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**In the Supreme Court of Ohio**

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***BERTHA LOUDEN, INDIVIDUALLY AND AS EXECUTOR  
OF THE ESTATE OF ROGER LOUDEN, et al.,***

Plaintiffs-Appellants,

v.

***A.W. CHESTERTON CO., et al.,***

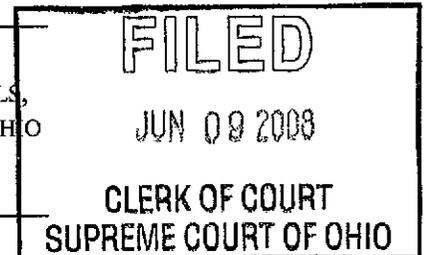
Defendants-Appellees.

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DISCRETIONARY APPEAL FROM THE COURT OF APPEALS,  
EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO  
CASE No 07-90184 & 07-90185

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**APPELLEES' MERIT BRIEF**

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## I.

### INTRODUCTION

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The long-standing and well-known rule of appellate practice is that the timely filing of a notice of appeal is the one and only jurisdictional step to perfect an appeal from the common pleas court to the court of appeals. *Wigton v. Lavender* (1984), 9 Ohio St.3d 40, 43; *Richards v. Industrial Comm.* (1955), 163 Ohio St. 439, paragraph two of the syllabus. Without the proper filing of a notice of appeal, an appellate court lacks jurisdiction to hear the appeal. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 322. And whenever the filing of a legal document, like a notice of appeal, is a prerequisite to invoking a court's jurisdiction, the paper must be properly filed with the officer and received by that officer to be kept in its proper place in his or her office. *Fulton v. State, ex rel. Gen. Motors Corp.* (1936), 130 Ohio St. 494, paragraph one of the syllabus; *King v. Penn* (1885), 43 Ohio St. 57, 61. In the case of such jurisdictional filings, of which a notice of appeal is one, that officer is the clerk of court and it is the clerk who must receive and take custody of the jurisdictional document in order to confer jurisdiction upon the court. R.C. 2303.09; *State, ex rel. Dawson v. Roberts* (1956), 165 Ohio St. 341.

The jurisdictional nature of a notice of appeal is what sets it apart in this case from other pleadings and filings that may be made during the course of a civil or criminal matter. Whenever the filing of a document is deemed to be jurisdictional, the document must be delivered to the clerk of court to effectuate its filing and the document must be indorsed by the clerk of court with a time-stamp. See, e.g., *State v. Gipson*, 80 Ohio St.3d 626, 1998-Ohio-659. In *Gipson*, this Court held that the hand-delivery of an affidavit of indigency to the trial court judge at the time of defendant's sentencing did not constitute "filing" as required by R.C. 2925.11 in order to avoid imposition of a mandatory fine. *Id.* at 632. This is so because the "filing" requirement of the

affidavit was deemed to be jurisdictional. *Id.* at 633. So too is the filing of a notice of appeal jurisdictional. *In re A.C.*, 160 Ohio App.3d 457, 2005-Ohio-1742, at ¶20, quoting *Transamerica Ins. Co. v. Nolan*, *supra*, 72 Ohio St.3d at 322. No special rule or exceptions should be recognized for appeals in asbestos cases.

The process and requirements for the proper and timely filing a notice of appeal are governed by the Rules of Appellate Procedure. Not the Rules of Civil Procedure. Not local rules of practice that have been adopted by a common pleas court or an appellate district. Not even the standing pretrial orders of a particular trial court judge can alter the requirements for the timely filing of a notice of appeal as mandated by the Rules of Appellate Procedure. Without question, the timely filing of a notice of appeal applies in order to perfect an appeal *in any and all cases*. See, App.R. 3(A) and App.R. 4(A). Noncompliance with App.R. 3(A) and App.R. 4(A) deprives the appellate court of jurisdiction to hear the appeal. As a lack of appellate jurisdiction cannot be excused or waived, there are no exceptions. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366.

Rule 3(A) of the Ohio Rules of Appellate Procedure expressly provides that a notice of appeal “shall” be filed “with the clerk of the trial court.” Transmission of a notice of appeal by way of an electronic docketing system is not (at least as of yet) a recognized manner of filing a notice of appeal in Ohio’s courts. Nor should it be under the current Rules of Appellate Procedure. While this case may be a matter of first impression, the legal principles governing the precise issue raised in this appeal have been addressed and settled by Ohio courts of appeals. When App.R. 3(A) expressly provides that a notice of appeal “shall” be filed “with the clerk of the trial court,” that is precisely what must happen.

The central issue in this appeal is straight-forward – what actions are required by the Rules of

Appellate Procedure for filing a notice of appeal in an asbestos case. More to the point, was it possible for Appellants to perfect a timely appeal by submitting their notices of appeal electronically on the asbestos docket system known as “File & Serve” instead of with the office of the Cuyahoga County Clerk of Courts when neither Rules of Appellate Procedure, the local rules for Cuyahoga County nor the Eighth District Court of Appeals permit parties to electronically file a notice of appeal. It is of critical importance to the issue raised herein to distinguish between filings, like a complaint and notice of appeal, that implicate a court’s ability to assert jurisdiction over a case and those filings that do not. Ohio case law and the Rules of Appellate Procedure establish that the transmission of Appellants’ notice of appeal on “File & Serve” does not constitute “filing” with the Cuyahoga County Clerk of Courts. Thus, the appeals in this case were properly dismissed by the Eighth District Court of Appeals. That disposition should be affirmed by this Court.

## *II.*

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

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#### **A. Genesis and Scope of The “File & Serve” System.**

In January 1998, due to the overwhelming number of asbestos filings in Cuyahoga County, Judge Harry A. Hanna issued Case Management Standing Order No. 1, which adopted the electronic filing system known as the Complex Litigation Automated Docket (“CLAD”).<sup>1</sup> (See Stipulation of Supplemental Record filed on March 20, 2008, Tab 1). The CLAD system was “provided by LEXIS-NEXIS in order to increase the efficiency of the [trial] Court.” ( See Stipulation of Supplemental Record, Tab 1). The CLAD system was in place for five years.

In July 2003, Judges Hanna and Leo Spellacy, the two asbestos judges handling asbestos cases

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<sup>1</sup> The authority to implement CLAD was derived from Cuyahoga County Loc. R. 21 allowing trial courts to adopt a case management order to control and manage its docket.

in Cuyahoga County, issued a case management order replacing the CLAD system with the “File & Serve” electronic system. (See Stipulation of Supplemental Record, Tab 2, Section B1(2) of the July 2003 case management order). The July 2003 case management order adopting the “File & Serve” system expressly provides that it applies only to “pre-trial discovery activities,” not all filings as Appellants claim. (See Stipulation of Supplemental Record, Tab 2, Section B1(1) & Section B2(1)(a) of the July 2003 case management order). As with the CLAD system, the “File & Serve” system is a service provided and maintained by Lexis-Nexis, *not* the Cuyahoga County Clerk of Courts. (See Stipulation of Supplemental Record, Tab 2, Sections B1(2) & B2(1)(a) of the July 2003 case management order). This is an important fact as the Clerk’s office is unaware of and unable to access any notice of appeal transmitted on “File & Serve.”

**B. Appellants Seek an Appeal but Fail to Comply with App.R. 3(A) and 4(A).**

On April 5, 2007, the trial court issued four signed and journalized final appealable orders granting summary judgment in favor of Appellees, Goulds Pumps, Inc. and Ingersoll Rand Company, which contained Civ.R. 54(B) language. The first set of orders granted summary judgment in favor of Goulds Pumps, Inc. and Ingersoll Rand Company in the Roger Louden case, while the second set of orders granted summary judgment in favor of Goulds Pumps, Inc. and Ingersoll Rand Company in the Wayne Border case. (See Stipulation of Supplemental Record, Tabs 9-10).

Instead of filing their notices of appeal with the Cuyahoga County Clerk of Courts as required by App.R. 3(A) and 4(A), Appellants admit they erroneously transmitted their notices of appeal on “File & Serve” on May 4, 2007. (See Stipulation of Supplemental Record, Tabs 15-16, 21-22). Fatal to Appellants’ position in this appeal is the undisputed fact that the notices of appeal were *never* filed with the Clerk’s office within thirty days from the April 5, 2007 orders. Neither the local rules for Cuyahoga County nor the Eighth District permit parties to electronically file a notice of

appeal. Despite this, Appellants appear to blame the Clerk's office for not serving their May 4, 2007 notices of appeal in accordance with App.R. 3(E). (Appellants' Merit Brief at p.3). But the Clerk's office was *not* aware that the notices of appeal were filed on May 4, 2007 because they were *never* filed with that office. The "File & Serve" system is a service provided and maintained by Lexis-Nexis, *not* the Clerk's office. (See Stipulation of Supplemental Record, Tab 2, Sections B1(2) & B2(1)(a) of the July 2003 case management order). So, transmitting the notices of appeal via "File & Serve" did not comply with the mandatory and jurisdictional prerequisites for invoking the appellate jurisdiction of the court of appeals pursuant to App.R. 3(A) and 4(A).

Realizing their error, on July 24, 2007, Appellants manually filed their notices of appeal, along with the filing fee, with the Clerk's office. The fact that Appellants filed their notices of appeal with the Clerk's office on July 24, 2007 (more than two months late) did not cure the jurisdictional defect created when they failed to properly and timely file their notices of appeal within thirty days from the April 5, 2007 judgment entries.<sup>2</sup> On July 27, 2007, Appellants filed a motion asking the Court of Appeals to recognize their late appeals.<sup>3</sup> On August 1, 2007, Goulds Pumps, Inc. and Ingersoll Rand Company filed a memorandum opposing Appellants' motion to determine the timeliness of

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<sup>2</sup> Appellants also filed a Civ.R. 60(B) motion from the trial court's summary judgment decision. Of course, the filing of this Civ.R. 60(B) motion did not extend the time to file a notice of appeal. *Blasko v. Mislík* (1982), 69 Ohio St.2d 684. The trial court issued four signed and journalized judgment entries denying Appellants' Civ.R. 60(B) motions on May 7, 2007 in accordance with Civ.R. 58(A). Two orders were issued in the Border case and the other orders were issued in the Loudon case. (See Stipulation of Supplemental Record, Tabs 17-18). As with the summary judgment orders, Appellants never filed their notices of appeal with the Clerk's office within thirty days from the May 7, 2007 judgment entries denying them Civ.R. 60(B) relief. This jurisdictional defect, likewise, cannot be cured by filing a notice of appeal with the Clerk's office on July 24, 2007.

<sup>3</sup> Appellants also filed a motion to determine the timeliness of their appeals with the trial court. Appellants withdrew this motion after Appellees filed an opposition pointing out that the trial court lacked jurisdiction to determine whether Appellants validly invoked the jurisdiction of the appellate court. (See Stipulation of Supplemental Record, Tabs 21-26).

the appeal, along with a motion to dismiss the appeal.

**C. The Eighth District Court of Appeals Correctly Dismissed the Appeals.**

On August 1, 2007, the Eighth Appellate District correctly dismissed the appeals in accordance with App.R. 4(A) as being untimely filed, stating:

Sua sponte, the appeal is dismissed per App.R. 3 and App.R. 4. Appellants failed to timely comply with this Court's requirements, therefore the appeal is dismissed per App.R. 4(A).

(08/01/07 Court of Appeals Journal Entry No. 399174 & 399175). Appellants sought reconsideration of this decision, which was denied on August 20, 2007. Appellants filed their notices of appeal with the Supreme Court of Ohio, and on January 23, 2008, this Court accepted jurisdiction over these cases. 116 Ohio St.3d 1474, 2008-Ohio-153.

As correctly recognized by the Eighth Appellate District, the transmission of a notice of appeal on the "File & Serve" system does not constitute "filing" with the Clerk's office as required by App.R. 3(A) and 4(A). The lower court correctly determined that Appellants' failure to properly and timely file their notices of appeal with the Clerk of Courts as mandated by App.R. 3(A) and 4(A) within thirty days from the April 5, 2007 final orders constitutes a jurisdictional defect and dismissed the appeals. Appellants now seek to permit their untimely appeals to go forward. To find as Appellants suggest would circumvent the jurisdictional requirements contained in App.R. 3(A) and 4(A), and render them meaningless.

## II.

### ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITION OF LAW

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**Counter Proposition of Law:** The filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal in all civil cases, thus a notice of appeal in an asbestos case must be filed with the Clerk of the trial court in accordance with App.R. 3(A) and 4(A) within thirty days of the entry of the final order, and such filing does not occur by transmitting the notice of appeal on the electronic docketing system known as "File & Serve." The failure to properly and timely file a notice of appeal in accordance with App.R. 3(A) and 4(A) deprives the court of appeals of appellate jurisdiction and results in mandatory dismissal of that appeal.

#### **A. The Rules Of Appellate Procedure Govern the Filing of a Notice of Appeal in an Asbestos Case.**

##### *i. The Rules of Appellate Procedure require a notice of appeal to be timely filed with the clerk of the trial court.*

The trial court's July 2003 case management order aids in the administration of asbestos cases and "promotes judicial economy in the management of such cases" in Cuyahoga County. (See Stipulation of Supplemental Record, Tab 2, Section A, Preamble to the July 2003 case management order). The July 2003 case management order functions well, but it does not supplant the Rules of Appellate Procedure – nor does it purport to do so.

Appellants take the position that their notices of appeal were properly and timely filed on May 4, 2007, arguing that the trial court's July 2003 case management order requires that all filings in asbestos cases be electronically submitted on "File & Serve." This argument is fundamentally flawed for two reasons. First, Appellants unjustifiably view the trial court's July 2003 case management order too broadly. Second, in doing so, they ignore the jurisdictional requirements of App.R. 3(A) and 4(A).

In making their argument that the trial court's case management order either permits or requires a notice of appeal to be filed on "File & Serve," Appellants ignore the second paragraph of the case

management order which establishes the scope of that order. A reading of that paragraph makes it clear that the trial court, when adopting the “File & Serve” system, never contemplated that it be utilized for the filing of notices of appeal or the transfer of jurisdiction to the court of appeals. Rather, the case management order adopting the “File & Serve” system is expressly limited in its application to “pre-trial discovery activities” only:

Cases to Which This Order Applies.

The General Personal Injury Case Management Order No. 1 (as amended, June \_\_\_\_, 2003) *shall govern pre-trial discovery activities in all asbestos personal injury cases currently pending or to be filed in this Court from the date of this Order until further order of this Court.*

(See Stipulation of Supplemental Record, Tab 2, See Section B1(1) & Section B21(a) of the July 2003 case management order). (Emphasis added).

The filing of a notice of appeal does not qualify as a “pre-trial discovery activit[y]” and thus, does not fall within the express scope of the July 2003 case management order. Since the notice of appeal is not covered by the case management order, that order’s electronic filing provisions are inapplicable and cannot govern the procedure for perfecting an appeal. “File & Serve” simply does not apply to the filing of a notice of appeal, and Appellants attempt to perfect an appeal solely by utilizing “File & Serve” cannot, and did not, invoke the jurisdiction of the Eight District Court of Appeals.

Rather, the Rules of Appellate Procedure govern the procedure for filing a notice of appeal. The adoption by a trial judge of a case management order governing procedure at the trial level in his or her courtroom cannot supercede the procedure established by the Rules of Appellate Procedure. Consequently, the trial court’s July 2003 case management order adopting the use of the “File & Serve” system for pretrial activities in pending asbestos matters cannot relieve Appellants from their obligation to follow the clear and unambiguous procedure for the filing of a notice of appeal

established by App.R. 3(A) and 4(A).

To avoid this result, Appellants make the circular argument that there is nothing in App.R. 3(A) and 4(A) to suggest that filing an electronic notice of appeal is expressly prohibited or unacceptable. The Rules of Appellate Procedure “govern procedure in appeals to courts of appeals from the trial courts of record in Ohio.” App.R. 1. App.R. 3(A) and 4(A) cannot be any clearer – these rules govern how and when a notice of appeal is to be filed. “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.” (Emphasis added). App.R. 3(A). [Appx. 1] “An appeal to the court of appeals as of right in a civil or criminal case is commenced by the *timely filing of a notice of appeal with the clerk of the trial court.*” Painter & Dennis, Ohio Appellate Practice (2007-2008), Section 3:1, citing to App.R. 3(A) (emphasis added). App.R. 4(A) provides that “[a] party shall file the notice of appeal required by App.R. 3 within thirty days \*\*\*.” [Appx. 1] Ohio case law has concluded that “[t]he correct procedure for the filing of a notice of appeal is set forth in App. R. 4 which specifically provides that the ‘notice of appeal required by [Appellate] Rule 3 shall be filed with the clerk of the trial court.’” *Piper v. Burden* (1984), 16 Ohio App.3d 361, syllabus. With respect to a notice of appeal, “a filing can only be accomplished by bringing the paper to the notice of the office, so that it can be accepted by him as official custodian.” *King v. Paylor* (1942), 69 Ohio App.3d 193, 196. And, R.C. 2505.04 confirms that in order for an appeal to be perfected, “a *written* notice of appeal” must be filed “*in accordance with the Rules of Appellate Procedure \*\*\*.*” (Emphasis added). [Appx. 5]

The Rules of Appellate Procedure are simple and straight-forward. The notice of appeal must be timely filed with the Clerk of the trial court. There is an important reason for this. It is only when the Clerk receives the notice of appeal that jurisdiction of the appellate court is invoked. Only after the Clerk has received the notice of appeal can it can fulfill its obligation to serve a copy upon the

other parties in the case and transmit the notice of appeal to the Clerk of the Court of Appeals. See, App.R. 3(E).<sup>4</sup> This is the clear and long-standing mechanism adopted by Ohio law for the invocation of appellate jurisdiction. Absent the invocation of that jurisdiction, the Court of Appeals is powerless to act upon an appeal. When the notice of appeal is not filed with the Clerk (but rather is transmitted on “File & Serve”), the Clerk cannot complete his/her duties under App.R. 3(E), and no appellate jurisdiction is invoked. Appellants here failed to properly and timely file their notice of appeal with the Clerk of the trial court. They now ask this Court to relax this jurisdictional requirement simply because these cases involve asbestos claims. There is no support for this position.

***ii. Transmitting a notice of appeal on “File & Serve” is not equivalent to filing with the Cuyahoga County Clerk of Courts under App.R. 3(A) and 4(A).***

The “File & Serve” system for asbestos cases does not override the requirements contained in the Rules of Civil Procedure or the Rules of Appellate Procedure. This point was illustrated in *Shesler v. Consol. Rail Corp.*, 8th Dist. No. 83656, 2004-Ohio-3110. Neither the Clerk of the trial court nor the Clerk of the Court of Appeals for the Eighth District recognize trial court orders entered on the “File & Serve” system. This is because the orders must still be signed by the trial court, time-stamped and journalized by the Clerk’s office in accordance with Civ.R. 58(A) to have legal effect. *Shesler* at ¶11-12, 20. See also, *State v. Domers* (1991), 61 Ohio St.3d 592.

Similarly, here, the trial court initially announced its decision granting summary judgment by

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<sup>4</sup> An analogy can be drawn between filing a notice of appeal and filing an asbestos-related complaint. To commence an action, asbestos-related complaints must still be physically filed with the Clerk of Court as required by Civ.R. 3(A). A plaintiff must also submit to the Clerk the appropriate filing fee at the time a complaint is filed as well as submit to the Clerk a physical copy of the complaint for each defendant and each primary plaintiff. (See Stipulation of Supplemental Record, Tab 2, See Section B1(3)(a) - (3) of the July 2003 case management order). The asbestos-related complaint is still filed manually with the Clerk of Courts so that the Clerk can serve the various defendants pursuant to Civ.R. 3(A). [Appx. 1 ]

way of an electronic entry on “File & Serve.” To obtain a final appealable order under Civ.R. 58(A), it was necessary to reduce the electronic entries to physical pieces of paper which were then manually signed by the trial court judge, time-stamped and journalized by the Clerk’s office. (See Stipulation of Supplemental Record, Tabs 9-10). Without taking these steps, the announcement by the trial court of its decision on “File & Serve” does not constitute an order of the court under Civ.R. 58. As such, the Court of Appeals will not recognize the “File & Serve” entry as a final appealable order, which is a pre-requisite to the exercise of appellate jurisdiction. Thus, *Shesler* demonstrates that a document electronically submitted on “File & Serve” is not equivalent to a filing with the Cuyahoga County Clerk of Courts unless the Rules of Civil Procedure are complied with.

In fact, Loc.App.R. 11 of the Eighth District confirms that the documents entered on “File & Serve” are not even recognized by the Cuyahoga County Clerk of Court or the Clerk of the Court of Appeals for the Eighth District. [Appx. 2 ] Under this local appellate rule, parties involved in an asbestos-related appeal are required to work together and compile a supplemental record. This supplemental record contains documents entered on the “File & Serve” system which the parties deem necessary to be included in the record on appeal. See Loc.App.R. 11(A)(3). These documents are produced *by the parties* because the Clerk’s office neither recognizes nor has access to the “File & Serve” system in order to compile the physical record. See, Loc.App.R. 11(A)(3) and (B)(1). Thus, the rule was implemented “to assist the clerk of the trial court in *obtaining* and transmitting an agreed record.” See Loc.App.R. 11(A)(3) (emphasis added). The supplemental record is then submitted by the appellant to the Cuyahoga County Clerk’s office who, in turn, transmits the supplemental record to the Clerk of the Court of Appeals. See, Loc.App.R. 11(B)(1)(c).

Appellants turn this local appellate rule on its head, claiming that since the Eighth District has adopted Loc.App.R. 11, it was reasonable for Appellants to assume that the electronic transmission

of the notice of appeal on “File & Serve” would be acceptable. There is nothing reasonable about that assumption. Loc.App.R. 11 governs the submission of a supplemental record on appeal in asbestos cases. There is no language in that rule which speaks to the filing of a notice of appeal, nor does it modify the requirements of App.R. 3(A) or 4(A) which still require a notice of appeal to be filed with the Clerk’s office. Nor can Loc.App.R. 11 change or modify a rule adopted as part of the Appellate Rules of Procedure. See, *Vorisek v. North Randall* (1980), 64 Ohio St.2d 62 (local rules of appellate practice cannot conflict with Rules of Appellate Practice). The only manner in which electronic filing of a notice of appeal would be permissible is by way of an amendment to the Appellate Rules of Procedure. Unless and until that happens, a notice of appeal cannot be filed electronically.<sup>5</sup>

***iii. The Rules of Civil Procedure do not permit the filing of a notice of appeal by electronic means.***

While Appellants rely on Civ.R. 5(E), courts interpreting Civ.R. 5(E) have rejected the very same argument that Civ.R. 5(E) applies to the filing of a notice of appeal. *Piper v. Burden* (1984), 16 Ohio App.3d 361, 362. Appellants ignore the fact that the Rules of Appellate Procedure govern the filing of a notice of appeal and the Civil Rules of Procedure do not apply to appeals and appellate jurisdiction. See, Civ.R. 1(C)(1); App.R. 1(A); *Martin v. Roeder*, 75 Ohio St.3d 603, 604, 1996-Ohio-451. Nevertheless, Appellants claim that their May 4, 2007 electronic notices of appeal were properly and timely filed on “File & Serve” pursuant to the trial court’s July 2003 case management

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<sup>5</sup> Just as a paper copy of a complaint must be filed physically with the Clerk to commence an action under Civ.R. 3(A), and a physical order must be signed, time-stamped and journalized under Civ.R. 58(A) to constitute a final appealable order, a physical copy of a notice of appeal must be filed with the trial court clerk under App.R. 3(A) and 4(A) in order to invoke the jurisdiction of the Court of Appeals.

order.<sup>6</sup> Civ.R. 5(E) states that a trial court “may provide, *by local rules adopted pursuant to the Rules of Superintendence*, for the filing of documents by electronic means.” (Emphasis added). But that rule only applies to filings that are made in the trial court, not to notices of appeal that invoke the jurisdiction of the appellate court. See, *Piper*, supra.

The “File & Serve” system was adopted by the judges overseeing the asbestos docket in Cuyahoga County through a case management order, *not* by way of a local rule. Thus, Appellants cannot rely on the case management order to claim that their notices of appeal were properly and timely filed by electronic means. Stated simply, the Cuyahoga County Court of Common Pleas has not adopted a local rule permitting the filing of a notice of appeal by electronic means. But even if there was such a local rule, as with a local appellate rule of practice as argued supra, it would be inconsistent with the Appellate Rules of Practice and thus ineffective. Ohio Const. Art. IV, §5(B); *State ex rel. Henneck v. Davis* (1986), 25 Ohio St.3d 23.

For this same reason Civ.R. 33 and 51 do not bolster Appellants’ claim that their notices of appeal were properly filed on “File & Serve.” Civ.R. 33 and Civ.R. 51 do not implicate the jurisdiction of the trial court. While the submission of interrogatories and jury instructions may be submitted to the trial court in electronic format, there is no comparable rule permitting the filing of a notice of appeal by electronic means. Appellants cannot point to any civil or appellate rule that expressly permits parties to electronically file a notice of appeal in Cuyahoga County. As a result,

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<sup>6</sup> Civ.R. 5(E) reads:

The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. \*\*\*

the written notice of appeal must be filed with the Clerk of the trial court in all cases, including asbestos cases. R.C. 2505.04 (“An appeal is perfected when a *written* notice of appeal is filed.” (Emphasis added)).

Appellants also mistakenly rely on Civ.R. 10(E), which states that “all pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 ½ x 11 inches in size without backing or cover.” This civil rule does not direct a litigant to file a notice of appeal electronically, nor does it permit such a filing. Rather, Civ.R. 10(E) merely dictates the page size of documents which are filed, including those which are permitted to be filed electronically. A notice of appeal is not such a document that can be filed electronically and thus Civ.R. 10(E) offers no support that a notice of appeal can be filed electronically in Cuyahoga County.

***iv. Appellants cannot rely upon the July 2003 Case Management Order to invoke appellate jurisdiction.***

Even if the July 2003 case management order could be construed to apply to the filing of a notice of appeal (which it does not), a recent United States Supreme Court decision establishes that Appellants cannot rely on a trial court’s case management order to dictate how or when a notice of appeal is to be filed. The case of *Bowles v. Russell* (2007), 551 U.S. \_\_\_\_, 127 S.Ct. 2360 is directly on point. In *Bowles*, the district court issued an order permitting the defendant-petitioner to reopen his appeal within 17 days, rather than the 14 day period provided by Fed.R.App.P. 4(a)(6) and 28 U.S.C. § 2107(c). The petitioner relied on the district court’s order and filed his notice of appeal within 17 days. *Id.* at 2363. The Sixth Circuit determined that the notice was untimely filed and thus, lacked jurisdiction to hear the case. *Id.* at 2362. The Supreme Court agreed and held that time limits for appealing judgments in civil cases to the United States Courts of Appeals are jurisdictional and courts cannot create equitable exceptions to jurisdictional time limits. *Id.* at 2366. The Supreme

Court reached this holding even though the notice of appeal was filed in reliance upon an order of the district court judge that miscalculated (or extended) the deadline.

Similarly, here, even if it is assumed for the sake of argument that the July 2003 case management order contains a provision that could be construed as allowing the filing a notice of appeal on “File & Serve” (which it does not), according to *Bowles*, the trial court has no authority to alter the procedural mandates of the Appellate Rules of Procedure which dictates the mechanism by which an appellate court is clothed with jurisdiction in an action. The appellate rules establish this procedure and the appellate rules cannot be altered or modified by a trial court’s order.<sup>7</sup> *Bowles*.

Alternatively, and despite the clear holding in *Bowles*, Appellants contend that this Court should excuse their untimely and improper filings because to find otherwise would amount to an “unduly harsh result on litigants who made every reasonable effort to comply with the operative rules.” (Appellants’ Merit Brief at p. 10). First, Appellants’ counsel did not comply with the “operative rules” – they did not follow App.R. 3(A) and 4(A) for filing their notices of appeal. Rather, Appellants’ counsel repeatedly claims to have relied on the trial court’s July 2003 case management order. Second, the United States Supreme Court has already rejected this type of argument in *Bowles*, noting that while there may be “great hardship” to a party who relies upon a trial court’s order, such reliance cannot be used to create an exception to a jurisdictional rule. *Id.* at 2366 (rejecting the “unique circumstances” doctrine).

**B. Appellants Were Aware That a Notice of Appeal must Be Filed with the Clerk of the Trial Court.**

Appellants’ counsel complains that they were “never warned” that only manually filed notices of appeals in asbestos cases would be accepted. (Appellants’ Merit Brief at p. 3). It is surprising that

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<sup>7</sup> Because the filing of a notice of appeal is jurisdictional, even an appellate court is not permitted to amend the process and deadline for filing a notice of appeal. See, App.R. 14(B).

Appellants' counsel, specifically the law firm of Mazur & Kittel, has taken the position that they were unaware that the notice of appeal had to be manually filed with the Clerk's office. In *Bope v. A.W. Chesterton Co.*, 8th Dist. No. 04-85215, the law firm of Mazur & Kittel represented a plaintiff-appellant in an asbestos-related appeal in Cuyahoga County, and they conventionally filed the notice of appeal with the Clerk's office on September 8, 2004. The Rules of Appellate Procedure provide adequate "warning." Appellants' counsel should have been aware of these requirements and, in fact, have been aware of these requirements since at least 2004.

Appellants have suggested to this Court that the "mistake" of electronically filing a notice of appeal will be repeated by other litigants, and that no one could have anticipated that the electronically filed notice of appeal would be rejected. Although "File & Serve" has been in place for five years in Cuyahoga County and the CLAD electronic filing system was in use for five years prior to that, Appellants have not cited a single instance where this "mistake" has been made by another litigant. If the paper filing of a notice of appeal is "antiquated" as Appellants urge, then this Court would have been inundated with a steady stream of appeals raising this same issue. That has not occurred. Rather, there have been a multitude of asbestos-related cases that have been properly prosecuted by both plaintiffs and defendants in the Eighth District by filing the notice of appeal with the Clerk's office.<sup>8</sup>

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<sup>8</sup> A few examples are:

*Jones v. A-Best Prods. Co.*, 8th Dist. No. 81792, 2003-Ohio-6612;

*Anderson v. A.C.&S., Inc.*, 154 Ohio App.3d 393, 2003-Ohio-4943;

*Darby v. A-Best Prods. Co.*, 8th Dist. No. 81270, 2003-Ohio-6001, affirmed, 102 Ohio St. 3d 410, 2004-Ohio-3720;

*Hess v. Norfolk S. Ry. Co.*, 8th Dist. No. 80717, 153 Ohio App.3d 565, 2003-Ohio-4172, affirmed in part and reversed in part, 106 Ohio St. 3d 389, 2005-Ohio-5408;

*Seaford v. Norfolk S. Ry. Co.*, 8th Dist. No. 83137, 159 Ohio App.3d 374, 2004-Ohio-6849, reversed and remanded, 106 Ohio St. 3d 430, 2005-Ohio-5407;

*Bugg v. Am. Std. Inc.*, 8th Dist. No. 84829, 2005-Ohio-2613;

*Beckler v. Goodyear Tire & Rubber Co.*, 8th Dist. No. 85547, 2005-Ohio-4163;

(continued...)

Appellants' cases appropriately ended because they failed to properly and timely file their notice of appeal with the Clerk's office in accordance with App.R. 3(A) and 4(A). This is not "strikingly unfair" as Appellants suggest. (Appellants' Merit Brief at p. 7).

**C. Ohio Courts Have Correctly Refused to Excuse the Requirements for "Filing" a Notice of Appeal with Clerk of Courts.**

Appellants cite no authority from any Ohio court to support their novel argument that the requirement for filing a notice of appeal with the Clerk of the trial court within thirty days of a final judgment, as set forth in App.R. 3(A) and 4(A), should be relaxed because the case involves an asbestos claim. In fact, Ohio courts have declined the invitation to relax the requirements for filing a notice of appeal.

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

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<sup>8</sup>(...continued)

*Norfolk S. Ry. Co. v. Bogle*, 8th Dist. No. 86339, 166 Ohio App.3d 449, reversed and remanded, 115 Ohio St.3d 455, 2007-Ohio-5248; and

*Dicenzo v. A-Best Products Co., Inc.*, 8th Dist. No. 88583, 2007-Ohio-3270, discretionary appeal allowed, 2007-Ohio 6803, 878 N.E.2d 33.

attention of the Clerk and he takes custody of it. The Eighth District's decision is consistent with Ohio case law and the Rules of Appellate Procedure.

Appellants rely on *Hanson v. Shaker Heights*, 152 Ohio App.3d 1, 2003-Ohio-749, to claim that the Eighth District's decision is incorrect. Appellants' reliance on *Hanson* is misplaced. In *Hanson*, several residents filed an administrative appeal from a decision by the City of Shaker Heights to pass a zoning ordinance. There was “no dispute that the proper body [the City] received the notice of appeal and praecipe within the thirty-day deadline[.]” *Hanson* at ¶12 (emphasis added). Rather, the dispute in *Hanson* concerned whether the City was required to receive the original notice of appeal for purpose of perfecting the appeal. *Id.* at ¶6, 12-17. In contrast, here, the proper body (the Clerk of the trial court) *never* received Appellants' notice of appeal within the thirty day deadline. Thus, *Hanson* is distinguishable and offers no support to Appellants' position.

Appellants next cite to *United States v. Harvey* (C.A. 7 2008), 516 F.3d 553, where the Seventh Circuit determined that an appeal was timely filed even though defense counsel violated a local rule that required him to file a paper copy of the notice of appeal. *Id.* at 556. Instead of filing a paper copy, defense counsel electronically filed his notice of appeal with the Clerk's office. The significant fact was that defense counsel “tendered to the clerk's office a timely electronic notice of appeal[.]” *Id.* at 556 (emphasis added). In contrast, here, Appellants' counsel *never* timely filed the notice of appeal with the Clerk's office within thirty days of the April 4, 2007 judgment entries. Rather, the notices of appeal were electronically submitted on “File & Serve,” and never timely filed with the Clerk's office. The “File & Serve” system is a service provided and maintained by Lexis-Nexis, *not* the Clerk's office. (See Stipulation of Supplemental Record, Tab 2, Sections B1(2) & B2(1)(a) of the July 2003 case management order). Thus, the Cuyahoga County Clerk's Office is not aware of notices of appeal filed on “File and Serve.” See *Shesler*, *supra*; Loc. App. R. 11.

Likewise, *In re Patel* (M.D. Ga., Jan. 30, 2006), Case No. 4:05-CV-118, 2006 U.S. Dist. LEXIS 5201, is distinguishable. In *Patel*, the creditor's complaint was filed and received by the bankruptcy clerk in electronic form. A hard copy of the complaint was not filed until two days after the sixty day deadline in violation of a local rule. Since the complaint "was *received by the clerk in electronic form prior to the expiration of the deadline*" it was deemed to be in the Clerk's possession and control, and thus, timely filed. *Id.* at 8 (emphasis added). In contrast, Appellants' notices of appeal were *never* timely filed with the Clerk's office. Again, the notices of appeal were electronically submitted on "File & Serve," *not* filed with the Clerk's office.

Moreover, Appellants' effort to rely upon case law discussing electronic filing in federal court overlooks the obvious and significant difference between "File & Serve," which was adopted by way of a court order implementing an electronic docketing system outside the auspices of the clerk's office, and the federal court's unified implementation of the Case Management/Electronic Case Filing ("CM/ECF") system. CM/ECF is a comprehensive case management system that allows courts to maintain electronic case files and offers electronic filing over the Internet. The implementation of CM/ECF began in January 1996 under the authority of the Administrative Office of the U.S. Courts and the filing system must be consistent with the very precise technical standards set forth by the Judicial Conference of the United States. See, Fed.R.Civ.P. 5(e). "File & Serve" is in no way comparable to CM/ECF. While the Ohio judiciary may be gravitating toward a system of electronic filing like CM/ECF, that has not yet happened.

The decision of the Eighth District does not place "form over substance." (Appellants' Merit Brief at p. 10). Any injustice caused in this case is the result of the failure of Appellants' counsel to follow App.R. 3 and 4, and file a proper, timely notice of appeal with the Clerk's office within thirty days from the April 5, 2007 final orders. This is not a technical error as Appellants urge. The

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

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

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

*Miller* at 215. See also, *Davis v. Immediate Med. Servs.*, 80 Ohio St.3d 10, 15, 1997-Ohio-363, quoting *Miller*.

While Appellants may believe that filing a notice of appeal with the Clerk's office is "antiquated," the Rules of Appellate Procedure require this process. Neither the local appellate rules

for the Eighth District nor the Rules of Appellate Procedure permit parties to electronically file a notice of appeal. An exception cannot be carved out to accommodate Appellants' untimely filing in these two cases.

**D. Because of the Isolated Nature of the Circumstances Raised in this Appeal and the Unlikelihood of its Recurrence, this Appeal Should Be Dismissed as Having Been Improvidently Allowed.**

Even though jurisdiction over this case has been accepted, S.Ct.Prac.R. XII(A) allows the Supreme Court to dismiss an appeal upon a finding that there is no substantial constitutional question or question of public or great general interest presented. Whatever arguments there may be for allowing electronic filing in Ohio's courts – and Appellants have made some of them in their brief at page 11 – such a procedure can and should only be accomplished by amending the Rules of Appellate Procedure and the adoption of local rules implementing such a system-wide change that can and will be recognized by the clerks of court in the affected jurisdictions in compliance with R.C. Chapter 2303. That has not happened and, for the reasons articulated herein, “File & Serve” does not do so.

The dramatic change in Ohio procedural law that would result by this Court's embracing electronic filing of a notice of appeal on “File & Serve” should not be accomplished by way of a decision in one isolated case to remedy largely an oversight. There is no evidence to suggest that this has been problem in the past (in fact, the evidence is to the contrary, see supra footnote 8) or that it is likely to be a recurring problem in the future. “File & Serve” has worked well for its intended purpose and within its limited scope. Changes on a larger scale should be subject to the input, oversight and scrutiny mandated by the established process for making amendments to Ohio's rules of practice as prescribed by Ohio Const. Art. IV, §5(B).

This appeal should be dismissed as having been improvidently allowed.

*III.*

**CONCLUSION**

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Regardless of whether the case involves an asbestos claim or any other civil claim, App.R. 3(A) and 4(A) clearly and unambiguously require that the notice of appeal be filed with the Clerk of the trial court within thirty days of the final entry. The Eighth District Court of Appeals' decision to dismiss these two appeals because Appellants failed to properly and timely file their notices of appeal with the Clerk's office is correct and is entirely consistent with the Rules of Appellate Procedure and Ohio law. For these reasons, Defendants-Appellees, Goulds Pumps, Inc. and Ingersoll Rand Company respectfully request that this Court affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

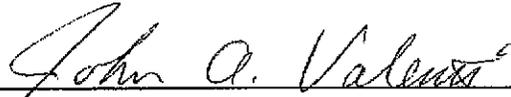
A copy of the foregoing *Appellees' Merit Brief* has been served via regular U.S. mail, postage prepaid, on this 6<sup>th</sup> day of June 2008, to:

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## **APPENDIX**

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## **App.R. 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.

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## **App.R. 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.

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## **Civ.R. 3. Commencement of Action; Venue**

**(A) Commencement.** A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

## **8<sup>th</sup> Dist. Loc.R. 11. DOCKETING OF APPEALS FROM TRIAL COURT ELECTRONIC FILING SYSTEMS**

**(A) Appeals Subject To This Rule.** When a case has been processed at the trial level under a court-ordered or court approved electronic filing system, the parties shall facilitate the docketing of an appeal in this court. The appeal will be assigned to the regular calendar. The documents to be transmitted on appeal will include:

- (1) any documents or exhibits originally filed in the trial court in hard copy (paper) format;
- (2) signed and journalized copies of the final appealable orders upon which the appeal is based; and
- (3) stipulated paper copies of the electronic trial court filings that the parties deem necessary to provide a record for appellate review.

The appellant is responsible for providing the appropriate record, but all parties shall affirmatively cooperate to assist the clerk of the trial court in obtaining and transmitting an agreed record.

**(B) Procedure.** It is a standing order of this court that an appeal under this rule will proceed in accordance with the applicable provisions of App.R. 9(E) and 10(E), and that the parts of the electronic record not necessary for transmittal to this Court of Appeals shall be retained in the trial court pending further order.

(1) Responsibilities of Appellant. The appellant shall create a supplemental record pursuant to App.R. 9(E) by providing the clerk of the trial court with paper copies of any electronic filings that the parties deem necessary for review on appeal and pursuant to the following schedule:

- (a) Within 21 days of filing the Notice of Appeal, the appellant shall serve upon appellees a proposed stipulation that designates the trial court filings believed necessary for a full and fair review by the

## Court of Appeals;

(b) Within 14 days after the proposed stipulation is provided to the appellee, the appellant shall file with the Clerk of the Court of Appeals a written stipulation by the parties to the appeal that designates the agreed filings believed necessary for transmittal to the Court of Appeals; if appellee fails to timely respond, the designation shall be filed by the appellant with certification that the filing complies with section (1)(a) of this rule.

(c) Within 5 days thereafter, the appellant shall file with the clerk of the trial court a copy of the stipulation of the agreed filings, the neatly assembled photocopies of each stipulated electronic filing, as well as the signed and journalized entry from the trial court for each order on appeal. Simultaneously, the appellant shall draft and file a praecipe directing the clerk to certify and transmit the stipulated papers as a supplemental record on appeal pursuant to App.R. 9(E) and within the time requirements of App.R. 10.

## (2) Provisions Applicable to Appellants and Appellees.

(a) All parties to the appeal shall make a timely and good faith effort to confer and agree to a reasonable stipulation of the filings necessary to comprise the record on appeal and shall assist one another in providing copies of the filings for the clerk of the trial court to certify and transmit to the Clerk of the Court of Appeals.

(b) In cases involving numerous parties, each side shall cooperate to designate, by motion filed in this court, one or more attorneys as liaison counsel who agree to receive and disseminate appellate filings from opposing counsel and notices from the Clerk of the Court of Appeals. The liaison counsel shall be responsible for promptly distributing copies electronically, or in such manner as agreed by the parties, to all co-parties, which service will constitute due notice. The parties with a common interest must try to prepare a common brief as set forth in Loc.App.R. 3(C)(1). Each side shall notify this court by motion at least 7 days prior to oral argument to

designate the counsel chosen to present oral argument.

(c) If necessary to resolve differences regarding procedure on appeal, a party may file a motion for a Prehearing Conference pursuant to Loc.App.R. 20. The motion must include an attached affidavit that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord. This statement shall recite those matters which remain in dispute and a detailed recitation of the efforts that have been made to resolve any such dispute.

(d) Upon its own motion or a party's motion, the Court of Appeals may modify any provision of this rule in a particular case.

## **R.C. 2303.09 Filing and preserving papers.**

The clerk of the court of common pleas shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding.

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## **R.C. 2505.04 Perfecting an appeal.**

An appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court, or, in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. If a leave to appeal from a court first must be obtained, a notice of appeal also shall be filed in the appellate court. After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.