

IN THE SUPREME COURT OF OHIO

STATE EX REL. KELLY BENSMAN

Appellant,

v.

LUCAS COUNTY BOARD OF ELECTIONS

Appellee.

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Case No. 2009-2035

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On Appeal from the Lucas
County Court of Appeals, Sixth
Appellate District

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Lucas County Court of Appeals
Case No. L-08-1211

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APPELLEE'S MOTION TO DISMISS APPEAL

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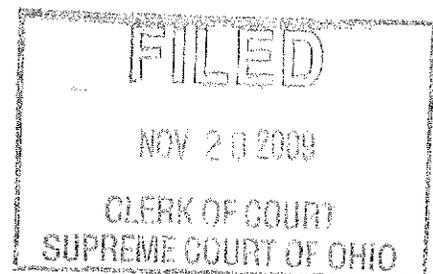
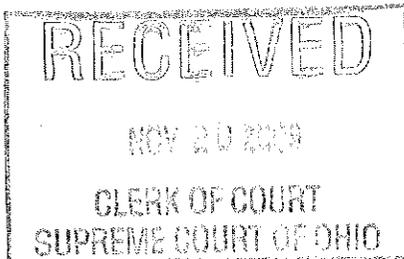
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COUNSEL FOR APPELLEE



Now comes Appellee, by and through counsel, and hereby moves this Court, pursuant to *S.Ct.Prac.R.* XIV, Section 4, for an order dismissing the Appellant's Notice of Appeal. This motion is based Appellant's failure to comply with *R.C.* 2505.03, in that the Court of Appeals October 22, 2009 Order is not a final order.

Therefore, this appeal must be dismissed.

**JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY**

By: _____

Andrew K. Ranazzi
Assistant Prosecuting Attorney
Counsel for Appellee

MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

During the period of time relevant to this appeal, the Appellant made virtually daily public records requests to the Appellee Board of Elections. The requests were made both orally and in writing.¹ It was not uncommon for the requests to be amended or supplemented during the course of Appellee's attempts to comply. Indeed, it was not uncommon for Appellant to made 3 or 4 public records requests a day.

Therefore, it was difficult to monitor whether the Appellee's employees complied with Appellant's many public records requests. In addition, the employee primarily responsible for complying with the public records requests has retired. In spite of this difficulty, however, Appellee believed that its employees had fully complied with Relator's numerous requests for documents.

On July 8, 2008, the Appellant filed a Complaint in mandamus asserting four claims for relief. The Respondent filed its Answer alleging that, to the best of its knowledge, Appellant had received all requested documents or redacted documents that it was required to disclose.²

¹ Under R.C. 149.43, the Appellee could not compel the Relator to submit written public records requests.

² It should be noted that several of the claims for relief admit that Appellant had received the requested documents, but complained about the manner in which they were received. *Complaint*, ¶¶ 6-40. In this situation, the documents were given to attorneys involved in related litigation who stated that they would provide Appellant with copies.

In addition, numerous allegations included in the Complaint are completely irrelevant to a public records action and Appellee could not determine the reasons for their inclusion. See *Complaint*, ¶¶ 6, 7, 8, 9, 10, 11, 13, 14, 20, 21, 22, 23, 24, 25, 26, 27, and 64.

After extensive discovery, including depositions and discovery requests involving over 12,000 additional documents, the Appellant filed a motion seeking an order compelling the Appellee to hire a forensic expert to recover emails which she alleges were deleted by the Appellee. The Appellant argued that this additional discovery was needed to amend the Complaint to include additional claims.

On October 22, 2009, the Court of Appeals denied the Appellant's motion. The Court held that the claim that the Appellant sought to include in an amended complaint was not the proper subject of a mandamus action.³

On November 6, 2009, the Appellant filed a Notice of Appeal from the Court of Appeals' October 22, 2009 Decision and Judgment denying the Appellant's motion for additional discovery.

The Appellee now files this motion to dismiss the appeal. This motion is based Appellant's failure to comply with *R.C. 2505.03*, in that the Court of Appeals October 22, 2009 Order is not a final order.

Therefore, this appeal must be dismissed

II. THE COURT OF APPEALS' OCTOBER 22, 2009 ORDER IS NOT A FINAL ORDER

The appellate jurisdiction of this Court is limited to the review of final orders, judgments, or decrees. *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004 Ohio 5580, 816 N.E.2d 597, at ¶ 3; *State ex rel. White, et al. v. Cuyahoga Metropolitan*

³ The Court of Appeals also held that, if Appellant's request was granted, the proceedings might continue indefinitely.

Housing Authority, 79 Ohio St.3d 543, 544, 1997 Ohio 366, 684 N.E.2d 72; R.C. 2505.03. A final order generally is one which ends the litigation on the merits and leaves nothing for a court to do but execute the judgment. *Catlin v. United States*(1945), 324 U.S. 229, 233. A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. *State ex rel. Keith v. McMonagle*, at ¶ 4.

The Court of Appeals October 22, 2009 Decision and Judgment clearly does not fall with the definition of a final order. The Order merely denied Appellant's request for specific, additional discovery that was allegedly needed to bring a claim that would not have been proper in a mandamus action.

Generally, discovery orders are not appealable. *Walters v. Enrichment Center of Wishing Well, Inc.*78 Ohio St.3d 118, 121, 1997 Ohio 232, 676 N.E.2d 890. A discovery order is generally not considered to be a final appealable order because any harm from erroneous discovery has been held to be correctable on appeal. *Culbertson v. Culbertson*, Delaware App. No. 07 CAF 06 0331, 2007 Ohio 4782.

However, with the revision to R.C. 2505.02 of the definition of final orders, there has been a broadening of the definition to include certain types of discovery orders affecting substantial rights and for which no meaningful appeal would be present at the conclusion of the proceedings. *Raymond M. Delost, et al. v. Ohio Edison Company*, Mahoning App. 07-MA-171, 2007 Ohio 5680, at ¶ 4. However, this broader definition of a final order is limited to orders involving the discovery of potential confidential information, trade secrets, or privileged material. *Joseph E. Concheck v. Elaina M. Concheck*, Franklin App. No. 07AP-896, 2008 Ohio 2569, at ¶ 10; *Raymond M. Delost*,

supra.; *Holly Mulkerin, et al. v. Donald E. Cho, M.D., et al.*, Medina App. No. 07 CA 007-M, ¶ 3.

The Court of Appeals' October 22, 2009 Order clearly does not involve the discovery of potential confidential information, trade secrets, or privileged material. It is not, therefore, an exception to the general rule that discovery orders are not appealable.

Therefore, the motion to dismiss must be granted and this appeal dismissed.

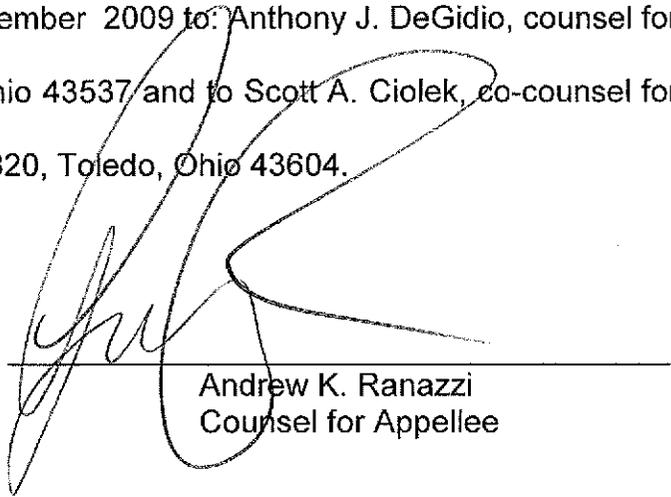
JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: _____

Andrew K. Ranazzi
Assistant Prosecuting Attorney
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss was sent by ordinary U.S. mail this 19th day of November 2009 to: Anthony J. DeGidio, counsel for Appellant, 712 Farrer St. Maumee, Ohio 43537 and to Scott A. Ciolek, co-counsel for Appellant, 520 Madison Avenue, Suite 820, Toledo, Ohio 43604.



Andrew K. Ranazzi
Counsel for Appellee