№ 2006-0896

In the Supreme Court of Ohio

ANDREA A. BARTH,

Plaintiff-Appellee

v.

JEFFREY BARTH,

Defendant-Appellant.

ON CERTIFIED CONFLICT BY THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE № CA-05-086473

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APPELLANT JEFFREY BARTH'S MEMORANDUM IN OPPOSITION TO MOTIONS FOR RECONSIDERATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT IN OPPOSITION TO RECONSIDERATION 1

I. LAW AND ARGUMENT 1

A. The Arguments Raised in Support of Reconsideration Were Presented to and Adequately Addressed by the Court. The Motions for Reconsideration filed by Appellee Andrea Barth and Guardian Ad Litem John J. Ready Should Be Denied As They Violate S.Ct.Prac.R. XI(2)(A) Prohibiting Reargument Of The Case. 1

B. The GAL's Motion for Reconsideration Raises New Arguments That Were Never Raised in This Case and Therefore Have Been Waived. 5

II. CONCLUSION 8

PROOF OF SERVICE 9

TABLE OF AUTHORITIES

Cases: **Page(s)**

Baker v. West Carrollton,
64 Ohio St.3d 446, 1992-Ohio-124 5-6

Barth v. Barth,
113 Ohio St.3d 27, 2007-Ohio-973 . . . . . *passim*

Barth v. Barth
(1967), 12 Ohio Misc. 141 5

Bennett v. Fleming
(1922), 105 Ohio St. 352 5

Coleman v. Coleman
(1972), 32 Ohio St.2d 155 6

Forster v. Superior Court
(2nd Dist. 1992), 11 Cal.App.4th 782, 14 Cal.Rptr.2d 258 7

In re Marriage of Thornton
(5th Dist. 1982), 135 Cal. App.3d 500, 185 Cal.Rptr. 388 7

Lovejoy v. Cuyahoga Cty. Dept. of Human Serv.
(1991), 76 Ohio App.3d 514 5

Moats v. Metropolitan Bank of Lima
(1974), 40 Ohio St.2d 47 6

Pratts v. Hurley,
102 Ohio St.3d 81, 2004-Ohio-1980 4

State ex rel. Shemo v. City of Mayfield Hts.,
96 Ohio St.3d 379, 2002-Ohio-4905, *cert. denied sub nom. City of Mayfield Heights v. Shemo*, 538 U.S. 906, 123 S.Ct. 1484, 155 L.Ed.2d 226 (2003) 1-2

State v. Wyant,
64 Ohio St.3d 566, 1992-Ohio-103 2

TABLE OF AUTHORITIES (Cont'd.)

Cases (cont'd.): Page(s)

Thompson v. Preferred Risk Mut. Ins. Co.
(1987), 32 Ohio St.3d 340 7-8

Williams v. State of North Carolina
(1942), 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 6

Statutes:

R.C. §3105.03 . . . . . *passim*

R.C. Chapter 3127 7

CAL FAM. CODE §2320 6

Rules:

S. Ct. Prac. R. XI, §2(A) 1-2

ARGUMENT IN OPPOSITION TO RECONSIDERATION

NOW COMES Appellant, Jeffrey Barth, by and through his undersigned counsel, and hereby opposes the Motions for Reconsideration filed by Appellee Andrea Barth and Guardian Ad Litem John J. Ready. The law in Ohio should remain that which is set forth in this Court's well-reasoned opinion in *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973, announced on March 21, 2007.

I.

LAW AND ARGUMENT

A. The Arguments Raised in Support of Reconsideration Were Presented to and Adequately Addressed by the Court. The Motions for Reconsideration filed by Appellee Andrea Barth and Guardian Ad Litem John J. Ready Should Be Denied As They Violate S.Ct.Prac.R. XI(2)(A) Prohibiting Reargument Of The Case.

Motions for reconsideration of this Court's decisions are governed by S.Ct.Prac.R. XI(2). That rule expressly provides that motions for reconsideration, "shall not constitute a reargument of the case. * * *" S.Ct.Prac.R. XI(2)(A). This aspect of the rule was recognized and applied in *State ex rel. Shemo v. City of Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, *cert. denied sub nom. City of Mayfield Heights v. Shemo*, 538 U.S. 906, 123 S.Ct. 1484, 155 L.Ed.2d 226 (2003). The *Shemo* case involved a ruling on a writ of mandamus. This Court refused to hear arguments on reconsideration that merely restated arguments that had been made prior to the Court's first merit decision. In response to the arguments raised

in the motion for reconsideration, this Court stated:

> [R]espondents' attempted reargument of this contention is not authorized by our Rules of Practice. 'A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration [and] shall not constitute a reargument of the case ***.' S.Ct.Prac.R. XI(2)(A).

Id. at ¶ 9 (emphasis added); see also, Id. at ¶ 24 (" ... respondents' arguments concerning relators' alleged delay in preparing to make access road improvements and the further delay concerning the resolution of the paper-streets issue were both raised in their initial brief; they cannot reargue them now. S.Ct.Prac.R. XI(2)(A).") (emphasis added).

Here, Appellee Andrea Barth and the GAL have filed their Motions for Reconsideration presenting nothing more than a general reargument of the merits of the Court's decision. Most blatant is the arguments of GAL John J. Ready at pages 4-6 where he simply renews and reiterates the very same arguments previously made in his own Merit Brief as well as that of Appellee Andrea Barth.

Appellee Andrea Barth's argument at pages 2-4 of her Motion that "motive" was not raised as an issue in the case is wrong. Appellee Andrea Barth has always maintained and argued that it was Appellant Jeffrey Barth's motive[1] to mislead Appellee Andrea Barth into moving to California so that he could divorce her there and that his doing so was a factor to be taken into account when deciding whether

[1] While Appellee Andrea Barth may not have used the word "motive" in her briefing in this case, that is the concept that she was clearly advocating under the very definition of motive set forth in her Motion at page 3 quoting from *State v. Wyant*, 64 Ohio St.3d 566, 571, 1992-Ohio-103 ("Motive is the reasons and beliefs that lead a person to act or refrain from acting.")

R.C. §3105.03 should be strictly applied. She argued this in the domestic relations court. See, e.g., Supplemental Brief in Support of Jurisdiction at pg. 7 (Supp. at pg. 102); Plaintiff's Response to Objections at pg. 2 (Supp. at pg. 222). She maintained this argument before this Supreme Court. See, e.g., Appellee Andrea Barth's Jurisdictional Memorandum in Case No. 2006-1048 at pg. 3; Appellee Andrea Barth's Merit Brief at pg. 1, 4, 24.

This Court clearly understood Appellee Andrea Barth's argument. See, *Barth* at ¶18 (Lundberg Stratton, J., concur) ("Appellee alleges that her husband lured her to California upon false pretenses solely to establish residency and presumably some tactical advantage by filing for divorce in California.") Having taken her argument into consideration, unlike the courts below, this Court employed rules of statutory construction to declare that "[i]n determining residency for purposes of R.C. 3105.03, a court shall not consider the motives of *either* spouse with regard to his or her establishment of residency outside of Ohio." *Barth*, supra, syllabus paragraph two (emphasis added). This Court addressed and resolved the certified issue.

Appellee Andrea Barth's "manifest weight of the evidence" argument at pages 4-6 is a red-herring and nothing more than another attempt to reargue the merits of the case. This Court did not weigh the evidence. Parsing a few words from the Court's opinion does not establish otherwise. In fact, the Court accepted Appellee Andrea Barth's version of what happened. Regardless of those facts, this Court made a *legal* determination that, because R.C. §3105.03 is to be strictly applied,

"there is no legal basis for" the courts below to have reached the conclusions they did. *Barth* at ¶16. Making such a legal determination is entirely consistent with the well-established principle that subject-matter jurisdiction is an issue "determined as a matter of law." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶34.

Without any support, Appellee Andrea Barth asserts at pages 6-7 of her Motion that this Court did not consider her argument that there was no conflict between appellate districts. Appellee Andrea Barth already made this argument in her Merit Brief at pages 7-13. Whether there was indeed a conflict was directly addressed and extensively explored by the Court with questions posed by the justices during much of the oral argument on December 13, 2006. In the end, this Court concluded that there was a conflict on the legal issue certified by the Eighth Appellate District. *Barth* at ¶¶1-2. Indeed, Justice Pfeifer dissented on this very basis. *Barth* at ¶20 (Pfeifer, J., dissent). Even so, reconsideration is not available to challenge the Supreme Court's certification of a conflict between appellate districts.[2]

Despite the suggestions to the contrary, the issues and law regarding jurisdiction of the domestic relations court pursuant to R.C. §3105.03 were

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[2] S. Ct. Prac. R. XI, §2(A) provides that "[a] motion for reconsideration * * * may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;
(2) The sua sponte dismissal of a case;
(3) The granting of a motion to dismiss;
(4) A decision on the merits of a case."

adequately briefed and competently argued by counsel for the parties. The Court appropriately gave due consideration to those arguments. Thus, the Motions for Reconsideration filed by Appellee Andrea Barth and GAL John J. Ready should be denied.

B. The GAL's Motion for Reconsideration Raises New Arguments That Were Never Raised in This Case and Therefore Have Been Waived.

In his Motion for Reconsideration, GAL John J. Ready raises arguments that were never presented by him or Appellee Andrea Barth (and, curiously, she does not advance those arguments herself in support of her own Motion).

First, GAL John J. Ready argues that the Court's decision will deprive *Appellee Andrea Barth*[3] of equal protection of the law. This argument was never raised by Appellee Andrea Barth or GAL John J. Ready in the domestic relations court, the Eighth Appellate District or in the merit briefing in this Court. Consequently, it has been waived. See, *Baker v. West Carrollton*, 64 Ohio St.3d 446, 448, 1992-

[3] The appointment of a GAL is to protect the best interests of the minor children and to advocate on their behalf in order to assist the court to insure that the children's rights are protected. *Bennett v. Fleming* (1922), 105 Ohio St. 352, 359; *Lovejoy v. Cuyahoga Cty. Dept. of Human Serv.* (1991), 76 Ohio App.3d 514, 517. This is true in a divorce case when the interests of the children often conflict with or are adverse to the parents. *Barth v. Barth* (1967), 12 Ohio Misc. 141. One wonders why then GAL John J. Ready is advancing an argument solely benefitting one spouse over the other, without any reference to how the argument is in the interest of the two minor children. Appellee Andrea Barth does not even make an equal protection argument in her own Motion for Reconsideration.

It is peculiar that during his oral argument presentation, GAL John J. Ready implored the Court to resolve the jurisdictional question as quickly as possible as doing so was, in his view, in the best interest of the two minor children and yet, with the realization that this matter is now going back to California, he is now trying to revive and prolong the dispute over whether Ohio has jurisdiction over the divorce.

Ohio-124 (equal protection challenge is waived in the Supreme Court when not first presented for consideration in the trial court or the court of appeals); *Moats v. Metropolitan Bank of Lima* (1974), 40 Ohio St.2d 47, 49-50 (same). Furthermore, the issues raised by GAL John J. Ready were already considered and rejected by this Court in *Coleman v. Coleman* (1972), 32 Ohio St.2d 155 at a time when Ohio's residency requirement for divorce was one-year, not six months. In *Coleman*, this Court concluded that, because "the state has a compelling interest in the civil status of marriage," requiring one spouse to satisfy a durational residency requirement before being permitted to file for divorce is "the least restrictive manner of insuring that its divorce laws are not utilized by nonresidents of Ohio." Id. at 162-163. See also, *Williams v. State of North Carolina* (1942), 317 U.S. 287, 298-299, 63 S.Ct. 207, 87 L.Ed. 279. This Court's decision in *Barth* does nothing more.

The GAL's argument at page 5-6 of his Motion that the Court's holding means that Appellee Andrea Barth is not able to access the courts of Ohio and California for relief is simply wrong. Nothing prevented Appellee Andrea Barth from filing for divorce in California in August 2004, even though she had not been a resident for six-months.[4] As long as Appellant Jeffrey Barth had met the residency requirement under California law (and no one disputes that he had), Appellee Andrea Barth could have filed for dissolution of the marriage in California instead of unilaterally

[4] The law in California differs from Ohio's R.C. §3105.03 in that an action seeking dissolution of the marriage can be filed in California provided that "one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition." CAL FAM. CODE §2320.

deciding to take herself and the couple's two minor children on a trek half-way across the country, first to Florida (by way of Las Vegas) and then to Ohio, in trying to file first. See, *In re Marriage of Thornton* (5th Dist. 1982), 135 Cal. App.3d 500, 507-513, 185 Cal.Rptr. 388. Further, nothing prevented Appellee Andrea Barth from immediately filing for legal separation in a California court, for which there is no residency requirement, and then amending her petition to request dissolution of the marriage once she met the six month residency requirement on January 12, 2005. See, *Forster v. Superior Court* (2nd Dist. 1992), 11 Cal.App.4th 782, 786, 14 Cal.Rptr.2d 258.

The GAL's argument that R.C. §3105.03 should be read *in pari materia* with the Uniform Child Custody Jurisdiction and Enforcement Act[5] was, like the equal protection argument, not previously raised in the courts below or in the merit briefing before this Court and is thus waived.[6] *Thompson v. Preferred Risk Mut.*

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[5] The Uniform Child Custody Jurisdiction and Enforcement Act, R.C. Chapter 3127, was not adopted in Ohio until April 2005 and therefore was not in effect in August 2004. Therefore, the UCCJEA, and in particular R. C. §3127.15, is not at issue in this appeal and certainly should not give rise to reconsideration. Moreover, the GAL's argument that it is proper to construe the two statutes *in pari materia* is inconsistent with the argument advanced by Appellee Andrea Barth in her Motion at page 6 that it was wrong for this Court to have found fault with the trial court's having construed the former Uniform Child Custody Jurisdiction Act, the predecessor statute to the UCCJEA, in such a way when deciding jurisdiction pursuant to R.C. §3105.03.

[6] Appellant Jeffrey Barth takes issue with the self-serving statement by the GAL at page 8 of his Motion that Ohio is the only state that has jurisdiction over the children in regard to allocation of parental rights, responsibilities and custody. That issue is yet to be determined by the California court that now has exclusive jurisdiction over the divorce matter filed there by Appellant Jeffrey Barth on August 25, 2004, which has been stayed while the jurisdictional issue was litigated and resolved in Ohio, an issue that has finally been resolved by this Court's decision in *Barth*.

Ins. Co. (1987), 32 Ohio St.3d 340, 342.

The Motions for Reconsideration should be denied.

II.

CONCLUSION

WHEREFORE, Appellant Jeffrey Barth respectfully requests that the Supreme Court of Ohio deny the Motions for Reconsideration filed by Appellee Andrea Barth and Guardian Ad Litem John J. Ready and proceed to issue the Court's mandate that Appellee Andrea A. Barth's complaint for divorce be dismissed for lack of subject-matter jurisdiction.

Date: April 5, 2007.

Respectfully submitted,

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