

IN THE SUPREME COURT OF OHIO

VIL LASER SYSTEMS, LLC

Plaintiff-Appellee,

v.

SHILOH INDUSTRIES, INC.

Defendant-Appellant.

CASE NO. **07-0996**

On Appeal from the Court of Appeals of
the Third Appellate Judicial District of
Ohio, Shelby County

Court of Appeals Case No. 17-07-02

**APPELLEE VIL LASER SYSTEMS, LLC'S
MEMORANDUM IN RESPONSE TO APPELLANT
SHILOH INDUSTRIES, INC.'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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FILED

JUL 02 2007

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i, ii
TABLE OF AUTHORITIES.....	iii
EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 1.....	4
 Proposition of Law No. 1: 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.....	
1. VIL’s Consent To Remittitur Does Not Commence The Time For Filing An Appeal.	4
2. The Trial Court’s January 16, 2007 Order Is A <i>Nunc Pro Tunc</i> Entry	5
3. Ohio’s Procedural Laws Need Not Be Identical To The Procedural Laws Of Other Jurisdictions.....	7
a. Federal Courts Will Necessarily Reach A Different Conclusion On The Issue Involved In This Case Because There Is No Federal Counterpart To R.C. 2505.02.....	7
b. Each State Should Be Free To Determine On Its Own Terms What Constitutes A Final Appealable Order.....	8
4. VIL Consented To Remittitur Well Before Shiloh’s Time For Filing A Notice Of Appeal Expired	9

TABLE OF CONTENTS

	<u>PAGE</u>
ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 2.....	10
Proposition of Law No. 2: 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.....	10
1. The Third District Court Of Appeals' Characterization Of The Trial Court's December 15, 2006 Order Does Not Alter The Fact That Shiloh's Notice Of Appeal Was Untimely.....	10
CONCLUSION	13
PROOF OF SERVICE.....	14

TABLE OF AUTHORITIES

<u>CASE LAW:</u>	<u>PAGE</u>
<i>Anderson v. Roberson</i> (2001), 249 F.3d 539 (6 th Cir.).....	7
<i>Atkinson v. Grumman Ohio Corp.</i> (1988), 37 Ohio St.3d 80.....	12
<i>Blancett v. Nationwide Care, Inc.</i> (December 16, 1998), No. 96 CV 260, 1999 WL 3958 (Ohio App. 5 Dist.).....	9
<i>Bobb Forest Products, Inc. v. Morvark Industries, Inc.</i> (2002), 151 Ohio App.3d 63 (7 th Dist.).....	6
<i>Dentsply v. Int'l., Inc. v. Kostas</i> (1985), 26 Ohio App.3d 116 (8 th Dist.).....	6
<i>Goldberg v. Industrial Comm'n of Ohio</i> (1936), 131 Ohio St. 399	10
<i>Howell v. Marmpegaso Compania Naviera, S.A.</i> (1978), 566 F.2d 992 (5 th Cir.).....	7
<i>In re Parmelee</i> (1938), 134 Ohio St. 420	6
<i>Yee v. Erie County Sheriff's Dept.</i> , (1990), 51 Ohio St.3d 43.....	10

STATUTES

Ohio Const. Art. IV, § 3(B)(2)	4
O.R.C. 2505.02.....	passim
Ohio Civ.R. 54.....	5
Ohio Civ.R. 58.....	5
Ohio Civ.R. 59.....	11
Ohio Civ.R. 60.....	6, 11
Ohio App.R. 3.....	1, 4
Ohio App.R. 4.....	1, 4, 5, 10
28 U.S.C. § 1291	8

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case does not present an issue of public or great general interest. Rather, this is a case of one party missing an appeal deadline in a fact-specific case. In a unanimous opinion, the Third District Court of Appeals properly dismissed Appellant Shiloh Industries Inc.'s ("Shiloh") appeal as untimely. Shiloh's Application for Reconsideration of that dismissal was also denied. Shiloh now requests that this Court accept this discretionary appeal because the Third District's opinion does not adhere to what Shiloh refers to as a "universal proposition of law." The proposition advanced by Shiloh is that an order setting aside judgment and granting remittitur or, in the alternative, a new trial, does not commence the time within which to appeal until consent to the remittitur is filed or the time to do so has expired. Shiloh's characterization of this proposition as "universal" is an exaggeration as only some federal courts, nine states, and the Northern Mariana Islands follow it.¹ The vast majority of jurisdictions have never actually addressed this obscure issue. Moreover, the fact that some jurisdictions have come to a different conclusion than the Third District does not mean that the Third District's ruling was incorrect. Rather, Ohio courts are bound to interpret and apply the laws of the State of Ohio. The Third District applied the plain language of Rules 3 and 4 of the Ohio Rules of Appellate Procedure and R.C. 2505.02 to the unique facts of this case. It determined that Shiloh's notice of appeal was not timely filed under Ohio law, which is the only jurisdiction which is relevant for that determination.

¹ The Northern Mariana Islands is a commonwealth in political union with the United States located in the western Pacific Ocean.

The issue presented in this case has never been addressed in any reported or unreported decision in Ohio since the relevant statute and rules were promulgated in 1953 and 1971.² This fact pattern is not likely to occur again anytime in the foreseeable future. The rarity of this set of facts supports the conclusion that this case does not present an issue of public or great general interest. This scenario is apparently just as unique in other jurisdictions considering that 80% of the states have never addressed this issue.

Shiloh also disagrees with the Third District's decision with respect to several policy considerations, namely judicial economy and litigating cases on their merits. Shiloh claims that the Third District's decision "prevented the parties from litigating the merits of their respective appeal and cross-appeal" and "undermined the principles of judicial economy." In reality, it was not the Third District that prevented the parties from litigating the merits. Rather, it was Shiloh's failure to timely file its notice of appeal that caused this result. Moreover, the timely filing of a notice of appeal is necessary to confer jurisdiction upon the appellate court. There is no allowance or preference for "judicial economy" or "litigating the merits" if the appeal is not timely filed. Because these policy considerations are irrelevant in determining whether jurisdiction is conferred upon the appellate court, there is no basis to find a public or great general interest merely because Shiloh argues that such considerations are present in this case.

Appellee VIL Laser Systems LLC ("VIL") respectfully requests that this Court deny Shiloh's request for acceptance of this discretionary appeal. If Shiloh is dissatisfied with R.C. 2505.02, then its proper recourse lies with the General Assembly rather than this Court.

² R.C. 2505.02 became effective in 1953. The Ohio Rules of Appellate Procedure became effective July 1, 1971.

STATEMENT OF THE CASE AND FACTS

On June 1, 2004, VIL filed a Complaint in the Shelby County Court of Common Pleas against Shiloh, among others, claiming breach of contract and unjust enrichment. On September 18, 2006, following summary judgment in favor of VIL on liability and a jury trial on the issue of damages only, the trial court entered judgment on a jury verdict against Shiloh in the amount of \$2,290,000. Shiloh filed a motion for judgment notwithstanding the verdict, a new trial, and/or remittitur. On December 15, 2006, the trial court entered an order setting aside the judgment and granting Shiloh's motion for remittitur conditioned upon VIL's acceptance or, in the alternative, a new trial. This order specifically stated that it was "an appealable order under 2505.02(B)(3)." VIL was given 14 days within which to accept the remittitur and on December 29, 2006, it did just that. VIL accepted judgment in the amount of \$2,016,416.22.

On January 10, 2007, Shiloh filed a Motion For Order *Nun Pro Tunc* [sic] seeking correction of a mathematical error in the calculation of prejudgment interest in the trial court's December 15, 2006 order. Without awaiting a response from VIL, the trial court sustained the motion on January 16, 2007, and filed an order correcting the calculation error. The trial court again provided VIL with 14 days within which to accept remittitur of the corrected judgment amount. Shiloh filed its notice of appeal with the Third District Court of Appeals on January 25, 2007. Five days later, on January 30, 2007, VIL accepted the remittitur.

VIL filed a motion to dismiss Shiloh's appeal on February 28, 2007, on the basis that Shiloh's appeal was untimely. The Third District unanimously granted VIL's motion to dismiss on April 18, 2007. Shiloh filed an Application for Reconsideration on April 27, 2007, which was subsequently denied by the Third District.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 1

Proposition of Law No. 1:

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.

1. VIL’s Consent To Remittitur Does Not Commence The Time For Filing An Appeal.

The issue in this case is straightforward: did Shiloh’s 30-day appeal clock begin to run (1) on December 15, 2006, when the trial court issued its order setting aside judgment and granting remittitur or, in the alternative, a new trial, or (2) on December 29, 2006, when VIL consented to the remittitur. The Third District unanimously held that Shiloh’s appeal time began to run on December 15, 2006. This is the only result consistent with Ohio statutory and procedural law, namely R.C. 2505.02 and Appellate Rules 3 and 4. Shiloh claims that December 29, 2006 is the appropriate date. Shiloh cites several other jurisdictions that might adhere to the approach it proposes. In doing so, Shiloh curiously and completely ignores any analysis under Ohio law. Shiloh apparently concedes that the Third District’s analysis of Ohio law is correct. Shiloh’s argument appears to be that this Court should change the result to conform with what Shiloh believes how nine other jurisdictions would decide this issue.

The issue in the case at bar is this: what event triggers the commencement of the appeal clock? An analysis of Ohio law begins with the Ohio Constitution. The jurisdiction of a state appellate court is limited by the Ohio Constitution to reviewing and affirming, modifying, or reversing “judgments or final orders of the courts of record inferior to the court of appeals within the district.” Ohio Const. Art. IV, § 3(B)(2). Pursuant thereto, an appellate court has jurisdiction only over a judgment or final order. The terms “judgment” and “final order” are defined in the

Ohio Revised Code and the Ohio Rules of Civil and Appellate Procedure. A “judgment” is “a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code.” Civ.R. 54(A). An order is a final order when it, among other things, “vacates or sets aside a judgment or grants a new trial.” R.C. 2505.02(B)(3). A party must file its notice of appeal within thirty days of the entry of the “judgment or order” appealed. App.R. 4(A). “Entry,” as this term is used in the Appellate Rules, means when the court signs the judgment or order and it is entered upon the journal as required by Civ.R. 58(A). App.R. 4(D); Civ.R. 58(A). A judgment or order is not effective until it has been signed by the court and journalized. Thus, Ohio has a specific procedural framework in its Constitution, statutes, and rules that addresses this issue, a framework which does not require reworking by this Court.

Shiloh’s position that the appeal time commenced when VIL consented to the remittitur is incorrect. As the Third District stated, “the pleading filed by Appellee [VIL’s consent to remittitur] was not an ‘order’ of the trial court and could not be designated as the subject of review as a final order.” VIL’s consent to remittitur was signed by counsel rather than the court. Under Ohio law, VIL’s consent to the remittitur cannot be considered a final order or judgment. The date of the filing of the consent therefore cannot be the date from which the appeal time is calculated.

The Third District appropriately recognized that the December 15, 2006 order was “the proper and only judgment subject to appeal in this case.”

2. The Trial Court’s January 16, 2007 Order Is A *Nunc Pro Tunc* Entry.

Shiloh alternatively argues that the appeal clock commenced on January 16, 2007, when the trial court issued its “amended final judgment” to correct a mathematical error. This argument also fails. The Third District concluded that the trial court’s January 16, 2007 order

resulted from Shiloh's specific request that the final judgment be corrected *nunc pro tunc* to correct the mathematical error. The trial court granted Shiloh's motion for a *nunc pro tunc* order without allowing VIL to respond to the motion, which further evidences the "housekeeping" nature of that order.

The Civil Rules permit such ministerial acts by the trial court. Civ.R. 60(A) permits a court to correct "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." Such motions were known at common law as "*nunc pro tunc*" motions. *Dentsply v. Int'l., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118 (8th Dist.). *Nunc pro tunc* orders are intended to correct a blunder in execution as compared to substantive changes, as might be reflected by the court changing its legal conclusion or factual findings or because it decided to exercise its discretion in a different manner. *Bobb Forest Products, Inc. v. Morvark Industries, Inc.* (2002), 151 Ohio App.3d 63, 77 (7th Dist.), citing *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247 (12th Dist.). A proper modification of a judgment entry pursuant to Civil Rule 60(A) should not be characterized as substantive merely because of the effect of the modification. *Id.* Rather, the nature of the correction is determinative of whether an order should be characterized as *nunc pro tunc*. *Id.* (For example, a judgment could be off by a decimal point – which is substantial – but a simple mistake nonetheless.) The Third District determined that the trial court's January 16, 2007 order "although incorrectly titled as an amended judgment ... was in effect a judgment entered *nunc pro tunc* to correct a 'blunder in execution,' as opposed to a change of mind." Once determined to be an order *nunc pro tunc*, it is retroactive in nature and an appeal must be taken from the order intended to be corrected rather than the order *nunc pro tunc*. *In re Parmelee* (1938), 134 Ohio St. 420.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 1

Proposition of Law No. 1:

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.

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Because the January 16, 2007 order is an order *nunc pro tunc*, it relates back to the court's December 15, 2006 order, which is the only order in this case from which an appeal could lie as the Third District correctly concluded.

3. Ohio's Procedural Laws Need Not Be Identical To The Procedural Laws Of Other Jurisdictions.

Shiloh repeatedly argues that the Third District's decision is incorrect simply because that court reached a different conclusion than other jurisdictions might have reached. Laws, particularly procedural ones, need not be uniform among all jurisdictions. Shiloh argues for uniformity, yet fails to present a single reason why such uniformity is desirable. Although it can be argued that some degree of uniformity among jurisdictions is desirable as to their substantive laws for such purposes as promoting interstate commerce (for example, the Uniform Commercial Code), there is no similar purpose served by seeking uniformity of laws which are purely procedural in nature. The procedural laws and rules of the many states and territories that make up this nation need not be in harmony. Not only is such a goal elusive, but there is no reward for achieving it. Procedural laws and rules are, by their nature, inherently local and peculiar to the forum.

a. Federal Courts Will Necessarily Reach A Different Conclusion On The Issue Involved In This Case Because There Is No Federal Counterpart To R.C. 2505.02.

This case would be different if it was in federal court. A different result arises in the federal courts because federal law on this issue is different, a conclusion acknowledged by the Third District. Federal law specifically provides that an order offering a party the option of remittitur or a new trial is incomplete, interlocutory, and not appealable. *Anderson v. Roberson* (2001), 249 F.3d 539, 542 (6th Cir.). The order becomes final and appealable only once the party elects to accept the remittitur or pursue a new trial. *Howell v. Marmpegaso Compania Naviera*,

S.A. (1978), 566 F.2d 992, 993 (5th Cir.). The Third District concluded that “[n]otwithstanding federal interpretation to the contrary, we are not persuaded that it took Appellee’s [VIL] ‘consent’ to accept remittitur to effectuate the trial court’s intent or judgment.” A review of the different underpinnings to federal and Ohio law on this issue reveal why this is true.

28 U.S.C. § 1291 provides that “the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States...” but does not further define what constitutes such a decision. In contrast, Ohio defines what constitutes a “final order” in R.C. 2505.02(B)(3), a definition which clearly encompasses the trial court’s December 15, 2006 order in this case. Because of these statutory differences, an Ohio court applying Ohio law will necessarily reach a different conclusion than a federal court applying federal law. The Third District’s decision in this case is correct, just as a contrary decision of a federal court on this issue would be correct. There is no valid or compelling reason to “force” the same result.

b. Each State Should Be Free To Determine On Its Own Terms What Constitutes A Final Appealable Order.

Shiloh also urges this court to accept this case and reverse the Third District’s ruling because Shiloh claims that it advances a “universal proposition” and “Ohio should not be the only jurisdiction in the country that rejects this principle of law.” Shiloh’s “universe” consists of nine states and a U. S. territory and ignores the fact that 41 states and numerous other U. S. territories have never faced this issue. Thus, Shiloh’s claim that Ohio is the “only jurisdiction” that rejects this proposition is somewhat misleading.

Moreover, these states have each separately determined whether and on what terms an order setting aside a judgment, granting a remittitur, or granting a new trial is a final, appealable order. There is nothing to indicate that these states sought uniformity amongst themselves. The Ohio General Assembly in enacting R.C. 2505.02(B)(3) chose, for whatever reason, to take

another path. There is nothing “wrong” with the General Assembly doing so, and certainly nothing about its decision that needs this Court’s intervention.

4. VIL Consented To Remittitur Well Before Shiloh’s Time For Filing A Notice Of Appeal Expired.

Shiloh further claims that the Third District’s decision establishes a poor system for conserving judicial resources because a party might appeal prior to the plaintiff’s election. Even if one is to take into account such policy considerations, the scenario that Shiloh posits is purely hypothetical as that was not the situation it faced. As the Third District unanimously determined, the trial court’s December 15, 2006 order triggered the appeal time, thereby establishing January 15, 2007, as Shiloh’s deadline for filing its notice of appeal. VIL consented to remittitur on December 29, 2006, well before this deadline. Shiloh still had 16 days within which to file a notice of appeal, yet it failed to do so. Moreover, if Shiloh was uncertain about the commencement of the appeal time, it could have filed its notice of appeal earlier pursuant to App. R. 4(C), in which case the appeal would have been considered timely filed. Parenthetically, it is interesting to note that whatever reluctance Shiloh may have had in filing its appeal before VIL accepted remittitur on December 29, 2006 apparently evaporated a month later when Shiloh filed its appeal on January 25, 2007, before VIL consented to the remittitur with respect to the *nunc pro tunc* order on January 30, 2007. Shiloh’s actions in this regard are wholly inconsistent with its claim that a “problem” exists that this Court needs to resolve.

Furthermore, Shiloh’s suggestion that filing its notice of appeal would have divested the trial court of jurisdiction to allow consent to the remittitur is simply not true. A party may consent to remittitur after the opposing party has filed a notice of appeal. *Blancett v. Nationwide Care, Inc.* (December 16, 1998), No. 96 CV 260, 1999 WL 3958 (Ohio App. 5 Dist.). The trial court retains jurisdiction, even in a case that has been appealed, to issue orders that are not

inconsistent with the appellate court's jurisdiction. *Yee v. Erie County Sheriff's Dept.*, (1990), 51 Ohio St.3d 43, 44. Accordingly, had Shiloh timely filed its notice of appeal, the trial court would not have been divested of jurisdiction to accept VIL's consent to the remittitur.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 2

Proposition of Law No. 2:

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.

1. The Third District Court Of Appeals' Characterization Of The Trial Court's December 15, 2006 Order Does Not Alter The Fact That Shiloh's Notice Of Appeal Was Untimely.

Shiloh argues that the Third District improperly "re-labeled" the trial court's January 16, 2007 order as an order *nunc pro tunc*, and thereby deprived Shiloh of its due process rights. This argument fails for three reasons. First, Shiloh failed to properly raise this issue with the Third District. Second, the Third District's characterization of the trial court's January 16, 2007 order as an order *nunc pro tunc* was proper as the order simply corrected a mathematical error and was issued in response to Shiloh's motion for an order *nunc pro tunc*. Finally, Shiloh had adequate notice that the trial court's December 15, 2006 order was final and appealable. Its due process rights were not violated.

This court should not consider Shiloh's claim that the trial court deprived Shiloh of its due process rights because that issue was not properly raised in the Third District. Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. *Goldberg v. Industrial Comm'n of Ohio* (1936), 131 Ohio St. 399, 404. Shiloh's memorandum in opposition to VIL's motion to dismiss Shiloh's appeal included no mention of a due process violation. Shiloh raised this issue only in its Application for Reconsideration after the Third District dismissed the appeal. Exercising its discretion, this court should not consider

Shiloh's second Proposition of Law because the Third District denied Shiloh's Application without any discussion of this issue.

Also, it should not be forgotten that the trial court issued the January 16, 2007 order in response to Shiloh's motion, which Shiloh itself captioned as a "Motion for Order *Nunc Pro Tunc*" [sic]. In Shiloh's own words, that motion was "purely to clarify a mathematical error" in the trial court's December 15, 2006 Order. This is exactly what the trial court did, and did so immediately and without opposition from VIL, which further evidences the "housekeeping" nature of the order. The trial court's order does not provide a reason for labeling it "amended" rather than "*nunc pro tunc*." There is nothing to indicate that the court even intended to distinguish between the two. As the Third District stated, the trial court's labeling of the January 16, 2007 order was of no consequence because "it was in effect a judgment entered *nunc pro tunc*."

Shiloh also argues that the January 16, 2007 order was a final appealable order, rather than a *nunc pro tunc* order, because the court labeled it an "appealable order under 2505.02(B)(3)." It is true that this language appears in the January 16, 2007 order. It is equally true that the trial court's December 15, 2006 order, which the Third District determined was the only final appealable order in this case, also contained the same language. A more plausible explanation for the inclusion of this language in January 16, 2007 order is that the trial court created that order by simply revising the December 15, 2006 order already on the court's computer system by adding an introductory paragraph acknowledging the need to correct the error, changing the dollar amounts, and renaming the order as an "amended order." The orders are identical in all other respects.

Further, the Third District's characterization of the trial court's December 15, 2006 order as an order *nunc pro tunc* does not violate Shiloh's due process rights. This court has held that the right to file an appeal is a property interest and a litigant may not be deprived of that interest without due process of law. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, Syllabus ¶ 1. *Atkinson* is clearly distinguishable from the case at bar. In *Atkinson*, the court failed to provide any notice to a party that a judgment entry had been filed. As a result, the party failed to timely file its notice of appeal and the appeal was dismissed. The Court of Appeals reversed the dismissal and reiterated that "[t]he opportunity to file a timely appeal pursuant to App.R. 4(A) is rendered meaningless when reasonable notice of an appealable order is not given." *Id.* In this case, Shiloh does not claim that the court failed to give it notice (as in *Atkinson*) or that Shiloh did not have notice of the trial court's December 15, 2006 order. Rather, Shiloh's appeal was dismissed because Shiloh itself incorrectly determined the date on which its appeal time began to run. Shiloh's error is not, and cannot be, attributed to anyone else.

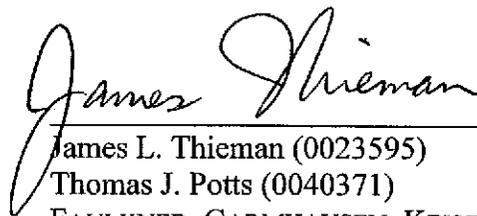
Moreover, it is disingenuous for Shiloh to argue now that its notice of appeal was not filed in response to the trial court's January 16, 2007 order. It clearly was not. It was filed in response to VIL's December 29, 2006 consent to the remittitur, which Shiloh believed commenced the running of its appeal time. In its memorandum in opposition to VIL's motion to dismiss Shiloh's appeal, Shiloh stated, "In the present case, Shiloh had thirty days from December 29, 2006, the date that VIL filed its consent to remittitur, to file its appeal." This concession by Shiloh reveals that Shiloh never considered the January 16, 2007 order to commence a new period within which to appeal.

There is nothing to suggest or indicate that Shiloh was deprived of its due process rights to appeal the trial court's decision in this case. Shiloh had many ways in which it could have

protected its appeal rights from the December 15, 2006 order. In the final analysis, it is clear that Shiloh failed to do so, through no fault of anybody else.

CONCLUSION

This case does not present a matter of public or great general interest. Accordingly, VIL respectfully requests that this Court deny Shiloh's request for acceptance of this discretionary appeal.



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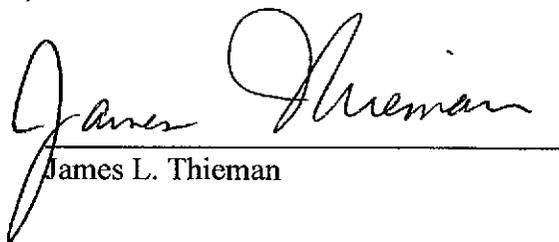
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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been sent via ordinary United States mail to Thomas D. Warren and Thomas R. Lucchesi, BAKER & HOSTETLER LLP, 1900 East Ninth Street, Suite 3200, Cleveland, Ohio 44114, and to Jeffrey W. Krueger, WEGMAN, HESSLER & VANDERBURG, 6055 Rockside Woods Boulevard, Suite 200, Cleveland, Ohio 44131, this 29th day of June, 2007.


James L. Thieman

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