

IN THE SUPREME COURT OF OHIO

<b>State of Ohio on the Relation of</b>	:
<b>GREGORY S. KUDLA</b>	:
<i>Relator,</i>	: Case No. 2018-1663
 v.	: Original Action in Mandamus
 <b>SUMMIT COUNTY CLERK OF COURTS and</b>	:
<b>NINTH DISTRICT COURT OF APPEALS</b>	:
 <i>Respondents</i>	:

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**MOTION TO DISMISS OF RESPONDENT**  
**NINTH DISTRICT COURT OF APPEALS**

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Ohio Attorney General

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<b>KUDLA</b>	:
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**MOTION TO DISMISS OF RESPONDENT  
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Pursuant to Sup.Ct.Prac.R. 12.04(A)(1) and Civ.R. 12(B)(6), Respondent Ninth District Court of Appeals moves this Court to dismiss Relator's petition for a writ of mandamus. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General

*/s/ Andrew Fraser*

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

Relator Gregory S. Kudla, an inmate, brings this action for a writ of mandamus against the Summit County Clerk of Courts and the Ninth District Court of Appeals (Ninth District). It is difficult to determine exactly what specific relief Relator requests as he provides a laundry list of alleged errors and omissions that the Summit County Clerk of Courts has made when docketing items in his case. He then merely states that this Court must compel the Ninth District to direct the Clerk of Courts to correct its alleged errors. Because the Ninth District is not sui juris and therefore not capable of being sued, and because Relator fails to state a claim against the Ninth District upon which relief can be granted, this Court must dismiss Relator's Complaint.

### **II. STATEMENT OF FACTS**

A jury found Relator guilty of sixteen counts of rape and sexual battery, and he was sentenced to forty-two and a half years in prison. *State v. Kudla*, 9th Dist. Summit C.A. No. 27652, 2016-Ohio-5215 at ¶ 4. Relator appealed the trial court's decision, which the Ninth District affirmed. *See generally id.* Relator attempted to re-open his case, but the Ninth District issued an Order in January 2017 denying this request. Respondent's Ex. A.<sup>1</sup> Over one year later, Relator filed a motion for the Ninth District to reconsider its January 2017 decision, which the Ninth District denied as untimely. *Id.* Relator next attempted to appeal the Ninth District's decision to this Court, but this Court declined to accept jurisdiction. *Id.*

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<sup>1</sup> This Court has concluded that courts may take judicial notice of appropriate matters in determining a Civ.R. 12(B)(6) motion to dismiss without converting it to a motion for summary judgment. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 26. The Court has further recognized that courts can take judicial notice of filings that are readily accessible from a court's website. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 974 N.E.2d 516, ¶¶ 8, 10. Accordingly, the docket for Relator's Court of Appeals action CA-27652 is annexed hereto.

Relator now brings this original action against Respondent Ninth District. While it is unclear exactly what relief Relator requests, it appears that he is not challenging any decision of the Ninth District but rather actions that he alleges were taken by the Summit County Clerk of Courts. *See generally* Complaint. It appears that Relator has named Respondent Ninth District in this action simply because he believes that “as the court of record having the supervisory and protecting charge over its records” it should be compelled to direct the Summit County Clerk of Courts to take certain actions. *See* Compl. at ¶ 48. Because the Ninth District is not *sui juris* and thus cannot be sued, and because Relator fails to state any claim upon which relief can be granted, this Court should dismiss Relator’s case.

### **III. LEGAL ARGUMENT**

#### **A. Standard of Review**

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and the plaintiff must be afforded all reasonable inferences possibly derived therefrom. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A court need not accept legal conclusions as true, however. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Finally, if a court finds that the plaintiff’s complaint does not provide relief on any possible theory, it may dismiss the complaint. Civ.R. 12(B)(6); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1999, ¶ 8.

## **B. Relator's Complaint Fails Because Relator Cannot Sue the Ninth District**

As a preliminary matter, this Court should dismiss this case because the Ninth District is not *sui juris* and thus cannot be sued. *See Malone v. Cuyahoga Cty. Court of Common Pleas*, 45 Ohio St.2d 245, 248, 344 N.E.2d 126 (1976). Ohio cases hold that absent express statutory authority, a court cannot be sued in its own right. *Id.*; *see also State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St.2d 120, 296 N.E.2d 544 (1973). Since no statutory authority exists that says otherwise, the Ninth District is not *sui juris*, and this Court should dismiss Relator's complaint.

## **C. Relator fails to state a claim in mandamus against Respondent Ninth District.**

To be entitled to relief in mandamus, Relator must demonstrate a clear legal right to the relief sought, a clear legal duty on the part of Respondent Ninth District, and a lack of an adequate remedy at law. *State ex rel. Baker v. Indus. Comm.*, 143 Ohio St.3d 56, 2015-Ohio-1191, 34 N.E.3d 104, ¶ 12; *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cnty.*, 126 Ohio St.3d 198, 2010-Ohio-3299, 931 N.E.2d 1082, ¶ 11. “Relators must prove entitlement to the writ by clear and convincing evidence.” *Baker* at ¶ 12.

Relator fails to meet the requirements for a writ of mandamus to issue. Relator apparently requests a writ of mandamus to compel Respondent Ninth District to exercise its position as a “court of record having the supervisory and protecting charge over its records and paper” to direct the Summit County Clerk of Courts to correct specific errors and omissions it has made in docketing filings. *See* Compl. at ¶ 48. It appears, however, that Relator's Complaint is directed solely against the Summit County Clerk of Courts, and makes no allegation of a clear legal right or duty against the Ninth District itself. Because Relator states no claim against the Ninth District, his Complaint should be dismissed.

#### IV. CONCLUSION

For the foregoing reasons, Respondent Ninth District respectfully requests that this Court dismiss Relator's Complaint.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General

*/s Andrew Fraser*

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ANDREW FRASER (0097129)\*

*\*Counsel of Record*

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*Counsel for Respondent  
Ninth District Court of Appeals*

## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Motion to Dismiss* was served by first class mail via the U.S. Postal Service on December 6, 2018, upon the following:

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*Relator pro se*

Sherri Bevan Walsh  
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53 University Avenue  
Akron, Ohio 44308

*Counsel for Respondent*  
*Summit County Clerk of Courts*

*/s Andrew Fraser*

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ANDREW FRASER (0097129)  
Assistant Attorney General

## Sandra Kurt - Summit County Clerk of Courts

## - Court of Appeals Case Information -

- 12/6/2018 -

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Court of Appeals Case No	File Date	Type	Judge
CA-27652	01/14/2015	NOTICE OF APPEAL - CRIMINAL COMMON PLEAS	--

## Parties

## -- Plaintiff --

## -- Defendant --

ID	ID
<b>Plaintiff</b> STATE OF OHIO 53 UNIVERSITY AVE AKRON OH 44308	<b>Defendant</b> GREGORY KUDLA A663388, MANSFIELD CORR MANSFIELD OH 44901

## Trial Court Information

Trial No	Court	Judge
	COMMON PLEAS CRIMINAL	JILL FLAGG LANZINGER

## Last 5 or Less Dockets If Any

## Docket Entries

Filing Date	By Atty	Docket Text	Document
07/24/2018	SUMMIT COUNTY CLERK OF COURTS	JOURNAL ENTRY FILED. UPON CONSIDERATION OF THE JURISDICTIONAL MEMORANDA FILED IN THIS CASE, THE COURT DECLINES TO ACCEPT JURISDICTION OF THE APPEAL PURSUANT TO S.CT.PRAC. R. 7.08(B)(4) CHIEF JUSTICE MAUREEN O'CONNOR	<a href="#">Document 1</a>
05/22/2018	GREGORY KUDLA	NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO FILED. CASE NUMBER 18-0694. FILED ON 5-15-2018	<a href="#">Document 2</a>
04/17/2018	GREGORY KUDLA	REGULAR MAIL SERVICE - MAILED GREGORY KUDLA	No Image
04/17/2018	GREGORY KUDLA	REGULAR MAIL SERVICE - MAILED JACQUENETTE S. CORGAN	No Image
04/17/2018	GREGORY KUDLA	JOURNAL ENTRY FILED. APPELLANT HAS MOVED THIS COURT TO RECONSIDER ITS JANUARY 27, 2017, ORDER, DENYING HIS APPLICATION FOR REOPENING. THE STATE HAS RESPONDED TO THE APPLICATION FOR RECONSIDERATION. APPELLANT'S APPLICATION FOR RECONSIDERATION IS DENIED AS UNTIMELY. JUDGE JENNIFER HENSAL FOR THE COURT. JUDGE DONNA CARR AND JUDGE JULIE SCHAFER CONCUR.	<a href="#">Document 3</a>

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