Supreme Court of Ohio Clerk of Court - Filed June 16, 2015 - Case No. 2015-0862

IN THE SUPREME COURT OF OHIO

ANTHONY BODE	:	
	:	**CASE NO. 2015-0862**
Appellee	:	
	:	
v.	:	
	:	**On Appeal from the Hamilton County**
ABUBAKAR ATIQ DURRANI, M.D., et. al.,	:	**Court of Appeals, First Appellate District**
	:	
Appellants	:	**Court of Appeals**
	:	**Case No. C1500133**
	:	

RESPONSE TO APPELLANTS MEMORANDUM IN SUPPORT OF JURISDICTION

Attorney for Appellee:

Matthew Hammer (0092483)
5247 Madison Pike
Independence, KY 41051-7941
Phone: (859) 363-1900
Fax: (859) 363-1444
mhammer@ericdeters.com

Attorneys for Appellants:

Michael F. Lyon (0006749)
Laurie A. McCluskey (0075310)
James F. Brockman (0009469)
David Williamson
Lindhorst & Dreidame
312 Walnut Street, Suite 3100
Cincinnati, OH 45202-4048
mlyon@lindhorstlaw.com
lmccluskey@lindhorstlaw.com

jbrockman@lindhorstlaw.com
dwilliamson@lindhorstlaw.com

J. David Brittingham (0061577)
Alison Knerr (0088235)
Michael J. Gray (0086804)
Dinsmore & Shohl, LLP
255 E. Fifth Street
Suite 1900
Cincinnati, OH 45202
david.brittingham@dinsmore.com
michael.gray@dinsmore.com
Allison.knerr@dinsmore.com

Paul W. McCartney (0040207)
Jason Paskan (0085007)
Bonezzi Switzer Polito & Hupp Co. L.P.A.
201 E. Fifth St., Ste. 1900
Cincinnati, OH 45202
pmcartney@bsphlaw.com
jpaskan@bsphlaw.com

IN THE SUPREME COURT OF OHIO

ANTHONY BODE	:	**CASE NO. 2015-0862**
	:	
Plaintiff-Appellee	:	
	:	**On Appeal from the Hamilton County**
v.	:	**Court of Appeals,**
	:	**First Appellate District**
ABUBAKAR ATIQ DURRANI, M.D., et. al.,	:	
	:	**Court of Appeals**
	:	**Case No. C1500133**
Defendants- Appellants	:	
	:	
	:	

RESPONSE TO APPELLANTS MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes Appellee and responds to Appellant's Memorandum In Support of Jurisdiction. A memorandum in support of this motion follows.

Respectfully submitted,

/s/Matthew Hammer_____

Matthew Hammer (0092483)
The Deters Law Firm
5247 Madison Pike
Independence, KY 41051
Ph: (859) 363-1900
Fax: (859) 363-1444
mhammer@ericdeters.com
Counsel for Appellee

I. EXPLANATION WHY THIS CASE IS NOT OF GREAT IMPORTANCE

Despite Appellants claims that the consolidation has **"created chaos"** at the trial court level. The only chaos created has been as a result of their appeals, first to the 1st District, and now to this Honorable Court. They have removed jurisdiction from the trial court, and further delayed the resolution of these cases that have already been pending for too long, in some cases years. The various Judges **HAVE** transferred their cases to Judge Ruehlman and new cases have been assigned to Judge Ruehlman as well. The Appellants were further granted a hearing on their Motion to Vacate, but appealed to the 1st District before the hearing they requested could be conducted. Though Appellees have no insight into the thought process of Appellants, it seems their issue is merely with Judge Ruehlman and their displeasure that he is now presiding over these cases.

Under Hamilton County Local Rule 7(G) it states that, "**Unless otherwise agreed by the judges involved**, motions to consolidate shall be heard by the judge to whom the lowest numbered case is assigned and, if granted, all cases shall then go to that judge."(emphasis added). Appellants seemingly ignore the first aspect of the rule other than to say there is no evidence the other Judges agreed. If the other judges did not agree, they would not have relinquished control of their cases as they have. There are over 300 related cases involving the same or similar parties pending in Butler County that have all been consolidated under Judge Guckenberger, which has been agreeable to all parties and has been far more judicially efficient than the proceedings in Hamilton County.

This is a matter of the Court of Common Pleas of Hamilton County seeking to administer the dockets as it sees fit in accordance with the rules. That Appellants have an issue with a certain Judge for reasons unknown to Appellees does not make this a matter of great importance.

The consolidation is not a final, appealable order, the Appellants have not had their Constitutional rights infringed, and burdening this Honorable Court with these baseless appeals is not an efficient use of judicial resources.

II. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

RESPONSES TO PROPOSITION OF LAW NO. 1

The Order Granting A Motion To Consolidate Is Not A Final, Appealable Order Because It Does Not Satisfy the Requirement of RC 2505.02(B)(4).

It is well established that an order must be final before it can be reviewed by an appellate court. *See* Article IV, Section 3(B)(2), Ohio Constitution; *see also DiCorpo v. Kelley*, 8th Dist. Cuyahoga No. 84609, 2005-Ohio-1863, 2005 WL 926972, ¶ 4, citing R.C. 2505.02. "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal." *Lisath v. Cochran*, 4th Dist. Lawrence No. 92CA05, 1993 WL 120627, *2 (Apr. 15, 1993); *In re Christian*, 4th Dist. Athens No. 1507, 1992 WL 174718, *2 (July 23, 1992).

The analysis of the Court's subject matter jurisdiction issue must focus on O. Const. art. IV, **Section 2**(B)(2)(e) providing that the Supreme Court has jurisdiction over "(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals." The Appellants' brief incorrectly cites to O. Const. art. IV, **Section 3**, which addresses the court of appeals' jurisdiction. That section has no application here. However, for the sake of argument, pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, an appellate court has jurisdiction over final orders of a trial court. R.C. 2505.02 statutorily governs what constitutes a final appealable order and provides as follows:

> An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

A trial court's order granting a party's motion to consolidate cases "does not constitute a final appealable order as defined in R.C. 2505.02." *Columbus Metropolitan Community Action Organization v. Enyart*, 10th Dist. Franklin No. 94APE12-1802, 1995 WL 422648 at *4 (July 13, 1995), appeal dismissed, 74 Ohio St.3d 1528, 660 N.E.2d 1223 (1996). Consequently, "The entry granting the motion to consolidate does not constitute a final order from which an appeal may be taken and, therefore, this court must dismiss appellant's appeal." *Id*. at *4. Therefore, the Court of Appeals made the proper ruling in dismissing the appeal for lack of a final appealable order.

Columbus v. Enyart is the only case on point in regards to consolidation, but a similar reasoning can be drawn to cases in which an appeal of a change in venue is sought. "Order changing venue was not a final appealable order; it did not determine the action or prevent a judgment, it was not a special proceeding, and appellant would still have an effective remedy through an appeal following final judgment in the transferee court." *Molzon v. Molzon* (Ohio App. 11 Dist., Geauga, 10-10-2003) No. 2003-G-2510, 2003-Ohio-5424, 2003 WL 22327313. Changing venue, like changing Judges does not prevent a judgment, and Appellants will have any opportunity to appeal after the resolution of the cases. Furthermore, they will be able to present all of their defenses to these claims. The judge the cases are in front of in no way affects any rights of the Defendants.

The cases Appellant's cite for the proposition that the Order was a "provisional remedy" and thus appealable under R.C. 2505.02 truly do impact substantial rights of the parties. The

Order in the immediate case does not involve the extinguishment of a right that is tantamount to deciding the case.

Appellants bold and italicize "if the cases were not consolidated before the judge specifically requested by Appellees" for dramatic effect on page 1-2 of their memo to imply "judge shopping" on the part of the Appellees. Despite Appellants theatric language, this could not be further from the truth. Appellants' apparently have a selective memory on this issue, as Judge Ruehlman had proposed consolidating all of the cases before him at a prior hearing in the fall of 2014. He was not hand picked as Appellants suggest. Appellants simply requested a consolidation of the cases after Judge Reuhlman expressed a willingness no other Hamilton County Judge had shared. This argument also seems to indicate they would have been fine with consolidate but for the cases being transferred to Judge Ruehlman. There is no right to appeal because one does not like a certain judge. Allowing a party to appeal because they are displeased with the judge *would* give rise to forum shopping.

Appellees filed a motion, properly directed to the Administrative Judge Robert E. Winkler and on January 29, 2015, the following *Order* was entered in the case consolidating it with several other cases pending in the Hamilton County Court of Common Pleas:

> Upon Plaintiffs Motion to Transfer and Consolidate Cases to the Docket of Judge Robert Ruehlman, said Motion is sustained. All cases from the attached Exhibit A are transferred to Judge Robert Ruehlman for his management. All current trial dates, pretrial dates and scheduling orders remain in effect until modified by Judge Ruehlman. All future Dr. Durrani cases until further ordered are to be assigned to Judge Ruehlman. (the "Order")

It is undisputed that Defendants have been advised that an appeal to the consolidation of the Hamilton County Durrani cases is not proper because the decision to consolidate the cases is NOT a final appealable order. Nevertheless, the Defendants appealed the Court's decision to consolidate, and as expected, the First District Court of Appeals dismissed the appeal stating:

> *The consolidation order in this case is not a final appealable order under R.C. 2505.02. Accordingly, this Court is without jurisdiction to review the consolidation order on direct appeal. This Court does not reach and hereby expresses no opinion with respect to the propriety of the consolidation order at this time. The appeal is hereby dismissed.*

See attached Entry Granting the Motion of Appellees to Dismiss Appeal, attached to Appellants Memorandum in Support of Jurisdiction at Appendix A-1. Appellants now seek to further waste resources and abuse the appellate court system in Ohio by filing this baseless appeal.

REPONSE TO PROPOSITION OF LAW NO. 2

An Order Granting a Motion to Consolidate Does Not Satisfy the Requirements of RC 2505.02 (B)(1)

The order does not affect a fundamental right or the due process rights of the Appellants. There is no fundamental constitutional due process right not to have cases consolidated. Appellants retain the right to defend against all substantive claims at a meaningful time and manner. This right is not impaired by the Order.

This Order in no way determines the action or prevents a judgment. "To determine the action and prevent a judgment, as required to constitute a final appealable order, the order must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Turner & Son Funeral Home v. Hillsboro* (Ohio App. 4 Dist., 03-23-2015) 28 N.E.3d 1279, 2015-Ohio-1138. The Order has no bearing on the merits in this or the other consolidated cases, and the entirety of the case is left to the determination of the court. Appellants still have every opportunity to defend against the claims in these cases.

Appellants further misrepresent their exhaustion of remedies at the trial court level. Appellants state in their memorandum that they filed a motion to vacate at the trial court level and that although fully briefed, "no ruling was entered". They are correct in this assertion, but only because they appealed the issue before a ruling could be entered, removing jurisdiction from the trial court. If Appellants seek to claim their constitutional right to due process was violated, it was only violated through their own actions. They raised these issues at the trial court level through their Motion to Vacate, but did not allow the trial court to address their issues. Appellants were granted a hearing on the motion to vacate, but denied themselves the opportunity to be heard through their own baseless appeal. Appellees can only speculate that Appellants would seek "two bites at the apple" and appeal the Motion to Vacate ruling if this appeal is unsuccessful.

Appellants have had no constitutional or due process rights violated. They had remedies at the trail court level, and chose to appeal instead.

RESPONSE TO PROPOSITION OF LAW No. 3

Pursuant to Hamilton County Local Rule 7(G) Judge Ruehlman is a Proper Judge To Hear And Decide A Motion To Consolidate

All Judges in Hamilton County have agreed to transfer their Dr. Durrani cases to Judge Ruehlman. Under 7(G) Consolidation and separate trials: Civil Rule 42 governs consolidation and separate trials. "**Unless otherwise agreed by the judges involved**, motions to consolidate shall be heard by the judge to whom the lowest numbered case is assigned and, if granted, all cases shall then go to that judge." Hamilton County Local Rule 7(G). As Appellants note, Appellee's motion to consolidate was properly directed to the Administrative Judge, Judge

Robert E. Winkler. The Appellants further argue there is no evidence that all of the judges agreed to consolidate the cases and transfer them to Judge Ruehlman. The granting of the motion and transfer of the cases to Judge Ruehlman indicates that all of the other judges agreed with this action as allowed under Hamilton County Local Rule 7(G). To the best of Appellee's knowledge, there has been no opposition to this transfer by the various Hamilton County Judges. Thus, since all Judges in Hamilton County have agreed to transfer their cases to Judge Ruehlman, Rule 7(G) is satisfied and there is no need for the case to be heard by the lowest number assigned case.

III. CONCLUSION

The Order grants a motion to consolidate cases. The Order is not a final appealable order as defined in R.C. 2505.02 from which an appeal may be taken, as reflected in the 1st District Court of Appeals Entry Granting the Motion to Dismiss the Appeal. Also, according to Hamilton County local Rule 7(G) Judge Ruehlman's Court is the appropriate Court to hear the case. Thus, this appeal should be dismissed. Appellees have also file a Motion to Dismiss with a request for sanctions pursuant to S.Ct. Rule 7.03 and applicable law which Appellees maintain are appropriate.

Respectfully submitted,

/s/Matthew Hammer
Matthew Hammer (0092483)
The Deters Law Firm
5247 Madison Pike
Independence, KY 41051
Ph: (859) 363-1900
Fax: (859) 363-1444
mhammer@ericdeters.com
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served electronically this 16th day of June 2015 upon all counsel of record, as follows:

Michael F. Lyon (0006749)
Laurie A. McCluskey (0075310)
James F. Brockman (0009469)
David Williamson
Lindhorst & Dreidame
312 Walnut Street, Suite 3100
Cincinnati, OH 45202-4048
mlyon@lindhorstlaw.com
lmccluskey@lindhorstlaw.com
jbrockman@lindhorstlaw.com
dwilliamson@lindhorstlaw.com

J. David Brittingham (0061577)
Alison Knerr (0088235)
Michael J. Gray (0086804)
Dinsmore & Shohl, LLP
255 E. Fifth Street
Suite 1900
Cincinnati, OH 45202
david.brittingham@dinsmore.com
michael.gray@dinsmore.com
Allison.knerr@dinsmore.com

Paul W. McCartney (0040207)
Jason Paskan (0085007)
Bonezzi Switzer Polito & Hupp Co. L.P.A.
201 E. Fifth St., Ste. 1900
Cincinnati, OH 45202
pmcartney@bsphlaw.com
jpaskan@bsphlaw.com

/s/Matthew Hammer
Matthew Hammer