

IN THE SUPREME COURT OF OHIO

LORNA B. RATONEL, et al. : CASE NO. 2015-0724

Plaintiffs-Appellees, : On Appeal from the

v. : Montgomery County Court of Appeals,

: Second Appellate District

ROETZEL & ANDRESS, LPA, et al. : Court of Appeals

Defendants-Appellants. : Case No. 26259

MEMORANDUM CONTRA OF DEFENDANT-APPELLANTS TO PLAINTIFFS-
 APPELLEES' MOTION TO DISMISS AND MOTION FOR SANCTIONS

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 SUPREME COURT OF OHIO

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MEMORANDUM

On June 5, 2015, Appellees Lorna B. Ratonel, Carmalor, Inc., and Carmalor Ohio, LLC (hereafter, collectively “Ratonel”) filed their Motion to Dismiss and Request for Sanctions. Ratonel asserts in their Motion that Appellants Roetzel & Andress, LPA and Mark Ropchock (hereafter, collectively “R&A”) have “consciously disregarded settled case law” and have failed to heed Ratonel’s repeated demands that R&A withdraw their appeal filed with this Court. Contrary to Ratonel’s assertions, an appellate court’s reversal of the trial court’s grant of summary judgment is a final appealable order pursuant to existing legal authority. If Ratonel’s position were taken to its logical end, it would result in the legislature impermissibly curtailing this Court’s jurisdiction. Any decision of an intermediate court of appeals resulting in a trial or new trial would be immune from review by this Court. R&A’s position was communicated professionally and in good faith to Ratonel prior to Ratonel’s filing of its Motion to Dismiss and for Sanctions. That correspondence was omitted from Ratonel’s Motion. It is attached to this Memorandum as exhibits A through C.

I. THE APPELLATE COURT’S REVERSAL OF R&A’S MOTION FOR SUMMARY JUDGMENT IS A FINAL APPEALABLE ORDER.

Ratonel asserts that R.C. 2505.03 limits the appellate jurisdiction of any court, including the Supreme Court. Even assuming the legislature may constitutionally abridge the jurisdictional authority of this Court, the Appellate Court’s Order was final and appealable as defined by R.C. 2505.02(B)(3). That section provides, in pertinent part, that an order is a final appealable order when it is “[a]n order that vacates or sets aside a judgment or grants a new trial.” Here, the trial court granted R&A summary judgment on Ratonel’s French Village claims. That judgment was reversed and set aside by the appellate court, and the case was remanded to the trial court for further proceedings.

The cases cited by Ratonel do not sustain their argument. R&A does not dispute that the denial of summary judgment by a trial court is typically not a final appealable order. However, the denial of summary judgment by a trial court is different from an appellate court's reversal and setting aside of a summary judgment that has previously been granted – which is the scenario in this case. When a trial court refuses to grant a party judgment the case will proceed to a trial on the merits. When a trial court has granted judgment to the movant, the movant is entitled to that judgment until that judgment is reversed after exhaustion of the movant's rights of appeal, including its right to invoke discretionary review by this Court.

Courts, including this Court, have found that the setting aside of a grant of summary judgment is a final appealable order. *McGreary v. Brocker*, 94 Ohio St.3d 440, 763 N.E.2d 1175; *Nationwide Ins. Co. v. Davey Tree Expert Co.*, 166 Ohio App.3d 268, 273 (2006) (“...a judgment vacating a grant of summary judgment is a final appealable order”). In *Hoecker v. Dayton*, a trial court granted summary judgment and then later vacated its own judgment after the non-movant filed a motion for reconsideration. The appellate court held that the trial court's vacation of its own judgment was a final appealable order. 1995 Ohio App. LEXIS 3983 (2d. Dist. Sept. 13, 1995).

R.C. 2505.02 and 2505.03 and existing case authority thus provide that a final appealable order exists when summary judgment is granted and then is later set aside. Were this Court not permitted to entertain appeals from an appellate court that reverses or sets aside a grant of summary judgment, there would be no mechanism for policing appellate courts that were ignoring the spirit and letter of Civil Rule 56.

II. R.C. 2505.02 AND 2505.03 ARE AN UNCONSTITUTIONAL RESTRAINT ON THIS COURT'S JURISDICTIONAL AUTHORITY.

Even assuming R&A's appeal did not meet the definition of a "final appealable order" as defined in R.C. 2505.02, this appeal is still proper because the General Assembly may not expand or contract the jurisdictional authority of this Court. The Ohio Constitution vests this Court with its judicial power. This Court was created and empowered under Article IV, Sections 1 and 2 of the Ohio Constitution.

Article IV, Section 2, in pertinent part, provides that this Court shall have appellate jurisdiction:

In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals.

Nowhere does Article IV, Section 2 discuss or define the term "final appealable order". Instead, Article IV, Section 2 expressly permits this Court to review the judgment of any court of appeals when there is a case of public or great general interest. The General Assembly enacted R.C. 2505.02, which defines the term "final appealable order". Pursuant to R.C. 2505.02, a final appealable order only exists when the delineated conditions of the statute are met. Consequently, a final appealable order is a statutory creation, and is a limitation on judicial authority imposed by the General Assembly.

In *Cincinnati Gas & Elec. Co. v. Pope*, this Court considered whether R.C. 2505.01 *et. seq.* unconstitutionally abridged the power of appellate court's to review judgments of the Courts of Common Pleas. 54 Ohio St.2d 12, 374 N.E.2d 406 (1978). In *Pope*, this Court noted that, "the attitude of this court has long been that the definition of final orders is within the judicial province." *Id.* at 16. However, this Court went on to find that the General Assembly's enactment of R.C. 2505.02 and 2505.03 did not constitutionally abridge the appellate court's

powers. *Id.* at 15-16. This Court so held because Article IV, Section 3 of the Ohio Constitution had been amended to expressly empower the General Assembly to define appellate courts' jurisdiction. *Ibid.* Article IV, Section 3 provides:

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, *and such jurisdiction as may be provided by law* to review, affirm, modify, set aside, or reverse judgments or final orders.... (emphasis added).

Notably, Article IV, Section 2 of the Ohio Constitution does not grant the General Assembly similar authority to define the appellate jurisdiction of the Ohio Supreme Court. Instead, Article IV, Section 2 delineates the appellate authority of the Supreme Court to cases of general or great public interest. Moreover, the only authority that Article IV, Section 2 confers upon the General Assembly is to alter the number of justices that comprise this Court.

Concededly, this Court has said that R.C. 2505.03 limits the appellate jurisdiction of all courts, including this Court. *State ex rel. White v. Cuyahoga Metro House. Auth.*, 79 Ohio St.3d 543 (1997). It appears, however, that this Court has never squarely considered the constitutionality of R.C. 2505.03 as it is applied to this Court's appellate jurisdiction. A review of the Ohio Constitution's plain language and a review of applicable case reveal that any attempt by the legislature to limit the jurisdictional authority of this Court is impermissible. Permitting the General Assembly to do so without an express grant of Constitutional authority is a usurpation of power by the legislative branch and violates the separation of powers doctrine.

Because R.C. 2505.03 cannot be constitutionally applied to abridge the appellate jurisdiction of this Court, this Court may review the judgment of any appellate court when the case is of great general or public interest. R&A's appeal is properly before this Court as it is such a case as was argued in R&A's jurisdictional memorandum in support of their appeal.

III. R&A'S APPEAL IS NOT FRIVOLOUS BECAUSE IT IS WELL FOUNDED IN LAW AND FACT AND IS MADE IN GOOD FAITH.

Ratonel seeks sanctions pursuant to S. Ct. Pract. R. 4.03(A) and asserts that R&A's pursuit of this appeal is not reasonably well-grounded in fact or law. To award sanctions under that rule it must be determined that R&A's appeal "is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." *Health Care REIT, Inc. v. Cuyahoga Cnty. Bd. of Revision*, 140 Ohio St.3d 30, 44-45 (2014). This Court has awarded attorney fees pursuant to S. Ct. R. Pract. 4.03(A) under limited circumstances. *Ibid.*

Ratonel's representation that R&A did not respond to their correspondence regarding a dismissal of this case is unfounded. R&A responded to both of Ratonel's written demands for a dismissal of this appeal and stated their position. These responses are attached to this Memorandum as exhibits A through C. The correspondence simply reflects a good-faith difference in opinion. It does not justify an invocation of Rule 4.03(A).

R&A has not advanced arguments that are not reasonably well grounded in fact or law. R&A was granted summary judgment by the trial court because the trial court judge found that there were no genuine issues of material fact and that R&A was entitled to judgment as a matter of law on the French Village claims. The trial judge's decision turned on the fact that a limited scope representation had been communicated by R&A and had been understood by Ratonel. The appellate court reversed the trial court's grant of summary judgment in a 2-1 decision. Judge Hall, in his dissenting opinion, observed that Ms. Ratonel's acknowledgment that R&A refused to handle the French Village claims unequivocally resulted in there being no genuine issue of material fact on that determinative issue. Two of the four judges who have thus far ruled on R&A's motion have found that it is well-grounded in fact and that it should be granted. To argue

otherwise in a motion for sanctions demonstrates little more than an excess of zeal on the part of Ratonel.

R&A's arguments are also well founded in law. Civil Rule 56 clearly provides a mechanism for summary judgment where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. R&A has demonstrated, and two judges agree, that the record does not support Ratonel's theory that R&A undertook representation for the French Village claims. Without a duty there can be no breach and no damages.

R&A's arguments that this is a case of general or great public interest are also well-founded. The appellate court's decision imperils lawyers who work on a contingent fee basis because it would prohibit these lawyers from limiting the scope of a written engagement agreement, and also prohibit them from explaining their rationale for declining to undertake representation of certain claims without it being argued that the lawyer expanded the scope of the representation by such a discussion. The appellate court's decision also risks reviving the long-abandoned "scintilla rule" and rendering Civil Rule 56 meaningless. Ratonel acknowledged in her own sworn testimony that R&A refused to undertake representation of the French Village claims. To deny summary judgment in the face of this admission is to return to the scintilla standard rather than utilizing the "reasonable minds" standard that was adopted long ago.

Finally, this Court has jurisdiction over R&A's appeal and R&A's appeal is not filed with an improper purpose or with the motive to harass Ratonel. R&A has appealed the appellate court's decision in order to obtain a reversal of that court's decision and a reinstatement of the trial court's grant of summary judgment.

CONCLUSION

This Court has appellate jurisdiction over this case because the appellate court set aside the trial court's grant of summary judgment and because this is a case of general or great public interest. R&A have filed their appeal in good faith based on existing law and/or an argument for a change in existing law. The appeal has not been filed to harass Ratonel or with an improper motive.

Respectfully submitted,



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CERTIFICATE OF SERVICE

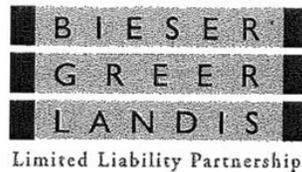
I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary United States mail to counsel for Appellees, Sam G. Caras, David M. Deutsch, and Mitchell J. Anderson, One First National Plaza, Suite 310, 130 West Second Street, Dayton, OH 45402, on the 12th day of June, 2015.



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May 13, 2015

Via E-Mail: deutsch.lawyer@gmail.com

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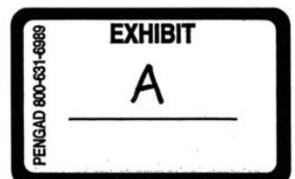
Re: Lorna B. Ratone, et al. v. Roetzel & Andress, LPA, et al.
Ohio Supreme Court Case No. 2015-0724

Dear David:

Thanks for your e-mail of May 11, 2015. As usual, it displays impressive imagination and ingenuity. Perhaps some recognition that two of the four judges thus far involved have found that your substantive arguments on French Village are without merit and that the other two judges found that sending the case to a jury is a "close call" would make the lawsuit easier to resolve. As far as your jurisdictional argument is concerned, I respectfully submit that you have inadvertently confused the jurisdiction of Ohio Courts of Appeals with the jurisdiction of the Ohio Supreme Court.

You have correctly cited Article IV, § 3 of the Ohio Constitution which governs jurisdiction of Ohio Courts of Appeals and which gave the Second District jurisdiction to hear your appeal from Judge Wiseman's grant of summary judgment. That section, however, does not impact the jurisdiction of the Ohio Supreme Court which is governed by Article IV, § 2 of the Ohio Constitution and confers discretionary jurisdiction on the Court whenever it finds a question presented to be of public or great general interest.

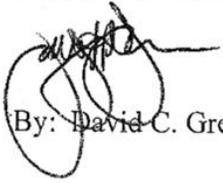
For cases like ours where a trial court granted summary judgment, the losing party obtained a reversal on appeal, and the Ohio Supreme Court accepted jurisdiction. *See, Layne v. Progressive Preferred Ins. Co.*, 104 Ohio St. 3d 509 (2004), *Pinchot v. Charter One Bank*, 99 Ohio St. 3d 390 (2003), and *Wills v. Frank Hoover Supply*, 26 Ohio St. 3d 186 (1986). If you can cite me a more current decision from the Ohio Supreme Court in support of your jurisdictional argument, I will be happy to give your letter the further consideration it would then deserve.



David M. Deutsch, Esq.
Page Two
May 13, 2015

Yours truly,

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By: David C. Greer

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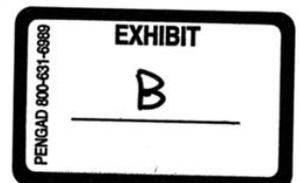
Re: Lorna B. Ratonel, et al. v. Roetzel & Andress, LPA, et al.
Ohio Supreme Court Case No. 2015-0724

Dear David:

I have carefully read all eight of the cases which you have cited, and each appears to be readily distinguishable from the situation presented by our case. In most of them the Court of Appeals had retained jurisdiction on some issue; in one, a Magistrate's recommendation had not been accepted by the Appellate Court; the only denial of summary judgment case was an appellate decision from the Eighth District which simply states the well-known rule that when a trial court denies a motion for summary judgment there is no appealable order.

Our case involves a final order of a trial court granting summary judgment, followed by a final order of an appellate court reversing the trial court's order. Rev. C. § 2305.03 indicates that our appeal to the Supreme Court is governed by the Rules of Practice of the Supreme Court. Rule 5.02(A)(3) authorizes a "jurisdictional appeal" as "an appeal from a decision of a Court of Appeals that asserts 'the case involves a question of public or great general interest pursuant to Article IV, § 2(B)(2)(e) of the Ohio Constitution.'" This jurisdiction is fixed by the Ohio Constitution.

I, in good faith, hold the opinion that there is a proper jurisdictional basis for the motion to certify which I filed on behalf of my client. Suppose the Second Appellate District, in reversing a trial court's grant of summary judgment, made a flat-out ruling that it considers Rule 56 of the Ohio Rules of Civil Procedure a meaningless rule and that the rule will never be enforced in the Second Appellate District. If I am wrong and you are right on the jurisdictional issue, the Ohio Supreme Court would be powerless to resurrect the rule through judicial review. From the representations made in your letters, I thought you had found an "all fours" decision where a trial court granted summary judgment, an appellate court reversed, and the Ohio Supreme Court declined jurisdiction. Despite what I am sure is a thorough job of research, no such decision has been cited to me and I have found no such decision.

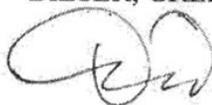


David M. Deutsch, Esq.
Page Two
May 20, 2015

You are, of course, free to file a motion to dismiss the motion to certify on jurisdictional grounds so we can play out our conflicting arguments. Under the circumstances, I do not believe there is a justifiable basis for your threatened motion for sanctions.

Yours truly,

BIESER, GREER & LANDIS, LLP

A handwritten signature in black ink, appearing to read 'D. Greer', is written over the printed name.

By: David C. Greer

DCG;jll
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May 22, 2015

Via E-Mail: samcaras@caraslaw.com

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Re: Lorna B. Ratone, et al. v. Roetzel & Andress, LPA, et al.
Ohio Supreme Court Case No. 2015-0724

Dear Sam:

I appreciate the fruits of your continuing research, but the new case you have cited does not carry us any further than your previous citations. The Ohio Supreme Court initially accepted jurisdiction over the appeal in the *Youngstown Diocese* case rather than dismissing it outright on the ground that the final judgment of the Court of Appeals was not a final judgment. The Supreme Court's subsequent decision simply says "the appeal is dismissed, *sua sponte*, as having been improvidently allowed." I assume that in reviewing the briefs the Court found that the appellant failed to present an issue of public or great general interest sufficient to justify acceptance of discretionary jurisdiction under the mandate of the Ohio Constitution. There are probably a dozen or more different and unstated reasons for such a finding in the *Youngstown Diocese* case.

Discretionary jurisdiction is dramatically different from no jurisdiction. I simply cannot in good faith accept your "no jurisdiction" argument which, in my opinion, would bar Supreme Court review of any appellate decision which sends a case back to the trial court for a trial or for a new trial. I cannot stop you from filing whatever you think is appropriate to file, but I don't believe that an action for sanctions is appropriate here as opposed to a simple motion to dismiss based on your "no jurisdiction" theory.

Yours truly,

BIESER, GREER & LANDIS, LLP

By: David C. Greer

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