



**TABLE OF CONTENTS**

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION .....	3
STATEMENT OF THE CASE AND FACTS .....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	6
<u>Proposition of Law No. 1:</u> In a garnishment action, where a magistrate grants a Debtor’s timely filed 60(B) Motion and a Motion for a Stay, which is granted, and the trial court subsequently overrules the magistrate and reinstates the Garnishment Order, the trial court judgment reinstating the Garnishment Order is a final appealable judgment that is subject to appeal even though the issues on appeal involve denial of a motion for a stay. ....	
	6
<u>Proposition of Law No. 2:</u> Because of the substantial constitutional question involved in garnishment of property, when a Creditor seeks to garnish a Debtor’s property and a magistrate grants the Debtor’s timely filed motion for a stay, it is a final appealable judgment where the validity of the Creditor’s right to garnishment is challenged by the Debtor. ....	
	11
CONCLUSION.....	13
CERTIFICATE OFF SERVICE.....	13
APPENDIX	
Opinion of the Cuyahoga County Court of Appeals (January 11, 2008) .....	
	1

**EXPLANATION OF WHY THIS CASE IS A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST  
AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This Court should accept jurisdiction of this case because this matter presents Ohioans with critical tough issues for the future of individuals slapped with a summons from a creditor with a vague foreign decree in a Garnishment Action: 1) appeal the Garnishment Order immediately, even though the individual still has to go back to get clarification of the foreign decree. However, if the individual loses on appeal because he or she had not gotten clarification of the foreign decree from the other state court, it becomes impossible to relitigate the case. 2) move for a Motion to Stay and obtain clarification of the foreign decree, but if the stay is denied the denial is not appealable.

In this case, Appellant did the latter and filed a Motion for a Stay in order to retain an attorney in California and to ask the California court to clarify the California court's vague language in its first's ruling of which Appellee had taken advantage. Appellant's request of a motion for a stay essentially was asking the trial court to maintain the status quo until the truth of the matter could be determined. That is the nature of a preliminary injunction. The Court of Appeals rigid interpretation of the law violates the constitutional rights guaranteed to the individual by the Ohio Constitution and the U.S. Constitution and puts persons such as Appellant in a lose-lose situation. The ruling also renders persons such as Appellants responsible for the obligations of the Defense Finance and Accounting Service (DFAS), the accounting arm of the U.S. military, simply because a party is unable to reach the DFAS personally or conveniently.

Appellant therefore urges this Court to accept jurisdiction of this matter because this case affects substantial constitutional rights of Debtors, involves federal statutory issues and involves issues concerning which foreign judgments are void and subject to collateral attack.

## STATEMENT OF THE CASE AND FACTS

Appellant is a 61-year-old man who currently works as a mechanic for the Greater Cleveland Regional Transit Authority (RTA) in Cleveland. Before working at RTA, Appellant served his country for a total of 30 years in the military during a career in which he spent seven years in the United States Army and 23 years in the United States Marines Corps. This case arose from an action by Appellee to garnish retirement payments that were not paid to Appellee from December 5, 1995, to July 30, 2004, by the Defense Finance and Accounting Service (DFAS), the accounting arm of the U.S. military. By federal statute and under the parties' California divorce decree, Appellee was required to apply for those benefits herself. In dividing the retirement benefits of the parties under an uncontested divorce decree in California in 1995, the Superior Court of San Bernardino County, California, stated as follows:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that this Court finds that the community property interest of the parties in the military retirement benefits that Respondent receives is 74% and Petitioner is awarded as her sole and separate property 37%, of said military retirement benefit increases as that dollar value may change from time to time based upon consideration other than the length of service of Respondent. The Court specifically finds that Petitioner and Respondent were married for seventeen (17) years, and that all seventeen (17) years, were while Respondent was on active duty with the United States Marines Corps. Said 37%, of Respondent's military retirement is awarded directly to Petitioner and *she shall have the right to apply directly to the Defense Finance and Accounting Service*, or any successor thereof, for payment of said amount directly to her rather than by or through Respondent." (*Emphasis added*)

Because Appellee carelessly failed to complete the proper paperwork for many years, the DFAS did not pay Appellee her share of the pension until she completed and filed the documents properly. The case began when Appellee registered an alleged foreign judgment from the State of

California in the Cuyahoga County Common Pleas. The alleged foreign judgment was transferred on June 24, 2006, to the Cleveland Municipal Court for execution. Appellant filed objections and a date was set for a hearing of Appellant's objections. Counsel for Appellee and the trial court went ahead with the garnishment while awaiting the September 6, 2006, date set for the hearing of Appellant's objections. At the hearing, Appellant asked the trial court for a stay of the Garnishment Order to allow Appellant to file a 60(B) motion in Common Pleas on the grounds that Appellee had led Ohio courts to rely on a California ruling that was not a final appealable order. The magistrate granted a stay and the trial court overruled and finally denied the motion for a stay on January 16, 2007. Appellant timely appealed. The appeal was dismissed on the grounds that denial of a motion for stay was not a final appealable order. Appellant sought the motion for stay for two reasons: 1) the garnishment was impoverishing Appellant; 2) Appellant was seeking to return to the Cuyahoga County Common Pleas to challenge the validity of the foreign decree filed with that court without being drained of resources as a result of the Garnishment Order. The issues on appeal were whether Appellee was entitled to garnish the retirement payments from Appellant, considering that their California Divorce and the significantly modified California Ruling on which Appellee had based her garnishment action, made it clear that the Defense Finance and Accounting Service, and not Appellant, was to pay the arrearage of retirement benefits owed to Appellee. The Cuyahoga County Court of Appeals erred in rigidly basing its ruling solely on the procedural posture and the issues raised on appeal.

In support of his position on these issues, Appellant presents the following arguments.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: In a garnishment action, where a magistrate grants a Debtor's timely filed a 60(B) Motion and a Motion for a Stay and the trial court subsequently overrules the magistrate and reinstates the Garnishment Order, the trial court judgment reinstating the Garnishment Order is a final appealable judgment that is subject to appeal even though the issues on appeal involve denial of a motion for a stay.**

Before the amendment of R.C. 2505.02, this Court had held that the granting of a preliminary injunction was an action for injunctive relief and was not a final appealable order. *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St.3d 145, 148, 532 N.E.2d 727. In the current R.C. 2505.02(B)(4), the legislature changed the law and made other provisional remedies reviewable. Appellant's timely filed motion for a stay, which was granted by the magistrate and subsequently overruled by the trial court, is more akin to a preliminary injunction because Appellant is seeking to return to the Cuyahoga County Common Pleas Court to challenge the validity of the foreign decree presented to that Court in a separate proceeding. The parties have already relitigated the ruling in California and the California court has clarified its ruling on March 2, 2007. Any new proceedings before the Cuyahoga County Common Pleas Court would not be ancillary to the Garnishment Action. The Garnishment Action is not attendant on nor would it aid in the Common Pleas proceeding in which Appellant would be challenging the validity of the foreign decree earlier utilized for the Garnishment Proceedings. As in a preliminary injunction, Appellant's success in the Cuyahoga County Common Pleas Court would simply lead to the dismissal of the Garnishment Action if the Common Pleas Court decides the foreign decree presented to that Court was in fact not final order.

As a result of the Garnishment, Appellant has become impoverished. He has had to retain attorneys in California and Ohio, and to take time off from work to travel to hearing in courts in both Cleveland and California. Because of the interest the trial court imposed, the amount in the Garnishment Order is huge. Appellant cannot maintain any accounts because any money going into an account automatically gets withdrawn without his knowledge and he has to pay the bank fees because checks written to creditors are unpaid. The trial court has garnished a substantial amount of funds that Appellee now seeks to have disbursed. However, Appellant stands to lose any funds paid to Appellee, who has now moved from California to Georgia and has no known assets. If Appellant's garnished money that should have been paid by the Defense Finance and Accounting Service (DFAS), the accounting arm of the U.S. military, is turned over to Appellee and Appellant wins in Cuyahoga County Common Pleas Court, he will have no means of redress. Appellee has no known assets. Appellant cannot collect from her pension. DFAS is obligated by law to pay her the portion of retirement to which she is entitled. For this reason, if this Court accepts jurisdiction, or issues any order concerning this case, Appellant asks that this Court immediately issue a stay.

Appellant is aware that in the past this Court had ruled on the appealability of Motions for a Stay pursuant to earlier versions of R.C. 2505.02. In *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St.3d 124, 543 N.E.2d 1200, and *Bellaire City Schools Bd. of Edn. v. Paxton* (1979), 59 Ohio St.2d 65, 13 O.O.3d 58, 391 N.E.2d 1021, this Court had held that a Motion for Stay pending arbitration was not final and appealable. However, the legislature then enacted R.C. 2711.02(C), which specifically made an order "that grants or denies a stay of a trial of any action pending arbitration" a final appealable order. In *Community First Bank & Trust v. Dafoe* (2006), 108 Ohio St.3d 472, a case which appeared limited to bankruptcy proceedings, this

Court also recently had previously answered the question whether a court's order staying an action, including the claims against nonbankrupt parties, pending determination of the bankruptcy of another party, is a final order subject to appeal under R.C. 2505.02. In *Community First Bank & Trust*, this Court held that R.C. 2505.02(B) stated what actions by trial courts constituted final appealable orders. Under R.C. 2505.02(B), an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- "(1) An order that affects a substantial right in an action that 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;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
  - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
  - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

The issue in *Community First Bank & Trust v. Dafoe* was whether the trial court's stay implicated R.C. 2505.02(B)(4), which made certain provisional remedies final appealable orders. This Court found that the term "provisional remedy" was defined in former R.C. 2505.02(A)(3), the version that was in effect in 2002, when the suit was filed:

"Provisional remedy means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence."

This Court based its ruling in *Community First Bank & Trust v. Dafoe* on whether a stay should be considered an ancillary proceeding pursuant to former R.C. 2505.02(A)(3), 147 Ohio Laws, Part II, 3277. *Community First Bank & Trust v. Dafoe* was an action to collect on personal guarantees entered into by appellees, including pledges of security should a default occur. One of the guarantors filed for bankruptcy while the garnishment action was proceeding, and moved the trial court for a stay on the basis of the Chapter 11 bankruptcy petition. The trial court ordered a stay on all matters in the case based upon the bankruptcy filing. The appellate court sua sponte determined that the appeal should be dismissed for want of jurisdiction, finding that the trial court's issuance of a stay was not a final appealable order. The appeals court held that pursuant to R.C. 2505.02 the trial court's order staying the action, including the claims against nonbankrupt parties, was not an order denying a provisional remedy and thus was not a final order subject to appeal.

This Court agreed that the issuance of a stay in *Community First Bank & Trust v. Dafoe* was not an ancillary proceeding pursuant to former R.C. 2505.02(A)(3). Because "ancillary" was not defined in R.C. 2505.02, this Court held in *Community First Bank & Trust v. Dafoe* that as used in former R.C. 2505.02(A)(3), an ancillary proceeding was "one that is attendant upon or aids another proceeding." This Court cited *State v. Muncie* (2001), 91 Ohio St.3d 440, 449, 746 N.E.2d 1092, quoting *Bishop v. Dresser Industries* (1999), 134 Ohio App.3d 321, 324, 730 N.E.2d 1079. In *Muncie*, the court of appeals determined that it lacked jurisdiction to review a "Forced Medication Order" that had been issued by the trial court in an effort to restore the appellant's competency to stand trial. The court of appeals dismissed the appeal on the grounds that it was not final and appealable under R.C. 2505.02. Because this Court has held that a

trial court's forced medication order was indeed a "final order" under R.C. 2505.02(B)(4), this Court reversed the court of appeals. Unlike the above cases, Appellant's 60(B) action in the Common Pleas would not be an ancillary action to the Garnishment proceeding. Rather, Appellant would be challenging the validity of the foreign decree that Appellee had utilized for the Garnishment proceedings, an action in the nature of an action for injunction to demonstrate that Appellee had no rights at law to garnish Appellant's property.

This Court has held that an order may be a final appealable order even though the remedy that it grants or denies is only provisional. See *State v. Muncie*. In defining "ancillary," the Muncie court had quoted the Black's Law Dictionary definition of "ancillary" as "aiding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered as principal. Auxiliary or subordinate." *Id.* at 449, 746 N.E.2d 1092, quoting Black's Law Dictionary (5th Ed.1979). The Muncie Court also looked at other types of proceedings that this court had found to be ancillary to the main action. The court noted that in *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, 192, 143 N.E. 549, the appointment of a receiver was deemed "ancillary to the main action." *Muncie*, 91 Ohio St.3d at 449, 746 N.E.2d 1092, because the appointment of a receiver, for instance, "aids the principal proceeding - the underlying litigation - for the receiver conserves the interests of litigants with respect to property that is in the custody of the court during the course of that principal litigation." *Id.*, citing *Forest*, 110 Ohio St. at 192, 193, 143 N.E. 549. This court also noted in *Muncie*, quoting *Lincoln Tavern, Inc. v. Snader*(1956), 165 Ohio St. 61, 68, 59 O.O. 74, 133 N.E.2d 606, that "an attachment is a provisional remedy; an ancillary proceeding which must be appended to a principal action and whose very validity must necessarily depend upon the validity of the commencement of the principal action."

**Proposition of Law No. 2: Because of the substantial constitutional question involved in garnishment of property, when a Creditor seeks to garnish a Debtor's property and a magistrate grants the Debtor's timely filed motion for a stay, it is a final appealable judgment where the validity of the Creditor's right to garnishment is challenged by the Debtor.**

Appellant urges this Court to hold that the granting of the Motion for a Stay in the instant case was required because a substantial property interests of Appellant was at stake. The parties in a garnishment action are litigating substantial property interests. Courts have defined a substantial right as one that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect. A substantial right has also been defined in the same way in Ohio Rev. Code § 2505.02(A)(1). In providing that no state shall "deprive any person of life, liberty, or property, without due process of law," the Fourteenth Amendment to the United States Constitution requires that substantial procedural safeguards be provided in our legal system before one may be deprived of a property right. Section 16 of Article I of the Ohio Constitution, states, in part that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." If as in this case a Creditor files an invalid "foreign decree" in the Ohio courts and obtains an Order of Garnishment, substantial procedural safeguards require that before the Debtor is deprived of his property right he or she should be entitled to the equivalent of an injunctive remedy. Without such remedy, the substantial procedural safeguards required by our legal system would be lacking if the Debtor relies on the trial court's motion for a stay.

Appellant also notes that when read in conjunction with Sections 1 and 19 of Article I, Section 16 provides substantially the same safeguards as does the Fourteenth Amendment, as this Court has pointed out in *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6. This Court also has spelled out the safeguards this Court requires, which this Court has set in place for prejudgment interest in the seminal case of *Peebles v. Clement* (1980), 63 Ohio St.2d 314, 17 O.O.3d 203, 408 N.E.2d 689, paragraph one of the syllabus, where the Peebles Court held that in order to comport with constitutional due process, "statutes providing for prejudgment attachment must at a minimum: (1) require plaintiff to furnish an appropriate bond or other security to compensate a defendant in the event of wrongful seizure; (2) require that an affidavit be filed alleging personal knowledge of specific facts forming a basis for prejudgment seizure; (3) require that a judicial officer pass upon the sufficiency of the facts alleged in the affidavit; (4) provide for dissolution of the seizure upon the posting of a bond by defendant; and (5) provide an immediate right of hearing to the defendant in which plaintiff must prove that the seizure is warranted." See in Ohio Rev. Code § 2715.01 et seq. Appellant urges this Court to accept jurisdiction of this matter because the outcome of this matter would significantly impact Appellant's substantial constitutional rights.

**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Appellant requests that this Court accepts jurisdiction of this case so that the important issues presented can be reviewed on the merits

  
\_\_\_\_\_  
SULAIMAN ROY GRAHAM  
COUNSEL FOR APPELLANT

**Certificate of Service**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to Counsel for Appellee, Marvin H. Hersch, 24100 Chagrin Blvd., Suite 330, Cleveland, Ohio 44122, on February 11, 2008.

  
\_\_\_\_\_  
SULAIMAN ROY GRAHAM  
COUNSEL FOR APPELLANT

**APPENDIX**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 89439

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**ATHENA HOLIVAY**

PLAINTIFF-APPELLEE

vs.

**PATRICK HOLIVAY**

DEFENDANT-APPELLANT

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**JUDGMENT:  
DISMISSED**

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Civil Appeal from the  
Cleveland Municipal Court  
Case No. 2006CVH0017063

**BEFORE:** Kilbane, J., Cooney, P.J., and Blackmon, J.

**RELEASED:** December 6, 2007

**JOURNALIZED:** JAN 11 2008

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**JAN 11 2008**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

**ATTORNEY FOR APPELLEE**

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**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**DEC 6 - 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED**

MARY EILEEN KILBANE, J.:

Patrick Holivay ("Patrick") appeals from the trial court's denial of his motion for a stay in a judgment transfer collection matter. Patrick argues the trial court erred in not staying the matter to allow him to file a Civ.R. 60(B) motion with the Cuyahoga County Court of Common Pleas. For the following reasons, we dismiss the appeal for want of jurisdiction.

In 1995, Athena Holivay ("Athena") and Patrick were divorced under a decree of the Superior Court of San Bernadino County, California. In dividing the benefits between the parties, the California court determined that Athena was entitled to a percentage of Patrick's military retirement benefits. Athena never received any of Patrick's retirement benefits and, in 2006, she brought an order to show cause. The California court determined that Patrick failed to make any payments to Athena from December 5, 1995 through July 30, 2004. Therefore, the California court determined that Patrick owed Athena \$59,797.92 in past due military retirement as well as \$11,100, which the court previously ordered as an equalization payment.

Athena registered this foreign judgment in the Cuyahoga County Court of Common Pleas, which was journalized on June 15, 2006. The case was then transferred to the Cleveland Municipal Court for execution. The trial court in

this case garnished Patrick's bank accounts and attached his wages. Patrick objected to the attachment of his wages and bank accounts and, during the entire proceeding, argued that he was not responsible for paying Athena his retirement benefits. Patrick claimed the military, or specifically, the Defense Finance and Accounting Service, was responsible for paying the benefits. Accordingly, Patrick filed a motion to stay the case to allow him to file a Civ.R. 60(B) motion for relief from judgment in the Cuyahoga County Court of Common Pleas. The trial court denied the stay and determined that the court's August 8, 2006 garnishment order remained.

Patrick appeals from this order, raising the following four assignments of error:

**I. Whether trial court erred in refusing to grant a stay to allow appellant to file a 60(B) motion in Common Pleas Court because appellee has led Ohio court to rely on a California ruling that was not a final, appealable order, that was being litigated in California, and the trial court's decision to deny the stay has caused appellant irreparable harm.**

**II. Whether trial court erred in refusing to grant a stay to allow appellant to file a 60(B) motion in Common Pleas Court because until litigation in California concluded over ruling on submitted matter was only the 1995 California divorce judgment was entitled to full faith and credit in Ohio (sic).**

**III. Whether trial court erred in refusing to grant a stay to allow appellant to file a 60(B) motion in Common Pleas Court based on the fact that the ruling on submitted matter was misinterpreted.**

**IV. Whether trial court erred in refusing to grant a stay to allow appellant to file a 60(B) motion in Common Pleas Court and as a result, appellant is in double jeopardy with garnishment orders from two counts in California and Ohio, and both courts appear to be punitively taking out their frustration with the Federal Government on appellant."**

A court of appeals only has jurisdiction over orders that are both final under Civ.R. 54(B) and appealable under R.C. 2505.02. *Grogan v. Grogan Co. Inc.* (2001), 143 Ohio App.3d 548. This court, as well as other Ohio courts, have previously determined that an order denying a stay of proceedings is not a final appealable order under R.C. 2505.02(B)(4). See *Cleveland v. Zakaib* (Oct.12, 2000), Cuyahoga App. Nos. 76928, 76929, 76930 (the appeal was dismissed for lack of jurisdiction because the order denying a stay of proceedings was not a final appealable order); *Grogan*, supra (a motion to stay the matter was not a provisional remedy and was therefore not an appealable order); *Watson v. Driver Management, Inc.* (1994), 97 Ohio App.3d 509 (it is settled law, requiring no citations, that a stay order is not a final appealable order); *Community First Bank & Trust v. Dafeo*, 108 Ohio St.3d 472, 2006-Ohio-1503 (a court's order staying an action, including the claims against nonbankrupt parties, pending

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determination of the bankruptcy of another party, is not a final order subject to appeal under former R.C. 2505.02).

Accordingly, because the denial of a stay of proceedings is not a final appealable order, we must therefore dismiss this appeal for lack of jurisdiction. *Zakaib*, supra. The same reasoning applies to Athena's motion for award of expenses, attorney's fees and punitive damages filed with this court. We do not have jurisdiction to rule on this motion.

This appeal is dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
\_\_\_\_\_  
MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, P.J., and  
PATRICIA A. BLACKMON, J., CONCUR