal. But Relator fails to present any authority to support her requests for extraordinary relief. And to the extent Relator argues that jurisdictional issues were improperly decided, that is an issue for an appeal. In either case, Relator is not entitled to a writ of mandamus or prohibition.

A. Because Relator cannot demonstrate a patent and unambiguous lack of jurisdiction, she is not entitled to extraordinary relief in prohibition.

Because the Twelfth District did not clearly and unambiguously lack jurisdiction to hear the removal appeal, Relator's request for a writ of prohibition must fail. Prohibition is an extraordinary writ and is not granted routinely or easily. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Ct. Com. Pl.*, 74 Ohio St.3d 536, 540, 660 N.E.2d 458 (1996). "The purpose of a

writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction.” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998). To be entitled to the requested writ, Relator must establish that the Twelfth District is about to exercise judicial or quasi-judicial power and that the exercise of that power is unauthorized by law. *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Ct. Com. Pl.*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 18.

But “if the lower court does not patently and unambiguously lack jurisdiction to proceed, that court has general subject-matter jurisdiction to determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 856 N.E.2d 263, ¶ 16, citing *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 12. In other words, absent a patent and unambiguous lack of jurisdiction, a court can make its own jurisdictional determinations, which a party can then appeal. *See 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, such as an appeal. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997). Importantly, this Court has noted that “it is significant that the preeminent [removal] cases . . . were resolved in the ordinary course of law rather than by extraordinary writ.” *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, 772 N.E.2d 1192, ¶ 16 (original action challenging purported jurisdictional requirement of removal statutes) (citations omitted).

As outlined below, Relator fails to demonstrate that the Twelfth District did not patently and unambiguously lack jurisdiction to consider the underlying removal appeal. 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. To the extent Relator requests a writ directing resolution of any jurisdictional questions, prohibition is inappropriate. *DuBose v. Ct. Com. Pl. of Trumbull Cty.*, 64 Ohio St.2d 169, 171, 413 N.E.2d 1205 (1980) (holding that prohibition will not lie to control judicial discretion). Relator does not meet the requirements for a writ of prohibition to issue and her request should be denied.

Further, while prohibition will lie to “to correct the results of prior actions taken without jurisdiction,” here there are no longer any actions that must be corrected. *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶ 15. The Twelfth District has rendered a final judgment in Relator’s favor. Neither party has sought an appeal in this Court. There is simply no detriment to the Relator that must be corrected. *See, e.g., State ex rel. Todd v. Felger*, 116 Ohio St. 3d 207, 2007-Ohio-6053, 877 N.E.2d 673, ¶ 13 (noting the general rule that the Court does not issue advisory opinions). Relator’s request for a writ of prohibition should also be dismissed for this reason.

B. Relator is also not entitled to a writ of mandamus for similar reasons.

These same considerations doom Relator’s request for a writ of mandamus. Relator’s Compl. at Prayer. Mandamus will only issue when the relator has both a clear legal right to the requested relief and the respondent has a clear legal duty to perform the requested relief. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. Relator must prove these requirements by clear and convincing evidence. *State ex rel. Orange Twp. Bd. of Trs. v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36, 985 N.E.2d 441, ¶ 14. Furthermore, “[m]andamus and prohibition are extraordinary remedies, 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 (1977).

Relator cites no legal authority indicating that she has a clear legal right (or that the Twelfth District has a clear legal duty) to dismissal of the removal appeal for lack of jurisdiction. Hearing the removal appeal was well within the Twelfth District’s jurisdiction; Relator has pointed to no legal authority requiring the Twelfth District to dismiss the appeal. *See infra* at 6-11. Relief in mandamus is also 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 was able to seek resolution of the jurisdictional questions she presents here in an appeal to this Court. Relator is therefore not entitled to the requested writ of mandamus.

Further, to the extent Relator requests a writ to direct the Twelfth District to find that it lacked jurisdiction to hear the removal appeal, 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 (“Mandamus will not lie to control judicial discretion, even if that discretion is abused.” (quotation omitted)); 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. Relator’s request for a writ of mandamus must therefore be denied.

II. The Twelfth District did not patently and unambiguously lack 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 lacked jurisdiction to hear the appeal from the underlying removal action. As discussed below, however, the Twelfth District had jurisdiction because the appellants perfected their substantive right to appeal by both obtaining the leave of the court and filing a timely notice of appeal. The remaining procedures in R.C. 3.09 are just that: procedures, not

jurisdictional prerequisites. Relator’s remaining argument concerning jurisdiction—the “signature requirement”—also fails. Because the Twelfth District did not patently and unambiguously lack jurisdiction to hear the removal appeal, Relator is not entitled to an extraordinary writ.

A. The R.C. 3.09 appeal procedures do not patently and unambiguously divest the Twelfth District of jurisdiction (Propositions of Law I – III).

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) (Proposition of Law II); and 2) the Twelfth District did not hold a hearing on appellants’ motion for leave to appeal (Proposition of Law III). Relator’s Merit Brief at 2-10. According to the language of the statute and the authority cited by Relator, however, these two “requirements” are not jurisdictional.

Parties to a removal action do not have an appeal of right but must instead seek the leave of the appellate court. R.C. 3.09; *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). When an appellant “fail[s] to obtain the necessary leave to appeal, his . . . appeal is thereby rendered moot,” even though the Appellate Rules only require a notice of appeal to be filed. *In re Osuna*, 116 Ohio App.3d at 341. In *Osuna*, a motion for leave was never filed with the appellate court, and the appeal was dismissed on those grounds. *Id.* In this case, of course, leave to appeal was granted by the Twelfth District, and the appellants timely filed a notice of appeal within 30 days of the trial court’s judgment. *See* Respondents’ Ev. Sub., Ex. A (entries dated 7/22/14 and 9/8/14); Complaint ¶¶ 12, 15.

Relator argues instead 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, divests the court of jurisdiction to hear the appeal and requires dismissal. But Relator cites no authority to support the contention that these procedures are indeed jurisdictional, and therefore that the Twelfth District patently and unambiguously lacked jurisdiction to proceed with the appeal.

First, case law interpreting the removal statutes indicates that Relator’s requirements are procedural only, and not jurisdictional. In *State ex rel. Ragozine*, this Court examined a similar timing provision in R.C. 3.08, which provides that:

The judge or clerk of the court shall cause a copy of such [removal] complaint to be served upon the officer, against whom the complaint has been filed, at least ten days before the hearing upon such complaint. *Such hearing shall be had within thirty days from the date of the filing of the complaint by said electors, or by the governor.*

96 Ohio St.3d at 11, quoting R.C. 3.08 (emphasis added). In *Ragozine*, a removal complaint had been filed against several members of a local board of education. *Id.* ¶ 2. The board members moved to dismiss the removal complaint, arguing that the trial court lacked jurisdiction because, in part, a hearing had not been conducted within 30 days of the filing of the complaint. *Id.* ¶ 3. The trial judge denied the motion. *Id.*

The board members then filed for a writ of prohibition in the appellate court to prevent the trial judge from continuing with the case. *Id.* ¶ 5. The trial judge filed a 12(B)(6) motion to dismiss, which the appellate court granted. *Id.* The board members appealed the dismissal of the prohibition action to this Court. *Id.* ¶ 6.

This Court held that the board members’ argument that the trial judge “patently and unambiguously lacked subject-matter jurisdiction to proceed . . . because he failed to hold a

merits hearing on the complaint within 30 days” lacked merit. *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). 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.

The statute Relator challenges is no different. R.C. 3.09 contains no expression of intent to limit the jurisdiction of the appellate court according to Relator’s 30-day timing requirement. According to Relator, within 30 days of the trial court’s judgment, an appellant would have to file a motion for leave to appeal, the appellate court would have to set a hearing and decide the motion, and the appellant (if successful) would then have to file a notice of appeal. 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 a motion for leave 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*.

Importantly, the *Ragozine* decision went on to note that reliance upon authorities holding that the removal statutes are quasi-penal (and therefore must be strictly construed) was erroneous. *Ragozine*, 96 Ohio St.3d at ¶ 15. Relator attempts the same arguments here. *See* Relator’s Merit Brief at 3, 7. But “[a] statutory provision may warrant strict construction even if

it is not jurisdictional.” *Ragozine*, 96 Ohio St.3d at ¶ 15, citing *Planck v. Auglaize Soil & Water Conservation Dist.*, 3d Dist. Auglaize No. 2–99–11, 1999 WL 693159 (Sept. 2, 1999) (“While not jurisdictional, the procedural statutes [relating to an administrative appeal] as applied to the facts of this case should be strictly construed”); *Ramsey v. A.I.U. Ins. Co.*, 10th Dist. Franklin 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”). In short, not every *procedure* imposed by statute divests a reviewing court of jurisdiction to hear a claim.

Relator’s comparison to the vexatious litigator statute is also inapposite. Relator’s Merit Brief at 9-10. Relator attempts to equate the procedural framework established by R.C. 3.09 with that of R.C. 2323.52, which sets the procedures for an adjudicated vexatious litigator to, among other things, institute an appeal. *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 two statutes are not comparable, however.

This Court has held that, for an adjudicated vexatious litigator, the grant of leave to appeal is a substantive requirement, rather than procedural. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 30. In *Sapp*, the trial court entered an order declaring the plaintiff a vexatious litigator, pursuant to R.C. 2323.52. *Id.* ¶ 2. The plaintiff filed a notice of appeal from that judgment without first seeking leave from the

appellate court. *Id.* ¶ 7. After one of the underlying defendants filed a motion to dismiss the appeal, the plaintiff then filed the required motion for leave to proceed, more than 30 days after the originating judgment had been entered. *Id.* The appellate court denied the motion to dismiss the appeal and granted the untimely motion for leave to proceed. *Id.* ¶¶ 8-10.

The defendants subsequently filed a prohibition and mandamus action in this Court to prevent the appellate court from proceeding with the appeal. *Id.* ¶ 11. This Court found that 1) the plaintiff had been declared a vexatious litigator and was required to obtain leave of the court before instituting an appeal; 2) the appellate court had been alerted to the fact that plaintiff had failed to comply with this requirement; and 3) by the time the plaintiff had moved for leave to institute his appeal, the 30-day appeal period required by Appellate Rule 4 had run. *Id.* ¶¶ 23-25. Importantly, the vexatious litigator statute provides that a court “shall dismiss the proceedings or application of the vexatious litigator” when the court is alerted that an adjudicated vexatious litigator has failed to obtain appropriate leave. R.C. 2323.52(I). Therefore, this Court concluded that the appellate court did not have jurisdiction to hear the appeal because the appellate court improperly granted the untimely motion for leave to appeal. *Sapp*, 118 Ohio St.3d at ¶ 27.

Relator argues that this situation is similar; that because the notice of appeal was filed before leave was granted by the appellate court, the notice must be stricken and the appellants were therefore out of time to file the appeal. Relator’s Merit Brief at 10. But the vexatious litigator statute differs in two important respects critical to this analysis: the filing of an application for leave to appeal tolls the time limitation for filing an appeal, and a court is directed by the statute to dismiss an appeal when leave is not first obtained. *See Humbert v. Borkowski*, 6th Dist. Fulton No. F-04-022, 2004-Ohio-4275, ¶ 7 (noting that the vexatious litigator statute

tolls time for leave application “[t]o compensate for the time it would take to obtain leave”). Not so for a removal appeal. There is no procedure for a removal appellant to be sure that the application for leave would be decided within the 30-day period Relator claims as jurisdictional. A removal appellant could miss that deadline (and, by extension, the 30-day deadline in Appellate Rule 4) through no fault of his own, and the appellate court would be deprived of jurisdiction to hear the appeal. This cannot be the intended result. Instead, the timing must be considered procedural, in line with the reasoning in *Ragozine*. Further, unlike the vexatious litigator statute (R.C. 2323.52(I)), there is no indication in the removal statute that instituting an appeal before obtaining leave is jurisdictional, or that a reviewing court must dismiss an appeal when a notice is filed before leave is granted.

An appeal in a removal action 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, and Relator is not entitled to either a writ of prohibition or mandamus on this theory.

B. Relator’s remaining jurisdictional argument also fails (Proposition of Law IV).

Relator’s remaining argument concerning jurisdiction also fails. There is absolutely no indication in the removal statutes or interpreting case law that failure to meet the “signature requirement” patently and unambiguously divests an appellate court of jurisdiction to hear an appeal. Relator’s Merit Brief at 11. To the contrary, the cases Relator cites indicate that such an

argument might be maintained on appeal to overturn the trial court's decision. *See id.*, citing *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). In *Mack*, for example, the Ninth District considered an appeal from a trial court decision dismissing a petition to remove a board of education member dismissed as too vague under R.C. 3.08, and denying plaintiffs leave to amend the complaint. *Id.* at 83-84. The Ninth District affirmed the trial court, finding that the complaint failed to give the defendant adequate notice of the charges against him. *Id.* at 83.

Similarly, both the trial court and the Twelfth District in this removal action were capable of deciding any pleading deficiencies or jurisdictional questions presented to them. *See, e.g., In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 161 (12th Dist.) (determining that it was "within the discretion of the trial judge" to permit multiple defendants to be joined in a removal action pursuant to R.C. 3.07 and 3.08). Relator presents no authority showing that the alleged pleading deficiencies patently and unambiguously deprived either the trial court or the Twelfth District of jurisdiction. Without such a showing, this collateral attack on the proceedings should be denied because the Relator had an adequate remedy at law. Accordingly, Relator is not entitled to a writ of mandamus or prohibition on this jurisdictional theory.

III. CONCLUSION

For the foregoing reasons, Respondents the Twelfth District Court of Appeals, its Judges, and Administrative Judge Hendrickson respectfully request this Court deny Relator's request for a writ of mandamus and/or prohibition. Relator has failed to demonstrate that the Twelfth District patently and unambiguously lacked jurisdiction to hear the removal appeal.

Accordingly, Relator had an adequate remedy at law to address the jurisdictional questions she presents here: an appeal to this Court. An adequate remedy precludes extraordinary relief in both mandamus and prohibition, and Relator is therefore not entitled to either.

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

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