

ORIGINAL

IN THE SUPREME COURT OF OHIO

CARLEAN DATES,	:	
	:	Case No. 2015-0238
Relator,	:	
	:	Original Action in
v.	:	Mandamus
	:	
OHIO FIRST DISTRICT COURT OF	:	
APPEALS et al.,	:	
	:	
Respondents.	:	

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MOTION TO DISMISS  
OF RESPONDENT DAVID A. WALLACE

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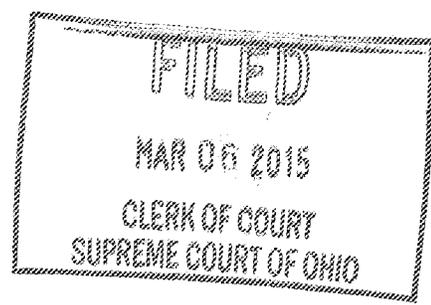
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Respondent David A. Wallace respectfully requests the Court dismiss Ms. Dates' Complaint for Writ of Mandamus against him with prejudice for failure to state a claim upon which relief can be granted. The reasons for the Motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS  
OF RESPONDENT DAVID A. WALLACE**

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**I. INTRODUCTION**

In her Complaint, relator Carlean Dates alleges that she demanded Mr. Wallace, who represented the party adverse to her in an appeal before the Ohio First District Court of Appeals, provide to her what she terms as his “oath and bond,” and that he failed to do so. She now requests this Court issue a Writ of Mandamus compelling Mr. Wallace to provide this alleged “oath and bond” to her. Ms. Dates provides no basis for the relief she is requesting, and indeed there is none. Ms. Dates first cites to the preamble to the Ohio Code of Judicial Conduct. She then references several statutes that govern members of the judiciary and other elected or appointed Ohio officials, the oaths of office they must take and, in some circumstances, the bonds they must post before holding public office. None of these authorities apply to Mr. Wallace, a private attorney. Ms. Dates’ references to Ohio’s Public Records Act likewise have no applicability to Mr. Wallace, a private citizen.

Ms. Dates’ Complaint thus simply fails to set forth *any* factual allegations which could entitle her to a writ of mandamus against Mr. Wallace. Ms. Dates cannot obtain a writ of

mandamus against a private attorney as a matter of law. Even if this were not the case, nothing in Ms. Dates' Complaint provides a factual or legal basis as to why or how Ms. Dates has a legal right to demand and receive what she calls an "oath and bond." Ms. Dates' Complaint also fails to establish why or how Mr. Wallace, a private attorney, has any legal duty – let alone a "clear legal duty" – to provide her (or anyone else) with what Ms. Dates again terms as his "oath and bond," either upon direct request or through a public records request. Simply put, Ms. Dates has failed to state a claim for issuance of a writ of mandamus against Mr. Wallace, mandating dismissal of her Complaint against him with prejudice.

## II. ARGUMENT

To establish a right to a writ of mandamus, this Court has consistently held that a relator must allege and prove three distinct elements: (1) a clear legal right to the relief prayed for; (2) a clear legal duty to perform the act requested; and (3) no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St. 3d 28, 29, 451 N.E.2d 225 (1983). "In order to dismiss a complaint for a writ under Civ. R. 12(B)(6), failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint, after presuming the veracity of all material factual allegations and reasonable inferences are made in the relator's favor, that the relator can prove no set of facts warranting extraordinary relief." *State ex rel. Hunter v. Patterson*, 75 Ohio St. 3d 512, 513-14, 664 N.E.2d 524 (1996). The burden is on the relator to establish all of the elements demonstrating entitlement to the writ. *State ex rel. Luna v. Hoffman*, 74 Ohio St. 3d 486, 659 N.E.2d 1279 (1996).

For a writ of mandamus to issue, let alone survive a motion to dismiss, Ms. Dates' petition must contain factual allegations that establish all three of the elements for a writ of mandamus set forth in *Berger*. Ms. Dates' petition fails to allege facts satisfying *any* of the

*Berger* requirements, however. Ms. Dates' petition does not remotely allege facts which could support either the first or second prongs of the *Berger* standard, i.e., Ms. Dates' legal right to "oath and bond" from Mr. Wallace and Mr. Wallace's legal duty to present "oath and bond" to her. Thus, there is no need for this Court to address whether Ms. Dates' Complaint meets the third *Berger* prong (lack of a plain and adequate remedy under the law), though it clearly does not. Mr. Wallace therefore respectfully requests this Court dismiss with prejudice Ms. Dates' Complaint against him.

**1. Ms. Dates failed to establish a clear legal right to "oath and bond" from Mr. Wallace.**

**A. A writ of mandamus cannot issue against a private attorney.**

This Court has consistently held that "mandamus will not lie to enforce a private right against a private person." *State ex rel. Longacre v. Penton Publishing Co.*, 77 Ohio St. 3d 266, 267-68, 673 N.E.2d 1297 (1997) (citing *State ex rel. Russell v. Duncan*, 64 Ohio St. 3d 538, 597 N.E.2d 142, 143 (1992); *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St. 2d 141, 228 N.E. 2d 631 (1967)). This includes this Court's prior determination that "no clear legal right to the relief" of mandamus exists against an attorney, as a matter of law, as an attorney is a purely private citizen, not a public official. *State ex rel. Huff v. Carson*, 3 Ohio St. 3d 22, 22, 445 N.E.2d 1104 (1983). Indeed, for this reason, the Court of Appeals in *State ex rel. Jackson v. Nau*, 7<sup>th</sup> Dist. Noble No. 03-NO-311, 2004-Ohio-564, ¶ 8, specifically held that mandamus could not lie to force an attorney to perform any particular act in a case. Rather, as to the mandamus claim against the attorney in *Nau*, the Court of Appeals held "as regards Attorney Gorman, it is established law that mandamus will not lie to enforce a private right against a private person." *Id.* (citing *State ex rel. Longacre*, 77 Ohio St. 3d at 266).

Similarly here, Ms. Dates improperly seeks a writ of mandamus compelling Mr. Wallace, an Ohio attorney, to take a specific action related to a previously pending case, namely, to present his “oath and bond” to her upon demand. *Complaint* at ¶¶ 21 & 40 & Exhibit A. Mr. Wallace is a private person, not a public official, however. *Id.* For this reason alone, Ms. Dates’ Complaint for Writ of Mandamus against Mr. Wallace is procedurally and substantively improper and must be dismissed with prejudice.

**B. Ms. Dates has no legal right to demand or receive “oath and bond” from Mr. Wallace.**

Under Ohio law it is clear that, “in order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for.” *State ex rel. Harris v. Rhodes*, 54 Ohio St. 2d 41, 374 N.E.2d 641 (1978). In her Complaint, Ms. Dates does not cite a *single* authority for her contention that she has a clear legal right to “oath and bond” from Mr. Wallace. Rather, the statutes and excerpts from the Code of Judicial Conduct to which Ms. Dates cites apply only to elected or appointed Ohio officials, including elected members of the Ohio judiciary, not to private attorneys such as Mr. Wallace. As such, as a matter of law, Ms. Dates has no legal right to a writ of mandamus against Mr. Wallace.

The Ohio Public Records Act (“OPRA”), to which Ms. Dates cites, also does not create any legal right for Ms. Dates to receive “oath and bond” from Mr. Wallace. Rather, the OPRA on its face applies only to “records kept by any public office.” *See* R.C. 149.43(A)(1). “Public office” is defined to include only “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” *See* R.C. 149.011(A). Mr. Wallace – a private citizen, and most certainly not a “public office” or “public official” – is simply not subject to the OPRA. To the extent Ms. Dates contends otherwise, such contention is without merit.

Simply put, Ms. Dates has *no* legal right, let alone a *clear* legal right, to demand or receive “oath and bond” from Mr. Wallace. Ms. Dates’ Complaint against Mr. Wallace must therefore be dismissed with prejudice.

**2. Ms. Dates failed to establish that Mr. Wallace is under a clear legal duty to present her with “oath and bond.”**

Under Ohio law, mandamus can only be utilized to require a person “to perform an act *which the law specifically enjoins* as a duty resulting from [the person’s] office.” *State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 3, 591 N.E.2d 1186 (1992)(emphasis added). As such, to grant a writ of mandamus, a court must find that “the respondent is under a clear legal duty to perform the requested act.” *Id.* Importantly, “a court in a mandamus proceeding cannot create the legal duty the relator would enforce through it; creation of the duty is the distinct function of the legislative branch of government.” *Id.* (citing *State ex rel. Stanley v. Cook*, 146 Ohio St. 348, 66 N.E.2d 207 (1946) and *Davis v. State ex rel. Pecsok*, 130 Ohio St. 411, 200 N.E. 181 (1936)). “A duty enforceable through a writ of mandamus must be created by the legislature. Further it must be a duty that the respondent is specifically joined to perform.” *Id.* “It is axiomatic that in mandamus proceedings, the creation of the legal duty that the relator seeks to enforce is the distinct function of the legislative branch of government, and courts are not authorized to create the legal duty.” *State ex rel. Voleck v. Powhatan Point*, 127 Ohio St. 3d 299, 302, 939 N.E.2d 819 (2010).

Here, Ms. Dates points to *no* statutory provision imposing upon a private attorney, like Mr. Wallace, a legal duty to present “oath and bond” to her (or any other person) upon demand, or under *any* other circumstance. The statutory authorities cited by Ms. Dates all relate to judges and other elected or appointed public officials, and impose no duties whatsoever on attorneys or other private citizens, such as Mr. Wallace. Specifically, with regard to Ms. Dates’ citations to

R.C. 3.23, this statute sets forth the oath of office that “each judge of a court of record” must take before assuming the bench. *See* R.C. 3.23. Similarly, R.C. 3.30 and 3.33 establish bond requirements only for certain persons “elected or appointed to an office.” *See* R.C. 3.30 and 3.33. Again, the OPRA only places a statutory duty to respond to a public records request on a public office or official, not on a private citizen. None of these statutes apply to or create any duty on the part of Mr. Wallace at all, let alone to Ms. Dates.

In sum, Mr. Wallace is under no legal duty to present Ms. Dates with “oath and bond.” Mr. Wallace is also under no legal duty to provide Ms. Dates with any documents pursuant to the OPRA or respond to any “public records request” from her.

### **III. CONCLUSION**

For the reasons set forth above, the Court should find that Ms. Dates has failed to make any factual allegations in her Complaint for Writ of Mandamus that could entitle her to mandamus against Mr. Wallace. Ms. Dates has *no* legal right to demand “oath and bond” from Mr. Wallace. Mr. Wallace has *no* clear legal duty to present Ms. Dates with “oath and bond,” either by direct request or pursuant to the OPRA. Ms. Dates is not entitled to a writ of mandamus against Mr. Wallace as a matter of long-held Ohio law. Mr. Wallace therefore respectfully requests the Court dismiss Ms. Dates’ Complaint against him with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,



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*Counsel for Respondent*

*David A. Wallace*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Dismiss of Respondent David A. Wallace has been served upon the following, via U.S. Mail, postage prepaid, this 6<sup>th</sup> day of March, 2015:

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*One of the Attorneys for  
Respondent David A. Wallace*