

Despite never raising the argument in the court of appeals, Appellee seeks to have this Court dismiss the instant appeal on the grounds that there is no final, appealable order. Appellants and Appellee do agree on one point: an appellate court does not have jurisdiction to hear an appeal if the order is not final. But, the parties disagree whether the April 13, 2010 order is a final order. In light of this Court's consistent pronouncements on the issue, as expressed in *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989) and *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989), Appellee's motion to dismiss should be denied, and the appeal be permitted to proceed.

Appellee contends that an order which does not dispense with all the claims against other defendants cannot be a final, appealable order. That is not the position of this Court or Ohio law. In fact, the Civil Rules contemplate instances when an order not dispensing with all claims and/or parties may be final. Civ.R. 54(B) provides in pertinent part:

When *more than one claim* for relief is presented in an action * * * or when *multiple parties* are involved, the court may enter *final judgment* as to one or more but fewer than all of the claims or parties only upon an *express determination that there is no just reason for delay*. In the absence of such determination, any order * * * 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 * * * 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.

(Emphasis added.)

Civ.R. 54(B) applies to those situations where there is more than one claim for relief presented or multiple parties are involved in an action, and where the lower court has rendered a final judgment, pursuant to R.C. 2505.02, with respect to fewer than all of the parties or to fewer than all of the claims. The purposes of Civ.R. 54(B) are “ ‘ * * * to make a reasonable

accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals' * * * as well as to insure that parties to such actions may know when an order or decree has become final for purposes of appeal * * *." (Citations omitted.) *Pokorny v. Tilby Dev. Co.*, 52 Ohio St.2d 183, 186, 370 N.E.2d 738, 739-740 (1977).

Moreover, this Court has repeatedly stated: "An order which adjudicates one or more but fewer than all of the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable" *Noble* at syllabus. The instant order, which dismisses all the claims against Appellee, but leaves pending all of the claims against the other defendants, meets those foregoing conditions because it complies with both Civ.R. 54(B) and R.C. 2505.02.

The requirement that the order comply with Civ.R. 54(B) can be quickly dispensed with: the order at issue does contain the language "no just reason for delay" as required for an order disposing of fewer than all the parties and/or claims.

The additional requirement that the order comply with R.C. 2505.02 is also easily met. The statute defines three types of final orders: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. *Chef Italiano*, 44 Ohio St.3d at 88, 541 N.E.2d 64. Because the latter two categories do not apply, the only determination to be made is whether this order is one that affects a substantial right, which in effect determines the action and prevents a judgment.

A substantial right has been defined as a “ * * * legal right entitled to enforcement and protection by law[.]” *In re Estate of Wyckoff*, 166 Ohio St. 354, 358, 260, 142 N.E.2d 660, 664 (1957). A court order which deprives a person of a remedy which he or she would otherwise possess deprives that person of a substantial right. *Chef Italiano* at 67. In other words, “[t]o be final, an order must also *determine* an action and *prevent* a judgment.” (Emphasis added). *Id.*, citing, *General Electric Supply Co. v. Warden Electric, Inc.*, 38 Ohio St.3d 378, 528 N.E.2d 195 (1988), syllabus.

This Court in *Chef Italiano*, sua sponte, held that neither of the two orders being appealed were final orders. *Chef Italiano* at 90. The first order, while containing the Civ.R. 54(B) language, did not dispose of all the claims against the prevailing party, therefore judgment against the prevailing party was not *prevented* by the order. *Id.* at 88-89. In contrast, the second order in *Chef Italiano*, which did dispose of all the claims against the prevailing party – Kent State – did not contain the Civ.R. 54(B) language “no just reason for delay.” *Id.* at 89. Given the requirement that an order in a multiparty/multi-claim action must comply with *both* Civ.R. 54(B) and R.C. 2505.02, this Court dismissed the appeal and declined to rule on the merits. *Id.* at 90.

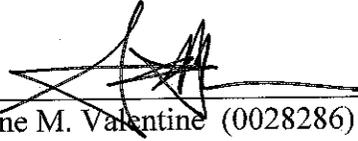
In its treatment of Kent State, *Chef Italiano* provides guidance as to whether the order at issue is a final one pursuant to R.C. 2505.02. This Court in *Chef Italiano* held that the appellant’s action against Kent State was *determined* since no claims remained pending. *Id.* at 89, emphasis by the Court. Because no claims remained, the appellant was *prevented* from obtaining a judgment against Kent State. *Id.* “Thus, the [order] is a final order pursuant to R.C. 2505.02” *Id.*

The holding in *Chef Italiano* dictates that the appropriate outcome in the instant case before the Court is that this order is final and appealable. Similar to Kent State, Appellee is one party in an action brought against several defendants, and all the claims against Appellee were adjudicated and dismissed by the trial court's order and decision granting summary judgment in his favor. Likewise, the order at issue *determined* the action against Appellee because no claims remained pending against him, and Appellants were *prevented* from obtaining a judgment against him. Therefore, this order is also a final order pursuant to R.C. 2505.02.

Despite the precedence set by this Court, Appellee essentially argues that the order at issue is not final, pursuant to R.C. 2505.02, because it leaves issues unresolved against the other parties. Therefore, under Appellee's interpretation of RC. 2505.02, an order that dismisses less than all of the parties and fewer than all of the claims can never be a final, appealable order. That has not been the position of this or other courts. Otherwise, this Court's holdings in *Chef Italiano* and *Noble* that "[a]n order which adjudicates one or more but fewer than all of the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable" would be nonsensical and impossible to comply with.

Ohio law holds that a trial court can enter a final, appealable order as to fewer than all of the claims or all of the parties in a multiple-claim or multiple-party action upon an express determination that there is "no just reason for delay." *Whitaker-Merrell Co. v. Geupel Co.*, 29 Ohio St.2d 184, 280 N.E.2d 922 (1972), syllabus. In this case, both conditions – Civ.R. 54(B) and R.C. 2505.02 – were met by the April 13, 2010 order. Accordingly, this Court has jurisdiction to hear the appeal, and Appellee's motion to dismiss must be denied.

Respectfully Submitted,

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Anne M. Valentine (0028286) – counsel of record

Susie L. Hahn (0070191)

LEESEBERG & VALENTINE

175 S. Third Street, Penthouse One

Columbus, Ohio 43215

Tel: 614/221-2223

Fax: 614/221-3106

Email: avalentine@leesebergvalentine.com

shahn@leesebergvalentine.com

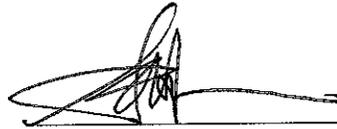
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the following this

27th day of January, 2012, by regular U.S. Mail, postage prepaid:

Gregory D. Rankin, Esq.
Ray S. Pantle, Esq.
LANE ALTON & HORST
2 Miranova Place, Suite 500
Columbus, Ohio 43215

A handwritten signature in black ink, appearing to read 'Anne M. Valentine', is written over a horizontal line.

Anne M. Valentine