Complex Appeals

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Topics

- Post-trial motions
- Numbers of appeals
- Reversal rates
- Preserving the record
  - Rulings, evidence, motions, standard, proffers, requests, civil issues
- Final Orders
  - RC 2505.03
  - Civ.R. 54
- Filing the appeal
- Deadline to appeal
- Remands
- Delayed Appeals
- Conclusion

Plaintiffs filed motions for post-trial relief in 16% of tort trials where they won, while defendants requested post-trial relief in 18% of tort trials with a plaintiff winner

Post-trial Motions in Tort Cases*

Why the setup matters

- **Post-trial motions – 28% of civil cases, 37% relief granted:**
  - **Plaintiffs filed motions for post-trial relief in 16% of tort trials where they won, while defendants requested post-trial relief in 18% of tort trials with a plaintiff winner**
  - **Approx. 90% of P motions for new trial or award modifications**
  - **36% of P motions granted: 29.5% new trial, 21.7% modified, 14.6% JNOV, 40% other (correct errors, costs & fees, amend)**
- **13% appealed**
  - **P 5% of those won, 13% of those lost; D 8% where P won**
  - **D 40% malpractice, 30% of product liability: (see next slide)**

*Civil Justice Survey of State Courts, Bureau of Justice Statistics, 2005

Notices of appeal filed 2005 (BJS, 2009)

Case type	Tort trials with plaintiff winners			Tort trials without plaintiff winners		
	Number*	Percent filing notice of appeal—		Number	Percent filing notice of appeal—	
		Plaintiff	Defendant		Plaintiff	Defendant
All tort trials	**8,773**	**5.3%**	**7.8%**	**7,587**	**12.5%**	**1.6%**
Professional malpractice	63	11.1	42.2	87	39.1	5.7
Product liability*	101	14.9	32.7	251	16.3	0.8
Medical malpractice	592	14.9	31.2	1,854	13.6	0.9
Other/unknown tort	306	7.8	21.9	357	17.9	0.3
Slander/libel	81	7.4	16.0	106	16.0	0.0
Premises liability	725	4.6	14.6	1,137	8.2	0.2
Conversion	179	1.7	12.3	197	10.2	23.2
Intentional tort	429	6.5	8.4	296	20.9	1.4
Automobile accident	6,180	4.1	3.1	3,222	11.2	1.2
Animal attack	108	7.4	0.0	31	9.7	0.0
False arrest/imprisonment	9	**	**	49	6.1	2.0

Note: Data are not available to determine whether litigants filing a notice of appeal in state trial courts further pursued appeals by filing documentation with the appropriate appellate court. Tort trial notice of appeals data were available for 99.9% of tort trials where the plaintiff prevailed and 99.9% of tort trials where the plaintiff did not prevail. Detail may not sum to total because of rounding.
**Too few cases to obtain statistically reliable estimates.

Hamilton County Appeals

- **Hamilton Co. Civil – 3.6% of civil cases are appealed***
  - **2017 – 255 appeals filed v. 7007 civil lawsuits filed**
- **Hamilton Co. Criminal – 5.6% of criminal cases appealed***
  - **2017 – 415 criminal appeals v. 7475 criminal cases**

*** appeals derive from cases filed or brought in prior years**

Reversal rates:

Federal – reversals in 12-month period terminations ended 12/31/2017*:

- **7.6% overall**
- **12.0% private civil**
- **6.3% criminal**

*Statistical Tables For The Federal Judiciary

Hamilton Co. 2017 filings reversal rate:

Including dismissals:

- **13.8% overall reversals**
- **17.9% civil reversals**
- **11.8% criminal reversals**

Decided cases:

- **29.6% overall reversals**
- **37.2% civil reversals**
- **26.4% criminal reversals**

Preserving the Record: Generally

- Crim.R. 51 – "Exceptions unnecessary. An exception, at any stage or step of the case or matter, is unnecessary to lay a foundation for review, whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon."

Evid.R 103 – Rulings on Evidence:

(A)Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1)Objection. In case the ruling is one admitting evidence, timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2)Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.

Once the court rules definitely on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(B)Record of offer and ruling. At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C)Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(D)Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Ohio App.R. 9 - Statement of the Evidence or Agreed Statement

Useable where the transcript is not available because the appellant is poor (*State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56). Without a transcript the court of appeals will accept the factual determinations of the trial judge as correct except as to unopposed statements. That is, if everyone cannot agree and there is no transcript, then the presumption of regularity applies.

The standard is **abuse of discretion**. A ruling by the trial court judge that the proposed statement does not conform to the record is fatal to the appellant's position. *In the Matter of Estate of Alexious G. Fouras*, 2004 Ohio 5563 (5th Dist. Licking Co. 2004).

Crim.R. 29. Motion for Acquittal

- Must be made at the conclusion of government case and close of evidence.
- Failure to make waives sufficiency of the evidence.
- But some courts hold that it must be interpreted as it was written, in the alternative.
- Factors for manifest weight of the evidence issue:
  - Not required to accept the incredible
  - Whether the evidence is uncontradicted
  - Whether a witness was impeached
  - What was not proved
  - Certainty of the evidence
  - Reliability of the evidence
  - Personal interests of witnesses
  - Quality of the evidence

Crim.R. 52 – Harmless Error/Plain Error:

(A)Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B)Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Criminal Proffers

- Question and answer or formal method
  - Evid.R. 702: relates to matters beyond knowledge or experience of jurors, witness must be qualified, testimony based on reliable scientific, technical, or specialized information.
- Statement of the evidence or informal method
  - Must inform the court of the legal theory on which admissibility is proposed
  - Must demonstrate the relevance of content to an issue

Requests for Jury Instructions

Ohio R.Crim.P. 30: Request in writing by close of evidence – must object with specificity before jury retires

"... [D]efendant is entitled to have the jury consider any theory of defense which is supported by law and has some foundation in the evidence, even though such evidence may be weak, insufficient, or of doubtful credibility.

However, if the defendant fails to sustain his evidentiary burden the court is duty-bound not instruct the jury on the defense." U.S. v. Patrick, 542 F.2d 381, 386 (7th Cir.1976).

Civil Refinements

- Preservation of issues
- Proffer of the excluded testimony or the content of such testimony is apparent from the circumstances
- Motion JNOV or new trial
- Transcripts!
- Objections to magistrate recommendations
- Expert Opinion

Finality of Orders: Ohio

- Ohio does not recognize the *Cohen v. Beneficial* interlocutory appeal schema (that an order which conclusively determines an important issue completely separate from the merits of the action is appealable if it would be effectively unreviewable on appeal from a final judgment).
- Ohio's rule is similar to the federal rule, but nominally simpler – a civil case is appealable if it is final or if the trial court certifies that it is appealable per Civ.R. 54(B) – though if fewer than all claims are resolved the trial court must find that there is no just reason for delay of the appeal.

Hamilton County dismissals 2017

- In practice, approximately half of all civil appeals are dismissed, many for lack of an appealable order. In 2017 in Hamilton County, 26 civil appeals were voluntarily dismissed, 96 were involuntarily dismissed
- Of the involuntary dismissals, 23 were for lack of a final appealable order, 51 for failing to file a compliant brief, transcript order, docketing statement, or amended notice.\
- Thus 24% of involuntary dismissals were for a lack of a final appelable order.

Ohio Finality (continued)

Only judgments, decrees and final orders are appealable. Ohio Rev. Code § 2505.03. Ohio Constitution, Article IV, § 3(B)(2).

A criminal order is final if the judgment includes the plea, the verdict or findings, and the sentence, and is signed by the judge and entered by the clerk of courts (Crim.R. 32(C)).

"Judgment" includes a decree and any order from which an appeal lies as provided in Ohio Rev. Code § 2505.02. Civil Rule 54(A).

The civil trial court's finding that there is no just reason for delay is not controlling on the appellate courts. They may and do disagree and dismiss appeals.

Finality of Orders: Ohio

A civil case is appealable if the trial court certifies that it is appealable per Civ.R. 54(B)

A criminal order is final if the judgment includes the plea, the verdict or findings, and the sentence, and is signed by the judge and entered by the clerk of courts

The trial court's finding that there is no just reason for delay is not controlling on the appellate courts

Noble v. Colwell (1989), 44 Ohio St. 3d 92, 540 N.E.2d 1381.

The question of whether an order is final and appealable is jurisdictional and can be raised *sua sponte* by an appellate court. The result has been over 800 cases interpreting and applying that decision.

"A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." (44 Ohio St. 3d at 94)

An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the finality tests of both R.C. § 2505.02 and Civ.R. 54(B):

§ 2505.02 Final order.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
  - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
  - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.
- (5) An order that determines that an action may or may not be maintained as a class action;

* * *

§ 2505.02 continued

- (6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;
- (7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

Sullivan v. Anderson Twp., 122 Ohio St. 3d 83 (2009)

Under the general rules, a court first applies R.C. 2505.02(B) to determine whether the order "affects a substantial right and whether it in effect determines an action and prevents a judgment." Wisintainer v. Elcen Power Strut Co. (1993), 67 Ohio St.3d 352, 354, 1993 Ohio 120, 617 N.E.2d 1136. If the court of appeals determines that the trial court order is final under R.C. 2505.02, the next step is to determine whether the trial court certified the order with the language of Civ.R. 54(B)--"there is no just reason for delay." Wisintainer, 67 Ohio St.3d at 354-355; Noble, 44 Ohio St.3d at 97. The use of Civ.R. 54(B) certification by a trial court is discretionary. Id. at 96-97, 540 N.E.2d 1381, and fn. 7.

Sullivan v. Anderson Twp., 122 Ohio St. 3d 83 (2009)

R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an [*86] alleged immunity from liability under R.C. Chapter 2744, even when the order makes no determination pursuant to Civ.R. 54(B).

Mynes v. Brooks, 124 Ohio St. 3d 13 (2009)

"R.C. 2711.02(C) permits a party to appeal a trial court order that grants or denies a stay of trial pending arbitration, even when the order makes no determination pursuant to Civ.R. 54(B)."

Robinette v. Bryant, 2016-Ohio-5956

"contempt order finding a party in contempt and imposing a sentence conditioned on the failure to purge is a final appealable order."

Rule 54. Judgments; Costs

- (B)Judgment upon multiple claims or involving multiple parties.
- When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Filing the Appeal – variations in Ohio

One notice or many?

3d District (Northwest Ohio) (similar to 10th District)

- Rule 6. Multiple appeals
  - (A) Notice of Appeal. A separate notice of appeal shall be filed in the trial court for each case appealed therefrom whether the case was consolidated in the trial court for hearing with one or more other cases

8th District (Cleveland):

(B) Appeal As Of Right. * * *

(2) A party is required to file only one notice of appeal from a judgment entered in cases consolidated in the trial court. The notice of appeal must list all consolidated case numbers. The appeal will proceed under one case number unless otherwise ordered by the court.

Hamilton County

In 2005:

- 1008 cases filed
- 877 decisions rendered
- 131 notices of appeal consolidated with other case involving the same parties.
- Might be cross-appeals, but:

Most were criminal cases:

- 660 notices of appeal filed
- 558 decisions.
- The remaining 102 cases were separate filings ultimately consolidated into other case.

App.R. 4 Appeal as of right -- When taken

(A)Time for appeal.(1)Appeal from order that is final upon its entry. Subject to the provisions of App.R. 4 (A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.

(2)Appeal from order that is not final upon its entry. Subject to the provisions of App.R. 4 (A)(3), a party who wishes to appeal from an order that is not final upon its entry but subsequently becomes final--such as an order that merges into a final order entered by the clerk or that becomes final upon dismissal of the action--shall file the notice of appeal required by App.R. 3 within 30 days of the date on which the order becomes final.

(3)Delay of clerk's service in civil case. In a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58 (B), the 30-day periods referenced in App.R. 4 (A)(1) and 4 (A)(2) begin to run on the date when the clerk actually completes service.

Except:

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

- (1)Multiple or cross appeals. If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.
- (2)Civil or juvenile post-judgment motion. In a civil case or juvenile proceeding, if a party files any of the following, if timely and appropriate:
  - (a) a motion for judgment under Civ.R. 50 (B);
  - (b) a motion for a new trial under Civ.R. 59;
  - (c) objections to a magistrate's decision under Civ.R 53 (D)(3)(b) or Juv.R. 40 (D)(3)(b);
  - (d) a request for findings of fact and conclusions of law under Civ.R. 52, Juv.R. 29 (F)(3), Civ.R. 53 (D)(3)(a)(ii), or Juv.R. 40 (D)(3)(a)(ii); or
  - (e) a motion for attorneys' fees; or
  - (f) a motion for prejudgment interest, then the time for filing a notice of appeal from the judgment or final order in question begins to run as to all parties when the trial court enters an order resolving the last of these post-judgment filings.

Next:

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

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

Next:

(3)Criminal and traffic post-judgment motions. In a criminal or traffic case, if a party files any of the following, if timely and appropriate:

- (a) a motion for arrest of judgment under Crim.R. 34;
- (b) a motion for a new trial under Crim.R. 33 for a reason other than newly discovered evidence; or
- (c) objections to a magistrate's decision under Crim.R. 19 (D)(3)(b) or Traf.R. 14; or
- (d) a request for findings of fact and conclusions of law under Crim.R. 19 (d)(3)(a)(ii),

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

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

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

- (4)Appeal by prosecution. In an appeal by the prosecution under Crim.R. 12 (K) or Juv.R. 22 (F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.
- (5)Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ.R. 54 (B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ.R. 54 (B).
- (C)Premature notice of appeal. A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.
- (D)Definition of "entry" or "entered". As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ.R. 58 (A) or Crim.R. 32 (C).

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

D128496664

QFS TRANSPORTATION, LLC,

Appellee,

vs.

WALL STREET SYSTEMS, INC.,

Appellant.

APPEAL NO. C-200102
TRIAL NO. A-1802329

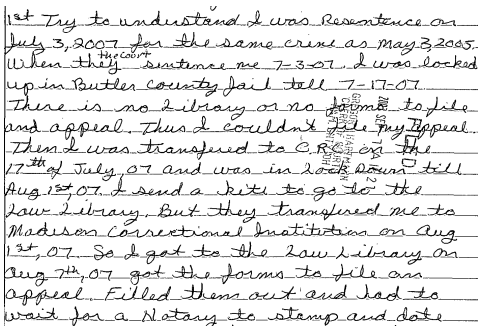
ENTRY GRANTING MOTION TO REMAND

ENTERED
MAR 24 2020

This cause came on to be considered upon the motion of appellant to remand the cause for the trial court to rule on its pending motion for attorney fees and costs.

The motion is well taken and is granted. The Court hereby stays the appeal and remands the cause to the trial court for the sole purpose of permitting the court to consider and determine the motion.

Delayed Appeals – App.R. 5


1st Try to understand I was Resentence on July 3, 2007 for the same crime as May 3 2005. When they Hyrcourt sentence me 7-3-07, I was locked up in Butler county Jail till 7-17-07. There is no Library or no forms to file and appeal. Thus I couldn't file my Appeal. Then I was transfered to C.R.C. on the 17th of July 07 and was in Lock Down till Aug 1st 07. I send a kite to go to the Law Library. But they transfered me to Madison Correctional Institution on Aug 1st, 07. So I got to the Law Library on Aug 7th, 07 got the forms to file an appeal. Filled them out and had to wait for a Notary to stamp and date

Conclusion

Failing to plan is planning to fail

BUT

Some failures can be avoided by prior proper planning.