

motion to stay proceedings pending arbitration (the “Order”). This order was journalized on June 10, 2009. The Order did not dispose of all claims by all parties, nor did it contain a Civ.R. 54(B) determination of no just reason for delay.

The plaintiff in the Underlying Action filed its notice of appeal of the trial court’s Order on July 17, 2009, 37 days after the Order was journalized. Local 45 moved Respondent (the “Appellate Court”) to dismiss the appeal (the “Appeal”) on alternative grounds that: (1) the Appeal was not timely filed in compliance with App.R. 4(B)(5), or (2) the Order lacked a Civ.R. 54(B) determination. One of the two must have applied, and either basis would have deprived Respondent of jurisdiction to hear the case. But the Appellate Court denied Local 45’s motion to dismiss and continues to exercise judicial power over the Appeal, in contravention of law.

Specifically, in response to Relator’s first argument the Appellate Court errantly applied App.R. 4(A), determining that the notice of appeal was not late because the clerk had yet to serve the Order. Respondent did not address the application of App.R. 4(B)(5) to the Order, despite the fact that the Order did not dispose of all claims as to all parties.

Regarding Relator’s second ground for dismissal, the Appellate Court stated that the issue of Civ.R. 54(B) applicability to an R.C. 2711.02 order is currently before this Court on a certified conflict.¹ Because the Fourth District’s ruling in *Mynes* (that Civ.R. 54(B) applies) is in direct conflict with Respondent’s

¹ *Mynes v. Brooks*, Supreme Court Case No. 2009-0054 (oral argument held September 2, 2009).

earlier holding to the contrary,² the Appellate Court determined to follow its precedent that a Civ.R. 54(B) determination is not required to appeal an R.C. 2711.02 order granting or denying a motion to stay in support of arbitration.

For the reasons that follow, the Appellate Court patently and unambiguously lacks jurisdiction to hear the Appeal. Therefore peremptory writs of prohibition and mandamus should issue to compel dismissal of the Appeal.³

IF CIV.R. 54(B) APPLIES TO ORDERS RENDERED UNDER R.C. 2711.02, THE ORDER WAS NOT A FINAL APPEALABLE ORDER.

Whether Civ.R. 54(B) applies to R.C. 2711.02 orders has been fully briefed and argued before this Court, and is now decisional.⁴ If Civ.R. 54(B) applies, the Order in the instant matter cannot invoke the Appellate Court's jurisdiction because it lacks the requisite determination of no just cause for delay. In this circumstance, though the notice of appeal was filed timely under App.R. 4(A) -- given the clerk's delay in serving the Order -- the Appeal nevertheless must be dismissed for want of a final appealable order.

In the absence of this Court's ruling in *Mynes*, (or if the Court finds that Civ.R. 54(B) does not apply) it was appropriate for Respondent to follow its own precedent on the question. This would render the Civ.R. 54(B) argument unmeritorious. But the Appeal must still be dismissed because, in that instance, the notice of appeal was not timely filed under App.R. 4(B)(5). This is so because

² *Stewart v. Shearson Lehman Bros.* (1992) 71 Ohio App.3d 305.

³ Relator is not required to show it has no adequate remedy at law. *State ex rel. Sapp v. Franklin County Court of Appeals* 2008 Ohio 2637, ¶ 15.

⁴ *Mynes v. Brooks*, Supreme Court Case No. 2009-0054 (oral argument held September 2, 2009).

the applicability of Civ.R. 54(B) directly impacts the time permitted for perfecting an appeal under App.R. 4.

AN APPEAL OF A PARTIAL FINAL JUDGMENT NOT SUBJECT TO CIV.R. 54(B) MUST BE FILED WITHIN 30 DAYS OF ENTRY OF JUDGEMENT UNDER APP.R. 4(B)(5).

The general rule regarding the time to appeal is set forth in App.R. 4(A), which requires the notice of appeal to be filed by the later of (1) 30 days after entry of the judgment, or (2) 30 days after the judgment is served if service was made outside of the three-day window provided in Civ.R. 58(B). However, Division B of App.R. 4 provides exceptions to the general rule, and explicitly lists the situations when division A does not apply. Specifically, App.R. 4(B)(5) governs partial final judgments:

Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under *Civ.R. 54(B)*, a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under *Civ.R. 54(B)*.

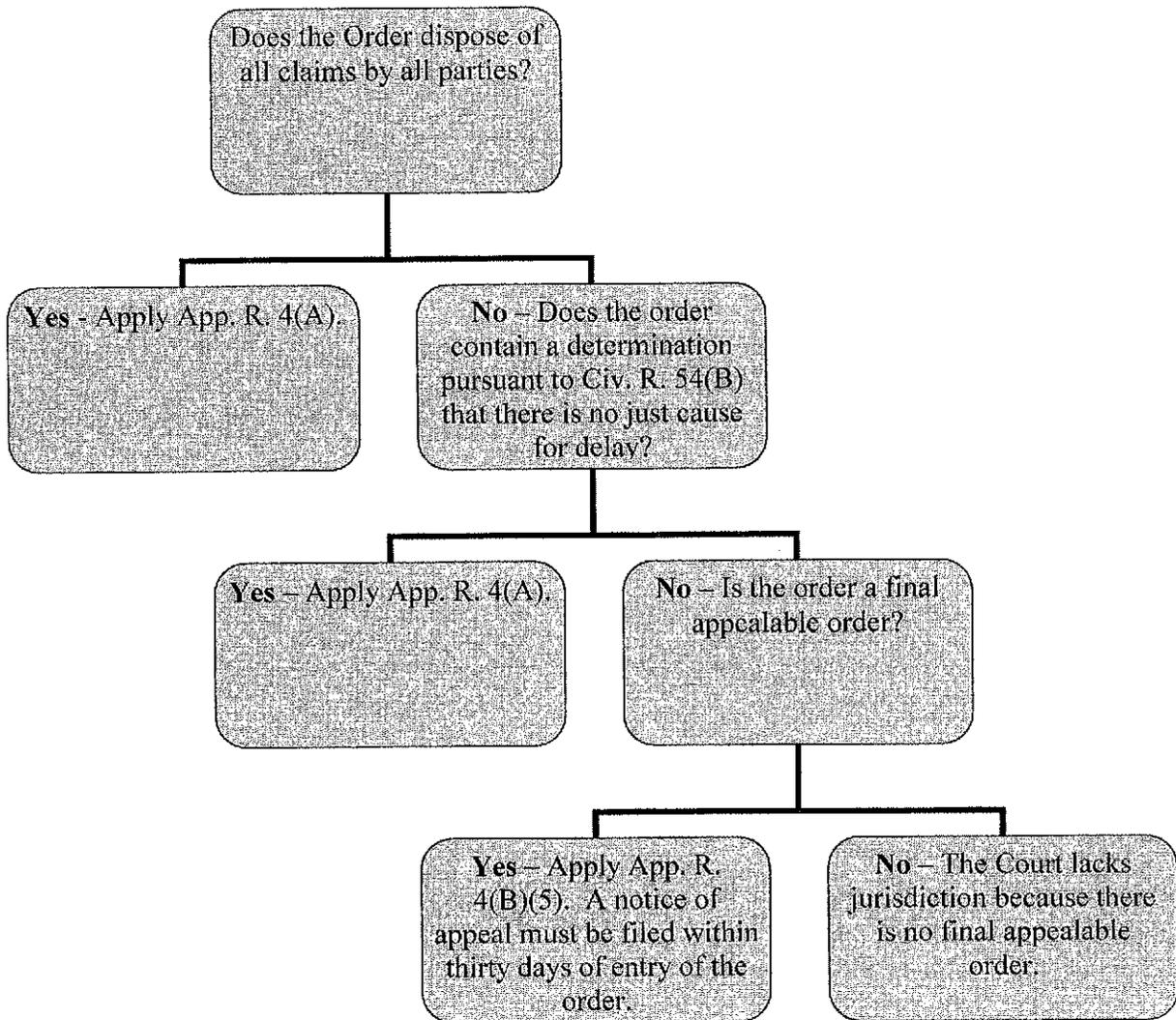
App.R. 4(B)(5) makes clear a distinction between partial final judgments entered under Civ.R. 54(B), and those that are not. App.R. 4(A) applies to partial final judgments entered under Civ.R. 54(B),⁵ while partial final judgments *not* entered under Civ.R. 54(B) are subject to App.R. 4(B)(5) instead.

In the case at bar, the Order clearly was not entered under Civ.R. 54(B). It was journalized on June 10. But the notice of appeal was not filed until July 17 – 37 days after entry of the Order. This was untimely under App.R. 4(B)(5), and

⁵ This is consistent with App.R. 4(A)'s reference to Civ.R. 58(B), which is also explicitly subject to Civ.R. 54(B).

should have resulted in a dismissal. Yet the Appellate Court, while asserting the Order was not subject to Civ.R. 54(B), nevertheless proceeded to apply App.R. 4(A) in testing the timeliness of the Appeal. This was plain error, as described in Figure 1, below.

FIGURE 1 – WHICH DIVISION OF APPELLATE RULE 4 APPLIES?



The first step in determining which division of App.R. 4 to apply is to determine whether the order disposes of all claims by all parties. If the order disposes of all claims, then App.R. 4(A) applies. But in the Underlying Action,

the order did not dispose of all claims by all parties. If the order does not dispose of all claims, then the Court must determine whether the order is entered under, or otherwise subject to Civ.R. 54(B), and whether it contains the requisite determination that there is no just reason for delay.

If the order is subject to Civ.R. 54(B) but lacks the determination, it is not a final appealable order. If Civ.R. 54(B) applies and the order contains the requisite determination, App.R. 4(A) applies. In the Underlying Action, the order did not contain a determination that there was no just cause for delay, and arguably, Civ.R. 54(B) does not apply. Accordingly, App.R. 4(A) cannot apply. If the Order is appealable at all, it must be pursuant to App.R. 4(B)(5).

If the order staying the proceedings was a final appealable order, then it is an order which has “not disposed of all claims as to all parties” and was “other than a judgment or order entered under Civ.R. 54(B)” – the only type of order to which App.R. 4(B)(5) applies. In this case, the notice of appeal must be filed within thirty days of entry of the judgment or order appealed. If the order was not a final appealable order, Respondent has no jurisdiction to hear the appeal.

In the Underlying Action, Appellant’s notice of appeal was filed 37 days after the entry of the Order Appellant seeks to appeal. If the court’s Order staying the proceedings was a final appealable order, then the appeal was filed 7 days after the permitted time to appeal. Notice of the entry is irrelevant because, unlike appeals governed by App. R. 4(A), service is not a contingency under App.R. 4(B)(5). Without such a requirement, Appellant’s notice was untimely filed, and the Respondent is without jurisdiction to hear the case.

Accordingly, the Appeal was governed by App.R. 4(B)(5), and not App.R. 4(A). Further, the notice of appeal was not timely. Therefore, Respondent patently and unambiguously lacks jurisdiction to hear the Appeal. Its continued exercise of judicial power is contrary to law and should be terminated by a peremptory writ.

CONCLUSION

For these reasons, Relator respectfully asks this Court to issue the peremptory writs as set forth in the Complaint ordering Respondent to cease and desist from further action on the Appeal, and to dismiss the same. In the alternative, this Court should issue an alternative writ and set the case for full briefing and argument.

Respectfully submitted,

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