[Cite as *Alexander v. Ohio High School Athletic Assn.*, 2012-Ohio-1867.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Teresa Alexander, Individually and as Natural Guardian and Next Friend of LeRoy Alexander III, a Minor, et al.

Appellees

v.

Ohio High School Athletic Association, et al.

Appellant

Court of Appeals No. L-11-1233

Trial Court No. CI0201104743

DECISION AND JUDGMENT

Decided: April 23, 2012

* * * * *

Martin E. Mohler and Deborah K. Rump, for appellant.

Jennifer A. Flint, for appellee, Washington Local School District Board of Education

* * * * *

PER CURIAM.

{¶1} Appellee, Washington Local School District Board of Education ("the board"), has filed a motion to dismiss the appeal filed by the Ohio High School Athletic

Association ("the association") in this case involving a preliminary injunction which allows Leroy Alexander to participate in sports at Whitmer High School, which is located in the Washington Local School District. The board contends that the order granting the preliminary injunction is not a final appealable order. The association responded, arguing that the board's motion to dismiss is untimely and must be denied and that the order is final and appealable under R.C. 2505.02(A)(3) and (B)(4)(b). The board filed a reply and the motion is now decisional.

{¶2} We first address the untimeliness issue. Lack of jurisdiction can be raised at any time. *See In re Byard*, 74 Ohio St.3d 294, 296, 658 N.E.2d 735 (1996). The motion was not filed untimely.

{¶3} The basic facts are that Leroy Alexander transferred from Springfield High School in Holland, Ohio to Whitmer High School in March 2011. Both schools are members of the association and its bylaws govern whether Alexander can participate in sports at Whitmer. Bylaw 4-7-2 states, "If a student transfers [from one member school to another] * * * the student will be ineligible [to participate in sports] for one year from the date of enrollment in the school to which the student transferred." An exception to this bylaw states,

> If the parents * * * have made a bona fide legal change of residence from one public school district to another public school district, * * * the student may enroll in * * * [the] public school district that includes the new

> residence. * * * The student is ineligible [to participate in sports at the new school] until ruled eligible by the Commissioner's office upon submission of an accurately completed Affidavit of Bona Fide Residence [from the parent].

{¶4} Leroy's mother provided the association the necessary affidavit and on March 31, 2011, the association informed Whitmer High School that Leroy was eligible to participate in sports. On April 11, 2011, based on its belief that the mother's affidavit contains false information, the association ruled that Leroy is ineligible to participate in sports at Whitmer for one year beginning April 21, 2011. Mrs. Alexander appealed the decision but the association denied her appeal.

{¶5} On August 8, 2011, Mrs. Alexander, on behalf of Leroy, filed a complaint in the common pleas court against the association and the board alleging that Leroy is a third party beneficiary of the contract between the association and the board, that the contract has been breached, and asking for, inter alia, a preliminary and a permanent injunction against the association's enforcement of its April 11, 2011 decision.

{¶6} The trial court granted the preliminary injunction and the association filed the present appeal from that order. Appellee, the board, filed this motion to dismiss the appeal, stating that the preliminary injunction is not a final appealable order.

{¶7} Any discussion of final appealability necessarily begins with the current definition of final orders. *See* R.C. 2505.02, which states, in relevant part,

(A) As used in this section:

* * *

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

* * *

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶8} The parties agree that the resolution of this question turns on whether the association "would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶9} Despite this agreement, the parties' memoranda debate two other statements of law as being dispositive of the question of final appealability in this case. These statements of law are "the granting of a temporary or preliminary injunction, in a suit in which the ultimate relief sought is a permanent injunction, is generally not a final appealable order" and its corollary "a preliminary injunction which acts to maintain the status quo pending a ruling on a permanent injunction is not a final appealable order" These statements of law have been used by courts in addressing the final appealability of preliminary injunctions since 1910 when they were first articulated in *May Co. v. Bailey Co.*, 81 Ohio St. 471, 91 N.E. 183, (1910) syllabus where the court states,

> An order of the court of common pleas, granting a temporary injunction in a suit in which the ultimate relief sought is an injunction, is not either a judgment or a final order which may be reviewed by the circuit court on petition in error.

{¶10} The court based its ruling on section 6707, Rev. St., the statute then in effect governing final appealable orders. This statute contained a definition of final appealable order as one that is "an order affecting a substantial right made in a special proceeding." However, the statute in 1910 did not include the category of final appealable orders in the present day statute, R.C. 2505.02(A) and (B)(4)(b), which is applicable to this case. Despite present day reliance on the rule of law in *May Co.* by courts in Ohio, it actually has no place in the modern day analysis of the issue of final appealability of a preliminary injunction. This was recognized in *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 844 N.E.2d 825, 2006 -Ohio- 1503, ¶ 23 where the Ohio Supreme Court states, "[B]efore the amendment of R.C. 2505.02 [in 1998], this court had held that the granting of a preliminary injunction is an action for injunctive relief and is not a final appealable order. *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St.3d 145, 148, 532 N.E.2d 727. The current R.C. 2505.02(B)(4) changed the law in this regard * * *."

{¶11} Thus, we must determine the issue by applying the current version of R.C. 2505.02, not by following the many cases which have relied on *May Co.* after 1998. As stated above, pursuant to the current R.C. 2505.02, the determinative issue is whether the association "would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶12} The association argues that it will be denied an effective remedy if it must wait to appeal. It states, "should OHSAA be disallowed from appealing this matter at this time, it will lose *all* of its available remedies with respect to Mr. Alexander, for he, as a senior, will have matriculated onto [sic] college." In essence the association argues that if it cannot appeal now, its entire case against Alexander will be moot. We agree. The association seeks to have its by-laws enforced in this dispute. Once Alexander graduates the issue will be moot.

{¶13} The board argues that "there is nothing in the record that shows OHSAA's ability to obtain relief will be destroyed if it cannot appeal now." It states that the board's own actions "belie the claimed need for exigency" because it declined to have the permanent injunction heard at the same time as the preliminary injunction, that it requested the trial date to be rescheduled so it could conduct discovery, and that it requested and received extensions of time from this court to file its appellate brief. These actions by the board have no relevance to whether the board will be denied an effective remedy if it must wait to appeal.

{¶14} The board also states that the association "seeks to defend its interpretation of its Bylaw and the application thereof to Leroy Alexander's situation." This is exactly the point of the board's argument that its remedy will be destroyed if it cannot appeal now; it will no longer be able to enforce its bylaws as to Alexander.

{¶15} We find that the board will "not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action," and therefore the granting of the preliminary injunction is a final appealable order.

MOTION DENIED.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.