**[Cite as *State ex rel. DeDonno v. Mason*, 2010-Ohio-4903.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**Nos. 95431 and 95498**

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## STATE OF OHIO, EX REL. GREGORY SMITH DeDONNO

RELATOR

vs.

## JUDGE LANCE T. MASON

RESPONDENT

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**JUDGMENT:**
**WRIT DENIED**

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Writ of Mandamus
Motion Nos. 437037 and 436763
Order No. 437772

**RELEASE DATE:** October 6, 2010

**FOR RELATOR**

Gregory Smith (Dedonno), pro se
Inmate # 365-935
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**ATTORNEYS FOR RESPONDENT**

William D. Mason
Cuyahoga County Prosecutor

By: Charles E. Hannan, Jr.
Assistant County Prosecutor
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JAMES J. SWEENEY, J.:

**{¶ 1}** On July 19, 2010, the relator, Gregory Smith DeDonno, commenced Cuyahoga County Court of Appeals Case No. 95431, a mandamus action, against the respondent, Judge Lance T. Mason, to compel the judge to issue a final, appealable order in the underlying case, *Gregory Smith DeDonno v. Charles Quinn*, Cuyahoga Cty. Common Pleas Court Case No. CV-716963. On August 3, 2010, DeDonno filed a nearly identical case, Cuyahoga County Court of Appeals Case No. 95498. The only differences between the two filings are that the Loc.R. 45 supporting affidavits were executed on different days and the

prison cashier's statement required by R.C. 2969.25 covers the time period September 2009 to March 2010 in Case No. 95431 and from January 2010 to July 2010 in Case No. 95498. The cases are otherwise identical. Thus, on August 31, 2010, this court consolidated both cases for all purposes. On August 19, 2010, the respondent judge moved for summary judgment on the grounds that he has no duty to issue a final, appealable order in the underlying case. On August 30, 2010, DeDonno filed a motion for summary judgment. Since then, neither party has made any further filings. This court finds that the matter is ripe for decision, and for the following reasons, grants the respondent's motion for summary judgment and denies DeDonno's application for a writ of mandamus.

**{¶ 2}** The requisites for mandamus are well established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Additionally, although mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Thus, mandamus does not lie to correct errors and procedural irregularities in the course of a case. *State ex rel. Tommie Jerninghan v. Judge Patricia Gaughan* (Sept. 26, 1994), Cuyahoga App. No. 67787. Moreover, mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should

not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Commission* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex rel. Connole v. Cleveland Bd. of Edn.* (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; and *State ex rel. Dayton-Oakwood Press v. Dissinger* (1940), 32 Ohio Law Abs. 308.

**{¶ 3}** In the underlying case DeDonno sued Quinn for legal malpractice. Although Quinn had obtained leave to plead, he never filed an answer or otherwise defended the action. Thus, on April 26, 2010, DeDonno moved for default judgment. According to the docket in the underlying case, the respondent judge set the matter for a default hearing on May 26, 2010, and ordered the "plaintiff to provide default package to include a copy of a notice of hearing mailed to defendant no less than seven days before the hearing informing defendant of default date and failure to appear may result in judgment. Plaintiff to provide affidavit of damages, affidavit of service, proposed journal entry, and evidence of the claim. Failure to provide evidence of the claim at the hearing shall result in dismissal." (Respondent's Exhibit A.) On June 1, 2010, the respondent issued the following order: "Gregory Smith (DeDonno) renewed motion for default judgment (Civ.R. 55(B)) pro se filed 4/26/2010, is denied. Plaintiff has failed to provide the requisite evidence supporting his claims for damages. Case is hereby dismissed without prejudice. Final." (Respondent's Exhibit B.)

**{¶ 4}** On June 18, 2010, DeDonno appealed this decision. *Gregory Smith DeDonno v. Charles Quinn,* Cuyahoga County Court of Appeals Case No. 95296.

On June 22, 2010, this court sua sponte dismissed the appeal per R.C. 2505.02 for lack of a final, appealable order. DeDonno moved the trial court to issue a final, appealable order. On July 9, 2010, the respondent judge ruled that motion was moot and reasoned as follows: "The court issued a final order on 06/01/2010. The docket reflects that the court denied plaintiff's motion for default judgment as plaintiff failed to provide the requisite default package. The court then dismissed the case without prejudice. There are no remaining claims pending for the court to issue a ruling on." (Respondent's Exhibit C.) DeDonno then commenced this mandamus action.

**{¶ 5}** DeDonno is facing the apparent anomaly under Ohio law that a decision may be final, but not appealable. Civil Rule 41(B)(1) provides in pertinent part as follows: "Where the plaintiff fails to * * * comply with * * * any court order, the court * * * on its own motion may, after notice to plaintiff's counsel, dismiss an action or claim." Civil Rule 41(B)(3) provides in pertinent part as follows: "A dismissal under division (B) of this rule * * * operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." Therefore, the Civil Rules allow a trial court judge to dismiss a case without prejudice for failing to follow a court order. The respondent judge was

acting within his discretion when he dismissed DeDonno's case without prejudice. That was and is a final order.

**{¶ 6}** However, a dismissal without prejudice is generally not appealable, even if it is final. In *Natl. City Commercial Capital Corp. v. AAAA At Your Serv. Inc.,* 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663 ¶8, the Supreme Court of Ohio held: "Ordinarily, a dismissal 'otherwise than on the merits' does not prevent a party from refiling and, therefore, ordinarily, such a dismissal is not a final, appealable order."

**{¶ 7}** To provide DeDonno with a final, appealable order this court would have to override the respondent judge's discretion to dismiss the case without prejudice and order him to dismiss with prejudice. However, mandamus does not lie to control judicial discretion. Therefore, upon the peculiar facts of this case, mandamus will not lie to compel the trial judge to issue a final, appealable order.

**{¶ 8}** Accordingly, this court grants the respondent's motion for summary judgment, denies DeDonno's motion for summary judgment, and denies his application for a writ of mandamus. Costs assessed against relator. This court directs the clerk to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

JAMES J. SWEENEY, JUDGE

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