

IN THE SUPREME COURT OF OHIO

ORIGINAL

TIMOTHY MYNES, *et al.*,

Appellees,

v.

JDG HOME INSPECTIONS, INC. d/b/a
THE HOMTEAM INSPECTION
SERVICE, *et al.*,

Appellants.

Case No. 2009-0054

Certified Conflict on Appeal
from the Scioto County Court
of Appeals, Fourth Appellate
District Judgment Filed
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I. STATEMENT OF FACTS

Plaintiffs/Appellees Timothy and Janeen Mynes (the “Mynes”) hereby incorporate Defendants/Appellees JDG Home Inspections, Inc. d/b/a The Home Team Inspections Service and Tim Gambill’s (collectively the “Inspection Defendants”) Statement of Facts. The Mynes note with respect to the Inspection Defendants’ fn1, that the December 26, 2008 Judgment Entry pertaining to the remaining claims against the remaining defendants contains Civ.R. 54(B) language thereby negating the Inspection Defendants’ assertion that the companion appeals should also be dismissed for lack of jurisdiction. See Inspection Defendants’ Supplement to Merit Brief at 143.

II. ARGUMENT IN RESPONSE TO PROPOSITIONS OF LAW

A. Response to Proposition of Law No. 1: R.C. 2711.02(C) orders, which are not applicable to all the parties or claims, are not final appealable orders without Civ.R. 54(B) language.

1. The Effect of the Supreme Court’s Promulgation of Civ.R. 54(B) is Purely Procedural and Controls R.C. 2711.02(C).

In this case Inspection Defendants claim there is a conflict is between Civ.R. 54(B) and R.C. 2711.02(C) as to which provision controls the determination of whether an order is final and appealable. Civ.R 54(B) states in part, “[w]hen more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may enter a final judgment as to . . . fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.” Whereas, R.C. 2711.02(C) provides in part,

an order under . . . this section that grants or denies a stay of a trial of any action pending arbitration . . . is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

Section 5(B), Article IV, of the Ohio Constitution provides in part that, “[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” This Court has stated, “[t]his constitutional amendment recognizes that where conflicts arise between the Civil Rules or Appellate Rules and the statutory law, the rule will control the statute on matters of procedure and the statute will control the rule on matters of substantive law.” *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 281. (Citations omitted).

The Inspection Defendants claim that the right to appeal under R.C. 2711.02(C) is jurisdictional and thus substantive law pursuant to *Akron v. Gay* (1976), 47 Ohio St.2d 164. Appellants’ Brief at 5. In *Akron*, this Court dealt with the conflicting provisions of R.C. 163.08 and Civ.R. 6(B). *Id.* at 165-66. In particular, the statute states, “no extension of time for filing of an answer shall be granted,” but the rule allows for a court, in its discretion, to enlarge the time for an act to be done according to the rules or court order. *Id.* at 166. Ultimately, the Court held, “the restriction upon extension of the answer date contained in R.C. 163.08 is jurisdictional.” *Id.* at syllabus.

However, in *Morgan*, another case cited by the Inspection Defendants, this Court distinguished its holding in *Akron*. *Morgan*, 69 Ohio St.2d at 283. At issue in *Morgan* was the constitutionality of a retroactive application of the right to appeal created by an amendment to R.C. 4123.519. *Id.* at 279. The appellee argued that the amendment to R.C. 4123.519 which created a right to appeal was a substantive right and therefore may not be retroactively applied. *Id.* at 283. In response to the appellee’s argument, this Court stated the reliance on *Akron* in support of the argument that a statute which created a right to appeal was substantive was

erroneous. *Id.* Instead, this Court stated, “[w]e deal here not with the substantive right to seek and be awarded compensation, but the procedure by which such claims may be effectuated.” *Id.* at 280.

Moreover, this Court has held that the effect of Civ.R. 54(B) is purely procedural. *Alexander v. Buckeye Pipeline Co.* (1977), 49 Ohio St.2d 158, 159. In *Alexander*, this Court recognized that while Civ.R. 54(B) “permits both the separation of claims for purposes of appeal and the early appeal of such claims, within the discretion of the trial court, . . . it does not affect either the substantive right to appeal or the merits of the claim.” *Id.* Thus, questions involving the joinder and separation of claims and the timing of appeals as provided in Civ.R. 54(B) are matters of practice and procedure within the rule-making authority of this Court under Section 5, Article IV of the Ohio Constitution. *Id.* at 159-160, citing *Sears Roebuck & Co. v. Mackey* (1956), 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297.

First, in this instance, there is no inherent conflict between the provisions of R.C. 2711.02(C) and Civ.R. 54(B) as there was in *Akron*. Civ.R. 54(B) does not contradict R.C. 2711.02(C). It does not state that a decision on a motion to stay is not a final appealable order. Rather, Civ.R. 54(B) provides when an appeal may be made where a final order relates to fewer than all of the parties and/or fewer than all of the claims. Because there is no conflict between the statute and rule, they must work in conjunction with one another. As such, R.C. 2711.02(C) orders which dispose of fewer than all of the claims or parties are not final appealable orders without Civ.R. 54(B) language.

Alternatively, should this Court identify a conflict between the provisions of R.C. 2711.02(C) and Civ.R. 54(B), the holdings in *Morgan* and *Alexander* provide the applicable principles of law. R.C. 2711.02(C) creates a right to appeal much like the amendment to R.C.

4123.519 discussed in *Morgan* wherein this Court recognized that such statute provided the procedure by which claims may be effectuated. *Morgan*, 69 Ohio St.2d at 280. Further, pursuant to *Alexander*, Civ.R. 54(B) is definitively procedural in effect. *Alexander*, 49 Ohio St.2d at 159. Thus, in this instance, where the issue is procedural, the rule, Civ.R. 54(B), controls the statute, R.C. 2711.02(C).

To argue that substantive law is at issue is illogical. The Mynes do not claim R.C. 2711.02(C) does not provide the *right* to appeal or that Civ.R. 54(B) takes that *right* away; instead, at issue is *when* the appeal is appropriate. If an R.C. 2711.02(C) order addresses all the claims against all of the parties, then the right to appeal is immediate. Conversely, if the R.C. 2711.02(C) order fails to address all the claims against all of the parties, the right to appeal is delayed until such time as all claims are determined, unless the court determines it is procedurally appropriate to include Civ.R. 54(B) language. Such is the procedure for all final orders, including those under R.C. 2505.02, which dispose of fewer than all the claims against all the parties.

Simply put, R.C. 2711.02(C) orders, which are not applicable to all the parties or claims, are not final appealable orders without Civ.R.54(B) language because the purely procedural effect of Civ.R. 54(B) renders the same controlling. Further, R.C. 2711.02(C) orders, like all other final orders, must be procedurally read in conjunction with Civ.R. 54(B). Therefore, the Fourth District Court of Appeals' decision dismissing the underlying appeal for lack of jurisdiction should be upheld.

2. **Civ.R. 54(B) is Applicable to Final Orders Which Dispose of Fewer than All the Claims Against All the Parties.**

Section 3(B)(2), Article IV of the Ohio Constitution limits an appellate court's jurisdiction to the review of final orders, and if an appeal is taken from an order that is not final

and appealable, the appellate court must dismiss the appeal. *Farmers Mkt. Drive-In Shopping Ctrs. v. Magana*, 10th Dist. No. 06AP-532, 2007-Ohio-2653, ¶10, citing *Renner's Welding & Fabrication, Inc. v. Chrysler Motor Corp.* (1996), 117 Ohio App.3d 61, 64; *McClary v. M/I Schottenstein Homes, Inc.*, 10th Dist. No. 03AP-777, 2004-Ohio-7047, ¶15. The Supreme Court of Ohio has established a two-step analysis for determining whether an order is final and appealable. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21. First, the appellate court must determine whether the order constitutes a final order. *Id.*; *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120. If the order is a final order, the court must then determine whether Civ.R. 54(B) language is required. *Gen. Acc. Ins. Co.*, 44 Ohio St.3d at 21. Civ.R. 54(B) provides, in part, as follows:

* * * In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Where, as here, an order adjudicates fewer than all claims in a case, it must be both a final order and meet the requirements of Civ.R. 54(B) to be final and appealable. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, at syllabus.

In *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, syllabus, this Court held that an order of a trial court denying a stay of litigation pending arbitration was not a final, appealable order pursuant to R.C. 2505.02 when it did not, in effect, determine the action and prevent a judgment. The General Assembly subsequently amended R.C. 2711.02 to provide, in relevant part: "Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived

arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." R.C. 2711.02(C). Thus, R.C. 2711.02(C) provides that an order staying the trial of an action pending arbitration is a final order, even though it did not qualify as such under R.C. 2505.02.

While R.C. 2711.02(C) satisfies the first step in the determination of whether a judgment constitutes a final appealable order, it does not address the second step of that process, namely the application of Civ.R. 54(B) where multiple claims or parties exist. Thus, despite the provision of R.C. 2711.02(C), declaring that an order that grants or denies a stay of a trial of any action pending arbitration is a final order reviewable by this court, such an order must still comply with the requirements of Civ.R. 54(B) in order to constitute a final appealable order. This is consistent with the Fourth District Court of Appeals' holding in *Redmond v. Big Sandy Furniture, Inc.* (Mar. 5, 2007), 4th Dist. Nos. 06CA15, 06CA19, 2007-Ohio-1024, and the Eighth District Court of Appeals' holding in *Simonetta v. A&M Bldrs., Inc.* (Oct. 7, 1999), 8th Dist. No. 74622. However, such is in conflict with other Ohio courts of appeals decisions. See *Stewart v. Shearson Lehman Brothers, Inc.* (1992), 71 Ohio App.3d 305, 306; *Barnes v. Andover Village Retirement Community Ltd.*, 2007-Ohio-4112; *Griffith v. Linton* (1998), 130 Ohio App.3d 746; *Welsh v. Indiana Ins. Co.*, 2006-Ohio-6803; *Baker v. Schuler*, 2002-Ohio-5386.

In *Simonetta v. A&M Bldrs., Inc.*, the trial court issued an order denying a motion to compel arbitration in a multiple party case, which did not include the Civ.R. 54(B) "no just reason for delay" language. (Oct. 7, 1999), 8th Dist. No. 74622. The trial court later reversed that order and permitted arbitration of the claim against one defendant. *Id.* at *1. The plaintiffs appealed, arguing that the first order, denying the motion to compel arbitration, constituted a

final appealable order citing to *Stewart*, 71 Ohio App.3d 305. Id. Therefore, they claimed the trial court lacked subject matter jurisdiction to modify its previous order. Id. The Eighth District held that, while the provisions of R.C. 2711.02 would control if there had not been multiple parties to the action, because the Civil Rules supersede statutes on procedural matters, Civ.R. 54(B) applied. Id. at *2. Therefore, the trial court's original order denying the motion to compel arbitration remained interlocutory. Id.

The Inspection Defendants argue the above-referenced case law should be disregarded as the interpretation of R.C. 2711.02(C) and Civ.R. 54(B) set forth therein serves to divest the General Assembly of authority to confer jurisdiction upon the courts of appeals. Such argument demonstrates a misunderstanding of the effect of Civ.R. 54(B) and overlooks this Court's authority to promulgate rules governing practice and procedure in all courts of the state. According to the Inspection Defendants' argument, Civ.R. 54(B) also infringes on the General Assembly's grant of jurisdiction under R.C. 2505.03. Obviously, the Inspection Defendants' argument is without merit given the generalized application of Civ.R. 54(B) to final orders as defined in R.C. 2505.02. Moreover, as provided above, Civ.R. 54(B) does not state that orders pursuant to R.C. 2711.02(C) are not final orders subject to appeal, it simply sets forth the procedure for when an appeal may be perfected. Such is consistent with General Assembly's 1990 amendment to R.C. 2711.02(C), which served to render an order staying the trial of an action pending arbitration final, even though it was not so under R.C. 2505.02. See *Gen. Elec. Supply Co.*, 38 Ohio St.3d 378.

The Inspection Defendants' argument that the Fourth and Eighth Districts' interpretation of the relationship between R.C. 2711.02(C) and Civ.R. 54(B) frustrates the purpose of Civ.R. 54(B) is likewise without merit. The requirement of "no just reason for delay" language in R.C.

2711.02(C) orders where multiple parties and/or claims remain does not result in injustice; rather, such requirement reasonably accommodates the policy against piecemeal appeals. Further, the adoption of Inspection Defendants' argument would render Civ.R. 54(B) inoperable. For example, according to the Inspection Defendants' argument, any final order, including those defined in R.C. 2505.02 pertaining to fewer than all the claims against all the parties, which did not have Civ.R. 54(B) language would result in injustice. Clearly, such is not the purpose or intent behind Civ.R. 54(B).

Finally, the Inspection Defendants' reliance on *Grain v. Trinity Health*, 551 F.3d 374 (6th Cir. 2008) is misguided. In *Grain*, the decision being appealed from was not the decision to stay claims pending arbitration; rather, the appellants were appealing the district court's confirmation of the arbitration award and denial of a motion to reconsider. *Id.* at 376-77. In determining whether it had jurisdiction to consider such appeal, the Sixth Circuit first noted that the traditional ground for appellate jurisdiction under 28 U.S.C. § 1921 did not give it authority to decide the appeal. *Id.* at 377. Like R.C. 2505.02, 28 U.S.C. § 1921 generally does not permit piecemeal appeals, but only permits an appeal once there is nothing left to do but enter judgment and enforce it. *Id.* Thus, a decision confirming an arbitration award is not final and appealable under 28 U.S.C. § 1921. *Id.* The Sixth Circuit also recognized that general exception in Fed. R. Civ. P. 54(B) did not apply, as the district court did not include the appropriate certification in the confirmation of the arbitration award. *Id.* However, contrary to the Inspection Defendants' assertion that the court found Fed. R. Civ. P. 54(B) language unnecessary, the court merely states Fed. R. Civ. P. 54(B) "may not apply to interlocutory arbitration decisions." *Id.*

Here, not only are the Federal Arbitration Act and R.C. Chapter 2711 different, the decision being appealed is an order denying a motion to stay pending arbitration under R.C.

2711.02, not a decision confirming an arbitration award under R.C. 2711.15. Thus, this case is distinguishable from *Grain*. Further, the notation that Fed. R. Civ. P. 54(B) may not apply to interlocutory arbitration decisions is irrelevant to this case because R.C. 2711.02(C) defines such decisions as final orders. Therefore, the application of the Federal Arbitration Act and Fed. R. Civ. P. 54(B) in *Grain* is inapplicable to this case.

Based on the above, Civ.R. 54(B) applies to R.C. 2711.02(C) orders. As such, R.C. 2711.02(C) orders, which are not applicable to all the parties or claims, are not final appealable orders without Civ.R. 54(B) language. Further, the application of Civ.R. 54(B) to R.C. 2711.02(C) orders does not frustrate the purpose of Civ.R. 54(B) or infringe on the General Assembly's authority to confer jurisdiction upon Courts of Appeals. Therefore, the Fourth District Court of Appeals' decision dismissing the underlying appeal for lack of jurisdiction should be upheld.

3. **The Clear and Unambiguous Language of R.C. 2711.02(C) Requires the Application of Civ.R. 54(B) to R.C. 2711.02(C) Orders.**

"[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. of Edn.*(2002), 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. "If it is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must *simply apply it.*" *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶13. (Emphasis added). In interpreting a statute, a court's paramount concern is legislative intent. *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, at ¶12. To determine this intent, we read words and phrases in context and construe them in accordance with the rules of grammar and common usage. R.C. 1.42; *Hedges v. Nationwide Mut. Ins. Co.*(2006), 109 Ohio St.3d 70, 2006-Ohio-1926, at ¶24.

R.C. 2711.02(C) states in part:

... an order under division (B) of this section that grants or denies a stay of a trial of *any action* pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal *pursuant to* the Rules of Appellate Procedure and, to the extent not in conflict with those rules, *Chapter 2505. of the Revised Code*. (Emphasis added).

First, the clear and unambiguous language of R.C. 2711.02(C) dictates its application to only those orders granting or denying the stay of an entire action. It follows that an order which grants or denies a stay relating to fewer than all the claims and/or parties is not contemplated by R.C. 2711.02(C). Further, the plain language provides that R.C. 2711.02(C) orders are to be reviewed pursuant to Chapter 2505. of the Revised Code. Final orders under R.C. 2505.02 are subject to the requirements of Civ.R. 54(B) where fewer than all the claims against fewer than all the parties are determined by such orders. *Noble*, 44 Ohio St.3d 92. Accordingly, R.C. 2711.02(C) orders are also subject to the requirements of Civ.R. 54(B) where not all the claims against all the parties are arbitable. Therefore, the clear and unambiguous language of R.C. 2711.02(C) requires the application of Civ.R. 54(B) to R.C. 2711.02(C) orders.

If this Court determines that the language of R.C. 2711.02(C) is ambiguous, the General Assembly's intent may be determined through the history of its amendments. As provided above, R.C. 2711.02(C) was amended by the General Assembly in 1990 in response to this Court's decision in *Gen. Elec. Supply Co.*, 38 Ohio St.3d 378. The holding in *Gen. Elec. Supply Co.*, was that orders staying litigation pending arbitration were not final orders as defined in R.C. 2505.02. *Id.* In amending the statute, the General Assembly intended that such orders be treated as final orders under R.C. 2505.02. Indeed, the express language of the amended statute makes

reference to R.C. Chapter 2505. The treatment of R.C. 2505.02 orders includes the application of Civ.R. 54(B) where appropriate. As such, the General Assembly intended that R.C. 2711.02(C) orders be subject to Civ.R. 54(B) when such orders dispose of fewer than all the claims against fewer than all of the parties.

In sum, the General Assembly's intent and the plain language of R.C. 2711.02(C) establish that orders pursuant to the same are final orders. Thus, they must be enforced as all other final orders, which includes the application of Civ.R. 54(B) where appropriate. Therefore, the Fourth District Court of Appeals' decision dismissing the underlying appeal for lack of jurisdiction should be upheld.

4. **Other Instances in which Appeals have been Permitted Without Civ.R. 54(B) Language are Distinguishable from R.C. 2711.02(C) Orders.**

The Inspection Defendants also argue that other similar appeals have been allowed without Civ.R. 54(B) language. Specifically, the Inspection Defendants identify orders granting or denying provisional remedies as well as R.C. 2744.02(C) orders denying alleged immunity benefits.

With regard to provisional remedies, this Court has held "a provisional remedy is a remedy other than a claim for relief." *State ex rel. Butler Cty. Child. Serv. Bd. v. Sage* (2002), 95 Ohio St.3d 23, 25. Additionally, R.C. 2505.02(A)(3) identifies a provisional remedy as a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, or a prima-facie showing in order to maintain asbestos litigation. *Id.* To be a provisional remedy, the remedy sought must be attendant upon or aid the underlying action. *State v. Muncie* (2001), 91 Ohio St.3d 440, 499.

A motion to stay litigation pending arbitration does not aid or accompany the underlying action. Rather, it is a claim for relief that seeks to place claims subject to arbitration on hold until arbitration may be conducted. See *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, 844 N.E.2d 825, ¶¶26, 31 ("A stay is not an offshoot of the main action; it is the main action postponed. * * * It does not further the main action. We therefore hold that the imposition of a stay pending the determination of the bankruptcy of a party it is not an ancillary proceeding * * * "). Accordingly, R.C. 2711.02(C) orders which grant or deny a stay of an action are distinguishable from provisional remedies and are more akin to the stay imposed by a bankruptcy filing. As such, the Inspection Defendants' comparison of provisional remedies to R.C. 2711.02(C) orders is unpersuasive and should be disregarded by this Court.

As to R.C. 2744.02(C) orders which deny an alleged benefit of immunity, this Court has recently determined such orders are final and appealable without the need for any consideration of Civ.R. 54(B). *Sullivan v. Anderson Twp.*, 2009-Ohio-1971. The decision in *Sullivan* was unique to R.C. 2744.02(C) alone as the Court specifically states, "[w]hen the denial of political subdivision immunity is concerned, the trial court has no discretion to determine whether to separate claims or parties and permit an interlocutory appeal." *Id.* at ¶12. Further, while the language of R.C. 2711.02(C) and R.C. 2744.02(C) is similar, it is not identical. Specifically, the General Assembly added the requirement that R.C. 2711.02(C) orders be reviewed pursuant to R.C. Chapter 2505. Such review includes the application of Civ.R. 54(B) in instances, such as this one, where fewer than all the claims are subject to arbitration. Therefore, this Court's decision in *Sullivan* is distinguishable and inapplicable to the instant case.

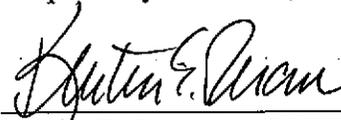
Based on the above, each of the Inspection Defendants' analogies is readily distinguishable from the instant case. Accordingly, such comparisons are unconvincing and

should be disregarded by this Court. Instead, this Court must enforce R.C. 2711.02(C) as written, which includes the application of Civ.R. 54(B) in instances where such orders dispose of fewer than all the claims.

III. CONCLUSION

R.C. 2711.02(C) orders, which are not applicable to all the parties or claims, are not final appealable orders without Civ.R.54(B) language. While the General Assembly has unfettered discretion to determine the subject matter jurisdiction of courts of appeals, this Court is charged with establishing the procedures under which such jurisdiction is exercised. Civ.R. 54(B) is one of the procedural measures imposed by this Court. Accordingly, its application to R.C. 2711.02(C) orders is appropriate, as with all other final orders under R.C. Chapter 2505. This is corroborated by the plain language R.C. 2711.02(C), which mandates that orders under R.C. 2711.02(C) be reviewed pursuant to R.C. Chapter 2505. Such a review includes that application of Civ.R. 54(B) where appropriate. The clear and unambiguous language of R.C. 2711.02(C) also dictates that the application of the statute is limited to orders affecting the entire action. Therefore, this Court should uphold the Fourth District Court of Appeals' decision to dismiss this action for lack of jurisdiction.

Respectfully submitted,



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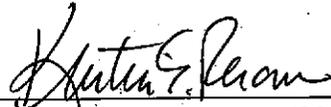
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Attorney for Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by regular First Class U.S. Mail, postage prepaid, this 14th day of May, 2009, upon the following:

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Attorney for Appellees

IN THE SUPREME COURT OF OHIO

TIMOTHY MYNES, *et al.*, :
:
Appellees, : Case No. 2009-0054
:
v. : Certified Conflict on Appeal
: from the Scioto County Court
JDG HOME INSPECTIONS, INC. d/b/a : of Appeals, Fourth Appellate
THE HOMTEAM INSPECTION : District Judgment Filed
SERVICE, *et al.*, : October 27, 2008
:
Appellants. :

APPENDIX TO
APPELLEES' BRIEF

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§ 5 Other powers of the Supreme Court

Article IV - Judicial

§ 5 Other powers of the Supreme Court

(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court.

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

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1.42**GENERAL PROVISIONS****CHAPTER 1: DEFINITIONS; RULES OF CONSTRUCTION**

1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

00002

163.08
TITLE [1] I STATE GOVERNMENT
CHAPTER 163: APPROPRIATION OF PROPERTY

163.08 Answer of owner.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. A petition for appropriation, filed by the director of transportation, which contains a declaration and journalization of his intent to construct a state highway or interstate highway, shall constitute a presumption that such appropriation is for the purpose of making or repairing roads which shall be open to the public without charge. At a hearing on an issue whether a taking sought by the director of transportation is for the purpose of making or repairing roads open to the public without charge, a set of construction plans made by or for the director and showing the proposed use of the property in connection with the construction or repair of such a road is presumptive evidence of such purpose, notwithstanding that no money has been appropriated for such construction or repair.

An answer shall be served in accordance with Civil Rule 12. If the agency involved in the action is a private agency, no more than one extension of the time authorized by Civil Rule 12 for serving an answer shall be granted pursuant to Civil Rule 6, and that extension shall not exceed thirty days.

Effective Date: 07-01-1983

00003

2505.02
TITLE [25] XXV COURTS -- APPELLATE
CHAPTER 2505: PROCEDURE ON APPEAL

2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right 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.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "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, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(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.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

00004

4123.512
TITLE [41] XLI LABOR AND INDUSTRY
CHAPTER 4123: WORKERS' COMPENSATION

4123.512 Appeal to court.

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the

clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (A) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Effective Date: 08-06-1999; 2006 SB7 10-11-2006; 2007 HB100 09-10-2007

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RULE 6 Time
RULES OF CIVIL PROCEDURE
TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS;
SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE
ORIGINAL COMPLAINT; TIME

RULE 6. Time

(A) Time: computation.

In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. When a public office in which an act, required by law, rule, or order of court, is to be performed is closed to the public for the entire day which constitutes the last day for doing such an act, or before its usual closing time on such day, then such act may be performed on the next succeeding day which is not a Saturday, a Sunday, or a legal holiday.

(B) Time: extension.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.

(C) Time: unaffected by expiration of term.

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action consistent with these rules.

(D) Time: motions.

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(C), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(E) Time: additional time after service by mail.

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4 through Rule 4.6.

[Effective: July 1, 1970; amended effective July 1, 1978.]

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Rule 54 Judgment; Costs
FEDERAL RULES OF CIVIL PROCEDURE
TITLE VII. JUDGMENT

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief - whether as a claim, counterclaim, crossclaim, or third-party claim - or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs - other than attorney's fees - should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

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