

IN THE ELEVENTH DISTRICT COURT OF APPEALS

CAREER & TECHNICAL  
ASSOCIATION,

Plaintiff-Appellee,

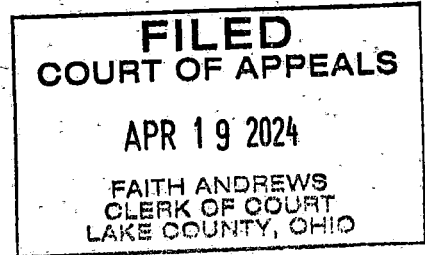
v.

AUBURN VOCATIONAL SCHOOL  
DISTRICT BOARD OF EDUCATION,

Defendant-Appellant.

CASE NO. 2023-L-114

On Appeal from the Lake  
County Common Pleas Court  
Case No. 11 CV 003318



**APPLICATION FOR EN BANC CONSIDERATION AND MOTION FOR RECONSIDERATION AS TO WHETHER THE TRIAL COURT HAS JURISDICTION OVER NUNC PRO TUNC ORDERS**

Now comes Defendant-Appellant Auburn Vocational School District Board of Education (“Board”) to apply for en banc consideration pursuant to Ohio App.R. 26(A)(2) and applicable rules, as well as request reconsideration pursuant to Ohio App.R. 26(A)(1) and applicable rules, since the April 9, 2024 decision of this Honorable Court (Filing Nos. 176255 and 176257) conflicts with prior decisions of this Honorable Court on the following dispositive issue:<sup>1</sup>

**Whether appellate court have jurisdiction over appeals from nunc pro tunc orders to determine whether such orders are deemed nullified as a matter of law, which are thereby reversed as a matter of law if deemed nullified.**

<sup>1</sup> While the April 9, 2024 decision of this Honorable Court specifically dismisses the Board’s appeal from the November 21, 2023 decision of the Trial Court (T.d. 323) denying the Board’s Civ.R. 22 interpleader motion (T.d. 295), this decision does not specifically dismiss the Board’s appeal from the November 20, 2023 decision of the Trial Court (T.d. 321). *Career & Technical Assn. v. Auburn Vocational School Dist. Bd. of Edn.*, 11th Dist. Lake 2023-L-114, ¶ 1. Nonetheless, for the purposes of the instant application and motion, the Board will proceed as though the Board’s appeal from the November 20, 2023 decision of the Trial Court T.d. 321) was also dismissed.

On the one hand, the April 9, 2024 decision of this Honorable Court holds that an appellate court may both (1) dismiss an appeal from a nullified nunc pro tunc order for want of jurisdiction and (2) affirm such a nullified nunc pro tunc order. *Compare Career & Technical Assn. v. Auburn Vocational School Dist. Bd. of Edn.*, 11th Dist. Lake 2023-L-114, ¶ 14 (holding that, “because the judgment appealed is a nullity, the appeal is dismissed”) *with id.* at ¶¶ 12-13 (finding “nothing problematic in the court’s use of the nunc pro tunc entry to reflect what was actually decided” despite taking issue with the nunc pro tunc order). In fact, at Paragraph 12 of the April 9, 2024 decision, this Honorable Court even added language to the nullified nunc pro tunc order that was not contained in either the nunc pro tunc November 20, 2023 journal entry (T.d. 321) or original October 14, 2024 journal entry (T.d. 289).

On the other hand, this Honorable Court has previously held that appellate courts have jurisdiction over appeals from nunc pro tunc orders to determine whether such orders are deemed nullified as a matter of law, which are thereby reversed as a matter of law if deemed nullified, in a plethora of cases. *See In re Guardianship of Rhinehart*, 11th Dist. Portage No. 2020-P-0047, 2020-Ohio-7005, ¶ 19 (explaining that whether a trial court properly issued a nunc pro tunc order is a question of law which this Honorable Court reviews de novo); *Home S. & L. Co. v. Great Lakes Plaza, LTD.*, 11th Dist. Lake Nos. 2011-L-168, 2011-L-169, 2011-L-170, 2011-L-171, 2012-Ohio-3420, ¶ 12 (same); *Swift v. Gray*, 11th Dist. Trumbull No. 2007-T-0096, 2008-Ohio-2321, ¶ 38 (same); *Salisbury v. Salisbury*, 11th Dist. Portage Nos. 2005-P-0010, 2005-P-0084, 2006-Ohio-3543, ¶ 87, fn. 2 (explaining that, while a purported nunc pro tunc “judgment entry was not a nullity on jurisdictional grounds, it is nevertheless a nullity for other reasons, since it goes far beyond the scope of a nunc pro tunc ruling”); *McKay v. McKay*, 24 Ohio App.3d 74, 75, 493 N.E.2d 317 (11th Dist.1985) (explaining the purpose of a nunc pro tunc order); *Wood v. Wood*,

11th Dist. Portage No. 2009-P-0076, 2010-Ohio-2155, ¶ 21 (explaining that a clerical mistake refers to a court's "mistake or omission" in an original order that is both "mechanical in nature and apparent on the record") (omitting citations); *id.* at ¶¶ 21-22 (explaining that "a legal decision or judgment" "where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner" (omitting citations); *id.* at ¶ 19 (holding that [c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders" and that "[d]uring the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court"); *Geauga Savs. Bank v. McGinnis*, 11th Dist. Trumbull Nos. 2010-T-0052, 2010-T-0060, 2010-Ohio-6247, ¶ 27 (explaining that a nunc pro tunc order "is applied to inadvertent clerical errors only, and cannot be used to change something which was deliberately done" and "does not reflect a modification of an erroneous judgment but rather supplies omissions of a clerical nature which serve to have the record speak the truth" and that a clerical mistake "is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney"), quoting *Swift v. Gray*, 11th Dist. No. 2007-T-0096, 2008 Ohio 2321, at ¶ 68 (Trapp, J., concurring in judgment only); *Home S. & L. Co. v. Great Lakes Plaza, LTD.*, 11th Dist. Lake Nos. 2011-L-168, 2011-L-169, 2011-L-170, 2011-L-171, 2012-Ohio-3420, ¶ 23 (explaining that a court may "correct an incorrect item nunc pro tunc if it is a mistake that does not involve a legal decision or judgment"); *Lake Cty. Treasurer v. Parcels of Land Encumbered With Tax Liens*, 11th Dist. Lake No. 2002-L-175, 2003-Ohio-6243, ¶ 12

(explaining that a nunc pro tunc judgment “is to be employed to correct clerical errors only” and that, “[t]hrough a nunc pro tunc order, the trial court may make a prior entry reflect its true judgment as long as the amendment does not alter the substance of the previous decision”); *Klammer v. Reimer*, 11th Dist. Lake No. 93-L-208, 1994 Ohio App. LEXIS 4981, at \*4-5 (Nov. 4, 1994) (holding that a trial court improperly issued a nunc pro tunc order because “the trial court did not indicate in any manner that the two judgments \*\*\* had been the product of a clerical mistake”); *id.* at \*4-5 (holding that “[a] plain reading of the judgment at issue discloses that the trial court determined that the two \*\*\* judgments were incorrect” and “[a]ccordingly, the trial court clearly exceeded its authority in entering a judgment nunc pro tunc”); *Reynolds v. Reynolds*, 11th Dist. Ashtabula ACCELERATED CASE NO. 2000-A-0006, 2000 Ohio App. LEXIS 5742, at \*7-8 (Dec. 8, 2000) (holding that a trial court improperly issued a nunc pro tunc order because it was “clear from the express language of the nunc pro tunc entry that the trial court was clarifying what its intention was in the [original] divorce decree” with respect to the payment of debts, but “nunc pro tunc entries are limited to reflecting what the court actually decided, not what the court intended to decide”); *Criado v. Truesdell*, 11th Dist. Ashtabula No. 2002-A-0035, 2003-Ohio-6681, ¶ 24 (holding that a trial court improperly issued a nunc pro tunc order “changing a person’s status from ‘primary residential parent for educational purposes’ to ‘primary residential parent and legal custodian’ [as it] is not simply correcting a clerical mistake; [but] instead, it alters the respective position of the parties in a fundamental manner”); *Celmer v. Rodgers*, 11th Dist. Trumbull No. 2004-T-0083, 2005-Ohio-7055, ¶ 33 (holding that a trial court improperly issued a nunc pro tunc order “reducing an award of damages from \$200,000 to zero dollars, [because it] is not simply correcting a clerical mistake; [but] instead, it is a fundamental modification of both the court’s earlier judgment entry on the verdict and the verdict of the jury”); *Jurasek v. Gould*

*Electronics, Inc.*, 11th Dist. Lake No. 2001-L-007, 2002-Ohio-6260, ¶ 15 (holding that “a trial court does not have the inherent power to sua sponte modify a final judgment” but, instead, “once an order has been journalized by a trial court as a final appealable order, that order cannot be modified or vacated except as provided under Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), or Civ.R. 60(B) (motion for relief from judgment”); *Mulliken v. Mulliken*, 11th Dist. Geauga No. 2007-G-2806, 2008-Ohio-2752, ¶ 22 (explaining that “[o]nce an appeal is filed, the failure to secure leave renders a nunc pro tunc decision a nullity”); and *State ex rel. Ames v. Portage Cty. Republican Central-Exec. Comm.*, 11th Dist. Portage No. 2018-P-0001, 2019-Ohio-74, ¶ 11 (explaining that “[o]nce an appeal is filed, the failure to secure leave renders a nunc pro tunc decision a nullity”).<sup>2</sup> *Accord* February 5, 2024 Initial Merit Brief (arguing the same); March 27, 2024 Reply Brief (arguing the same).

As two or more decisions of this Honorable Court are now in conflict, the instant appeal must be considered en banc to secure and maintain uniformity of the decisions of this Honorable Court on the following issue that is dispositive in the instant case:

**Whether appellate court have jurisdiction over appeals from nunc pro tunc orders to determine whether such orders are deemed nullified as a matter of law, which are thereby reversed as a matter of law if deemed nullified.**

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<sup>2</sup> While the April 9, 2024 decision of this Honorable Court is in direct conflict with the decision of the Ohio Supreme Court in the case of *State ex rel. Finkbeiner v. Lucas Cty. Bd. of Elections*, 122 Ohio St.3d 462, 2009-Ohio-3657, 912 N.E.2d 573, ¶ 43, as well as the decisions of the Second District, Ninth District, and Tenth District, by way of example, in the cases of *Nemcic v. Phelps*, 2d Dist. Montgomery No. 26066, 2014-Ohio-3952 (accepting jurisdiction to determine whether a nunc pro tunc order is deemed a nullity); *Business Data Sys. v. Gourmet Café Corp.*, 9th Dist. Summit No. 22096, 2005-Ohio-4 (same); *Ohio DOC v. NCM Plumbing Corp.*, 9th Dist. Summit No. 21878, 2004-Ohio-4322 (same); and *Jeffrey v. Marietta Mem. Hosp.*, 10th Dist. Franklin Nos. 11AP-492, 11AP-502, 2013-Ohio-1055 (same); these issues are being addressed in the motion to certify a conflict that is contemporaneously filed herein with this Honorable Court pursuant to Ohio App.R. 25(A), as well as the forthcoming notice of appeal and memorandum in support of jurisdiction that shall be filed with the Ohio Supreme Court. *See, also, State ex rel. Nese v. State Teachers Retirement Bd. of Ohio*, 136 Ohio St.3d 103, 2013-Ohio-1777, 991 N.E.2d 218 (explaining that any decision on whether compensation is eligible for retirement purposes rests solely with the State Teacher Retirement System of Ohio).

As explained by this Honorable Court:

[A] panel of this court cannot overrule the decision of another panel absent an en banc proceeding. Inconsistent authority within the same district may be resolved by a court convening en banc. *See McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, ¶16, 896 N.E.2d 672 (“The principal utility of determinations by the courts of appeals [e]n banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.” *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689-690, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960), quoting *Maris, Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)).

*Muldowney v. Portage Cty. Ohio Bd. of Cty. Cmm'rs.*, 2018-Ohio-2579, 115 N.E.3d 676, ¶ 39 (11th Dist.), fn. 2.

Here, this Honorable Court must grant the requested en banc consideration, as well as the requested reconsideration, to enable this Honorable Court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions.

Pursuant to Ohio App.R. 26(A)(1) and (2) and applicable rules, the instant application and motion is made in writing and in a single document no later than ten (10) days after the Clerk both mailed to the parties the April 9, 2024 decision of this Honorable Court that creates the intra-district conflict and made note on the docket of the mailing as required by App.R. 30(A).

Based upon the foregoing, this Honorable Court must grant the application for en banc consideration and motion for reconsideration pursuant to Ohio App.R. 26(A)(1), Ohio App.R. 26(A)(2), and applicable rules.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing will be sent via electronic communication to the following on April 19, 2024.

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