

IN THE SUPREME COURT OF OHIO

ORIGINAL

WILLIAM WESTBROOK,
Plaintiff-Appellee,
v.
VALERIE SWIATEK, et al.,
Defendants-Appellants,

: Supreme Court Case No.
: **09-0828**
: On Appeal from the Delaware
: County Court of Appeals,
: Fifth Appellate District
: Court of Appeals Case Nos.
: 08CAE12-0078 & 08CAE12-0079
:

MOTION OF APPELLANTS VALERIE SWIATEK, DEBORAH BONNER, VICTORIA BONNER, ABL GROUP, LTD., ALUM CREEK, INC., COBBLETON BACHMAN, LLC, COBBLETON BACHMAN II, LLC, RENNOB, INC., AND WHITTINGTON, INC. FOR STAY OF TRIAL COURT PROCEEDINGS TO ENFORCE ORDER PENDING APPEAL TO THIS COURT

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FILED
MAY 05 2009
CLERK OF COURT
SUPREME COURT OF OHIO

**APPELLANTS' MOTION FOR STAY OF TRIAL COURT PROCEEDINGS
TO ENFORCE ORDER PENDING APPEAL TO THIS COURT**

Pending before this Court is a discretionary appeal from the Fifth District Court of Appeals, which dismissed an appeal from a Judgment Entry Awarding Advancement of Litigation Expenses” to Appellee William Westbrook (the “Order”). The court of appeals found that it lacked jurisdiction over the Appellants’ appeal and further denied the Appellants’ motion to stay enforcement of the trial court’s Order as “moot” in light of its dismissal.

Appellants hereby move the Court to enter an order staying enforcement of the trial court’s Order without the necessity of a supersedeas bond or, alternatively, a nominal bond of \$100.00. Appellants make this motion pursuant to Ohio Supreme Court Rule II, Section 2 and R.C. 2505.09, and support it as set forth below.

I. BACKGROUND

A. The Order Appealed From

On December 10, 2008, the Delaware County Common Pleas Court entered a “Judgment Entry Awarding Advancement of Litigation Expenses to Westbrook” (the “Order”). In that Order, the Court awarded \$227,975.75 in attorney’s fees and \$12,976.31 in litigation expenses to Appellee William Westbrook as an “advancement” of fees and expenses for Westbrook’s “defense of the counterclaims filed against him” in both the Westbrook v. Swiatek, et al. action (Case No. 06 CVH 08-683) and the Whittington v. Westbrook action (Case No. 08 CVH 04 0543).

While styled an “advancement,” the amounts awarded are only for fees incurred in the past, between February 2007 and October 2008. The court ruled no fees are to be paid for services rendered after October 31, 2008. As such, the Order does not truly require “advancement” for future fees, as that term is normally used, but only reimbursement of past fees. Relying solely on an “oral certification” from counsel, it turns out that the court’s award

included over \$80,000 in fees incurred in Westbrook's offensive claims against the Appellants. About another \$80,000 were for fees incurred by Westbrook in the Whittington action in which he had never asserted a claim for fees or even filed a motion for fees.

The court ordered that "Defendants [i.e., Appellants] shall pay these amounts to the Plaintiff by January 12, 2009."¹ Appellants appealed the Order to the Fifth District Court of Appeals but, to date, have not paid the monies specified in the Order.

B. Trial Court Denies Motion To Stay Outright

On January 7, 2009, Appellants filed with the trial court a motion to stay enforcement of the Order (the "Motion"). Appellants argued that they were entitled to a stay of the Order as a matter of law once the court determined the appropriate amount of a supersedeas bond. Appellants also asked the trial court to exercise its discretion to permit a stay without requiring the posting of a bond, or alternatively to permit the posting of a nominal bond.

The Appellants based their request for either no bond or a nominal bond upon undisputed evidence presented to the court that Appellants are solvent and that the properties at the heart of this action consist of unencumbered real estate worth several million dollars – far in excess of the \$241,000 the trial court ordered to be paid to Westbrook. Though Westbrook opposed the Appellants' Motion seeking a stay, he did not dispute that the Defendants have more than sufficient assets to satisfy the award, if upheld.

On February 12, 2009, the trial court denied Defendants' Motion.² The trial court denied the Motion outright, refusing to grant a stay or permit Appellants the right to post any bond. The court did not explain how it could deny the Motion outright and not permit the posting of a bond in light of the plain language of Civil Rule 62(B) and the authority of State, ex rel. Ocasek v. Riley (1978), 54 Ohio St.2d 488, 490, which provides that an appellant is

¹ Order, at p. 4, attached as Exhibit A.

² See Judgment Entry, attached as Exhibit B.

entitled to a stay as a matter of law upon the court's determination of an appropriate supersedeas bond.

C. The Court of Appeals' Judgment

Having had their requested stay denied in the trial court, the Appellants sought a stay from the Fifth District Court of Appeals under App.R. 7(A). The court of appeals denied the Appellants' motion as "moot" in light of its disposition of the case—the order from which Appellants have appealed to this Court. See Westbrook v. Swiatek (Apr. 13, 2009), 5th Dist. App. Nos. 08CAE-12-0078 and 08CAE-12-0079 (copy attached as Exhibit C).

The court of appeals did not reach the merits of the Appellants' appeal from the Advancement Order. Instead, the court of appeals dismissed the Appellants' appeal for want of jurisdiction, holding that the order awarding advancement of attorney's fees was not a final appealable order. See *id.* Without explanation, the court of appeals tersely stated that the Advancement Order was "not ancillary" to the main action and therefore did not constitute a final appealable order.

II. DISCUSSION

A. This Court Has Authority To Stay Enforcement in the Trial Court

The Appellants have commenced a discretionary appeal with this Court by filing a Notice of Appeal concurrently with this Motion. See S.Ct.R. II, Section 2(A)(3). In accordance with this Court's Rule II, Section 2(A), Appellants intend to timely file a memorandum in support of jurisdiction within 45 days of the court of appeals' judgment. In the meantime, however, this Court has jurisdiction under Rule II, Section 2 to issue a stay of proceedings in the trial court to enforce the Order pending the disposition of the Appellants' discretionary appeal. See, e.g., Kagy v. Toledo-Lucas County Port Auth. (1999), 86 Ohio St. 3d 1411 (granting stay of action in trial court pending appeal).

In this case, a stay is appropriate in order for this Court to have the opportunity to review the jurisdictional memoranda—and potentially accept a case of public or great general interest—without having the matter arguably deemed moot by proceedings to enforce the trial court’s Order. Indeed, the possibility of enforcement is not just a theoretical possibility.

Shortly after the court of appeals dismissed the Appellants’ appeal, Appellee Westbrook filed a motion for a show cause order, seeking to hold Appellants in contempt for not yet having paid the “advancement” of attorney’s fees and legal expenses as set forth in the December 10, 2008 Order. Thus, absent a stay of enforcement issued by this Court, the Appellants could ultimately be forced to comply with the Order without ever having any appellate tribunal explain why the Order is not appealable under R.C. 2505.02—much less review the merits of an Order that Appellants respectfully submit is deeply flawed as a matter of fact and law.

B. An “Adequate Bond” Can Be A Nominal Bond

In addition, R.C. 2505.09 authorizes a court to issue a stay of a final order, judgment or decree, conditioned on the posting of “sufficient sureties.” Though R.C. 2505.09 further describes the sum that must be posted as a supersedeas bond under the statute,³ Ohio cases have determined that Ohio courts have discretion, by operation of rule (*i.e.*, Civ.R. 62 and App.R. 7), to grant a stay *without* requiring an appellant to post a supersedeas bond. See, e.g., Irvine v. Akron Beacon Journal, 147 Ohio App.3d 428, 2002-Ohio-2204, at ¶ 108; Lomas & Nettleton Co. v. Warren (June 29, 1990), 11th Dist. App. No. 89-G-1519, 1990 Ohio App.

³ R.C. 2505.09 states: “Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken.”

LEXIS 2720, at *3-5. If the lower courts have this discretion, there is no reason why this Court should not have the same discretion.

Ohio law requires nothing more than an “adequate” supersedeas bond to be posted in order for an appellant to obtain a stay pending appeal. See Irvine at ¶ 108. On the issue of what is an “adequate” supersedeas bond, it is well established that such bond “could reasonably be construed to mean no bond at all, if the trial court felt that none was necessary....” Irvine at ¶ 108; see also Whitlatch & Co. v. Stern (Aug. 19, 1992), 9th Dist. No. 15345, 1992 Ohio App. LEXIS 4218 at *25 (“Under appropriate circumstances, the trial court may exercise its discretion and stay the execution of judgment without requiring the appellant to post a supersedeas bond.”).

As part of a court’s determination as to whether it is reasonable not to require the posting of a bond, the court may consider the defendant’s solvency. See Irvine at ¶ 109. In Irvine, the court found that the trial court acted properly within its discretion to grant a stay pending appeal *without* requiring the appellant to post a bond when it was evident that the prevailing plaintiffs were “adequately secured by the Defendant’s solvency and well-established ties to [the community].” Id.

C. Appellants Have More Than Sufficient Assets To Satisfy The Order

Appellants are sufficiently solvent so as to obviate the need to take the extra step of requiring a supersedeas bond to protect Westbrook’s interests pending the Appellants’ appeal. In fact, the very subject of this lawsuit is proof of that solvency.

The Cobbleton property at issue is owned by Rennob, Inc. and ABL Group, Ltd. It is comprised of approximately 300 acres that Westbrook himself believes is worth much more than the \$6 million that the Appellants have put into it. In fact, Westbrook agrees that just

one small part of the Cobbleton property was under contract to be sold to Dominion Homes in September 2007 for \$637,000.⁴

The parties do not dispute that there is no mortgage on any of the real property and it is otherwise unencumbered by debt, except for ordinary taxes, which are current. That is, it is an unencumbered asset that all parties believe is worth several million dollars. This was pointed out to the trial court and Westbrook did not dispute it.

In addition to the land, the affidavit of Valerie Swiatek (attached to the motions for stay in the lower courts), an officer or general partner of Rennob, ABL Group, Whittington, and Alum Creek, confirms that the Bonner companies have more than sufficient assets on hand to pay the amount awarded, if affirmed.⁵

Westbrook himself must believe that the Bonner companies have sufficient assets on hand since he originally requested that they “advance” him almost \$700,000 to pay the attorney fees he has incurred in this matter.

“The purpose of an appeal bond is to secure the appellee’s right to collect on the judgment during the pendency of the appeal.” Mahoney v. Berea (1986), 33 Ohio App.3d 94, 96; see, also, State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan, 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶ 21, quoting Mahoney. The Appellants’ financial condition provides sufficient security to assure that Westbrook will be able to obtain the “advancement” of the fees and expenses identified in the Order should the Order be affirmed on appeal.

⁴ See Westbrook’s Second Amended Complaint, Count 14. In fact, this parcel would have been sold to Dominion Homes but for Westbrook’s efforts through the receivership that this Court has subsequently found to have been invalid.

⁵ See attached Exhibit D.

III. CONCLUSION

For these reasons, Appellants respectfully request the Court to issue an order staying any enforcement of the Order of December 10, 2008 pending the discretionary appeal to this Court, and that the Court find that an adequate supersedeas bond would be no bond at all or, alternatively, a nominal bond of \$100. However, even if the Court finds that a bond is required, it remains the case that Appellants are entitled to a stay upon posting of a bond, whatever this Court determines that amount to be.

Respectfully Submitted,



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Counsel for Appellants

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing Motion For Stay Of Trial Court Proceedings To Enforce Order Pending Appeal To This Court was served, via regular U.S. Mail, this 5th day of May, 2009, upon:

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Delaware, Ohio 43015



Vladimir P. Belo (0071334)

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IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

WILLIAM WESTBROOK,

Plaintiff,

VS.

VALERIE SWIATEK, et al.,

Defendants.

Case No. 06 CV H 08 0683

JUDGE EVERETT H. KRUEGER

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317-320

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CLERK

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COMMON PLEAS COURT
DELAWARE COUNTY OHIO
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JUDGMENT ENTRY CLARIFYING THE COURT'S OCTOBER 2, 2008 JUDGMENT ENTRY AND JUDGMENT ENTRY AWARDING ADVANCEMENT OF LITIGATION EXPENSES TO WESTBROOK

This matter is before the Court upon the Defendants', Valerie Swiatek, et al., Motion Requesting Clarification of Judgment Entry Granting Plaintiff's Motion for Hearing on Interim Award of Legal Fees and Expenses, filed on November 4, 2008. This matter is also before the Court on the amount of legal fees and expenses to be advanced to the Plaintiff, William Westbrook. The Court held a hearing on the issue of the amount of the legal fees and expenses to be advanced on November 5, 2008. On the same day, the Plaintiff filed a hearing brief. The Court also permitted the parties to file post-hearing briefs on the issues. The Defendants filed their post-hearing brief on November 12, 2008. The Plaintiff filed his memorandum in response to the Defendants' brief on November 19, 2008.

The Defendants argue that there is no lawful basis to award Westbrook his legal fees in the *Whittington* action because Westbrook did not file a counterclaim seeking recovery of his fees in that action. The claims originally filed in the *Whittington* action have now been dismissed. The Plaintiff argues that the *Whittington* action was transferred to Delaware County and consolidated with the instant action. This all took place before Westbrook even filed an answer to the claims. There was already pending before the Court a motion for advancement of legal fees in the instant case when the *Whittington* case was



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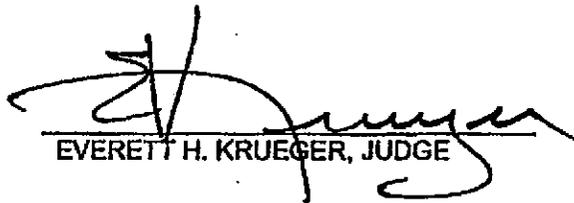
transferred and consolidated. Thus, when the Court rendered its Judgment Entry on October 2, 2008 granting the Plaintiff's Motion for Hearing on Interim Award of Legal Fees and Expenses, the Court determined that Westbrook was entitled to advancement of litigation fees and expenses related to his defense of the counterclaims asserted by the Defendants. The Defendants had asserted counterclaims against Westbrook in the instant action and in the *Whittington* action. Since the *Whittington* action was consolidated with the instant action and the claims against Westbrook were re-classified as counterclaims, the Court's October 2, 2008 Judgment Entry clearly and properly awarded Westbrook advancement of litigation fees and expenses for his defense of all counterclaims against him in the action, which at the time included those claims originally filed in the *Whittington* action. Therefore, in clarification of the Court's October 2, 2008 Judgment Entry, Westbrook is entitled to advancement of litigation fees and expenses for his defense of the counterclaims filed against him in both the instant action and in the former *Whittington* action.

The Defendants further argue that there is no legal basis to award Westbrook his legal fees in the instant action because Westbrook did not bring a legal claim for advancement and then move for summary judgment on the claim. The Defendants argue that the motion for a hearing filed by Westbrook does not provide a lawful basis for recovery of legal fees. The Plaintiff argues that the Court has already addressed the motion for advancement of legal fees and expenses on its merits and the Civil Rules of Procedure and justice require that the Court proceed to rule on the amount of fees to be advanced. The Court agrees that this issue has already been determined by the Court and the Defendants' argument amounts to a request for the Court to reconsider its October 2, 2008 Judgment Entry rather than a request for clarification. The Court will not reconsider its October 2, 2008 decision to award advancement of legal fees and expenses.

the defense of the counterclaim total \$227,975.75, and the expenses incurred in defense of the counterclaim total 12,976.31. Based upon the case law cited by the parties, the Court determines that a certification from counsel that the fees and expenses requested were incurred in defending the counterclaims is sufficient for the Court to award advancement of reasonable fees and expenses.

Accordingly, the Court hereby awards at this time advancement of fees to the Plaintiff from the Defendants in the amount of \$227,975.75, and advancement of expenses to the Plaintiff from the Defendants in the amount of \$12,976.31. The Defendants shall pay these amounts to the Plaintiff by January 12, 2009. The payment of these amounts is subject to the assurance of repayment executed by Westbrook. The Court hereby defers the final hearing on indemnification until after the trial occurs in this case.

Dated: December 9, 2008


EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

cc: O. JUDSON SCHEAF III, 41 SOUTH HIGH STREET, SUITE 1700, COLUMBUS, OH 43215
QUINTIN F. LINDSMITH, 100 SOUTH THIRD STREET, COLUMBUS, OH 43215
ANTHONY M. HEALD, 125 NORTH SANDUSKY STREET, DELAWARE, OH 43015

This document sent to each attorney/party by:

ordinary mail.
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IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

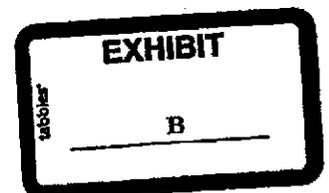
WILLIAM WESTBROOK, :
 :
 Plaintiff, : Case No. 06 CV H 08 0683
 :
 VS. :
 :
 VALERIE SWIATEK, et al., : JUDGE EVERETT H. KRUEGER
 :
 Defendants. :

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
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JAN ANTONIOPLOS
CLERK

**JUDGMENT ENTRY DENYING DEFENDANTS' MOTION TO STAY ENFORCEMENT
OF JUDGMENT ENTRY AWARDING ADVANCEMENT OF LITIGATION EXPENSES
TO PLAINTIFF WESTBROOK**

This matter is before the Court upon the Defendants', Valerie Swiatek, et al., Motion to Stay Enforcement of Judgment Entry Awarding Advancement of Litigation Expenses to Plaintiff Westbrook, filed on January 7, 2009. The Plaintiff filed a memorandum in opposition on January 12, 2009. The Defendants filed a reply thereto on January 21, 2009. For the reasons that follow, the Court hereby denies the Defendants' Motion to Stay Enforcement of Judgment Entry Awarding Advancement of Litigation Expenses to Plaintiff Westbrook.

The Defendants request a stay of enforcement of the order awarding advancement of litigation fees and expenses to Plaintiff Westbrook for the reason that the Defendants have filed a notice of appeal regarding the Court's December 10, 2008 Judgment Entry. The Defendants also request that the Court not require the Defendants to post a supersedeas bond, or that the Court set a nominal bond. The Defendants attached an affidavit of Defendant Valerie Swiatek to their motion in which Defendant Swiatek states the Defendants are solvent.



The Plaintiff argues that a stay of enforcement of the order awarding advancement of litigation fees would defeat the purpose behind the advancement provision and would essentially allow the Defendants to escape their advancement obligations altogether. The Plaintiff also argues that a supersedeas bond, regardless of the amount, would fail to protect Westbrook's interest because delaying payment would cause irreparable harm.

First, in reviewing the case law provided by the parties in briefing the issue of advancement of litigation fees, it is the Court's position that the December 10, 2008 Judgment Entry Awarding Advancement of Litigation Expenses to Westbrook is not a final appealable order. Thus, staying enforcement of the order may not serve the interest of justice.

Second, this action has been pending before the Court for two and a half years. The Plaintiff filed his Motion for Hearing on Interim Award of Legal Fees and Expenses on August 28, 2007. Due to the appeal filed by the Defendants regarding the Court's order appointing a receiver, the Court stayed the issue of advancement of litigation expenses for a period of time. After the motion had been pending for almost a year and no decision had been issued from the Court of Appeals, the Court permitted the parties to supplement their briefing on the motion.

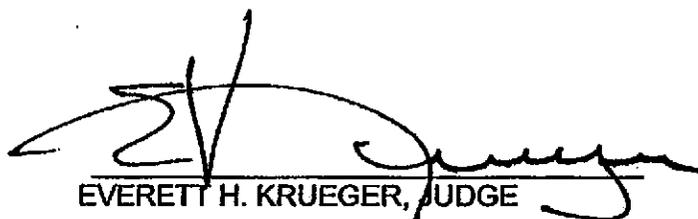
On October 2, 2008, the Court issued a judgment entry granting Westbrook's Motion for Hearing on Interim Award of Legal Fees and Expenses and setting a hearing on the amount of fees and expenses to be awarded. On December 2, 2008, the Court issued a judgment entry on the amount of fees and expenses to be advanced. Thus, Westbrook's motion for advancement of litigation fees and expenses was pending

before the Court for well over a year before the Defendants were ordered to advance litigation expenses to Westbrook. The Defendants still have not advanced expenses to Westbrook despite having been ordered to do so by January 12, 2009.

The Court finds that issuing a stay of the order awarding advancement of litigation fees to Plaintiff Westbrook would continue to deprive him of his right to enjoy the benefits of advancement of litigation fees as provided under the Corporate Defendants' bylaws and R.C. 1701.13. Furthermore, the Court's award of advancement of litigation fees to Plaintiff Westbrook is subject to the Assurance of Repayment signed by Westbrook in which he promises to repay all amounts paid by the Defendants if it is later determined that he is not entitled to such amounts.

Based on the foregoing, the Court hereby DENIES the Defendants' Motion to Stay Enforcement of Judgment Entry Awarding Advancement of Litigation Expenses to Plaintiff Westbrook.

Dated: February 10, 2009


EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

cc: O. JUDSON SCHEAF III, 41 SOUTH HIGH STREET, SUITE 1700, COLUMBUS, OH 43215
QUINTIN F. LINDSMITH, 100 SOUTH THIRD STREET, COLUMBUS, OH 43215
ANTHONY M. HEALD, 125 NORTH SANDUSKY STREET, DELAWARE, OH 43015

Court of Appeals
Delaware Co., Ohio
 IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
 I hereby certify the within be a true
 copy of the original on file in this office.
FIFTH APPELLATE DISTRICT
 Jan Antonoplos, Clerk of Courts
 By Deputy

WILLIAM WESTBROOK

Plaintiff-Appellee

-vs-

VALERIE SWIATEK, ET AL.

Defendant-Appellants

CASE NO. 08 CAE 12 0078
08 CAE 12 0079

JUDGMENT ENTRY

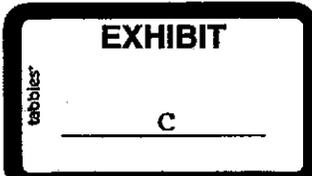
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 DELAWARE COUNTY, OHIO
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 JAN ANTONOPLIS
 CLERK

This matter came before the Court upon Appellee's Motion to Dismiss for lack of a final, appealable order. Appellants have filed a response in opposition.

Ohio law provides that appellate courts have jurisdiction to review only the final orders or judgments of inferior courts in their district. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed.

The order being appealed requires Appellants to pay attorney fees to Appellee. The trial court's order is labeled in relevant part, "Judgment Entry Awarding Advancement of Litigation Expenses to Westbrook." The underlying litigation remains pending although certain counterclaims filed by Appellants have been dismissed.

Appellants argue the entry awarding attorney fees is ancillary to the claims which remain. Further, Appellants argue the fact they have dismissed certain counterclaims makes the award of attorney fees an indemnification award rather



than an advancement of fees. We find the issue of attorneys fees and the remainder of the case are intertwined and not ancillary. For this reason, the motion to dismiss is granted.

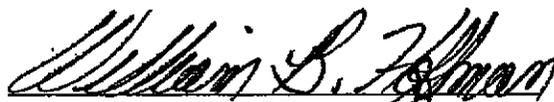
Appellants have also filed a Motion to Stay Enforcement of the trial court's judgment which is denied as moot in light of our dismissal of this case.

MOTION TO DISMISS GRANTED.

MOTION TO STAY DENIED AS MOOT.

APPEAL DISMISSED.

COSTS TO APPELLANTS.


JUDGE


JUDGE


JUDGE

3. The Bonner Companies are solvent and have assets that are more than sufficient to satisfy the payment of attorney fees and expenses described in the Court's order of December 10, 2008.

4. Among the assets that would be available to liquidate and pay any such award would be parcels of real estate that comprise what Plaintiff has described as the "Cobbleton Property," which is comprised of almost 300 acres that adjoin State Route 33 and Ebright Road in Franklin County, Ohio.

5. With accruing interest, the Bonner Companies have over \$6 million invested in the Cobbleton Property. The Property was acquired and improved by cash from the Bonner Companies so that there is no bank debt or any other debts secured by the Property.

6. The Cobbleton Property is otherwise free and clear of debt, other than ordinary course debt, such as real estate taxes that are current.

Further Affiant sayeth naught.

Valerie B. Swiatek
Valerie Swiatek

Sworn to before me and subscribed in my presence this 18th day of February

2009.

Carol McRoberts-Taylor
Notary Public



CAROL MCROBERTS-TAYLOR
Notary Public, State of Ohio
My Commission Expires April 24, 2010