IN THE SUPREME COURT OF OHIO

VIL LASER SYSTEMS, LLC	:	CASE NO. **2007-0996**
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Court of Appeals of the Third Appellate Judicial District of Ohio, Shelby County
SHILOH INDUSTRIES, INC.	:	
Defendant-Appellant.	:	Court of Appeals Case No. 17-07-02

MERIT BRIEF OF APPELLEE VIL LASER SYSTEMS, LLC

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STATEMENT OF THE CASE AND FACTS

On June 1, 2004, Appellee VIL Laser Systems, LLC ("VIL") filed a Complaint in the Shelby County Court of Common Pleas against Appellant Shiloh Industries, Inc. ("Shiloh"), among others, claiming breach of contract and unjust enrichment. (Supplement at S-5.) 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. (Appendix to Shiloh's Merit Brief ("Shiloh Appendix") at A-9.) Shiloh filed a motion for judgment notwithstanding the verdict, a new trial, and/or remittitur. (VIL Appendix at A-1.) On December 15, 2006, the trial court entered an order setting aside the judgment and granting a new trial on damages or, in the alternative, remittitur (the "December 15 Order"). (Shiloh Appendix at A-10.) The December 15 Order specifically stated that it was "an appealable order under 2505.02(B)(3)." (*Id.* at A-12.) VIL was given 14 days within which to accept the remittitur and on December 29, 2006 it did just that. (*Id.* at A-12, A-13.) VIL accepted judgment in the total amount of $2,016,416.22, inclusive of prejudgment interest. (*Id.* at A-13.)

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 December 15 Order. (VIL Appendix at A-25.) The trial court sustained the motion on January 16, 2007, and filed an order correcting the calculation error. (Shiloh Appendix at A-15.) The trial court again provided VIL 14 days within which to accept remittitur of the corrected judgment amount. (*Id.* at A-17.) Shiloh filed its notice of appeal with the Third District Court of Appeals on January 25, 2007, <u>prior</u> to the deadline imposed by the trial court for VIL to accept the remittitur. (Supplement at S-1.) The notice of appeal referred to the trial court's orders dated August 6,

2004, September 2, 2004, October 4, 2004, December 30, 2005, and September 18, 2006, but failed to mention the December 15 Order or the subsequent January 16, 2007 order. On January 30, 2007, five days after Shiloh filed its notice of appeal with the Third District, VIL accepted the remittitur. (Shiloh Appendix at A-19.)

VIL filed a motion to dismiss Shiloh's appeal on February 28, 2007, on the basis that Shiloh's appeal was untimely. (VIL Appendix at A-28.) Shiloh filed a Brief in Opposition to the motion to dismiss on March 8, 2007. (VIL Appendix at A-37.) In its Brief in Opposition, Shiloh argued that the December 15 Order became a final appealable order on December 29, 2006, upon VIL's consent to the remittitur. (VIL Appendix at A-38, A-46-A-47.) The Third District unanimously granted VIL's motion to dismiss on April 18, 2007, holding that the proper and only judgment subject to appeal in this case was the trial court's December 15 Order. (Shiloh Appendix at A-4.) Shiloh filed an Application for Reconsideration on April 27, 2007, which was subsequently denied by the Third District. (VIL Appendix at A-49, A-64.)

This case is now before this Court on a discretionary appeal.

ARGUMENT

Proposition of Law:

> **An order setting aside judgment and granting a new trial or, in the alternative, remittitur, is a final appealable order from which the thirty-day appeal clock begins to run.**

A. Introduction

The issue before this Court is straightforward: when did Shiloh's thirty-day appeal clock begin to run? The Third District unanimously held that Shiloh's appeal time began to run on December 15, 2006, the date the trial court entered and journalized the December 15 Order. This is the only result consistent with Ohio statutory and procedural law, namely R.C. 2505.02, Civ.R.

58, and App.R. 4. Shiloh argues now or has argued in the past, in various forms, that its appeal time began to run either on December 29, 2006 (the date VIL filed its consent to the remittitur), January 16, 2007 (the date the trial court entered its *Nunc Pro Tunc* order correcting a mathematical error in the calculation of the prejudgment interest), or, alternatively, that it has not yet begun to run. In the Third District, Shiloh's sole argument was that the December 15 Order became a final appealable order on December 29, 2006. At that time, Shiloh stated that "[a]ny other determination would defy case law and reason." (VIL Appendix at A-47.) Shiloh nonetheless now presents this Court with two other possible dates from which its appeal could lie, all the while ignoring the possibility that its appeal clock began to run on December 15, 2006. None of the dates proposed by Shiloh conforms with Ohio's statutory and procedural laws relating to final appealable orders.

Shiloh is posing an answer to a question that nobody else, practitioners and judges alike, seems to be asking. The fact that no published (reported or unreported) case in Ohio has dealt with this issue before now evidences that parties and their counsel are not getting "tripped up" by the law as it currently exists. Nothing prevented Shiloh from timely filing a notice of appeal in this case; it simply failed to do so. This Court should not be persuaded by Shiloh's unenviable predicament to attempt to repair a system that clearly is not broken.

B. The Trial Court's December 15 Order Was A Final Appealable Order Under R.C. 2505.02(B)(3).

The trial court's December 15 Order was a final appealable order under Ohio law. An analysis of why this is so necessarily begins with the Ohio Constitution, which provides that a state appellate court has jurisdiction to review, affirm, modify, or reverse "judgments or final orders" of lower courts within the district. Ohio Const. Art. IV, § 3(B)(2). (Shiloh Appendix at A-21.) An order of a court is a final appealable order only if the requirements of both Civ.R.

54(B), if applicable, and R.C. 2505.02 are met. *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86, 88. Civ.R. 54(B) is inapplicable here. Therefore, in this case, the December 15 Order of the trial court is final and appealable if it meets the requirements of R.C. 2505.02. In addition, a final judgment or order must be signed by the court and journalized to be effective. Civ.R. 58. (Shiloh Appendix at A-25.)

The version of R.C. 2505.02 in effect at the time of trial listed six orders that are final appealable orders.[1] (Shiloh Appendix at A-23.) The only one at issue here is referred to in subsection (B)(3): an order that "vacates or sets aside a judgment or grants a new trial." The December 15 Order alternatively granted two of the remedies contemplated by R.C. 2505.02(B)(3) -- it set aside the judgment and granted a new trial on damages. (Shiloh Appendix at A-10.) Specifically, the trial court stated, "[t]he Court hereby sets aside the judgment amount" and "[t]he Court grants the Plaintiff [VIL] 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." (Shiloh Appendix at A-11, A-12.) The December 15 Order is final and appealable under R.C. 2505.02(B)(3). The trial court recognized this, specifically stating, "[a]ll counsel and parties are notified that this order is an appealable order under 2505.02(B)(3)." (Shiloh Appendix at A-12.) Accordingly, Shiloh had thirty days from December 15, 2006, or until January 16, 2007, to file its notice of appeal.[2] App.R. 4(A). (VIL Appendix at A-70.) Shiloh filed its notice of appeal on January 25, 2007, nine days late.

The Third District also recognized this and unanimously held that the December 15 Order was final and appealable and dismissed Shiloh's appeal. In doing so, the Third District stated,

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[1] R.C. 2505.02 was amended effective October 10, 2007 to add a seventh type of order.

[2] January 14, 2007 fell on a Sunday and January 15, 2007 was a holiday, Martin Luther King, Jr. Day.

"... 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)." (Shiloh Appendix at A-7.)

Shiloh finds fault with this conclusion on four fronts. First, Shiloh argues that the December 15 Order cannot be a final appealable order under R.C. 2505.02 because the trial court never entered an order journalizing VIL's consent to the remittitur or otherwise entered a final judgment reflecting VIL's consent. Second, Shiloh discusses and analyzes the December 15 Order under R.C. 2505.02(B)(1), which is not only inapplicable but was not argued by either VIL or Shiloh or discussed or analyzed by the Third District below. Third, Shiloh argues that the Third District's holding is inconsistent with remittitur jurisprudence and specifically this Court's holding in *Wightman v. Consol. Rail Corp.* (1999), 86 Ohio St.3d 431. Fourth, Shiloh argues that no other jurisdiction which has considered this issue would deem the December 15 Order a final appealable order under the laws of that jurisdiction. VIL will address these arguments in order.

1. **The trial court is not required to enter and journalize an order reflecting VIL's consent to the remittitur.**

Shiloh argues (for the first time) that the December 15 Order cannot be a final appealable order under R.C. 2505.02 because the trial court never entered an order journalizing VIL's consent to the remittitur or otherwise entered a judgment reflecting VIL's consent. [3] Shiloh failed to raise this argument in the court below and therefore waived its right to raise it in this Court. See, e.g., *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278; *State v.*

[3] The only authority that Shiloh presents in support of this suggestion is that "[s]ome other jurisdictions have adopted this approach." (Shiloh Merit Brief at 10.) Shiloh identifies only two federal circuits and one state that have done so.

1981 Dodge Ram Van (1988), 36 Ohio St.3d 168, 170. Further, Shiloh's position is unsupported by Ohio law. In fact, Civ.R. 58(A) provides that, "upon a decision announced...the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal." Civ.R. 58(A). (Shiloh Appendix at A-25.) Because VIL's consent to remittitur is not "a decision announced" by the court, the trial court is not required to enter a judgment reflecting this election. Civ.R. 58(A).

Ohio's current statutory and procedural laws resolve the issue before this Court. R.C. 2505.02 defines the type of orders which are final appealable orders, Civ.R. 58(A) specifies when the order is effective, and App. R. 4(A) states that the notice of appeal from that order must be filed within thirty days. Despite this, Shiloh asks this Court to unnecessarily establish new law to accommodate Shiloh's untimely filing in this case, a request that does not appear to benefit anyone other than Shiloh.

Shiloh's argument ignores the fact that the trial court's December 15 Order is self-executing. "A self-executing judgment is one that accomplishes by its mere entry the result sought and requires no further exercise of the power of the court to accomplish its purpose." *Perala v. Perala* (Nov. 6, 1987), No. 12-102, 1987 WL 19753, 2 (Ohio App. 11 Dist.), citing *In re Dabney's Estate* (1951), 232 P.2d 481. The trial court did not need to take further action for the December 15 Order to be effective. While it is true that VIL's election on the remittitur determines the outcome of the order, it makes the order no less effective than when it was entered by the court on December 15, 2006. If VIL did not accept the remittitur and allowed the 14-day window to pass without taking any action, the result would have been a new trial on damages. It would occur automatically under the terms of the December 15 Order. In that situation, the December 15 Order clearly is a final appealable order under R.C. 2505.02(B)(3). If

that conclusion flows if VIL did not consent to remittitur, it must also flow in this case where VIL did. To hold otherwise would mean that the appeal clock would commence on different dates depending on VIL's election, a result which is illogical considering there is only one order.

2. R.C. 2505.02(B)(1) does not apply in this case, was not raised or argued in the Third District, and can be ignored by this Court.

Shiloh also discusses and analyzes the December 15 Order under R.C. 2505.02(B)(1), which is not only inapplicable to this case but has not been fully briefed or argued by VIL or Shiloh or discussed or analyzed by the Third District. As a result, Shiloh waived its right to raise this argument in this Court. Nonetheless, R.C. 2505.02(B) provides that an order is a final order "when it is one" of the types of orders set forth in subsections (B)(1) – (B)(6). R.C. 2505.02(B) (emphasis added). Because the December 15 Order is a final appealable order under R.C. 2505.02(B)(3), as noted by both the trial court and the Third District, further analysis under R.C. 2505.02(B)(1) is unnecessary.

3. The Third District's holding is consistent with this Court's remittitur jurisprudence.

Shiloh incorrectly claims that the December 15 Order is not final and appealable because it granted remittitur in addition to setting aside the judgment and granting a new trial. In Shiloh's words, "[t]he order was not final and appealable for the simple reason that one of the two potential judgments was remittitur." (Shiloh Merit Brief at 5). Ohio law does not require a trial court to limit its orders to a single remedy as Shiloh suggests. R.C. 2505.02 has not and should not be so interpreted. In *Rumley v. Cesco* (Sept. 20, 2001), No. 00AP-1228, 2001 WL 1097864 (10th Dist.), the court determined that an order granting a new trial and denying a motion for judgment notwithstanding the verdict was a final appealable order under R.C. 2505.02. The plaintiff claimed that the order was not final and appealable because R.C. 2505.02

does not specifically address the denial of a motion for judgment notwithstanding the verdict. *Id.* at 2. The Tenth District rejected plaintiff's argument stating, "[e]ven if the trial court's single judgment entry is viewed as one that primarily denies JNOV, it still incorporates the granting of a new trial into the JNOV denial, and we are left with a single entry that grants a new trial." *Id.* at 4. The same result is required here.

Shiloh also claims that its appeal clock could not have begun until December 29, 2006, when VIL consented to the remittitur, citing this Court's decision in *Wightman.* (Shiloh Merit Brief at 6.) *Wightman* does not support this conclusion. In *Wightman*, this Court held that a plaintiff who accepts a remittitur may appeal the trial court's determination of the damage issue if the opposing party appeals the issue. *Wightman*, 86 Ohio St.3d at 443. No Ohio case before this one, including *Wightman*, has decided when the order granting the new trial, or in the alternative remittitur, is effective for purposes of determining the deadline for an appeal. There is no need for this Court to do so now because R.C. 2505.02 and Civ.R. 58(A), when read together, answer this question for us. There is no need to look further.

The Third District Court of Appeals properly determined that VIL's consent to remittitur was not a final order under Ohio law and therefore could not have triggered Shiloh's appeal clock. Civ.R. 58 requires that a judgment or order be signed by the court and journalized. An entry not signed by the trial court is not a final appealable order. *In Re Mitchell* (1994), 93 Ohio App.3d 153, 154 (8th Dist.); see also, *Brackman Comm., Inc. v. Ritter* (1987), 38 Ohio App.3d 107 (12th Dist.). VIL's Consent to Remittitur was signed by VIL's counsel, not the court. 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.'" Shiloh Appendix at A-7. Moreover, VIL's Consent to Remittitur did not magically transform the

December 15 Order in any way. As the Third District explained, "it did not take VIL's Consent to Remittitur to effectuate the trial court's intent or judgment." (Shiloh Appendix at A-7.) Accordingly, Shiloh's appeal time could not have commenced to run on December 29, 2006 as Shiloh claims.[4] This is further supported by the very terms of the December 15 Order in which the trial court specifically stated that "[t]his order is an appealable order under 2505.02(B)(3)." (Shiloh Appendix at A-12.) Shiloh should have heeded the trial court's warning in that regard and filed its notice of appeal by January 16, 2007.

Also, Shiloh's Notice of Appeal indicated that Shiloh was appealing the trial court's September 18, 2006 order (the original judgment on jury verdict), which, according to Shiloh, "became a final judgment on January 16, 2007" (the date of the amended order). (Shiloh Supplement at S-1-S-2.) Shiloh's argument that December 29, 2006 is the date their appeal clock began is disingenuous considering its notice of appeal fails to even mention VIL's Consent to Remittitur, as required by App.R. 3(D).[5] The Third District recognized this deficiency in Shiloh's Notice of Appeal stating, "we note that a notice of appeal must designate the judgment appealed." (Shiloh Appendix at A-7.) Accordingly, not only was Shiloh's notice of appeal not timely filed, but it was also procedurally defective.

The very nature of a remittitur is two-pronged: the plaintiff either consents to the remittitur or a new trial results. If Shiloh's reasoning is adopted, then no order granting a new trial or, alternatively, a remittitur can <u>ever</u> be a final appealable order. This, however, runs

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[4] Shiloh seems to recognize this fact. Shiloh acknowledges in its Merit Brief that this argument is in "tension" with Civ.R. 58. (Shiloh Merit Brief at 10.)

[5] App.R. 3(D) provides that a notice of appeal "shall designate the judgment, order or part thereof appealed from." App.R. 3(D). (VIL Appendix at A-67.)

contrary to R.C. 2505.02, Civ.R. 58(A), and every case ever appealed in which a remittitur was ordered, this Court's decision in *Wightman* included.

4. Ohio law need not follow any of the options chosen by other jurisdictions.

Shiloh continues to argue 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." (Shiloh Appendix at A-7.) A review of the different underpinnings to federal and Ohio law on this issue reveals 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. 28 U.S.C. § 1291. (VIL Appendix at A-72.) 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 Order. 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. <u>Each State Should Be Free To Determine On Its Own Terms What Constitutes A Final Appealable Order</u>.

Shiloh also urges this court to reverse the Third District's ruling because Shiloh claims that it advances a "universally recognized principle." (Shiloh Merit Brief at 1.) 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, Shiloh's claim that the other jurisdictions "uniformly" deal with this issue is also incorrect. If that were the case, then they would each deal with it the same way. They do not. These jurisdictions have each separately determined whether and on what terms an order setting aside a judgment or granting a new trial, or in the alternative a remittitur, is a final,

appealable order. Not only is there no uniformity, but also there is nothing to indicate that these states sought uniformity amongst themselves. In fact, as Shiloh's Merit Brief indicates, there are three distinct approaches adopted by these jurisdictions. So much for "uniformity." The Ohio General Assembly in enacting R.C. 2505.02(B)(3) chose, for whatever reason, to take a different approach. There is nothing "wrong" with the General Assembly's choice, and certainly nothing about it that needs this Court's intervention.

C. 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.[6] However, the Civil and Appellate Rules make it perfectly permissible for a defendant to do so. Had Shiloh done so in this case it would have avoided the predicament in which it now finds itself. Also, the scenario posited by Shiloh is purely hypothetical, as that was not the situation it faced. As the Third District unanimously determined, the trial court's December 15 Order triggered the appeal time, thereby establishing January 16, 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 18 days within which to file a notice of appeal, yet it failed to do so. 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. App.R. 4(C) provides, "[a] notice of appeal filed after the announcement of a decision [or] order . . . but before entry of the judgment or order that begins the running of the

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[6] Interestingly, Shiloh argues that a defendant cannot do this without divesting the trial court of jurisdiction for the plaintiff to consent to remittitur, but did this very thing when it filed its notice of appeal before VIL consented to the remittitur arising out of the trial court's January 16, 2007 *Nunc Pro Tunc* entry.

appeal time period is treated as filed immediately after the entry." App.R. 4(C). (VIL Appendix at A-71.) 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 on January 30, 2007 to the remittitur with respect to the January 16, 2007 *Nunc Pro Tunc* order.

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.* (Dec. 16, 1998), No. 96 CV 260, 1999 WL 3958 (Ohio App. 5 Dist.) (copy attached). 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 in such a manner as to render ineffective VIL's consent to the remittitur.

Ohio's statutory and procedural laws in their current form provided the safeguards necessary for Shiloh to have perfected a timely appeal in this case. Shiloh's failure to do so in this one case is hardly a reason for this Court to attempt to repair a system that nobody (other than perhaps Shiloh) believes is broken.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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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, Joslyn E. Kaye, 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 27th day of December, 2007.

James L. Thieman

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APPENDIX

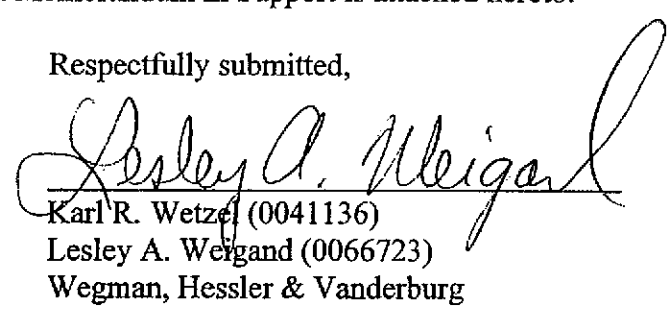
IN THE COURT OF COMMON PLEAS
SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, L.L.C.	)	CASE NO. 04 CV 000158
	)	
Plaintiff,	)	JUDGE JEFFREY M. WELBAUM
	)	(By Assignment 04JA0521)
v.	)	
	)	**DEFENDANTS' MOTIONS FOR**
SHILOH INDUSTRIES, INC., *et al.*	)	**JUDGMENT NOTWITHSTANDING THE**
	)	**VERDICT AND/OR IN THE**
Defendants.	)	**ALTERNATIVE, A NEW TRIAL**
	)	**AND/OR IN THE ALTERNATIVE**
	)	**REMITTITUR**

Oral Argument Requested

Now come Defendants, Shiloh Industries, Inc., Shiloh Corporation, and Medina Blanking, Inc., (collectively "Shiloh"), by and through undersigned counsel, Wegman, Hessler & Vanderburg, and move this Court pursuant to Rule 50(B) of the Ohio Rules of Civil Procedure for judgment notwithstanding the verdict ("JNOV") and/or in the alternative pursuant to Rule 59 of the Ohio Rules of Civil Procedure for a new trial and/or in the alternative for remittitur. A Memorandum in Support is attached hereto.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

The failure to purchase an antiquated LW-B Basic ("Basic") system and an ill-designed LW-B Cubed ("Cubed") system that never performed to the contract specifications and which had never earned a gross margin of 25% in the past, has lead to a jury verdict of Two Million Two Hundred Ninety Thousand Dollars ($2,290,000). This verdict coupled with the fact the jury completely ignored the admission by Bob Lewinski and David Knapke that credits were owed Shiloh in the amount of $4,052,360, speaks plainly and directly. It says unequivocally that the jury was inflamed by passion and prejudice and led astray by a wildly speculative damages theory that could not be explained upon cross examination.

The verdict is a miscarriage of justice. It is abundantly clear from the jury interrogatories that the jury adopted *carte blanche* everything Plaintiff argued, irrespective of the fact Plaintiff failed to demonstrate with any degree of reason its entitlement to a gross profit margin of 30% on the Basic system and a gross profit margin of 25% on the Cubed system. Plaintiff's damage theory ignored the facts. It ignored the fact that none of the previously made Basic systems ever achieved a gross profit margin of 25%, let alone 30%. It ignored the fact that the only two Cubed systems it ever manufactured never hit Plaintiff's intended gross profit margin, in addition to the fact that Plaintiff failed to properly account for all of the accruals associated with both of those systems.

In their motions for directed verdict at the close of Plaintiff's evidence and again at the close of all evidence, Defendants' counsel moved this Court for judgment in their favor due to the very real possibility the jury may base its verdict on mere conjecture and

speculation. Clearly there was no substantive evidence on the reasonableness of the claimed gross profit percentage. Plaintiff's case was based on *assumptions* that it would do a better job the next time, even though there was no evidence to support this assumption (ie., no redesigns of the problems associated with the LW-B cubed system). Furthermore, Plaintiff relied on the testimony of Dan Thompson, the expert who admittedly looked no further than the profit planner for the Cubed system, the testimony of Sterling Stevenson, and the RMA manual (which reviewed only a sliver of the machine tool industry), to support Plaintiff's position that it would earn a gross profit margin of 25% on the Basic and Cubed systems. Dan Thompson could not even explain on cross examination the underlying simple math which would support his theory, rather his comment was it didn't matter. In Thompson's opinion, when comparing the actual gross profit margin earned on the second unit with the profit planner of the third system, it didn't matter that to have a corresponding increase in gross profit with a decrease in the selling price that costs would necessarily have to be cut in the range of $1,300,000. It also didn't matter to Thompson that there was no way to cut costs from the previous cubed unit in the amount of $1,300,000. In his analysis that just didn't matter. The jury's verdict defies all logic and should shock the conscience of any court and lead to the conclusion that the verdict cannot stand.

Defendants therefore respectfully move this Court pursuant to Ohio R. Civ. P. 50, for an entry of judgment notwithstanding the verdict ("JNOV") and/or in the alternative, pursuant to Ohio R. Civ. P. 59(A)(4)(5)and (6), for a new trial and/or in the alternative for remittitur.

I. SHILOH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, A NEW TRIAL BECAUSE THE DAMAGE AWARDS (A) ARE SPECULATIVE, (B) REST ON INCOMPETENT EVIDENCE THAT DID NOT SATISFY APPLICABLE LEGAL AND ACCOUNTING STANDARDS; (C) ARE GROSSLY EXCESSIVE AND OTHERWISE LEGALLY FLAWED.

Shiloh's breach of contract for failing to purchase and antiquated Basic system and a Cubed system wrought with problems and which never made any money for VIL has led to verdicts of $2,290,000 based upon improper testimony on the proper fashion in which to calculate gross profit margin.

Ohio R. Civ. Pr. 50(B) permits a party to request the trial court to enter a judgment notwithstanding the verdict ("JNOV"). A motion for JNOV tests the legal sufficiency of the evidence. The standard for granting a motion for JNOV is whether, construing the evidence most strongly in favor of the non-moving party, the movant is entitled to judgment as a matter of law. *Sanek v. Duracote Corp.* (1989), 43 Ohio St. 3d 169; *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St. 2d 271, 275. When ruling on a motion for JNOV, all of the evidence introduced at trial is available for the trial court's consideration. *Bellman v. Ford Motor Company* 2005 Ohio 2777 *citing, Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 347.

Additionally, "a motion for new trial may be combined with a motion for judgment notwithstanding the verdict or a new trial may be prayed for in the alternative." *McCormac, Ohio Rules Civil Practice* (2 Ed. 1992) 380, Section 13.28. "Where there is a motion for new trial upon the ground that judgment is not sustained by sufficient evidence, a duty devolves upon the trial court to review the evidence adduced during trial and to itself pass upon the credibility of the witnesses and the evidence in general." *Verbon v. Pennese* (1982), 7 Ohio App. 3d 182, 183, *citing Poske v. Mergl* (1959), 169

Ohio St. 70, 73-74. Where a court finds judgment manifestly against the weight of the evidence, it is its duty to set it aside. *Id.* Likewise, a judgment may be vacated merely upon the weight of the evidence, if the ground being pursued as a basis for new trial is a matter of law. *Id.* citing *Dryer v. Hastings* (1950), 87 Ohio App. 147.

In the case at bar, the jury was induced to award enormous damages by testimony that was legally incompetent, as is more fully set forth below, and accordingly, this Court must enter a judgment for Defendants ("JNOV") and vacate the jury verdict or order a new trial.

A. The Jury's Determination of Gross Profit Margin Percentages for both the LW-B Basic System and the LW-B Cubed System Are Based On Improper Evidence, Against The Manifest Weight of the Evidence And The Result Of Passion And Prejudice.

1. LW-B Basic System ("Basic").

Defendants heard for the first time at trial the midnight calculations of Robert Lewinski to come up with a projected gross profit margin on the Basic system of 33%. (Lewinski TT pg. 254-258). Although Mr. Thieman argued in closing that these calculation were done weeks before the trial, this ignored Mr. Lewinski's admission on cross examination. (Closing TT pg. 37). Mr. Lewinski admitted that he had just prepared this spreadsheet the two to three nights before his testimony. (Lewinski TT. pg. 258). In all of Plaintiff's pleadings and pretrial motions as well as in the deposition of its expert witness, Dan Thompson, Plaintiff argues for a gross profit margin of 25%. Indeed, that is the gross profit margin demonstrated on its "profit planner" for the Basic system that was to be sold to Shiloh under this December 15, 2000 Agreement. (See Plaintiff's trial exhibit 8, Lewinski TT pg. 75). Plaintiff even argued during closing argument that an

award of 25% for the Basic was appropriate. (Closing TT. pg. 16, 18, 23, 26, 29, 30, 31 and 34).

Lewinski's calculations of projected profit margins certainly had many flaws, but one is enough: It rested on projections prepared no earlier than two to three nights before his testimony at trial, more than 5 ½ years after the December 15, 2000 Agreement. (Lewinski TT pg. 257-258). Lost profits can be awarded only if they were within the parties' contemplation when the alleged contract was made. *E.g. AGF, Inc. v. Great Lakes Heat Treating Co.* (1990), 51 Ohio St. 3d 177, 183; *Charles R. Combs Trucking, Inc. v. International Harvester Co.* (1984), 12 Ohio St. 3d 241. By allowing lost profits testimony based on projections prepared years later, the Court erred as a matter of law.

There is nothing other than Lewinski's self-serving statement and calculation to support the purported 33% gross profit margin and Mr. Thieman states as much in his closing argument. As the Supreme Court in *Charles A. Combs Trucking* made clear, it is the anticipated profits the party expected to earn at the time of the contract, not calculated the night before trial or even a few weeks before trial. Rather, the relevant time frame is December 15, 2000.

Over and above this error, the jury acted out of passion and prejudice in awarding anything greater than 10% on the Basic system's gross profit margin. Lewinski testified that on the prior Basic systems sold, although each time the projected profit margin from the profit planner was around 20%, the actual profit margin earned was only 10%. (Lewinski TT. pg. 175). There was no evidence other than Lewinski's own testimony that the Basic unit which is the subject of this litigation would have earned 33%. The argument that somehow VIL was going to earn such a substantial gross profit on this unit

because it could compare its costs with the fifth Basic system supplied under paragraph 6 of the December 15, 2000 Agreement ignores the fact that the fifth Basic was produced for VIL stock and there was no pressure from customer demands, timelines, or specific customer specifications. VIL made the fifth Basic system for itself so of course there aren't going to be any costs related to requests or changes.

What the evidence did demonstrate in this case is that VIL could never properly project its profit margin on any of the systems sold, even simplistic systems such as the wash-dry-lube system (projected 22.63%, actual 7.79%), its patented edge prep system (projected 20.57%, actual 10.04%)or the LW-B Robotic system sold to LWB in the UK (projected 17.92%, actual -.78%), not to mention the previous Basic systems and the two previous Cubed systems sold to Shiloh. (See Defendants' Trial Exhibits 119, 120, 135, 125, respectively). This verdict is completely unsupportable by any of the evidence elicited in this case.

Accordingly, Defendant is entitled to judgment notwithstanding the verdict on the gross profit margin related to the Basic system and/or in the alternative a new trial on damages related to the Basic system.

2. The LW-B Cubed System ("Cubed").

As raised in Defendants' Motion for Directed Verdict, Defendants' counsel was adamant that the jury was going to be deciding the issue of damages on improper and incompetent testimony. Bob Lewinski testified that warranty costs are not calculated to determine gross profit of these systems. (Lewinski redirect TT pg. 46). Recall that Lewinski is not an accountant or a CPA but rather derives his familiarity from producing

profit planners for VIL while it was a part of Littell.[1] This is absolutely improper accounting by any standard, even Littell's. Littell's own profit and loss statements include a figure for warranty work in its calculation of adjusted gross profit. (Defendant's Trial Exhibit 114).

As testified to by Lou Maglione, there really is no such thing as "adjusted gross profit" rather this is just a way Littell chose to keep its internal books. Furthermore, Mr. Maglione also testified that proper accounting standards dictate that if a cost is readily traceable to a particular product, it should be included in the cost of goods sold associated with that product.

While undersigned counsel does not wish to get into a detailed explanation of proper accounting practices related to warranty items, several publications from the Financial Accounting Standards Board are very relevant to this issue and highlight the fact that Plaintiff argued an improper premise of calculating gross profit margin to the jury. As mentioned previously, Defendants were concerned that Plaintiff was basing a gross profit margin calculation on improper accounting standards, ie. the failure to account for accruals and warranties that are directly related to the production of the product in question and moved this Court for directed verdict on this issue because of the impropriety of the testimony.

Statement of Financial Accounting Concepts No. 5 entitled "Recognition and Measurement in Financial Statements of Business Enterprise," at paragraphs 83 and 84 discuss the concept of Revenues and Gains and when they are realized or realizable, specifically paragraph 83(b) states in pertinent part:

Curiously, Lewinski no longer is involved in the preparation of profit planners at VIL (Knapke TT. pg. 81).

> *Earned.* Revenues are not recognized until earned. An entity's revenue-earning activities involve delivery or producing goods...or other activities that constitute its ongoing major or central operations, and revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues. (See attached Exhibit A.)

In other words, if there are accruals which are directly related to the cost of producing the Cubed systems, then VIL cannot properly calculate its revenue earned until such time as the accruals are properly accounted, thereby reducing the gross profit margin. Stated another way, proper accounting methodology dictates that a company "match" its expenses with its assets, to the extent they are readily identifiable. (See Accounting Practices Bulletin Statement No. 4, paragraphs 156-160).

Mr. Lewinski discussed warranties and the fact that warranties are not to be deducted in calculating the gross profit margin. (Lewinski redirect TT. pg. 46). Perhaps that is the way Mr. Lewinski calculates his gross profit margin, but that is not the proper method under the Financial Accounting Standards Board. Statement of Financial Accounting Standards No. 5, paragraph 8, states:

> An estimated loss from a loss contingency (ie. product warranties) shall be accrued by a charge to income if both of the following conditions are met:
>
> a. Information available prior to issuance of the financial statements indicates that it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.
>
> b. The amount of the loss can be reasonably estimated. (See attached Exhibit B.)

As mentioned previously, it is not Defendants' desire to get into a dissertation on proper accounting practices; however, because this goes to the basis of Defendants' motion for directed verdict and in turn motion for judgment notwithstanding the verdict, a review of

the applicable accounting principles is helpful to demonstrate that Plaintiff's explanation that to come up with the proper gross profit margin percentage the accruals should be backed out of the actual gross profit and that warranty work does not need to be accounted for is not only beyond belief, but contrary to established accounting principles.

The jury was permitted to determine this case based upon conjecture, speculation and most importantly, improper testimony that for some reason any "accruals or warranty costs" should not be accounted for in determining the gross profit margin of the previous systems. This assertion is baffling to any seasoned accountant. Dan Thompson, during his cross examination when asked to explain this merely reiterated that VIL did not keep its books in this fashion so he was not going to include it. Again, beyond belief. Dan Thompson further admitted that he knew nothing about Littell or how it kept its books. Lewinski testified Littell's financials were audited, but not that the gross profit calculations were audited since those figures are always used for internal accounting purposes, not outside and are therefore not subject to audit review. Furthermore, the actual product line profit and loss statement setting forth the gross profit margins earned on the various products is an internal document for management purposes only, not an audited financial statement.

As testified to by Bob Lewinski, Littell closed its books on the two previous Cubed systems only 4 months after the systems were delivered to Shiloh. (Lewinski 8/31/06 TT. pg. 18). Regarding the first Cubed system, this was even before the vast majority of the problems were discovered and certainly before any of the laser issues arose. (Defendants' Trial Exhibit 22, Lewinski 8/31/06 TT pgs. 22-23). VIL was purposefully backloading all of the necessary work that needed to be done on both Cubed

systems into this "warranty pool" to which Lewinski testified. All this does is artificially inflate the gross profit margin because costs directly tied to the product are not recognized until subsequent accounting periods and can be hidden among other products that do not have any cost overruns. Without a complete audit of the warranty pool, there would be no way of knowing which costs are directly related to which products. This serves no identifiable internal accounting purpose (ie. management certainly wants to know what products are outperforming others) and also serves no financial accounting purpose (investors want to know which products outperform others). Accepting VIL's methodology does nothing but sanction such practices that are so diametrically opposed to reasoned accounting principles, they must be denied as improper by this Court.

In giving an award of money damages in a breach of contract action, the intent is to place the injured party in the same position it would have been in had the contract not been breached. *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St. 3d 436, 439. Plaintiff was awarded a windfall on both the Basic and the Cubed systems since the record is devoid of any evidence supporting that VIL would have earned these amounts as gross profit, but for the breach. A jury verdict based on this evidence is improper and judgment notwithstanding the verdict on both systems gross profit margin percentage is necessary as a matter of law.

B. In The Alternative Shiloh Is Entitled To A New Trial On Damages.

Plaintiff's trial strategy was to seek to have its speculative damages claim assessed by a sympathetic jury in the hope of winning a legally baseless award. It succeeded. But the law does not entitle it to receive what the jury awarded.

1. Legal Standard.

If an award is excessive and appears to be the product of passion or prejudice, a new trial is proper and should be ordered. *Moskowitz v. Mt. Sinai Medical Ctr.* (1994), 69 Ohio St. 3d 638, 654. The trial court possesses broad discretion in deciding whether to order a new trial based on excessive damages. *Knor v. Parking Co. of America* (1991), 73 Ohio App. 3d 177, 187; *Jeanne v. Hawkes Hospital of Mt. Carmel* (1991), 74 Ohio App. 3d 246. In *Jeanne*, supra at 257, the court discussed the issue of excessive damage awards:

> A jury verdict should not be set aside unless the damages awarded are so excessive as to appear to have been awarded as a result of passion or prejudice. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42.
>
> In *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, the court set forth a standard to be utilized in determining whether a verdict was influenced by passion and prejudice and stated, at paragraph three of the syllabus:
>
>> In order to determine whether excessive damages were so influenced, a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one has been entered, but it also becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence; (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded. See also, *Loudy v. Faries* (1985), 22 Ohio App. 3d 17

Defendants contend that the jury verdict was based not only on passion and prejudice and against the manifest weight of the evidence but also because this is an action for damages in a breach of contract action and the damages in this circumstance must reasonably reflect what the plaintiff would have earned had the contract been completed. See, *Schulke Radio Productions, Ltd., supra.*

2. The Award of Damages Was Based On Passion And Prejudice Caused By The Denial Of Defendant's Motion In Limine Regarding Breach Of Contract And Plaintiff's Counsel's Improper Arguments.

Defendants were well aware of the fact that Plaintiff and its counsel intended to make an issue out of the fact the contract had been breached. This is precisely why Defendants' filed their motion in limine to preclude references to the breach of contract in order to avoid any of the passion that necessarily accompanies such argument. Plaintiff's counsel, over the objection of Defendants, introduced the letter signed by Jack Falcon stating "Shiloh was as good as our word" and that Shiloh would honor the December 15, 2000 Agreement. (Lewinski TT pg. 168, Plaintiff's Ex. 12). Plaintiff continued to harp on this "Prima" letter with the deposition testimony of both Jack Falcon and Dave Frink and then turned around in closing argument and argued to the jury that it wasn't Shiloh that called Falcon or Frink and made the comment of "where were they..." (Closing TT. pg. 34, 11).

As Defendants contended all along, this case is and was about damages. Not what the intention of the parties was in honoring the contract. The intention of the parties has no business being in this case. This testimony and argument only serves to fuel the fire for a passionate jury award. All this does is demonstrate it is "Big Bad Shiloh" taking advantage of little hometown VIL.

Furthermore, Plaintiff's counsel argued in closing argument that the reason this contract was breached was because Ted Zampetis did not believe it to be a contract and that Falcon and Frink were gone from the scene. (Closing TT pg. 35). Again, why the contract was breached or what Mr. Zampetis' personal belief is has no bearing on this case. It only serves to inflame the jury. Plaintiff's counsel additionally argued throughout

the trial over the objection of Shiloh regarding the content and meaning of paragraph 6 of the December 15, 2000 Agreement. Plaintiff was permitted to argue the meaning of that paragraph but Defendants were precluded from arguing the issue of the backcharges. (Knapke TT pg. 84). No where in paragraph 6 does it address the amount of the backcharges. The backcharges are specifically relevant because they are in the exact same amount as the LW-B Basic unit and the 10,000 engineering hours provided. By allowing Plaintiff to argue paragraph 6 but denying Defendants the ability to explain paragraph 6 is tantamount to a passionate jury verdict because the jury was under the impression that Shiloh received something for nothing and on top of it all did not purchase the Cubed or the Basic system set forth in paragraphs 5.1 and 5.3 of the December 15, 2000 Agreement.

Mr. Thieman continued making improper comments and insinuations in closing argument by telling the jury that there is no counterclaim in this case and insinuating that there were no problems on the systems because no counterclaim was filed. (Closing TT pg. 25). No counterclaim was filed because VIL waited until after the statute of limitations had passed relating to the warranty to file this suit! As this Court is well aware the problems with both Cubed systems were brought out to demonstrate Plaintiff could not accurately predict its gross profit percentage on either of the previous cubed units produced and therefore, there is no inherent reliability of the profit planner on the third Cubed system.

Finally, the question in this case is not "we did our part, now they have to do their part. They have to pay up. That's what it's all about. It's time to pay up." (Closing TT. pg. 36). Rather, it is whether Plaintiff met its burden to a reasonable degree of certainty

that it would have earned 30% on the Basic unit and 25% on the Cubed unit. This was not a breach of contract trial. This Court has already decided that issue. This trial was only to be about damages and whether Plaintiff could prove its entitlement to damages. By allowing Plaintiff's counsel to go on witness after witness and testify regarding the intent of Shiloh, the import of the Prima letter, the intent of paragraph 6 of the December 15, 2000 Agreement (with no corresponding rebuttal evidence permitted by Defendant) and the fact Ted Zampetis did not believe the Agreement to be a contract only served to prejudice Defendants, which resulted in this ridiculous and unsupported verdict.

It is clear that the jury was angered at Shiloh, most certainly because it felt VIL delivered a free Basic unit and 10,000 engineering hours and Shiloh failed to make the purchases under 5.1 and 5.3 of the December 15, 2000 Agreement. The jury ignored the evidence that every time VIL created a profit planner, it failed to meet its projections. It ignored the fact that VIL closed out its books on the two previous Cubed systems only 4 months after being delivered and failed to account for any additional accruals to that particular project. This perhaps is the most glaring problem with the verdict, it ignored all financial information regarding the competency of the evidence related to lost profits. It is only too obvious that this ignorance was motivated by passion and prejudice instilled by improper references of the intentions of Shiloh. As stated by the Supreme Court in *Toledo , C&O R.R. Co. v.* Miller (1921), 103 Ohio St. 17, 22, "if the sympathy of the jury is exhibited in the verdict to such extent as to show passion or prejudice, and excessive damages result therefrom, the law of Ohio makes it the imperative duty of the court to set aside the verdict." There can be "no other conclusion but that the verdict of the jury was

one influenced by passion and prejudice." *Giles v. Yellow Cab Co.* (1964), 1 Ohio App. 2d 404, 409. A new trial is required.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUBSTANTIALLY REMIT THE VERDICT.

A. Introduction

The legal concept of remittitur was developed to provide the trial court with the procedural mechanism by which it could adjust or correct an unjust award. *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App. 3d 211, 218. Remittitur is proper where a court can affirmatively find that the jury's verdict is manifestly excessive. *Uebelacker v. Cincom Systems, Inc.* (1992), 80 Ohio App. 3d 97, 103. Excessive damages can only be determined from reviewing the weight and sufficiency of the evidence. *Id.*; *Schendel v. Bradford* (1922), 106 Ohio St. 387. Upon concluding the amount of the verdict is excessive, the court may reduce the verdict by remittitur "to any amount warranted by the evidence." *Lance v. Leohr* (1983), 9 Ohio App. 3d 297, 298 at paragraph one of the syllabus.

In the case at bar, Plaintiff failed to demonstrate to any reasonable degree of certainty its entitlement to a 30% gross profit margin on the Basic system and a 25% gross profit margin on the cubed system, as more fully discussed in Plaintiff's Motion for Judgment Notwithstanding the Verdict and/or in the alternative for a New Trial. In addition, and most pertinent to the remitittur argument is the fact that the jury **ignored** the admissions by both Bob Lewinski and David Knapke that Shiloh was entitled to credits in the amount of $4,051,730.

Based upon the arguments set forth in Defendants' Motion for Judgment Notwithstanding the Verdict and/or in the Alternative for a New Trial as well as the

arguments surrounding why credits in this case are appropriate, this Court should award of remittitur of $4,051,730 in credits which directly offsets the total purchase profile of $10,125,000 due to the fact both Bob Lewinski and David Knapke testified Shiloh was owed these credits. There was no testimony in this case from either Mr. Lewinski or Mr. Knapke that Shiloh was owed nothing in credits, rather this assertion was made solely by Mr. Thieman as counsel for Plaintiff, and is improper.

In addition, this Court should order a remittitur of 20% on the Basic for a total gross profit margin percentage of 10%, in compliance with the gross profit margins earned on all the prior Basic systems and issue a remittitur of 25% on the Cubed system since there was no competent testimony establishing any projected profit margin for the third Cubed system and given the fact utilizing the proper accounting standards, Plaintiff lost money on both previous cubed systems. In the alternative, this Court should issue a remittitur of at least 5% on the Basic unit since the profit planner created at the time of the December 15, 2000 Agreement demonstrated a projected gross profit margin of 25% on the Basic system and that was the amount of the gross profit anticipated by the Plaintiff at the time the contract was executed. Further, in the alternative this Court should enter a remittitur of at least 9% on the Cubed unit since Mr. Thieman's alternative argument in closing requested the jury to award Plaintiff at least the amount it earned per its records on the second cubed system.

Defendants' propose the following formula be utilized by this Court in figuring out the proper amount of total damages:

Contract Price:	$10,125,000
Less: Credits:	($4,051,730)[2]
Adjusted Price:	$6,073,270

Basic unit: $\frac{\$1,800,000}{\$8,800,000} = 20.5\%$

Cubed unit: $\frac{\$7,000,000}{\$8,800,000} = 79.5\%$

$6,073,270 x .205 x (GP% of Basic) = Damages for Basic

$6,073,270 x .795 x (GP% of Cubed) = Damages for Cubed

Damages for Basic + Damages for Cubed = Total Damages

[2] Defendants alternatively argue that the proper credit amount should be $5,000,000 as there was competent testimony regarding the additional capital equipment purchase of the PW-01 press automation with a value of $340,000 (Defendants' Ex. 216) and additional engineering services in the amount of $650,000 (Parente direct exam).

B. Defendants Are Entitled To Credits In The Amount Of $4,051,730 Per The Admissions Of Bob Lewinski And David Knapke

Fundamental to this concept of credits is Lewinski's acknowledgement that Shiloh most likely would not purchase the Basic or the Cubed system, but rather the purchase would take the substance of several different types of systems equaling the total dollar value of the Basic and Cubed systems. (Lewinski TT. pg. 85-86). As testified to by Shiloh personnel as well as Mr. Lewinski, Shiloh continued making purchases of capital equipment items after January 1, 2001 that provided significant engineering and manufacturing work to VIL and VIL continued to credit Shiloh for those purchases. (Lewsinki TT. pg. 85-91). In fact, as of the date VIL was sold to Wayne Trail, according to Lewinski, the relationship between VIL and Shiloh was as good as it had ever been. (Lewinski TT. pg. 96).

Mr. Lewinski testified about the credit document, Plaintiff's Exhibit 11, and said that this document was prepared by him and reconciled weekly with Shiloh personnel, specifically Bill Zapf in Shiloh's accounting department. (Lewinski TT pgs. 85-91, 97). At page 268 of Lewinski's cross examination, when asked whether as he sits here today he believes Shiloh is entitled to credits in the amount of $4.1 million[3], Lewinski responded "as a matter of personal opinion our arrangement was to give them credits toward substantial capital equipment purchases." The only mention that the credits should not be given to Shiloh was heard from Mr. Thieman. However, it is the opinion of Mr. Lewinski, not Mr. Thieman that counts. Mr. Thieman is just representing his client zealously and attempting to get the most out of this case, but his argument to the jury is not testimony or evidence. There is no evidence that Mr. Lewinski ever equivocated on

his agreement with Shiloh to credit them the amount of capital equipment purchases toward the fulfillment of the December 15, 2000 purchase profile.

Lewinski time and time again during his testimony stated that additional capital equipment purchases counted and if Shiloh bought equipment, they would have been credited. (Lewinski TT. pg. 270, 271, 272). Additionally, during the cross examination of David Knapke, Mr. Knapke agreed with Lewinski's calculation of credits at $4.1 million. (Knapke TT. pg. 55).

Mr. Thieman's explanation for his argument that no credits should apply is that since Jack Falcon signed the "Prima" letter, it was always Shiloh's intention to purchase another basic and cubed system irrespective of the credits. Unfortunately for Mr. Thieman, there is no evidence of that anywhere in the record, not even from his own client. Therefore, this explanation holds no muster and must be dismissed.

This failure to consider the admissions of Bob Lewinski and David Knapke as relates to the issue of the credits and the jury's clear ignorance of the credit document itself which demonstrates credits as of March, 2002 in the amount of $3,464,730, is further evidence of the fact that this jury verdict is excessive and not based on the evidence. When the Court deems the award excessive, the proper course is to offer the plaintiff remittitur and, if the remittitur is refused, to set aside the verdict and grant a new trial. See *Uhlmanseik v. Salvation Army* (2005), 159 Ohio App. 3d 623, *citing Powell v. Montgomery* (1971), 27 Ohio App. 2d 112, 124. in *Uhlmanseik*, the First District Court of Appeals reversed the lower court's order of remittitur and instead granted a new trial because the lower court admitted it could only speculate how the jury apportioned

[3] The amount of $4.1 million was used for ease of the jury. The exact figure as testified to by Lewinski and for purposes of this motion is accepted by Defendants is $4,051,730.

damages. The beauty of the instant case is that there is no speculation how the jury arrived at their verdict, the jury interrogatories explain their analysis. Defendants' position is that the jury just ignored the testimony of Mr. Lewinski and Mr. Knapke who admitted credits were owed Shiloh and instead relied on the argument of counsel that Shiloh was not owed any credits.

Situations such as this are exactly the reason for remittitur. Remittitur allows a trial judge to correct a jury verdict when it is against the manifest weight of the evidence. See, *Brady v. Miller,* Montgomery App. No. 19723, 2003 Ohio 4582, citing *Menda v. Springfield Radiologists, Inc.*, Clark App. No. 2001-CA-91, 2002 Ohio 6785. In *Brady,* the plaintiff, a college student, filed a malpractice action against his physician for failure to diagnose testicular cancer. The jury awarded Brady $300,000 in lost wages. The trial court granted a remittitur in the total amount of the lost wages award finding that Brady had failed to establish any lost wages with reasonable certainty. The Second District Court of Appeals, after reviewing the full trial transcript found no evidence to support an award of lost wages.[4]

Similar to the factual situation in our case, like Brady, VIL produced no evidence that Shiloh was not entitled to credits in the amount of $4,051,730. In fact, VIL produced just the opposite, admissions from its two principle witnesses that Shiloh was indeed owed credits of $4,051,730 and even calculated this amount for the jury while on the stand, giving Shiloh additional credits for items purchased after VIL was sold to Wayne Trail. The record is completely devoid of any evidence that Shiloh was *not* entitled to credits in the amount of $4,051,730.

[4] The Court ultimately reversed the trial court for failure to obtain the consent of Brady and remanded the case for a new trial on the lost wage claim.

C. **Conclusion**

Based upon the foregoing arguments, should this Court fail or order a new trial on damages in this case, Defendants request a substantial remittitur utilizing the formula set forth in the introduction above as follows:

Alternative 1:

Contract Price:	$10,125,000
Less: Credits	($4,051,730)[5]
Adjusted Price:	$6,073,270

Damages for Basic:

$6,073,270 x .205 x .10 = $124,502

Damages for Cubed:

$6,073,270 x .795 x 0 = $-0-

Total Damages: $124,502

Therefore, a remittitur of $2,165,498

Alternative 2:

Contract Price:	$10,125,000
Less: Credits	($4,051,730)
Adjusted Price:	$6,073,270

Damages for Basic:

$6,073,270 x .205 x .25 = $311,255

Damages for Cubed:

$6,073,270 x .795 x .1594 = $769,623

Total Damages: $1,080,878

Therefore, a remittitur of $1,209,122

[5] Should this Court adopt Defendants' figure of credits of $5,000,000, this figure would necessarily change on each alternative.

Alternative 3:

Contract Price:	$10,125,000
Less: Credits	($4,051,730)
Adjusted Price:	$6,073,270

Damages for Basic:

$6,073,270 x .205 x .25 = $311,255

Damages for Cubed:

$6,073,270 x .795 x .25 = $1,207,062

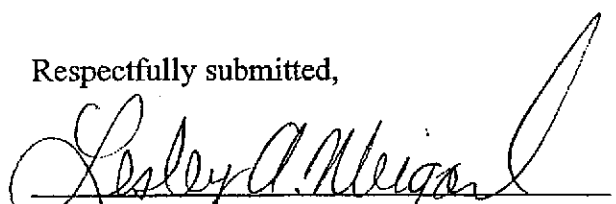
Total Damages: $1,518,317

Therefore, a remittitur of $771,683

III. CONCLUSION

Based upon the foregoing arguments and citations to the record, Defendants respectfully request this Court to enter judgment notwithstanding the verdict (JNOV) and/or in the alternative grant a new trial on damages and/or in the alternative grant a remittitur of the jury verdict.

Respectfully submitted,



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Attorneys for Defendants
Shiloh Industries, Inc, Shiloh Corporation
and Medina Blanking, Inc.

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of September, 2006, a true copy of Defendants' Motions for Judgment Notwithstanding the Verdict and/or in the Alternative, a New Trial and/or in the Alternative Remittitur was forwarded via regular U.S. Mail to:

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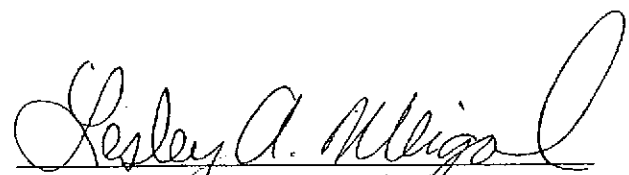
A Legal Professional Association
Courtview Center, Suite 300
100 South Main Avenue
Sidney, Ohio 45365
E-mail: jthieman@fgks-law.com

Attorney for Plaintiff
VIL Laser Systems, LLC.



One of the Attorneys for Defendants
Shiloh Industries, Inc., Shiloh Corporation
and Medina Blanking, Inc.

IN THE COURT OF COMMON PLEAS
SHELBY COUNTY, OHIO

VIL LASER SYSTEMS, L.L.C.	)	CASE NO. 04 CV 000158
	)	
Plaintiff,	)	JUDGE JEFFREY M. WELBAUM
	)	(By Assignment 04JA0521)
v.	)	
	)	**DEFENDANT'S MOTION FOR ORDER**
SHILOH INDUSTRIES, INC., *et al.*	)	***NUN PRO TUNC***
	)	
Defendants.	)	
	)	
	)	

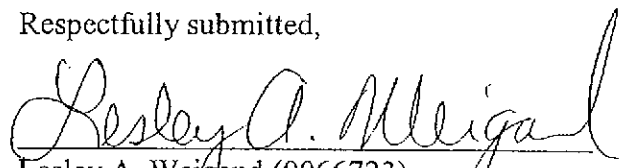
Now comes Defendant, by and through undersigned counsel and hereby requests this Court to issue an Order *Nun Pro Tunc* revising the final judgment amount contained in its December 15, 2006 Order for the reason that the prejudgment interest figure included in the Order was not proportionately reduced when the remittitur was granted.

The prejudgment interest amount reflected in the Order, $435,847.70, is the amount of prejudgment interest on a total judgment of $2,290,000 (the amount of the jury verdict), not $1,580,568.52 (the amount after remittitur). (See attached Exhibit A for complete breakdown).

Accordingly, Defendant submits the proper calculation of prejudgment interest from September 4, 2003 up until the date of the judgment upon the verdict, September 18, 2006, is $300,827.64. Therefore the total amount of the judgment as of September 18, 2006 should be $1,881,396.16.

Wherefore, Defendant respectfully requests this Court to enter an Order *Nun Pro Tunc* to reflect the proper amount of the final judgment through the date of the Judgment Upon Verdict, September 18, 2006, of $1,881,396.16. This Motion is made to the sound discretion of the Court and is meant purely to clarify a mathematical error in this Court's December 15, 2006 Order.

Respectfully submitted,



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Attorney for Defendant
Shiloh Industries, Inc.

CERTIFICATE OF SERVICE

This is to certify that on January 9, 2007, a true copy of Defendants' Motion for an Order Nun Pro Tunc was forwarded via regular U.S. Mail and e-mail to:

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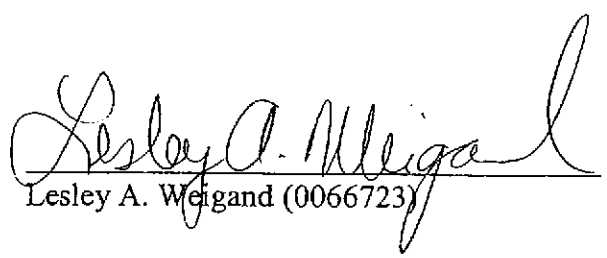
100 South Main Avenue
Sidney, Ohio 45365



Lesley A. Weigand (0066723)

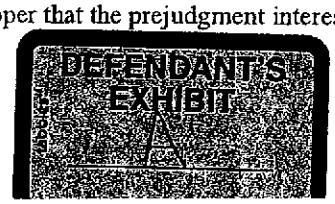
PREJUDGMENT INTEREST CALCULATION

DATES	CALCULATION	INTEREST TOTAL
9/4/03-12/31/03	$2,290,000 x .10 x 119/365	$74,660.27
1/1/04 – 6/1/04	$2,290,000 x .10 x 152/365	$95,363.28
6/2/04 – 12/31/04	$2,290,000 x .04 x 213/365	$53,452.35
1/1/05 – 12/31/05	$2,290,000 x .05	$114,500.00
1/1/06 – 9/17/06	$2,290,000 x .06 x 260/365	$97,871.80
TOTAL PREJUDGMENT INTEREST		**$435,847.70**[1]

DATES	CALCULATION	INTEREST TOTAL
9/4/03-12/31/03	$1,580,568.52 x .10 x 119/365	$51,530.86
1/1/04 – 6/1/04	$1,580,568.52 x .10 x 152/365	$65,820.93
6/2/04 – 12/31/04	$1,580,568.52 x .04 x 213/365	$36,894.36
1/1/05 – 12/31/05	$1,580,568.52 x .05	$79,028.43
1/1/06 – 9/17/06	$1,580,568.52 x .06 x 260/365	$67,553.06
TOTAL PREJUDGMENT INTEREST		**$300,827.64**[2]

[1] This figure was calculated by Defendants as an example of the prejudgment interest on the jury verdict of $2,290,000. However, in Defendants' Supplemental Memorandum filed on November 17, 2006, Defendant attached a footnote indicating that should Defendants' Motion for Remittitur be granted, this principal amount would necessarily need to be reduced.

[2] This figure represents the reduced prejudgment figure after the application of the remittitur and thus, since Plaintiff accepted the remittitur, it is only proper that the prejudgment interest be proportionately reduced.



FILED
COURT OF APPEALS
FEB 2 8 2007
SHELBY COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DIVISION
SHELBY COUNTY

Case No. 17-2007-0002
REGULAR CALENDAR

VIL LASER SYSTEMS, LLC
Plaintiff-Appellee

-vs-

SHILOH INDUSTRIES, INC., et al.
Defendants-Appellants

APPEAL FROM THE COMMON PLEAS COURT OF
SHELBY COUNTY, OHIO – CASE NO. 04CV000158

PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL

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Attorney for Plaintiff-Appellee

MOTION TO DISMISS APPEAL

Now comes Appellee, VIL Lasers Systems, LLC ("VIL"), by and through counsel and hereby moves this Court to dismiss the appeal of Appellant Shiloh Industries, Inc. ("Shiloh"). This Court lacks subject matter jurisdiction because Shiloh's Notice of Appeal was not timely filed.

A Memorandum in Support follows.

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Attorney for Appellee

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 1, 2004, VIL filed a Complaint in the Shelby County Court of Common Pleas ("Court") against Shiloh, among others, claiming breach of contract and unjust enrichment. A jury trial on the issue of damages resulted in a verdict for VIL in the amount of $2,290,000. See Judgment Upon Verdict, a copy of which is attached hereto as Exhibit "A".

Shiloh filed a Motion for Judgment Notwithstanding the Verdict, And/Or In The Alternative, A New Trial, And/Or In The Alternative, Remittitur. The Motion for Remittitur was granted on December 15, 2006, providing VIL the option of accepting remittitur or proceeding with a new trial on the issue of damages and requiring VIL's decision on the option within 14 days. See Order Setting Aside Judgment By Granting Defendant's Motion For Remittitur Conditioned On Plaintiff's Acceptance, a copy of which is attached hereto as Exhibit "B". On December 29, 2006, VIL consented to the remittitur and accepted final judgment in the amount of $2,016,416.22. See Plaintiff's Notice To Consent To Remittitur, a copy of which is attached hereto as Exhibit "C". On January 15, 2007, Shiloh filed a Motion Nunc Pro Tunc seeking correction of a mathematical error in the calculation of prejudgment interest in the Court's prior Order. See Motion Nunc Pro Tunc, a copy of which is attached hereto as Exhibit "D". The Court sustained the Motion on January 16, 2007. See Amended Order Setting Aside Judgment By Granting Defendant's Motion For Remittitur Conditioned On Plaintiff's Acceptance, a copy of which is attached hereto as Exhibit "E".

Shiloh filed its Notice Of Appeal on January 25, 2007. VIL filed its Notice Of Cross-Appeal on February 2, 2007.

II. LAW AND ARGUMENT

A. App.R. 4(A) Sets Forth Jurisdictional Boundaries For This Court.

App.R. 4(A) sets forth the time period within which a party must file a notice of appeal. The time limits contained in App.R. 4(A) are jurisdictional in nature. *Lake v. Lake* (May 1, 2001), No. 14-2000-45, 2001 WL 454680, 2 (3rd Dist.) (copy attached). These time limits are strict and may not be enlarged. *Wilson v. Johnston* (Sept. 9, 2002), No. 9-02-27, 2002 WL 31006159, 1 (3rd Dist.) (copy attached); App.R. 14(B). If a party's notice of appeal is not timely filed, the appellate court does not have subject matter jurisdiction over the action. *Lake*, 2001 WL 454680 at 2. A party's failure to timely file its notice of appeal constitutes a waiver of that party's right to appellate review of the issues resolved by the lower court. *Wolery v. Wolery* (May 24, 2002), No. 1-01-134, 2002 WL 1285322, 3 (3rd Dist.) (copy attached). The principle of finality requires that rulings be given binding effect among the parties once the time for appeal has passed. *Wilson*, 2002 WL 31006159 at 2.

B. The Order Setting Aside Judgment Is A Final Appealable Order.

The Order Setting Aside Judgment By Granting Defendant's Motion For Remittitur Conditioned On Plaintiff's Acceptance ("Order Setting Aside Judgment") entered on December 15, 2006, is a final, appealable order that triggered the running of the 30-day time period set forth in App.R. 4(A).

The concept of a final order is based upon the rationale that a court making an order that is not final is thereby retaining jurisdiction for further proceedings. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94. An order may be final and appealable even though it leaves unresolved certain ministerial tasks that are unlikely to produce a second appeal. *Brady v. Miller* (Aug. 29, 2003), No. 19723, 2003 WL 22025969, 6 (2nd Dist.) (copy attached). In this case, the Order Setting Aside Judgment disposed of all issues and claims and after its issuance, nothing remained

to be decided. Further, the Order Setting Aside Judgment specifically stated that it was final and appealable.

An order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86, 88. Civ.R. 54(B), which pertains to a judgment upon multiple claims or involving multiple parties, does not apply to this case. Therefore, the Order Setting Aside Judgment is final and appealable if it complies with R.C. 2505.02.

1. **The Order Setting Aside Judgment Is A Final Appealable Order Under The Ohio Revised Code.**

R.C. 2505.02(B)(3) provides that an order is final when it is "an order that vacates or sets aside a judgment or grants a new trial." (Copy attached.) The Order Setting Aside Judgment issued on December 15, 2006, both in title and in substance, embodies this statute and is therefore final and appealable. The Order Setting Aside Judgment was entered in response to Shiloh's Motion for Judgment Notwithstanding the Verdict, a New Trial, or in the Alternative, Remittitur. The Court granted Shiloh's Motion for a New Trial or, in the Alternative, Remittitur. Pursuant to R.C. 2505.02(B)(3), because the Order set aside the judgment and granted a new trial, it is a final appealable order, the entry of which triggered the commencement of the 30-day time period for appeal. The Order Setting Aside Judgment was in fact marked by Judge Welbaum as an "appealable order under 2505.02(B)(3)." All parties had notice that it was final and appealable.

2. **The Order Setting Aside Judgment Is A Final Appealable Order Under Ohio Case Law.**

Although the Order Setting Aside Judgment clearly fits into the definition of a final order under R.C. 2505.02(B)(3), no Ohio court has yet explicitly held that such an order is a final order. The Fifth District Court of Appeals suggested that it is final in *Moore v. Daw* (May

5, 1999), No. CT98-0023, 1999 WL 333240 (5th Dist.) (copy attached). In *Moore*, the court determined that the trial court did not offer the prevailing party a choice between accepting the remittitur amount or proceeding to a new trial. *Id.* at 3. Because of this, the court was "forced to find that the order appealed from was not a final order" and the court therefore lacked jurisdiction to review the matter. *Id.* at 3. It can be inferred from *Moore* that if the order appealed from provided the prevailing party the option of accepting remittitur or proceeding to a new trial, the court would have determined that the order was final and appealable. In this case, the Order Setting Aside Judgment provides VIL a choice between remittitur and proceeding with a new trial and therefore constitutes a final appealable order under Ohio law.

3. <u>Federal Law Differs From Ohio Law On This Issue</u>.

The Ohio and Federal rules differ in the manner in which orders setting aside a judgment and granting remittitur or, in the alternative, a new trial, are handled with respect to appeals. Federal law 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.). Further, should a party elect a new trial, the initial order granting the new trial would not become final and appealable until after judgment is entered following the retrial. *Seltzner v. RDK Corporation* (1985), 756 F.2d 51, 52 (7th Cir.).

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 . . . " § 1291. There is no federal statute or rule that defines what constitutes a "final decision". Most federal courts, when reviewing an order offering a party the option of remittitur or a new trial rely solely on case law precedent in holding that such an order is interlocutory. See, among others, *Anderson*,

249 F.3d at 541-542; *Herold v. Burlington Northern, Inc.* (1985), 761 F.2d 1241, 1249 (8th Cir.); *Eaton v. Nat'l Steel Products* (1980), 624 F.2d 863, 864 (9th Cir.). Other federal courts rely on Fed. R. App. P. 4(A) in reaching this conclusion.

Fed. R. App. P. 4(A) provides that if a party timely files a motion for judgment as a matter of law or a motion for a new trial, the time to file an appeals runs "from the entry of the order disposing of the last such remaining motion." In applying this rule, federal courts have ruled that an order providing a party the option of remittitur or a new trial does not "dispose of" the motion and therefore does not trigger the running of the time to file an appeal. Accordingly, under federal law, the 30-day time period to appeal would not begin to run until the party actually elects remittitur or a new trial.

Federal courts have been forced to rely on case law precedent and interpretation of the phrase "order disposing of the last such remaining motion" in determining that such an order is interlocutory. Federal courts must do so in the Federal Rules of Appellate Procedure because Congress has failed to specifically define what constitutes a "final decision" under 28 U.S.C. § 1291. In Ohio, however, the General Assembly has specifically defined an order vacating or setting aside judgment or granting a new trial as a final appealable order. R.C. 2505.02(B)(3). Thus, federal law on this issue is different than Ohio law.

C. **The 30-Day Time Period Within Which Shiloh Was Required To File Its Notice Of Appeal Commenced On The Date Of The Entry Of The Order Setting Aside Judgment (i.e. December 15, 2006). Shiloh's Notice Of Appeal Was Filed 11 Days Late.**

The Order Setting Aside Judgment was entered on December 15, 2006. Shiloh had thirty days thereafter to file its notice of appeal. App. R. 4(A). Shiloh's Notice of Appeal was filed on January 25, 2007, forty-one days following the entry of the Order Setting Aside Judgment, and was therefore filed eleven days late.

D. The Amended Order Setting Aside Judgment Does Not Affect The Time For Filing A Notice Of Appeal.

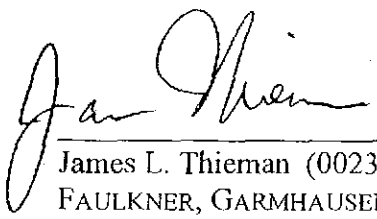
On January 16, 2007, the Court entered an Amended Order Setting Aside Judgment By Granting Defendant's Motion For Remittitur Conditioned On Plaintiff's Acceptance ("Amended Order Setting Aside Judgment"). The Amended Order Setting Aside Judgment was entered in response to Shiloh's Motion For Order Nun Pro Tunc [sic] ("Nunc Pro Tunc Motion"). A motion for an order nunc pro tunc does not toll the 30-day time period for filing a notice of appeal.

The function of a nunc pro tunc journal entry is to correct an omission in a prior entry by changing the record to reflect judicial action taken, but erroneously omitted from the action. *Roth v. Roth* (1989), 65 Ohio App.3d 768, 771 (6th Dist.). Such entries permit a court to correct clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission. Civ.R. 60(A). A nunc pro tunc entry is not made to show what the court might or should have decided, but rather what the court actually did decide. Accordingly, an appeal must be taken from the order intended to be corrected by the motion nunc pro tunc. *Goelling v. Goelling* (Dec. 22, 1992), No. 92 CA 21, 1992 WL 388535, 3 (4th Dist.) (copy attached).

The Amended Order Setting Aside Judgment corrects an alleged mathematical error regarding interest in the Court's Order Setting Aside Judgment. Such a correction is permitted pursuant to Civ.R. 60(A) on the court's own initiative or by a party's motion. As the Court indicated in *Goelling*, the appeal must be taken from the order intended to be corrected, which in this case is the Order Setting Aside Judgment, rather than the later Amended Order Setting Aside Judgment. Accordingly, the 30-day time period for appeal is not affected by the Amended Order.

III. CONCLUSION

Shiloh's Notice of Appeal was filed on January 25, 2007, forty-one days after the entry of the court's Order Setting Aside Judgment and eleven days late. Shiloh has thus waived its right to appellate review of this case and this Court is without jurisdiction to hear their appeal. Therefore, Shiloh's appeal should be dismissed.



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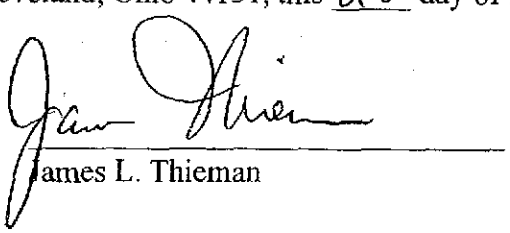
jthieman@fgks-law.com
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been sent via ordinary United States mail to Lesley A. Weigand, WEGMAN, HESSLER & VANDERBURG, 6055 Rockside Woods Boulevard, Suite 200, Cleveland, Ohio 44131, this 28th day of February, 2007.



James L. Thieman

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MAR 12 2007

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DIVISION
SHELBY COUNTY

Case No. 17-2007-0002
REGULAR CALENDAR

VIL LASER SYSTEMS, LLC
Plaintiff-Appellee

v.

SHILOH INDUSTRIES, INC., et al.
Defendants-Appellants

APPEAL FROM THE COMMON PLEAS COURT OF
SHELBY COUNTY, OHIO – CASE NO. 04CV000158

DEFENDANTS-APPELLANTS' BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL

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Facsimile (216) 642-8826
Attorney for Defendant
Shiloh Industries, Inc.

DEFENDANTS-APPELLANTS' BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL

NOW COME Defendants-Appellants, Shiloh Industries, Inc., et al. ("Shiloh"), by and through its attorneys, Wegman, Hessler and Vanderburg, and respectfully submits its Memorandum in Opposition to Plaintiff VIL Laser Systems, LLC's ("VIL") Motion to Dismiss Defendants' appeal. The premise of VIL's appeal is that Shiloh's appeal is untimely under App. R. 4(A), as it was not filed within thirty days of Judge Welbaum's December 15, 2006 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 ("Order"). However, as undersigned counsel explained to VIL's counsel as well as is thoroughly examined in this Memorandum in Opposition, the December 15, 2006 Order was an interlocutory order as it did not fully and finally determine the rights of the parties. It was not until VIL consented to the remittitur on December 29, 2006, that the issues were ripe for appeal. Had Plaintiff elected a new trial, there would nothing from which Defendants Shiloh would appeal *nor* would there have been any requirement for Shiloh to post an appeal bond in the amount of $2,250,000. An appeal, if taken, would have been the prerogative of Plaintiff, VIL, not Defendants Shiloh.

The procedural history of this case post-trial is not in dispute and a brief review of the facts discloses the following order of events. The trial court granted Shiloh's Motion for Remittitur on December 15, 2006, conditioned specifically on VIL's acceptance of the remittitur. If VIL chose not to consent to the remittitur a new trial on damages would be scheduled. (See December 15, 2000 Order attached hereto as **Exhibit A**). On December 29, 2006, VIL consented to remittitur. (See Consent, attached hereto as **Exhibit B**). On January

9, 2007, the appeal bond in the amount of $2,250,000 was posted and recorded with the clerk of courts. On January 16, 2007 Judge Welbaum entered an Amended Order Setting Aside The 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 25, 2007, Shiloh filed its Notice of Appeal, appealing to this court from the lower court's August 26, 2004, September 2, 2004, October 4, 2004, December 30, 2005 and September 18, 2006 Orders.

As more fully set forth below, Shiloh filed its notice of appeal well within the thirty (30) day time period set forth in App.R. 4(A), as the time to calculate the appeal began to run at the time of VIL's election of either remittitur or new trial as presented in the December 15, 2006 Order. As case law from the Sixth Circuit, other federal circuits as well as other states have correctly pointed out, until the plaintiff elects to accept or reject the remittitur, the order of the lower court remains interlocutory and the court of appeals is without jurisdiction to hear the appeal. Accordingly, Plaintiff-Appellee's Motion to Dismiss must necessarily be denied.

I. THE COURT'S DECEMBER 15, 2006 ORDER DID NOT BECOME A FINAL APPEALABLE ORDER UNTIL DECEMBER 29, 2006 UPON THE CONSENT OF VIL TO THE REMITTITUR.

As VIL correctly points out, there is no Ohio case law directly on point regarding whether an Order requiring a party to elect either remittitur or face a new trial is interlocutory or final and appealable. Commendably, VIL does set forth the fact that the Sixth Circuit case law does address this issue in cases directly on point with the facts of this case and specifically states that "**the decision offering remittitur or a new trial is incomplete, interlocutory, and not appealable.**" See *Anderson v. Roberson*, 249 F.3d 539 (6th Cir. 2001) (emphasis added).

VIL, however, attempts to distinguish the federal circuit line of cases from Ohio cases based upon the fact that O.R.C. § 2505.02 describes what is a final appealable order and there is no similar code section found in the United States Code. Noticeably absent from O.R.C. § 2505.02 is any mention of when election to consent to remittitur is given in exchange for foregoing a new trial. VIL wishes to limit the analysis to a review of O.R.C. §2505.02(B)(3), wherein it is specified that an appeal can be taken from an order that grants a new trial. Unfortunately for VIL, that perspective ignores the clear language of the December 15, 2006 Order wherein it specifically grants VIL the ability to consent to a remittitur or have to endure a new trial on damages. Since the statute is silent on how to handle the situation involved with granting a remittitur, a review of case law is most certainly appropriate.

A. Under Ohio Law An Order Leaving Issues Unresolved And Contemplates Further Action Is Not A Final Appealable Order.

Appellate jurisdiction is limited to review of lower courts' final judgments. Ohio Const. art. IV, § 3(B)(2). To be a **final, appealable order,** a judgment entry must meet the requirements of R.C. § 2505.02 and, if applicable, Civ. R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64. A "final order" is defined in Ohio Rev. Code Ann. § 2505.02 as an order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a **new trial** is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. Ohio Rev. Code Ann.§ 2505.03 provides that final orders are reviewable. *Graybill v. Worthington Indus.* (1993), 91 Ohio App. 3d 469.

O.R.C. 2505.02(B)(1) requires that a final order affect a substantial right and determine the action or prevent a judgment. As the Ninth District Court of Appeals analyzed in *Wenger v. Wenger* 2006 Ohio 3330, the primary function of a final order or judgment is the termination of the case before the court. See, e.g., *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 215. "This court must look to the language employed in the purported judgment entry to ascertain whether the trial court's entry accomplishes that result." *Id.* To terminate a claim between the parties, the order must contain a statement of relief to which the parties are entitled that is sufficiently complete so that the parties can enforce their rights and obligations through an execution on that judgment. *Id.* at 219.

A final statement of relief, creating a final appealable order, reserves no further questions or directions for future determination and leaves nothing to be done but to enforce by execution what has been determined. *Wenger, citing Green v. Acacia Mut. Life Ins. Co.* (1950), 88 Ohio App. 67, 74. "A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id. citing Bell v. Horton* (2001), 142 Ohio App. 3d 694, 696, 2001 Ohio 2593. In the case at bar, there most certainly is an issue left unresolved on December 15, 2006, that being whether VIL will accept the remittitur or reject the remittitur thereby necessitating a new trial. This question was not conclusively established until December 29, 2006, when VIL consented to the remittitur. It is only at that point did the judgment become final and appealable. Indeed, there was nothing to appeal prior to that time and any appeal taken would have been subject to dismissal.

B. Other States With Statutes Similar to O.R.C. §2505.02 Have Determined That Orders Granting Plaintiff the Election Between a Remittitur And A New Trial Are Not Final And Appealable Until Plaintiff Has Made Its Election.

Since there is no case law in Ohio directly on point on the issue of when an Order specifying the reduction of a verdict conditioned on acceptance of remittitur or the ordering of a new trial becomes a final appealable order, it is appropriate to look to other jurisdictions which have similar statutes to O.R.C. § 2505.02 and how those states dealt with this issue.

Arizona Rev. Stat. §12-2101 authorizes appeals from final judgments, from special orders made after final judgment, from a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment and also authorizes an appeal from the granting or refusing a new trial. As can be seen, this statute is quite similar to O.R.C. §2505.02. In *E.W. Harris v. Foley Co.*, 409 P.2d 309 (AZ. App. 1965), the Arizona Court of Appeals dealt with a very similar issue to the one presented in the case at bar. The trial court ordered remittitur of the jury verdict to be accepted within thirty (30) days and if not a new trial would be granted on the issue of damages only. The facts in *Harris* demonstrate that an injury victim filed a notice of appeal before the date on which the remittitur order was to have lapsed, and the trial court later signed an order stating that it lacked jurisdiction to enter an order for a new trial. The injury victim contended on appeal that an appeal could be taken from a remittitur order. The court dismissed the appeal and the cross-appeal. The court was of the opinion that the order did not in and of itself dispose of the motion for new trial and that a further order was required. The court held that in the absence of affirmative advice by the plaintiff given to the trial court accelerating and terminating the time within which the election could be made, **the remittitur order could not be appealable until the expiration of the time interval set forth in the order.** (emphasis added). The court held that the notice of appeal given by the injury victim, prior

to the entry of either a further order by the trial judge or the expiration of the 30-day period next following the issuance of the **remittitur** order, was premature.

In deciding the *Harris* case, the Court of Appeals reviewed the procedural aspects of remittitur by analyzing:

> An order for remittitur has its place in our procedure as one aspect of the motion for new trial. It is not separate and distinct from a motion for new trial. When a motion for new trial is denied, the judgment becomes final and both are appealable. When a motion for new trial is granted, a party can appeal from the order. The order in question is not a final ruling on a motion for new trial, at least it was not as of the 11th day of August (day of order setting forth election). The order in question is not an order within subsection (C) above (authorizing an appeal from any special order made after final judgment) in that it is an integral part of the motion for new trial procedure and there is no 'final judgment' where a motion for new trial has been made, until the motion has been ruled upon by an express order or has been determined by operation of law.

The reasoning of *E.W. Harris* is instructive because to follow VIL's logic, had the 30 day appeal time begun to run on December 15, 2006, and had Shiloh filed its Notice of Appeal, it would have been unknown at the time what issues were being appealed and furthermore, Shiloh would have also been required to post a bond for an uncertain amount since there was no definitive answer to the question of whether or not a bond would have even been required. Thus, this uncertainty demonstrates why there could not be a final appealable order as of December 15, 2006. By way of example, had VIL rejected the remittitur, thereby necessitating a new trial on damages, no bond would have been necessary at all and indeed Defendants would have had no reason to appeal. The determination on whether to appeal would have been in the sole province of VIL.

Likewise in Missouri, the Supreme Court held in *Wicker v. Knox Glass Assoc.*, 362 Mo. 614 (1951) "where... the trial court orders a remittitur within a specified time as a condition to overruling a motion for new trial and the remittitur is not made as specified, **the order becomes final and appealable at the expiration of the time specified for remittitur,**

and the new trial is granted as of the date when the conditional order was entered." (emphasis added). There is no specific provision in either Missouri statutory law or its rules for appellate procedure specifically addressing the issue of remittitur (similar to Ohio), rather, the accrual of the time for an appeal from an order granting a new trial unless remittitur is accepted is set forth in the case law. In *Jenkins v. Robert,* 420 S.W.2d 24, 1967 Mo. App. LEXIS 608 (Mo. Ct. App., October 2, 1967), the Missouri Court of Appeals followed the Missouri supreme court's holding nearly twenty years prior in *Wicker,* supra noting "when the plaintiff refuses to make remittitur, the motion for new trial is sustained effective as of the date when the plaintiff's right to elect expires. Such an order granting a new trial is an appealable order as is specifically provided in Mo. Rev. Stat. § 512.020 (1959)." (emphasis added). A review of the Missouri statute demonstrates it is similar to O.R.C. §2505.02 in that Missouri allows for an appeal from an order granting a new trial.

C. Federal Case Law Supports Shiloh's Position That An Order Giving Plaintiff The Option Of Consenting To A Remittitur To Avoid A New Trial Is Not Final And Appealable Until Plaintiff Makes His Election.

Exactly on point is the Sixth Circuit decision of *Anderson v. Roberson,* 249 F.3d 539 (6th Cir. 2001). Federal case law and commentary are generally in accord with the resolution that when a party is given the choice between accepting remittitur or a new trial, the order is not a final appealable order. Though federal law is not controlling with regard to the interpretation of the Ohio Rules of Civil Procedure, it is persuasive authority and is instructive. See, *First Bank of Marietta v. Mascrete, Inc.* (1997) 79 Ohio St. 3d 503, 508 . The Sixth Circuit in *Anderson* held:

> If the choice of remittitur or a new trial is properly put to the plaintiff, the matter, under the direction and control of the district court, remains open in the district court until he elects one of his options. The decision offering remittitur or a new trial is incomplete, interlocutory, and not appealable.

Id. at 542, citing to *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 281 (5th Cir. 1983); *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980); *Evans v. Calmar S.S. Co.* , 534 F.2d 519 (2nd Cir. 1976. The Sixth Circuit concluded by stating, "until the district court either enters a final order based upon the plaintiff's election to accept the remittitur, or proceeds with judgment after a new trial, there is nothing for this court to review." *Id.* at 543.

The one fundamental difference in analyzing the situation at bar under federal case law is the fact that the federal statutes, unlike Ohio, do not permit an appeal as a matter of course from an order granting a new trial. In other words, in the remittitur context, should Plaintiff elect a new trial and reject the remittitur, Plaintiff cannot appeal until after the new trial. This nuance, however, is not relevant to our analysis here and is pointed out for clarification to this Court.

Many courts have cited to the Sixth Circuit's decision in determining that a post trial order allowing the Plaintiff time to accept or deny the remittitur is not a final appealable order. In a recent decision, *Peters v. School Board of the City of Virginia Beach*, 2007 U.S. Dist. Lexis 6120 *7 (E.D. Va. 2007), the court held that the post trial order, allowing the Plaintiff time to accept or deny the remittitur is not a final appealable order and it is instead an interlocutory order subject to modification, citing to *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003); *Fayette Investors v. Commercial Buildings, Inc.*, 936 F.2d 1462, 1469-70 (4th Cir. 1991).

Similarly, in *Vasalle v. Wal-Mart Stores, Inc.*, 801 So. 2d 331 (S.Ct. Louisiana 2001), the court reviewed the reasoning in *Anderson* and held that the Sixth Circuit's reasoning was sound and agreed that a ruling giving defendant's a choice between additur and a new trial was not a final judgment but an interlocutory appeal.

D. **VIL's Reliance On *Moore v. Daw* (May 5, 1999) (5th App. No. 98-0023), 1999 Ohio App. LEXIS 2227, Unreported, Is Misplaced.**

VIL attempts to draw a connection between cases in Ohio wherein the lower court has only ordered remittitur and has failed to give plaintiff the option of selecting the remedy to the situation in the case at bar. The case law in Ohio on remittitur is quite clear, should the trial judge decide to grant remittitur, he must give plaintiff the ability to select acceptance and/or the option of a new trial. *Uhlmanseik v. Salvation Army* (2005), 159 Ohio App. 3d 623, *citing Powell v. Montgomery* (1971), 27 Ohio App. 2d 112, 124. By failing to allow plaintiff the ability to choose between a new trial on damages or a remittitur, improperly invades the province of the jury.

The issue in *Moore* that was of concern was that the court was in error by not offering the prevailing party a choice between accepting the remittitur amount or proceeding to a new trial. VIL's attempt to read into what the court meant by its order makes no logical sense. The only way to read the court's opinion is in its logical sense, Ohio law mandates if a remittitur is to be given, the party affected has the ability to choose whether to accept or try the damages aspect of the case again. *Moore* should not be given any other meaning. Federal law on this issue is much more relevant and on point than any existing Ohio case law.

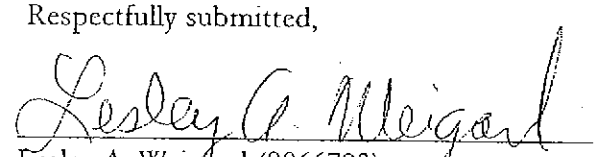
In the present case, Shiloh had thirty days from December 29, 2006, the date that VIL filed its consent to remittitur, to file its appeal. It was only after VIL filed its decision, that Shiloh was able to determine whether it wanted to proceed and file a notice of appeal. As stated in the Sixth Circuit's opinion in *Anderson,* this Court does not have jurisdiction over interlocutory appeals. There was nothing for this Court to review until VIL accepted the remittitur or proceeded to judgment after a new trial. Following the existing case law, it

is clear that Shiloh had until January 28, 2007, to file its notice of appeal. Any other determination would defy case law and reason.

II. CONCLUSION

For the aforementioned reasons, Shiloh respectfully requests that this Court deny VIL's Motion to Dismiss its Appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of March, 2007, a true copy of the Brief in Opposition to Appellee, VIL Lasers Systems, LLC Motion to Dismiss Appeal was forwarded via regular U.S. Mail to:

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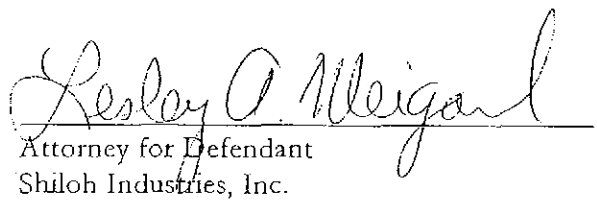

Attorney for Defendant
Shiloh Industries, Inc.

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

VIL LASER SYSTEMS, L.L.C.,	)	CASE NO. 17-07-02
Plaintiff – Appellee, Cross-Appellant,	)	**APPELLANT'S APPLICATION FOR RECONSIDERATION OF THIS COURT'S JOURNAL ENTRY FILED APRIL 18, 2007 DISMISSING THE APPEAL FILED BY APPELLANT PURSUANT TO APPELLATE RULE 26(A)**
v.	)	
SHILOH INDUSTRIES, INC.,	)	
Defendant-Appellant, Cross-Appellee.	)	

NOW COMES Defendant-Appellant, Shiloh Industries, Inc. ("Appellant"), by and through its undersigned counsel, and, pursuant to Rule 26(A) of the Ohio Rules of Appellate Procedure, applies for reconsideration of this Court's April 18, 2007 Journal Entry dismissing its appeal of the underlying action. For the reasons set forth below, Appellant respectfully requests that this Court vacate the Journal Entry dismissing its appeal of the underlying action and reinstate Appellant's appeal so as to allow the same to proceed to a decision on its merits.

1) <u>STATEMENT OF PROCEDURAL FACTS</u>.

a) On June 1, 2004, Appellee filed its complaint in the Court of Common Pleas, Shelby County, Ohio (the "Trial Court") against Appellant.

b) A jury trial was conducted by the Trial Court on the issue of damages only. On September 18, 2006, the Trial Court entered judgment upon the jury's verdict in favor of Appellee and against Appellant in the amount of $2,290,000. (***Exhibit 1***).

c) Appellant filed its Motion for Judgment Notwithstanding the Verdict, and/or in

the Alternative, a New Trial, and/or in the Alternative, Remittitur with the Trial Court (the "Motion for New Trial") on September 21, 2006.

d) On December 15, 2006, the Trial Court entered its Order Setting Aside Judgment By Granting [Appellant's] Motion For Remittitur Conditioned On [Appellee's] Acceptance; Alternatively, [Appellee] Is Granted The Option For A New Trial On Damages (the "December 15 Order"). (***Exhibit 2***). In its December 15 Order, the Trial Court overruled Appellant's motion for judgment notwithstanding the verdict. Then, the Trial Court *conditionally* granted Appellant's motion for new trial subject to Appellee's refusal to accept remittitur in the principal amount of $1,580,568.52. If, however, Appellee consented to remittitur within fourteen days, i.e., by December 29, 2006, then Appellee's judgment, including prejudgment interest, would be in the total amount of $2,016,416.22.

e) On December 29, 2006, Appellee elected to accept remittitur in accordance with the Trial Court's December 15 Order. (***Exhibit 3***).

f) Appellant then filed a Motion for Order *Nunc Pro Tunc* on January 10, 2007, which sought to further reduce the amount of Appellee's judgment under the December 15 Order. The basis for the reduction sought by Appellant was the Trial Court's failure to reduce the prejudgment interest calculation in accordance with the reduction in the principal amount of the judgment as a result of Appellee's election to accept remittitur. (***Exhibit 4***).

g) On January 16, 2007, the Trial Court entered its Amended Order Setting Aside Judgment By Granting [Appellant's] Motion For Remittitur Conditioned On [Appellee's] Acceptance; Alternatively, [Appellee] Is Granted The Option For A New Trial On Damages (the "January 16 Amended Order"). (***Exhibit 5***). While the Trial Court acknowledged an error in its prejudgment interest calculation in the December 15 Order, the Trial Court did not make its

January 16 Amended Order *nunc pro tunc*. Instead, the Trial Court gave Appellee fourteen days, until January 30, 2007, to either accept the further reduced judgment amount[1] or to accept a new trial on the issue of damages.

h) Appellant filed its Notice of Appeal to this Court on January 25, 2007.

i) On January 30, 2007, Appellee filed its Notice to Consent to Remittitur (***Exhibit 6***), which stated:

> [Appellee] 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.

2) LAW AND ARGUMENT.

a) Applicable Law.

Provisions of the Ohio Constitution, the Ohio Revised Code and the Ohio Rules of Appellate Procedure all play a significant role in determining the timeliness of Appellant's Notice of Appeal. Article IV, § 3(B)(2) of the Ohio Constitution provides:

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

What constitutes a final order for purposes of the appeal of this matter is further defined by R.C §2505.02.

Section 2505.02(B) of the Revised Code defines a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, to include: (1) an order that affects a

[1] The Trial Court reduced the amount of judgment, including prejudgment interest, from $2,016,416.22 to $1,881,396.16.

substantial right in an action which in effect determines the action and prevents a judgment; (2) an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment; or (3) an order that vacates or sets aside a judgment or grants a new trial.

Rules 3(D), 4(A) and 4(C) of the Ohio Rules of Appellate Procedure are also particularly applicable to the circumstances of this matter. Appellate Rules 3(D) states:

> **(D) Content of the notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

In relevant part, Appellate Rule 4 provides:

> **(A) Time for appeal.** A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.
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> * * * *
>
> **(C) Premature notice of appeal.** A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

Here, Appellant filed its Notice of Appeal within the time prescribed by Appellate Rule 4(A) and has, thereby, perfected its appeal to this Court.

b) <u>ARGUMENT IN SUPPORT OF APPELLANT'S APPLICATION FOR RECONSIDERATION</u>.

i) <u>Appellant's Notice of Appeal Was Timely Filed Under App.R. 4(A)</u>.

The thirty-day time for appeal commenced either on December 29, 2006, the date on which Appellee filed its notice to consent to remittitur under the Trial Court's December 15

Order, or January 30, 2007, the date on which Appellee filed its second notice of consent to remittitur under the Trial Court's January 16 Amended Order. Under no circumstance, however, did the thirty-day time for appeal commence prior to December 29, 2006, the filing date of Appellee's notice of consent to remittitur under the Trial Court's December 15 Order. Neither Order was a final order for purposes of appeal until Appellee filed its notice to consent to remittitur. In either event, the Notice of Appeal was not filed late.

It is a fundamental principal of jurisprudence that if a party is given a choice to elect a specified judgment or to submit to further proceedings, there is no final judgment until the election is made voluntarily or the opportunity to choose has lapsed by the terms of the decree. 15B Fed. Prac. & Proc. Juris.2d § 3915.3. This fundamental principal has been followed by numerous courts throughout the country[2] and was followed by the U.S. Court of Appeals for the

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[2] For example, see *Barker v. Craig (1888), 127 U.S. 213, 215-16* (An order which gives a party the right to pay the amount due on a mortgage or to suffer ejectment is not final until the party makes a choice.); *Howell v. Marmpegaso Compania Naviera, S.A. (5th Cir. 1978), 566 F.2d 992, 993* ("On its face the May 31 judgment would appear to be a final decision of the district court, appealable to this Court under 28 U.S.C.A. § 1291. * * * [H]owever, Howell was authorized to reject the remittitur and insist on a new trial. Until he accepted the remittitur, the judgment remained "open, unfinished (and) inconclusive." Thus, Howell's June 13 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. Fed.R.App.P. 4(a). (Citations omitted)."); *Wright v. Preferred Research, Inc. (11th Cir. 1990), 891 F.2d 886, 888* ("The district court denied all of Preferred's motions but 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."); *Mauriello v. University of Medicine and Dentistry of New Jersey (3rd Cir. 1986),* 781 F.2d 46, 49 ("In the case at hand, until plaintiff accepted the remittitur, the University did not know the extent of its liability. 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."); and *Peters v. School Bd. of City of Virginia Beach (E.D.Va. 2007),* 2007 WL 295618, *2 ("Because the Plaintiff rejected the remittitur contained in the post-trial order, and elected a new trial on damages, the Court ruled in March 2006 that the March 31, 2005, post-trial order is not a final order. Instead, it is an interlocutory order subject to modification).

Sixth Circuit in *Anderson v. Roberson.*[3]

In *Anderson*, defendants filed a post-trial motion for judgment notwithstanding the verdict or, alternatively, for a new trial or remittitur. The trial court denied defendants' motion for judgment as a matter of law or for a new trial, but granted the motion for remittitur. One of the defendants then filed a motion to correct and/or clarify the first remittitur order, which the trial court granted. The trial court then "entered an order stating that the remittitur order included both defendants and that the defendants would be granted a new trial if the plaintiffs rejected the order of remittitur." *Id at 541.* The court of appeals considered whether the trial court's order granting plaintiff a choice between remittitur and a new trial was a "final order" from which an appeal would lie. The court of appeals held that a trial court's order giving the plaintiff a choice between remittitur and a new trial is incomplete, interlocutory, and <u>not</u> appealable.[4]

Under both the December 15 Order and the January 16 Amended Order, the granting of a new trial on the issue of damages was expressly conditioned upon Appellee's failure to accept remittitur. Thus, the Trial Court gave Appellee a choice between remittitur and a new trial. In each instance, Appellee filed its notice to consent to remittitur on the last day for it to provide notice to the Trial Court of its choice. It was on such date that the time for appeal began to run.

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[3] (6th Cir. 2001), 249 F.3d 539.

[4] "While this circuit has not directly addressed the question of whether an order such as this is a final order, other circuits have considered the question and concluded that "If the choice [of remittitur or new trial] is properly put to the plaintiff, the matter, under the direction and control of the district court, remains open in the district court until he elects one of his options. The decision offering remittitur or a new trial is incomplete, interlocutory, and not appealable." *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 281 (5th Cir. 1983) (disavowed on other grounds by *Overman v. Fluor Constructors, Inc.*, 797 F.2d 217 (5th Cir. 1986)); see also *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980); *Evans v. Calmar S.S. Co.*, 534 F.2d 519 (2d Cir. 1976). We think that those courts are correct, and we hold today that a district court order giving the plaintiff a choice between remittitur or a new trial is not a final, appealable order. Therefore, the parties' notices of appeal--all filed before the plaintiffs responded to the district court's order of March 1st--were premature." *Id. at 542.*

This Court stated that "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." Appellant agrees that the notice to consent to remittitur filed by Appellee was not an "order" of the Trial Court. Appellant also agrees that the notice to consent to remittitur filed by Appellee could not be designated as the subject of review as a "final order." The subjects of review as final orders are the Trial Court's prior orders including the December 15 Order and/or the January 16 Amended Order. However, neither of these orders became "final orders" subject to appellate review until Appellee chose whether to accept remittitur or a new trial. This is perfectly analogous to the situation considered by the Supreme Court of Ohio in *Denham v. New Carlisle.*[5]

In *Denham v. New Carlisle*, the Supreme Court of Ohio considered whether a decision of a trial court granting summary judgment for one of several defendants in a civil action became a final appealable order when the plaintiff voluntarily dismissed the remaining parties to the suit pursuant to Civ.R. 41(A)(1). The Supreme Court of Ohio considered how the federal courts had addressed the same issue under the federal counterpart to Ohio Civ.R. 41(A). The Supreme Court of Ohio found the rationale employed by the federal courts in addressing the issue of whether the interlocutory order became appealable upon the filing of the notice of dismissal by plaintiff to be persuasive. *Id at 596 – 97.* The Ohio Supreme Court then held that a trial court's decision granting summary judgment for one of several defendants in a civil action becomes a final appealable order when the plaintiff gives notice of its voluntary dismissal of the remaining parties to the suit in accordance with Civ.R. 41(A)(1).

---

[5] *(1999) 86 Ohio St.3d 594, 716 N.E.2d 184.*

Here, as in *Denham v. New Carlisle*, the rationale employed by the federal courts in similar cases, such as *Anderson v. Roberson*, is persuasive. In *Denham* (as in the present case), the pleading filed by the plaintiff, the notice of voluntary dismissal under Civ.R. 41(A)(1),[6] was neither an "order" of the trial court nor could it be designated as the subject of review as a 'final order.' Yet, plaintiff's notice of voluntary dismissal was the triggering event that *converted* the trial court's interlocutory order into a final order which was then the proper subject for appellate review, and from which the time for appeal under App.R. 4(A) began to run. Similarly, here, Appellee's notices to consent to remittitur served as the triggering events that converted the Trial Court's interlocutory orders into final orders which are now the proper subject for appellate review, and from which Appellant's time for appeal under App.R. 4(A) began to run.

For these reasons, the thirty-day time for Appellant to appeal from the December 15 Order started to run on December 29, 2006, the date on which Appellee filed its first notice of consent to remittitur with the Trial Court. Alternatively, the thirty-day time for Appellant to appeal from the January 16 Amended Order started to run on January 30, 2007, the date on which Appellee filed its notice of consent to remittitur with the Trial Court relating to that order. In either event, Appellant did not file its Notice of Appeal too late. At worst, Appellant's Notice of Appeal may have been filed prematurely; but in that event, the provisions of App.R.4(C) would govern and the Notice of Appeal is treated as having been filed on January 31, 2007. In sum, the notice of appeal was not untimely and this Court's order dismissing the appeal is in error.

---

[6] Here, the pleading filed was Appellee's notices to consent to remittitur.

ii) **<u>The Failure of the Notice of Appeal to Designate the December 15 Order Does Not Affect the Validity of Appellant's Appeal. In Fact, the Proper Order to Appeal from is the January 16 Amended Order, which the Trial Court Properly Characterized as an "Amended Order" and Not an Order *Nunc Pro Tunc*.</u>**

The Trial Court properly characterized its January 16 Amended Order as an "Amended Order" and not an Order *Nunc Pro Tunc*. As noted in the two cases cited by the Court,[7] a *nunc pro tunc* entry is intended to remedy "clerical mistakes" that can be corrected under Civ.R. 60(A), such as a transposition in numbers.[8] Here, the January 16 Amended Order did not reflect what the Trial Court actually decided; rather, it reflected what the Trial Court should have decided or what the court intended to decide with regard to prejudgment interest. The Trial Court also recognized that a further reduction of $135,020.06 in the amount of Appellee's judgment might result in a different decision by Appellee as to whether remittitur would be accepted. Accordingly, the Trial Court provided an additional fourteen (14) day period for Appellee to make its decision as to whether to elect remittitur or a new trial, thus vacating the election filed by Appellee on December 29, 2006. This new fourteen day period for Appellee to

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[7] *Kuehn v. Kuehn (1988), 55 Ohio App.3d 245;* and *Bobb Forest Products, Inc. v. Morbark Industries, Inc. (2002), 151 Ohio App.3d 63.*

[8] Civ.R. 60(A) allows a trial court to correct "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." Civ.R. 60(A) does not authorize a trial court to make substantive changes. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100, 671 N.E.2d 236. "The function of nunc pro tunc is not to change, modify, or correct erroneous judgments but merely to have the record speak the truth." *Ickes v. CNA Ins. Dba Transcontinental Ins. Co.*, 5th Dist. No. 2001 CA00241, 2002 Ohio 2531, at P19; *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 26 OBR 327, 498 N.E.2d 1079. Accordingly, its proper use is limited to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide. *Leskovyansky*, 77 Ohio St. 3d at 100.

* * * *

A clerical mistake contemplated by Civ.R. 60(A) is mechanical in nature, apparent on the record, and does not involve a legal decision or judgment by an attorney. *Leskovyansky*, 77 Ohio St. 3d at 100; *Dentsply* at paragraph two of the syllabus.

Bobb Forest Products at p. 76 – 77.

choose between a new trial on damages and remittitur reset the calendar for purposes of calculating the time to appeal under App.R. 3. Since the change to the December 15 Order was of a substantive nature, not a clerical mistake, the Trial Court properly entered an amended order rather than a *nunc pro tunc* order. Accordingly, the Trial Court did not grant Appellant's motion for order "nunc pro tunc;" rather, it amended its order granting Appellant's Motion for New Trial.

Further, the Trial Court did not designate the January 16 Amended Order as a *nunc pro tunc* entry.[9] This Court's act of interpreting the January 16 Amended Order as a *nunc pro tunc* entry, when the Trial Court did not state such an intention in the plain meaning of the language used in the January 16 Amended Order, significantly impacts and has effectively denied Appellant's right to legal redress of its injuries under Article I, § 16 of the Ohio Constitution[10] and its right to due process of law under both the Ohio and United States Constitutions.[11] The Trial Court notified both Appellant and Appellee that the January 16 Amended Order constituted a final order for purposes of appeal, and both parties acted in accordance with that notice. Therefore, Appellant properly appealed from the Trial Court's January 16, 2007 Amended Order, which had the effect of vacating or nullifying the Trial Court's December 15 Order. Appellant properly appealed the Trial Court's January 16 Amended Order.

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[9] "A trial court speaks only through its journal entries . . . *(citation omitted)*." *State v. Brown (Allen Cty. April 16, 2007), 2007 Ohio 1761, 2007 Ohio App. Lexis1604.*

[10] See *Atkinson v. Grumman Ohio Corp. (1988), 37 Ohio St. 3d 80, 523 N.E.2d 851.*

[11] See *Herzog Contracting Corp. v. McGowen Corp (7th Cir. 1992)*, 976 F.2d 1062, 1065 -1066 ("The judge's action in designating his amendment of the judgment "nunc pro tunc" could not alter the effect of a Rule 59(e) motion in tolling the time for an appeal. Otherwise in any case in which such a motion was filed the district judge could destroy the losing party's right to appeal by sitting on the motion until the time to appeal from the original judgment had passed and then granting the motion "nunc pro tunc." Latin is a wonderful language but it is not properly used to destroy people's legal rights. *King v. Ionization International, Inc., supra,* 825 F.2d at 1188.").

iii) **The Filing of Appellant's Notice of Appeal Prior to Entry of the Trial Court's January 16 Amended Order Would Have Divested the Trial Court of Jurisdiction to Amend Its December 15 Order.**

The filing of Appellant's Notice of Appeal prior to entry of the Trial Court's January 16 Amended Order would have divested the Trial Court of jurisdiction to amend its December 15 Order. In *Powell v. Turner*,[12] the court of appeals concluded that the filing of the notice of appeal divested the trial court of jurisdiction to consider pending motions for a new trial, for judgment notwithstanding the verdict, and for remittitur. In reaching this conclusion, the court of appeals referred to the Supreme Court of Ohio's decision in *Majnaric* v. *Majnaric* and stated:

> [T]he court, in *Majnaric* v. *Majnaric* (1975), *46 Ohio App. 2d 157 [75 O.O.2d 250]*, in paragraph one of the syllabus, stated:
>
> "When an appeal is pending, the trial court is divested of jurisdiction except to take action in aid of the appeal. The trial court is without power to grant relief under *Civ. R. 59* * * *."
>
> In *Majnaric*, the court reasoned that a motion for a new trial is inconsistent with a notice of appeal of the judgment sought to be retried. We are of the opinion that motions for remittitur and for judgment notwithstanding the verdict are also inconsistent with an appeal.

Powell v. Turner at 405. The effect of this Court's present order is to have required Appellant to file its notice of appeal by January 15, 2007, thirty (30) days after the filing of the December 15 Order. (Journal Entry at p. 3). Had Appellant done so, the Trial Court would have been divested of jurisdiction to amend the December 15 Order, an amendment which Appellant, Appellee, and the Trial Court each acknowledged was appropriate. Upon the filing of a notice of appeal, the Trial Court would only have retained jurisdiction to rule on a motion in aid of the appeal, such as a motion for stay of execution. The Trial Court's January 16 Amended Order was not a ruling in

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[12] *(Lake Cty. 1984), 16 Ohio App.3d 404, 476 N.E.2d 368.*

aid of the appeal; rather, it was a ruling that substantively changed the underlying judgment and gave rise to a right of appeal in the event Appellee elected to accept remittitur.

Therefore, this Court's conclusion is in error. Appellant's notice of appeal was timely in light of Appellee's election on December 29, 2006 to accept remittitur in accordance with the December 15 Order. (Journal Entry at p. 3). However, since the January 16 Amended Order granted Appellee an additional fourteen (14) days in which to choose between a new trial and accepting remittitur of the judgment in a significantly lower amount, the January 16 Amended Order was incomplete, interlocutory, and not appealable until Appellee elected to accept remittitur or a new trial. The critical point, however, is that the January 16 Amended Order is the proper subject of the appeal. It replaced, made null, the December 15 Order.

Appellant's notice of appeal filed on January 25, 2007 may have divested the trial court of jurisdiction to accept Appellee's January 30, 2007 Notice to Consent to Remittitur, but it certainly was not filed too late. Consequently, dismissal of the present appeal would be error. At most, this Court could declare that the January 16 Amended Order has yet to become a final appealable order because the Trial Court was divested of jurisdiction to receive the consent to remittitur. Only in that case could this Court remand the matter to the Trial Court so as to allow the Trial Court's January 16 Amended Order to become final and appealable. More fairly, however, Appellee's consent to remittitur was filed with the Trial Court and the provisions of App.R. 4 (C) are in effect, which would cause Appellant's Notice of Appeal to be deemed filed on January 31, 2007, the day following the filing of Appellee's January 30, 2007 Notice of Consent to Remittitur.[13] Again, therefore, the appeal is properly before this Court.

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[13] Otherwise and because this Court's Journal Entry dismissed the appeal and remanded the matter to the Trial Court, the running of the fourteen (14) days in which Appellee was to choose between accepting remittitur and proceeding with a new trial resumed on April 18, 2007. Since nine (9) days of

3) **CONCLUSION.**

In sum, this Court's Order dismissing the appeal is based on two errors. First, this Court erred in holding that the time for appeal began to run on December 15, 2006. Rather, the time for appeal began to run on the date Appellee filed its consent to remittitur. Second, this Court erred by holding that the January 16 Amended Order was a *nunc pro tunc* order. It was not and, therefore, the running of the time for appeal began anew (subject of course to Appellee's filing of its consent to remittitur). Under either or both instances, Appellant's appeal is properly before this Court.

If this Court accepts both claimed errors, then Appellant's filing of its Notice of Appeal was premature in that the time for appeal began to run on January 30, the date Appellant filed its consent to remittitur. In that case, however, the provisions of App. R. 4(C) dictate that the appeal was filed on the day following January 30, 2007.

If this Court accepts the first claimed error and rejects the second, then the appeal was timely filed because the time for appeal began to run on December 29, 2006.

If this Court rejects the first claimed error and accepts the second, then the January 16 Amended Order is the final appealable order and Appellant's appeal is timely.

However, if this Court rejects both claimed errors, then Appellant has been denied its fundamental rights of appeal and its due process rights under the State of Ohio and United States Constitutions.

Therefore, Appellant, Shiloh Industries, Inc., applies for reconsideration of this Court's

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Appellee's time for election had run prior to the filing of the notice of appeal, which may have divested the Trial Court of jurisdiction, Appellee had until five (5) days after April 18, 2007, i.e., until April 23, 2007, to file its notice of consent to remittitur. Since no such consent was filed, Appellant would be entitled to a new trial on the issue of damages in accordance with the Trial Court's January 16 Amended Order. This, however, is not in order, but it does demonstrate the logical extension of this Court's April 18 Order.

Journal Entry filed on April 18, 2007 dismissing Appellant's appeal of the underlying action pursuant to Rule 26(A) of the Ohio Rules of Appellate Procedure and respectfully requests that this Court vacate its Journal Entry filed on April 18, 2007, and reinstate Appellant's appeal, allowing the same to proceed to a decision on the merits.

Respectfully submitted,

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Attorneys for Appellant Shiloh Industries, Inc.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of April, 2007, a true copy of the foregoing Application for Reconsideration was served by regular U.S. Mail, postage prepaid, upon the following:

James L. Thieman
Faulkner, Garmhausen, Keister & Shenk
A Legal Professional Association
Courtview Center, Suite 300
100 South Main Avenue
Sidney, Ohio 45365

Attorney for Appellee
VIL Laser Systems, LLC.

_____
WEGMAN, HESSLER & VANDERBURG
Attorneys for Appellant Shiloh Industries, Inc.

JUN 1 9 2007

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

SHELBY COUNTY

VIL LASER SYSTEMS, LLC,

PLAINTIFF-APPELLEE,
CROSS-APPELLANT,

v.

SHILOH INDUSTRIES, INC.,

DEFENDANT-APPELLANT,
CROSS-APPELLEE,

-and-

SHILOH CORPORATION, ET AL.,

DEFENDANTS-APPELLEES.

CASE NUMBER 17-07-02

FILED
COURT OF APPEALS
JUN 1 8 2007
SHELBY COUNTY, OHIO

JOURNAL

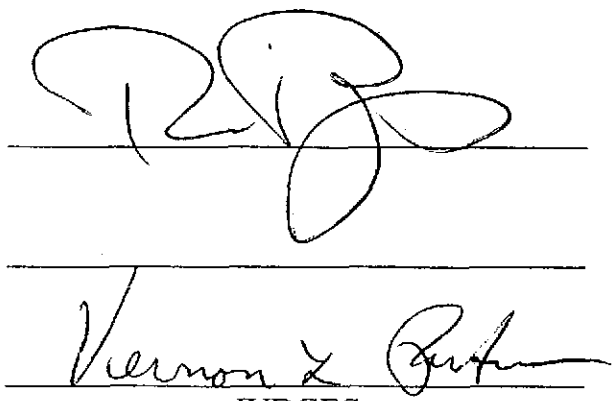
ENTRY

This matter comes on for determination of Defendant-Appellant's application for reconsideration of the judgment dismissing the appeal for want of jurisdiction, Appellee's memorandum in opposition, and Defendant-Appellant's reply memorandum in support of the motion.

Upon consideration the court finds that the application fails to call to the attention of the court an obvious error in the decision or raise an issue not properly considered in the first instance. See *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Rather, the motion presents the same alternative theories for characterizing the

various judgment entries and deficiencies with the notice of appeal previously raised, considered and found not well taken. Accordingly, the application should be denied.

It is therefore **ORDERED** that Defendant-Appellant's application for reconsideration be, and the same hereby is, denied.



JUDGES

DATED: June 15, 2007

TITLE VII. JUDGMENT

RULE 54. Judgments; Costs

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

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

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

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

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

Staff Note (July 1, 1996 Amendment)

Rule 54(A) Definition; Form

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

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF COURT OF RECORD

RULE 3. Appeal as of Right - How Taken

(A) Filing the notice of appeal. An 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. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or consolidated appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Cross appeal.

(1) Cross appeal required. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App. R. 4.

(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal.

(D) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof apealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(E) Service of the notice of appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing, or by facsimile transmission, a copy to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at the party's last known address. The clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to App.R. 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect

the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or a party's counsel. The clerk shall note in the docket the names of the parties served, the date served, and the means of service.

(F) Amendment of the notice of appeal. The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(G) Docketing statement. If a court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, a docketing statement shall be filed with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

(1) No transcript is required (e.g., summary judgment or judgment on the pleadings);

(2) The length of the transcript is such that its preparation time will not be a source of delay;

(3) An agreed statement is submitted in lieu of the record;

(4) The record was made in an administrative hearing and filed with the trial court;

(5) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or

(6) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding. The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App.R. 15(B) filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1977; July 1, 1982; July 1, 1991; July 1, 1992; July 1, 1994.]

RULE 4. Appeal as of Right--When Taken

(A) Time for appeal

A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals

If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion

In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R. 53(E)(4)(c) or Rule 40(E)(4)(c) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion

In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution

In an appeal by the prosecution under Crim. R. 12(K) or Juv. R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order

If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ. R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ. R. 54(B).

(C) Premature notice of appeal

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of "entry" or "entered"

As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ. R. 58(A) or Crim. R. 32(C).

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1985; July 1, 1989; July 1, 1992; July 1, 1996; July 1, 2002.]

Staff Note (July 1, 2002 Amendment)

Appellate Rule 4	**Appeal as of Right—How Taken**
Appellate Rule 4(B)(4)	**Exceptions: Appeal by prosecution**

The July 1, 2002, amendment to Appellate Rule 4 corrected two errors. First, in App. R. 4(B)(4), a cross-reference was changed from Criminal Rule 12(J) to Criminal Rule 12(K), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 2001.

Second, in App. R. 4(D), a cross-reference was changed from Criminal Rule 32(B) to Criminal Rule 32(C), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 1998.

No substantive amendment to Appellate Rule 4 was intended by either amendment.

Westlaw.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)
→ **§ 1291. Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

Current through P.L. 110-133 approved 12-6-07

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