

**[Cite as *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 2005-Ohio-1283.]**  
**IN THE COURT OF CLAIMS OF OHIO**

|                                                  |   |                                              |
|--------------------------------------------------|---|----------------------------------------------|
| ALTERNATIVES UNLIMITED-<br>SPECIAL, INC., et al. | : |                                              |
| Plaintiffs                                       | : | CASE NO. 2002-04682<br>Judge Joseph T. Clark |
| v.                                               | : | <u>DECISION</u>                              |
| OHIO DEPARTMENT OF EDUCATION                     | : |                                              |
| Defendant                                        | : |                                              |

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{¶ 1} On May 19, 2004, this court ordered defendant to pay plaintiffs \$1,500 as reasonable costs that plaintiffs incurred when the trial deposition of Elijah Scott did not go forward as scheduled. To date, defendant has refused to comply with the court's order. On October 22, 2004, plaintiffs filed a motion for contempt and requested attorneys fees incurred to prepare the motion. On October 29, 2004, defendant filed a response wherein it admitted that it had not complied with the court's order; however, defendant contends that the delay is unavoidable inasmuch as it intends to seek appellate review of the court's order and such can be attempted only after final judgment is entered in this case.

{¶ 2} On November 16, 2004, the court issued an entry scheduling a show cause hearing. On December 6, 2004, defendant filed a motion for reconsideration of the court's May 19, 2004, entry. On December 8, 2004, the court amended the November 16, 2004, entry to reflect that a charge of contempt has been entered on the record. On January 11, 2005, plaintiffs filed a motion for leave to file a supplemental affidavit detailing attorneys fees totaling over \$3,000 both to prepare the motion for contempt and to respond to subsequent contempt-related filings and proceedings. The court

hereby GRANTS plaintiffs' January 11, 2005, motion to file affidavit, instanter.

{¶ 3} On January 13, 2005, a hearing was held for defendant to show cause why the court should not enter findings of contempt. Defendant first argued that the court's order awarding costs was in error because the witness did not appear at the scheduled deposition for reasons other than lack of a subpoena. According to defendant, the witness was unable to attend because he was recovering from injuries he sustained when he was mugged earlier in the week. Although defendant admitted it did not issue a subpoena to Mr. Scott, it contended that his failure to appear was unavoidable. Defendant urged this court to reconsider and vacate the May 19, 2004, entry.

{¶ 4} The court notes that the parties identified Mr. Scott early on in this case as a central figure to the issues that form the basis of this case. Defendant requested and received permission from the court to have the witness testify via deposition after it represented to the court that Mr. Scott had suffered a previous back injury which limited his ability both to travel to Columbus and to sit for several hours in the courtroom. On the day of the noticed deposition, while in transit with their client who arrived from out of state, plaintiffs were notified that Mr. Scott would not be available and that the deposition would not go forward. The court's May 19, 2004, entry awarding costs to plaintiffs was issued after careful consideration of the foregoing. Upon review of the December 6, 2004, motion and the arguments of counsel, the court is not persuaded that its prior ruling was in error. Accordingly, defendant's motion to reconsider and vacate the May 19, 2004, entry is DENIED.

{¶ 5} As to the issue of contempt, defendant argued that the court's May 19, 2004, ruling was not a final appealable order but instead was an interlocutory order that could not be appealed until final judgment had been entered in this case. Defendant relied on the holding of *Kennedy v. Chalfin* (1974), 38 Ohio St.2d 85, which held that the denial of a motion for an order awarding reasonable expenses incurred as the result of the other party's failure to attend a deposition is an interlocutory order which is not subject to immediate appellate review but is reviewable upon an appeal from final judgment.

{¶ 6} The court notes that *Kennedy* involved the denial of an order seeking costs whereas this case concerns the exact opposite event. In *Galbreath v. Galbreath* (June 13, 1989), Franklin App. No. 89AP-103, the Tenth District Court of Appeals stated that "an order overruling a motion is not appealable even though an order granting the same motion is appealable." The court added that "[a]ccordingly, *Kennedy* is not controlling as to whether the granting of sanctions, \*\*\*, constitutes a final appealable order since *Kennedy* only held that an order denying such relief is not a final appealable order." The court in *Galbreath* does not decide the issue definitively; rather, the court observes that there may be instances when such order is subject to immediate review. However, the appellate court also noted that the Supreme Court of Ohio has since determined that the right to immediate review hinges on whether the "harm resulting to that party from the order sought to be reviewed is both extreme and irreparable as a practical matter." In the instant matter, it is not likely that defendant's payment of costs incurred by plaintiffs would result in irreparable harm.

{¶ 7} The court takes into account that it has not found any authority which excuses defendant's refusal to honor this court's order, regardless of the timing of any subsequent appellate review.

"As a general rule, 'unless it is void, an order must be obeyed until it is set aside by orderly and proper proceedings,' and a person may be found in contempt for violating that order." *Barbato v. Miller* (May 18, 2000), Cuyahoga App. No. 76536. (Citations omitted.)

{¶ 8} R.C. 2705.02 states as follows:

{¶ 9} "A person guilty of any of the following acts may be punished as for a contempt:

{¶ 10} "(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer; \*\*\*."

{¶ 11} For the foregoing reasons, the court finds defendant in contempt and hereby ORDERS defendant to comply with the court's May 19, 2004, order within *ten days* of the date of this entry. In addition, given defendant's failure to comply with the initial order, defendant is ORDERED to pay plaintiffs \$1,000 for reasonable attorneys fees incurred in connection with the filing of the motion for contempt and subsequent hearing. Should defendant fail to comply with this order, and upon notice of such by plaintiffs, the court will consider the imposition of additional sanctions.

## IN THE COURT OF CLAIMS OF OHIO

ALTERNATIVES UNLIMITED-  
SPECIAL, INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF EDUCATION

Defendant

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CASE NO. 2002-04682

Judge Joseph T. Clark

JUDGMENT ENTRY

: : : : : : : : : : : : : : : :

A hearing was conducted in this case upon plaintiffs' motion for contempt. For the reasons set forth in the decision filed concurrently herewith, defendant is ORDERED to pay plaintiffs the sum of \$2,500 within *ten days* of the date of this entry. The clerk shall serve upon all parties notice of the judgment and its date of entry upon the journal.

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 JOSEPH T. CLARK

Judge

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SJM/cmd  
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