

IN THE SUPREME COURT OF OHIO

VIL LASER SYSTEMS, LLC, :
 :
 :
 Plaintiff-Appellee, : On Appeal From the
 : Shelby County Court
 : of Appeals, Third
 v. : Appellate District,
 : Case No. 17-07-02
 :
 SHILOH INDUSTRIES, INC., :
 :
 :
 Defendant-Appellant. :

07-0996

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SHILOH INDUSTRIES, INC.

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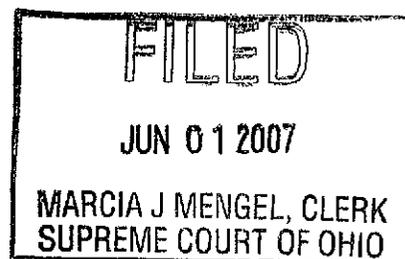


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**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST**

It is a universally recognized principle that when a court gives a party a choice between two different results – such as the choice between a remittitur or a new trial on damages – the order does not become final until the party makes its choice, or the window of time to make that choice closes.

Yet the Third District Court of Appeals, the first Ohio court to consider the issue, decided to the contrary. In doing so, it prevented the parties from litigating the merits of their respective appeal and cross-appeal, undermined the principles of judicial economy and finality of judgments, and unjustifiably set Ohio apart from other jurisdictions, both state and federal. This Court should avail itself of the opportunity to hold that this universal rule is the law of Ohio as well.

Furthermore, under Ohio law, a party's right to appeal cannot be deprived without due process. The Third District recharacterized an amended order of the trial court as a nunc pro tunc order and held that defendant's notice of appeal was untimely as a result. The Court should not permit an appellate court to recast a trial court's order in a manner that divests a party of its vested right to appeal.

STATEMENT OF THE CASE AND FACTS

On September 18, 2006, the Shelby County Court of Common Pleas entered judgment on a jury verdict against defendant Shiloh Industries in the amount of \$2.29 million plus interest.¹ Shiloh filed a motion for judgment notwithstanding the verdict, new trial, and/or remittitur.

In a December 15, 2006, order the trial court found the jury award to be excessive and contrary to law.² It granted a new trial on damages, but gave the plaintiff, VIL Laser Systems, the option to accept a remittitur of \$2,016,416.22 in the alternative. The trial court gave the plaintiff 14 days to choose. On December 29, 2006, the plaintiff accepted the remittitur.³

On January 16, 2007, the trial court issued an amended judgment, as its original order had miscalculated the amount of prejudgment interest.⁴ It gave the plaintiff the right to accept a remittitur of \$1,881,396.16 or face a new trial on damages. The trial court gave the plaintiff a new 14-day time period to decide. On January 30, 2007, the plaintiff accepted the new remittitur.⁵

Shiloh filed a notice of appeal to the Third District on January 25, 2007. VIL filed a notice of cross-appeal on February 2. The Third District threw out the appeal.⁶ It acknowledged that the appeal was timely if the 30-day period started running after the plaintiff made its election of remedies. Nevertheless, it held that the time for appeal started running on December 15, and that the January 25

¹ See Appendix B.

² See Appendix C.

³ See Appendix D.

⁴ See Appendix E.

⁵ See Appendix F.

⁶ See Appendix A.

notice of appeal was untimely. “Notwithstanding federal interpretation to the contrary,” held the Third District, “we are not persuaded that it took Appellee’s ‘consent’ to accept remittitur to effectuate the trial court’s intent or judgment.”⁷ It dismissed both Shiloh’s appeal and VIL’s cross-appeal.

⁷ *Id.* at 4.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition Of Law No. I: It is a universal proposition of law that when a court allows a plaintiff to choose between two rulings – such as remittitur vs. a new trial on damages – the order is not final until the plaintiff makes his election, or the window of time to choose closes. The Third District was “not persuaded” by this rule and dismissed the appeal as untimely. Ohio should not be the only jurisdiction in the country that rejects this principle of law.

A. The Court should bring Ohio into harmony with other jurisdictions.

On December 15, 2006, the trial court gave plaintiff VIL Laser Systems a 14-day window of time to choose between accepting a remittitur or a new trial on damages. On the last day of the 14-day window – December 29 – the plaintiff accepted the remittitur. Defendant Shiloh Industries filed its notice of appeal on January 25, 2007. That date was more than 30 days after December 15, but less than 30 days after December 29.

Whether the Third District correctly dismissed the appeal as untimely hinges upon whether the 30-day clock runs from December 15 or December 29. This is a question of first impression in Ohio.

Federal and state courts across the country consistently hold that an order is not final – and, where applicable, the appeal clock does not start running – until the plaintiff elects a remedy or the window of time to choose expires. This includes the United States Supreme Court,⁸ the Second Circuit,⁹ the Third

⁸ See *City of Paducah v. East Tennessee Tel. Co.* (1913), 229 U.S. 476, 480; *Barker v. Craig* (1888), 127 U.S. 213, 215-16.

⁹ See *Ortiz-Del Valle v. N.B.A.* (1999), 190 F.3d 598, 600 (2d Cir.) (“Where the plaintiff elects the remittitur, the defendant’s time for filing the notice of appeal runs from the date of entry of the amended judgment reduced as a result of the remittitur.”); *Evans v. Calmar S.S. Co.* (1976), 534 F.2d 519, 522 (2d Cir.).

Circuit,¹⁰ the Fourth Circuit,¹¹ the Fifth Circuit,¹² the Sixth Circuit,¹³ the Ninth Circuit,¹⁴ the Tenth Circuit,¹⁵ the Eleventh Circuit,¹⁶ Alabama,¹⁷ Arizona,¹⁸

¹⁰ *Mauriello v. Univ. of Med. and Dentistry of New Jersey* (1986), 781 F.2d 46, 49 (3d Cir.) (“The amount of the judgment was not fixed until plaintiff filed her consent, and at that point the time for appeal began to run. The notice of appeal was filed within 30 days of the plaintiff’s acceptance, and therefore was timely.”).

¹¹ *American Canoe Ass’n. v. Murphy Farms, Inc.* (2003), 326 F.3d 505, 514-15 (4th Cir.); *Fayetteville Investors v. Commercial Builders, Inc.* (1991), 936 F.2d 1462, 1469-70 (4th Cir.).

¹² *Howell v. Marmpegaso Compania Naviera, S.A.* (1978), 566 F.2d 992, 993 (5th Cir.) (“acceptance of the remittitur rendered the judgment final and appealable, and actuated the 30-day time limit within which notice of appeal must be filed”).

¹³ *Anderson v. Roberson* (2001), 249 F.3d 539, 542 (6th Cir.) (“a district court order giving the plaintiff a choice between remittitur or a new trial is not a final, appealable order”).

¹⁴ *Gila River Ranch, Inc. v. United States* (1966), 368 F.2d 354, 357 (9th Cir.) (“The time for appeal in a case involving the United States . . . commenced to run upon the entry of the order accepting the remittitur.”); see also *Eaton v. National Steel Products Co.* (1980), 624 F.2d 863, 864 (9th Cir.).

¹⁵ *McKinney v. Gannett Co., Inc.* (1982), 694 F.2d 1240, 1248 (10th Cir.) (“By the terms of the ‘Final Judgment’ McKinney still has the option to rescind or not rescind. Thus, a final judgment has not been entered by the district court. An appellate opinion at this juncture would be advisory only.”).

¹⁶ *Wright v. Preferred Research, Inc.* (1990), 891 F.2d 886, 888 (11th Cir.) (“The district court . . . denied the motion for new trial conditionally upon Wright’s acceptance of a remittitur. When Wright accepted the remittitur on December 28, 1988, the judgment became final and appealable, actuating the 30-day period within which a notice of appeal must be filed.”).

¹⁷ *Parsons v. Aaron* (2002), 849 So.2d 932, 936 (Ala.) (“On July 5, 2001 the trial court unconditionally denied all posttrial motions except for the Parsons’ motion for a new trial, which the court denied conditioned upon Aaron’s acceptance of a remittitur. Because that remittitur had not been accepted as of July 6, that aspect of the Parsons’ posttrial motions remained pending on July 6, 2001. Because the Parsons’ notices of appeal were filed on August 17, 2001, 42 days after July 6, the notices of appeal were timely filed.”).

¹⁸ *Harris v. Howard P. Foley Co.* (1965), 2 Ariz. App. 389, 391 (30-day period does not run until election made or window of time expires); *Arizona Land Corp. v. Sterling* (1967), 5 Ariz. App. 4, 7 (order granting either a new trial or remittitur becomes appealable when brought “to a conclusion” by acceptance of remittitur and a formal order signed by the trial judge).

Arkansas,¹⁹ Colorado,²⁰ Florida,²¹ Louisiana,²² Massachusetts,²³ Missouri,²⁴ Pennsylvania,²⁵ and even the Northern Mariana Islands.²⁶

These decisions make eminent sense. Whether the judgment is a new trial on damages or a remittitur depends upon the choice made by the plaintiff. Until the election is made, the judgment cannot be determined, and thus it cannot be final.

Against this body of law, the Third District held that it was “not persuaded that it took Appellee’s consent to accept remittitur to effectuate the trial court’s

¹⁹ *Horton v. Eaton* (1975), 258 Ark. 987, 991 (time limitation for filing appeal commences when remittitur is accepted and order disposing of litigation issued).

²⁰ *Kimmey v. Peek* (1983), 678 P.2d 1021, 1023 (Colo. App.) (period for filing notice of appeal commenced no earlier than the acceptance of remittitur, because “the ruling of the trial court was conditioned upon the conduct of the [parties] and the operative date of its order was thus indeterminate”).

²¹ *Stanberry v. Escambia County* (2002), 813 So.2d 278, 280 (Fla. App.) (“[w]hen an order granting remittitur or, in the alternative, a new trial is entered, subsequent rejection of remittitur can transform the order into an order granting a new trial, which may be appealed.”).

²² *VaSalle v. Wal-Mart Stores, Inc.* (2001), 801 So.2d 331, 336 (La.) (“The reasoning of the *Anderson [v. Roberson]* court is sound and we agree with it.”).

²³ *Okongwu v. Stephens* (1986), 396 Mass. 724, 729 (“It was not until the plaintiff accepted the remittitur on July 11, 1984, that the defendants’ motion for a new trial effectively was denied. Therefore, it was on July 12, 1984, that the new appeal period began to run . . . and that is the date from which the timeliness of this appeal must be measured.”).

²⁴ *Cotter v. Miller* (2001), 54 S.W.3d 691, 695 (Mo. App.) (“The trial court’s ruling that the Cotters had fifteen days to accept the remittitur means that the judgment became appealable at the conclusion of the fifteen day period . . . Therefore, the judgment became appealable fifteen days later on April 1, 2000. Under Rule 81.04, the Cotters had ten days from April 1, 2000, to file the notice of appeal.”).

²⁵ *Atene v. Lawrence* (1972), 220 Pa. Super. 444, 446 (“Until such election is made, an appealable final order cannot be entered. If the plaintiff decides to remit, a judgment may be entered on the verdict as remitted and a judgment appealable by the defendant exists. If the plaintiff refuses to remit, an order granting a new trial should be entered. Such an order is also appealable.”).

²⁶ *Ishimatsu v. Royal Crown Ins. Corp.* (2006), 2006 WL 1049667, *2 (N. Mariana Islands).

intent or judgment.”²⁷ But remittitur *required* VIL’s consent.²⁸ And while the trial court’s “intent” may have been clear in the December 15 order – to give the plaintiff a choice between two alternatives – its “judgment” was not. The judgment was unknown until VIL made its choice. The Third District’s faulty reasoning does not warrant a departure from the uniform law of the land.

There are two ways the Court could handle the time for appeal. First, a conditional judgment could automatically become final upon the plaintiff’s election or when the window of time to choose closes, actuating the 30-day time to appeal.²⁹ Alternatively, the Court could require lower courts to enter a final judgment under Rule 58 after the election, as some courts have required, and have the 30-day clock run from the entry of the later judgment.³⁰ Some of this Court’s prior rulings appear to reflect this latter approach, ordering the entry of judgment after the election is made.³¹

²⁷ Appendix A at 4.

²⁸ *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 444, 715 N.E.2d 546, 556; *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, 290, 166 N.E. 186, 191 (“Neither the trial court nor any reviewing court has power or authority to reduce a verdict on any grounds without the assent of the prevailing party[.]”).

²⁹ *See, e.g., Howell*, 566 F.2d at 993 (acceptance of remittitur automatically starts 30-day time to appeal).

³⁰ *See, e.g., Ortiz-Del Valle*, 190 F.3d at 599 (court obligated to issue new judgment under Fed. R. Civ. P. 58 after election is made).

³¹ *See, e.g., Silverglade v. Von Rohr* (1923), 107 Ohio St. 75, syllabus, 140 N.E. 669 (“A trial court upon finding the damages assessed by a jury to be excessive, not the result of passion or prejudice, may order a remittitur of the excess as a condition precedent to entering judgment upon the verdict, and *upon the remittitur being made may enter judgment* for the amount of the verdict, less the remittitur.”) (emphasis added); *Chester Park Co.*, 120 Ohio St. at 281-82, 166 N.E. at 188-89 (“If a remittitur in the above sum is entered by the plaintiff below the judgment will be affirmed, otherwise reversed, and a new trial ordered.”); *Bartlebaugh v. Pennsylvania R. Co.* (1948), 150 Ohio St. 387, 389, 82 N.E.2d

Using the first approach, Shiloh had until January 29 to appeal. It filed its notice of appeal on January 25, making the appeal timely. Using the latter approach, the trial court has yet to issue a final judgment reflecting VIL's choice. Any appeal, therefore, is premature, and awaits this Court's instruction to the trial court to enter judgment reflecting VIL's consent to the second remittitur.

B. If the Third District's ruling stands, parties may have to appeal before a plaintiff has decided whether to accept a remittitur. This undermines judicial economy and the principles behind remittitur.

In *Wightman v. Consolidated Rail Corp.*, this Court emphasized the importance of remittitur as a tool to improve judicial economy:

Remittitur plays an important role in judicial economy by encouraging an end to litigation rather than a new trial. The trial court sets forth persuasively the great value of a conclusion. There are times when an end has its own value, with justice delivered, and not further delayed. A final judgment brings closure, certainty, and possibly a commitment to changed future behavior. These are societal benefits as well as benefits to the parties. Wrongs are righted through judgments. Our justice system does not work without finality. Until then, the system's great value is in limbo. We take little from it, but we continually feed it with our energies, intellect, and emotions. The judge and both parties play a role in ending litigation. The law surrounding remittitur should reflect that.³²

If the Third District's reasoning stands, however, judicial economy will suffer. Parties will be forced to appeal before the plaintiff's election deadline if the 30-day time to appeal is fast approaching, or if the plaintiff's window of time

853, 854 ("For error of the court in refusing to give request No. 6, this judgment must be reversed, unless the defendant in error shall, within 30 days from this date, enter a remittitur of that amount, with interest, and in that event the judgment, less \$700, and interest, will be affirmed; otherwise the entire judgment of the superior court and that of the Court of Appeals affirming the same will be reversed and cause remanded for a new trial.") (citing *Hutton v. Curry* (1918), 93 Ohio St. 339, 344, 112 N.E. 1019, 1020).

³² (1999), 86 Ohio St.3d 431, 443, 715 N.E.2d 546, 556.

to decide exceeds 30 days. Then, depending upon the plaintiff's decision, the parties will have to decide whether to withdraw their appeals or modify them. This is a poor system for conserving judicial resources.

Moreover, if filing an appeal divests the trial court of the jurisdiction to allow acceptance of the remittitur,³³ the rule of the Third District will undermine remittitur's central place in promoting finality of judgments in this State.

C. The Third District's other findings do not make this appeal any less certworthy.

The Third District made two other findings that do not make this appeal any less certworthy.

First, it held that the trial court's amended order of January 16 was issued nunc pro tunc to December 15.³⁴ As set forth below, this holding violated due process and constitutes an independent ground for reversal. But if the 30-day time to appeal did not start to run until the date of VIL's election, the appeal was timely whether or not the order was cast as "amended" or "nunc pro tunc." The January 25 notice of appeal was filed before the 30-day window of time expired after December 29 (the first consent to remittitur), and was filed before January 30 (the second consent to remittitur).

Second, the Third District stated in dicta that Shiloh's notice of appeal was defective because it did not specifically reference the December 15 order. But any

³³ One court of appeals has held that a plaintiff can accept a remittitur after the filing of a notice of appeal. See *Blancett v. Nationwide Care, Inc.* (1998), 1999 WL 3958, *8 (Ohio App. 5 Dist.); but compare *Powell v. Turner* (1984), 16 Ohio App.3d 404, 405, 476 N.E.2d 368, 370 (appeal divests trial court of jurisdiction to consider motion for new trial or remittitur).

³⁴ See Appendix A at 3-4.

alleged deficiency did not affect the validity of the appeal. That question hinges solely on timeliness.³⁵ In fact, there is no deficiency, as the notice of appeal appropriately references – and attaches – the final order issued by the trial court.³⁶ And even were there a deficiency, dismissal would be inappropriate, as VIL can claim no prejudice³⁷ and this Court desires that appeals be determined on their merits.³⁸ The Third District itself has so held.³⁹

³⁵ *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 322-23, 649 N.E.2d 1229, 1231 (abuse of discretion to dismiss appeal based on technical violation where mistake made in good faith, no prejudice accrued, dismissal was disproportionate sanction, client was punished for the fault of counsel and dismissal frustrated overriding objective of deciding cases on their merits).

³⁶ See *Sharp v. Sharp* (2002), 2002 WL 378090, *2 (Ohio App. 10 Dist.) (“appellant’s notice of appeal adequately identifies the final judgment appealed from, which incorporates all prior orders of the trial court which were not final appealable orders and consequently could not be independently appealed”); *Bard v. Society Nat. Bank* (1998), 1998 WL 598092, *2 (Ohio App. 10 Dist.) (“all interlocutory orders and decrees are merged into the final judgment, and as such, an appeal from the final judgment brings up all interlocutory rulings so merged with it”).

³⁷ See, e.g., VIL cross-appeal referencing both December 15 and January 16 orders. And if no final judgment has yet issued, Shiloh may yet have time to correct any alleged deficiency.

³⁸ See *Transamerica*, 72 Ohio St.3d at 322, 649 N.E.2d at 1231; *Barksdale v. Van’s Auto Sales, Inc.* (1988), 38 Ohio St.3d 127, 128, 527 N.E.2d 284, 285 (rejecting dismissal where notice of appeal referenced trial court’s order denying j.n.o.v. or new trial but did not cite to final judgment); *Maritime Manufacturers, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 260, 436 N.E.2d 1034, 1036 (“any mistake in appealing from the order denying the motion for new trial rather than from the judgment should be treated as harmless error and . . . the appeal should be treated as if arising from the final judgment.”).

³⁹ See, e.g., *Hale v. Rosenberg* (2004), 2004 WL 491576, *3 (Ohio App. 3 Dist.); *State v. Barker* (1988), 1988 WL 126750, *1 (Ohio App. 3 Dist.); *Wise, Childs and Rice Co., L.P.A. v. Hatcher* (1989), 1989 WL 156161, *3 (Ohio App. 3 Dist.); *Shaffer v. Shaffer* (1987), 1987 WL 14997, *2 (Ohio App. 3 Dist.).

Proposition Of Law No. II: An appellate court cannot relabel a trial court’s amended order as a nunc pro tunc order and deprive a party of its vested right to appeal in the process.

Even if the Court rejected the hornbook rule, Shiloh’s appeal was still timely filed within 30 days of the amended judgment.

Seeking to correct the trial court’s miscalculation of the interest component of the remittitur in its December 15 order, Shiloh sought a nunc pro tunc order with a corrected total figure. When the trial court issued its January 16 order, however, it declined to issue the order nunc pro tunc. Instead, the court deemed it an amended order, presumably because the court gave VIL a new 14-day period to accept or reject the newly calculated remittitur. It further characterized the order as an “appealable order under 2505.02(B)(3).”⁴⁰

In issuing the amended order, Shiloh obtained a new 30-day period of time in which to appeal. This new right to appeal was a vested property interest that could not be denied without due process.⁴¹ Assuming arguendo that the time to appeal runs from the date of the court’s order, not the acceptance of the remittitur, the Third District’s recharacterization of the trial court’s January 16 order as a nunc pro tunc entry⁴² – making Shiloh’s notice of appeal untimely as a result – violated Shiloh’s due process.

⁴⁰ See Appendix E.

⁴¹ See *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 85, 523 N.E.2d 851, 856.

⁴² See Appendix A at 3-4.

CONCLUSION

Ohio should not stand alone. The Court should review and reverse the decision below.

Date: June 1, 2007

Respectfully submitted,



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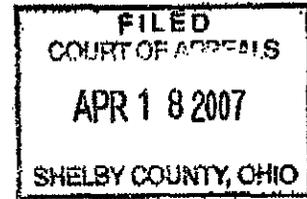
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A handwritten signature in black ink, consisting of a large, stylized 'O' followed by a horizontal line that curves upwards at the end.

COUNSEL FOR APPELLANT
SHILOH INDUSTRIES, INC.

APPENDIX

Exhibit A

**IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO****SHELBY COUNTY**

VIL LASER SYSTEMS, LLC,**PLAINTIFF-APPELLEE,
CROSS-APPELLANT,****CASE NO. 17-07-02****v.****SHILOH INDUSTRIES, INC.,****DEFENDANT-APPELLANT,
CROSS-APPELLEE,
-and-****JOURNAL
ENTRY****SHILOH CORPORATION, ET AL.,****DEFENDANTS-APPELLEES.**

This cause comes before the court upon Appellee's motion to dismiss the appeal, alleging that the notice of appeal was not timely filed within thirty days of the final judgment, and upon Appellant's brief in opposition to the motion to dismiss.

Although numerous, the relevant filing dates of the trial court judgments are not at issue. On September 18, 2006, the trial court entered judgment on the jury's verdict against Appellant in the amount of \$2,290,000.00, with interest to accrue, plus prejudgment interest at the statutory rate. Appellant filed a timely motion for judgment notwithstanding the verdict and/or new trial and/or

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remittitur, and the trial court issued an order setting deadlines for responses to the post-trial motion and for briefs on the amount of prejudgment interest. On December 13, 2006, judgment was entered specifically determining the amount of prejudgment interest due, and granting judgment in the amount of \$2,725,847.70.

On December 15, 2006, the trial court entered judgment denying the motion for judgment notwithstanding the verdict, but granting the motion for new trial, on damages only, via remittitur, based upon entitled credits on the contract. The order set aside the verdict and entered judgment in the amount of \$2,016,416.22, including specific calculation for prejudgment interest, upon consent of the Plaintiff [Appellee]. The order granted Plaintiff [Appellee] a new trial on damages, unless it filed a notice of consent to the reduced amount of damages within fourteen days. On December 29, 2006, Plaintiff [Appellee] filed one sentence pleading captioned "Plaintiff's Notice to Consent to Remittitur."

Thereafter, on January 10, 2007, Appellant filed a motion for order *nunc pro tunc* "purely to clarify a mathematical error" in the calculation of prejudgment interest. On January 16, 2007, the trial court entered an amended judgment granting new trial and remittitur under the same terms, but in the amount of \$1,881,396.16, based upon a prior error in calculation of prejudgment interest.

Appellant filed a notice of appeal on January 25, 2007, referencing intent to appeal a number of early, interlocutory orders and the September 18, 2006 order, "which became a final judgment on January 16, 2007." Appellee then filed

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its' notice of cross-appeal on February 2, 2007, referencing intent to appeal a number of early, interlocutory orders and all the judgments referenced above.

Consequently, we are required to determine whether the thirty-day time for appeal commenced upon filing of the final judgment granting new trial and remittitur, in which case the appeal and cross appeal are untimely and must be dismissed for want of jurisdiction; the filing of Appellee's notice of consent to remittitur, in which case the appeal is timely; or filing of the amended final judgment to correct mathematical error, in which case the appeal is also timely.

Upon consideration of same, we find that the thirty-day time for appeal commenced upon filing of the December 15, 2006 final judgment granting new trial and remittitur and, therefore, the January 25, 2007 notice of appeal and the February 2, 2007 notice of cross-appeal are not timely filed.

The "amended final judgment" resulted from Appellant's specific request that the final judgment be corrected *nunc pro tunc* to correct a calculation error, the docket reflects no opposition filed by Appellee, and the trial court agreed to the calculation error as "pointed out" by Appellant. Although incorrectly titled as an amended judgment, it was in effect a judgment entered *nunc pro tunc* to correct a "blunder in execution," as opposed to a change of mind. Civ.R. 60(A); *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245; and *Bobb Forest Products, Inc. v. Morbark Industries, Inc.* (2002) 151 OhioApp.3d 63. Because it is retroactive in effect, an

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appeal will not lie from a nunc pro tunc judgment. *In re Parmelee* (1938), 134 Ohio St. 420.

Regarding the notice to consent to remittitur, the pleading filed by Appellee was not an “order” of the trial court and could not be designated as the subject of review as a “final order.” See R.C. 2505.02; and App.R. 3. Furthermore, although no Ohio precedent exists directly on point, we conclude that the proper and only judgment subject to appeal in this case was the trial court’s December 15, 2006 judgment granting a new trial on damages or, in the alternative, remittitur. An order that vacates or sets aside a judgment or grants a new trial is a “final order” subject to appeal. R.C. 2505.02(B)(3).

The initial judgment entered on the jury’s verdict of liability was unaffected and the verdict on damages was set aside. Notwithstanding federal interpretation to the contrary, we are not persuaded that it took Appellee’s “consent” to accept remittitur to effectuate the trial court’s intent or judgment.

Furthermore, we note that a notice of appeal must designate the judgments appealed. App.R. 3(D). In the instant case, appellant’s notice of appeal references, in pertinent part, the September 18, 2006 judgment (the original judgment on jury verdict) and indicates it “became a final judgment on January 16, 2007” (the amended judgment granting appellants’ own request for nunc pro tunc correction of the judgment granting new trial.) The notice of appeal makes no reference to the original December 15, 2006 final judgment granting new trial on

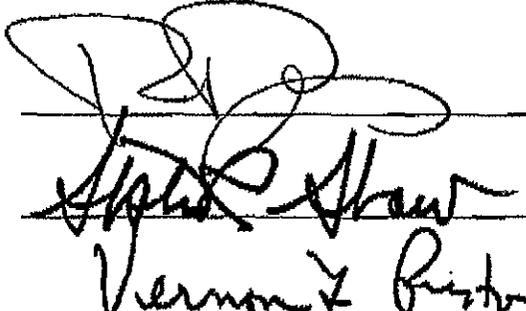


Case No. 17-07-02 - Journal Entry - Page 5

damages or, in the alternative, remittitur, and gives no indication there even was a notice of consent to remittitur, or the need for a second notice of consent after the amended judgment.

Accordingly, as neither the notice of appeal nor the notice of cross-appeal was timely filed, the court lacks jurisdiction to entertain the appeals and the motion to dismiss is well-taken.

It is therefore **ORDERED, ADJUDGED and DECREED** that the appeal and cross-appeal be, and hereby are, **DISMISSED** at the costs of the Appellant and Cross-Appellant for which judgment is hereby rendered. It is further **ORDERED** that this cause be, and hereby is, remanded to the trial court for execution of the judgment for costs.



Vernon Z Bristow

JUDGES

DATED: April 11, 2007

*Court
Thimman
Weigand*

/jlr

Copies 1.50

4/18/07gpc

Exhibit B

... do hereby certify that the foregoing to be a full, true and correct copy of the original as the same appears on file in my office.

MICHELE K. MUMFORD CLERK

By [Signature]
Deputy

FILED
COMMON PLEAS COURT

06 SEP 18 PM 1:42

MICHELE K. MUMFORD
SHELBY COUNTY CLERK

IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, LLC.

CASE NO. 04CV000158

Plaintiff,

JUDGE WELBAUM
(By assignment)

-vs-

SHILOH INDUSTRIES, INC., et al.

JUDGMENT UPON VERDICT

Defendants.

* * * * *

This matter came on for trial before a jury commencing August 29, 2006 through September 7, 2006. Upon the verdict rendered on September 7, 2006, the Court grants judgment in favor of Plaintiff VIL Laser Systems, LLC, and against Defendant Shiloh Industries, Inc. in the amount of \$2,290,000.

Interest shall accrue on the amount of this judgment, plus any prejudgment interest, at the statutory rate. The costs of this action shall be paid by Defendant Shiloh Industries, Inc.

SO ORDERED.

[Signature]
Judge Welbaum

TO THE CLERK:
Please serve all counsel of record.

Pursuant to Civil Rule 59 (B),
the Clerk of this Court is hereby
directed to serve upon all parties
not in default for failure to
appear, notice of this judgement
and the date of entry upon the
Court's docket.

[Signature]

Exhibit C

FILED
COMMON PLEAS COURT

06 DEC 15 PM 2:06

FILED
SHELBY COUNTY CLERK

IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, LLC : CASE NO. 04CV000158
Plaintiff : Judge Welbaum
(By Assignment 04JA0521)
vs. :
SHILOH INDUSTRIES, INC., :
et al. :
Defendants :

ORDER SETTING ASIDE JUDGMENT BY GRANTING DEFENDANT'S MOTION
FOR REMITTITUR CONDITIONED ON PLAINTIFF'S ACCEPTANCE;
ALTERNATIVELY, PLAINTIFF IS GRANTED THE OPTION FOR A
NEW TRIAL ON DAMAGES

.....

On September 21, 2006, the Defendant Shiloh Industries, Inc., filed a motion for judgment notwithstanding the verdict, a new trial, or in the alternative, remittitur. On October 13, 2006, the Plaintiff filed a memorandum contra. On October 25, 2006, the said Defendant filed a reply memorandum.

The Court overrules the motion for judgment notwithstanding the verdict. The Court finds that there is no evidence that the verdict was given under the influence of

passion or prejudice, irregularity or error, or any other ground alleged by the Defendant and set forth in Rules 50(B) or 59(A) except to warrant remittitur to the extent set forth herein.

When damages are excessive but not the result of passion or prejudice, a court has inherent authority to remit an award to an amount supported by the weight of the evidence. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St. 3d 431, *McLeod v. Mt. Sinai Medical Center*, 2006-Ohio-2206.

The Court finds that the verdict in the amount of \$2,290,000.00 is clearly excessive and in error based on the evidence and law. The damage amount awarded by the jury is beyond the realm of proper compensation. The Court finds that the case is a proper one for granting a new trial on damages only, via remittitur, as to the credits on the contract which the Defendant was clearly entitled.

The Court hereby sets aside the judgment amount. The Total Contract Damages shall be \$1,580,568.52, computed as follows:

Contract Price:	\$10,125,000
Less Credits:	\$4,051,730
Adjusted Price:	\$6,073,270
Damages for Basic:	$\$6,073,270 \times .205 \times .30 = \$373,506.11$
Damages for Cubed:	$\$6,073,270 \times .795 \times .25 = \$1,207,062.41$

Total Contract Damages: \$1,580,568.52

Remittitur: \$709,431.48 (\$2,290,000 judgment
minus \$1,580,568.52 total damages)

Judgment shall be entered against Defendant Shiloh Industries, Inc. for Total Contract Damages in the amount of \$1,580,568.52 upon the consent of the Plaintiff. The Court grants the Plaintiff a new trial on damages, unless the Plaintiff files a notice of consent to the Contract Damages Amount of \$1,580,568.52 within fourteen (14) days of the filing of this order. Pre-judgment interest in the amount of \$435,847.70 shall be added to the said Contract Damages Amount and included in the final judgment against Defendant Shiloh Industries, Inc. Judgment is granted to Plaintiffs in the total amount of \$2,016,416.22 in the manner set forth above.

IT IS SO ORDERED.


JEFFREY M. WELBAUM, JUDGE

NOTICE

ALL COUNSEL AND PARTIES ARE NOTIFIED THAT THIS ORDER IS AN APPEALABLE ORDER UNDER 2505.02(B)(3).

PRAECIPE

THE CLERK OF COURT IS ORDERED TO CAUSE A COPY OF THIS ORDER TO BE SERVED UPON ALL COUNSEL AND PARTIES OF RECORD.

IT IS SO ORDERED.


JEFFREY M. WELBAUM, JUDGE

Exhibit D

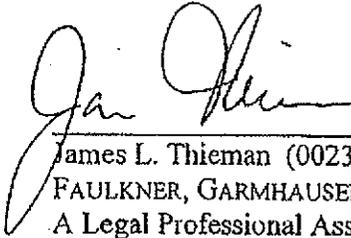
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COMMON PLEAS COURT
06 DEC 29 AM 8:38
MICHELE K. MUMFORD
SHELBY COUNTY CLERK

IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, LLC. * CASE NO. 04CV000158
Plaintiff, * JUDGE WELBAUM
-vs- * (By assignment)
SHILOH INDUSTRIES, INC., et al. * PLAINTIFF'S NOTICE TO
Defendants. * CONSENT TO REMITTITUR

* * * * *

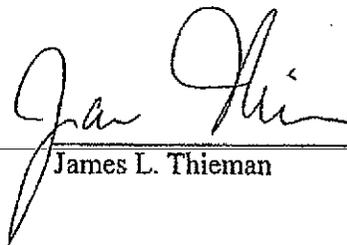
Plaintiff elects to accept remittitur of the judgment as ordered by the trial court in its entry of December 15, 2006, thereby accepting the final judgment in the amount of \$2,016,416.22.


James L. Thieman (0023595)
FAULKNER, GARMHAUSEN, KEISTER & SHENK
A Legal Professional Association
Courtview Center - Suite 300
100 South Main Avenue
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(937) 492-1271
(937) 498-1306 Facsimile
jthieman@fgks-law.com
Attorney for Plaintiff

FAULKNER,
GARMHAUSEN, KEISTER
& SHENK
A LEGAL PROFESSIONAL
ASSOCIATION
COURTVIEW CENTER
SUITE 300
100 SOUTH MAIN AVENUE
SIDNEY, OHIO 45365
(937) 492-1271

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been sent by ordinary United States mail, postage prepaid, to Lesley Weigand, Wegman, Hessler & Vanderburg, 6055 Rockside Woods Blvd., #200; Cleveland, Ohio 44131, this 29th day of December, 2006.


James L. Thieman

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JLT- th

FAULKNER,
HAASEN, KEISTER
& SHENK
LEGAL PROFESSIONAL
ASSOCIATION
COURTVIEW CENTER
SUITE 300
1700 MAIN AVENUE
CLEVELAND, OHIO 44115
(330) 492-1271

Exhibit E

FILED
COMMON PLEAS COURT
07 JAN 16 PM 2:19
SHELBY COUNTY CLERK

IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, LLC : CASE NO. 04CV000158
Plaintiff : Judge Welbaum
vs. : (By Assignment 04JA0521)
SHILOH INDUSTRIES, INC., :
at al. :
Defendants :

AMENDED

ORDER SETTING ASIDE JUDGMENT BY GRANTING DEFENDANT'S MOTION
FOR REMITTITUR CONDITIONED ON PLAINTIFF'S ACCEPTANCE;
ALTERNATIVELY, PLAINTIFF IS GRANTED THE OPTION FOR A
NEW TRIAL ON DAMAGES

.....
On January 10, 2007 the Defendant, Shiloh industries
pointed out an error in the Court's prior order granting
remittitur as to the amount of interest due and owing on the
reduced amount. This order is filed to correct that error.

On September 21, 2006, the Defendant Shiloh Industries,
Inc., filed a motion for judgment notwithstanding the verdict,

a new trial, or in the alternative, remittitur. On October 13, 2006, the Plaintiff filed a memorandum contra. On October 25, 2006, the said Defendant filed a reply memorandum.

The Court overrules the motion for judgment notwithstanding the verdict. The Court finds that there is no evidence that the verdict was given under the influence of passion or prejudice, irregularity or error, or any other ground alleged by the Defendant and set forth in Rules 50(B) or 59(A) except to warrant remittitur to the extent set forth herein.

When damages are excessive but not the result of passion or prejudice, a court has inherent authority to remit an award to an amount supported by the weight of the evidence. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St. 3d 431, *McLeod v. Mt. Sinai Medical Center*, 2006-Ohio-2206.

The Court finds that the verdict in the amount of \$2,290,000.00 is clearly excessive and in error based on the evidence and law. The damage amount awarded by the jury is beyond the realm of proper compensation. The Court finds that the case is a proper one for granting a new trial on damages only, via remittitur, as to the credits on the contract which the Defendant was clearly entitled.

The Court hereby sets aside the judgment amount. The Total

Contract Damages shall be \$1,580,568.52, computed as follows:

Contract Price: \$10,125,000

Less Credits: \$4,051,730

Adjusted Price: \$6,073,270

Damages for Basic: $\$6,073,270 \times .205 \times .30 = \$373,506.11$

Damages for Cubed: $\$6,073,270 \times .795 \times .25 = \$1,207,062.41$

Total Contract Damages: \$1,580,568.52

Remittitur: \$709,431.48 (\$2,290,000 judgment
minus \$1,580,568.52 total damages)

Judgment shall be entered against Defendant Shiloh Industries, Inc. for Total Contract Damages in the amount of \$1,580,568.52 upon the consent of the Plaintiff. The Court grants the Plaintiff a new trial on damages, unless the Plaintiff files a notice of consent to the Contract Damages Amount of \$1,580,568.52 within fourteen (14) days of the filing of this order. Pre-judgment interest in the amount of \$300,827.64 shall be added to the said Contract Damages Amount and included in the final judgment against Defendant Shiloh Industries, Inc. Judgment is granted to Plaintiffs in the total amount of \$1,881,396.16 in the manner set forth above.

IT IS SO ORDERED.


JEFFREY M. WELBAUM, JUDGE

NOTICE

ALL COUNSEL AND PARTIES ARE NOTIFIED THAT THIS ORDER IS AN APPEALABLE ORDER UNDER 2505.02(B)(3).

PRAECIPE

THE CLERK OF COURT IS ORDERED TO CAUSE A COPY OF THIS ORDER TO BE SERVED UPON ALL COUNSEL AND PARTIES OF RECORD.

IT IS SO ORDERED.



JEFFREY M. WELBAUM, JUDGE

Exhibit F

FILED
COMMON PLEAS COURT

07 JAN 30 AM 8:46

MICHELE K. MUMFORD
SHELBY COUNTY CLERK

IN THE COMMON PLEAS COURT OF SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, LLC.

*

CASE NO. 04CV000158

Plaintiff,

*

JUDGE WELBAUM
(By assignment)

-VS-

*

SHILOH INDUSTRIES, INC., et al.

*

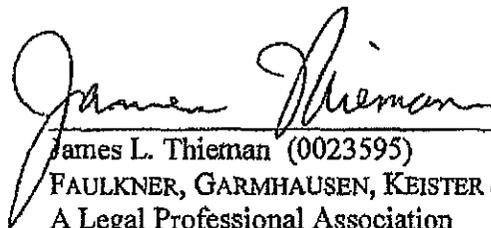
PLAINTIFF'S NOTICE TO
CONSENT TO REMITTITUR

Defendants.

*

* * * * *

Plaintiff elects to accept remittitur of the judgment as ordered by the trial court in its Amended Order of January 16, 2007, thereby accepting the final judgment in the amount of \$1,881,396.16.

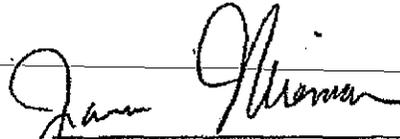


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(937) 498-1306 Facsimile
jthieman@fgks-law.com
Attorney for Plaintiff

FAULKNER,
GARMHAUSEN, KEISTER
& SHENK
LEGAL PROFESSIONAL
ASSOCIATION
COURTVIEW CENTER
SUITE 300
SOUTH MAIN AVENUE
SIDNEY, OHIO 45365
(937) 492-1271

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been sent by fax and ordinary United States mail, postage prepaid, to Lesley Weigand, Wegman, Hessler & Vanderburg, 6055 Rockside Woods Blvd., #200, Cleveland, Ohio 44131, this 30th day of January 2007.


James L. Thieman

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JLT- th

FAULKNER,
GARMHAUSEN, KEISTER
& SHENK
LEGAL PROFESSIONAL
ASSOCIATION
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(937) 492-1271