

STATE OF OHIO  
COUNTY OF GEAUGA

)  
)SS.

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

NANCY McARTHUR,

**FILED**  
IN COURT OF APPEALS

JUDGMENT ENTRY

Relator,

APR 30 2015  
DENISE M. KAMINSKI  
CLERK OF COURTS  
GEAUGA COUNTY

CASE NO. 2015-G-0002

-vs-

GEAUGA COUNTY COURT  
OF COMMON PLEAS, JUVENILE  
DIVISION, et al.,

Respondents.

On January 13, 2015, respondents, the Geauga County Court of Common Pleas, Juvenile Division, and the Honorable Timothy J. Grendell, filed a Civ.R. 12(B)(6) motion to dismiss relator's, Nancy McArthur, complaint for writ of prohibition and a motion to dissolve stay of proceedings. Because we find that relator has stated a claim for relief in prohibition, we deny respondents' motion to dismiss. We also deny respondents' motion to dissolve stay of proceedings in order to maintain the status quo pending resolution of relator's claim on the merits.

**Legal Standard—Civ.R. 12(B)(6)**

A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. *State ex rel. Hanson v. Guemsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In deciding whether to dismiss a complaint pursuant to Civ.R. 12(B)(6), the court must presume all factual allegations in the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). A complaint should not be dismissed for failure to state a

claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975), syllabus.

### **Writ of Prohibition**

A writ of prohibition is an extraordinary judicial writ issued by a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73 (1988). Generally, to obtain a writ of prohibition, the relator must establish that (1) the court against whom the writ is sought is about to exercise judicial power; (2) the exercise of the power is not authorized by law; and (3) the refusal of the writ would result in injury for which there exists no adequate remedy in the ordinary course of law. *Id.* at 74; *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App.3d 419, 428 (8th Dist. 1999); *Johnson v. Summit Cty. Court of Common Pleas*, 11th Dist. No. 2014-G-3307, 2015-Ohio-211, ¶ 7. A writ of prohibition is an extraordinary remedy that is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies. *Suster* at 73.

Generally, a writ of prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the lower court. *Id.*, quoting *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409 (1988). However, the Supreme Court of Ohio has recognized exceptions to this general limitation where an inferior court has entered a procedural order that is not authorized by law, particularly when First Amendment free speech rights are implicated. *Suster* at 73, fn. 2; *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149,

2010-Ohio-1533, ¶ 4 ("prohibition is the only remedy available to nonparties who wish to challenge an order which restricts the right of free speech"); *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juv. Div.*, 77 Ohio St.3d 40 (1996). The court has also made an exception where the inferior court had subject-matter jurisdiction but patently and unambiguously lacked personal jurisdiction. *State ex rel. Connor v. McGough*, 46 Ohio St.3d 188 (1989). Other appellate courts have also issued writs of prohibition where the trial court has issued a procedural order that patently exceeds its authority. *Gaul* at 436 (trial court patently exceeds its authority when it pursues an investigation of an individual who no longer has any involvement in the matter before it).

Here, the first requirement for a writ of prohibition is not contested. Respondents have sought to exercise judicial power by issuing a subpoena and show cause order. With respect to the second requirement, relator alleges facts that implicate exceptions to the general rule that prohibition is a remedy limited to challenges to subject-matter jurisdiction. Respondents' subpoena and show cause order require relator to appear "to show cause why [she] should not be held in Contempt of Court for making vile, contemptuous, slanderous, and insulting language directed at the Judge." (Complaint, at ¶ 11.) These alleged statements were made outside the presence of the court. (Complaint, at ¶ 22.) Relator further alleges that respondents' subpoena and show cause order were issued by respondents "based upon a hearsay allegation that she voiced her opinions about Respondent Grendell" (Complaint, at ¶ 19), and that such expressions of opinion are protected under both the Ohio and United States Constitutions. (Complaint, at

¶ 26, 30(e).) Therefore, relator alleges facts that suggest respondents are attempting to use a procedural device to abridge relator's First Amendment rights.

Relator also alleges facts that challenge respondents' attempted exercise of authority over her. Relator alleges she "is not a party to the Matter, does not know the minor, and has no personal knowledge whatsoever regarding the Matter or the issues involved in the case." (Complaint, at ¶ 6.) Likewise, in paragraph 20 of the complaint, relator alleges she "knows nothing about the matter or the issues therein." Assuming these allegations are true, relator has no connection to the underlying case whatsoever. Relator's complaint challenges the court's authority to issue a subpoena and/or show cause order to a person who patently has no connection with the underlying adjudication other than an allegation that she made derogatory statements about respondent Grendell to a person that may have some connection to the underlying juvenile proceeding. These allegations fall within the category of cases where courts have recognized prohibition as an available remedy even though the court's subject-matter jurisdiction is not challenged. *News Herald; Gaul*. Therefore, relator has alleged facts that satisfy the second requirement for a writ of prohibition.

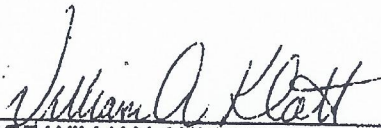
Relator has also alleged that she has no adequate remedy at law. (Complaint, at ¶ 31.) An appeal may not be an adequate remedy when a court, without authority, issues a procedural order such as a subpoena and show cause order to a nonparty/nonwitness for purposes of restricting or punishing the exercise of free speech. *Toledo Blade Co.* at ¶ 4. Moreover, when a judge patently exceeds his or her authority, the availability of an appeal is immaterial. *McGough* at 191; *Gaul* at 437-38.

For the foregoing reasons, we conclude that relator has stated a claim in prohibition.

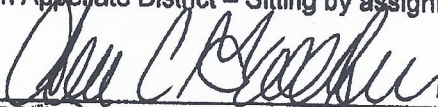
Respondents also argue that we should dismiss the complaint because relator filed this action in her individual capacity and not in the name of the state. We disagree. The only authority cited by respondents in support of this proposition addresses mandamus actions, not actions in prohibition. There is no requirement that prohibition actions be brought solely in the name of the state. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶ 16; *Planey v. Court of Common Pleas*, 7th Dist. No. 07MA141, 2007-Ohio-7273.

Therefore, we deny respondents' motion to dismiss.

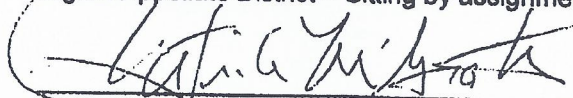
Lastly, respondents request that we lift the emergency stay entered by this court in early January 2015. In order to maintain the status quo pending our resolution of relator's claim, we also deny respondents' motion to dissolve stay of proceedings.



JUDGE WILLIAM ANDREW KLATT  
Tenth Appellate District – Sitting by assignment



JUDGE SEAN CHRISTOPHER GALLAGHER  
Eighth Appellate District – Sitting by assignment



JUDGE PATRICK MARTIN MCGRATH  
Retired – Tenth Appellate District – Sitting by assignment