

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

CHARLES W. DAVIS,	:	MEMORANDUM OPINION
Relator,	:	CASE NO. 2010-G-2982
- vs -	:	
BRUCE SMALHEER, MAGISTRATE,	:	
Respondent.	:	

Original Action for Writ of Procedendo.

Judgment: Petition dismissed.

A. Clifford Thornton, Jr., Peckinpaugh & Thornton, L.L.C., Three Commerce Park Square, #605, 23230 Chagrin Boulevard, Cleveland, OH 44122 (For Relator).

David P. Joyce, Geauga County Prosecutor, and *Rebecca F. Schlag*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Respondent).

COLLEEN MARY O'TOOLE, J.

{¶1} This action in procedendo is presently before the court for consideration of the motion to dismiss of respondent, Magistrate Bruce Smalheer of the Geauga County Court of Common Pleas. As the primary basis for his motion, respondent submits that the merits of the procedendo petition have been rendered moot because he has already performed the specific act which relator, Charles W. Davis, wanted to compel. For the following reasons, we conclude that the motion to dismiss is well taken.

{¶2} In maintaining the instant action, relator sought the issuance of a writ to compel respondent to issue a magistrate's decision in an underlying divorce case. As part of the factual allegations in his petition, relator asserted that the trial judge in that case assigned the matter to respondent for the purpose of conducting the final hearing on the divorce complaint. He further asserted that the trial on the merits was concluded in November 2009, and that the parties' respective written final arguments were filed in January 2010. However, despite the fact that respondent had before him all materials that were necessary for him to render a final decision at that time, no such decision had been released when relator instituted this action approximately seven months later.

{¶3} In now moving to dismiss the sole procedendo claim, respondent asserts that it is no longer necessary to review the substance of relator's allegations because, subsequent to the filing of this action, he rendered the specific magistrate's decision that had been referenced by relator. Specifically, respondent maintains that, on August 18, 2010, he released a fifty-page decision which purported to dispose of all litigated issues in the divorce action.

{¶4} In support of his dismissal request, respondent further stated in his motion that a certified copy of the magistrate's decision was attached to his submission. This court's review of respondent's original motion to dismiss, and the accompanying copies of that motion, shows that, if he intended to attach a copy of the magistrate's decision, he failed to do so. Nevertheless, we would also indicate that, even though relator was afforded an ample opportunity to respond to the motion to dismiss, such a response was never filed. As a result, relator has not challenged respondent's assertion that the magistrate's decision has actually been rendered, and that the divorce action can now

proceed before the trial court for final resolution.

{¶5} As a general proposition, a writ of procedendo will only lie when the relator can demonstrate, inter alia, that he has a legal right to have a judicial officer proceed in an underlying case and release a final determination on a pending matter. *State ex rel. Fontanella v. Kontos*, 11th Dist. No. 2007-T-0055, 2007-Ohio-5213, at ¶13. In light of the nature of this element, this court has held that the merits of a claim in procedendo will be considered moot when the judicial officer had already completed the precise act which the relator sought to compel. *Perry v. McKay*, 11th Dist. No. 2009-T-0023, 2009-Ohio-5767, at ¶16.

{¶6} In considering a “mootness” argument in the context of a mandamus case, this court has stated that the submission of a certified copy of a new judicial entry is not always necessary:

{¶7} “In regard to this point, this court would indicate that, in most instances in which a judge has moved to dismiss on the basis that a judgment on the pending matter has already been rendered, the judge has usually attached a certified copy of the judgment to his motion. See *Penko [v. Mitrovich]*, 11th Dist. No. 2003-L-191, 2004-Ohio-6326, at ¶6. However, although the submission of certified copies may be the best method for establishing the existence of such a judgment, we have also indicated that a finding of mootness can be made in an original action when the relator does not contest the respondent’s contention. See *State ex rel. Pasqualone v. Yost* (July 24, 1998), 11th Dist. No. 98-A-0052, 1998 Ohio App. LEXIS 3424.” *State ex rel. Verbanik v. Bernard*, 11th Dist. No. 2006-T-0080, 2007-Ohio-1786, at ¶8.

{¶8} In *Verbanik*, the relator sought a writ of mandamus to compel a trial judge

to render a decision on a pending motion to vacate. Given that the instant procedendo action was brought for the identical purpose, the foregoing analysis in *Verbanik* would also be applicable here.

{¶9} In the instant matter, relator has not submitted any challenge to the factual assertion that respondent has performed his legal duty by rendering a magistrate's decision as to the final merits of the divorce action. Therefore, since the sole purpose of relator's procedendo claim was to compel the issuance of such a decision, the merits of his entire procedendo petition are now moot.

{¶10} Consistent with the foregoing discussion, respondent's motion to dismiss is granted. It is the order of this court that relator's entire procedendo petition is hereby dismissed as moot.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.