

**ORIGINAL**

**In The  
SUPREME COURT OF OHIO**

**Pilkington North America, Inc.** : Case No. 2013-0709  
: :  
Appellant, : On appeal from the Public Utilities  
: Commission of Ohio, Case No. 08-255-  
v. : EL-CSS.  
: :  
**The Public Utilities Commission of** :  
**Ohio,** :  
: :  
Appellee. :  
:

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**MERIT BRIEF  
SUBMITTED ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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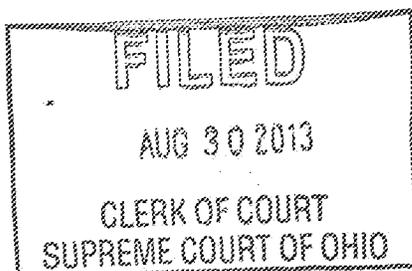
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**MERIT BRIEF  
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**INTRODUCTION**

The General Assembly has created one process for challenging decisions of the Public Utilities Commission of Ohio (“Commission”). Appellant Pilkington North America, Inc. (“Pilkington”) chose not to use this procedure. Now, having seen the outcome of other litigation, Pilkington seeks to benefit from that decision. Pilkington asked the Commission to create a second appeal mechanism in direct violation of the General Assembly’s requirements. The Commission properly refused this request. This Court should also refuse Pilkington’s bid for a second bite at the apple.

## STATEMENT OF THE FACTS AND CASE

In 2009, Pilkington and five other industrial customers filed separate complaints with the Commission regarding Toledo Edison's termination of their special contracts in February of 2008. After the filing of the complaints, Toledo Edison and each of the complainants agreed to establish escrow accounts for the difference between the special contract rate and the higher tariff rate. After consolidating these cases, the Commission issued an order finding that the special contracts were properly terminated. All of the complainants except for Pilkington filed an application for rehearing which was denied by the Commission.

Each of the complainants except for Pilkington then filed a notice of appeal to this Court. Pilkington did not appeal and also surrendered any claim to the escrow fund. On August 25, 2011, the Court reversed the Commission order, holding that the special contracts terminated in December, rather than February, of 2008. *Martin Marietta Magnesia Specialties L.L.C. v. Pub. Util. Comm'n*, 129 Ohio St. 3d 485, 2011-Ohio-4189, 954 N.E.2d 104 (2011). The appellants in that case were then entitled to refunds to be paid out of the escrow fund.

On January 5, 2012, Pilkington filed a motion for relief under Civil Rule 60(B) with the Commission. Pilkington asserted that it was entitled to relief based on the Court's decision in *Martin Marietta*, even though it had not participated in the appeal. The Commission denied the motion in an Entry issued on January 23, 2013. *In the Matter of the Complaint of Pilkington North America*, Case No. 08-255-EL-CSS (Entry) (January 23, 2013), Appellant's App. at 5. Pilkington then filed an application for

rehearing that was denied by the Commission. *In the Matter of the Complaint of Pilkington North America, Inc.*, Case No. 08-255-EL-CSS (Entry on Rehearing) (March 20, 2013), Appellant's App. at 11. This appeal then ensued.

**PROPOSITION OF LAW NO. I:**

**A motion for relief from judgment pursuant to Civ. R. 60(b) is not a proper procedural mechanism to vacate a commission order.**

The Commission properly denied Pilkington's Civ. R. 60(B) motion as it was an improper procedural mechanism to use to vacate a commission order. The proper procedure, as defined by statute, is an application for rehearing followed by a timely appeal to the Supreme Court of Ohio. Pilkington is seeking to use the Civ. R. 60(B) motion to alleviate it from its poor but deliberate decision not to appeal the order entered against it by the Commission. *See* Entry, ¶9, Appellant's App. p. 09. Pilkington gave up its right to challenge the Commission order when it chose not to appeal via the clear and unambiguous statutory scheme set forth by the General Assembly. As demonstrated below, courts have consistently held that a Civ. R. 60(B) motion cannot and will not be used as a substitute for a direct appeal. Pilkington has failed to meet the Civ. R. 60(B) requirements and this case does not rise to the level of extraordinary circumstances. Finally, it would be inequitable to relieve Pilkington of the consequences of its decision not to appeal. Pilkington would become the windfall beneficiary of the other litigants' efforts. While there must be both justice and finality in litigation, parties must be able to rely on final, unappealed decisions for justice to ever be fully served.

**A. A Civ. R. 60(B) motion is not a substitute for a direct appeal.**

A Civ. R. 60(B) motion is not a substitute for the direct appeal of a Commission order. As the Commission is a “creature of statute”, the General Assembly created a clear and unambiguous procedure for vacating a Commission decision, *Akron & B. B. R. Co. v. Pub. Util. Comm’n*, 165 Ohio St. 316, 135 N.E.2d 400 (1956). After the issuance of a Commission order, a party may apply for a rehearing under R.C. 4903.10. An application for rehearing is a prerequisite for any “cause of action arising out of any order of the commission.” Ohio Rev. Code Ann. § 4903.10 (West 2013), App. at 6. After the rehearing proceedings have been concluded or the application is denied, the party may then appeal as of right to the Ohio Supreme Court. Ohio Rev. Code § 4903.13 (West 2013), App. at 7. To perfect an appeal, a challenger of a Commission order must file **both** a rehearing application and a notice of appeal specifying the errors complained of. Pilkington filed **neither** from the original Commission order. There is no substitute for a direct appeal to vacate a Commission order and the statutory requirements are jurisdictional and cannot be waived.

The posture of this case is similar to that in *Erie Lackawanna Ry. Co. v. Pub. Util. Comm’n*, 24 Ohio St. 2d 159, 265 N.E.2d 266 (1970). In that case, a railroad filed a petition to rescind an order from which it had not appealed. The Court upheld the Commission’s denial of the petition, concluding that the railroad’s failure to appeal conclusively resolved any question as to its legality, absent a patent violation of the Commission’s jurisdiction. In the present case, Pilkington’s motion is analogous to the

railroad's petition to rescind. As in *Erie Lackawana*, Pilkington's failure to appeal the initial order defeats its present claims.

It is well recognized that a Civ. R. 60(B) motion cannot relieve a party from a deliberate choice not to appeal a judgment. *Ackermann v. United States* controls, stating that a "petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." 340 U.S. 193,198 (1950). In *Ackerman*, a party deliberately gave up his right to appeal his citizenship proceeding and lost his right to obtain relief from his judgment later with a Civ. R. 60(B) motion based on a change in law. The Supreme Court also found in *Polites v. United States*, 364 U.S. 426, 432 (1960), that a party cannot obtain Civ. R. 60(B) relief where their choice not to appeal is "free, calculated, and deliberate." This Court followed that reasoning in *Knapp v. Knapp*, holding that granting a Civ. R. 60(B) motion to a party "would relieve them of the consequences of their voluntary, deliberate choices" and that it would be unfair to "relieve either party from the consequences of these choices simply because hindsight indicated they may not have been wise." 24 Ohio St.3d 141, 493 N.E.2d 1353 (1986).

A Civ. R. 60(B) motion is not a means for a party "to negate a prior finding that the party could have reasonably prevented," *Jackson v. Hendrickson*, 2nd Dist. No. 21912, 2008-Ohio-491, ¶29, and a party may not use a Civ. R. 60(B) motion to "reap where they have not sown." *American Mfrs. Mut. Ins. Co. v. Midland Ross Corp.*, 1991 Ohio App. LEXIS 3649 (11th Dist. Ct. App., Aug. 2, 1991), App. at 1. Pilkington chose not to appeal the original Commission order, while the other industrial customers did appeal and were successful. See *Martin Marietta*, 2011-Ohio-4189, 954 N.E.2d 104.

Pilkington cannot now use a Civ. R. 60(B) motion to obtain relief from other litigants' efforts.

Pilkington's claim that a Civ. R. 60(B) motion is an appropriate collateral attack of the final, unappealed Commission order is also erroneous. Parties must also be able to rely on final, unappealed judgments. As this Court held in *Wigton v. Lavender*, 9 Ohio St. 3d 40, 42-43, 457 N.E.2d 1172 (1984), "an unappealed judgment is final and the prevailing party may fully rely upon it, and that filing of a notice of appeal is the jurisdictional prerequisite to a valid exercise of appellate jurisdiction." (Citations omitted). This Court has determined that "R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this Court has held that reasonable grounds may exist to raise issues which might strictly be viewed as "collateral attacks" on previous orders." *Allnet Comm. Svcs., Inc., v. Pub. Util. Comm'n* 32 Ohio St. 3d 115, 117, 512 N.E.2d 350 (1987). However, "the reasonable grounds for complaint requirement of R.C. 4905.26 must still be met before the PUCO is required to order a hearing." *Id.* A proper "collateral attack" of a Commission order is through the complaint statute recognizing reasonable grounds for review, not a Civ. R. 60(B) motion. Where, as here, a party fails to appeal a final judgment, it may not use a Civ. R. 60(B) motion as a backdoor substitute for its decision not to directly appeal. Nor can it be used as a collateral attack on a Commission order. Pilkington deliberately chose not to utilize the clear and unambiguous statutory structure for appealing a final order issued by the Commission and may not now substitute a Civ. R. 60(B) motion to remedy that unwise decision.

**B. Pilkington failed to satisfy the requirements of a Civ. R. 60(B) motion.**

The Commission properly denied Pilkington's motion as it failed to satisfy the requirements of Civ. R. 60(B). Pilkington claims that while civil rules are not binding on administrative bodies, there are no rules or statutes precluding administrative bodies from recognizing them. *Yoder v. Ohio State Board of Ed.*, 40 Ohio App.3d 111, 531 N.E.2d 769 (1988). Given the statutory structure discussed above, it is difficult to see how Civ. R. 60(B) applies to Commission proceedings. Even if this rule does apply to the Commission, all criteria must be met, which Pilkington failed to do.

The criteria for a valid Civ. R. 60(B) motion are both independent and in the conjunctive—all three need to be satisfied or relief must be denied. “To prevail on a motion filed pursuant to Civ. R. 60(B), the movant must demonstrate: (1) that the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); (2) that the party has a meritorious defense or claim to present if relief is granted; and (3) that the motion is made within a reasonable time.” (Citation omitted). *Volodkevich v. Volodkevich*, 35 Ohio St. 3d 152, 153, 518 N.E.2d 1208 (1988). Pilkington failed to show that it is entitled to relief under one of the grounds stated in Civ. R. 60(B) and its motion was properly denied by the Commission.

Pilkington also incorrectly claims it is entitled to relief under Civ. R. 60(B)(5), allowing for any other reason justifying relief from the judgment. While the motion is broad, Pilkington did not invoke any substantial grounds for relief as required by Civ. R. 60(B)(5). Courts have narrowed this broad relief to be allowed only in the most extreme circumstances. In *Volodkevich* at 154, the Court found that “60(B)(5) is a catchall

provision which reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. However, the grounds for invoking the provision must be substantial.” Pilkington based its claim for relief under Civ. R. 60(B)(5) on the supposedly “*ultra vires*” nature of the situation, which is erroneous. Pilkington’s situation is not unique or extraordinary. It could have been remedied with a timely appeal of the initial Commission order. Relief under Civ. R. 60(B)(5) is “limited to issues that cannot properly be raised on appeal.” *State v. Helms*, 9th Dist. No. 26472, 2013-Ohio-359, ¶10. The deliberate choice to forego an appeal is not a unique or substantial circumstance that reaches the level of Civ. R. 60(B)(5) relief. In *California Medical Assoc. v. Shalala*, 207 F.3d 575, 578 (9<sup>th</sup> Cir. 2000), “the aggrieved party did not properly appeal any part of the judgment against it. Because the parties failed to preserve their challenges to the adverse judgments, they could not subsequently move for relief under Rule 60(B)(5).” Pilkington failed to appeal the judgment against it and cannot now claim relief under Civ. R. 60(B)(5).

Pilkington also claims that because its rights are so interwoven with the other industrial customers, the justice of the case requires the reversal to apply to it as well. This is an incorrect interpretation of the precedent and of the standard adopted by this Court. In *Wigton v. Lavender*, 9 Ohio St. 3d 40, 42, 457 N.E.2d 1172 (1984), the Court held that an appeal will not inure to nonappealing parties unless their rights are “so interwoven or dependent on each other as to require reversal of the whole judgment.” Interwoven parties are parties whose interests and liabilities are connected in such a manner that a reversal to only one would unreasonably impair the rights of the other.

The rights and responsibilities of one party must be *dependent* upon the other and this connection must be greater than just similar economic interests or facts and issues surrounding the cases. “The fact that the appealing and non-appealing parties have a similar economic interest, however, is not enough.” *National Assoc. of Broadcasters v. FCC*, 554 F.2d 1118, 1124 (D.C. Cir. 1976). Additionally, parties who file separate and distinct causes of action are generally not seen as interwoven parties by the courts. The 11th District Court of Appeals, drawing from *Wigton*, laid out criteria for whether or not two parties’ interests are interwoven or dependent so that it would be inequitable for a reversal on one to not apply to the other. The criteria set forth are:

whether the party which appealed had any other co-party's interest in mind or was solely looking to have its own judgment reversed; whether there were any contingent or conflicting interests between the appellant there and those that did not appeal; whether there were separate and distinct subrogation rights and properties between appellant and the other non-appealing parties; and whether there were any contribution or indemnification claims at issue.

*American Mfrs. Mut. Ins. Co. v. Midland Ross Corp.*, 1991 Ohio App. LEXIS 3649 (11th Dist. Ct. App., Aug. 2, 1991), App. at 1. Per *American*, if an appealing party is seeking to have only its judgment reversed, and its rights do not depend upon the rights of the nonappealing party, then the parties will not be defined as interwoven by the courts and a reversal to the appealing party will not trigger a reversal to the nonappealing party. Pilkington does not share any rights or liabilities with the other industrial customers.

Each industrial customer appealed the initial Commission order separately, and while the issues were essentially the same and they stipulated the same facts, none had

shared liabilities or was seeking to reverse more than their own individual judgment. In *Federated Dep't Stores, Inc. v. Moitie*, 452 US 394, 401 (1981), seven class actions were filed against a department store and were consolidated into one proceeding. Only five appealed and obtained a reversal on the judgment. The two parties who failed to appeal then made a motion under Civ. R. 60(B)(5) based on the interwoven nature of their interests. The U.S. Supreme Court stated that parties were not interdependent where they “have no interest in respondents’ case, not a reversal on interrelated cases procured, by the same affected party.” (Citation omitted). Justice Blackmun, in his concurring opinion, also indicated situations in which parties’ interests would be interwoven, specifically where “appealing and nonappealing parties made competing claims to a single piece of property, or in which reversal as to appealing party would have unjustly left the nonappealing party liable, or without recourse on his cross claim.” This further clarifies that interwoven parties are parties where their rights or liabilities are the same. The U.S. Supreme Court also “recognizes no general equitable doctrine \* \* \* which countenances an exception to the finality of a party’s failure to appeal merely because his rights are “closely interwoven” with those of another party.” *Federated*, 452 U.S. at 400. Pilkington and the other industrial customers each have separate and distinct causes of action and are not interwoven or dependent upon one another such that the justice of the case does not require the granting of the Civ. R. 60(B)(5) motion.

Finally, there was no error in the proceedings which would allow for a Civ. R. 60(B)(5) motion where “error permeates the entire case” under an exception stated in *Wigton*, 9 Ohio St. 3d at 42. Pilkington claims that this Court’s reversal of the

Commission order, stating that “the Commission unlawfully and unreasonably allowed Toledo Edison to terminate special contracts,” made the Commission order a legal nullity and void. *Martin Marietta*, 2011-Ohio-4189 at ¶46. This is wrong. *State v. Montgomery*, 6th Dist. No.H-02-039, 2003-Ohio-4095, ¶8-10, explains that “a judgment rendered by a court without subject matter jurisdiction is void ab initio. A void judgment may be challenged at any time. \* \* \* A voidable judgment is one rendered by a court having jurisdiction and although seemingly valid, is irregular and erroneous.” The Commission had jurisdiction over the proceedings and the order was merely determined to be erroneous by the Court. The Commission order is therefore a voidable judgment “that will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on its merits.” *Id* at ¶10. While a voidable judgment may also be subject to the provisions of Civ. R. 60(B), the motion must be valid and satisfy all requirements, which Pilkington failed to do.

Pilkington failed to meet the requirements for a valid Civ. R. 60(B)(5) motion and the Commission properly denied it. Pilkington also failed to assert any substantial grounds for relief. Pilkington’s situation is not *ultra vires* and could have been remedied on direct appeal of the original Commission order. Pilkington’s rights are not interwoven with the appealing parties such that justice requires a reversal as to Pilkington. Finally, the Commission order was not void, but rather a voidable judgment subject to direct appeal, which Pilkington consciously chose not to undertake.

**C. Public policy favors upholding the Commission's decision denying Pilkington Civ. R. 60(B) relief.**

Public policy favors upholding the Commission's decision denying Pilkington Civ. R. 60(B) relief in favor of finality and reliability in litigation. Pilkington should not be relieved of the consequences of the final, unappealed judgment against it. The future circumstances to which Pilkington says this remedy will be limited are not rare and Pilkington is asking for an appellate avenue that is outside of the statutory scheme provided to the Commission by the General Assembly. There is a clear structure for both obtaining relief from a Commission order through the appellate process and for asking the Commission to revisit a prior order under the complaint statute, Ohio Rev. Code Ann. § 4905.26 (West 2013), App. at 8. The Civ. R. 60(B) motion was used by Pilkington to merely relitigate a case it lost before the Commission and to rectify its poor decision to forego the appeal of that order.

It would be inequitable to relieve Pilkington from the consequences of its decision not to appeal the initial Commission order. Pilkington made a calculated choice, even though they had two million dollars in escrow, and must now be made to live with the price of that choice. Toledo Edison is also not unlawfully retaining the money awarded to them by an unappealed final judgment. R.C. 4903.19 recognizes the importance of a proper appeals process, stating that "upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all money which the public utility \* \* \* has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the

corporations or persons entitled to them.” Ohio Rev. Code Ann. §4903.19 (West 2013), App. at 7. Pilkington did not appeal the judgment issued against it and therefore is not entitled to money it relinquished.

This court held in *Wigton*, 9 Ohio St. 3d at 42, that “an unappealed judgment is final and the prevailing party may fully rely upon it.” Reversing the Commission’s decision to deny Pilkington’s Civ. R. 60(B) motion would encourage litigants “to litigate carelessly.” *Knapp v. Knapp*, 24 Ohio St.3d 141, 145, 493 N.E.2d 1353 (1986). Litigants could benefit from the appeals of others and be relieved “of the consequences of their voluntary, deliberate choices.” *Id.* This would be contrary to the U.S. Supreme Court’s holding in *Ackerman* and to this court’s own precedent. Pilkington cannot now via an improper Civ. R. 60(B) motion ask for relief from its own considered choices.

Overturing the denial of Pilkington’s Civ. R. 60(B) motion would also decrease judicial economy, contrary to Pilkington’s claim. If parties are permitted to use a Civ. R. 60(B) motion to relieve themselves from their failure to appeal in a timely manner, “judgments would never be final because a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a motion for reconsideration or a motion to vacate judgment.” (Internal citations omitted). *Ohi-Rail Corp. v. Barnett*, 7th Dist. No. 09-JE-18, 2010-Ohio-1549, ¶20. This Court has found that there must be finality and perfection in the adjudication process, but “for obvious reasons, courts have typically placed finality above perfection in the hierarchy of values.” *Knapp*, 24 Ohio St. 3d at 145. Allowing Pilkington to benefit from the appeals of other parties would make them the “windfall beneficiaries of an appellate reversal procured by other independent

parties, who have no interest in respondents' case, not a reversal in interrelated cases procured \* \* \* by the same affected party." *Federated Dep't Stores, Inc. v. Moitie*, 452 US at 400. The equities dictate that the Commission order denying Pilkington's Civ. R. 60(B) motion should be upheld to prevent Pilkington from benefitting from the hard work of others and relieving Pilkington from the fallout of its own deliberate decision.

### CONCLUSION

Pilkington has failed to demonstrate grounds for the relief it seeks. The Commission order is lawful, reasonable, and should be affirmed.

Respectfully submitted,

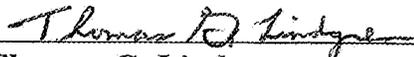
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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, upon the following parties of record, this 30<sup>th</sup> day of August, 2013.

  
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# APPENDIX

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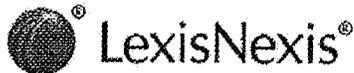
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AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., Plaintiff-Appellant, v. MIDLAND ROSS CORP., et al., Defendants-Appellees

Case No. 90-P-2202

Court of Appeals of Ohio, Eleventh Appellate District, Portage County

1991 Ohio App. LEXIS 3649

August 2, 1991

**PRIOR HISTORY:** [\*1] Character of Proceedings: Civil Appeal from the Court of Common Pleas; Case No. 82CV2071.

**DISPOSITION:** JUDGMENT: Affirmed in part; reversed and remanded in part.

**COUNSEL:** ATTY. KEVIN C. ALEXANDERSEN, Cleveland, Ohio, (For Plaintiff-Appellant).

ATTY. DANIEL W. HAMMER, ATTY. BARBARA J. ARISON, ATTY. THOMAS L. MCGINNIS, ATTY. DONALD P. SCREEN, Cleveland, Ohio, (For Defendant-Appellee Midland-Ross Corp.).

ATTY. FREDRIC E. KRAMER, Cleveland, Ohio, (For Defendant-Appellee Noe & Bryer).

**JUDGES:** Presiding Judge Donald R. Ford. Joseph E. Mahoney, J., Mahoney, J., (Edward) Ret., Sitting by assignment, concur.

**OPINION BY:** FORD

**OPINION**

*OPINION*

This is an appeal from the trial court's judgment in which appellant's motion for leave to file a second amended complaint was overruled and the court dismissed appellant's entire case against Midland as well as against Noe & Bryer.

This appeal emanates from several separate actions initiated in 1981 and 1982, all of which arose from the

sale and subsequent failure of a dryer system sold by appellee, Midland-Ross Corporation, to Chemtrol Adhesives, Inc. (Chemtrol), and a solvent recovery system [\*2] sold by appellee, Noe & Bryer to Chemtrol.

Due to the exhaustive nature of the relevant procedural history, the chain of events are set out as follows:

- In 1981, the dryer and solvent systems failed, and Chemtrol filed insurance claims with its Insurers, American Manufacturers Mutual Insurance Company (American), and Lexington Insurance Company (Lexington). Both insurers denied Chemtrol business interruption benefits. (American is the appellant in this appeal.)

- In 1981, Chemtrol filed a lawsuit against Noe & Bryer for breach of contract.

- In 1981, Chemtrol also commenced a separate suit against American and Lexington for wrongful denial of benefits. In the same action, Lexington as subrogee of Chemtrol instituted a third party complaint for indemnification against Midland.

- In 1982, American as subrogee of Chemtrol initiated a separate action against Midland and Noe & Bryer.

- In 1984, Midland moved for summary judgment against American in the action by American as subrogee of Chemtrol; Midland, as third party defendant, also moved for summary judgment against Lexington in the Chemtrol action against Lexington for wrongful denial of benefits.

- On February 25, 1985, [\*3] American amended its complaint as a matter of course, and on March 15, 1985, Noe & Bryer answered the amended complaint in American's subrogation action.

- On May 6, 1985, American filed a motion, along with a brief, for leave to file a second amended complaint.
- On June 19, 1985, in the separate breach of contract case, Chemtrol and Noe & Bryer settled their lawsuit, executed a full release, and the case was dismissed with prejudice.
- Noe & Bryer submitted an answer brief opposing American's motion for a second amended complaint, Noe & Bryer referenced the settlement with Chemtrol, attached a copy and served it on American on or about September 23, 1985, although it was not filed until October 18, 1985.
- On September 30, 1985, American submitted a supplemental brief in response to Noe & Bryer's answer.
- On November 14, 1985, the cases of *Chemtrol v. American and Lexington* (which included the third party complaint by Lexington against Midland) was consolidated with the separate suit of *American v. Midland and Noe & Bryer*.
- Prior to ruling on American's motion for a second amended complaint, the trial court held a hearing on Midland's motion for summary [\*4] judgment against American, and on March 26, 1986, entered summary judgment for Midland.
- On July 16, 1986, the court granted summary judgment for Midland against Lexington.
- In August 1986, Lexington, as subrogee in the suit Chemtrol filed, noticed its appeal to this court regarding the summary judgment order. American also filed a separate appeal from the summary judgment in favor of Midland in the case American had independently filed against Midland and Noe & Bryer on bifurcated basis.
- On September 30, 1987, this court issued separate opinions affirming the trial court's summary judgment as against both American and Lexington.
- Subsequently, American and Lexington noticed separate appeals to the Ohio Supreme Court.
- In December 1987, American filed a notice of voluntary dismissal of appeal in the Supreme Court.
- Lexington proceeded with its appeal. The Supreme Court rendered a decision which is reported as *Chemtrol Adhesives, Inc. v. American Manufacturer Mutual Insurance Co.* (1989), 42 Ohio St. 3d 40. The court af-

firmed in part, but remanded to the trial court for the purposes of determining "exactly which damages are excluded" by the [\*5] Chemtrol/Midland-Ross contract, and whether *Lexington* provided Midland Ross timely notice of its alleged breach of contract.

- On resubmission to the trial court, all parties provided the court with their pending claims and the status of their respective cases. It appears that during the appeals pursued by American and Lexington, the *American v. Noe & Bryer* case was not further advanced during that time frame.

- Subsequently, on May 9, 1990, the trial court finally addressed American's motion regarding the second amended complaint which was filed in May 1985.

- In its order, the trial court referenced the fact that the Chemtrol suit against Noe & Bryer had been settled in 1985, and dismissed with prejudice, and that all claims Chemtrol had or has against Noe & Bryer were extinguished.

- Additionally, the court noted that all of American's claims in the second amended complaint were barred due to the foregoing settlement and the summary judgment order of March 1986 against American. The court then dismissed American's suit in its entirety.

Appellant appeals raising the following assignments of error:

"1. The trial court erred to the prejudice of the appellant [\*6] by dismissing appellant's case.

"2. The trial court erred to the prejudice of the appellant in not granting appellant's motion for leave to file its second amended complaint.

"3. The trial court erred to the prejudice of the appellant when it dismissed all of appellant's claims on *res judicata* grounds, including its claims against Midland-Ross."

American presents three assignments of error which overlap. Essentially, American asserts two arguments. First, American claims that the court erred in overruling its motion to file a second amended complaint, and in dismissing its entire case against Midland. Second, American contends that the court erred in overruling its motion to file a second amended complaint and in dismissing its case against Noe & Bryer on the basis of *res judicata*. Therefore, this case will be addressed by analyzing the two principal, foregoing arguments in relationship to the three assignments of error in a consolidated manner.

In the *American v. Midland Ross* suit, the trial court, in 1986, entered summary judgment in favor of Midland. Also, as previously indicated, the trial court granted

Midland's summary judgment motion against the other insurer, [\*7] Lexington, which was also a subrogee of Chemtrol.

In 1986, both American and Lexington filed separate appeals to this court, assigning as error the trial court's summary judgment order assessed against each. This court affirmed the two trial court orders and rendered separate opinions as to American and Lexington. Again, both parties noticed separate appeals to the Ohio Supreme Court; however, incipiently, American voluntarily dismissed its appeal, while Lexington pursued its legal recourse.

Since American did not pursue its appeal through the Ohio Supreme Court on the trial court's summary judgment order, as did Lexington, the doctrine of the law of the case applies to that order since it was affirmed by this court on appeal.

"There can be no question that where a judgment becomes final in the course of litigation, it becomes *res judicata* or the law of the case as to all questions therein decided. Where a second action or a retrial of an action is predicated on the same cause of action and is between the same parties as the first action or first trial of an action, a final judgment of an appellate court in the former action or the first trial of an action is conclusive in the [\*8] second action as to every issue which was or might have been presented and determined in the former instance." (Citations omitted.) *Burton, Inc. v. Durkee* (1954), 162 Ohio St. 433, 438.

See, also, *Hawley v. Ritley* (1988), 35 Ohio St. 3d 157; *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1.

All of the allegations in American's original complaint against Midland were disposed of by summary judgment at the appellate level in this court, in Midland's favor. Thus, no further action by way of a second amended complaint can be maintained by American against Midland in the underlying facts here. Accordingly, the trial court properly overruled American's motion to file a second amended complaint to the extent that it applied to Midland.

In oral argument, American conceded that the law of the case controls the action against Midland. However, in its brief, American implied that its action against Midland should not have been dismissed, but rather addressed in conjunction with the Lexington remand, because of the substantially similar claims between the case of *American v. Midland* and that of *Lexington v. Midland*. [\*9] In light of the prevailing case law on this question, we find it necessary to consider this issue to assure a complete and fair disposition of this matter.

Essentially, the question before this court is whether American can claim success from the results in the Lexington appeal in the Ohio Supreme Court, in spite of the fact that American voluntarily dismissed its own appeal.

This court does not take umbrage with American's assertions that the two cases are quite similar, and that they were originally consolidated in the trial court for that specific reason. However, in reviewing the very question that American's argument impliedly raises, the Ohio Supreme Court duly considered and reviewed a multitude of cases from various jurisdictions presenting similar factual postures to the one at bar, and adopted the prevailing view that "where one party appeals from a judgment, a reversal as to him will not justify a reversal against other non-appealing parties unless the respective rights of the appealing parties are so interwoven or dependent on each other as to require a reversal on the whole judgment where a part thereof is reversed." *Wigton v. Lavender* (1984), 9 Ohio St. 3d 40, [\*10] syllabus.

In *Wigton*, the court considered several factors to discern whether or not the parties and their claims were interwoven or dependent. The court assessed whether the party which appealed had any other co-party's interest in mind or was solely looking to have its own judgment reversed; whether there were any contingent or conflicting interests between the appellant there and those that did not appeal; whether there were separate and distinct subrogation rights and properties between appellant and the other non-appealing parties; and whether there were any contribution or indemnification claims at issue. The court determined all of the questions in the negative and consequently concluded that neither the parties nor their respective claims were interwoven or dependent upon each other.

Likewise, in the case at bar, Lexington's appeal was a separate case from that involving American. Lexington had no interest in the Supreme Court appeal but to have its own judgment reversed. This is intimated by the fact that throughout the entire proceedings Lexington filed separate notices of appeal, and continued its appeal in the Supreme Court while American dismissed. Both parties had [\*11] separate insurance policies with Chemtrol, and were subrogated to differing amounts. American was not seeking indemnification or contribution from Lexington, nor Lexington from American.

Additionally, since the Supreme Court's remand in the Lexington appeal was very precise and narrow, and focused only on Lexington's rights, it makes it even more apparent that Lexington's and American's interests are readily distinct. First, the Supreme Court directed the trial court to ascertain exactly which damages are excluded under the Chemtrol/Midland-Ross contract. Ob-

viously, this determination can be made without American remaining as a party to the suit, since the contract itself must answer this question. Second, the Supreme Court ordered the trial court to determine whether Lexington gave Midland timely and adequate notice of its breach of contract. Clearly, this would be a highly individualized factual determination by the court, which would involve only the relevant surrounding facts between Lexington's employees and Midland's.

Having determined that the cases are not so interwoven or dependent, this court concludes that American cannot "reap where they have not sown," and therefore has [\*12] no standing in the Lexington-Midland remand per *Wigton, supra*. Accordingly, this court's affirmation of the trial court's originally entered judgment, which as a result of American's voluntary dismissal in the Supreme Court, became the final controlling order of judgment.

Therefore, the trial court's conclusion that American had no viable claim against Midland in this litigation was proper. The court's dismissal of American's case as against Midland was proper. Thus, the argument is without merit.

The second case involved here is between American and Noe & Bryer. While the foregoing *American v. Midland* and *Lexington v. Midland* cases were being appealed through the courts, the American action against Noe & Bryer was apparently held in abeyance, since no further proceedings during the appeal process are indicated in the record.

Once the Lexington appeal was remanded by the Supreme Court, all of the parties, i.e., American, Midland, Noe & Bryer, and Lexington provided the trial court with the status of the pending claims of their respective cases. On May 9, 1990, the trial court addressed American's motion to file a second complaint which was filed [\*13] in May 1985. The trial court noted that another separate and independent suit between Chemtrol and Noe & Bryer had been settled and was dismissed with prejudice in 1985, and that all claims Chemtrol had or has against Noe & Bryer were extinguished. The court then determined that all of American's claims in the second amended complaint were barred due to the foregoing settlement between Chemtrol and Noe & Bryer, and thus, overruled American's motion to amend the complaint and dismissed its case against Noe & Bryer.

Initially, this court observes that the record here on appeal does not readily disclose that the independent suit between Chemtrol and Noe & Bryer was ever properly certified in the record as evidence in the case at bar. During the pleading stage in a supplemental answer to an amended complaint, Noe & Bryer noted the *Chemtrol v. Noe & Bryer* case and attached a copy of the settlement.

However, no proof of the judgment dismissing the case with prejudice was ever entered into evidence as part of the record.

Thus, the court apparently took judicial notice of the referenced settlement since it cited the case and settlement for res judicata purposes when dismissing the [\*14] instant case between American and Noe & Bryer.

As a general rule, the defense of res judicata cannot be determined from the pleadings alone, but must be proved. The burden of establishing a former adjudication is upon the party asserting res judicata. *First National Bank v. Berkshire Life Insurance Co. (1964)*, 176 Ohio St. 395. Accordingly, where res judicata is raised by the pleadings but neither a record of the prior judgment, nor the pleadings are offered in evidence, there is no probative evidence from which a determination of res judicata can be made by the trial court. *The Personal Service Insurance Co. v. Johnson* (June 22, 1984), Trumbull App. No. 3347, unreported, citing *Fawcett v. Miller (1961)*, 85 Ohio L. Abs. 443, at 448.

This court is likewise directed to the separate *Chemtrol v. Noe & Bryer* settlement and release; however, no proof of the case or its disposition is included in the record on appeal before this court. Without the record in the particular trial court in the referenced case, there is no factual basis upon which to rest a conclusion that the issues there were the same involved in the current action, [\*15] and that there was a fair opportunity available for American to litigate those issues. Cf. *Johnson v. Linder (1984)*, 14 Ohio App. 3d 412. (Application of res judicata in summary judgment exercise.)

Parenthetically, it was brought to this court's attention during oral argument that the *Chemtrol v. Noe & Bryer* suit actually involved a separate and distinct corporate entity of Noe & Bryer rather than the division of Noe & Bryer that is here on appeal. We concede that this information is not a part of our record, but does serve to reinforce the propriety and appropriateness of causing such relevant information to become part of the disputed record to enable administering courts to reach more valid conclusions that reflect the reality of litigants' positions.

Thus, such an observation underscores the necessity for submitting in evidence the records and judgments that are prerequisites for res judicata determinations. See *Linder, supra*.

Moreover, even if the *Chemtrol v. Noe & Bryer* action had been properly submitted in evidence, there still remains the question of whether or not the settlement could have operated as a contractual [\*16] bar to the claims of American against Noe & Bryer.

American provided Noe & Bryer's notice of its subrogation rights with Chemtrol on three separate occa-

sions. American specifically indicated its interest as subrogee in its original complaint against Noe & Bryer, again in its amended complaint, and also in its motion to file a second amended complaint. All of the pleadings were noticed to Noe & Bryer prior to the settlement and execution of a release between Chemtrol and Noe & Bryer.

A number of cases when construed together, exudes the view that when a tortfeasor has knowledge of the fact of subrogation, he has a duty to request joinder of the causes of action. Without knowledge, however, the general release is a defense in the separate action by the insurer. See, *Hoosier Casualty Co. v. Davis* (1961), 172 Ohio St. 5; *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St. 2d 87; *Motorist Mutual Ins. Co. v. Gerson* (1960), 113 Ohio App. 321.

Although research has failed to disclose a case directly on point, a somewhat analogous situation occurred in *Nationwide Ins. Co. v. Steigerwalt* (1970), 21 Ohio St. 2d 87. [\*17] In that case, the tortfeasor defended separate property damage suits filed in the same court by the insured and the insurer (based upon subrogation). He failed to move for joinder. In the action by the insured, the defendant-tortfeasor won a verdict. He asserted the verdict as res judicata (collateral estoppel) against the insurer. The trial court granted summary judgment on the pleadings in favor of the defendant tortfeasor, which was affirmed by the court of appeals. The Supreme Court, however, reversed on the ground that the defendant tortfeasor waived his right to assert estoppel by failure to request a joinder. *Steigerwalt, supra*.

Therefore, since Noe & Bryer was thrice put on notice of American's subrogation interests, and failed to join American, it appears that the dismissal with prejudice of the *Chemtrol v. Noe & Bryer* case, without the consent or participation of American, and with knowledge of American's subrogation claims, would not operate as res judicata to the claims in the *American v. Noe & Bryer* lawsuit per *Steigerwalt, supra*.

Thus, American's assertion that the trial court erred in dismissing its case against [\*18] Noe & Bryer on the grounds of res judicata, is well taken.

Similarly, American's second contention regarding Noe & Bryer, that the trial court erred in overruling the motion to file a second amended complaint, is likewise well taken.

It is this court's observation that the trial court's ruling on the foregoing motion was predicated on its finding

that the *Chemtrol v. Noe & Bryer* suit operated as a contractual bar to any further litigation between American and Noe & Bryer. Therefore, it appears that based on the foregoing perceived concept, the trial court found it unnecessary to consider the merits of the motion in accordance with *Civ. R. 15(a)*, which provided:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. *Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.*" (Emphasis added.)

Thus, it [\*19] is clear that "the mandate of *Civ. R. 15(A)*, as to amendments requiring leave of court, is that leave 'shall be freely given when justice so requires.'" *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161. The *Peterson* court further held that:

"Although the grant or denial of leave to amend a pleading is discretionary, where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion." *Id. at 175*.

Moreover, ample reason for refusal to grant a motion to amend should be shown, and actual prejudice to an opposing party is the most important factor to be considered, in the granting or withholding of leave to amend. Timeliness is another factor to consider, but delay itself should not operate to preclude an amendment.

Consequently, this court discerns that since the *Chemtrol v. Noe & Bryer* action does not bar further litigation of claims by American against Noe & Bryer, it was error for the trial court [\*20] to overrule the motion to amend without first assessing the merits under *Civ. R. 15(A)*, and the foregoing prevailing case precedent.

Accordingly, as to the suit between *American v. Noe & Bryer*, the judgment of the trial court is reversed and remanded for further proceedings, including but not limited to the motion to file a second amended complaint. Additionally, the trial court's judgment is affirmed as to the suit involving *American v. Midland*.

#### **4903.10 Application for rehearing.**

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original

order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

**4903.13 Reversal of final order - notice of appeal.**

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

**4903.19 Disposition of moneys charged in excess.**

Upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all moneys which the public utility or railroad has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled to them, in such manner and through such methods of distribution as are prescribed by the court. If any such moneys are not claimed by the corporations or persons entitled to them within one year from the final decision of the supreme court, the trustees appointed by the court shall give notice to such corporations or persons by publication, once a week for two consecutive weeks, in a newspaper of general circulation published in Columbus, and in such other newspapers as are designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund. The court may make such order with respect to the compensation of the trustee as it deems proper.

Effective Date: 10-07-1977

**4905.26 Complaints as to service.**

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Amended by 128th General Assembly File No.43, SB 162, §1, eff. 9/13/2010.

Effective Date: 09-29-1997