IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.* STEVEN A. ARMATAS, *et al.* *Relators,* *vs.* **THE HON. MICHAEL E. JACKSON,** Visiting Judge, Stark County Court of Common Pleas by Appointment of the Ohio Supreme Court, *Respondent.*	)	CASE NO.: 2021-0134 **ORIGINAL ACTION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS**

AFFIDAVIT OF RELATOR REGARDING PRESENTATION OF EVIDENCE IN ACCORDANCE WITH S.CT.PRAC.R. 12.06

--- EMERGENCY CONSIDERATION REQUESTED---

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AFFIDAVIT OF RELATOR REGARDING PRESENTATION OF EVIDENCE IN ACCORDANCE WITH S.CT.PRAC.R. 12.06

STATE OF OHIO)
)
COUNTY OF STARK)

I, Steven A. Armatas, being duly sworn, state under penalty of law that the following is true:

1. I am over the age of 18, of sound mind and body, and do not suffer from any condition or restriction which would prevent me from executing this Affidavit and attesting to the matters set forth herein.

2. I have reviewed each and every line of the attached **Exhibit A** with provides additional evidentiary and analytical support regarding the writ of prohibition and writ of mandamus filed by Affiant on or about January 29, 2021 .

3. I am personally familiar with those matters discussed in **Exhibit A** as attached hereto.

4. The facts and statements contained in the attached **Exhibit A** are true and correct.

5. Any additional materials appended to the attached **Exhibit A** are true and exact copies of the originals and are what they purport to be.

6. I have a good faith belief that Respondent has failed to comply with the cited provisions of the law, specifically the Ohio Rules of Civil Procedure concerning Service of Process, and that Respondent exceeded his judicial authority by ordering the Stark County Clerk of Court's Office to serve the defendants in a lawsuit without the consent of the plaintiffs therein.

FURTHER AFFIANT SAYETH NAUGHT.

Steven A. Armatas

SWORN TO before me and subscribed in my presence this 12 day of April, 2021.

NOTARIAL SEAL STATE OF OHIO

GEORGE W. BURGESS III
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Stark County
My Comm. Exp. 7/2/2023

Notary Public

My Commission Expires:_____

EXHIBIT A

I. INTRODUCTION

Before beginning discussion of the facts and law in this matter, Relators (sometimes hereinafter referred to collectively as the "Plaintiff") would like to reiterate that they have nothing but the utmost respect and regard for Respondent (sometimes hereinafter referred to as "Judge Jackson" or the "Trial Court") and his legal acumen. Relators are ***not*** suggesting Judge Jackson has any bias or animus towards them. This Writ in not intended as an attack upon or criticism of Judge Jackson. This matter simply concerns an honest disagreement between Relators and the Trial Court over the scope of a trial judge's authority and the proper interpretation of several of the Ohio Rules of Civil Procedure.

The ruling in question improperly initiated the case of *Steven A. Armatas, et al. v. Aultman Hospital, et al.*; Stark Cty. C.P. Case No. 2020CV00741 (the "Underlying Litigation"). As such, Relators feel they cannot keep silent and condone a decision that alters the fundamental nature of who can commence a lawsuit in Ohio, and significantly erodes the rights of plaintiffs in that regard.

The Motion to Dismiss filed by Respondent raises several procedural arguments as to why a Writ of Mandamus and/or Prohibition is not the appropriate vehicle to challenge the Trial Court's ruling. Instead, Respondent suggests filing an appeal upon the conclusion of the case. Plaintiff will respond to such arguments in the ensuing sections, but first it is important to highlight what Respondent did not discuss in its Motion to Dismiss.

First and foremost are the two Ohio Civil Rules at the heart of the dispute-----Civ. R. 4(E) and Civ. R. 3(A), which would be rendered meaningless if the Ohio Supreme Court elects to uphold Judge Jackson's ruling. These two Rules, in plain and simple English, delineate the time

period a plaintiff has to effectuate service following the filing of his complaint. Civ. R. 3(A) entitled "Commencement" provides:

> A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D) (emphasis supplied).

Correspondingly, Civ.R. 4(E), entitled, "Summons: **time limit for service**" states, in part:

> If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion (emphasis supplied).

How can a Civil Rule which expressly deals with the "time limit for service" not govern the deadline by which a plaintiff must effectuate process or face dismissal? How is it appropriate for a trial court judge to simply disregard the deadlines imposed by the Civil Rules and instead establish his own time schedule? If a judge has the discretion to "expedite" service of process, what is to preclude him from ordering service to be delayed for months, or even years, until his docket has been cleared or is more manageable.

Respondent's Motion to Dismiss never mentions the text of Civ. R. 3(A) or 4(E); never explains how their clear language can be reconciled with the Trial Court's ruling; and never elaborates upon the question of what roles do Civil Rules 4.1(B), 4.1(C), 4(D), 4(E), and now 4.7 play, if Civ. R. 4(A) ***always*** requires service to be completed by the clerk's office "forthwith."

The second significant omission in Respondent's Motion to Dismiss is its limited discussion of *Seger v. For Women, Inc.*, 100 Ohio St.3d 451, 2006-Ohio-4855 (hereinafter, "*Seger*"), the case the Trial Court relied upon almost exclusively to justify its ruling, as evidenced by the fact it devoted 7 of 11 pages of its Judgment Entry thereto. Respondent fails to

address Plaintiff's arguments that *Seger* is non-binding because it is both dicta ***and*** flawed in its reasoning. It is dicta because the Trial Court borrows its entire analysis, not from the Majority Opinion of *Seger*, but rather from its Concurring Opinion.

As a practical matter, concurring opinions are far less significant than majority opinions because, having failed to receive a majority of the court's votes, concurring opinions are ***not*** binding precedent and cannot be cited as such. *See*, Comment, *A Study in Stare Decisis*, 24 U. Chi. L. Rev. 99 (1956) ("One of the basic postulates of the American case law system is that the decision of a majority determines the result and establishes a precedent for use in subsequent adjudications.").

Seger is not only dicta, its reasoning is flawed, perhaps explaining why its analysis was not incorporated into the Majority Opinion. To begin with, the Concurring Opinion focuses solely on Civ. R. 4(A) which provides "[u]pon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption." The Concurring Opinion and the Trial Court apparently read Rule 4(A) as requiring the clerk to "forthwith" ***issue*** a summons ***and*** "forthwith" ***serve it*** upon each defendant. The second "command" is not necessarily present, however.

The more appropriate reading is that the clerk must forthwith issue [i.e., "prepare"] the summons needed to serve the defendant, but not necessarily serve it himself. Otherwise, all the other methods of service prescribed by the Civil Rules would be rendered meaningless. The interpretations proffered by both the Concurring Opinion and the Trial Court thus ignore the numerous ways in which service may be perfected in Ohio.

For instance, while a plaintiff may select "Service by Clerk," pursuant to Civil Rule 4.1(A), he or she may also choose "Personal Service" under 4.1(B), or "Residence Service"

under 4.1(C). In those instances, the clerk must promptly "issue" or prepare the summons, but then give it to (a) the local sheriff; (b) a bailiff, if issued by a municipal court; or (c) any person over 18 years of age who is not a party to the matter. Effectuation of ***service*** by the clerk is therefore not a *sine qua non* of the Civil Rules.

Finally, the Concurring Opinion in *Seger* also perfunctorily dismissed Rule 3(A)'s express one-year period to accomplish service by a labeling it a "fail-safe for serving an elusive defendant." The problem with such theory; however, is that the Civil Rules make no mention of additional time or a grace period to locate "elusive" defendants in Rule 4(A), or anywhere else. In fact, Rule 3(A) specifically allots one year for service to be completed "upon a named defendant," without any qualifications or contingencies attached.

II. THE PUBLIC POLICY BEHIND CIVIL RULES 3(A) AND 4(E)

Perhaps the most puzzling aspect of the Trial Court's decision is not its reliance on a non-binding opinion, but its rationale for taking service of process out of the hands of the plaintiff in order to defer to the wishes of the defendants. Unfortunately, such rationale or public policy objective is never explained by the Trial Court.

The closest the Motion to Dismiss comes is the theory expressed on page 11 that Judge Jackson "merely ordered the Clerk to proceed with performing those duties, and fulfilling the parties' expectations based on the rights of litigants to expeditiously resolve liability alleged against them (emphasis supplied)." Unfortunately for the Respondent; however, there is no such recognized right.

Plaintiff is well aware of the right to a speedy trial in the context of criminal prosecutions, but has no knowledge of the right of civil defendants "to expeditiously resolve liability alleged against them." For obvious reasons, the Ohio Civil Rules were not drafted to

give large hospital systems the same "speedy trial" rights afforded incarcerated individuals. The Civil Rules were not intended to favor defendants over plaintiffs or *vice versa*. Rather, they were designed to be neutral. In the case at bar; however, the Court's ruling yielded a distinct advantage to the defendants that was not previously available.

In addition, there exists no expressed public policy rationale for interpreting the Civil Rules to require a ***more*** expeditious service of process than is currently provided. Defendants in the Underlying Litigation were not harmed or injured by Plaintiff simply filing his Complaint. The only costs incurred were completely self-inflicted by first sending Plaintiff's counsel threatening letters, preparing Answers and other filings before service, and finally motioning the Trial Court to begin the litigation. These tactics were employed for nothing more than gaining a strategic advantage, the same thing Plaintiff is being accused of and wrongly punished for.

Such "no harm /no foul" analysis is not the creation of Plaintiff, but rather a concept noted by the Ohio Supreme Court in *Seger*, the very case the Trial Court embraces so passionately. While expressing displeasure over the "common practice…to serve complaints other than 'forthwith,'" the Majority Opinion in *Seger* ***declined*** to compel service because the defendant "was not prejudiced" since it "received notice as prescribed by Civ. R. 3(A)." [*Seger* at ¶10].

The Ohio Supreme Court further explained its reluctance to permit courts to order individual Clerk's offices to issues summonses as soon as the complaint was filed [i.e., the very action that Judge Jackson took] by writing:

> …to hold otherwise would lead to a host of potential problems, including determining on a case-by-case basis whether the clerk ordered service "forthwith," and, if not, whether the delay was intentional or the result of negligence, and what the consequences of the delay should be. Our conclusion is unaffected by Seger's encouragement of the clerk to ignore the requirement of ordering service found in Civ.R. 4(A). *Id.* (emphasis supplied)]

The truth is that delaying service more often aids both parties. The filing of a complaint without immediate service gives plaintiffs more time to prepare and reduces the need to ask for constant continuances and extensions. It gives the potential defendants a "heads-up" on what might be coming and the opportunity to avoid a 28-day scramble to investigate and file an Answer. It gives both sides a chance to discuss resolution before substantial time and money are expended in protracted litigation.

In many ways, filing and waiting longer for service enhances the civil justice system and still protects the defendant from remaining in limbo forever by virtue of Civil Rule 4(E), which allows him to file a motion to dismiss the claims without prejudice after six months, and Civil Rule 3(A), which permits the entire case to be dismissed with prejudice if service is not effectuated within one year of filing.

The only people helped by the "clerk shall forthwith issue a summons for service" argument are defense lawyers who don't want to risk a big case possibly slipping away, particularly in these days when many of them are obtaining enormous PPP loans from the government just to stay afloat. [1]

III. FACTS AND PROCEDURAL HISTORY

Respondent provides a description of the underlying facts and lower court procedures which is fairly accurate, except in its omission of several key events. To begin with, on page 5, Respondent writes: "The [request for waiver of service] letter [Mr. Armatas sent to defense counsel] further stated that if defense counsel withheld to consent, Relators would 'arrange to

[1] PPP loans are limited to being used to continue paying the salaries of employees. They may not be used for construction or expansion purposes. Legal counsel for the Aultman Defendants in the Underlying Litigation, the Milligan Pusateri (or "MP") law firm, recently secured a PPP loan of $228,500.00 from the federal government. Interestingly, the other defense firm in the case who represents some of the individual physicians, Reminger Co. LPA, secured a PPP loan of $7,200,000.00. Plaintiff has not sought nor received any government funds under the PPP loan program

have the summons and complaint served.'" For some reason, the Trial Court interprets this letter to be some sort of binding contract which Plaintiff breached.

The Court never takes into account that the Aultman Defendants not only refused to waive service, they accused Plaintiff of unethical conduct, threatened to sue him if he proceeded with service, and despite Plaintiff not moving forward, sued him anyway by filing a Vexatious Litigator Action against him on May 28, 2020, five months ***before*** they were served upon the instructions of the Trial Court.

Respondent, which also accused Plaintiff of "inappropriate" conduct in its Order of October 2, 2020 (the "Service Order"), apparently found nothing inappropriate with the Aultman Defendants wasting everyone's time and money by initially refusing to waive service; calling Plaintiff unethical for attempting to sue them; filing a Vexatious Litigator Complaint against Plaintiff before they were even sued; then demanding to be served; calling Plaintiff unethical for not suing them; and then filing a motion to be served with the complaint they had earlier described as frivolous and meritless.

Ironically, ***but for*** the Aultman Defendants' Motion to Compel Service and the Service Order granting same, the Aultman Defendants may never have been sued (or been sued much later), and Plaintiff would not currently be defending a vexatious litigator suit because his medical negligence complaint may never have been served (or been served much later). In reality, the Service Order resulted in Plaintiff being forced to prosecute his wrongful death case and defend the Vexatious Litigator Action in accordance with the timetable manipulated by Defendants.

On page 6 of its Motion to Dismiss, Respondent writes that its Order of September 1, 2020, "instructed Relators to follow the Ohio Rules of Civil Procedure regarding service of the

complaint and the defendants to file the motions they considered appropriate." On the surface that sounds as if Plaintiff was being pushed to prepare service while the Aultman Defendants were being given the green light to force him to do so. The text of the actual 9/1/2020 Order conveys a much different message, however.

While it did "permit each party to take action as deemed appropriate;" the Court's order also made clear that (a) "Plaintiff, in his sole discretion, is to decide whether to take all necessary steps in accordance with the Ohio Civil Rules" regarding effectuating service upon the defendants; and (b) "the Court does not require any party to take further action prior to the service of the Complaint." [A copy of such 9/1/2020 Order was attached as Exhibit # 4 to Plaintiff's original Writ Action].

Also on page 6 of its Motion to Dismiss, Respondent attempts to signal that Mr. Armatas was somehow a willing participant in the effort to get Defendants served by late October, so therefore he has nothing to complain about. Respondent writes:

> Mr. Armatas, engaged in the initial process to perfect service through the Clerk when he requested the Clerk to copy the Complaint, and the Clerk fulfilled his request and served the summons with the copies of the Complaint that Mr. Armatas requested the Clerk to produce.

In truth, Mr. Armatas was about as willing to assist with service as anyone featured in a hostage video is willing to praise his captors. What the Motion to Dismiss omits to mention is that the Trial Court instructed Mr. Armatas to supply or arrange for the Stark County Clerk of Court's Office to have sufficient copies of his Complaint to mail out ***or else*** the Court would dismiss his case. In its Judgment Entry of October 9, 2020 [attached hereto as **Exhibit # 1**], the Trial Court issued the following directive to Mr. Armatas:

> Should timely service not be completed on the defendants - due to Plaintiff's failure to supply the copies of the Complaint to the Clerk or for any other reason - this rule states what occurs next:

> "If a service of the summons and complaint is not made upon a defendant within six months alter the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." *See Romine* v. *Decker* 5th Dist. No. 98CAE01006. 1998 Ohio App. LEXIS 5226, * 7 (Oct. 8, 1998) (affirming a dismissal of a complaint where the plaintiff failed to show good cause why the six-month period of Civ.R. 4(E) should be extended).

Plaintiff does not dispute that come October 31, 2020 (6 months after he filed his Complaint); the Trial Court, after first affording Plaintiff the opportunity to show good cause, would have had the authority to dismiss Mr. Armatas' complaint without prejudice.

The problem is that the Trial Court did not wait until October 31, 2020 as it was supposed to. Rather, it chose to bypass Mr. Armatas and by October 2, 2020 ordered the Stark County Clerk of Court's Office to ***immediately*** serve Defendants. The Trial Court acknowledged as much in its October 9, 2020 Order wherein it wrote: "Plaintiff argues that the Court is without authority to order Plaintiff to seek service. (Suppl. p. 6). However, the Court did not order Plaintiff to issue the summons or order Plaintiff to comply with Civ. R. 4(B)." Finally, on page 7 of its Motion to Dismiss, Respondent notes:

> Relators filed an amended complaint adding another defendant and asserting additional causes of action. (Complaint, ¶ 13, n 1.) The parties commenced discovery and participated in the pretrial process with a trial date set in January 2022. (Complaint, ¶ 27.) After service of the initial complaint was complete in November 2020 and the filing of an amended complaint on November 23, 2020, the Relators initiated this action about two months later, on January 29, 2021…

Plaintiff does not deny that following the effectuation of the Service Order, the litigation commenced as the Trial Court intended. The undersigned supposes that he could have refused to participate in discovery and declined to answer any motions or file any briefs in protest, and

devoted all his efforts to filing (and hopefully winning) his Writ of Mandamus/Prohibition as soon as possible.

Such strategy would not only have been risky, but perhaps catastrophic. By refusing to move forward with prosecuting the wrongful death case and neglecting to start defending the Vexatious Litigator Action, that had now also been triggered by the Court's Service Order, Mr. Armatas risked default judgments on two fronts. Plaintiff did the only thing he could--- start prosecuting the wrongful death action, begin defending the Vexatious Litigator lawsuit, and commence thoroughly researching and preparing the Writ involving Judge Jackson, something he took extremely seriously and would not have pursued unless he was 100% convinced he was on the correct side of the law.

Plaintiff concurs it would have been better to file the Writ earlier, but one has to fight his battles with the weapons, tools, manpower and resources he has available at the time, not the ones he wished he had.

IV. LAW AND ARGUMENT

The lacuna of Respondent's "Law and Argument" section is that it fails to cite any law from which a trial court may derive authority to order a local clerk of court's office to effectuate service upon a defendant. It does not emanate from the Civil Rules since no provision vests such power in a court of common pleas, and it certainly does not arise from the common law because Respondent cannot cite a single case from Ohio (or any other state for that matter) where such an act was permitted to occur.

If a judge wants to "penalize" the plaintiffs in a civil case for delaying service, he has only two options------(1) dismiss the case without prejudice after 6 months have elapsed pursuant to Civ. R. 4(E); or (2) dismiss the case after one year, with or without prejudice (depending on

the applicable statute of limitations), pursuant to Civ, R. 3(A). Forced service is not an option. But one does not have to take Plaintiff's word on such interpretation. See *e.g., Thomas v. Freeman* (1997), 79 Ohio St.3d 221 ("Civ.R. 3(A) provides plaintiffs with a one-year post-filing period in which to obtain service of process.");*see also*, Professor J. Patrick Browne,[2] considered the foremost authority on the Ohio Civil Rules, who has described the interplay between Civ. R. 4(E) and 3(A) as follows:

> Can Civil Rule 3(A)'s "year" be reduced? Prior to the enactment of Civil Rule 4(E), it was well settled that it could not be; the plaintiff had an absolute right to a full year in which to acquire jurisdiction over the person of the defendant."[3]

A. Standard of Review

The standard of review for a writ action is the same as it is for any other complaint. In determining whether a complaint states a claim upon which relief can be granted, all factual allegations thereof must be presumed to be true and all reasonable inferences must be made in favor of the non-moving party. It must also appear beyond doubt that the relator/plaintiff can prove no set of facts warranting relief. *State ex rel. Neff v. Corrigan*, 75 Ohio St. 3d 12, 14, 661 N.E.2d 170, 173, 1996-Ohio-231, citing, *State ex rel. Williams Ford Sales, Inc. v. Connor* (1995), 72 Ohio St. 3d 111, 113, 647 N.E.2d 804, 806.

B. Relators have adequately stated a claim for relief

1. The Writ of Mandamus Request

On pages 9 through 17 of its Motion to Dismiss, Respondent attempts a divide and conquer strategy by arguing Relators have not met their burden of establishing the necessary

[2] Professor of Law, Cleveland State University, Cleveland-Marshall College of Law; B.S., John Carroll University; M.S.L.S., Case Western Reserve University; J.D., University of Detroit.

[3] J. Patrick Browne, *Being and Nothingness: Commencement and the Application of Ohio Civil Rules 3(A) and 4(E)*, 33 Clev. St. L. Rev. 245 (1984-1985):

elements of ***either*** a Writ of Mandamus or a Writ of Prohibition under Ohio law. But Plaintiff is not seeking independent writs for separate and self-operating acts. Rather, Plaintiff seeks remedies that must work in conjunction with each other in order to right a wrong.

Here, the Trial Court must first and foremost be prohibited from moving forward with the Underlying Litigation because it exceeded its judicial authority in ordering the local Clerk of Court's office to serve the defendants. However, since such service has already been effectuated, a potential remedy is to mandate or require that the existing service be revoked or cancelled as well, so that Plaintiff could re-effectuate it on his own terms.

Respondent argues on page 10 of its Motion to Dismiss that "Relators cannot show that they have a clear legal right to an order compelling Visiting Judge Jackson to 'revoke or nullify' his Service Order." Relators assert no such "right." Rather, Relators claim the Trial Court has a clear legal duty to, and Relators have a clear legal right to expect that Respondent shall: observe, follow and adhere to the Ohio Rules of Civil Procedure, particularly Civ. R. 3(A) and Civ. R. 4(E). A court may not ignore these "service of process time-limit" rules any more than it could eliminate summary judgment by opting to ignore Civ. R. 56.

Respondents next suggest on page 9 that "[w]hile mandamus may require a court to exercise its judgment or proceed to discharge its functions, there is no legal entitlement to control judicial discretion." They follow up by writing on page 10 that "Judge Jackson exercised judicial discretion after fully analyzing the issue and entering an order granting the defendant's motion to receive service in accordance with Civ.R. 4." There is no dispute Judge Jackson "exercised" discretion in inventing a new remedy; the real question; however, is when does such discretion cross the line into unbridled power?

The Trial Court's disregard of the sole remedies the Civil Rules currently provide to deal with "delayed" service of process is not merely an abuse of discretion, it is an abuse of power. Such abuse arises when the trial court essentially creates new law by adding another option to effectuate service----one belonging solely to the defendants. Such option is nowhere to be found in the Ohio Civil Rules or established by any case.

Respondent attempts to counter Plaintiff's argument by positing on pages 9 and 10 of its Motion to Dismiss, that "[m]andamus will not lie to control judicial discretion, even if that discretion were abused. *State ex rel. Dreamer v. Mason,* 115 Ohio St. 3d 190, 2007 Ohio 4789, ¶12, 874 N.E.2d 510;" yet *Mason* and the cases it relies upon are essentially limited to a judge's discretion over mundane discovery matters. The Ohio Supreme Court specifically held in *Mason:*

> {¶ 12} Appellees have not established this requirement, because mandamus will not lie to control judicial discretion, even if that discretion is abused. State ex rel. Rashada v. Pianka,[4]112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 3; R.C. 2731.03. In essence, appellees are challenging the trial judge's pretrial discovery decision to quash appellees' subpoena for the requested records. But this challenge is not permitted. See Berthelot v. Dezso (1999), 86 Ohio St.3d 257, 259, 714 N.E.2d 888 ("given the discretionary authority vested in [the trial court judge] in discovery matters * * *, an extraordinary writ will not issue to control her judicial discretion, even if that discretion is abused"); State ex rel. Abner v. Elliott (1999), 85 Ohio St.3d 11, 16, 706 N.E.2d 765 ("Trial courts * * * have extensive jurisdiction over discovery, * * * so [an extraordinary writ] will not generally issue to challenge these orders"); State ex rel. Sobczak v. Skow (1990), 49 Ohio St.3d 13, 14, 550 N.E.2d 455 ("mandamus cannot be used as a substitute for appeal or to create an appeal from an order, like a discovery ruling, that is not final").

[4] Even the *Rashada v. Pianka* case referenced in *Mason* cites back to *Berthelot v. Dezso* (1999), 86 Ohio St.3d 257, 259, 714 N.E.2d 888 ("given the discretionary authority vested in Judge Dezso in discovery matters * * *, an extraordinary writ will not issue to control her judicial discretion, even if that discretion is abused").

Limiting litigants to appealing discovery disputes only after the case ends makes eminent sense; otherwise, upper-level tribunals would be mired in reviewing transcripts to determine the fairness of every discovery request and motion to quash ever filed.

This is not such a case. The issue here is not whether certain confidential documents should be disclosed or if quashing a subpoena was the correct decision. The question now before this Honorable Court is a fundamental one-------who decides when a plaintiff can actually initiate litigation against another party---said plaintiff, the named defendants, or the presiding trial judge? Deciding to uphold the Trial Court's ruling would mark a fundamental sea change in Ohio jurisprudence. Overturning it would restore the *status quo*.

On page 10, Respondent argues that Visiting Judge Jackson exercised proper judicial discretion in "determin[ing] that the Rules of Civil Procedure impose a legal duty on a Clerk to issue service, and the defendants have legal right to plaintiff's diligent compliance with those Rules." Such "right" appears to have been manufactured out of whole cloth; however, as no legal authority is ever cited in support thereof. While considering the effectiveness of service may fall outside the scope of a writ action, the extra-judicial creation of a litigation remedy clearly falls within those boundaries and merits expedient review.

Just as serious; however, as unilaterally "amending" the service of process rules is the Respondent's decision to ignore Section 2303.26 of the Ohio Revised Code. Such provision provides in pertinent part that "[t]he clerk shall not restrict, prohibit, or otherwise modify the rights of parties to seek service on party defendants allowed by the Rules of Civil Procedure, either singularly or concurrently." By unilaterally removing the right of Plaintiff to wait at least six months before effectuating service, the Trial Court effectively "modified the rights of parties to seek service."

While interpreting the coordination of Civil Rules 4(A), 4(D), 4(E), 4.7, and 3(A) may fall within the jurisdiction of a court, "amending" the service rules can never be classified as an exercise of judicial discretion, or even an abuse thereof. It can only be classified as what it is----- legislating from the Bench and usurping the rights of the Ohio Legislature to create and modify the laws of this State.

Under current law, the right to choose the time and place for initiating a lawsuit is vested exclusively in the plaintiff; provided he or she complies with certain deadlines regarding service of process, applicable statutes of limitation, and personal jurisdiction matters. Conversely, the Trial Court has now legislated that the Civil Rules require an expedient service of process upon the filing of ***any*** complaint. Should a plaintiff fail to comply, the Trial Court has also legislated that the presiding judge may order the local Clerk of Court to serve the defendants with all due haste, even if such timing falls before the deadlines established by Civ. R. 3(A) and Civ. R. 4(E).

A failure by this Honorable Court to rule on these issues because Plaintiff supposedly has an adequate remedy at law via appeal (which he does not) would be an improvident "kicking of the can down the road." Such inaction would only "bless" the Trial Court's decision and encourage other judges to follow suit.[5] The time to end such judicial rulemaking is now, not several years in the future after an appeal slowly winds its way to the Ohio Supreme Court.

Respondent next argues on page 11 of its Motion to Dismiss that:

> Relators cannot logically maintain the position that plaintiffs were deprived of a clear legal right where defendants named in a complaint can, and the Altman (sic) Defendants did in the underlying matter, file an appearance, an answer, a counterclaim, and defended against the action without service being made.

[5] Would this Honorable Court consider a trial court's decision to do away with discovery in a case, or forbid the parties from filing for summary judgment, to constitute no more than a mere abuse of discretion? Should the determination of such an important issue only reach the Ohio Supreme Court via the lengthy and time-consuming appellate process? One would hope the answer to both questions is a resounding "No."

> (Complaint, ¶19.) Regardless whether a plaintiff intentionally forebears from causing service, or a plaintiff's active pursuits of service have failed, a named defendant may enter an appearance while preserving the defense of failure of service (emphasis supplied).

In simpler terms, Respondent appears to suggest that whether the Trial Court ordered service to take place, or the Plaintiff did it himself, is irrelevant in the matter at bar because both the Aultman and ICU Defendants voluntarily entered the litigation before being served. However, if such appearance alone was sufficient to constitute service upon them; then why did these same defendants petition the Trial Court to order the Clerk to issue them summonses?

The answer is contained within the very *Maryhew* case which Respondent cites on page 11. As *Maryhew* attests, entering a case establishes personal jurisdiction over the defendants, but not necessarily proper service because "a named defendant may enter an appearance while preserving the defense of failure of service." As such, Mr. Armatas still had to ensure the defendants were properly served despite their decision to file Notices of Appearance, Answers, and Motions to Dismiss *sans* service.

Finally, the Ohio Supreme Court has several options available in achieving a just result herein. It could leave the previously-effectuated service in place and simply issue an opinion that the Trial Court's actions were improper so that firm precedent could be established. It could issue a peremptory writ or a stay of the Underlying Litigation until it had sufficient time to consider the matter fully. Or it could toll the one-year filing period to effectuate service until a decision is rendered.

What the Ohio Supreme Court should ***not*** do; however, is somehow nullify the existing service and force Plaintiff to re-serve the defendants ***after*** April 30, 2021without some "tolling" of the one-year deadline;[6] otherwise Plaintiff would be barred from asserting certain of his

[6] Plaintiff's original complaint was filed on April 30, 2020 in the Stark County Court of Common Pleas.

claims since the statute of limitations would have expired by then. Obviously, Plaintiff should not be placed in a position where he prevails on the merits of his arguments, but loses the ability to prosecute his case because of the timing of the Ohio Supreme Court's ruling.

In light of the multiple remedies this Honorable Court has as its disposal, a Writ of Mandamus would not necessarily have to be issued, but Plaintiff leaves that to this Court's discretion.

2. The Writ of Prohibition Request

Conversely, a writ of prohibition must issue in order for Relators to prevail since the crux of their case is that the Trial Court acted improperly by disregarding the Ohio Civil Rules and R.C. 2323.06 when it issued the Service Order.

"To be entitled to the requested writ of prohibition, [Relators] must establish that (1) the court is about to exercise or has exercised judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Bell v. Pfeiffer,* 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶18; *State ex rel. Miller v. Warren Cty. Bd. of Elections,* 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶12." *State ex rel. Walton v. Williams*, 145 Ohio St.3d 469, 471, 2016-Ohio-1054, 50 N.E.3d 520, 523, ¶13 (2016).

Respondent attacks Plaintiff's request for a prohibition on three fronts. First, that courts of general jurisdiction have the authority to order compliance with the Rules of Civil Procedure; second; that the entire matter is now moot because the Underlying Litigation is already underway; and third, that refusing the writ would not result in any injury for which there is no adequate remedy in the ordinary course of the law. We take these in the order presented.

a. Judge Jackson acted without jurisdiction and continues to do so

On pages 13-14 of its Motion to Dismiss, Respondent suggests a Writ of Prohibition "will not lie, if the court had basic statutory jurisdiction," and that Relators cite no cases establishing "any authority demonstrating that [Respondent] patently and unambiguously lacks jurisdiction over the underlying matter or otherwise issued a void order without jurisdiction." In fact, Plaintiff already addressed such question in ¶44 of his original writ wherein he highlighted the holding of the Majority Opinion in *Seger*:

> "Our conclusion is ***unaffected*** by Seger's encouragement of the clerk to ignore the requirement of ordering service found in Civ.R. 4(A). We conclude, as did the court of appeals, that Seger commenced her action in compliance with Civ.R. 3(A). Accordingly, we affirm the judgment of the court of appeals." [emphasis supplied].

In other words, the majority in *Seger* allowed the plaintiff her one-year period to serve the defendants and attributed no legal significance to "Seger's encouragement of the clerk to ignore the requirement of ordering service found in Civ.R. 4(A)." Frankly, the only reason Relators and Respondent disagree on the impact of *Seger* is that Plaintiff relies on *Seger's* Majority Opinion, while the Trial Court ties itself to the dicta of the Concurring Opinion.

Regardless, *Seger* also clearly disavows the Trial Court's intervention in the Underlying Litigation by voicing its reluctance to permit judges to command county common pleas clerks to issue summonses as soon as the complaint is filed [i.e., the very action that Judge Jackson took] by writing:

> …to hold otherwise would lead to a host of potential problems, including determining on a case-by-case basis whether the clerk ordered service "forthwith," and, if not, whether the delay was intentional or the result of negligence, and what the consequences of the delay should be.

Thus, *Seger* stands for the proposition that the actions taken by the Trial Court went beyond anything the Ohio Supreme Court was willing to sanction as far back as 2006. Therefore, it was Respondent who exceeded the authority the Ohio Supreme Court had placed on him; not Plaintiff

or his actions.

As this Honorable Court explained in *State ex rel Tubbs Jones vs. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998):

> Prohibition will not lie to prevent an anticipated erroneous judgment [citation omitted]. However, we have created a limited exception in cases where there appears to be a total lack of jurisdiction of the lower court to act. Early cases referred to a "total want of jurisdiction" or to the court's being "without jurisdiction whatsoever to act." *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 285 N.E.2d 22, 24 (1972) and paragraph two of the syllabus. Later cases defined this exception as a "'patent and unambiguous' lack of jurisdiction to hear a case." *Ohio Dept. of Adm. Serv, Office of Collective Bargaining v. State Emp. Relations Bd*., 54 Ohio St.3d 48, 51, 562 N.E.2d 125, 129 (1990); *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals*, 40 Ohio St.3d 145, 148, 532 N.E.2d 727, 729 (1988).

Prior to October 2, 2020, the defendants against whom a complaint had been filed, but who were waiting to be served, had two avenues to address such situation----***one***, file a motion to dismiss the complaint without prejudice after 6 months had passed pursuant to Civ. R. 4(E); or ***two***, file a motion to dismiss the complaint with prejudice after one year had lapsed pursuant to Civ. R. 3(A). Both of these avenues involve "terminating" the litigation. If Judge Jackson's ruling is upheld, defendants will now be afforded a completely new and polar opposite right to ***commence*** the litigation by motioning the court to compel service of process.

While Respondent may have wide discretion to interpret the Civil Rules, even to the point of abusing said discretion, the Trial Court is clearly "without jurisdiction whatsoever to act," *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 285 N.E.2d 22, 24 (1972), when it comes to unilaterally amending the Civil Rules and inventing a "right" for the defendants to be served.

b. *Plaintiff's claims are not moot*

On pages 17-18 of its Motion to Dismiss, Respondent claims that "Relators' requests here are moot because the result will not 'definitely affect existing relations between the parties to the underlying action,'" and that "[a] case is moot when the Court is unable to grant the requested relief." Unfortunately for Respondent, such position is logically inconsistent. If the Underlying Litigation was improperly commenced due to the actions of the Trial Court,[7] then it cannot be deemed properly "ongoing." A judge is obviously operating under a "patent and unambiguous" lack of jurisdiction by continuing to preside over a case that never technically began.

A football game that started with one side using ineligible players should be stopped by the referees and either re-played or forfeited. The same concept holds true here. If the Underlying Litigation was commenced through improper means, then it was equally improper for it to proceed. A race that was never properly sanctioned by its governing body cannot declare an official winner simply because the gun went off before the officials realized their error.

As such, the Ohio Supreme Court should issue a writ that mandates Respondent reverse its Service Order and prohibits the Trial Court from continuing to preside over a matter that never officially commenced and is therefore a nullity.

c. Plaintiff does not have an adequate remedy at law

In opposing both Plaintiff's request for a Writ of Mandamus and a Writ of Prohibition to issue, Respondent argues a writ "may not be employed before trial on the merits, as a substitute for an appeal for the purpose of reviewing [alleged] errors[] or irregularities in the proceedings of a court having proper jurisdiction * * *." [Motion to Dismiss, p. 17, citing *State ex rel. Levin*

[7] Even though the Motion to Dismiss vigorously argues that Judge Jackson acted properly and correctly in deciding to issue the Service Order, it occasionally strays from such path by implying that it was actually Plaintiff who sought service of process. Case in point appears on page 18 wherein Respondent writes: "The defendants received effective service of summons and copies of the complaint through a process Relators initiated when requesting the Clerk copy of (sic) the complaint, which the Clerk agreed to perform and carried out on Relators' behalf." However, as already discussed on page 10 of this Opposition Memo, the only reasons Plaintiff assisted in his regard, was because the Trial Court advised him in writing that his failure to provide sufficient copies would result in his case being dismissed.

v. Sheffield Lake, 70 Ohio St.3d 104, 109, 637 N.E.2d 319 (1994)]. In simpler terms, "Relators have a plain and adequate remedy in the ordinary course of law," [Motion to Dismiss, p. 11, citing *Am. Legion Post* 25, 2008-Ohio-1261 at ¶11]. But a "plain and adequate remedy" as construed under Ohio law is not as cut and dry as it sounds.

To begin with, an exception applies in "situations where the court or officer patently and unambiguously lacks jurisdiction to act. In such a situation, the availability or adequacy of a remedy is immaterial to the issuance of a writ of prohibition." *State ex rel. Walton v. Williams*, 145 Ohio St.3d 469, 471, 2016-Ohio-1054, 50 N.E.3d 520, 523, ¶6 (2016), citing *State ex rel. Tilford v. Crush*, 39 Ohio St.3d 174, 176, 529 N.E.2d 1245 (1988).

"An order issued without jurisdiction is a nullity; it is void and without legal effect. *State v. Hall*, 4th Dist. No. 06CA17, 2007-Ohio-947, ¶11, citing *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus. * * * Moreover, Ohio courts possess inherent authority to vacate a void judgment. *Hall* at ¶11, citing *Patton* at paragraph four of the syllabus." *Fifth Third Mtge., Co. v. Rankin*, 4th Dist. Pickaway No. 11CA18, 2012-Ohio-2804, ¶15.

In the case at bar, the Trial Court has exceeded its constitutional and legal authority by (i) legislating from the bench; (ii) improperly initiating the Underlying Litigation without Relators' consent; (iii) directing the Clerk's Office of the Stark County Court of Common Pleas "to serve all the defendants in accordance with Civ.R. 4 and 4.1 (A) or (B);" and (iv) continuing to preside over a case that was not properly commenced.

In addition, the Ohio Supreme Court has held that a remedy is not adequate for purposes of denying a writ unless it affords complete, beneficial and speedy relief. See *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900. As such, Respondents' suggestion that Relator simply continue to engage in civil litigation with the Aultman

Defendants, and bring his appeal concerning the Service Order after the Trial ends, is not an adequate remedy, because such appeal will take years to wind its way back to the Ohio Supreme Court.

Such relief is neither "beneficial" nor "speedy" when Relators have been injured and will suffer irreparable harm by a Trial Court that (i) has exceeded its jurisdiction, (ii) commenced a case without proper authority, (iii) legislated from the Bench; and (iv) forced Plaintiff to begin litigating and incurring both defense and prosecution costs; all for a case that will likely be overturned and forced to start all over again by virtue of the Trial Court's unsanctioned Service Order. The time to avoid such calamity for the sake of all the parties is now.

C. Relators are entitled to the requested expedited consideration and peremptory or alternative writ

This Honorable Court is free to examine the factual determinations and decide whether emergency relief is appropriate in this matter. *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 117 Ohio St. 3d 1207, 2008-Ohio-904, 882 N.E.2d 918, ¶4. Time is of the essence. If a decision in Plaintiff's favor is issued after April 30, 2021, Relators could win the battle, but lose the war, because the grant of a Writ after such date would effectively be moot.

If the Ohio Supreme Court orders service on Defendants to be withdrawn or nullified, Relators would have only until April 30, 2021 to re-serve them in order to preserve the filing of their Complaint. Repeating service after April 30, 2021 would be considered a completely new case wherein several of the statute of limitations regarding Plaintiffs' causes of action will have lapsed. Therefore, it is imperative that any new Service of Process (assuming the original service is withdrawn by this Court) be re-effectuated before April 30, 2021.

In the alternative*;* however, Relators propose that this Honorable Court issue an immediate stay of the Underlying Litigation, take whatever time the Court needs to grant or deny the Peremptory or Permanent Writ, and simply toll the one-year mandatory service period during such period of time. In that way, no one is penalized for seeking a ruling on this important issue.

IN THE COURT OF COMMON PLEAS STARK COUNTY, OHIO

STEVEN A. ARMATAS, et. al.	)	**CASE NO. 2020 CV 00741**
	)	
PLAINTIFFS	)	
	)	**VISITING JUDGE:**
-vs-	)	**MICHAEL JACKSON**
	)	**Ohio Supreme Court Certificate: 20JA1570**
	)	
AULTMAN HOSPITAL, et.al.	)	**JOURNAL ENTRY & ORDER:**
	)	**PLAINTIFF'S SUPPLEMENTAL**
DEFENDANTS	)	**MOTION FOR RECONSIDERATION**
	)	**IS DENIED & A RELATED ORDER**

The Court has reviewed the Supplemental Motion for Reconsideration filed by Plaintiff Steven A. Armatas, individually (Armatas), as the personal Medicare Representative for Alexander E. Armatas, and as the Executor of the Estate of Alexander E. Armatas, (collectively, Plaintiff). [1]

The Court denies Plaintiff's supplemental motion for reconsideration. Having reviewed the initial motion for reconsideration and now this supplement, the Court finds nothing in Plaintiff's filings to contradict the Supreme Court's previous determination that a clerk "should not have" complied with a plaintiff's request to withhold service. *Seger v. For Women, Inc.*, 100 Ohio St.3d 451, 2006-Ohio-4855, ¶ 9.

In this case, by its Journal Entry and Order granting Defendants' motion to serve the Complaint, the Court explained how the Plaintiff prevented the Clerk from issuing the summons "forthwith." As a result, the Court ordered the Clerk to issue the summons by complying with Civ.R. 4 and with Civ.R 4.1 (A&B).

[1] Armatas is a licensed Ohio attorney authorized to practice law. He is representing himself regarding all counts in the Complaint where he is asserting his own individual claim for relief. He is acting as an attorney for the other plaintiffs, including beneficiaries related to these other plaintiffs - one of whom is Armatas - regarding all other claims for relief.

EXHIBIT # 1

Plaintiff argues that the Court is without authority to order Plaintiff to seek service. (Suppl. p. 6). However, the Court did not order Plaintiff to issue the summons or order Plaintiff to comply with Civ.R. 4(B).

Plaintiff did make it clear in his motion that he understands the obligation of a plaintiff under Civ. R. 4(B) to submit to a clerk copies of the complaint for attachment to the summons. However, Plaintiff stated that he will not provide the required copies of the Complaint to the Clerk. Id. p.6.

Should timely service not be completed on the defendants - due to Plaintiff's failure to supply the copies of the Complaint to the Clerk or for any other reason - this rule states what occurs next:

"If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." *See Romine v. Decker*, 5th Dist. No. 98CAE01006, 1998 Ohio App. LEXIS 5226, * 7 (Oct. 8, 1998) (affirming a dismissal of a complaint where the plaintiff failed to show good cause why the six-month period of Civ.R. 4(E) should be extended).

The Court also orders that no further filing by any party will be accepted regarding this Court's Journal Entry and Order referred herein, unless that party obtains leave of this Court regarding such filing. A motion for leave to file is limited to two pages, including attachments, and shall state: what the new information is, how it differs from the prior filings, and why it was not include in any prior filings. The motion for leave shall not include any argument and shall not attach the proposed filing.

SO ORDERED. Date: 10/9/2020

Visiting Judge Michael Jackson
Ohio Supreme Court Certificate: 20JA1570

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2021, a true and accurate copy of the foregoing **Affidavit of Relator Regarding Presentation of Evidence in accordance with S.Ct.Prac.R. 12.06** was served by Regular U.S. Postal Mail upon the following:

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