[Cite as *In re Adoption of C.A.L.*, 2015-Ohio-2014.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

IN THE MATTER OF THE ADOPTION OF:	:	CASE NO. CA2015-01-010
C.A.L.	:	O P I N I O N
	:	5/26/2015
	:	
	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
PROBATE DIVISION
Case No. 2013 AD 1172

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PIPER, P.J.

{¶ 1} Appellant-respondent, A.S.L. (Father), appeals a decision of the Clermont County Court of Common Pleas, Probate Division, granting adoption of his child, C.A.L. to petitioner-appellee, M.A. (Adoptive Father).

{¶ 2} Father and C.A. (Mother) were married in 1996. Mother had a daughter from a previous relationship, and the daughter lived in Mother and Father's home. Father and Mother had one child born in 1997, and Mother left the home to receive treatment for drug and alcohol addictions. During the time that Mother was receiving treatment, Father raped

Mother's daughter on multiple occasions. Upon her release from treatment, Mother became pregnant with C.A.L., Mother and Father's second child together. During her pregnancy, Mother's daughter informed her of the sexual abuse, and Father was arrested and incarcerated. Mother gave birth to C.A.L. in 1999, and Father was soon thereafter convicted and sentenced to 30 years in prison. Father has never had any contact with C.A.L.

{¶ 3} Mother and Father divorced in 2002, and the domestic relations court did not order any visitation between the children and Father. Instead, the order states that the children, as they aged, could visit their father if they chose to do so. The court also stated that Father had no obligation to pay child support.

{¶ 4} Mother met Adoptive Father in 1999, and the two began a relationship when C.A.L. was approximately five months old. Since that time, Adoptive Father has acted as a father to C.A.L. Mother and Adoptive Father married in 2003, and throughout his childhood, C.A.L. expressed his desire to be adopted by his stepfather. Adoptive Father filed the petition for adoption when C.A.L. was 14, and the matter proceeded to a hearing before the probate court. The probate court determined that Father's consent was not needed for the adoption to occur because Father had not had contact with C.A.L. for the year prior to the adoption request. Father appealed that decision out of time, and this court dismissed the appeal as being untimely.

{¶ 5} The matter proceeded to a best interest hearing, and the probate court determined that the adoption was in C.A.L.'s best interest. C.A.L. then filed his consent to the adoption with the probate court, which was required by statute because he was older than 12. Father now timely appeals the probate court's decision to grant the adoption petition, raising two assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN FINDING THE BIOLOGICAL FATHER'S

CONSENT TO THE ADOPTION WAS NOT REQUIRED.

{¶ 8} Father argues in his first assignment of error that the probate court erred in determining that his consent was not necessary in order to proceed with the adoption. Before addressing Father's argument, we first address whether this court has jurisdiction to consider Father's first assignment of error.

{¶ 9} According to R.C. 3107.07(A), consent to proceed with an adoption is not required when a court finds by clear and convincing evidence that the parent has failed, without justifiable cause, to provide either contact or support to a child for the year immediately preceding the filing of an adoption petition.

{¶ 10} The record is undisputed that Father was not ordered to pay child support, and the probate court recognized as much when making its decision. Instead, the probate court relied upon the fact that Father had no contact with C.A.L. in the year immediately preceding the filing of the adoption petition by Adoptive Father, and determined that Father's consent was not necessary for that reason. Despite Father's attempt to appeal the probate court's decision to this court, we dismissed Father's appeal as untimely because he did not file his notice of appeal within 30 days as required by App.R. 4(A). After our dismissal of Father's appeal, the probate court conducted a second hearing and granted the adoption petition as being in C.A.L.'s best interest, and Father appealed that decision.

{¶ 11} The Ohio appellate districts are split as to whether a parent is barred by res judicata for not appealing, within 30 days, the trial court's decision that consent is not needed to move forward with the adoption.

{¶ 12} The Ohio Supreme Court has expressly held that a trial court's finding that consent is not required pursuant to R.C. 3107.07 is a final appealable order. *In re Adoption of Greer*, 70 Ohio St.3d 293 (1994). In a footnote, the *Greer* Court stated, "it should, therefore, be well-noted by practitioners before the probate bar that, to be timely, an appeal

of an R.C. 3107.07 decision adverse to one claiming a right to withhold consent must be appealed within thirty days of the entry of the order finding consent unnecessary." *Id*. at fn. 1. The court reiterated in its footnote that failure to appeal final orders results in any future challenges to the finding being barred by res judicata. *Id.*

{¶ 13} Based on this rationale, the Sixth District Court of Appeals has held that a parent's failure to appeal the trial court's finding that consent is not necessary within 30 days of that determination bars that parent from raising the issue on appeal of the trial court's later final approval of the adoption petition. *In re Adoption of Joshua Tai T*., 6th Dist. Ottawa No. OT-07-055, 2008-Ohio-2733.

{¶ 14} However, other districts have determined that a trial court's decision regarding whether consent is necessary is a "partial final judgment or order" as contemplated in App.R. 4(B)(5). Based on App.R. 4(B)(5), parties are permitted to appeal a trial court's final order immediately or wait until unresolved issues between the parties are determined by the trial court. App.R. 4(B)(5), which is titled "partial final judgment or order," provides,

> If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ.R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed *or the judgment or order that disposes of the remaining claims*.

(Emphasis added.)

{¶ 15} According to several districts, App.R. 4(B)(5) provides two different times a parent may appeal the trial court's decision that consent is not necessary; either directly after the trial court makes a determination that consent is not necessary *or* after the trial court's final grant of the adoption petition.

{¶ 16} For example, the Second District Court of Appeals has applied App.R. 4(B)(5) to permit a mother to appeal the trial court's decision regarding consent after the trial court

granted the adoption motion. *In re Adoptions of A.L.*, 2d Dist. Greene No. 2007-CA-0059, 2008-Ohio-1302. The Second District reasoned that,

> the trial court's order determining that [Mother's] consent to the adoption was not necessary was not entered under Civ. R. 54(B), nor could it have been, since there is but one claim for relief in Connie's petition for adoption. The trial court's order determining that [Mother's] consent was not necessary did not dispose of the claim for relief. It was immediately appealable. Nevertheless, by virtue of App.R. 4(B)(v), [Mother] had the option of either immediately appealing from that order, or waiting until the trial court disposed of the petition for adoption before appealing. She chose the latter course, which is permitted by the Rule.

Id. at ¶ 19.

{¶ 17} Similarly, the Third District Court of Appeals has applied App.R. 4(B)(5) to permit an appeal of the trial court's consent decision more than 30 days after the decision was made. *In re Adoption of Eblin*, 126 Ohio App.3d 774 (3d Dist.1998). The *Eblin* Court recognized that the consent decision was a final appealable order according to *Greer*, but nonetheless determined, "pursuant to App.R. 4(B)(5), even though the court's judgment was a final appealable order, it is considered a 'partial final judgment' that is appealable alternatively thirty days after the court renders a final order on all issues in the case." *Id*. at 776.

{¶ 18} The Fourth District Court of Appeals has also used App.R. 4(B)(5) to permit a parent to challenge the consent decision after the trial court's final decision on the adoption petition was issued. *In re Adoption of S.L.N.*, 4th Dist. Scioto No. 07CA3189, 2008-Ohio-2996. The Fourth District concluded, "even though the court's finding that [Mother's] consent is not required was a final appealable order, it is considered a 'partial final judgment' that is also appealable under App.R. 4(B)(5) thirty days after the court renders a final order on all issues in the case." *Id*. at ¶ 17.

{¶ 19} Within each of the three cases cited above, the districts recognize that a trial

court's decision as to whether consent is necessary is a final appealable order, but use App.R. 4(B)(5) to allow the parent to appeal the consent decision *after* the final adoption decision is made because the consent decision is a partial final judgment. While the Ohio Supreme Court did not apply or discuss App.R. 4(B)(5) in *Greer* or subsequent cases regarding adoption, it has applied App.R. 4(B)(5) to adjudication determinations as those determinations relate to permanent custody. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810.

{¶ 20} The *H.F.* Court accepted a certified conflict between the districts, and held that a parent must appeal the trial court's adjudication of a child as abused, neglected, or dependent within 30 days of the trial court's adjudication, and cannot wait until the trial court's grant of permanent custody. *Id*. In placing the certified conflict in its proper context, the court stated, "In this case, we are asked to determine whether a juvenile court's adjudication order must be appealed within 30 days from the entry of judgment or whether App.R. 4(B)(5) authorizes a second opportunity to appeal after the final disposition order." *Id*. at ¶ 1. In answering the certified question, the court held, "App.R. 4(B)(5) does not apply and that an appeal of a juvenile court's adjudication order of abuse, dependency, or neglect and the award of temporary custody pursuant to R.C. 2151.353(A)(2) must be filed within 30 days of the judgment entry pursuant to App.R. 4(A)." *Id*.

{¶ 21} In deciding the case, the *H.F.* Court analyzed App.R. 4(B)(5) and provides appellate courts with guidance as to when and how App.R. 4(B)(5) is to be applied. In *H.F.*, the supreme court reasoned, "for App.R. 4(B)(5) to apply, an order must meet two requirements: (1) it must be a final order that does not dispose of all claims for all parties and (2) it must not be entered under Civ.R. 54(B)." *Id*. at ¶ 12. The court further explained that when determining whether a final order disposed of all claims between the parties, the proper question to ask is "whether any claim remained pending between the parties." *Id*. at ¶ 12.

The court held that App.R. 4(B)(5) applies *only if* claims remain pending between the parties. *Id*.

{¶ 22} Specific to the adjudication issue, the court determined that no claims remained pending between the parties because the complaint filed by the child services agency requested a finding of abuse, dependency, or neglect, as well as a grant of temporary custody to the agency. Once the trial court made its adjudication orders and granted temporary custody to the agency, the two issues raised in the agency's complaint were resolved so that no further issues remained pending between the parties. The court recognized that the adjudication of a child as an abused, neglected, or dependent child often leads to further proceedings, such as legal or permanent custody requests. However, the court concluded that the adjudication decision reaches the final merits of whether the child is abused, neglected, or dependent and "although some future action is contemplated in a temporary custody order, the immediate action between the parties is concluded." *Id*. at ¶ 13.

{¶ 23} To further support its analysis and application of App.R. 4(B)(5), the court noted, "there is no assurance that a parent would have an alternative opportunity to appeal an adjudication order * * * [because] a children services agency is not required to seek permanent custody unless statutorily required to do so under R.C. 2151.413(D)(1)." *Id*. at ¶ 14. The court reasoned that the agency has other options than permanent custody should the temporary custody order expire, such as returning the child to its parent, placing the child under protective supervision, or placing the child with a relative. *Id*. Based upon the fact that the agency is left with options that do not require permanent custody, the court concluded that no other issues remained unresolved between the parties so that App.R. 4(B)(5) was inapplicable.

{¶ 24} While the *Greer* Court did not address App.R. 4(B)(5), we do not believe that

the lack of reference to the rule in *Greer* has foreclosed the possibility that App.R. 4(B)(5) applies.[1] When applying the supreme court's analysis regarding App.R. 4(B)(5), as set forth in *In re H.F.*, we find that the consent determination is a partial final judgment, and that other issues remain between the parties that must be decided.

{¶ 25} Unlike an adjudication that may never require any further action, the finding that consent is not needed (or that consent is needed and has been given) is always accompanied by a second determination that the adoption is in the best interest of the child. According to R.C. 3107.14(C), "If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person sought to be adopted as supported by the evidence, it may issue * * * a final decree of adoption or an interlocutory order of adoption."

{¶ 26} Therefore, when a petition for adoption is filed, the party is asking essentially for a determination that consent is not needed or has been given, and that the adoption is in the best interest of the child. Although the first determination regarding consent is a final appealable order, that decision only addresses one issue raised in the petition, but leaves open the issue of the child's best interest. As such, the finding that consent was not necessary did not resolve both of the issues raised within the petition so that App.R. 4(B)(5) applies to permit Father to appeal the consent decision once the probate court granted the final adoption petition. Consequently, we will now address Father's argument that the probate court erred when it found that consent was not necessary.

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1. The dissent is correct in stating that the Ohio Supreme Court's statement in *Greer* is unequivocal. Nonetheless, the *Greer* Court was not asked to determine whether App.R. 4(B)(5) applied to the consent decision, it was only asked to determine whether a trial court's consent decision was a final appealable order. As such, this court's decision to apply App.R. 4(B)(5) to the case sub judice does not usurp the role of the supreme court, nor does it circumvent established precedent as suggested by the dissent. The supreme court's analysis of when and how App.R. 4(B)(5) is to be applied, as found in *H.F.*, is not discretionary for appellate courts given that App.R. 4(B)(5) is a rule adopted by the Ohio Supreme Court and there is no doubt that the court is cognizant of the rule's correct application.

{¶ 27} The right of natural parents to the care and custody of their child is one of the most precious and fundamental in law. *In re Adoption of C.M.F.*, 12th Dist. Butler Nos. CA2013-06-090 and CA2013-06-091, 2013-Ohio-4719, ¶ 8. An adoption permanently terminates the parental rights of a natural parent. *In re Adoption of L.C.W.*, 12th Dist. Butler No. CA2014-08-169, 2015-Ohio-61, ¶ 10. Given the termination of the fundamental right to parent one's child, Ohio law requires parental consent to an adoption unless a specific statutory exemption exists. *In re Adoption of A.N.B.*, 12th Dist. Preble No. CA2012-04-006, 2012-Ohio-3880, ¶ 5.

{¶ 28} As previously stated, and pursuant to R.C. 3107.07(A), consent to proceed with an adoption is not required when a court finds by clear and convincing evidence that the parent has "failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree" for at least one year immediately preceding the filing of an adoption petition.

{¶ 29} The question of whether justifiable cause has been demonstrated is a question for the probate court. *In re Adoption of Masa*, 23 Ohio St.3d 163, 166, (1986). This determination cannot be reversed by an appellate court unless the determination is against the manifest weight of the evidence. *Id.* The probate court is in the best position to observe the demeanor of the parties and assess the credibility and accuracy of the testimony. *In re Adoption of C.M.F.*, 2013-Ohio-4719 at ¶ 16.

{¶ 30} A trial court is not obligated to find justifiable cause exists solely on the basis that a parent is incarcerated. *Id*. at ¶ 17. Instead, when a parent is in prison, imprisonment is one of several factors the court should consider. *Id.* Additionally, visitation does not equate with communication because a parent can communicate with a child "notwithstanding the inability to physically visit with the child." *In re Adoptions of Doyle*, 11th Dist. Ashtabula Nos. 2003-A-0071 and 2003-A-0072, 2004-Ohio-4197, ¶ 17.

{¶ 31} The probate court correctly noted that the domestic relations court ordered that Father was not responsible for child support. Consequently, his lack of support for the year preceding the adoption petition was justified. The probate court therefore addressed whether or not Father had contact with C.A.L. in the year immediately preceding the adoption petition. The probate court found that Father has not had any contact whatsoever with C.A.L. since his birth, including the year before Adoptive Father filed the adoption petition.

{¶ 32} Father does not dispute that he has not communicated, or attempted to communicate, with the children. Instead, Father argues that his lack of contact with C.A.L. was not without justifiable cause once the domestic relations court ordered no contact between himself and his children. Despite Father's argument to the contrary, the order of the domestic relations court did not prohibit communication between Father and the children because the orders only stated that *visitation* was to be determined by the children when they were older.

{¶ 33} The pertinent section of the order states, "No parenting time for Husband at the present time. As the children age, if they wish to do so and so request, the children may visit with their father and Wife shall allow same. However, Wife shall not be required to transport the children and the children shall be accompanied by a trusted family member or friend."

{¶ 34} The order from the domestic relations court did not prohibit Father from having written or oral contact with the children, it merely states that visitation was to be at the children's request. The order did not stop Father from trying to communicate with the children by sending cards, letters, or gifts. Nor did the order deny Father's ability to call the children on the phone or try to persuade them to visit him in prison. Father's ability to have communication with the children existed despite his inability to initiate physical visitation.

{¶ 35} Although the order did not deny Father's ability to reach out to the children, the record is patently clear that Father took no steps to communicate or contact his children.

The probate court heard evidence that Father failed to initiate any contact with the children, or with Mother in an effort to facilitate communication with the children, despite having Mother's valid address at her father's residence. During the consent hearing, the following exchange occurred during Father's cross-examination,

> [Father] There was no way that [Mother] was going to let me write to [the children.]
>
> [Question] But did you attempt to write her, though, did you reach out, did you try to communicate?
>
> [Father] No.

{¶ 36} The record also indicates that Father had the phone number and address for Mother's father, but that he did not try to establish contact. Mother and the children lived with her father for approximately four years. While Father had the correct address and phone number to that residence, Father did not try to contact the children there. Mother's father still lives at the same residence and has the same phone number to this day, yet Father never tried to reach Mother's father in an attempt to communicate with the children. Father's excuse for not contacting Mother's father was that her father "hates [his] guts." Even so, and assuming arguendo, that Mother's father harbors ill will toward Father, Father still could have made an effort to contact his children to demonstrate his desire to establish communication with them. However, he did not.

{¶ 37} The record also indicates that Father never made any efforts through legal channels to communicate with his children. The record does not contain any indication that Father tried to contact the domestic relations court to clarify its order, or to request the court's facilitation of communication with the children. Father never filed a contempt motion to suggest that Mother was interfering with his right to communicate with the children, nor did he file any motions to compel Mother to facilitate communication.

{¶ 38} Even so, Father suggests that the domestic relations order provides the

justifiable cause for why he did not contact C.A.L. because at the least, he *believed* that he could not contact his children. During the hearing, Father asked the probate court whether he was permitted to have contact with the children, and suggested his belief that the order prohibited contact between himself and the children. In response, the probate court stated that contact between Father and C.A.L. was "not prohibited by the Court. If you wish to have written contact with them you can do that. I guess the question is whether or not the children would wish to have that written contact. So I'm happy to ask [C.A.L.] if he would like to have that written contact. It's up to you."

{¶ 39} The probate court later stated its belief that the "intent behind" the order was to make any contact contingent upon the child's wishes. Even so, the probate court expressly stated that contact was never prohibited by the order, and further expressly told Father, "you are free to go ahead and write those children if you wish." Father cannot rely upon the order to excuse his failure to communicate, or at least attempt to communicate, with C.A.L. where the order did not prohibit communication and did nothing to stop Father from attempting to communicate with the children. Again, if Father was confused as to what the order permitted or prohibited, he could have taken steps to clarify the order with the domestic relations court. Father never took any steps to clarify the order, or to better understand what was permitted.

{¶ 40} Nor does Father's incarceration provide justified cause for his failure to contact C.A.L. There is no indication in the record that Father lacked access to paper and postage, as he filed several, handwritten, motions with the probate court. Father further indicated on record that he has a monthly salary of $22 per month, and that he spends some of that money on postage. *See In re Adoptions of Doyle*, 2004-Ohio-4197, ¶ 14 (noting that "a natural parent's term of incarceration does not prevent that parent from communicating with the child or otherwise toll the one-year statutory time period. Therefore, although appellant was incarcerated, she was not precluded by that incarceration from communicating with her

children"); and *In the Matter of the Adoption of Buswell*, 6th Dist. Erie No. E-78-33, 1979 WL 207116, *3 (May 25, 1979) (noting that a relevant factor in considering whether failing to communicate is justifiably excused is "the natural parent's utilization of resources at his command while in prison to continue a close relationship with his child. Parental rights are not preserved by waiting for some convenient time for performance of parental duties and responsibilities by the natural father while confined in prison").

{¶ 41} After reviewing the record, we find that Adoptive Father has proven by clear and convincing evidence that Father's consent was not needed to proceed with the adoption, and that the probate court's finding that Father's lack of communication was not justifiably caused is not against the manifest weight of the evidence. As such, Father's first assignment of error is overruled.

{¶ 42} Assignment of Error No. 2:

{¶ 43} THE TRIAL COURT IMPROPERLY ACCEPTED THE CONSENT OF THE CHILD.

{¶ 44} Father argues in his second assignment of error that the probate court improperly accepted C.A.L.'s consent to be adopted because that consent was premised upon the child's mistaken belief that Father wanted no contact with him.

{¶ 45} According to R.C. 3107.06(E), once a child turns 12, his or her consent to be adopted must be obtained unless the court expressly finds that such consent is not necessary within its consideration of the best interest of the child.

{¶ 46} The record is clear that C.A.L. not only consented to the adoption, but also requested that Adoptive Father file the petition. Even so, Father argues that C.A.L.'s consent was not valid because of the child's mistaken belief that Father never wanted any contact with the child. Despite Father's argument, the record is clear that the child's consent was validly accepted by the probate court, and that the child greatly desired the adoption for many

reasons other than Father not having contact with him.

{¶ 47} C.A.L. testified that he asked Adoptive Father to file the adoption petition because Adoptive Father "is just my dad. I don't look at him as anything else, he's been with me since I don't know how many months old. You know, me and him tell everybody we're PB&J, we're close." C.A.L. later stated that he did not know of anyone who would be a better father to him, and that Adoptive Father provides for all of his needs and wants in life. When asked about his desire to be adopted, C.A.L, told the court that he wanted to have Adoptive Father's name, and to have Adoptive Father recognized as his father by law.

{¶ 48} C.A.L. also stated the importance of having Adoptive Father's last name to make himself feel "fully a part of the family," and that having his biological father's last name was uncomfortable to him and that he did not "like it at all." C.A.L. also testified that Adoptive Father brings stability to his life, and that it makes him "mad" when people refer to Adoptive Father as his stepfather. C.A.L. explained that he has never felt or treated Adopted Father as a stepfather because he has always considered Adoptive Father to be his real father.

{¶ 49} After reviewing the record, we find that the probate court properly accepted C.A.L.'s consent, as it was not based upon a misapprehension of the facts. The record is clear that C.A.L. treated Adoptive Father as his father, and that his desire to be adopted was not solely predicated upon Father's failure to communicate with the child. Adoptive Father has provided care, stability, and a fatherly presence for the child since C.A.L. was six months old. C.A.L. repeatedly asked Adoptive Father to adopt him, and once the child was old enough to understand the consequences of his decision, Adoptive Father filed the petition. C.A.L. unequivocally stated his desire to be adopted, and the probate court did not err in accepting C.A.L.'s consent in the matter. As such, Father's second assignment of error is overruled.

{¶ 50} Judgment affirmed.

S. POWELL, J., concurs.

M. POWELL, J., concurs in part and dissents in part.

M. POWELL, concurring in part and dissenting in part.

{¶ 51} While I concur with the decision that C.A.L. gave valid consent to his adoption, I dissent from the majority's conclusion that Father was permitted to appeal the probate court's determination that consent was unnecessary. I believe that the Ohio Supreme Court made an unequivocal statement in *In re Adoption of Greer*, 70 Ohio St.3d 293, that a party must appeal the trial court's consent determination within 30 days in order for the appeal to be timely.

{¶ 52} Not only did the *Greer* Court determine that the consent decision constituted a final appealable order, but the court also determined that res judicata would apply to bar any appeal of the consent decision attempted past the 30-day timeframe set forth in App.R. 4. While the majority has already cited the relevant portion of *Greer*, it bears repeating that the *Greer* Court unequivocally stated, "it should, therefore, be well-noted by practitioners before the probate bar that, to be timely, an appeal of an R.C. 3107.07 decision adverse to one claiming a right to withhold consent *must be appealed within thirty days* of the entry of the order finding consent unnecessary." 70 Ohio St.3d at fn. 1. (Emphasis added.) The court then included reference to case law establishing that matters that could have been reviewed on a timely and direct appeal are barred by res judicata in a subsequent appeal taken from the final adoption order. *Id*.

{¶ 53} *Greer* was decided in 1994, two years *after* the Ohio Supreme Court adopted App.R. 4(B)(5). Therefore, the court was well-aware of the appellate rule regarding final partial judgments. Even so, the court included its express warning to practitioners, as quoted

above, that *to be timely*, the appeal must be taken within 30 days of the consent finding, and further warned that failure to appeal the decision within that time frame would result in the argument being barred by res judicata. Had the court wanted to establish precedent that App.R. 4(B)(5) provided an exception to the express statement it made to practitioners regarding a timely appeal, it could have done so.

{¶ 54} While I also agree with the majority that the *Greer* Court was not asked to determine if App.R. 4(B)(5) applies to consent determinations, I nonetheless believe that my role as an appellate judge does not include making assumptions as to what the Ohio Supreme Court considered or did not consider when making its decisions. The fact that App.R. 4(B)(5) is not referenced in the *Greer* decision does not necessarily mean that the court did not consider it. Just as easily, the court could have decided not to reference the rule because it did not find the rule applicable or dispositive of the appeal.

{¶ 55} My dissent is premised upon the fact that *Greer* included an express and unequivocal statement that to be timely, the appeal of a consent determination must occur within 30 days. I agree with the majority that the Ohio Supreme Court's later analysis of App.R. 4(B)(5) likely indicates that the consent determination is a partial final judgment. However, and until the Ohio Supreme Court directs otherwise, I believe that *Greer* created binding precedent that a timely appeal of a trial court's consent decision must occur within 30 days or the issue is barred by res judicata. I therefore concur in part and dissent in part.