



# Court of Claims of Ohio

The Ohio Judicial Center  
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TRANSAMERICA BUILDING  
COMPANY, INC.

Plaintiff/Counter Defendant

v.

OHIO SCHOOL FACILITIES  
COMMISSION, etc.

Defendant/Counter  
Plaintiff/Third-Party  
Plaintiff/Counter Defendant

v.

LEND LEASE (US) CONSTRUCTION,  
INC.

Third-Party Defendant/Counter  
Plaintiff/Fourth-Party Plaintiff

and

STEED HAMMOND PAUL INC., etc.

Third-Party  
Defendant/Fourth-Party Plaintiff

v.

BERARDI PARTNERS, INC., et al.

Fourth-Party Defendants

Case No. 2013-00349

Referee Samuel Wampler

ORDER OF THE REFEREE

2015 MAY 18 AM 10:29

FILED  
COURT OF CLAIMS  
OF OHIO

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ORDER

On May 11, 2015, defendant Ohio School Facilities Commission ("OSFC") filed a motion pursuant to Civ.R. 60(B) for relief from the order/judgment "severing the Architect and Construction Manager from Plaintiff-Contractor's lawsuit."<sup>1</sup>

A party may only seek relief under Civ.R. 60 (B) from a final appealable order. *See, Matrka v. Stephens*, 77 Ohio App. 3d 518, 520 (Ohio Ct. App., Franklin County 1991). The Court of Appeals, Tenth Appellate District, recently ruled that the order of severance from which OSFC now seeks relief under Civ.R. 60(B) is not a final appealable order.<sup>2</sup>

The same court has also made it clear that Civ.R. 60 (B) cannot be used to create an appealable event.

Ordinarily, a grant or denial of a genuine Civ.R. 60(B) motion is a final appealable order. However, this rule presumes that the underlying order under challenge by a movant's Civ.R. 60(B) motion is, itself, a final appealable order. \* \* \* [A] movant cannot be permitted to use a Civ.R. 60(B) motion to turn "an unappealable event into an appealable event." \* \* \* Otherwise, any order of a trial court that is not a final, [\*6] appealable order could be converted into a final appealable order by the simple expedient of moving, unsuccessfully, for relief from that order.

*Safe Auto Ins. Co. v. Perry*, 2001 Ohio App. LEXIS 195, 5-6 (Ohio Ct. App., Franklin County Jan. 25, 2001)

Additionally, Civ.R. 60(B) cannot be used as a substitute for a direct appeal to correct a non-clerical mistake by a trial court in rendering its order.

. . . [A] motion for relief from judgment cannot be predicated upon the argument that the trial court made a mistake in rendering its decision. *Chester Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1995),

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<sup>1</sup>Although OSFC does not refer to the order of March 24, 2015, that is the order that severed the trial. OSFC objected to the order on April 7, 2015 and moved to set it aside. On April 17, 2015, the court, while noting that the OSFC's objection were untimely, nevertheless agreed with the analysis and application of the referee when he granted the motion to sever. Accordingly, the court denied the motion to set aside the March 24, 2015 order.

<sup>2</sup>Finding that the order from which OSFC has appealed does not constitute a final appealable order under R.C. 2505.02, we grant TransAmerica's motion to dismiss." May 15, 2015 Journal Entry of Dismissal, *TransAmerica Building Company, Inc. v. Ohio School Facilities Commission*, 15AP-489.

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102 Ohio App.3d 404, 408, 657 N.E.2d 348. The type of mistake contemplated by Civ.R. 60(B)(1) is a mistake by a party or his legal representative, not a mistake by the trial court in its legal analysis. *Antonopoulos v. Eisner* (1972), 30 Ohio App.2d 187, 284 N.E.2d 194. To contest the trial court's judgment dismissing his medical claim, appellant was required to directly appeal the judgment. It is well-established that a motion under Civ.R. 60(B) may not be used as a substitute for a direct appeal. *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128, 28 Ohio B. 225, 502 N.E.2d 605.

*Foy v. Trumbull Corr. Inst.*, 2011-Ohio-6298, P11 (Ohio Ct. App., Franklin County Dec. 8, 2011); *see also, Genhart v. David*, 2011-Ohio-6732 (Ohio Ct. App., Mahoning County Dec. 22, 2011)

The original order entered on January 28, 2015 denying TransAmerica Building Co., Inc.'s ("TA") motion to sever was denied ***without prejudice***, clearly opening the door for TA to file another motion to sever under Civ.R. 14(A) if it could submit sufficient evidence to establish agency. OSFC did not object to this interlocutory order.

Interlocutory orders are subject to revision (reconsideration) any time prior to entry of judgment adjudicating the claims and the rights and liabilities of all the parties.

"Civ.R. 54(B) allows for a reconsideration or rehearing of interlocutory orders. The rule, when discussing interlocutory orders, states, in pertinent part, that they are "subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties." Therefore, a motion for reconsideration would be the proper procedural vehicle for obtaining relief after interlocutory orders."

*Pitts v. Ohio Dep't of Transp.*, 67 Ohio St. 2d 378, 379 (Ohio 1981).

As interlocutory orders, such judgments are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Civ.R. 54(B). Accordingly, a plaintiff may file a motion for reconsideration challenging a trial court's interlocutory order granting summary judgment to one of multiple defendants. (*citing Pitts*)

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Further, when presented with such a motion for reconsideration, a trial court may alter or reverse its earlier decision.

*Perritt v. Nationwide Mut. Ins. Co.*, 2004-Ohio-4706, P10 (Ohio Ct. App., Franklin County Sept. 7, 2004)

On February 11, 2015, Plaintiff TA filed its objections to the January 28, 2015 order denying its motion to sever and included additional evidence not previously presented in support of its original motion to sever.<sup>3</sup> On March 24, 2015, the court, ruling on TA's objections, treated the objections as a renewed motion to sever and directed the referee to consider the renewed motion in light of such additional evidence. On March 24, 2015, having considered TA's motion to sever in light of the additional evidence, the referee granted the motion to sever. The granting of the motion to sever was, in effect, a revision of the previous interlocutory order which denied severance, a procedure allowed by Civ.R. 54(B) as explained above by the courts in *Pitts* and *Perritt*.

Defendant OSFC did not timely object to the revised order of March 24, 2015 as required by Civ.R. 53(D)(2)(b). Failure to timely object waived all objections other than plain error. *PHH Mortg. Corp. v. Santiago*, 2012-Ohio-942, P8 (Ohio Ct. App., Franklin County Mar. 8, 2012). In its judgment entry of April 17, 2015, even though OSFC failed to timely object to the order of severance, the court nevertheless reviewed the order granting severance and found that in granting the motion to sever the referee was correct in his analysis of the issues and application of the law.

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<sup>3</sup>On February 17, 2015, TA also filed a renewed motion to sever.

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For all of the foregoing reasons, defendant OSFC's motion pursuant to Civ.R. 60(B)  
is DENIED.

  
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SAMUEL WAMPLER  
Referee

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