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**IN THE SUPREME COURT OF OHIO  
CASE NO. 2007-1821**

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**DISCRETIONARY APPEAL FROM THE CUYAHOGA COUNTY  
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT  
CASE NO. 07-90185**  
◆

**BERTHA LOUDEN, INDIVIDUALLY AND AS EXECUTOR  
OF THE ESTATE OF ROGER LOUDEN, ET AL.  
Plaintiffs-Appellants**

**vs.**

**A.W. CHESTERTON CO., ET AL.  
Defendant-Appellee**

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**DEFENDANT-APPELLEE, INGERSOLL-RAND COMPANY'S,  
MEMORANDUM OPPOSING JURISDICTION**

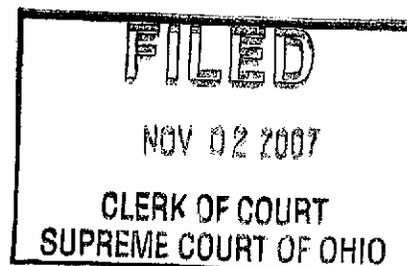
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**I.**  
**EXPLANATION OF WHY THERE IS NO PUBLIC OR GREAT GENERAL INTEREST  
IN THE ISSUE RAISED BY THE APPEAL IN THIS CASE**

S.Ct.Prac.R. III, Section1(B)(2) provides that a memorandum in support of jurisdiction “shall” set forth a “thorough explanation” of why the case being appealed is one of public or great general interest, or involves a substantial constitutional question. Cases presenting questions of public or great general interest are to be distinguished from cases where the outcome is primarily of interest to the parties in the case. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254. While undoubtedly important to the parties here, this appeal falls into the latter category. The decision in this case by the Eighth Appellate District is consistent with the precedent set forth by Ohio case law and the Rules of Appellate Procedure concerning the filing of a notice of appeal with the Clerk of Courts. Therefore, this Court should decline jurisdiction herein.

The decision of the Eighth District to dismiss Appellants’ appeal is based upon App.R. 3 and 4. Specifically, the Court of Appeals determined that Appellants “failed to timely comply with this Court’s requirements, therefore, the appeal is dismissed per App.R. 4(A).” (08/01/07 Court of Appeals Journal Entry No. 399175). Rather than file their notice of appeal with the Clerk of Courts as required by App.R. 3(A) and 4(A), Appellants erroneously filed their notice of appeal on the asbestos electronic filing system used in Cuyahoga County known as “File & Serve.” Neither the local appellate rules for the Eighth District nor the Rules of Appellate Procedure recognize the “File & Serve” system for purposes of filing a notice of appeal. There are no legal principles either created or ignored by the Eighth District’s decision. The court below correctly applied App.R. 3(A) and 4(A) and properly dismissed the appeal as being untimely filed.

Appellants, however, ask this Court to revise App.R. 3(A) and 4(A) due to their counsel’s

failure to properly and timely file their notice of appeal with the Clerk of Courts. Appellants cite no authority from any Ohio court to support their novel argument that the requirements in App.R. 3(A) and 4(A) should be relaxed because the case involves an asbestos claim.

For the ease and convenience of the parties and the trial court overseeing the asbestos docket in Cuyahoga County, Judges Hanna and Spellacy and Justice Sweeney have permitted the parties to use the electronic filing system known as “File & Serve.” This electronic system was adopted by these judges pursuant to a case management order. Documents such as notices of appearances, motions, briefs and trial court orders are electronically filed on “File & Serve.” The “File & Serve” system, however, does not replace the Cuyahoga County Clerk of Courts and does not override the requirements contained in the Rules of Civil Procedure or the Rules of Appellate Procedure.

This point was illustrated by the Eighth Appellate District in *Shesler v. Consol. Rail Corp.*, 8th Dist. No. 83656, 2004-Ohio-3110. Neither the Clerk of the trial court nor the Clerk of the Court of Appeals for the Eighth District recognize trial court orders filed on the “File & Serve” system. This is because the orders must still be signed by the trial court, time-stamped and journalized by the Clerk’s office in accordance with Civ.R. 58(A) to have legal effect. *Shesler* at ¶11-12, 20. See, also, *State v. Domers* (1991), 61 Ohio St.3d 592.

In this same regard, Loc.App.R. 11 of the Eighth District confirms that the documents filed on “File & Serve” are not recognized by the Clerk of the trial court or the Clerk of the Court of Appeals for the Eighth District. Under this local appellate rule, parties involved in an asbestos-related appeal are required to work together and compile a supplemental record since the Clerk’s office does not recognize the “File & Serve” system. This supplemental record contains documents filed on the electronic filing system which the parties deem necessary to be included in the record

on appeal. See Loc.App.R. 11(A)(3). The supplemental record is then submitted by the appellant to the Cuyahoga County Clerk's office who, in turn, transmits the supplemental record to the Clerk of the Court of Appeals. See Loc.App.R. 11(B). Nowhere in this local appellate rule does it permit a party in an asbestos case to file a notice of appeal on "File & Serve" rather than with the Clerk's office as required by App.R. 3(A) and 4(A).

Appellants' proposition of law is contrary to the established Rules of Appellate Procedure and case law governing the filing of a notice of appeal. The Rules of Appellate Procedure should not be relaxed to accommodate Appellants' late filing. Appellants have not cited to any authority from Ohio's other appellate districts which conflict with the Eighth District's decision to dismiss their untimely filed appeal. The Eighth District had no difficulty in applying App.R. 3 and 4. There is no confusion about this case which would necessitate guidance or clarification from this Court.

Instead, the arguments advanced by Appellants grossly exaggerate the need for review. Appellants' counsel complain that they were given no "warning" that only manually filed notices of appeals in asbestos cases would be accepted. The Rules of Appellate Procedure provide adequate "warning," and Appellants' counsel should have been aware of these requirements.<sup>1</sup> Appellants further claim that "countless unwitting litigants" will repeat the mistake Appellants' counsel made in this case. (Appellants' memorandum at p. 1). Although "File & Serve" has been in place for four years in Cuyahoga County and the CLAD electronic filing system was in use for five years prior to that, Appellants have not cited a single instance where this "mistake" has been made by another

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<sup>1</sup> It is surprising that Appellants' counsel, specifically the law firm of Mazur & Kittel, has taken the position that they were unaware that the notice of appeal had to be manually filed with the Clerk's office in the case. In *Bope v. A.W. Chesterton Co.*, 8th Dist. No. 04-85215, the law firm of Mazur & Kittel represented a plaintiff-appellant in an asbestos-related appeal and they conventionally filed the notice of appeal with the Clerk's office on September 8, 2004.

litigant. Appellants simply failed to follow the Rules of Appellate Procedure. Appellants' case appropriately ended because they failed to properly and timely file their notice of appeal with the Clerk's office in accordance with App.R. 3(A) and 4(A). The Rules of Appellate Procedure govern the filing of a notice of appeal. It is not a "gaping trap for the unwary" as Appellants suggest. (Appellants' memorandum at p. 2).

Appellants have filed this discretionary appeal in hopes that a different result might be reached in this Court concerning the untimely filing of the notice of appeal. But this Court's discretionary jurisdiction should be reserved for cases addressing areas of the law which are unsettled, not to apply settled law to facts of any particular case. See, e.g. *Baughman v. State Farm Mut. Auto. Ins.*, 88 Ohio St.3d 480, 492, 2000-Ohio-397 (Cook, J., concur). There is nothing unique or distinctive about this case which would warrant this Court accepting jurisdiction.

## ***II.***

### **STATEMENT OF THE CASE AND FACTS**

On April 5, 2007, the trial court issued two signed and journalized final appealable orders granting summary judgment in favor of Ingersoll-Rand which contained Civ.R. 54(B) language. The first order granted summary judgment in favor of Ingersoll-Rand in the Roger Louden case, while the second order granted summary judgment in favor of Ingersoll-Rand in the Wayne Border case.

Instead of filing their notice of appeal with the Clerk of the trial court, Appellants admit they erroneously filed their appeal on "File & Serve" on May 4, 2007.<sup>2</sup> Fatal is the fact that the notice

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<sup>2</sup> Appellants appear to blame the Clerk's office for not serving the May 4, 2007 notice of appeal in accordance with App.R. 3(E). But the Clerk's office was not aware that the notice of appeal was filed on May 4, 2007 because it was *never* filed with their office. The "File & Serve" system is maintained by Lexis-Nexis, *not* the Clerk's office.

of appeal was *never* filed with the Clerk's office within 30 days from the April 5, 2007 orders. Neither the local appellate rules for the Eighth District nor the Rules of Appellate Procedure recognize the "File & Serve" system for purposes of filing a notice of appeal in an asbestos case.

On July 24, 2007, Appellants filed their notice of appeal, along with the filing fee, with the Clerk's office. The fact that Appellants filed their notice of appeal with the Clerk's office on July 24, 2007 (more than two months late) did not cure the jurisdictional defect that they failed to properly and timely file their notice of appeal within 30 days from the April 5, 2007 judgment entries.<sup>3</sup> On July 27, 2007, Appellants filed a motion asking the Court of Appeals to recognize their late appeal. On August 1, 2007, Ingersoll-Rand filed a memorandum opposing Appellants' motion to determine the timeliness of the appeal, along with a motion to dismiss the appeal.

On August 1, 2007, the Eighth Appellate District correctly dismissed the appeal in accordance with App.R. 4(A) as being untimely filed. Specifically, the court stated: "Sua sponte, the appeal is dismissed per App.R. 3 and App.R. 4. Appellants failed to timely comply with this Court's requirements, therefore the appeal is dismissed per App.R. 4(A)." (08/01/07 Court of Appeals Journal Entry No. 399175). Appellants sought reconsideration of this decision, which was denied on August 20, 2007.

As correctly recognized by the Eighth Appellate District, the filing of a notice of appeal on

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<sup>3</sup> Appellants also filed a Civ.R. 60(B) motion from the trial court's summary judgment decision. As reflected on the Clerk's docket, the trial court issued two signed and journalized judgment entries denying Appellants' Civ.R. 60(B) motions on May 7, 2007 in accordance with Civ.R. 58(A). One order was issued in the Border case and the other order was issued in the Loudon case. As with the summary judgment orders, Appellants never filed their notice of appeal with the Clerk's office within 30 days from the May 7, 2007 judgment entries denying them Civ.R. 60(B) relief. This jurisdictional defect, likewise, cannot be cured by filing a notice of appeal with the Clerk's office on July 24, 2007.

the "File & Serve" system does not constitute a filing with the Clerk's office as required by App.R. 3(A) and 4(A). The lower court correctly determined that Appellants' failure to file their notice of appeal with the Clerk of Courts as mandated by App.R. 3(A) and 4(A) within 30 days from the April 5, 2007 final orders constitutes a jurisdictional defect and dismissed the appeal. Appellants now hope for a different result from this Court and seek to permit their untimely appeal to go forward. To find as Appellants suggest would circumvent the requirements contained in App.R. 3(A) and 4(A), and render them meaningless.

### *III.*

#### **ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW**

**Counter Proposition of Law:** As in every other civil case, a notice of appeal in an asbestos case must be filed with the Clerk of the trial court in accordance with App.R. 3 and 4 within 30 days of the entry of the final order, not by filing the notice of appeal on the trial court's electronic filing system known as "File & Serve." The failure to properly and timely file a notice of appeal in accordance with App.R. 3 and 4 will result in a dismissal of that appeal.

Appellants claim that they were dismayed to discover that "paper Notices of Appeal are still required in Cuyahoga County." (Appellants' memorandum at p.1). According to Appellants, their appeals were dismissed "as a result of some unwritten or obscure rule requiring certain documents to be physically presented to a Clerk employee for time-stamping." (Appellants' memorandum at p. 2). This is an incredible position given that App.R. 3 and 4 have been in effect since 1971 and thus, cannot be characterized as "obscure."

According to Appellants, there is nothing in App.R. 3(A) and 4(A) to suggest that filing an electronic notice of appeal is unacceptable. App.R. 3(A) and 4(A), however, expressly require that the notice of appeal must be filed with the Clerk of the trial court within 30 days of the entry of the

final order. In this regard, App.R. 3(A) specifically states that “[a]n appeal as of right shall be taken by filing a notice of appeal *with the clerk of the trial court* within the time allowed by Rule 4.” (Emphasis added). App.R. 4(A) provides that “[a] party shall file the notice of appeal required by App.R. 3 within thirty days \*\*\*.” And, R.C. 2505.04 confirms that “[a]n appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, *in accordance with the Rules of Appellate Procedure* \*\*\*.” (Emphasis added). The Rules of Appellate Procedure are simple and straight-forward. Appellants failed to follow them and now ask this Court to relax these requirements because this case involves an asbestos claim. There is no support in Ohio for this position.

In fact, Ohio courts have refused to relax the requirements for filing a notice of appeal. For example, the Fifth Appellate District has held that a notice of appeal was not timely filed even though the notice of appeal was filed with the appellate court within 30 days, rather than with the Clerk of the trial court. See *In Re Cassady* (July 26, 2000), 5th Dist. No. CA884, 2000 Ohio App. LEXIS 3420. Likewise, the First and Third Appellate Districts have refused to modify the requirements for filing a notice of appeal. In *Piper v. Burden* (1984), 16 Ohio App.3d 361, syllabus, the Third District held that a notice of appeal was not timely filed even though it was given to and accepted by the trial court judge on the last day for filing the appeal and then given by the judge to the clerk of the trial court on the following day. And, in *King v. Paylor* (1942), 69 Ohio App.3d 193,196, the First District determined that leaving a notice of appeal in the office of the clerk of courts without his knowledge is not a filing and does not become a filing until it is brought to the attention of the clerk and he takes custody of it. The Eighth District’s decision is consistent with the precedent set forth by Ohio case law and the Rules of Appellate Procedure.

In spite of this, Appellants claim that since the trial court in Cuyahoga County has ordered all “filings” in asbestos cases to be electronically submitted on “File & Serve,” their notice of appeal was properly and timely filed on May 4, 2007. First, the case management order adopting the “File & Serve” system applies to “pre-trial discovery activities,” not appeals. (See Section B(1) of case management order). Second, Appellants miss the point that the trial court’s case management order does not circumvent the requirements contained in the Rules of Appellate Procedure.

For this same reason, Civ.R. 5(E) offers no support. Appellants rely on Civ.R. 5(E) to claim that their notice of appeal was properly and timely filed on “File & Serve.” Civ.R. 5(E) states that a trial court “may provide, *by local rules* adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means.” (Emphasis added). First, “File & Serve” was adopted by the judges overseeing the asbestos docket in Cuyahoga County through a case management order, not by way of a local rule. Likewise, the Court of Common Pleas, itself, has not adopted the use of “File & Serve” for electronic filing by way of a local rule.

Second, Civ.R. 5(E) expressly applies only to the filing of documents “*as required by these [civil] rules.*” (Emphasis added). See, also, *Piper* at 362. In contrast, App.R. 3 and 4 expressly govern the filing of a notice of appeal. “The correct procedure for the filing of a notice of appeal is set forth in App. R. 4 which specifically provides that the ‘notice of appeal required by [Appellate] Rule 3 shall be filed *with the clerk* of the trial court.’” *Piper* at syllabus. With respect to a notice of appeal, “a filing can only be accomplished by bringing the paper to the notice of the office, so that it can be accepted by him as official custodian.” *King* at 196.

Appellants next rely on *Hanson v. Shaker Heights* (2003), 152 Ohio App.3d 1, to claim that the Eighth District’s decision is incorrect. Appellants’ reliance on *Hanson* is misplaced. In *Hanson*,

several residents filed an administrative appeal from a decision by the City of Shaker Heights to pass a zoning ordinance. There was “*no dispute* that the proper body received the notice of appeal and praecipe within the thirty-day deadline[.]” *Hanson* at ¶12 (emphasis added). Rather, the dispute in *Hanson* concerned which body (the Clerk of the trial court or the administrative body) should receive the original notice of appeal for purposes of perfecting the appeal. *Id.* at ¶6, 12-17. In contrast, here, the proper body (the Clerk of the trial court) *never* received Appellants’ notice of appeal within the 30 day deadline. Thus, *Hanson* is distinguishable and offers no support to Appellants’ position.

Appellants further claim that since the Eighth District has adopted Loc.App.R. 11, it was reasonable for them to “assume” that the electronic filing of the notice of appeal would be acceptable. To the contrary, Loc.App.R. 11 and *Shesler* confirm that neither the Clerk of the trial court nor the Clerk of the Court of Appeals recognize filings made on “File & Serve.” As explained earlier, in *Shesler*, the Eighth District refused to recognize a trial court order filed on the “File & Serve” system and held that to have legal effect, the order must be signed by the trial court, time-stamped and journalized by the Clerk’s office in accordance with Civ.R. 58(A). *Id.* at ¶11-12, 20. In this same respect, Loc.App.R. 11 was adopted because the Clerk’s office does not recognize any of the documents filed on “File & Serve.” This local rule requires the parties involved in asbestos cases to compile and submit the relevant documents electronically filed on “File & Serve” to the Clerk of the trial court for purposes of supplementing the record on appeal. This rule does not speak to the filing a notice of appeal. Nor does it modify the requirements of App.R. 3(A) or 4(A).

The decision of the Eighth District does not amount to a “grave injustice” and does not place “form over substance.” (Appellants’ memorandum at pp. 2,6). Any injustice caused in this case is the result of Appellants’ counsel’s failure to follow App.R. 3 and 4, and file a proper, timely notice

of appeal with the Clerk's office within 30 days from the April 5, 2007 final orders. This is not a technical error as Appellants urge. The proper and timely filing of the notice of appeal is mandatory and jurisdictional. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320; *Kaplysh v. Takieddine* (1988), 35 Ohio St.3d 170, 175; *Auburn Pipe & Plumbers Supply Co. v. Wholesale Waterproofers, Inc.*, 11th Dist. No. 2005-G-2674, 2006-Ohio-52, at ¶6; *Ditmars v. Ditmars* (1984), 16 Ohio App.3d 174, 175. Appellants' failure to properly file a notice of appeal with the Clerk of the trial court in a timely manner constitutes a jurisdictional defect. "Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal." *State ex rel. Pendell v. Adams County Bd. of Elections*, (1988), 40 Ohio St. 3d 58, 60. This jurisdictional defect cannot be cured by Appellants claiming that the requirements of App.R. 3 and 4 should be relaxed in asbestos cases pending in Cuyahoga County.

Nor does the decision of the Eighth Appellate District violate this Court's policy of having a case resolved on the merits. While it is certainly preferable to resolve a case upon its merits, the procedural rules are not optional and noncompliance cannot be simply overlooked. *Davis v. Immediate Med. Servs.*, 80 Ohio St.3d 10, 15, 1997-Ohio-363; *State ex rel. Pendell v. Adams County Bd. of Elections*, (1988), 40 Ohio St.3d 58, 60; *Miller v. Lint* (1980), 62 Ohio St.2d 209, 215. Here, Appellants failed to properly and timely file an appeal from a final order as required by App.R. 3(A) and 4(A). It is illogical for Appellants to suggest that this Court should relax the Rules of Appellate Procedure simply to resolve this case on the merits:

However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment.

*Miller* at 215.

While Appellants may believe that filing a notice of appeal with the Clerk's office is "antiquated," the Rules of Appellate Procedure require this process. Neither the local appellate rules for the Eighth District nor the Rules of Appellate Procedure recognize the "File & Serve" system for purposes of filing a notice of appeal. An exception cannot be carved out to accommodate Appellants' untimely filing in this case.

**IV.**

**CONCLUSION**

Regardless of whether the case involves an asbestos claim or any other civil claim, App.R. 3(A) and 4(A) require that the notice of appeal be filed with the Clerk of the trial court within 30 days of the final entry. The Eighth District Court of Appeals decision to dismiss the appeal because Appellants failed to properly and timely file their notice of appeal with the Clerk's office is correct and is entirely consistent with the Rules of Appellate Procedure and Ohio law. For these reasons, Defendant-Appellee, Ingersoll-Rand Company, respectfully request that this Court decline jurisdiction over the appeal in this case as there are no issues of public or great interest involved.

Respectfully submitted,



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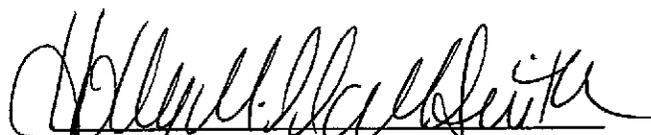
**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served via regular U.S. mail this 15<sup>th</sup> day of November 2007, to:

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