

IN THE SUPREME COURT OF OHIO

WILLIAM WESTBROOK,

Plaintiff-Appellee,

-vs-

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
:
:

**APPELLEE WILLIAM WESTBROOK'S
MEMORANDUM IN OPPOSITION TO THE MEMORANDUM IN SUPPORT
OF JURISDICTION OF APPELLANTS VALERIE SWIATEK,
VICTORIA BONNER, DEBORAH BONNER, ABL GROUP, LTD.,
ALUM CREEK, INC., RENNOB, INC., AND WHITTINGTON, INC.**

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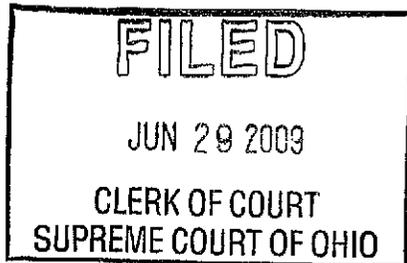


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WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

There is no public or great general interest here. The Appellants simply regret the corporate bylaws (a) which they drafted, (b) in which they promised to advance Appellee William Westbrook, a former officer of the corporate Appellants, his attorney's fees and expenses spent defending a lawsuit over his claims as an officer, on an interim and provisional basis, and (c) which preclude them from appealing the trial court's interlocutory advancement orders until this litigation is concluded. The appeals court enforced, and refused to rewrite, the parties' contract—the corporate bylaws—and dismissed the Appellants' mid-lawsuit appeal for lack of a final order. While this dispute is important to these parties, its resolution would add nothing to Ohio law.

This appeal does not involve any statute requiring advancement, which would apply to other Ohioans and corporations. Instead, it involves a straightforward application of these parties' corporate bylaws, which apply only to them and their corporate officers and directors, including Mr. Westbrook.

Nor does this appeal even involve the merits of the advancement dispute. Although the Appellants oddly spend many of the pages of their memorandum discussing it, the issue here is not whether Mr. Westbrook is or is not entitled to advancement. Rather, this case involves the jurisdiction of the appeals court, and a routine application of R.C. 2505.02—something lower courts do everyday, without this Court's involvement. What made the trial court's advancement orders non-appealable in this case is nothing new or momentous: (a) The orders do not include Civil Rule 54(B) language; (b) there are still numerous issues and claims pending in the trial court; and (c) both the trial and appellate courts will have additional opportunities to revisit the advancement issue, and may ultimately order Mr. Westbrook to repay all amounts advanced.

Indeed, had the appellate court accepted the Appellants' premature appeal of the advancement orders, and not dismissed it, that would have been a case of great public or general interest, because that would have been a dramatic departure from well-settled advancement law. Just two years ago, in a case on all fours with this one, this Court held that the issues here do not involve public or great general interest. *See MD Acquisition, L.L.C., et al. v. Martin L. Myers, et al.*, Ohio Supreme Court Case No. 2007-1604. In *MD Acquisition*, the appellate court held that a trial court's order granting advancement of attorneys' fees to an officer of a company pursuant to corporate bylaws was not a final, appealable order. *MD Acquisition, L.L.C. v. Myers* (10th Dist.), 2007-Ohio-3521, at ¶ 14. After the appeals court dismissed the appeal for lack of subject-matter jurisdiction, the corporate plaintiffs—like the Appellants here—sought a discretionary appeal with this Court, alleging that the advancement order was final and appealable. (*See Memorandum in Support of Jurisdiction of Plaintiffs-Appellants MD Acquisition, LLC and Martin Designs, Inc.*, filed August 24, 2007, at 9.) This Court declined to accept jurisdiction. (*See* December 12, 2007 Entry in Case No. 2007-1604 (“Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.”).)

In any event, the Appellants recently mooted their own appeal to this Court. Nine days after the Appellants filed their Notice of Appeal with this Court, the trial court held them in contempt for failing to obey the trial court's advancement orders, directing them to make advancement by January 12, 2008 (the “Advancement Orders,” defined *infra*.) Instead of complying the Advancement Orders, however, the Appellants once again appealed to the Fifth District. This time, they appealed the order holding them in contempt (the “Contempt Order”) and, for the second time, the underlying Advancement Orders—the very same Orders from which the Appellants are purporting to appeal to this Court. The Fifth District just recently held

(on June 23, 2009) that although the Advancement Orders are not themselves final and appealable, the Contempt Order is appealable. In doing so, the Fifth District held that when it passes on the validity of the Contempt Order, it will necessarily review, and rule upon, the merits of the underlying Advancement Orders. Thus, the Fifth District has already granted the Appellants the exact relief which they are now requesting from this Court: a mid-lawsuit review of the interlocutory Advancement Orders. This appeal is therefore moot. Of course, moot cases are not of great public or general interest, and this Court does not accept them for review.

STATEMENT OF THE CASE AND THE FACTS

A. The Proceedings Below, And The Appellants' Unabashed Contempt Of The Advancement Orders.

In February 2007, August 2007, and August 2008, the Appellants filed counterclaims against Mr. Westbrook based on actions that he allegedly took when he served as an officer of Alum Creek, Rennob, ABL, and Whittington (collectively, the "Corporate Defendants"). The Corporate Defendants' respective Codes of Regulations provided that Mr. Westbrook was entitled to advancement of his legal fees and expenses spent in defending against those counterclaims. Thus, Mr. Westbrook first sought advancement of his fees and expenses directly from the Corporate Defendants. The Corporate Defendants refused. That refusal led to the following sequence of events, none of which are in dispute:

- **August 28, 2007:** Mr. Westbrook moves for a hearing on an interim award of his legal fees and expenses spent defending against the Appellants' counterclaims filed in the Delaware and Franklin County, Ohio Courts of Common Pleas (the "Motion for Advancement").
- **October 2, 2008:** The trial court enters the *Judgment Entry Granting The Plaintiff's Motion For Hearing On Interim Award Of Legal Fees And Expenses And Judgment Entry Granting Defendant Suhovecky's Motion For Partial Summary Judgment And Judgment Entry Setting Evidentiary Hearing On Advancement Of Litigation Expenses* (the "October Advancement Order"), which grants the Motion for Advancement and sets the requested hearing for November 5, 2008.

The trial court properly ruled that the Appellants' counterclaims were based upon actions that Mr. Westbrook allegedly took as an officer of the Appellants. (October Advancement Order at 11.) The trial court further held that the Appellants' Code of Regulations, at Sections 5.01 and 5.05, required the Appellants to advance Mr. Westbrook his attorneys' fees and expenses for defending against the counterclaims. (*Id.*)

Sections 5.01 and 5.05 of the Corporate Appellants' Code of Regulations provide that any fees and expenses incurred by a director or officer in defending a civil proceeding brought "by reason of the fact" that he is or was serving as a director or officer of the corporation "*shall be paid by the corporation in advance of the final disposition of such action*" if the "officer or director shall first agree, in writing, to repay all amounts so paid in respect of any claim, issue or other matter asserted in such action, suit or proceeding in defense of which he shall not have been successful on the merits or otherwise," which he did. (October Advancement Order at 5-6 (emphasis supplied).)¹

- **November 5, 2008:** The trial court conducts the hearing on the amount of fees and expenses to be advanced.
- **December 10, 2008:** The trial court enters the *Judgment Entry Clarifying The Court's October 2, 2008 Judgment Entry And Judgment Entry Awarding Advancement Of Litigation Expenses To Westbrook*, directing Defendants to advance to Mr. Westbrook \$240,952.06, on or before January 12, 2009 (the "December Advancement Order"). (The October and December Advancement Orders being the "Advancement Orders.").
- **December 30, 2008:** The Appellants appeal the Advancement Orders.
- **January 7, 2009:** The Appellants move the trial court to stay the enforcement of the Advancement Orders (the "Trial Court Motion To Stay").
- **February 12, 2009:** The trial court denies the stay request ("Decision Denying Stay"), rejecting all of the Appellants' arguments in their Trial Court Motion To Stay.

¹ The laudable public policy reason behind the enforcement of contractual and statutory advancement of attorneys fees for corporate officials is to encourage talented individuals to serve corporations and, at the same time, to eliminate the reasonable concern that corporate officials will be forced to defend unjustified suits and claims brought against them for actions taken as a corporate official. See *DeLucca v. KKAT Management* (Del. Ch. Jan. 23, 2006), 2006 WL 224058, at *15-16.

- **February 16, 2009:** Mr. Westbrook’s counsel writes to defense counsel, insisting upon advancement in light of the trial court’s Decision Denying Stay. The Appellants never respond.
- **February 18, 2009:** The Appellants move the Fifth District to stay enforcement of the Advancement Orders (the “Motion To Stay”).
- **April 13, 2009:** The Fifth District dismisses the Appellants’ appeal for lack of subject-matter jurisdiction, and denies the Appellants’ Motion To Stay.
- **May 5, 2009:** The Appellants appeal to this Court, and move to stay the enforcement of the Advancement Orders.
- **May 14, 2009:** After a show-cause hearing, the trial court finds the Appellants in contempt for disobeying the Advancement Orders, and issues the Contempt Order.
- **May 14, 2009:** The Appellants still refuse to make advancement to Mr. Westbrook. Instead, they appeal the Contempt Order and, for the second time in five months, purport to appeal the Advancement Orders—the very same Advancement Orders from which the Appellants are purporting to appeal in this discretionary appeal.
- **June 3, 2009:** This Court denies the Appellants’ Motion to Stay the enforcement of the Advancement Orders.
- **June 23, 2009:** The Fifth District holds that although the interlocutory Advancement Orders were not originally appealable, the Contempt Order—issued for the Appellants’ failure to obey the Advancement Orders—is appealable. Thus, according to the Fifth District, the underlying Advancement Orders are now “subject to review by the [Fifth District] on appeal of the contempt finding.” (June 23, 2009 Judgment Entry, at pp. 1-2.)

Twenty-two months since his initial motion, two years after the first counterclaim was asserted, and less than two months before trial, the Appellants have not advanced Mr. Westbrook a single penny to defend against their counterclaims. Instead, Mr. Westbrook finds himself in two different appellate courts at the very same time—this Court and the Fifth District—briefing the very same issue: whether a mid-lawsuit advancement order, issued pursuant to the Appellants’ bylaws, is final and appealable. It is not.

B. Mr. Westbrook's Response To The Appellants' Statement Of The Case And Facts.

The only relevant facts and procedural events are found in Section A of this memorandum. The Appellants' "Statement of the Case and Facts" is devoted, almost entirely, to complaints about the underlying merits of the Advancement Orders, as if the merits are in any way relevant to the narrow jurisdictional issue being appealed. The only question here is whether the Advancement Orders were final and appealable under R.C. 2505.02 and Civil Rule 54(B).

The Appellants devote pages of their brief to nitpicking the amount of the advancement award. (*See* Jurisdictional Memorandum at 3-8.) They complain that what the trial court held was "defensive" should have really been "offensive." (*See id.*) They complain that \$80,000 worth of time was really in the so-called "Whittington action" and not the "Westbrook action." (*Id.*) They quote fee statements here and there, mocking specific time entries. (*See id.*) What the Appellants are attempting to do, via their jurisdictional memorandum, and what they will surely do if this Court accepts jurisdiction, is to litigate fee statements in the Ohio Supreme Court. That is unprecedented. Whatever Mr. Westbrook's counsel said they were doing, and how much time they were billing, on some random date in the middle of a three-year lawsuit, is completely irrelevant to the only issue in this appeal: whether the Advancement Orders are final and appealable.

The Appellants also repeatedly attack the trial court's procedure in awarding advancement. Not only is that issue irrelevant in this appeal, but the procedure which the trial court employed is precisely the procedure employed by Delaware state courts, which are the courts that are most often asked to resolve corporate advancement issues. *See Fasciana v. Elec. Data Sys. Corp.* (Del. Ch. 2003), 829 A.2d 160, 177 (explaining that a court should avoid

“inject[ing] [itself] as a monthly monitor of the precision and integrity of advancement requests,” and holding that where counsel certifies, in good faith, its belief that the expenses for which advancement was sought related to actions covered by the corporation’s advancement provisions, the corporation “should have adequate protection so that it can reserve any ultimate fight about the precise amounts until a later indemnification proceeding”); *see also Duthie v. Corsolutions Med., Inc.* (Del. Ch. Sept. 10, 2008), 2008 Del. Ch. LEXIS 128, at * 5 (“Advancement is not the proper stage for a detailed analytical review of the fees, whether in terms of the strategy followed or the staffing and time committed. Typically, a good faith certification from counsel should suffice. In the absence of clear abuse, the fees should be advanced.”) (emphasis added).

LEGAL DISCUSSION

Response to Appellants’ Propositions of Law Nos. 1 and 2: Where, As Here, The Requirements of R.C. 2505.02 and Civil Rule 54(B) Have Not Been Met, There Is No Final, Appealable Order, And The Appeal Must Be Dismissed.

The Appellants wrongly suggest that the Advancement Orders are final orders under R.C. 2505.02(B)(2) and (4). (Jurisdictional Memorandum at 9.) In reality, the Advancement Orders are not appealable under R.C. 2505.02(B)(2) for three independent reasons: (1) the orders do not include a Civil Rule 54(B) certification; (2) the orders do not affect any “substantial right”; and (3) the orders were not made in a special proceeding. Likewise, the Advancement Orders are not appealable under R.C. 2505.02(B)(4), as the Appellants will have the opportunity later to seek relief from the trial court orders, and by an appeal to the Fifth District following final judgment.

A. The Advancement Orders Are Not Appealable Under R.C. 2505.02(B)(2).

1. The Advancement Orders Do Not Contain The Required Civil Rule 54(B) Certification, And Therefore Are Not Final Appealable Orders Under R.C. 2505.02(B)(2).

As a threshold matter, the trial court's Advancement Orders, which determined only one claim in a multi-claim, multiparty suit, are not final appealable orders because they did not contain the Civil Rule 54(B) certification that there is "no just reason for delay." The Orders only determined *provisional* liability as to one of Mr. Westbrook's contract rights. Therefore, the Advancement Orders could only be final appealable orders under R.C. 2505.02(B)(2) if they included a Civil Rule 54(B) certification that there "is no just reason for delay." *Gehm v. Timberline Post & Frame* (2007), 112 Ohio St.3d 514, 517 ("An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ. R. 54(B), are met.") (quoting *State ex rel. Scruggs v. Sadler* (2002), 97 Ohio St.3d 78, 79). Here, the trial court did not include Civil Rule 54(B) certification in the Advancement Orders. The Advancement Orders therefore are not final appealable orders under R.C. 2505.02(B)(2).

Appellants contend that Civil Rule 54(B) is inapplicable because the trial court has supposedly not disposed of a claim. (Jurisdictional Memorandum at 10.) This is so much form over substance. Whatever it is called and whatever the procedural vehicle is, the reality is that a claim for advancement (a) was tendered to the trial court, (b) was opposed by the Appellants, (c) remained pending for sixteen months, (d) was adjudicated as to liability first, and then (e) was adjudicated as to damages. Civil Rule 54(B) applies, and the omission of Rule 54(B) language means that the Advancement Orders are not final and appealable orders under R.C. 2505.02(B)(2).

2. **The Advancement Orders Do Not Affect A Substantial Right, And Therefore Are Not Final Appealable Orders Under R.C. 2505.02(B)(2).**

To “affect a substantial right,” an order must “be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Here, the Appellants have several avenues available to obtain relief from the Advancement Orders, both from the trial court and from the Fifth District upon a proper appeal, all of which the Appellants simply ignore.

First, the trial court has the ability to modify the Advancement Orders, in the unlikely event that, after a trial on the merits, it is determined that Mr. Westbrook was not entitled to advancement. Indeed, the Appellants’ own Code of Regulations—which they now apparently regret enacting—spells out in great detail the circumstances under which an advancement order can be reversed (and the burden is a very high one), the timing of when that should happen (after trial), and the forum in which any such adjudication should take place (the Delaware County, Ohio Court of Common Pleas). That relief is not merely “appropriate,” but is the precise relief the Appellants chose for themselves. The Appellants never explain how or why this Court will supposedly be unable to rule upon their alleged errors in the Advancement Orders following an appeal from a final order.

Second, the Appellants likewise ignore the fact that the trial court has yet to determine whether Mr. Westbrook is entitled to indemnification. The Appellants’ own Code of Regulations draws an important distinction between advancement and indemnification. The whole paradigm here—which Appellants created—was that advancement happen timely, so that a corporate officer would not be forced, as here, to shoulder the burden of his own defense, and so that the ultimate questions of whether such advancement was appropriate be decided later, after the litigation ends.

Third, and perhaps most notably, the Appellants ignore the fact that Mr. Westbrook executed an “Assurance of Repayment.” Following the precise terms of the Appellants’ own Code, he promised to repay any amounts which should not have been advanced. As such, it is disingenuous for Appellants to argue that the December Advancement Order would “foreclose appropriate relief in the future,” *Bell, supra*, when they created their own court-supervised procedure to provide appropriate relief in the future.

The Appellants nevertheless contend that “substantial rights” are involved, supposedly because certain Ohio Civil Rules were violated. (Jurisdictional Memorandum at 10.) In addition, the Appellants contend that “substantial rights” are involved because, after this Court considers the merits of their appeal, it is allegedly clear that they were denied due process of law and that the trial court misapplied provisions of Ohio’s common law. (*Id.*)

The Appellants’ reasoning is circular. They insist that this Court should determine the merits of their appeal in order to consider whether or not a “substantial right” has been impacted. That has the law backwards. The Advancement Orders either are or are not final orders. The Appellants’ reasoning is that the trial court erred in ordering advancement of fees, and thus “substantial rights” are implicated. This Court explicitly rejected that reasoning in *State v. Coffman* (2001), 91 Ohio St.3d 125, 129.

Likewise, courts have also rejected the Appellants’ contention that alleged violations of Ohio Civil Rules constitute “substantial rights” under R.C. 2505.02(B)(2). *See Fredricks v. Good Samaritan Hosp.*, 2008-Ohio-3480, ¶¶ 22-23 (holding that an alleged violation of Civil Rule 45 did not affect a substantial right, and noting that “there is no basis for concluding that the Rules of Civil Procedure create ‘substantial rights’”).

Moreover, the Appellants fail to recognize that the trial court's order must not only involve substantial rights (which the orders here do not), but must affect substantial rights. An order affects substantial rights only if appropriate relief in the future is foreclosed. *See Bell*, 67 Ohio St.3d at 63; *In re Adoption of M.P.*, 2007-Ohio-5660, ¶ 23 (holding that the appeal regarding adoption rights clearly involved substantial rights, but that the trial court order was not final and appealable, as the substantial rights could be addressed in the future if not immediately appealable). Again, the Appellants have available several avenues to obtain relief from the Advancement Orders, and the Advancement Orders do not foreclose appropriate relief in the future. Thus, there are no substantial rights affected in this appeal, and the Advancement Orders are not final appealable orders under R.C. 2505.02(B)(2).

3. **The Advancement Orders Were Not Made In A Special Proceeding, And Therefore Are Not Final Appealable Orders Under R.C. 2505.02(B)(2).**

In addition to not including Civil Rule 54(B) language and not affecting any substantial right, the Advancement Orders were not made in a “special proceeding” as required by R.C. 2505.02(B)(2). Orders entered in actions recognized at common law or in equity, and not specially created by statute, are not orders entered in special proceedings under R.C. 2505.02. *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, syllabus. Here, Mr. Westbrook asserted a claim for advancement and indemnification based on his rights as an officer of the Corporate Appellants, as set forth under their respective Codes of Regulations. (Second Amended Counterclaim, at ¶¶ 98-108.)

The Appellants wrongly suggest that the Advancement Orders were “made in a special proceeding based upon R.C. § 1701.13, which governs when and how corporations can make advancements or reimbursements of the attorney fees of officers.” (Jurisdictional Memorandum at 11.) In fact, the trial court specifically held that Mr. Westbrook's advancement claim was not

based on R.C. 1701.13(E), which only *permits* a corporation to advance funds to officers and directors for the defense of a claim, but which does not *mandate* advancement or indemnification. (October Advancement Order, at 9-10.) Indeed, Section 5.05 of the Corporate Defendants' Code of Regulations (the advancement provision) specifically states that the "provisions of Section 1701.13(E)(3) of the Ohio Revised Code do not apply to the corporation."

But even if R.C. 1701.13(E) applied, which it does not, that statute does not create any sort of "special proceedings" within the meaning of R.C. 2505.02(B)(2). In order to determine whether a "special proceeding" is at issue, courts look at the basic core of the statute in question, and then determine whether the statute merely provides details within the structure of an ordinary action, or whether it actually creates a special proceeding such as an independent judicial inquiry. *Steven v. Ackman* (2001), 91 Ohio St.3d 182, 188-89. R.C. 1701.13 does not establish or provide for any independent judicial inquiry, nor does it include any mechanism for enforcement. Again, Mr. Westbrook's advancement right stems from the plain language of the Corporate Defendants' Code of Regulations—it is a simple contract claim. "If an action has the characteristics of an ordinary action it does not qualify as a special proceeding." *Polikoff*, 67 Ohio St.3d at 107; *see also BCI v. DeRyke*, 2003-Ohio-6321, ¶ 10 (recognizing that a corporation's bylaws, rules, and regulations are contractual in nature). Mr. Westbrook's claim for advancement under the Corporate Appellants' Code of Regulations is not, and does not require, a special proceeding, and therefore the Advancement Orders are not final, appealable orders under R.C. 2505.02(B)(2).

B. The Advancement Orders Are Not Appealable Under R.C. 2505.02(B)(4).

Even assuming that the advancement claim is a "provisional remedy" (and it is not), the Advancement Orders nonetheless fail to satisfy the mandates set forth in R.C. 2505.02(B)(4). That is because they did not both (1) determine the action with respect to a provisional remedy

and (2) foreclose the Appellants from any meaningful relief in the future. *See* R.C. 2505.02(B)(4)(a), (b) (providing that a “provisional remedy” is appealable only if it meets both of those requirements).

Here, the Advancement Orders neither make a final determination regarding the advancement (or indemnification) of fees and expenses nor prevent a favorable judgment on that issue, or otherwise preclude a meaningful appeal on that issue. Mr. Westbrook agreed to repay any amounts advanced to him should it ultimately be determined that advancement was improper. (*See* October Advancement Order, at 11-12.) The Advancement Orders do not prevent Appellants from later obtaining a favorable judgment on the advancement or indemnification issue.

Moreover, if the trial court erred in its legal analysis of the advancement issue, an appellate court could reverse the trial court’s decision and require Mr. Westbrook to return any amounts advanced after the close of the trial court proceedings. The Appellants are afforded a “meaningful and effective” remedy on appeal. Indeed, advancing funds with the possibility that they may be recovered at some later time is exactly the remedy the Corporate Appellants determined was proper when they adopted their Code of Regulations. Through their Code of Regulations, the Corporate Appellants agreed to advance Mr. Westbrook’s fees and expenses should Mr. Westbrook be required to defend himself “by reason of the fact” that he was an officer. The Corporate Appellants made that commitment with full knowledge that advancement ultimately may be found to be improper, and with full knowledge that the Corporate Appellants would then have to seek recovery of the advancements at a later time. (*See* October Advancement Order, at 6.) Consequently, Appellants cannot show that they will be deprived of a “meaningful remedy” on appeal. The advancement of fees with the promise of repayment if

advancement was improper is precisely the remedy the Corporate Appellants chose for themselves.

C. The Only Other Appellate Decision Addressing This Issue Squarely Held That Orders Regarding Corporate Advancement Of Legal Fees And Expenses Are Not Immediately Appealable.

The Appellants admit that, other than the Fifth District's decision in this case, there is only one other Ohio appellate decision regarding the immediate appealability of an advancement order: the Tenth District's decision in *MD Acquisition*. The Appellants oddly suggest that those cases "conflict" on the dispositive issue before this Court, despite the fact that both courts held that such an order is not final and appealable. There is no "conflict" here.

The Appellants argue that this case "involves an award of only past legal fees," whereas *MD Acquisition* "dealt only with a true 'advancement' order." (Jurisdictional Memorandum at 2.) That is flat wrong. Mr. Westbrook moved for advancement in August, 2007. Although the trial court did not immediately issue its advancement order, that delay did not transform, and could not have magically transformed, the nature of the court's order and the relief it issued—which was advancement.

The Appellants also wrongly contend that *MD Acquisition*'s holding was based on the fact that the trial court had not determined the precise amount of attorneys fees to be advanced. (Jurisdictional Memorandum at 15.) Rather, the *MD Acquisition* court held that the advancement order was not a final order because the trial court had yet to determine whether indemnification applied to the facts, and because the trial court remained free to modify its decision as to advancement depending on the outcome of the trial on the merits. 2007-Ohio-3521, ¶ 12. That same analysis applies here.

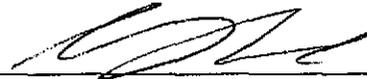
Finally, the Appellants suggest that *MD Acquisition* is distinguishable because the Tenth District held that the advancement order in that case was a "provisional remedy." (Jurisdictional

Memorandum at 2.) That argument actually helps Mr. Westbrook. As detailed above, even if the Advancement Orders in this case are “provisional remedies,” they nonetheless are not final and appealable because they did not “determine the action” with respect to the provisional remedy or foreclose appellants from any meaningful relief in the future. Thus, the Advancement Orders are not final orders under R.C. 2505.02(B)(4). That is exactly what the Tenth District held in *MD Acquisition*. 2007-Ohio-3521, ¶¶ 12, 14.

CONCLUSION

For all the foregoing reasons, Appellee William Westbrook respectfully requests that this Court deny jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2009, a copy of the foregoing was served

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