

IN THE SUPREME COURT OF OHIO

JAMES G. JACKSON,)	Case No. 06-2096
)	
Appellant,)	On appeal from the Franklin
)	County Court of Appeals, Tenth
vs.)	Appellate District
)	
CITY OF COLUMBUS, et al.,)	Court of Appeals
)	Case No. 05-APE-09-1035
Appellees.)	

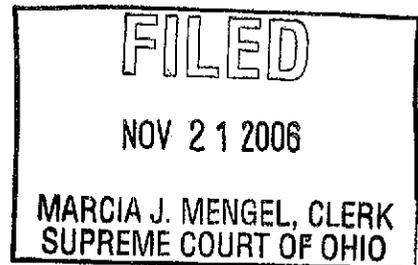
APPELLANT JAMES G. JACKSON'S
MEMORANDUM IN OPPOSITION TO
APPELLEES' MOTION TO STRIKE

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I. Summary.

The Court should overrule Appellees' September 17, 2006 Motion to Strike Appellant's Notice of Appeal and Case Information Statement.

On November 13, 2006, Appellant timely filed his Notice of Appeal and Memorandum in Support of Jurisdiction. Appellant thereby satisfied all requirements for invoking this Court's jurisdiction.

Appellees' Motion to Strike is based on (1) the fact that Appellant filed his Case Information Statement the day after he filed his Notice of Appeal; and (2) the fact that Appellant *served* that Case Information Statement seven days later. Neither fact justifies striking the documents or dismissing this appeal.

II. The only requirement for invoking this Court's jurisdiction under Sup.Ct.Prac.R. II(2)(A) is timely filing a notice of appeal and memorandum in support of jurisdiction, which Appellant did.

Sup.Ct.Prac.R. II(2) reads:

(A) *Perfection* of Appeal.

(1)(a) To *perfect* an appeal from a court of appeals to the Supreme Court, . . . the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the judgment being appealed. . . . If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction . . .

(Emphasis added.) The use of the term "perfect" in this rule differentiates the rule from the other mandatory provisions in the Court's rules. There are 393 instances of the word "shall" in the Court's rules. These instances do not reflect 393 requirements for perfecting an appeal. They reflect 393 rules violation of which are sanctionable. Appellant perfected his appeal by timely filing his Notice of Appeal and Memorandum in Support.

III. Appellant's late filing of his Case Information Statement does not warrant dismissal.

A. Timely filing a Case Information Statement is not a jurisdictional requirement.

Sup.Ct.Prac.R. II(6) requires a Case Information Statement: “[T]he appellant shall file, in addition to the other documents required by these rules, a case information statement at the time the notice of appeal is filed.” As explained in Part II above, this requirement is not jurisdictional.

Appellees cite *Ohio Consumers' Counsel v. PUCO*, 105 Ohio St.3d 1211, 2005-Ohio-1023, for the proposition that “[b]ecause Appellant failed to timely file the required case information statement, his appeal was not timely perfected.” (Appellees' Motion, 2.) *Ohio Consumers' Counsel* does not stand for that proposition. In *Ohio Consumers' Counsel*, the Court struck the OCC's notice of appeal for a different reason: the notice of appeal was substantively deficient: “The notice of appeal did not include the certificate of filing required by S.Ct.Prac.R. XIV(2)(C)(2).” *Id.* at ¶ 2. S.Ct.Prac.R. XIV(2)(C)(2) reads:

In an appeal from the Public Utilities Commission or the Power Siting Board, the notice of appeal shall also contain a certificate of filing to evidence that the appellant file a notice of appeal with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

The Court in *Ohio Consumers' Counsel* exercised its discretion to strike the OCC's Notice of Appeal for any of the following reasons, none of which exist in this case:

1. The applicable rule (S.Ct.Prac.R. XIV(2)(C)(2)) imposed a requirement for the content of the notice of appeal – the timely filing of which *is* a jurisdictional requirement.
2. The applicable rule was specific to PUCO appeals and was not a rule of general application.
3. The applicable rule required evidence proving a predicate act – prior filing of a separate notice of appeal with the PUCO.
4. That predicate act was required by a separate body of law – the Ohio Revised Code, not the Court's rules. It is R.C. 4903.13 that requires the prior filing of a separate notice of appeal with the PUCO:

The proceeding to obtain such reversal, vacation, or modification [by the Supreme Court] shall be by *notice of appeal, filed with the public utilities commission* by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus.

(Emphasis added.)

5. The substance of PUCO cases potentially affects all Ohioans, thus perhaps justifying a stringent notice procedure.
6. The appellant, the OCC, was a frequent litigant before the Court.

In this case, in contrast:

1. The applicable rule (S.Ct.Prac.R. II(6)) has nothing to do with the jurisdictional requirement (filing a notice of appeal and memorandum in support of jurisdiction).
2. The applicable rule is a rule of general application.
3. The applicable rule has nothing to do with proving anything.
4. This case does not potentially affect all Ohioans
5. The tardy document (the Case Information Statement) did not provide notice of anything, because Appellant *did* serve upon Appellees the Notice of Appeal and Memorandum in Support of Jurisdiction.
6. Appellant has never been a litigant in this Court.

Ohio Consumers' Counsel is also distinguishable in that it was decided under a *different section of S.Ct.Prac.R. II* – Section 3 (“Institution of Appeal from Administrative Agency), not Section 2 (Institution of Appeal from Court of Appeals). Indeed, the Court’s Rules of Practice contain multiple distinctions between PUCO appeals and appeals from courts.

Ohio Consumers' Counsel does not apply.

B. The Court should not sanction Appellant for the one-day tardiness in filing his Case Information Statement.

As explained in Part II above, Appellant did “perfect” his appeal. What Appellees are really asking this Court to do is exercise its discretion to sanction Appellant for his one-day tardiness by dismissing his appeal.

The Court should overrule Appellees’ motion for three reasons.

First, Appellees cite no other authority for their argument that the one-day tardiness in filing his Case Information Statement justifies any sanction at all, much less dismissal of his appeal.

Second, the late filing did not adversely affect Appellees or the efficient administration of justice – a fact evidenced by Appellees’ silence on the subject.

Third, a sanction for the one-day tardiness in filing the Case Information Statement would be particularly unjust in this particular case. After filing Appellant’s Notice of Appeal and Memorandum in Support of Jurisdiction, undersigned counsel realized the Case Information Statement had not been filed. He spoke with an assistant clerk of court, who told him that filing the Case Information Statement on November 14, one day late, was acceptable because the timely filing of a Case Information Statement, he said, is “not jurisdictional.” Undersigned counsel reasonably relied on the plain meaning of S.Ct.Prac.R. II(2) and the assistant clerk’s confirmation thereof.

Appellant’s one-day tardiness in filing his Case Information Statement does not warrant dismissal.

IV. Appellant’s late service of his Case Information Statement does not warrant dismissal.

S.Ct.Prac.R. XIV(2)(D) provides that the Court has the discretion to strike a document that was not timely served:

(1) When a party or *amicus curiae* fails to provide service upon a party or parties to the case in accordance with division (A) of this section, any party adversely affected may file a motion to strike the document that was not served. . . .

(2) If the Supreme Court determines that service was not made as required by this rule, it may strike the document or, if the interest of justice warrant, order that the document be served and impose a new deadline for filing any responsive document. If the Supreme Court determines . . . the movant was not adversely affected, it may deny the motion.

Appellant filed his Notice of Appeal and Memorandum in Support of Jurisdiction on November 13 and filed his Case Information Statement the next day. He served the Case Information Statement November 21, 2006.

Appellees argue that the tardy *service* of the Case Information Statement is another reason to dismiss the appeal. The Court should reject that argument for three reasons.

First, the service requirement is not jurisdictional. If it were, S.Ct.Prac.R. XIV(2)(D) could not, as it does, provide for the Court entertaining and overruling a motion on a discretionary basis.

Second, the late service did not “adversely affect” Appellees – a fact evidenced by Appellees’ silence on the subject.

Third, the Court need not even “order that the document be served” or “impose a new deadline for filing any responsive document,” because the document has already been served, and there is no responsive document.

V. Conclusion.

The Court should overrule Appellees’ motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this memorandum was served by regular U.S. Mail, postage pre-paid, this 21st day of November 2006, upon the following counsel for Appellees:

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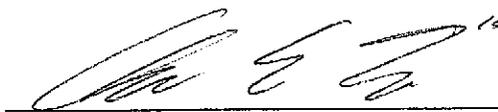
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