

[Cite as *State ex rel. Automated Solutions Corp. v. Friedland*, 2009-Ohio-3741.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 92583**

---

**STATE OF OHIO, EX REL.,  
AUTOMATED SOLUTIONS CORPORATION**

PLAINTIFF-RELATOR

VS.

**JUDGE CAROLYN B. FRIEDLAND**

DEFENDANT-RESPONDENT

---

**JUDGMENT:  
COMPLAINT DISMISSED**

---

WRIT OF MANDAMUS AND PROCEDENDO  
MOTION NOS. 419257, 419251 and 420120  
ORDER NO. 424386

**RELEASE DATE:** July 29, 2009

**ATTORNEYS FOR PLAINTIFF-RELATOR**

Drew A. Carson  
David A. Kunselman  
Miller Goler Faeges LLP  
100 Erieview Plaza, 27th Floor  
1301 East Ninth Street  
Cleveland, Ohio 44114-1835

**ATTORNEYS FOR DEFENDANT-RESPONDENT**

William D. Mason  
Cuyahoga County Prosecutor

BY: Charles E. Hannan, Jr.  
Assistant County Prosecutor  
8th Floor Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113

SEAN C. GALLAGHER, P.J.:

{¶ 1} Relator, Automated Solutions Corporation (“ASC”), had been a party to a contract with Paragon Data Systems, Inc. (“Paragon”) for the development and sale of newspaper delivery management systems. Paragon terminated the contract and ASC brought an action in declaratory judgment, *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, Cuyahoga County Court of Common Pleas Case No. CV-511012. The court of common pleas entered judgment for ASC. This court affirmed in *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 167 Ohio App.3d 685, 2006-Ohio-3492, 856 N.E.2d 1008, and the Supreme Court did not accept the

appeal for review, *Automated Solutions Corp. v Paragon Data Sys., Inc.*, 112 Ohio St.3d 1407, 2006-Ohio-6447, 858 N.E.2d 818. ASC and Paragon are also parties to an action for copyright infringement and tortious interference with business interests in *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, N.D. Ohio No. 1:05-CV-1519 (“the Federal Case”).

{¶ 2} Paragon commenced a legal malpractice action -- *Paragon Data Sys., Inc. v. Brouse McDowell*, Cuyahoga County Court of Common Pleas Case No. CV-614746 (“the malpractice action”) -- which has been assigned to respondent. Respondent issued a stipulated protective order submitted by the parties on May 9, 2007. On July 21, 2008, respondent issued an order indicating that the case was settled and that a formal entry was to follow.

{¶ 3} In an order issued on December 8, 2008, respondent granted the joint motion to withdraw documents filed by the parties under seal, noting that the case had been settled, and requiring the parties to withdraw the documents under court supervision as well as submit a list of the documents removed from the court file. In a December 10, 2008 order, respondent ordered that court reporting services destroy any court reporter’s notes, depositions or exhibits in the malpractice action.

{¶ 4} The docket in the underlying case reflects that the malpractice action was dismissed with prejudice on December 17, 2008. On December 23, 2008, the same date on which relator filed this action, respondent amended her December 10 order to prevent destruction of materials from the malpractice action until resolution

of the discovery issue in the Federal Case. On January 8, 2009, ASC moved to intervene in the malpractice action and for modification of the protective order and Paragon filed a brief in opposition.

{¶ 5} On February 27, 2009, more than two months after ASC commenced this action, respondent ordered the parties to return under seal all filings which the parties had removed. In early March 2009, Paragon and Brouse McDowell filed notices of compliance and filed the removed records under seal.

{¶ 6} In this action, ASC filed a first amended complaint, respondent filed a motion to dismiss and ASC filed a brief in opposition to the motion to dismiss.<sup>1</sup> For the reasons stated below, we grant respondent's motion to dismiss.

{¶ 7} Because ASC believes that the filings in the malpractice action are relevant to discovery in the Federal Case, ASC requests that this court grant relief:

1. in mandamus compelling respondent to vacate the order authorizing the removal of filings in the malpractice action;
2. in mandamus compelling respondent to vacate the order authorizing the destruction of discovery materials in the malpractice action;

---

<sup>1</sup> By separate entries, this court has denied Paragon's motion to intervene and ASC's motion for leave to file second amended complaint. The parties also complied with this court's order to show cause in writing whether this action should be dismissed as moot in light of respondent's December 23, 2008 order prohibiting the parties and their representatives from destroying any of the case materials.

3. in mandamus compelling respondent to vacate the order denying ASC’s motion to intervene in the malpractice action and to modify the stipulated protective order to permit production of materials in accordance with the protective order in the federal action; and
4. in procedendo directing respondent to proceed to judgment on ASC’s motion to stay and vacate the order to destroy court reporter’s notes and transcripts.

{¶ 8} “The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914.” *State ex rel. Smith v. Fuerst*, Cuyahoga App. No. 86118, 2005-Ohio-3829, at ¶4.

{¶ 9} In the motion to dismiss, respondent argues that ASC’s request for relief in mandamus compelling respondent to vacate the order authorizing the removal of filings in the malpractice action is moot. We agree.

{¶ 10} In her February 27, 2009 journal entry, respondent ordered the return to the court of documents which had been removed. ASC contends, however, that its claim for relief in mandamus is not moot because it is capable of repetition yet evading review. “This exception ‘applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’

*State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182.” *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 166-167, 2009-Ohio-590, 902 N.E.2d 976. ASC does not argue and certainly has not demonstrated that the requisite two factors are present.

{¶ 11} Rather, the materials which had been removed have been returned. Respondent has effected the relief which ASC requested in its first claim in mandamus. As a consequence, we hold that ASC’s request for relief in mandamus compelling respondent to vacate the order authorizing the removal of filings in the malpractice action is moot.

{¶ 12} In the motion to dismiss, respondent argues that ASC’s second request for relief in mandamus compelling respondent to vacate the order authorizing the destruction of discovery materials in the malpractice action is moot. We agree.

{¶ 13} As noted above, on December 23, 2008, respondent amended her December 10 order to prevent destruction of materials from the malpractice action until resolution of the discovery issue in the Federal Case. Although ASC acknowledges that the December 23 order prohibits the parties and their representatives from destroying materials in the malpractice action, ASC argues that court reporters are not included among “the parties and/or their representatives” mentioned in the December 23 order.

{¶ 14} The docket in the underlying case reflects the following entry for the December 10 order: “Pltfs. Motion to order destruction of court reporter notes and transcripts is granted. It is therefore ordered that any court reporting services utilized to transcribe discovery depositions in the instant matter are hereby ordered to destroy and court reporter notes transcripts and archival quality copies of any depositing transcripts and exhibits taken and maintained in the instant matter.” The docket entry for the December 23 order provides, in part: “It is further ordered that the parties and/ or

their representatives shall not destroy any court report notes, transcripts, archival quality copies of any deposition transcript, and exhibits referenced in the court's 12/10/2008 order.” Clearly, the same materials were the subject of both entries.

{¶ 15} The December 23 journal entry expressly refers to the December 10 order. The plain meaning of the December 23 entry is to prevent the destruction of the records which had been authorized by the December 10 order. Despite ASC’s arguments to the contrary, ASC’s second request for relief in mandamus compelling respondent to vacate the order authorizing the destruction of discovery materials in the malpractice action is moot.

{¶ 16} In its third claim for relief in mandamus, ASC requests that this court compel respondent to vacate the order denying ASC’s motion to intervene in the malpractice action and to modify the stipulated protective order to permit production of materials in accordance with the protective order in the federal action. In the motion to dismiss, respondent argues that mandamus may not be used to control the discretion of a judge deciding a motion to intervene or to compel a judge to modify a protective order. We agree.

{¶ 17} “A decision whether to grant or deny a motion to intervene is left to the sound discretion of the trial court.” *In re Stapler* (1995), 107 Ohio App.3d 528, 531, 669 N.E.2d 77 [Eight Dist. No. 68425] (citations deleted), cited with approval in *Rokakis v. Martin*, 180 Ohio App.3d 696, 698, 2009-Ohio-369, 906 N.E.2d 1200, at ¶6. Similarly, “\*\*\* courts have broad discretion over discovery matters.” *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 92, 2007-Ohio-5542, 876 N.E.2d 913, at ¶18.

{¶ 18} These authorities reflect the general principle that “[t]he writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its

functions, but it *cannot control judicial discretion.*” R.C. 2731.03 (emphasis added). Because ASC is requesting that this court control judicial discretion by compelling respondent to grant ASC’s motion to intervene in the malpractice action and its motion to modify the stipulated protective order, we must dismiss ASC’s third claim in mandamus.

{¶ 19} ASC’s final claim seeks relief in procedendo. “The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie County Sheriff’s Department* (1990), 51 Ohio St.3d 43, 553 N.E.2d 1354. Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth District Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079.” *State ex rel. Brooks v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 93265, 2009-Ohio-2872, at ¶2.

{¶ 20} ASC requests that this court issue a writ of procedendo directing respondent to proceed to judgment on ASC’s motion to stay and vacate the December 10 order to destroy court reporter’s notes and transcripts. In the December 23 journal entry, respondent amended her December 10 order to prevent destruction of materials from the malpractice action until resolution of the discovery issue in the Federal Case. Clearly, the December 23 entry has provided ASC the relief it requested. Compare *State ex rel. Mayes v. Ambrose*, Cuyahoga App. No. 91980, 2009-Ohio-25, at ¶4. As a consequence, ASC’s claim for relief in procedendo is moot.

{¶ 21} Accordingly, respondent’s motion to dismiss is granted. ASC to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Complaint dismissed.



---

SEAN C. GALLAGHER, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and  
MELODY J. STEWART, J., CONCUR