

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-1819/2007-1821

BERTHA LOUDEN EXECUTRIX; MARY J. BORDER, EXECUTRIX
Plaintiff-Appellants,

-vs-

A.W. CHESTERTON CO.; GOULD'S PUMPS, INC.; INGERSOLL-RAND CORP., et al.
Defendant-Appellees.

ON APPEAL FROM CUYAHOGA COUNTY
COURT OF APPEALS CASE NOS. 90184 & 90185

REPLY BRIEF OF PLAINTIFF-APPELLANTS,
BERTHA LOUDEN, EXECUTRIX AND MARY J. BORDER, EXECUTRIX

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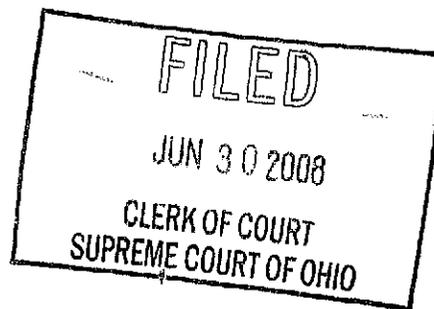


TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

REPLY 1

PROPOSITION OF LAW: WHEN THE TRIAL COURT HAS ORDERED THAT ALL FILINGS MUST BE SUBMITTED TO THE CLERK ELECTRONICALLY, A NOTICE OF APPEAL FILED ELECTRONICALLY IN ACCORDANCE THEREWITH WITHIN THIRTY DAYS OF THE ENTRY OF JUDGMENT SATISFIES THE REQUIREMENTS OF APP. R. 3(A) AND 4(A)..... 1

 A. OVERVIEW 1

 B. CLERK’S AWARENESS OF THE NOTICE 2

 C. ELECTRONIC FILING OF COMPLAINTS 7

 D. THE PARTIES’ OTHER ELECTRONIC FILINGS..... 9

 E. DEFENDANTS’ INAPPOSITE AUTHORITIES..... 11

 F. DEFENDANTS’ REMAINING ARGUMENTS 12

CONCLUSION..... 14

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Bowles v. Russell (2007), ___ U.S. ___, 127 S.Ct. 2360, 168 L.Ed.2d 9611

City of Brunswick v. Brunswick Hills Twp. Bd. of Trustees (9th Dist. 1992), 81 Ohio App.3d 252, 258, 610 N.E.2d 1054, 1058, fn. 4.....3

Gray v. Baughman Twp. Trustees (Apr. 8, 1996), 5th Dist. No. 1995 CA 00173, 1996 W.L. 2437883

King v. Paylor (1st Dist. 1942), 69 Ohio App. 193, 43 N.E.2d 31311

Piper v. Burden (3rd Dist. 1984), 16 Ohio App.3d 361, 476 N.E.2d 38611

Sinnott v. Aqua-Chem, Inc., 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217.....13

State v. Gipson, 80 Ohio St.3d 626, 1998-Ohio-659, 687 N.E.2d 750.....12

REPLY

PROPOSITION OF LAW: WHEN THE TRIAL COURT HAS ORDERED THAT ALL FILINGS MUST BE SUBMITTED TO THE CLERK ELECTRONICALLY, A NOTICE OF APPEAL FILED ELECTRONICALLY IN ACCORDANCE THEREWITH WITHIN THIRTY DAYS OF THE ENTRY OF JUDGMENT SATISFIES THE REQUIREMENTS OF APP. R. 3(A) AND 4(A).

A. OVERVIEW.

This appeal would have been over if Defendant-Appellees, Goulds Pump, Inc. and Ingersoll Rand Company, had been able to cite a procedural rule or judicial order requiring the manual filing of paper notices of appeal. Undoubtedly, their able counsel scoured the Ohio Rules of Appellate Procedure, Ohio Rules of Civil Procedure, the Rules of Superintendence, the Local Rules of the Cuyahoga County Court of Common Pleas, the various standing orders that have been imposed in asbestos cases, and every other conceivable source of authority in the preparation of their Merit Brief and, yet, no such requirement has been identified. *Appellees' Merit Brief*, pp. 7-21. Instead, it has taken Defendants twenty-two (22) pages of largely repetitive argument and the citation to nearly forty (40) judicial opinions (none of which actually draws a distinction between paper and electronic filings) to explain why the governing standards "clearly" forbid the electronic filing of notices of appeal. Their seemingly endless diatribe over the supposedly inexcusable failure of Plaintiff-Appellants, Bertha Loudon, Executrix, and Mary Kay Border, Executrix, to comply with the controlling procedural rules cannot alter the fact that the Ohio judicial system permits the submission of documents through an electronic medium and the era of unmanageable paper dockets is now drawing to a close.

Defendants' argument relies more upon empty rhetoric than insightful analysis. They have proclaimed that: "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.” *Appellees’ Merit Brief, p. 12 (citations omitted)*. Never once had Plaintiffs suggested otherwise. It was actually Plaintiffs, and not Defendants, who had recognized in the first instance that App.R. 3(A) was the appropriate starting point for examining the propriety of the Eighth District’s dismissal entry. *Merit Brief of Plaintiff-Appellants, p. 5*. They had even cited App.R. 3(A) and 4(A) in the Proposition of Law, which was accepted by this Court. In an effort to focus the appeal, Plaintiffs had openly acknowledged “that the thirty (30) day deadline established by App.R. 4(A) is both mandatory and jurisdictional.” *Id., p. 6 (citation omitted)*. Unmoved by this concession, Defendants proceeded to devote several paragraphs of their Brief to confirming that the 30-day deadline is indeed “mandatory and jurisdictional.” *Appellees’ Merit Brief, pp. 1-2 & 14-15*.

The crux of Defendants’ position is that: “Appellants cannot point to any civil or appellate rule that expressly permits parties to electronically file a notice of appeal in Cuyahoga County.” *Appellees’ Merit Brief, p. 13*. Actually, the civil and appellate rules express no preference for any form of “filing.” In their analysis of App.R. 3 & 4, Defendants simply assume that “filing” necessarily means “paper filing.” The rules are considerably more flexible than that. Because App.R. 3(A) does not distinguish between electronic and manual “filings,” trial courts in Ohio remain free to determine for themselves how documents will be accepted and dockets will be managed.

B. CLERK’S AWARENESS OF THE NOTICE.

Seizing upon App.R. 3(A)’s requirement for “filing a notice of appeal with the clerk of the trial court” Defendants have represented that “the Clerk’s office is unaware of and unable to access any notice of appeal transmitted on ‘File & Serve.’” *Appellees’ Merit Brief, p. 4*. Where

is that in the record? The parties had prepared Joint Stipulations for purposes of this appeal through which Defendants could have presented any materials needed to establish their defense of the Eighth District's dismissal order. The fact that they can point to nothing in the appellate record confirming that the Cuyahoga County Clerk of Courts "is unaware of and unable to access any notice of appeal" filed in accordance with the two (2) standing orders is certainly telling. Appellate review is, of course, confined to the record. *City of Brunswick v. Brunswick Hills Twp. Bd. of Trustees* (9th Dist. 1992), 81 Ohio App.3d 252, 258, 610 N.E.2d 1054, 1058, fn. 4; *Gray v. Baughman Twp. Trustees* (Apr. 8, 1996), 5th Dist. No. 1995 CA 00173, 1996 W.L. 243788.

The Office of the Cuyahoga County Clerk of Courts undoubtedly would be quite surprised to learn that, at least according to Defendants, they are "unaware of and unable to access any notice of appeal transmitted on 'File & Serve.'" *Appellees' Merit Brief*, p. 4. What is confirmed in the record is that LexisNexis, which furnishes File & Serve, is the Clerk's agent in pending asbestos actions.

*** LexisNexis is hereby appointed the agent of the Clerk as to the electronic filing, receipt, service, and/or retrieval of any pleading or document maintained electronically. Upon filing and receipt of a document, LexisNexis shall issue a confirmation receipt that the document has been received. The confirmation receipt shall serve as proof that the document has been filed. A filer will receive email notification of documents subsequently rejected by the Clerk, and may be required to refile the instruments to meet necessary filing requirements. [emphasis added].

Stip. Rec., Tab 2, Section B2(5). Far from remaining blissfully detached from the asbestos docket, the Clerk continues to maintain the duty to reject documents which have not been properly filed electronically. *Id.* At the same time, it is the Clerk who is charged with refusing to accept any paper filing by Section 7(b) of the same standing order. *Id.* Any attempt by

Plaintiffs to submit the Notice of Appeal in the manner which Defendants and the Eighth District believe was required undoubtedly would have been unsuccessful as a result of this directive.

In the event that this Court is indeed prepared to venture beyond the appellate record, a simple phone call will conclusively dispel the notion that "the Clerk's office is unaware of and unable to access any notice of appeal transmitted on 'File & Serve.'" *Appellees' Merit Brief, p.*

4. The undersigned attorneys understand that at least one clerk employee, Charles E. Jannsohn, does not just have "access" to the LexisNexis system, but is available to lawyers and *pro se* litigants to assist with any questions or problems they may have with electronic filings. He can be reached at 216-443-7975.

Defendants have cited two (2) subsections of the standing order of July 11, 2003 in support of the dubious proposition that the "'File & Serve' system is a service provided and maintained by Lexis-Nexis *not* the Cuyahoga County Clerk of Courts." *Appellees' Merit Brief,*

p. 4. All those provisions state is:

B. GENERAL PROVISIONSB. [sic] GENERAL PROVISIONS

2. The Docket. The Docket

The Court has decided to use the LexisNexis *File & Serve* system in order to increase the efficiency of the Court. (Section C of this Order).

B2. ELECTRONIC FILING PROCEDURES

1. DEFINITIONS.

The following terms in this Rule shall be defined as follows:

(a) LexisNexis *File & Serve*. The service provided LexisNexis and approved by the Court for filing and service of complaints, petitions, pleadings, briefs, motions, discovery and other

documents via the Internet. LexisNexis *File & Serve* services are available at www.lexisnexis.com/fileandserve. [emphasis added].

Stip. Rec., Tab 2. These provisions mention nothing about the Clerk. In no sense has the Clerk been denied “access” to the electronic filings. Subsection B2(1)(a) actually confirms that Cuyahoga County has elected to require any “filing” of “complaints, petitions, pleadings, briefs, motions, discovery and other documents” to be through the electronic system, which is in no way prohibited by App.R. 3(A) or any other procedural rule that has been identified.

The second standing order of July 11, 2003 forcefully confirms that filing electronically with LexisNexis File & Serve is indeed “filing with the Clerk,” which is what one would expect given the agency relationship that has been judicially established. *Stip. Rec., Tab 2, Section B2(5)*. Noticeably absent from Defendants’ analysis is any meaningful reference to subsection B2(1)(b), which provides the following definition:

Electronic Filing (e-file) – Electronic transmission of documents to the Clerk, and from the Clerk or Court, via *File & Serve* for the purposes of filing. [emphasis added].

Id. Defendants have made no mention of subsection B2(5), which states that:

TIME FOR FILING AND EFFECT OF USE OF EFILING.

Any pleading filed electronically shall be considered as filed with the Clerk when the transmission is completed (“authorized date and time”). Any document e-filed with the Clerk by 11:59 p.m. ET shall be deemed filed with the Clerk on that date. ***

Id. They also have also failed to account for subsections B2(8) & (9)(a), which direct that:

8. SYSTEM OR USER FILING ERRORS.

If the electronic filing is not filed with the Clerk because of (1) an error in the transmission of the document to LexisNexis which was unknown to the sending party, or (2) a failure to process the electronic filing when received by the LexisNexis, or (3) other technical problems experienced by the file, the Clerk or Court may upon satisfactory proof enter an order permitting the document to

be filed nunc pro tunc to the date it was first attempted to be sent electronically.

9. FORM OF DOCUMENTS ELECTRONICALLY FILED.

(a) Format of Electronically Filed Documents. All electronically filed pleadings shall, to the extent practicable, be formatted in accordance with the applicable rules governing formatting of paper pleadings, and in such other and further format as the Clerk may require from time to time. [emphasis added].

Id. Furthermore, subsection 11 authorizes the Clerk's full participation in the electronic system.

11. ELECTRONIC FILING AND SERVICE OF ORDERS AND OTHER NOTICES.

The Clerk and the Court may issue, file, and serve notices, orders, and other documents electronically, subject to the provision of these Rules.

Id.

The Clerk's indispensable involvement in the electronic filing system is actually mandated by subsection B2(13), which requires that:

PUBLIC ACCESS TERMINAL.

The Clerk shall also provide a Public Access Terminal located at the Court to allow electronic filing.

Id. It is difficult to understand how Defendants can advise this Court in good conscience that "the Clerk's office is unaware of and unable to access any notice of appeal transmitted on 'File & Serve'" when this official is required to maintain a terminal through which this very same notice is allowed to be filed. *Appellees' Merit Brief, p. 4.*

Defendants further contend that "Loc.App.R. 11 of the Eighth District confirms that documents entered on 'File & Serve' are not even recognized by the Cuyahoga County Clerk of Courts or the Clerk of the Court of Appeals for the Eighth District." *Appellees' Merit Brief, p.*

11. It is hard to imagine how the "Cuyahoga County Clerk of Courts" can refuse to recognize such File & Serve filings when LexisNexis is his "agent" pursuant to judicial decree. *Stip. Rec.,*

Tab 2, Section B2(5). All that can be gleaned from Loc.App.R. 11 is that the court of appeals clerk does not maintain either electronic or hard copies of asbestos filings, which is perfectly understandable given that only a small percentage of those actions ever reach that tribunal. Far from suggesting that electronic notices of appeal are unacceptable, that rule simply establishes a process whereby the documents that have been maintained in a computerized database can be made available to the appellate court.

In light of the Clerk's management and control of the electronic filing system, which is being operated by its agent, there is no truth to Defendants' bold declaration that "the proper body (the Clerk of the trial court) *never* received Appellants' notice of appeal within the thirty day deadline." *Appellees' Merit Brief, p. 18 (emphasis original)*. No one disputes that File & Serve received the Notice of Appeal on May 4, 2007, which was within thirty (30) days of the final judgment entry of April 5, 2007. *Stip. Rec., Tabs 9, 10, 15 & 16*. At the risk of being repetitive, the notice was "deemed filed with the Clerk" by operation of Section B2(5) of the second standing order. *Stip. Rec., Tab 2*.

C. ELECTRONIC FILING OF COMPLAINTS.

Defendants' argument for paper-only notices of appeal is also based upon an analogy which has been drawn to the complaints which are filed in asbestos actions in Cuyahoga County.

They have assured this Court that:

To commence an action, asbestos-related complaints must still be physically filed with the Clerk of Courts as required by Civ.R. 3(A).

Appellees' Merit Brief, p. 10 fn. 4. They have further theorized that the unwritten "physical filing" requirement of Civ.R. 3(A) should be cross-applied to App.R. 3(A) and 4(A). *Id., p. 12 fn. 5*.

The obvious flaw in Defendants syllogism is that their premise is patently untrue. Since the issuance of the standing order of July 11, 2003, the rule in Cuyahoga County has been that asbestos complaints must be filed electronically.

7. ELECTRONIC FILING OF PLEADINGS AND OTHER DOCUMENTS.

(a) Original Petition and Original Answers. ? [sic] For designated cases types, counsel representing plaintiffs shall file their complaints electronically. *** [emphasis added].

Stip. Rec., Tab 2, Section B2. As Defendants fully appreciate, the Complaints that commenced the instant proceedings were filed against them electronically through File & Serve. This fact can be confirmed by an examination of the pleadings, which are part of the stipulated record in this case. *Stip. Rec., Tabs 3 and 4.* The trial court case numbers (CV-06-590044 and CV-06-592502) were not imprinted thereon with a stamp at the Clerk's filing desk, as is the practice with standard civil complaints, but were included by Plaintiffs' counsel when the documents were prepared. *Id.* This was possible because they had already commenced the proceedings electronically through File & Serve and had been furnished with the case numbers. Hard copies - not the original - were printed and supplied to the Clerk only for purposes of facilitating service of process together with the Summons by certified mail. *See Stip. Rec., Tab 2, Standing Order of July 11, 2003, Section B(3)(d)* ("a copy of the complaint shall be provided to the clerk for each defendant and each primary plaintiff").

Because complaints are electronically filed in asbestos actions in Cuyahoga County in accordance with Section B2(7)(a) of the second standing order, Defendants' syllogism becomes another argument for reversing the Eighth District dismissal order. Plaintiffs agree with them that it makes sense to harmonize Civ.R. 3(A) and App.R. 3(A) together. Those rules both require a "filing" to commence a proceeding without specifying whether the paper or electronic

format is preferred. Since Defendants never raised the slightest concern with the “filing” of the instant Complaints through LexisNexis File & Serve, they have tacitly acknowledged that such a mechanism is an appropriate means for “filing” documents in Cuyahoga County. As Defendants had astutely observed in their Brief, it makes no sense to construe the word “filing” differently in Civ.R. 3(A) than in App.R. 3(A).

D. THE PARTIES’ OTHER ELECTRONIC FILINGS.

Defendants’ disdain for electronic filings is puzzling given that they have availed themselves of this convenient feature of the Cuyahoga County asbestos docket on repeated occasions. They seem to have forgotten that they themselves submitted numerous items in the proceedings below without ever having to stand in line at the Clerk’s office, including their Denials of Plaintiffs’ allegations, Motions for Summary Judgment, and multiple Memoranda in Opposition. *Stip. Rec. Tabs 5-8, 12, 14, 23 & 24*. Just like App.R. 3(A), Civ.R. 5(D) requires all “papers” (other than complaints and discovery materials) to be “filed with the court.” By all appearances, everything submitted by the defense to the trial judge in the proceedings below was through the LexisNexis File & Serve system they are now maligning. Their position appears to be, in essence, that the filings they submitted electronically through this system are entitled to full and fair consideration while Plaintiffs’ Notices of Appeal are not.

Citing Section B(1) & B2(1)(a) of the second standing order, Defendants have asserted the curious argument that the mandatory requirement of electronic filing applies only to “pre-trial discovery activities.” *Appellees’ Merit Brief, p. 8*. Not even Defendants have abided by such a nonsensical interpretation of the Court’s directives. In the lower court proceedings they had electronically filed Briefs in Opposition to Plaintiffs’ Motion to Vacate Under Rule 60(B), which obviously are not “pre-trial activities.” *Stip. Rec., Tabs 13 & 14*. Plaintiffs strongly

suspect, moreover, that both Defendants and the law firms representing them have submitted countless filings electronically during trials and post-trial proceedings pending on the asbestos docket.

Defendants have made much ado over the fact that previously Plaintiffs' counsel had "conventionally filed the notice of appeal with the Clerk's office on September 8, 2004" in a prior asbestos action they were handling. *Appellees' Merit Brief*, p. 16. From this innocuous event, this Court is supposed to conclude that it has always been appreciated that electronic notices of appeal are unacceptable in the Eighth District. *Id.* What Defendants have neglected to mention is that those proceedings had been commenced on May 24, 2002, which was over a year before the standing order of July 11, 2003 had been promulgated. *Bope v. A.W. Chesterton Co.*, Cuy. C.P. Case No. 475429. At least in the mind of Plaintiffs' counsel, it was unclear whether the designation of LexisNexis File & Serve as the Clerk's "agent" would apply to asbestos proceedings that had arisen at the time that the first standing order of January 26, 1998 was in force. That directive, which had implemented the CLAD system, had not embraced electronic filing to the extent that the July 11, 2003 standing order later would. *Stip. Rec., Tab 1.*

It is hardly uncommon for attorneys, like courts, to revise their procedures based upon new interpretations of rules and changing circumstances. All that can be drawn from the manual filing of a notice of appeal on September 8, 2004 is that at some point thereafter Plaintiffs' counsel decided that Section B2(7)(b) meant what it said and the Clerk would not be accepting "any pleadings or instrument in paper form." *Stip. Rec., Tab 2.* There is no dancing around the fact that manual, time-stamped filings are a relic of the past of the Cuyahoga County asbestos docket and the Eighth District plainly erred in refusing to recognize this laudable development.

E. DEFENDANTS' INAPPOSITE AUTHORITIES.

Despite what was undoubtedly an exhaustive effort, Defendants have been unable to cite a single case from anywhere in the United States even remotely suggesting that a rule's reference to "filing" can only mean "paper filing." *Appellees' Merit Brief*, pp. 7-21. The dearth of judicial support for their counterintuitive position is aptly reflected by their belief that *Bowles v. Russell* (2007), ___ U.S. ___, 127 S.Ct. 2360, 168 L.Ed.2d 96, "is directly on point." *Appellees' Merit Brief*, p. 14. That decision has nothing whatsoever to do with the viability of electronic filings. The solitary issue presented was "whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order." *Bowles*, 127 S.Ct. at 2362. In the widely publicized decision, the majority answered this question in the negative. *Id.* at 2366. *Bowles* stands only for the proposition, which Plaintiffs have never questioned, that the 30-day deadline for filing an appeal "is both mandatory and jurisdictional." *Merit Brief of Plaintiff-Appellants*, p. 6 (citation omitted). In this instance, the Eighth District's authority over the final judgment of April 5, 2007 was properly invoked when the Notices of Appeal were electronically filed with the Clerk's agent, LexisNexis File & Serve, on May 4, 2007 in strict accordance with App.R. 3(A) & 4(A) and the standing order of July 11, 2003.

Defendants have also been forced to rely upon decisions which were issued long before the internet revolution. *Appellees' Merit Brief*, p. 9. In *Piper v. Burden* (3rd Dist. 1984), 16 Ohio App.3d 361, 476 N.E.2d 386, the Court simply held that leaving a notice of appeal at the trial judge's home was unacceptable. The First District merely refused to overlook a time-computation error which led to an untimely appeal in *King v. Paylor* (1st Dist. 1942), 69 Ohio App. 193, 43 N.E.2d 313. It is safe to assume that if those appellants had been able to point to a

specific trial court rule or order authorizing the manner of “filing” they had chosen, very different results would have been reached. The existence of the Cuyahoga County Standing Order of July 11, 2003 thus serves to distinguish the case *sub judice* from those short-lived appeals. *Stip. Rec., Tab 2.*

Defendants’ reliance upon *State v. Gipson*, 80 Ohio St.3d 626, 1998-Ohio-659, 687 N.E.2d 750, is also misplaced. *Appellees’ Merit Brief, pp. 1-2.* That opinion was also focused upon a timing issue. This Court held that an affidavit of indigency submitted during a sentencing hearing was invalid since former R.C. §2925.11(E)(5) required such “filings” to be presented to the clerk in advance of the proceeding. *Id.*, 80 Ohio St.3d at 632. The opinion stops well short of advocating the counterintuitive view that “filing” means “paper only filing” for purposes of App.R. 3(A) or any other procedural rule.

F. DEFENDANTS’ REMAINING ARGUMENTS.

After concluding the seriously misguided discussion of how electronically filed notices of appeal supposedly never reach the Clerk, Defendants’ argument deteriorates into nothing more than the pointless exercise of attacking positions which Plaintiffs have never advocated. For example, Plaintiffs have been criticized for asserting the “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.” *Appellees’ Merit Brief, p. 17.* Perhaps in oral argument Defendants will explain where such a contention appears, because Plaintiffs have no recollection of having made it.¹ Now that Defendants have raised the point, however, it is worth noting that this Court has in

¹ Plaintiffs had actually advocated just the opposite. Citing several authorities, they had maintained that in civil appeals in general App.R. 3 & 4 have never been afforded a strict construction except for “the jurisdictional thirty (30) day deadline.” *Merit Brief of Plaintiff-Appellants, p. 10.*

fact recognized “that asbestos claims have proven to be a challenge to Ohio defendants, plaintiffs, and the court system as a whole” while defining the jurisdiction of appellate courts over such actions. *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217 (holding that trial court order finding that the asbestos claimant had established a *prima facie* showing of liability was immediately appealable). Perhaps Defendants are indeed onto something.

In the end, Defendants’ Brief concludes in a plea for this Court to dismiss this appeal “as having been improvidently allowed.” *Appellees’ Merit Brief*, p. 21. This is not the type of argument one expects from a litigant who is confident of prevailing on the merits. Defendants are seeking, of course, nothing more than a reconsideration of the ruling which had been issued on January 23, 2008, accepting jurisdiction over this appeal. For the reasons stated in the Memorandum in Support of Jurisdiction which was filed by Plaintiffs on October 4, 2007, and developed further herein, this Court should proceed to resolve the issues of public and great general importance, which lay at the heart of the Eighth District’s ill-advised dismissal orders. As Defendants’ Merit Brief attests, considerable confusion still exists over whether App.R. 3(A)’s use of the term “filing” means “paper filing” only.

CONCLUSION

For the foregoing reasons, this Court should adopt the Proposition Law that has been submitted, reverse the Eighth District's dismissal orders of August 20, 2007, and remand these actions to the appellate court for resolution of the merits of the appeals.

Respectfully submitted,

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I hereby certify that the foregoing **Reply** was served by regular U.S. Mail on this 30th day of June, 2008 upon:

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