

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. DANIEL J. SULLIVAN

Appellee

v.

JUDGE DONALD L. RAMSEY

Appellant

\* Case No. 09-1118

\* ON APPEAL FROM THE  
LUCAS COUNTY COURT OF  
APPEALS, SIXTH APPELLATE  
DISTRICT

\* APPEAL OF RIGHT

\* Court of Appeals

\* Case No. L-09-1168

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APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO  
STRIKE MERIT BRIEF

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I. STATEMENT OF THE CASE AND THE FACTS

On April 28, 2009, Appellee Daniel J. Sullivan filed in the Sixth District Court of Appeals a Verified Complaint for Alternative and Permanent Writs of Prohibition. (Supp. 0.) The Complaint named as Respondent, Appellant Judge Donald L. Ramsey, a visiting judge serving in the Lucas County Court of Common Pleas, Domestic Relations Division. (Supp. 1.) Appellant had, since July, 2006, presided over a case entitled: *Janet M. Sullivan v. Daniel J. Sullivan*, Case No. DR-1996-0989. (Supp. 1-2, and 4.)

The Appellee's Complaint alleged that the Appellant Judge was without jurisdiction to issue an Amended Qualified Domestic Relations Order (QDRO), since the Appellee had filed a Notice of Appeal from a January 9, 2009 Judgment Entry and Qualified Domestic Relations Order (QDRO) issued by the Appellant. (Supp. 3-4.) The Complaint also alleged that the Amended QDRO interfered with and was inconsistent with the Court of Appeals' ability to affirm, modify, or reverse the January 9, 2009 Judgment Entry and QDRO. (Supp. 5.) The Complaint requested that the Court of Appeals issue an alternative writ vacating the Amended QDRO issued by the Appellant on April 7, 2009 and a permanent writ of prohibition. (Supp. 6.)

On May 7, 2009, the Sixth District Court of Appeals,

*without giving the Appellant an opportunity to respond*, issued a peremptory writ of prohibition vacating the April 7, 2009 Amended QDRO and ordering the Appellant from taking any action inconsistent with the Court of Appeals' ability to affirm, modify or reverse the January 9, 2009 judgment entry. (Appx. v.)

On June 18, 2009, the Appellant filed a timely Notice of Appeal with this Court, pursuant to *S.Ct.Prac.R. II, Sect. 1(A)* (1). (Appx. i.) On August 7, 2009, the Appellant filed a merit brief herein. The merit brief established that the Appellant had jurisdiction to issue the Amended QDRO and the Appellee had an adequate remedy at law.

On September 28, 2009, the Appellee filed a motion to strike. This motion seeks an order striking Appellant's merit brief and pages 59-61 of the Appellant's Supplement. The Appellee appears to argue that, instead of a direct appeal, the Appellant was required to file a Rule 60(B) motion. This argument is, of course, incorrect.

In addition, the Appellee asserts that the Merit Brief and Supplement pages 59-61 should be stricken because they improperly injected factual matters that were not presented to the Court of Appeals. These pages are the docket sheets from a direct appeal in the underlying case. As will be established below, pages 59-61 are properly before this.

## II. LAW AND ARGUMENT

### A. A Rule 60(B) Motion for Relief from Judgment is an Improper Motion and not a Substitute for an Appeal

As noted above, the Sixth District Court of Appeals, *without giving the Appellant an opportunity to respond*, issued a peremptory writ of prohibition vacating the April 7, 2009 Amended QDRO and ordering the Appellant from taking any action inconsistent with the Court of Appeals' ability to affirm, modify or reverse the January 9, 2009 judgment entry. (Appx. v.) Thus, the Appellant was not given the opportunity to oppose the Appellee's request for a writ or submit, as the Appellee did, any documentation, so that the Court of Appeals would have all relevant facts before it.

The Appellee now argues that, since the Appellant was not given an opportunity to respond in the Court of Appeals, he is foreclosed from raising any issues on appeal, since they are being raised for the first time in this Court. The Appellee also argues that the Appellant has waived the right to assert any issues on appeal, since he did not file a Rule 60(B) motion in the Court of Appeals.

The Appellee is, of course, incorrect.

A Civ.R. 60(B) motion cannot be used as a substitute for appeal or to circumvent the procedural requirements of an appeal. *Doe v. Trumbull County Children Services Board*(1986), 28

Ohio St.3d 128, 502 N.E.2d 605. A motion filed pursuant to Civ.R. 60(B) is intended only to provide relief from a final judgment in specific, enumerated situations and is not a substitute for an appeal.<sup>1</sup> *Kim A. Elliot v. Smead Manufacturing, Co., et al.*, Hocking App. No. 08CA13, 2009 Ohio 3754, at ¶ 13; *Naomi Ann Newell v. Steven Carl White*, Pickaway App. No. 05CA27, 2006 Ohio 637, ¶ 15. In order to fall within the limited application of Civ.R. 60(B), a party must establish the existence of extraordinary circumstance under one of the five Rule 60(B) grounds. *GTE Automatic Electric v. ARC(1976)*, 47 Ohio St.2d 146, 150, 351 N.E.2d 113; *In the Matter of the Guardianship of Albert J. Rogers*(Oct. 14, 1993), Vinton App. No. 481, unreported, 1993 Ohio App. LEXIS 5023 \*4; *State of Ohio ex rel. Gill v. Hilbert Winters, et al.*(May 2, 1988), Jackson App. No. 1539, unreported, 1988 Ohio App. LEXIS 1539 \*4-5; *Delores Taylor v. Lindal Taylor*(Mar. 17, 1987), Lawrence App. No. 1801, unreported, 1987 Ohio App. LEXIS 6282 \*10.

It is the function of an appeal to correct legal errors by a lower court. *State of Ohio ex rel. Gill v. Hilbert Winters* (May 2, 1988), Jackson App. No. 565, unreported, 1988 Ohio App.

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<sup>1</sup> Indeed, the limited application of Rule 60(B) also restricts the appellate process, since an appeal from an order denying a Rule 60(B) motion cannot include issues relating to the merits of the judgment from which relief had been sought. *Blasio v. Mislik* (1983), 69 Ohio St.2d 684, 686, 433 N.E.2d 612.

LEXIS 1539 \* 4. Consequently, where a party challenges the correctness of a court's decisions on the merits, an appeal, not a Rule 60(B) motion, is the correct remedy. *Bank One v. Grover Salser*, Meigs App. No. 05CA1, 2005 Ohio 3573, ¶ 7; *Ted Lorber v. Helen Norvelis, et al.* (Aug. 31, 1989), Cuyahoga App. No. 57481, unreported, 1989 Ohio App. LEXIS 3428 \*3; *Lucinda Russell v. Ronald C. Russell* (July 24, 1985), Clark App. No. CA-2039, unreported, 1985 Ohio App. LEXIS 6869 \*5; *Haendiges v. Widenmeyer* (1983), 9 Ohio App.3d 37, 38, 458 N.E.2d 437.

In the present case, the Appellate is not attempting to establish any of the limited grounds for relief under Rule 60(B). Instead, the Appellant is challenging the correctness of a lower court's decision on the merits.

Thus, a motion under Rule 60(B) is not the appropriate remedy. Therefore, the Appellee's argument that the Merit Brief must be stricken because the Appellant did not first file a Rule 60(B) motion is incorrect and the Appellee's motion to strike the merit brief must be denied.

**B. The Merit Brief has not Improperly Injected Factual Matters**

The Appellee also asserts that the Merit Brief and Supplement pages 59-61 should be stricken because they improperly injected factual matters that were not presented to the Court of Appeals. This assertion is also incorrect.

Except for three documents, the Appellant's Merit Brief is based only on documents submitted by the Appellee to the Court of Appeals.<sup>2</sup> These documents were a May 13, 2009 and July 6, 2009 opinions by the Court of Appeals in *Sullivan v. Sullivan*, Sixth District Case No. L-09-1123 and the docket sheets from the same case. These documents are from the direct appeal in the underlying divorce case.

Thus, the Appellant did not submit evidence outside of the record, but merely submitted opinions of the Court of Appeals and the related document sheets.<sup>3</sup> These Court documents do not constitute matters outside of the record.

Therefore, the Appellee's motion to strike must be denied.

C. Granting the Appellee's Motion would Violate Appellant's Due Process Rights

Due Process under the Fourteenth Amendment to the United States Constitution and Article I, Sec. 16 of the Ohio Constitution requires that the Appellant be given an effective opportunity to respond. See generally *Mary K. Riordan v. Civil Service Commission of the City of Lakewood* (Sept. 3, 1987),

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<sup>2</sup> As noted previously, the Sixth District Court of Appeals issued a peremptory writ of prohibition without giving the Appellant an opportunity to respond. Thus, the Appellant was not given an opportunity to submit any evidence.

<sup>3</sup> While these Court of Appeals decisions given this Court a more accurate and complete understating of the underlying case, even without them, the Appellant has established that the Court of Appeals May 7, 2009 judgment must be reversed.

Cuyahoga App. No. 52398, unreported, 1987 Ohio App. LEXIS 8578 \*4; *In the Matter of Baby Boy Heller*(Hancock App. No. 5-78-30, unreported, 1980 Ohio App. LEXIS 10781 \*6.

In the present case, the Court of Appeals essentially issued an ex parte order, since the Appellant was not given an opportunity to respond. The Appellee argues that the Order can only be challenged under the limited grounds specified in Civ.R. 60(B). In addition, the Appellee asserts that the Appellant's appeal is confined to only those facts "selected" by the Appellee and submitted to the Court of Appeals. Such a restricted process, on the whole, would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sec. 16 of the Ohio Constitution

### III. CONCLUSION

Therefore, the Appellee's motion to strike must be denied.

Respectfully submitted,

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LUCAS COUNTY PROSECUTING ATTORNEY

By: John A. Borell  
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Assistant Prosecuting Attorney  
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to the Motion to Strike was sent by Ordinary U.S. mail to the following counsel on the 6<sup>th</sup> day October, 2009:

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