

**IN THE SUPREME COURT OF OHIO**

INTERNATIONAL BROTHERHOOD OF )  
ELECTRICAL WORKERS, LOCAL )  
UNION NO. 8, )

Plaintiff-Appellant, )

v. )

VAUGHN INDUSTRIES, LLC, )

Defendant-Appellee. )

Case No. 2006-1868

On Appeal from:

Sixth District Court of Appeals,  
Case No. 06-WD-061

Wood County Court of Common  
Pleas,

Case No. 05-CV-155

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**BRIEF OF APPELLEE VAUGHN INDUSTRIES, LLC**

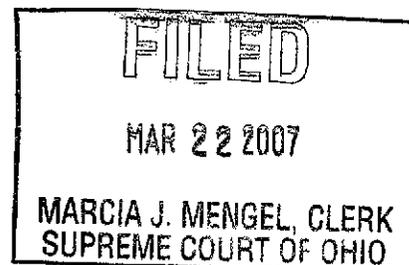
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## STATEMENT OF FACTS

Defendant-Appellee Vaughn Industries, LLC (“Vaughn”) is an electrical and mechanical contractor located in Carey, Ohio. As a contractor that performs construction work on public improvements, Vaughn is charged with compliance with the Ohio Prevailing Wage Law, Ohio Revised Code § 4115.03 *et seq.*

In 2005, Plaintiff-Appellant the International Brotherhood of Electrical Workers, Local Union No. 8 (“Local 8”), filed complaints, later consolidated, with the Wood County Court of Common Pleas alleging, *inter alia*, that Vaughn’s method of calculating the fringe benefit credit on three public improvement projects at Bowling Green State University was in violation of Ohio’s Prevailing Wage Law.

On August 10, 2006 the Wood County Court of Common Pleas issued its Order on Vaughn’s Motion for Summary Judgment, Vaughn’s Motion for Reconsideration, and Local 8’s Rule 56(F) Motion. (Appx. 10-12). The trial court granted judgment in favor of Vaughn on Local 8’s claims that Vaughn had violated Ohio’s Prevailing Wage Law, and denied Local 8’s Rule 56(F) Motion for an extension of time to conduct discovery. *Id.* The trial court’s August 10, 2006 Order did not include Civ. R. 54(B) “no just cause for delay” language, and did not rule on Vaughn’s claim for attorneys’ fees pursuant to R.C. § 4115.16(D), as affirmatively pled in Vaughn’s Answer. *Id.*; (Appx. 38). On Friday, August 11, 2006, the Order was journalized. (Appx. 10). On the following Monday, August 14, 2006 at 9:38 a.m., Local 8 filed its Notice of Appeal. Vaughn subsequently filed its request for attorney fees.

On September 25, 2006, the Sixth District Court of Appeals dismissed Local 8’s appeal as premature and held 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.” *Int’l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.* (Sept 25, 2006), 6<sup>th</sup> Dist. No. WD-06-061, 2006 Ohio 5280, ¶ 18 (Appx. 7).

In paragraph 19 of its decision, the Sixth District acknowledged that only one district court of appeals, the Ninth, has held that a party who requests attorney fees in the original pleadings must also present that claim with the party’s case in chief or be forever barred from recovering attorney fees. (Appx. 7). The Sixth District certified this conflict and on December 27, 2006 this Court ordered briefs on the following issue:

**“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?”**

*Int’l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus.*, 2006 Ohio 6712 (Appx. 1).

## **LAW & ARGUMENT**

### **Proposition of Law:**

**A trial court’s order is not a final, appealable order if it does not dispose of all of the claims for relief, and O.R.C. § 4115.16(D) specifically contemplates that a motion for attorney fees will be filed only after judgment on the case in chief is entered.**

The Ohio Constitution limits an appellate court’s jurisdiction to the review of final judgments from inferior courts. Section 3(B)(2), Article IV. (Appx. 37). If a lower court’s order is not final, an appellate court has no jurisdiction to hear the appeal and the matter must be dismissed. *Renner’s Welding and Fabrication, Inc. v. Chrysler Motor Corp.* (1996), 117 Ohio App.3d 61, 64; *General Acc. Ins. Co. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17, 20.

This Court has held that only after the requirements of both R.C. § 2505.02 (Appx. 39) and Civ. R. 54(B) (Appx. 41) are met, may an order be considered a final order capable of

review. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus. Under Civ.R. 54(B), “when more than one claim for relief is presented in an action ... 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.” (Appx. 41). Because the trial court herein disposed of less than all claims in the action and did not include Civil Rule 54(B) “no just reason for delay” language in its decision, the Sixth District properly held Plaintiff’s appeal to be premature. (Appx. 12).

The remaining claim to be adjudicated before the trial court is Defendant’s Motion for Attorneys’ Fees. R.C. § 4115.16(D) permits the award of attorneys’ fees to a successful Defendant:

**In the event the Court finds that no violation has occurred**, the court may award court costs and attorneys fees to the prevailing party, other than to the Department of Commerce or the public authority, where the Court finds the action brought was unreasonable or without foundation, even if not brought in subjective bad faith.

[Emphasis added]. (Appx. 38).

As demonstrated by the highlighted language in R.C. § 4115.16(D), the Prevailing Wage Law specifically contemplates that a prevailing defendant’s motion for attorneys’ fees will come only *after* a ruling on the case in chief. *See, International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Company* (1990), 67 Ohio App.3d 672, 588 N.E.2d 176 (R.C. 4115.16(D) attorneys fee issue “should have been presented to the trial court at the conclusion of the trial court proceedings.”). Here, Local 8 obviously raced to the appellate court on the morning of the first business day after the trial court’s judgment entry to file its Notice of Appeal, in an improper and obvious attempt to thwart an attorney fees request. Vaughn had not even received notice of the trial court’s ruling before Local 8 filed its Notice of Appeal. As set

forth above, the Prevailing Wage Law itself contemplates consideration of an attorney fees petition *after* a finding of no violation. The trial court did not include Civil Rule 54(B) language in its August 10 Order, warranting the Sixth District's denial of Local 8's appeal as premature.

Even when considering statutory schemes that do not include express language regarding fee petitions after adjudication on the merits, numerous courts have determined that there can be no final appealable order until the attorneys' fees issue has been disposed of by the trial court so long as the attorneys' fees request was raised in the initial pleading. As held by the Fifth District:

It is well established that when attorney fees are requested in the complaint, there is no final appealable order until those fees have been addressed by the trial court unless the Court utilizes Civ. R. 54 (B) language.

*Warne v. Bamfield*, 161 Ohio App.3d 537, ¶14, 2005-Ohio-2982 (5<sup>th</sup> Dist), quoting *Ft. Frye Teachers Assn. v. Bd. of Edn.*, 87 Ohio App.3d 840, 843 (4<sup>th</sup> Dist, 1993). See also, *Abrams v. Siegel*, 166 Ohio App.3d 230, ¶67, 2006-Ohio-1728 (8<sup>th</sup> Dist.); *Aquarium Systems, Inc. v. Omega Sea Manufacturing Co.*, 11<sup>th</sup> Dist Ct. App. Nos. 2004-L-110 and 2004-L-111, 2005-Ohio-350; *Palmer Brothers Concrete Inc. v. Indus. Comm.*, 2006-Ohio-1659 (3<sup>rd</sup> Dist.); *Urso v. Compact Cars*, 2005-Ohio-6292 (11<sup>th</sup> Dist.); and *State ex rel. Bushman v. Blackwell*, 2002-Ohio-6753, ¶16 (10<sup>th</sup> Dist). Vaughn has preserved its claim for attorneys' fees by affirmatively alleging in its Answers<sup>1</sup> the right to be awarded attorneys' fees. Vaughn specifically requested pursuant to R.C. "4115.16 that it be granted its statutory attorneys' fees and costs necessitated with defending this action."

Moreover, attorney fees may be awarded even when not prayed for in the initial pleadings or in the party's case in chief. As noted by the Sixth District in paragraph 15 of its

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<sup>1</sup> Wood County Cases Nos. 05-CV-155, 05-CV-159 and 05-CV-160, were consolidated after Answers had been filed in each of the three actions.

decision, “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.” (Appx. 6).

Furthermore, judicial economy is best served by the disposition of the attorneys’ fee issue after a ruling on the merits. This Court has held that the paramount consideration to be made is whether the court’s determination serves judicial economy at the trial level. *Wistainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 355, 617 N.E.2d 1136; *Alexander v. Buckeye Pipe Line* (1977), 49 Ohio St.2d 158, 160, 3 Ohio Op. 3d 174, 359 N.E.2d 702. Briefing the issue of attorney fees where that issue may very well be moot upon adjudication of the case on the merits would not serve the interests of judicial economy.

Finally, there is no conflict of authority even if the Ninth District holdings are applied to the case herein. The Sixth District’s decision references four Ninth District cases as being in conflict: *Fair Housing Advocates Assn., Inc. v. James*, 114 Ohio App.3d 104 (9<sup>th</sup> Dist. 1996); *Shepherd v. Shea* (May 14, 1997), Summit App. No. 17974, 1997 WL 270544 (9<sup>th</sup> Dist.) (Appx. 13); *Wengerd v. Martin* (Apr. 5, 2000), Wayne App. No. 99CA0004, 2000 WL 354148 (9<sup>th</sup> Dist.) (Appx. 19); and *Mollohan v. Court Dev., Inc.*, 2004-Ohio-2118 (9<sup>th</sup> Dist. 2004). These four cases are in turn relied upon by Local 8 in its Brief. None of the Ninth District cases purported to create a conflict actually does so because none of these cases is based upon the Prevailing Wage Law or upon a statute that specifically contemplates that a prevailing party’s motion for attorneys’ fees will come only *after* a ruling on the case in chief.

The leading Ninth District case cited by Appellant is *Fair Housing*. In *Fair Housing*, the prevailing party on a federal fair housing claim moved for attorney fees after the trial court issued its opinion and *final judgment entry*. *Fair Housing*, at 106. The Ninth District denied the

request for attorney fees reasoning that, because the federal substantive law entitling the prevailing party to an award of “reasonable attorney fees and costs” failed to “designate when or how a claim for attorney fees should be made,” the actual “timing of [the prevailing party’s] motion for attorney fees is a procedural matter governed by state law.” *Id.* Significantly, the Ninth District specifically held that, “*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).”<sup>2</sup> [Emphasis added]. *Id.*, at 107.

Here, unlike the prevailing party in *Fair Housing*, Vaughn’s request for attorney fees was not made after the trial court’s “final judgment entry” as per Civ. R. 54(B) because all of the claims had not been adjudicated and the trial court did not include any “express determination that there is no just reason for delay.” Moreover, although Appellant relies heavily upon *Fair Housing* in support of its brief, glaringly absent is any reference to *Fair Housing*’s actual holding as set forth above. See Appellant’s Brief at 4-5. Furthermore, R.C. § 4115.16(D), the Prevailing Wage Law, unlike the federal fair housing statute at issue in *Fair Housing*, specifically contemplates that a motion for attorney fees will come only *after* ruling on the case in chief.

Appellant’s reliance upon *McGinnis v. Donatelli*, 36 Ohio App.3d 120 (8<sup>th</sup> Dist. 1997) on pages five and six of its Brief is also misplaced. *McGinnis* involved an action by tenants for the return of their security deposit from the landlord. The Eighth District denied the tenants’ motion for attorney fees because their motion was filed after the final judgment and appeal deadline and because the trial court never established that the tenants’ security deposit was “wrongfully withheld.” *Id.* at 121-122. Furthermore, the language for attorney fees provision therein, R.C. § 5321.16(C) is virtually identical to the statute at issue in *Fair Housing* because it entitles the

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<sup>2</sup> Civ. R. 58(A) specifically states that it is “subject to the provisions of Rule 54(B).”

prevailing party to an award of “reasonable attorney fees” but fails to designate when or how a claim for attorney fees should be made.

The *Shepherd* case, discussed on page 6 of Appellant’s Brief, is similarly inapposite. In *Shepherd*, and unlike the case herein, the plaintiff filed for attorney fees only after the “final judgment entry” had been filed by the court. (Appx. 15). Moreover, on page four of its decision, the *Shepherd* court, citing *Fair Housing*, held that “*in the absence of a statute that provides otherwise*, 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.” [Emphasis added]. (Appx. 16).

In *Wengerd*, the Ninth District dismissed the appellants’ request for attorney fees based upon *Fair Housing* and *Shepherd*, and because the appellants therein failed to raise the issue of attorney fees on initial appeal. (Appx. 31) See *Wengerd*, at 15 (Appx. 31), citing *Whitehead v. General Tel. Co.* (1969), 20 Ohio St.2d 108, paragraph one of the syllabus, overruled in part, on other grounds (1995), *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus (“a party who fails to raise an error on initial appeal, waives the right to have that asserted error reviewed later”); and *Blackwell v. Internatl. Union, UAW* (1984), 21 Ohio App.3d 110, 112 (“when a case is remanded for a limited purpose, ‘the trial court [is] obligated to accept all issues previously adjudicated as finally settled’”).

On pages seven through eight of its Brief, Local 8 mischaracterizes the ruling in *Wengerd* and that court’s reliance upon *City of Solon v. Solon Baptist Temple*, 8 Ohio App. 3d 347, 351-352 (8<sup>th</sup> Dist., 1982). Appellant argues that *Wengerd* addressed “the trial court’s *sub silentio* denial of [the defendant’s] motion” for attorney fees and that “by not acting on the motion before rendering judgment, the trial court implicitly overruled the motion.” Appellant Brief at 7.

However, the actual issue therein was *transcript costs* as to the defendant's *initial appeal*, not attorney fees. *Wengerd*, at 18-19 (Appx. 33-34). As stated by the *Wengerd* court, "the trial court's *sub silentio* denial of [the defendant's] motion [for costs] was not error. Because the assessment of costs on appeal is exclusively within the jurisdiction of the appellate court, the trial court could not properly have granted their motion." *Id.* at 19 (Appx. 34).

In *Mollohan*, discussed on pages eight through nine of Appellant's Brief, the Ninth District relied upon *Fair Housing*, *Shepherd* and *Wengerd* in holding that a party must move for attorney fees before a final, appealable order is rendered. *Mollohan*, at ¶¶15-16. In the case at bar, it is undisputed that the trial court's order lacked any such express determination. Furthermore, *Mollohan*, unlike the facts herein, was not based upon a statute that specifically contemplated a motion for attorneys' fees *after* the ruling on the case in chief. The language quoted by Appellant has nothing whatsoever to do with the attorney fee issue in this action.

Local 8 also characterizes the holding in *State ex rel. Bushman v. Blackwell*, 2002-Ohio-6753 (10<sup>th</sup> Dist.) as "an affront to the well-settled rule" that fees must be requested in the case in chief. This mischaracterization wholly ignores the decisions of six different district appellate courts,<sup>3</sup> all of which clearly establish that attorney fees may be requested by motion after a judgment pursuant to Civ. R. 54(B) and R.C. § 2505.02 if requested in the original pleadings. See Appellant's Brief at 9-10.

Finally, Appellant's concern regarding the so-called "negative policy implications of adopting the reasoning of the Sixth District"<sup>4</sup> is meritless. If a party is concerned that a judgment may not contain the requisite Civ. R. 54(B) language or is not "final and appealable," that party

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<sup>3</sup> See Vaughn Memorandum at 6.

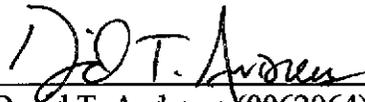
<sup>4</sup> Appellant's Brief at 11.

may simply file a motion with the trial court asking that a final and appealable order be rendered with the appropriate 54(B) language.

**CONCLUSION**

For all of the foregoing reasons, Vaughn respectfully requests that this Court affirm the decision of the Sixth District Court of Appeals and remand this matter to the trial court for final disposition of Vaughn's Motion for Attorneys' Fees.

Respectfully submitted,



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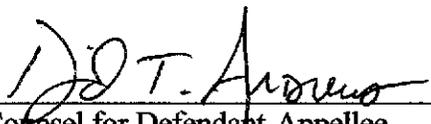
**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Appellee's Brief was sent by ordinary U.S. mail, postage prepaid, to:

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Counsel for Plaintiff/Appellant  
The International Brotherhood of Electrical Workers, Local Union No. 8.

this 21<sup>st</sup> day of March, 2007.

  
\_\_\_\_\_  
Counsel for Defendant-Appellee

# 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.

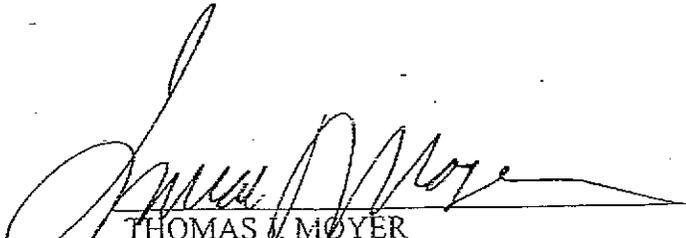
This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Wood County. On review of the order certifying a conflict,

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  
CLERK OF APPEALS  
MARCIA J. MENGEL

FILED  
WOOD COUNTY, OHIO

2006 SEP 25 AM 10:17

SIXTH DISTRICT  
COURT OF APPEALS  
REBECCA E. ENAER, 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

Trial Court No. 05-CV-155

Appellant

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

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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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SEP 25 2006

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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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CERTIFICATE TO COPY

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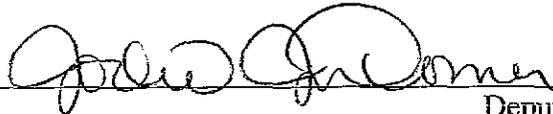
The State of Ohio, Wood County.

Common Pleas Court

I, the undersigned, Clerk of Common Pleas Court and the Sixth District Court of Appeals within and for said County and in whose custody the **Files, Journals and Records** of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that 06WD061 APPEAL DISMISSED PER 7 PAGE DECISION AND JUDGMENT ENTRY DATED 9/25/06 is taken and copied from the original now on file in said Court, that said copies have been compared by me with the original document and that it is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially and affix the seal of said Court at the Court House, in **Bowling Green, Ohio** in said County, this Monday, September 25, 2006.

*Rebecca E. Bhaer, Clerk of Courts*

By:  Deputy Clerk

**JOURNALIZED**

AUG 11 2006

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FILED  
WOOD COUNTY CLERK  
COMMON PLEAS COURT

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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

Plaintiff,

**JOURNALIZED**

Judge Robert C. Pollex

v.

AUG 10 2006

Vaughn Industries, Inc.,

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

Defendant

Vol. Pg

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

to present its case at this time. Plaintiff also previously requested an extension of time to respond to Defendant's motion for summary judgment, which the Court granted in part, but failed to mention the need for additional discovery. The cited reason for the request to extend time was counsel's long-planned family vacation. The Court will not delay its decision on summary judgment motion based on discovery issues in another case pending in another court. The motion for summary judgment is properly before the Court for a decision and Plaintiff's Civ.R. 56(F) motion for continuance should be denied.

The Court also finds that an interlocutory ruling on Defendant's motion for reconsideration is proper. Based on the recent decision by the Sixth District Court of Appeals in *Vaughn Industries, Inc. v. Dimech Services*, Wood App. No. WD-05-039, 2006-Ohio-3381, the Court finds that it must vacate the initial ruling granting Plaintiff's motion for partial summary judgment.

Finally, the Court finds 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 Offenhauer Residence Hall Renovation Project and the Rodgers Quadrangle Electrical Upgrade Project to be well taken. Vaughn submitted complete documentation exhibiting detailed prevailing wage calculations and substantiating that the amounts claimed were actually paid. The Court carefully reviewed all the exhibits and concludes that there is no genuine issue of material fact; reasonable minds can come to but one conclusion, and that conclusion is adverse to Plaintiff, which is entitled to have the evidence construed most strongly in its favor; and Defendant is entitled to judgment as a matter of law. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 15, 670 N.E.2d 1061.

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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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**JOURNALIZED**

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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

1997 Ohio App. LEXIS 2037, \*

HALEY SHEPHERD, Appellee v. REX A. SHEA, ET AL., Appellants

C.A. NO. 17974

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT  
COUNTY

1997 Ohio App. LEXIS 2037

May 14, 1997, Dated

**PRIOR HISTORY:** [\*1] APPEAL FROM JUDGMENT ENTERED IN THE  
COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. CV 91 09  
3414.

**DISPOSITION:** Judgment reversed.

**COUNSEL:**

**APPEARANCES:**

JORDAN S. DELMONTE, Attorney at Law, UAW Legal Services Plan, 707 Brookpark  
Road, Brooklyn Heights, Ohio 44109, for Appellants.

LOUIS A. DIRKER, Attorney at Law, 817 Locust Drive, Tallmadge, Ohio 44278-1121,  
for Appellees.

BERNARD L. MOUTZ, Attorney at Law, 302 South Cleveland Avenue, Mogadore,  
Ohio 44260, for Appellees.

**JUDGES:** CLAIR E. DICKINSON, Presiding Judge. BAIRD, J., REECE, J., CONCUR

**OPINION BY:** CLAIR E. DICKINSON

**OPINION:** DECISION AND JOURNAL ENTRY

Dated: May 14, 1997

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Presiding Judge.

Defendants Rex Shea and Betty Shea have appealed from the trial court's judgment entry granting Plaintiff Haley Shepherd's motion for attorney fees. They have argued that the trial court lacked jurisdiction to grant the motion for attorney fees because the trial court had already entered final judgment before the motion was filed. This Court reverses the judgment of the trial [\*2] court that granted plaintiff's motion because the trial court was without jurisdiction to consider it.

I.

During September 1991, plaintiff filed a complaint against defendants, alleging fraud and requesting compensatory and punitive damages, costs, and attorney fees. The 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 "all other claims of the Plaintiff were not proven and should be dismissed." Plaintiff and defendants filed objections. On December 9, 1994, the trial court adopted the referee's report in its entirety without modification. Defendants appealed from that decision, and this Court affirmed the judgment of the trial court. See *Shepherd v. Shea*, 1995 Ohio App. LEXIS 4747 (Oct. 25, 1995), Summit App. No. 17090, unreported. This Court also dismissed plaintiff's cross-appeal for attorney fees for lack of a final,

appealable order, noting that plaintiff's motion for attorney fees in the trial court had not yet been fully resolved. See *id.* at 17.

The issue in this appeal involves only attorney fees. On December 16, 1994, seven days after the court's final [\*3] judgment entry and 20 days before defendants filed their notice of appeal, plaintiff moved the trial court for attorney fees. Over defendants' objection, the trial court scheduled an evidentiary hearing before the referee on attorney fees. This Court stayed the appeal and remanded the case to the trial court for the hearing. Following the hearing, the referee recommended, in a Supplemental Report, that plaintiff be awarded \$ 9,045 in attorney fees. The appeal then proceeded, and defendants filed objections to the report in the trial court. Because there had been no ruling on those objections by the trial court when the appeal was decided, there was not yet a final, appealable order from the trial court on the issue of attorney fees. This Court, therefore, lacked jurisdiction to hear plaintiff's cross-appeal on that issue and dismissed it. See *id.* On June 17, 1996, the trial court adopted the referee's Supplemental Report. Defendants timely appealed from that decision.

## II.

Defendants' sole assignment of error is that the trial court lacked jurisdiction to grant the motion for attorney fees because the trial court had already entered final judgment in the case before the motion [\*4] was filed. Plaintiff has argued that it is the common practice of the trial court to consider attorney fees after the case has been decided on its merits.

She has also argued that it is judicially economical to do so, because: (1) the attorney would otherwise have to testify during the trial on the merits, which could prejudice the plaintiff; and (2) it would be a potential waste of time to address attorney fees before a decision on the merits has been made, because the plaintiff may not prevail.

It may appear judicially economical to consider attorney fees after, rather than before, the decision on the merits has been made. n1 That does not, however, afford a trial court jurisdiction to do so after a final judgment has been entered. <sup>HNI</sup>In the absence of a statute that provides otherwise, 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. See *Fair Housing Advocates Assoc. Inc. v. James*, 1996 Ohio App. LEXIS 3982 (Sept. 18, 1996), Summit App. No. 17622, unreported, 1996 WL 527200, at \*2. Plaintiff took neither of these steps. In *Fair Housing Advocates*, this Court noted [\*5] that the plaintiff in that case could have moved for bifurcation of the proceedings pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure and thereby reserved the issue of attorney fees until after it had succeeded on the merits. *Id.* Plaintiff's argument that bifurcation may properly take place pursuant to a motion filed after a final judgment entry is without merit:

----- Footnotes -----

n1 As demonstrated by this case, however, consideration of attorney fees after entry of a final judgment would potentially lead to multiple appeals, thereby thwarting judicial economy.

----- End Footnotes -----

We decline to allow [plaintiff] a second chance to litigate an attorney fee issue which might properly have been presented at trial. \*\*\* Likewise, we rule that the trial court had no jurisdiction to modify its final judgment concerning [plaintiff's] attorney fees once its judgment had been properly filed with the clerk. \*\*\*

\*\*\* [Plaintiff] had ample opportunity to either present its attorney fee evidence at trial or properly reserve the matter [\*6] for later.

*Id.* (citations omitted).

This Court is not aware of any statute that allowed an award of attorney fees after the December 9, 1994, judgment entry in this case. That judgment entry provided that "the recommendations [in the Referee's Report] shall serve and be the final judgment entry and order of this Court." The judgment entry was filed with the clerk the same day, and the case was concluded at that point. The trial court did not have jurisdiction to consider a motion for attorney fees filed after that. n2 Defendants' assignment of error is sustained.

----- Footnotes -----

n2 Plaintiff's assertion in her brief that this Court "has already ruled that a subsequent finding of attorney fees in this case [by the trial court] is proper" is incorrect. This Court held, in *Shepherd v. Shea*, 1995 Ohio App. LEXIS 4747 (Oct. 25, 1995), Summit App. No. 17090, unreported, at 17, that it had no jurisdiction to consider plaintiff's cross-appeal because the trial court had not yet issued a final, appealable order in response to plaintiff's motion for attorney fees filed in the trial court. That holding did not address the trial court's jurisdiction to consider plaintiff's request for attorney fees.

----- End Footnotes ----- [\*7]

III.

Defendant's assignment of error is sustained. The judgment of the trial court is reversed.

*Judgment reversed.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellee.

Exceptions.

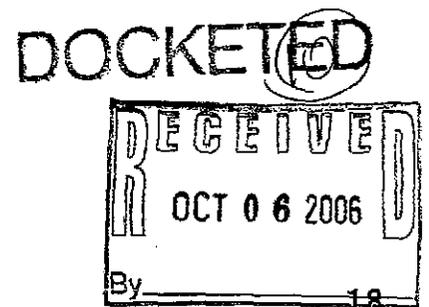
CLAIR E. DICKINSON

FOR THE COURT

BAIRD, J.

REECE, J.

CONCUR



2000 Ohio App. LEXIS 1487, \*

RANDY WENGERD, Appellee v. HOWARD W. MARTIN, et al., Appellants

C.A. NO. 99CA0004

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, WAYNE

COUNTY

2000 Ohio App. LEXIS 1487

April 5, 2000, Decided

**PRIOR HISTORY:** [\*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF WAYNE, OHIO. CASE NO. 96-CV-0534.

**DISPOSITION:** Affirmed in part, reversed in part and cause remanded.

**COUNSEL:** CHARLES A. KENNEDY, Attorney at Law, Wooster, Ohio, for Appellants.

PEGGY J. SCHMITZ, Attorney at Law, Wooster, Ohio, for Appellee.

**JUDGES:** WILLIAM R. BAIRD, SLABY, J., CARR, J., CONCUR.

**OPINION BY:** WILLIAM R. BAIRD

**OPINION:**

DECISION AND JOURNAL ENTRY

Dated: April 5, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Presiding Judge.

On remand from an earlier appeal, the Common Pleas Court of Wayne County ordered Randy Wengerd to pay rent to Howard Martin and Esther Martin in the amount of \$ 2,040, but denied the Martins' request for attorney fees and costs. The Martins have appealed from this judgment.

The Martins have asserted that the trial court erred by (1) reducing the monthly rent for the period of litigation; (2) denying their request for attorney fees; and (3) refusing to tax the transcript expenses of the prior appeal to Wengerd as costs.

I

#### A. Procedural Background

Wengerd entered [\*2] into an agreement to lease farmland owned by the Martins from May 1, 1993, to April 30, 1997. The agreement also contained a provision through which Wengerd could purchase the property from the Martins toward the end of the lease period. Under the terms of the lease, Wengerd was to use the premises exclusively and continuously for the purpose of conducting a general purpose dairy farm. Wengerd failed to do so and the Martins filed a claim for restitution of the premises, back rent, and attorney fees. Their claim was filed as a counterclaim to a complaint by Wengerd seeking specific performance on the purchase option. n1

----- Footnotes -----

n1 All matters related to the purchase option were resolved in the prior appeal. Wengerd v. Martin, 1998 Ohio App. LEXIS 2038 (May 6, 1998), Wayne App. No. 97CA0046, unreported.

The counterclaim made by the Martins was framed as an action for forcible entry and detainer. R.C. 1923.01. On December 9, 1996, the Martins gave Wengerd a three day notice that "on or before December 12, 1996, [he was] to vacate and leave the premises." See R.C. 1923.04. On December 12, 1996, the day before the Martins could have filed their action for forcible entry and detainer pursuant to R.C. 1923.01, Wengerd filed a complaint seeking specific performance. Martin filed a counterclaim for restitution of the premises, and for damages arising out of Wengerd's continued occupancy from December 1996 on. Because neither party asserted that a forcible entry and detainer claim could not properly be brought as a counterclaim to a claim for specific performance, that question is not examined here. We treat the counterclaim as subject to the law governing forcible entry and detainer claims to the extent necessary to resolve the claim for back rent.

----- End Footnotes----- [\*3]

The trial court dismissed the counterclaim for forcible entry and detainer, rent, and attorney fees. On appeal, the Martins "claimed the court erred in dismissing their counterclaim for *restitution and for rent* beginning December 1996." (Emphasis added.)

Wengerd v. Martin, 1998 Ohio App. LEXIS 2038, \*8-9 (May 6, 1998), Wayne App. No. 97CA0046, unreported. In remanding the matter to the trial court, this court noted, "Given our reversal of the trial court's order, we find this error well taken and remand *these issues* to the trial court for determination." (Emphasis added.) *Id.*

On remand the Martins dismissed the claim for restitution of the premises, because Wengerd surrendered possession of the premises before the matter came to trial. The counterclaim for rent was tried. In its remand judgment on the counterclaim, the trial court observed that the Martins had refused to accept tendered rent checks for the first two months during which Wengerd had possession of the premises and paid no rent. The court determined that Wengerd was using only the house trailer and the dairy barn, and prorated the rent according to Schedule 1 that was attached to the lease. Of the \$ 625 monthly rent, Schedule [\*4] 1 assigned \$ 240 of it to the trailer, \$ 100 to the dairy barn, \$ 100 to the old shop, \$ 100 to the machinery shed, and \$ 85 to the pasture. Based on that, the trial court awarded the Martins \$ 340 a month for each of the six months, a total of \$ 2040. n2

----- Footnotes -----

n2 The judgment of the trial court states that the "Martins want \$ 4375.00 in rent for six (6) months (December, 1996, through June, 1997) at \$ 625 a month." The period from December 1996 through June 1997 is seven months. The Martins' request is consistent with a seven month period. The award of the trial court was for six months only.

----- End Footnotes -----

On remand, the Martins again moved the trial court for attorney fees. The Martins asserted that the mutual indemnity clause in the lease agreement required Wengerd to bear the responsibility for attorney fees the Martins incurred as a result of Wengerd's breach of the lease. The trial court denied attorney fees, stating that, "This is an indemnification clause which has no application here."

Finally, the Martins moved [\*5] the trial court to tax the expenses they incurred for the preparation of a transcript, for the purposes of appeal, as costs. The trial court did not rule on the motion to tax the costs of the transcript to Wengerd.

#### Interactions Between the Parties

The essential facts are undisputed. The written lease calls for Wengerd to pay the Martins \$ 625 a month in rent. The lease specifies that "any reference in this lease to the term of the lease shall include not only the primary term, but, where applicable or [*sic*] any period prior to surrender of the Premises." It also includes a covenant by Wengerd that "during the term of this lease \* \* \* he will promptly pay the [\$ 625] rent when due." In the event of default by Wengerd, Martin had the right to both restitution of the premises and to "any rent unpaid under this lease until the expiration of the term thereof."

The lease agreement consistently describes the property being leased as "the Premises," without reference to smaller portions of the property, with two exceptions. The paragraph

labeled, "Description, Construction of Improvements and Use of Premises," describes the various portions of the Martins' property that [\*6] were part of the lease to Wengerd, and designates those portions collectively "the Premises." Similarly, SCHEDULE 1, allocates a portion of the rental fee to each identifiable portion of the leased property. The lease does not provide for Wengerd to rent any smaller portion of the premises.

Wengerd retained possession of the property from the inception of the lease until the end of June 1998. There was no testimony that Wengerd possessed only a portion of the area described as "the Premises" from December 1996 through June 1997, the period during which he did not pay rent. In the 1997 trial, Wengerd was questioned about his possession of the entire premises, and about his possession of the pasture. Wengerd specifically denied having abandoned the premises or the pasture. In the 1998 trial the Martins asserted, without contradiction, that Wengerd had control of the entire premises through June 1998.

Wengerd paid Martin \$ 625 a month from the inception of the lease through November 1996. In November and early December of 1996 each party made demands on the other, which culminated in the instant litigation. On November 1, 1996, the Martins notified Wengerd that they were exercising [\*7] their right under the lease agreement to possession of the premises because Wengerd was in default, and because he had failed to cure the default despite notice to do so. The Martins' notice also informed Wengerd that they intended to hold him "liable for any unpaid rent under the Lease Agreement until the expiration of the term." On December 9, 1996, the Martins served notice on Wengerd,

pursuant to R.C. 1923.04, to vacate the premises within three days or face eviction proceedings.

----- Footnotes -----

n3 Many of the demands are unrelated to the current appeal; the demands recited here are those that are relevant to this decision.

----- End Footnotes-----

Wengerd tendered rent for December 1996 and January 1997, but the Martins refused to accept it. Wengerd did not pay any rent from December 1996 through June 1997. During the 1997 trial, Wengerd agreed that the rent is "Six Hundred and Twenty-Five Dollars a month" and testified that, "I expect to pay [the rent]" for the period during which he lived there rent-free. Following [\*8] the decision in the 1997 trial, Wengerd resumed paying \$ 625 a month for the premises. n4 From December 1996 through Wengerd's surrender of possession of the property to them in July 1998, the Martins continued to seek rent in the amount of \$ 625 a month.

----- Footnotes -----

n4 Although it was not explicitly stated during the trial, the only reasonable conclusion that can be drawn from the testimony is that the amount paid from July 1997 through June 1998 was \$ 625 a month. Howard Martin was questioned about the rent under the lease. He responded that it was \$ 625. After explaining that Wengerd lived on the premises until June 1998, Martin was asked, "was there a part of that time where the rent wasn't paid, Six Hundred and Twenty-Five Dollars?" He responded, "Yeah, back to

December of '96 through June of '97." A similar exchange took place when he was asked about the fair market rental value of the property.

----- End Footnotes -----

## II

### A. Rent Reduction

*HN1*

In Ohio, an individual who lawfully enters premises, but remains in occupancy of the [\*9] premises after his right to do so has terminated is a tenant at sufferance. Palmer v. O'Leary, 1975 Ohio App. LEXIS 7945, \*5 (Dec. 3, 1975) Summit App. No. 7745, unreported (Cook, J., dissenting). In that event, the landlord may treat the tenant as a trespasser, or may choose to hold the tenant to a new lease term.

In such cases, the conduct of the parties determines whether an implied contract arises.

For example, *HN2* if the tenant holds over and continues paying the same rent, an implied contract arises and is governed by the provisions of the original lease. The same result is reached if a tenant remains on the premises and fails to pay the rent.

(Internal citations omitted.) Steiner v. Minkowski (1991), 72 Ohio App. 3d 754, 762, 596 N.E.2d 492. Unless modified by the parties, the terms of the implied lease are those previously agreed to by the parties. See Bumiller v. Walker (1917), 95 Ohio St. 344, 349, 116 N.E. 797.

Wengerd lawfully entered the premises he rented from the Martins pursuant to a written lease. He breached that lease, and his contractual right to occupy the premises pursuant to the written lease terminated sometime before November 30, 1996. See [\*10] Wengerd v. Martin, 1998 Ohio App. LEXIS 2038, \*6-9 (May 6, 1998), Wayne App. No. 97CA0046, unreported. Wengerd was, from the termination of his contractual right to occupy the premises, a tenant at sufferance.

The Martins had the option of treating Wengerd as a trespasser or as a holdover tenant. Although the trial court judgment did not explicitly characterize the relationship between the parties, it referred to the damages owed to the Martins by Wengerd as rent. We understand this to mean that the trial court considered the parties to have a landlord-tenant relationship for the period from December 1996 through June 1997, rather than a landowner-trespasser relationship in which case the damages would probably not have been described as rent. Such a determination is consistent with the actions of the parties.

HN3

Because Wengerd was treated as a holdover tenant by the Martins, there is a rebuttable presumption that the terms of the implied lease are those to which the parties had earlier explicitly agreed. See Craig Wrecking Co. v. S. G. Loewendick & Sons, Inc. (1987), 38 Ohio App. 3d 79, 81-82, 526 N.E.2d 321. That presumption can be rebutted by a showing that the parties modified [\*11] their agreement either explicitly, or by their conduct. *Id.* Therefore, the trial court's award of a diminished monthly rent would only have been proper if the undisputed facts supported the legal conclusion that the parties had modified

the terms of the implied lease.

The trial court did not explicitly find that the parties modified either the monthly rent, or the portion of the premises occupied by Wengerd when he became a tenant at sufferance. If the judgment is read as implicitly making such a finding, the undisputed evidence does not support it. There was no testimony that the parties expressly modified their agreement. Likewise, there was no testimony from which a conclusion could be drawn that the parties had, by their conduct, modified their agreement.

The original lease between the parties was for an area collectively referred to in the lease as the premises. The lease did not provide for Wengerd to selectively rent portions of the premises. Wengerd testified that he had not abandoned the premises, and specifically that he had not abandoned the pasture. Martin testified that Wengerd was in possession of the entire premises.

The trial court awarded rent for [\*12] the trailer and for the dairy barn but not for shop, the machinery shed, and the pasture. Implicit in that award is a finding that Wengerd only possessed the house trailer and the dairy barn for the seven month period in question. This is explicitly contradicted by Wengerd's testimony that he had not abandoned the pasture, a portion of the premises for which rent was denied. It is also generally contradicted by the testimony of Wengerd and Martin that Wengerd possessed or, in the alternative had not abandoned, the entire premises until the end of June 1998.

Possession of the entire premises aside, the parties could still have agreed to modify the rent during the period. The conduct and statements of the parties, however, do not support this conclusion. Wengerd paid rent in the amount of \$ 625 a month until the start of the legal action. During the initial trial Wengerd testified that the rent was \$ 625 a month, and that he expected to pay it for the period from December 1996 through the June 1997 trial court decision. Following the initial decision of the trial court Wengerd resumed paying rent, apparently at \$ 625 a month, and continued for a year thereafter.

In like manner, [\*13] the Martins have consistently sought damages in the amount of \$ 625 a month for December 1996 through June 1997. On the advice of their attorney, the Martins did refuse the rent tendered by Wengerd in December 1996 and January 1997.

Because <sup>HN4</sup> acceptance of future rent is inconsistent with maintaining an action in forcible entry and detainer, the Martins could not accept rent from Wengerd without jeopardizing their attempt to evict him. See Presidential Park Apts. v. Colston (App. 1980), 17 Ohio Op. 3d 220, 221. The refusal to accept rent, the acceptance of which might have waived their right to evict, does not indicate their agreement to a lesser rent.

The express intent of the original lease was that Wengerd would be liable for the full amount of rent under the contract, even if he defaulted during the contract period. The term of the original lease continued through April 30, 1997, covering five of the seven months for which rent was not paid. In the notice of default they served on Wengerd, the Martins repeated their understanding that, even though he had defaulted, Wengerd was still liable for rent for the full primary term of the lease.

The lease explicitly [\*14] provides that the phrase "term of the lease" includes any period prior to surrender of the premises. Wengerd did not surrender possession of the premises until July 1998. The phrase "during the term of the lease" is used to describe Wengerd's covenant to pay rent. It is likely that the drafter of this clause contemplated a mutually agreeable extension of the original lease. Nonetheless, the language suggests that the parties intended that so long as Wengerd had not surrendered possession he was subject to the covenants made in the lease, including the covenant to pay the \$ 625 monthly rent.

Pursuant to their lease agreement, Wengerd had a contractual obligation to pay \$ 625 a month rent to the Martins through April 30, 1997. In addition, because the Martins elected to treat Wengerd as a tenant, rather than a trespasser, Wengerd owes them rent pursuant to the implied contract. The terms of that implied contract are presumed to be those explicitly agreed to by the parties in their prior written lease. We find that the undisputed conduct of the parties during the holdover period did not modify either the estate or the monthly rent, to which they had previously agreed, as a matter [\*15] of law.

The Martins' first assignment of error is sustained.

#### B. Attorney Fees

HN5

A party seeking attorney fees must generally present evidence to support an award of fees

before the final judgment is entered. See Shepherd v. Shea, 1997 Ohio App. LEXIS 2037, \*4 (May 14, 1997), Summit App. No. 17974, unreported. If it is impracticable to present a request for attorney fees as part of the case, the party seeking fees may request a bifurcation of the trial, pursuant to Civ.R. 42(B), so that the matter of fees can be litigated separately from liability. Fair Housing Advocates Assoc. Inc. v. James, 114 Ohio App. 3d 104, 107, 682 N.E.2d 1045 (1996). <sup>HN6</sup> A party who fails to raise an error on initial appeal, waives the right to have that asserted error reviewed later. See Whitehead v. General Tel. Co. (1969), 20 Ohio St. 2d 108, 254 N.E.2d 10, paragraph one of the syllabus, overruled in part, on other grounds (1995), Grava v. Parkman Twp., 73 Ohio St. 3d 379, 653 N.E.2d 226, syllabus.

<sup>HN7</sup>

When a case is remanded for a limited purpose, "the trial court [is] obliged to accept all issues previously adjudicated as finally settled." Blackwell v. Internatl. Union, UAW (1984), 21 Ohio App. 3d 110, 112, 487 N.E.2d 334. [\*16]

In their initial pleading, the Martins counterclaimed for restitution of the property to their possession, back rent, and attorney fees. Although the request for attorney fees was part of their counterclaim, the Martins did not introduce evidence of their attorney fees or of Wengerd's purported obligation to pay them. Nor did they move for a bifurcation of the trial so that the matter of attorney fees could be considered separately. Because 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, they have waived any right they may have had to attorney fees.

Although the trial court initially dismissed their request for attorney fees when it dismissed their entire counterclaim, the Martins did not raise the dismissal of their claim for attorney fees as part of their appeal of the June 1997 final judgment of the trial court. The error, if it was one, existed at the time of the June 1997 judgment. Because the Martins did not assert as part of their initial appeal that the dismissal of their request for attorney fees was improper, they waived their right to assert that [\*17] error for review during a subsequent appeal.

----- Footnotes -----

If the Martins believed that they raised the issue of attorney fees on initial appeal, but that it was not properly reflected in the judgment it was their responsibility to bring their concern to the attention of this court by means of a motion for reconsideration, pursuant to App.R. 26(A).

----- End Footnotes -----

The Martins have already had opportunity for a full review of any potential errors made by the trial court. As a result of that review, this court remanded the matter for a limited and specific purpose, saying,

In their fourth and final assignment of error, the Martins claim the court erred in dismissing their *counterclaim for restitution and for rent beginning December 1996*

when, due to the dispute involved herein, the Martins began refusing to accept Wengerd's rent payments although he remained on the property. \* \* \* Given our reversal of the trial court's order, we find this error well taken and remand *these issues* to the trial court for determination.

(Emphasis [\*18] added.) Wengerd v. Martin, 1998 Ohio App. LEXIS 2038, \*8-9 (May 6, 1998), Wayne App. No. 97CA0046, unreported. The issues the trial court was permitted to revisit on remand were rent and restitution of the premises to the Martins. All other issues that were part of the initial adjudication, were finally settled by our prior judgment.

The Martins' second assignment of error is overruled.

#### Transcript Costs

The process by which the expenses of a transcript are handled by the office of the Clerk of Courts is governed by <sup>HN8</sup> R.C. 2303.21. It provides that "the expense of procuring such transcript \* \* \* shall be taxed in the bill of costs and recovered as in other cases."

<sup>HN9</sup> The rules of appellate procedure provide for the assessment of costs to the parties to an appeal. App.R. 24. The assessment of the costs is exclusively within the jurisdiction of the appellate court. Munroe v. Munroe (1997), 119 Ohio App. 3d 530, 545, 695 N.E.2d 1155, quoting Crest Mgt., Inc. v. McGrath, 1994 Ohio App. LEXIS 2997, \*8 (July 6, 1994), Summit App. No. 16579, unreported. Whatever apportionment is made by the court of appeals, the costs assessed include, by definition, "expense incurred in

preparation of the record, [\*19] including the transcript of proceedings." App.R. 24(B).

On remand, the Martins moved the trial court to tax the costs of the transcript for the initial appeal to Wengerd. The trial court did not act on the motion before it rendered judgment, and by doing so it implicitly denied the motion. Solon v. Solon Baptist Temple, Inc. (1982), 8 Ohio App. 3d 347, 351-352, 457 N.E.2d 858. Whether or not the proper party ultimately paid for preparing the transcript of proceedings for appeal, the trial court's *sub silentio* denial of the Martins' motion was not error. n6 <sup>HNI0</sup> Because the assessment of costs on appeal is exclusively within the jurisdiction of the appellate court, the trial court could not properly have granted their motion.

----- Footnotes -----

n6 In the initial appeal, this court ordered, "Costs taxed to appellee." Wengerd v. Martin, 1998 Ohio App. LEXIS 2038 (May 6, 1998), Wayne App. No. 97CA0046. Those costs should have included, by definition, the expenses of preparation of the transcript and "were to be recovered as in other cases." R.C. 2303.21. The record does not contain an accounting of the costs for the previous appeal, nor was one submitted by either party, so it is impossible for this court to determine whether the costs actually paid by Wengerd included the expenses of the preparation of the transcript.

----- End Footnotes -----

[\*20]

The Martins third assignment of error is overruled. III

The Martins first assignment of error is sustained because the trial court erred, as a matter of law, by reducing the rent Wengerd owed to the Martins from December 1996 through June 1997. Because the Martins failed to pursue the matter of attorney fees at the proper time and by the proper means, they have waived their right to appellate review of the earlier trial court dismissal of their claim for attorney fees. Their second assignment of error is overruled. The Martins' third assignment of error is overruled because the trial court did not have jurisdiction to grant the Martins' motion that the transcript for the prior appeal be taxed as costs.

The judgment of the trial court is reversed, as to the rent Wengerd owes to the Martins, and the matter is remanded to the trial court. As a matter of law, Wengerd owes the Martins \$ 625 rent per month for each of the seven months from December 1996 through June 1997. The trial court is instructed to enter judgment in favor of the Martins for \$ 4375, plus interest from the date of the trial court judgment and costs. The remainder of the judgment of the trial court is affirmed. [\*21]

*Judgment affirmed in part,  
reversed in part and cause,  
remanded with instructions.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to both parties equally.

Exceptions.

WILLIAM R. BAIRD

FOR THE COURT

SLABY, J.

CARR, J.

CONCUR

**§ 3**

**CONSTITUTION OF THE STATE OF OHIO**

**Article IV - Judicial**

**§ 3 Court of appeals**

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**§ 3 Court of appeals**

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) 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.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

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**§ 4115.16****Statutes & Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4115: WAGES AND HOURS ON PUBLIC WORKS****4115.16 Filing complaint.****4115.16 Filing complaint.**

(A) An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred or that the violation was not intentional, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertain to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, 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.

Effective Date: 07-01-2000

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**§ 2505.02****Statutes & Session Law****TITLE [25] XXV COURTS – APPELLATE****CHAPTER 2505: PROCEDURE ON APPEAL****2505.02 Final orders.****2505.02 Final orders.**

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(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:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(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.

(5) An order that determines that an action may or may not be maintained as a class action.

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19,

and 2315.21 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005

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**§ RULE 54**

**Ohio Court Rules**

**RULES OF CIVIL PROCEDURE**

**TITLE VII. JUDGMENT**

**RULE 54 Judgments; Costs**

**RULE 54. Judgments; Costs**

**(A) Definition; Form.**

"Judgment" as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code. A judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings.

**(B) Judgment upon multiple claims or involving multiple parties.**

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.

**(C) Demand for judgment.**

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings.

**(D) Costs.**

Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

[Effective: July 1, 1970; amended effective July 1, 1989; July 1, 1992; July 1, 1994; July 1, 1996.]

Staff Note (July 1, 1996 Amendment)

RULE 54(A) Definition; Form

The amendment changed the rule's reference from "report of a referee" to "magistrate's decision" in division (A) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. The amendment is technical only and no substantive change is intended.

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**§ RULE 58**

**Ohio Court Rules**

**RULES OF CIVIL PROCEDURE**

**TITLE VII. JUDGMENT**

**RULE 58 Entry of Judgment**

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**RULE 58. Entry of Judgment**

**(A) Preparation; entry; effect.**

Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.

**(B) Notice of filing.**

When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

**(C) Costs.**

Entry of the judgment shall not be delayed for the taxing of costs.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1989.]

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