

[Cite as *Mallett v. Cleveland Civ. Serv. Comm.*, 2017-Ohio-750.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104799

HENRY MALLET

RELATOR

vs.

**CLEVELAND CIVIL SERVICE
COMMISSION, ET AL.**

RESPONDENTS

**JUDGMENT:
WRIT DISMISSED**

Writ of Mandamus
Motion No. 499722
Order No. 504455

RELEASE DATE: March 1, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} On August 2, 2016, the relator, Henry Mallett, commenced this mandamus action against the respondents, the Cleveland Civil Service Commission and the city of Cleveland, to compel the respondents to reinstate Mallett to his former position as a city of Cleveland employee with full back pay.¹ On September 2, 2016, the named respondents filed a motion to dismiss, and Mallett filed his brief in opposition on September 12. The respondents sought leave to file a reply brief on September 19, and Mallett filed his opposition to that motion on September 21, 2016. For the following reasons, this court grants the respondents' motion to dismiss and dismisses the application for a writ of mandamus.

{¶2} The city of Cleveland had employed Mallett as construction equipment operator for the city's department of public utilities. In May 2013, Cleveland was trying to repair a water main break on Miles Road. Mallett's foreman directed him to collect debris blocking the road into a pile that would be picked up later. Mallett deposited a small amount of the debris into a nearby creek. He stopped doing this when instructed to do so. The dumping into the creek risked violating federal, state and local environmental laws.

¹The relator's demand for relief seeks a writ of mandamus directing the trial court to withdraw its transfer order, and requiring Mallett's reinstatement with all the money he would have earned during the duration of his wrongful termination. However, the relator did not name the trial judge or the Cuyahoga County Common Pleas Court as a respondent.

{¶3} Because of dumping the debris into the creek, Cleveland terminated Mallett for “neglect of duty,” “conduct unbecoming an employee in the public service,” and “for other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance, or nonfeasance in office.” Mallett appealed this decision through the Cleveland Civil Service Commission, which affirmed the termination. He appealed to the Cuyahoga County Common Pleas Court, which upheld the termination. *Mallett v. Cleveland Civ. Serv. Comm.*, Cuyahoga C.P. No. CV-14-823882. He then appealed to this court.

{¶4} In *Mallett v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 102559, 2015-Ohio-5140, this court held “that this one-time event did not fall into any of the city’s enumerated grounds for termination of Mallett.” *Id.* at

¶ 23. Thus, the trial court abused its discretion in upholding his termination. Specifically, this court ordered: “Judgment reversed; case remanded to the trial court for reversal of the January 5, 2015 judgment entry.” *Id.* at ¶ 35.

{¶5} On remand in a July 12, 2016 journal entry, the trial court reversed its January 5, 2015 order. It then ruled:

while the court of appeals indicated that Mallett’s actions did not rise to a level that justified termination, it did not state that no discipline was warranted. The court of appeals found that generally it was the city’s protocol to haul away such debris in dump trucks, that Mallett’s foreman directed Mallett to collect debris in a pile that would be picked up later after the water drained and it had dried, and that Mallett failed to follow this order and, instead, dumped the debris into a nearby creek. Clearly, such actions warrant discipline pursuant to R.C. 124.34. Therefore, this court remands this matter back to the Cleveland Civil Service Commission to

determine the appropriate level of discipline, short of termination, for Mallett's actions. So ordered.

{¶6} Mallett now brings this mandamus action under the theory of law of the case to compel his reinstatement with full back pay without any discipline.² The law of the case “doctrine provides that the decision of a reviewing court in a case remains the law of the that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). Thus, “[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *State ex rel. Smith v. O'Connor*, 71 Ohio St.3d 660, 662, 1995-Ohio-40, 646 N.E.2d 1115. Moreover, a “writ

²The 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*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Furthermore, mandamus is not a substitute for appeal. *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Jerningham v. Gaughan*, 8th Dist. Cuyahoga No. 67787, 1994 Ohio App. LEXIS 6227 (Sept. 26, 1994). Furthermore, if the relator had 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, 1997-Ohio-245, 676 N.E.2d 108. Moreover, mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977). Although mandamus should be used with caution, the court has discretion in issuing it. In *Pressley*, *id.* at paragraph seven of the syllabus, the Supreme Court of Ohio ruled 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.”

of mandamus is an appropriate remedy to require a lower court to comply with an appellate court's mandate directed to that court." *Id.*

{¶7} Mallett's argument is a strong one. Because Mallett's action in dumping a small amount of debris into the creek did not fall into any of the city's enumerated grounds for termination, this court necessarily ruled that there are no longer any pending charges against him. Therefore, Mallett argues the order to reverse the trial court's judgment must necessarily mean that Mallett must be reinstated with full back pay.

{¶8} However, this argument is not persuasive, because this court did not explicitly state what had to be done or what should be done on remand, other than reversing the trial court's January 5, 2015 judgment entry. This court's order of remand did not preclude other actions after reversing the judgment entry. A clear, legal right enforceable in a law of the case mandamus is not created by a lack of specificity or by inference.

{¶9} *State ex rel. Smith v. O'Connor, supra*, and the following cases are instructive. Smith sued a hospital for, inter alia, wrongful death. The jury returned a general verdict in favor of the hospital, but in the interrogatories, the jury found that the hospital was negligent, which apparently contributed to the decedent's death. The court of appeals held that the jury's verdict was against the manifest weight of the evidence because no competent, credible evidence supported the jury's verdict that the hospital's negligence was not the proximate cause of the decedent's injuries. The court of appeals reversed the verdict against the hospital and remanded for a new trial and for further

proceedings consistent with the reasoning of the appellate court's decision. When the trial court ordered a new trial on all issues, including negligence and causation, Smith commenced a mandamus action based on law of the case to compel a trial only on the issues of damages, arguing that the court of appeals' decision had already concluded there was negligence and causation. Upon review, the Supreme Court of Ohio ruled that because the court of appeals never ordered the trial judge to hold a new trial limited to damages, Smith failed to establish a clear, legal right to a limited trial. *State ex rel. Mullins v. Curran*, 131 Ohio St.3d 441, 2012-Ohio-685, 966 N.E.2d 267 — because the court of appeals did not include clearer language in its mandate and opinion, the trial court did not lack jurisdiction to conduct a new trial on all issues, as compared to a trial limited to the issue of comparative negligence.

{¶10} In *Berthelot v. Dezso*, 86 Ohio St.3d 257, 1999-Ohio-100, 714 N.E.2d 888, the court of appeals held that an award of spousal support was an abuse of discretion because it was not certain that the trial court considered certain factors and reversed and remanded the issue for further consideration. Upon review, the Supreme Court of Ohio held that the law of the case doctrine and the language of the remand did not require further discovery or an evidentiary hearing, as asserted by the wife.

{¶11} Similarly in *O'Donnell Constr. Co. v. Mannen*, 8th Dist. Cuyahoga No. 88717, 2006-Ohio-6601, this court declined to issue a writ of prohibition based on law of the case because the absence of a specific remand did not preclude the trial judge from

conducting a hearing. So too, in the present case, this court’s remand specifying only reversal, did not create a clear, legal right to reinstatement with back pay.

{¶12} The court also notes that the relator improperly captioned this case as “*Mallett v. Cleveland Civil Service Commission.*” R.C. 2731.04 requires that an application for a writ of mandamus “must be by petition, in the name of the state on the relation of the person applying.” This failure to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition. *Maloney v. Court of Common Pleas of Allen Cty.*, 173 Ohio St. 226, 181 N.E.2d 270 (1962).

{¶13} Accordingly, this court grants the motion to dismiss and dismisses this writ action. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶14} Writ dismissed.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR