

ORIGINAL

In the  
Supreme Court of Ohio

The Clermont County Transportation Improvement District	:	
	:	Supreme Court Case No. 2013-1177
	:	
Appellee,	:	
	:	On Appeal from the
v.	:	Clermont County Court of Appeals,
	:	Twelfth Appellate District
Gator Milford, LLC,	:	
	:	Court of Appeals Case No. CA2013-010
Appellant.	:	
	:	
	:	

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**MERIT BRIEF OF THE APPELLEE**  
**THE CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT**

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## INTRODUCTION

This case presents a question that has already been resolved by this Court in *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429 (1993), specifically, when the time for appeal commences under App. R. 4(A). This Court held in *Hughes* that **service** pursuant to Civ. R. 5(B) of a final appealable order begins the period for filing a timely appeal under App. R. 4(A). In *Hughes*, service under Civ. R. 5(B) was properly made by opposing counsel (and not the clerk). Though the clerk did not note service in the docket, this Court found that the making of service controls for the period to commence.

Appellant Gator Milford, LLC (“Appellant”) received service in a manner authorized by Civ. R. 5(B). There is no dispute that on November 27, 2012 - the very day the final appealable order in this case was entered – the trial court’s bailiff signed a “Certificate of Service” certifying:

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-mail/Regular U.S. Mail this 27<sup>th</sup> day of November 2012 to all counsel of record and unrepresented parties.

Trial Docket #243, Appellant’s Appx. at A-5.

Fax, e-mail, and United States mail are all expressly permitted methods of service under Civ. R (5)(B)(2):

A document is served under this rule by:

\* \* \*

(c) mailing it to the person’s last known address by United States mail . . . ;

\* \* \*

(f) sending it by electronic means to a facsimile number or e-mail address . . .

Appellant never disputed that it received the service copy of the final appealable order. Further, in a letter to the trial court dated November 28, 2012, Appellant acknowledges the trial court’s “final

rulings.” Exhibit G to *Appellee’s Motion to Dismiss Appeal*, Appellate Docket #259 (See Appendix at 001).

Actual knowledge (without service) is not the focus as to whether an appeal is timely. The plain words of App. R. 4(A) provide that service is the key component, and Appellant received service of the final appealable order on November 27, 2012. Under App. R. 4(A) and *Hughes*, Appellant’s notice of appeal was due thirty days later on December 27, 2012. Appellant failed to meet this deadline, and its notice of appeal was late. The Twelfth District Court of Appeals was correct in dismissing Appellant’s appeal.

Because *Hughes* addressed the proper method to calculate the deadline to file an appeal, this Court should dismiss this appeal pursuant to S. Ct. Prac. R. 8.04. Alternatively, in the event that this Court elects to re-examine this issue on the merits, the Court should reaffirm the principles in *Hughes* by holding that properly completed service pursuant to Civ. R. 5(B) begins the time to appeal under App. R. 4(A).

### **STATEMENT OF FACTS**

Appellee The Clermont County Transportation Improvement District (“CCTID”) largely agrees with the Statement of Facts set forth in Appellant’s Brief, with the following exceptions or additions:

- Appellant characterizes the service of the final appealable order as “a transmission of a courtesy copy by a trial court’s bailiff.” *Appellant’s Brief*, P. 14. While the transmission of the final appealable order was courteous, it was also proper service by the trial court on all parties. Service is evidenced by the “Certificate of Service” signed by the trial court’s bailiff at the end of the November 27, 2012 Decision/Entry which states that Appellant’s counsel was duly served

with the order by the following methods set forth in Civ. R. 5(B): (1) United States mail, (2) facsimile, **and** (3) e-mail. Trial Docket #243, Appellant’s Appx. at A-5.

- Appellant incorrectly states that the clerk “did not note any service of the entry on the appearance docket.” *Appellant’s Brief*, P. 3. In fact, the clerk expressly indicated in the appearance docket on November 27, 2012 that the final appealable order was “distributed to all parties and/or counsel of record.” Trial Docket, #243, (*See Appendix at 013*).
- Appellant cites to statements from the trial court in open court about whether the clerk complied with Civ. R. 58(B). *Appellant’s Brief*, P. 4.<sup>1</sup> In those statements, the trial court specifically confirmed that Appellant was “served as a practical matter by my office.” *1/18/13 Transcript*, P. 13; Exhibit D to Appellants Memorandum in Opposition to Motion to Dismiss, Appellate Docket #260 (*See Appendix at 026*). Further, the trial court could not have been making any interpretation of Civ. R. 58(B)’s requirements in relation to calculating the deadline to file a notice of appeal under App. R. 4(A), because Appellant had not even filed its second notice of appeal at that time.
- On November 28, 2012, one day after the bailiff faxed, e-mailed, and mailed the final appealable order, Appellant’s counsel wrote a letter to the trial court which read in part: “[b]ased upon the Court’s final rulings on this matter, I would ask that the Court prepare a ‘final judgment entry.’” Exhibit G to *Appellee’s Motion to Dismiss Appeal*, Appellate Docket #259 (*See Appendix at 001*)

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<sup>1</sup> The trial court made its statement regarding compliance with Civ. R. 58(B) without any briefing by the parties. Appellee contended below (and would contend here if App. R. 4(A) specifically incorporated all aspects of Civ. R. 58(B)) that, between service by the bailiff and the notation on the record by the clerk that the judgment was “distributed” to counsel, the trial court and clerk did in fact meet the requirements of Civ. R. 58(B). If service by the bailiff, as opposed to an employee of the clerk’s office is non-compliant, then service by the bailiff was harmless error by the trial court.

- Appellant never disputed that its attorney of record received the service copy of the final appealable order by a method prescribed by Civ. R. 5(B). Indeed, in the May 15, 2013 Entry Granting Motion to Dismiss Appeal, the Appellate Court expressly found that “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.” *Entry Granting Motion to Dismiss*, P. 3, Appellant’s Appx. at A-27.

## LAW AND ARGUMENT

### **I. THERE IS NO CONFLICT OF LAW.**

PROPOSITION OF LAW: This appeal should be dismissed pursuant to S. Ct. Prac. R. 8.04 on the basis that this Court previously addressed the calculation of the deadline to file a notice of appeal in *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429 (1993).

S. Ct. Prac.R. 8.04 states as follows:

When the Supreme Court finds a conflict pursuant to S. Ct. Prac. R. 8.02, it may later find that there is no conflict or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may *sua sponte* dismiss the case as having been improvidently certified or summarily reverse or affirm on the basis of precedent.

The certified conflict in this case is resolved by the application of *Hughes*, and thus this Court should summarily affirm the Appellate Court’s ruling dismissing Appellant’s appeal.

#### **A. This Court’s Decision in *Hughes*.**

As a fundamental matter of jurisprudence, there can be no conflict among the appellate districts on a matter that has been previously resolved by this Court. And the matter of Civ. R. 58(B) and its relation to calculating the deadline to file a notice of appeal under App. R. 4(A) was passed upon by this Court in *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429 (1993).

In *Hughes*, a convicted felon (Hughes) filed a mandamus action against the Governor of the State of Ohio seeking consideration of an application for pardon. The trial court issued a

peremptory writ against the Governor, which constituted a final appealable order in the action. While there was no evidence on the docket that the order was served on the Governor's counsel by the clerk or the trial court, it was undisputed that a copy of the order was delivered to the Governor's counsel by Hughes' counsel on the same day it was issued.

The Governor appealed, but his notice of appeal was filed more than thirty days after the date of the order. Hughes argued that the Governor's notice of appeal was untimely under App. R. 4(A), while the Governor argued that the deadline to file the notice of appeal had not commenced, and, was tolled based on the fact that the clerk had not done the following as provided by Civ. R. 58(B): (1) served the peremptory writ on the Governor, (2) noted the service in the docket. In an opinion authored by Chief Justice Moyer, this Court held that the time for appeal had commenced upon service being made under Civ. R. 5(B) by counsel for Hughes delivering a copy to counsel for the Governor. This Court followed the plain language of App. R. 4(A) and specifically noted that the non-compliance with Civ. R. 58(B) did not toll the appeal deadline:

The Governor is bound by the trial court's initial peremptory writ if he failed timely to appeal it. App. R. 4(A) states that "[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." Thus, the Governor was obligated to file a notice of appeal within thirty days of the January 10, 1991 order granting the peremptory writ, unless service was not made within the three-day period in Civ. R. 58(B).

Civ. R. 58(B) directs the clerk of court to serve the parties with notice of a judgment, within three days of its entry upon the journal, in a manner prescribed by Civ. R. 5(B). **The task of service of notice of a judgment thus normally befalls the court clerk. Civ. R. 58(B) further provides, however, that "[t]he 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)."** App. R. 4(A), by its clear language as quoted above, tolls the time period for filing a notice of appeal only if service is not made within the three-day period of Civ. R. 58(B).

The record in this case shows that the court's issuance of the peremptory writ of mandamus was journalized on January 10, 1991. The docket lacks an entry

indicating that the court clerk served notice on the parties, nor does the record reveal any evidence of service. Such an apparent defect does not toll the running of the time for appeal, however, unless no service is effected within three days. App. R. 4(A); Civ. R. 58(B). **This is not the case here. Civ. R. 5(B) provides that service may be made “by delivering a copy to the person to be served...” Appellant’s attorney served the Governor’s attorney, Assistant Attorney General Patrick A. Devine, with a copy of the peremptory writ on the day it was issued. Service was thus perfected in a manner consistent with Civ. R. 5(B).**

We conclude that: (1) the first peremptory writ was issued and journalized on January 10, 1991; (2) the Governor was served with the writ on the same day; (3) the writ was a final appealable order; (4) the time for appeal was never tolled; and (5) the Governor failed to appeal the writ within thirty days of its entry upon the court’s journal. The Governor is thus bound by the writ. The judgment of the court of appeals is reversed and the January 10, 1991 judgment of the trial court is reinstated.

*Id.* at 431 (emphasis added).

**B. *Hughes* is the Law of the State of Ohio.**

The two Ohio Supreme Court cases dealing with the issue of timeliness of filing a notice of appeal and decided subsequent to *Hughes* are consistent with *Hughes*. The first case had similar facts and this Court followed the principle of *Hughes*. *State ex rel. Pheils v. Pietrykowski*, 93 Ohio St.3d 460 (2001), *judgment vacated and case dismissed* 93 Ohio St.3d 1232 (2001). The second case had different facts—there was no service whatsoever—and thus the appeal time could not commence. *In re Anderson*, 92 Ohio St.3d 63 (2001).

In *Pheils*, this Court granted a peremptory writ against the judges of a court of appeals and that writ was vacated by this Court in a subsequent two-sentence decision without substantive explanation. Regardless, the decision presents an instance where this Court dealt with the issue of when a notice of appeal is due. *Pheils* has remarkably similar facts to this case. In *Pheils*, it was undisputed that **the bailiff** sent the final appealable order to the appellant by United States mail. *Pheils*, 93 Ohio St.3d at 463. Appellant’s notice of appeal was not filed within thirty days, and

appellees moved to dismiss. The appellate court denied the motion, holding that because the clerk did not complete service, Civ. R. 58(B) was not complied with and the deadline was tolled.

This Court, citing *Hughes*, reversed the appellate court and held that appellant's notice of appeal was late:

The court of appeals erred in denying Pheils's motion to dismiss the Palmers' appeal. Initially, the record establishes that the Palmers were served with notice of both the December 11, 2000 judgment and its entry within the three-day period of Civ.R. 58(B) because the copy sent by the bailiff to the Palmers contained a date-stamp noting that the judgment was filed on December 11, 2000. In fact, respondents do not contend to the contrary in their dismissal motion, which is confined to their assertion that the clerk of courts is the only office that can satisfy the service requirements of App. R. 4(A).

Moreover, the failure of the clerk of the common pleas court to serve the Palmers with the December 11, 2000 judgment entry in accordance with Civ. R. 58(B) did not toll their time to appeal. In fact, Civ. R. 58(B) expressly states that “[t]he failure of the clerk to serve notice [of the judgment and its date of entry upon the journal] does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).” (Emphasis added.) App. R. 4(A) provides that only a failure to serve a party within the three-day period after entry of the judgment tolls the appeal time.

\* \* \*

Therefore, service of the notice of judgment and its entry was perfected within the three-day period of Civ. R. 58(B), and the time for the Palmers to appeal began to run on December 11, 2000. App. R. 4(A); *Hughes*. The Palmers' January 18, 2001 notice of appeal was consequently untimely.

*Id.* at 463-464. *Pheils* is fully consistent with a dismissal of Appellant's appeal.

As to the *Anderson* decision, the principle of *Hughes* was not altered in any way. Unlike *Hughes*, there was **no evidence** in the *Anderson* record that the appellant was served with the final judgment. *Anderson*, 92 Ohio St.3d at 67. Clearly, without evidence of any sort of service of the final judgment, *Hughes* would be inapplicable and the tolling provision of App. R. 4(A) would control. Given this obvious distinction, it is not surprising that *Anderson* did not cite *Hughes*.

*Anderson* has been interpreted as following, not modifying, *Hughes*. In *Flynn v. General Motors Corp.*, 7<sup>th</sup> Dist. Columbiana No. 02 CO 71, 2003-Ohio-6729, the appellant appealed an October 22, 2002 judgment on December 2, 2002. Subsequent pleadings filed with the trial court indicated that the appellant had received the October 22, 2002 final judgment shortly after it was issued. On appeal, the appellant argued, relying on *Anderson*, that his appeal was not time-barred because the clerk never served the final order as required under Civ. R. 58(B). Finding the appeal to be late, the Seventh District Court of Appeals noted the obvious distinction between *Hughes* and *Anderson*:

Appellants contend that *Anderson* implicitly overruled *Hughes*, and that there is an absolute requirement that the appearance docket indicate the date that notice of the judgment was sent to the parties. In fact, at oral argument Appellants argue that they have not yet been served with the entry. We do not agree with Appellants' interpretation of the holding or the effect of *Anderson*. In *Anderson*, the Supreme Court looked to the record to see if the parties had been given notice of the judgment entry. *Anderson* first noted that, "the trial court never endorsed upon the judgment entry the required 'direction to the clerk to serve upon all the parties \* \* \* notice of the judgment and its date of entry upon the journal' pursuant to Civ. R. 58(B)." *Anderson*, 92 Ohio St.3d at 67, 748 N.E.2d 67. Obviously, if the judgment entry being appealed contains nothing about whether the clerk was supposed to serve copies on all the parties, the judgment entry cannot be used as proof that service was actually made. The *Anderson* court then looked for any other indication it could find in the record that service had been made. The only other indication in the record that a reviewing court would normally expect to find is the notation in the appearance docket that service has been made. *Anderson* indicated that there was no such notation in the appearance docket. Therefore, based on the record before the *Anderson* court, there was no evidence that the parties had been served with the judgment entry.

In *Hughes*, although the official record was silent concerning the date that the judgment entry had been served on the parties, it was apparently an uncontroverted fact on appeal that the Governor's attorney was personally served with the writ on the same day that it was issued. *Hughes*, 67 Ohio St.3d at 431, 619 N.E.2d 412. Thus, in *Hughes*, the Supreme Court was able to rely on the fact that the judgment entry had been served even though service was not performed by the clerk of court and was not noted in the appearance docket by the clerk of court.

*Id.* at ¶¶37-38 (emphasis added).

**C. Application of App. R. 4(A), *Hughes* and *Pheils* to the Certified Conflict.**

In this case, the Twelfth District 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 begin following service and notation of service on the docket by the clerk of courts?

The answer to the first part of the question is “no” unless, as is the case here, service is made under Civ. R. 5(B). Actual knowledge and possession of a judgment, without more, is not sufficient. App. R. 4(A) explicitly requires service, and *Hughes* clarifies that service by any method pursuant to Civ. R. 5(B) begins the time to appeal. Without service, the tolling provision in App. R. 4(A) governs. Thus, the Twelfth District Court of Appeals’ first option, so far as it goes, is not correct.

But neither is the second option where, as the Twelfth District proposed, the thirty-day period begins “following service and notation of service on the docket by the clerk of courts.” Under this formulation of the rule, the appeal time would begin following (1) service by the clerk, and (2) notation on the docket by the clerk.<sup>2</sup>

In this option, two additional requirements are added to App. R. 4(A) that are nowhere to be found within the rule’s text. Appellant tries to divert this Court’s attention to purported non-compliance issues with Civ. R. 58(B), but the legal issue in this case relates to timeliness, not docketing. It is the Rules of Appellate Procedure that are primarily implicated in this case, and the Civil Rules are only incorporated either via explicit reference or by decisions from this Court.

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<sup>2</sup> The conflict as stated by the Twelfth District permits two different readings. The Twelfth District may have meant to frame the second option as the period begins upon (1) service (without regard to who makes service), and (2) notation of service in the docket by the clerk; or, (1) service by the clerk only, and (2) notation of service by the clerk. Given that Appellant has repeatedly argued below and in its Brief that service must be made by the clerk, and only the clerk, Appellee interprets the Twelfth District’s framework as requiring service by the clerk. As set forth herein, neither reading is the correct application of App. R. 4(A).

App. R. 4(A) is controlling. That rule contains the time for filing, as well as the tolling provision. And there is no reference whatsoever in App. R. 4(A) to a requirement that the clerk serve, or that the clerk note the service of the judgment in the appearance docket. App. R. 4(A) provides that the time for filing a notice of appeal is tolled only if service “is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.” App. R. 4(A)’s limited reference to the three-day period in Civ. R. 58(B) does not somehow also incorporate, as Appellants suggest, every single aspect of Civ. R. 58(B) into the tolling provision. To do so one must add words to App. R. 4(A).<sup>3</sup> The words of App. R. 4(A) only mention **when** service was made, not who makes service or whether it was noted on the docket.

Moreover, these same two requirements – service by the clerk (and only the clerk) plus notation on the docket by the clerk -- were absent in *Hughes* (and *Pheils*). Yet in both cases this Court still held that the notice of appeal was untimely. As noted above, in *Hughes* service was completed by opposing counsel. In *Pheils*, service was completed by the bailiff. Nor was there a notation of service in the docket in either case. *Hughes* at 341 (“The docket lacks an entry indicating that the court clerk served notice on the parties, nor does the record reveal any evidence of service. Such an apparent defect does not toll the running of the time for appeal, however, unless no service is effected within three days.”); *Pheils* at 461 (“The docket did not, however, contain any notation that the clerk had served the parties with notice of the judgment and the date of its entry.”).

Application of the plain language of App. R. 4(A) and *Hughes* demonstrate that the Twelfth District Court of Appeals’ second option – service by the clerk only and notation of service on the docket by the clerk – cannot be correct. What matters is service, and when service was made.

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<sup>3</sup> Appellant rightly states that this Court should look to the “plain meaning” of the rule as written and “apply it as written if its meaning is unambiguous and definite.” *Appellant’s Brief*, p. 17. Appellant wrongly seeks to add words to App. R. 4(A).

**D. *Hughes, Pheils and Anderson Provide Objective Certainty.***

Further, Appellants suggest that this Court should craft a rule that provides “objective certainty” and “not one that adds to the Rule an unwritten exception...” *Appellant’s Brief*, P. 16-17. *Hughes* and its progeny do just that. This Court has followed the precise words of App. R. 4(A) and consistently stated that “service” is what controls. If served by mail, “service is complete upon mailing.” Civ. R. 5(B)(2)(c). If served by fax or e-mail, “service is complete upon transmission.” Civ. R. 5(B)(2)(f). It is difficult to conceive of a more objective and straightforward test than whether service has been completed.

**E. *Bambi Motel Was Decided Without Citation to Hughes and Was in Error.***

Despite this Court’s clear pronouncements, some appellate courts have committed error in applying App. R. 4(A).<sup>4</sup> The Twelfth District Court of Appeals found a conflict based on the appellate decision of *City of Whitehall ex rel. Fennessy v. Bambi Motel, Inc.*, 131 Ohio App.3d 734 (10<sup>th</sup> Dist. 1998). In *Bambi Motel*, the appellant filed an appeal of several judgments on April 1, 1998, including an appeal of a permanent injunction that was entered on April 10, 1996. Given the two-year delay between the entry of the permanent injunction and the filing of the notice of appeal, the appellee argued that the notice of appeal was not timely filed.

The *Bambi Motel* opinion indicates that the trial court journalized the April 10, 1996 permanent injunction, and that “[c]opies were mailed to all counsel and to [the defendant].” *Id.* at 739. While, the Tenth District Appellate Court did not make any determination whether the defendant was properly served under Civ. R. 5(B), it was undisputed that the appellant had received a copy of the judgment. *Id.* at 741. It was also undisputed that certain requirements under Civ. R. 58(B) were not complied with, namely: (1) there was no instruction by the trial court to the clerk to

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<sup>4</sup> See also, *Beltz v. Beltz*, 5<sup>th</sup> Dist. Stark No. 2005CA00193, 2006-Ohio-1144, ¶¶66-76; *In re Elliott*, 4<sup>th</sup> Dist. Washington Nos. 03CA65, 03CA66, 2004-Ohio-2770, ¶¶12-13; *Zuk v. Campbell*, 12<sup>th</sup> Dist. Clermont No. CA94-03-018, 1994 WL 721990 (Dec. 30, 1994).

serve the entry, (2) the clerk did not serve the entry, and (3) there was no notation of service in the appearance docket. Ultimately, the Tenth District Appellate Court concluded that:

[t]he 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.* Accordingly, the appeal was deemed timely.

Although there is some ambiguity as to whether service was made in *Bambi Motel* (and thus *Bambi Motel* may be factually distinguishable from both this case and *Hughes*), the language quoted above is directly contrary to the text of App. R. 4(A) and this Court's analysis in *Hughes*. The language of App. R. 4(A) controls. There is no requirement in App. R. 4(A) that an appeal is tolled unless the trial court directs the clerk to give notice, the clerk serves, and, the clerk notes service in the docket. In *Hughes*, there was neither direction from the trial court to the clerk to serve the Governor, nor any evidence that the clerk served the final appealable order at all, yet the notice of appeal was deemed late. *Hughes*, 67 Ohio St. 3d at 415.

Notably, despite being rendered five years after *Hughes*, the *Bambi Motel* decision did not even cite to *Hughes*. It is unclear why *Hughes* was not cited by the Tenth District Appellate Court. What is clear, however, is that the Tenth District Appellate Court's analysis improperly engrafted requirements within App. R. 4(A) and failed to take into account binding precedent from this Court. And if the record in *Bambi Motel* was that appellant had actually been served the final appealable order, the Tenth District Appellate Court's ultimate decision was in error as well.

Merely because an appellate court fails to follow binding precedent does not mean a conflict exists among the appellate districts. If that were true, the certified conflict process would effectively be converted to one of error correction. By definition, once a question is ruled upon by the highest court of this state, this Court's ruling eliminates any purported conflict among the lower appellate

courts. S. Ct. Prac. R. 8.02 clearly recognizes that an issue previously addressed by this Court is not suitable for disposition under a certified conflict procedure, and provides the Court the procedural option to dismiss improvidently certified conflicts.

**F. Appellant’s Reliance On Various Lower Appellate Court Rulings Is Misplaced.**

To buttress purported support of *Bambi Motel*, Appellant cites additional cases for the proposition that all the technical requirements of Civ. R. 58(B) must be complied with before the time to file a notice of appeal begins to run. However, these cases are distinguishable and/or properly place the focus on whether service was made.

As this Court observed in *Hughes*, “[t]he task of service of notice of a judgment thus normally befalls the court clerk.” *Hughes* at 341. Accordingly, there are a number of cases that contain some language to the effect that “the clerk did not complete service.” While Appellant suggests that this frequently used language means that these courts were imposing an affirmative obligation under App. R. 4(A) for the clerk (and only the clerk) to complete service, in reality, these cases are devoid of any evidence of service at all – not lack of service by the clerk, but lack of service of any kind. With this recognition, the cases cited by Appellant reinforce *Hughes* because the key inquiry is whether service was completed

For instance, in *Defini v. Broadview Hts.*, 76 Ohio App.3d 209 (8<sup>th</sup> Dist. 1991), the appearance docket was stamped “NOTICE ISSUED” in connection with entering the judgment. *Id.* at 201. However, the appellant had presented an affidavit from an employee who worked for the clerk’s office who testified that

[a]fter having checked the computer entries, the microfiche records pertaining to post care mailing notices, and the civil post card proof sheet, an official record of the Common Pleas Court of Cuyahoga County, I determined that no mail service had been issued on that ruling.

*Id.* at 202. In denying a motion to dismiss for lack of timely appeal, the Eighth District Court of Appeals stated:

Appellee argues that appellant had notice pursuant to the *Atkinson* provisions because the court's execution docket is stamped 'NOTICE ISSUED.' This narrow reading of the *Atkinson* holding conveniently ignores the central element of the decision **which is that there must be a service . . .** Where a notice is not first served on the parties, a thousand notations on the case docket is insufficient to satisfy the *Atkinson* requirement.

*Id.* at 201-202 (emphasis added).

In *Kertest Enterprises, Inc. v. Planning Zoning Comm.*, 71 Ohio App.3d 151 (8<sup>th</sup> Dist. 1990), there was no evidence of service, and thus the court found the time for filing a notice of appeal was tolled.

In *Huntington National Bank v. Zeune*, 10<sup>th</sup> Dist. Franklin No. 08AP-1020, 2009-Ohio-3482, there was evidence that appellant was served with a default entry, but that entry did not fix damages and was thus not a final appealable order. *Id.* at ¶12-15. There was no evidence that appellant was served with a second entry that did fix damages. *Id.*

The case of *State ex rel. Delmonte v. Village of Woodmere*, 8<sup>th</sup> Dist. Cuyahoga No. 83293, 2004-Ohio-2340, is distinguishable because the final appealable order was not properly journalized. *Id.* at ¶5 ("However, a judgment is effective only when entered by the clerk upon the journal . . . While the trial court's July 2, 2003 paper copy of its memorandum and opinion was made a part of the file, the clerk of courts never entered the judgment into the court's computer journal and thus failed to make the judgment a part of the court's docket . . .").

None of these cases support Appellant's effort to engraft additional requirements to App. R. 4(A). To determine when an appeal is due under App. R. 4(A), one must know nothing more than (1) whether and when the judgment was entered and (2) when service was made. As *Hughes* made clear, any other consideration is unnecessary and in conflict with the express text of the rule. With

the question set forth in the certified conflict having previously addressed by this Court in *Hughes*, this Court should dismiss this appeal and summarily affirm the appellate court's dismissal of Appellant's appeal.

## **II. SERVICE BEGINS THE TIME TO APPEAL.**

**PROPOSITION OF LAW:** Any permissible service method under Civ. R. 5(B) constitutes "service" under App. R. 4(A) in order to commence the period for filing a notice of appeal.

In the event that this Court elects to address the merits of the certified conflict, this Court should reaffirm the principles set forth in *Hughes* by ruling that the time period for filing a notice of appeal commences under App. R. 4(A) upon service, and that service may be completed by any permissible method under Civ. R. 5(B).

In contrast, Appellant's Proposition of Law attempts to impute two additional requirements into App. R.4(A) that do not currently exist: that the time for filing an appeal under App. R. 4(A) begins to run only (1) "upon the clerk's service of the final judgment entry" and (2) "a notation of the service on the docket." *Appellant's Brief*, P. 5. As discussed extensively above, the plain meaning of App. R. 4(A) and the precedential application of *Hughes* (and the analysis in *Pheils*) reject the addition of any requirements to App. R. 4(A).

## **CONCLUSION**

Despite being served with the final appealable order by mail, e-mail, and fax the same day it was journalized, Appellant filed its Notice of Appeal months later. The appeal was properly dismissed as untimely pursuant to App. R. 4(A) and *Hughes*. This Court should dismiss this proceeding on the basis that the certified conflict has previously been resolved.

In the alternative, this Court should not impose any additional obligations to the clear language of App. R. 4(A), and hold that any service pursuant to Civ. R. 5(B) constitutes service under App. R. 4(A), thereby commencing the period for filing a notice of appeal.

Respectfully submitted,

By: 

John P. Brody (0012215)

COUNSEL OF RECORD

Richard W. Schuermann, Jr. (0032546)

Daniel J. Bennett (0079932)

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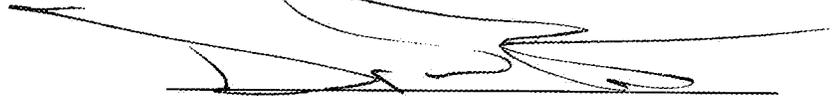
[dbennett@keglerbrown.com](mailto:dbennett@keglerbrown.com)

*Counsel for Appellee, The Clermont County  
Transportation Improvement District*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy this Merit Brief of Appellee was served by ordinary U.S. mail, postage prepaid, upon the following this 16th day of December, 2013.

William E. Santen, Jr.  
Brian P. O'Connor  
Santen & Hughes  
600 Vine Street, Suite 2700  
Cincinnati, Ohio 45202  
*Attorneys for Appellant*

A handwritten signature in black ink, appearing to read "Daniel J. Bennett", is written over a horizontal line.

Daniel J. Bennett

**APPENDIX**

	Appx. Page
November 28, 2012 letter from William E. Santen, Jr. to the Honorable Jerry R. McBride.....	001
<i>The Clermont County Transportation Improvement District v. Gator Milford, LLC, et al.</i> , Clermont County C.P. No. 2010 CVH 02287 (November 27, 2012).....	004
January 18, 2013 Hearing Transcript, Clermont County C.P. No. 2010 CVH 02287.....	014

## SANTEN & HUGHES

A Legal Professional Association

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Telephone: (513) 721-4450  
Fax: (513) 721-0109

November 28, 2012

*Via Fax – 513.732.7285*  
Honorable Jerry R. McBride  
Clermont County Court of Common Pleas  
270 East Main Street  
Batavia, Ohio 45103

Re: *The Clermont County Transportation Improvement  
District v. Gator Milford LLC, et al. - Case No.: 2010CVH02287*

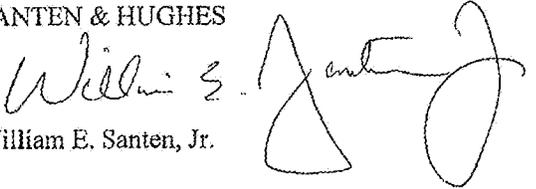
Dear Judge McBride:

In reference to the above matter, this is to confirm that the court of appeals has filed an Entry of Dismissal of the appeal filed on this matter. Please find enclosed a time-stamped copy of the Entry of Dismissal. Based upon the Court's final rulings on this matter, I would ask that the Court prepare and enter a "Final Judgment Entry" pursuant to the requirements of Civil Rule 54(b) and ORC 2505.02.

Thank you for the Court's consideration on this matter.

Sincerely,

SANTEN & HUGHES

  
William E. Santen, Jr.

WSJ/skj  
Enclosure  
copy: John Brody, Esq. (via email)  
Dan Bennett, Esq. (via email)  
497187.1

IN THE COURT OF APPEALS FOR CLERMONT COUNTY, OHIO

CLERMONT COUNTY  
TRANSPORTATION  
IMPROVEMENT DISTRICT,

CASE NO. CA2012-11-081

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

Appellee,

vs.

GATOR MILFORD, LLC et al

ENTRY OF DISMISSAL

Appellants.

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.

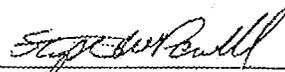
An order of a court is a final, appealable order only if the requirements of Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86 (1989). If an order is not a final appealable order, a court of appeals has no subject matter jurisdiction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

Clermont CA2012-11-081  
Page -2-

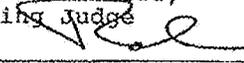
Accordingly, this appeal is hereby DISMISSED, costs to appellant.

IT IS SO ORDERED.



---

Stephen W. Powell,  
Presiding Judge



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Robert P. Ringland, Judge

FILED

2012 NOV 27 PM 3:36  
BARBARA A. HILGEMAN  
CLERK OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>THE CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT</b>	:	
	:	<b>CASE NO. 2010 CVH 02287</b>
Plaintiff	:	
	:	<b>Judge McBride</b>
vs.	:	
<b>GATOR MILFORD, LLC, et al.</b>	:	<b>DECISION/ENTRY</b>
Defendants	:	

Kegler, Brown, Hill & Ritter Co., L.P.A., John P. Brody and Daniel J. Bennett, attorneys for the plaintiff Clermont County Transportation Improvement District, 65 East State Street, Suite 1800, Columbus, Ohio 43215.

Santen & Hughes, William E. Santen, attorney for the defendant Gator Milford LLC, 600 Vine Street, Suite 2700, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for attorney fees and costs filed by the defendant Gator Milford, LLC (hereinafter referred to as "Gator Milford").

At the request of the parties, the court agreed to render a decision regarding the defendant's legal entitlement to an award of attorney fees and costs prior to setting an evidentiary hearing on the request for attorney fees, as such an evidentiary hearing

would be rendered moot if the court found that the defendant was not legally entitled to an award of fees. The court received oral argument on this threshold issue raised by the motion for attorney fees and costs on November 5, 2012. At the conclusion of that hearing, the court took the portion of the defendant's motion pertaining to its alleged legal entitlement to attorney fees under advisement.

Upon consideration of the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

#### **FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

The present action is an eminent domain appropriation proceeding which resulted from a taking of a portion of Gator Milford's property by the Clermont County Transportation Improvement District (hereinafter referred to as "CCTID"). The taking occurred as part of a road works project on Business 28 in Milford, Ohio which was implemented to widen and improve that public road.

On October 4, 2012, the jury empaneled in the present action awarded a verdict for the defendant Gator Milford, LLC in the amount of \$366,384.00.<sup>1</sup> The initial good faith offer made by the plaintiff was \$161,335.00. The parties agree that the jury's award is greater than 125% of the plaintiff's good faith offer for the property.

The defendant filed the present motion to award attorney fees and costs pursuant to Sections 163.21(C), 163.62(A) and 163.09(G) of the Revised Code. At the hearing on this matter, the defendant acknowledged that R.C. 163.09(G) is not

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<sup>1</sup> Verdict filed October 4, 2012.

applicable in the case at bar and withdrew its request for fees under that particular code section.

### LEGAL ANALYSIS

Pursuant to R.C. 163.62(A):

"The court having jurisdiction of a proceeding instituted by a state agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for the owner's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceeding, as provided in division (G) of section 163.09 or division (A) or (C) of section 163.21 of the Revised Code, as applicable."

As R.C. 163.09(G) is not applicable in the present action, the court turns to R.C. 163.21, which provides in pertinent part as follows:

"(C)(1) Except as otherwise provided in division (C)(2) or (3) of this section and subject to division (C)(5) of this section, when an agency appropriates property and the final award of compensation is greater than one hundred twenty-five per cent of the agency's good faith offer for the property or, if before commencing the appropriation proceeding the agency made a revised offer based on conditions indigenous to the property that could not reasonably have been discovered at the time of the good faith offer, one hundred twenty-five per cent of the revised offer, the court shall enter judgment in favor of the owner, in amounts the court considers just, for all costs and expenses, including attorney's and appraisal fees, that the owner actually incurred.

(2) The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure, for the purpose of making or repairing roads that shall be

open to the public without charge, for the purpose of implementing rail service under Chapter 4981. of the Revised Code, or under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency, or the agency is a municipal corporation that is appropriating property as a result of a public exigency, except that the court shall enter judgment in favor of the owner for costs and expenses, including attorney's and appraisal fees, that the owner actually incurred only if the property being appropriated is land used for agricultural purposes as defined in section 303.01 or 519.01 of the Revised Code, or the county auditor of the county in which the land is located has determined under section 5713.31 of the Revised Code that the land is "land devoted exclusively to agricultural use" as defined in section 5713.30 of the Revised Code and the final award of compensation is more than one hundred fifty per cent of the agency's good faith offer or a revised offer made by the agency under division (C)(1) or (3) of this section."

As noted above, the parties agree that the final award by the jury in the case at bar was greater than one hundred twenty-five per cent of the plaintiff's good faith offer for the property. As a result, that requirement of R.C. 163.21(C)(1) has been met.

However, as the language of R.C. 163.21(C)(1) states, that provision is limited by the language of R.C. 163.21(C)(2) and (3). The plaintiff argues that R.C. 163.21(C)(2) provides that attorney fees and costs cannot be awarded in the present case because the property was appropriated "for the purpose of making or repairing roads that shall be open to the public without charge." In response, the defendant argues that the language "if the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure," which immediately precedes the making or repairing roads language, modifies the provisions which follow it such that attorney fees and costs are not to be awarded only when the agency appropriated the property in a time of war or other public exigency for the purpose of making or repairing roads.

R.C. 163.21(C)(2) is a classic example of poor legislative drafting. The placement of commas and the uses of the word "or" in that code section result in two equally plausible interpretations of the language of that statutory provision.

First, it is possible to read the meaning of the pertinent language of R.C. 163.21(C)(2) as follows: "The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if:

- (a) the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure
  - (i) for the purpose of making or repairing roads that shall be open to the public without charge, or
  - (ii) for the purpose of implementing rail service under Chapter 4981. of the Revised Code; or
- (b) the agency is appropriating the property under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency; or,
- (c) the agency is a municipal corporation that is appropriating property as a result of a public exigency."

However, that same statutory language can also be reasonably interpreted as follows: "The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if the agency is appropriating property:

- (a) in time of war or other public exigency imperatively requiring its immediate seizure;

(b) for the purpose of making or repairing roads that shall be open to the public without charge;

(c) for the purpose of implementing rail service under Chapter 4981. of the Revised Code;

(d) under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency; or,

(e) the agency is a municipal corporation that is appropriating property as a result of a public exigency."

The use of the word "or" between the phrases "for the purpose of implementing rail service under Chapter 4981. of the Revised Code," and "under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency," does not resolve the ambiguity. It is possible that the placement of the word "or" in that particular location was meant to signify that the "making or repairing roads" and "implementing rail service" phrases were meant to be modified by the "in a time of war or other public exigency" language. Furthermore, the referenced code sections, namely 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11, deal with takings for the purposes of water supply and sewers and drainage and takings by a Board of Commissioners for courthouses, jails, public offices, bridges and other structures. The reference to these sections is modified by "as the result of a public exigency." Therefore, it is possible to conclude that the provisions regarding making and repairing roads and implementing rail service were meant to be modified by the "in a time of war or other public exigency" language, as all of the other referenced takings

only preclude an award of attorney fees when such a taking occurs as the result of a public exigency.

However, the statutory language is by no means unambiguous. The comma used between the "in a time of war" language and the "making or repairing roads" language suggests that these can also be read as two separate provisions. Furthermore, if the language is interpreted under the first option set forth above, it does not explain why there is no "or" between the "making or repairing roads" and "implementing rail service" language if those were intended to be the two phrases modified by the "in a time of war" provision.

The defendant argues that the "in a time of war or other public exigency" language was intended to modify all of the language following it. However, the court does not find that this results in a reasonable plain reading of the statute. If the phrase "in a time of war or other public exigency" was meant to modify the other four situations set forth thereafter, it makes no sense as to why the last two provisions contain references to "as the result of a public exigency." If the "in a time of war or other public exigency" language modified those phrases, there would be no need to reiterate the public exigency requirement.

The court finds that either of the statutory interpretations set forth above are reasonable interpretations of the language of R.C. 163.21(C)(2). As a result, the court finds that this statutory language is ambiguous. Pursuant to R.C. 1.49:

"If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute."

In its discussion of Senate Bill 7 and the changes made to Chapter 163 of the Revised Code thereby, the Legislative Service Commission stated in pertinent part as follows:

"Attorney's fees

\* \* \*

\* \* \* [T]he act requires a judgment for attorney's fees based on the amounts of the agency's offer and the final award of compensation, except in the situations noted below. Under the act, with the exceptions noted below, if the award exceeds 125% of the agency's good faith offer \* \* \* the court must enter judgment for the owner in amounts the court considers just for all costs and expenses actually incurred by [the] owner, including attorney's and appraisal fees. (R.C. 163.21(C)(1).)

The provisions described in the preceding paragraph do not apply if the agency is appropriating the property (1) in time of war or other public exigency imperatively requiring its immediate seizure, (2) for the purpose of making or repairing roads that will be open to the public without charge, (3) for the purpose of implementing rail service under R.C. Chapter 4981., (4) under R.C. 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 as the result of a public exigency, or (5) if the agency is a municipal corporation that is appropriating the property as a result of a public exigency unless the property being appropriated is land used for agricultural purposes or devoted exclusively to agricultural use and the final award of compensation exceeds 150% of the agency's good faith offer or revised offer. \* \* \*<sup>2</sup>

<sup>2</sup> Plaintiff's Memorandum in Opposition to Defendant's Motion for Attorneys' Fees and Costs, Exhibit A.

This Final Analysis report of the Legislative Service Commission clearly sets forth that the intent of the legislative drafters of R.C. 163.21(C)(2) was that each of the five exceptions are to be read independently of one another. As such, the court will find that this is the legislative intention of the statutory language and will follow that interpretation accordingly.

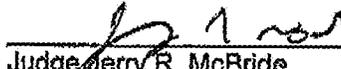
As the taking in the present case was an appropriation for the purpose of repairing roads that will be open to the public without charge, the defendant is not entitled to an award of attorney fees pursuant to R.C. 163.21(C)(2).

**CONCLUSION**

Based on the above analysis, the defendant's motion for attorneys' fees and costs is not well-taken and is hereby denied.

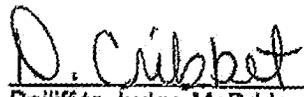
**IT IS SO ORDERED.**

DATED: November 27, 2012

  
\_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies 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.

  
\_\_\_\_\_  
Bailliff to Judge McBride

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COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

THE CLERMONT COUNTY :  
TRANSPORTATION IMPROVEMENT :  
DISTRICT, :  
Plaintiff, :  
vs : Case No. 2010CVH2287  
COA No. 2013-CA-02-010  
GATOR MILFORD, LLC, ET AL, : Hearing  
Defendant. :

-----  
APPEARANCES

On Behalf of the Plaintiff: On Behalf of Cecilian Bank:  
DANIEL P. BENNETT, ESQ. KEVIN FEAZELL, ESQ.  
Kegler, Brown, Hill & Ritter Cors & Bassett  
On Behalf of Gator Milford:  
WILLIAM E. SANTEN, JR., ESQ.  
Santen & Hughes

BE IT REMEMBERED that the above-entitled  
hearing came on to be heard before the Honorable Jerry  
R. McBride, on the 18th day of January, 2013.

KATHY SIMPSON, Official Court Reporter  
Clermont County Court of Common Pleas  
270 Main Street  
Batavia, Ohio 45103  
(513) 732-7103

1 THE BAILIFF: Clermont County Transportation  
2 Improvement v. Gator Milford, 2010CVH2287.

3 MR. FEAZELL: Good morning, Your Honor?

4 THE COURT: Good morning.

5 THE BAILIFF: Okay. When you guys are talking Dan  
6 Bennett is on the phone so make sure you talk into the  
7 microphone so he can hear you.

8 MR. FEAZELL: Yes, ma'am.

9 THE BAILIFF: Are you ready, Judge?

10 THE COURT: Mr. Bennett asked to participate by  
11 phone, and I think his role in this probably is not as  
12 significant as the two of you, so will that be correct, Mr.  
13 Bennett?

14 MR. BENNETT: Yes, that's correct, Your Honor.

15 THE COURT: Okay. Go right ahead.

16 MR. FEAZELL: Well, good morning, Your Honor?

17 THE COURT: Good morning.

18 MR. FEAZELL: May it please the Court, Kevin  
19 Feazell, on behalf the Defendant, the Cecilian Bank. We're  
20 here actually on -- I guess cross motions for distribution  
21 of the jury award deposited in -- in the clerk of courts.  
22 To be fair, your motion was filed first. I don't know if  
23 you prefer to go first or --

24 MR. SANTEN: Oh, sure. It doesn't matter, Kevin.

25 MR. FEAZELL: Well, I know.

KATHY SIMPSON, Official Court Reporter  
Clermont County Court of Common Pleas  
270 Main Street  
Batavia, Ohio 45103  
(513) 732-7103

1 MR. SANTEN: Good morning, Your Honor?

2 THE COURT: Good morning.

3 MR. SANTEN: Of course this is for distribution of  
4 the jury award. An amount of 171,000 was initially  
5 deposited approximately, so the dispute is over the  
6 remaining balance, which is approximately \$205,000. And Mr.  
7 Bennett made a deposit of that I filed pleadings on this;  
8 that's Exhibit B. Really this comes down to two basic  
9 arguments: Gator contends that the distribution should be  
10 made to them because they put all the time and effort in  
11 this Court to get the jury award.

12 But more importantly, in doing that, there are no  
13 net proceeds. They've incurred many attorney fees and costs  
14 in trying to protect their interest. And we filed a motion  
15 with the Court for attorney fees and costs, and the Court  
16 denied that based upon the statute. So really they're in a  
17 negative balance right now. Their attorney fees and costs  
18 exceeded the amount of the balance of \$205,000. So Gator's  
19 position it would be inequitable to -- to give the bank  
20 something that they've incurred a lot of costs and attorney  
21 fees on when they're at a zero balance. Actually they were  
22 at a negative \$50,000 balance.

23 The other reason is -- is by the terms of the loan  
24 agreement between the bank and Gator Milford and, once  
25 again, it seems like this language is ambiguous. We have

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1 said all along that the bank was entitled to that, and  
2 that's fine, but there's some language in there about they  
3 should hold the money for repair or restoration, and if the  
4 Court makes a decision that the bank should receive the  
5 money then we would ask that it be held in a trust account  
6 for two reasons.

7           Number one is the Court of Appeals -- we're going  
8 to appeal the Court of Appeals -- to the Court of Appeals on  
9 the issue of attorney fees and costs. And if the money's  
10 held in trust, and the Court interprets that new statute on  
11 attorneys fees and says, yeah, fine, Gator you get the  
12 money, then it's a different issue. That way if the money's  
13 held in trust then we can decide at that time how it should  
14 be divided up. So that's the way we look at the -- the  
15 condemnation division.

16           So it seems to make sense maybe the best thing to  
17 do is to hold the amount in trust until the appeals court  
18 makes a decision. So that's what we're asking.

19           THE COURT: Okay. So you're asking either for the  
20 money to go to you or to be held by the Court essentially is  
21 what you're asking.

22           MR. SANTEN: It could be held by us in a trust  
23 account. The problem -- or the Court either which way. It  
24 might be an interest bearing account to --

25           THE COURT: Okay.

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1 MR. SANTEN: -- protect everyone.

2 MR. FEAZELL: We're asking that the money come to  
3 us, Judge. There's no equitable basis for giving this --  
4 this money to anyone other than the first mortgagee. The  
5 fact that the case was upside down and it was more a -- it  
6 cost more to try than -- than was recovered is -- is  
7 something that every litigant faces as a potential outcome.  
8 That doesn't mean the bank should finance that litigation.  
9 We didn't compel the -- the -- the property owner, the  
10 mortgagor to -- to pursue a jury.

11 We had no involvement in that. There's -- the  
12 inequity would be for the bank to be turned to as -- as  
13 financing and taking -- somehow underwriting that negative  
14 result that resulted from the cost incurred versus the --  
15 the amount of the ultimate jury award.

16 Secondly, the mortgage does provide that unless an  
17 event of default has occurred that the bank will hold the --  
18 the condemnation awards if appropriate and fund remediation  
19 or restoration of the property in accordance with the bank's  
20 then current construction lending standards and policies.  
21 That's fine. If -- if the mortgagor is entitled to that and  
22 the mortgagor comes to us with a request for remediation or  
23 -- or restoration of the property, then -- then the bank  
24 would be contractually bound to do so as long as it's in  
25 accord with its construction lending policies.

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1           That's a matter between the bank and its customer  
2 if the customer -- if -- if the debtor, Gator Milford, would  
3 come forward with some request or plans for restoration or  
4 remediation of the property. Frankly, I'm skeptical that it  
5 would happen. I believe the property has been restored.  
6 This is not an instance of a fire. This is not an instance  
7 of something going unrepaired or undone.

8           But be it as it may, that -- that may come up in  
9 the future between the -- between the debtor and its bank.  
10 But there's no basis for creating a trust for this Court to  
11 continue to hold it. There's just simply no basis in the law  
12 or in the -- in the -- in the contract, in the mortgage  
13 between the -- between Gator Milford and the Cecilian Bank.  
14 So we would -- we would urge this Court and move this Court  
15 to -- to enter an award or an order directing the -- the  
16 deposit to be -- to be directed to the Cecilian Bank.

17           This really was not a matter of any controversy at  
18 all, Judge, until -- until quite recently the -- the --  
19 Gator Milford has repeatedly insisted to this Court, both in  
20 pleadings and when we were on conferences, that -- that this  
21 money is going to belong to the Cecilian Bank. We agree.  
22 That really should not be a matter of any controversy.  
23 That's all I have, Your Honor. Thank you.

24           THE COURT: I'm trying to think. Some of the  
25 award was for the temporary take, right?

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1 MR. SANTEN: That is correct.

2 THE COURT: Which you're entitled to the money  
3 that is for any other injury or decrease in the value of the  
4 mortgaged property. So injury, I guess, theoretically would  
5 be a temporary take even though your client didn't incur any  
6 costs at all with respect to that, right?

7 MR. FEAZELL: No, we didn't incur any costs other  
8 than an impairment of our collateral. No, I can't say that  
9 we had an out-of-pocket cost by virtue of the Plaintiff's  
10 equipment and personnel being on a portion of our collateral  
11 for a period of time. No, I don't -- I can't represent to  
12 the Court that we suffered costs from that other than some  
13 temporary impairment of our collateral, which is the nature  
14 of the temporary take.

15 THE COURT: Mr. Bennett, do you have any position?

16 MR. BENNETT: Your Honor, the TID has no position  
17 with respect to the competing motions of the Cecilian Bank,  
18 and -- and Defendant Gator Milford. You know, our -- our  
19 interest is effectively ended in the matter of -- once the  
20 -- the fair market value of the property is then set by  
21 agreement or indicated through the jury and the funds are  
22 placed with the Court. So the TID aren't opposed to either  
23 motion from the bank or -- or Gator.

24 THE COURT: Okay.

25 MR. FEAZELL: Your Honor, if -- if I may. I -- I

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1 want to emphasize that our right to these condemnation  
2 proceeds are not a matter of -- are not really related to  
3 damages or costs incurred. This is -- this is by virtue of a  
4 contractual right under the mortgage. And just as when a  
5 house is sold or a piece of property is sold that the bank  
6 is paid off on its loan. It's similar that when collateral  
7 is destroyed or taken by eminent domain we are entitled to  
8 those proceeds.

9 And understand -- I mean it's -- I guess it's  
10 obvious, but it bears repeating that this is going for  
11 Gator's benefit. This is Gator -- this is an award that is  
12 going to its bank, to its lender to pay down Gator's  
13 principle balance on a loan that it owes. It is ultimately  
14 going to Gator. It's just that Gator does not have a right  
15 to direct how that goes. It's going to its first secured  
16 mortgage holder to pay down Gator's debt. I think it's  
17 important to remember that in view of the -- the equitable  
18 arguments that -- that Mr. Santen raises.

19 THE COURT: Well, the purpose of the provision of  
20 condemnation awards is so that you -- to the extent that the  
21 property is -- there's a decrease in value of the property.  
22 You're not -- your collateral is not impaired isn't the  
23 purpose of that -- the purpose of that provision?

24 MR. FEAZELL: I would say that's probably a fair  
25 assessment as to the underlying policy between those --

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1 those sorts of provisions, yes.

2 THE COURT: Okay. And your client may be  
3 perfectly secure at this point with -- in terms -- I don't  
4 know what the loan balance is, the value of the collateral,  
5 but your client may be perfectly secure with -- without  
6 getting those proceeds, but your position is you're entitled  
7 to it just because the contract says that? I mean is that  
8 fair?

9 MR. FEAZELL: The contract says that and Ohio law  
10 says that as well, Your Honor.

11 THE COURT: Okay. Mr. Santen?

12 MR. SANTEN: Yes, Your Honor. There is -- the  
13 balance is current. There is no default by Gator. They've  
14 made timely payments and everything is current. So I -- I  
15 don't see any prejudice to the bank at this point. And once  
16 again we think probably the best way to resolve this is to  
17 put it in a trust account. I -- I just -- it seems  
18 inequitable to give the bank a windfall of this jury verdict  
19 to apply it the loan. The contract language does not say  
20 that. It says for repair or restoration, and Mr. Feazell  
21 just said they're going to apply it to the loan. That --  
22 that would not be proper by law or by the contract.

23 THE COURT: Mr. Feazell is saying he's entitled --  
24 his client is entitled to that money by virtue of contract,  
25 by virtue of Ohio law; is there any law that you have that

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1 says I can disregard the contract under these circumstances?

2 MR. SANTEN: I do not have any law at this time,  
3 but I'd be glad to brief it if -- if the Court would allow  
4 us to do so.

5 THE COURT: A week?

6 MR. SANTEN: Sure.

7 MR. FEAZELL: Your Honor, it's been briefed. His  
8 brief has been filed for a month and a half. Your -- Your  
9 Honor, the plaintiff -- Defendant Gator Milford has insisted  
10 throughout this proceeding, as they've tried to drag the  
11 bank into more and more active role of the jury trial, that  
12 the condemnation proceeds belong to Gator Milford -- or  
13 strike that -- to the Cecilian Bank.

14 I mean, it's --- it's in at least -- as I note in  
15 my -- in my motion it's -- it's -- it's emphasized at least  
16 four times in writing by Gator Milford's own filings it was  
17 insisted in conference calls and --- and telephonic reports  
18 to this Court that this money belongs to Cecilian. It's a  
19 given. It's a given in commercial law, and the -- the  
20 mortgage does not -- I mean the mortgage is clear that the  
21 condemnation award goes to the bank; however, in the even  
22 there is not a default the bank will -- the proceeds will be  
23 held by the lender and dispersed for restoration or repair  
24 of the real property if appropriate -- that means there's  
25 something to repair or restore remaining after the take or

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1 the condemnation -- in accordance with lender's then current  
2 construction lending procedures.

3 So it goes to the bank, and if appropriate under  
4 certain circumstances it will be held or made available to  
5 the borrower for restoration or remediation of a premises.  
6 If that occurs and if the bank for some reason refuses to  
7 disperse money for the improvement or maintenance of their  
8 collateral, then the debtor would have a cause of action,  
9 either a direct cause of action or perhaps a defense in --  
10 in the event of a foreclosure or a declaration of default.  
11 But there is nothing in this contract that provides it to be  
12 held in trust, that it go directly to the debtor, that it go  
13 anywhere other than to the bank. That's a standard mortgage  
14 provision.

15 THE COURT: You're saying that if there's any law  
16 that supports his position he should have briefed it  
17 already. I -- I agree with that, but on the other hand my  
18 job is to make the right decision. So if he has any law to  
19 support the position that I can disregard the contractual  
20 provision and award it to then I want to see it. So I'm --  
21 that's the reason I'm giving him no longer than a week and  
22 then it's going to be under advisement at that point, and I  
23 will rule. Other issue that has been raised is with regard  
24 to the -- you wanted me to make a 54(B) Order --

25 MR. SANTEN: Oh, yes.

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1 THE COURT: -- and I don't think a 54(B) Order is  
2 appropriate because it is -- 54(B) Order is dealing with  
3 where the Court has not -- has not ruled on all claims or  
4 with respect to all parties, but the issue is being -- the  
5 Court is saying this is final for purposes of appeal, Court  
6 of Appeals doesn't have to accept that of course. That's  
7 not -- I mean everything has been decided at this point in  
8 this case. The -- the way I -- the decision entry that went  
9 on with respect to attorney fees in December I think was the  
10 final -- the only reason -- I think the reason the Court of  
11 Appeals dismissed it is because that issue was remaining  
12 pending.

13 MR. SANTEN: Right.

14 THE COURT: That issue was then resolved, and I  
15 think that was a final order in the -- in the sense that it  
16 -- at the time then there was nothing left for this Court,  
17 and so you have to appeal from that time. However, 58(D)  
18 requires that the Court direct the clerk to serve notice of  
19 that judgment within three days and to note that on the  
20 appearance docket. I don't believe that has been done. So  
21 what I am going to do is ask the clerk to go ahead and serve  
22 that entry, and you -- just like in every case -- you have  
23 to decide whether that is a final appealable order at this  
24 point. That's -- I -- I don't put on an entry saying this  
25 is the starting line, go for it. I think it probably is,

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1 because I don't think there's anything --- this is not  
2 something that -- that keeps that from being a final  
3 appealable order. So I think -- but I'm -- since you were  
4 not served with that -- you were served as a practical  
5 matter by my office, but you were not served by the clerk,  
6 which is what's required.

7 MR. SANTEN: Just so I understand, Your Honor. So  
8 you will ask the clerk give them a praecipe to make -- to  
9 serve the entry --

10 THE COURT: That's correct.

11 MR. SANTEN: -- we'll receive that, and that  
12 starts the clock ticking?

13 THE COURT: That's my interpretation of the law.  
14 That's correct.

15 MR. SANTEN: Okay.

16 THE COURT: Court of Appeals may have a different  
17 interpretation, or Mr. Feazell or Mr. Bennett may have a  
18 different interpretation, but I think that's -- that's the  
19 way I interpret the law. Anything else, Mr. Bennett?

20 MR. BENNETT: No, Your Honor.

21 THE COURT: Mr. Feazell?

22 MR. FEAZELL: No, Your Honor.

23 THE COURT: Okay. Thank you very much.

24 MR. SANTEN: Your Honor, just for the --

25 THE COURT: Decision date -- decision date will be

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1 --

2 MR. SANTEN: That's my question.

3 THE COURT: Because you're being given a week will  
4 be February 15th.

5 MR. SANTEN: February 15th --- no that -- I'm given  
6 a week, so a week from today.

7 THE COURT: A week from today and then it's going  
8 to be under advisement. So I will have it under advisement  
9 on January 24th.

10 MR. SANTEN: Okay.

11 THE COURT: And I set a decision date out three  
12 weeks usually. If I get it done before that, you'll get the  
13 decision as soon as it's done.

14 MR. FEAZELL: Your Honor, will I have an  
15 opportunity to respond if appropriate to what Mr. Santen  
16 submits?

17 THE COURT: I'm assuming you've given me all of  
18 your law at this point. No, I'm just -- yeah, you can do  
19 that. Why don't you call the office and indicate whether  
20 you'd like an opportunity to respond.

21 MR. FEAZELL: Yes, Your Honor.

22 THE COURT: Once you get his response. Fair  
23 enough?

24 MR. FEAZELL: Yes, sir.

25 THE COURT: Okay. Thanks.

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1 MR. SANTEN: Thank you.

2 THE BAILIFF: All rise. This Court is in recess.

3 (Court is in recess.)  
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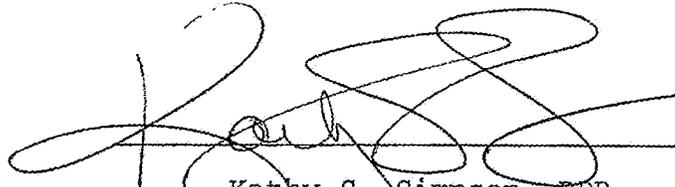
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C E R T I F I C A T E

STATE OF OHIO :  
: SS  
COUNTY OF CLERMONT:

I, Kathy S. Simpson, official court reporter for Court of Common Pleas, Clermont County, Ohio, do hereby certify that the foregoing transcript was duly taken by digital audio equipment and thereafter transcribed into typewriting by computer under my supervision, and that the same is true and correct in all respects as transcribed from said equipment.

I further certify that I am not counsel, attorney, relative or employee of any of the parties hereto, or in any way interested in the within action.

  
Kathy S. Simpson, RPR  
Notary Public - State of Ohio

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