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The Application and Misapplication of Ohio Rule of Civil Procedure 54(B)

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THE APPLICATION AND MISAPPLICATION OF OHIO RULE OF CIVIL PROCEDURE 54(B)

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I. INTRODUCTION

A rulebook of civil procedure is a compilation of brief rules which guide attorneys in conducting civil actions — from the drafting of the initial complaint\(^1\) or answer\(^2\) all the way through trial\(^3\) and post trial activities.\(^4\) Indeed, representing a client zealously within the bounds of the law\(^5\) must include a thorough knowledge of the rules of civil procedure as cases can be won or lost on the application or misapplication of these rules.\(^6\) Mastery of the civil rules cannot be overemphasized, and one cannot be deceived into believing that procedural mandates are always easy to understand, follow, or apply.

The rules of civil procedure, seemingly straightforward, can be misinterpreted due to attorney inattentiveness. However, a more pervasive reason for the misapplication of procedure is that the rules may be cloaked in mystery with hidden meanings and traps for the unwary. There are

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\(^1\) For rules governing the preparation of a complaint, see OHIO R. CIV. P. 3(a), 7, 10.
\(^2\) Rules addressing the drafting of an answer included OHIO R. CIV. P. 7, 10, 12.
\(^3\) See generally OHIO R. CIV. P. 38-53. These rules cover trial practice.
\(^4\) See, e.g., OHIO R. CIV. P. 59, 60.
\(^5\) OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1988).
\(^6\) Statement by J. Patrick Browne, Professor of Civil Procedure at Cleveland-Marshall College of Law, Cleveland, Ohio (May 23, 1989).
several reasons for this. First, state rules of civil procedure are often adopted almost verbatim from the federal rules\(^7\) without significant analysis of how they will fit into the state scheme. This leaves the meanings of such rules to evolve gradually in the courts. Secondly, courts in various districts may analyze the same rule in different ways and create confusion as to the proper application of the rule.\(^8\) Even a state supreme court may not always interpret a rule of civil procedure in a consistent manner.\(^9\) Finally, a rule may be written unclearly, ambiguously, or without specificity so that it is open to various interpretations. One rule which has suffered and is suffering from misinterpretation and misapplication is Ohio Rule of Civil Procedure 54(B),\(^10\) judgment upon multiple claims or involving multiple parties, the subject of this note.

The following discussion, an analysis of Rule 54(B), will attempt to accomplish several tasks. First, the note will briefly describe the history, nature, and purpose of the rule. Secondly, it will analyze the major aspects and requirements of Rule 54(B). The analysis will emphasize the facets of the rule which have often been misconstrued and explain the proper interpretations where they exist. Third, the note will suggest ways to combat misuse and misinterpretation of Rule 54(B) and will propose an amended version which will alleviate some of the confusion in the rule's application.


\(^8\) Compare Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360 (3rd Cir. 1975) (held that reasons for entering Federal Rule 54(B) language of "no just reason for delay" on a judgment order must also be on the order) with Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2d Cir. 1968) (reasons for "no just reason for delay" language not mandatory on the judgment order, just suggested).

\(^9\) See, e.g., Noble v. Colwell, 44 Ohio St. 3d 92, 540 N.E.2d 1381 (1989); Chef Italiano Corp. v. Kent State Univ., 44 Ohio St. 3d 86, 541 N.E.2d 64 (1989); General Accident Ins. Co. v. Insurance Co. of N.A., 44 Ohio St. 3d 17, 540 N.E.2d 266 (1989). These cases demonstrate that the Ohio Supreme Court is not consistent in its application of Ohio Rule of Civil Procedure 54(B). See infra notes 214-30 and accompanying text.

\(^10\) Rule 54(B), judgment upon multiple claims or involving multiple parties, as adopted on July 1, 1970 by the Supreme Court of Ohio and the 108th Ohio General Assembly states:

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

Ohio R. Civ. P. 54(B). For a comparison of the original first draft of the rule, see Draft Ohio Rules of Civil Procedure, 42 Ohio B. 89 (1969). The 1970 version as adopted and the current rule are identical.
II. HISTORY, NATURE, AND PURPOSE OF RULE 54(B)

A. Origin of Rule 54(B)

Ohio Civil Rule 54(B) went into effect July 1, 1970, along with the new Ohio Rules of Civil Procedure which replaced the Ohio Code of Civil Procedure. The 1970 rules were modeled after the Federal Rules of Civil Procedure at the suggestion of the Ohio Supreme Court. An appointed Rules Advisory Committee used the Federal Rules as an outline, adopted the Federal numbering system, and made the "modifications, omissions, and supplements" it deemed desirable. It supposedly conducted a careful rule-by-rule study before accepting a new rule. However, due to the almost word-for-word similarity between some of the Ohio rules and their federal counterparts, the rapid promulgation of the rules, and the misunderstandings which have arisen in connection with some of the rules, one wonders if the Committee considered all the ramifications of each adopted federal rule on the Ohio court system.
Although fashioned after its federal counterpart, Ohio Rule of Civil Procedure 54(B) must be primarily interpreted and understood through Ohio case law especially since the rule has evolved for twenty years in the Ohio system and has developed some characteristics distinct from the federal rule. This is not to say that scrutiny of the federal rule or comparable state rules is never illustrative or helpful in analyzing Ohio Rule 54(B). Though it may be helpful to examine the purpose and interpretations of other 54(B) rules absent Ohio authority, one must understand how the Ohio courts have uniquely applied and misapplied Rule 54(B) with special emphasis on the required certification language of "no just reason for delay" and on the rule's effects on multiple claims.

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17 By June 20, 1968, the Supreme Court had directed the formation of the Rules Advisory Committee. The Committee presented the first draft rules to the Court in January, 1969. Corrigan, supra note 14, at 728-29. By July 1, 1970, the new Ohio Rules of Civil Procedure were in effect.


19 One court has suggested that where the particular Ohio Rule and its comparable federal rule are virtually identical, the courts' application of the Ohio rule should, absent inapplicable jurisdictional questions, be guided by the federal interpretations of the federal rule. Abbeyshire Constr. Co. v. Ohio Civil Rights Comm'n, 39 Ohio App. 2d 125, 129, 316 N.E.2d 893, 896 (1974). The Ohio Rule 54(B) cases have sometimes looked to the Federal Rules or to other states' 54(B) rules for aid in interpretation especially soon after the adoption of the Ohio Civil Rules. In Amato v. General Motors Corp., 67 Ohio St. 2d 253, 255, 423 N.E.2d 452, 454 (1981), the Supreme Court of Ohio examined the North Dakota version of Rule 54(B) in order to determine Ohio Rule 54(B)'s applicability to class actions. Similarly, in Way v. Wallach, 30 Ohio App. 2d 180, 181, 283 N.E.2d 823, 824 (1972), the court examined federal cases for support for the proposition that absent a determination of no just reason for delay, an order on one or more but less than all the parties in a lawsuit cannot be final.

20 The process of placing Rule 54(B) language of "no just reason for delay" on a judgment is referred to as certification and this term will be used in this note to refer to that process.

21 Ohio R. Civ. P. 54(B).

22 See infra notes 159-230 and accompanying text.
B. Nature and Purpose of Rule 54(B)

Ohio Rule 54(B), like many of the current Ohio rules, was promulgated in order to facilitate the prompt and effective modernization of the Ohio court system. Rule 54(B)'s contribution to the facilitation of justice is that it allows final judgment as to one or more but less than all of the claims or parties in case, a practice not generally allowed under the Ohio Code of Civil Procedure, but one which is needed in the new Civil Rule System which allows more liberal joinder of parties and claims. As was stated recently by the Ohio Supreme Court in General Accident Insurance Co. v. Insurance Co. of North America:

Historically, an appeal could not be taken until all claims and parties in an action had been disposed of. Permitting only one appeal from any one action was adequate at a time when most litigation involved only two parties and one claim. However, as joinder of parties and claims became more prevalent, it became to be accepted that to deny an immediate appeal from the disposition of identifiable and separable portion of a highly complex action might result in an injustice.

Therefore, one of the main purposes of Ohio Rule 54(B) is to allow portions of a case to be appealed before the entire case is resolved. However, to limit one's understanding of the goals of Rule 54(B) to this one purpose is to misunderstand, as have many attorneys and courts, the true nature and purpose of the rule. Indeed, "[w]hatever may be said of the Ohio Rules of Civil Procedure, it was not one of their purposes to encourage or to permit unnecessary fragmented appeals . . . ."

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23 Corrigan, supra note 14, at 728. As Judge John V. Corrigan, Chairman of the Rules Advisory Committee, noted, the new rules of procedure represented "the most thorough revision in history . . . and substantially remove[d] the old formalities of the pleadings" in order to "zero in on the basic issues of lawsuits" thus "eliminating delay, unnecessary express, and other impediments to the expeditious administration of justice." Id. at 727-28. The court system modernization was effectuated through the Modern Courts Amendment to the Ohio Constitution which was adopted by the voters of the state in May, 1968. See Text of Modern Courts Amendment, 41 OHIO B. 343 (1968). Section 5(B) of the Amendment empowered the supreme court to prescribe the rules for governing procedure in Ohio courts. Draft Ohio Rules of Civil Procedure, 42 OHIO B. 89 (1969).

24 OHIO R. CIV. P. 54(B).

25 See, e.g., Branch v. Dick, 14 Ohio St. 551 (1863). Before 1970, the courts of Ohio held that generally there was no right to appeal part of a case. However, there is some evidence that part of an action was appealable in some instances. Logue v. Wilson, 45 Ohio App. 2d 132, 134, 341 N.E.2d 641, 643 (1972) noted that 54(B) was adopted in part because before 1970 it was difficult to determine whether a judgment disposing of less than all of an action was an appealable order.

26 44 Ohio St. 3d 17, 20, 540 N.E.2d 266, 270 (1989) (quoting 20 C. Wright & C. Miller, Federal Practice and Procedure § 2653 (1983)).

27 Whitaker-Merrell Co. v. Carl M. Geupel Constr. Co., 29 Ohio St. 2d 184, 187, 280 N.E.2d 922, 924-25 (1972). This case which correctly concluded that summary judgment for less than all of the claims or parties was not appealable without Rule 54(B) certification is typical of many early Rule 54(B) cases because it relied solely on the rule to reject the appeal. This type of analysis helped promote the misconception that the rule alone rendered a partial order final and appealable.
In order to fully understand the nature of Rule 54(B) and its role in the appellate process, it is necessary to note that the rule does not stand in isolation but operates in conjunction with and only after the application of Section 3(B)(2), Article IV of the Ohio Constitution and Section 2505.02 of the Ohio Revised Code. Together these two sections specify that the appellate courts only have jurisdiction to review judgments or final orders of the inferior courts. The Ohio Constitution is the supreme law of the state and the Ohio Rules of Civil Procedure cannot change or diminish any substantive right given by the statutes of the state. Thus, in order for Rule 54(B) to apply to part of a case which has been adjudicated, the partial decision must first be a final order or judgment. In other words, the rule itself cannot determine which parts of cases qualify for Rule 54(B) treatment, but can only, after a portion of a case is final, decide whether to allow the otherwise final order to be appealed. The effect of Rule 54(B) is "purely procedural."

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28 In part, Section 3(B)(2), Article IV, Ohio Constitution grants appellate courts "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the [inferior] courts." OHIO CONST. art. IV, § 3(B)(2).

29 In part, Section 2505.02 states that "an order that affects a substantial right in an action which in effect determines the action and prevents a judgment . . . is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial." OHIO REV. CODE ANN. § 2505.02 (Baldwin 1988). There are four other Section 2505.02 definitions of final order, but three of them will rarely, if ever, apply to Rule 54(B) situations and one of them will pose no Rule 54(B) problem. Browne, The Supreme Court and Civ. R. 54(B): A Noble Effort to Interpret Chef Italiano's General Accident Insurance, PRO/GRAM, Nov. 1989, at 1, 3 [hereinafter Noble Effort].

30 The Ohio Rules of Civil Procedure define judgment as "a decree and any order from which an appeal lies as provided in R.C. 2505.02." (emphasis added) OHIO R. CRV. P. 54(A). The emphasized language became effective on July 1, 1989. This addition is important because it helps clarify that a judgment under 54(B) must comply with the finality requirements of Section 2505.02. Even as late as 1988, it was commonly but erroneously thought that partial judgment did not require "compliance with R.C. 2505.02." J. KLEIN, P. BROWNE, & J. MURTAUGH, supra note 12, at § 25.01.

31 OHIO REV. CODE ANN. § 2505.02 (Baldwin 1988).

32 OHIO CONST. art. IV, § 3(b)(2).

33 Statement by J. Patrick Browne, Professor of Civil Procedure at Cleveland-Marshall College of Law, Cleveland, Ohio (May 23, 1989).

34 Determining whether a partial judgment is final is a two-step analysis. The order must first be final under R.C. § 2505.02, then the court must take a second step to decide if 54(B) language is required. General Accident Ins. Co. v. Insurance Co. of N.A., 44 Ohio St. 3d 17, 21, 540 N.E.2d 266, 271 (1989). Indeed, "[a]bsent a final order pursuant to R.C. 2505.02, Civ. R. 54(B) is never reached." Noble v. Colwell, 44 Ohio St. 3d 92, 98, 540 N.E.2d 1381, 1386 (1989).

35 Alexander v. Buckeye Pipeline Co., 49 Ohio St. 2d 158, 169, 359 N.E.2d 702, 703 (1977). Although Alexander correctly concluded that a Rule 54(B) order was not immediately appealable unless it was also final under R.C. § 2505.02, scant attention was paid to this part of the case because the court applied 54(B) in a way that accorded with the common erroneous understanding. Noble Effort, supra note 29, at 2.
Since the finality requirement derived from the Ohio Constitution and the Ohio Revised Code applicable to Rule 54(B) hinders "piecemeal litigation, avoids delay, and . . . promotes judicial economy," Rule 54(B) cannot be viewed as indiscriminately allowing wholesale appeals. Rule 54(B) is, in fact, an exception to the general and still valid rule that "when there are multiple claims in an action . . . or when there are multiple parties, a court's order is not final until there is an entry adjudicating all the claims . . . of all the parties." Only if there is a "hardship or injustice" to the party for whom a partial judgment was rendered can the court enter final judgment on part of a case by declaring that there is "no just reason for delay." The true aim of Ohio Civil Rule 54(B) is to resolve the tension created between the state's policy against piecemeal appeals and the possible injustice sometimes created by the delay of appeals. Although Rule 54(B) is often misunderstood as a rule which alone facilitates the appeals of parts of cases, in actuality it was intended to prevent fragmented appeals by converting otherwise final and appealable orders into interlocutory orders. One court noted that the policy considerations of rendering orders interlocutory, a function performed by Rule 54(B), consist of the following:

1) the rule prevents parties from engaging in costly delaying tactics at trial by appealing each adverse ruling as it is entered;
2) the losing party on a particular motion may ultimately prevail at trial, and not seek an appeal, thus saving appellate

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36 OHIO CONST. art. IV, § 3(b)(2).
37 OHIO REV. CODE ANN. § 2505.02 (Baldwin 1988).
40 48 Ohio App. 2d at 222, 356 N.E.2d at 769.
41 OHIO R. Civ. P. 54(B). Declaration of "no just reason for delay" is not a mere formality. See infra notes 88-94 and accompanying text. Orders which are otherwise final but which are not given certification are interlocutory, cannot be appealed, and are "subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." OHIO R. Civ. P. 54(B).
44 Browne, Applying Civil Rule 54(B), PRO/GRAM, June 1989, at 1 [hereinafter Applying 54(B)].
court time; 3) a single appeal in which all objections to the trial court's ruling are raised will be more efficient than numerous appeals, each requiring its own set of briefs, record, oral argument, and appellate opinion; 4) by avoiding interlocutory appeals, the trial court can move rapidly and will not have to be stalled while waiting for the court of appeals to rule on some point.45

Unfortunately, many early cases and some later cases discussed Rule 54(B) and its ramifications without reference to the related constitutional and statutory provisions.46 This helped create the misconception that Rule 54(B) alone permitted "final judgment as to one or more but fewer than all of the claims or parties."47

III. APPLICATION OF OHIO RULE 54(B)

In order for Rule 54(B) to operate, three prerequisites must be met. First, there must be multiple claims and/or parties of which some but not all of the claims and rights of parties have been adjudicated.48 Second, the decision which is being appealed must be a final order.49 Third, the trial court must expressly determine that there is "no just reason for delay."50 There have been misunderstandings and misapplications of Rule 54(B) in all three areas. In category one, the confusion revolves around the meaning of what constitutes a claim for relief under Rule 54(B).51 Next, the finality requirement is not always understood or followed, thus creating confusion as to the role of Rule 54(B).52 Finally, attorneys and courts have often been under the incorrect assumption that certification automatically and magically converts any partial judgment into a final appealable order.53 This section will examine the certification requirement, mention Rule 54(B)'s applicability to multi-party actions, define what constitutes a claim for relief for the purposes of Rule 54(B), and discuss the rule's operation in multi-claim actions. Finality under R.C. § 2505.02 and its requirements will be treated as necessary under each section.

46 See, e.g., Jarrett v. Dayton Osteopathic Hosp., Inc., 20 Ohio St. 3d 77, 486 N.E.2d 99 (1985); Way v. Wallach, 30 Ohio App. 2d 180, 283 N.E.2d 823 (1972). These cases reveal little about the actual operation of Rule 54(B) as the analyses are limited to dismissals based merely on lack of an express determination of "no just reason for delay" without reference to constitutional and statutory requirements for finality.
47 Ohio R. Civ. P. 54(B).
48 Id.
49 See supra notes 28-47 and accompanying text.
51 See infra notes 167-95 and accompanying text.
52 See supra notes 28-47 and accompanying text.
53 See infra notes 72-94 and accompanying text.
A. Certification

The important certification requirement of Rule 54(B) is the portion of the rule which is its essential feature. In evaluating and understanding certification, one must consider the correct interpretation and application of the phrase "upon an express determination of no just reason for delay." The effect of certification or lack thereof, the reasons why the required language has created confusion, and the ways in which attorneys or courts can better utilize certification to effectuate the goals of the rule.

1. Compliance with the Certification Requirement

Under Rule 54(B), in a multi-claim or multi-party action, "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." Proper use of the rule requires that the determination only be made in certain instances and by certain language.

In order for a judge to be allowed to make an express determination of "no just reason for delay," Rule 54(B) must first be applicable. A two-step analysis can help one to ascertain whether a Rule 54(B) situation exists. First, it is necessary that the case have multiple parties and/or claims and that the court has adjudicated only part of the case. Second, the case must be one within the sound discretion of the trial judge. See Ollick v. Rice, 16 Ohio App. 3d 448, 451, 476 N.E.2d 1062, 1067 (1984); Fair v. School Employees Retirement Sys., 44 Ohio App. 2d 115, 120, 335 N.E.2d, 868, 872 (1975). A nonexclusive list of factors considered by federal judges in exercising their Rule 54(B) discretionary power includes:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3rd Cir. 1975). One significant shortcoming of the Ohio Rule 54(B) cases is the paucity of discussion on what actually constitutes "no just reason for delay."

The emphasis in this section is on certification. Cases used to discuss the application and misapplication of certification may or may not be valid under the proper interpretation of Rule 54(B).

See Commercial Nat'l Bank v. Deppen, 65 Ohio St. 2d 65, 418 N.E.2d 399 (1981). In this case, the appellant tried to claim that a full summary judgment for the appellee was not a final appealable order because the journal entry did not contain the 54(B) language. The court correctly noted that since all the rights of all the parties had been adjudicated, Rule 54(B) was inapplicable. Id. at 66, 418 N.E.2d at 401.
the partial adjudications must be final orders under R.C. § 2505.02.\textsuperscript{59} Systematic use of the two-step process can help determine if Rule 54(B) applies in many situations, but it is still sometimes difficult to decide if an express determination may be declared.

Courts have generally agreed that certification is not an option available to the judge when: summary judgment as to one party in a lawsuit is denied;\textsuperscript{60} only some of the claims are adjudicated but all of the remaining ones are rendered moot;\textsuperscript{61} liability is established, but a ruling on the damages is still pending;\textsuperscript{62} the action is for forcible entry and detainer\textsuperscript{63} or; the remaining claim is against a “John Doe” defendant who has not been served.\textsuperscript{64} Rule 54(B) also does not apply when: the case is a criminal action;\textsuperscript{65} the trial judge fails to resolve all of the claims and instead ignores the remaining claims;\textsuperscript{66} a motion to dismiss for failure to join an indispensable party is overruled;\textsuperscript{67} although it appears otherwise, there is really only one claim in an action;\textsuperscript{68} and the partial order is one declaring that an action may be maintained as a class action.\textsuperscript{69} The fact that trial judges have inserted the “no just reason” language in these

\textsuperscript{59} See supra notes 28-47 and accompanying text.

\textsuperscript{60} See, e.g., Hinkle v. Akron Novelty Co., 40 Ohio App. 3d 162, 532 N.E.2d 772 (1987). Rule 54(B) does not apply as denials of summary judgments are not final and appealable under R.C. § 2505.02. Id. at 163, 532 N.E.2d at 774. That 54(B) may have no application to any order overruling a motion for summary judgment is readily apparent since such orders do not purport to enter final judgment as to any party or to any claim. Thompson v. Axt, No. 80AP-90, slip op. at ___ (Ohio Ct. App. May 8, 1980) (LEXIS, States library, Ohio file at 3). This is because a denial of summary judgment means that there are genuine issues of material fact that still need to be determined. Ohio R. Civ. P. 56(C).

\textsuperscript{61} See, e.g., Wise v. Gursky, 66 Ohio St. 2d 241, 421 N.E.2d 150 (1981); Harleysville Mut. Ins. Co. v. Santora, 3 Ohio App. 3d 257, 444 N.E.2d 1076 (1982). In these cases, the claims became moot by a partial order which made the entire judgments final under R.C. § 2505.02. Rule 54(B) was not needed because no claims were left pending. See, e.g., Wise, 66 Ohio St. 2d at 243, 421 N.E.2d at 152.

\textsuperscript{62} See, e.g., Fireman’s Fund Ins. Co. v. BPS Co., 4 Ohio App. 3d 3, 446 N.E.2d 181 (1982). The issues of liability and damages are not multiple claims for relief, but only two aspects of one claim for relief so Rule 54(B) is not applicable. See cases cited supra note 191.

\textsuperscript{63} See, e.g., Cuyahoga Metro. Housing Auth. v. Jackson, 67 Ohio St. 2d 129, 423 N.E.2d 177 (1981); Smith v. Wright, 65 Ohio App. 2d 101, 416 N.E.2d 655 (1979). The reason that Civ. R. 54(b) does not apply to forcible entry and detainer cases is because the civil rules specify that they cannot be used in such cases. Ohio R. Civ. P. 1(c).


\textsuperscript{65} See, e.g., Middleton v. Jackson, 8 Ohio App. 3d 431, 457 N.E.2d 898 (1983). Although juvenile proceedings are quasi-criminal, Rule 54(B) has been held to apply to these type of proceedings. See, e.g., State v. Wylie, No. 45952, slip op. (Ohio Ct. App. Aug. 4, 1983) (LEXIS, States library, Ohio file).


\textsuperscript{68} See infra notes 196-201 and accompanying text.

\textsuperscript{69} Amato v. General Motors Corp., 67 Ohio St. 2d 253, 423 N.E.2d 452 (1981).
situations and the fact that appellants have succeeded in obtaining ju-
risdiction in the appellate courts in some cases demonstrates that both
attorneys and judges are often perplexed as to when to request or add
certification.

The aforementioned cases generally fall into two categories. First, Rule
54(B) may not apply because the action is already appealable solely by
application of R.C. § 2505.02.70 Second, the rule may be inapplicable
because the partial order is not final under R.C. § 2505.02.71

Many cases in which Rule 54(B) could apply involve appeals to the
Ohio Courts of Appeals or the Ohio Supreme Court in which a party tries
to appeal an order or decision on part of a case which does not contain
the express determination of no "just reason for delay."72 Although these
somewhat simple cases appear to be unanimous in holding that the ab-
source of certification where needed renders an otherwise final order in-
terlocutory,73 they have nevertheless contributed to the misunderstanding
of Rule 54(B). The problem with these cases is that they dismiss appeals
solely on the lack of required language and do not discuss whether the
partial decisions are otherwise final under R.C. § 2505.02.74 While this
analysis promotes judicial economy and efficiency and is sufficient to
dismiss the appeals, the absence of at least a cursory statement noting
whether the partial adjudication was or was not final under R.C. § 2505.02
creates the impression that only the requirement of Rule 54(B) has to be
met for a partial order to be appealable. These cases have helped con-
tribute to the misguided popular belief that the trial court can "convert
an interlocutory order into a final appealable order by adding the magic
phrase 'no just reason for delay.'"75 The appellate courts should at least
mention in all Rule 54(B) cases that final appealable orders must satisfy
R.C. § 2505.02 as well as Rule 54(B).

"A finding of 'no just reason for delay' pursuant to Civ. R. 54(B) does
not make appealable an otherwise non-appealable order."76 Rule 54(B) is
designed to be used only in those situations where there are multiple
claims or parties, and there is an otherwise final adjudication of less than
all of the claims or rights of the parties.77 This proposition is not obscure,
but has been reiterated many times. As was stated in O'Neils Dep't Store v. Taylor:

An order denying a motion for summary judgment is not a final appealable order. The trial court's determination of 'no just reason for delay' is always subject to appellate review and reversal, if erroneously recited; the certification does not automatically convert a judgment which is not final into a final appealable order. A truly final order is one that, between the parties, ends the litigation and leaves nothing for the trial court to do as to those parties but to execute the judgment.

What Rule 54(B) certification actually does is to "convert a final appealable order into an interlocutory order by omitting the magic phrase from the judgement entry" in order to conserve the judicial time and effort of the appellate courts.

The misconception as to the function of certification has arisen often in cases involving summary judgement. This has occurred in part because while denials of summary judgments for fewer than all of the parties in an action can never be final and appealable, certification can make the grant of summary judgment as to less than all of the parties in an action appealable pursuant to Rule 54(B). Buckeye Union Co. v. IBM, involving the denial of summary judgment as to one party in a multi-party case, is a typical example of the confusion surrounding Rule 54(B). When the party tried to appeal, the court of appeals began its analysis correctly by stating that the overruling of a motion for summary judgment was not final and appealable under R.C. § 2505.02. However, the court also stated "[m]oreover, the order does not contain the language that there is no just reason for delay pursuant to Civ. R. 54(B)" and "therefore, appellee's motion to dismiss is well taken." This last statement insinuates that the lack of certification had some bearing on the denial of the appeal. The correct analysis is that since there was no final order under R.C. § 2505.02, Rule 54(B) had no application to the case. Rule 54(B) should not have been mentioned at all or the opinion should have been careful to state that the rule did not apply. This careless remark is yet another example of the misconception that certification alone can render an interlocutory order final and appealable.

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78 See supra note 60.
80 Applying 54(B), supra note 44, at 1.
81 See cases cited supra note 60.
82 See supra note 60.
85 Id. at 376.
86 Id. at 377.
Another feature of court opinions which has contributed to the misinterpretation of the proper utilization of Rule 54(B) certification is reference to the "no just reason for delay" language as a "magic phrase" or "magic words." Repeated reference to certification in this manner may well have contributed to the notion that the language of Rule 54(B) has independent power to convert nonfinal orders into final ones. The courts could better employ phrases such as "the required language," "the mandatory phrase," or "the necessary words" to refer to the certification language.

Just as court opinions in Rule 54(B) cases should always state that the requirements of R.C. § 2505.02 have been met before the rule may apply, they should never try to utilize Rule 54(B) when it is otherwise not applicable. The problem is that just because part of a case is final pursuant to R.C. § 2505.02 does not mean that it automatically qualifies for the certification which is needed to make it appealable. There must be good reasons for the courts to ignore the general policy against piecemeal appeals and grant certification. Unfortunately, a reading of the Ohio cases reveals that there is no specific discussion on what actually constitutes a good justification to support a determination of "no just reason for delay" in situations in which partial orders are otherwise final and little discussion on when the trial judge abused his discretion in adding or not adding the required Rule 54(B) phrase. It has been noted that Rule 54(B) certification should only be added in the infrequent harsh case and not entered routinely as courtesy or accommodation to counsel.

What type of situation is the infrequent harsh case is not readily discernable from the case law. Generally, an order disposing of all claims against one of multiple parties warrants certification unless the claims against one party are so intertwined with the claims against another party that one appeal at the end of the entire case makes more efficient use of the courts. The absence of reasons in the cases has contributed to the misconception that certification is a pro forma requirement. In fact Rule 54(B) language should only be added after a careful consideration as to why one appeal at the end of the entire case would not satisfy justice. Since judicial economy and efficiency are goals of Rule 54(B), presumably any situation in which these objectives are not hindered by an immediate appeal would justify certification. However, the understanding of Rule 54(B) would be enhanced if the cases discussed the particularities of grants or denials of the phrase "no just reason for delay."
One way to increase the understanding of what actually qualifies as the infrequent harsh situation which justifies the immediate appeal of part of a case would be to require the trial judge to place upon the judgment order the reasons why he added or refused to add certification. At least one federal district court has adopted this approach and has held that an appeal must be dismissed and the certification vacated when the trial court fails to enumerate its justification for employing Rule 54(B).\textsuperscript{95} Other federal courts, while not making reasons mandatory, suggest that it is highly recommended for the trial court to state its reasons for adding certification to a partial order.\textsuperscript{96} A dissenting judge in one Eighth District Court of Appeals case has suggested that Ohio follow the mandatory federal procedure. He declared that the "unsolicited incantation of the statutory language standing alone, will not brew a magic potion that vests our court with jurisdiction."\textsuperscript{97} "Our authority to review," he stated, "must not rest on the whim of the lower court when it makes an unsupported determination that there is no just reason for delay."\textsuperscript{98} Thus far the Ohio Supreme Court has not addressed the issue of whether reasons should be mandatory on a judgment entry which contains Rule 54(B) certification. This approach would be a valuable addition to Rule 54(B) jurisprudence because it would create a body of case law which would help attorneys understand when certification of an otherwise final order is allowable. More importantly, it would aid the appellate court in determining whether the trial court had abused its discretion by adding or failing to add the "no just reason for delay language." The value of such an approach is illustrated by examining the Ohio Fourth District Court of Appeals treatment of partial orders which come up on appeal without certification.

In an attempt to reduce the strictness of the Rule 54(B) requirements, the Fourth District routinely states that where an appeal is rejected due to the absence of Rule 54(B) certification, it will allow the appellants to submit the same briefs on immediate reappeal if the trial court on remand adds the phrase "no just reason for delay."\textsuperscript{99} In these opinions, the court

\textsuperscript{95} See Allis Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360 (3rd Cir. 1975). The court reasoned:

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. . . . It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and more boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.\textsuperscript{100} Id. at 364.

\textsuperscript{96} See, e.g., Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2d Cir. 1968). See generally Annotation, Necessity of a Statement of Reasons Underlying District Court's Decision to Grant Certification Under Rule 54(B) of Federal Rules of Civil Procedure, 23 A.L.R. Fed. 772 (1977).\textsuperscript{101}

\textsuperscript{97} Alex Fodor Realty Co. v. Newman, No. 37006, slip op. at ___ (Ohio Ct. App. June 29, 1978) (LEXIS, States library, Ohio file at 8).

\textsuperscript{98} Id.

does not even discuss whether such certification may be appropriate. This approach contributes to the Rule 54(B) confusion. First of all, it suggests that certification is a mere formality. Secondly, it could be interpreted by the trial court as a directive to add the certification automatically. If the trial court were required to state reasons why certification is or is not appropriate, parts of cases would not be indiscriminately parlayed back and forth between the courts. It would aid judicial economy and efficiency if the trial court was required to do one of the following when 54(B) certification is requested: 1) place certification and its justifications on the judgment entry; or 2) deny certification, place the reasons for denial in the record, and state in the judgment entry that the cause is continued.\(^{100}\)

Just as there has been confusion as to when the judge has the option of using Rule 54(B), the requirements to fulfill certification have produced misconceptions. Certification is a strict requirement.\(^{101}\) Using the rule's phraseology of "no just reason for delay"\(^{102}\) or words which are equivalent such as "no genuine reason for delay,"\(^{103}\) "no further entry required,"\(^{104}\) "this entry shall be considered a final entry,"\(^{105}\) or "no just reason to delay enforcement or appeal hereof,"\(^{106}\) the judge must actually place certification on the judgment entry.\(^{107}\) The intention or even announcement of a decision to grant certification without actually recording the language on the judgment entry will not satisfy the certification requirement of Rule 54(B).\(^{108}\) The rule is simple. Absent the express determination of no "just reason for delay" on the judgment entry, a decision will

\(^{100}\) See P.L. Grant Realty v. Bowles, No. 1427, slip op. at 1 (Ohio Ct. App. Aug. 14, 1980) (LEXIS, States library, Ohio file at 1). In this case, the court specifically stated on the judgment entry "and this cause is continued." Id. This left no doubt that, absent an abuse of discretion by the trial court, there was no final appealable order on the part of the case on which judgment had been rendered.

\(^{101}\) Vanhoose v. Board of Educ. of Gallia Local School District, No. 87 CA 23 at — (Ohio Ct. App. Mar. 27, 1989) (LEXIS, States library, Ohio file at *2). The strict requirement is that, despite the reasons, the absence of certification on the judgment order makes an otherwise final partial order nonappealable. Id.

\(^{102}\) Ohio R. Civ. P. 54(B)


\(^{105}\) Hawker v. Jackson, No. 445, slip op. at 1 (Ohio Ct. App. Apr. 14, 1982) (LEXIS, States library, Ohio file). The court observed that while the certification language did not have to be "parrotlike," it did have to convey the same meaning as "no just reason for delay." Id.


\(^{107}\) Morrison v. Firestone Photographs, Inc., No. 77AP-339, slip op. at — (Ohio Ct. App. Sept. 6, 1977) (LEXIS, States library, Ohio file at 2). This case illustrates the strictness of the certification requirement. The court recognized that the trial judge undoubtedly intended to dispose of the counterclaim but still rejected the appeal on the grounds that the judgment entry lacked the Rule 54(B) language. Id.

\(^{108}\) Id.
not be considered a final judgment or a final appealable order. In order that a possible Rule 54(B) situation is not overlooked or ignored by the court, it is prudent for the attorney to move for Rule 54(B) certification rather than relying on the court to correctly ascertain and utilize the rule. Although a strict requirement, in certain instances, the omission of Rule 54(B) language can be corrected so that an otherwise final partial order can be appealed.

If the trial court intended to add certification language to an order but forgot, the judgment entry may be amended nunc pro tunc, to add the phrase "no just reason for delay" in order to make the order comply with Rule 54(B). This type of corrective entry may be added by the court on its own initiative, but a prudent attorney should move for such an order. Thus, nunc pro tunc entries have been entered upon joint stipulation of both parties or after appellees filed objections to a judgment order because certification had not been given. Attorneys cannot correct the final judgment entries themselves. In jurisdictions where the attorney is required to prepare the judgment entry for the judge's signature and the judge has indicated a willingness to add certification on a part of a case, it has been held that when the attorney neglects to add the required Rule 54(B) language to the judgment entry and the judge thereafter fails to add it, a nunc pro tunc entry will be denied. Only the trial court has the authority to amend a judgment entry. Declaring in the appellate court that an appeal should be allowed because lack of certification was an oversight at the trial level, whether true or not, does not give the appellate court the right to amend a trial court judgment entry to add certification. Nunc pro tunc orders are retroactive, and the appeal time does not start to run until the date of the amended entry. Moreover,


110 Nunc pro tunc literally means then for now. It only applies to omissions in the record which were really had but omitted due to inadvertence or mistake. BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

111 It is unlikely that without prompting the trial court would amend an order on its own to insert Rule 54(B) language.


113 White v. White, 48 Ohio App. 2d 72, 72-73, 355 N.E.2d 816, 817 (1975).


115 See Provident Bank v. Fish, Nos. C-830537, C-830552, A-8202603, slip op. at 3 (Ohio Ct. App. May 16, 1984) (LEXIS, States library, Ohio file). In this case, the attorney actually added the phrase "no just reason for delay" on the final judgment entry. When the court discovered that the language was not its own, it had it stricken from the record. Id.


Rule 54(B) language has been added on a partial judgment as late as a year after the judgment entry. However, the best practice for an attorney to follow is to move for certification before a judgment entry is recorded, because the *nunc pro tunc* method can only remedy inadvertent mistakes of omission by the trial court.

2. Effects of Certification and Noncertification

Once a judgment is properly certified under Rule 54(B), part of an action becomes a final judgment. The losing party is permitted to take an immediate appeal while the prevailing party can attempt to enforce the judgement. Certification is intended to ensure that parties to an action know when an order is final so they can calculate the time period in which they have to appeal. Parties must be careful to have their attorneys read the judgment entries. In *Kiss v. Allstate Insurance Co.* a 1983 case in which the trial court entered an express determination of “no just reason for delay,” both defendants argued on appeal that they were not informed of the finality of the orders so that they should be allowed to appeal even though their appeals were filed in an untimely manner. The court pointed out that there is no procedural requirement that parties be served with final orders. Thus, even though the rule was harsh, the appeal was dismissed as untimely. As long as the rules “are as they are,” the court said, the parties must check the judgment orders to ascertain if certification rendered part of a case appealable.

The failure of the trial court to grant certification on a judgment entry for an otherwise final part of a case has certain inescapable consequences. First, that part of the multi-claim or multi-party action is not a final appealable order, 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 rights and liabilities of all the parties.” If an appeal is attempted on a decision lacking certification, then that appeal is premature and must be dismissed *sua sponte* by the appellate court.

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119 Id.
120 Id.
for lack of jurisdiction. Courts often express sympathy for the plight of Rule 54(B) appellants who appeal despite lack of certification, and exasperation at the Rule 54(B) dilemma, but their only alternative is to dismiss. As one court noted, "Court rules are made to be followed both by the court and by counsel, not ignored. If a court feels its rules do not reflect the proper course of action, it should amend them, not ignore them." The misuse and misinterpretation of Ohio Rule of Civil Procedure 54(B) indicates that it is one of those rules which needs to be amended.

B. Ohio Rule 54(B) and Multi-Party Actions

Although subject to the general misconceptions regarding certification requirements, generally Rule 54(B) is fairly easy to apply in multi-party cases. The typical cases involve one plaintiff suing various defendants in one lawsuit or several plaintiffs suing one defendant. Cases may also involve several plaintiffs and more than one defendant. Further complications arise when there are multiple parties on each side and multiple claims. However, the simple multi-party actions usually require only the typical Rule 54(B) analysis which requires an affirmative answer to the following questions: 1) is this a multiple party action?; 2) does the judgment for less than all of the parties in the action


131 Alward v. Zimmerman, No. 34304, slip op. at ___ (Ohio Ct. App. Dec. 23, 1975) (LEXIS, States Library, Ohio file at 2). This exasperation was expressed by the statement "Once again we must dismiss the appeal for want of a final appealable order pursuant to Civil Rule 54(B)." Id.


133 Although 54(B) as applied specifically to multi-party actions has not contributed significantly to the rule confusion, its use in this regard is discussed briefly here because a major function of 54(B) is to render a cause of action against only one of many parties in a lawsuit final and appealable while the rest of the case is still pending.

134 See supra notes 54-132 and accompanying text.


139 See infra notes 159-230 and accompanying text. This section is an examination of the complications which arise when multiple claims are involved in the 54(B) analysis.

140 Ohio R. Ctv. P. 54(B).
dispose of an entire cause of action against those parties for whom judgment is entered? [141] and 3) has the Rule 54(B) certification been given? [142] 

Sakian v. Taylor [143] illustrates a simple and typical Rule 54(B) multi-party situation. Plaintiff Peter Sakian, who was injured when the bleachers at a high school function collapsed, sued the school board and twelve other defendants for negligence. The court granted the board’s motion to dismiss and entered a final order stipulating that there was “no just reason for delay.” [144] Since the school was completely out of the action, the order prevented a negligence action against the board. Thus, it was final under R.C. § 2505.02. [145] Rule 54(B) certification made the otherwise final order immediately appealable. [146] 

Recently, Chef Italiano v. Kent State University [147] demonstrated that Rule 54(B) still permits final judgments in multi-party cases and its result is as would be expected from a reading of the earlier Rule 54(B) in multi-party action cases. Chef Italiano Corp. brought a four-count complaint against three defendants. [148] Against Kent State it filed two of the counts, both of which were dismissed on a motion for summary judgment. However, the court did not add the language of “no just reason for delay” in its order of summary judgment for Kent State. [149] The supreme court’s dismissal of Kent State’s appeal contains an analysis which should serve as a model for other courts in construing the use of Rule 54(B) in multi-party actions. The supreme court noted that since the trial court had dismissed Chef Italiano’s only counts against Kent State, no claims remained pending. [150] Because no claims remained pending against Kent State, the action was determined and Chef Italiano was prevented from obtaining a judgment against the school. Thus, the order was final under R.C. § 2505.02. [151] Only then did the court apply the Rule 54(B) analysis and conclude that the dismissal of summary judgment, though final, was not appealable because of the lack of certification. [152] The court observed “[t]his case clearly shows the interrelationship between R.C. § 2505.02 and 54(B).” [141] In other words, the order must be final under R.C. § 2505.02. See supra notes 28-35 and accompanying text. 


[144] Id. at 63, 480 N.E.2d at 823. 

[145] An order is final under the code if it affects a substantial right in an action, prevents a judgment, and determines an action. OHIO REV. CODE ANN. § 2505.02 (Baldwin 1988). R.C. § 2505.02 was not mentioned in Sakian. This is yet another example of where the court should have, at least in a cursory fashion, stated that the requirements of R.C. § 2505.02 were met so as not to imply that all that is required for an order to be final and appealable is compliance with 54(B). 

[146] See supra notes 59-109 and accompanying text. 


[148] Id. 

[149] Id. at 86-87, 541 N.E.2d at 66. 

[150] Id. at 89, 541 N.E.2d at 68. 

[151] Id. 

[152] 44 Ohio St. 3d at 89, 541 N.E.2d at 68.
and Civ. R. 54(B) in . . . a multi-party action." Chef Italiano confirms what earlier cases had established, that if an order leaves no claim pending against one party in a multi-party action, then that order is eligible for Rule 54(B) certification.

Generally, there is no reason to disallow an appeal on a judgment which completely removes one party from action pursuant to R.C. § 2505.02 and Rule 54(B). One situation to be aware of, however, is where the parties and the issues surrounding them are so interconnected that for purposes of judicial efficiency, they should be considered together not only at trial level but also on appeal. In Ollick v. Rice, Carol Ollick sued defendants John Rice and Richard Stark in connection with Rice's administration and Stark's probate of two estates. Ollick sued Rice for breach of fiduciary duty and Stark for illegal conduct. An order containing Rule 54(B) certification was entered by the court removing Stark as administrator. Rice was removed as trustee of the estates but certification was not put on the judgement of that decision. Each defendant appealed. Rejecting both appeals, the court of appeals ruled that since the relationships of Stark as administrator and Rice as trustee successor were interrelated and since there was some joint misconduct, any attempt to distinguish between the two as multiple parties was impossible.

In Ollick v. Rice, judicial economy required that the final outcomes be determined together since many of the same issues would be heard in two separate trials if Stark was allowed to appeal immediately. Since an appellate court does not have the authority to add certification to a trial court order, the Ollick court was obligated to keep the claims against the two parties together by rejecting an immediate appeal although the order concerning Stark did contain the Rule 54(B) language. This is just another instance in which the presence of a Rule 54(B) certification does not automatically render an order appealable.

C. Ohio Rule 54(B) and Multi-Claim Actions

Under Rule 54(B), final judgment may be entered as to one or more but fewer than all the claims in an action upon an express determination of "no just reason for delay." The task of determining if one "claim"
or "claim for relief"\footnote{Id.} out of many is a final appealable order has become very complex and has caused so many misapplications of the rule that one expert has declared that the "confusion ... will not be resolved for at least a generation."\footnote{Dirty Tricks with Rule 56: Avoiding the Cincinnati Confession and the Lemon Trap, PRo/GRAM, Aug. 1989, at 1, 4 [hereinafter Dirty Tricks].} The difficulty in applying Rule 54(B) to multi-claim lawsuits has arisen because there is no common understanding of what constitutes a proper definition of "claim for relief."\footnote{Henderson v. Ryan, 13 Ohio St. 2d 31, 233 N.E.2d 506 (1968) (defines claim for relief in three ways).} In addition, courts have used various imprecise terms in reference to Rule 54(B) claims for relief.\footnote{See infra notes 168-79 and accompanying text.} In order to employ Rule 54(B) in multi-claim cases, one must properly define a Rule 54(B) claim for relief, apply that definition to the facts of each case, and remember at all times that no matter what constitutes a claim for relief, it must satisfy the finality requirements of R.C. § 2505.02.\footnote{See supra notes 28-38 and accompanying text.} This section will discuss the definition of claim for relief in conjunction with Rule 54(B), illustrate that whether a "claim" is final under the rule depends on the definition of claim, and will demonstrate how the courts' definitions have compounded the bewilderment surrounding the application of Rule 54(B) to multi-claim cases.\footnote{These terms will be analyzed and distinguished throughout this section as necessary.}

1. Definition of Claim for Relief

violations of a right," violations of a right," violations of a right," 175 "theories of relief," 176 "distinct branch of a case," 177 and "demands." 178 These terms and the phrase "claim for relief" are often not defined — especially in the early cases. 179 The imprecise language employed by the courts in referring to a Rule 54(B) claim for relief should be abandoned. Literary variety should be sacrificed for the sake of consistency. The term "claim for relief" should be designated as such and have one precise meaning, uniformly understood by the courts.

Although there are various definitions of claim for relief, 180 one expert has recently suggested that for the purpose of Rule 54(B), a claim for relief is a "transaction or occurrence," 181 a group or aggregate of operative facts, limited to a single occurrence or affair, without particular reference to the resulting legal right or rights. This so-called factual unit theory places the emphasis upon the breadth of the transaction or occurrence rather than the particular right of the plaintiff which has been infringed . . . . 182

Under this theory, "if the defendant wrongfully takes plaintiff's chattel and in the ensuing struggle strikes him . . . but one cause of action" 183

177 Noble v. Colwell, 44 Ohio St. 3d 92, 95 n.3, 540 N.E.2d at 1381, 1384 n.3 (1989).
179 Id. at 134-35, 341 N.E.2d at 643.
180 See Henderson v. Ryan, 13 Ohio St. 2d 31, 233 N.E.2d 506 (1968). This case proposes three definitions of cause of action. The first definition, called the secondary right definition, equates a cause of action with each legal theory arising form a wrongful act. The second definition, the primary right definition, is not concerned with legal theories but equates a cause of action with a wrongful act. The third theory of cause of action defines it as all rights emanating from a single set of facts. Id. at 31, 233 N.E.2d at 509.
181 Applying 54(B), supra note 44, at 2.
182 Id. (quoting Henderson v. Ryan, 13 Ohio St. 2d at 34-35, 233 N.E.2d at 509).
183 In Ohio it has been said that the words "claim for relief" are synonymous with "cause of action." Amato v. General Motors Corp., 67 Ohio St. 2d 253, 256, 423 N.E.2d 452, 454 (1981). Cf. Dirty Tricks, supra note 162, at 4 (inferring that claim and cause of action are not the same). Whether the two are actually synonymous does not appear to have been settled. For example, it has been stated that a claim, like a cause of action, refers to an aggregate group of operative facts which give rise to a right enforceable in the courts. Rhodes v. Jones, 351 F.2d 884, 886 (6th Cir. 1965). See also Harvey Aluminum Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir.), cert. denied, 345 U.S. 964 (1953). However, it has also been declared that a claim is not the same as a cause of action, Haugland v. Schmidt, 349 N.W.2d 121, 123 (Iowa 1984), but is broader than a cause of action. White v. Land Homes Corp., 251 Md. 603, 607, 248 A.2d 159, 163 (1968). Whatever the subtle difference, both claim for relief and cause of action are a set of operative facts giving rise to a right. If cause of action is slightly narrower than claim for relief, that is immaterial for the analysis here, and if something designated as cause of action falls under the definition of claim for relief, it should be designated as such.
results, since both acts took place during a single occurrence."184 Under other definitions, the plaintiff in the example could have two or three claims for relief.185 The factual unit theory of claim for relief seems to be a widely accepted definition. For example, one finds support for this definition in the cases of other states,186 in federal cases187 and in the Restatement of Judgments.188 Indeed,

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief . . . that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.189

Under this factual unit definition, a claim for relief cannot be correctly described for the purposes of Rule 54(B) as an issue, count, matter, demand, theory of entitlement, or theory of recovery because any number of issues, matters, and theories may arise out of the same set of operative facts to constitute one claim for relief. While one of many claims for relief may be made final and appealable under Rule 54(B), the separate issues or theories which combine to equal one claim for relief, while they can be adjudicated separately, cannot be made final and appealable until the entire claim for relief is otherwise final under R.C. § 2505.02. To call a theory, matter, or issue a claim for relief is to imply that these elements of a case are subject to the operation of Rule 54(B). This is precisely one of the misconceptions which has muddled the understanding and application of Rule 54(B).

No matter how many issues constitute an action or how many theories of recovery can be advanced in support of a case arising out of one set of operative facts, the resulting "bundle of rights"190 is only one claim for

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185 For example, in the chattel example, under the secondary right theory in which each legal theory entitles a plaintiff to recovery, there would be three claims for relief under replevin, trover, and battery. Id. Under the wrongful act theory, the plaintiff would have two claims, one for the taking of the chattel and one for hitting the plaintiff. Id. at 35, 233 N.E.2d at 509.
187 See, e.g., McNellis v. Merchants Nat'l Bank & Trust of Syracuse, 385 F.2d 916, 919 (2d Cir. 1967); Backus Plywood Corp. v. Commercial, Inc., 317 F.2d 339, 341 (2d Cir. 1963). Both of these cases in construing Federal Rule of Civil Procedure 54(B) concluded that "claim for relief" denoted an aggregate of operative facts giving rise to enforceable rights.
188 Restatement (Second) of Judgments § 24 (1982).
189 Id. at § 24 comment a.
190 This definition of claim for relief is found in Aldrete v. Foxboro Co., No. 54020 at 2 (Ohio Ct. App. June 16, 1988) (LEXIS, States library, Ohio file) (claim of relief defined as a single bundle of rights which arose from a single set of alleged circumstances).
relief. For example, the issues of liability and damages are inseparable parts of one claim for relief.\(^{191}\) Likewise, in a case for contempt of court, the entire claim for relief consists of a finding of contempt and the imposition of a penalty so that the determination of contempt alone is not subject to Rule 54(B) certification.\(^{192}\) There is only one claim for relief if, as a result of a breach of contract, the plaintiff who is entitled to only one recovery sues under more than one theory of damages.\(^{193}\) "Unless a separate and distinct recovery is possible on each claim asserted, multiple claims [for relief] do not exist".\(^{194}\) Recovery for damages and specific performance arising out of one occurrence would constitute two claims for relief.\(^{195}\)

2. Use and Misuse of Transaction Definition of Claim for Relief

Courts have not always understood\(^{196}\) or utilized the "occurrence or transaction" definition of claim for relief. Moreover, they have tried to render adjudications of some issues or theories of recovery in one claim for relief into final appealable orders by granting Rule 54(B) certification. For example, in \textit{R & H Trucking, Inc. v. Occidental Fire & Casualty Co.},\(^{197}\) a plaintiff sued a defendant for breach of contract, proposing as theories of recovery consequential damages, recovery for loss, damages for lost business, and punitive damages. The trial court found no basis for consequential damages and on the judgment order dismissing these damages, the court wrote "no just cause for delay."\(^{198}\) On appeal the appellant claimed that the order was final and appealable under Rule 54(B) because the requirements of the rule had been satisfied. The appellate court dismissed the appeal stating,

\(^{191}\) Courts have often tried to add 54(B) language on an order resolving only the issue of liability before the issue of damages has been decided. \textit{See, e.g.,} Tripplett v. Rosen, No. 87AP-72 (Ohio Ct. App. Apr. 5, 1988) (LEXIS, States library, Ohio file); Argo Plastics Products Co. v. Cleveland, No. 46664, slip op. (Ohio Ct. App. Nov. 23, 1983) (LEXIS, States library, Ohio file).

\(^{192}\) Cooper v. Cooper, 14 Ohio App. 3d 327, 329, 471 N.E.2d 525, 526-27 (1984). The trial court tried to make one issue, the contempt issue, final and appealable by adding certification. The appellate court noted that only one true claim for relief existed and rejected the appeal despite Rule 54(B) language.


\(^{194}\) \textit{Applying 54(B)}, supra note 44, at 4 (quoting Watkins, Bates, Handwork, Gross, Mills & Guthrie v. Upp No. L-84-100 (Ohio Ct. App. Sept. 21, 1984) (LEXIS, States library, Ohio file)).

\(^{195}\) \textit{Id.} at 3.

\(^{196}\) It is not always clear whether or not "claims" arise out of the same set of operative facts. \textit{See, e.g.,} Baldwin v. Consolidated Controls, No. C-870287 at 4 (Ohio Ct. App. Feb. 3, 1988) (LEXIS, States library, Ohio file). In Baldwin, the court was uncertain whether the complaint set forth one claim for severance pay based on four theories of entitlement or whether some of the theories arose out of a different set of facts. It assumed without deciding that only one claim for relief existed. \textit{Id.}

\(^{197}\) 2 Ohio App. 3d 269, 441 N.E.2d 816 (1981).

\(^{198}\) \textit{Id.} at 270, 441 N.E.2d at 817.
[w]here only one claim for relief has been presented, and the trial court decides one of the legal issues involved in the case, but does not finally adjudicate the claim for relief, the court’s decision does not become a final judgment subject to appeal simply by reason of the inclusion of Civ. R. 54(B) ... language, in the court’s order.”

This is one claim for relief because the plaintiff was entitled to one recovery arising out of one transaction, a breach of contract. Although the court spoke of issues, the plaintiff had actually advanced various theories of recovery.

In the particularly well reasoned case of Aldrete v. Foxboro, the Court of Appeals for the Eighth Appellate District explained the difference between claim for relief and theories of recovery. In Aldrete, an employee had asserted eleven “claims” for damages all emanating out of one transaction, the employer’s alleged wrongful termination of employment. Relying on the “transaction or occurrence” definition of claim for relief, the court decided that the tort and contract claims were simply inextricably intertwined theories of recovery in one claim for relief and declared the trial court’s use of Rule 54(B) language did not “divide a single claim into multiple claims for appellate purposes.” The only flaw in Aldrete is that it referred to the eleven theories of recovery several times as claims when the point of the case was to explain why the eleven parts of that case were not claims for relief but theories comprising one claim for relief.

The transaction definition of claim for relief and the approaches in R & H Trucking and Aldrete make sense in light of the purpose of Rule 54(B) to prevent piecemeal appeals except when injustice would result. It certainly does not aid judicial efficiency to allow one party to appeal four or eleven issues one by one when that party is still embroiled in the original lawsuit and could just as well appeal the entire claim for relief when all issues or theories have been adjudicated. In cases such as Aldrete and R & H Trucking in which it turns out that there is ultimately only one claim for relief, Rule 54(B) does not even apply. “[R]ule 54(B) provides a procedure for dealing with a situation where ‘some ... distinct branch’ of a case is adjudicated but the whole case is not determined.” Various theories of entitlement or issues in one claim for relief are not separate and distinct parts of a case.

199 Id. at 271, 441 N.E.2d at 818.
201 Id. at 82, 550 N.E.2d at 209.
202 See supra notes 23-47 and accompanying text.
203 Gannon v. Perk, 46 Ohio St. 2d 301, 315, 348 N.E.2d 342, 351 (1976). The court stated that because only one true claim for relief existed, the case did not fall within the parameters of Rule 54(B). It was not a multi-claim case, only a case with several issues within one claim for relief.
204 Noble v. Colwell, 44 Ohio St. 3d 92, 95 n.3, 540 N.E.2d 1381, 1384 n.3 (1989).
Another reason why the transaction definition of claim for relief is compelled over various other definitions is because of the requirement that before Rule 54(B) even applies, the prongs of R.C. § 2505.02 must be satisfied. Under the part of R.C. § 2505.02 which most often is implicated in Rule 54(B) cases, a judgment cannot be final unless it affects a substantial right of a party, determines an action, and prevents a judgment. If one theory of recovery or one issue was considered a claim for relief as they are under the first Henderson definition, then Rule 54(B) and R.C. § 2505.02 could not be reconciled. The adjudication of one issue or theory would not prevent a judgment. Other issues would be pending against the defendant and thus an order on a theory or issue would not be final under R.C. § 2505.02. Thus, Rule 54(B) could not be used.

Before 1989, Rule 54(B) allowed one party to appeal an order on one of many portions of a case as long as certification was on the order. In Alexander v. Buckeye Pipe Line Co., a plaintiff landowner sued a pipeline company for damages and injunctive relief alleging eight causes of action. All but one of the "claims for relief" were dismissed on motion for partial summary judgment, and the order granting the summary judgment contained the required Rule 54(B) language. The court noted that Rule 54(B) was purely procedural, recognized that orders had to first be final under R.C. § 2505.02, but then stated that the trial court had not abused its discretion in making the seven dismissed "causes of action" immediately appealable under Rule 54(B).

In Alexander, there was no discussion of the meaning of claim for relief. The court seemed to consider all eight assertions of rights as true claims for relief. However, it is arguable that all eight causes arose out of one set of facts, the laying of a pipeline. If so, only one true claim for relief existed and Rule 54(B) should not have been employed. Alexander illustrates how the transaction definition of claim for relief, the broadest of the Henderson definitions, narrows the scope of Rule 54(B) because it...
groups together parts of cases which previously were considered separate claims for relief. Although Alexander sanctioned the immediate appeals pursuant to Rule 54(B) of orders adjudicating one or more but less than all distinct claims by one party in a lawsuit against another, after 1989, it is not so certain that one party in a lawsuit will be able to appeal less than all of separate claims for relief.

In the summer of 1989, perhaps spurred by the volume of Rule 54(B) cases and by frustration and confusion with the Rule itself, the Ohio Supreme Court decided three cases which will make it "virtually impossible to take a Rule 54(B) appeal in a single party-multiple claim case." This narrowing of the scope of Rule 54(B) arose because of the interrelationships between the transaction definition of claim for relief, the application of R.C. § 2505.02 to multi-claim lawsuits, and the definition of "action" as applied to R.C. § 2505.02. In Chef Italiano, a corporation sued Testa, among others, on four counts. It was by no means clear that the four courts arose out of the same transaction. The trial court dismissed two of the claims and entered an order with Rule 54(B) certification. The supreme court held that Rule 54(B) was not applicable in this situation because under R.C. § 2505.02, Chef Italiano's action against Testa was not determined nor was a judgment prevented because Chef could still prevail on the other two counts. There is a problem with this decision. If R.C. § 2505.02

214 This frustration was expressed by Justice Douglas in Chef Italiano when he stated:

The jurisdictional issue in this case provides us with a perfect vehicle to speak about an ever-increasing problem of orders emanating from trial courts to the courts of appeals and to this court which are not final and appealable but which the originating court has attempted to render appealable by including the so-called magic language of "no just reason for delay" from Civ. R. 54(B).

Chef Italiano Corp. v. Kent State Univ., 44 Ohio St. 3d 86, 87, 541 N.E.2d 64, 66-67 (1989). Similarly Justice Alice Robie Resnic in a recent decision began an opinion by expressing her frustration with Rule 54(B) cases. She stated that "[w]e must once again consider what is a final and appealable order pursuant to R.C. § 2505.02 and Civ. R. 54(B)." (emphasis added) General Accident Ins. Co. v. Insurance Co. of N.A., 44 Ohio St. 3d 17, 19-20, 540 N.E.2d 266, 269 (1989).

215 To get a flavor for the confusion by the supreme court regarding the use of Rule 54(B), see cases cited supra note 9. The majority and dissenting opinions of these cases taken together demonstrate that the supreme court is as perplexed as anyone else about the proper interpretation and role of 54(B). Dirty Tricks, supra note 162, at 4.

216 See cases cited supra note 9. The contribution of General Accident Insurance is that it reemphasized the often forgotten requirement that Rule 54(B) cannot apply until the R.C. § 2505.02 has been satisfied. 44 Ohio St. 3d at 21, 540 N.E.2d at 271. Chef Italiano and Noble confused the issues by applying the R.C. § 2505.02 rule in such a way that it is now harder to appeal a claim for relief. See infra notes 219-29 and accompanying text.

217 Noble Effort, supra note 29, at 1.

218 See generally id.

219 Chef Italiano Corp. v. Kent State Univ., 44 Ohio St. 3d 86, 541 N.E.2d 64 (1989).
always requires for finality that the single party plaintiff be prevented by the order from taking a judgment against the defendant, then even an adjudication of a separate true claim for relief would not be final under R.C. § 2505.02. This is because judgments could be had on the other separate claims for relief and thus Rule 54(B) could not operate. Two judges dissented, and one stated that the language of the decision could lead to the conclusion that the trial court must dispose of all the claims in a lawsuit before an order can be final and appealable, thus creating a result inconsistent with the plain language of the rule.223

It would seem Chef Italiano construed "action" in R.C. § 2505.02 to mean entire bundle of claims for relief that Chef Italiano had against Testa.224 This interpretation suggests that claims for relief, even if separate and distinct, cannot ever be made final and appealable as Rule 54(B) intended in certain instances because R.C. § 2505.02 could not be satisfied until the adjudication of all the claims against one party.

"Action" in R.C. § 2505.02 for the purposes of Rule 54(B) should not be defined as the entire lawsuit. Rather, "action" in this context should itself refer to a separate and distinct branch of a case so that less than all of the claims for relief in a case can become final. For example, in Noble v. Colwell, a majority held that if Rule 54(B) language had been added to the order dismissing plaintiff's claim but leaving defendant's counterclaim, the order would have been final and appealable because under R.C. § 2505.02 the plaintiff was foreclosed from obtaining a judgment against the defendant.225 The majority must have viewed "action" in R.C. § 2505.02 not as the entire case but as distinct parts of the case, namely the claim being one action and the counterclaim being another action.226

The confusion arising out of Noble is that while it theoretically suggests Rule 54(B) applies to counterclaims, it also suggests that because a claim and counterclaim arose out of the same set of operative facts, they would constitute only one claim for relief and, therefore, adjudication of one would not qualify for certification.227 Two concurring justices agreed that Rule 54(B) would not apply in such a case.228 A claim and a counterclaim do arise out of the same set of operative facts. However, one set of operative facts, if they produce distinct recoveries rather than just different issues or theories of entitlement, can create more than one claim for relief.229

223 Id. at 91, 541 N.E.2d at 70. Chief Justice Moyer stated, "I cannot concur in the opinion because parts of it could be construed to virtually eliminate an appeal pursuant to Civ. R. 54(B)." Id.
224 Noble Effort, supra, note 29, at 5.
225 Noble v. Colwell, 44 Ohio St. 3d 92, 95, 540 N.E.2d 1381, 1384 (1989).
226 Noble Effort, supra, note 29, at 5.
227 44 Ohio St. 3d at 97 n.7, 540 N.E.2d at 1385 n.7.
228 Id. at 98-100, 540 N.E.2d at 1386-88. Justice Douglas declared that this case had nothing to do with Rule 54(B) and Justice Resnick agreed it had no application. Id. The perplexity of the 1989 Rule 54(B) cases is compounded further by yet another justice's, Justice Holmes, concurring statements that 54(B) was applicable because more than one claim for relief existed. Id. at 98, 540 N.E.2d at 1386.
229 See sources cited supra note 194.
In the situation where there is a claim and a counterclaim, two individuals have distinct, separate rights of recovery so that concluding that a claim and a counterclaim are only one claim for relief is too restrictive. The better view is that when more than one party has rights arising out of one transaction, each party has a separate claim for relief. If other safeguards such as the transaction definition of claim for relief as applied to one party which prevents any intertwined issues from being separately appealed and proper certification requirements are utilized, there is no danger of wholesale appeals under Rule 54(B). Something has to be done to resolve the misapplications and misconceptions regarding Ohio Civil Rule 54(B), but foreclosing its use altogether, as the supreme court seems to want to do is no solution.

IV. CONCLUSION

A. Proposed Amendment of Ohio Rule 54(B)

1. The New Rule

The problems caused by the misinterpretation and resulting misapplication of Ohio Rule of Civil Procedure 54(B), the sheer number of cases which are appealed to Rule 54(B), and the apparent inability of the courts to alleviate the confusion surrounding the rule indicate that it is time for Rule 54(B) to be amended. Changes to the rule would clarify its meaning and help create uniformity in its application. The author's proposed amendment to Rule 54(B) states:

54(B)(1) Judgment upon multiple claims or involving multiple parties:

When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may enter final judgment on one which is otherwise final under R.C. § 2505.02 as to one or more but fewer than all of the claims or parties only when there is no just reason for delay and only on an entry of such express determination and the reasons therefore upon the judgment order. In absence of such determination and the reasons therefore, any order or other form of decision, however designated, which adjudicates fewer than all the claims or fewer than all the rights and liabilities of all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

230 Noble Effort, supra, note 29 at 6.

231 There has been much litigation on the application Rule 54(B). A LEXIS search in December, 1989 under the phrase "54 w/3 b and final appealable order" conducted for each year from 1970 through 1989 revealed 586 cases.
54(B)(2) Procedures in lieu of an express determination of no just reason for delay in a multi-claim or multi-party action.

When more than one claim for relief is presented in an action or when there are multiple parties involved and there is an otherwise appealable order pursuant to R.C. § 2505.02 on less than all the claims or less than all the parties but there is a reason for delay in entering final judgment as to the partial orders, the court shall place upon the judgment entry that the cause is continued and the reasons therefore.

54(B)(3) For the purposes of this rule, a claim for relief is a transaction or occurrence arising out of one set of operative facts. A claim for relief may consist of many issues or many theories of recovery, but only an adjudication of an entire claim for relief is subject to the operation of this rule.

54(B)(4) For the purposes of this rule, “action” in R.C. § 2505.02 does not refer to an entire lawsuit, but to a distinct branch thereof.

2. Justification for Proposed Changes

The proposed modifications to Rule 54(B)(1) would clarify some of the 54(B) problems mentioned in this note. Although the definition of judgment in 54(A) includes a reference to R.C. § 2505.02, the addition of the words “on one which is otherwise final under R.C. § 2505.02” to Rule 54(B) will leave no doubt that an order on part of a case must conform to both R.C. § 2505.02 and Rule 54(B), thus eliminating—at least in the minds of those who carefully read the rule—the previous erroneous belief that Rule 54(B) alone made a partial order final and appealable. Expanding the language “only upon an express determination that there is no just reason for delay” into a two-step process of first deciding the reasons for rendering a partial order final and then entering that determination on the judgment entry emphasizes to the court that it must make a conscious decision based on rational reasoning and will help decrease any temptation to add the certification language as a mere accommodation to counsel or as a routine. Requiring reasons for certification to be given on the judgment entry also facilitates the appellate courts’ review of Rule 54(B) cases.

The addition of 54(B)(2) to the rule is to help decrease the now abundant number of nonfinal judgments which parties nevertheless appeal and to aid the appellate courts in deciding whether the trial judge abused his discretion by not adding certification. If the trial court enumerates its reasons for refusing to add the Rule 54(B) language, attorneys will recognize when it is not appropriate to appeal, thus cutting down on the volume of cases. The “reasons requirement” will also prevent routine use of Rule 54(B) by trial judges when its use is not warranted.

233 Ohio R. Civ. P. 54(B).
The perplexing problem of what constitutes an appealable claim for relief could be clarified by the addition of 54(B)(3) and 54(B)(4). This is, of course, assuming that these are the desired definitions. However, because of the many understandings of "claim for relief" and the confusion created by Accident Insurance, Chef Italiano, and Noble, 54(B)(3) and 54(B)(4) should not be added at this time. On the one hand, the transaction definition of claim for relief prevents an appellant from appealing every little issue in a case. On the other hand, coupled with the R.C. § 2505.02 requirement that an order must determine an action and prevent a judgment, the transaction definition has greatly narrowed the scope of Rule 54(B). The proper balance between the policy against piecemeal appeals and the prevention of injustice caused by delayed appeals must be redefined. The best solution in this regard is for the supreme court to reconvene the Rules Advisory Committee to study the mechanics of Rule 54(B) as applied to multi-claim actions. In fact, whether or not the aforementioned proposed changes are adopted, the Rules Advisory Committee should study the entire operation of Rule 54(B) and make the modifications it deems necessary to fulfill the purpose of Rule 54(B) before the supreme court, weary of Rule 54(B) cases, follows its trend in General Accident Insurance, Chef Italiano, and Noble and completely forecloses the possibility of appealing partial orders.

Action must be taken now. Only careful analysis and modification of Ohio Rule of Civil Procedure 54(B) can prove wrong the prediction of one noted expert in civil procedure who declared that the confusion surrounding Rule 54(B) "will not be resolved for at least another generation."