

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

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**CASE NO. 2010-1965**

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EDWARD C. HARRISON, JR.,  
Plaintiff-Appellee,

-vs.-

JAMES J. DOERNER, JR.,  
Defendant-Appellant.

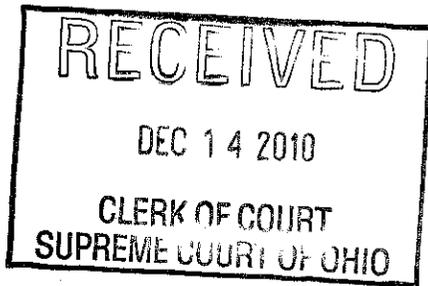
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**PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE**

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Appeal from the Court of Appeals, Eighth Appellate District  
Court of Appeals Case No. 94270

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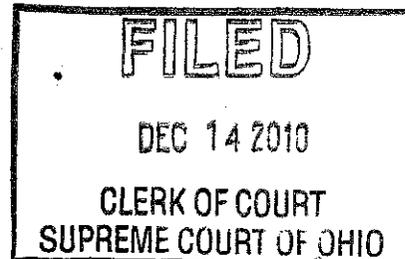


David Ledman (0038504)  
LAW OFFICE OF DAVID LEDMAN  
35000 Chardon Road, Suite 105  
Willoughby Hills, Ohio 44094  
(440) 918 – 1850  
(440) 918 – 1851 (fax)  
[ledmanlaw@lightstream.net](mailto:ledmanlaw@lightstream.net)

Attorney for Plaintiff-Appellee  
Edward C. Harrison, Jr.

Joel A. Nash (0061081)  
ATTORNEY AT LAW  
4325 Mayfield Road  
Cleveland, Ohio 44121  
(216) 691 – 3000  
(216) 291 – 1207 (fax)

Attorney for Defendant-Appellant  
James J. Doerner, Jr.



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Appellant’s Proposition of Law:

“In ruling upon a Civ. R. 60(B) motion the fact that a fraud has been perpetrated upon the trial court is a more important consideration than [sic] the timeliness of the filing of the motion.”

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**1. STATEMENT OF APPELLEE'S POSITION AS TO WHETHER THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.**

This is not a case of public or great general interest, and this Court should decline to exercise its discretionary jurisdiction in this case.

In his Memorandum in Support of Jurisdiction, Defendant-Appellant James J. Doerner, Jr. asserted that the trial court should not have overruled his Motion for Relief from Judgment (the "Motion"). According to Appellant, Plaintiff-Appellee Edward C. Harrison, Jr. obtained a judgment in this action "by a bald faced lie." (Memorandum in Support of Jurisdiction, pg. 1.) Based thereon, Appellant asserts that the trial court should have permitted him to re-litigate the claims in this case.

The Motion was overruled because it was not timely. The Judgment was entered in May 2005, and the Motion was not filed until September 2009. As such, in the Motion, Appellant was seeking relief from a judgment that was four years and four months old. In spite of the bluster and acrimony of Appellant's accusations regarding fraud, Appellant was still required to seek relief in a timely manner, and Appellant failed to do so. In this case, the trial court properly concluded that the motion was not timely, and the trial court overruled the Motion.

In the Court of Appeals, Appellant asserted that the trial court's decision was an abuse of discretion, and that the trial court's decision should have been overruled. However, on the facts of this case, the court of appeals found no abuse of discretion and affirmed the trial court's decision.

In reaching these rulings, the trial court and the court of appeals applied settled law to the unique facts of this case, and there is no public or great general interest in any further review by this Court. Moreover, if adopted, Appellant's proposition of law would permit unsuccessful litigants an unlimited period of time to claim – with little or no supporting evidence – that the prevailing party had lied, and to seek relief from a final judgment on that basis. With due respect to Appellant and his counsel, this Court should not open the floodgates to such motions.

## **2. ARGUMENT IN SUPPORT OF APPELLEE'S POSITION REGARDING APPELLANT'S PROPOSITION OF LAW.**

### **Appellant's Proposition of Law:**

“In ruling upon a Civ. R. 60(B) motion the fact that a fraud has been perpetrated upon the trial court is a more important consideration than [sic] the timeliness of the filing of the motion.”

#### **a) Introduction.**

As this Court has stated, “To prevail on a motion brought under Civil Rule 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civil Rule 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.” *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146 (syllabus, ¶ 2).

While evidence of a “fraud on the court” may satisfy one or two of these prongs, the movant is still required to establish that the motion is made within a reasonable time. In fact, as Civil Rule 60(B)(3) expressly provides grounds for relief for “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party,” a motion based on “fraud on the court” should be filed not more than one year after the judgment.

In this case, the trial court found the Motion untimely. This decision was within the sound discretion of the trial court, and the decision cannot be disturbed on appeal without a “clear showing of abuse of discretion.” See, *Wilson v. Lee* (2007), 172 Ohio App.3d 791, 795 (Montgomery Cty.). In this regard, the term “abuse of discretion” requires more than an error of law or judgment; rather, it implies that the trial court’s attitude is unreasonable, arbitrary or unconscionable. *Wilson*, 172 Ohio App.3d at 795 (quoting from *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In this case, Appellant failed to establish an abuse of discretion, on the facts of this case. Quite simply, the trial court did not abuse its discretion by overruling the Motion, and the trial court’s decision was correctly affirmed by the Court of Appeals. There is no public or great general interest in any further review by this Court. Moreover, if adopted, Appellant’s proposition of law would permit unsuccessful litigants an unlimited period of time to claim – with little or no supporting evidence – that the prevailing party had lied, and to seek relief from a final judgment on that basis. With due respect to Appellant and his counsel, this Court should not open the floodgates to such motions.

**b) Procedural History of this Case.**

Harrison commenced this action on February 4, 2004, with the filing of his Complaint. As is set forth therein, this action arises from an agreement to purchase, co-own and operate a tavern business known as the “S&S Lounge” (the “Lounge”), and also in connection with Defendant’s subsequent breach and repudiation of that agreement. (See, Complaint, pp. 1 – 3.) In the Complaint, Harrison asserted claims for breach of contract, breach of fiduciary duties, promissory estoppel and unjust enrichment, and Harrison sought compensatory damages and other relief arising from same. (See, Complaint, pp. 3 – 6.)

On November 17, 2009, Harrison filed Plaintiff’s Motion for Summary Judgment, which was based on the affidavit testimony of Harrison, the admissions of Appellant and other supporting documentation. Notably, in the motion, counsel for Harrison requested an oral hearing, noting that Appellant was not represented by counsel. (See, e.g., Plaintiff’s Motion for Summary Judgment, p. 8.)

On February 8, 2005, the trial court scheduled a hearing in connection with the motion for summary judgment, with the hearing to occur on March 10, 2005 at 3:15 p.m. Of course, the trial court was not required to schedule such an oral hearing, but counsel for Harrison and the trial court were attempting to assure that – as Appellant was proceeding *pro se* – Appellant would have an opportunity to appear and defend himself in connection with the motion.

Appellant did not appear for the March 10 hearing. Thereafter, on March 25, 2005, the trial court granted the motion, but the trial court scheduled another hearing for

May 9, 2005, for the stated purpose of reviewing the “damages issue”. In this regard, the trial court was attempting to provide Appellant with another opportunity to respond to the motion. The May 9 hearing was subsequently re-set to May 20, 2005.

On May 20, 2005, the trial court conducted an evidentiary hearing in connection with the motion for summary judgment. Once again, Appellant again failed to appear. On May 24, 2005, the trial court entered judgment in favor of Harrison and against Appellant, awarding compensatory damages in the amount of \$93,500, plus interest and costs. The judgment was based on the pleadings and evidence, including the admissions of Appellant, the affidavit testimony submitted by Harrison, and the supporting documents and exhibits referenced therein.

Appellant was aware of the judgment immediately. Yet, Appellant did not appeal from the judgment, and he sought no immediate relief from it. Meanwhile, Harrison obtained a judgment lien, and Harrison attempted to proceed with execution, including a post-judgment deposition of Appellant regarding his assets and sources of income.

Then, more than four years after the judgment, on September 11, 2009, Appellant filed the Motion, seeking relief from the trial court’s judgment entry of May 24, 2005. Essentially, in the Motion, Appellant asserted that Harrison had obtained the judgment “through fraud upon [Appellant] and the Court,” and Appellant sought to vacate the Judgment pursuant to Civil Rule 60(B)(5) and to re-litigate this case.

On October 5, 2009, Harrison filed his brief in opposition to the Motion. As was set forth therein, Harrison opposed the Motion because (1) there was no evidence of any “fraud” by Harrison in connection with the Judgment, (2) any such fraud would have

been subject to Civil Rule 60(B)(3), which is subject to a one year time limitation, and (3) in any case, Appellant failed to seek relief from the Judgment within a reasonable time, as required by Civil Rule 60(B).

The trial court overruled the Motion on October 23, 2009, noting that the Motion was not timely.

On November 18, 2009, Appellant filed a notice of appeal to the Eighth District Court of Appeals. In the appeal, Appellant asserted that the trial court should not have overruled the Motion as untimely, where Appellant was asserting that there had been a fraud on the court. After oral argument, the Court of Appeals affirmed the trial court's decision in its Journal Entry and Opinion filed September 30, 2010.

On October 8, 2010, Appellant filed a Motion to Certify a Conflict. This Motion was denied by the Court of Appeals on October 19, 2010.

Appellant filed his Notice of Appeal to this Court on November 12, 2010.

**c) There was no fraud on the Court.**

In order to establish that he has a meritorious defense, and in order to establish that he qualifies for relief pursuant to Civil Rule 60(B)(5), Appellant has asserted that Harrison perpetrated a fraud on the trial court. In support of this proposition, Appellant asserts that Harrison "knowingly misrepresented to the trial court that he was entitled to the rights and benefits of a partner" in the parties' tavern business, and that Harrison's "failure to advise the trial court of his felony record" was also a fraud upon the court. (Memorandum in Support of Jurisdiction, pg. 6.)

Essentially, Appellant has asserted that Harrison was merely hired to serve as a manager for the tavern business, that he had a felony record, that he *could not* have been a partner in the tavern business by reason of the felony record, and that his failure to advise the trial court of his felony record constituted a fraud upon the trial court.

By asserting that there was no oral partnership agreement between the parties, Appellant has ignored the evidence presented in support of Harrison's motion for summary judgment, including (a) the admissions made by Appellant, (b) the Affidavit of Harrison, and (c) the supporting documentary evidence referenced therein. As is plainly set forth therein, Harrison and Appellant did have an oral partnership agreement in connection with the purchase, ownership and operation of the tavern, which is corroborated by their joint execution of the promissory note for the purchase of the assets of the business, and by their joint execution of a sub-lease for the tavern location.

By asserting that Harrison should have advised the trial court of his felony record, Appellant's counsel opines that "it is unlikely that the division [of liquor control] would grant a permit to [Harrison] with his felony record." (Memorandum in Support of Jurisdiction, pg. 7.) In this regard, the relevant restrictions on the issuance of a liquor permit are set forth in Ohio Rev. Code §4303.29(A). This section was amended by the Ohio General Assembly in 1994 – at least six years before Harrison and Doerner's partnership – to provide that the division of liquor control has discretion to issue liquor permits to persons convicted of felonies. In fact, the division of liquor control is not supposed to deny a liquor permit unless the felony conviction is reasonably related to the person's fitness to operate such a business. Thus, although Harrison was convicted of a

felony, he *could* have been a partner in the tavern business, and his felony conviction did not prevent him from entering into an oral partnership agreement with Appellant.

Ultimately, despite Appellant's effort to re-characterize the evidence that was presented to the trial court as "fraudulent" or sham evidence, the record contains substantial testimony, exhibits and other evidence supporting the trial court's finding that there was an oral partnership agreement. Despite the opinions of Appellant's counsel regarding Harrison's fitness to operate a liquor establishment, Harrison did not perpetrate a fraud on the trial court by testifying to these facts. Although Appellant now wants to re-litigate this matter, there is ample evidence to support the judgment entered by the trial court, and it should not be disturbed.

**d) The Motion was not timely.**

In any event, the Motion was not timely, and the trial court did not abuse its discretion by denying the Motion on this basis – whether Appellant was proceeding under Civil Rule 60(B)(3) or (5).

First, as Appellant was seeking relief from the judgment based on fraud, misrepresentation or other misconduct of an adverse party, Appellant should have been proceeded under Civil Rule 60(B)(3). As such, Appellant was required to seek relief from the judgment not more than one year after the judgment was entered. As the Motion was not filed until four years and four months after the judgment, the trial court was correct to find the Motion untimely.

Second, although Appellant has attempted to evade the one-year time limit by claiming that he is entitled to relief pursuant to Civil Rule 60(B)(5), he should not be

permitted to do so. As is apparent from the language of Civil Rule 60(B)(5), relief under that subsection is limited to reasons “other” than those set forth in items (1) through (4) of the rule. See, *Celina Mutual Insurance Co. v. State of Ohio* (1971), 31 Ohio Misc. 21, 26 – 27 (South Euclid Municipal). Thus, this Court has stated that Civil Rule 60(B)(5) is “intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment,” but this Court also noted that Civil Rule 60(B)(5) cannot be used as a substitute for the more specific provisions of the rule, stating as follows:

[T]he grounds for invoking said provision should be substantial. Staff Note to Civil Rule 60(B); *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. Nor should Civ. R. 60(B)(5) be used as a substitute for any of the other more specific provisions of Civ. R. 60(B). *Adomeit v. Baltimore, supra; Antonopoulos v. Eisner* (1972), 30 Ohio App.2d 187.

*Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66.

Appellant cannot contend that he should be relieved from the judgment “simply because [he] had a meritorious defense.” See, *Caruso-Ciresi*, 5 Ohio St.3d at 66. In *Celina*, an Ohio court made the following observation:

Since Rule 6(B) specifically precludes a court from extending the time for taking any action under Rule 60(B), it seems clear that it was not the intent of the Ohio Supreme Court when it promulgated Rule 60(B) of the Ohio Rules of Civil Procedure to permit Item (5) of Rule 60(B) to be used as a means of circumventing the one-year time limitation provided for Items (1), (2) and (3) of Rule 60(B).

*Celina*, 31 Ohio Misc. at 26.

Thus, if Appellant could present evidence of fraud or misrepresentation by Harrison, he should have sought relief from the trial court’s judgment pursuant to Civil

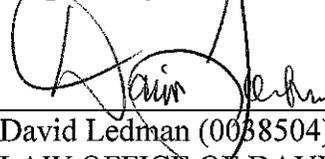
Rule 60(B)(3), and within the one year time limitation applicable thereto. Appellant failed to seek relief within such one year period, and, as such, the Motion was untimely.

Third, and finally, assuming *arguendo* that Appellant could present evidence of a “fraud on the trial court,” Appellant still would have been required to seek relief from the judgment “within a reasonable time,” whether pursuant to Civil Rule 60(B)(5) or otherwise. In this case, it would not be an abuse of discretion for the trial court to have found that Appellant failed to seek such relief within a reasonable time, and, as such, to overrule the Motion as untimely.

### 3. CONCLUSION

For the foregoing reasons and authorities, Plaintiff-Appellee Edward C. Harrison, Jr. respectfully requests this Court to decline to exercise jurisdiction in this matter. The trial court overruled the Motion as untimely, and it was not an abuse of discretion for the trial court to do so. The trial court applied settled law to the unique facts of this case, and there is no public or great general interest in any further review by this Court.

Respectfully submitted,



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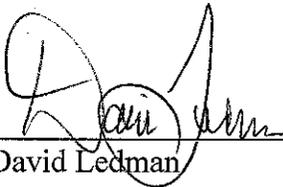
David Ledman (0038504)  
LAW OFFICE OF DAVID LEDMAN  
35000 Chardon Road, Suite 105  
Willoughby Hills, Ohio 44094  
(440) 918 – 1850  
(440) 918 – 1851 (fax)  
[ledmanlaw@lightstream.net](mailto:ledmanlaw@lightstream.net)

Attorney for Plaintiff-Appellee  
Edward C. Harrison, Jr.

**CERTIFICATE OF SERVICE**

A copy of the foregoing Plaintiff-Appellee's Memorandum in Response has been sent by ordinary U. S. mail, postage prepaid, this 13<sup>th</sup> day of December 2010, to the following:

Joel Nash, Esq.  
ATTORNEY AT LAW  
4325 Mayfield Road  
South Euclid, Ohio 44121

  
\_\_\_\_\_  
David Ledman