

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. 2010-0669

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

Lucas County Court of Appeals
Case No. L-08-121

APPELLEE'S MOTION TO DISMISS APPEAL

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SUPREME COURT OF OHIO

Now comes Appellee, by and through counsel, and hereby moves this Court, pursuant to *S.Ct.Prac.R.* 14.4, for an order dismissing the Appellant's Notice of Appeal. This motion is based Appellant's failure to comply with *R.C.* 2505.02 and 2505.03, in that the Court of Appeals March 2, 2010 Order is not a final order.

Therefore, this appeal must be dismissed.

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

By: John A. Borell
John A. Borell
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 believes that its employees have 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 Appellee 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.

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. (Case No. 2009-2035) The Appellee filed a motion to dismiss the appeal. The motion was based Appellant's failure to comply with *R.C. 2505.02 and 2505.03*, in that the Court of Appeals October 22, 2009 Order is not a final order.

On January 27, 2010, this Court granted the appellee's motion and dismissed the appeal,

On March 2, 2010, the Court of Appeals issued a Decision and Judgment finding that Appellee had provided relator with all of the public records that had been identified in her complaint in mandamus and therefore, the Court's jurisdiction over the issue of whether Appellee had fully complied with those requests had ended.

The Decision and Judgment also deferred a decision on an award of attorney fees and statutory damages pursuant to *R.C. 149.43*. On March 22, 2010, the Appellant filed a motion for statutory damages and attorney fees. The Appellee was granted until April 26, 2010 to file a memorandum in opposition.

On April 16, 2010, the Appellant filed in the Court a notice of appeal from the March 2, 2010 Decision and Judgment of the Court of Appeals.

The Appellee now moves this Court, pursuant to *S.Ct.Prac.R.* 14.4, for an order dismissing the Appellant's Notice of Appeal. This motion is based Appellant's failure to once again comply with *R.C.* 2505.02 and 2505.03, in that the Court of Appeals March 2, 2010 Order is not a final order.

Therefore, this appeal must be dismissed.

II. THE COURT OF APPEALS' MARCH 2, 2010 DECISION AND JUDGMENT 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 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.

It is well-settled law that a judgment deferring final adjudication of a request for attorney fees is not a final, appealable order. *Kimble Mixer Company v. James St. Vincent, et al.*, Tuscarawas App. No. 2003AP020014, unreported, 2004 Ohio App. LEXIS 2857; *Fleener v. Caudill*, Scioto App. No. 03CA2886, 2003 Ohio 6513, at ¶ 16;

Frate v. Al-Sol, Inc.(1999), 131 Ohio App.3d 283, 286, 722 N.E.2d 185. The Court of Appeals March 2, 2010 Decision and Judgment clearly deferred a decision on an award of attorney fees and statutory damages. Indeed, the Relator has actually filed a motion seeking attorney's fees.

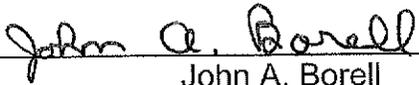
Thus, since the Court of Appeals March 2nd Decision and Judgment is not a final, appealable order and this Court lacks jurisdiction to hear this appeal. Therefore, the Appellee's motion must be granted and the appeal dismissed.

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: John A. Borell
John A. Borell
Andrew K. Ranazzi
Assistant Prosecuting Attorney
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that, pursuant to *S.Ct.Prac.R.* 14.2(B) a copy of the foregoing Motion to Dismiss was sent by E-mail this 29th day of April, 2010 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.



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