

ORIGINAL

IN THE SUPREME COURT OF OHIO

The STATE OF OHIO ex rel. KELLY BENSMAN)	
)	Case No. 2009-2035
)	
Appellant)	
)	
-vs-)	On Appeal from the Lucas County
)	Court of Appeals, Sixth Appellate
)	District
THE LUCAS COUNTY BOARD OF)	
ELECTIONS)	
)	Lucas County Court of Appeals
Appellee)	Case No. L-08-1211
)	

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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1. STATEMENT OF THE CASE

Both Mandamus and the Ohio Public Records Act provide a method of redress for citizens against illegal actions by their government. This case arose because of the illegal actions of the Lucas County Board of Elections ("BOE") and sets forth the perils awaiting any citizen of Lucas County who might dare to request records pursuant to the Ohio Public Records Act. The facts and background have been set forth in detail in Relator - Appellant Kelly Bensman's Motion to Appoint a Forensic Expert to Recover Deleted E-mails and herein below.

The request made in Bensman's Motion was not novel and mirrors the relief provided by the Ohio Supreme Court in another Mandamus action, The State of Ohio ex rel. The Toledo Blade Co. v. Seneca County Board of Commissioners, 120 Ohio St.3d 372, 899 N.E.2d 961,(2008). The Court of Appeals denied Appellant's motion because of a year of delay caused solely by the BOE. This delay, and the discovery of evidence which Bensman should have had a year sooner, necessitated and amendment to Bensman's Complaint.

The Court ruled that Bensman (inconsistent with the civil rules) would be denied her right to amend the Complaint to conform to the evidence. This ruling was made before Bensman had even filed her motion to amend which she acknowledged was being prepared to include newly discovered claims for spoliation and destruction of public documents under R.C. 149.351. As a result of the court's order, these claims are currently forever barred for legal and practical reasons set forth herein.

Procedural History

On 1/4/2008 Relator Kelly Bensman first began requesting public records from the Lucas County Board of Elections ("BOE"). Eventually, because of incomplete requests (greatly detailed in her court filings), she filed the present action on 7/8/2008. On 7/23/2008 the Court of Appeals issued

an alternative writ instructing the BOE to produce the documents or file an answer¹. On 8/6/2008 the BOE filed its Answer claiming that it had produced all of the requested documents².

On 9/16/2008 the Court of Appeals issued a scheduling order which provided that Discovery would be completed by 11/3/2008, Summary Judgment Motions were due by 11/17/2008, and if no summary judgment motions were filed then the case would be submitted to court pursuant to the 6th Dist. Loc. App. R. on or before 12/15/2008³.

On 10/7/2008 Bensman served her first Requests for Production⁴ and on 11/4/2008 the BOE responded. The responses by the BOE were blatantly deficient and Bensman promptly filed a Motion to Compel complete responses on 11/17/2008. Up to this point in time the case had proceeded with no delays by either side for four months⁵.

On 11/24/2008 the BOE filed a motion for an extension of time to respond to Bensman's Motion to Compel and on 12/8/2008 the court granted that request and allowed the BOE until 12/15/2008 to file its response to the Motion to Compel. This delay required the court to reset the Summary Judgment and L.R. 6 filings until February 16, 2009 and March 16, 2009. This three month delay is completely attributable to the BOE's failure to properly respond to discovery and its requests for a time extension. Bensman could not proceed to her case in chief as she had no discovery at all up to this point⁶. Additionally, counsel had stipulated in writing that all discovery requests would be treated as

1 Its important to note that the court ordered that the case would thereafter proceed "...pursuant to the Ohio Rules of Civil Procedure", which provide for liberal amendments to pleadings.

2 It was not until September of 2009 that the BOE recanted this claim and admitted (after filing an affidavit to the contrary) that it did not even check the CDs provided to Bensman to see if all of the documents were on them.

3 6th Dist. Loc. App. R. 6. provides that if no motion for summary judgment is filed the parties shall submit their case to the court by submitting a brief on the law, an agreed statement of facts, if applicable, and/or stipulations, depositions, and/or affidavits. The rule also provides that original actions "... shall proceed as any civil action under the Ohio Rules of Civil Procedure...".

4 The First (and only) Document Requests consisted of a mere 6 requests.

5 The case was on the docket for a total of one year and approximately four months.

6 Discovery is clearly necessary in Public Records cases because the Relator must determine which documents were in existence at the time of the requests in order to determine which documents

public records requests because they were in fact public records (See Motion to Enforce Stipulation filed 11/2/2009) so an amendment by Bensman was needed to conform the pleadings to the evidence and add these public records. Bensman was never provided with an opportunity to Amend her Complaint to include these discovery documents because they still have not all been produced and some were the subject of the Motion to Hire Forensic Expert.

On 12/17/2008 the BOE finally filed its Memorandum in Opposition to the Motion to Compel claiming the documents were subject to the attorney client privilege or had already been produced. The Court granted Bensman's Motion to Compel on 2/10/2009 and had to once again re-set the deadlines because of this delay interposed by the BOE. The court ordered that Discovery was now due by 4/17/2009, the summary judgment deadline was now 6/1/2009, and the L.R. 6 filings were now due on 6/15/2009. So at this point the BOE had postponed the matter from being finalized on 12/15/2008 to the new date of 6/15/2009, a six month delay. The court also ordered the BOE to identify the privileged documents and produce them to the court for in camera inspection by March 16, 2009⁷ and to produce the other requested documents to Bensman by 3/12/2009.

Not surprisingly, the BOE did not meet the 3/12/2009 deadline to produce responses to Bensman's 10/7/2008 document requests. On 3/11/2009 the BOE filed another motion for an extension of time to respond to Bensman's first document requests. Bensman opposed this extension citing the numerous delays already interposed by the BOE. The court denied Bensman's objection to this continuing delay and then gave the BOE until 4/3/2009 to respond to Bensman's 10/7/2008 document

should have been provided. In this case the Relator also knew she made other written requests and wanted copies from the BOE because she could not find her copies. With these in hand she could, pursuant to the Civil Rules, Amend her claims to conform to the evidence with regards to all documents that were never provided.

⁷ The BOE did not provide the allegedly privileged emails to the court until the final hearing then set for 8/31/2009.

requests. The BOE should have provided these documents in its discovery response on 11/4/2008 and now had delayed production for 6 months.

Even though the BOE had not yet fully responded to Bensman's 10/7/2008 document requests, and Bensman could not yet take a competent deposition, the BOE, on 3/20/2009, filed a Motion to Dismiss claiming that all public records had been produced⁸. It was a clear ploy by the BOE to try and end the proceedings without actually producing the records. This was clear because shortly after filing the Motion to Dismiss, the BOE's counsel commenced emailing document to Bensman's counsel with additional documents. These emails began on 3/31/2009 and continued through 4/27/2009, totaling 74 separate emails with hundreds of documents.

Despite the new production of these documents the BOE had no problem representing to the court on 3/20/2009 that it had already provided them. At this point in time the BOE had until BOE until 4/3/2009 to respond to Bensman's 10/7/2008 document requests and Bensman's response to the motion to dismiss was now due by 4/6/2009.

On 3/30/2009 Bensman requests a 3 day extension until 4/9/2009 and then on 4/9/2009 Bensman filed a detailed (4 pages with 6 Exhibits) request asking for another 4 days due to the numerous discovery problems and the fact that she received numerous documents from the BOE on the 9th the very day her response to the motion to dismiss was due. The court granted these two requests. This seven day extension requested by Bensman was necessary because of the BOE's continued failure to adhere to court imposed deadlines and not due to any lack of diligence by Bensman. Bensman filed a massive response to the motion to dismiss on 4/13/2009 setting forth in great detail the numerous requests which had been made and still not responded to as well as the continuing discovery violations.

⁸ The Motion to Dismiss misrepresented to the court that all documents had been responded to fully. In September of 2009, when Bensman finally took depositions, Marty Limmer admitted on the record that the affidavit where he made this representation was completely false. The motion clearly had no basis in fact as the BOE walked into court on 8/31/2009 with the allegedly privileged emails and an additional 6 CDs of unreviewed documents not previously provided to Bensman.

The BOE sought and the court of appeals granted additional time extensions on 4/10/2009, 5/14/2009, and 6/19/2009. Bensman still had not obtained the documents she needed to conduct her depositions. Then on 7/13/2009⁹ the court set the matter for a hearing "...on the outstanding Motion to Dismiss...", to be held on 8/31/2009. The court also provided the BOE with another extension to respond to Bensman's 10/7/2008 document requests and provide the privileged documents until 7/31/2009¹⁰.

While the court seemed to indicate that the hearing was solely for the Motion to Dismiss, it also implied that it was to be a hearing on the merits of the case since it ordered Bensman to "... present to the court a list of all records she claims she has not yet received which comply with the public records request in her mandamus complaint or the discovery requests." On 8/5/2009 Bensman filed a Motion for Sanctions based upon the BOE's failure to attend a properly noticed deposition. Bensman had still not been able to take a single deposition.

At the hearing on 8/31/2009 Bensman provided to the court a detailed list of documents which still had not been produced and explained that she had never had the opportunity to conduct depositions because she needs to see those documents first and because the BOE failed to appear at the one deposition she noticed. Based upon this lack of discovery she could not present her case in chief or even prepare a competent motion to amend. At this point in time it had been almost nine months since the BOE had responded to Bensman's first document request and all of this delay was directly attributable to the BOE. The court ordered the BOE to appear for the depositions previously noticed by Bensman and the dates of September 16, 17, and 18, were agreed to.

The BOE continued its representation to the court that all the discovery documents and public

⁹ The 7/13/2009 had a typo by the Court of Appeals. The court indicated that the BOE's Motion to Dismiss was filed on 3/30/2009 when in fact it was filed on 3/20/2009. Bensman's request for an extension was filed 3/30/2009.

¹⁰ The BOE essentially ignored even this deadline by producing 7 CDs of information including the privileged documents at the 8/31/2009 hearing.

records requests had been provided. to Relator. This position was still patently false as the BOE appeared at the 8/31/2009 hearing with 10,000 e-mails it had never before provided. The court made its in camera review and on 9/21/2009 ordered the BOE to produce 138 emails which were not privileged. The BOE did not produce them until after all depositions had been held.

On 9/16/2009, Bensman took the deposition of Linda Howe, the Director of the BOE. Howe's testimony revealed that she had destroyed public records and signing a fraudulent copy of a document destruction form which was produced in discovery. These acts violates R.C. 149.351, and are also a fourth degree felony under R.C. 3599.16. Howe falsely testified that the BOE does not destroy any e-mails, and that even if they did destroy them she believes they could be recovered.

On 9/17/09, Bensman took the deposition of Marty Limmer, the individual responsible for filling records requests and in charge of computers. During Limmer's deposition, he admitted that he never verified the responses to Bensman's records requests. The responses were incomplete and he had therefore made false representations in his affidavit to the court. He verified that numerous e-mails were destroyed by himself and other employees before they could be produced for public records requests and that no reasonable effort was even made to search for all responsive e-mails.

Limmer indicated he didn't know about the Bensman litigation until a year after it began and that he could have easily deleted documents relevant to the litigation because nobody at the BOE ever provided notice to the employees to institute a litigation hold as far as he knows. When asked if he could produce copies of Bensman's document requests he claimed he "...can't produce what doesn't exist." He testified that the emails are maintained on a computer at the BOE but when there are document requests for e-mails the Lucas County Information Services (LCIS) produces the emails for him. According to Limmer it takes, on average, two weeks before he takes the time to send the request to LCIS even though it only takes him 30 seconds to do so. He further admitted that employees could

become aware of these pending requests for their e-mails and delete their own e-mails weeks before he sends the request on to LCIS for gathering to place them on CDs. Thus BOE employees using their own unfettered discretion can delete public documents at will and there has never been a general policy communicated to the contrary.

In order to determine if the BOE had properly responded to public records requests several of the requests were selected and Limmer was asked to examine the CDs he produced and point to where the responsive documents were on those CDs. One of Bensman's requests asked for all incoming and outgoing e-mails for Jill Kelly, Dan Pilrose, Paula Lykowski, Levera Scott, Dennis Lange, and Desiree Lyonette from January 1, 2008 through April 23, 2008. Limmer and the BOE represented previously that this request and all others had been fully responded to.

Limmer next authenticated an email he received from Desiree Lyonette on 5/13/2008 where she told Limmer she was "cleaning out her e-mails". Limmer acknowledged this is generally interpreted to mean she was "deleting" e-mail from her account and that he had knowledge of this on that date, 5/13/2008.

He next affirmed that on 5/13/2008, Desiree Lyonette sent an e-mail to *everybody in the office* saying she was deleting e-mails, and that the e-mails were public records that were pending a request made by Kelly Bensman¹¹. In this manner everybody was tipped off to clean out their email boxes. Therefore, the response for Bensman would not be complete because Lyonette and no doubt other employees destroyed some of those e-mails before the documents were gathered by LCIS to respond to the request.

Limmer went so far as to now admit that he had personally deleted e-mails and that he couldn't recall what they were but presumably they were public records. Limmer did explain that deleted

¹¹ Limmer knew at the time he received the email from Lyonette that BOE policy specifically states that e-mails are public records.

e-mails can be recovered as many were presumably just moved from a current folder to a "deleted" folder

and they may still reside there but he does not know if these deleted folders were searched for the responses all though it appears they were not. Limmer went on to admit he submitted a false affidavit to the court and that he had not provided all of the requested documents.

Counsel for Bensman asked Limmer to use a computer at the deposition and to examine the CDs he previously produced and show where these e-mails were located on those CDs. Limmer began by checking for the e-mails of Desiree Lyonette for the period January 1st, 2008, through April 23rd, 2008. After admitting that he had never checked for these previously he examined the CD and concluded there were no e-mails produced by Desiree Lyonette from January 1st, 2008, through April 23rd, 2008 the period requested. In fact there were only a few e-mails for Lyonette produced and they were all from August 20th and August 21st and thus unresponsive. Limmer was also asked to find the e-mails for Jill Kelly, another person listed on the 4/23/2008 request. Limmer again examined the CD the BOE produced which supposedly had the requested emails. This time he found that there were ZERO e-mails in the folder for Jill Kelly and again admitted he never checked this before.

After a year of litigation and numerous motions to compel the BOE had still not produced these documents and now admitted that possibly thousands if not hundreds of thousands of e-mails had been deleted in violation of Ohio Public records law. There was no sense in asking Limmer about the numerous other requests since it was clear a good faith effort to respond records requests or discovery requests had never been made by the BOE. Based upon the testimony of Marty Limmer counsel stated on the record (and filed with the court on 9/25/2009) the following stipulation:

Based upon the testimony taken on September 16th, 2009, and September 17th, 2009, both the parties agree additional documents must be produced to respond to previous public records requests and/or discovery requests. The parties are jointly

suspending depositions in this case. The parties intend to file a stipulated motion with the court requesting Marty Limmer and the remaining 30(b)(5)depositions intended to be taken Thursday, 9-17 pm., and Friday, 9-18,2009, be temporarily suspended and resumed 30 days from 9-18-09.And during that time respondent will

supplement their discovery and public records responses so as to complete the discovery and public records requests.

Based upon these events Bensman filed her Motion to Hire a Forensic Expert to restore the deleted emails on 10/1/2009. On 10/8/2009 the BOE filed a motion for an extension of time to respond to Bensman's motion and on 10/9/2009 yet another motion for an extension to comply with the court's discovery order. On 10/22/2009 the court denied Bensman's Motion to Hire a Forensic Expert, the order that is under appeal.

II. THE COURT'S OCTOBER 22, 2009 ORDER IS A FINAL APPEALABLE ORDER.

A. The Order on Appeal

The Court of Appeal's 10/22/2009 Order denied Bensman's Motion to Hire a Forensic Expert because it had the "...potential to prolong indefinitely the proceedings in a case that has included multiple delays and requests for additional time over the past year." The court thus provided a year's worth of extensions based upon the BOE's misconduct and no extensions of time for Bensman despite her legitimate needs.

The court further held that "...any claim that relator may bring pursuant to R.C. 149.351 is not the proper subject of this mandamus action." The court thus denied Bensman the opportunity to amend before she even filed her Motion requesting leave to

amend. The court's holding relied on the decision in *State ex rel. Woods v. Navarre*, 6th Dist. No. L-06-1292, 2009-Ohio-3217 p21. The *Woods* court excluded a claim because there was an adequate remedy at law for the same particular wrong. Bensman secured original jurisdiction in the Court of Appeals pursuant to the legislative authority provided in 149.43(C)(1), not by the common law mandamus requirements.

There is no requirement in this case for the requirement of showing that there is no adequate remedy at law. The only question is whether or not the Court of Appeal's original jurisdiction allows it to hear the related claims of spoliation and the statutory claim of destruction of public records under 149.351 as these are required to afford a complete remedy and could not be raised in another proceeding. Bensman fully briefed the court on the decision of this Court in *The State of Ohio ex rel. The Toledo Blade Co. v. Seneca County Board of Commissioners*, 120 Ohio St.3d 372, 899 N.E.2d 961,(2008).

B. The Court of Appeal's October 22, 2009 Order is NOT a Discovery Order.

The only argument set forth by the BOE in its Motion to Dismiss, is based upon the notion that the court's order is a discovery order. The BOE however offers no support for its conclusion that the motion was a discovery motion or that the order was a "discovery" order.

Bensman's motion calling for an independent expert to recover deleted email public records was not a discovery motion. A review of the motion shows that it was not captioned as a discovery motion nor do the contents of the motion remotely suggest it is a discovery motion. Neither did the Court of Appeals refer to it as a discovery issue or ruling.

Bensman simply sought a mandamus remedy. The same exact mandamus remedy crafted by the this Court in the *Seneca County* case. Bensman could not bring this request as part of her

complaint because the deletion of emails wasn't discovered until 9/17/2009 over a year after the case had been filed. It took a year because of the delays caused by the BOE and provided by the court, not because of any fault of Bensman.

The request for recovery of deleted public record e-mails, in a case pursuant to R.C. 149.43 is a request for a mandamus remedy, not a discovery remedy. Given this is the only argument for dismissal set forth by the BOE, its motion can be summarily dismissed without further consideration. Alternatively, Appellant sets forth two additional reasons why the order is a final appealable one and this Court has jurisdiction to hear this appeal.

C. Mandamus is a Special Proceeding under R.C. 2005.02(B)(2).

Section 2505.02(B)(2) defines an order as final if it is made in a special proceeding and it affects a substantial right. According to Section 2505.02(A)(2), a special proceeding is “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” “Orders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02. (*Amato v. Gen. Motors Corp.* [1981], 67 Ohio St.2d 253, 21 O.O.3d 158, 423 N.E.2d 452, overruled.)” *Polikoff v. Adam*, 67 Ohio St.3d 100, 616 N.E.2d 213 (1993), syllabus.

Bensman's action arises under R.C.149.43(C)(1). This statute did not exist in 1853 and specifically provides that a mandamus action is the appropriate remedy to enforce the public records statute. Because mandamus is the specific statutorily appointed remedy for public records requests, the element of lack of an adequate remedy is dispensed with. *State ex rel. Simonsen v. Ohio Department of Rehabilitation and Correction*, Franklin App. No. 08AP-21, 2008-Ohio-6826 and *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.* (1997), 78 Ohio St.3d 518, 678 N.E.2d 1388.

The jurisdiction in mandamus that is conferred by the Ohio Constitution is common-law jurisdiction. Jurisdiction for the remedy of recovering deleted emails in a public records case is a mandamus remedy afforded by the public records statute and therefore renders orders denying or providing this mandamus remedy are "special proceedings" and therefore final orders pursuant to R.C. 2005.02(B)(2).

D. The Court of Appeal's October 22, 2009 Order is final order pursuant to R.C.2505.02 (B)(1)

R.C.2505.02 (B)(1) provides that an order is final if it "affects a substantial right in an action that in effect determines the action and prevents a judgment". The Court of Appeal's October 22, 2009 order affected a number of Bensman's substantial rights including her right to litigate all claims in one forum, her right to have the court follow the civil rules of procedure, her right to amend, her right to obtain a remedy for spoliation or destruction of public records. The court prevented Bensman from obtaining a judgment on her claims of spoliation and destruction of records under R.C. 149.351. Bensman cannot bring her spoliation claims elsewhere and the claim under 149.351 is completely intertwined with the present action. Thus the court cannot afford a complete determination of Bensman's claims without ruling on these additional claims.

Spoliation of evidence.

The elements for the tort of interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts;" *Smith v. Howard Johnson Company, Inc.* (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037. If the claim

for spoliation is discovered during the pendency of the primary action it must be brought through an amendment to the complaint in that same action where the destruction was discovered.

In Davis v. Wal-Mart Stores, Inc., 93 Ohio St. 3d 488, at 491, the Supreme Court of Ohio held that "...claims for spoliation of evidence may be brought after the primary action has been concluded *only when evidence of spoliation is not discovered until after the conclusion of the primary action.*" (emphasis added). Therefore Bensman cannot bring her spoliation claims at a later time in a different court. They must be brought now if at all. The court's decision therefore deprives Bensman of this claim forever.

Additionally spoliation of evidence is sometimes more akin to a remedy than an actual cause of action and the court of appeals original jurisdiction presumably only limits the claims the court can hear and not the remedies it can provide. This Court in Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St.3d 638, (1994), held that even if the plaintiff could not prove the element of actual damages flowing directly from the destruction that a showing of the destruction alone would support the award of punitive damages. The Court stated it expressly rejected any notion a separate claim must be brought.

[I]f appellant were constrained to bring a separate cause of action for spoliation of evidence, that claim would inevitably fail, since there is no damage flowing directly from the alteration of records. Therefore, no punitive damages could be awarded to punish the unlawful conduct. Thus, if Figgie's argument is taken to its logical conclusion, litigants and prospective litigants could alter and destroy documents with impunity so long as no actual damage was caused thereby. Of course, if the damning evidence were destroyed without trace, no liability would attach on any claim, since no evidence would remain to implicate the spoliator. In our judgment, Figgie's alteration of records was inextricably intertwined with the claims advanced by appellant for medical malpractice, and the award of compensatory damages on the survival claim formed the necessary predicate for the award of punitive damages based upon the alteration of medical records. (*Id.* at 651).

Based upon the foregoing the court of appeals can clearly hear Bensman's claim for spoliation of evidence.

R.C. 149.351

The courts of appeals have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, and procedendo proceedings, as well as in any cause on review as may be necessary to its complete determination. *Morningstar v. Morningstar*, 63 Ohio App. 3d 653, 579 N.E.2d 761 (2d Dist. Greene County 1990). In hearing Bensman's mandamus claims arising under 149.43 the court must hear the precise evidence that will have to be heard in any separate court action arising under 149.351.

Once this court took jurisdiction of part of the case no other court can rule on any part of it and by the time this action is over the deleted emails will not be able to be recovered and Bensman will thus lose her claims for both spoliation and under 149.351 because the evidence will be non-existent.

When a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of, and no court of coordinate jurisdiction is at liberty to interfere with its proceedings. "John Weenink & Sons Co. P. Cuyahoga Cty. Court of Common Pleas (1948), 150 Ohio St. 349, syll. 3.

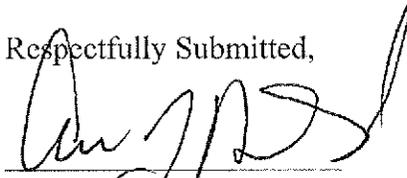
Furthermore, the court of appeals must hear these claims pursuant to the jurisdictional priority rule. This Court explained the jurisdictional priority rule as follows: "As between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." "State ex rel. Racing Guild of Ohio v. Morgan (1985), 17 Ohio St.3d 54, 56, quoting State ex rel. Phillips v. Polcar (1977), 50 Ohio St.2d 279, syllabus.

Based upon the foregoing, the court of appeal's October 22, 2009 order is final order pursuant to R.C.2505.02 (B)(1).

CONCLUSION

Based on the foregoing, Appellant asks the Court to DENY the Appellee's Motion to Dismiss and proceed on her appeal.

Respectfully Submitted,



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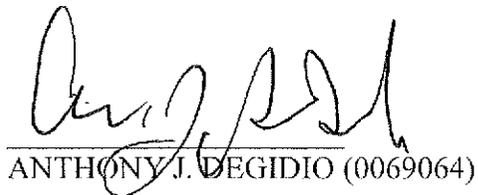
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Opposition to Appellee's Motion to Dismiss was served via ordinary U.S. Mail, postage prepaid, this 3rd day of December, 2009, upon Andrew K. Ranazzi, Assistant Prosecuting Attorney, 700 Adans Street, Suite 250, Toledo, OH 43623.



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