

[Cite as *State ex rel. S.P. v. Cleveland*, 2018-Ohio-2063.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105795

**STATE OF OHIO, EX REL.
S.P., ET AL.**

RELATORS

vs.

THE CITY OF CLEVELAND, ET AL.

RESPONDENTS

JUDGMENT:
WRIT GRANTED IN PART AND DENIED IN PART

Writ of Mandamus
Motion No. 508923
Order No. 517146

RELEASE DATE: May 23, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} The relators, S.P., M.P., and N.P. (the “parents” of S.P.), have filed a complaint for a writ of mandamus. The relators allege that the respondents, that consist of the city of Cleveland, Mayor Frank G. Jackson, and Merle Gordon, director of the Cleveland Department of Public Health, have violated duties and procedures regarding lead inspection, abatement, and enforcement procedures imposed by R.C. Chapter 3742 and Ohio Adm.Code 3701-30-01, et seq.

The respondents have filed a motion for summary judgment.¹ We grant the respondents’ motion for summary judgment in part and deny the motion for summary judgment in part.

¹On March 26, 2018, this court converted the respondents’ Civ.R. 12(B)(6) motion to dismiss into a Civ.R. 56(C) motion for summary judgment. *See* Civ.R. 12(B).

I. Facts

{¶2} The facts that are pertinent to this original action for a writ of mandamus are gleaned from the respondents' motion for summary judgment, the briefs, the affidavits, and the exhibits filed by the parties.

{¶3} In October 2016, S.P. was tested for lead poisoning in blood levels at the age of 18 months, and found to have elevated lead blood levels. On November 11, 2016, S.P.'s elevated blood levels triggered a lead level investigation of the residence, a rental property, where S.P. resided. The lead level investigation test results of S.P. were received by the respondents on November 23, 2016, and a lead risk assessment report was completed on December 7, 2016.

{¶4} On March 14, 2017, the respondents sent a lead hazard control order, by certified mail, to the owner of the residence where S.P. had resided prior to the determination of her elevated lead blood levels. On April 24, 2017, the United States Post Office returned the March 14, 2017 lead hazard control order to the respondents as undelivered. On March 18, 2017, the relators filed a complaint for a writ of mandamus. On April 24, 2017, the respondents resent the lead hazard control order, by regular mail, to the owner of the residence where S.P. had resided prior to the determination of elevated lead blood levels. The owner received the lead hazard control order on April 29, 2017.

{¶5} On June 1, 2017, S.P. and her parents vacated the lead contaminated residence. On October 25, 2017, and November 6, 2017, the owner of the lead contaminated residence requested two extensions of time in which to comply with the lead hazard control order and effect lead abatement. On January 29, 2018, the respondents determined that the owner of the lead contaminated residence had failed to effect lead abatement that resulted in the issuance of a

notice of noncompliance, an order to vacate the lead contaminated residence, and the placement of lead warning hazard signs at the front and back of the residence.

{¶6} Pursuant to an order issued by this court on January 9, 2018, the parties were ordered to certify the status of the original action for a writ of mandamus. On February 2, 2018, the parties filed their respective status certifications. On March 5, 2018, the relators filed a supplemental certification of the status of their complaint for a writ of mandamus.

II. Standards for Issuing a Writ of Mandamus

{¶7} In order for this court to issue a writ of mandamus, the relators are required to establish: (1) the relators possess a clear legal right to the requested relief, (2) the respondents possess a clear duty to perform the requested relief, and (3) there must exist no other adequate remedy in the ordinary course of the law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, if the relators possess or possessed an adequate remedy, regardless of whether it was used, relief in mandamus is precluded. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 676 N.E.2d 108 (1997).

{¶8} Moreover, mandamus is an extraordinary remedy that is to be exercised with great caution and issued only when the right and duty is absolutely clear. Mandamus will not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (1993); *State ex rel. Dayton-Oakwood Press v. Dissinger*, 32 Ohio Law Abs. 308, 1940 Ohio App. LEXIS 1173 (1940). The Supreme Court of Ohio has also established that the facts submitted in support of the complaint for mandamus and the proof produced must be plain, clear, and convincing before

a court is justified in using the “strong arm of the law” and granting a writ of mandamus. *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967).

{¶9} In addition to the aforesaid basic requirements that must be established by the relators, the following principles of law guide this court’s determination as to whether a writ of mandamus should be issued on behalf of the relators:

A) Mandamus lies only to enforce the performance of a ministerial duty or act. A ministerial duty or act has been defined as one that a person performs in a given state of facts in a prescribed manner in the obedience to the mandate of legal authority, without regard to, or the exercise of, his or her own judgment upon the propriety of the act being done. The duty to be enforced must be specific and definite, clear and concise, must be specifically enjoined by law, must be incident to the office, trust, or station that the respondent holds, and it may not be one of a general character that is left to the respondent’s discretion. *State ex rel. Neal, Jr. v. Moyer*, 3d Dist. Allen No. 1-84-44, 1985 Ohio App. LEXIS 5380 (Jan. 9, 1985). The object of a writ of mandamus is to compel an officer to do a specific act required by law, and not to compel the general enforcement of the mandate of the law.

[A]nd while a court might well hold that the general course of conduct contended for by the relator, and which he seeks to have the plaintiff commanded to follow, is the course of conduct which the law requires, and, therefore, the course which the [respondent] is in duty bound to pursue, yet a court will not employ the extraordinary writ of mandamus to supplant every other form of remedy, for if it be employed to compel the observance of law generally, the court would thereby constitute itself the public conscience, and all others would become its agents through which the court would, within the law, exercise its will. The function of a court is to render judgment in actual controversies between adverse litigants, to command or restrain specific acts affecting existing rights of parties before the court, as distinguished from declaratory judgments affecting possible rights and potential controversies.

State ex rel. Cullen v. Toledo, 105 Ohio St. 545, 138 N.E. 58 (1922). See also *State ex rel. Keyser v. Commrs. of Wayne Cty.*, 57 Ohio St. 86, 48 N.E. 136 (1897). B) If the allegation of a complaint for a writ of mandamus demonstrates that the real object sought is a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for lack of jurisdiction. *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 2007-Ohio-5699, 876 N.E.2d 953; *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 716 N.E.2d 704 (1999).

C) Mandamus will not issue to require a public officer to prospectively observe the law. *State ex rel. Home Care Pharmacy, Inc. v. Creasy*, 67 Ohio St.2d 342, 423 N.E.2d 482 (1981); *State ex rel. Kay v. Fuerst*, 156 Ohio St. 188, 101 N.E. 730 (1951).

D) Finally, this court possesses the *sound discretion* to deny or grant a writ of mandamus. In *Pressley* at paragraph seven of the syllabus, the Supreme Court of Ohio held that “in considering the allowance or denial of the writ of mandamus on the merits, [the court] will exercise sound, legal and judicial discretion based upon all the facts and circumstances in the individual case and the justice to be done.”

III. Relators’ Claims for Mandamus

{¶10} The relators have presented six claims that form the basis of their request for a writ of mandamus. Specifically, the relators argue that the respondents possess the duty to fulfill each of the following six claims:

- 1) Pursuant to Ohio Adm.Code 3701-30-07, orders respondents to send a copy of the complete lead investigation and/or lead risk assessment to the parent or guardian of any child whose elevated blood lead levels triggered the investigation within one week of its completion.

2) Pursuant to Ohio Adm.Code 3701-30-08, orders respondents to serve written notice via regular mail or hand delivery on the owner of any residential unit which is the subject of a lead risk assessment prior to or within three calendar days that the City will conduct the lead risk assessment.

3) Pursuant to Ohio Adm.Code 3701-30-08, orders respondents to send a copy of the lead risk assessment by certified mail return receipt requested or hand delivered to the owner of any residential unit upon which a lead risk assessment was conducted within fourteen calendar days of receipt of laboratory tests.

4) Orders respondents to determine within a reasonable time, not to exceed one week, whether a lead hazard control order must issue due to the results of all lead risk assessments conducted.

5) Pursuant to R.C. 3742.40, orders respondents to issue an order prohibiting all owners and managers from permitting the unit to be used as a residential unit and to placard any unit that has not been remediated in compliance with the issuance of lead hazard control order.

6) Orders respondents to comply with the other rules and regulations in Chapter 3742 of the Ohio Revised Code and the associated sections of the Ohio Administrative Code.

IV. Analysis

{¶11} Based upon the motion for summary judgment filed by the respondents, the brief in opposition to the motion for summary judgment, the supporting affidavits, and the attached exhibits, we issue a writ of mandamus in part. As previously stated, this court in considering the grant or denial of the writ of mandamus on the merits, will exercise sound, legal, and judicial discretion based upon all of the facts and circumstances in this case and the justice to be done.

{¶12} Applied to the facts and circumstances of this action, are the following principles: 1) mandamus will not be employed to enforce the general mandate of the law; 2) mandamus will not be employed to require a public entity or officer to follow the law generally in the conduct of his official duties; 3) mandamus will not issue to compel a public entity or officer to prospectively observe the law and perform a specific duty; 4) mandamus will not be employed as a substitute for one seeking declaratory judgment and prohibitory injunction; 5) mandamus will

not be employed to order a vain act; and 6) mandamus will not be employed where the act requested is moot. The relators have raised six claims in support of their complaint for a writ of mandamus. We find, for the following reasons, that mandamus is granted in part and denied in part with regard to the relators' six claims.

A. Copy of Completed Lead Investigation/Lead Assessment

{¶13} Pursuant to Ohio Adm.Code 3701-3-07, the relators seek an order that requires the respondents to send a copy of the complete lead investigation and/or lead risk assessment to the parent or guardian of any child whose elevated blood lead levels triggered the investigation.

{¶14} **Granted in part and denied in part:** Ohio Adm.Code 3701-30-07(E) provides that a copy of the complete public health lead investigation report, including all public health lead risk assessment information obtained pursuant to the public health lead investigation, shall be provided to the parent or guardian of the child that has an elevated blood level. The record before this court demonstrates that the respondents have not provided the parents of S.P. with a copy of the complete lead investigation and/or lead risk assessment. The respondents are ordered to provide the parents of S.P., within seven days of the date of this judgment, with a complete copy of the lead investigation report and the lead risk assessment report. However, to the extent that the relators seek mandamus to compel the respondents to generally follow the law, by providing the parent or guardian of any child whose elevated lead blood levels triggers a lead investigation with a complete lead investigation report and/or lead risk assessment, we decline to issue a writ of mandamus. A writ of mandamus may not be employed to compel the respondents to generally follow the law in the conduct of duties and does not lie to compel the respondents to prospectively observe the law.

B. Serve Written Notice of Need for Lead Risk Assessment upon Owner

{¶15} Pursuant to Ohio Adm.Code 3701-30-08, the relators seek an order that requires the respondents to serve written notice via regular mail or hand delivery on the owner of any residential unit that is the subject of a lead risk assessment prior to or within three calendar days that the City will conduct the lead risk assessment.

{¶16} **Denied:** Written notice of elevated lead levels have already been provided or delivered to the owner of the residence where S.P. previously resided. In addition, mandamus may not be employed to compel the respondents to generally follow the law in the conduct of duties and does not lie to compel the respondents to prospectively observe the law.

C. Serve Copy of Lead Risk Assessment Report on Owner

{¶17} Pursuant to Ohio Adm.Code 3701-30-08, the relators seek an order that requires the respondents to send a copy of the lead risk assessment by certified mail return receipt requested or hand deliver to the owner of any residential unit upon which a lead risk assessment was conducted within fourteen calendar days of receipt of laboratory tests.

{¶18} **Denied:** A copy of the lead risk assessment has already been provided or delivered to the owner of the residence in which S.P. previously resided. Mandamus may not be employed to compel the respondents to generally follow the law in the conduct of duties and does not lie to compel the respondents to prospectively observe the law.

D. Period of Time for Respondents to Issue Lead Hazard Control Order

{¶19} The relators seek an order that requires the respondents to determine within a reasonable time, not to exceed one week, whether a lead hazard control order must issue after completion of the lead risk assessment.

{¶20} **Denied:** The relators seek an order that requires the respondents, within one week after completion of a lead assessment, to issue a lead control order. In essence, the relators seek

judgment from this court to “define” the period of time to issue lead control order, which is not defined in Ohio Adm.Code 3701-30-09 or R.C. 3742.37. The request by the relators to define the period of time in which to issue a lead control order constitutes a declaratory judgment that is not permissible in mandamus.

E. Post Lead Hazard Warnings at Lead Contaminated Properties

{¶21} Pursuant to R.C. 3742.40, the relators seek an order that requires the respondents to issue an order prohibiting all owners and managers from permitting the unit to be used as a residential unit and to placard any unit that has not been remediated in compliance with the issuance of a lead hazard control order.

{¶22} **Granted:** Pursuant to R.C. 3742.40 and Ohio Adm.Code 3701-30-11, if the owner or manager of a residential unit fails or refuses to comply with a lead hazard control order issued under R.C. 3742.37, the respondents are required to post lead warning hazard signs at the lead contaminated residential property alerting the general public of the existence of a lead hazard. The lead warning hazard signs must include a declaration that the residential unit is unsafe for human occupation, especially for children under the age of six and pregnant women. The respondents must also ensure that any lead warning hazard signs remain posted at the lead contaminated residential property until the residential property has been remediated of the lead hazard and has passed a clearance examination. Thus, the respondents are required to place lead warning hazard signs that fully comply with R.C. 3742.40, within 30 days of the date of this judgment, at **ALL** residences that have been determined to contain a lead hazard, as of the date of this judgment, and have not been currently remediated and have not passed a lead clearance examination. However, mandamus may not be employed to compel the respondents to generally follow the law in the conduct of duties and does not lie to compel the respondents to

prospectively observe the law. Thus, mandamus will issue only with regard to the residences that have currently been declared to contain a lead hazard, and not those residences that may in the future be found to contain lead hazards.

F. Future Compliance with R.C. Chapter 3742 and Ohio Adm. Code 3701-30-01, et seq.

{¶23} The relators request an order that requires the respondents to fully comply with the other rules and regulations contained in Chapter 3742 of the Ohio Revised Code and the associated sections of the Ohio Administrative Code.

{¶24} **Denied:** Mandamus may not be employed to compel the respondents to generally follow the law, contained within R.C. Chapter 3742 and Ohio Adm.Code 3701-30-01, et seq., in the conduct of duties and does not lie to compel the respondents to prospectively observe the law.

V. Conclusion

{¶25} In essence, mandamus may only be employed to compel the performance of a present existing duty as to which there is a present default. Mandamus will not issue to require a vain act. Mandamus will not issue to force prospective relief nor will mandamus lie to remedy the anticipated nonperformance of a duty. In addition, other facts taken into consideration by this court, including the relators' rights, the equity and justice of denying a writ of mandamus, public policy, the public's interest, and whether the performance of the requested acts would give the relators effective relief, weigh heavily against the complete issuance of a writ of mandamus as sought by the relators. Thus, this court, in the exercise of its discretion, grants a writ of mandamus in part and declines to issue a writ of mandamus, in part, on behalf of the relators.

{¶26} Accordingly, this court grants the respondents' motion for summary judgment in part and denies the motion for summary judgment in part. Respondents are ordered to: 1) pursuant to Ohio Adm.Code 3701-30-07, provide S.P.'s parents with a complete lead

investigation report and a lead risk assessment report within seven days of the date of this entry; and 2) pursuant to R.C. 3742.40 and Ohio Adm.Code 3701-30-11, place lead warning hazard signs, within 30 days of the date of this judgment, on any home, apartment, or real properties that have already been determined to contain a lead hazard as of the date of this judgment and have not been remediated as required by a lead hazard control order. Parties to bear own costs. The court directs the clerk of courts to serve all parties with notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶27} Writ granted in part and denied in part.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR