

IN THE SUPREME COURT OF OHIO

VIL LASER SYSTEMS, LLC,

Plaintiff-Appellee,

v.

SHILOH INDUSTRIES, INC.,

Defendant-Appellant.

Case No. 2007-0996

On Appeal from the
Court of Appeals of the
Third Appellate Judicial
District, Shelby County
Case No. 17-07-02

REPLY MERIT BRIEF OF APPELLANT SHILOH INDUSTRIES, INC.

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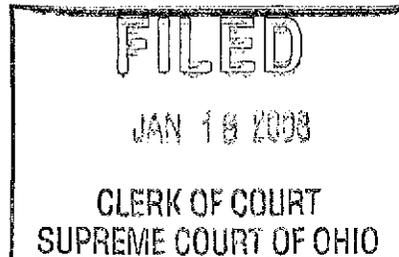


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REPLY MERIT BRIEF

VIL concedes that whether the December 15 order was final and appealable hinges upon whether the order “meets the requirements of R.C. 2505.02.”¹ VIL does not dispute that R.C. 2505.02(B)(1) is inapplicable to the December 15 order, given that the December 15 order left fundamental issues unresolved. VIL argues only that Shiloh waived its right to argue this point by failing to raise this argument below. Not so. Shiloh specifically contended below that the December 15 order was not final under section (B)(1). *See* VIL Appendix at A-41.

The sole statutory provision upon which VIL thus relies is R.C. 2505.02(B)(3). But section (B)(3) only makes final the grant of a new trial. It does not, by its terms, apply to orders of remittitur. And given VIL’s consent to remittitur, a new trial was *never* granted, making section (B)(3) inapplicable on its face.

VIL argues that “Ohio law does not require a trial court to limit its orders to a single remedy[.]”² It is true that a trial court can simultaneously grant a new trial and deny a JNOV motion. But a single order cannot grant both remittitur and a new trial, as they are *mutually exclusive* remedies.³ And which of these mutually exclusive remedies became the ultimate judgment of the trial court in

¹ Appellee Br. at 4.

² *Id.* at 7.

³ VIL states that the December 15 order “granted remittitur *in addition* to setting aside the judgment and granting a new trial.” *Id.* at 7 (emphasis added). The words “in addition” are disingenuous, as a new trial and remittitur are alternative remedies. VIL’s later words betray its position: “The very nature of a remittitur is two-pronged: the plaintiff *either* consents to the remittitur or a new trial results.” *Id.* at 9 (emphasis added).

this case necessarily hinged upon something unknown on December 15, namely, VIL's choice of remedy.

VIL's argument also fails to reflect the unique nature of remittitur. VIL does not dispute that a trial court may not grant remittitur unless and until the plaintiff consents. Thus, the December 15 order—which did not order remittitur, but rather offered VIL the option of accepting it—cannot have been final.

As neither section (B)(1) nor section (B)(3) applies, the December 15 order was not a final appealable order. This result is consistent with every decision rendered by every other court in the land to have weighed in on the matter. VIL argues that Ohio need not follow any of these jurisdictions. True. But VIL points out no reason in logic or law—other than its misreading of R.C. 2505.02(B)(3)—for Ohio to treat the matter differently. The uniformity of these decisions reflects the unassailable logic behind the proposition that an order giving the plaintiff the choice of a new trial or remittitur cannot be final because the ultimate judgment turns on a decision not yet made.

VIL argues that deeming the December 15 order to be not final and appealable conflicts with “every case ever appealed in which a remittitur was ordered[.]”⁴ This is false. VIL points to no case (other than the Third District's opinion) that has held that an order granting remittitur or, in the alternative, a new trial is a final appealable order. In fact, Ohio cases routinely reflect the entry of a judgment *after* the plaintiff consents to remittitur.⁵

⁴ Id. at 9.

⁵ See, e.g., *Wells v. C.J. Mahan Const. Co.*, 10th Dist. No. 05AP-180, 05AP-183, 2006-Ohio-1831, at ¶ 41 (“Upon remand to the trial court, appellee shall inform

It is true that different jurisdictions handle differently the question of when the judgment actually *does* become final. As Shiloh pointed out in its initial brief, some hold that a separate judgment must follow the plaintiff's election, and some hold that the original order becomes final upon either the plaintiff's election or the expiration of the window of time to choose. VIL contends that these differences somehow undermine Shiloh's appeal. Not so. VIL does not dispute that if the December 15 order was not a final appealable order, Shiloh's January 25, 2007 notice of appeal was timely, regardless of when (if ever) the final judgment issued. Thus, whether the judgment became final upon VIL's December 29 or January 30 election of remittitur or on another date, or has yet to occur because no final judgment has yet issued, the Third District's dismissal of Shiloh's appeal was unwarranted.⁶

the trial court whether or not she accepts the remittitur. If she does not accept, the trial court shall conduct a new trial on the issue of damages. If she does accept, the trial court shall enter judgment specifying the appropriate amount of damages in accordance with law and this opinion.”); *Tolliver v. Braglin*, 4th Dist. No. 03CA18, 2004-Ohio-731, at ¶ 28 (same); *Lewis v. Public Finance Corp. of Youngstown No. 3* (1967), 9 Ohio App.2d 215, 216, 223 N.E.2d 828 (after plaintiff consented to remittitur, journal entry filed by trial court entering judgment against defendant in amount of \$2000).

⁶ VIL contends that Shiloh waived its right to argue that the judgment is not yet final because a post-election judgment was never journalized. Appellee Br. at 5. But the question of whether the December 15 order was final—which is the issue certified for appeal—is distinct from the collateral issue of whether a final judgment ever actually issued. Shiloh raised this collateral issue because it naturally arises from the fact that the December 15 order was not final. This Court does not hesitate to reach matters implicated by the issue raised on appeal. See *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Co., Inc.* (1993), 67 Ohio St.3d 274, 279, 617 N.E.2d 1075. And in any event, as noted above, Shiloh's appeal was timely whether the answer to this collateral question is “yes” or “no.”

CONCLUSION

For the reasons set forth above and in Shiloh's opening brief, the Court should reverse the decision below.

Date: January 16, 2008

Respectfully submitted,



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A handwritten signature in black ink, consisting of a stylized 'O' followed by a horizontal line and a small flourish.

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