ORIGINAL

In the Supreme Court of Ohio

CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT,	:	Supreme Court Case No. 2013-1177
Appellee,	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
vs.	:	
GATOR MILFORD, LLC,	:	
Appellant.	:	Court of Appeals Case No.: CA2013-02-010

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STATEMENT OF THE CASE

In this certified conflict case, the Court is called upon to resolve a threshold question concerning appellate jurisdiction. App. R. 4(A) generally gives a party to a civil action thirty days to appeal unless the clerk does not serve the final judgment entry within three days as required by Civ. R. 58(B). In those cases, the time for appeal is tolled pending service. Neither the Rules of Appellate Procedure nor the Rules of Civil Procedure speak to whether actual knowledge or actual receipt of a final judgment entry is an exception to the requirement that service of a final judgment entry must be made before a party's time to appeal begins to run.

Nevertheless, Ohio's courts of appeals are divided on this issue. Some appellate districts have held that a party's actual knowledge has no bearing on the service analysis required by the Rules. However, the Twelfth Appellate District, below, concluded that a party's time for appeal begins to run when that party has actual knowledge of a judgment entry, even if the clerk of courts has not served the entry or made a notation of service of the entry on the docket.

By adopting an actual knowledge exception, the Twelfth Appellate District has departed from the clear language of the Appellate and Civil Rules. The Rules are unambiguous in their insistence that the time to appeal should begin upon service of the final judgment entry. Shifting the inquiry from "service" to "actual knowledge", as

the court below has done, will cause endless uncertainty about whether future civil appeals are timely.

This Court should therefore reverse the judgment of the court of appeals below, answer the certified conflict in the negative, and hold that in a civil case in which the final appealable order is not served within the three day period prescribed by Civ. R. 58(B), the time for filing an appeal under App. R. 4(A) only begins to run upon service of the final judgment entry and a notation of service on the docket. A party's actual knowledge of a final judgment entry is not an exception to the requirement of service.

STATEMENT OF FACTS

This is an appropriation action that culminated in a nearly two week jury trial. On October 4, 2012, the jury awarded Appellant a total of $366,384. Verdict Form, T.d. 221. On October 16, Appellant filed a motion for an award of attorney fees under Chapter 163 of the Revised Code. T.d. 224. Thereafter, on October 26, the Court entered a judgment entry on the verdict (T.d. 233), but this entry did not resolve Appellant's outstanding motion for attorney's fees. Eighteen days later, on November 13, 2012, Appellant filed its first notice of appeal.

The court of appeals *sua sponte* dismissed the first appeal only days after its filing for lack of a final appealable order. *Clermont County Trans. Improvement Dist. v. Gator Milford, LLC*, 12th Dist. Clermont No. CA2012-11-081 (Nov. 26, 2012) (Appendix A-23). The following day, the trial court then issued a decision and entry denying Appellant's

motion for attorney's fees. T.d. 243. The trial court's decision and entry on the motion for attorney's fees: (i) did not contain language providing that it was a final appealable order; and (ii) did not contain an instruction to the clerk of courts to serve the entry in accordance with Civ. R. 58. Instead, the end of the entry contained a statement from the trial court's bailiff that "copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 27th day of November 2012 to all counsel of record and unrepresented parties." T.d. 243, p. 10. Because there was no instruction to the clerk of courts to serve the entry, the clerk of courts did not serve the entry and did not note any service of the entry on the appearance docket. Rather, the clerk just paraphrased the bailiff's language from the end of the entry that a copy of the entry was "distributed to all parties and/or counsel of record." *See* Entry, T.d. 243.

At the time of the trial court's decision on the motion for attorney's fees, other motions (including a motion for reconsideration (T.d. 235) and a motion for distribution of award (T.d. 242)) still remained pending. Because of this, Appellant filed a motion with the trial court requesting that a final appealable order be prepared. T.d. 247. When the court took no action on that motion, Appellant's counsel sent a letter to the trial court asking that the entry be served by the clerk of courts. T.d. 249. At a January 18, 2013 hearing on one of the outstanding motions, the trial court expressly admitted on the record that it had not instructed the clerk of courts to serve the November 27, 2012 entry in accordance with Civ. R. 58. Transcript of Proceedings on 1/18/2013, pp.

12-13. As the trial court stated, Rule "58(D) [sic] requires that the Court direct the clerk to serve notice of that judgment within three days and to note that on the appearance docket. I don't believe that has been done." *Id.; see also Id.* at p. 13 ("you were served as a practical matter by my office, but you were not served by the clerk, which is what's required.").

Then, on January 30, 2013, after deciding other outstanding motions, the trial court finally ordered the clerk of courts to serve the entry that had been filed on November 27, 2012. (Unnumbered Trial Docket Notation dated Jan. 30, 2013, Appendix A-4). Only five days later, Appellant filed its second notice of appeal, this time appealing from the entry dated November 27, 2012 that was not served until January 30, 2013. T.d. 252.

Appellee moved to dismiss the appeal, claiming that it was tardily filed. T.d. 259. The court of appeals granted that motion, finding that Appellant's appeal was untimely because "it was not timely filed within 30 days of the trial court's November 27, 2012 decision/entry." T.d. 277, p. 4. This prompted Appellant to file a motion to certify a conflict (T.d. 280) which the court of appeals granted (T.d. 284). The Twelfth Appellate District certified the conflict as:

> Whether actual knowledge and receipt of a judgment entry that is a final appealable order begins the 30-day time period during which to file an appeal, or does the 30-day period only begin following service and notation of service on the docket by the clerk of courts?

Having determined that a conflict does exist, the matter is now before this Court.

STANDARD OF REVIEW

The court of appeals below concluded that it was without jurisdiction to hear appellant's appeal. The determination of an appellate court's jurisdiction is a question of law, and this Court reviews issues of law *de novo*. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶9 (citing *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶23).

ARGUMENT

PROPOSITION OF LAW:

> **In a civil case in which the final appealable order is not served within the three day period prescribed by Civ. R. 58(B), the time for filing an appeal under App. R. 4(A) only begins to run upon the clerk's service of the final judgment entry and a notation of service on the docket.**

A. SUMMARY OF THE ARGUMENT

The court of appeals below has added an unwritten exception to App. R. 4(A). It held that an appellant's actual knowledge of a judgment entry can defeat the tolling provision contained in App. R. 4(A) for instances in which the clerk of courts has not timely served notice of the judgment. While the text of App. R. 4(A) is clear that the time for appeal cannot run if the clerk has not served notice of the judgment, the court below has held that the tolling provision of App. R. 4(A) is inapplicable in instances in which the appellant had actual knowledge of the judgment prior to its service. As explained below, such a holding must be reversed both because of the plain language of the Rules and because of the drastic consequences that it will elicit.

B. CIV. R. 58(B), APP. R. 4(A), AND THEIR REQUIREMENTS

Civ. R. 58(B) governs what the court and the clerk must do in preparing a final judgment entry. The rule provides, in pertinent part:

> When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of service in the appearance docket, the service is complete.

Thus, at its core, Civ. R. 58(B) requires three separate things with regard to a final entry: (1) an endorsement by the court to the clerk to serve the parties; (2) service by the clerk of courts of the judgment entry within three days; and (3) a notation by the clerk of courts in the docket that service is complete.

App. R. 4(A) then supplements Civ. R. 58(B). App. R. 4(A) specifically addresses the contingency that a court or clerk might not follow the language of Civ. R. 58(B), and it governs how that noncompliance would affect the time for filing an appeal. That rule states:

> A party shall file a notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

When taken together, these two Rules expressly provide the construct for determining the timeliness of an appeal in Ohio. In a typical civil case in which the trial

court and clerk follow Civ. R. 58(B), an appellant would have thirty days from the date of judgment to file her appeal. However, if service does not occur timely despite the requirements of Civ. R. 58(B), App. R. 4(A) tolls the time for appeal and gives an appellant thirty days from service of the notice of judgment to file her appeal. *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 468, 2008-Ohio-1444, 844 N.E.2d 1062 ("App. R. 4(A) tolls the time period for filing a notice of appeal if service is not made within the three-day period of Civ. R. 58(B).")(internal citations omitted).

C. IN THIS CASE, THE RECORD CONCLUSIVELY ESTABLISHES THAT SERVICE DID NOT OCCUR TIMELY, BUT THAT APPELLANT DID HAVE ACTUAL KNOWLEDGE OF THE JUDGMENT ENTRY PRIOR TO ITS SERVICE.

The record in this case is clear that service of the November 27, 2012 final appealable order did not occur until January 30, 2013. The meaning of the term "service" as used in the context of these two rules is specifically given by Civ. R. 58(B). That rule provides that "service is complete" "upon serving the notice [in a manner prescribed by Civ. R. 5(B)] and notation of service in the appearance docket."

This preceding sentence from Civ. R. 58(B) is inartfully drafted in the passive voice and therefore does not specify the subject to its predicate. However, under the rule of *noscitur a sociis*, a writing should be read as a whole and the meaning of a word or clause is controlled by those words or clauses around it. *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Authority*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997). Thus, when read as a whole, Civ. R. 58(B) is clear that service (i.e. (a) serving the

notice of judgment and (b) noting the service in the appearance docket) must be done by the clerk of courts. *See* Civ. R. 58(B) ("Within three days of entering the judgment upon the journal, **the clerk shall** serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket")(emphasis supplied).

With this understanding of the term "service", the record in this case is clear that service did not occur until January 30, 2013. The trial court expressly stated on the record on January 18, 2013 that "you were not served by the clerk, which is what's required." Transcript of Proceedings on 1/18/2013, p. 13. And the Appellee does not dispute that the clerk of courts did not serve the parties until January. *See* Appellee's Reply Memorandum in Support of its Motion to Dismiss, T.d. 261, p. 2.

In addition, the record also reveals that "service" of the November 27, 2012 judgment entry could not have occurred until January 30, 2013 because the clerk did not note that it served notice of judgment until that time. The notation in the docket from November 27, 2012 is not in the form that accompanies every other instance of service having occurred in the case, including the notation that accompanied the actual service of the judgment entry on January 30, 2013. This is best illustrated visually, as shown in **Appendix A-5** and **Appendix A-6**. Appendix A-5 shows the page of the docket statement on November 27, 2012. There, the docket simply reads "[c]opy distributed to all parties and/or counsel of record." In contrast, the page of the docket statement attached as Appendix A-6 shows how the Clermont County Clerk of Courts actually

notes service in the docket. That page, from the January 30, 2013 notation of service identifies: the document being served; the date of that document; the names and addresses of everyone being served; the method of service used; a tracking number; and the cost of service. And this is the precise form of the notation used for every other instance of service in this case as well.

"An adequate notation of service in the appearance docket should indicate (1) that the clerk served the parties with notice of the final judgment and the date that judgment was journalized, (2) the date of service, (3) the names and addresses of the parties served, and (4) the method of Civ. R. 5 service used." *Carter-Jones Lumber Co. v. Willard,* 2006-Ohio-1980, ¶12 (6th Dist.). In this case, the only adequate notation of service on the appearance docket was the docket entry from January 30, 2013. Hence it was only at that time that "service" was completed.

But just as the record is unequivocal that service did not occur until January 30, 2013, so too is the record clear that Appellant had actual knowledge of the November 27, 2012 judgment entry prior to its service on January 30, 2013. Appellant readily acknowledges that it filed a motion asking the trial court to direct the clerk to serve the order. T.d. 247. Appellant obviously could have only filed such a motion if it had knowledge that the order existed. Nevertheless, it has consistently been Appellant's position that actual knowledge has absolutely no bearing on the analysis required by

Civ. R. 58(B) and App. R. 4(A) because neither rule references a party's subjective knowledge.

D. THE MAJORITY OF OHIO'S DECISIONS HAVE CONCLUDED THAT ACTUAL KNOWLEDGE OF A JUDGMENT ENTRY IS NOT AN EXCEPTION TO THE REQUIREMENT OF THAT ENTRY'S SERVICE.

When the Twelfth Appellate District, below, certified a conflict in this case, it cited *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.*, 131 Ohio App.3d 734, 723 N.E.2d 633 (10th Dist. 1998) as the case with which its decision was in direct conflict. In the *Whitehall* opinion, the Tenth Appellate District began its decision by noting that "[s]ince appellants did not file their notice of appeal from the April 10, 1996 order until April 1, 1998, we must first address the issue of whether the appeal from the agreed permanent injunction is timely." *Id.*, 131 Ohio App.3d at 740. The appellants in that case argued that the time for appeal had been tolled because the trial court did not comply with Civ. R. 58(B): the court did not instruct the clerk to serve the entry, and the clerk did not note service in the appearance docket. *Id.* at 741. In response, the appellee argued that the appellants "admitted receiving the document." *Id.* However, the court was unpersuaded and held that "[a]ppellants' actual knowledge of the agreed permanent injunction is insufficient to begin the running of the time for appeal in the absence of formal notice in compliance with Civ. R. 58(B)." *Id.* (internal citations omitted). That court continued:

> The parties may have received copies of the judgment but receiving a copy of the judgment is not enough. Service of both the notice of

> the judgment and its date of entry upon the journal is required. Even then, the time for appeal does not start to run until the clerk makes a notation of the service in the appearance docket. Civ. R. 58(B). Here, the clerk was not directed to give the required notice or make the necessary notation in the appearance docket. Because of this, the time for appeal of the April 10, 1996 agreed permanent injunction ***never began to run.***

Id. at 741 (bold and italics in original); *Accord Beltz v. Beltz*, 2006-Ohio-1144, ¶¶74-76 (5th Dist.); *In re Elliott*, 2004-Ohio-2770, ¶13 (4th Dist.). Indeed, this is the same rationale advocated by the Appellant in the case now before this Court, and this is the same rationale that has been adopted in numerous appellate decisions.

In *State ex rel. Delmonte v. Vill. of Woodmere*, 2004-Ohio-2340 (8th Dist.), the Eighth Appellate District began its opinion with a discussion of whether the notice of appeal in that case was timely filed. In its analysis, that court concluded that the time for appeal does not begin to run until "the clerk has served the parties notice of the entry and made the *appropriate notation in the appearance docket*". *Id.* at ¶3 (italics in original) (citing *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 86, 523 N.E.2d 851 (1988) and *DeFini v. Broadview Hts.*, 76 Ohio App.3d 209, 601 N.E.2d 199 (8th Dist. 1991)).

In *Defini v. Broadview Hts.*, 76 Ohio App.3d 209, 601 N.E.2d 199 (8th Dist. 1991), that court offered an extensive discussion of Civ. R. 58(B). A party argued that the opposing party had reasonable notice of the final entry because the docket had been stamped "NOTICE ISSUED". *Id.*, 76 Ohio App.3d at 213. However, the court's decision emphasized that service is a *sine qua non* under Civ. R. 58(B). "Where a notice is not first

served on the parties, a thousand notations on the case docket is insufficient to satisfy the *Atkinson* requirement" with respect to Civ. R. 58(B). *Id; Accord JP Morgan Chase Bank N.A. v. Brown,* 2008-Ohio-200, ¶ 84 (2d Dist.)) ("It is the service of notice, and adequate proof thereof, and not actual notice that is required by Civ. R. 58(B).")(internal citation omitted).

Similarly, in *Kertes Enterprises, Inc. v. Planning Zoning Comm.*, 71 Ohio App.3d 151, 593 N.E.2d 306 (8th Dist. 1990), the court *sua sponte* ordered the parties to address at oral argument the court's concerns about whether the appeal was timely filed. There, the record lacked a notice in the docket from the clerk of courts indicating that the final entry was served. *Id.*, 71 Ohio App.3d at 152. Even the trial court in that case – like the trial court in the case *sub judice* – acknowledged the clerk's omission. *Id.* Because of this, the appellate court concluded that dismissing the appeal "absent notice of service * * * would deny appellant its right to appeal, without due process of law." *Id.*

Finally, the court in *Zuk v. Campbell*, 12th Dist. Clermont No. CA94-03-018, 1994 Ohio App. LEXIS 6085 (1994) also confronted this issue. In *Zuk*, the court noted that the judgment entry being appealed from had a certificate of service indicating that a copy was mailed to the appellant, "however, the trial court never endorsed upon its * * * judgment entry the required direction to the clerk to serve upon all parties notice of judgment and its date of entry upon the journal as mandated by Civ. R. 58(B)." *Id.* at *6. Because of this defect, this court reasoned that "even if appellants received copies of the

judgment, which they claim they did not, according to App. R. 4(A) and Civ. R. 58(B), the time for appeal does not start to run until the clerk makes a notation of the service on the appearance docket." *Id.*

Appellee has argued below that transmission of the entry by the trial court's bailiff – not service by the clerk of courts – was sufficient to overcome the tolling provision of App. R. 4(A). However, as shown above, it is not. *See also Huntington Nat'l Bank v. Zeune,* 2009-Ohio-3482, ¶11 (10th Dist.)("However, if the **clerk** fails to timely serve the parties, then App. R. 4(A) tolls the time period for filing a notice of appeal until the **clerk** accomplishes service.")(emphasis added); *Ocwen Loan Servicing, LLC v. Prater,* 2012-Ohio-4879, ¶5 (3d Dist.)(same).

E. THE DECISION BELOW ESTABLISHING AN ACTUAL KNOWLEDGE EXCEPTION TO THE REQUIREMENT OF SERVICE OF A FINAL JUDGMENT ENTRY.

The Twelfth Appellate District below characterized Appellant's argument that actual service is a precondition to the running of a party's time for appeal as "elevat[ing] form over substance." *Clermont County Trans. Improvement Dist. v. Gator Milford, LLC,* 12th Dist. Clermont No. CA2013-02-010 at *4 (May 15, 2013). "Due process does not require service of a document that has been previously provided," wrote the court below, without a direct citation in support of this broad assertion. *Id.*

In support of its argument for dismissal of the appeal, Appellee has repeatedly cited *State ex rel. Hughes v. Celeste,* 67 Ohio St.3d 429, 619 N.E.2d 412 (1993), arguing that

Hughes created the actual knowledge exception to the tolling provision of App. R. 4(A) that Appellee advocates. The Twelfth Appellate District below was apparently convinced by this argument, and analogized the present case to *Hughes*. In actuality, *Hughes* is not the panacea that Appellee would suggest, and *Hughes* does not control in this case.

The underlying facts of *Hughes* could not be more dissimilar than those in this case. *Hughes* was a writ of mandamus case with incredibly unique (and politically-charged) facts. A federally-convicted felon sued the Governor of Ohio in the hopes of receiving a full pardon. *Hughes*, 67 Ohio St.3d at 429. In contrast, this appeal arises in the normal course following a civil jury trial.

The purported service of the order being appealed from in *Hughes* also drastically differed from this case: *Hughes* involved personal service by the appellant's attorney upon the Ohio Attorney General; this case involves a transmission of a courtesy copy by a trial court's bailiff.

Also of particular importance for *Hughes* is the fact that Justice Douglas wrote a separate concurrence in that case to specifically "make the point that the discussion of the majority of * * * Civ. R. 5(B) and 58(B) is neither necessary nor appropriate and is, at best, confusing." *Hughes*, 67 Ohio St.3d at 432 (Douglas, J, concurring). Clearly, Justice Douglas understood that this opinion from that factually unique case could be used to misconstrue the plain language of the Civil Rules.

And the deviation from the plain language of the Civil Rules – a deviation that was forecast 20 years ago by Justice Douglas – is precisely what has occurred in this case. The court of appeals has used this authority to conjure an actual knowledge exception to the plain language of the Rules that requires service of a final judgment entry.

F. OTHER JURISDICTIONS AGREE THAT THE CLERK OF COURTS MUST SERVE A FINAL JUDGMENT AND NOTE THAT SERVICE IN THE DOCKET BEFORE A PARTY'S TIME FOR APPEAL BEGINS TO RUN.

Like Ohio, Louisiana requires that "notice of the signing of a final judgment...shall be mailed by the clerk of court of the parish where the case was tried to the counsel for each party..." La. Code Civ. Proc. Ann., Art. 1913. And Louisiana cases have held that the time for appeal is triggered by actual service. *Johnson v. East Carroll Detention Ctr.*, 658 So.2d 724, 727 (La. Ct. App. 1995) (citing *Haywood v. Salter*, 21 So.2d 1190 (La. Ct. App. 1982)). Thus, in Louisiana, actual knowledge of a final judgment, absent the Clerk's entry of such judgment, does not cause the time for appeal to begin to run. *Id.* (citing *Draper v. Draper*, 54 So.2d 79 (La. Ct. App. 1989))("Any actual knowledge of the signing of the judgment outside the record and absent compliance with the mailing or service requirement is not sufficient to cause the new trial and appeal delays to commence.").

Similarly, Rule 77.04 of the Kentucky Rules of Civil Procedure requires the clerk to serve a notice of the final judgment, just as in Ohio. After the clerk serves notice of

the judgment, "the clerk shall make a note in the case docket of the service...and the notation shall show the date of service." Ky. Civ. R. 77.04(2). The Court of Appeals for Kentucky clarified the notation requirement, deciding that "the time for filing a notice of appeal is triggered not by service but by the date of the clerk's notation on the docket of the service of entry. That date is the date of entry for the purposes of fixing the running of time for appeal." *Fox v. House*, 912 S.W.2d 450 (Ky. Ct. App. 1995). Thus, as with Ohio, Kentucky's time for appeal cannot begin to run until the clerk makes an appropriate notation of service on the docket.

In light of this, it is clear that at least two other jurisdictions have held that a party's time for appeal must be determined by reference to actions of the clerk of courts, and not by reference to a party's knowledge concerning, or receipt of, a judgment entry.

G. POLICY CONSIDERATIONS WEIGH AGAINST ADOPTING AN ACTUAL KNOWLEDGE EXCEPTION TO CIV. R. 58(B) AND APP. R. 4(A).

While nonbinding in nature, considerations of precedent and policy may guide courts in determining the best possible interpretation of a statute or rule. *See, e.g.*, Ronald Dworkin, *Law's Empire*, 211 (1986); *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 229-30, 2010-Ohio-6280, 943 N.E.2d 522; *Marshall v. Ortega*, 87 Ohio St.3d 522, 524-25, 721 N.E.2d 1033 (2000). In this case, the best construction of Civ. R. 58(B) and App. R. 4(A) is one that is based on the Rule's plain language – not one that adds to the Rule an unwritten exception about a party having actual knowledge that an unserved final order exists.

It is only this construction of these two Rules that offers the certainty required for this crucial of an issue. For example, if a party's actual knowledge of an unserved final order begins the running of the party's time for appeal, then every civil appeal whose final order was not served within the three day window prescribed by Civ. R. 58(B) will be scrutinized about its timeliness. By having a requirement that service be noted in the appearance docket, the Rules provide an objective and irrefutable measure for the timeliness of civil appeals. Any party can quickly review the appearance docket and determine the date on which the 30-day window of App. R. 4 begins to run. In short, the requirement of service by the clerk ensures certainty.

In contrast, adopting the unwritten actual knowledge exception advanced by Appellee will force courts of appeals to routinely make factual determinations about the subjective knowledge of an appellant. Those types of factual determinations are ill-suited for the courts of appeals, and they will inevitably lead to protracted litigation with unpredictable outcomes.

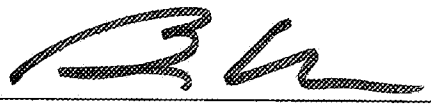
This Court's preference for objective certainty permeates Ohio's jurisprudence. It is the same preference for certainty that causes this Court to repeatedly note that, when faced with an issue of statutory or rule interpretation, this court will first look to the plain language of the statute or rule and apply it as written if its meaning is unambiguous and definite. *See State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶9. This is because abiding by unambiguous and definite language

produces certain and predictable results. And in this case, Appellant asks this Court to do just that: to abide by the unambiguous and definite language of Civ. R. 58(B). Adhering to the plain language of Civ. R. 58(B) is the only way that will produce the predictability and certainty that is necessary for the determination of appellate jurisdiction.

CONCLUSION

The court of appeals below erred in dismissing Appellant's appeal as untimely, even though the appeal was filed within thirty days of service of the final appealable order and the notation of service on the docket by the clerk of courts. This Court should reverse the judgment of the court of appeals below, answer the certified conflict in the negative, and hold that in a civil case in which the final appealable order is not served within the three day period prescribed by Civ. R. 58(B), the time for filing an appeal under App. R. 4(A) only begins to run upon service of the final judgment entry and a notation of service on the docket. Such a decision is required to promote consistent, uniform determinations by the courts of appeals about the timeliness of civil appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Appellant's Merit Brief has been served by ordinary U.S. mail this 14th day of November, 2013 addressed to:

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APPENDIX:

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RULE 58. Entry of Judgment

(A) Preparation; entry; effect; approval.

(1) Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.

(2) Approval of a judgment entry by counsel or a party indicates that the entry correctly sets forth the verdict, decision, or determination of the court and does not waive any objection or assignment of error for appeal.

(B) Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

(C) Costs. Entry of the judgment shall not be delayed for the taxing of costs.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1989; July 1, 2012.]

Staff Note (July 1, 2012 Amendment)

Division (A) has been subdivided in order to add Civ.R. 58(A)(2) which is a restatement of Rule 7(B) of the Rules of Superintendence for the Courts of Ohio. The provision is more appropriately included within the civil rules governing the conduct of actions.

The July 1, 1997 Commentary to Sup. R. 7 stated in pertinent part:

[T]he rule was added in 1995 and is intended to address the decision of the Eighth District Court of Appeals in *Paletta v. Paletta* (1990), 68 Ohio App.3d 507. In *Paletta*, the court of appeals held that the appellant waived any objection to the judgment of the trial court when his attorney signed a proposed judgment entry and failed to file objections as required by local rule of court, notwithstanding the attorney's assertion that he did not intend to approve the entry but only to acknowledge its receipt. The 1995 amendment indicates that a party's approval of a proposed judgment entry only reflects agreement that the entry correctly sets forth the decision of the court and does not constitute a waiver of any error or objection for purposes of appeal.

RULE 4. Appeal as of Right--When Taken

(A) Time for appeal

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals

If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion

In a civil case or juvenile proceeding, if a party files any of the following, if timely and appropriate:

(a) a motion for judgment under Civ.R. 50(B);

(b) a motion for a new trial under Civ.R. 59;

(c) objections to a magistrate's decision under Civ.R 53(D)(3)(b) or Juv.R. 40(D)(3)(b);

(d) a request for findings of fact and conclusions of law under Civ.R. 52, Juv.R. 29(F)(3), Civ.R. 53(D)(3)(a)(ii), or Juv.R. 40(D)(3)(a)(ii); or

(e) a motion for attorneys' fees under R.C. 2323.42,

then the time for filing a notice of appeal from the judgment or final order in question begins to run as to all parties when the trial court enters an order resolving the last of these post-judgment filings.

If a party files a notice of appeal from an otherwise final judgment but before the trial court has resolved one or more of the filings listed in this division, then the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the post-judgment filings in question and shall stay appellate proceedings until the trial court has done so. After the trial court has ruled on the post-judgment filing on remand, any party who wishes to appeal from the trial court's orders or judgments on remand shall do so in the following manner: (i) by moving to amend a previously filed notice of appeal or cross-appeal

under App.R. 3(F), for which leave shall be granted if sought within thirty days of the entry of the last of the trial court's judgments or orders on remand and if sought after thirty days of the entry, the motion may be granted at the discretion of the appellate court; or (ii) by filing a new notice of appeal in the trial court in accordance with App.R. 3 and 4(A). In the latter case, any new appeal shall be consolidated with the original appeal under App.R. 3(B).

(3) Criminal and traffic post-judgment motions

In a criminal or traffic case, if a party files any of the following, if timely and appropriate:

(a) a motion for arrest of judgment under Crim.R. 34;

(b) a motion for a new trial under Crim.R. 33 for a reason other than newly discovered evidence; or

(c) objections to a magistrate's decision under Crim.R. 19(D)(3)(b) or Traf.R. 14; or

(d) a request for findings of fact and conclusions of law under Crim.R. 19(d)(3)(a)(ii),

then the time for filing a notice of appeal from the judgment or final order in question begins to run as to all parties when the trial court enters an order resolving the last of these post-judgment filings. A motion for a new trial under Crim.R. 33 on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds; but if made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

If a party files a notice of appeal from an otherwise final judgment but before the trial court has resolved one or more of the filings listed in (a), (b), or (c) of this division, then the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the motion in question and shall stay appellate proceedings until the trial court has done so.

After the trial court has ruled on the post-judgment filings on remand, any party who wishes to appeal from the trial court's orders or judgments on remand shall do so in the following manner: (i) by moving to amend a previously filed notice of appeal or cross-appeal under App.R. 3(F), for which leave shall be granted if sought within thirty days of the entry of the last of the trial court's judgments or orders on remand and if sought after thirty days of the entry, the motion may be granted in the discretion of the appellate court; or (ii) by filing a new notice of appeal in the trial court in accordance with App.R. 3 and 4(A). In the latter case, any new appeal shall be consolidated with the original appeal under App.R. 3(B).

(4) Appeal by prosecution

In an appeal by the prosecution under Crim. R. 12(K) or Juv. R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) 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).

(C) Premature notice of appeal

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of "entry" or "entered"

As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ. R. 58(A) or Crim. R. 32(C).

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1985; July 1, 1989; July 1, 1992; July 1, 1996; July 1, 2002; July 1, 2009; July 1, 2011; July 1, 2012; July 1, 2013.]

Staff Notes (July 1, 2013 Amendments)

The amendments to App.R. 4(B)(2)(d) and App.R. 4(B)(3)(d) clarify that a proper and timely request to the trial court for findings of fact and conclusions of law defers the running of the time to appeal in all circumstances in which the rules permit such a request. That general concept was reflected in the prior rule, but the amendments reference additional provisions of the civil, juvenile, and criminal rules that authorize parties to request findings of fact and conclusions of law.

Staff Note (July 1, 2002 Amendment)

Appellate Rule 4 Appeal as of Right—How Taken
Appellate Rule 4(B)(4) Exceptions: Appeal by prosecution

The July 1, 2002, amendment to Appellate Rule 4 corrected two errors. First, in App. R. 4(B)(4), a cross-reference was changed from Criminal Rule 12(J) to Criminal Rule 12(K), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 2001.

2010 CVH 02287 Clermont County Transportation Improvement Distvs. Gator Milford LLC

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	11/26/12	Notice of Hearing filed. Event: Hearing on Motion Date: 12/17/2012 Time: 8:30 am Judge: McBride, Jerry R Location: Court Room 204 *For Distribution of Jury Award and Notice of Deposit. Result: Case Continued 262	0.00	0.00
241	11/26/12	Fee for preparation notice and page fee	2.00	2.00
242	11/26/12	Motion of Gator Milford for Distribution of Jury Award and Notice of Deposit Filed cc judge w/order 263	5.00	5.00
243	11/27/12	Decision/Entry filed: Copy distributed to all parties and/or counsel of record 264	30.00	30.00
	11/28/12	Decision rendered The following event: Decision scheduled for 11/26/2012 at 10:00 am has been resulted as follows: Result: Decision rendered Judge: McBride, Jerry R Location: Court Room 204	0.00	0.00
244	12/03/12	Entry Overruling Motion for Reconsideration filed; 265	6.00	6.00
245	12/12/12	Defendant the Cecilian Bank's Memorandum in Opposition to Gator Milford's Motion for Distribution of Jury Award and Cross-Motion for Distribution of Jury Award, filed; 266	5.00	5.00
	12/14/12	Result of Hearing: Case Continued The following event: Hearing on Motion scheduled for 12/17/2012 at 8:30 am has been resulted as follows: Result: Case Continued Judge: McBride, Jerry R Location: Court Room 204 267	0.00	0.00
	12/17/12	Notice of Hearing filed. Event: Hearing on Motion Date: 01/18/2013 Time: 9:00 am Judge: McBride, Jerry R Location: Court Room 204 Result: Under advisement 268	0.00	0.00

2010 CVH 02287 Clermont County Transportation Improvement Distvs. Gator Milford LLC

No.	Date of	Pleadings Filed, Orders and Decrees Journal Book-Page-Nbr Ref Nbr	Amount Owed/ Amount Dismissed	Balance Due
	01/29/13	Payment issued Kevin R Feazell Esq	154,318.73	
				0.00
	01/30/13	Issue Date: 01/30/2013 Service: Decision/Entry dated 11-2712 Method: Ordinary Mail (5-10 sheets) Cost Per: $ 1.50	10.50	
				10.50

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Tracking No: R000028000

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Cincinnati, OH 45202
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In the
Supreme Court of Ohio

CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT,	:	Supreme Court Case No.
	:	13-1177
Appellee,	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
vs.	:	
GATOR MILFORD, LLC,	:	
Appellant.	:	Court of Appeals Case No.: CA2013-02-010

NOTICE OF CERTIFIED CONFLICT BY APPELLANT, GATOR MILFORD, LLC

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FILED
JUL 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

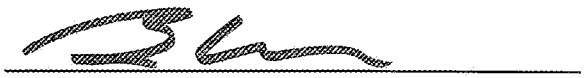
Pursuant to S. Ct. Prac. R. 8.01, Appellant, Gator Milford, LLC, notifies this Court that on July 10, 2013, the Clermont County Court of Appeals, Twelfth Appellate District, certified a conflict between its May 15, 2013 decision entered in this case and the decision of the Franklin County Court of Appeals, Tenth Appellate District, in Whitehall ex rel. Fennessy v. Bambi Motel, Inc., 131 Ohio App.3d 734 (10th Dist. 1998). The Order certifying the conflict is attached as **Exhibit 1**. The decisions in conflict are attached as **Exhibit 2** and **Exhibit 3**.

The Court of Appeals certified the conflict as:

> **Whether actual knowledge and receipt of a judgment entry that is a final appealable order begins the 30-day time period during which to file an appeal, or does the 30-day period only begin following service and notation of service on the docket by the clerk of courts?**

WHEREFORE, Appellant respectfully requests that this Court issue an order finding the existence of a conflict and establishing a briefing schedule in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by ordinary U.S. mail this 22nd day of July, 2013 to:

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516849.1

IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

CLERMONT CTY. TRANSPORTATION : CASE NO. CA2013-02-010
IMPROVEMENT DISTRICT,

: ENTRY GRANTING MOTION TO CERTIFY CONFLICT

Appellee,

vs.

GATOR MILFORD, LLC

Appellant.

COURT OF APPEALS
FILED
JUL 10 2013
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Gator Milford, LLC, on May 23, 2013; a memorandum in opposition filed by counsel for appellee, Clermont County Transportation Improvement District, on June 3, 2013; and a reply memorandum filed by counsel for appellant on June 10, 2013.

On May 15, 2013, this court filed an entry granting a motion to dismiss the present appeal on the basis that the appeal was not timely filed. The court concluded that appellant's counsel had received actual notice of the final appealable order in question and therefore needed to file an appeal within 30 days pursuant to *State ex rel. Hughes v. Celeste,* 67 Ohio St.3d 429 (1993). Appellant claims that this court's decision is in conflict with a number of cases by other courts of appeal.

Many of the cases cited by appellant as being in conflict are not factually analogous to the present case because there is no indication in those cases that a copy of the final appealable order had actually been received. However, it appears that there is a direct conflict with a case decided by the Tenth District, *City of Whitehall ex rel. Fennessy v. Bambi Motel, Inc.*, 131 Ohio App.3d 734 (1998).

EXHIBIT
1

Accordingly, the motion to certify a conflict is GRANTED. The issue for certification is whether actual knowledge and receipt of a judgment entry that is a final appealable order begins the 30-day time period during which to file an appeal, or does the 30-day period only begin following service and notation of service on the docket by the clerk of courts.

IT IS SO ORDERED.

Robert A. Hendrickson, Presiding Judge

Stephen W. Powell, Judge

Robin N. Piper, Judge

IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

CLERMONT CTY. TRANSPORTATION : IMPROVEMENT DISTRICT,

Appellee,

vs.

GATOR MILFORD, LLC,

Appellant.

CASE NO. CA2013-02-010

ENTRY GRANTING MOTION TO DISMISS APPEAL

COURT OF APPEALS
FILED
MAY 15 2013
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

The above cause is before the court pursuant to a motion to dismiss appeal filed by counsel for appellee, Clermont County Transportation Improvement District, on March 7, 2013; a memorandum in opposition filed by counsel for appellant, Gator Milford, LLC, on March 19, 2013; a reply memorandum filed by counsel for appellee on March 20, 2013; a motion for leave to file addendum to memorandum in opposition to motion to dismiss filed by counsel for appellant on March 25, 2013; and a memorandum in opposition to the motion for leave to file addendum filed by counsel for appellee on March 29, 2013.

Appellee is a governmental entity that develops and implements transportation improvement projects in Clermont County, Ohio. Appellant is the owner of a parcel of properly along State Route Business 28 in Clermont County. In 2010, appellee commenced an appropriations case against appellant to obtain certain easements necessary to facilitate the widening of State Route Business 28 from three to five lanes. The case was tried to a jury, which reached a verdict on October 11, 2012. On October 16, 2012 appellant filed a motion for attorney fees and costs. On October 26, 2012, the trial court entered judgment on the verdict.

EXHIBIT
2

Appellant filed a notice of appeal on October 26, 2012. That appeal was dismissed by this court due to outstanding issues, *i.e.*, the pending motion for attorney fees and costs. See *Clermont Cty. Transportation Improvement Dist. v. Gator Milford, LLC*, Clermont App. No. CA2012-11-081, entry of dismissal filed November 26, 2012.

On November 27, 2012, the trial court filed a decision on the motion for attorney fees and costs. Attached to the decision/entry was a certificate of service signed by the trial court's bailiff stating that copies of the decision/entry were sent "via Facsimile/E-mail/Regular U.S. Mail this 27th day of November 2012 to all counsel of record and unrepresented parties." The decision/entry was filed with the clerk on the same date, and the docket indicates that it was "distributed to all parties and/ or counsel of record."

The next day, on November 28, 2012, appellant's counsel wrote a letter to the trial court which read in part as follows: "[b]ased upon the Court's final rulings on this matter, I would ask that the Court prepare a 'final judgment entry.'" On January 30, 2013, the trial court instructed the clerk to issue an additional notice of the November 27, 2012 decision/entry to all parties and/or counsel. On February 4, 2013, appellant filed its second notice of appeal. A "final judgment entry" was apparently never prepared.

The basis of the motion to dismiss appeal is that the second notice of appeal was not timely filed within 30 days of the trial court's entry ruling on the motion for attorney fees and costs. Appellee contends that the appeal is not timely based upon *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429 (1993), because appellant had actual notice of the trial court's November 27, 2012 decision/ entry ruling on the

motion for attorney fees and costs. Appellant concedes that it received a copy of the trial court's decision/entry, but argues that "receiving a copy of an entry is not sufficient service." (Emphasis sic.)

As a matter of due process, litigants are entitled to reasonable notice of a trial court's appealable orders. *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80 (1988). In the *Atkinson* case, the Supreme Court of Ohio set forth rules that the court believed would satisfy due process. In *Atkinson*, however, the party seeking to appeal was merely given oral notice of the court's ruling; no judgment entry had been prepared or given to counsel.

In the present case, appellant received a copy of the trial court's November 27, 2012 decision/entry, and the docket indicates that a copy was distributed to all parties and counsel of record. Appellant's counsel's subsequent letter to the court indicates that counsel was aware that the trial court had made a final ruling. This case is therefore more closely aligned with *State ex rel. Hughes v. Celeste* than *Atkinson* because appellant received actual notice of the court's ruling and clearly was aware that the ruling had been filed with the clerk.

This court's decision in *Zuk v. Campbell*, 12th Dist. No. CA94-03-018, 1994 WL 721990 (Dec. 30, 1994) is distinguishable as well. In *Zuk*, the appellant claimed that the final appealable order at issue was never received. Here, appellant admits that a copy of the trial court's November 27, 2012 decision/entry was received. We noted in *Zuk* that "in the event that service of the notice of judgment on a party is not made in accordance with the requirements of Civ.R. 58(B) within three days of the entry of judgment upon the journal, the party may file a notice of appeal of the judgment within thirty days from the date he actually receives proper legal notice of

the judgment." *Zuk* at ¶ 3.

Appellant's position appears to be that although it was aware of the trial court's November 27, 2012 entry and in fact received a copy of it, this was not "proper" service by the clerk and therefore the time to file an appeal did not begin until January 30, 2013 when the trial court directed the clerk to again serve the November 27, 2012 entry. This argument elevates form over substance. "Due process" does not require service of a document that has been previously provided. Appellant knew about and received a copy of the November 27, 2012 decision/entry, and knew that it resolved all issues necessary to file an appeal. However, a timely appeal was not filed.

In the alternative, appellant argues in its addendum to the memorandum in opposition to the motion to dismiss appeal that the parties' cross-motions for distribution of the jury award raise an additional issue that extends the time to file a notice of appeal. The cross-motions were resolved after a hearing by an agreed entry filed on January 28, 2013. This argument is without merit. Distribution of a jury award that has been paid into court is a separate proceeding pursuant to R.C. 163.18. R.C. 163.19 contemplates a separate appeal from distribution of a deposit or award.

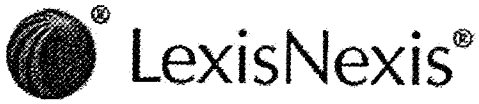
Based upon the foregoing, the motion to dismiss appeal is with merit and hereby GRANTED. This court is without jurisdiction to entertain the present appeal because it was not timely filed within 30 days of the trial court's November 27, 2012 decision/entry which determined appellant's motion for attorney fees and costs and resolved all remaining issues. This cause is hereby DISMISSED, with prejudice, costs to appellant.

IT IS SO ORDERED.

Robert A. Hendrickson,
Presiding Judge

Robin N. Piper, Judge

Stephen W. Powell, Judge



City of Whitehall ex rel. Dennis J. Fennessy, Plaintiff-Appellee, v. The Bambi Motel, Inc., and Stew Banks, Defendants-Appellants.

No. 98AP-384

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

131 Ohio App. 3d 734; 723 N.E.2d 633; 1998 Ohio App. LEXIS 6369

December 29, 1998, Rendered

SUBSEQUENT HISTORY: As Corrected April 11, 2000.

PRIOR HISTORY: [***1] APPEAL from the Franklin County Municipal Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Charles D. Underwood, Whitehall City Attorney and Charles W. McGowan, Assistant City Attorney, for appellee City of Whitehall.

Betty D. Montgomery, Attorney General, Barbara Serve, for appellee State Fire Marshall.

Daniel J. Igoe; Whiteside & Whiteside and Alba L. Whiteside, for appellants.

JUDGES: LAZARUS, J. BOWMAN and PETREE, JJ., concur.

OPINION BY: LAZARUS

OPINION

[**635] [*737] (REGULAR CALENDAR)

OPINION

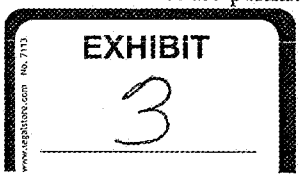
LAZARUS, J.

Defendants-appellants, The Bambi Motel, Inc., and Stewart Banks, appeal from the April 10, 1996 agreed permanent injunction and the March 3, 1998 decision and entry of the Franklin County Municipal Court, Environmental Division, denying appellants' *Civ.R. 60(B)* motion to set aside the April 10, 1996 agreed permanent injunction. For the reasons that follow, we affirm.

Appellant, The Bambi Motel, Inc. ("motel"), owns and operates a motel on East Main Street in Whitehall, Ohio. Appellant Stewart Banks is president of the corporation. On November 22, 1995, plaintiff-appellee, the city of Whitehall ("City") initiated this action against appellants alleging numerous structural defects and violations of the fire code and other ordinances. In addition, [***2] the City claimed illegal drug activity was occurring on the premises. The City moved for a preliminary and permanent injunction to compel compliance with building, zoning, and licensing law, and to have the business closed and the premises vacated as a public nuisance.

On December 5, 1995, appellants, represented by attorney Louis J. Chodish, and the City entered into extensive off-the-record discussions with the trial court. As a result of those discussions, the trial court prepared an "Agreed Entry," which was journalized on December 7, 1995. The entry stated that there existed life-threatening violations of the building and fire codes of the city of Whitehall. Consequently, appellants were to immediately vacate the motel and to begin to remedy the life-threatening violations. If the violations were remedied to the satisfaction of Captain Tilton of the City's fire department, the motel could re-open.

[*738] On January 26, 1996, the trial court conducted a hearing where it was determined that appellants were represented by attorneys Mr. Fagin, Mr. Croushore, and Mr. Chodish. The trial court also determined that the life-threatening violations in the majority of the units had been cured [**636] [***3] and, therefore, the trial court permitted re-occupancy of most of the units. The



City also agreed not to proceed on the portion of its complaint alleging nuisance activities as a result of illicit drug activities and other criminal activities.

On March 22, 1996, Mr. Chodish filed, and the trial court granted a motion asking to withdraw as attorney of record. On April 1, 1996, Mr. Croushore filed a motion to continue the hearing scheduled for April 2, 1996. Also on April 2, 1996, Mr. Fagin filed a motion for leave to withdraw as counsel.

The hearing on the City's request for permanent injunctive relief went forward on April 2, 5 and 9, 1996. Attorney Croushore represented the motel, and appellant Stewart Banks represented himself. During the April 9, 1996 hearing, while still in the City's case, an off-the-record discussion occurred among the trial court, counsel for the parties, and Mr. Banks. After that discussion, the trial court went back on the record and made three findings of fact, that Mr. Banks, counsel for the motel, and counsel for the state agreed were stipulated. The parties also agreed that based upon those findings of fact, the motel would be vacated and razed or Mr. [***4] Banks would make a good-faith effort to sell the property.

The trial court stated:

"THE COURT: After considerable discussion among the parties, the following situation arises. At this point the Court makes three findings of fact: One, that the Bambi Motel has allowed transient guests for a period of more than - has allowed - that the Bambi has maintained sleeping accommodations - that the Bambi has offered sleeping accommodations for pay to transient guests who have stayed there for a period of more than 30 days. Or, put another way, if that' s not clear, there have been transient guests staying at the Bambi, and their stays have been longer than 30 days. And this has been going on since, at least, 1992.

"Finding of fact two, the Bambi has been operating as an apartment house since, at least, 1992.

"Fact three, the Bambi did not have a motel and/or hotel license issued pursuant to *Chapter 3731 of the Revised Code* by the State Fire Marshal for the year 1994.

"With those three findings of fact, what is agreed to among the parties is this: That a week from today, by April 16, all occupants of the Bambi will be gone with the exception of Mr. Stewart Banks who may continue [***5] to live there and maintain his residence until July 9. In other words, Mr. Banks can stay there for the next 90 days, with the 90-day period ending July 9.

[*739] "By July 9, it is agreed that the Bambi will be either razed, that is to say, torn down and taken and all structures clean to grade, or, two, the Bambi will have been sold or Mr. Banks will be able to demonstrate a good-faith effort to sell the property by demonstrating he has retained a licensed real estate broker and is actively advertising and actively having the facility marketed on the market for sale." (Tr. 4/9/96, 66-68.)

The trial court also made a preliminary conclusion of law that based on the stipulated facts, the motel had lost its status as a nonconforming use under the zoning laws and could no longer operate as a motel in that location. (Tr. 4/9/96 at 68.) The trial court gave counsel for the motel an opportunity to research the law on the nonconforming use issue, stating:

"Mr. Croushore has asked the Court for an opportunity to search the law. And if Mr. Croushore finds there exists law which would suggest the Court is erroneous in it's preliminary conclusion of law, the Court would entertain such arguments.

"At [***6] this point, the Court will list a miscellaneous hearing on its docket for 3 p.m., April - the Court needs to give a tickle date by which time it will remind itself if it has not heard from Mr. Croushore whether Mr. Croushore has anything to tell the [**637] Court. I think it's agreed we give Mr. Croushore seven days to search the law.

"MR. UNDERWOOD: It's agreed by. I hope it can also be agreed that plaintiff doesn't waive any rights under its complaint in response to whatever Mr. Croushore comes up with.

"THE COURT: That is correct. If Mr. Croushore can come up with law that convinces the Court the Court is wrong, then we schedule a continuation of this full-blown hearing to continue to proceed with plaintiff's case in chief in its effort to seek a complaint for permanent injunctive relief.

"This agreement in no way waives anybody's right to assert its claim or make its defenses.

"Do you agree with what we have said?

"MR. UNDERWOOD: Yes, but I want to clarify. Is this - Are these three findings of facts stipulated between the parties?

"MR. CROUSHOURE: Yes. The findings of fact are stipulated between the parties." (Tr. 4/9/96 at 68-69.)

The trial court memorialized [***7] the findings of fact (but not the preliminary conclusion of law) in an "Agreed Permanent Injunction," journalized on April 10, 1996. Copies were mailed to all counsel and to Mr. Banks. Mr. Croushore never [*740] submitted any legal authority to the trial court on the issue of whether the motel had lost its status as a nonconforming use.

The City initiated contempt proceedings against appellants on July 18, 1996, and again on January 31, 1997. On April 8, 1997, after several hearings in which appellants were represented by new counsel, the trial court found appellants to be in contempt. Appellants appealed the judgment, and this court affirmed. *Whitehall v. Bambi Motel, 1997 Ohio App. LEXIS 5729* (Dec. 18, 1997), Franklin App. No. 97APC04-539, unreported (1997 Opinions 5307).

On April 9, 1997, appellants, represented by new counsel, filed a "Motion to Vacate Judgment of April 10th, 1996." The trial court conducted an evidentiary hearing on appellants' motion on November 19, 1997, and on March 3, 1998, the trial court denied the motion to set aside the agreed permanent injunction.

On April 1, 1998, appellants appealed from both the April 10, 1996 agreed permanent injunction and the March 3, 1998 denial of the motion [***8] to set aside the agreed permanent injunction, assigning as error the following:

1. "The Trial Court erred in rendering its Order of April 10, 1996 by making an erroneous conclusion of law which is not supported by the 'Purported Stipulated Findings of Fact'"

2. "The Trial Court erred in denying Appellants their right of due process of law during the proceedings on April 5, 1996 and April 9, 1996."

3. "The Trial Court erred in determining that the 1995 Whitehall Zoning Ordinance changing a motel from a 'Permitted Use' to a 'Special Permit Use' terminated the Bambi Motel's right to operate because it did not have a 1994 motel license issued to it."

4. "The Trial Court erred and abused its discretion in not granting Appellant's Motion to Vacate."

4(A). "The Trial Court erred and abused its discretion in finding that Appellants did not have a meritorious defense or claim to present if the 60(B) Motion was granted."

4(B). "The Trial Court erred and abused its discretion in finding the Motion to Vacate was not brought within a reasonable time."

In their first three assignments of error, appellants present their direct appeal of the "Agreed Permanent Injunction" [***9] of April 10, 1996. Since appellants did not file their notice of appeal from the April 10, 1996 order until April 1, 1998, we must first address the issue of whether the appeal from the agreed permanent injunction is timely.

[*741] [**638] Appellants claim the time for filing their notice of appeal pursuant to *App.R. 4(A)* never began to run because the trial court failed to comply with *Civ.R. 58(B)*. We agree. Upon review of the record, we find service of the agreed permanent injunction was not made in compliance with *Civ.R. 58(B)* because the entry does not contain a notation to the clerk to serve appellants with notice of the judgment, and the clerk did not enter an entry in the appearance docket noting the service of the entry on appellants.

The City, however, argues the appeal is untimely because Mr. Banks admitted receiving the document and there were subsequent contempt proceedings based upon the agreed permanent injunction. We disagree. Appellants' actual knowledge of the agreed permanent injunction is insufficient to begin the running of the time for appeal in the absence of formal notice in compliance with *Civ.R. 58(B)*. *Welsh v. Tarentelli (1992), 76 Ohio App. 3d 831, 833-834, 603 N.E.2d* [***10] *399*; *Britford v. Duncan, 1993 Ohio App. LEXIS 5417* (Nov. 12, 1993), Franklin App. No. 93AP-385, unreported (1993 Opinions 4836). The thirty-day time limit for filing the notice of appeal does not begin to run until the later of: (1) entry of the judgment or order appealed if the notice mandated by *Civ.R. 58(B)* is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in *Civ.R. 58(B)*. Here, the trial court never endorsed upon the judgment entered April 10, 1996, the required "direction to the clerk to serve upon all parties *** notice of the judgment and its date of entry upon the journal" as mandated by *Civ.R. 58(A)*. The parties may have received copies of the judgment but receiving a copy of the judgment is not enough. Service of both the notice of the judgment and its date of entry upon the journal is required. Even then, the time for appeal does not start to run until the clerk makes a notation of the service in the appearance docket. *Civ.R. 58(B)*. Here, the clerk was not directed to give the required notice or make the necessary notation in the appearance docket. Because of this, [***11] the time for appeal of the April 10, 1996 agreed permanent injunction ***never began to run***. Where the trial court never instructed the clerk to send notices to the parties and where no notices were sent in compliance with *Civ.R. 58(B)*, the appeal is deemed timely under *App.R. 4(A)*. *Lamberson v. State Farm Mutual Auto. Ins. Co., 1994 Ohio App. LEXIS 3818* (Aug. 25, 1994), Franklin App. No. 94APE02-274, unreported (1994 Opinions 3804). Accordingly, the appeal from the April 10, 1996 agreed permanent injunction was timely filed. We now turn to the merits of the appeals.

In their first assignment of error, appellants claim that their acquiescence to the agreed permanent injunction was prompted by the trial court's ruling to the effect that if sleeping accommodations are rented to transient

guests for more than thirty days, the structure is an apartment house rather than a motel. [*742] Appellants also claim that the stipulated facts and the trial court's ruling were based upon the erroneous conclusion of law that the "Bambi can no longer operate as a motel in that location because these findings of fact cause it to lose its legal status as a nonconforming use." (Tr. 4-9-96, at 68.)

Appellants contend that [***12] the trial court erroneously concluded that permitting a guest to rent a motel room for one week at a time for more than thirty days converted the building from a motel to an apartment house. Appellants argue that by offering accommodations for one week and then re-renting for successive periods of one week, guests could stay in excess of thirty days without converting the building from a motel to an apartment house.

Had appellants not entered into stipulated facts, their argument might be material. *R.C. 3731.01(A)(1)* defines a "hotel" as "any structure consisting of one or more buildings, with more than five sleeping rooms kept, used, maintained, advertised, or held out to the public to be a [**639] place where sleeping accommodations are offered for pay to transient guests for a period of thirty days or less." While appellants could have challenged the determination that the motel was operating as an apartment house, instead, they stipulated on the record, and in the presence of the trial court, that "Defendant Bambi, Inc., continuously since at least 1992, has operated as an apartment house." (Agreed permanent injunction.) A stipulation, once entered into, filed and accepted by the court, [***13] is binding upon the parties and is a fact deemed adjudicated for purposes of determining the remaining issues in the case. *Horner v. Whitta, 1994 Ohio App. LEXIS 1248* (Mar. 16, 1994), Seneca App. No. 13-93-33, unreported. A party who has agreed to a stipulation cannot unilaterally retract or withdraw from it. *Id.*

Even after announcing on the record the terms of the agreed permanent injunction, the trial court gave appellants seven days to research the law, stating, "This agreement in no way waives anybody's right to assert its claim or make its defenses." (Tr. 4-9-96 at 69.) The trial court indicated it would put a 3 p.m. April 18, 1996 "tickler" date on its calendar to determine if Mr. Croushore concluded anything about his independent search of the law. After the April 9, 1996 hearing, the trial court prepared the agreed permanent injunction and sent it to the clerk who journalized it on April 10, 1996. Although the trial court did not wait until the April 18, 1996 "tickler" date to put on its order, the clear implication of the trial court's statement was that if appellants came forward with some legal authority in support of its interpretation of the law, the trial court would reconsider its ruling, [***14] based on the proposed conclusion of law, that the motel had lost its right to operate as a motel. Although appellants apparently disagreed with the trial court's proposed conclusion of law that the Bambi had lost its right to continue to use the property as a nonconforming use, appellants never submitted any authority to the trial court before the April 18, 1996 deadline to support their [*743] position. Appellants thus waived the opportunity to present that defense and to have the trial court reconsider its ruling and have the agreed permanent injunction set aside.

At oral argument, counsel for appellants argued that appellants did not actually agree to the terms of the permanent injunction, i.e., the razing or selling of the motel. We find that the record indicates otherwise. The trial court stated on the record at the April 9, 1996 hearing that the parties agreed to the terms of the injunction. (Tr. 4-9-96 at 67.) Appellants did not object to the trial court's characterization of the parties' agreement. While the terms of the injunction are admittedly harsh, neither appellant Banks nor counsel for the motel raised an objection to those terms. Nor did they seek to have the injunction [***15] set aside on the basis that the motel had the right to continue to operate as a nonconforming use. Therefore, it is clear from a review of the record that as of April 9, 1996, appellants agreed to the findings and the terms of the agreed permanent injunction. The first assignment of error is not well-taken.

In their second assignment of error, appellants argue that the trial court denied appellants due process of law by: (1) requiring appellants to proceed with inadequate trial counsel by allowing withdrawal of Mr. Chodish and Mr. Fagin in violation of Loc.R. 3 of the Municipal Court of Franklin County; (2) not allowing appellants to present their own witnesses; (3) not allowing appellants to finish cross-examining the City's witnesses; and (4) not allowing counsel for appellants to research the law as it had expressly announced during the April 9, 1996 hearing.

With respect to the withdrawal of counsel, Mr. Banks made no objection to the trial court's decision to allow the request. Moreover, Mr. Banks indicated on the record that he had a strategic reason for choosing to have Mr. Croushore represent the motel and Mr. Banks represent himself. Because he was familiar with all the [***16] facts, Mr. Banks' wanted to cross-examine witnesses himself. (Tr. 11-19-97 at 87.) Having [**640] raised no objection to the withdrawal of trial counsel and being unable to show prejudice from the strategic decision to represent himself, the argument is not well-taken.

With respect to the claim that appellants were not permitted to complete cross-examination and call their own witnesses, we find nothing in the record that indicates any impropriety in the decision to go off the record

and conduct negotiations culminating in the agreed permanent injunction. As discussed under the first assignment of error, appellants were given seven days to research the law and raise any defense. They did not submit any legal authority to the trial court, nor did they object in any way to the trial court entering judgment before the seven-day period had expired. As discussed under assignment of error one, appellants have not demonstrated any prejudice as a result of the trial court [*744] entering judgment on April 10, 1996. The second assignment of error is not well-taken.

In their third assignment of error, appellants contend that the motel did not lose its "grandfather" status to exist as a nonconforming but [***17] legal use as a motel pursuant to *R.C. 713.15*. That statute provides that a nonconforming use must be voluntarily discontinued for at least two years, unless otherwise validly provided by ordinance, before an entity's grandfather status is lost. As discussed under assignment of error one, on April 9, 1996, appellants stipulated that the motel had been operating as an apartment house since 1992. Based on this stipulation of fact, the trial court made a preliminary conclusion of law that the motel had lost its grandfather status, and the trial court gave appellants the opportunity to research the law and submit legal authority in support of the contrary position. Appellants did not avail themselves of this opportunity and, thus, became bound by the terms of the agreed entry. Unless set aside for good cause, the agreed permanent injunction is binding upon the parties and the trial court. The third assignment of error is not well-taken.

Appellants' fourth assignment of error, although divided into three parts, asserts that the trial court abused its discretion in not granting the motion to vacate. Appellants filed their motion to vacate the judgment of April 10, 1996, on April 9, 1997. [***18] Appellants moved for vacation of the agreed permanent injunction on the grounds that they had been represented by incompetent counsel, that Mr. Banks entered into the agreed permanent injunction under duress, and that they had been deprived of the opportunity to present their defense due to incompetent counsel or an erroneous legal interpretation. Appellants presented evidence on their *Civ.R. 60(B)* motion at a full hearing before the trial court. The trial court found that appellants' motion was not timely and that they failed to present a meritorious defense.

To prevail on a motion brought under *Civ.R. 60(B)*, the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in *Civ.R. 60(B)*; and (3) the motion is made within a reasonable time. *GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113*, paragraph two of the syllabus. "The question of whether relief should be granted is addressed to the sound discretion of the trial court." *Rose Chevrolet, Inc. v. Adams (1988), 36 Ohio St. 3d 17, 20, 520 N.E.2d 564*. An abuse of [***19] discretion connotes conduct, which is unreasonable, arbitrary, or unconscionable. *State ex rel. Richard v. Seidner (1996), 76 Ohio St. 3d 149, 151, 666 N.E.2d 1134* (citing *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn. [1995], 72 Ohio St. 3d 106, 107, 647 N.E.2d 799*).

[*745] As discussed under the first assignment of error, appellants were bound by the agreed permanent injunction unless they could establish a valid reason for [**641] vacating the order such as coercion. The trial court indicated that Mr. Banks' testimony was less than credible on this point. For example, at the November 17, 1997 hearing on the motion to vacate, Mr. Banks testified that he only put the motel up for sale because the trial court told him he had to. This was in direct contradiction to his testimony on April 5, 1996, in which Mr. Banks testified as follows:

"Q. Within the last three years, have you tried to sell the Bambi Motel?

"A. There is a sign on it right now.

"Q. Have you received any nibbles as to buying the motel?

"A. No, sir." (Tr. 4-5-96 at 13-14.)

Mr. Banks also testified that for eighteen months, from April 10, 1996 continuously through November 19, 1997, he felt he [***20] was under duress by the trial court to say on the record that he agreed to the April 10, 1996 agreed permanent injunction. Yet during those eighteen months there were four hearings in which Mr. Banks was represented by new counsel at which he had many opportunities to raise the issue. He did not. Appellants' silence as to why this matter was never raised at any of the four contempt hearings held on the matter supports the conclusion that the agreed permanent injunction was actually agreed to by appellants. Accordingly, the trial court was within its discretion in finding that appellants had failed to meet their burden of presenting a meritorious defense.

Appellants' failure to raise the issue of duress until filing their *Civ.R. 60(B)* motion one day short of one year also goes to the issue of whether the motion was made within a reasonable time. As stated in the Staff Notes accompanying *Civ.R. 60(B)*:

" *** The rule provides that the motion for vacation of judgment 'shall be made within a reasonable time.'...The quoted language applies to all of the five grounds for vacation. Thus a party has the possible right

to bring a motion to vacate the judgment on the grounds of newly discovered [***21] evidence up to one year after entry of judgment, but the motion is also subject to the 'reasonable time' provision. Hence if the newly discovered evidence was discovered one month after entry of judgment and a party might have made his motion at that time but waited until the last day before the year was up, the court in its discretion might hold that the motion was brought too late because although made within one year not made within a 'reasonable time.' For newly discovered evidence, for example, the outside limit is one year--or a shorter 'reasonable time.'"

[*746] Here, appellants offered no evidence at the hearing or in their memoranda to explain what necessitated the delay. Appellants were represented by counsel throughout the contempt proceedings that were affirmed by this court on appeal, yet they never raised the issue that they never really agreed to the April 10, 1996 agreed permanent injunction. "In the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion." *Mount Olive Baptist Church v. Pipkins Paints (1979), 64 Ohio App. 2d 285, 289, 413 N.E.2d 850.* Thus, it was within the sound discretion of the trial court to deny [***22] the motion as having been untimely and failing to present a meritorious defense. The fourth assignment of error is not well-taken.

Based on the foregoing, the four assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BOWMAN and PETREE, JJ., concur.

IN THE COURT OF APPEALS FOR CLERMONT COUNTY, OHIO

CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT,	:	CASE NO. CA2012-11-081
Appellee,	:	
vs.	:	ENTRY OF DISMISSAL
GATOR MILFORD, LLC, et al.,		
Appellants.		

COURT OF APPEALS
FILED
NOV 26 2012
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

The above cause is before the court pursuant to a notice of appeal filed by appellant, Gator Milford, LLC, on November 13, 2012.

The language contained in the judgment entry appealed from, indicates that there are outstanding issues remaining in this matter. The record does not indicate that the outstanding issues have ever been resolved.

An order of a court is a final, appealable order only if the requirements of Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86 (1989). If an order is not a final appealable order, a court of appeals has no subject matter jurisdiction to consider the appeal. *Logue v. Wilson*, 45 Ohio App.2d 132 (1975).

As there are outstanding issues in this action, the court concludes that the order is not a final appealable order, and that the court is without jurisdiction to consider this appeal.

Accordingly, this appeal is hereby DISMISSED, costs to appellant.

IT IS SO ORDERED.

Stephen W. Powell,
Presiding Judge

Robert P. Ringland, Judge

IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

CLERMONT CTY. TRANSPORTATION : IMPROVEMENT DISTRICT,

Appellee,

vs.

GATOR MILFORD, LLC,

Appellant.

CASE NO. CA2013-02-010

ENTRY GRANTING MOTION TO DISMISS APPEAL

COURT OF APPEALS
FILED
MAY 15 2013
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

The above cause is before the court pursuant to a motion to dismiss appeal filed by counsel for appellee, Clermont County Transportation Improvement District, on March 7, 2013; a memorandum in opposition filed by counsel for appellant, Gator Milford, LLC, on March 19, 2013; a reply memorandum filed by counsel for appellee on March 20, 2013; a motion for leave to file addendum to memorandum in opposition to motion to dismiss filed by counsel for appellant on March 25, 2013; and a memorandum in opposition to the motion for leave to file addendum filed by counsel for appellee on March 29, 2013.

Appellee is a governmental entity that develops and implements transportation improvement projects in Clermont County, Ohio. Appellant is the owner of a parcel of properly along State Route Business 28 in Clermont County. In 2010, appellee commenced an appropriations case against appellant to obtain certain easements necessary to facilitate the widening of State Route Business 28 from three to five lanes. The case was tried to a jury, which reached a verdict on October 11, 2012. On October 16, 2012 appellant filed a motion for attorney fees and costs. On October 26, 2012, the trial court entered judgment on the verdict.

Appellant filed a notice of appeal on October 26, 2012. That appeal was dismissed by this court due to outstanding issues, *i.e.*, the pending motion for attorney fees and costs. See *Clermont Cty. Transportation Improvement Dist. v. Gator Milford, LLC*, Clermont App. No. CA2012-11-081, entry of dismissal filed November 26, 2012.

On November 27, 2012, the trial court filed a decision on the motion for attorney fees and costs. Attached to the decision/entry was a certificate of service signed by the trial court's bailiff stating that copies of the decision/entry were sent "via Facsimile/E-mail/Regular U.S. Mail this 27th day of November 2012 to all counsel of record and unrepresented parties." The decision/entry was filed with the clerk on the same date, and the docket indicates that it was "distributed to all parties and/or counsel of record."

The next day, on November 28, 2012, appellant's counsel wrote a letter to the trial court which read in part as follows: "[b]ased upon the Court's final rulings on this matter, I would ask that the Court prepare a 'final judgment entry.'" On January 30, 2013, the trial court instructed the clerk to issue an additional notice of the November 27, 2012 decision/entry to all parties and/or counsel. On February 4, 2013, appellant filed its second notice of appeal. A "final judgment entry" was apparently never prepared.

The basis of the motion to dismiss appeal is that the second notice of appeal was not timely filed within 30 days of the trial court's entry ruling on the motion for attorney fees and costs. Appellee contends that the appeal is not timely based upon *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429 (1993), because appellant had actual notice of the trial court's November 27, 2012 decision/ entry ruling on the

motion for attorney fees and costs. Appellant concedes that it received a copy of the trial court's decision/entry, but argues that "receiving a copy of an entry is not sufficient service." (Emphasis sic.)

As a matter of due process, litigants are entitled to reasonable notice of a trial court's appealable orders. *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80 (1988). In the *Atkinson* case, the Supreme Court of Ohio set forth rules that the court believed would satisfy due process. In *Atkinson*, however, the party seeking to appeal was merely given oral notice of the court's ruling; no judgment entry had been prepared or given to counsel.

In the present case, appellant received a copy of the trial court's November 27, 2012 decision/entry, and the docket indicates that a copy was distributed to all parties and counsel of record. Appellant's counsel's subsequent letter to the court indicates that counsel was aware that the trial court had made a final ruling. This case is therefore more closely aligned with *State ex rel. Hughes v. Celeste* than *Atkinson* because appellant received actual notice of the court's ruling and clearly was aware that the ruling had been filed with the clerk.

This court's decision in *Zuk v. Campbell*, 12th Dist. No. CA94-03-018, 1994 WL 721990 (Dec. 30, 1994) is distinguishable as well. In *Zuk*, the appellant claimed that the final appealable order at issue was never received. Here, appellant admits that a copy of the trial court's November 27, 2012 decision/entry was received. We noted in *Zuk* that "in the event that service of the notice of judgment on a party is not made in accordance with the requirements of Civ.R. 58(B) within three days of the entry of judgment upon the journal, the party may file a notice of appeal of the judgment within thirty days from the date he actually receives proper legal notice of

the judgment." *Zuk* at ¶ 3.

Appellant's position appears to be that although it was aware of the trial court's November 27, 2012 entry and in fact received a copy of it, this was not "proper" service by the clerk and therefore the time to file an appeal did not begin until January 30, 2013 when the trial court directed the clerk to again serve the November 27, 2012 entry. This argument elevates form over substance. "Due process" does not require service of a document that has been previously provided. Appellant knew about and received a copy of the November 27, 2012 decision/entry, and knew that it resolved all issues necessary to file an appeal. However, a timely appeal was not filed.

In the alternative, appellant argues in its addendum to the memorandum in opposition to the motion to dismiss appeal that the parties' cross-motions for distribution of the jury award raise an additional issue that extends the time to file a notice of appeal. The cross-motions were resolved after a hearing by an agreed entry filed on January 28, 2013. This argument is without merit. Distribution of a jury award that has been paid into court is a separate proceeding pursuant to R.C. 163.18. R.C. 163.19 contemplates a separate appeal from distribution of a deposit or award.

Based upon the foregoing, the motion to dismiss appeal is with merit and hereby GRANTED. This court is without jurisdiction to entertain the present appeal because it was not timely filed within 30 days of the trial court's November 27, 2012 decision/entry which determined appellant's motion for attorney fees and costs and resolved all remaining issues. This cause is hereby DISMISSED, with prejudice, costs to appellant.

IT IS SO ORDERED.

Robert A. Hendrickson,
Presiding Judge

Robin N. Piper, Judge

Stephen W. Powell, Judge