ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., ALEXANDRE NEOFOTISTOS,	)	CASE NO. 10-1042
Appellant,	)	**MOTION FOR RECONSIDERATION OF THE *SUA SPONTE* DISMISSAL OF THIS CASE AND MEMORANDUM IN SUPPORT.**
v.	)	
INDUSTRIAL COMMISSION OF OHIO, et al.,	)	
Appellees.	)	

Appellant, Alexandre Neofotistos, by and through counsel, and pursuant to S. Ct. Prac. R. XI, Section 2, hereby respectfully requests that this Court reconsider its *sua sponte* dismissal of this case because Appellant's Brief was presented for filing one (1) day late, all as is more fully set forth in the attached Memorandum In Support, which is incorporated as if fully rewritten herein.

FILED
FEB 04 2011
CLERK OF COURT
SUPREME COURT OF OHIO

CONSOLO O'BRIEN LLC

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CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., ALEXANDRE NEOFOTISTOS,	)	CASE NO. 10-1042
Appellant,	)	**MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE *SUA SPONTE* DISMISSAL OF THIS CASE.**
v.	)	
INDUSTRIAL COMMISSION OF OHIO, et al.,	)	
Appellees.	)	

Pursuant to stipulation of the parties, Appellant's Brief was to be filed on Monday, January 31, 2011. However, on Saturday, January 29, as Counsel of Record had finalized Appellant's Brief and was readying it to be sent via UPS overnight mail on Saturday for timely filing with this Court on Monday, January 31, counsel was unable to print the brief due to an error in his Kyocera printer. *See Affidavit of Counsel Of Record, Frank Consolo, attached hereto as Exhibit 1.*

Counsel tried unsuccessfully to solve the problem on his own because no repair service was available over the weekend. As a result, counsel was unable to place the brief in overnight mail for timely delivery on January 31. *Id.*

At approximately 1:00pm on Monday, January 31, after waiting for a repairman, counsel successfully rebooted and restarted the printer, clearing the error. Counsel made the requisite number of copies and the brief was ready by about 2:00pm. *Id.*

Counsel was going to have his legal assistant drive the brief from Cleveland to Columbus for filing. However, counsel was concerned with the approaching winter storm into the Columbus area based on reports that freezing rain had begun to fall in Columbus in the afternoon. As a result, counsel decided to prepare a motion for leave to file one (1) day late and send the brief by UPS overnight mail. *Id.*

Appellant's Brief was presented to the Clerk of Court on February 1 but the Clerk rejected the brief for filing because it was late. The Clerk's office telephoned counsel on February 1 to notify him of the rejection. Counsel immediately notified opposing counsel of the rejection and prepared this request for reconsideration. *Id.*

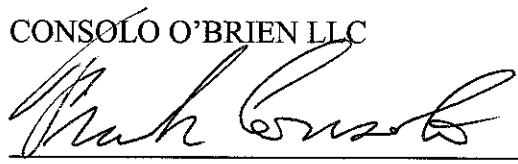
Counsel meant no disrespect to this Court or the administration of its rules. Appellant's Brief was completed on Saturday, January 29, two days before it was due. But because the printer problem occurred on the weekend and was not remedied until Monday, January 31 counsel missed placing the brief in overnight mail on Saturday.

Moreover, because of counsel's fear of the winter storm and freezing rain that hit the Columbus area beginning Monday, January 31, counsel did not have the brief driven from Cleveland to Columbus for filing. Instead, counsel placed the brief in overnight mail on January 31 and requested leave to file one (1) day late.

This was a stupid mistake by counsel but Appellant should not suffer from it. Appellant's Brief presents worthy propositions of law that Appellant deserves to have considered by this Court.

Therefore, Appellant respectfully requests that this Court reconsider its *sua sponte* dismissal of this case because Appellant's Brief was presented for filing one (1) day late, and allow Appellant to present his Brief for filing and due consideration by this Court.

CONSOLO O'BRIEN LLC



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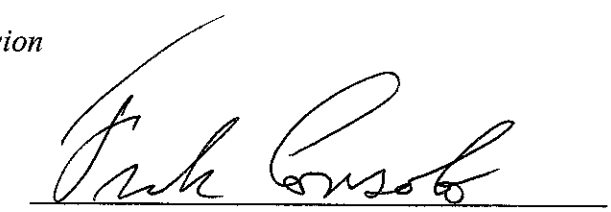
Attorney for Appellant Neofotistos

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion For Reconsideration and Memorandum In Support was sent by regular U.S. mail, postage prepaid, this 3d day of February, 2011 to:

Gerald Waterman
Eric Tarbox
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215-3130
Attorneys for Appellee Industrial Commission



FRANK CONSOLO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., ALEXANDRE NEOFOTISTOS,	)	CASE NO. 10-1042
Appellant,	)	**AFFIDAVIT OF FRANK CONSOLO IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE *SUA SPONTE* DISMISSAL OF THIS CASE.**
v.	)	
INDUSTRIAL COMMISSION OF OHIO, et al.,	)	
Appellees.	)	

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

I, Frank Consolo, being first duly sworn, hereby depose and state as follows:

1. This Affidavit is made based on my personal knowledge and given in support of reconsideration.

2. I am Counsel of Record in this case for Appellant Neofotistos. Because I just recently became involved in the case the parties stipulated to a twenty day extension to file Appellant's Brief. Pursuant to stipulation of the parties, Appellant's Brief was to be filed on Monday, January 31, 2011.

3. On Saturday afternoon, January 29, I finalized Appellant's Brief and was readying it to be sent via UPS overnight mail on Saturday for timely filing with this Court on Monday, January 31. However, when I went to print the final brief on my office's Kyocera printer it would not print due to some kind of hardware error. I tried unsuccessfully for over two hours to get the brief printed, even trying to utilize an old HP printer in my office. By that time I had missed the Saturday pickup for UPS. No repair service was available over the weekend. The next morning, Sunday, January 30, I again tried unsuccessfully to print the brief and even tried re-booting our network server. This made matters worse because the server failed and I now could not even access Appellant's Brief.

4. On Monday, January 31 I was able to get the network server back on-line and gained access to Appellant's Brief and my staff called a repairman for the Kyocera. At approximately 1:00pm, after waiting for a repairman, I successfully rebooted and restarted the printer, clearing the error. My office made the requisite number of copies and the brief was ready by about 2:00pm. .

5. I was going to have my legal assistant drive the 2 hours from Cleveland to Columbus for filing the brief. However, after hearing news reports about the huge winter storm coming North from St. Louis I checked the Columbus Channel 4 news website and saw reports that freezing rain was hitting Columbus and would worsen through the afternoon. I decided it was not safe to have anyone drive to Columbus to file Appellant's Brief. Instead I prepared a motion for leave to file one (1) day late and sent the brief and copies by UPS overnight mail.

6. The next day, February 1, which is the same day I am giving this Affidavit, the Clerk's Office called my legal assistant to notify us that the brief was presented for filing on February 1 but was being rejected for being untimely. The Clerk's Office indicated we could

seek reconsideration when this Court dismisses the appeal. As a result I immediately prepared this Affidavit and prepared a motion for reconsideration. My office also notified Assistant Attorney General Waterman that Appellant's Brief had been rejected for filing.

7. In hindsight, it was a stupid mistake not to drive the brief to Columbus but I was very worried about the storm and freezing rain. I never meant any disrespect to this Court or its rules. I have been admitted to practice in this State since 1989 and have never filed anything late and had it rejected. I apologize for the mistake. But Mr. Neofotistos should not suffer from it. Appellant's Brief presents worthy propositions of law that Mr. Neofotistos deserves to have considered by this Court.

FRANK CONSOLO

SWORN TO, AND SUBSCRIBED BEFORE ME, a Notary Public, on this 1st day of February, 2011.

Notary Public

SUZANNE ZARANKO
Notary Public, State of Ohio, Cuy. Cty.
My commission expires Feb. 12, 2011