

IN THE SUPREME COURT OF OHIO

<b>Barbara Andersen, et al.,</b>	)	<b>CASE NO. 2015-0393</b>
	)	
<b>Relators,</b>	)	<b>RESPONDENT'S RESPONSE TO</b>
<b>vs.</b>	)	<b>RELATORS' MOTION TO</b>
	)	<b>PREVENT THE MISCARRIAGE</b>
	)	<b>OF JUSTICE</b>
<b>The City of Cleveland,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

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**RESPONDENT'S RESPONSE TO RELATORS' MOTION  
TO PREVENT THE MISCARRIAGE OF JUSTICE**

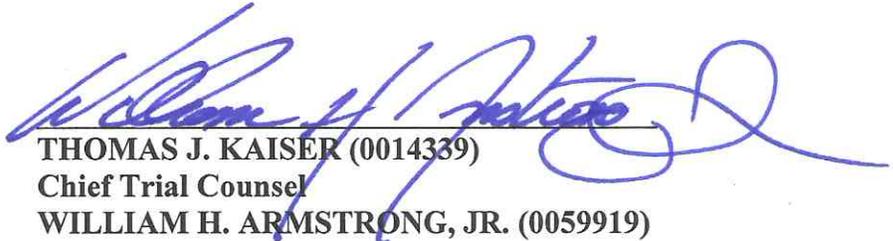
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The City of Cleveland, by and through counsel, responds to Relators' Motion to Prevent the Miscarriage of Justice and deny all Relators' claims for relief. As this Court held in its Decision, Relators' Original Action and Complaint lack subject-matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. The grounds for Respondent's Motion are more fully set forth in the attached Memorandum in Support, which is hereby incorporated by reference.

Respectfully submitted,

**BARBARA LANGHENRY (0038838)**  
**Director of Law**

By:



**THOMAS J. KAISER (0014339)**

**Chief Trial Counsel**

**WILLIAM H. ARMSTRONG, JR. (0059919)**

**Assistant Director of Law**

Room 106—City Hall

601 Lakeside Avenue E.

Cleveland, Ohio 44114-1077

(216) 664-3584

(216) 420-8291 Fax

[warmstrong@city.cleveland.oh.us](mailto:warmstrong@city.cleveland.oh.us)

*Counsel for Respondent*

*City of Cleveland*

**CERTIFICATE OF SERVICE**

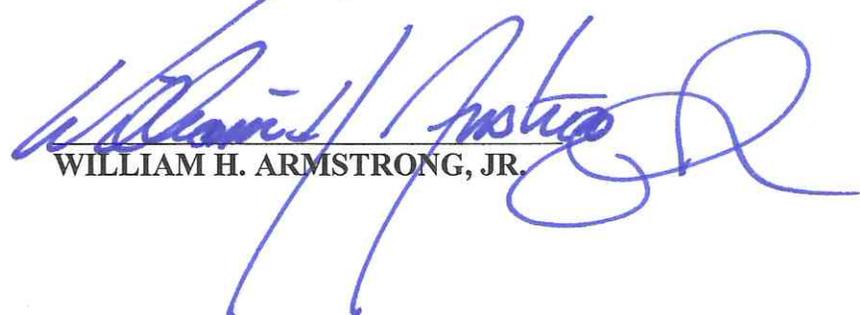
I certify that a true and accurate copy of Respondent's Response to Relators' Motion for Clarification of the Supreme Court of Ohio's Decision to Dismiss Relators' Original Action and Complaint was served via U.S. Mail, email at [mccarthy519@gmail.com](mailto:mccarthy519@gmail.com), and the Clerk of Court's e-filing system on February 29, 2016 to

Barbara Andersen  
3802 Bosworth Rd.  
Cleveland, Ohio 44111

Michael McCarthy  
3802 Bosworth Rd.  
Cleveland, Ohio 44111

*Relator (Pro se)*

*Relator (Pro se)*



**WILLIAM H. ARMSTRONG, JR.**

## MEMORANDUM IN SUPPORT

### I. STATEMENT OF THE CASE

On March 9, 2015, Relators Barbara Andersen and Michael McCarthy filed their Original Action with this Honorable Court. On May 4, 2015, Respondent the City of Cleveland filed its Motion to Dismiss in which it argued that Relators' Original Action and Complaint lack subject-matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. On June 24, 2015, this Court granted Respondent's Motion to Dismiss and dismissed Relators' case. 2015-Ohio-2341.

On September 28, 2015, Relators filed a Motion for Clarification, which was, in essence, a time-barred Motion for Reconsideration—the Relators' did not file a Motion for Reconsideration within the 10-day time limit. Respondents timely responded to the Motion for Clarification. While that Motion was pending, Relators filed a motion to amend the motion to substitute some photographs and a motion to strike Respondent's response to that motion. On December 2, 2015, this Court denied Relators' Motion for Clarification. 2015-Ohio-4947. This Court also denied Relators' other motions as moot. *Id.*

On February 19, 2016, Relators filed yet another Motion in this dismissed case. Specifically, Relators have now filed what they have titled a Motion to Prevent the Miscarriage of Justice in an attempt to ask this Court for the second time to reconsider its dismissal of the original action and complaint. As will be discussed below, and indeed has been discussed twice before, this Court does not have jurisdiction, however, to hear Relators' claims.

### II. LAW AND ARGUMENT

#### A. Relator's Complaint lacks subject-matter jurisdiction.

The filing of Relators' Motion to Prevent the Miscarriage of Justice, which is their second attempt to ask this Court to reconsider its decision, does not alter the fact that their Complaint lacks subject-matter jurisdiction. Consequently, this Court must overrule Relators' Motion to Prevent the Miscarriage of Justice and affirm the dismissal of this case.

Under Section 2(B)(1), Article IV of the Ohio Constitution, the Court has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 450, 2011-Ohio-4101, 953 N.E.2d 329. Neither the Rules of Civil Procedure nor statutes can expand the Supreme Court's original jurisdiction and require it to hear an action not authorized by the Ohio Constitution. *State ex rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 63 Ohio Op. 2d 199, 296 N.E.2d 544 (1973).

The original action did not fall into one of the explicitly stated categories in Article IV. Furthermore, the instant case does not qualify as a "cause for review." Thus, the Court was correct in dismissing it because it did not have original jurisdiction. See *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 133 Ohio St. 3d 561, 565, 2012-Ohio-4837, 979 N.E.2d 1193, (finding that the Court did not have original jurisdiction over claims for declaratory judgment; see also *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3, 640 N.E.2d 1136, (finding that the Court did not have original jurisdiction in prohibitory injunction). Consequently, this Court must overrule Relators' Motion to Prevent the Miscarriage of Justice and affirm the dismissal of this case.

**B. Relator's Original Action and Complaint is barred under the doctrine of res judicata.**

The filing of Relators' Motion to Prevent the Miscarriage of Justice, which is their second attempt to ask this Court to reconsider its decision, does not alter the fact that res judicata bars Relators' Original Action and Complaint through issue and claim preclusion. Therefore, this Court must overrule Relators' Motion for Clarification and affirm the dismissal of this case.

The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). See *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226, 228; see also *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 254 N.E.2d 10; *Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062 (1989); 46 American Jurisprudence 2d (1994) 780, Judgments, Section 516. "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction \* \* \* is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald*, 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67 (1943), paragraph one of the syllabus. The parties are co-owners of the home and therefore are in privity. Privity is also found through the two underlying suits. Furthermore, "[i]t has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit'." *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 978, 986 (1983) (quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388 (1986)) ("We also declared that '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'").

Through Relators' own admissions, many of the issues brought forth in the Original Action and Complaint are barred by res judicata. Issue preclusion bars each of the claims that

were already litigated. These barred claims include: resolution of the matters with the City of Cleveland, Municipal Housing Court and Eighth District Appeals Court, See Relators' Original Action and Complaint at pg. 1; issues regarding improper site grading, *Id.*; misrepresentations of the law, regulations and physical facts, *Id.* at 6; and willful ignorance and negligence of proper application of City codes, *Id.* at 8. All other issues, including but not limited to allegations of false prosecution and conviction, *Id.* at 0; the failure to dispatch a credible assessor, *Id.* at 9; impropriety of influence, *Id.* at 13; and due process considerations regarding a fair hearing, *Id.* at 30, are barred by claim preclusion, as they could have and should have been raised in the appropriate actions before the previous courts.

Relators' Original Action and Complaint requests a fair hearing and uniform enforcement and application of law and regulation in its ad damnum clause. See *Id.* at 30. These issues, as well as the underlying claims referenced above, were brought before the Eighth District in 2013. If, however, Relators had any disagreement with the decision of the Eighth District, their only recourse was through timely appeal to this Court prior to December 9, 2013. "To perfect an appeal or right [sic], the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed." S.Ct.Prac.R. 6.01 (A)(1). "The time period designated in this rule for filing a notice of appeal is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal\* \* \*." S.Ct.Prac.R. 6.01 (A)(3).

Furthermore, the Respondents did not file 2506 administrative appeals of the Board of Building Standards and Appeals decisions. Consequently, they did not exhaust their administrative remedies. A party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court. *Noernberg v. Brook Park*, 63

Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980), citing *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951). Therefore, all claims are barred by res judicata or are otherwise time-barred and this honorable Court is without jurisdiction to hear the claims.

**C. The Relators' Complaint failed to attach an affidavit specifying the details of the claim.**

The Relators' Motion to Prevent the Miscarriage of Justice is really the Relators' second attempt to ask this Court to reconsider its dismissal of this case. The Motion, however, does not alter the fact that their Original Action and Complaint fails to comply with Supreme Court Rule of Practice 12.02 (B)(1). Therefore this Court should overrule the Motion to Prevent the Miscarriage of Justice.

The Supreme Court Rules of Practice govern the procedure and form of documents in all original actions before the Court. See S.Ct.Prac.R. 12.01 (A)(2)(a). Therefore, any and all of the Court's Rules are binding on the parties to this original action. Under S.Ct.Prac.R. 12.02 (B)(1), "[a]ll complaints \* \* \* shall be supported by an affidavit specifying the details of the claim, and may be accompanied by a memorandum in support of the writ." (emphasis added).

The only case interpreting this rule is inapplicable to the instant case because in that case affidavits were filed with the complaint, *State ex rel. Commt. for Charter Amendment Petition v. Maple Hts.*, 140 Ohio St. 3d 334, 337, 2014-Ohio-4097, (reviewing whether the affidavits were made with personal knowledge). Ample case law exists interpreting the rule under its identical predecessor. Effective June 1, 1994, S.Ct.Prac.R. (X)(4)(B) was renumbered. The language in S.Ct.Prac.R. 12.02 (B) was retained in its entirety. The only change to the Section was its numbering. Failure to comply with S.Ct. Prac.R. X(4)(B), and through S.Ct.Prac.R. 12.02 (B) as renumbered, warrants dismissal of the original action. See *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 442, 2006-Ohio-5439, 857 N.E.2d 88. In fact, the Supreme Court has "routinely

dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge.” *Id* at 443 (citing *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050; *State ex rel. Tobin v. Hoppel*, 96 Ohio St.3d 1478, 2002-Ohio-4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324, 750 N.E.2d 167). In the instant case, no affidavit was filed at all. Consequently, this Court must overrule Relators’ Motion to Prevent the Miscarriage of Justice and affirm the dismissal of this case because Relators’ underlying Complaint did not contain the required affidavit.

**D. There is no provision in the Rules for the Relators’ Current Motion.**

The Relators filed their current Motion to Prevent the Miscarriage of Justice after this Court has twice decided that their original action and complaint cannot go forward. This Court granted the Respondent’s Motion to Dismiss and denied the Relators’ Motion for Clarification, which was, in essence, a time-barred Motion for Reconsideration. The Supreme Court Practice Rules do not specifically mention or permit a motion to prevent the miscarriage of justice. S.Ct.Prac.R. 18.02, however, does provide a party the opportunity to file a motion for reconsideration. As discussed above, the Relators did not file a motion for reconsideration within the required 10-day limit following this Court’s dismissal of their Original Action and Complaint. Rather, they later filed a Motion for Clarification, which like their current motion, is not contemplated or provided for in this Court’s Rules. Therefore, this Court must overrule the Relators’ Motion to Prevent the Miscarriage of Justice. This Court has definitively spoken twice by dismissing the Relators’ Original Action and Complaint and affirming that dismissal. The Relators should not be allowed to continue to file additional requests ad infinitum.

Moreover, almost all of the issues raised in the Motion to Prevent the Miscarriage of Justice are not new. In their Motion to Prevent the Miscarriage of Justice, the Relators claim that they have an easement regarding the neighboring party. Although they cite to a deed that they say is in their Complaint, a review of the Complaint does not show a deed. Furthermore, the Cuyahoga County Court of Appeals, in its 2013 decision held that there was no merit to the Relators's belief that they were entitled to excavate the swale based on an alleged right to an easement on the neighboring property because they did not present any evidence establishing the easement and there was no documentation in the record to support the existence of such a property right. *City of Cleveland v. Barbara Anderson*, (Ohio App. 8<sup>th</sup> Dist.) 2013-Ohio-4710, ¶14. The Relators' did not appeal this decision. Consequently, their claims regarding the existence of an easement are barred by res judicata.

The Relators argue that the Respondents did not treat their property and the neighboring property uniformly. The Cuyahoga County Court of Appeals also addressed this issue in the 2013 case. The appellate court stated that a uniform assessment under R.C. 1515.01(H)(1) was not necessary since that section relates to the powers and responsibilities of Ohio's Soil and Water Conservation Commissions. *Id* at ¶11. The appellate court further noted that the Relators argument that the excavation of the swale was necessary to remedy the drainage of the neighboring property was not supported by evidence and never an issue before the trial court. *Id.* at ¶12. Moreover, the appellate court held that the condition of the neighboring property did not negate the Relators' duty to comply with the relevant provisions of the Cleveland Codified Ordinances. *Id.* Again, the Relators did not appeal this decision. Thus, the appellate court's findings are res judicata.

The appellate court also found no merit to the Relators' contention that the Reasonable-Use Rule as developed in *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.* (1980), 62 Ohio St.3d 55, 402 N.E.2d 1196 rendered her conduct harmless. *City of Cleveland v. Barbara Anderson*, (Ohio App. 8<sup>th</sup> Dist.) 2013-Ohio-4710, ¶13. The appellate court held that the Reasonable-Use Doctrine was not intended to be used as a defense to criminal charges. *Id.* Again, the Relator's did not appeal the 2013 decision. Consequently, these arguments are also barred by res judicata.

The Relators appear to raise a new issue regarding the strict liability of criminal codes. Unfortunately, the Relators argument regarding this issue is not clear. They appear to argue that the City is strictly liable to enforce its Codes against them. But, the issue of strict liability in the City's enforcement of its Codes is really directed toward the liability of the Relators and other people whose actions violate those codes. Therefore, the Relators' arguments regarding strict liability is not relevant or correct. Furthermore, the Relators' could have raised these arguments earlier during the trial or appellate levels of the case. Because they did not do so, they are estopped by asserting them now by the doctrine of res judicata. Consequently, this Court must overrule the Relators' Motion to Prevent the Miscarriage of Justice and affirm its previous decisions dismissing their Original Action and Complaint.

### III. CONCLUSION

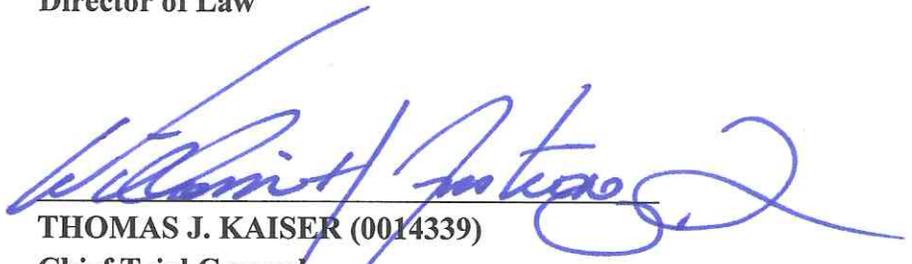
Relators' Motion to Prevent the Miscarriage of Justice, for which there is no provision in this Court's Rules, is yet another attempt to ask this Court to reconsider its decision dismissing their Original Action and Complaint. This Court has already affirmed that dismissal when it denied the Relators' Motion for Clarification. Moreover, this Court does not have jurisdiction to hear Relators' claims. Additionally, Res judicata bars Relators from asserting their claims

because they could have brought them in the preceding cases. Finally, Relators' Original Action and Complaint does not meet this Court's Rules of Practice by not attaching an affidavit. Consequently, this Court must overrule Relators' Motion to Prevent the Miscarriage of Justice and affirm the dismissal of this case.

Respectfully submitted,

**BARBARA A. LANGHENRY (0038838)**  
**Director of Law**

By:



**THOMAS J. KAISER (0014339)**

**Chief Trial Counsel**

**WILLIAM H. ARMSTRONG, JR. (0059919)**

**Assistant Director of Law**

Room 106—City Hall

601 Lakeside Avenue E.

Cleveland, Ohio 44114-1077

(216) 664-3584

(216) 420-8291 Fax

warmstrong@city.cleveland.oh.us

*Counsel for Respondent*

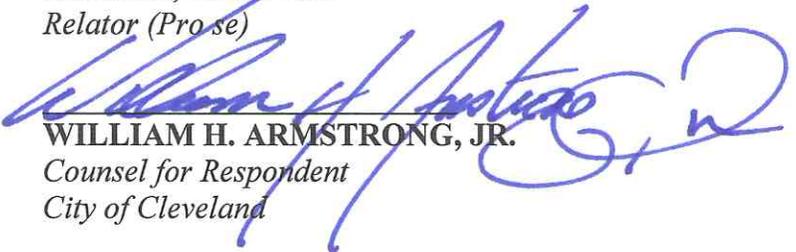
*City of Cleveland*

**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of Respondent's Response to Relators' Motion for Clarification of the Supreme Court of Ohio's Decision to Dismiss Relators' Original Action and Complaint was served via U.S. Mail, email at mccarthy519@gmail.com, and the Clerk of Court's e-filing system on February 29, 2016 to:

Barbara Andersen  
3802 Bosworth Rd.  
Cleveland, Ohio 44111  
*Relator (Pro se)*

Michael McCarthy  
3802 Bosworth Rd.  
Cleveland, Ohio 44111  
*Relator (Pro se)*

  
**WILLIAM H. ARMSTRONG, JR.**  
*Counsel for Respondent  
City of Cleveland*