

entry that denied relator's motion for new trial, thereby rendering relator's complaint for writ of procedendo moot. No objections have been filed to the magistrate's decision.

{¶ 3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts that decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's recommendation, we hereby grant respondent's motion for summary judgment and deny relator's request for a writ of procedendo.

*Motion for summary judgment granted;
writ of procedendo denied.*

TYACK and KLATT, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Javier H. Armengau,	:	
	:	
Relator,	:	
	:	
v.	:	No. 16AP-223
	:	
Judge Jennifer A. French,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	

MAGISTRATE'S DECISION

Rendered on May 25, 2016

Javier H. Armengau, pro se.

Ron O'Brien, Prosecuting Attorney, and Scott J. Gaugler, for respondent.

**IN PROCEDENDO
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

{¶ 4} In this original action, relator, Javier H. Armengau, an inmate of the Allen Oakwood Correctional Institution ("AOCI"), requests that a writ of procedendo issue against respondent, the Honorable Jennifer A. French, a judge of the Franklin County Court of Common Pleas. Relator requests that the writ order respondent to rule on his Crim.R. 33(B) motion for new trial filed in the common pleas court on August 7, 2015 in case No. 13CR-2217.

Findings of Fact:

{¶ 5} 1. On March 24, 2016, relator, an AOCI inmate, filed this original action against respondent. Relator requests that this court issue a writ of procedendo ordering

respondent to rule on his Crim.R. 33(B) motion for new trial filed in the common pleas court on August 7, 2015 in case No. 13CR-2217.

{¶ 6} 2. On April 21, 2016, respondent moved for summary judgment. In support, respondent submitted a certified copy of her decision and entry filed April 5, 2016 in the common pleas court in case No. 13CR-2217. The decision and entry denies relator's motion for new trial filed on August 7, 2015.

{¶ 7} 3. On April 22, 2016, the magistrate issued notice that respondent's motion for summary judgment is set for submission to the magistrate on May 16, 2016.

{¶ 8} 4. On May 5, 2016, relator objected to the magistrate's order (notice) of April 22, 2016. However, in his objection, relator asserts that, but for the filing of this original action, his motion for new trial would still be pending. Thus, relator admits that respondent has ruled on his motion which is the relief he seeks in this action.

Conclusions of Law:

{¶ 9} It is the magistrate's decision that this court grant respondent's motion for summary judgment.

{¶ 10} In this original action, relator seeks a writ of procedendo ordering respondent to rule on his August 7, 2015 motion for new trial filed in the common pleas court. Subsequent to the filing of this action, respondent has ruled on relator's motion.

{¶ 11} Procedendo will not compel the performance of a duty that has already been performed. *State ex rel. Walker v. Koch*, 98 Ohio St.3d 295, 2003-Ohio-856, ¶ 14.

{¶ 12} 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*, 67 Ohio St.3d 337, 339-40 (1993); *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 13} Clearly, respondent is entitled to judgment as a matter of law.

{¶ 14} Accordingly, it is the magistrate's decision that this court grant respondent's motion for summary judgment.

/S/ MAGISTRATE
KENNETH W. MACKE

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).