IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, ex rel. FAITH ANDREWS, CLERK OF COURTS FOR LAKE COUNTY, OHIO,	:	Case No. 2022-0409
Relator	:	Original Action in Prohibition and Mandamus or in the Alternative in *Quo Warranto*
vs.	:	
THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO, et al.,	:	
Respondents	:	

RESPONDENTS' MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

PORTER WRIGHT MORRIS & ARTHUR LLP
Counsel for Relator

EDMUND W. SEARBY (0067455)
Counsel of Record
KEVIN J. KELLEY (0077707)
950 Main Avenue, Suite 500
Cleveland, Ohio 44113-7201
Tel: (440) 443-9000
Fax: (440) 443-9011
Email: esearby@porterwright.com, kkelley@porterwright.com

L. BRADFIELD HUGHES (0070997)
41 S. High Street
Columbus, Ohio 43215-6194
Tel: (614) 227-2053
Fax: (614) 227-2100
Email: bhughes@porterwright.com

MONTGOMERY JONSON LLP
Counsel for Respondents

KIMBERLY V. RILEY (0068187)
Counsel of Record
14701 Detroit Avenue, Suite 555
Cleveland, Ohio 44107
Tel: (440) 779-7978
Fax: (513) 768-9244
Email: kriley@mojolaw.com

LINDA L. WOEBER (0039112)
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Tel: (513) 768-5239
Fax: (513) 768-9244
Email: lwoeber@mojolaw.com

Please direct all paper mail in this matter to the Cincinnati office.

Respectfully submitted,

/s/ Kimberly V. Riley

MONTGOMERY JONSON LLP
Counsel for Respondent

KIMBERLY V. RILEY (0068187)
14701 Detroit Avenue, Suite 555
Cleveland, Ohio 44107
Tel: (440) 779-7978
Fax: (513) 768-9244
Email: kriley@mojolaw.com

LINDA L. WOEBER (0039112)
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Tel: (513) 768-5239
Fax: (513) 768-9244
Email: lwoeber@mojolaw.com

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION

Introduction

Pursuant to S.Ct.Prac.R. 18.02(B)(4), Respondents, the Lake County Common Pleas Judges ("Judges"), respectfully move this Court for reconsideration of its decision of November 30, 2022, in which it granted Relator's petitions for writs of prohibition and mandamus. The Respondent Judges seek an Order granting this motion; vacating Slip Op. No. 2022-Ohio-4189; and issuing an alternative writ pursuant to S.Ct.Prac.R. 12.05. In the alternative, they seek an Order that vacates Slip Op. No. 2022-Ohio-4189 and affords them an opportunity to submit an answer to the Amended Complaint.

Procedural History

Relator, Lake County Clerk of Court Faith Andrews ("Clerk" or "Clerk Andrews"), filed a Complaint in this matter on April 18, 2022. In that action, she sought writs of prohibition and mandamus to vacate and preclude enforcement of a draft Entry the Respondent Judges had provided her on March 4, 2022, which the Judges permitted Relator to follow voluntarily *in lieu* of issuing an Entry that ordered her compliance.

Thereafter, on May 4, 2022, the Respondent Judges executed and journalized an Entry, comprising the first and only instance of a judicial order that required Clerk Andrews' compliance.

In response, on May 10, 2022, Relator filed an Amended Complaint in this matter, seeking writs of prohibition and mandamus—or, in the alternative, in *quo warranto*—again seeking to vacate and preclude enforcement of both the draft Entry and journalized Entry; alternatively, Relator Clerk Andrews sought a writ of *quo warranto*, restoring her to office.

The Respondent Judges filed a Motion to Dismiss the Amended Complaint on June 14, 2022, which Relator opposed on June 24, 2022. Because their Motion to Dismiss has been pending since this time, Respondents did not, and have not, yet responded to Relator's factual allegations and the documents incorporated into her Amended Complaint.[1] As this Court's opinion noted, when considering Respondents' motion to dismiss, it was obligated to do so with the presumption that the Relator's factual allegations and the documents incorporated into her Amended Complaint were true; it was likewise obligated to consider Respondents' motion to dismiss by making all reasonable inferences in Relator's favor. *State ex rel. Andrews v. Lake Cty. Court of Common Pleas*, Slip Op. No. 2022-Ohio-4189, ¶ 19 (*citing Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 12.) Further, because of the procedural constraints of a motion to dismiss, Respondents proffered no evidence in support of their arguments.

In an opinion of November 30, 2022, this Court denied Respondents' motion to dismiss. However, instead of issuing an alternative writ or instructing Respondents to answer the Amended Complaint, it issued Relator's requested writs of prohibition and mandamus, thereby issuing a

[1] Because Relator amended her original Complaint before a response was due, Respondents did not answer the original Complaint.

dispositive determination that precluded Respondents from submitting an answer or taking further action in the case. *Id.* at ¶¶ 37-38, 40.

Respondents seek a reconsideration of this Court's decision of November 30, 2022, respectfully submitting that its issuance of Relator's requested writs was premature under the Rules of Practice and principles of due process: This Court granted Relator's requested writs and entered judgment against Respondents without first affording Respondents an opportunity to address the allegations in the Complaint; further, it did so without awaiting Respondents' answer to Relator's allegations and by relying exclusively on briefings that presumed all of Relator's allegations as true and which construed all inferences in Relator's favor. Respondents seek reconsideration of this Court's opinion to allow them an opportunity to address the allegations in the Complaint and allow any determination about the propriety of extraordinary relief to be based only upon the parties' submission of evidence and briefing (in the event of an alternative writ) or the uncontroverted facts (in the event of an answer).

Standard of Review and Procedural Posture

While a Motion for Reconsideration may not simply reargue the underlying case, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 58, fn. 2, there is also no heightened standard of proof to prevail: Rather, Motions under S.Ct.Prac.R. 18.02 should "correct decisions which, upon reflection, are deemed to have been made in error." *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 19. That is, the standard for granting this Motion should simply be whether this Court agrees its original decision was issued prematurely.

Analysis

I. The Relator Is Not Entitled to Extraordinary Relief Before Respondents Have Had an Opportunity to Submit Evidence and Briefing, or, Alternatively, Before They Have Had an Opportunity to Answer the Allegations of the Amended Complaint.

S.Ct.Prac.R. 12.04(A) and (B) provide for Respondents to submit an Answer; a Motion to Dismiss; or an Answer with a Motion for Judgment on the Pleadings in response to an original action. Thereafter, this Court has three alternatives. *See also State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, 819 N.E.2d 703, at ¶¶ 10-12:

> (1) it may dismiss the case (*i.e.,* "when it appears beyond doubt, after presuming the truth of all material factual allegations of the complaint and making all reasonable inferences in [the Relator's] favor, that [the Relator] is not entitled to the requested extraordinary relief," *Rodak,* 104 Ohio St.3d at ¶ 10, *citing State ex rel. Satow v. Gausse-Milliken,* 98 OhioSt.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, ¶ 11.*);*
>
> (2) it may issue an alternative or a peremptory writ, if a writ has not already been issued (*i.e.,* "if…after so construing [the Relator's] complaint, it appears [their]…claim may have merit, an alternative writ should be granted and a schedule for evidence and briefs should be issued." *Rodak,* 104 Ohio St.3d at ¶ 11, *citing Tatman v. Fairfield Cty. Bd. of Elections,* 102 Ohio St.3d 425, 2004-Ohio-3701, 811 N.E.2d 1130, ¶ 13. Or "if the pertinent facts are uncontroverted [*i.e.,* if Respondent has admitted all pertinent facts in an answer] and it appears beyond doubt that [the Relator] is entitled to the requested writ, we will issue a peremptory writ…" *Rodak,* 104 Ohio St.3d at ¶ 12, *citing State ex rel. Highlander v. Rudduck,* 103 Ohio St.3d 370, 2004-Ohio-4952, 816 N.E.2d 213, ¶ 8*)*; or
>
> (3) it may deny the request for the writ (*i.e.*, if the admissions within the answer confirm that the request for extraordinary relief must be denied, it may deny the requested writ; *see Rodak, supra*).

Instead, on November 30, 2022, this Court entered an opinion and judgment, denying Respondents' motion to dismiss, but then it additionally issued Relator's requested writs of prohibition and mandamus, working exclusively from the still-unanswered allegations of her Amended Complaint—and without affording the Respondents an opportunity to respond.

The Rules of Practice do not specify what happens following a denied motion to dismiss; however, S.Ct.Prac.R. 12.01(A)(2)(b) provides that the Ohio Rules of Civil Procedure supplements the Rules of Practice in these instances, unless clearly inapplicable. Under the Civil Rules, the filing of a motion to dismiss simply delays the deadline for the filing of an answer until after the Court denies the motion. Civ.R. 12(A)(2) and (B); *State ex rel. Yeagley v. Harden*, 68 Ohio St.3d 136, 137, 624 N.E.2d 702 (1993).

Respondent Judges had no obligation to admit or deny the allegations of the Amended Complaint before this Court denied their motion to dismiss.[2] *Yeagley*, 68 Ohio St.3d at 137; Civ.R.8(D). This is the reason this Court was obliged to presume all material facts in Relator's favor when considering Respondents' motion to dismiss. *State ex rel. Rodak v. Betleski*, 104 Ohio St.3d 345, 2004-Ohio-6567, 819 N.E.2d 703, at ¶ 10.

For these reasons, the Respondents respectfully submit that, after denying their motion to dismiss, this Court was obligated to issue an alternative writ, to afford the parties the opportunity to submit evidence and briefing; or, at a minimum, the Respondents were entitled to submit an answer in response to Relator's Amended Complaint before this Court granted her requested relief—particularly because the allegations of her Amended Complaint are not exclusively founded upon matters this Court may judicially notice, but they largely arise from her own disputed allegations of fact and law.

This Court has endorsed this very standard: In *State ex rel. Temke v. Outcalt*, 49 Ohio St.2d 189, 189, 360 N.E.2d 701 (1977), the Relator brought an original action in the Court of Appeals, seeking a writ of mandamus against the Judge who was presiding over his underlying case. The

[2] This Court's issuance of the Relator's requested writs was dispositive and thereby terminated the case, thereby precluding Respondents from submitting an answer after this Court's denial of their motion to dismiss.

Judge moved to dismiss the Complaint, and the Court of Appeals denied the motion to dismiss; like in this case, it simultaneously issued a writ of mandamus. *Id.* On appeal, this Court determined the Court of Appeals erred, concluding "a peremptory writ of mandamus should [only] issue…when material facts are admitted disclosing that relator is entitled to relief as a matter of both law and fact…An alleged right to performance is unclear when the facts underpinning the claimed right are not admitted and it has not been established that no valid excuse can be given for nonperformance of the alleged duty." *Id.* at 191.

This Court continued, determining that, because the Court of Appeals had issued the writ before the Respondent Judge had an opportunity to respond to the Relator's factual contentions (*i.e.,* before he had either had an opportunity to answer the Complaint or issue evidence and briefing in response to an alternative writ), the lower Court had issued a peremptory writ prematurely. *Id.* at 191.

Temke is only one of several similar opinions this Court has issued, concluding that a court may not grant a peremptory writ before obtaining the Respondent's answer, thereby depriving he Respondent of the opportunity to admit or deny the material facts:

- *State ex rel. Beacon Journal Publishing Co.*, 57 Ohio St.3d 102, 103, 566 N.E.2d 661 (1991): A court generally may not grant a writ "before an answer admitting or denying the material facts ha[s] been filed. No answer has been filed here, and no facts have been admitted….The court of appeals granted relief here on no more than Beacon Journal's naked assertions. The court gave respondents no chance to deny the truth of those assertions…No evidence lay before the court that the assertions were true. The judgment is therefore reversed and the case is remanded to the court of appeals."

- *State ex rel. Conley v. Park,* 146 Ohio St.3d 454, 2015-Ohio-5226, 58 N.E.3d 1112, ¶¶ 9-10: Before Judge Park had answered a complaint in mandamus, the Court of Appeals issued a peremptory writ. This Court held, "a peremptory writ of mandamus should issue…only when material facts are admitted disclosing that relator is entitled to relief as a matter of both law and fact…An alleged right to performance is unclear when the facts underpinning the claimed right are not admitted and it has not been established that no valid excuse can be given for nonperformance of the alleged duty."

The *Park* Court continued, "Thus a court generally may not grant the writ 'before an answer admitting or denying the material facts ha[s] been filed." *Id.* at ¶ 9 (*citing State ex rel. Beacon Journal Publishing Co. v. Radel*, 57 Ohio St.3d 102, 103, 566 N.E.2d 661 (1991), *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 40, 550 N.E.2d 464 (1990).) "The court of appeals acted prematurely by issuing a writ [to Judge Park] before she had a chance to explain the reasoning behind her [challenged action]."

- *State ex rel. Ramirez-Ortiz v. Twelfth Dist. Court of Appeals*, 151 Ohio St.3d 46, 2017-Ohio-7816, 85 N.E.3d 725, ¶ 15: "In an original action before this court, once the respondent's time to answer or move for dismissal has elapsed, our rules provide for four possible judgments: the court may (1) dismiss the complaint, (2) issue an alternative writ, thereby requiring the parties to submit evidence and additional briefing, (3) issue a peremptory writ of mandamus or prohibition, or (4) deny the writ outright.…***Summary disposition is generally not proper in a mandamus action, when the underlying facts establishing the legal duty and/or the right to relief are in dispute or have not been admitted***." (Emphasis added.)

These opinions and others stand for the proposition that Relator was not entitled to extraordinary relief until she could demonstrate an entitlement to relief as a matter of law and fact—and until the Respondent Judges have answered the Amended Complaint or submitted evidence and briefing in response to an alternative writ. At this stage, this Court has only the benefit of Relator's unchallenged factual and legal allegations. As a result, Respondents must first be afforded an alternative writ, or in the alternative, the opportunity to submit an answer.

II. None of the Exceptions Apply to Issuing a Peremptory Writ Simultaneously With Denying the Motion to Dismiss or Without Obtaining an Answer.

On rare occasions, it is sometimes permissible to proceed exactly as this Court did—*i.e.*, granting the Relator's request for extraordinary relief simultaneously with denying the motion to dismiss. However, these instances occur subject to limited exceptions that do not apply here:

A. Answer and Motion for Judgment on the Pleadings

In *State ex rel. Fire Rock, Ltd. v. Ohio DOC*, 163 Ohio St.3d 277, 2021-Ohio-673, 169 N.E.3d 665 (Mar. 11, 2021), Relator Fire Rock filed an original action in this Court for a writ of mandamus, and the Respondent filed an answer and a simultaneous Motion for Judgment on the Pleadings. *Id.* at ¶ 4. This Court concluded it should deny the Respondent's motion for judgment

on the pleadings because its argument rested on a flawed legal theory. *Id.* at ¶ 23. It further indicated that "because [issuing] an alternative writ ordering the submission of evidence and briefing would not aid in our disposition of this case, we grant Fire Rock's request for relief based on the reasons set forth above and issue a peremptory writ of mandamus…" That is, pursuant to R.C. 2731.06, "[w]hen the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus. In all other cases[,] an alternative writ must first be issued on the allowance of the court, or a judge thereof."

The single distinction between this Court's issuance of an extraordinary writ in *Fire Rock* and in this matter was that the Respondent in *Fire Rock* had already answered the Complaint, whereas the Respondent Judges in this case have not. In *Fire Rock,* it was feasible for this Court to both determine that the Motion for Judgment on the Pleadings failed to warrant a dismissal of the action—*and* to conclude from the admissions in the Respondent's answer that the Relator was entitled to a peremptory writ. Here, because the Respondents have not had the opportunity to answer the Amended Complaint or proffer evidence in response to an extraordinary writ, this Court's issuance of extraordinary relief was premature.

B. Procedurally Unique Matters With Timebound Exigencies

In at least two kinds of procedurally unique matters, this Court has determined that the exigencies of the type of case—and the peculiar time constraints at issue—created an exception to the general rule that a writ would not issue without first obtaining either an answer or issuing an alternative writ.

In elections matters, because "time is of the essence," this Court has determined that the urgency of reaching a decision creates a need for respondents who file motions to dismiss instead

of answers to do so "at the risk of having the court accept the facts as stated in the complaint…" *State ex rel. Beck v. Casey*, 51 OhioSt.3d 79, 83, 554 N.E.2d 1284 (1990).

Secondly, when this Court issues an alternative writ, the parties have a limited window to submit evidence and briefs in support of their position. However, in matters where the respondents moved to dismiss the case instead of submitting evidence and briefing, this Court has affirmed the subsequent issuance of a peremptory writ without awaiting the respondent's answer or opportunity to provide substantive evidence. *See e.g., State ex rel. Nat'l Broadcasting Co. v. Lake Cty. Court of Common Pleas*, 52 Ohio St.3d 104, 115, 556 N.E.2d 1120, 1131 (1990).

Neither of these exceptions apply to this matter.

C. Respondent's or Co-Respondent's Default

In *State ex rel. Board of Educ. v. City of Youngstown*, 84 Ohio St.3d 51, 53, 701 N.E.2d 986, 1998-Ohio-501 (Dec. 2, 1998), the Relator filed an action for extraordinary relief, but the Respondent failed to submit any timely response—neither an answer nor a motion to dismiss. Thereafter, Relator filed a motion for a peremptory writ, which Respondents also failed to answer. In light of this default and the uncontroverted submissions the Relator had provided to the Court in support of its motion, this Court granted the peremptory writ. *Id.*

Similarly, in *State ex rel. State Farm Mut. Ins. Co. v. O'Donnell*, 163 Ohio St.3d 541, 2021-Ohio-1205, 171 N.E.3d 321, the Relator sought writs of prohibition and mandamus against two different judges arising out of their trial court conduct. One Respondent Judge (Coletta) did not respond to the Complaint at all, and the other Respondent Judge (O'Donnell) didn't answer, but he submitted a motion to dismiss. Due to Judge Coletta's default, the majority presumed the unanswered allegations of fact pled against him as true—*i.e.*, they were no longer merely unanswered allegations of the Relator, but allegations they could now presume as true as the result

of Judge Coletta's default. The majority then considered those "admitted" facts to grant the Relator's petition for a peremptory writ against the *other* Respondent, Judge O'Donnell. Absent this procedural wrinkle, the majority would have presumably been incapable of advancing to a peremptory writ against *either* Respondent without first obtaining their answer or issuing an alternative writ to obtain evidence either Respondent submitted on his behalf.

Justice Kennedy issued an opinion, concurring in part and dissenting in part. Citing a wealth of established case law, she maintained that a default could supply admitted allegations that allowed the Court to bypass an answer or alternative writ against the *defaulting* Respondent, but it failed to provide the same as to the *non-defaulting* co-Respondent:

> It is premature at this stage of the proceedings to grant preemptory writs of prohibition and mandamus, as the majority does, because Judge O'Donnell has not answered and therefore has not admitted the material facts that demonstrate that State Farm is entitled to relief as a matter of law and of fact.
>
> **A court generally may not grant a peremptory writ before an answer has been filed. A peremptory writ will not issue unless it is without doubt that the relator is entitled to relief as a matter of law and of fact, until an answer is filed, all we have to review are one party's allegations in the complaint.** Because the court cannot simply presume that [Relator's] allegations are true, the majority adopts a different approach: the facts of this case are uncontroverted as to Judge O'Donnell because a separate party—Judge Coletta—has failed to respond to the complaint.
>
> That analysis is flawed. Although a default may be an admission of the allegations of the complaint against the defaulting defendant, it does not operate as an admission of those allegations against other codefendants. (Citations omitted). Rather, those codefendants must be given the opportunity to controvert the evidence against them….
>
> At this stage of the proceedings, no answer has been field and Judge O'Donnell may still deny the allegations in the complaint, dispute the authenticity of the documents attached to it, or assert a defense precluding relief in [Relator's] favor. That may be unlikely, but it cannot be said to be *beyond all doubt* that he cannot or will not. The decision to grant peremptory writs of prohibition and mandamus in this case is therefore premature.

State ex rel. State Farm Mut. Ins. Co. v. O'Donnell, 163 Ohio St.3d 541, at ¶¶ 18-22 (italics in original; bold added).

Justice Kennedy's analysis addressed the *O'Donnell* majority's answer to a procedurally complex question—*i.e.*, whether one Respondent's admissions by default may be used against a non-defaulting Respondent *in lieu* of awaiting that Respondent's answer or evidence. However, her analysis and references to solidly established case law clearly confirm the far simpler proposition of law at issue here: Before these Respondents may have extraordinary writs issued against them, they are entitled to the opportunity to address the Relator's currently unanswered allegations against them, whether through the submission of evidence in support of an alternative writ, or in an answer.

Conclusion

For the foregoing reasons, Respondent Judges respectfully move this Court for reconsideration of its decision of November 30, 2022, as it was issued prior to their opportunity to either answer the Amended Complaint or proffer evidence and argument in response to an alternative writ. They seek an Order granting this motion; vacating Slip Op. No. 2022-Ohio-4189; and issuing an alternative writ pursuant to S.Ct.Prac.R. 12.05. In the alternative, they seek an Order that vacates Slip Op. No. 2022-Ohio-4189 and affords them an opportunity to submit an answer to the Amended Complaint.

Respectfully submitted,

/s/*Kimberly V. Riley*_____
MONTGOMERY JONSON LLP
Counsel for Respondents

KIMBERLY V. RILEY (0068187)
14701 Detroit Avenue, Suite 555
Cleveland, Ohio 44107
Tel: (440) 779-7978
Fax: (513) 768-9244
Email: kriley@mojolaw.com

LINDA L. WOEBER (0039112)
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Tel: (513) 241-4722
Fax: (513) 768-9244
Email: lwoeber@mojolaw.com

CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11(C), I certify that I submitted this document to the following via electronic mail on this 12th day of December, 2022:

EDMUND W. SEARBY (0067455)
Counsel of Record
KEVIN J. KELLEY (0077707)
950 Main Avenue, Suite 500
Cleveland, Ohio 44113-7201
Tel: (440) 443-9000
Fax: (440) 443-9011
Email: esearby@porterwright.com, kkelley@porterwright.com

L. BRADFIELD HUGHES (0070997)
41 S. High Street
Columbus, Ohio 43215-6194
Tel: (614) 227-2053
Fax: (614) 227-2100
Email: bhughes@porterwright.com

/s/*Kimberly V. Riley*_____
MONTGOMERY JONSON LLP

Counsel for Respondents