

IN THE SUPREME COURT OF OHIO

International Brotherhood of Electrical Workers, Local Union No. 8)	On Appeal from the Wood County Court of Appeals, Sixth Appellate District
Appellant)	
)	
vs.)	
)	S.C. Case No.: 2006-1868
Vaughn Industries LLC)	
Appellee)	

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 8'S APPELLANT'S BRIEF

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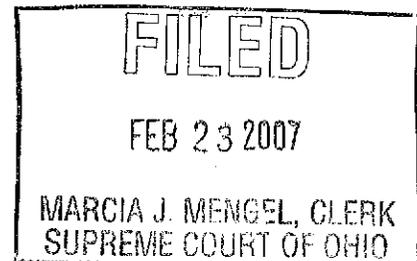


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I. STATEMENT OF THE FACTS

This action began in March 2005 with the filing of three civil complaints for enforcement of the prevailing wage law under R.C. 4115.16(B). The three complaints, addressing violations on the Bowling Green State University Administration Building Fire Alarm Project, the Offenhauer Residence Hall Project, and the Rodgers Quadrangle Electrical Upgrade Project, were consolidated by the trial court into Case No. 05-CV-155.

Prior to consolidation, Local 8 filed a Motion for Summary Judgment on the Fire Alarm case. Following consolidation, Judge Pollex granted Local 8 partial summary judgment finding that Vaughn violated R.C. 4115.071(C) on that Project, but denied summary judgment on whether Vaughn did so intentionally. *Order on Plaintiff's Motion for Partial Summary Judgment*, Wood County Case No. 05-CV-155, at 5. The remaining claims involving underpayments on the Offenhauer Hall and Rodgers Quad projects likewise remained for further proceedings.

Vaughn then filed its own Motion for Summary Judgment on what it specifically described as "the two remaining issues in this litigation."

- (1) whether Vaughn paid the applicable prevailing wage rate to its employees who performed work on the Offenhauer Residence Hall Renovation Project and the Rodgers Quadrangle Electrical Upgrade Project; and
- (2) whether Vaughn's failure to enumerate hourly fringe benefit amounts on its certified payroll reports constitutes an intentional violation as defined by R.C. 4115.13(H)

Defendant's Motion for Summary Judgment, Wood County Case No. 05-CV-155, at 1, 24

Significantly, although Vaughn may have prayed for attorney's fees and costs in its Answer, it did not ask the court to award Vaughn its fees and costs in its summary judgment motion. Nor did Vaughn even ask the court for leave to move for fees and costs by separate

motion. To the contrary Vaughn affirmatively advised the court that it had addressed the “only two remaining issues in this litigation,” and that it was entitled to judgment in its favor.

Because Local 8 had yet to receive responses to its discovery requests submitted over a year earlier, in spite of an order compelling Vaughn to so respond, Local 8 sought either a denial of Vaughn’s summary judgment motion or a continuance pursuant to Civ. R. 56(F). While these motions were pending, the Sixth District Court of Appeals decided *Vaughn Indus., Inc. v. Dimech Serv.* (Dec 10, 2004), Wood County Case No 03-CV-058, at 10-11, which prompted Vaughn to seek reconsideration of the trial court’s earlier grant of partial summary judgment to Local 8 on the R.C. 4115.071(C) claim. Local 8 opposed.

Thus, pending before the trial court at the time of its August 10, 2006 Order was (1) Vaughn’s motion for summary judgment, (2) Local 8’s Civ.R. 56(F) motion, and (3) Vaughn’s motion for reconsideration, which was opposed. The trial court’s August 10 Order disposed of all outstanding claims and matters before it. *Order on Defendant’s Motion for Summary Judgment and for Reconsideration and Plaintiff’s Rule 56(F) Motion*, Wood County Case No. 05-CV-155, at 3 (J. Pollex). Specifically, the court granted Vaughn’s motions for summary judgment and for reconsideration, and denied Local 8’s Civ. R. 56(F) motion. In doing so, the court held that Vaughn had complied with the prevailing wage law in all respects and dismissed the Action, charging costs to Local 8. The notice of appeal was timely filed by Local 8 the following day.

It was not until two weeks after the Notice of Appeal was filed, that Vaughn filed its request for attorney’s fees.

Vaughn subsequently filed a motion to dismiss the appeal in the Sixth District Court of Appeals, claiming that the Trial Court’s August 10th order was not final and appealable.

Because the Trial Court's order constituted a final disposition of all pending claims, Local 8 opposed the motion to dismiss. In its September 25, 2006 opinion, the Sixth District dismissed the appeal as premature. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.* (Sept 25, 2006), 6th Dist. No. WD-06-061, 2006 Ohio 5280. However, while the Sixth District cited to some case law that supported its position, it also acknowledged other cases holding that parties may not request attorney fees after a judgment disposing of the claim on the merits has been journalized. *Id.* at ¶ 10-12. As a result of the district split, the appellate court certified a conflict. On December 27, 2006, this Court determined that a conflict exists, and ordered that the issue be briefed. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.*, 2006 Ohio 6712.

II. LAW AND ARGUMENT

A. AN ORDER DISPOSING ENTIRELY OF THE CASE'S MERITS WITHOUT RESERVING THE ISSUE OF ATTORNEY'S FEES FOR LATER ADJUDICATION IS FINAL AND APPEALABLE; IF THE PARTY HAS REQUESTED ITS FEES IN THE FINAL DISPOSITION, THEY ARE DENIED, IF NOT, THEY ARE DEEMED ABANDONED.

The doctrine of finality has been integral and unchanging in American jurisprudence for many years. Over one hundred and thirty years ago, this Court considered it "well settled by authority, and a doctrine sound in principle[] that all questions which existed on the record, and could have been considered . . . must ever afterward be treated as settled by the first adjudication of the reviewing court." *Pollock v. Cohen*, 32 Ohio St. 514, 519 (1877). In a more recent explanation of the parameters of the doctrine, the Court held that "a party should have his day in court, and that that day should conclude the matter. A party is bound then to present his entire cause and he is foreclosed from later attempting to reopen the cause as to

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issues which were or could have been presented.” *Anderson v. Richards*, 173 Ohio St. 50, 53 (1962). Finally, and in no uncertain terms, the Court held that an “existing final judgment or decree between the parties in litigation is conclusive as to all claims which were or might have been litigated in the first lawsuit.” *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986).

The case before the court today addresses the dimensions of the doctrine of finality through its application in two lines of judicial thought. One line holds that even after a judgment disposing of the issue on its merits has been issued, a party may return at a later date to reopen the case. The other cases reassert classic finality jurisprudence, that “all questions which existed on the record, and could have been considered . . . must ever afterward be treated as settled by the first adjudication of the reviewing court.” *Pollock*, 32 Ohio St. at 519.

The first contemporary case to hold that a party is barred from bringing up claims after judgment is entered was in the Ninth District. *Fair Hous. Advocates Assoc., Inc. v. James* (1996), 114 Ohio App.3d 104. The plaintiff organization in *James* requested attorney fees in the complaint, but did not mention its request for fees at any other time during the entire judicial process. The court, in its “opinion and final judgment entry,” subsequently found in plaintiff’s favor. *Id.* at 105. After the judgment entry was filed, plaintiff requested its attorneys’ fees. The trial judge granted the fee request, and the appeal followed. In reversing the fee award, the court “decline[d] to allow FAA a second chance to litigate an attorney fee issue which might properly have been presented at trial.” *Id.* at 107. Further, the court found that the “trial court had no jurisdiction to modify its final judgment concerning FAA’s attorney fees once its judgment had been properly filed with the clrk.” *Id.*

In coming to its decision, the court discussed case law established prior to the enactment of the Ohio Rules of Civil Procedure. These extensive cases held that “the stability

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of judgment would be destroyed” by allowing court to consider attorney fees requests after the judgment has become final. *Id.* (citing *State ex rel. National City Bank of Cleveland v. Cuyahoga Cty. Court of Common Pleas* (1950), 154 Ohio St. 74, 77). Finally, the appellate court analogized plaintiff’s attorney fees application to a motion for costs by reliance on a line of cases finding post-judgment costs request untimely. *See Mills v. Dayton*, (1985) 21 Ohio App.3d 208, 210 (holding that the principle of finality required motions for cost to precede a final judgment entry).

Further, *James* relied on an Eighth District case holding that once a judgment has been entered, any attempt at securing attorney’s fees is void based on the doctrine of *res judicata*. *McGinnis v. Donatelli*, 36 Ohio App. 3d 120 (1987). In *McGinnis*, the initial complaint contained a demand for attorney’s fees. After the hearing on the complaint, the court ruled in favor of the plaintiffs, but did not mention attorney’s fees. *Id.* at 121. The order was subsequently journalized. Thirty-seven days after the judgment entry was journalized, attorney fees were requested. *Id.* The trial court granted the request, and the appeal followed. *Id.*

The *McGinnis* court held that the original journal entry was “dispositive of this case, and the issue of attorney fees which could have been determined at the original trial is *res judicata*. *Res judicata* attaches not only to questions actually presented to a court, but also to questions which might have been presented for adjudication.” *Id.* Continuing, the court cited to this Court’s precedent, which held that “the doctrine of *res judicata* is broad enough to preclude the presenting of any matter which *could* have been presented . . . [Otherwise, the party] who obtained judgment in the trial court[] would be deprived of the benefit of that judgment by the act of the losing party in appealing and in disregarding the appeal until a

much later time. This is repugnant to settled judicial principles.” *Anderson v. Richards*, 173 Ohio St. 50, 53 (Ohio 1962) (emphasis added). (As cited in *James*, at 121-122)

In *Shepherd*, the Plaintiff had filed a complaint alleging fraud and requesting, among other things, attorney fees. *Shepherd v. Shea* (May 14, 1997), Summit App. No. 17974 at *1, 1997 Ohio App. LEXIS 2037. Subsequently, “[t]he case was heard by a referee, who recommended that plaintiff be awarded \$7.850 in compensatory damages, \$2,000 in punitive damages, and court costs. In his report, the referee wrote that ‘[a]ll other claims of the Plaintiff were not proven and should be dismissed.’ ... [T]he trial court adopted the referee’s report in its entirety without modification.” *Id.* Seven days after the order was issued, plaintiff moved for attorney fees. The referee held another hearing, and then recommended that the fees be granted. *Id.* The trial court adopted the recommendation, and the appeal followed.

The Court of Appeals found that, while “[i]t may appear judicially economical to consider attorney fees after, rather than before, the decision on the merits has been made”, it does not afford “a trial court jurisdiction to do so after a final judgment as been-entered.” *Id.* at *2. The Court held that “a plaintiff who wishes to be awarded attorney fees must either present evidence of the fees at trial, or move the court for an award of attorney fees before the court enters final judgment.” *Id.*

The next conflict case, *Wengerd v. Martin* (Apr. 5, 2000), Wayne App. No. 99CA0004, 2000 Ohio App. LEXIS 1487, addresses the issue seen before in *James* and *Shea*. Plaintiffs in *Wengerd* requested attorney fees in their initial pleading, a counterclaim. However, they did not- just as the defendant in the case before the court today did not- “introduce evidence of their attorney fees or of [the defendant’s] purported obligation to pay

them. Nor did they move for a bifurcation . . . so that the matter of attorney fees could be considered separately.” *Id.* at *15. As a result, “[b]ecause the Martins did not introduce evidence as to the matter of attorney fees during the initial trial of this case and did not move for a separate trial on the matter,” the appellate court held, “they have waived any right they may have had on attorney fees.” *Id.* at *16.

Further, in *Wengerd* the appellate court addressed “the trial court’s *sub silentio* denial of [the defendant’s] motion.” *Id.* at *19. According to the Ninth District, by not acting on the motion before rendering judgment, the trial court implicitly overruled the motion. *Id.* In so finding, the court relied on *City of Solon v. Solon Baptist Temple*, 8 Ohio App. 3d 347, 351-352 (8th Dist., 1982). While *Solon* did not specifically consider the issue of outstanding attorney’s fees, it nonetheless discussed a party’s outstanding request. Defendant had requested leave to file an amended counterclaim, but the trial court granted summary judgment in favor of plaintiff, without ruling on the outstanding motion. Defendant subsequently raised the issue as an assignment of error. The appellate court held that “[b]y entering judgment in favor of the plaintiffs and dismissing defendant’s counterclaim, the trial court implicitly overruled defendant’s [outstanding] motion for leave to file and amended counterclaim.” The *Solon* court continued, citing two out-of-state cases supporting its finding. See *Lichtenstein v. L. Fish Furniture Co.* (1916), 272 Ill. 191 (where court proceeds to trial of an action on counts against which demurrer was filed, express overruling of demurrer is unnecessary); *In re Automobile Liability Ins. Rates* (1969), 128 Vt. 73 (where court proceeded to dispose of merits of case without oral argument, court impliedly overruled motion for oral argument). Finally, the *Solon* court cited an Ohio Supreme Court case holding

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that an objection is *presumed* overruled when the court, after a timely objection is made, fails to make a ruling. *Jayes v. Smith*, 62 Ohio St. 161 (1900) (emphasis added).

The final opinion holding that “a party seeking attorney fees must generally present evidence to support an award of fees before the final judgment is entered” is *Mollohan v. Court Development*, Lorain App. No. 03CA008361. 2004 Ohio 2118 (9th Dist.) at ¶15. In fact, both the facts and the law in *Mollohan* are specifically on point with the case before the court today. The appellee in *Mollohan*, however, took its diligence one step further than the defendant in the case today- it raised the issue of attorney fees in both its pleading and its motion for summary judgment. *Id.* at ¶16. at ¶16. However, it did not present any evidence in its motion to support the award of attorney fees, nor did it ask for an additional time period in which to brief the issue. The trial court did not grant fees in its judgment. *Id.* Instead, the “court explicitly granted the Appellee summary judgment on all of Appellee's claims, entered monetary judgment against Appellants as requested, and closed the case.” *Id.* The appellate court refused to allow Appellee to collect on its attorney fee claim. Instead, “[t]he issue of attorney fees was already before the court, and the court entered final judgment, closing the case, without granting those fees. We presume that the court, therefore, denied the request for attorney fees.” *Id.* In stating its reasoning, the appellate court clearly, concisely and accurately stated that they

fail[ed] to see how Appellee's post-judgment filing of a motion to grant relief, which was previously requested and not granted, should suddenly render the court's judgment a non-final order. We find that the trial court's grant of summary judgment was a final, appealable order.

Id.

While the Sixth District cited three cases purportedly standing for the proposition that “when attorney fees are requested in the original pleadings, a judgment that adjudicates all

issues except the attorney fee issue is not final absent a Civ.R. 54(B) certification,” only a single one of those three cases actually stand for that rule of law. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.* 6th Dist. No. WD-06-061, 2006 Ohio 5280. at ¶ 18. The other two are factually different, and that difference is significant enough to affect the final outcome of the case. *Russell v. Smith* (Aug 12, 1987), 1st Dist. No. C-860841 (trial court specifically reserved issue of attorney fees for later date, discussion *infra*); *Russ v. TRW, Inc.*, (Feb 2, 1989), 8th Dist. No. 54973 (trial court specifically reserved issue of attorney fees for later date, discussion *infra*).

The only case standing for the proposition claimed by the Sixth District is *State ex rel. Bushman v. Blackwell*, 2002-Ohio-6753, a Tenth District case that addresses a party's claim for attorney fees after a successful §1983 case. The trial court initially granted summary judgment in favor of plaintiffs, while ordering respondent to make certain factual findings before judgment was issued. Plaintiffs then filed a motion for attorney fees, along with an “affidavit and resume of relators' attorney, an itemization of the legal services performed and the rates charged, and the affidavit of another attorney which stated that the attorney fees were reasonable and proper.” *Id.* at ¶10. Two days later, the court filed a “final judgment entry.” *Id.* at ¶11. In determining whether the appellate court had subject-matter jurisdiction, the court relied on the attorney fees documentation submitted by plaintiff after the initial judgment, but before the entry was journalized. The court found that “part of relators' claims was for damages in the form of attorney fees” and, because those claims were unresolved, the order was not final and appealable. *Id.* at ¶16.

Blackwell's resulting remand to the trial court was an affront to the well-settled rule, integral to our system of jurisprudence, that requires finality of judgment in a case. It

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specifically contradicts Justice Ashburn's declaration that "[t]he time should come, in the history of a cause, when litigation must end. If the failing party was allowed to prosecute ... on the same record ... litigation would be interminable. Such a practice would violate well-settled principles of law and be against public policy." *Pollock v. Cohen*, 32 Ohio St. 514, 520 (1877)

The other two cases cited by the Sixth District are factually distinguishable from both the case before the court today and from *Blackwell*. In both cases, the judge specifically reserved the issue of attorney's fees for adjudication at a later date, intentionally retaining jurisdiction over the attorney fee claim. The specific reservation was, thus, the basis for the appellate court's holding that the order was not final.

In 1989, the Cuyahoga Court of Common Pleas issued an order on the merits, disposing of a pending case. *Russ v. TRW, Inc.*, (Feb. 2, 1989), 8th Dist. No. 54973. That order contained a sentence to address the attorney's fees originally requested in the complaint: the "motion for att[orne]y fees [is] to be determined after all appeals are exhausted." *Id.* at *3. By including this sentence but failing to include Civ.R. 54(B) language, the Eighth District held that there was no final appealable order. *Id.* at *5. Because plaintiff's counsel "prayed for attorney fees in his complaint and also filed an itemized statement of services rendered in plaintiff's post judgment motion for fees[,] . . . [p]laintiff has not waived the issue of attorney fees." *Id.* at *4. The court continued, finding that "[s]ince the issue of attorney fees has not been adjudicated, the trial court's judgment entry is not a final appealable order." *Id.*

A Hamilton County trial court faced a similar situation, and filed a judgment with virtually identical attorney-fee language. *Russell v. Smith*, (Aug. 12, 1987), 1st Dist. No.

54973. In that case, the First District similarly held that the order was not final and appealable because “[t]he trial court specifically reserved its ruling on appellee’s motion for assessment of reasonable attorney fees against appellants.” *Id.* at *1.

In both *TRW* and *Russell*, the court considered the specific language of the order, and that language explicitly and expressly reserved the issue of attorney fees for a later date. In the case before the court today, there was no reservation of attorney fees, specific or otherwise. To the contrary, the court disposed of the entire matter in its August 10th decision. As a result, *TRW* and *Russell* are more closely aligned with *James* and its progeny, by holding that the judgment entry not final and appealable when the issue of attorney’s fees is specifically reserved in the order.

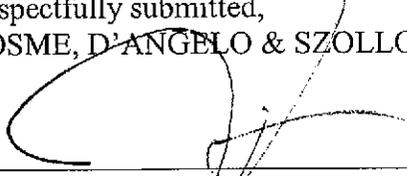
The negative policy implications of adopting the reasoning of the Sixth District are far-reaching and wide-ranging. The court would essentially be giving deference to a party who inserted a boiler-plate sentence in an initial pleading, while allowing that single sentence to dictate the scheduling and finality of a court’s docket and opinions. For example, assume that over a month has passed since the judge has entered an order disposing of the case entirely on the merits, and the defendant decides not to file for fees. Does the original non-final order transfigure into one that is final and appealable? If so, the time for appeal has passed. It is now unreviewable. Or does the judge have to reissue a new order, with identical language, that is somehow more final and appealable than the first? If so, valuable judicial time and resources are wasted. And what happens if the defendant decides to move for fees three months after the case is disposed of on the merits? Six months? If the trial court decision is not considered a final appealable order, cases may remain in the court system for years after the merits have been completely adjudicated.

Instead, the *James* line of cases, along with *TRW* and *Russell*, came to the better, correct conclusion. Once a party has placed a motion on the record in front of a trial court, when the court issues a ruling disposing of the case in its entirety, the only way it may retain jurisdiction is by explicitly reserving the contents of the motion for a future date. Otherwise, the motion is deemed denied, and the judgment is final and appealable.

III. CONCLUSION

For all of the foregoing reasons, Appellant International Union of Electrical Workers, Local Union No. 8 respectfully requests that this Court adopt the reasoning of the *James* court and subsequent line of cases, holding that an order disposing of the case on the merits, without reserving the issue of attorney fees, is a final appealable order; reversing the holding in this case and remanding this case to the Sixth District for treatment consistent with this Court's holding.

Respectfully submitted,
COSME, D'ANGELO & SZOLLOSI CO., L.P.A.



Joseph M. D'Angelo
COUNSEL FOR APPELLANT INTERNATIONAL
UNION OF ELECTRICAL WORKERS, LOCAL
UNION NO. 8

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2007, a copy of Appellant's

Brief was personally served on:

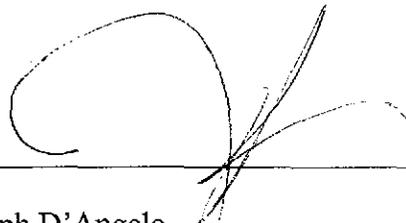
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NOTICE OF INTENT TO NOT FILE A SUPPLEMENT

Appellant International Brotherhood of Electrical Workers, Local Union No. 8 has determined that no portion of the record is necessary for this Court to determine the questions presented, and that preparation of a supplement is unwarranted. Therefore, Appellant will not be filing a supplement with this case.



Joseph D'Angelo

APPENDIX

1. Supreme Court Order Certifying a Conflict (Dec. 27, 2006)
2. Notification of the Date the Record was Filed
3. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.* (Sept. 25, 2006), 6th Dist. No. WD-06-061
4. *Order on Defendant's Motion for Summary Judgment and for Reconsideration and Plaintiff's Rule 56(F) Motion*, Wood County Case No. 05-CV-155 (J. Pollex)

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The Supreme Court of Ohio

FILED
DEC 27 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

International Brotherhood of Electrical
Workers, Local Union No. 8

Case No. 2006-1868

v.

ENTRY

Vaughn Industries, Inc.

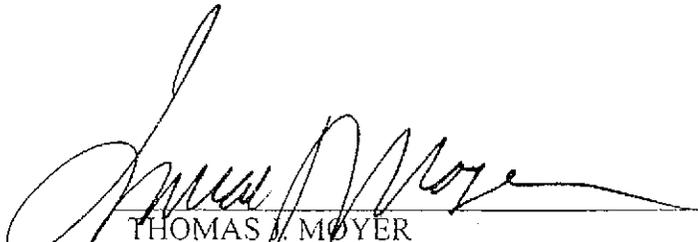
This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Wood County. On review of the order certifying a conflict,

It is determined by the Court that a conflict exists and it is ordered by the Court that the parties brief the issue state at page 6 of the court of appeals' Decision and Judgment Entry filed September 25, 2006, as follows:

"Where attorney fees are requested in the original pleadings, may a party wait until after judgment on the case in chief is entered to file its motion for attorney fees?"

It is ordered by the Court that the Clerk shall issue an order for transmittal of the record from the Court of Appeals for Wood County.

(Wood County Court of Appeals; No. WD06061)


THOMAS J. MOYER
Chief Justice

FILED
WOOD COUNTY, OHIO
DEC 29 PM 4:09
MARCIA J. MENGEL, CLERK

Appellant
0001

The Supreme Court of Ohio

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JAN 19 2007

January 17, 2007

Joseph Michael D'Angelo
Cosmo, D'Angelo & Szollosi Co., L.P.A.
202 N. Erie Street
Toledo, OH 43604

Re: 2006-1868

International Brotherhood of Electrical Workers, Local Union No. 8

v.

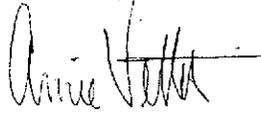
Vaughn Industries, Inc.

Dear Joseph Michael D'Angelo:

This is to notify you that the record in the above-styled case was filed with the Clerk's Office on January 16, 2007.

If, after reviewing the Supreme Court Rules of Practice, you have any questions about filing deadlines in the case, please feel free to call a deputy clerk at (614) 387-9530.

Sincerely,



Amie Vetter
Records Assistant

Appellant
0002

FILED
WOOD COUNTY, OHIO

2006 SEP 25 AM 10:17

SIXTH DISTRICT
COURT OF APPEALS
REBECCA E. BHAER, CLERK

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

International Brotherhood of
Electrical Workers, Local Union No. 8

Court of Appeals No. WD-06-061

Appellant

Trial Court No. 05-CV-155

v.

Vaughn Industries, Inc.

DECISION AND JUDGMENT ENTRY

Appellee

Decided: SEP 25 2006

Joseph M. D'Angelo and Joseph J. Guarino, III, for appellant.

David T. Andrews and Nick A. Nykulak, for appellee.

JOURNALIZED
COURT OF APPEALS

SEP 25 2006

PER CURIAM

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{¶1} Appellee, Vaughn Industries, LLC, has filed a motion to dismiss the appeal filed by International Brotherhood of Electrical Workers, Local Union No. 8 ("Local 8").

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Vaughn Industries contends that without a Civ.R. 54(B) determination by the trial court judge that there is no just reason for delay, the August 10, 2006 order from which Local 8 has appealed is not final and appealable. Local 8 has responded with a memorandum stating that Civ.R. 54(B) does not apply to this case and its appeal is properly before the court.

{¶2} The pertinent history is that Local 8 filed a violation of prevailing wage complaint against Vaughn Industries. In its answer, Vaughn Industries prayed for an award of attorney fees pursuant to R.C. 4115.16(D), which states:

{¶3} "Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code [covering Wages and Hours on Public Works], the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds the action brought was unreasonable or without foundation, even though not brought in subjective bad faith."

{¶4} On August 10, 2006, the trial court granted summary judgment in favor of Vaughn Industries on the prevailing wage claim, Local 8 filed its appeal, and Vaughn Industries subsequently filed a motion for attorney fees in the trial court. Vaughn Industries contends that since the issue of attorney fees is outstanding, and the August 10,

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2006 judgment does not contain a Civ.R. 54(B) no just cause for delay determination, the summary judgment order is not yet final and appealable.

{¶5} Civ.R. 54(B) states:

{¶6} "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

{¶7} In *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus, the court states:

{¶8} "An order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met."

{¶9} Local 8 states that Civ.R. 54(B) is not applicable because by not arguing the attorney fee issue in its motion for summary judgment, Vaughn Industries abandoned

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its claim for attorney fees. Vaughn Industries counters that as long as its claim for attorney fees was made in the original pleadings, it is an outstanding claim until it is ruled on by the trial court. Further, it argues that since it is not entitled to attorney fees unless it prevails, it is clear that the motion for attorney fees must be made after the basic claim has been decided. Appellate courts in several of Ohio's 12 districts have held that when attorney fees are requested in the original pleadings, a judgment that adjudicates all issues except the attorney fee issue is not final absent a Civ.R. 54(B) certification. *Russell v. Smith* (Aug. 12, 1987), 1st Dist. No C-860841; *Russ v. TRW, Inc.*, (Feb. 2, 1989), 8th Dist. No. 54973; *State ex rel. Bushman v. Blackwell*, 10th Dist. No. 02AP-419, 2002-Ohio-6753.

{¶10} Our research has uncovered only one Ohio appellant district, the 9th, which holds that when you request attorney fees in the original pleadings, unless you present that claim with your case in chief, you abandon your claim. In *Fair Hous. Advocates Assoc., Inc. v. James* (1996), 114 Ohio App.3d 104, 107, appeal not allowed (1997), 77 Ohio St.3d 1519 the court states:

{¶11} " * * * unless otherwise provided by statute, we hold that attorney fees cannot be awarded after the ultimate conclusion of a case as provided in Civ.R. 58(A). Therefore, a party should either present evidence of its attorney fee expenses at trial or move for an award of fees before the court issues the final judgment.

{¶12} " * * *

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{¶13} " * * * FAA could have sought bifurcation pursuant to Civ.R. 42(B), reserving the attorney fee issue until after it had succeeded on the merits. For whatever reason, it chose not to do so. Instead, rather than utilize the prescribed procedures, it simply waited until after the trial and the final judgment entry to move for its fees. Moreover, nothing prevents a party from presenting a claim for attorney fees in its case in chief in a bench trial. In fact, in the instant case, that is what FAA declared it would do in its complaint. However, after such notice, it then failed to present any evidence on the matter at trial." (Footnotes omitted.)

{¶14} See, also, *Mollohan v. Court Dev., Inc.* (Apr. 28, 2004), 9th Dist No. 03CA008361; *Wengerd v. Martin* (Apr. 5, 2000), 9th Dist. No. 99CA0004; and *Shepherd v. Shea* (May 14, 1997), 9th Dist. No. 17974.

{¶15} We decline to follow these cases. First, their holding is overly broad in that it is clear that when attorney fees are not prayed for in the initial pleadings, such as in an attorney fee request under Civ.R. 11, a party may move for and be awarded attorney fees after the conclusion of the case in chief. See *Croston v. DeVaux*, 5th Dist. No. 2003 CA00394, 2003CA00420, 2004-Ohio-5472. Even in a case such as the one presently before us, where attorney fees are requested in the original pleadings, it seems overly technical and cumbersome not to allow a post-judgment motion for attorney fees under circumstances where it is not clear who can ask for attorney fees until the case in chief has been decided.

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{¶16} Article IV, Section 3(B)(4) of the Ohio Constitution states:

{¶17} "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

{¶18} In today's decision we hold that where attorney fees are requested in the original pleadings, a judgment that disposes of all the claims between all the parties, except for the attorney fee claim, is not final and appealable without Civ.R. 54(B) no just reason for delay language and a party may file a motion for attorney fees after that judgment has been entered. We find that this holding is in conflict with *Fair Hous. Advocates Assoc., Inc. v. James* (1996), 114 Ohio App.3d 104, appeal not allowed (1997), 77 Ohio St.3d 1519; *Mollohan v. Court Development, Inc.* (Apr. 28, 2004), 9th Dist No. 03CA008361; *Wengerd v. Martin* (Apr. 5, 2000), 9th Dist. No. 99CA0004; and *Shepherd v. Shea* (May 14, 1997), 9th Dist. No. 17974.

{¶19} Given this actual conflict between our district and the 9th Appellate District, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question: Where attorney fees are requested in the original pleadings, may a party wait until after judgment on the case in chief is entered to file its motion for attorney fees?

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{¶20} The parties are directed to S. Ct. Prac. R. IV for guidance in how to proceed.

{¶21} Accordingly, we find the motion to dismiss well-taken. Since there is an outstanding claim for attorney fees and the judgment of August 10, 2006 does not contain a Civ.R. 54(B) no just reason for delay determination, that judgment is not final and appealable. The motion is granted and this appeal is ordered dismissed. Appellee's motion for an extension of time or to stay the briefing schedule is rendered moot. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

APPEAL DISMISSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

William J. Skow, J.
CONCUR.

Peter M. Handwork

JUDGE
Mark L. Pietrykowski

JUDGE
William J. Skow

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>.

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AUG 11 2006

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2006 AUG 10 P 2:02

REBECCA E. BHAER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

International Brotherhood of Electrical
Workers, Local Union No.8,

Case No. 05-CV-155

Judge Robert C. Pollex

Plaintiff, **JOURNALIZED**

v.

Vaughn Industries, Inc.,

AUG 10 2006

Defendant Vol. Pg

ORDER ON DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT AND FOR
RECONSIDERATION AND
PLAINTIFF'S RULE 56(F)
MOTION

This matter came to be heard on the following: (1) Plaintiff's Rule 56(F) motion to deny Defendant's motion for summary judgment or, alternatively, for a continuance; (2) Defendant's motion for reconsideration and for judgment on Plaintiff's claims that Defendant violated R.C. 4115.071(C); and, (3) Defendant's motion for summary judgment on Plaintiff's claims that Defendant failed to pay the prevailing wage rate.

OPINION

Upon due consideration of the facts, the arguments of counsel, and the applicable law, the Court initially finds that Plaintiff's Civ.R. 56(F) motion to deny Defendant's motion for summary judgment or, alternatively, for continuance of summary judgment proceeding, is not well taken. This case has been pending since March 2005. The deadline for filing summary judgment motions is June 5, 2006. The Court's final cut-off date for discovery is July 5, 2006. The case is scheduled for trial on August 16, 2006. Plaintiff had sufficient time to conduct discovery in this case and should have been ready

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has complied with the prevailing wage law by paying its employees who worked on the Offenbauer and Rodgers projects the base hourly rate of pay plus irrevocable fringe benefit contributions on behalf of those employees into the VEBA, Training Trust, and 401K pension plan funds. See, R.C. 4115.03(E).

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Civ.R. 56(F) motion for continuance and request for additional discovery is denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's motion for reconsideration be, and hereby is, granted. The Court's November 1, 2005 Order granting Plaintiff's motion for partial summary judgment is vacated. The Court finds that Plaintiff's claims that Defendant violated R.C. 4115.071(C) and did so intentionally pursuant to R.C. 4115.13(H) to be without merit. Defendant's motion for judgment on Plaintiff's claims that Defendant violated R.C. 4115.071(C) is well taken and is granted.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's motion for summary judgment on Plaintiff's claims that Defendant failed to pay the applicable prevailing wage rate to its employees who performed work on the Offenbauer Residence Hall Renovation Project and the Rodgers Quadrangle Electrical Upgrade Project be, and hereby is, granted.

Plaintiff shall pay the costs of these proceedings.

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Robert C. Pollex

Judge Robert C. Pollex

CLERK TO FURNISH TO ALL COUNSEL
OF RECORD AND UNREPRESENTED PARTIES
NOT IN DEFAULT FOR FAILURE TO APPEAR
WITH A COPY OF THIS ENTRY INCLUDING
THE DATE OF ENTRY ON THE JOURNAL

Appellant
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