

IN THE SUPREME COURT OF OHIO

CRAIG L. WHITAKER)	Case No. 05-331
)	
Appellant)	
-vs-)	On Appeal from the Summit County
)	Court of Appeals, Ninth Appellate District
M.T. AUTOMOTIVE, INC., d/b/a)	
MONTROSE TOYOTA)	Court of Appeals Case No. 21836
)	
Appellee)	

* * * * *

MOTION OF APPELLANT, CRAIG L. WHITAKER, TO STRIKE APPELLEE'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE TO ESTABLISH NEW DEADLINE FOR RESPONSE

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FILED
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 MARCIA J. MENGEL, CLERK
 SUPREME COURT OF OHIO

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* * * * *

**MOTION OF APPELLANT, CRAIG L. WHITAKER, TO STRIKE
APPELLEE'S MOTION FOR RECONSIDERATION, OR IN THE
ALTERNATIVE TO ESTABLISH NEW DEADLINE FOR RESPONSE**

Pursuant to SCt Rule 14, Section 2(B)(1), Appellant Craig L. Whitaker respectfully moves this Court to strike the motion for reconsideration filed by Appellee, or in the alternative to establish a new deadline for Appellant's response to the motion.

Appellee filed its motion for reconsideration on November 20, 2006. Also on November 20, *amici curiae* The Ohio Automobile Dealers Association and Ohio Council of Retail Merchants filed a brief in support of Appellee's motion for reconsideration. Appellee's motion contains a certification that it was served on Appellant's counsel on November 17, 2006 by regular mail. The amicus brief contains a certification that it was served by regular mail upon counsel for Appellant on November 20, 2006.

Neither piece of mail was received by Appellant's counsel until November 27, 2006.¹ One possible explanation for the delay in service can be found in the postmarks on the envelope containing the *amici* brief. The envelope, attached as Exhibit A, bears an in-house postage meter date stamp of November 20, 2006. The Columbus post office added a cancellation stamp bearing a date of November 22, 2006 P.M. A second cancellation stamp is sometimes used by the United States Postal Service to correct metered mail bearing a date stamp other than the date the item is actually deposited at the post office, if the discrepancy is noticed, or to otherwise mark mail delayed within the postal system. Regardless of the reason, it is clear that this piece of mail was still in Columbus the evening of November 22, 2006, and that (along with the Thanksgiving holiday) could explain why it was not delivered to counsel's office in Akron until November 27.

The delay in delivery of Appellee's brief is even more difficult to understand. The certification for that brief states that it was served on Appellant's counsel on November 17, 2006. A piece of mail deposited with the postal service in Akron, addressed to an Akron address, is supposed to be delivered the next business day. In this case, Appellee's mail was not delivered until ten days later. Appellee's brief was also served on Akron lawyers Todd Willis and Mark Willis, and according to the certificate of service that mail was also sent on November 17, 2006. Attorney Willis indicates that the mailing was received in their office on Monday, November 27, 2006. (Exhibit C). Two separate service copies of Appellee's brief, both mailed from Akron to Akron addresses, were both delayed ten days.

¹ The delay in receipt of the mail was not caused by the change of address of counsel for Appellant, as set forth in the Notice of Change of Address filed with the Court this date. Counsel's office is in the same physical location it has been in for more than fifteen years, and during this transition to the new firm she continues to receive daily delivery of mail at both the old and new post office boxes.

The undersigned counsel for Appellant does not believe and is not suggesting that counsel for Appellee or counsel for *amici* purposely delayed service of the motion for reconsideration or the brief in support. Counsel assumes that the delay in mail delivery was caused by the intervening holiday,² and/or inadvertence on the part of counsel who have conducted this litigation in a professional manner.³ Because of the delay in service, however, the motion and brief were not received until seven days after they were filed. Since Appellant's response was due within seven days of the filing, the motion and brief were received on the same date the response was due.

This is a situation contemplated by the rules, in which a clear injustice has occurred. Appellant's counsel received the brief on the date her response was due. The interests of justice warrant that Appellant be afforded a brief extension of time to respond to pleadings. Appellant requests leave of this Court to file his response brief within seven days of being permitted to do so by this Court. Such a leave to respond is not unprecedented. *See, e.g., In Re Ray*, 2002-Ohio-5799, 97 Ohio St.3d 1417 (Table).

The undersigned counsel for Appellant has discussed this issue with Clair Dickinson, counsel for Appellee. Attorney Dickinson has indicated that he does not object to the Court granting Appellant seven days to respond to the motion for reconsideration.

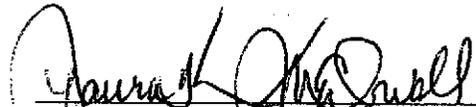
² The office of Appellant's counsel and the office of Willis & Willis were closed for the Thanksgiving holiday on November 23 and 24, 2006.

³ On November 22, 2006, counsel for Appellant reviewed the Ohio Supreme Court docket and noticed that the motion and brief had been filed. She contacted counsel for Appellee, indicated she had not received service copies of the motions, and requested electronic copies of both filings. Counsel for Appellee attempted to send a copy of the motion electronically, but it was bounced back due to an error in the address. See Exhibit B. Unfortunately, for some unexplained reason the re-sent e-mail was also delayed until sometime after close of business on November 22. Because of the holiday it was not received by counsel until Monday November 27, 2006.

For the foregoing reasons, Appellant respectfully moves this Court to establish a new deadline for Appellant's response to the motion for reconsideration, as permitted by SCt Rule 14, Section 2(B)(1).

Respectfully submitted,

McDOWALL CO., L.P.A.



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by facsimile transmission and regular United States Mail on November 29, 2006, to the following counsel of record:

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Brouse McDowell
388 South Main Street, Suite 500
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Attorneys for amicus curiae Ohio Academy of Trial Lawyers
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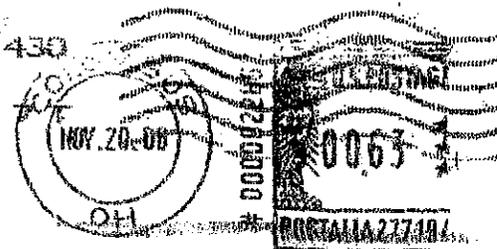
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22 NOV 2006 PM



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44312+0210



Laura McDowall

From: Dickinson, Clair E. [CDickinson@brouse.com]
Sent: Monday, November 27, 2006 11:49 AM
To: davidbr@cooperelliott.com
Cc: lm@youngmcdowall.com
Subject: FW: #661938 v1 - Motion for Reconsideration

-----Original Message-----

From: Laura McDowall [mailto:lm@youngmcdowall.com]
Sent: Monday, November 27, 2006 12:05 PM
To: Dickinson, Clair E.
Subject: RE: #661938 v1 - Motion for Reconsideration

Clair,

The Supreme Court docket shows that the amicus dealers association also filed a brief in support of the motion for reconsideration. I did not receive a copy of that either. Could you send it over or ask the lawyer who filed it to send it over ASAP. Thanks.

Laura

-----Original Message-----

From: Dickinson, Clair E. [mailto:CDickinson@brouse.com]
Sent: Wednesday, November 22, 2006 12:40 PM
To: lm@youngmcdowall.com
Subject: #661938 v1 - Motion for Reconsideration

Sorry for the delay. The first time I sent it, it came back because I made a mistake in your address.

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**STATEMENT OF AMICUS CURIAE, OHIO ACADEMY OF TRIAL LAWYERS,
IN SUPPORT OF APPELLANT CRAIG WHITAKER'S MOTION TO STRIKE
APPELLEE M.T. AUTOMOTIVE, INC., d/b/a MONTROSE TOYOTA'S MOTION
FOR RECONSIDERATION, OR IN THE ALTERNATIVE TO ESTABLISH
NEW DEADLINE FOR RESPONSE**

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Counsel for Appellee, M.T. Automotive Inc., d/b/a/ Montrose Toyota

Counsel for Amicus Curiae's office was closed for the Thanksgiving holiday on Thursday and Friday, November 23 - 24, 2006. Counsel's office did not receive Appellee M.T. Automotive Inc. d/b/a/ Montrose Toyota's Motion for Reconsideration until the office re-opened on Monday, November 27, 2006.

Respectfully submitted this 29th day of November, 2006.



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