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Special Proceedings in Ohio: What Is the Ohio Supreme Court Doing with the Final Judgment Rule

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SPECIAL PROCEEDINGS IN OHIO: WHAT IS THE OHIO SUPREME COURT DOING WITH THE FINAL JUDGMENT RULE?¹

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I. INTRODUCTION

As in most jurisdictions in the United States, Ohio law imposes limitations on the kinds of judicial determinations that are appealable.² The general rule governing appellate practice throughout the United States is that appeals can only be taken from a final judgment, a principle known as the final judgment rule.³ The final judgment rule promotes judicial efficiency by ensuring the steady progress of litigation, unhampered by appeals prior to a resolution on the merits.⁴ On the other hand, the final judgment rule's rigidity can cause hardship and injustice that might be avoided by allowing interlocutory appeals prior to final judgment.⁵ As a result, every jurisdiction in the United States has made some provision for exceptions to the final judgment rule.⁶

In deciding which circumstances should be considered an exception to the final judgment rule, courts weigh the competing rationales of judicial economy and fairness to the litigants. As an example of this process, federal courts have created exceptions to the rule, which include permitting appeals of an order overruling a criminal defendant's motion to dismiss on the grounds of double

¹This note is dedicated to the memory of my beloved father, David Gitlin, who passed away shortly before its publication.

²The state of New York is a notable exception that imposes "virtually no restrictions" on the right to appeal . . . [from an] order or judgment" See ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE FEDERAL AND STATE CIVIL APPEALS* § 4.12, at 63 (1983)[hereinafter MARTINEAU].

³*Id.* at 47-48.

⁴*Id.*

⁵*Id.*

⁶*Id.* at 47-48, 60-61.

jeopardy.⁷ On the other hand, examples of where the process has led federal courts to reject attempts to create exceptions include an order disqualifying counsel,⁸ and an order denying certification of a class action.⁹ In contrast to federal practice, Ohio courts have reached directly opposite results when considering these same issues.¹⁰

Ohio's remarkable approach to interlocutory appeals stems from the Ohio Supreme Court's evolving and strangely inconsistent interpretations of Ohio's final order rule. Ohio's final order rule is set forth in Ohio Revised Code Section 2505.02:

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, with or without retrial.¹¹

The Ohio Supreme Court has determined that the authority of Ohio appellate courts to hear interlocutory appeals is conferred by the second prong of Ohio's final order rule: "an order [that] affect[s] a substantial right made in a special proceeding."¹² The "special proceeding" prong of Ohio's final order rule is deemed to permit appeals from various interlocutory orders and from certain statutorily defined proceedings.¹³ Thus, from the point of view of Ohio law, an appealable interlocutory order is "an order affecting a substantial right made in a special proceeding."¹⁴

This note will analyze special proceedings in Ohio insofar as they relate to the appealability of interlocutory orders. Because of the complex and evolving nature of the Ohio Supreme Court's interpretation of special proceedings, this note's analysis must necessarily be largely descriptive of Ohio case law. In

⁷See *Abney v. United States*, 431 U.S. 651 (1977).

⁸See *Flanagan v. United States*, 465 U.S. 259 (1984).

⁹See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

¹⁰See *State v. Crago*, 559 N.E.2d 1353 (Ohio 1990) (finding that an order overruling a defendant's motion to dismiss on the grounds of double jeopardy is not appealable), *cert. denied*, 449 U.S. 941 (1991); *Russell v. Mercy Hosp.*, 472 N.E.2d 695 (Ohio 1984) (holding that granted motion resulting in disqualification of counsel is an appealable order); *Roemisch v. Mutual of Omaha Ins. Co.*, 314 N.E.2d 386 (Ohio 1974) (finding that denial of class certification is an appealable order).

¹¹OHIO REV. CODE ANN. § 2505.02 (Anderson 1991).

¹²See, e.g., *Amato v. General Motors Corp.*, 423 N.E.2d 452 (Ohio 1981).

¹³E.g., *id.* (holding that certification of a class action is an appealable interlocutory order) *overruled by Polikoff v. Adam*, 616 N.E. 2d 213 (Ohio, 1993); *General Accident Ins. Co. v. Ins. Co. of N. Am.*, 540 N.E.2d 266 (Ohio 1989) (finding that declaratory judgment action created by statute is a special proceeding).

¹⁴§ 2505.02.

addition, this note will highlight differences between Ohio appellate practice and federal practice in order to acquaint the reader with the dramatically different results reached by the two systems.

In addition, Part II of this note will examine what is meant by the phrase "substantial right," which appears in the second prong of Ohio's final order rule. Part III will analyze the historical development of the special proceeding, from its initial statutory creation to the landmark case of *Amato v. General Motors Corp.*¹⁵ Part IV will examine a selection of post *Amato* cases to illustrate the shortcomings of the *Amato* approach. In Part V, this note will scrutinize the ideological split on the Ohio Supreme Court regarding the definition of special proceedings and its influence on special proceedings jurisprudence. In Part VI, this note will analyze Ohio's approach to the special proceedings prong of the final judgment rule and suggest an alternative. Lastly, this note will discuss the Ohio Supreme Court's most recent decisions concerning special proceedings.

II. WHAT IS A SUBSTANTIAL RIGHT?

In order to satisfy the second prong of Ohio's final order rule,¹⁶ an order must both "[affect] a substantial right" and be "made in a special proceeding."¹⁷ Normally, dissecting statutes into component elements is a useful way to probe the statute's meaning. Unfortunately, the special proceeding prong of Ohio's final order rule defies such tidy analysis. A few cases perform an independent inquiry as to the presence of a substantial right that has been affected by the putative special proceeding.¹⁸ Other cases fail to make such an independent inquiry and suggest that the presence of a substantial right is intimately related to whether the order is appealable as a special proceeding.¹⁹ These latter cases suggest that the substantial right inquiry can be collapsed into a ripeness question: is review of the order premature or will a denial of the appeal prejudice a party in such a way as to be irreparable on appeal after a final disposition?²⁰ Both kinds of inquiries will now be examined in further detail.

¹⁵423 N.E.2d 452 (Ohio 1981), *overruled by* Polikoff v. Adam 616 N.E.2d 213 (Ohio 1993).

¹⁶*See supra* Part I.

¹⁷§ 2505.02.

¹⁸*See, e.g.,* State v. Port Clinton Fisheries, Inc., 465 N.E.2d 865 (Ohio 1984); State v. Thomas, 400 N.E.2d 897 (Ohio 1980).

¹⁹*See, e.g.,* Amato v. General Motors Corp., 423 N.E.2d 452 (Ohio 1981); Smith v. Chester Township Board of Trustees, 396 N.E.2d 743 (Ohio 1979).

²⁰One commentator suggests that the courts are employing, "an ad hoc, case-by-case approach to determine whether certain rights have fallen within the penumbras of substantiality and finality." *See* Comment, *Determining Whether a Judicial Order is Final and Appealable Under Ohio Law*, 58 U. CIN. L. REV. 1337, 1342 (1990).

An independent inquiry into the existence of a substantial right was made in *Armstrong v. Herancourt Brewing Co.*²¹ The court proclaimed that, "[a] substantial right involves the idea of a legal right,—one which is protected by law."²² At issue in *Armstrong* was a court order mandating that the defendant corporation disclose information to stockholders who had instituted an action for dissolution of the corporation.²³ The corporation appealed the order requiring it to disclose the information, and the supreme court held that such an order was not appealable since it did not affect a substantial right of the corporation.²⁴ The court reasoned that the corporation's desire not to disclose was not a legally cognizable right since a corporation is created by statute and the statute imposes a duty of disclosure in a proceeding of dissolution.²⁵ Since the statute that creates a corporation does not confer any right to refuse to disclose information in a dissolution proceeding, the corporation could not claim a substantial right was affected by an order requiring it to disclose.²⁶

A number of other decisions by Ohio courts have made independent inquiries into the existence of a substantial right and rejected the existence of such rights on statutory grounds. In *State v. Jones*,²⁷ the court held that a criminal defendant cannot appeal from an order denying shock probation, even though such an order is made in a special proceeding.²⁸ The court found that there is no right to shock probation since it is entirely left to the discretion of the trial court, and therefore, the denial of such a motion cannot affect a substantial right.²⁹

In a bizarre case involving a dispute between a judge and a police chief over where a police van was being parked, the lack of a substantial right proved dispositive in finding that an appeal could not proceed.³⁰ The court found that while a judge's order requiring the van to be parked so that it would not block the courthouse driveway might have been made in a special proceeding, there

²¹ 42 N.E. 425 (Ohio 1895).

²² *Id.* at 427.

²³ *Id.* at 425.

²⁴ *Id.* at 427.

²⁵ *Id.*

²⁶ *Armstrong*, 42 N.E. at 427.

²⁷ 532 N.E.2d 153 (Ohio Ct. App. 1987).

²⁸ *Id.* at 154.

²⁹ *Id.*

³⁰ *In re Obstruction of Summit County Driveway*, 161 N.E.2d 452 (1959). The judge apparently became frustrated at repeatedly being blocked from access to the courthouse by the police van. *Id.* at 453-54. The judge conducted an *ex parte* hearing and issued an injunction enjoining the police chief and the police department from parking in a manner that would obstruct his access to the courthouse. *Id.* at 454.

was no legal right to park the van in such a manner, and thus the order could not be appealed.³¹

Substantial rights are also created by legal principles arising from non-statutory origin. In *State v. Port Clinton Fisheries, Inc.*,³² the court found that an order compelling the state to disclose the identity of a confidential informant is reviewable as a special proceeding.³³ The court cited approvingly an earlier decision stating that, "[s]ociety has a substantial right to effectively enforce its laws."³⁴ Other common law concepts such as property rights have been held to create substantial rights within the meaning of Ohio Revised Code section 2505.02.³⁵ Also, rights protected by the United States Constitution are deemed to be substantial.³⁶

In some instances, however, there is no independent inquiry into the existence of a substantial right and the denial of an appeal stems merely from a finding that since the appeal is interlocutory in nature, it does not affect a substantial right. In *Smith v. Chester Township Board of Trustees*,³⁷ the township board appealed from an order requiring it to bear the costs of preparing a transcript of proceedings it conducted in firing an employee.³⁸ The Ohio Supreme Court, in somewhat conclusory language, found that since the order was interlocutory in character and any prejudice to the board could be corrected on appeal pending final judgment, there was no substantial right affected.³⁹

Conversely, a substantial right is sometimes presumed to be affected by an order made in a special proceeding if the order cannot effectively be reviewed

³¹*Id.* at 455.

³²465 N.E.2d 865 (Ohio 1984).

³³*Id.* at 868.

³⁴*Id.* at 867 (citing *State v. Collins*, 265 N.E.2d 261 (Ohio 1970)); see *infra* part IV for a more detailed discussion of *Collins*.

³⁵*Cincinnati, Sandusky & Cleveland R.R. v. Sloan*, 31 Ohio St. 1 (1876); *William Watson & Co. v. Sullivan*, 5 Ohio St. 42 (1855).

³⁶*State v. Thomas*, 400 N.E.2d 897, 901 (Ohio 1980) (the double jeopardy clause of the U.S. Constitution confers a substantial right), *overruled on other grounds by State v. Crago*, 559 N.E.2d 1353 (Ohio 1990), *cert. denied*, 449 U.S. 941 (1991).

³⁷396 N.E.2d 743 (Ohio 1979).

³⁸*Id.* at 745.

³⁹*Id.* (citing *Snell v. Cincinnati St. Ry.*, 54 N.E. 270 (Ohio 1899)). *Snell* involved an order denying a motion for a change of venue. *Id.* at 270. The court employed a similarly conclusory analysis as it did in *Smith*, and merely observed that the order was interlocutory in character, and thus was not immediately appealable. *Id.* at 272; see also *City of Cincinnati v. Public Utils. Comm'n*, 588 N.E.2d 775 (Ohio 1992) (finding no substantial right affected when appeal was not ripe even though the order was made in a special proceeding); *Hall China Co. v. Public Utils. Comm'n*, 364 N.E.2d 852 (Ohio 1977) (finding no substantial right affected by special proceeding since appeal was not ripe).

on appeal. A good illustration of this principle is found in *Amato v. General Motors Corp.*⁴⁰ In *Amato*, the court held that an order certifying an action as a class action was reviewable as an order made in a special proceeding.⁴¹ The court reasoned that the added burden of conducting litigation in the context of a class action is impossible to undo if the order is reversed after final judgment.⁴² Thus, *Amato* suggests that substantial rights can be created by the impracticability of review after a final judgment.

In review, for the purposes of section 2505.02 of the Ohio Revised Code, a substantial right is created in a number of ways. It can be created by statute, by the common law or by constitutional principles. The practicability of an appeal after final judgment or the conclusion of a proceeding can extinguish the existence of a substantial right. Also, if an appeal is not practicable after final judgment, a substantial right can be created by the burdens imposed by not allowing an immediate appeal.

III. SPECIAL PROCEEDINGS IN OHIO PRIOR TO *AMATO*

The term "special proceeding" has been a part of Ohio's final order rule since the Code of Civil Procedure of 1853 (Code).⁴³ A special proceeding was intended to be distinct from an "action", which was defined by abolishing the distinction between actions at law and equity, and replacing them with a unitary "civil action".⁴⁴ The Code specified certain proceedings that would not be subject to the new rules of civil procedure and designated them special proceedings.⁴⁵

⁴⁰423 N.E.2d 452 (Ohio 1981), *overruled by* Polikoff v. Adam, 616 N.E.2d 213 (Ohio 1993).

⁴¹*Id.* at 456.

⁴²*Id.*

⁴³*Fields v. Fields*, 94 N.E.2d 7, 9 (Ohio Ct. App. 1950) (citing OHIO REV. STAT. vol. 3, § 512, at 2021 (Curwen's 1854)) ("An Act to Establish a Code of Civil Procedure," passed on March 11, 1853). In section 512 of this act a final order is defined as follows:

An order affecting a substantial right in an action when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment is a final order which may be vacated, modified or reversed as provided in this title.

Id. at 9 (quoting § 512, at 2021).

⁴⁴*See id.* (citing OHIO REV. STAT. vol. 3, § 3, 1939 (Curwen's 1854)). "Forms Abolished. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be hereafter but one form of action which shall be called a civil action." *Id.* (quoting § 3, at 1939).

⁴⁵The section dealing with exceptions to the new civil rules is as follows:
Code Not to Control Special Proceedings[.] . . . Until the legislature shall otherwise provide this Code shall not affect proceedings on Habeas Corpus, Quo Warranto or to assess damages for private property taken for public uses; or proceedings under the statutes for the settlement of

The implications of the language defining special proceedings are that in order for a proceeding to be "special", it must be unknown to law or equity prior to the adoption of the Code in 1853.⁴⁶ Also, proceedings that were deemed "special proceedings" were subject to the procedural rules that were set forth in the statutes that created them.⁴⁷ Thus, special proceedings were subject to unique procedural rules entirely distinct from the procedures that governed "actions".

An early illustration of the procedural uniqueness requirement of a special proceeding is *William Watson & Co. v. Sullivan*.⁴⁸ At issue in *Sullivan* was whether an order of a trial court discharging an attachment on property is an order made in a special proceeding.⁴⁹ In finding that such an order was made in special proceeding, the court reasoned as follows:

The code provides a mode of proceeding in attachment, which is called a "provisional remedy". It provides, that at or after the commencement of the action, an order of attachment may be obtained. In some cases it is made by the clerk of the court; in others, by the court or a judge thereof. It specifies particularly the grounds upon which such order may be made. It requires the execution of a bond in some cases, to be approved by the clerk, in double the amount of the plaintiff's claim, with a condition, that the plaintiff will pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained; and it provides, specially, the whole mode of proceeding, upon and including the order, until the final disposition of the property, whether the plaintiff obtains judgment or not; and is in fact, in its very nature, a special proceeding.⁵⁰

The *Sullivan* court observed that the proceeding of attachment, which was created by the code of civil procedure, was not given the label of a special

estates of deceased persons; nor proceedings under statutes relating to dower, divorce or alimony, or to set aside a will; nor proceedings under statutes relating to apprentices, arbitration, bastardy, insolvent debtors; nor any special statutory remedy not heretofore obtained by action; but such proceedings may be prosecuted under the Code, whenever it is applicable.

Id. (quoting OHIO REV. STAT. vol. 3, § 604, at 2036 (Curwen's 1854))(internal quotations and emphasis omitted).

⁴⁶*Id.* (citing § 604, at 2036).

⁴⁷*Id.* (citing § 604, at 2036).

⁴⁸5 Ohio St. 43 (1855).

⁴⁹*Id.* at 43-44.

⁵⁰*Id.*; accord *Swift & Co. Packers v. Columbiana Del Caribe*, 339 U.S. 684 (1950) (finding that an order vacating an attachment of property that constituted security for a judgment is a final appealable order).

proceeding.⁵¹ Nevertheless, the court reasoned that since attachment was not obtained by action and was defined with a comprehensive procedural framework, it must be a special proceeding.⁵² *Sullivan* thus established the principle that when a proceeding is governed by a unique procedural structure not applicable to actions, and is not itself an action, that proceeding is a special proceeding.

In *Cincinnati, Sandusky and Cleveland R.R. v. Sloan*,⁵³ the court extended its reasoning in *Sullivan* to proceedings involving the appointment and removal of receivers.⁵⁴ *Sloan* held that proceedings involving the appointment and removal of receivers are special proceedings, and when a substantial right is affected in such a proceeding, it is subject to appellate review.⁵⁵ In comparing the dispute before it with *Sullivan*, the *Sloan* court stated:

The issuing of an attachment and the appointment of a receiver in a civil action are both proceedings which are merely ancillary or auxiliary to the main action. The action may be prosecuted to final judgment, either with or without such proceedings. These auxiliary proceedings are merely intended to secure the means for satisfying the final judgment in case the plaintiff should succeed in the action, and they can only be resorted to where the special circumstances exist which the law prescribes as the grounds for their institution.⁵⁶

Sloan thus announced an additional characteristic of a special proceeding. The court spoke of the auxiliary nature of proceedings like attachment or the appointment and removal of receivers. The implication of *Sloan* is that in addition to a unique procedural framework, a special proceeding should be ancillary or auxiliary to the main action and thus not be an integral part of it.

⁵¹*Sullivan*, 5 Ohio St. at 44.

⁵²*Id.* at 44.

⁵³31 Ohio St. 1 (1876).

⁵⁴*Id.* The plaintiff was a stock and bondholder of the defendant corporation and claimed that the corporation had fallen past due in its obligations to him. *Id.* at 2. The plaintiff moved that a receiver be appointed to take possession of the defendant's property, which was granted. *Id.* Subsequently, the defendant moved to vacate the receiver order, which the court did. *Id.* at 4. The plaintiff then appealed, claiming that a substantial right was affected by an order made in a special proceeding. *Id.* at 6.

⁵⁵*Id.* at 9; accord 28 U.S.C. § 1292(a)(2)(1988) (stating that appointment of receivers is a final appealable order by statute). *Contra* Warren v. Bergeron, 831 F. 2d 101 (5th Cir. 1987) (holding that order vacating the appointment of a receiver is not a final appealable order).

⁵⁶*Sloan*, 31 Ohio St. at 7-8.

In a continuing effort to more precisely define special proceedings, the Ohio Supreme Court set forth what was to become an influential definition⁵⁷ for special proceedings in *Missionary Soc'y of the Methodist Episcopal Church v. Ely*:⁵⁸

Our Code does not, as does the Code of New York, specify that every remedy which is not an action is a special proceeding, nor do our statutes give any definition of an action or a 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 process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding.⁵⁹

Ely reiterated the requirement that a special proceeding must be distinct from an action.⁶⁰ What made *Ely* significant is that it introduced the idea that a special proceeding is commenced by an original application to a court in a manner distinct from that which initiates an action.⁶¹ It is also important to realize that the result in *Ely* was necessary if the order at issue was to receive any review at all.⁶² Thus, *Ely* used the special proceeding prong of the final order rule to provide an avenue of review for a proceeding that otherwise would have slipped through the cracks, since it was not recognized as an action.

The perhaps overly-expansive "original application" definition of special proceedings enunciated in *Ely* set the stage for *Squire v. Guardian Trust Co.*⁶³ In *Squire*, the Ohio Supreme Court rejected the claim that an order of revivor against the personal representative of a deceased defendant is an order affecting a substantial right made in a special proceeding.⁶⁴ In reaching its

⁵⁷See *Bernbaum v. Silverstein*, 406 N.E.2d 532 (Ohio 1980); *State v. Collins*, 265 N.E.2d 261 (Ohio 1970).

⁵⁸47 N.E. 537 (Ohio 1897). The plaintiff (Missionary Society) made an application to the probate court to admit the will of Albert Ely, deceased. The court refused to admit the will, claiming that the will was not legally valid. The plaintiff appealed, and the appeal was dismissed by the circuit court as not being within its jurisdiction (it was not a final and appealable order). *Id.* The supreme court reversed, holding that the denial of an application to the probate court for the admission of a will is an order that affects a substantial right made in a special proceeding. *Id.* at 541.

⁵⁹*Id.* at 538.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* at 541.

⁶³68 N.E.2d 312 (Ohio 1946).

⁶⁴*Id.* at 313. The plaintiff, *Squire*, who was Superintendent of Banks, brought an action against the Guardian Trust company and others for breach of fiduciary duty. *Id.* at 312. Subsequently, some of the defendants died and *Squire* then obtained orders of revivor against personal representatives of the deceased defendants. *Id.* The personal

decision the court announced the principle that, "[t]he prompt and orderly disposal of litigation is an object much to be desired, and the entertainment of appeals from various orders made by the trial court during the progress of the main action is not in pursuance of such object."⁶⁵

Squire was a 4-3 decision with the dissent contending that the order did affect a substantial right and was made in a special proceeding.⁶⁶ *Squire* established the principle that there is an important countervailing interest to finding that a proceeding is a special proceeding, namely judicial economy.⁶⁷ The *Squire* court regarded the order of revivor fully capable of review after final judgment, and thus the practicability of review after final judgment is a factor that militates against a finding that a proceeding is special.⁶⁸

If the practicability of review after final judgment militates against immediate review, what happens if review after final judgment is not feasible? This question was answered in *State v. Collins*.⁶⁹ The *Collins* court ruled that an order granting a motion to suppress evidence in a criminal trial is an appealable order made in a special proceeding.⁷⁰ In reaching its result, the court recited the definition of a special proceeding that was offered in *Missionary Soc'y of the Methodist Episcopal Church v. Ely*,⁷¹ and then added, "we are convinced that modern exigency must not be left unattended solely upon the basis of academic genealogy."⁷² The court went on to say that there was no doubt that the order suppressing evidence in this case was a special proceeding since:

representatives appealed the order of revivor, which the court of appeals dismissed for lack of jurisdiction. *Id.* at 313. The supreme court affirmed, reasoning that the order is merely interlocutory in nature and does no more than substitute one party for another in an already existing action. *Id.*

⁶⁵*Id.* at 314.

⁶⁶*Id.* (Turner, J., dissenting). The dissent argues that the defendants have a substantial right to not having an action revived against them and that right can only be taken away by statute. *Id.* at 316. Revivor is a special statutory remedy that is made by an original application to a court. *Id.* Thus the order of revivor at issue in this case affected a substantial right and was made in a special proceeding. *Id.* at 317.

⁶⁷*Id.* at 314.

⁶⁸*Squire*, 68 N.E.2d at 314.

⁶⁹265 N.E.2d 261 (Ohio 1970). *Collins* involved a prosecution for violation of liquor laws. The trial court granted a motion to suppress evidence, which the state contended was necessary in order to obtain a conviction. *Id.*

⁷⁰*Id.*; accord 18 U.S.C. § 3731 (1988) (providing statutory authorization for the government to appeal from a trial court order granting a motion to suppress evidence in a criminal proceeding provided that the U.S. attorney certifies that the appeal is not for the purpose of delay and the evidence is substantial proof of a material fact in the proceeding).

⁷¹47 N.E. 537 (Ohio 1897).

⁷²*Collins*, 265 N.E.2d at 263.

the [state] represented in oral argument that the deprivation of the use of the evidence suppressed below rendered it virtually impossible for the state to obtain a conviction, and that without that evidence the prosecution would be terminated. Society has a most substantial right to the diligent prosecution of those accused of crime, and where prosecution is irretrievably foreclosed through the suppression of evidence, that right is clearly and adversely affected.⁷³

Collins marked a turning point in the development of special proceedings law in Ohio. By insisting that, "modern exigency must not be left unattended,"⁷⁴ the *Collins* court dispensed with many of the previously established requirements of a special proceeding. *Collins* established the principle that impracticability of review after final judgment can be dispositive irrespective of any other requirements in determining whether a proceeding is special.

The court extended the reasoning of *Collins* in *State v. Thomas*,⁷⁵ holding that an order overruling a criminal defendant's motion to dismiss on the grounds of double jeopardy was an order affecting a substantial right made in a special proceeding.⁷⁶ The court observed that the constitutional protection of double jeopardy is not only limited to precluding punishment twice for the same offense, but also provides protection against being tried more than once for the same offense.⁷⁷ The court stated, "[i]t is clear that . . . an order affecting a right of constitutional dimensions is an order affecting a substantial right within the contemplation of R.C. § 2505.02."⁷⁸ Using the logic presented in *Collins*, the court stated:

We believe that a proceeding on a motion to dismiss for double jeopardy should be considered a special proceeding as well. A claim of double jeopardy raises an issue entirely collateral to the guilt or

⁷³*Id.* at 263. However, the court was unable to allow the state to prosecute an appeal in this particular case because of a statutory restriction on the matters that a state may appeal in a criminal prosecution. *Id.* at 266. Section 2945.70 of the Ohio Revised Code limited state appeals to the following matters: motion to quash, plea in abatement, a demurrer, or a motion in arrest of judgment. *Id.* at 264.

⁷⁴*Id.* at 263.

⁷⁵400 N.E.2d 897 (Ohio), *cert. denied*, 449 U.S. 852 (1980), *overruled by* *State v. Moss*, 433 N.E.2d 181 (Ohio 1982), *and overruled by* *State v. Crago* 559 N.E.2d 1353 (Ohio 1990). The defendant, Thomas, was indicted for aggravated robbery and he pleaded guilty to the lesser offense of robbery. Later, the robbery victim died, and the state brought involuntary manslaughter charges. The defendant moved to have the charges dismissed, claiming a violation of the double jeopardy provision of the United States Constitution. *Id.*

⁷⁶*Id.*; *accord* *Abney v. United States*, 431 U.S. 651 (1977) (holding that the collateral order doctrine permits immediate appeal of a denial of a criminal defendant's motion to dismiss on the grounds of double jeopardy).

⁷⁷*Thomas*, 400 N.E.2d at 901.

⁷⁸*Id.* (internal quotations omitted).

innocence of the defendant. While it is a complete defense, it is more than that, for it, in principle, bars a new trial as well as a new conviction. Additionally, an erroneous decision on a double jeopardy claim cannot be effectively reviewed after judgment within the second trial; by that time, the defendant's right has been violated.⁷⁹

The result reached in *Thomas* is the inevitable result of the slippery slope introduced in *Collins* with regard to analysis of special proceedings.⁸⁰ *Collins* established the precedent that impracticability of review after final judgment was a sufficient criteria for finding that an order was made in a special proceeding,⁸¹ and the *Thomas* court simply followed suit. *Thomas* did, however, refer to the 'collateral' nature of a motion to dismiss on the grounds of double jeopardy,⁸² but in view of the subsequent decisions involving special proceedings, it is not at all clear how important collaterality is in making such a finding.

As might be expected, after the *Collins* and *Thomas* decisions, 'impracticability of review after final judgment' became standard boilerplate language in appeals from interlocutory orders. In *Bernbaum v. Silverstein*,⁸³ the Ohio Supreme Court rejected such a claim in holding that an order overruling a motion to disqualify counsel is not an order made in a special proceeding.⁸⁴ The court observed:

Research discloses that a prime determinant of whether a particular order is one made in a special proceeding is the practicability of appeal after final judgment. A ruling which implicates a claim of right that would be irreparably lost if its review need await final judgment is likely to be deemed a final order.⁸⁵

The court rejected the contention by the defendants that postponed review of their claim would preclude effective review since any disclosures made by

⁷⁹*Id.*

⁸⁰*Thomas* was subsequently overruled by *State v. Crago*, 559 N.E.2d 1353 (Ohio 1990), cert. denied, 499 U.S. 941 (1991).

⁸¹*State v. Collins*, 265 N.E.2d 261, 263 (Ohio 1970).

⁸²*Thomas*, 400 N.E.2d at 901.

⁸³406 N.E.2d 532 (Ohio 1980). In *Bernbaum*, limited partners of a cable television business sued the general partners for an alleged breach of fiduciary duty. *Id.* at 533. The defendants moved to disqualify plaintiff's counsel on the grounds that members of the law firm representing the plaintiffs had at one time represented the defendants. The trial court overruled the motion, and the defendants appealed. The court of appeals dismissed the appeal for lack of a final and appealable order. *Id.* The supreme court affirmed. *Id.* at 535.

⁸⁴*Id.*; accord *Firestone Tire & Rubber v. Risjord*, 449 U.S. 368 (1981) (holding that the collateral order doctrine of federal practice does not allow an interlocutory appeal of the denial of a motion to disqualify counsel).

⁸⁵*Bernbaum*, 406 N.E.2d at 534-35.

their old attorneys could not be corrected in a second trial.⁸⁶ The court reasoned that an attorney's improper disclosure could not be readily cured by an immediate appeal since any improper disclosures are likely to be made well before disqualification proceedings.⁸⁷ The court noted that the requirement that a special proceeding be initiated by "original application" as outlined in *Missionary Society of the Methodist Episcopal Church v. Ely*,⁸⁸ was dispensed with in *Collins* and *Thomas* because of the court's concern that, "there be an effective mode of review of such rulings."⁸⁹

After *Bernbaum*, the state of the law regarding special proceedings was in great need of clarification. Unfortunately, in the case of *Amato v. General Motors Corp.*,⁹⁰ the court instead expanded the definition of special proceedings, and in the process gave little guidance as to what proceedings were 'special.' *Amato* addressed the mirror image of the issue presented in *Roemisch v. Mutual of Omaha Insurance Co.*⁹¹ and held that a trial court's order certifying an action as a class action was a final and appealable order.⁹²

The *Amato* court reasoned that the line of cases in Ohio dealing with special proceedings present certain principles that must be considered in determining whether an interlocutory order is appealable.⁹³ First, the court observed that a guiding principle is "the prompt and orderly disposal of litigation."⁹⁴ A second guiding principle, noted by the court, is "the practicability of appeal after final judgment."⁹⁵ The court reasoned that the two principles should be weighed in a balancing test in order to determine whether an order affects a substantial

⁸⁶*Id.* at 535.

⁸⁷*Id.*

⁸⁸47 N.E. 537 (Ohio 1897).

⁸⁹*Bernbaum*, 406 N.E.2d at 535.

⁹⁰423 N.E.2d 452 (Ohio 1981), *overruled by* Polikoff v. Adam, 616 N.E.2d 213 (Ohio 1993).

⁹¹314 N.E.2d 386 (Ohio 1974). *Roemisch* held that a denial of class action certification is a final and appealable order since the order affects a substantial right of the class which, "in effect determines the action and prevents a judgment." *Id.* at 388. *Contra* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (rejecting the "death knell" doctrine and holding such orders to be nonappealable).

⁹²*Amato*, 423 N.E.2d at 453. A consumer of a General Motors automobile sued the company when he discovered that the Oldsmobile he had purchased was equipped with a Chevrolet engine. The plaintiff moved pursuant to Rule 23 to certify the action as a class action on behalf of all Ohio consumers similarly situated. The trial court ruled that the action was maintainable as a class action. General Motors appealed the trial court decision to the court of appeals, which dismissed the appeal for lack of a final appealable order. *Id.*

⁹³*Id.* at 455.

⁹⁴*Id.* (citing *Squire v. Guardian Trust Co.*, 68 N.E.2d 312, 314 (Ohio 1946)).

⁹⁵*Id.* at 455-56 (citing *Bernbaum*, 406 N.E.2d 532, 534).

right in a special proceeding: "[the] 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 practicable."⁹⁶

In applying its test to the facts before it, the *Amato* court ruled that the certification order was final and appealable.⁹⁷ The court reasoned that it was not certain that judicial economy would be compromised by allowing an immediate appeal since the added burdens on the court of conducting class action litigation were significant, thus a reversal of the order would promote judicial efficiency.⁹⁸ The court also observed that immediate review of such an order is necessary because of the added burdens placed on the defendant, which are impossible to undo if review of the order is postponed until after final judgment.⁹⁹

Amato, under the guise of unifying the case law that preceded it, greatly expanded the scope of the special proceeding prong of the final order rule. By focusing solely on the issues of judicial economy and impracticability of review after final judgment, *Amato* assured a permanent departure from the kinds of inquiries that were previously necessary to determine whether a proceeding was special. The balancing test further undermines the vitality of the final order rule since all that is required for immediate review is that the impracticability of review after final judgment 'outweigh' considerations of judicial economy.

IV. SPECIAL PROCEEDINGS AFTER AMATO

Since *Amato*, determining whether an interlocutory order is an order affecting a substantial right made in a special proceeding is like shooting at a moving target.¹⁰⁰ An examination of the cases dealing with special proceedings after *Amato*, if anything, demonstrates how unworkable the Ohio Supreme

⁹⁶*Id.* at 456. The analog in federal practice to the *Amato* balancing test is the collateral order doctrine. The collateral order doctrine treats an interlocutory order as final and subject to immediate review if it: 1) conclusively determines an issue and is not subject to revision; 2) resolves an important issue completely separate from the merits of the action; and 3) is effectively unreviewable upon appeal of the final judgment. See MARTINEAU, *supra* note 2, at 56.

⁹⁷*Amato*, 423 N.E.2d at 456.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰In the words of one commentator, "In essence, the balancing test boils down to this: If at least two of the appellate judges feel like hearing the case, the interlocutory order is an order affecting a substantial right made in a special proceeding; otherwise, it is not." J. PATRICK BROWNE, PITFALLS AND PRACTICE IN APPELLATE PROCEDURE 16 (unpublished article on file with the author).

Court's approach to final appealable orders has become.¹⁰¹ The cases evince a lack of consistently applied rationale and when viewed in the aggregate, give little guidance to the practitioner as to what is a final order.¹⁰²

In a classic display of how balancing tests can be misused, the court in *City of Columbus v. Adams*¹⁰³ held that a pretrial suspension of suspected drunk drivers' driving privileges is not a final and appealable order.¹⁰⁴ The appellees argued that an appeal after final judgment is not practicable because the pretrial suspension of the ability to drive cannot be undone by an appeal after final judgment.¹⁰⁵ In applying the *Amato* balancing test, the court agreed that the impracticability of appeal after judgment is a factor to consider in deciding whether an order is final and appealable, but the court found that the countervailing interest of society in keeping drunk drivers off the road outweighed the appellees interest in securing immediate review.¹⁰⁶

¹⁰¹*Compare* Russell v. Mercy Hosp., 472 N.E.2d 695 (Ohio 1984)(holding that the granting of a motion to disqualify counsel is a final appealable order) *with* Bernbaum v. Silverstein, 406 N.E.2d 532 (Ohio 1980)(holding that overruling a motion to disqualify counsel is not a final appealable order).

¹⁰²*Compare* State v. Port Clinton Fisheries, Inc., 465 N.E.2d 865 (Ohio 1984) (applying *Amato* test to find special proceeding) *with* General Accident Insurance Co. v. Ins. Co. of N. Am., 540 N.E.2d 266 (Ohio 1989)(finding a special proceeding without applying *Amato* test). *But see infra* part VII.

¹⁰³461 N.E.2d 887 (Ohio 1984).

¹⁰⁴*Id.* Consolidated appeals of parties whose driver's licenses were suspended in a preliminary hearing charging them with violating Ohio's drunk driving law. *Id.* at 889. The parties filed appeals to have the orders that their drivers licenses be suspended reviewed. The court of appeals ruled that the drivers license suspensions were final appealable orders. *Id.* The supreme court reversed in a 4-3 decision. *Id.* at 890.

¹⁰⁵*Id.* at 889.

¹⁰⁶The opinion of the supreme court stated:

Without question, the pretrial suspension of the operator's license of one accused of operating a motor vehicle while under the influence of alcohol is beneficial to society if the accused is ultimately convicted because the risk posed by the drunk driver is eliminated at an early stage in the proceeding. In that respect, appellant has identified a legitimate interest militating against immediate review of the pretrial suspension orders. Indeed, the catastrophes associated with drunk driving, the tragic loss of life and the permanent debilitating injuries that can result have reached nearly epidemic proportions across the nation. This has prompted aggressive and positive steps to combat this carnage by volunteer groups and the private sector as well as various state legislatures, including our own. Were immediate review available, the accused could obtain a stay of the suspension order pending outcome of the appeal and, according to appellant, circumvent the purpose behind allowing for the pretrial suspension of an operator's license of one meeting the criteria of R.C. 4511.191(K).

Id. at 890.

The dissent correctly argued that the majority misapplied the balancing test set forth in *Amato*.¹⁰⁷ Justice Sweeney argued that a substantial right is implicated in actions of this type based on the due process requirements of the Fourteenth Amendment of the United States Constitution.¹⁰⁸ The dissenting Justice further observed that the majority mistakenly applied the policy rationale of Ohio's drunk driving law¹⁰⁹ as a countervailing interest to immediate review instead of following the requirements of *Amato*, which would dictate that judicial economy be weighed against the interest in immediate review.¹¹⁰

In *State v. Port Clinton Fisheries, Inc.*, the court applied the *Amato* balancing test and reversed a longstanding policy against allowing appeals from discovery orders.¹¹¹ The court held that an order compelling the state to divulge the identity of a confidential informant is an order affecting a substantial right made in a special proceeding.¹¹² The court reasoned that the damage the state would incur through compliance with the order could not be corrected on appeal after judgment.¹¹³ In ruling that the order was an appealable order made in a special proceeding, the court observed that any harm to judicial economy was clearly outweighed by the state's interest in effective law enforcement.¹¹⁴

¹⁰⁷*Id.* at 891 (Sweeney, J., dissenting).

¹⁰⁸*Columbus*, 461 N.E.2d at 891 (citing *Bell v. Burson*, 402 U.S. 535, 539 (1971)).

¹⁰⁹OHIO REV. CODE ANN. § 4511.191(K)(Anderson 1991).

¹¹⁰*Columbus*, 461 N.E.2d at 891.

¹¹¹465 N.E.2d 865 (Ohio 1984). The State of Ohio brought the action against Port Clinton Fisheries to recover damages for wrongful conversion of some 67,000 pounds of walleye fished from the waters of Lake Erie. *Id.* at 865. Through discovery, the defendant found that the state's investigation was prompted by information provided by two confidential informants. The defendant filed a motion to compel disclosure of the identities of the informants, or in the alternative, to dismiss the action. The court subsequently ordered the disclosure of the name of one of the confidential informants. The state appealed the order, and the court of appeals dismissed the appeal for lack of a final and appealable order. *Id.*

¹¹²*Id.* at 867. *Contra Socialist Workers Party v. Attorney Gen.*, 565 F.2d 19 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978) (holding that the government could not appeal from a discovery order requiring it to reveal the names of eighteen persons who gave the government information about the Socialist Workers Party and the Young Socialist Alliance). It is interesting to note that Ohio had consistently disallowed the appeal of discovery orders prior to *Port Clinton Fisheries*. See, e.g., *Kennedy v. Chalfin*, 310 N.E.2d 233 (Ohio 1974); *Klein v. Bendix Westinghouse Co.*, 234 N.E.2d 587 (Ohio 1968). After *Port Clinton Fisheries*, a number of cases have held discovery orders to be appealable. See, e.g., *Humphry v. Riverside Methodist Hosp.*, 488 N.E.2d 877 (Ohio 1986)(order compelling hospital to disclose the names of patients); *Doe v. Univ. of Cincinnati*, 538 N.E.2d 419 (Ohio 1988)(order compelling the disclosure of a person infected with AIDS); see also Stanley B. Kent, *Appealability of Discovery Orders*, CLEVELAND B. J. 354 (1989).

¹¹³*Port Clinton Fisheries*, 465 N.E.2d at 867-68.

¹¹⁴*Id.* (basing its rationale on language used in *State v. Collins*, 265 N.E.2d 261 (Ohio 1970)); see *supra* text accompanying note 73.

Two justices dissented from the holding in *Port Clinton Fisheries*.¹¹⁵ One of the dissenters, Justice William Brown, observed that the court had previously addressed the question of whether discovery orders were special proceedings in *Kennedy v. Chalfin*¹¹⁶ and found that they were not.¹¹⁷ The dissent went on to point out that other kinds of discovery orders are not sufficiently distinct from that in the instant case to avoid wholesale destruction of the policy against interlocutory appeals of discovery orders.¹¹⁸

In another application of the *Amato* balancing test, *Tilberry v. Body*¹¹⁹ held that a trial court order of dissolution of a partnership is a final appealable order prior to the winding up of partnership affairs.¹²⁰ The court reasoned that substantial rights of the partners were affected because the partnership was dissolved pursuant to Section 1775.31(A) of the Ohio Revised Code rather than in accordance with the terms specified in the partnership agreement.¹²¹ Further, the court found that the order of dissolution satisfied the *Amato* requirements for a special proceeding because the dissolution was ordered pursuant to Section 1775.31(A), and the *Amato* balancing test tipped in favor of allowing an immediate appeal.¹²² The court found that unnecessary winding

¹¹⁵*Id.* at 869 (W. Brown, J., dissenting).

¹¹⁶310 N.E.2d 233 (Ohio 1974).

¹¹⁷*Port Clinton Fisheries*, 465 N.E.2d at 869 (W. Brown, J., dissenting). The *Kennedy* opinion stated:

Discovery orders have long been considered interlocutory. ***
[D]iscovery techniques are pretrial procedures used as an adjunct to be [sic] a pending lawsuit. They are designed to aid in the final disposition of the litigation, and are, therefore, to be considered as an integral part of the action in which they are utilized. They are not special proceedings as that phrase is used in R.C. 2505.02.

Id. at 869 (citing *Kennedy v. Chalfin*, 310 N.E.2d 233, 235 (Ohio 1974))(internal quotations omitted allegations and omissions in original).

¹¹⁸*Id.*

¹¹⁹493 N.E.2d 954 (Ohio 1986).

¹²⁰*Id.* *Tilberry* involved an action for the dissolution of a partnership. *Id.* The court ordered a dissolution of the partnership, but prior to the winding up of partnership affairs, the defendants appealed the order of the dissolution. *Id.* at 956. The court of appeals dismissed the appeal for lack of a final and appealable order. *Id.* The supreme court reversed, finding that an order of a dissolution of a partnership short of the winding up of partnership affairs is an order affecting a substantial right made in a special proceeding. *Id.* at 957-58.

¹²¹*Id.* at 957. The significance of a dissolution pursuant to statute, according to the court, was that the statutory dissolution "greatly alter[ed]" the original agreement of the parties, thus compromising substantial rights. *Id.*

¹²²*Id.* It is not clear why the court found it significant that the dissolution order was made pursuant to OHIO REV. CODE ANN. § 1775.31(A) (Anderson 1991) for the purposes of determining whether the order was made in a special proceeding. A likely explanation is that "academic genealogy" is creeping back into the court's analysis of special proceedings. See *supra* notes 43-47 and accompanying text and *infra* Part VII.

up of the partnership (if on appeal it was determined that the dissolution was improper) would actually waste judicial resources, and thus an immediate appeal was appropriate.¹²³

In a curious departure from *Amato* and arguably a return to classical special proceedings analysis,¹²⁴ a unanimous court in *General Accident Insurance Co. v. Ins. Co. of North America*¹²⁵ held that a declaratory judgment action is a special proceeding.¹²⁶ The court found that the question of whether there is a duty to defend creates substantial rights both with the insured and the insurer.¹²⁷ If the question of whether there is a duty to defend is decided incorrectly, substantial consequences will result.¹²⁸ The court then approached the question of whether a declaratory judgment action is a special proceeding.¹²⁹ Curiously, the court did not apply the *Amato* balancing test in reaching the conclusion that a declaratory judgment action is a special proceeding.¹³⁰ Instead, the court observed that declaratory judgment actions are a special remedy not available at common law or in equity.¹³¹ The court also observed that the statutory authorization for declaratory judgments is found in section 2721 of the Ohio Revised Code, and the statutory provision, "provides a complete statutory

¹²³*Tilberry*, 493 N.E.2d at 958. Justice Douglas filed an important dissent in *Tilberry*. *Id.* at 958 (Douglas, J., dissenting); see *infra* part V.

¹²⁴Classical analysis of special proceedings would revive the analysis used in the early cases and require that the proceeding be unknown to law or equity and have a unique procedural framework before it would qualify as a special proceeding. See *supra* notes 43-47 and accompanying text.

¹²⁵540 N.E.2d 266 (Ohio 1989). After an action was settled concerning defects in the design and construction of coke ovens for an industrial plant, a group of insurers who had covered the liability sought a declaratory judgment that another group of insurers were responsible to cover a portion of the liability. *Id.* at 268-69. On cross motions for summary judgment, the trial court ruled that one of the defendants, the general liability insurer, Ins. Co. of North America (INA), had no liability as a result of its policy agreement. *Id.* at 269. The trial court, as part of its order, added the language, "no just reason for delay" pursuant to OHIO R. CIV. P. 54(b) in dismissing INA from the lawsuit. *Id.* at 269. The plaintiffs appealed INA's dismissal from the lawsuit and the court of appeals dismissed the appeal without comment. *Id.* The Ohio Supreme Court reversed, finding that the declaratory judgment action affected a substantial right in a special proceeding. *Id.* at 272.

¹²⁶*Id.* at 271-72; accord 28 U.S.C. § 2201 (1988) (specifying that a declaratory judgment "shall have the force and effect of a final judgment or decree and shall be reviewable as such.").

¹²⁷*General Accident*, 540 N.E.2d at 271.

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.* at 271-72.

scheme for obtaining declaratory relief."¹³² As a result, a declaratory judgment action is a special proceeding.¹³³

Despite a seeming resurgence of classical special proceedings analysis, *Stewart v. Midwestern Indemnity Co.*¹³⁴ holds that an order of a trial court vacating an arbitration award and resubmitting the matter for arbitration is not a final and appealable order.¹³⁵ The court employed the first prong of Ohio's final order rule and concluded that the order, "cannot be considered a 'determin[ation of] the action' or one which 'prevents a judgment' within the meaning of R.C. § 2505.02."¹³⁶ The *Stewart* court's analysis is strange because it did not make any reference to the special proceeding prong of the final order rule,¹³⁷ and as both dissenting justices pointed out, arbitration is, in the classical sense, a special proceeding.¹³⁸

132540 N.E.2d at 271-72.

¹³³*Id.* The decision in *General Accident* suggests that the classical definition of special proceedings is still relevant to the determination of which proceedings are "special." Presumably, then, there are two ways to argue that a proceeding is a special proceeding: 1) the *Amato* balancing test weighs in favor of review; and 2) the proceeding is a unique statutory remedy unknown to law or equity, that is governed by procedural rules totally distinct from those governing actions. *But see infra* Part VII.

¹³⁴543 N.E.2d 1200 (Ohio 1989). *Stewart* was injured in an automobile accident with an uninsured motorist, and sought compensation from her insurance company. *Id.* at 1201. The insurance company disputed the amount of the plaintiff's claim, at which time the plaintiff filed suit against the insurance company. The insurance company sought to exercise its option to submit the dispute to arbitration, and the trial court found that the terms of the policy compelled arbitration, but the plaintiff's action in the trial court could remain since there were other damages that were not subject to arbitration. The arbitration panel awarded the plaintiff damages, but the plaintiff moved to vacate the arbitration award, claiming that the arbitration panel had failed to address all of the issues presented. The trial court vacated the earlier arbitration award and ordered that the matter be submitted to a new arbitration panel. The defendant appealed the trial court's order and the court of appeals dismissed the appeal for lack of a final and appealable order. *Id.* The supreme court affirmed. *Id.* at 1202.

¹³⁵*Id.* *Contra* 9 U.S.C.A. § 16(a)(1)(E) (West Supp. 1993) (providing statutory authorization for an appeal from an order "modifying, correcting, or vacating an award" in an arbitration proceeding).

¹³⁶*Stewart*, 543 N.E.2d at 1202.

¹³⁷*Id.* The court instead focused on section 2711.10 of the Ohio Revised Code which states:

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if: . . . The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

Id. at 1202 n.1 (quoting OHIO REV. CODE ANN. § 2711.10 (Anderson 1991)). The *Stewart* court reasoned that since § 2711.10 gives the trial court the authority to vacate an

The inevitable issue of whether failure to timely appeal an order made in a special proceeding is fatal to preserving the issue on appeal after judgment arose in *Dayton Women's Health Center v. Enix*.¹³⁹ The court held that failure to appeal an order of class certification within the time required by Appellate Rule 4(A)¹⁴⁰ waives the right to preserve the issue for appeal after final judgment.¹⁴¹ The court noted that previous decisions in *Roemisch v. Mutual of Omaha Ins. Co.*¹⁴² and *Amato v. General Motors Corp.*¹⁴³ established that an order denying

arbitration award and resubmit the matter to arbitration, the order is not final. *Id.* at 1202.

¹³⁹*Id.* at 1203 (Douglas, J., dissenting); *id.* at 1204-05 (stating that arbitration is a special remedy and, "provides a complete statutory scheme for obtaining relief. . . ."); *see also* *General Elec. Supply Co. v. Warden Elec., Inc.*, 528 N.E.2d 195 (Ohio 1988) (stating that an order of a trial court denying a stay of proceedings to permit arbitration and dismissing arbitration proceedings is not a final appealable order).

¹³⁹555 N.E.2d 956 (Ohio 1990). The plaintiff, a nonprofit provider of women's reproductive health services, brought an action for injunctive relief and damages against picketers who had interfered with the plaintiff's activities. The plaintiff moved to have the defendants certified as a class. *Id.* Class certification was granted designating, "all individuals protesting the activities conducted at the Dayton Women's Health Center." *Id.* at 957. The trial court granted the requested injunctive relief and enjoined all members of the defendant class from protesting outside the plaintiff's health center. *Id.* Representatives of the defendant class appealed the decision of the trial court, and the court of appeals modified the injunctive relief ordered by the trial court, but held that the defendants had failed to properly bring an appeal of the order certifying them as a class. *Id.* The class certification order was made on January 15, 1987, and the defendants did not appeal until after final judgment on July 10, 1987 and thus the defendants failed to bring an appeal within the required 30 days of a final order. *Id.*

¹⁴⁰OHIO R. APP. P. 4(A) provides that appeal must be taken from a final order within thirty days of the date of entry of the order or judgment. *Id.* Failure to file the notice of appeal in a timely manner deprives the appeals court of jurisdiction, and thus timely filing cannot be waived. *See* *Piper v. Burden*, 476 N.E.2d 386 (Ohio Ct. App. 1984).

¹⁴¹*Enix*, 555 N.E.2d at 959. *Contra In re Agent Orange Prod. Liab. Litig.*, 818 F. 2d 179 (2nd Cir. 1987). A similar view is expressed in an influential treatise:

Any rule that requires forfeiture of appellate opportunities for guessing wrong about doctrines of appealability that often are obscure would greatly increase the costs of [the] collateral order doctrine by forcing protective appeals in many situations in which appealability is uncertain and in which all parties might prefer to await review on appeal from the final judgment. Forfeiture, moreover, would trap some parties in a box framed by a rule designed to alleviate untoward risks, not to create them.

CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 3911, 359 (1992).

¹⁴²314 N.E.2d 386 (Ohio 1974).

¹⁴³423 N.E.2d 452 (Ohio 1981), *overruled by* *Polikoff v. Adam*, 616 N.E.2d 213 (Ohio 1993).

or granting class certification is a final and appealable order.¹⁴⁴ Recognizing that both *Roemisch* and *Amato* dealt with plaintiff class actions, the court found that a defendant class action did not present a significant distinction, and thus the order certifying the defendant class was a final appealable order.¹⁴⁵

The *Enix* court was understandably regretful of the result they had to reach. By creating the unintelligible quagmire of what had become special proceedings jurisprudence, the court was forced to deny review to a substantive legal claim after a final judgment. The court therefore set out a footnote in the opinion which stated, "[w]e recommend that the Rules Advisory Committee appointed by this court review whether an amendment to App.R. 4(A) should be adopted in order for a party to have the option of appealing an interlocutory final appealable order after final judgment is rendered in a case."¹⁴⁶ The Rules Committee accordingly amended the appellate rules to provide an escape hatch for future litigants who might become confused by Ohio's special proceedings jurisprudence.¹⁴⁷

In a surprising and powerful resurgence of classical special proceedings analysis, the court in *State v. Crago*¹⁴⁸ overturned *State v. Thomas*¹⁴⁹ and held

¹⁴⁴*Enix*, 555 N.E.2d at 958.

¹⁴⁵*Id.*, overruled by *Polikoff v. Adam*, 616 N.E.2d 213 (Ohio 1993).

¹⁴⁶*Id.* at 959 n.3.

¹⁴⁷OHIO R. APP. P. 4(B)(5)(amended July 1, 1992). The staff notes of the rules committee that accompanied the amendment state in pertinent part:

After studying the matter, the Committee concluded that a party should have the option to appeal a partial final judgment or order either immediately or at the end of the entire case. Without the option, a party who wants to appeal a partial final judgment or order and who is in doubt about whether it meets the test of finality in *Amato* will be forced to take an immediate appeal to protect its right to appeal. It will then be up to the court of appeals to decide whether the partial judgment or order meets the test of *Amato*. Many unnecessary appeals may result. On the other hand, a party who is unaware of the *Amato* and *Dayton Women's Health Center* decisions may not seek to appeal a partial final judgment or order until the final judgment is entered, and that is too late. Neither result is desirable. For this reason, the rule is amended to give the party the option to appeal immediately or at the end of the case.

SUPREME COURT RULES ADVISORY COMM., COMMENTARY APPENDED TO OHIO R. APP. P. 4 (1992). Justice Douglas repeated his displeasure with the *Amato* decision and announced that he stood ready to overrule it. *Enix*, 555 N.E.2d at 960 (Douglas, J., dissenting). Justice Resnick also expressed displeasure at the *Amato* decision on the grounds that it had no support in any other jurisdiction. *Id.* at 963 (Resnick, J., dissenting).

¹⁴⁸559 N.E.2d 1353 (Ohio 1990), *cert. denied*, 499 U.S. 941 (1991). Martin Crago was charged with three counts of aggravated murder in the death of Edward Murray. *Id.* at 1354. Count one alleged that Crago purposefully murdered Murray with prior calculation and design, count two alleged purposeful killing during the commission of an aggravated robbery, and count three alleged purposefully killing during the course of a kidnapping. At trial, the jury found Crago guilty of aggravated robbery and kidnapping and not guilty of aggravated murder arising from kidnapping and found him guilty of the lesser included offense of involuntary manslaughter. The jury was

that a denial of a motion to dismiss criminal proceedings on the grounds of double jeopardy is not an appealable interlocutory order.¹⁵⁰ The opinion of the court, written by Justice Douglas, states that the order of the trial court in the instant case does not meet any of the prongs of Ohio's final order rule, and, as such, the order cannot be reviewed before final judgment.¹⁵¹ The court thus concluded that the court of appeals was without jurisdiction to hear an appeal and vacated its order granting immediate review.¹⁵²

In *Nelson v. Toledo Oxygen & Equip. Co.*¹⁵³ the court revisited the issue of the appealability of discovery orders and held that an order compelling discovery of alleged work product is not a final appealable order.¹⁵⁴ The court reasoned that interlocutory appeals of discovery orders interfere with judicial economy and should only be allowed, "with much reluctance."¹⁵⁵ The court distinguished the harm to a party through exposure of work product from

unable to reach a verdict on the aggravated murder charge arising from aggravated robbery. The count of aggravated murder arising from robbery which previously resulted in a mistrial was set for retrial and the defendant moved to dismiss on the grounds of double jeopardy and collateral estoppel. The defendant's motion was overruled and the defendant appealed to the court of appeals. *Id.* The court of appeals affirmed the trial court's denial of the defendant's motion for dismissal on double jeopardy grounds and affirmed in part the order dealing with collateral estoppel. *Id.* at 1354-55. The supreme court reversed. *Id.* at 1355.

149400 N.E.2d 897 (Ohio), *cert. denied*, 449 U.S. 852 (1980), *overruled by State v. Moss*, 433 N.E.2d 181 (Ohio 1982), and *overruled by State v. Crago*, 559 N.E.2d 1353 (Ohio 1990).

150*Id.* *Contra Abney v. United States*, 431 U.S. 651 (1977) (holding that the collateral order doctrine permits immediate appeal of a denial of a criminal defendant's motion to dismiss on the grounds of double jeopardy).

151*Crago*, 559 N.E.2d at 1355. Justice Douglas' view of special proceedings would permit no other outcome in this case. *See Tilberry v. Body*, 493 N.E.2d 954 (Ohio 1986)(Douglas, J., dissenting); *see also infra* part V.

152*Crago*, 559 N.E.2d at 1355. Justice Holmes filed a dissenting opinion in which he stated he was inclined to follow *State v. Thomas*, 400 N.E.2d 897 (Ohio 1980) in deciding the instant case. *Crago*, 559 N.E.2d at 1356 (Holmes, J., dissenting) (Sweeney, J., concurring with the dissent).

153588 N.E.2d 789 (Ohio 1992). Nelson brought an action against Toledo Oxygen and Equip. Co. alleging that air tanks were improperly filled by the defendant. *Id.* at 789-90. During the course of discovery, Toledo Oxygen filed a motion to compel the discovery of Nelson's treating physician's reports. *Id.* at 790. Nelson filed a brief in opposition claiming that the reports were work product since they were prepared for the purpose of assisting Nelson's counsel prepare for litigation. The trial court granted the defendant's motion to compel the production of the documents. Nelson appealed and the appeal was dismissed by the court of appeals for lack of a final appealable order. *Id.* The supreme court affirmed. *Id.* at 792.

154*Id.*; *accord American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277 (2nd Cir. 1967) (denying appeal from a discovery order requiring the disclosure of information claimed to be protected by work-product privilege).

155*Nelson*, 588 N.E.2d at 791.

physician-patient privilege¹⁵⁶ by saying that work-product exposure is a harm "peculiarly related to litigation."¹⁵⁷ In applying the *Amato* balancing test, the court reasoned that such harm does not outweigh considerations of judicial economy.¹⁵⁸

V. THE IDEOLOGICAL SPLIT ON THE OHIO SUPREME COURT

In the cases dealing with special proceedings that have reached the Ohio Supreme Court since *Amato*, an ideological split has developed that pits the classical view of special proceedings against the *Amato* balancing test.¹⁵⁹ The classical view has occasionally ruled the day and determined the outcome of cases.¹⁶⁰ But more often than not, *Amato* would provide the primary mode of analysis.¹⁶¹

Justice Douglas is the only member of the Ohio Supreme Court who has consistently voiced opposition to the *Amato* balancing test.¹⁶² Justice Resnick criticized the holding in *Amato* on the grounds that it departed from the law in every jurisdiction in the United States.¹⁶³ The other justices appeared satisfied with the *Amato* approach, although *Amato* analysis is notably absent in cases where it could have been used.¹⁶⁴

¹⁵⁶See *Humphry v. Riverside Methodist Hosp.*, 488 N.E.2d 877 (Ohio 1986)(holding that order compelling hospital to disclose the names of patients is a final appealable order).

¹⁵⁷*Nelson*, 588 N.E.2d at 792. The court reasoned that since work-product protection is a litigational matter, appeals courts are equipped to provide appropriate relief for its erroneous exposure in an appeal after final judgment. *Id.*

¹⁵⁸*Id.* Justice Douglas filed a concurring opinion in which he reiterated his desire to overrule *Amato*, and cited the instant case as an example of the type of appeal that will be routinely made since the outcome of the *Amato* balancing test is impossible to predict. *Id.* at 793 (Douglas, J. concurring).

¹⁵⁹See, e.g., *Nelson v. Toledo Oxygen & Equip. Co.*, 588 N.E.2d 789 (Ohio 1992)(Douglas, J., concurring); *State v. Crago*, 559 N.E.2d 1353 (Ohio 1990)(opinion of the court written by Douglas, J.), *cert. denied*, 499 U.S. 941 (1991); *Dayton Women's Health Ctr. v. Enix*, 555 N.E.2d 956 (Ohio 1990)(Douglas, J., dissenting); *Stewart v. Midwestern Indemnity Co.*, 543 N.E.2d 1200 (Ohio 1989)(Douglas, J., dissenting); *Tilberry v. Body*, 493 N.E.2d 954 (Ohio 1986)(Douglas, J., dissenting); *Humphry v. Riverside Methodist Hosp.*, 488 N.E.2d 877 (Ohio 1986)(Douglas, J., dissenting).

¹⁶⁰*Crago*, 559 N.E.2d 1353; *General Accident Ins. Co. v. Insurance Co. of N. Am.*, 540 N.E.2d 266 (Ohio 1989).

¹⁶¹*Nelson*, 588 N.E.2d 789; *Tilberry*, 493 N.E.2d 954; *Humphry*, 488 N.E.2d 877. *But see infra* Part VII.

¹⁶²See cases cited *supra* note 159.

¹⁶³*Enix*, 555 N.E.2d 956 (Resnick, J., dissenting). Justice Resnick's disagreement with *Amato* appears to be based more on the substantive outcome than with the application of a balancing test to determine if a proceeding is "special." *Id.* at 963.

¹⁶⁴See, e.g., *Crago*, 559 N.E.2d 1353; *General Accident*, 540 N.E.2d 266 (Ohio 1989).

Justice Douglas' classical view of special proceedings received its most complete treatment in his dissent in *Tilberry v. Body*.¹⁶⁵ His argument is that the definition of special proceedings is contained in the Ohio Rules of Civil Procedure. In dissent in *Tilberry*, Justice Douglas argues:

Civ. R. 2 states, "[t]here shall be only one form of action, and it shall be known as a civil action."

Civ. R. 1 states that the Civil Rules prescribe the procedure to be followed in all civil courts, except: "(C) *** (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings: ***."¹⁶⁶

Justice Douglas argues that in order to satisfy rule 1(C)(7), the purported special proceeding must statutorily specify the, "step-by-step procedures to be utilized."¹⁶⁷ The Douglas approach would revive the analysis of special proceedings that was used in the early history of special proceedings law.¹⁶⁸ The problem with Justice Douglas' approach is that it provides a paucity of flexibility in an area where the Ohio Supreme Court has demanded increasing authority to make ad hoc determinations of appealability since 1970.¹⁶⁹

It is hard to imagine a scenario where Justice Douglas would accept a definition of special proceedings that is anything but in accordance with the classical definition. It is also equally hard to imagine the Ohio Supreme Court closing the door on interlocutory appeals in all cases except where there is a bona fide special proceeding in the classical sense.¹⁷⁰ Unless the Ohio Supreme Court completely overhauls its approach to interlocutory appeals in a way that does not rely on the special proceeding prong of the final order rule, it is likely that the debate will rage on.

VI. ANALYSIS OF OHIO'S APPROACH TO INTERLOCUTORY APPEALS

This note's analysis of special proceedings in Ohio will begin with a simple working assumption: Ohio's approach of relying on the *Amato* balancing test

¹⁶⁵493 N.E.2d 954 (Douglas, J., dissenting).

¹⁶⁶*Id.* at 958.

¹⁶⁷*Id.*

¹⁶⁸See discussion of *Watson* *supra* Part III. See *supra* notes 43-47 and accompanying text.

¹⁶⁹*State v. Collins*, 265 N.E.2d 261 (Ohio 1970) "[W]e are convinced that modern exigency must not be left unattended solely upon the basis of academic genealogy." *Id.* at 263.

¹⁷⁰On August 11, 1993, the Ohio Supreme Court overruled *Amato* and imposed the classical view of special proceedings as the law in Ohio. *Polikoff v. Adam*, 616 N.E.2d 213 (Ohio 1993); see *infra* part VII.

as a means of determining the availability of interlocutory appeals is a failure.¹⁷¹ The avowed policy of Ohio courts is to discourage interlocutory appeals and yet the *Amato* balancing test has created judicial exceptions to the final order rule that do not exist in any other jurisdiction.¹⁷² Thus, the policy question for Ohio is whether a more workable rule can be developed to screen interlocutory appeals.

A number of commentators have advanced approaches to the problem of when to allow interlocutory appeals.¹⁷³ One solution is to eliminate the "as of right" appeal entirely and to replace it with a system where appeals courts exercise discretion over the appeals that are heard.¹⁷⁴ Also, the balancing approach has found support in the academic literature.¹⁷⁵ Another method suggested is that the extraordinary writ be used instead of the interlocutory appeal.¹⁷⁶ Yet another suggestion is that exceptions to the final judgment rule should be codified.¹⁷⁷

Professor Martineau, a noted expert in the field of appellate practice, observes that each of the above suggestions has its drawbacks.¹⁷⁸ Abolishing the "as of right" appeal, while providing appellate courts with better control over dockets, would threaten the credibility of the judicial system and would face severe opposition.¹⁷⁹ The balancing approach leads to uncertainty as to what orders are appealable and encourages review of those issues where

¹⁷¹The author does not pretend to have "proven" this assumption. However, reference to the preceding sections of this note suggest that Ohio's approach to interlocutory appeals is at best daunting to the practitioner, and at worst, unintelligible.

¹⁷²*General Elec. Supply Co. v. Warden Elec., Inc.*, 528 N.E.2d 195 (Ohio 1988). "This court has always been reluctant to allow immediate review of rulings made during the pendency of an action." *Id.* at 197 (quoting *City of Columbus v. Adams*, 461 N.E.2d 887, 890 (Ohio 1984)). Despite such rhetoric the result in *Amato* is a departure from the law in every jurisdiction in the United States. *Dayton Women's Health Ctr. v. Enix*, 555 N.E.2d 956, 963 (Ohio 1990) (Resnick, J., dissenting),

¹⁷³MARTINEAU, *supra* note 2. Professor Martineau suggests that the final judgment rule is inherently subject to exception due to the tension between judicial economy and fairness to litigants. *Id.* at 67.

¹⁷⁴*Id.* (citing Carleton M. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L.J. 539, 554 (1932)); see also Harlon L. Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

¹⁷⁵MARTINEAU, *supra* note 2, at 67 (citing Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 97-102 (1975)).

¹⁷⁶MARTINEAU, *supra* note 2, at 68 (citing Note, *Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950)).

¹⁷⁷MARTINEAU, *supra* note 2, at 68 (citing Lawyers Conference Committee on Federal Courts and the Judiciary, *The Finality Rule: A Proposal For Change*, JUDGES' J., Fall 1980, at 33).

¹⁷⁸MARTINEAU, *supra* note 2, at 68.

¹⁷⁹*Id.*

appellate judges are anxious to reach the merits of the case.¹⁸⁰ The use of extraordinary writs to review interlocutory orders is criticized on the grounds that it creates unwarranted broadening of the supervisory powers of the appeals courts.¹⁸¹ The suggestion that exceptions to the final judgment rule be codified does not avoid the problem of inflexibility of a final judgment rule: there will always be situations where adherence to the statutory criteria will make an unjust result unreviewable.¹⁸²

Professor Martineau suggests that the most workable solution to the problem of when to allow interlocutory appeals is a proposal offered by the American Bar Association in its Standards of Judicial Administration for Appellate Courts.¹⁸³ The proposal suggests a two-tiered appellate review process: appeals from final judgments are as of right, and any nonfinal judgments or orders are appealable at the discretion of the reviewing court, subject to specified criteria.¹⁸⁴ A discretionary appeal would be permitted if the appeal would: "(1) materially advance the termination of the litigation or clarify further proceedings therein; (2) protect a party from substantial and irreparable injury; or (3) clarify an issue of general importance in the administration of justice."¹⁸⁵

As Professor Martineau observes, the ABA plan has a number of important advantages. The plan allows appellate courts to manage their dockets more effectively since the appellate courts could exercise discretion in hearing interlocutory appeals. It also provides built-in flexibility to accommodate the various rationales that in the past have led to judicial exceptions to the final judgment rule. In addition, the plan obviates the need for ongoing judicial involvement in carving out exceptions to the final order rule.¹⁸⁶

The ABA plan clearly appears to embody Ohio's stated judicial philosophy towards interlocutory appeals more effectively than the *Amato* balancing

¹⁸⁰*Id.* Compare *Russell v. Mercy Hosp.*, 472 N.E.2d 695 (Ohio 1984) (holding that the granting of a motion to disqualify counsel is not a final appealable order) with *Bernbaum v. Silverstein*, 406 N.E.2d 532 (Ohio 1980) (holding that overruling a motion to disqualify counsel is not a final appealable order); See also *City of Columbus v. Adams*, 461 N.E.2d 887 (Ohio 1984) (reasoning that pretrial suspension of a drivers license is not appealable since society's interest in keeping drunks off the road outweighs any interest in review).

¹⁸¹MARTINEAU, *supra* note 2, at 68. "Traditionally, extraordinary writs were to issue only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Id.* at 68 n.12 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

¹⁸²MARTINEAU, *supra* note 2, at 68-9.

¹⁸³*Id.* at 69 (citing AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION RELATING TO APPELLATE COURTS, § 3.12 (1977)).

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶*Id.* Professor Martineau also notes that the ABA plan has been adopted by Wisconsin in 1978. *Id.* at 69-70.

approach.¹⁸⁷ The question thus arises, can Ohio implement a version of the ABA plan, and if so, how would such a plan be incorporated into Ohio's final order rule? A necessary first step in this inquiry is to examine how Ohio appellate courts derive their authority to hear appeals.

Art. IV, section 3, of the Ohio Constitution states, "Courts of Appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district . . .".¹⁸⁸ This provision of the Ohio Constitution is held to, "empower the General Assembly to alter the appellate jurisdiction of the Court of Appeals."¹⁸⁹ Thus, the Ohio General Assembly has the authority to determine the kinds of orders that can be appealed within the constraints imposed by the Ohio Constitution.

The General Assembly's definition of a final order is set forth in Section 2505.02 of the Ohio Revised Code:

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.¹⁹⁰

The interplay between Art. IV, Section 3(B)(2) and Section 2505.02 does much to explain the development of what has become known as a special proceeding in Ohio. There is no provision in either the Ohio Constitution or Ohio Revised Code Section 2505.02 for an appeal of an interlocutory order.¹⁹¹ Thus, the Ohio Supreme Court has had to rely on the special proceeding prong of Section 2505.02 in order to create the judicial exceptions to the final order rule that it considers important.¹⁹²

Thus, the essential question is: if the General Assembly placed a version of the ABA proposal for review of interlocutory orders into the final order rule, would the rule exceed the powers granted to the General Assembly by Art. IV, Section 3(B)(2) of the Ohio Constitution? This question cannot be precisely answered, but the Ohio Constitution, in limiting the General Assembly's

¹⁸⁷That philosophy is clearly stated in *General Elec. Supply Co. v. Warden Elec., Inc.*, 528 N.E.2d 195 (Ohio 1988). "This court has always been reluctant to allow immediate review of rulings made during the pendency of an action." *Id.* at 197 (quoting *Columbus v. Adams*, 461 N.E.2d 887, 890 (Ohio 1984)).

¹⁸⁸OHIO CONST. art. IV, § 3(B)(2). Cf. U.S. CONST. art. III (Congress' power to define the jurisdiction of appellate courts is not limited to "judgments or final orders").

¹⁸⁹*State v. Collins*, 265 N.E.2d 261, 262 (Ohio 1970)(citing *Youngstown Mun. Ry. v. Youngstown*, 70 N.E.2d 649 (Ohio 1946)).

¹⁹⁰OHIO REV. CODE ANN. § 2505.02 (Anderson 1991).

¹⁹¹OHIO CONST. art. IV, § 3(B)(2); OHIO REV. CODE ANN. § 2505.02.

¹⁹²*See Collins*, 265 N.E.2d at 262.

authority to determine appellate jurisdiction, does refer to "judgments or final orders."¹⁹³ The Ohio Supreme Court has had no problem reviewing non-final orders when they were given the label, "special proceeding."¹⁹⁴ But the term "special proceeding" has a long history of respectability in terms of its status as a final appealable order.¹⁹⁵ If explicit language were amended to section 2505.02 making a provision for the appeal of interlocutory orders, it well might be deemed repugnant to Art. IV, section 3(B)(2) of the Ohio Constitution.

Another method the General Assembly might employ is to codify the meaning of the phrase "special proceeding" to include both its classical meaning¹⁹⁶ and a version of the ABA's proposal for discretionary interlocutory appeals.¹⁹⁷ Given the Ohio Supreme Court's willingness to tolerate its own modifications of the meaning of a special proceeding, it is unlikely that it could justify blocking an effort by the General Assembly to codify what is already a substantial departure from the original meaning of the term, "special proceeding."¹⁹⁸

VII. EPILOGUE: *AMATO* AFTER *POLIKOFF* AND *BELL*

On August 11, 1993, the Ohio Supreme Court announced decisions in *Polikoff v. Adam*¹⁹⁹ and *Bell v. Mt. Sinai Medical Center*.²⁰⁰ *Polikoff* explicitly overrules *Amato* and substitutes in its place the classical view of special proceedings as advocated by Justice Douglas.²⁰¹ *Bell* purports to apply the new classical

¹⁹³OHIO CONST. art. IV, § 3(B)(2).

¹⁹⁴See *State ex rel. Leis v. Kraft*, 460 N.E.2d 1372, 1372 (Ohio 1984)(concluding that *Amato*-type interlocutory appeals must be constitutional since they are special proceedings).

¹⁹⁵See *supra* notes 43-47 and accompanying text.

¹⁹⁶The classical view of special proceedings is expressed by Justice Douglas in *Tilberry v. Body*, 493 N.E.2d 954 (Ohio 1986)(Douglas, J., dissenting). See *supra* notes 43-47 and accompanying text.

¹⁹⁷The importance of retaining the classical meaning of the term, "special proceeding," is illustrated by *Missionary Soc'y of Methodist Episcopal Church v. Ely*, 47 N.E. 37 (Ohio 1897)(holding that an order denying the application of a will to the probate court is not reviewable unless it is a special proceeding).

¹⁹⁸It also seems plausible that the Ohio Supreme Court could, itself, define a special proceeding in accordance with the ABA plan, although such an approach would have no basis in the court's precedents involving special proceedings, and thus the court might be understandably reluctant to assume such a task.

¹⁹⁹616 N.E.2d 213 (Ohio 1993).

²⁰⁰616 N.E.2d 181 (Ohio 1993).

²⁰¹Justice Resnick, writing for a unanimous court stated: "[w]e determine that orders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02." *Polikoff*, 616 N.E.2d at 218. See *supra* notes 43-47 and accompanying text.

approach in rejecting the availability of an interlocutory appeal.²⁰² While the classical view of special proceedings is arguably a more faithful interpretation of the original understanding of special proceedings, serious problems are presented by the classical view, and it is unlikely that *Polikoff* will be the last word on the subject of interlocutory appeals in Ohio.

As pointed out by Professor Martineau, there is a reason why every jurisdiction in the United States has made some provision for exceptions to the final judgment rule. The reason is that the requirement of finality before an appeal often conflicts with a litigant's need to receive review of intermediate determinations made in judicial proceedings in order to avoid irreparable harm.²⁰³ Ohio's approach to interlocutory appeals as expressed in *Polikoff* simply turns back the clock to the distant past and ignores the policy questions that have led every other jurisdiction in the United States to formulate principles that take into account the inherent tension between the final judgment rule and fairness to litigants.

Under *Polikoff*, no interlocutory appeals will be permitted unless the order appealed from was made in a special statutory proceeding. As a result, the availability of interlocutory appeals will depend on a formalistic analysis of the kind of proceeding in which an order was made.²⁰⁴ In addition, an order made in a special statutory proceeding will be reviewable regardless of whether irreparable harm can be shown or if the special statutory proceeding is itself final or completed.²⁰⁵ Thus, the "new" approach is both over and underinclusive. A host of interlocutory orders that present litigants with irreparable harm will be unreviewable, while orders of no particular consequence will be reviewable simply by virtue of having occurred in the context of a proceeding created by statute.

The decision in *Bell v. Mt. Sinai Medical Center* illustrates an already emerging crack in the Ohio Supreme Court's new resolve to limit interlocutory appeals.²⁰⁶ In rejecting the immediate appealability of a trial court order

²⁰² *Bell*, 616 N.E.2d at 185.

²⁰³ MARTINEAU, *supra* note 2, at 48, 60-1.

²⁰⁴ *Polikoff*, 616 N.E.2d at 218.

²⁰⁵ *Bell*, 616 N.E.2d at 185 n.2.

²⁰⁶ *Bell* involved an appeal from a trial court order compelling an in camera inspection of materials alleged to be protected by attorney client privilege. *Id.* at 183. The order was made in the context of an action for prejudgment interest, which the Ohio Supreme Court readily agreed was a special proceeding, since an action for prejudgment interest is created by statute. *Id.* The court found that the order was not appealable because no substantial rights were implicated since the in camera inspection would serve only to allow the trial court to make a determination of whether the materials were discoverable. *Id.* at 184. The court suggests that if the trial court's order had required disclosure to the opposing party, then the order would be appealable. *Id.* at 184-85. Under the Ohio Supreme Court's new approach, the appealability of such an order greatly depends on the sheer accident that it occur in the context of a proceeding created by statute, otherwise it is not appealable.

compelling an in camera inspection of alleged privileged material, the court appears to pretend that irreparable harm can still form the basis of review of interlocutory orders.²⁰⁷ Also, the court found it necessary to distinguish *Humphry*²⁰⁸ and *Port Clinton Fisheries*²⁰⁹ from the dispute before it as opposed to adhering to the view dictated by *Polikoff*, namely that the results reached in those cases are in doubt given the *Polikoff* decision.²¹⁰ In addition, the *Bell* court found it necessary to employ revisionist history when confronted with its holding in *Nelson*, by stating that the analysis employed in *Nelson* revolved around the first prong of Ohio's final order rule rather than the second prong, which is patently incorrect.²¹¹ Given the appearance of backpedaling and the outright intellectual dishonesty of the *Bell* decision, it seems certain that the groundwork is once again being laid for departures from the classical view of special proceedings.²¹²

As for the future of interlocutory appeals in Ohio, the long winding road is likely to begin anew. As the decision in *Bell* suggests, the return to the classical view of special proceedings is likely to be just another starting point in a series of convoluted decisions generated by the results-oriented jurisprudence of the Ohio Supreme Court. What Ohio needs is a cohesive doctrine governing interlocutory appeals and an abandonment of both "academic genealogy"²¹³ and ad hoc determinations of appealability based on the bare intuitions of the ranking members of Ohio's judiciary.

VIII. CONCLUSION

Special proceedings in Ohio are inexorably intertwined with the complex issue of when to allow appeals from the determinations of a court of law. The history of Ohio Supreme Court cases, particularly since 1970, evince a diligent attempt to formulate a decisional rule of when to allow appeals from interlocutory orders. The Ohio Supreme Court is, in the final analysis, as much a victim of Ohio's final order rule as it is to blame for promulgating a series of unsatisfactory doctrines governing the appealability of interlocutory orders.

²⁰⁷The court's opinion suggests that the "substantial right" requirement of the special proceeding prong of Ohio's final judgment rule can still be satisfied by a showing of irreparable harm in the absence of immediate appellate review. *Id.* at 184. But, under the *Polikoff* approach, such rights can only be vindicated if they happen to be threatened in the context of a proceeding created by statute. *Polikoff*, 616 N.E.2d at 218.

²⁰⁸See *supra* note 112.

²⁰⁹See discussion of *Port Clinton Fisheries* *supra* part IV.

²¹⁰*Bell*, 616 N.E.2d at 184.

²¹¹See *id.* at 185 n.2; see also discussion of *Nelson* *supra* part IV.

²¹²It is worth noting that Justice Douglas concurred in the judgment only in *Bell* and did not file an opinion. 616 N.E.2d 181.

²¹³See discussion of *Collins* *supra* part III.

Solutions (or at least preferable approaches) to the problem of when to allow interlocutory appeals are available, such as the ABA plan. Ohio would be well served by undertaking the task of implementing improvements of its system of appellate practice. As a result of such an effort, scarce judicial resources would be used more optimally and the quality of justice would be improved.

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