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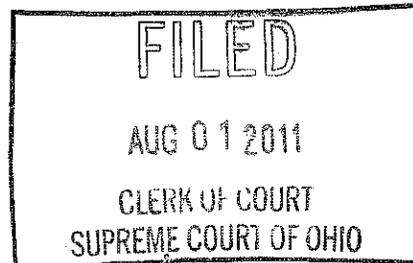
IN THE SUPREME COURT OF OHIO

JULIE ROSE ROWELL	:	
Appellant,	:	Case No. 2011-1053
	:	
v.	:	On Appeal from the Franklin
	:	County Court of Appeals,
JULIE ANN SMITH	:	Tenth Appellate District
Appellee.	:	
	:	Court of Appeals Case Nos.
	:	10AP—675 and 10AP-708

APPELLANT’S MEMO CONTRA APPELLEE’S “MOTION TO DISMISS AND MEMORANDUM CONTRA MOTION TO CLARIFY STAY ENTRY”

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Appellant's Memorandum Contra Appellee's Second "Motion to Dismiss and
Memorandum Contra Appellant's Motion to Clarify Stay Entry"

Appellee has filed a second "Motion to Dismiss" in combination with her Memorandum Contra Appellant's Motion to Clarify Stay Entry". Appellee's Motion to Dismiss should be denied.

First, the portion of the combination motion and memo that purports to be a new Motion to Dismiss is, in essence, a nearly duplicate filing of and /or supplemental argument to Appellee's earlier motion to dismiss as filed on June 29, 2011, thus violating at least the spirit of the Supreme Court Rules of Practice that make no provision for supplemental filings or reply memoranda. Inasmuch as this Court already granted Appellant's Motion for Stay, this second Motion to Dismiss, despite its title, is perhaps more in the nature of a Reply Memorandum which is also not provided for in the Supreme Court Rules of Practice except in certain specified circumstances. Accordingly, the Motion to Dismiss raises no new legal issues and should be denied.

The nature of Appellee's combination Motion to Dismiss and additional Memorandum would appear, based upon the nature and volume of the assortment of exhibits shared, be an attempt to reach out to this Court to argue the dispute between the parties that remains before the trial court at this time (this matter is still in trial). Alternatively, Appellee seems to argue the merits of the proposed appeal even before this Court accepts jurisdiction, rather than focusing on the limited procedural matter that is properly at issue at this time: the terms of this Court's Stay Entry. In essence, the only real question (and what Appellee is really opposing) is whether or not Appellee will be required to permit visitation consistent with the reinstated temporary order pending the outcome of this appeal, or whether, as Appellee seeks, she will remain free to refuse to

provide visitation pursuant to the reinstated temporary order without consequence, thereby undermining the purpose of temporary orders in general and, more to the point herein, undermining the purpose of issuing the stay and reinstating the temporary order.

Beyond that issue, the bulk of Appellee's argument and exhibits are an inappropriate attempt at this time to ask this Court to step in and determine the outcome of this case before the trial court has even had an opportunity to find the facts and apply the law in the first instance. As has been pointed out in earlier pleadings, this matter is only now in trial before the Magistrate, and despite Appellee's attempt to document and then argue to this Court Appellee's one-sided version of the "facts", these "facts" as urged by Appellee have not been determined by the trial court and many are either presented out of context, are very much contested despite representations to the contrary by Appellee, or have explanations other than Appellee has offered. Indeed, Appellee's filing of a second Motion to Dismiss and the exhibits attached thereto highlights the sound reasons behind Ohio's appellate court's general deference in such matters to the finder of fact who has the opportunity to hear testimony and assess the credibility of witnesses. It is, quite simply, inappropriate and inconsistent with the terms and spirit of the Rules of Practice of the Supreme Court for Appellee to urge this Court to make and act upon independent factual determinations, via Appellee's second Motion to Dismiss and the assortment of purportedly uncontroverted factual appendices, including, for example, copies of affidavits submitted by Appellee in opposition to the Magistrate's initial issuance of temporary orders nearly three years ago (content largely controverted), copies of documentary evidence that are only now being introduced at the trial of this matter (out of context), and the like.

Appellee has, in her second Motion to Dismiss, certainly made her strenuous and continued desire to avoid compliance with the reinstated temporary orders, quite clear. Appellee's clarity and singularity of purpose does not justify her attempt to state facts as fact that have not as yet been determined by the trial court. This is not properly a new forum in which to submit affidavits to determine whether the terms set forth in the reinstated temporary order are appropriate given the magistrate's evaluation of competing affidavits upon which the temporary orders are based, and to ask this Court to review them anew.

Counsel for Appellant takes umbrage at Appellee's claim that Counsel for Appellant in any manner "misled" this Court in Appellant's earlier Motion for Clarification of Stay. Indeed, despite Appellee's claim at page 3 of her second Motion to Dismiss that Appellant "misled" this Court regarding Appellee's compliance with the underlying visitation order, it is uncontroverted by Appellee that the very day that Appellee filed this second Motion to Dismiss, July 22, 2011, Appellee completed her two weeks of uninterrupted vacation time with the minor child and at 6:00 p.m. on that day, pursuant to the reinstated temporary order, Appellant was entitled to begin a week of visitation with the minor child. It is further uncontroverted that Appellee failed to make the child available for visitation on that date as called for by the reinstated order and has failed to make the child available for visitation at any time since that date. Several attempts by Appellant's counsel to contact Appellee's counsel to confirm Appellee's intention relative to permitting visitation pursuant to the reinstated temporary order at the end of Appellee's asserted two-week vacation period were simply ignored.

This is exactly the kind of non-compliance with temporary orders reinstated during the appeal below that led the Tenth District Court of Appeals to release its earlier stay against enforcement of the contempt sanction that was at issue in this very appeal, inviting Appellant to approach the trial court to pursue enforcement during that appeal. And now, Appellee's continued refusal to comply with the temporary orders as reinstated by this Court has led Appellant to request clarification authorizing the trial court to enforce the sanctions already ordered against Appellee for her previous violation of the reinstated temporary order and to permit sanctions for contempt and enforcement as may be required over the coming months to obtain Appellee's compliance with the reinstated temporary orders until such time as this Court resolves this appeal.

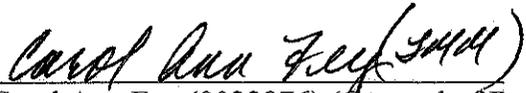
For all of these reasons, Appellant respectfully requests that this Court deny Appellee's second Motion to Dismiss and, consistent with Appellant's Motion to Clarify, issue an amended Entry clarifying and amending this Court's July 8, 2011 Entry reinstating the temporary orders. To fail to clarify and amend this Court's July 8, 2011 Entry in order to confirm that the trial court has authority to enforce the reinstated temporary orders during the appeal process, given Appellee's historically consistent and now ongoing refusal of the Appellee to comply with such orders, will unquestionably render the reinstated temporary orders completely impotent.

In essence, to dismiss the Stay or refuse the clarification sought, as requested by Appellee, would simply and predictably permit Appellee to continue to deprive the child of visitation with and, indeed, any access to or communication of any kind with Appellant during the pendency of this appeal, without consequence, thus continuing Appellee's refusal to provide visitation between the minor child and Appellant since June

10, 2011. Appellant trusts that was not the intention of this Court when it stayed the decision of the court of appeals and reinstated the trial court's temporary orders on July 8, 2011.

Thank you for your consideration.

Respectfully submitted,


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Massucci & Kline LLC

Attorneys for Appellant Julie Rose Rowell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum was sent by ordinary U.S. mail to counsel for Appellee, Gary J. Gottfried and Eric M. Brown, 608 Office Parkway, Suite B, Westerville, Ohio 43082, and to Meredith A. Snyder, Guardian ad Litem, 572 East Rich Street, Columbus, Ohio 43215, on August 1, 2011.


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