

**IN THE SUPREME COURT OF OHIO**

**International Association of Heat  
and Frost Insulators and Asbestos  
Workers, Local Union No. 45**

*Relator,*

v.

**Lucas County Court of Appeals  
Sixth Appellate District**

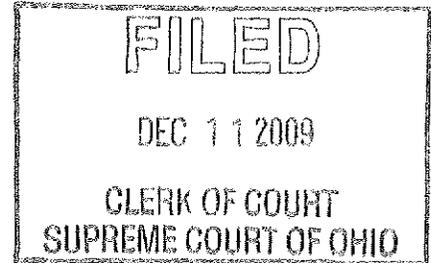
*Respondent.*

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09-2031

Supreme Court Case No. 2008-2139

\* ORIGINAL ACTION IN PROHIBITION  
AND MANDAMUS



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**RELATOR'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

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The time to appeal a partial final judgment that is *not* entered under Civ.R. 54(B), like the R.C. 2711.02 order at issue in the case at bar, is 30-days after entry of the judgment, pursuant to App.R. 4(B)(5). The notice of appeal at issue here was untimely, filed some 37 days after entry. Therefore, Respondent patently and unambiguously lacks jurisdiction to hear the underlying appeal, and Relator is entitled to judgment as a matter of law.

### **STATEMENT OF FACTS**

Based on Respondent's answer and dispositive motion, the underlying facts are not disputed. Relator ("Local 45") is a party defendant in Lucas County Common Pleas Case No. G-4801 CI200805567 ("Underlying Action"), a two-count complaint for declaratory judgment and to vacate an arbitration award. Local 45 filed an answer to the declaratory judgment action, and counterclaimed to confirm the arbitration award. On June 8, the Trial Court granted Local 45's motion to stay proceedings pending arbitration (the "Order"). The Order did not dispose of all claims and was journalized on June 10, 2009.

The plaintiff in the Underlying Action filed its notice of appeal on July 17, some 37 days after the Order was journalized. Local 45 asked 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.<sup>1</sup> But the Appellate Court denied Local

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<sup>1</sup> Relator's Civ.R. 54(B) argument is no longer valid in light of this Court's holding in *Mynes v. Brooks*, 2009-Ohio-5946 that Civ.R. 54(B) does not apply to R.C. 2711.02 orders.

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 is a partial final judgment.

In its motion for judgment on the pleadings Respondent remains obstinate in its refusal to address the text of App.R. 4(B)(5). It focuses on the timing of appellant's notice of the Order, rather than the time permitted to appeal under the Rules. 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.<sup>2</sup>

**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 is 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, explicitly listing the situations when Division A does not apply. Rule 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

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<sup>2</sup> 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.

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)*.

Unlike App.R. 4(A), App.R. 4(B)(5) does not allow filing an appeal on the later of entry or service. Instead, the appeal must be filed within 30 days after entry.

In the case at bar, the Order was journalized on June 10, but the Appeal was not filed until July 17 – 37 days after entry of the Order. This was untimely under App.R. 4(B)(5), and should have resulted in a dismissal. Yet the Appellate Court, while concluding the Order was not subject to *Civ.R. 54(B)* nevertheless proceeded to apply App.R. 4(A), allowing the Appeal to be filed on the later of entry or service. This was plain error.

Respondent asserts that the clerk's failure to serve the Order in compliance with *Civ.R. 58(B)* precludes dismissal of the Appeal. But this ignores the plain text of the Rules. Indeed, *Civ.R. 58(B)* explicitly says, “[t]he failure of the clerk to serve notice does not affect \* \* \* the running of the time for appeal except as provided in App.R. 4(A).” Therefore, the failure to serve does not affect the time for appeals governed by App.R. 4(B)(5), which is an exception to App.R. 4(A) that does not provide for tolling of the time for appeal.

This outcome is consistent with the cases relied on by Respondent too. Respondent's cases dealt with entries that were subject to App.R. 4(A).<sup>3</sup> And in each case, the failure of those appeals due to lack of service would forever strip the parties

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<sup>3</sup> *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 81; *Moldovan v. Cuyahoga County Welfare Dept.* (1986), 25 Ohio St.3d 293, 294.

of their right to appeal.<sup>4</sup> But the same outcome does not obtain under App.R. 4(B)(5). A party's failure to timely appeal a partial final judgment does not terminate the right to appellate review because the order may be appealed after entry of a final judgment disposing of the remaining claims in the action.<sup>5</sup>

The *Sautter* Court observed that the language in App.R. 4(A) providing for tolling of the time for appeal when service is made beyond the time prescribed in Civ.R. 58(B) is unique.<sup>6</sup> *Sautter* held that no such provision preserved an untimely filing under S.Ct.Prac.R. II(2)(A)(1), which like App.R. 4(B)(5), ties the time for appeal solely to the entry of the judgment being appealed.<sup>7</sup> And given App.R. 4(B)(5)'s alternative time for appeal upon termination of the entire case, no constitutional or due process concern requires embellishments to the plain text of the Rules.

## **CONCLUSION**

The Appeal was governed by App.R. 4(B)(5), and not App.R. 4(A). 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.

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

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<sup>4</sup> *State ex rel. Sautter et al. v. Grey*, 2008-Ohio-1444 ¶ 23; *Swander Ditch Landowners' Assoc. v. Jt. Bd. Of Huron & Seneca County Commissioners* (1990), 51 Ohio St.3d 131, 133; *Atkinson*, 37 Ohio St.3d at 81; *Moldovan*, 25 Ohio St.3d at 294.

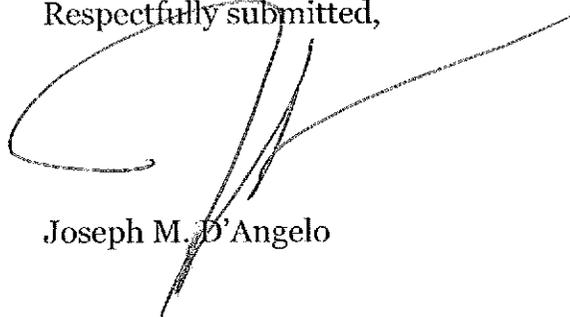
<sup>5</sup> App.R. 4(B)(5).

<sup>6</sup> 2008-Ohio-1444 ¶ 22.

<sup>7</sup> *Id.*

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,

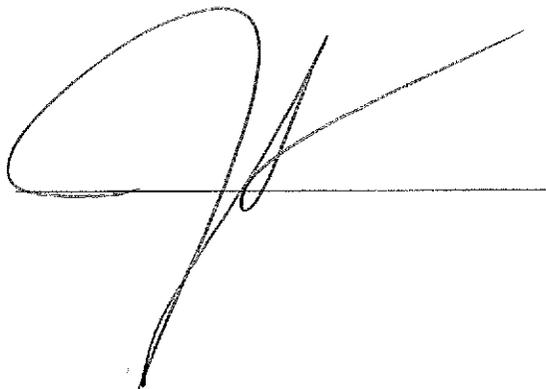
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Joseph M. D'Angelo

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this Cross-Motion for Judgment on the Pleadings was served by regular U.S. mail on the 10<sup>th</sup> day of December 2009 to:

John A. Borell, Esq.  
700 Adams Street, Ste 250  
Toledo, Ohio 43623  
Counsel for Respondent

A handwritten signature in black ink, appearing to read 'J. Borell', written over a horizontal line.