

IN THE SUPREME COURT OF OHIO

DALE R. DEROLPH, et al.,

Appellees,

v.

STATE OF OHIO, et al.

Appellants.

:
: Case No. 99-0570
:
: Related Case No. 95-2066
:
: Appeal from the Common Pleas
: Court of Perry County, Ohio,
: Case No. 22043 as Remanded By
: The Ohio Supreme Court,
: Case No. 95-2066
:

PLAINTIFFS'-APPELLEES' MOTION FOR EXPEDITED ORDER TO COMPEL
DEFENDANTS-APPELLANTS TO RESPOND TO DISCOVERY

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Now come Plaintiffs-Appellees, by and through counsel, and move the Court to issue an expedited order compelling Defendants-Appellants to respond to discovery requests pursuant to Supreme Court Rule X and Rule 37 of the Ohio Rules of Civil Procedure.

I. SUMMARY

By virtue of the Court's retention of jurisdiction and direction that the parties file evidence on or before June 15, 2001, the Court has exercised original jurisdiction pursuant to Article IV, Section 2(B) of the Ohio Constitution, which grants this Court original jurisdiction in "any cause on review as may be necessary to its complete determination." By virtue of the Court exercising original jurisdiction to complete its determination of the remaining issues following the Court's decision in DeRolph v. State (2000), 89 Ohio St.3d 1 ("*DeRolph I*"), Supreme Court Rule X applies to this proceeding, including Sections 2 and 7 of that rule which, respectively, permit all such actions to proceed "under the Ohio Rules of Civil Procedure," and require that "evidence shall be submitted by affidavits, stipulations, depositions, and exhibits."

Shortly after the issuance of *DeRolph II*, Plaintiffs served upon the Defendants a set of interrogatories which the Defendants outright refused to respond to. More recently, as it appeared that the State was moving closer to formulating its response to *DeRolph I*¹ and *DeRolph II*, Plaintiffs served upon Defendants a request for production of documents. On April 30, 2001, the State responded in writing that it would not respond to the request for documents and would not participate in any discovery whatsoever.

This Court has ordered that the parties file "any evidence" on or before June 15, clearly contemplating that before evidence can be filed, it must be gathered. In blatant violation of both

¹ DeRolph v. State (1997), 78 Ohio St.3d 193.

the Civil Rules and the Supreme Court Rules, the State simply refuses to allow any evidence to be gathered.

Accordingly, Plaintiffs request that the Court issue an order compelling the State to respond to all discovery requests, immediately as to the interrogatories and within twenty-eight days after service of the request for production of documents.

II. STATEMENT OF FACTS

In *DeRolph II*, the Court stated at the conclusion of its decision:

This Court will maintain continuing jurisdiction. The matter is continued to June 15, 2001, at which time this Court will establish a briefing schedule. DeRolph, 89 Ohio St.3d at 38.

On July 24, 2000, Plaintiffs served upon Defendants a “First Set of Post-*DeRolph II* Interrogatories,” a copy of which is attached hereto as Exhibit A. The interrogatories were directed to the State’s response to the Court’s direction that the “unfunded mandates in H.B. 412 and S.B. 55, . . . , must be addressed and *immediately funded*.” (Emphasis added.) Id., at 37. Plaintiffs took this language to mean what the Court said and inquired through the interrogatories what the State was doing to immediately fund the unfunded mandates.

Instead of receiving answers to the interrogatories, Plaintiffs received a letter from counsel for Defendants bluntly indicating that Defendants refused to respond to any discovery, claiming that “the Court’s decision does not contemplate discovery at this time.”²

On January 25, 2001, the Court issued an entry which stated in part:

IT IS ORDERED by the Court, sua sponte, that the parties file *any evidence* they intend to present as early as practicable but no later than June 15, 2001. (Emphasis added.)

² See attached Exhibit B.

Notwithstanding the Court's January 25 entry, the State, to date, has yet to respond to Plaintiffs' interrogatories.

More recently, on April 19, 2001, Plaintiffs served upon Defendants a comprehensive request for production of documents addressing material issues identified by the Court in *DeRolph I* and *DeRolph II*.³ The timing of the service of this request was largely driven by the State's own conduct. It is no secret from the media reports and other sources of information that during the ten months following the issuance of *DeRolph II*, the State did not even begin a legislative response. It has only been in recent days that it appears the State's response is coming together in what is presently draft legislation not yet enacted.

The legislation makes reference to studies, analysis, and factual determinations which have not been made public and which, if conducted at all, may well not support the conclusions advanced in the legislation. In addition, Plaintiffs believe that the State has conducted simulations which will demonstrate that this legislation, as in the case of previous legislation, is yet another example of residual budgeting of funding for public education. All of these issues are relevant to the Court's consideration of this matter in June.

Plaintiffs' request for production of documents was accompanied by a cover letter whereby counsel for Plaintiffs requested that counsel for Defendants respond within four days as to whether or not Defendants would even participate in discovery.⁴ Met with silence, Plaintiffs asked the State again.⁵ It was not until twelve days after the initial inquiry was made that the State finally responded in writing with confirmation that it was bluntly refusing to participate in any discovery.⁶ It is ironic that in its letter of May 1, 2001, the State is complaining on the one

³ See attached Exhibit C.

⁴ See attached Exhibit D.

⁵ See attached Exhibit E.

⁶ See attached Exhibit F. Plaintiffs responded on the same day. See attached Exhibit G.

hand that it is only just now completing legislation in response to *DeRolph I* and *DeRolph II* and, on the other hand, berating Plaintiffs for not seeking discovery earlier.

The parties now have only six weeks to gather evidence, process it, and determine what is appropriate for filing with the Court.

III. ARGUMENT

Plaintiffs will first address the permissibility of discovery and will then discuss the importance of the discovery requested.

A. The State Is In Blatant Violation Of The Civil Rules And The Rules Of This Court

“Article IV of the Ohio Constitution authorizes this Court to enter such judgments in causes it hears on review as are necessary to provide a complete and final determination thereof.” State v. Steffen (1994), 70 Ohio St.3d 399, 408.

The Court’s direction that the parties file “any evidence” before June 15 is consistent with the Court’s invocation of its original jurisdiction pursuant to Article IV, Section 2 of the Ohio Constitution, as to “any cause on review as may be necessary to its complete determination.” By virtue of the Court invoking its original jurisdiction, Supreme Court Rule X became expressly applicable to these proceedings. Section 1 of that rule states:

(A) This rule applies only to actions, . . . , within the original jurisdiction of the Supreme Court under Article IV, Section 2 of the Ohio Constitution.

Section 2 of Supreme Court Rule X further states:

All original actions shall proceed under the Ohio Rules of Civil Procedure, *unless clearly inapplicable*. (Emphasis added.)

Finally, Section 7 of Rule X states:

To facilitate the consideration and disposition of original actions, counsel, when possible, should submit an agreed statement of facts to the Supreme Court. All other evidence shall be submitted by affidavits, stipulations, depositions, and exhibits.

The State has asserted an untenable position that because this matter is “on appeal,” no discovery can occur. Actually, the issues on appeal were decided long ago in *DeRolph II*. As such, any appeal of any decision from a lower court has been concluded.

What remains is this Court’s declaration that it is retaining jurisdiction to oversee the State’s compliance with *DeRolph I* and *DeRolph II*. There is no question that by this Court retaining jurisdiction, it has invoked its original jurisdiction pursuant to Article IV, Section 2 of the Ohio Constitution. As this Court has already noted:

“Section 2(B)(1)(f), Article IV of the Constitution of Ohio grants original jurisdiction to this court ‘[i]n any cause on review as may be necessary to its complete determination.’ We have interpreted this provision to authorize judgments in this court that are necessary to achieve closure and complete relief in actions pending before the court. (Several citations omitted.) We conclude from these cases that Section 2(B)(1)(f), Article IV of the Ohio Constitution authorizes this court to enter such judgment in causes it hears on review as are necessary to provide a complete and final determination thereof.” State v. Steffen (1994), 70 Ohio St.3d 399, 407-8.

Following Steffen, the Court addressed this issue again in the case of State v. Berry (1997), 80 Ohio St.3d 371. There, the Court had already decided the defendant’s appeal and the public defender argued that the Court no longer had jurisdiction to consider the defendant’s competency. In response to this argument, the court held:

State v. Steffen (1994), 70 Ohio St.3d 39, 639 N.E.2d 67, demonstrates that the term ‘cause on review’ is not limited to cases currently pending on direct appeal. Berry, 80 Ohio St.3d at 373.

Indeed, by this language, the court established that it can exercise original jurisdiction on a matter that is either before it on a direct appeal or on a matter wherein the appeal has been

decided and the court continues to retain jurisdiction. The latter is the current posture of this case.

Supreme Court Rule X clearly applies to these proceedings. As such, the Ohio Rules of Civil Procedure are applicable by virtue of Section 2 of Rule X. It then follows that the parties have an obligation to follow those rules as they relate to discovery.

B. The Discovery Being Sought By Plaintiffs Is Crucial To A Fair Consideration Of The Merits.

It is an understatement to state that a significant amount of evidence against the State before *DeRolph I* and *DeRolph II* came from the State. For example, the Department of Education has a division known as the “Simulation Unit.” It has the capacity to run a stunning combination of simulations projecting funding levels either on a statewide basis or at the level of individual districts. The slightest changes in assumptions and facts can dramatically alter the results for individual districts. Past simulations have shown what facts and assumptions the State considered and also showed what a certain funding level could look like if the State wanted to hit a certain fiscal target, *i.e.*, residual budgeting.

After *DeRolph I*, discovery resulted in the State producing documents which showed surveys the State had conducted estimating the cost of the unfunded mandates in H.B. 412 and S.B. 55. The State’s own records showed their own calculations of the hundreds of millions of dollars those mandates would cost Ohio schools. Current legislation makes findings in the actual text of the legislation that the mandates are fully funded. Plaintiffs have a right to know what is the basis for those findings or whether there is *any* basis for those findings. In fact, preliminary information already indicates that the State is engaging in a manipulation of numbers. It apparently plans to disclose to the public what it giveth, but to hide what it taketh away.

Presumably the State has data on the fiscal impact of the phase out of the business inventory tax and the reduction in assessed valuation for public utilities. Again, the preliminary information largely gathered from media sources indicates that when one compares the purported increase in funding with the erosion of the local tax base, any increase in funding is yet another illusion.

But none of this can be confirmed in the form of evidence unless the State turns over the records which have been requested. By the State simply refusing to turn over those records where there is no basis in law for them to do so, such conduct represents an admission by the State that it has information to hide, evidence to suppress, and conduct to cloak.

It is no small irony that the General Assembly of the State of Ohio which enacted Ohio's Sunshine Law is now, in concert with other State officials, actively working to suppress evidence in one of the most important civil actions to come before this Court in several generations. This is truly astounding.

IV. CONCLUSION

The State's litigation strategy is clear: obstruct discovery as long as possible so that Plaintiffs have virtually no capacity to gather evidence which would identify the manipulations and hidden deficiencies within the State's response to *DeRolph I* and *DeRolph II*. It is a strategy of the guilty.

Plaintiffs ask that this Court issue an expedited order that the State:

1. Respond immediately to the interrogatories which have been served,
2. Produce all records requested by Plaintiffs on or before May 17, 2001, and
3. Immediately make available individuals requested by Plaintiffs for deposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing document was served upon the following counsel by hand-delivery this 2nd day of May, 2001, addressed as follows:

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