

[Cite as *State ex rel. Brown v. Mohr*, 2012-Ohio-821.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Frank C. Brown, Jr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1159
	:	
[Gary C. Mohr], in his official capacity as	:	(REGULAR CALENDAR)
Director of the Ohio Department of	:	
Rehabilitation and Correction et al.,	:	
	:	
Respondents.	:	
	:	

---

D E C I S I O N

Rendered on March 1, 2012

---

*Frank C. Brown, Jr., pro se.*

*Michael DeWine, Attorney General, and Jason Fuller, for respondents.*

---

IN MANDAMUS

BROWN, P.J.

{¶1} Relator, Frank C. Brown, Jr., an inmate of the London Correctional Institution, has filed this original action requesting that this court issue a writ of mandamus against respondents, Gary C. Mohr, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC"), and Steven Young, ODRC legal counsel. The action is brought pursuant to the Public Records Act, R.C. 149.43.

{¶2} This matter was referred to a magistrate of this court, pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended

that this court grant respondents' motion for summary judgment and deny relator's motion for summary judgment. No objections have been filed to that decision.

{¶3} As there have been no objections filed to the magistrate's decision, and it contains no error of law or other defect on its face, based on an independent review of the file, this court adopts the magistrate's decision. Respondents' motion for summary judgment is granted, and relator's motion for summary judgment is denied.

*Respondents' motion for summary judgment granted.*

BRYANT and CONNOR, JJ., concur.

---

**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

State of Ohio ex rel.	:	
Frank C. Brown, Jr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-1159
	:	
[Gary C. Mohr], in his official capacity as	:	(REGULAR CALENDAR)
Director of the Ohio Department of	:	
Rehabilitation and Correction et al.,	:	
	:	
Respondents.	:	
	:	

---

**MAGISTRATE'S DECISION**

**Rendered on October 24, 2011**

---

*Frank C. Brown, Jr., pro se.*

*Michael DeWine, Attorney General, and Jason Fuller, for respondents.*

---

**IN MANDAMUS  
ON MOTIONS FOR SUMMARY JUDGMENT**

{¶4} In this original action, relator, Frank C. Brown, Jr., an inmate of the London Correctional Institution ("LCI"), requests that a writ of mandamus issue against respondents Gary C. Mohr, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC") and Steven Young, the ODRC legal counsel. The action is brought pursuant to the Public Records Act, R.C. 149.43.

**Findings of Fact:**

{¶5} 1. On December 16, 2010, relator filed this mandamus action against respondents.

{¶6} 2. Relator has not deposited with the clerk of this court the sum of \$100 as security for the payment of costs. See Loc.R. 12(B).

{¶7} 3. With his complaint, relator filed a document purporting to be the statement of the LCI institutional cashier, dated November 10, 2010, indicating the monthly balances in his inmate account beginning June 16, 2010. The document also provides an affidavit of indigency executed by relator on December 2, 2010.

{¶8} 4. With his complaint, relator also filed a document purporting to be an R.C. 2969.25(A) affidavit. The document is nine pages in length. Relator also executed this affidavit on December 2, 2010.

{¶9} 5. On January 19, 2011, respondents answered the complaint.

{¶10} 6. On February 15, 2011, relator moved for summary judgment.

{¶11} 7. On February 22, 2011, the magistrate issued an order setting relator's summary judgment motion for submission to the magistrate on March 14, 2011.

{¶12} 8. On March 2, 2011, respondents moved for an extension of time to respond to relator's motion for summary judgment.

{¶13} 9. On March 3, 2011, the magistrate granted respondents' March 2, 2011 motion to the extent that the non-oral hearing date was moved to April 1, 2011. The magistrate also stated that respondents may file their own motion for summary judgment no later than April 1, 2011.

{¶14} 10. On April 1, 2011, respondents filed their memorandum contra to relator's motion for summary judgment. On that date, respondents also filed their own motion for summary judgment.

{¶15} 11. In support of summary judgment, respondents submitted the affidavit of Jerri Fosnaught executed April 1, 2011. The Fosnaught affidavit avers:

[One] I have personal knowledge of the facts in this declaration. I am competent to testify about these facts.

[Two] I am employed by the Office of Ohio Attorney General Michael DeWine, in the Criminal Justice Section. My position is Associate Assistant Attorney General. My duties,

in part, include defending the State of Ohio and its agencies and employees in federal habeas corpus actions.

[Three] I have acted in that capacity in a federal habeas corpus action brought by Frank C. Brown, Jr.—*Brown v. Timmerman-Cooper* (2010), N.D. Ohio No. 3:10-cv-1941. Mr. Brown filed that petition on September 1, 2010. The document attached as Exhibit A is a true and accurate copy of Mr. Brown's petition, as it is published on PACER.

{¶16} 12. Submitted with the Fosnaught affidavit is a copy of relator's petition for a writ of habeas corpus filed in the United States District Court, Northern District, Eastern Division on September 1, 2010. The petition is assigned case No. 3:10CV01941.

{¶17} 13. On April 6, 2011, the magistrate issued an order setting respondents' motion for summary judgment for submission to the magistrate on April 25, 2011. The magistrate also sua sponte moved the non-oral hearing date for relator's motion for summary judgment to April 25, 2011.

{¶18} 14. On April 27, 2011, respondents filed a document captioned "Reply of Respondents in Support of their Motion for Summary Judgment." Attached to the above-described document as an exhibit is a document prepared by relator captioned "Relator's Motion to Amend R.C. 2969.25 Affidavit and Motion to Deny the Motion of Respondent for Summary Judgment." Because the document prepared by relator had been served on respondents but had not been filed with this court as required by Civ.R. 5(D), on June 2, 2011, the magistrate issued an order instructing relator to file two legible copies of the document no later than June 10, 2011.

{¶19} 15. On June 9, 2011, apparently pursuant to the magistrate's order of June 2, 2011, relator filed copies of the document captioned "Relator's Motion to Amend R.C. 2969.25 Affidavit and Motion to Deny the Motion of Respondent for Summary Judgment." (June 9, 2011 motion.)

{¶20} 16. Relator's June 9, 2011 motion states: "Relator now amends his 2969.25(A) affidavit, which he inadvertently did not update." Attached to relator's document is a one-page document that appears to be the last page of an affidavit executed by relator on April 15, 2011. This one-page document provides in part:

PETITION UNDER 28 U.S.C.A. 2254 FOR WRIT OF HABEAS CORPUS

Petition to the U.S.D.C., N.D. of Ohio, Eastern Division, in Case No. 2002-CR-00197 for Habeas Corpus relief from unlawful incarceration in Ohio. Frank C Brown, Jr., v. Deb Timmerman-Cooper, Warden.  
Case No. 3:10-cv-01941.  
Case pending.

Conclusions of Law:

{¶21} It is the magistrate's decision that this court grant respondents' motion for summary judgment. It is further the magistrate's decision that this court deny relator's motion for summary judgment.

{¶22} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-40; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶23} R.C. 2969.25 states:

(A) At the time that an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit that contains a description of each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court. The affidavit shall include all of the following for each of those civil actions or appeals:

- (1) A brief description of the nature of the civil action or appeal;
- (2) The case name, case number, and the court in which the civil action or appeal was brought;
- (3) The name of each party to the civil action or appeal;

(4) The outcome of the civil action or appeal, including whether the court dismissed the civil action or appeal as frivolous or malicious under state or federal law or rule of court, whether the court made an award against the inmate or the inmate's counsel of record for frivolous conduct under section 2323.51 of the Revised Code, another statute, or a rule of court, and, if the court so dismissed the action or appeal or made an award of that nature, the date of the final order affirming the dismissal or award.

{¶24} It is largely undisputed that, on the date relator filed the instant action, i.e., December 16, 2010, he filed an incomplete R.C. 2969.25(A) affidavit that failed to describe the petition for a writ of habeas corpus that he had filed on September 1, 2010 in the United States District Court.

{¶25} Moreover, as the case law indicates, not only is satisfaction of the R.C. 2969.25(A) filing requirement mandatory for the inmate, he cannot later amend the affidavit that is deficient as of the filing of the action.

{¶26} In *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, an inmate, Carlos J. Fuqua, filed in the Allen County Court of Appeals a petition for a writ of habeas corpus. He requested leave to proceed in forma pauperis but he did not file the affidavit required by R.C. 2969.25(A) describing each civil action or appeal of a civil action that he had filed in the previous five years in any state or federal court.

{¶27} Fuqua's prison warden, Jesse J. Williams, moved to dismiss the petition.

{¶28} Fuqua requested leave in the court of appeals to amend his petition with the affidavit required by R.C. 2969.25(A).

{¶29} The court of appeals dismissed the petition for habeas corpus and Fuqua appealed as of right to the Supreme Court of Ohio.

{¶30} The Supreme Court of Ohio, in *Fuqua*, at ¶9, states:

\* \* \* Fuqua's belated attempt to file the required affidavit does not excuse his non-compliance. See R.C. 2969.25(A), which requires that the affidavit be filed "[a]t the time that an inmate commences a civil action or appeal against a government entity or employee." (Emphasis added.)

{¶31} In *Hawkins v. S. Ohio Correctional Facility*, 102 Ohio St.3d 299, 2004-Ohio-2893, an inmate, Jomo Hawkins, petitioned the Scioto County Court of Appeals for



**NOTICE TO THE PARTIES**

**Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).**