

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

PART I

BEE DESELM,

**on relationship of the
State of Tennessee**

and

BEE DESELM,

individually,

Plaintiffs,

VS.

No. 164615-1

**TIMOTHY HUTCHISON and
KNOX COUNTY, TENNESSEE,**

Defendants.

MEMORANDUM OPINION

This case came to be further heard on February 3, 2006, upon the following items:

- (1) PLAINTIFF'S WRITTEN MOTION TO AMEND AND SUPPLEMENT TO RE-INSTATE PREVIOUSLY NON-SUITED CLAIMS FOR OUSTER AND TO ALLEGE PRIOR DEMAND filed November 2, 2005, at 3:08 P.M.;
- (2) KNOX COUNTY'S OPPOSITION AND REPLY TO PLAINTIFF'S MOTION TO AMEND filed November 3, 2005;

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(3) OPPOSITION TO PLAINTIFF'S MOTION TO AMEND filed November 7, 2005, by defendant Timothy Hutchison;

(4) Document filed November 30, 2005, by defendant, Knox County, Tennessee, entitled, "SUPPLEMENTAL MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS AND SUPPLEMENTAL OPPOSITION TO PLAINTIFF'S MOTION TO AMEND SUBMITTED BY KNOX COUNTY, TENNESSEE;"

(5) ADOPTION OF KNOX COUNTY'S SUPPLEMENTAL MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS AND SUPPLEMENT OPPOSITION TO PLAINTIFF'S MOTION TO AMEND filed December 6, 2005, by the defendant, Timothy Hutchison;

(6) MOTION TO DIRECT FINAL JUDGMENT ON FEWER THAN ALL CLAIMS filed December 9, 2005, by the plaintiff;

(7) MOTION filed December 14, 2005, by defendant Timothy Hutchison, Sheriff of Knox County, TO STRIKE NOTICE OF APPEAL; and

(8) MOTION filed December 15, 2005, by defendants Knox County, Tennessee, and the Knox County Law Director.

On November 10, 2005, this Court filed a memorandum opinion. However, no order was entered upon the Court's memorandum opinion until the hearing on February 3, 2006, having been tendered to the Court, without the signature of the plaintiff's counsel, by letter of the county's counsel dated February 1, 2006.

The matters enumerated above relate to the Court's memorandum opinion filed November 10, 2005. The Court adopts and incorporates its above memorandum opinion.

The above items may be grouped into four topics: (1) the plaintiff's motion to amend; (2) the defendants' post hearing supplemental motions to dismiss the plaintiff's action, relating to the right of Timothy Hutchison to occupy the office of Sheriff of Knox County, in light of the ruling of the Western District of the Court of Appeals in *Walter Bailey, et al v. County of Shelby, et al*, No. W2005-01508-COA-R3-CV, filed November 22, 2005; (3) the plaintiff's motion to certify the Court's order entered February 3, 2006, as a final judgment under Rule 54.02 of the Tenn. R. Civ. P.; and (4) the defendants' motions to strike the notice of appeal filed by the plaintiff. The Court will discuss the matters currently before it, by topic, in the above sequence.

PLAINTIFF'S MOTION TO AMEND

The plaintiff remade her motion to amend in written form after the Court had denied the plaintiff's oral motion for the same relief at the hearing on November 2, 2005. The plaintiff's motion is adequately addressed in the Court's memorandum opinion filed November 10, 2005. However, an additional ground exists for denying the motion in that the decision by the Court of Appeals in *Walter Bailey, et al v. County of Shelby, et al*, *supra*, shows that the granting of the plaintiff's motion will be futile. See *Forsythe v. Gibbs*, 2002, Tenn. App. LEXIS 599 (Tenn. Ct. App. August 15, 2002); *Welch v. Thuan*, 818 S.W. 792, 794 (Tenn. Ct. App. 1994) ("The futility of an amendment is clear when granting it would prolong the litigation, but almost certainly not lead to a different

ultimate result.”).

The *Bailey* case disposes of the plaintiff’s argument that a county charter may impose term limits upon a constitutional officer, such as a sheriff. In *Bailey*, the Court of Appeals held that T.C.A. § 5-1-210(4), insofar as it permits county charters to prescribe the qualifications of constitutional officers, is void as unconstitutional under Article 7, Section 1 of the Tennessee Constitution.

In paragraph 6 of the plaintiff’s written motion to amend, the plaintiff states:

6. Plaintiff acknowledges and pleads the action pending in the Western Section of the Tennessee Court of Appeals in *Bailey v. Shelby County, Tennessee* may be dispositive of this amended complaint.

In the plaintiff’s prior motion entitled, “PLAINTIFF’S MOTION TO RESCHEDULE AND CONTINUE MOTION HEARING ON NOVEMBER 2, 2005,” filed November 2, 2005, the plaintiff states:

Originally Plaintiff sought a ruling from this Court that Timothy Hutchison was subject to Knox County’s 1994 term limits. It had previously been decided in the Shelby County Chancery Court in *Bailey v. Shelby County* that County Commissioner’s were subject to term limits, however, the Shelby County case did not address the office of sheriff and this action was to determine whether the Knox County sheriff was also subject to term limits.

Plaintiff was unsuccessful in having the issue of Sheriff resolved prior to the Western Section of the Court of Appeals expediting an appeal in *Bailey v. Shelby County*. *Bailey v. Shelby County* was argued in the Western Section of the Court of Appeals on September 21, 2005 but an opinion has not yet been released.

Consequently, Plaintiff concedes that if *Bailey v. Shelby County* is decided contrary to the Chancery Court opinion that decision will be controlling on Plaintiff’s position in this case unless that decision is reviewed by and

overruled by the Tennessee Supreme Court. Counsel has conferred with the Law Director as to agreeing to continue these motion hearings until an opinion is issued by the Western Section of the Court of Appeals in *Bailey v. Shelby County*, however, the Law Director opposes resetting these motions.

T.R.Civ.P. Rule 1 provides that T.R.Civ.P. Rule 16 be construed to “secure the just, speedy, and inexpensive determination of every action.” T.R.Civ.P. Rule 16.02 provides that the Court consider procedures to (3) discourage wasteful pretrial practices and (5) facilitate the settlement of the case.

In this case, if the *Bailey v. Shelby County* is decided favorable to the position of Sheriff Hutchison, i.e., that a county cannot impose term limits on its county commissioner, then the residual issue presented by Plaintiff of whether the Knox County Sheriff is subject to term limits that are applicable to a county commissioner will become moot and Plaintiff will concede that issue thereby disposing of all the issues of term limits in this litigation.

As a consequence, judicial economy will be served; unnecessary expenses and complexity will be avoided by not litigating pretrial motions until an opinion of the Court of Appeals in *Bailey v. Shelby County* is received.

At the hearing on November 2, 2005, the plaintiff’s counsel represented to this

Court:

Mr. Moncier: . . . if that opinion comes down and holds that a county cannot impose term limits, I can concede that that opinion is applicable to this action, because certainly if a county cannot impose term limits on a commissioner, we will concede and not make any issue about the fact that they likewise cannot do so with the sheriff.

[Transcript of proceedings, November 2, 2005, pp. 6-7]

If the Court were to grant the plaintiff’s motion to amend so that the plaintiff could reinstate the *quo warranto* proceeding nonsuited by her, the Court would be required to conduct an *in limine* hearing to determine whether the district attorney general

had cause for declining to bring or authorize the *quo warranto* action. *See Bennett v. Stutts*, 521 S.W.2d 575, 577 (Tenn. 1975). The district attorney general is the party by whom a *quo warranto* action should be brought absent arbitrary or capricious action or an abuse of discretion by the district attorney in refusing to bring the action. *See Bennett*, at 577; *Trigg v. Mansfield*, 648 S.W.2d 946, 948 (Tenn. Ct. App. 1982). *See also* 21 Tenn. Juris., *Quo Warranto* § 1. When a citizen seeks to bring such an action, the citizen is to serve a copy of the complaint on the district attorney general. *Bennett*, at 577. The Court is then to conduct an *in limine* hearing to determine whether the district attorney general's refusal to bring or authorize the action was without cause. *Id.* Undisputedly, as previously recognized by the plaintiff's counsel, the decision of the Court of Appeals, in *Bailey*, by itself, constitutes such cause. The Tennessee Supreme Court has granted permission to appeal in the *Bailey* case; however, it cannot be said that the district attorney general has acted arbitrarily in comporting with the Court of Appeals' decision.

DEFENDANTS' POST HEARING MOTIONS TO DISMISS

The Court's order entered February 3, 2006, and memorandum opinion filed November 10, 2005, render the defendants' supplemental motions to dismiss as moot. The Court's denial of the plaintiff's written motion to amend also renders the defendants' motions as moot.

PLAINTIFF'S MOTION TO CERTIFY ORDER OF FEBRUARY 3, 2006, AS A FINAL JUDGMENT

By amendments to her complaint, the plaintiff has joined two other claims in this

case which involve the same issue ruled upon in the order entered February 3, 2006, and the memorandum opinion filed November 10, 2005. The plaintiff now requests that this Court certify the order entered February 3, 2006, as final. At the hearing on February 3, 2006, the plaintiff's counsel offered to nonsuit portions of her remaining two claims. The plaintiff offered to nonsuit the portions that are related to the Court's order entered February 3, 2006, and memorandum opinion filed November 10, 2005, if this Court would certify the order of February 3, 2006, as final. However, the history of this case, as discussed in the memorandum opinion of November 10, 2005, indicates that the plaintiff's counsel has not considered "interlocutory" nonsuits as binding. Moreover, this Court, as the adjudicator, does not bargain.

The primary reason offered to the Court for certification is the burden and expense to the plaintiff of the interlocutory appeal process. However, the Tennessee Supreme Court does not encourage piecemeal appellate review from the certification of interlocutory judgments as final under Rule 54.02 of the Tennessee Rules of Civil Procedure. *See Harris v. Chern*, 33 S.W.3d 741, 745 n.3 (Tenn. 2000). Upon the record as it presently exists, including two related but unadjudicated claims, this Court cannot determine that "no just reason for delay exists" and that the order of February 3, 2006, should be certified as final. *See Huntington Nat. Bank v. Hooker*, 840 S.W.2d 916, 922 (Tenn. Ct. App. 1991) ("If after our review we determine the trial court has, pursuant to Rule 54.02, improperly determined that no just reason for delay exists, then an appeal must be dismissed. Tenn. R. App. P. 3(a).").

This Court presently finds and concludes that the order entered February 3, 2006, is not appealable as of right. However, the alternative approach of an interlocutory appeal remains open to the plaintiff under Rule 9 of the Tennessee Rules of Appellate Procedure.

DEFENDANT'S MOTIONS TO STRIKE NOTICE OF APPEAL

The plaintiff filed a notice of appeal on December 9, 2005. Not only is the notice of appeal not from a final judgment, the notice of appeal states that it is conditional, "in the event that it is determined that said severed rulings are final judgments in this action..." However, the appeal was docketed in the appellate court clerk's office on December 14, 2005. The Court of Appeals may very well determine that the appeal should be dismissed. *See Huntington Nat. Bank*, at 922, *supra*. However, this Court has no jurisdiction by which to dismiss the plaintiff's appeal.

RELIEF

In accordance with the foregoing, the Court will enter an order providing as follows:

(1) That the PLAINTIFF'S WRITTEN MOTION TO AMEND AND SUPPLEMENT TO RE-INSTATE PREVIOUSLY NON-SUITED CLAMS FOR OUSTER AND TO ALLEGE PRIOR DEMAND filed November 2, 2005, is denied;

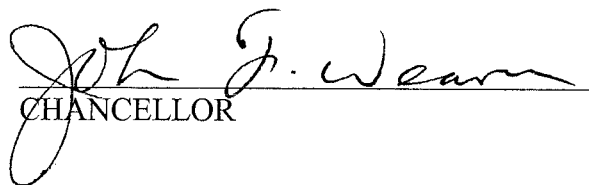
(2) That the SUPPLEMENTAL MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS filed November 3, 2005, by the defendant, Knox County, Tennessee, joined by the defendant, Timothy Hutchison, is denied.

(3) That the plaintiff's MOTION TO DIRECT FINAL JUDGMENT ON FEWER

THAN ALL CLAIMS filed December 9, 2005, is denied; and

(4) That the MOTION filed December 14, 2005, by the defendant, Timothy Hutchison, Sheriff of Knox County, joined by the defendants, Knox County, Tennessee and the Knox County Law Director, is denied.

Signed this 27th day of February, 2006.


CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was placed in the United States Mail, postage prepaid to:

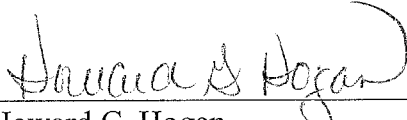
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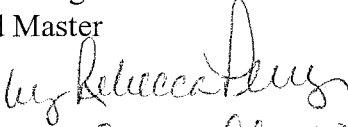
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This 28th day of February, 2006.



Howard G. Hogan
Clerk and Master


Deputy Clerk