No. 2007-0863

In The Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE No. 05CA008824

WILLIAM EVANICH, et al.
Plaintiffs-Appellees,

v.

STEVEN BRIDGE, et al.
Defendants-Appellants.

MOTION OF APPELLANTS STEVEN AND MARGARET BRIDGE TO FILE A CORRECTED MERIT BRIEF TO INCLUDE A PAGE OMITTED BY INADVERTENCE

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MOTION OF APPELLANTS FOR LEAVE TO FILE
AN AMENDED, CORRECTED MERIT BRIEF
TO INCLUDE PAGE 21 OMITTED BY INADVERTANCE

Appellants, Steven and Margaret Bridge, respectfully move the Court for an order permitting them leave to file a corrected merit brief for the sole purpose of including page number 21 that had been omitted from their brief by reason of oversight and inadvertence.

MEMORANDUM IN SUPPORT

On November 26, 2007, appellants filed their merit brief. However, counsel has discovered that the brief is incomplete in that numbered page 21 was not included with the submission. The omitted page contained the concluding paragraph of the fourth argument and the introductory paragraph to the section entitled Conclusion. The next page, number 22, begins with an incomplete sentence followed by two paragraphs and ends with counsel's signature in submission of the brief. And the next following page, number 23, contains the proof of service. Although the table of contents of the merit brief clearly refers to a page number 21, it is not present in the scanned filing posted on the Court's on-line docket or in copies returned by the Clerk. As submitted, the merit brief is awkward and not intelligible and nonconforming.

Counsel is acutely aware of the rules of this Court, including Rule VI pertaining to the form and content of merit briefs. Counsel is regretful for the omission which happened by inadvertence when the merit brief was prepared for collating and photocopying the required number of copies. And though it is no excuse, the mistaken omission occurred on Thanksgiving Eve, November 21, 2007, the day the brief was transmitted the Court.

To be sure, attorneys are expected to understand and conform to the rules of this Court. See *State ex. rel. Physicians Commt. For Responsible Medicine v. Ohio State Univ. Bd. of*

Trustees, 108 Ohio St.3rd 288, 2006-Ohio-903. A failure to conform to a requirement concerning form may result in dire consequences including the striking of a party's merit brief.

Strict adherence to the rules of practice and the imposition of fatal sanctions for violations are tempered by the presumption that cases should be decided on their merits rather than procedural technicalities. See *State ex rel. Wilcox v. Seidner*, 76 Ohio St. 3rd 412 at 414, 1996-Ohio-390 (denying a motion to strike brief containing nondate-stamped notice of appeal and declaring that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on their merits). See also *State ex rel Becker v. City of Eastlake*, 93 Ohio St.3rd 502, 505, 2001-Ohio-1606 (declining to strike a brief violating S.Ct. Prac.R. VI that did not include a table of contents and a table of authorities). Even a failure of judges to include a table of contents, statement of facts, propositions of law or list of authorities contrary to S.Ct.Prac.R. V did not merit striking their filing in this Court. *State ex rel. Birdsall v. Stephenson*, 68 Ohio St.3rd 353, 1994-Ohio-520, finding the omissions not so pervasive as to justify dismissal.

In the syllabus of *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2nd 189, the Court outlined factors for determining whether or not to strike a filing. They are also apropos to consider when permitting the correction of a mistake and include whether:

> (1) appellants' counsel's mistake was inadvertent, correctable and made in good faith, not as a part of a course of continuing conduct for the purpose of delay, (2) appellee suffered no prejudice from [the] error... (3) the Court ...suffered no prejudice from [the] error... (4) the sanction of dismissal for a hypertechnical, clerical error is disproportionately harsh in view of the nature of the mistake, and (5) appellant should not be punished for a highly technical error of his counsel". *Id.* at Syllabus and p. 192.

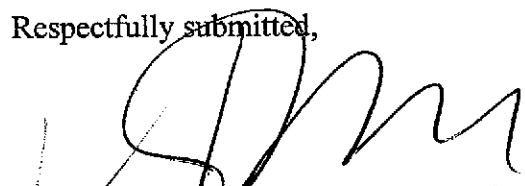
Counsel's mistake in failing to notice that a numbered page was omitted happened by inadvertence; especially since the missing page is referred to in the table of contents. It apparently occurred when static electricity combined pages when using the auto-photocopying function to produce the required copies. In any event, he certainly has not engaged in a plan for delay. The error is easily correctable with a submission of amended briefs containing the errant page. Appellees' counsel has not suffered prejudice since he did not discover the error nor bring it to the Court's or this counsel's attention. Moreover, appellees' responsive merit brief is not due until December 27, 2007; that is assuming no stipulated leave is taken.

It is true that the Court is prejudiced whenever there has been any failure to comply with its rules. And this is truely to counsel's chagrin and embarrassment. However, there is no actual harm given the briefing schedule and the clerk's relative ease of scanning and docketing a corrected brief.

Appellants should not be punished with a stricken or incomplete brief because of counsel's inattention to the process of collating and photocopying their merit brief that resulted in omitting a single page. The omission does not even approach the mistakes in merit filings that were accepted in *State ex rel. Birdsall*, *State ex. rel Physicians Commt.* and *State ex rel. Wilcox*.

The appellants, Steven and Margaret Bridge, request they be permitted to resubmit their brief containing the omitted page but without any change in pagination or otherwise. Counsel apologizes to the Court for the error that prompts this motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion of Appellants to File a Corrected Merit Brief to Include an Omitted Page was served upon counsel for the appellees, William Evanich and Roselyn Evanich, by facsimile transmission at (440) 934-7208 and by mailing the same by ordinary U.S. mail, postage prepaid, on the 12 day of December, 2007, to the following:

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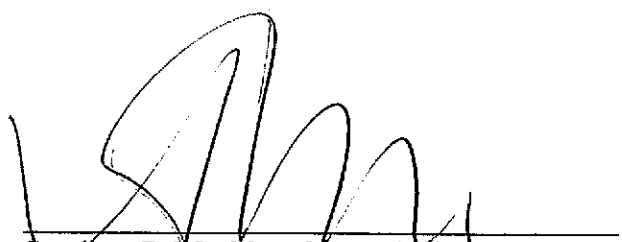

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