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## Appellate Jurisdiction in Ohio over Final Appealable Orders

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APPELLATE JURISDICTION IN OHIO OVER FINAL  
APPEALABLE ORDERS

GARY L. GARRISON<sup>1</sup>

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## I. INTRODUCTION

Appellate jurisdiction is an area of the law rarely given much thought by courts and trial practitioners. This is not surprising. Only a fraction of the lawsuits filed each year are fully litigated and an even smaller percentage of those are ever appealed. Judges and practitioners therefore spend more time mastering jurisdictional and procedural requirements for trial courts than they do for appellate courts. Nevertheless, when appellate review of a trial court judgment is sought, counsel must have a working knowledge of the rules governing the power of courts of appeals to hear a case. Fortunately, there are just two jurisdictional requirements to be met in Ohio before the judgment of a trial court can be reviewed in an appellate court. The first is that the judgment being appealed is a final, appealable order and the second is that the notice of appeal from that judgment is filed within the time frame prescribed by Ohio R. App. P. 4.<sup>2</sup> This article addresses the first of these two requirements - the so-called “final order rule.”

The Ohio Constitution specifies that the state’s twelve district courts of appeals shall have appellate jurisdiction, as provided by law, to review and affirm, modify or reverse “final orders” of inferior courts within their district.<sup>3</sup> This sounds simple enough but the Constitution does not specify what constitutes a “final order” and determining whether an order is “final” oftentimes involves the use of arcane and convoluted rules which make the whole process seem, at best, esoteric and, at worst, pointlessly hyper-technical. Be that as it may, the question of an order’s finality is critically important. If a judgment is not final, or if it is final but does not comply with applicable procedural rules, an appellate court has no jurisdiction to review it and the appeal must be dismissed.<sup>4</sup> This is so even when parties to the appeal do not raise the issue themselves.<sup>5</sup> Thus, practitioners who mistakenly believe an order is

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<sup>2</sup>Parties generally have a thirty (30) day window of opportunity to file a notice of appeal after the trial court enters judgment. Ohio R. App. P. 4(A). This time frame is mandatory and jurisdictional. *See State, ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga County*, 564 N.E.2d 86, 89 (Ohio 1990); *Kaplysh v. Takieddine*, 519 N.E.2d 382, at paragraph one of the syllabus (Ohio 1988); *Moldovan v. Cuyahoga County Welfare Dep’t.*, 496 N.E.2d 466, 467 (Ohio 1986). There are, however, several exceptions. *See, e.g.*, Ohio R. App. P. 4(B)(2) (tolling commencement of the thirty day time limit in certain instances), Ohio R. App. P. 4(B)(4) (mandating that criminal appeals by prosecutors pursuant to Crim. R. 12(k) or Ohio R. Juv. P. 22(F) be filed within seven days) and Ohio R. App. P. 5 (allowing criminal defendants to file motions seeking delayed appeal).

<sup>3</sup>Ohio Const. art. IV, § 3(B)(2). The term “appellate jurisdiction” is used in contrast to the courts’ original jurisdiction over the writs of *quo warranto*, *mandamus*, *habeas corpus*, prohibition and *procedendo*. *Id.* at (B)(1)(a)-(e).

<sup>4</sup>*Davison v. Rini*, 686 N.E.2d 278, 281 (Ohio Ct. App. 1996); *Prod. Credit Assn. v. Hedges*, 621 N.E.2d 1360, 1362 n.2 (Ohio Ct. App. 1993); *Kouns v. Pemberton*, 617 N.E.2d 701, 702 (Ohio Ct. App. 1992).

<sup>5</sup>Subject matter jurisdiction cannot be waived, *see Weathersfield Twp. v. Trumbull County Budget Comm’n*, 632 N.E.2d 1281, 1282 (Ohio 1994); *Shawnee Twp. v. Allen County Budget Comm’n*, 567 N.E.2d 1007, 1009 (Ohio 1991); *Painesville v. Lake County Budget. Comm’n*, 383 N.E.2d 896, 898 (Ohio 1978), and a lack of such jurisdiction can be raised any time during the course of the proceedings including for the first time on appeal. *See Fox v. Eaton Corp.*, 358 N.E.2d 536, 537 (Ohio 1976) *overruled on other grounds by Manning v. Ohio State Library Bd.*, 577 N.E.2d 650 (Ohio 1991); *Jenkins v. Keller*, 216 N.E.2d 379, at

final and appealable waste time and their client's money by filing an appeal that will ultimately be dismissed. Conversely, if the judgment is erroneously thought not to be final, counsel may be left open to potential malpractice liability for failing to file an appropriate notice of appeal and preserving the rights of the client.<sup>6</sup>

The criteria for determining whether an order is final and appealable are set out in Section 2502.02 of the Ohio Revised Code and, where applicable, Ohio R. Civ. P. 54(B). However, the interpretation and application of these rules have been uneven at best. Appellate procedure is a branch of law where *simplicity*, *clarity* and *consistency* are particularly important.<sup>7</sup> Unfortunately, over the years, the Ohio Supreme Court has fallen far short of those ideals and its jurisprudence in this area has been anything but clear and consistent. One appellate judge laments that, whenever the final order issue rears "its ugly head," the Supreme Court unleashes upon the legal community "such a poignant pendulum of vacillation" that he is left "utterly and confoundedly confused."<sup>8</sup> If the number of appeals being dismissed for lack of a final order are any indication, so too are many attorneys and trial court judges.<sup>9</sup>

This article focuses on the rules for determining finality and appealability of judgments under section 2505.02 and Ohio R. Civ. P. 54(B). To that end, this article addresses not only the various categories of "final orders" but also the procedural mechanisms by which interlocutory appeals are taken from judgments on one part of a case while the rest of the case remains pending. The objective of this article is two-fold. First and foremost, it provides a resource and guide to appellate practitioners and trial court judges for understanding the "final order rule" and for navigating its various provisions in the courts of appeals. The second objective is to address some of the theoretical problems and inconsistencies underlying the Ohio Supreme Court's jurisprudence in this area and, where possible, to suggest a more consistent approach to adjudicating whether a judgment is final and appealable. The process for determining finality and appealability is much more complex and convoluted than it needs to be and the goal of this article is to contribute to the

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paragraph five of the syllabus (Ohio 1966). Moreover, when the parties to an appeal neglect to raise and brief a jurisdictional issue themselves, the appellate court is required to raise it *sua sponte* and dismiss an appeal which is not from a final appealable order. See *In re Murray*, 556 N.E.2d 1169, 1174 n.2 (Ohio 1990); *Whitaker-Merrell v. Geupel Constr. Co.*, 280 N.E.2d 922, 924 (Ohio 1972).

<sup>6</sup>When in doubt, practitioners may file successive notices of appeal whenever an order arguably appears to be final and appealable so as to preserve the right to appeal and to protect them from liability. Such practice clogs the court system even further and is a waste of judicial resources. See Mark J. Chumky, *Fairness and Finality: Rethinking Final Appealable Orders Under Ohio Law*, 64 U. CIN. L. REV. 143 (1995).

<sup>7</sup>*Gray v. Youngstown Mun. Ry. Co.*, 117 N.E.2d 27, 31 (Taft, J., concurring) (Ohio 1954) (emphasis in original).

<sup>8</sup>*In re Estate of Pulford*, 701 N.E.2d 55, 56-57 (Ohio Ct. App. 1997) (Ford, P.J., writing for a unanimous court).

<sup>9</sup>Specific records are not kept as to the number of dismissals for jurisdictional reasons in general or lack of a final order in particular. However, I have worked on innumerable cases over the years that have been dismissed for that very reason.

bench's and the bar's understanding of these rules and also make the process simpler and more consistent.

## II. STATUTORY BACKGROUND

As noted before, the Ohio Constitution vests the state courts of appeals with appellate jurisdiction over final orders.<sup>10</sup> However, the Constitution does not spell out what constitutes a "final order." This is an issue left, in the first instance, to the General Assembly to define by statute and then to the courts as they try to interpret and apply those statutes. For many years, section 2505.02 simply defined a "final order" as an order which fell into one of three categories: (1) an order affecting a substantial right which, in effect, determined the action; (2) an order affecting a substantial right made in a special proceeding or upon a summary application after judgment; and (3) an order which vacated or set aside a judgment or granted a new trial.<sup>11</sup> This classification scheme provided a more or less workable standard until the 1980s and 1990s when several troubling cases arose concerning issues of privilege and confidentiality.

One such case was *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*<sup>12</sup> wherein two parents filed suit against a daycare center which allegedly made a false report of child abuse against them in retaliation for the parents having filed a complaint with police accusing the daycare center of leaving the children in its care unattended. The parents made various discovery requests seeking, among other things, child abuse reports thought to be confidential. Not surprisingly, the daycare center moved for a protective order, which the trial court granted in part and denied in part. An immediate appeal was taken as to that portion of the order, allowing discovery of some of the documents. The Cuyahoga County Court of Appeals found that it had jurisdiction to review the case and then held that the trial court erred in allowing the discovery. The case was appealed to the Ohio Supreme Court, which found that the trial court's judgment was not a final appealable order.<sup>13</sup> In so holding, the Court acknowledged that various policy concerns weighed in favor of making the trial court's order immediately appealable. The Court nevertheless

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<sup>10</sup>Ohio Const. art. IV, § 3(B)(2). See text at note 3.

<sup>11</sup>The statutory antecedent for OHIO REV. CODE § 2505.02 first appeared in 1935 when the General Assembly enacted a "simplified method of appellate review" and defined a final order as any order affecting a substantial right which either determined the action and prevented a judgment or was entered in a special proceeding or upon summary application in an action after judgment. See H.B. No. 42, 116 Ohio Laws 104, 105 (codified at former Ohio General Code Section 12223-2). The third category (i.e. an order vacating or setting aside a judgment or ordering a new trial) was added two years later. See Am.H.B. No. 87, 117 Ohio Laws 615. However, that legislation was struck down as an unconstitutional enlargement of appellate court jurisdiction over orders granting a new trial. *Hoffman v. Knollman*, 20 N.E.2d 221, at paragraph four of syllabus (Ohio 1939). The Constitution was amended, effective in 1945, and the General Assembly passed legislation two years later reclassifying a judgment, which ordered a new trial as a final order. See H.B. No. 86, 122 Ohio Laws 754. These categories were carried over when the General Code was replaced with the Ohio Revised Code in 1953 and survived without major changes until 1998.

<sup>12</sup>676 N.E.2d 890 (Ohio 1997).

<sup>13</sup>*Id.* at 894.

concluded that those concerns were better addressed to the General Assembly for that body to “consider modifying section 2505.02.”<sup>14</sup> Until such time as the statute was amended, the Court held, no appeal could be taken from the discovery order unless the entire case was also resolved.

The General Assembly responded shortly thereafter with Sub.H.B. No. 394 to address the policy concerns and statutory interstices pointed out by the Supreme Court.<sup>15</sup> This legislation amended section 2505.02 and, among other things, enlarged the previous three categories of final orders into the following five categories:

“(1) An order that affects a substantial right ... 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 ...

(5) An order that determines that an action may or may not be maintained as a class action.”<sup>16</sup>

Each of these five categories is discussed in varying degrees in this article. As a practical matter, most final orders come under the first two categories - i.e. those that determine the action and prevent a judgment or those that are entered in a special proceeding - and thus they receive the most attention.<sup>17</sup> Conversely, several categories are relatively self-explanatory—e.g. orders that vacate or set aside a judgment or grant a new trial and orders that determine whether an action can be maintained as a class action - and they are only briefly discussed. Finally, this article delves into the new category of final orders concerning judgments that grant or deny a provisional remedy. This new category was created in response to *Walters* and was meant to ameliorate the harsh results that could occur if an immediate appeal is not allowed on highly sensitive matters involving confidentiality, privilege, etc.

When analyzing the various provisions of section 2505.02, as well as the other procedural rules affecting appealability of judgments, courts and practitioners should keep in mind Ohio’s strong public policy interest in avoiding “piecemeal” appeals during the pendency of an action.<sup>18</sup> Ohio law favors the prompt and orderly disposal

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<sup>14</sup>*Id.* at 894 n.2.

<sup>15</sup>147 Ohio Laws, Part II, 3277.

<sup>16</sup>OHIO REV. CODE § 2505.02(B)(1)-(5).

<sup>17</sup>Of the two, orders entered in a special proceeding have proven the most problematic and are given the most attention herein. It should also be noted that determining which of these two categories to apply is not always easy. On several occasions, a majority of the Supreme Court has analyzed an order under the first category and looked at whether that order determined the action and prevented a judgment, *see, e.g., In re Murray*, 556 N.E.2d at 1171, *Stewart v. Midwestern Indemn. Co.*, 543 N.E.2d 1200, 1202 (Ohio 1989), only to have one or more Justices opine that the case should have been analyzed under the second category of the statute with an eye toward whether or not the order was entered in a special proceeding. *Murray*, 556 N.E.2d at 1175 (Douglas, J., concurring); *Stewart*, 543 N.E.2d at 1203-06 (Douglas & Wright JJ., dissenting). This is just another example of the high degree of confusion surrounding this area of the law.

<sup>18</sup>*See Denham v. New Carlisle*, 716 N.E.2d 184, 187 (Ohio 1999); *City of Columbus v. Adams*, 461 N.E.2d 887, 890 (Ohio 1984).

of litigation<sup>19</sup> and the entertainment of appeals from various orders made by the trial court during the pendency of an action does not further that policy.<sup>20</sup> It should also be noted that strict application of the final order rule is not simply a convenience for appellate courts. By requiring that appeals generally wait until the entire case is resolved, litigants are spared the time-consuming process of judgment and appeal on individual issues in a case and the interminable wait that such a process would cause for resolving the entire action. The final order rule also preserves judicial resources, and thus benefits taxpayers, by requiring that a case be reviewed all at once, in a single appeal, rather than in numerous piecemeal appeals over time. These considerations, convenience to litigants and conservation of judicial resources, should be the polestars by which section 2505.02 and the other procedural rules are interpreted and applied.

### III. ORDERS AFFECTING A SUBSTANTIAL RIGHT THAT DETERMINE AN ACTION

The first category of final orders under section 2505.02 are those which affect a substantial right and, in effect, determine the action and prevent a judgment.<sup>21</sup> These are the traditional types of judgments usually thought of as being final and appealable. They determine the entire case, or a distinct portion thereof, such that it will not be necessary to bring the case back before the court for further proceedings.<sup>22</sup> By definition, in order to be appealable under this category, the judgment must (1) affect a substantial right, (2) effectively determine the action, and (3) prevent a judgment.<sup>23</sup> A brief discussion of these three criteria follows.

#### A. Substantial Rights

Before a judgment can be deemed final and appealable under this first category of the statute, it must affect a *substantial right*.<sup>24</sup> Prior to Sub.H.B. No. 394, there was no statutory definition of a “substantial right.” Courts simply defined the concept as any legal right enforced and protected by law.<sup>25</sup> In 1998, however, the Ohio General Assembly codified the definition of “substantial right” to mean a right that the United States Constitution, the Ohio Constitution, a statute, common law or rule of procedure entitles a person to enforce or protect.<sup>26</sup> Practitioners will want to

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<sup>19</sup>State, *ex rel.* Celebrezze v. K&S Circuits, Inc., 453 N.E.2d 653, 654 (Ohio 1983); Bernbaum v. Silverstein, 406 N.E.2d 532, 534 (Ohio 1980).

<sup>20</sup>Squire v. Guardian Trust Co., 68 N.E.2d 312, 314 (Ohio 1946).

<sup>21</sup>OHIO REV. CODE § 2505.02(B)(1).

<sup>22</sup>See Lantsberry v. Tilley Lamp Co., 272 N.E.2d 127, 129 (Ohio 1971); Teaff v. Hewitt, 1 Ohio St. 511, 520 (Ohio 1853).

<sup>23</sup>Cleveland v. Trzebuckowski, 709 N.E.2d 1148, 1150 (Ohio 1999); State *ex rel.* Hughes v. Celeste, 619 N.E.2d 412, 414 (Ohio 1993).

<sup>24</sup>OHIO REV. CODE § 2505.02(B)(1).

<sup>25</sup>See, e.g., State *ex rel.* Hughes, 619 N.E.2d at 414; State *ex rel.* White v. Cuyahoga Metro. Hous. Auth., 684 N.E.2d 72, 74 (Ohio 1997); Noble v. Colwell, 540 N.E.2d 1381, 1383 (Ohio 1989).

<sup>26</sup>OHIO REV. CODE § 2505.02(A)(1). One eminent treatise has noted that the statute does not include any express reference to rights created by municipal ordinance. See Whiteside,

take care to pinpoint the precise source of whatever substantial right they assert to be involved. In *State v. Coffman*, the Ohio Supreme Court ruled that the Ohio Revised Code did not create “a legal right to shock probation” even though a statute vested trial courts with discretion as to whether to grant such probation.<sup>27</sup> This would suggest that the legal authority for whatever right is asserted must be affirmatively shown and will not be assumed to exist implicitly.<sup>28</sup>

Even if the right involved in the case is a substantial right, the order appealed must still *affect* that right in order to be deemed appealable. An order is said to affect a substantial right if it is one that, if not appealable, would foreclose appropriate relief in the future.<sup>29</sup> In order to successfully assert that an order affects a substantial right, a party must demonstrate that, in the absence of immediate review of the order, that party will be denied effective future relief.<sup>30</sup> It is not enough that the order appealed merely restricts or limits that right.<sup>31</sup> Rather, there must be virtually no opportunity in the future to provide relief from the allegedly prejudicial order.<sup>32</sup>

### B. Determines the Action

In addition to affecting a substantial right, the order must also *determine the action*. The question of whether an order determines the action cannot be determined solely by the nature of the order, but must be ascertained from the effect that the order has on the pending case.<sup>33</sup> An order determines the action when it

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OHIO APPELLATE PRACTICE, § T2.11, at 48 (2003). This is true. However, the 1998 statutory amendments notwithstanding, many courts still apply the broader judicial definition of a substantial right. *See, e.g., Trzebuckowski*, 709 N.E.2d at 1150. The argument could also be made that, since ordinances are adopted by municipal corporations pursuant to statutes giving them legislative authority, *see* OHIO REV. CODE Chapter 731, the rights granted by municipal ordinance are derivative of statute and should be implicitly included in the statutory definition of a “substantial right.”

<sup>27</sup>742 N.E.2d 644, 646 (Ohio 2001).

<sup>28</sup>The Court’s reasoning on this issue was flawed. While state law may not have created a “legal right to shock probation,” it did create an implied right to be fairly considered for such release. Were it otherwise, and there was no such right, then there would be no reason to vest trial courts with discretion in determining whether to grant release. Moreover, under the Court’s reasoning, a prisoner could be denied probation on racial or even religious grounds but have no recourse on appeal.

<sup>29</sup>*See Bell v. Mt. Sinai Med. Ctr.*, 616 N.E.2d 181, 184 (Ohio 1993).

<sup>30</sup>*See Konold v. R.W. Sturge, Ltd.*, 670 N.E.2d 574, 576 (Ohio Ct. App. 1996); *Rhynehardt v. Sears Logistics Services*, 659 N.E.2d 375, 377 (Ohio Ct. App. 1995); *Kelm v. Kelm*, 639 N.E.2d 842, 845 (Ohio Ct. App. 1994).

<sup>31</sup>*State v. Chalender*, 649 N.E.2d 1254, 1255-56 (Ohio Ct. App. 1994).

<sup>32</sup>*Id.*

<sup>33</sup>*State v. Eberhardt*, 381 N.E.2d 1357, 1361 (Ohio Ct. App. 1978); *Sys. Constr., Inc. v. Worthington Forest Ltd.*, 345 N.E.2d 428, 429 (Ohio Ct. App. 1975). In some instances, however, the title attached to the order can be a pretty good indication of its finality. For example, an interim order set to expire at a specific date by definition does not determine the action and prevent a judgment. *See Barker v. Barker*, 693 N.E.2d 1164, 1168 (Ohio Ct. App. 1997).

disposes of all the issues in the case leaving nothing for further adjudication.<sup>34</sup> That is to say, the order is *final* in the truest sense of the word because it terminates the entire proceeding. For instance, an order rejecting a magistrate's decision and setting a matter for trial *de novo* does not "determine the action"<sup>35</sup> nor does a judgment which determines liability but defers the determination of damages for future resolution.<sup>36</sup> In both of these cases, there are further proceedings that must take place. Neither order effectively determines the action, hence, neither order is appealable. There are some exceptions, however. In mortgage foreclosures, judgments determining that a mortgage constitutes the first and best lien on property, and ordering that such lien be foreclosed and the property sold at sheriff's sale, is a final order from which an appeal should be perfected notwithstanding that a confirmation entry directing distribution of proceeds will be filed after sale.<sup>37</sup>

Another way to look at this issue is to contrast judgments that determine an action with interlocutory orders.<sup>38</sup> The focus of an interlocutory order is not to determine the rights of the parties, but to give trial courts more discretion in determining the manner in which litigation proceeds.<sup>39</sup> An interlocutory ruling remains subject to change or modification at any time before entry of final judgment.<sup>40</sup> However, after final judgment is entered, the trial court is generally divested of its ability to amend any interlocutory rulings<sup>41</sup> or the final order itself.<sup>42</sup>

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<sup>34</sup>Legg v. Fuchs, 746 N.E.2d 1195 (Ohio Ct. App. 2000); Twinsburg v. Bucky Arnes, Inc., No. 9677, 1980 Ohio App. LEXIS 11498 (Ohio Ct. App. Sept. 17, 1980).

<sup>35</sup>AAA Pipe Cleaning Corp. v. Arrow Unif. Rental, Inc., No. 74215, 1999 Ohio App. LEXIS 3381 (Ohio Ct. App. July 22, 1999).

<sup>36</sup>Bautista v. Kolis, 754 N.E.2d 820 (Ohio Ct. App. 2001); Jones v. White, No. 00CA644, 2000 Ohio App. LEXIS 2055 (Ohio Ct. App. July 10, 2000).

<sup>37</sup>See, e.g., Third Nat'l Bank of Circleville v. Speakman, 480 N.E.2d 411, 412 (Ohio 1985); Oberlin Sav. Bank Co. v. Fairchild, 194 N.E.2d 580, 581 (Ohio 1963); Queen City Sav. & Loan Co. v. Foley, 165 N.E.2d 633, at paragraph one of the syllabus (Ohio 1960).

<sup>38</sup>Judgments are generally classified as either final or interlocutory. See 63 OHIO JUR. 3D *Judgments* § 257 (1985). "Interlocutory" means provisional or temporary and not final. BLACK'S LAW DICTIONARY 731 (5th ed. 1979).

<sup>39</sup>See John Hunt, *Determining Whether a Judicial Order is Final and Appealable Under Ohio Law*, 58 CIN. L. REV. 1337, 1340 (1989-1990).

<sup>40</sup>D'Agastino v. Uniroyal-Goodrich Tire Co., 717 N.E.2d 781, 785 (Ohio Ct. App. 1998); Corradi v. Gene Norris Honda, Inc., 667 N.E.2d 416, 417 (Ohio Ct. App. 1995).

<sup>41</sup>State v. Johnson, 601 N.E.2d 555, 559 (Ohio Ct. App. 1991); State v. Snedegar, No. C-980078, 1999 Ohio App. LEXIS 3297 (Ohio Ct. App. July 16, 1999).

<sup>42</sup>See Harkai v. Scherba Indus., Inc., 736 N.E.2d 101, 103 (Ohio Ct. App. 2000). Once final judgment is entered, all interlocutory rulings merge into the final order and become appealable at that time. See also Horner v. Toledo Hosp., 640 N.E.2d 857 (Ohio Ct. App. 1993); Safe Auto Ins. Co. v. Perry, No. 00AP-722, 2001 Ohio App. LEXIS 195 (Ohio Ct. App. Jan. 25, 2001); Bard v. Society Nat'l Bank, No. 97APE11-1497, 1998 Ohio App. LEXIS 4187 (Ohio Ct. App. Sept. 10, 1998).

*C. Prevents a Judgment*

Finally, in addition to affecting a substantial right and determining the action, the order in question must also prevent a judgment. Where an order affects a complete resolution of all claims and issues in a case, it essentially prevents a judgment inconsistent therewith.<sup>43</sup> In other words, an order prevents a judgment if it divests a right in such a manner as to put it beyond the power of the court making the order to place the parties back in their original condition.<sup>44</sup> This may appear like nothing more than a mirror image of the requirement that an order determine the action. However, in *Cleveland v. Trzebuckowski*,<sup>45</sup> the Ohio Supreme Court made clear that this is a completely independent criteria. In *Trzebuckowski*, the city of Cleveland appealed a decision by the Cleveland Municipal Court dismissing a criminal case on the grounds that a municipal ordinance was unconstitutional.<sup>46</sup> The judgment entry granting the dismissal was prepared June 22, 1995, but not journalized with the clerk until September 12, 1995. The city filed its notice of appeal on August 28, 1995, but appellee moved to dismiss arguing that the appeal was not timely. The Court of Appeals apparently denied the motion because it proceeded to address the case on its merits. However, the jurisdictional argument was addressed by the Ohio Supreme Court, which concluded that the appeal was timely because the order was not final until journalized on September 12, 1995.<sup>47</sup> The Court agreed that the Municipal Court decision dismissing the criminal case affected a substantial right and determined the action. Until journalized, though, the entry did not prevent further judgment since the trial court could vacate the judgment and set the matter for trial.<sup>48</sup> Thus, the unjournalized judgment was not a final order and the time limit for filing a notice of appeal had not run.<sup>49</sup>

*D. Examples*

A considerable body of case law has developed addressing whether certain judgments are final orders under section 2505.02(B)(1). Time and space constraints simply do not allow for an exhaustive list and discussion of those various judgments

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<sup>43</sup>See *Sys. Constr., Inc.*, 345 N.E.2d at 428 (order appealed from required the parties to submit entire matter to arbitration thus there could be no further judgment on the complaint or cross-complaint); *Harvey v. Civil Serv. Comm'n of Cincinnati*, 501 N.E.2d 39, 41 (Ohio Ct. App. 1985) (order affected complete satisfaction of plaintiff's cause of action and prevented any form of judgment in defendant's favor); *Puthoff v. Owens-Illinois Glass Co.*, 31 N.E.2d 684, 686 (Ohio Ct. App. 1938) (test of an order's finality is whether the court's power to change the judgment has terminated).

<sup>44</sup>*Gahr v. Smith*, 42 N.E.2d 203, 204 (Ohio Ct. App. 1942); *Hamilton v. Temple*, 19 N.E.2d 650, 651 (Ohio Ct. App. 1938).

<sup>45</sup>709 N.E.2d at 1148.

<sup>46</sup>*Id.* The ordinance in question apparently required billiard room operators to deny entrance to juveniles. Five complaints were filed against the defendant for violating this ordinance.

<sup>47</sup>*Id.* at 1151.

<sup>48</sup>*Id.* at 1150-51.

<sup>49</sup>*Id.* See also *State ex rel. Hansen v. Reed*, 589 N.E.2d 1324, 1327 (Ohio 1992).

here.<sup>50</sup> However, I can make several general observations from my own experiences. First, when a case involves various parties with numerous claims, cross-claims and counterclaims, the parties and the courts occasionally lose track of all the claims involved and will let an errant claim get by unresolved. This leaves the action undetermined and, in the absence of Ohio R. Civ. P. 54(B) language, will result in dismissal of the appeal.<sup>51</sup> Second, orders directed at strictly procedural matters, are almost never final unless they involve termination of the case.<sup>52</sup> For instance, orders overruling motions to dismiss,<sup>53</sup> orders denying summary judgment motions,<sup>54</sup> orders regarding requests for change of venue,<sup>55</sup> orders entered in reference to motions for continuance,<sup>56</sup> orders granting or denying motions *in limine*<sup>57</sup> and orders rejecting a magistrate's decision and setting a matter for trial *de novo* are not final orders.<sup>58</sup> Discovery rulings made in actions that existed at common law, and were not specially created by statute, are not final appealable orders<sup>59</sup> unless they could be characterized as judgments that grant or deny provisional remedies.<sup>60</sup>

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<sup>50</sup>A rather extensive list of such orders can be found in WHITESIDE, *supra* note 26, at 59-76.

<sup>51</sup>*See, e.g.*, Karr v. JLH of Athens, Inc., No. 99CA57, 2000 Ohio App. LEXIS 5735 (Ohio Ct. App. Dec. 4, 2000).

<sup>52</sup>*See* Drayer v. Williams, 143 N.E.2d 137, 138 (Ohio Ct. App. 1957) (orders overruling or sustaining motions directed to pleadings are not final orders unless they are accompanied by a dismissal and termination of proceedings in the trial court). *See also* Colonial Mortgage Serv. Co. v. Habitat Assocs., No. 76AP-597, 1976 Ohio App. LEXIS 8251 (Ohio Ct. App. Dec. 28, 1976), (procedural orders regarding time, place and manner of trial are not final and appealable). However, the denial of a motion to intervene as a party defendant (while arguably procedural) has been held to be a final order. *Widder & Widder v. Kutnick*, 681 N.E.2d 977 (Ohio Ct. App. 1996) (non-special proceeding). This is intuitively logical though because such order determines the action and prevents any further judgment with respect to the would be intervenor.

<sup>53</sup>*See, e.g.*, Hughes v. Zordich, No. 99CA167, 2001 Ohio App. LEXIS 1913 (Ohio Ct. App. Apr. 25, 2001); Shane v. Tracey, No. 77025, 2000 Ohio Ct. App. LEXIS 3844 (Ohio Ct. App. Aug. 24, 2000).

<sup>54</sup>*Stevens v. Ackman*, 743 N.E.2d 901 (Ohio 2001); *Celebrezze v. Netzley*, 554 N.E.2d 1292, 1293 (Ohio 1990).

<sup>55</sup>*See, e.g.*, Mansfield Family Rest. v. CGS Worldwide, Inc., No. 00-CA-3, 2000 Ohio App. LEXIS 6187 (Ohio Ct. App. Dec. 28, 2000); *Wilson v. Kemp*, No. 99CA2667, 1999 Ohio App. LEXIS 5753 (Ohio Ct. App. Nov. 24, 1999).

<sup>56</sup>*See, e.g.*, *Miller v. Bauer*, 746 N.E.2d 217, 221 (Ohio Ct. App. 2000); *State v. Yee*, 563 N.E.2d 54, 56 (Ohio Ct. App. 1989).

<sup>57</sup>*Covington v. Sawyer*, 458 N.E.2d 465, 469-470 (Ohio Ct. App. 1983); *In re Isaacs*, No. 18104, 2000 Ohio App. LEXIS 3491 (Ohio Ct. App. July. 31, 2000).

<sup>58</sup>*AAA Pipe Cleaning Corp. v. Arrow Unif. Rental, Inc.*, No. 74215, 1999 Ohio App. LEXIS 3381 (Ohio Ct. App. July 22, 1999).

<sup>59</sup>*Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 676 N.E.2d at 893 (Ohio 1997); *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, at paragraph seven of the syllabus (Ohio 1994).

<sup>60</sup>*See infra* notes 219-261 and accompanying text.

Appellate courts frequently encounter problems with judgments that leave one or more issues in a claim unresolved. For example, judgments that determine liability but defer the issue of damages for later adjudication do not determine the entire action and thus are neither final nor appealable.<sup>61</sup> Likewise, judgments awarding attorney fees, but deferring the amount of those fees for later adjudication are not final<sup>62</sup> nor are judgments that fail to dispose of a request for prejudgment interest.<sup>63</sup>

There has also been confusion over the distinction between decisions and final judgment entries. A *judgment* includes a decree and any order from which an appeal lies.<sup>64</sup> Judgments must terminate the entire action, and determine the rights of the parties, leaving nothing for further adjudication.<sup>65</sup> A document in the nature of a decision or opinion which calls for the preparation of a journal entry consistent with the court's reasoning is not a final order.<sup>66</sup> Only after there is an entry fully adjudicating the rights of the parties is there an order, which can be appealed.

Practitioners also need to be aware that interplay with other procedural rules may affect the finality of the judgments they seek to appeal. For instance, an order that merely adopts a magistrate's recommended decision pursuant to Ohio R. Civ. P. 53(E)(4), but does not specify the relief being granted to the parties, is not appealable.<sup>67</sup> Moreover, otherwise final judgments are not appealable if there are unresolved Ohio R. Civ. P. 59 or Ohio R. Crim. P. 33 motions for new trial<sup>68</sup> or unanswered Ohio R. Civ. P. 52 requests for findings of fact and conclusions of law.<sup>69</sup>

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<sup>61</sup>See, e.g., *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 684 N.E.2d 72, 74 (Ohio 1997); see also *GTE North, Inc. v. Carr*, 618 N.E.2d 249, 250, n.1 (Ohio Ct. App. 1993).

<sup>62</sup>See, e.g., *Ft. Frye Teachers Ass'n v. Ft. Frye Local Sch. Dist. Bd. of Educ.*, 623 N.E.2d 232, 234 (Ohio Ct. App. 1993); *Cole v. Cole*, No. 93CA2146, 1992 Ohio App. LEXIS 5375 (Ohio Ct. App. Nov. 8, 1993); *Pickens v. Pickens*, No. 459, 1992 Ohio App. LEXIS 4450 (Ohio Ct. App. Aug. 27, 1992).

<sup>63</sup>*Timmotors, Inc. v. Lima Ford, Inc.*, No. 1-2000-11, 2001 Ohio App. LEXIS 3620 (Ohio Ct. App. Aug. 16, 2001) (decision on cross-appeal); *Grubbs v. Brown*, No. CA8471, 1991 Ohio App. LEXIS 3178 (Ohio Ct. App. Jun. 24, 1991).

<sup>64</sup>Ohio R. Civ. P. 54(A).

<sup>65</sup>2 KLEIN & DARLING, CIVIL PRACTICE § 54-1 (1997) (a civil action is terminated by the court judgment); 63 OHIO JUR. 3D *Judgments* § 376 (2002) (a final judgment *inter alia* determines the rights of the parties).

<sup>66</sup>*Millies v. Millies*, 350 N.E.2d 675, 667 (Ohio 1976); see also *Prod. Credit Assn v. Hedges*, 621 N.E.2d 1360, 1362 n.2 (Ohio Ct. App. 1993); *Minix v. Collier*, No. 98CA2619, 1999 Ohio App. LEXIS 3405 (Ohio Ct. App. July 16, 1999).

<sup>67</sup>*Harkai v. Scherba Indus.*, 736 N.E.2d 101, 108 (Ohio Ct. App. 2000); *Wellborn v. K-Beck Furn. Mart, Inc.*, 375 N.E.2d 61, 62 (Ohio Ct. App. 1977).

<sup>68</sup>*State v. Untied*, Muskingum App. No. CT2001-19 (Apr. 17, 2002) (unreported); *Gallucci v. Freshour*, No. 99CA22, 2000 Ohio App. LEXIS 3002 (Ohio Ct. App. June 22, 2000); *Columbus v. Triplett*, No. 99AP-368, 1999 Ohio App. LEXIS 5983 (Ohio Ct. App. Dec. 14, 1999); *State v. Rhoden*, No. 95CA562, 1996 Ohio App. LEXIS 3574 (Ohio Ct. App. Aug. 19, 1996).

<sup>69</sup>*Caudill v. Caudill*, 594 N.E.2d 1096, 1097 (Ohio Ct. App. 1991); *Caruthers v. Caruthers* No. 00CA09, 2001 Ohio App. LEXIS 402 (Ohio Ct. App. Jan. 25, 2001). Similarly, in proceedings on petitions for postconviction relief pursuant to OHIO REV. CODE § 2953.21,

Compliance with the technical requirements of these rules is necessary to determine the action and make the judgment final and appealable.

Though less common than in civil proceedings, these jurisdictional deficiencies occur in criminal cases as well. Practitioners should note that a final order in a criminal prosecution is one that contains a sentence amounting to a disposition of the entire case.<sup>70</sup> Thus, an appeal from the jury's verdict, or the court's judgment of conviction, before sentence is imposed, is premature.<sup>71</sup> From the defense standpoint, virtually no order other than the final judgment of conviction and sentence is ever appealable. Examples of cases dismissed for lack of a final order include appeals from judgments denying motions to dismiss on grounds of double jeopardy,<sup>72</sup> judgments denying motions to suppress evidence<sup>73</sup> and judgments denying motions to dismiss for speedy trial violations.<sup>74</sup> None of these rulings determine the action and prevent a judgment. From the prosecution standpoint, interlocutory appeals can be taken from orders that grant motions to suppress evidence or dismiss part, or all, of an indictment or complaint.<sup>75</sup> When appealing an order suppressing evidence, the State must certify that its appeal is not taken for the purpose of delay and that the trial court's ruling rendered its proof with respect to the pending charge so weak as to destroy any reasonable probability of effective prosecution.<sup>76</sup> The State also has other limited rights of appeal regarding ancillary criminal matters.<sup>77</sup> Whether the order being appealed originates in a criminal or civil context, however, practitioners should keep in mind that appeals under section 2505.02(B)(1) must generally wait

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judgments dismissing the petition that are not accompanied by findings of fact and conclusions of law are not final and appealable. State *ex rel.* Baker v. Common Pleas Court, No. 830, 2000 Ohio App. LEXIS 811 (Ohio Ct. App. Feb. 17, 2000); State v. Girts, No. 73749, 1998 Ohio App. LEXIS 5934 (Ohio Ct. App. Dec. 10, 1998); State v. Smith, No. 97CA807, 1998 Ohio App. LEXIS 874 (Ohio Ct. App. Mar. 3, 1998).

<sup>70</sup>See State v. Hunt, 351 N.E.2d 106, 109 (Ohio 1976); State v. Chamberlain, 202 N.E.2d 695, 696 (Ohio 1964).

<sup>71</sup>See, e.g., Cuyahoga Falls v. Andy, No. 17529, 1996 Ohio App. LEXIS 1149 (Ohio Ct. App. March 27, 1996); Coshocton v. James, No. 90-CA-6, 1990 Ohio App. LEXIS 4823 (Ohio Ct. App. Oct. 29, 1990).

<sup>72</sup>State v. Prokos, No. 00CA02, 2000 Ohio App. LEXIS 2387 (Ohio Ct. App. May 31, 2000); State v. Leonhardt, Nos. C-950193, C-950194, C-950258 & C-950259, 1996 Ohio App. LEXIS 4165 (Ohio Ct. App. Sep. 25, 1996).

<sup>73</sup>State v. Prieto, No. 99CA263 & 99CA264, 1999 Ohio App. LEXIS 4857 (Ohio Ct. App. Oct. 14, 1999); see also *infra* notes 261-265 and accompanying text.

<sup>74</sup>Middletown v. Jackson, 457 N.E.2d 898, 899 (Ohio Ct. App. 1983); State v. Serednesky, No. 99CA7, 1999 Ohio App. LEXIS 5812 (Ohio Ct. App. Nov. 22, 1999); State v. Edwards, No. CA89-07-103, 1989 Ohio App. LEXIS 3582 (Ohio Ct. App. Sep. 18, 1989).

<sup>75</sup>OHIO REV. CODE ANN. § 2945.67(A) (Anderson 2002).

<sup>76</sup>Ohio R. Crim. P. 12(K)(1)&(2). This certification, as well as the notice of appeal, must be filed within seven days of the entry suppressing or excluding evidence. *Id.*

<sup>77</sup>See OHIO REV. CODE § 2945.67(A) (state may appeal as of right an order granting return of seized property or post conviction relief and may seek leave to appeal any other decision of the trial court except for the final verdict); OHIO REV. CODE § 2953.08(B)(1)-(3) (state may appeal sentences based on state felony sentencing guidelines under certain circumstances).

until the entire case has been resolved and the matter formally terminated before the order can be reviewed.

#### IV. ORDERS AFFECTING A SUBSTANTIAL RIGHT MADE IN A SPECIAL PROCEEDING

The second category of final orders under section 2505.02 are those that affect a substantial right made in a “special proceeding.”<sup>78</sup> This category has proven the most conceptually difficult for the bench and bar over the years and the analytical process for determining whether an action is a *special proceeding* has been likened by one writer to “the old medieval question of how many angels can sit on the head of a pin.”<sup>79</sup> For many years, section 2505.02 never defined a “special proceeding” or delineated the sorts of actions that fell within that rubric. Crafting a workable definition fell to the judiciary, but implementation of differing standards over time, as well as inconsistent application of those standards, led to considerable confusion and a lack of predictability. Finally, in 1998, the Ohio General Assembly stepped in and defined a special proceeding as “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.”<sup>80</sup> This definition essentially codified the culmination of special proceeding jurisprudence as it evolved over the last century and a half. To better understand the current definition, practitioners and judges must understand the previous definitions and the manner in which they were applied. That history is best understood in reference to the seminal case of *Amato v. General Motors Corp.*<sup>81</sup> Though *Amato* is no longer the applicable standard, case law interpreting the concept of a special proceeding is oftentimes thought of as being *Pre-Amato*, *Amato* or *Post-Amato*. Each of these periods is discussed as follows.

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<sup>78</sup>OHIO REV. CODE § 2505.02(B)(2). The same principles concerning “substantial rights” that applied with respect to the first category of final orders, apply here as well. *See supra* notes 24-32 and accompanying text. Moreover, this category of final orders also includes those rulings that affect a substantial right and are made upon a *summary application in an action after judgment*. There is little case law discussing this variety of proceeding. The term *summary application* is not specifically defined by statute but seems to include those situations that arise after judgment and do not involve lengthy trial court proceedings. *State v. Wilkinson*, Montgomery App. No. 18286, (Ohio Ct. App. Sept. 25, 2000) (unreported); *State v. Kelly*, No. 18170, 2000 Ohio App. LEXIS 5074 (Ohio Ct. App. Sept. 25, 2000). Thus, the denial of a post-judgment motion to take a polygraph exam is an order made upon summary application, *see State v. Branham*, No. H-95-066, 1995 Ohio App. LEXIS 5247 (Ohio Ct. App. Nov. 27, 1995), as is a ruling on a post-judgment motion for sanctions pursuant to OHIO REV. CODE § 2323.51, *see Victoria’s Garden v. Sheehy*, No. 93AP-404, 1993 Ohio App. LEXIS 3759 (Ohio Ct. App. Jul. 27, 1993), and an action seeking an order for judgment debtor exam. *See Hessell v. Polen*, No. 9920, 1986 Ohio App. LEXIS 9731 (Ohio Ct. App. Nov. 26, 1986). The Court in *Kelly* and *Wilkinson*, both held that rulings on motions for shock probation were orders entered in a summary application after judgment and were thus final and appealable. Those holdings are no longer good law given the decision of the Ohio Supreme Court in *Coffman*, 742 N.E.2d at 644. *See supra* notes 27-28 and accompanying text.

<sup>79</sup>Michael J. Buenger, *Ohio Appellate Practice Before and After Polikoff: Are Things Really all That Much Clearer?*, 28 AKRON L. REV. 11 (1994).

<sup>80</sup>OHIO REV. CODE § 2505.02(A)(2).

<sup>81</sup>423 N.E.2d 452 (Ohio 1981).

A. *The Pre-Amato Classification of a Special Proceeding*

The Ohio Supreme Court first spoke to the issue of a “special proceeding” more than a century ago in *Watson & Co. v. Sullivan*,<sup>82</sup> which dealt with a lawsuit brought to recover money. Contemporaneously with its complaint, the plaintiff sought and obtained an order of attachment against the defendant’s property. Defendant moved the common pleas court to discharge the attachment and his motion was granted. Plaintiff appealed that ruling but the defendant argued that an appeal could not be taken until after disposition of the whole case. The Ohio Supreme Court disagreed and found that attachment was a “special proceeding”<sup>83</sup> and that the order dissolving that attachment affected a substantial right<sup>84</sup> thereby making the order final and appealable. In defining a “special proceeding,” the Court turned to recent legislation establishing a code of civil procedure and reasoned as follows:

The 3d section of the code abolishes the distinction between *actions at law* and *suits in chancery*, and substitutes in their place but one form of action, called a civil action. The commissioners, in their report to the Legislature upon this section, say: “A civil action, under this code, will comprehend every proceeding in court heretofore instituted by any and all the forms hereby abolished. Every other proceeding will be something else than an action; say, ‘a special proceeding.’” The Legislature seems to regard all proceedings, not theretofore obtained by suit or action, as a special proceeding, or special statutory remedy; and it would seem to follow, that a provision in the code providing a proceeding, not by action, would be a special proceeding.<sup>85</sup>

The Court thus adopted what was essentially an “historical basis test.” This test asked whether the proceeding in question existed at either common law or equity prior to 1853. If the answer to that question was yes, then the proceeding was an ordinary civil action and an interlocutory order entered therein was not final. However, if the answer was no, then the action was a “special proceeding” and, so long as the order entered therein affected a substantial right, it was final and appealable.

The problem with this test was that it was never strictly or consistently applied. Even in *Watson & Co.*, the Supreme Court deviated from its own standard. The real claim in that case was to recover money, an action that has long existed at common

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<sup>82</sup>5 Ohio St. 42 (Ohio 1855).

<sup>83</sup>*Id.* at 45.

<sup>84</sup>*Id.* at 43.

<sup>85</sup>*Id.* at 44. Effective June 1, 1853, Ohio abolished the distinction between actions at law and suits in equity and established in their place a single form of action called a “civil action.” See 2 REVISED STATUTES OF OHIO § 3 (Swann & Critchfield 1860). Civil actions thereafter included all proceedings previously regarded as actions at law or suits in equity. See 1 OHIO JUR. 3D *Actions* § 5 (1998). This classification scheme survives to this day in the guise of Ohio R. Civ. P. 2, which states that there shall be only one form of action and that is a “civil action.”

law.<sup>86</sup> Attachment is only an ancillary remedy to achieve that end<sup>87</sup> and, generally, has no status separate and apart from a civil action to recover money.<sup>88</sup> However, the Supreme Court treated the attachment as an entirely separate proceeding and applied the test to that remedy rather than the underlying action to recover money.<sup>89</sup> Further, rather than inquire whether attachment had existed at common law or equity prior to 1853, the Court simply opined that it was a special proceeding.<sup>90</sup>

This sort of inconsistent rhetoric and incongruent application of the historical basis test bred confusion and conflicting results over time. On the one hand, the Supreme Court defined a “special proceeding” in contradistinction to a civil action (thus reinforcing that the test was to determine whether the action existed at law or in equity prior to 1853)<sup>91</sup> but then, on the other hand, would remark that the question of whether an order is reviewable should be answered by looking at its substance and effect without regard to whether it was of a legal or equitable nature.<sup>92</sup> In many instances, the Court applied no test at all and simply ruled *ipso facto* that an action was a special proceeding.<sup>93</sup> Further, as in *Watson & Co.*, the Court oftentimes

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<sup>86</sup>The factual recitation in *Watson & Co.* is a bit sparse and the Supreme Court never clearly stated the nature of the claim except to say that it was “an action” to “recover a large sum of money.” 5 Ohio St. at 42. However, the fact that plaintiff sought attachment would suggest that this was a claim on a debt. See 24 OHIO JUR. 3D *Creditors’ Rights and Remedies* § 254 (1998) (attachment is a remedy for the collection of an ordinary debt). A “debt” is a sum of money due by contract and an action on a debt was a common law form of action to recover a sum certain of money. See 13 OHIO JUR. *Debt* § 2 (1930).

<sup>87</sup>See *Endel v. Leibrock*, 33 Ohio St. 254, 267 (Ohio 1877) (attachment proceeding is ancillary); *Seibert v. Switzer*, 35 Ohio St. 661, at paragraph one of the syllabus (Ohio 1880) (attachment is an auxiliary proceeding).

<sup>88</sup>*Wellborn v. K-Beck Furn. Mart, Inc.*, 375 N.E.2d 61, 63 (Ohio 1977).

<sup>89</sup>5 Ohio St. at 45. Attachment proceedings are either *in personam* or *in rem*. 24 OHIO JUR. 3D *Creditors’ Rights and Remedies* § 257 (1998). When the principal action is *in personam*, and a judgment can be rendered against a person, then the proceeding is not an independent action. *Id.* By contrast, when the principal action is *in rem*, and is aimed at specific property, the attachment is an action in and of itself. *Id.* Again, the opinion in *Watson & Co.* is a little vague as to whether the principal action was *in rem* or *in personam*. However, the decision states that the action was commenced “to recover a large sum of money against Sullivan.” 5 Ohio St. at 43. This suggests that the proceeding was *in personam*. Accordingly, attachment should have been treated as an ancillary remedy to the principal action to recover debt rather than as an independent proceeding.

<sup>90</sup>5 Ohio St. at 45. The court was correct in its finding. Attachment is a statutory proceeding, see *Carper v. Richards*, 13 Ohio St. 219, 222 (Ohio 1862), and is in derogation of the common law. *Smith v. Buck*, 162 N.E. 382, 384 (Ohio 1928). Nevertheless, the Court reached that conclusion without engaging in any analysis.

<sup>91</sup>See, e.g., *Young v. Shallenberger*, 41 N.E. 518, 521 (Ohio 1895); *Maginnis v. Schwab*, 24 Ohio St. 336, at paragraph one of the syllabus (Ohio 1873); *Taylor v. Fitch*, 12 Ohio St. 169, at syllabus (Ohio 1861).

<sup>92</sup>See, e.g., *Webb v. Stasel*, 88 N.E. 143, 144 (Ohio 1909); *Cincinnati, Sandusky & Cleveland RR. Co. v. Sloan*, 31 Ohio St. 1, at syllabus (Ohio 1876).

<sup>93</sup>See, e.g., *Cincinnati Gas & Elec. Co. v. PUCO*, 65 N.E.2d 68, 69 (Ohio 1946); *Cleveland, Columbus & Cincinnati Highway, Inc. v. PUCO*, 49 N.E.2d 759, 760 (Ohio 1943)

focused its attention on the ancillary proceeding rather than the underlying action itself.<sup>94</sup>

This confusion in early special proceeding jurisprudence is best illustrated by the Court's treatment of probate cases. The Supreme Court held in *Missionary Society of M.E. Church v. Ely* that an application to admit a will to probate is a "special proceeding" so that a judgment denying that application was a final appealable order.<sup>95</sup> In reaching that conclusion, however, the Court applied a somewhat different definition of special proceeding:

But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by application to a court for a judgment or an order is a special proceeding.<sup>96</sup>

At issue in this case was a statute allowing anyone receiving a devise or bequest by will the right to present that will for probate. The Court reasoned that the statute conferred a legal right and authorized an application to a court for its enforcement and, thus, the proceeding was "of a judicial nature" and belonged to that class of special proceedings.<sup>97</sup>

However, in *Hollrah v. Lasance*, the Court held that an order admitting a will to probate was not a final appealable order.<sup>98</sup> No discussion of special proceedings was even made in that case but the Court distinguished its holding in *Missionary Society of M.E. Church* by noting that an order admitting a will to probate could still be challenged by a will contest whereas an order excluding a will from probate could not.<sup>99</sup> The Court reaffirmed that an order admitting a will to probate was not reviewable in the case of *In re Estate of Frey*.<sup>100</sup> Again, though, there was no

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(PUCO proceedings are special proceedings); *Pittsburgh, Cleveland & Toledo RR. Co. v. Tod*, 74 N.E. 172, 174 (Ohio 1905); *In re Appropriation for Highway Purposes*, 203 N.E.2d 247, 248 (Ohio 1964); *In re Appropriation of Easements for Highway Purposes*, 175 N.E.2d 512, 513 (Ohio 1961) (appropriation actions are special proceedings).

<sup>94</sup>*See, e.g., Jones v. First Nat'l Bank of Bellaire*, 176 N.E. 567, 569 (Ohio 1931) (injunction not a special proceeding); *Burke v. Ry. Co.*, 17 N.E. 557 (Ohio 1888) (order overruling motion to dissolve injunction was made in a special proceeding though the nature of the action is not even specified); *Cincinnati, Sandusky & Cleveland RR. Co.*, 31 Ohio St. 1 at syllabus (Ohio 1876); *Forrest City Inv. Co. v. Haas*, 143 N.E. 549, at syllabus (Ohio 1924) (appointment of a receiver is an order made in a special proceeding)

<sup>95</sup>56 Ohio St. 405, at syllabus (Ohio 1897)

<sup>96</sup>*Id.* at 407.

<sup>97</sup>*Id.* at 408.

<sup>98</sup>63 Ohio St. 58, at syllabus (Ohio 1900).

<sup>99</sup>*Id.* at 65. It is tempting to try and reconcile this case as being decided on the basis of whether or not the order affected a substantial right. However, the Court's opinion gives little analysis of either concept.

<sup>100</sup>40 N.E.2d 145, at syllabus (Ohio 1942).

discussion of whether this was a special proceeding. The Court seemed to focus instead on the first category of final orders noting that the order did not determine the rights of all interested parties until termination of proceedings.<sup>101</sup> Until such rights were determined, this was only a “conditional order” because, otherwise, there would be “two final orders.”<sup>102</sup> A somewhat different question was presented in the case of *In re Estate of Wykoff*<sup>103</sup> wherein the Probate Court allowed presentment of a late claim under then existing section 2217.07 and the administrator appealed. The Court of Appeals sustained a motion to dismiss for lack of a final order but the Supreme Court reversed finding that the order affected a substantial right and was entered in a special proceeding. In reaching this latter conclusion, the Court returned to the standard enunciated a century before in *Watson & Co*:

We think it can accurately be said that the term, “civil action,” as used in our statutes embraces those actions which prior to the adoption of the Code of Civil Procedure in 1853 abolishing the distinction between actions at law and suits in equity, were denoted as actions at law or suits in equity; and that other court proceedings of a civil nature come, generally at least, within the classification of special proceedings.<sup>104</sup>

The Court found that “the proceeding provided by section 2117.07, Revised Code” represented an independent judicial inquiry and was thus a special proceeding.<sup>105</sup>

The problems with these cases were two-fold. First, the Court never consistently applied its historical basis test for determining whether an action was a “special proceeding.” Indeed, in some instances, the Court never applied the test at all. Even in *Wykoff*, where reference was made to the standard first announced in *Watson & Co.*, the Court never delved into whether probate actions in general, or “section 2117.07 proceedings” in particular, existed at common law or equity prior to 1853. Instead, the Court determined that this was a special proceeding because it was made “in connection with which a petition and no other pleadings are required and wherein there is notice only, without service of summons and which represents essentially an independent judicial inquiry.”<sup>106</sup>

The second problem with these cases is that the Court continued to direct its inquiry to ancillary matters rather than the underlying action. Probate is the process by which a will is proved to be valid, or invalid, and includes all matters and proceedings pertaining to administration of estates.<sup>107</sup> Rather than focus on this process in its entirety, the Court focused its attention on each individual and ancillary proceeding (e.g. application to admit will to probate, application to present a late claim, etc.). What the Court failed to realize is that probate, like most court actions, involves many ancillary proceedings. Motions will be filed, discovery will be

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<sup>101</sup>*Id.* at 148.

<sup>102</sup>*Id.*

<sup>103</sup>142 N.E.2d 660 (Ohio 1957).

<sup>104</sup>*Id.* at 663.

<sup>105</sup>*Id.* at 664.

<sup>106</sup>*Id.*

<sup>107</sup>BLACK’S LAW DICTIONARY 1081 (5th ed. 1979).

conducted and the trial courts will enter innumerable orders throughout the course of an action. Had the Ohio Supreme Court in these cases focused its attention on determining whether probate cases as a whole were special proceedings, rather than each individual application within that action, then the Court might have developed a consistent body of case law over the years.<sup>108</sup> Instead, varying definitions of what was or was not a special proceeding, and focus on ancillary matters rather than the underlying action, led to confusion and inconsistency.

*B. Amato v. General Motors*

The confusing state of “special proceeding” jurisprudence begged for some degree of clarification and the Ohio Supreme Court took that opportunity in *Amato v. General Motors Corp.*<sup>109</sup> However, rather than refine or clarify the test for determining whether an action was a “special proceeding,” or espousing a stricter application of the test it had already announced, the Court threw out its old standard and adopted a new one altogether.

Paul Amato was a consumer who bought an Oldsmobile that had been secretly equipped with a Chevrolet engine. Upon discovering the switched engine, he filed suit against General Motors asserting claims for breach of contract, fraud and violation of the Ohio Consumer Sales Practices Act. Amato sought, and was granted, permission under Ohio R. Civ. P. 23, to represent a class of plaintiffs who bought similar cars. General Motors appealed the class certification, but the case was dismissed for lack of a final appealable order. The Ohio Supreme Court reversed. In so doing, the Court acknowledged that the judiciary had been “less than precise” in defining a “special proceeding.”<sup>110</sup> The Court nevertheless noted that certain principles could be gleaned from past cases. First and foremost was that the Court had been “most reluctant” to allow interlocutory rulings during the pendency of litigation under the guise that such rulings were made in a special proceeding.<sup>111</sup> Second, from the small class of rulings deemed to have been reviewable under this

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<sup>108</sup>To be fair, the issue of whether the entire probate process is a special proceeding has never been definitively stated and defies easy explanation. Modern probate proceedings can trace their lineage back to English ecclesiastical and chancery courts. 1 MERRICK-RIPPNER, PROBATE LAW §1.1 (1997). By the same token, however, provision for descent and distribution of property has been provided for by statute in Ohio as far back as the Northwest Ordinance. *Id.* § 1.4 n.2. It has also been said that the application to make probate of a will belongs neither to the common law nor equity jurisdiction conferred upon common pleas courts. *See Hunter’s Will*, 6 Ohio 499, 501 (Ohio 1834). The Ohio Supreme Court has also said that the right to transmit or inherit property is not an inherent or natural right but is purely a statutory right and subject to legislative control and restriction. *Ostrander v. Preece*, 196 N.E. 670, 673 (Ohio 1935). This would suggest that, under the Supreme Court’s definition of a special proceeding in *Watson & Co.* and *In re Estate of Wykoff*, probate proceedings in general are “special proceedings.” Nevertheless, this issue continues to cause disagreement among the courts. *See infra* note 154 and accompanying text.

<sup>109</sup>423 N.E.2d 452 (Ohio 1981).

<sup>110</sup>*Id.* 455. As demonstrated by the cases previously discussed herein, this was an understatement of monolithic proportion. It is also interesting to note that, nowhere in its opinion, did the Supreme Court ever recognize its previous standard of looking to whether the proceeding had existed as an action at law or equity prior to 1853.

<sup>111</sup>*Id.*

category of final orders, a “prime determinant” of whether a particular order was one made in a “special proceeding” was “the *practicability* of appeal after judgment.”<sup>112</sup> The Court thus adopted a “balancing test” for determining whether an order was made in a special proceeding:

This test weighs the harm to the ‘prompt and orderly disposition of litigation,’ and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practical.<sup>113</sup>

Applying that standard to the facts at hand, the Court concluded that the balance tipped in favor of allowing immediate review.<sup>114</sup> The Court thus held that an order allowing an action to continue as a class action was made in a special proceeding and was a final appealable order.<sup>115</sup>

Aside from the novelty of this new balancing test, there were several noteworthy analytical anomalies in *Amato*. First, the Court need never have reached the whole “special proceeding” issue at all. The Court had already determined that an order denying class action status was a final appealable order under the first category of section 2505.02 because it effectively determined the action with respect to the proposed plaintiff class.<sup>116</sup> The Court could have simply extended that holding and ruled that an order allowing a class action to be maintained also determined the action.<sup>117</sup> More importantly, however, the Court in *Amato* was never entirely clear as to whether it was treating the class certification order or the underlying action as the “special proceeding.” It appears from the opinion that the Court was treating the ancillary order granting class certification as the special proceeding.<sup>118</sup> If that was the case, then the Court clearly erred. A class action is not a proceeding in and of

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<sup>112</sup>*Id.* at 456 (emphasis added).

<sup>113</sup>*Id.*

<sup>114</sup>*Amato*, 423 N.E.2d at 456. The Court reasoned that class actions impose enormous burdens on courts as well as litigants and, thus, allowing an immediate appeal of a class certification that might have been improper may actually conserve judicial resources. Furthermore, because the costs of litigation and potential liability were so high for defendants in a class action, the Court believed that defendants would be forced to settle the case thereby foreclosing any future appellate review as to the propriety of the class certification. *Id.*

<sup>115</sup>*Id.* at the syllabus.

<sup>116</sup>*Roemisch v. Mutual of Omaha Ins. Co.*, 314 N.E.2d 386, at the syllabus (Ohio 1974). See *infra* notes 268-271 and accompanying text.

<sup>117</sup>The Court’s reasoning that the litigation costs and potential liability of class actions would force companies to settle rather than wait to appeal certification at the end of trial, could just as easily have been used to conclude that the trial court’s decision effectively determined the action. *Amato*, 423 N.E.2d at 456. Oddly enough, the Court acknowledged that it could have decided *Amato* in this manner, but declined to do so. *Id.* at 455 n.9.

<sup>118</sup>The Court stated that “an order certifying that an action may be maintained as a class action is made in a special proceeding and, as such, it is a final, appealable order.” *Amato*, 423 N.E.2d at 456.

itself but rather a procedural device by which to maintain some other action.<sup>119</sup> However, if the Court was looking to the underlying action itself, then it failed to explain how the plaintiff's claims for breach of contract and common law fraud were "special proceedings."

If anything, the *Amato* balancing test proved less workable than the pre-*Amato* historical basis test. The determination as to whether a proceeding had existed at common law or equity prior to 1853 was, at least theoretically, an objective one. An action either existed at common law or equity or it did not. However, the balancing test was entirely subjective. The Court was oftentimes divided on whether the test weighed in favor of immediate review or in favor of review on appeal after final judgment.<sup>120</sup> The balancing test was also frequently criticized<sup>121</sup> and, on occasion, even ignored altogether.<sup>122</sup>

One of the more significant areas of the law affected by *Amato* was the issue of whether discovery orders were immediately appealable. Discovery orders had long

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<sup>119</sup>*Woods v. Oak Hill Cmty. Med. Ctr., Inc.*, 730 N.E.2d 1037, 1046 (Ohio Ct. App. 1999); *Turoff v. Halle Bros. Co.*, Cuyahoga App. No. 34413 (Ohio Ct. App. Apr. 8, 1976) (unreported). The Court acknowledged that distinction in its opinion but appears to have treated the pleading mechanism as a separate cause of action anyway. See *Amato*, 423 N.E.2d at 454

<sup>120</sup>*Compare State, ex rel. Celebrezze v. K & S Circuits, Inc.*, 453 N.E.2d 653, at the syllabus (Ohio 1983) (order denying jury trial in water pollution control case not a final order), *with id.* at 655 (Holmes, J., dissenting) (would allow appeal). *Compare Columbus v. Adams*, 461 N.E.2d 887, at the syllabus (Ohio 1984) (pre-trial suspension of an operator's license of one accused of violation of § 4511.19 or municipal ordinance related to operation of a motor vehicle while under influence of alcohol not a final order), *with id.* at 891 (Sweeney, W. Brown & C. Brown, JJ., dissenting) (would allow appeal). *Compare Tilberry v. Body*, 493 N.E.2d 954, 956 (Ohio 1986) (judicial dissolution of partnership is a special proceeding and immediate appeal should be allowed), *with id.* at 958 (Douglas & Locher, JJ., dissenting) (order did not emanate from a special proceeding). *Compare General Elec. Supply Co. v. Warden Elec., Inc.*, 528 N.E.2d 195, at the syllabus (Ohio 1988) (order denying stay of litigation pending arbitration and granting motion to dismiss arbitration not a final order), *with id.* at 199 (Wright, Sweeney & Brown, JJ., dissenting) (would allow appeal).

<sup>121</sup>See, e.g., *Nelson v. Toledo Oxygen & Equip. Co.*, 588 N.E.2d 789, 793 (Ohio 1992) (Douglas & Sweeney, JJ, concurring) (the *Amato* balancing test is "malleable, non-definitive and subjective in nature" and "brings about the necessity of multifarious appeals."); *Stewart v. Midwestern Indemn. Co.*, 543 N.E.2d 1200, 1204 (Ohio 1989) (Douglas, J., dissenting) (the term "special proceeding" has nothing to do with the test set forth in *Amato*. The need for immediate review, waste of judicial resources or orderly disposition of litigation does not make a proceeding "special." A special proceeding is an action not recognized at common law or as part of our standard civil practice but is one that has been brought about by a special type of action. Examples would include forcible entry and detainer, declaratory judgment, appropriation and arbitration.)

<sup>122</sup>See, e.g., *General Acc. Ins. Co. v. Ins. Co. of N. Am.*, 540 N.E.2d 266, at the syllabus (Ohio 1989) (Declaratory Judgment is a "special proceeding"). The Court reached this conclusion by reasoning that declaratory judgment actions were a special remedy not available at common law or at equity. Because they were unknown at common law, jurisdiction to hear such cases were dependent on statutory authorization. *Id.* at 271. This reasoning was reminiscent of the Pre-*Amato* historical basis test. No mention was made of the *Amato* balancing test.

been considered interlocutory and not subject to immediate appeal.<sup>123</sup> After *Amato*, however, the Court carved out several exceptions to that longstanding rule. In *State v. Port Clinton Fisheries, Inc.* the Court held that an order compelling disclosure of the identity of a confidential informant was a final appealable order.<sup>124</sup> The Court reasoned that the balancing test weighed in favor of an immediate appeal because, once the informant's identity was revealed, no appeal could remedy the harm of that disclosure.<sup>125</sup> Similarly, in *Humphrey v. Riverside Methodist Hosp.*, it was held that an order compelling disclosure of names of patients who had contracted Legionnaire's Disease while at a hospital was a final order.<sup>126</sup> The Court reasoned that the need for immediate appellate review so as to protect patient privilege outweighed any potential disruption to the proceeding or waste of judicial resources.<sup>127</sup> Retreating from these positions a bit, the Court held in *Nelson v. Toledo Oxygen & Equip. Co.* that a discovery order both compelling the production of documents and overruling a claim that the materials sought were exempt as work product was not a final order.<sup>128</sup> This time, the Court held that the balancing test weighed in favor of review after final judgment in the case.<sup>129</sup>

Despite its flaws, the balancing test was not without some benefit.<sup>130</sup> The basic theme of *Amato* and its progeny was that a party should be granted an immediate right of review where harm resulting to that party was extreme and irreparable.<sup>131</sup> Thus, in *Doe v. Univ. of Cincinnati*, an immediate appeal was allowed of an order compelling disclosure of the identity of a blood donor infected with the HIV virus.<sup>132</sup> It was aptly noted by the Court of Appeals that, absent immediate review, the donor's rights of privacy and confidentiality in medical diagnosis would be compromised and that this was a wrong which could not be later corrected on subsequent review.<sup>133</sup> This result seems intuitively reasonable and just. Even if the equities weighed in favor of disclosing the donor's identity, the donor's rights to

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<sup>123</sup>Kennedy v. Chalfin, 310 N.E.2d 233, 235 (Ohio 1974); *In re Coastal States Petroleum*, 290 N.E.2d 844, 847 (Ohio 1972); Klein v. Bendix-Westinghouse Auto. Brake Co., 234 N.E.2d 587, 589 (Ohio 1968).

<sup>124</sup>465 N.E.2d 865, at the syllabus (Ohio 1984).

<sup>125</sup>*Id.* at 867.

<sup>126</sup>488 N.E.2d 877, 879 (Ohio 1986).

<sup>127</sup>*Id.* at 879. Several of the justices disagreed noting that this was an ordinary civil action and was not a special proceeding. *Id.* at 880 (Douglas & Sweeney, JJ., dissenting).

<sup>128</sup>588 N.E.2d 789, at the syllabus (Ohio 1992).

<sup>129</sup>*Id.* at 791.

<sup>130</sup>*Buenger, supra* note 79, at 15 (the advantage of the *Amato* test was in its flexibility).

<sup>131</sup>Hollis v. Finger, 590 N.E.2d 784, 788 (Ohio Ct. App. 1990); Galbreath v. Galbreath, No. 89AP-103, 1989 WL 65389 (Ohio Ct. App. Jun. 13, 1989). This would essentially become the underlying premise for allowing appeals from orders that grant or deny provisional remedies under OHIO REV. CODE § 2505.02(B)(4). See *infra* notes 225-228 and accompanying text.

<sup>132</sup>538 N.E.2d 419, 422 (Ohio Ct. App. 1988).

<sup>133</sup>*Id.*

privacy and confidentiality were substantial enough that immediate review seemed warranted.<sup>134</sup> The price paid to achieve that review, however, was a lack of consistency and widely divergent opinions as to what sort of discovery orders were immediately appealable.<sup>135</sup>

### C. *Post-Amato*

After twelve years of inconsistent application and widely divergent rulings, the Supreme Court overruled *Amato* and got rid of the balancing test in *Polikoff v. Adam*.<sup>136</sup> Harry Polikoff, trustee under the will of Marjorie Polikoff, filed a shareholder derivative suit against TRW, Inc., its board of directors and officers. The defendants moved to dismiss arguing that plaintiff failed to make the requisite demand under Ohio R. Civ. P. 23.1 or plead that such demand would have been futile.<sup>137</sup> Their motion was denied and defendants appealed to the Cuyahoga County Court of Appeals, which dismissed the case for lack of a final order. An appeal was then taken to the Ohio Supreme Court, which was asked to decide whether the denial

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<sup>134</sup>The Court ultimately held that the donor's privacy interests, as well as the interest of maintaining an adequate volunteer blood supply, outweighed the interests of the plaintiff seeking disclosure of the information. *Id.* at 425.

<sup>135</sup>*See, e.g.*, *Cent. Benefits Mut. Ins. Co. v. State Emp. Comp. Bd.*, 604 N.E.2d 198, 199 (Ohio Ct. App. 1992) (discovery order to obtain allegedly confidential information from insurance company not made in a special proceeding); *Lomano v. Cigna Healthplan of Columbus, Inc.*, 613 N.E.2d 1075, 1079 (Ohio Ct. App. 1992) (discovery order seeking information regarding physician's application to join organization's list of member physicians not a special proceeding); *Grant v. Collier*, No. 12670, 1992 WL 28161 (Ohio Ct. App. Jan. 23, 1992) (order compelling discovery of medical records made in a special proceeding); *Medley v. Taylor*, No. WD-90-16, 1991 WL 59883 (Ohio Ct. App. Apr. 19, 1991) (discovery order concerning privileged medical records not appealable); *Wozniak v. Kombrink, Hamilton App. No. C-890531* (Ohio Ct. App. Feb. 13, 1991) (unreported) (discovery order concerning medical histories of non-party patients was made in special proceeding); *Aetna Casualty & Surety Co. v. Desprez*, No. 52634, 1987 WL 6120 (Ohio Ct. App. Feb. 5, 1987) (discovery order mandating production of work product in an insurance company's claim file arose in a special proceeding); *In re Guardianship of Johnson*, 519 N.E.2d 655, 658 (Ohio Ct. App. 1987) (court ordered psychiatric evaluation on a guardianship application occurs in a special proceeding and is immediately appealable); *Foor v. Huntington Nat'l Bank*, 499 N.E.2d 1297, 1301 (Ohio Ct. App. 1986) (order overruling motion to quash subpoena *duces tecum* served on non-party was a final order); *George E. Kuhn & Co. v. Genslinger*, No. 12786, 1992 WL 157717 (Ohio Ct. App. July 8, 1992) (order compelling discovery of trade secrets held to be made in a special proceeding). *But see* *Trionix Research Lab., Inc. v. ADAC Laboratories, Inc.*, 15896, 1993 WL 208306 (Ohio Ct. App. June 16, 1993) (discovery order into technology and trade secrets did not rise to the level of a special proceeding); *Klaban v. Chiefs, Inc.*, No. CA91-02-022, 1991 WL 99622 (Ohio Ct. App. June 10, 1991) (discovery order regarding trade secrets and alleged confidential information not made in a special proceeding).

<sup>136</sup>616 N.E.2d 213 (Ohio 1993).

<sup>137</sup>*Id.* at 214. The provisions of Ohio R. Civ. P. 23.1 state, in pertinent part, that the complaint in a shareholder derivative action must allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and the reasons for his failure to obtain the action or for not making the effort.

of the motion to dismiss was an order affecting a substantial right made in a special proceeding.<sup>138</sup>

Before addressing this question directly, the Court first paused to consider the historical development of special proceeding jurisprudence.<sup>139</sup> The Court noted that, as far back as 1855, a special proceeding was defined as one that previously did not exist as an action at law or a suit in equity prior to the adoption of the Code of Civil Procedure.<sup>140</sup> This standard was carried over into other cases and applied, more or less consistently, for over a century.<sup>141</sup> By contrast, the *Amato* balancing test was developed in the early 1980s making it a recent, and arguably ill-advised, deviation from long established precedent.

The Court then cited several of its own recent cases to illustrate that application of the balancing test had led to “disparate conclusions.”<sup>142</sup> The Court noted that application of the balancing test varied with each case “proving that it [was] impossible to ensure the objective application of subjective criteria.”<sup>143</sup> Thus, in the interests of justice, clarity and judicial economy, the Court deemed it time to abandon the balancing test and return to the historical basis test previously used to determine whether an action was a special proceeding.<sup>144</sup> *Amato* was therefore overruled and the Court held that orders entered in actions that were recognized at common law or in equity, and not specially created by statute, are not orders entered in special proceedings for purposes of section 2505.02.<sup>145</sup> Applying that test to the facts of the case, the Court noted that shareholder derivative suits had long been recognized as suits in equity and, thus, did not fall under the definition of a special proceeding.<sup>146</sup> Consequently, the order appealed was not final and the appellate court’s dismissal for lack of jurisdiction was affirmed.

The *Polikoff* decision was correct insofar as it abandoned the unwieldy and subjective *Amato* balancing test and returned to a more logically consistent and objective historical basis test. Nevertheless, the decision is problematic for several reasons. First, as it has periodically done in these cases, the Supreme Court misdirected its legal analysis to a procedural matter (i.e. the mechanism for maintaining a shareholder derivative suit) rather than the underlying claim in the case. Had the Court properly applied the test set out in its syllabus to the underlying claim, rather than the procedural mechanism affecting how that claim was brought,

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<sup>138</sup>*Polikoff*, 616 N.E.2d at 217-18.

<sup>139</sup>*Id.* at 215-17.

<sup>140</sup>*Id.* at 215 (citing *Watson & Co.*, 5 Ohio St. at 42).

<sup>141</sup>*Id.* at 216 (citing *Missionary Society of M.E. Church*, 47 N.E. at 537 and *In re Estate of Wykoff*, 142 N.E.2d at 660).

<sup>142</sup>*Id.* at 217 (citing *inter alia Humphrey*, 448 N.E.2d at 877 and *Nelson*, 588 N.E.2d at 789).

<sup>143</sup>*Id.* at 217.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.* at the syllabus.

<sup>146</sup>*Id.* at 218.

the Court would have concluded that this was an order entered in a special proceeding.<sup>147</sup> This mistake would come back to haunt the Court in later cases.<sup>148</sup>

Another problem with the *Polikoff* decision concerns some superfluous dicta at the end of the opinion. After holding that special proceedings would now be defined as proceedings which were not previously actions at law or suits in equity, and were specially created by statute, the Court should have stopped. Instead, the decision concludes with the following bizarre paragraph:

We look next at the nature of the relief sought. Appellees sought redress of an alleged wrong by filing a lawsuit in the court of common pleas. This not a case wherein the aggrieved party filed a special petition seeking a remedy that was conferred upon that party by an Ohio statute nor is it a proceeding that represents what is essentially an independent judicial inquiry. In examining the ultimate reviewability of the order, we find that the facts needed to analyze this precise issue will be unchanged by the ultimate disposition of the underlying action. The question of whether appellees complied with Ohio R. Civ. P. 23.1 will be preserved throughout this litigation. The underlying action can be distinguished from a special proceeding in that it provides for an adversarial hearing on the issues of fact and law which arise from the pleadings and which will result in a judgment for the prevailing party.<sup>149</sup>

Though far from a model of clarity, this paragraph appears to add no fewer than three additional tests for determining whether an action is a special proceeding: (1) Does the action involve filing a “special petition” seeking a remedy conferred by statute? (2) Is the proceeding one which represents what is essentially an independent judicial inquiry? (3) Does it provide for an adversarial hearing on issues

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<sup>147</sup>The complaint alleged various violations of the Fair Credit Reporting Act codified at 15 U.S.C. 1681 *et seq.* *Polikoff*, 616 N.E.2d at 214. Civil liability for a violation of those provisions is set out in 15 U.S.C. 1681n. Because this is an action specially created by statute, which did not exist at common law or equity, it was in fact a special proceeding.

<sup>148</sup>*See infra* notes 155-161 and accompanying text. The Court made the same mistake in another case decided the same day as *Polikoff*. In *Bell v. Mt. Sinai Med. Ctr.*, 616 N.E.2d 181, 183-84 (Ohio 1993), a medical malpractice action, the Court noted that an ancillary proceeding for prejudgment interest was a “special proceeding” because the right to obtain prejudgment interest was statutory in nature and did not exist at common law. Rather than focus on the request for prejudgment interest, however, the Court should have focused on the underlying medical malpractice action, which obviously did exist at common law. *See* 67 OHIO JUR. 3D *Malpractice* § 1 (1999) (malpractice actions are loosely based on common law negligence theories). A year later, the Court reversed itself and held that a request for prejudgment interest was not a special proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, at paragraph four of the syllabus (Ohio 1994). However, the Court reached that decision not because it finally realized that a request for prejudgment interest was an ancillary proceeding to the underlying claim, but because it had come to the conclusion that such proceedings did exist at common law after all. *Id.* at 347. Finally, in *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 676 N.E.2d 890, 893-94 (Ohio 1997), the Court came to the realization that it is the underlying action which should be analyzed to determine if the case involves a special proceeding and not the ancillary order being appealed.

<sup>149</sup>*Polikoff*, 616 N.E.2d at 218 (citations omitted).

of fact and law? The Court never defined many of these terms or explained the parameters of the tests or how they would relate to the historical basis test set out in the syllabus. As one commentator noted, rather than creating a simple and clear test for determining what constitutes a special proceeding, the court's standard is "complex," "prone to produce inconsistent results" and requires a multi-prong analysis so subtle in its distinctions that it is likely to produce great confusion.<sup>150</sup> Fortunately, that result has been avoided as most courts have simply ignored the dicta. The General Assembly also eliminated any need to consider it by taking the syllabus language from *Polikoff* and codifying it into section 2505.02(A)(2). This new statutory definition eliminates any need to apply extraneous tests set out in the body of the *Polikoff* opinion.

These problems notwithstanding, *Polikoff* also was not the panacea that resolved all difficulties surrounding the determination of whether an action was a "special proceeding." To begin, there is still a substantial body of case law applying the *Amato* balancing test and holding that a particular action is, or is not, a special proceeding. Practitioners dealing with this issue in the courts of appeals must be careful when citing cases prior to 1993 for the proposition that a particular order is final and appealable. Those unfamiliar with the subtle nuances of this area of the law could mistakenly cite a case in support of their contention that an order was final and be unaware that the precedential underpinning of the case they are citing has been explicitly or implicitly overruled.<sup>151</sup>

Further complicating matters is that the process of determining whether an action previously existed at common law or equity is sometimes easier said than done. The Supreme Court held in *Bell v. Mt. Sinai Med. Ctr.* that an action for pre-judgment interest is a special proceeding because it "is purely statutory in nature and was unavailable at common law"<sup>152</sup> only to reverse itself the following year and come to the opposite conclusion.<sup>153</sup> Another example can be found in probate proceedings. The various appellate districts in this State continue to split over the question of whether probate actions are, in fact, special proceedings.<sup>154</sup>

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<sup>150</sup>*Buenger, supra* note 79, at 22-23.

<sup>151</sup>Courts are not immune to this problem either. The Fourth Appellate District in *State v. Mounts*, 644 N.E.2d 1129, 1130 (Ohio Ct. App. 1994), dismissed an appeal from an administrative license suspension (ALS) based on the decision of *Columbus v. Adams*, 461 N.E.2d 887, at the syllabus (Ohio 1984). As was aptly noted by the dissent, however, *Adams* was decided on the basis of the *Amato* balancing test which had since been overruled by *Polikoff* and, thus, was no longer good authority. *Mounts*, 644 N.E.2d at 1130 (Harsha, J., dissenting). After that, most courts held that an ALS was a final appealable order. See *Vermilion v. McCullough*, 666 N.E.2d 269, 271 (Ohio 1995); *Ohio Bur. of Motor Vehicles v. Williams*, 647 N.E.2d 562, 563 (Ohio Ct. App. 1994). The Ohio Supreme Court finally revisited the issue in *State v. Williams*, 667 N.E.2d 932, at paragraph two of the syllabus (Ohio 1996), and held that an ALS was an order entered in a special proceeding (overruling *Adams*).

<sup>152</sup>*Bell*, 616 N.E.2d at 183.

<sup>153</sup>*Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d at 347.

<sup>154</sup>Cases indicating that these are not special proceedings include *In re Estate of Pulford*, 701 N.E.2d 55, 56-57 (Ohio Ct. App. 1997); *In re Estate of Endslow*, No. 99CA-F-07-37, 2000 WL 502819 (Ohio Ct. App. Apr. 12, 2000); *In re Estate of Packo*, No. L-99-1350, 2000 WL 191784 (Ohio Ct. App. Feb. 15, 2000); *In re Estate of Adams*, No. OT-98-047, 1999 WL

In addition, the Supreme Court's mistaken focus on the procedural order in *Polikoff*, rather than the underlying claim, led some courts to follow suit and consider the ancillary orders being appealed rather than the case as a whole to determine if a special proceeding was involved. In *Niemann v. Cooley*, the Hamilton County Court of Appeals held that an order compelling production of psychiatric and counseling information over an assertion of patient-physician privilege was a final order.<sup>155</sup> The Court acknowledged the *Polikoff* standard but reasoned that the case "should not be read in so sweeping a fashion 'that it renders all orders in suits that were recognized at common law as not being final orders.'"<sup>156</sup> The Court looked, instead, to the nature of the privilege asserted rather than the underlying action. Concluding that the privilege was statutory, the Court held that the order appealed was entered in a special proceeding.<sup>157</sup> Similarly, in *Arnold v. Am. Natl. Red Cross*, the Cuyahoga County Court of Appeals found that an order compelling the disclosure of the identity of a donor of blood infected with HIV was made in a special proceeding and hence was a final order.<sup>158</sup> In so doing, the Court reasoned that an analysis of whether the underlying action was recognized at common law or in equity is only the first inquiry.<sup>159</sup> The case must be decided, however, by "reviewing *the specific proceeding* in question leading to the order being appealed."<sup>160</sup> Inasmuch as disclosure of HIV test results or diagnosis was barred by statute, the Court concluded that the order being appealed emanated from a special proceeding.<sup>161</sup> Though in conflict with the *Polikoff* syllabus, *Niemann* and *Arnold* were both perfectly

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1262074 (Ohio Ct. App. Dec. 30, 1999). Cases holding that probate proceedings are special proceedings include *In re Myers*, 669 N.E.2d 53, 54 (Ohio 1995); *In re Estate of Nussbaum*, No. C-990527, 2000 WL 1005201 (Ohio Ct. App. Jul. 21, 2000); *In re Estate of Lilley*, Nos. CA99-07-083, CA99-07-084, CA99-08-087 & CA99-08-088, 1999 WL 1239470 (Ohio Ct. App. Dec. 20, 1999); *In re Estate of Knauff*, No. 96CA623, 1997 WL 305232 (Ohio Ct. App. May 27, 1997). A certified conflict between these cases was accepted for review by the Ohio Supreme court in *In re Estate of Bloom*, 735 N.E.2d 455 (Ohio 2000), but was later dismissed on application of the appellant. *In re Estate of Bloom*, 739 N.E.2d 813 (Ohio 2000). The issue remains unresolved.

<sup>155</sup>637 N.E.2d 943, 948 (Ohio Ct. App. 1994).

<sup>156</sup>*Id.* (citing with approval *Stevens v. Grandview Hosp. & Med. Ctr.*, No. 14042, 1993 WL 420127 (Ohio Ct. App. Oct. 20, 1993)).

<sup>157</sup>*Id.*

<sup>158</sup>639 N.E.2d 484, 490 (Ohio Ct. App. 1994).

<sup>159</sup>*Id.* at 489.

<sup>160</sup>*Id.* (emphasis added).

<sup>161</sup>*Id.* at 490. It is interesting to note that the underlying action in *Niemann* was for assault and in *Arnold* it was negligence, both of which are tort actions that long existed at common law. Had the Courts in these cases looked to the underlying actions, as directed by *Polikoff*, rather than the specific nature of the order being appealed, they would have come to the inexorable conclusion that these were not special proceedings and that the orders appealed therein were simply interlocutory, non-appealable, discovery orders. This raises suspicion that the courts may have purposely misdirected their analyses to the procedural orders, rather than the underlying actions, in order to address the important privacy and confidentiality questions at issue in the case.

consistent with the mistaken manner in which the Supreme Court applied its own test.

Not every court followed the reasoning in *Niemann* and *Arnold*<sup>162</sup> and the Ohio Supreme Court eventually held that those two cases “misinterpreted” *Polikoff*.<sup>163</sup> In rather emphatic language, the Court made clear that it was the underlying action rather than the order itself that was important:

Since there appears to be much confusion among appellate courts as to precisely what was meant in the *Polikoff* syllabus, we will proceed to clarify that syllabus paragraph. The determining factor of *Polikoff* is whether the “action” was recognized at common law or in equity and not whether the “order” was so recognized. In making the determination courts need look only at the underlying action. The type of order being considered is immaterial. To focus on the nature of the order itself is to return to the balancing test of *Amato*. Such an approach is irreconcilable with *Polikoff* .... Under *Polikoff*, it is the underlying action that must be examined to determine whether an order was entered in a special proceeding. In the case *sub judice*, the underlying action was an ordinary civil action, seeking damages. It was recognized at common law and hence was not a special proceeding.<sup>164</sup>

Another problematic area of the law since returning to a historical basis test has been the field of domestic relations. One year after *Polikoff*, the Supreme Court decided the case of *State ex rel. Papp v. James*.<sup>165</sup> Although *James* was an original action for writs of mandamus and prohibition, and had nothing whatsoever to do with appellate jurisdiction over final orders, the Court inexplicably went out of its way to enunciate that divorce was a special proceeding for purposes of section 2505.02.<sup>166</sup> This pronouncement was made with respect to a change of custody order rendered just a little over a week before entry of a “divorce decree” confirming that judgment.<sup>167</sup> Carried to its conclusion, *reductio ad absurdum*, this ruling would seem to suggest that virtually any interlocutory order in a divorce proceeding is immediately appealable. However, as most practitioners in the field would confirm, emotions run high in domestic cases and allowing parties to immediately appeal every single order therein, and frustrate their ex-spouse or drag the proceedings out in endless appeals, is neither desirable nor practical.

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<sup>162</sup>*See, e.g.*, *Uschold v. Cmty. Blood Ctr.*, 647 N.E.2d 816, 817 (Ohio Ct. App. 1994); *Turner v. Romans*, No. 95APE05-528, 1995 WL 390933 (Ohio Ct. App. Jun. 30, 1995); *In re Grand Jury*, Nos. 93CA09, 93CA10 & 93CA12, 1995 WL 365386 (Jul. 12, 1995) (entry on Application for Reconsideration); *see also* *McHenry v. Gen. Acc. Ins. Co.*, 662 N.E.2d 51, 52 (Ohio Ct. App. 1995) (Patton, J., concurring) (critical of *Niemann* and *Arnold*).

<sup>163</sup>*Walters*, 676 N.E.2d at 893.

<sup>164</sup>*Id.* at 893. The Supreme Court’s criticism of the lower appellate court in this case was a little disingenuous given that the Supreme Court had also erroneously focused on the order appealed, rather than the underlying action, in *Polikoff*, *Bell* and *Moskovitz*.

<sup>165</sup>632 N.E.2d 889 (Ohio 1994).

<sup>166</sup>*Id.* at 894-95.

<sup>167</sup>*Id.*

The *James* case is not without its critics and detractors.<sup>168</sup> Many courts have avoided the absurd results that would follow from strict compliance with *James* by focusing attention on whether the order, even if made in a special proceeding, truly affects a substantial right.<sup>169</sup> Thus, in a good many cases, appeals from patently interlocutory judgments have been dismissed on the basis that effective relief can be had when all issues in the case are resolved.<sup>170</sup> Depending on the order in question, however, some courts have found that a substantial right is affected and allowed an immediate appeal.<sup>171</sup> The guiding principle to keep in mind with domestic cases is that appellate courts are reluctant to allow piecemeal appeals on every issue unless there is an express showing that one of the litigants will be irreparably harmed in the absence of immediate review - that is to say, a “substantial right” must be clearly and irrevocably affected. Otherwise, the entire matter can be reviewed once all of the issues are resolved at the trial level.

These problems aside, the Supreme Court returned, at least theoretically, to a more consistent and less subjective means of determining whether an action was, or was not, a “special proceeding.” By focusing on whether the action previously existed at common law or equity, or whether it was specially created by statute, the Court re-implemented a historical basis test it first adopted over a century ago but unfortunately failed to consistently apply. The Court even appeared to be correcting its misguided focus on ancillary orders by re-emphasizing that it is the underlying action, and *not* the order being appealed, which should be the focus of inquiry. All these signs pointed to a more settled system of special proceeding jurisprudence. Then came the decision in *Stevens v. Ackman*.<sup>172</sup>

This case involved a wrongful death action filed by Shira Stevens against Emily Ackman and the city of Middletown, Ohio.<sup>173</sup> The City moved for summary

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<sup>168</sup>Two justices declined to join in that portion of the opinion because there was “no need” to even reach that issue. *Id.* at 896-97 (Resnick & Wright, JJ., concurring in part and dissenting in part). See also *In re Estate of Pulford*, 701 N.E.2d 55, 57 (Ohio Ct. App. 1997) (Ford, J., writing for a unanimous court states that he does not agree with the “historical rendition of the common law” as it was offered in *James*).

<sup>169</sup>*Buck v. Buck*, 660 N.E.2d 475, 476 (Ohio Ct. App. 1995) (finding that even when an order is issued in a special proceeding, it is only immediately appealable provided it affects a substantial right).

<sup>170</sup>*Id.* (order reducing child support arrearage to judgment but not determining motion for contempt is not final); *Haskins v. Haskins*, 660 N.E.2d 1260, 1262 (Ohio Ct. App. 1995) (order overruling motion to dismiss request to modify custody is not final); *Koroshazi v. Koroshazi*, 674 N.E.2d 1266, 1268 (Ohio Ct. App. 1996) (order reducing child support obligation but deferring custody issue is not final); *Montecalvo v. Montecalvo*, 710 N.E.2d 379, 380 (Ohio Ct. App. 1999) (order that parties undergo tests for purposes of resolving custody motion not final).

<sup>171</sup>See, e.g., *Hollis v. Hollis*, 706 N.E.2d 798, 800 (Ohio Ct. App. 1997) (order disqualifying counsel from representing one of the parties to a divorce is final); *Langer v. Langer*, 704 N.E.2d 275, 278 (Ohio Ct. App. 1997) (summary judgment in favor of husband as to wife’s entitlement to payments under antenuptial agreement found to be final).

<sup>172</sup>743 N.E.2d 901 (Ohio 2001).

<sup>173</sup>Ms. Stevens’s son, Corey Banks, was killed in an automobile accident when the car, driven by Ms. Ackman, went left of center and collided with an oncoming vehicle. The City

judgment asserting that it was entitled to statutory immunity. Its motion was denied and the City appealed. The Court of Appeals determined that it had jurisdiction over the case because the trial court's order denying the City immunity affected a substantial right and was entered in a special proceeding (i.e. a wrongful death action).<sup>174</sup> The Court went on to address the merits of the case, reversed the trial court and entered summary judgment in favor of the City on the issue of immunity. Finding its decision on the merits to be in conflict with another appellate district, the Court of Appeals certified the case to the Ohio Supreme Court for final review and determination. The Supreme Court never reached the merits but found, instead, that the Court of Appeals had no jurisdiction to consider the matter in the first place. In so doing, the Court decided that a wrongful death action was not a "special proceeding" for purposes of section 2505.02.<sup>175</sup>

This decision overruled a large body of authority, which had come to the opposite conclusion.<sup>176</sup> However, this was not the most troubling aspect of the case. In reviewing the majority opinion, it is possible to discern no less than three additional tests for determining when a "special proceeding" is involved.<sup>177</sup> The first test applied by the Court was to determine whether a wrongful death action "provide[d] for a remedy to be sought through 'an original application to a court for a judgment or an order'."<sup>178</sup> Though resolved in the negative, the Court was less than specific in explaining why this test was significant, how a wrongful death complaint was different from "an original application" or how a judgment for damages was different from the "judgment or order" referred to in its new test. The second test applied by the Court was culled from dicta in an old Minnesota case and queried whether the action authorized "a special application to a court to enforce a right."<sup>179</sup> Again, while answering this in the negative, the Court gave no insight as to how a wrongful death complaint authorized by section Chapter 2125 of the Ohio Revised Code differed from a "special application" as such a proceeding was envisioned by the Minnesota Supreme Court at the turn of the century. Finally, the Court asked if a wrongful death claim provided "for what is essentially an independent judicial inquiry."<sup>180</sup> The Court again concluded that the answer was no, but did not explain

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of Middletown was joined as a defendant because it allegedly failed to properly maintain the road on which the accident had occurred. *Id.* at 902.

<sup>174</sup>*Stevens v. Ackman*, No. CA99-03-0053, 1999 WL 125806 (Ohio Ct. App. Dec. 20, 1999).

<sup>175</sup>*Stevens*, 743 N.E.2d 901, at paragraph one of the syllabus (Ohio 2001).

<sup>176</sup>*See, e.g., In re Estate of Pulford*, 701 N.E.2d at 61; *Uschold v. Cmty. Blood Ctr.*, 647 N.E.2d at 817; *Mazurek v. Hoover*, No. 00CA50, 2001 WL 243233 (Ohio Ct. App. Feb. 28, 2001); *see also* 1 OHIO JUR. 3D *Actions* § 126 (1998); McCORMAC, *WRONGFUL DEATH IN OHIO* § 101 (1982).

<sup>177</sup>Though not entirely clear, these tests do not appear to be the same tests referred to in the aforementioned *Polikoff* dicta. *See supra* notes 149-150 and accompanying text.

<sup>178</sup>*Stevens*, 743 N.E.2d at 906 (citing *Missionary Society of M.E. Church v. Ely* (discussed *supra*)).

<sup>179</sup>*Id.* (citing *Schuster v. Schuster*, 87 N.W. 1014 (Minn. 1901)).

<sup>180</sup>*Id.* (citing *In re Estate of Wykoff* (discussed *supra*)).

what it meant by an “independent judicial inquiry” or how such an independent judicial inquiry was distinguishable from any other judicial inquiry in an action filed in a court of law.

Not only did the Supreme Court appear to adopt these new tests, it also misapplied its own test from *Polikoff* as well as the standard set out in section 2505.02(A)(2). The Court held that a wrongful death action was nothing more than an “ordinary civil action seeking damages” which was “recognized at common law and hence was not a special proceeding.”<sup>181</sup> There are several flaws to this reasoning. First, the phrase “civil action” as used in special proceeding jurisprudence is a term of art and is not used in its literal sense.<sup>182</sup> For instance, a federal civil rights claim is a civil action seeking damages but nobody would seriously consider that such a proceeding existed at common law or equity prior to 1853.<sup>183</sup> Second, it is the origin of the action and not the nature of the remedy that distinguishes a “special proceeding” from a non-special proceeding. The fact that the litigant seeks monetary damages, over some other form of relief, should not be the dispositive factor. Third, the Court contradicted its own prior case law in announcing that wrongful death was an action “recognized at common law.”<sup>184</sup> Less than sixty years ago, in *Sabol v. Pekoc*, the Court noted that “[a]t common law there is no action for wrongful death.”<sup>185</sup>

There was also obvious confusion on the part of the Court over the concepts of “common law” and “equity” as well as the fact that both the *Polikoff* syllabus and section 2505.02(A)(2) are phrased in the conjunctive. The Court acknowledged that a wrongful death statute was first enacted in 1851.<sup>186</sup> From there, however, the Court leapt to the conclusion that wrongful death was an “action at law” because the legislation pre-dated adoption of the Code of Civil Procedure by two years.<sup>187</sup> This was a complete misapplication of the pertinent tests. The standard set forth in *Polikoff* and section 2505.02(A)(2) asks whether the action was recognized at

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<sup>181</sup>*Id.*

<sup>182</sup>A “civil action” is usually thought of as including all actions other than criminal proceedings. See BLACK’S LAW DICTIONARY 222 (5th ed. 1979). However, in *Watson & Co.*, the Supreme Court previously explained that it was using the term “civil action” to denote only those actions which did not exist at common law or equity prior to the adoption of the Code of Civil Procedure in 1853. *Watson & Co.*, 5 Ohio St. at 43-44.

<sup>183</sup>See generally 14 OHIO JUR. 3D *Civil Rights* § 1 et seq. (1995) (detailing federal and state civil rights statutes imposing liability on those who violate civil rights of another).

<sup>184</sup>*Stevens*, 743 N.E.2d at 906.

<sup>185</sup>76 N.E.2d 84, 87 (Ohio 1947); see also *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629, 634 (Ohio 1874) (the cause of action given by the wrongful death statute “was not known at common law”). Had the Court wanted to overrule these prior decisions, it should have done so explicitly rather than leave it to the bench and bar to try and reconcile them.

<sup>186</sup>*Stevens*, 743 N.E.2d at 907.

<sup>187</sup>*Id.*

common law or equity *and* whether it was specially created by statute.<sup>188</sup> The common law consists of those rules and principles which derive their authority from “usages and customs of immemorial antiquity” or from courts recognizing, affirming and enforcing those usages and customs.<sup>189</sup> At least one appellate court has defined the common law as all statutory and case law background of England and the American colonies before the revolution.<sup>190</sup> Whichever definition one uses, it is manifestly obvious that a claim for wrongful death, codified in 1851, is not a part of the common law. Moreover, even if it was, the special proceeding test is phrased in the conjunctive which is to say that an action must not only have existed at common law, but must also not have been specially created by statute.<sup>191</sup> Even if all the aforementioned authorities were disregarded, and a wrongful death claim was considered a part of the common law, the fact remains that the proceeding was specially created by statute (as the Court acknowledged in its opinion) and was therefore a special proceeding.

It is too early to tell what the precise effect will be from the *Stevens* decision. There is a temptation to simply limit the case to its syllabus<sup>192</sup> and consider the opinion an anomaly that, hopefully, the Court will one day correct.<sup>193</sup> Nevertheless, the decision is out there and the legal community should be aware that the Court may deviate again from strict compliance with its own standard for determining whether a given action is a special proceeding. The better practice is still to approach this issue as called for both by the syllabus in *Polikoff* and by the standard set forth in section 2505.02(A)(2) and inquire as to whether the proceeding can trace its origins back to common law or to equity. If not, or if it was specially created by statute, then the action is a special proceeding and one can go on to determine whether the order at issue also affects a substantial right.<sup>194</sup>

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<sup>188</sup>*Polikoff*, 616 N.E.2d 213, at paragraph one of the syllabus; OHIO REV. CODE § 2505.02(A)(2) (special proceeding means an action that is specially created by statute *and* that prior to 1853 was not denoted as an action at law or equity).

<sup>189</sup>BLACK’S LAW DICTIONARY 250-251 (5th ed. 1979). This is in contradistinction to statutory or legislative law. *Id.*

<sup>190</sup>*In re Estate of Pulford*, 701 N.E.2d at 60.

<sup>191</sup>*See Jetter v. Abbott*, No. 17888 (Ohio Ct. App. Jul. 30, 2000) (unreported).

<sup>192</sup>For cases decided prior to May, 2002, the syllabus of an Ohio Supreme Court decision stated the law of Ohio. *See* former S.Ct.R.Rep.Op. 1(B). *See also* *Williamson Heater Co. v. Radich*, 190 N.E. 403, at paragraph one of the syllabus (Ohio 1934); *Baltimore & Ohio R.R. Co. v. Baillie*, 148 N.E. 233, at paragraph two of the syllabus (Ohio 1925). Where the justice writing an opinion discussed matters, or gave expression to views not carried into the syllabus, it was merely the personal opinion of the justice and was dicta. *State ex rel. Donahey v. Edmondson*, 105 N.E. 269, 270 (Ohio 1913). Those observations or opinions were not generally binding on lower courts. *See State v. Boggs*, 624 N.E.2d 204, 209 (Ohio 1993); *Ecker v. Cincinnati*, 3 N.E.2d 814, 815 (Ohio Ct. App. 1936).

<sup>193</sup>At least one court has continued to opine that wrongful death actions did not exist at common law - either unaware of *Stevens* or in defiance thereof. *See Kissinger v. Pavlus*, No. 01AP-1203, 2002 WL 1013085 (Ohio Ct. App. May 21, 2002).

<sup>194</sup>OHIO REV. CODE § 2505.02(B)(2). The Supreme Court has characterized the test for determining finality as a two-step process with the first step being to determine whether the action is a special proceeding and, only after resolving that in the affirmative, does one

*D. Examples*

Again, time and space constraints do not allow for an exhaustive list of all the actions that have been determined to be (or not be) special proceedings. However, a few examples shall follow. A wrongful death action is not a special proceeding<sup>195</sup> and neither is an action in mandamus.<sup>196</sup> Although crimes are statutory in nature, criminal prosecutions existed prior to 1853 and thus are not considered special proceedings.<sup>197</sup> The Supreme Court has now made it abundantly clear that the process of discovery is not, in and of itself, a special proceeding and that discovery orders are typically not subject to immediate appeal.<sup>198</sup> However, such orders may be appealable if entered in special proceedings<sup>199</sup> or made as part of a summary application after judgment.<sup>200</sup> Grand Jury proceedings existed at common law and, hence, are not special proceedings.<sup>201</sup> Adoptions are special statutory proceedings that have no counterpart at common law.<sup>202</sup> Actions in forcible entry and detainer are

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proceed to the second step, which is determining whether a substantial right has been affected. *Stevens*, 743 N.E.2d at 905. As a practical matter, though, it makes little difference which step is focused on first. If both criteria are not satisfied, the judgment is not a final appealable order.

<sup>195</sup>*Stevens*, 743 N.E.2d at paragraph one of the syllabus.

<sup>196</sup>*State ex rel. White*, 684 N.E.2d at 74 (complaints for writs of mandamus were recognized at common law).

<sup>197</sup>*State v. Saadey*, No. 99CO49, 2000 WL 1114519 (Ohio Ct. App. Jun. 30, 2000); *State v. Serednesky*, No. 99CA7, 1999 WL 1124763 (Ohio Ct. App. Nov. 22, 1999); *State v. Branham*, No. H-95-066, 1995 WL 704100 (Ohio Ct. App. Nov. 27, 1995).

<sup>198</sup>*Walters*, 676 N.E.2d at 890; *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, at paragraph seven of the syllabus (Ohio 1994).

<sup>199</sup>The action in *Walters* was an “ordinary civil action,” 676 N.E.2d at 893, and the order at issue in *Steckman* was filed directly in a criminal case, 639 N.E.2d at 96, which is not a special proceeding. *See supra* note 197 and accompanying text. Given that neither *Walters* nor *Steckman* involved special proceedings *per se*, their holdings arguably do not apply to discovery orders that, in fact, do emanate from special proceedings. This was precisely the conclusion reached by several appellate courts in cases that involved discovery orders in divorce proceedings. *See, e.g., Shoff v. Shoff*, No. 95APF01-8, 1995 WL 353874 (Ohio Ct. App. Jul. 27, 1995); *Whiteman v. Whiteman*, No. CA94-12-229, 1995 WL 375848 (Ohio Ct. App. Jun. 26, 1995) (both of which distinguished *Steckman*). Discovery orders in other sorts of special proceedings should, at least theoretically, still be appealable. As a practical matter though, even if entered in a special proceeding, the discovery order must still affect a substantial right and this is where most litigants would run into difficulty. In the vast majority of instances, it would be very difficult for litigants to show that they could not obtain effective relief from the discovery order on appeal after the case is concluded. *See supra* notes 29-32 and accompanying text.

<sup>200</sup>*See Kemper Sec., Inc. v. Schultz*, 676 N.E.2d 1197, 1199 (Ohio Ct. App. 1996).

<sup>201</sup>*In re Grand Jury*, 667 N.E.2d 363 (Ohio 1996).

<sup>202</sup>*In re Adoption of Greer*, 638 N.E.2d 999 (Ohio 1994).

special proceedings<sup>203</sup> as are parentage actions.<sup>204</sup> When dealing with actions not previously denoted by case law as a special or non-special proceeding, practitioners should carefully research the origins of the action to ascertain whether it existed at common law or equity prior to 1853 and whether it was specially created by statute. Consistent application of that standard, directed to the underlying action rather than the order being appealed, will go a long way to dispelling the Supreme Court's past analytical errors and providing a more settled special proceeding jurisprudence.

#### V. ORDERS THAT VACATE OR SET ASIDE A JUDGMENT OR GRANT A NEW TRIAL

The third category of final orders includes those that vacate or set aside a judgment or grant a new trial.<sup>205</sup> If the Ohio Supreme Court's special proceeding jurisprudence was characterized by its own internal conflicts and inconsistencies, then the Court's rulings in this particular area are demonstrative of conflict with the General Assembly. This category was first introduced to the statutory framework of final orders in 1937.<sup>206</sup> Almost immediately, however, the legislation was struck down as unconstitutional insofar as it made judgments granting a new trial final and appealable.<sup>207</sup> The Constitution was later amended<sup>208</sup> and this provision was re-enacted by the General Assembly.<sup>209</sup> Once again, it was determined that an order granting a new trial did not constitute a "judgment" or "final order" and that the General Assembly had "no power or authority to provide for appeal of such order."<sup>210</sup> The Court inexplicably reversed itself several years later and stated that, in

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<sup>203</sup>Colombo Enterprises, Inc. v. Fegan, No. 78041, 2001 WL 17555 (Ohio Ct. App. Apr. 12, 2001); Bryant v. Dale, No. 98CA36, 1999 WL 731824 (Ohio Ct. App. Sep. 10, 1999); see also Cuyahoga Metro. Hous. Auth. v. Jackson, 423 N.E.2d 177 (Ohio 1981).

<sup>204</sup>Sexton v. Conley, No. 99CA2655, 2000 WL 1137463 (Ohio Ct. App. Aug. 7, 2000); Mullins v. Roe, No. 97CA2518, 1998 WL 282974 (Ohio Ct. App. May 15, 1998).

<sup>205</sup>OHIO REV. CODE § 2505.02(B)(3).

<sup>206</sup>See Am.H.B. No. 87, 117 Ohio Laws 615.

<sup>207</sup>Hoffman v. Knollman, 20 N.E.2d 221, at paragraph four of the syllabus (Ohio 1939). From 1913 to 1945, Section 6, Article IV, Ohio Constitution, provided that courts of appeals only had appellate jurisdiction in the trial of chancery cases and "to review, affirm, modify or reverse . . . judgments . . ." THOMAS R. SWISHER, OHIO CONSTITUTION HANDBOOK 579-580 (1990). The Court in *Hoffman*, 20 N.E.2d at 227, reasoned that an order granting a new trial did not come within the definition of a "judgment" for purposes of appellate jurisdiction because the very nature of the decision granting a new trial showed that nothing had been attained at that stage of the proceeding. Thus, the Court reasoned, the granting of a motion for new trial was a "merely interlocutory step" in the progress toward finality and a judgment. *Id.*

<sup>208</sup>Effective January 1, 1945, Section 6, Article IV, Ohio Constitution, was amended to provide that the courts of appeals would have appellate jurisdiction "*as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders....*" Swisher, *supra* note 207, at 579 (emphasis added). This amendment gave the General Assembly power to change the appellate jurisdiction of the Court of Appeals. Youngstown Mun. Ry. Co. v. Youngstown, 70 N.E.2d 649, at paragraph one of the syllabus (Ohio 1946).

<sup>209</sup>H.B. No. 86, 122 Ohio Laws 754.

<sup>210</sup>Green v. Acacia Mut. Life Ins. Co., 100 N.E.2d 211, at paragraph four of the syllabus (Ohio 1951).

those instances where a verdict is returned for one party and the other party's motion for new trial is sustained, there emerges from such sequence of events a final appealable order.<sup>211</sup> These apparently inconsistent rulings were finally resolved in *Price v. McCoy Sales & Service, Inc.*<sup>212</sup> wherein the Court held that the granting of a motion for new trial was a final order for purposes of section 2505.02.<sup>213</sup> It is now well settled law that these orders are appealable.<sup>214</sup> Although such appeals typically arise as a result of motions filed pursuant to Ohio R. Civ. P. 59, they can also come about as a result of new trials ordered pursuant to other rules.<sup>215</sup>

Orders that vacate, or set aside, a judgment had a slightly less tortured route to becoming final and appealable. The Supreme Court ruled in *Chandler & Taylor Co. v. Southern Pacific Co.*, that an order vacating a default judgment, upon motion of the defendant, filed at the same term, but more than three days after its rendition, was not a final determination of the rights of the parties and was not reviewable unless the court abused its discretion.<sup>216</sup> It is important to keep in mind, though, that the legislature had not yet tried to make such orders appealable and the Court was merely construing the statute as it then existed in light of the order that was at issue in that case. Subsequently, the Constitution was amended<sup>217</sup> and legislation was passed<sup>218</sup> to include such orders within the rubric of a final order. Although *Chandler & Taylor Co.* was never expressly overruled, its holding was implicitly rejected by the Court in *GTE Automatic Electric v. ARC Industries*, which held that an order setting aside a default judgment was a final order.<sup>219</sup> Since that time, there has been no question that a judgment granting Ohio R. Civ. P. 60(B) relief is a final appealable order.<sup>220</sup> By the same token, a judgment overruling an Ohio R. Civ. P. 60(B) motion for relief is also final and appealable.<sup>221</sup>

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<sup>211</sup>*Gray v. Youngstown Mun. Ry. Co.*, 117 N.E.2d 27, 29 (Ohio 1954).

<sup>212</sup>*Price v. McCoy Sales & Service, Inc.*, 207 N.E.2d 236 (Ohio 1965).

<sup>213</sup>*Id.* at paragraph one of the syllabus (overruling *Green* and approving *Youngstown Mun. Ry. Co.*).

<sup>214</sup>*Colvin v. Abbey's Rest., Inc.*, 709 N.E.2d 1156, 1159 (Ohio 1999); *see also State, ex rel. Roulhac, v. Probate Court*, 255 N.E.2d 636, 637 (Ohio 1970) (probate court order vacating judgment and ordering new trial is final and appealable); *Mayo v. Hall*, Cuyahoga App. No. 41423 (Ohio Ct. App. Aug. 28, 1980) (unreported) (“[S]ince 1965, there has been no question that a lower court decision granting a new trial is appealable.”). A trial court's order granting the defendant a new trial in a criminal case is, likewise, a final order. *State v. Matthews*, 691 N.E.2d 1041, at the syllabus (Ohio 1998). However, the State must seek leave to appeal pursuant to OHIO REV. CODE § 2945.67(A). *Id.* at 1043.

<sup>215</sup>New trial orders pursuant to Ohio R. Civ. P. 49(B) are also final and appealable. *Colvin*, 709 N.E.2d at 1159. Though the court of appeals is confined solely to ruling on the propriety of the order and cannot review any of the other claimed errors. *Id.* at 1160.

<sup>216</sup>135 N.E. 620, at paragraph two of the syllabus (Ohio 1922).

<sup>217</sup>*See supra* note 208 and accompanying text.

<sup>218</sup>*See supra* note 209 and accompanying text.

<sup>219</sup>351 N.E.2d 113, at paragraph one of the syllabus (Ohio 1976).

<sup>220</sup>*See, e.g., Bellamy v. Bellamy*, 674 N.E.2d 1227, 1229 (Ohio Ct. App. 1996); *Hopkins v. Quality Chevrolet, Inc.*, 607 N.E.2d 914, 916 n.1 (Ohio Ct. App. 1992); *Eads v. Spring*, 529

## VI. ORDERS THAT GRANT OR DENY A PROVISIONAL REMEDY

The fourth category of final orders, and the first of two new sections added by Sub.H.B. No. 394, are those that grant or deny certain provisional remedies.<sup>222</sup> A “provisional remedy” for purposes of section 2505.02 is defined as a *proceeding* ancillary to an action, including but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence.<sup>223</sup> Not every order granting or denying a provisional remedy is a final order, however. The order granting that remedy must, in addition, satisfy both of the following requirements:

- (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.<sup>224</sup>

Although Sub.H.B. No. 394 made other changes to section 2505.02, the primary impetus for the legislation was to allow for immediate appeals from these sorts of

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N.E.2d 1280, 1282 (Ohio Ct. App. 1987). These authorities are all based on the premise that the Ohio R. Civ. P. 60(B) order was entered with respect to a final judgment of the trial court. Orders granting or denying Ohio R. Civ. P. 60(B) relief from non-final, interlocutory, judgments are neither final nor appealable. *See* Wolford v. Newark City Sch. Dist. Bd. of Educ., 596 N.E.2d 1085, 1086 (Ohio Ct. App. 1991); Wolf v. Associated Materials, No. 00COA01350, 2000 WL 1262540 (Ohio Ct. App. Aug. 15, 2000).

<sup>221</sup>Colley v. Bazell, 416 N.E.2d 695, at paragraph one of the syllabus (Ohio 1980).

<sup>222</sup>*See* OHIO REV. CODE § 2505.02(B)(4).

<sup>223</sup>*Id.* at (A)(3). Careful attention must be paid to the unusual wording of this provision. Generally speaking, a “proceeding” is the manner or process by which judicial business is conducted before a court. BLACK’S LAW DICTIONARY 1083 (5th ed. 1979). A remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. *Id.* at 1163. A “provisional remedy” is a remedy provided for in a temporary process available in a civil action to secure against immediate loss, irreparable injury, etc. while the principal action is pending. *Id.* at 1102. By defining a “provisional remedy” as an “ancillary proceeding,” rather than the remedy awarded as part of that proceeding, the drafters of this legislation clearly mixed up the concepts of “proceeding” and “remedy.” This error in drafting is even more pronounced when considering the preamble to Sub.H.B. No. 394, which explains that the purpose of the legislation is to specify circumstances under which an order granting or denying a provisional remedy is a final order. This explanation treats the provisional remedy as an order not as the proceeding from which that order emanated. The General Assembly may want to consider amending the statute so as to correct its mistake and define a provisional remedy as an order emanating from a proceeding ancillary to an action. In the meantime, as the Supreme Court has noted, it is a misnomer to refer to the order being appealed as the “provisional remedy.” *See* State v. Muncie, 746 N.E.2d 1092, 1098 (Ohio 2001).

<sup>224</sup>OHIO REV. CODE § 2505.02(B)(4)(a)-(b).

judgments.<sup>225</sup> This was in response to the harsh results associated with the Supreme Court's decision in *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*<sup>226</sup> as well as its explicit overruling of several lower appellate cases that allowed for immediate appeal of discovery orders concerning confidential information.<sup>227</sup> The intent of the Judiciary Committee in passing this legislation was to carve out a niche for interlocutory orders having the potential for irreparable injury and adopt the *Amato v. General Motors Corp.* balancing test - weighing the expenditure of time and resources from an immediate appeal against the urgency of the need for review and the potential for irreversible harm.<sup>228</sup> An excellent summary of these provisions, and the purpose behind them, can be found in the reasoning of the Fifth Appellate District in a case deciding that a ruling on a motion to change venue was not immediately appealable:

The basic purpose of OHIO REV. CODE § 2505.02(A)(3) in categorizing certain types of preliminary decisions of a trial court as final, appealable orders is the protection of one party against irreparable harm by another party during the pendency of the litigation.... The types of provisional remedies listed under 2505.02(A)(3) include decisions that, made preliminarily, could decide all or part of an action or make an ultimate decision on the merits meaningless or cause other irreparable harm. For instance, a preliminary injunction could be issued against a high school football player preventing him from playing football his senior year based on recruiting violations. The trial court could grant the attachment of property for which the owner has a ready buyer. Discovery of privileged material could force a person to divulge highly personal or sensitive information. If evidence critical to the prosecution of a criminal case is suppressed, the state could lose any meaningful chance at successful prosecution of a criminal. The decision to deny a change of venue does not result in any of the types of irreparable harm just listed. There is an

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<sup>225</sup>See preamble to Sub. H.B. No. 394 declaring its purpose “[t]o amend Section 2505.02 of the Revised Code to specify circumstances under which an order granting or denying a provisional remedy is a final appealable order . . . .” See also the Witness Information Form completed by the Hon. Mike Fain prior to testifying before the Judiciary and Criminal Justice Committee of the General Assembly. Judge Fain explained his support for Sub.H.B. No. 394 because it would “permit appellate courts to provide meaningful appellate remedies to parties with meritorious appeals in certain cases where no meaningful remedy can be provided under existing law.” The Seventh District Court of Appeals noted in *Wilson v. Barnesville Hosp.*, Belmont App. No. 01-BA-40 (Ohio Ct. App. Dec. 21, 2001) (unreported), that the addition of the “provisional remedy” provision to OHIO REV. CODE § 2505.02 was intended to prevent disclosure of confidential information.

<sup>226</sup>676 N.E.2d at 894 (disallowing immediate appeal of an order permitting partial discovery of confidential child abuse reports).

<sup>227</sup>See *Niemann*, 637 N.E.2d at 948 (order compelling production of psychiatric and counseling information over patient-physician privilege); *Arnold*, 639 N.E.2d at 489 (order compelling disclosure of identity of blood donor with HIV infected blood).

<sup>228</sup>See *Tribett v. Mestek, Inc.*, Jefferson App. No. 99 JE 1 (Ohio Ct. App. Mar. 18, 1999) (unreported). The essentials of the *Amato* balancing test can now be found at OHIO REV. CODE § 2505.02(B)(4)(b).

adequate legal remedy from a decision denying a change of venue, after final judgment. In other words, it may be expensive to get the cat back in the bag, if a trial court errs when it denies a change of venue, but it can be done. Whereas, when the types of decisions listed in 2505.02(A)(3) are made, the cat is let out of the bag and can never be put back in.<sup>229</sup>

Despite its vernacular, the “cat out of the bag” standard is the best gage by which to measure the potential for irreparable injury. For instance, in *Walters*, if the trial court erred in allowing discovery of written documents pertaining to confidential child abuse reports, it would be impossible to restore that confidentiality in an appeal at the end of the case.<sup>230</sup> The proverbial cat would be “out of the bag” at that point and could not be put back in. Thus, the order would have been appealable under section 2505.02(B)(4).<sup>231</sup> So too in *Arnold* where the plaintiff sought to discover the identity of a donor from whom he received blood infected with the HIV virus. Ohio law generally prohibits disclosure of HIV test results.<sup>232</sup> Once confidential information of that sort is disclosed, it cannot be undisclosed in a subsequent appeal. Consequently, an order requiring disclosure of such information should be appealable under section 2505.02(B)(4).<sup>233</sup>

The Ohio Supreme Court first addressed the parameters of this new category of final appealable order in *State v. Muncie*.<sup>234</sup> That case involved an interlocutory appeal of an order directing forced medication of a defendant in hopes of restoring his competency to stand trial. The Twelfth District Court of Appeals dismissed the case for lack of a final order holding that the forced medication directive neither determined the action (i.e. the criminal case) nor arose in a special proceeding.<sup>235</sup> The Court went on to rule that the directive also did not grant or deny a provisional remedy because it was not in the nature of a preliminary injunction, discovery of privileged matter or suppression of evidence.<sup>236</sup> A discretionary appeal to the Supreme Court was allowed for the sole purpose of determining whether the order was final and appealable.<sup>237</sup>

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<sup>229</sup>*Mansfield Family Rest. v. CGS Worldwide, Inc.*, No. 00-CA-3, 2000 WL 1886226 (Ohio Ct. App. Dec. 28, 2000) (citations omitted).

<sup>230</sup>*Walters*, 676 N.E.2d at 893-94.

<sup>231</sup>This is assuming (1) that the trial court’s judgment on a motion for protective order qualified as an ancillary proceeding under OHIO REV. CODE § 2505.02(A)(3) and (2) that the judgment, in effect, determined the action relative to such proceeding pursuant to OHIO REV. CODE § 2505.02 (B)(4)(a). Both of these would seem to be safe assumptions to make.

<sup>232</sup>*Arnold*, 639 N.E.2d at 490 (citing OHIO REV. CODE § 3701.243).

<sup>233</sup>Here again, the assumption is made that the court’s discovery order arose in an ancillary proceeding that essentially determined the action with respect to that proceeding.

<sup>234</sup>746 N.E.2d 1092 (Ohio 2001).

<sup>235</sup>*State v. Muncie*, No. CA99-07-076, 2000 WL 342131 (Ohio Ct. App. Apr. 3, 2000).

<sup>236</sup>*Id.*

<sup>237</sup>*State v. Muncie*, 735 N.E.2d 456 (Ohio 2000). The defendant was not allowed to challenge the order on substantive grounds.

The Ohio Supreme Court reversed the dismissal of the appeal holding that a judgment directing the involuntary administration of psychotropic medication was a final order under section 2505.02(B)(4).<sup>238</sup> In so doing, the Court ruled that a judgment is final and appealable under the new statutory provision so long as it meets three requirements: (1) the order must grant or deny relief in a certain type of proceeding known as a “provisional remedy;” (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy; and (3) the reviewing court must decide that the party appealing from the order would not have a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.<sup>239</sup>

Insofar as the first part of this test was concerned, the Court concluded that the appellate court took too restrictive a view of provisional remedies when noting that a forced medication order did not fall into the categories of a preliminary injunction, discovery of privileged matter or suppression of evidence. The Court stated that the examples of provisional remedies set out in section 2505.02(A)(3) are non-exhaustive.<sup>240</sup> Indeed, the statute’s definition of a provisional remedy as *any* “proceeding ancillary” to an action necessitates that a wider array of proceedings be considered. The Court noted that an ancillary proceeding is one that is attendant upon or aids another proceeding—one that is auxiliary or subordinate to the principal action.<sup>241</sup> Given this broader definition, the Court reasoned that a proceeding seeking involuntary medication of a criminal defendant in hopes of restoring his competency to stand trial aids in the resolution of the criminal proceeding and is thus ancillary to that proceeding and qualifies for treatment as a provisional remedy.<sup>242</sup> Turning to the second part of the test, the Court quickly noted that the order appealed determined the action against appellant with respect to the ancillary proceeding by directing that he be medicated against his will.<sup>243</sup> The Court further held that the order prevented a judgment in favor of appellant with respect to that proceeding because it made no provision for him to make any future challenge to the administration or dose of medication being given to him.<sup>244</sup> Finally, on the issue of whether appellant could be afforded a meaningful or effective remedy by appeal following final judgment on the criminal prosecution, the Court held that he could not.<sup>245</sup> Much like the “cat out of the bag” colloquialism, the Court phrased the pertinent question as whether the

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<sup>238</sup>*Muncie*, 746 N.E.2d 1096, at paragraph two of the syllabus.

<sup>239</sup>*Id.* at 1097.

<sup>240</sup>*Id.* at 1099.

<sup>241</sup>*Id.* at 1100 (citing *Bishop v. Dresser Indus.*, 730 N.E.2d 1079, 1081 (Ohio Ct. App. 1999) and *Sorg v. Montgomery Ward & Co, Inc.*, No. E-98-057, 1998 WL 904945 (Ohio Ct. App. Dec. 17, 1998)).

<sup>242</sup>*Id.* at 1100.

<sup>243</sup>*Muncie*, 746 N.E.2d at 1100.

<sup>244</sup>*Id.* at 1101.

<sup>245</sup>*Id.* at 1101-02.

“proverbial bell” could be “unrung” in any future appeal.<sup>246</sup> Involuntary medication is a highly intrusive procedure and violates very important liberty interests protected by the Fourteenth Amendment Due Process Clause.<sup>247</sup> The violation of those interests cannot be undone in a future appeal. Further, as the Court noted, the drugs to which appellant was to be subjected carried the potential for severe or even fatal side effects, which also could not be undone in a future appeal.<sup>248</sup> Given these factors, the Court concluded that the order compelling involuntary medication was one granting or denying a provisional remedy and was thus appealable under section 2505.02(B)(4).<sup>249</sup> The matter was remanded to the appellate court for a review of the order on its merits.

The *Muncie* case notwithstanding, interlocutory appeals from orders which grant or deny provisional remedies are a relatively new occurrence in Ohio and it will be some time before there is a settled body of law on this issue.<sup>250</sup> However, some expected trends have developed. Orders granting discovery of privileged or confidential materials are now largely appealable<sup>251</sup> though orders to produce such materials for *in camera* inspections by the court are not.<sup>252</sup> Parties may appeal interlocutory orders compelling the disclosure of trade secrets during discovery,<sup>253</sup>

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<sup>246</sup>*Id.* at 1101 (citing *Gibson -Myers & Assocs. v. Pearce*, No. 19358, 1999 WL 980562 (Ohio Ct. App. Oct. 27, 1999), and *Cuervo v. Snell*, Nos. 99AP-1442, 99AP-1443 & 99AP-1458, 2000 WL 1376510 (Ohio Ct. App. Sep. 26, 2000)).

<sup>247</sup>*See Riggins v. Nevada*, 504 U.S. 127, 134 (1992).

<sup>248</sup>*Muncie*, 746 N.E.2d at 1102.

<sup>249</sup>*Id.* at 1092.

<sup>250</sup>An example of the “unsettled” state of the law in this area is the disagreement between appellate districts over whether an order removing the executor of an estate is appealable as an order granting or denying a provisional remedy. The Seventh and Tenth Districts have answered this question in the affirmative. *See In re Estate of Geanangel*, 768 N.E.2d 1235, 1239 (Ohio Ct. App. 2002); *In re Estate of Nardiello*, No. 01AP-281 2001 WL 1327178 (Ohio Ct. App. Oct. 30, 2001). Whereas the Sixth District has answered it in the negative. *See In re Estate of Gannett*, Huron No. H-01-047 (Ohio Ct. App. Nov. 27, 2001) (unreported).

<sup>251</sup>*See, e.g., McPherson v. Goodyear Tire & Rubber Co.*, 766 N.E.2d 1015 (Ohio Ct. App. 2001) (appeal allowed on denial of protective order without any discussion of the jurisdictional issue); *Nester v. Lima Mem. Hosp.*, 745 N.E.2d 1153, 1155 (Ohio Ct. App. 2000); *Wilson v. Barnesville Hosp.*, No. 01-BA-40, 2001 WL 1647298 (Ohio Ct. App. Dec. 21, 2001); *Indiana Ins. Co. v. Hardgrove*, No. 98AP-910, 1999 WL 224433 (Ohio Ct. App. Apr. 15, 1999). This is not to say, however, that every discovery order concerning privileged or confidential material will automatically be considered a final order. *Nester*, 745 N.E.2d at 1157 (Walters, J., dissenting). Appellants must also show that the requirements of OHIO REV. CODE § 2505.02(B)(4)(a)&(b) have been met.

<sup>252</sup>*See, e.g., Ingram v. Adena Health Sys.*, 761 N.E.2d 72, 74 (Ohio Ct. App. 2001); *Gupta v. Lima News*, 757 N.E.2d 1227, 1229-30 (Ohio Ct. App. 2001). The reason for this is intuitive. Should the court examine the materials *in camera* and decide they should not be disclosed to the party requesting them, then nobody’s rights have been irreparably injured.

<sup>253</sup>*Gibson-Myers & Assoc., Inc. v. Pearce*, No. 19358, 1999 WL 980562 (Ohio Ct. App. Oct. 27, 1999).

orders that disqualify counsel from representing them during the proceedings,<sup>254</sup> orders that impose monetary sanctions which are not stayed and can be collected immediately<sup>255</sup> and orders enforcing a forum selection clause in a contract and transfer of a case to another state court.<sup>256</sup> Summary judgment proceedings are not provisional remedies,<sup>257</sup> nor are orders denying a stay of the case,<sup>258</sup> or proceedings on a motion to dismiss a criminal prosecution on double jeopardy grounds.<sup>259</sup> A judgment denying the State's request to bind a juvenile offender over to adult court has been successfully appealed as an order denying a provisional remedy.<sup>260</sup>

Although "suppression of evidence" was expressly included in the statute as a "provisional remedy,"<sup>261</sup> several cases have held that judgments overruling motions to suppress evidence are not immediately appealable.<sup>262</sup> The reasoning of these courts has been that the criminal defendants could still prevail at trial and, even if they did not, could still seek a stay of execution pending appeal.<sup>263</sup> However, as one judge has aptly noted, the fact that the General Assembly included "suppression of evidence" under the new rubric of "provisional remedy" lends support to the argument that it intended to change existing law and make such rulings immediately appealable.<sup>264</sup> The State could already appeal an adverse ruling on such a motion<sup>265</sup> and, thus, there would have been little reason to include this language in the amended statute unless the legislature intended to allow immediate appeals by

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<sup>254</sup>*Scaccia v. Dayton Newspapers, Inc.*, Nos. 18435 & 18729, 2001 WL 1517043 (Ohio Ct. App. Nov. 30, 2001).

<sup>255</sup>*Pinnacle Tech. Res., Inc. v. Shafer Consulting Group, Inc.*, No. 00AP-1291, 2001 WL 1117315 (Ohio Ct. App. Sep. 25, 2001).

<sup>256</sup>*Overhead, Inc. v. Standen Contracting*, No. L-01-1397, 2002 WL 398342 (Ohio Ct. App. Mar. 11, 2002).

<sup>257</sup>*Bishop v. Dresser Indus., Inc.*, 730 N.E.2d 1079, 1081 (Ohio Ct. App. 1999); *Tribett v. Mestek, Inc.*, No. 99 JE 1, 1999 WL 159216 (Ohio Ct. App. Mar. 18, 1999). Ohio R. Civ. P. 56(A)&(B) allow for summary judgment on claims, counterclaims and cross-claims which are the very nature of the proceeding and cannot be characterized as "ancillary" to the main action.

<sup>258</sup>*Meldrum v. Meldrum*, No. L-02-1204, 2002 WL 1782225 (Ohio Ct. App. Jul. 22, 2002).

<sup>259</sup>*State v. Hubbard*, 734 N.E.2d 874, 876 (Ohio Ct. App. 1999); *State v. Prokos*, No. 00CA02, 2000 WL 714999 (Ohio Ct. App. May 31, 2000).

<sup>260</sup>*In re Cline*, No. 19082, 2002 WL 63794 (Ohio Ct. App. Jan. 14, 2002).

<sup>261</sup>OHIO REV. CODE § 2505.02(A)(3).

<sup>262</sup>*State v. Ricciardi*, 733 N.E.2d 291, 294-295 (Ohio Ct. App. 1999); *State v. Lebron*, No. 99CA35, 1999 WL 1124762 (Ohio Ct. App. Nov. 22, 1999).

<sup>263</sup>*Ricciardi*, 733 N.E.2d at 294-95, (citing *State v. Smith*, Portage App. No. 98-P-0116 (Ohio Ct. App. Jan. 29, 1999) (unreported)).

<sup>264</sup>*Ricciardi*, 733 N.E.2d at 295-96 (Cox, P.J., dissenting).

<sup>265</sup>*See* OHIO REV. CODE § 2945.67(A); Ohio R. Crim. P. 12. *See also supra*, notes 75-76, and accompanying text.

criminal defendants if their suppression motions were denied. Some further clarification on this issue is obviously needed.

All of these cases illustrate the paramount need to show danger of irreparable harm in order to have immediate review of the judgment being appealed. The policy of this State has long been to discourage interlocutory appeals<sup>266</sup> and section 2505.02(B)(4) should be read in light of that policy. Only in highly unusual circumstances, where irreparable damage will be done and cannot be undone once the case is resolved, should the appeal be allowed. Appellate courts will undoubtedly be vigilant in making sure that this exception does not subsume the general rule against interlocutory appeals. Practitioners must be clear in describing how their clients could not be afforded an effective or meaningful remedy if forced to wait to appeal the order until resolution of all issues, claims and proceedings in the action.

#### VII. ORDERS DETERMINING CLASS ACTION STATUS

The fifth category of final orders, and the second new provision added by Sub.H.B. No. 394, are orders that determine whether a case can be maintained as a class action.<sup>267</sup> Prior to its statutory inclusion, this variety of orders also enjoyed a rather disparate treatment. The Ohio Supreme Court first addressed the issue in *Roemisch v. Mutual of Omaha Ins. Co.*<sup>268</sup> and held that orders denying class action status were final and appealable for purposes of section 2505.02.<sup>269</sup> The Court analyzed the order under the first part of the statute, as it then existed, holding that such orders affected a substantial right and determined the action by foreclosing any judgment for, or against, the class.<sup>270</sup> The Court also reasoned that the underlying purpose of section 2505.02 was to limit the number of appeals. If class status was denied, the number of individual actions filed could approach the magnitude of the number of class members and possible appeals from those actions would far exceed any piecemeal appeals arising from a unified class action. Thus, the Court believed judicial economy was better served at both the trial and appellate levels by making such determinations immediately appealable.<sup>271</sup>

The Court came to a similar conclusion, albeit for different reasons, seven years later in *Amato v. General Motors Corp.*<sup>272</sup> This time, the issue was whether an order granting class action status was also a final order. The Court resolved that issue in

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<sup>266</sup>See *supra* notes 18-20 and accompanying text.

<sup>267</sup>See OHIO REV. CODE § 2505.02(B)(5).

<sup>268</sup>314 N.E.2d 386, at the syllabus (Ohio 1974).

<sup>269</sup>*Id.*

<sup>270</sup>*Id.* at 388.

<sup>271</sup>*Id.* at 389. This ruling was not unanimous. Several justices noted that the order denying class status was “interlocutory inasmuch as it [did] not determine the action or prevent final judgment in plaintiff’s individual action.” *Id.* at 391 (Corrigan & Brown, JJ., dissenting). Though it was conceded that the order was tantamount to dismissing the action as to all other members of the proposed class, those members were not foreclosed from proceeding individually. *Roemisch*, 314 N.E.2d at 391.

<sup>272</sup>423 N.E.2d 452, at the syllabus (Ohio 1981).

the affirmative but, rather than analyze the order under the first part of section 2505.02 as was done in *Roemisch*, the Court chose to consider the order as a “special proceeding.”<sup>273</sup> The Court offered no explanation as to why a different portion of the statute was employed. The Court simply applied the aforementioned “balancing test” and concluded that an order certifying a class action was made in a special proceeding and was a final appealable order.<sup>274</sup>

Although analytically inconsistent with one another, *Roemisch* and *Amato* were both expressly affirmed by the Ohio Supreme Court in *Dayton Women’s Health Ctr. v. Enix*.<sup>275</sup> This case involved an action brought by workers at a women’s health clinic against a certified defendant class of protestors. After class certification, the case proceeded on its merits to a final resolution at which time a permanent injunction was issued against the protestors. The protestors appealed both the class certification and the remedy awarded against them. The Court of Appeals modified and affirmed the permanent injunction but held that the class certification was a final order that should have been appealed within thirty days after it was rendered. Because an appeal was not taken, the Court ruled that the issue of class certification could no longer be reviewed. The matter was then appealed to the Ohio Supreme Court, which affirmed citing both *Roemisch* and *Amato* for the proposition that class certifications were appealable orders and, thus, subject to the time limit provisions set forth in App. R. 4(A).<sup>276</sup>

Once *Amato* was overruled, however, there was no longer any clear authority as to whether an order certifying a class action was still a final appealable order. The issue came up again, post-*Polikoff*, in *Chamberlain v. AK Steel Corp.*<sup>277</sup> and was answered in the negative.<sup>278</sup> In that case, a group of steel workers sought, and were granted, plaintiff class status in a lawsuit against their employer for exposing them to asbestos in their place of employment. AK Steel Corporation filed an immediate appeal of the class certification order but its case was dismissed for lack of a final appealable order.<sup>279</sup> The Court acknowledged that *Amato* had been overruled and that the action brought by Chamberlain and the other members of the plaintiff class did not fall within the parameters of a “special proceeding” as defined by *Polikoff*. Thus, the question boiled down to whether *Roemisch* was controlling authority and whether an order granting class certification “determined the action” in the same way

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<sup>273</sup>*Id.* at 455.

<sup>274</sup>*Id.* at 456.

<sup>275</sup>555 N.E.2d 956, at the syllabus (Ohio 1990).

<sup>276</sup>*Dayton Women’s Health Ctr.*, 555 N.E.2d at 958-59. Subsequent to this decision, and in response thereto, Ohio R. App. P. 4 was amended to allow parties to appeal “partial final judgments” either immediately or at the end of the entire case. See Ohio R. App. P.4, Staff Notes (1992).

<sup>277</sup>696 N.E.2d 569 (Ohio 1998).

<sup>278</sup>*Id.* The Supreme Court’s decision in this case is merely a one line summary affirmation of the appellate court decision. Thus, all future citations to this case are to the Court of Appeals opinion.

<sup>279</sup>*Chamberlain v. AK Steel Corp.*, Butler App. No. CA97-04-074 (Ohio Ct. App. Jan. 20, 1997) (unreported).

that an order denying such status. The Twelfth District Court of Appeals answered that question in the negative. Parroting the language used in *Amato*, the defendant, AK Steel Corporation, argued that “an order granting class certification similarly determined the action and prevented a judgment ‘because the economics of a class action are such that defendants are forced to settle the case in order to avoid the extraordinary expense of litigating a class action and the risk of a potentially bankrupting judgment on behalf of the class.’”<sup>280</sup> The Court rejected that argument for the following reasons:

It is undisputed that granting a motion for class certification will affect the trial tactics employed by the defendants and may be an incentive to settle. However, an order granting class certification does not have the effect of determining the action and preventing a judgment in favor of the defendants in the manner that an order denying class certification affects the plaintiff class. While the defendants may be discouraged from continuing the action if a class is certified, the plaintiff class is absolutely precluded from continuing the action if certification is denied. The Court therefore finds that an order granting class certification is fundamentally different from an order denying class certification with respect to designation as a final appealable order under OHIO REV. CODE § 2505.02.<sup>281</sup>

The appellate court thus dismissed the appeal<sup>282</sup> which dismissal was later affirmed by the Ohio Supreme Court.<sup>283</sup> The whole issue is now moot, of course, given that the General Assembly has expressly designated that judgments determining whether a case may be maintained as a class action are final appealable orders.<sup>284</sup>

#### VIII. MULTIPLE CLAIMS AND/OR MULTIPLE PARTIES

Implicit in the discussion thus far has been the assumption that there are only two parties to the case in question and only one claim for relief. The analytical process changes somewhat when there are multiple claims and/or multiple parties involved. Under those circumstances, the provisions of Ohio R. Civ. P. 54(B) must also be factored into determining whether an order is final and appealable.<sup>285</sup> This rule provides as follows:

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

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<sup>280</sup>*Id.*

<sup>281</sup>*Id.*

<sup>282</sup>*Id.*

<sup>283</sup>*Chamberlain*, 696 N.E.2d at 569.

<sup>284</sup>OHIO REV. CODE § 2505.02(B)(5).

<sup>285</sup>*In re Berman*, 590 N.E.2d 809, 811 (Ohio Ct. App. 1990); *Gallucci v. Freshour*, No. 99CA22, 2000 WL 864977 (Ohio Ct. App. Jun. 22, 2000); *McGuire v. Mills*, No. 96CA2191, 1997 WL 271731 (Ohio Ct. App. May, 21, 1997).

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 right and liabilities of all the parties.<sup>286</sup>

Ohio R. Civ. P. 54(B) is based on Fed. R. Civ. P. 54(b) and provides for entry of final judgment against one party in a multi-party or multi-claim action while the action continues against the other parties.<sup>287</sup> Historically, an appeal could not be taken until all claims and parties in an action had been resolved.<sup>288</sup> Permitting only one appeal from an action was adequate at a time when most litigation involved only two parties and one claim.<sup>289</sup> However, as joinder of parties and claims became more prevalent, it came to be accepted that denial of an immediate appeal from the disposition of an identifiable and severable portion of a complex action might result in an injustice.<sup>290</sup> Ohio R. Civ. P. 54(B) was promulgated to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals - a possibility rendered more likely by modern procedural rules allowing liberalized joinder of parties and claims.<sup>291</sup> Now, where applicable, the provisions of Ohio R. Civ. P. 54(B) must be met in addition to the requirements of section 2505.02 in order for a judgment to be considered final and appealable.<sup>292</sup>

There are several important points for courts and practitioners to keep in mind when confronted with multiple claims and Ohio R. Civ. P. 54(B). First, by its own language, the rule applies only to claims. It does not apply to issues or remedies that are component parts of that claim. Second, the order resolving that claim must still be final under section 2505.02. The rule is not a means by which to circumvent the general prohibition against interlocutory appeals and cannot make appealable an order that is not final under the statute. Finally, an appropriate finding of “no just reason for delay” is the *sine qua non* to immediate appealability. Without such finding, the order is not final and the appeal must be dismissed. Even with such a finding, the appellate court may determine that the finding was improper and dismiss the appeal anyway. Each of these points is discussed in greater detail below.

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<sup>286</sup>Ohio R. Civ. P. 54(B).

<sup>287</sup>See Staff Note.

<sup>288</sup>Gen. Acc. Ins. Co. v. Ins. Co. of N. Am., 540 N.E.2d 266, 270 (Ohio 1989).

<sup>289</sup>*Id.*

<sup>290</sup>*Id.*

<sup>291</sup>*Id.* See also *Alexander v. Buckeye Pipe Line Co.*, 359 N.E.2d 702, 703 (Ohio 1977).

<sup>292</sup>State *ex rel.* Wright v. Ohio Adult Parole Auth., 661 N.E.2d 728, 731 (Ohio 1996); *Chef Italiano Corp. v. Kent State Univ.*, 541 N.E.2d 64, at the syllabus (Ohio 1989).

A. *Ohio R. Civ. P. 54(B) Applies Only to Claims*

By its express terms, Ohio R. Civ. P. 54(B) applies only where there is resolution of one or more but fewer than all claims in a multi-claim action.<sup>293</sup> The rule does not apply where issues within a claim have been determined but other issues are left unresolved. For instance, judgments that determine liability, but defer the issue of damages, are not final and Ohio R. Civ. P. 54(B) cannot be used to make them appealable.<sup>294</sup> This is because damages are a remedy - part of the claim for relief - rather than a separate claim in and of itself.<sup>295</sup> For the same reason, Ohio R. Civ. P. 54(B) does not apply to procedural orders<sup>296</sup> or to orders granting or denying a “provisional remedy” under section 2505.02(B)(4).<sup>297</sup> None of these judgments determine an entire claim; they only resolve a component part of a claim.

As noted previously, compliance problems with Ohio R. Civ. P. 54(B) arise most often in situations where the parties or the trial court lose track of all the competing claims, cross-claims and counterclaims and one or more of them are left inadvertently unresolved.<sup>298</sup> In those cases, absent compliance with Ohio R. Civ. P. 54(B), the judgment sought to be appealed will not be final and appealable.<sup>299</sup> The one exception to this rule, where strict compliance with Ohio R. Civ. P. 54(B) is not necessary, arises in those instances where the claims remaining for adjudication are rendered moot by judgments already entered on other claims.<sup>300</sup> Appellate courts

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<sup>293</sup>The rule also applies where there are multiple parties but, because the presence of multiple parties inevitably means multiple claims, the discussion is limited to that issue for the sake of simplicity. Nevertheless if claims by, or against, all parties in a case have not been resolved, then the trial court must include the appropriate Ohio R. Civ. P. 54(B) language to make the judgment appealable.

<sup>294</sup>State *ex rel.* White, 684 N.E.2d at 74; State *ex rel.* A & D Ltd. P’ship v. Keefe, 671 N.E.2d 13, 15-16 (Ohio 1996).

<sup>295</sup>See *Hitchings v. Weese*, 674 N.E.2d 688, 698 (Ohio 1997) (Resnick, J., concurring); *see also* *McKee v. Inabnitt*, No. 01CA711, 2001 WL 1512031 (Ohio Ct. App. Sep. 26, 2001); *Miller v. Biggers*, No. 00CA2751, 2001 WL 1192123 (Ohio Ct. App. Aug. 13, 2001).

<sup>296</sup>*Colonial Mtg. Serv. Co. v. Habitat Assoc.*, Franklin App. No. 76AP-597 (Ohio Ct. App. Dec. 28, 1976) (unreported). *See, e.g., Owens Flooring Co. v. Hummel Constr. Co.*, 749 N.E.2d 782, 784 (Ohio Ct. App. 2001) (Ohio R. Civ. P. 54(B) does not apply to orders denying stay of action pending arbitration); *Kagy v. Toledo-Lucas County Port Auth.*, 699 N.E.2d 566, 569 (Ohio Ct. App. 1997) (Ohio R. Civ. P. 54(B) does not apply to orders denying summary judgment).

<sup>297</sup>*Johnson v. Univ. Hosp. of Cleveland*, No. 80117, 2002 WL 472298 (Ohio Ct. App. Mar. 28, 2002); *Premier Health Care Services, Inc. v. Schneiderman*, No. 18795, 2001 WL 1479241 (Ohio Ct. App. Aug. 21, 2001).

<sup>298</sup>See *supra* note 51 and accompanying text.

<sup>299</sup>See, e.g., *Karr v. JLH of Athens, Inc.*, No. 99CA57, 2000 WL 33226179 (Ohio Ct. App. Dec. 4, 2000).

<sup>300</sup>See *General Acc. Ins. Co. v. Ins. Co. of N. Am.*, 540 N.E.2d 266, 270-71 (Ohio 1989); *Wise v. Gursky*, 421 N.E.2d 150, 152 (Ohio 1981).

will have jurisdiction in that event notwithstanding the absence of a finding of “no just reason for delay.”<sup>301</sup>

*B. The Claim Appealed Must Still be Final Under Section 2505.02*

The corollary to the first rule, that Ohio R. Civ. P. 54(B) applies only to claims and not to issues or component parts of a claim, is that the entire claim must be resolved and be final under section 2505.02. A finding of “no just reason for delay” pursuant to Ohio R. Civ. P. 54(B) does not make appealable an otherwise non-appealable order.<sup>302</sup> Careful attention must therefore be paid to what constitutes a “claim.” Over the years, intermediate appellate courts have given various definitions to “claim for relief” including “counts,” “issues,” “theories of entitlement,” “theories of relief,” “distinct branch of a case” or “demand.”<sup>303</sup> These definitions were either wrong or too imprecise to provide a workable standard. The Ohio Supreme Court gave a more precise definition in 1981 stating that a claim for relief, for purposes of Ohio R. Civ. P. 54(B), was synonymous with a “cause of action.”<sup>304</sup> A “cause of action” is that set of facts which establish or give rise to a “right of action,” the existence of which affords a party the right to judicial relief.<sup>305</sup> “Cause of action” is to be distinguished from the “action” itself, which is a judicial proceeding brought in a court of law to vindicate the cause of action.<sup>306</sup> These distinctions are critically important because an action (whether in the form of a complaint, cross-complaint or counter-complaint) may contain numerous “counts,” “theories,” or “demands” for relief but still encompass only a single “cause of action” or “claim for relief.” For instance, where a person suffers personal injury and property damage as the result of a wrongful act, there is only a single “cause of action” even though the complaint asserts counts in battery and trespass.<sup>307</sup> Summary judgment rendered on one of those counts, while the other count remains pending, would not be final and appealable even with a finding of “no just reason for delay.” Consequently, before including the Ohio R. Civ. P. 54(B) language in an entry, trial courts should consider

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<sup>301</sup>*See, e.g.,* Nichols v. Arnold, No. 01CA9 2001 WL 1682939 (Ohio Ct. App. Dec. 24, 2001) (judgment in favor of plaintiffs rendered moot an unresolved counterclaim asserting that the complaint was frivolous); Ashbaugh v. Family Dollar Stores, No. 99CA11, 2000 WL 146391 (Ohio Ct. App. Jan. 20, 2000) (judgment finding that store was not liable in slip and fall case rendered moot an unresolved subrogation claim).

<sup>302</sup>McCabe/Marra Co. v. Dover, 652 N.E.2d 236, 249 (Ohio Ct. App. 1995); Palmer v. Westmeyer, 549 N.E.2d 1202, 1209 (Ohio Ct. App. 1988); Douthitt v. Garrison, 444 N.E.2d 1068, 1069-70 (Ohio Ct. App. 1981).

<sup>303</sup>Diane S. Leung, Note, *The Application and Misapplication of Ohio Rule of Civil Procedure 54(B)*, 39 CLEVE. ST. L. REV. 237, 257-258 (1991).

<sup>304</sup>*Amato*, 423 N.E.2d at 454.

<sup>305</sup>*State, ex rel. Wilson v. Preston*, 181 N.E.2d 31, at paragraph two of the syllabus (Ohio 1962); *Baltimore & Ohio RR. Co. v. Larwill*, 93 N.E. 619, 621 (Ohio 1910).

<sup>306</sup>*See generally* *Baramore v. Washing*, 160 N.E.2d 432, 434 (Ohio Com. Pl. 1959).

<sup>307</sup>*See* *Henderson v. Ryan*, 233 N.E.2d 506, 509 (Ohio 1968). This so-called “factual unit theory” for defining a “claim for relief” is widely used in other states and federal courts and is the position taken by the Restatement of Judgments 2d. Leung, *supra* note 303, at 259.

whether the partial judgment actually resolves an entire claim or just a particular count or theory of recovery advanced as part of that claim.

*C. The Trial Court Must Find “No Just Reason for Delay” to  
Make the Order Appealable*

As stated above, a final judgment on one or more but fewer than all claims in a multi-claim action can be reviewed on appeal only after the trial court expressly determines that there is “no just reason for delay.”<sup>308</sup> Unless a judgment contains that required phrase, the order is interlocutory, subject to future modification and is neither final nor appealable.<sup>309</sup> Courts have been fairly stringent in requiring the precise language of that phrase to be used. Anything less is deemed insufficient.<sup>310</sup> For instance, a trial court’s finding that an interlocutory order “shall constitute a final judgment pursuant to Rule 54” has been deemed insufficient to make an interlocutory order appealable under that rule.<sup>311</sup>

Even if the “no just reason for delay” language is included in the judgment entry, this is still no guarantee that the order is appealable. The Supreme Court made clear in *Wisintainer v. Elcen Power Strut Co.*<sup>312</sup> that a trial court’s finding of “no just reason for delay” is essentially a factual determination that allowing an interlocutory appeal is “consistent with the interests of sound judicial administration.”<sup>313</sup> As such, the court’s finding is reviewable by appellate courts just like any other factual finding.<sup>314</sup> Where the record indicates that the interests of sound judicial administration could be served by a finding of “no just reason for delay,” the trial court’s determination must stand.<sup>315</sup> However, where there is insufficient evidence to support that determination, appellate courts may reverse the Ohio R. Civ. P. 54(B) certification and dismiss the appeal.<sup>316</sup>

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<sup>308</sup>Ohio R. Civ. P. 54(B).

<sup>309</sup>*See* 2 KLEIN & DARLING, CIVIL PRACTICE § 54-3 (1997). *See also* Noble v. Colwell, 540 N.E.2d 1381, 1385 (Ohio 1989); Stewart v. Midwestern Indemn. Co., 543 N.E.2d 1200, 1203 (Ohio 1989).

<sup>310</sup>For example, the Fourth Appellate District has frequently referred to this as the “magic language” from Ohio R. Civ. P. 54(B). *See, e.g.*, Cokonougher v. Loring, No. 99CA20, 2001 WL 243274 (Ohio Ct. App. Mar. 5, 2001); Max J. Colvin & Sons Trucking, v. Phillip Diniaco & Sons, Inc., No. 87CA18, 1988 WL 85077 (Ohio Ct. App. Jul. 29, 1988); Rainsford v. Royal Ins. Co. of Am., No. 1294, 1987 WL 7584 (Ohio Ct. App. Feb. 27, 1987).

<sup>311</sup>*See, e.g.*, Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc., Nos. 01SC2816 & 2817, 2002 WL 1676323 (Ohio Ct. App. Jul. 15, 2002).

<sup>312</sup>617 N.E.2d 1136 (Ohio 1993).

<sup>313</sup>*Id.* at paragraph one of the syllabus.

<sup>314</sup>*Id.* at 1138.

<sup>315</sup>*Id.* at paragraph two of the syllabus.

<sup>316</sup>The Supreme Court nevertheless made clear that, as with any other factual finding, trial courts are entitled to a presumption of correctness and appellate courts should not substitute their own judgment on the issue where there is some competent and credible evidence to support the trial court’s determination. *Id.* at 1138.

Instances of appellate courts reversing trial court Ohio R. Civ. P. 54(B) certifications are rare, but they do exist.<sup>317</sup> Trial courts should therefore exercise caution before certifying interlocutory orders as appealable under that rule. A finding of “no just reason for delay” should not be made *pro forma* as “boilerplate” language in a judgment entry.<sup>318</sup> There must be good reason for trial courts to ignore the general policy against piecemeal appeals and grant certification.<sup>319</sup> Some have suggested that Ohio follow the lead of the federal courts and require trial courts to either explicitly set out in their judgment entries the reasons for making a Ohio R. Civ. P. 54(B) certification<sup>320</sup> or at least consider the criteria adopted by federal courts when deciding whether to make a Ohio R. Civ. P. 54(B) certification.<sup>321</sup> Those criteria are, among others: (1) the relationship between the adjudicated and unadjudicated claims, (2) the possibility that the need for review may be mooted by future decisions in the trial court, (3) the possibility that a reviewing court might be forced to consider the same issue a second time, and (4) other considerations such as delay, economic oppression and solvency, shortening the time of trial, frivolity of competing claims and expense to the parties involved.<sup>322</sup> The first option, that trial courts explain their reasons for making a Ohio R. Civ. P. 54(B) determination, would be burdensome to a system already straining against ever increasing workloads. The second option, however, is eminently reasonable and trial courts should keep in mind the aforementioned federal criteria when determining whether to make a Ohio R. Civ. P. 54(B) certification. Other states have already followed suit<sup>323</sup> and, if trial courts are unwilling to engage in a deeper analysis of the issue, then appellate courts should step in and ensure that a finding of “no just reason for delay” is indeed supported by the evidence and consistent with state policy against piecemeal appeals. Interlocutory appeals should be the exception and not the general rule.

#### IX. CONCLUSION

Appellate jurisdiction is an area of the law rarely given much thought until counsel has an appeal dismissed or a trial court has a case returned to it for lack of a final appealable order. To avoid those situations, practitioners and trial court judges need a working knowledge of the jurisdictional requirements determining when

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<sup>317</sup>*See, e.g.*, *Ranlom, Inc. v. Mikulic*, No. C-971066, 1999 WL 49350 (Ohio Ct. App. Feb. 5, 1999) (Ohio R. Civ. P. 54(B) certification improvidently made); *Bell Drilling & Prod. Co. v. Kilbarger Constr., Inc.*, No. 96CA23, 1997 WL 361025 (Ohio Ct. App. Jun. 26, 1997) (case involved “one of those rare occasions when the trial court’s [Ohio R. Civ. P. 54(B)] certification is not justified.”).

<sup>318</sup>*Wisintainer*, 617 N.E.2d at 1139.

<sup>319</sup>*See* Leung, *supra* note 303, at 249.

<sup>320</sup>*Id.* at 250 (citing *Allis Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (CA. Pa. 1975) (“A proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of ‘no just reason for delay.’ The court should clearly articulate the reasons and factors underlying its decision to grant 54(b) certification.”)

<sup>321</sup>*Wisintainer*, 617 N.E.2d at 1144 (Resnick, J., dissenting).

<sup>322</sup>*Id.* (citing *Allis Chalmers Corp.*, 521 F.2d at 364).

<sup>323</sup>*See, e.g.*, *Vanover v. Kansas City Life Ins. Co.*, 535 N.W.2d 424, 426 n.1 (N.D. 1995); *Banks v. State Farm Ins. Co.*, 708 So. 2d 523, 525 (La. Ct. App. 1998).

courts of appeals can hear cases. Ohio appellate courts only have jurisdiction to review trial court judgments that are “final” orders as defined by section 2505.02 and comply with Ohio R. Civ. P. 54(B) where applicable. These provisions should be construed, and applied, consistent with the important public policy interests against allowing piecemeal appeals. More importantly, however, the Ohio Supreme Court needs to be more careful and consistent in its jurisprudence in this area. This is particularly true in those cases dealing with “special proceedings” where the Court has frequently made pronouncements which are, at best, confusing and, at worst, analytically inconsistent with prior decisions. Recent statutory amendments should clear up some of the confusion but practitioners and trial court judges need to be aware of pertinent case law to fully understand and properly apply those provisions. With careful and considered attention paid to section 2505.02 and Ohio R. Civ. P. 54(B), appellate courts can avoid dismissing so many appeals for lack of jurisdiction and practitioners and trial courts will have greater certainty that, when a case is appealed, it will actually be decided on the merits rather than dismissed on what is often (albeit erroneously) considered a “technicality.”