

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 4

Proposition of Law No. 1: Litigants’ appeals should be decided on their merits and not be dismissed based on a procedural defect. 4

Proposition of Law No. 2: Litigants should not be penalized for acting *pro se* when they make a good-faith effort to comply with the Ohio Rules of Appellate Procedure. 5

Proposition of Law No. 3: Filing the Notice of Appeal on the thirty-first day caused no undue delay or prejudice to the Court of Appeals or the Appellee..... 7

CONCLUSION..... 8

CERTIFICATE OF SERVICE 9

APPENDIX..... 10

TABLE OF AUTHORITIES

Cases

DeHart v. Aetna Life Ins. Co. (1982) 69 Ohio St. 2d 189, 1934

DeHart v. Aetna Life Ins. Co. 69 Ohio St. 2d 189.....7

Hawkins v. Marion Correctional Inst.(1986), 28 Ohio St. 3d. 4.....4

Marion Production Credit Assn. v. Cochran (1988), 40 Ohio St. 3d. 265, 271.....4

Montgomery v. R & D Chem Co.....5

Sabouri v. Ohio Dept. of Job & Family Serv. (2001), 145 Ohio App. 3d 651, 6546

State ex rel. Lindenschmidt v. Butler Cty. Bd. Of Commrs. (1995) 72 Ohio St. 3d 464, 4664

State ex rel. Montgomery.....5

State ex rel. Montgomery v. R & D Chem. Co. (1995), 72 Ohio St. 3d 202.....4

Other Authorities

App. R. 4.....1, 7

App. R. 4(A)5

App. R. 5.....6

App. R. 5(A)1

App. R. 9(B)(3).....5

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC
OR GREAT GENERAL INTEREST**

This cause presents a critical issue for civil litigants on appeal; specifically, whether courts should have the discretion to vest jurisdiction in courts of appeal when the filing of the notice of appeal is tardy for an unavoidable and compelling reason.

In this case, the court of appeals denied Appellant's Motion for Delayed Appeal and Appellant's Motion for Reconsideration based on the fact that App. R. 5 does not allow for a delayed appeal in civil matters and because Appellant filed her Notice of Appeal one (1) day past the time prescribed by App. R. 4. The court of appeals also ruled that it did not have jurisdiction to allow an appeal to proceed even if the litigant has a compelling reason for failing to timely file the notice of appeal.

The decision of the court of appeals, while consistent with prior decisions of the U.S. Supreme Court, threatens all civil litigants' access to the appellate courts, making this case one of great general interest. While Appellant does not dispute the necessity and prudence of the timing requirements contained within the Ohio Rules of Appellate Procedure, Appellant posits that a blanket rule divesting the courts of jurisdiction for *every* situation in which a civil appeal is not timely filed does not take into account often unavoidable circumstances and thus unfairly prejudices litigants. It is logical and in keeping with the spirit of American jurisprudence that in compelling circumstances courts afford civil litigants the same opportunity given to criminal litigants under App. R. 5(A): namely, the right to file a delayed appeal.

Accordingly, this case puts in issue civil litigants' access to the appellate system. To promote litigants' appeals being decided on their merits, to promote *pro se* litigants not being penalized for procedural defects when a good-faith effort has been made to comply with the same; and because there was neither prejudice nor undue delay to the appellee or court of appeals

due to Appellant's untimely filing of her appeal, this court should grant jurisdiction to hear this case and review the decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from a professional liability claim against Attorney Jeffrey A. Burkam and his law firm Burkam, Fuller & Herzog. (App., p. 1). Appellant retained Attorney Burkam in September 2006 as counsel for her pending divorce case. (*Id.* at p. 2). As part of his representation of Appellant, Attorney Burkam advised that Appellant agree to a settlement. (*Id.* at p. 3). She signed the agreement under Attorney Burkam's advice and an Agreed Entry on Divorce was filed. (*Id.* at pp. 3-4).

Appellant terminated Attorney Burkam's representation of her in October of 2006. (App., p. 4). Thereafter, Appellant filed an action for professional liability alleging that Attorney Burkam and his law firm failed to exercise reasonable care in a manner that proximately caused her to sustain economic damage including but not limited to child support, spousal support, and division of marital property. (*Id.* at pp. 4-5). She dismissed this case without prejudice on May 5, 2008 and timely re-filed it on May 4, 2009; Delaware County Court of Common Pleas Case No.: 09-CV-A-05-0575. (*Id.* at p. 1).

On August 15, 2011, the Court entered judgment for the defendants. (App., p. 6).

On September 15, 2011, Appellant Patricia A. Byers, acting *pro se*, filed a Motion for Leave to File a Delayed Appeal and a Notice of Appeal of the Judgment Entry of the Delaware County Court of Common Pleas entered on August 15, 2011 in case number 09-CVA-05-0575. The court of appeals filed a judgment entry on September 23, 2011 denying her motion and dismissing the appeal for want of jurisdiction. (App., p. 7). The motion was denied because

App. R. 5 does not allow for a delayed appeal in civil matters, and the appeal dismissed because Appellant filed her notice of appeal on the thirty-first day.

Thereafter, Appellant filed a Motion for Reconsideration on October 3, 2011. This motion was denied on October 20, 2011 for want of jurisdiction due to the untimely notice of appeal. (App., p. 8).

Appellant is the mother and guardian of her and her ex-husband's daughter Brooke. Brooke suffers from serious medical problems including, but not limited to, cystic fibrosis. Brooke's conditions require frequent medical attention and near constant care by her mother.

Due to the severity of her cystic fibrosis, Brooke is treated at The Indiana University Department of Pediatrics in Indianapolis, Indiana. Her mother, as guardian and caretaker, is required to be present when Brooke is seen and treated at this facility. Because of the touch-and-go nature of her daughter's health, Appellant does not have the luxury of scheduling appointments around important dates. When Brooke has a flare-up of her cystic fibrosis, Appellant is forced to ignore all other obligations and drive her daughter to Indianapolis for treatment. Unfortunately for Ms. Byers, Brooke experienced one of these unforeseen flare-ups of her cystic fibrosis the week that the Notice of Appeal was due in the court of appeals.

On September 13, 2011, Appellant and her daughter were attending the funeral of Appellant's grandmother in Lima, Ohio. While at the funeral, Brooke experienced a flare-up which necessitated being seen at Indiana University Department of Pediatrics the next day – September 14, 2011. Appellant had no choice but to take her daughter straight from the funeral to Indianapolis. Brooke's appointment was at 3:00 p.m. on September 14, 2011, and although Appellant came straight home after the appointment it was too late to file her Notice of Appeal.

On September 15, 2011, Appellant went to the Delaware County Court of Common Pleas to file her Notice of Appeal, knowing that she was filing a day past the deadline. As such, she filed a Motion for Leave to File a Delayed Appeal and Memorandum in Support pursuant to App. R. 5. Because she was acting *pro se*, she was not aware that this motion was not available for civil appeals. In addition to filing the motion and memorandum in support, she also filed all necessary paperwork to perfect her notice of appeal, including: the notice of appeal, the docketing statement, a time-stamped copy of the judgment, the praecipe for transcript and the request to file transcript.

This motion was denied and the appeal dismissed as outlined above, as was the motion for reconsideration she filed thereafter.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Litigants' appeals should be decided on their merits and not be dismissed based on a procedural defect.

Deciding a case on its merits is a fundamental tenet of judicial review. *Hawkins v. Marion Correctional Inst.* (1986), 28 Ohio St. 3d. 4. The Supreme Court has routinely held that, if possible, cases should be decided on their merits, despite procedural deficiencies. *See e.g. State ex rel. Lindenschmidt v. Butler Cty. Bd. Of Commrs.* (1995) 72 Ohio St. 3d 464, 466; *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St. 3d. 265, 271. The longstanding belief of the Court is that “[f]airness and justice are best served when a court disposes a case on the merits.” *DeHart v. Aetna Life Ins. Co.* (1982) 69 Ohio St. 2d 189, 193.

The Ohio Supreme Court routinely decides cases on their merits despite procedural defects, as the Court’s treatment of *State ex rel. Montgomery v. R & D Chem. Co.* (1995), 72 Ohio St. 3d 202, clearly shows. There, the State sued defendants for storing, treating, and disposing of hazardous waste in violation of hazardous waste laws. (*Id.* at 203). The trial court

ruled in favor of the State, ordered an injunction against the defendants and imposed a \$50,000.00 fine. (*Id.*). Appellants appealed, but failed to file a transcript as required by App. R. 9(B)(3). The Court of Appeals affirmed the findings of the trial court due to the appellants' failure to properly file a trial transcript. (*Id.*). On appeal, the Supreme Court held that "given the important issues involved in this case and the fact that a trial transcript is indeed available, this case should be decided on the merits." (*Id.* at 204.).

Here, Appellant's underlying case was for legal malpractice. The trial court ruled against her. Because of the unavoidable hospitalization of her daughter, Appellant filed her notice of appeal one day after the period of time prescribed by App. R. 4(A). Legal malpractice - like hazardous waste - is an important issue as the performance of attorneys directly impacts the efficiency and maintenance of justice. Further, just like the trial transcript was available in *State ex rel. Montgomery*, the notice of appeal and all supporting documentation was available to the court of appeals in the instant matter.

Thus, because this appeal dealt with important issues and the notice of appeal is available, this court of appeals should have followed the lead of the Supreme Court in *State ex rel. Montgomery v. R & D Chem Co.* Therefore, this court should grant jurisdiction to hear this case and review the decision rendered in the court of appeals.

Proposition of Law No. 2: Litigants should not be penalized for acting *pro se* when they make a good-faith effort to comply with the Ohio Rules of Appellate Procedure.

When Appellant filed her Notice of Appeal on September 15, 2011, she was not represented by counsel and was acting *pro se*. As such, she did not fully appreciate the rules and timing issues set forth in the Ohio Rules of Appellate procedure. Despite her lack of counsel, she made a good-faith effort to comply with the rules, as evidenced by her filing of the documents required for an appeal.

Due to placement of the write-in Motion for a Delayed Appeal form at the Clerk of Courts office at the Delaware County courthouse, Appellant was under the mistaken impression that this motion was available for both civil and criminal matters. Thus, knowing that she was filing her notice of appeal a day late because of her daughter's unavoidable hospitalization, she filed this motion along with her notice of appeal in an attempt to comply with the rules. Because she was proceeding as a *pro se* litigant, she did not understand that this motion is unavailable for civil matters under App. R. 5.

Appellant should not be penalized for her failure to understand the rules. It is true that the Supreme Court has held that *pro se* litigants are presumed to have knowledge of the law and legal procedures and thus, should be held to the same standard as litigants who are represented by counsel. *State ex rel. Fuller v. Mengel* (2003) 100 Ohio St. 3d 352, 354 (citing *Sabouri v. Ohio Dept. of Job & Family Serv.* (2001), 145 Ohio App. 3d 651, 654). However, this presumption is flawed. Appellant, like most *pro se* litigants, must rely on their own personal education and experience when reading the laws and rules and as such, much can be lost in translation. Appellant's mistaken belief that a Motion for Delayed Trial was available based on its placement in the Clerk of Courts' office illustrates this fact perfectly. While it is true that *pro se* litigants should not be given *carte blanche* when it comes to the legal system, they should not be precluded from asserting their legal rights based on their lack of legal sophistication either.

The fact remains that Appellant made a good-faith effort to comply with the Ohio Rules of Appellate Procedure. Dismissing her claim based on her lack of knowledge of sophisticated legal procedure unfairly prejudiced her. As such, this court should grant jurisdiction to hear this case and review the decision of the court of appeals.

Proposition of Law No. 3: Filing the Notice of Appeal on the thirty-first day caused no undue delay or prejudice to the Court of Appeals or the Appellee.

Appellant's appeal was dismissed by this Court for want of jurisdiction due to her filing the notice of appeal on the thirty-first day, making it untimely. However, the filing of this Notice of Appeal on the thirty-first day, as opposed to the thirtieth, caused no undue delay or prejudice to the appellee. In *DeHart v. Aetna Life Ins. Co.* 69 Ohio St. 2d 189, the Supreme Court held that:

A court of appeals abuses its discretion when, after dismissing a case, sua sponte, for a minor, technical, correctable, inadvertent violation of a local rule, it refuses to reinstate the case when: (1) the mistake was made in good faith and not as part of a continuing course of conduct for the purpose of delay, (2) neither the opposing party nor the court is prejudiced by the error, (3) dismissal is a sanction that is disproportionate to the nature of the mistake . . . (5) dismissal frustrates the prevailing policy of deciding cases on the merits.

Appellant recognizes that App. R. 4 is not a local rule and that the filing of a notice if appeal past the time prescribed by rule is not minor or correctable. However, given the specific circumstances of her situation – specifically, her daughter's unavoidable out-of-state hospitalization - this Court should apply the same rationale it did in deciding *DeHart*.

First, Appellant did not file her notice of appeal for purposes of delay or in bad faith. Rather, Appellant was precluded from filing her notice of appeal on September 14, 2011 due to the unavoidable hospitalization of her daughter in Indianapolis. Further, knowing that her daughter's hospitalization had caused her to miss the filing date, Appellant attempted to comply with the Ohio Rules of Appellate Procedure by filing a Motion to File Delayed Appeal. Although this type of motion is not available for civil appeals, the fact that Appellant filed it shows that her late filing of her Notice of Appeal was not in bad faith or solely to delay appellee or the court.

Second, the filing of her notice of appeal on the thirty-first day – instead of the thirtieth – prejudiced neither the court of appeals nor the appellee. Both the court of appeals and the appellee had the same amount of time in which to proceed as they would have had the notice of appeal had been filed on the thirtieth day.

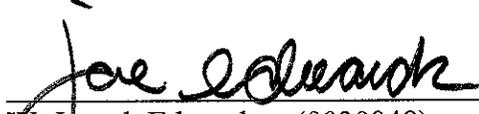
Third, dismissal is a sanction that is disproportionate for the nature of the mistake at issue here. Appellant did not file her notice of appeal one year, or even one week late. She filed it *one day* late due to her daughter's hospitalization. She should not be deprived of justice due to her daughter's health problems. Finally, as stated in section (A), dismissal of Appellant's appeal on a procedural deficiency frustrates the prevailing policy of deciding cases on the merits.

Therefore, because there was no undue delay or prejudice to the court of appeals or appellee caused by Appellant's filing of her notice of appeal one day late, this Court should grant jurisdiction to hear this case and review the decision of the court of appeals.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



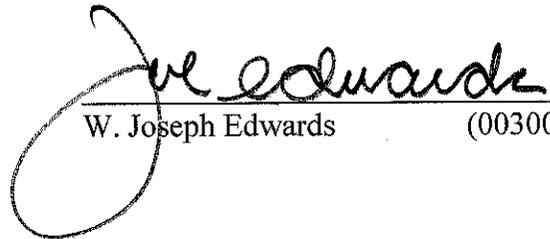
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Columbus, Ohio 43215
614/228-0523
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jedwardslaw@live.com
Attorney for Appellant, Patricia A. Byers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following via regular U.S. mail, postage prepaid this 2nd day of December, 2011.

David A. Herd, Esq.
John C. Nemeth & Associates
21 E. Frankfort Street
Columbus, Ohio 43206

Respectfully submitted,



W. Joseph Edwards (0030048)

APPENDIX

Appx.
Page

Findings of Fact and Conclusions of Law for Final Judgment Court of Common Pleas for Delaware County, Ohio Dated August 15, 2011	1-6
Judgment Entry Court of Appeals for Delaware County, Ohio Fifth Appellate District Dated September 23, 2011	7
Judgment Entry Court of Appeals for Delaware County, Ohio Fifth Appellate District Dated October 20, 2011	8

IN THE COURT OF COMMON PLEAS
FOR DELAWARE COUNTY

JAN ANTONOPoulos
CLERK

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COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

PATRICIA A. BYERS

Plaintiff

vs.

JEFFREY A. BURKHAM and
BURKHAM, FULLER & HERZOG
Defendants

349
382-387

CASE NO. 09-CV-A-05-0

JUDGE RICHARD M. MARCUS
(Serving by Assignment)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR FINAL JUDGMENT

On May 4, 2009, the plaintiff refiled this professional liability claim against the defendant lawyer and his law firm, having previously dismissed the same claim without prejudice on May 5, 2008. After multiple delays while the parties pursued discovery and motion practice and while the plaintiff repeatedly retained replacement counsel, this court conducted a bench trial for her claims with a requested recess between two sessions: May 4-6, 2011, and June 30-July 1, 2011. At the conclusion of that trial, all counsel asked to file written closing arguments, together with proposed findings of fact and conclusions of law. Having carefully reviewed those materials and its own notes, the court now provides its own findings and conclusions:

FINDINGS OF FACT

1. The plaintiff married Frank Byers in November 1987. The Franklin County Common Pleas Court granted them a dissolution of their marriage in 1990. They remarried in October 1994. In 2003, the plaintiff filed for divorce in Delaware County Common Pleas Case No. 03 DR A 02 0051. That court granted the parties a legal separation in 2004. The plaintiff reactivated that case with a divorce action in April 2006. During their legal separation and while the divorce actions were pending, she periodically resided with her



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husband, and her husband sometime provided support above any court order, though he sometimes failed to comply with support orders.

2. Their marriage produced three children, and the plaintiff had one other child from a previous marriage. One of their three children suffered from juvenile diabetes and cystic fibrosis, but that child apparently functioned normally after pancreatic transplant surgery. The plaintiff failed to show that this child had "special needs" which required her husband to provide financial support beyond normal terms and guidelines, especially when the plaintiff did not provide custodial care for this child.
3. On September 22, 2006, the plaintiff retained defendant Jeffrey Burkham as counsel for her pending divorce case. Attorney Robert Cohen and subsequently attorney Charley Hess had previously withdrawn as her counsel in that case. She had also consulted attorneys Anthony Heald and Robert Behal.
4. Attorney Hess obtained the court's permission to withdraw as her counsel on August 21, 2006, after he conducted substantial discovery including the taking of her husband's deposition and obtaining relevant financial records.
5. When the plaintiff retained defendant Burkham, the court had already scheduled a hearing for pending motions only eleven days later on October 3, 2006. Attorney Burkham strongly recommended that they ask the court to delay that hearing so he could obtain further discovery and better prepare. The plaintiff rejected that advice and expressly instructed attorney Burkham not to postpone that hearing.
6. During the limited time before the hearing, attorney Burkham met with the plaintiff for many hours, discussed the case with prior counsel, reviewed the court file and all prior

discovery materials, and received the plaintiff's version of relevant information. The plaintiff reviewed and approved the memorandum that attorney Burkham prepared and filed for that hearing.

7. In anticipation of that imminent hearing, attorney Burkham communicated with adverse counsel, attorney Thomas Clark. During those conversations, attorney Clark asserted that he could defeat any spousal support claim with evidence that the plaintiff had been cohabiting with another man. In fact, attorney Burkham knew that the plaintiff had a male companion who accompanied her to attorney Burkham's office, advised her, and paid her attorney fees.
8. In his conversations with attorney Clark before and on the morning of the scheduled hearing, attorney Burkham discussed possible settlement terms. He reported those conversations to the plaintiff. He advised her that she risked a substantial reduction in child support because she did not maintain custody of the children that the previous agreement and order prescribed.
9. On the morning of the scheduled hearing and before it commenced, attorney Burkham and adverse counsel negotiated settlement terms that they then reduced to writing, with handwritten interlineations and modifications. Attorney Burkham consulted with the plaintiff during those negotiations and ultimately advised the plaintiff to accept those terms. She agreed to those terms and signed the resulting Memorandum of Agreement. The plaintiff contends that she disfavored those terms and signed the agreement reluctantly. However, she failed to show that anyone coerced her approval or that anyone misinformed her about any relevant circumstances. The plaintiff subsequently approved

an Agreed Judgment Entry on Divorce that contained those settlement terms. The plaintiff then terminated attorney Burkham's representation on October 31, 2006.

10. The plaintiff failed to show that she would have declined to approve those settlement terms if she had any additional information that she later acquired. Further, she failed to show that she would have obtained a more favorable result if she had rejected those settlement terms and proceeded with her case.
11. The plaintiff contends that the settlement lacked sufficient safeguards against her husband's possible recourse to bankruptcy protection. However, she had discussed bankruptcy implications with attorney Burkham. She related to him that a bankruptcy attorney advised her husband that he could not obtain bankruptcy protection in his circumstances. Moreover, she failed to show that her husband would have agreed to any proposed bankruptcy related terms, that a bankruptcy court would have responded differently if the agreement contained those supposed terms, or that she would have obtained a more favorable result if attorney Burkam proposed such terms.
12. The plaintiff contends that attorney Burkham failed to take appropriate action regarding federal tax liens on her residence. However, she did not show what he should have done to alter that situation. Moreover, shortly thereafter the revenue service determined that she was an innocent spouse and effectively removed any resulting liens on her home. The plaintiff did not show how the tax liens adversely affected her during their limited duration.
13. The plaintiff failed to show that attorney Burkham's representation adversely affected her rights to child custody or child support, or impaired her ability to obtain modifications of

child custody or support if and when she faced significantly changed circumstances.

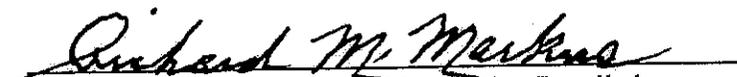
14. The plaintiff failed to show that attorney Burkham's representation adversely affected her rights to a division of marital property or spousal support, or prevented her from obtaining relief from those terms if she could seasonably show that her husband fraudulently misrepresented his assets or income.
15. The plaintiff's expert witness asserted that attorney Burkham was negligent because he accepted this client when the client would not accede to a necessary continuance. This court rejects that conclusion. Apparently she found no other attorney who would accept her case in this difficult situation. The plaintiff was better served by this attorney's assistance than by an attempt to act on her own behalf. The attorney exercised reasonable care in the situation that existed then and there.

CONCLUSIONS OF LAW

- A. To prevail on her claim, the plaintiff must show by the greater weight of the evidence that the defendant lawyer failed to exercise reasonable care in a manner that proximately caused her to sustain economic damage.
- B. Reasonable care is the care that a reasonably careful attorney would exercise in the same or similar circumstances, by providing services that a reasonable careful attorney would provide and by refraining from conduct that a reasonably careful attorney would avoid in the same or similar circumstances.
- C. In performing professional services an attorney can and should have some latitude and discretion to deal with and respond to frequently unpredictable situations that an advocate and counselor faces. The practice of law is an art and not a precise science. The fact that

some other attorney would have performed those services differently does not necessarily mean that the defendant performed them negligently.

- D. In this case, the plaintiff failed to show by the greater weight of the evidence that defendant Burkham was negligent or that he performed his services as her counsel negligently.
- E. In this case, the plaintiff failed to show by the greater weight of the evidence that any conduct by defendant Burkahm, including any conduct that she claimed was negligent conduct, proximately caused her to sustain any economic damage.
- F. The plaintiff voluntarily agreed to, approved, and signed the Memorandum of Agreement prepared on October 3, 2006, and she voluntarily approved the resulting Agreed Judgment Entry on Divorce. Her contemporaneous or subsequent misgivings do not detract from the legal effect of her consent to those terms.
- G. The plaintiff failed to show by the greater weight of the evidence that Attorney Burkham negligently advised her to approve those terms in those circumstances.
- H. The plaintiff failed to show by the greater weight of the evidence that she would have obtained a more favorable result if she declined to accept that settlement agreement.
- I. This court should enter its judgment in favor of the defendants


Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Delaware County Common Pleas Court for this matter

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS ORDER
TO ALL COUNSEL AND THE VISITING JUDGE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PATRICIA A. BYERS

Plaintiff - Appellant

Case No. 11 CAE 09 0083

33
462

-vs-

JUDGMENT ENTRY

JEFFREY A. BURKAM, ET AL.

Defendant - Appellee

This matter came before the Court upon Appellant's Motion for Delayed Appeal of the trial court's entry dated August 15, 2011. The entry being appealed is from a civil case. App.R. 5 does not provide for a delayed appeal in a civil case, therefore, the motion is denied. The appeal is dismissed for want of jurisdiction due to the untimely notice of appeal.

MOTION DENIED.

CAUSE DISMISSED.

COSTS TO APPELLANT.

IT IS SO ORDERED.

COURT OF APPEALS
DELAWARE COUNTY, OHIO
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JAN ANTONOPLOS
CLERK

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JUDGE

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JUDGE

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JUDGE



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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PATRICIA A. BYERS

Plaintiff - Appellant

-vs-

JEFFREY A. BURKHAM, ET AL.

Defendants-Appellees

Case No. 11 CAE 09 0083

JUDGMENT ENTRY

This matter comes before the Court upon Appellant's Motion for Reconsideration of our denial of Appellant's motion for delayed appeal. As this Court previously stated, we do not have jurisdiction to allow an appeal to proceed that is untimely filed in a civil case even if the litigant has a compelling reason for failing to timely file the notice of appeal. For this reason, Appellant's motion is denied.

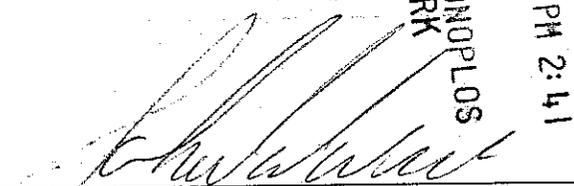
MOTION DENIED.

IT IS SO ORDERED.

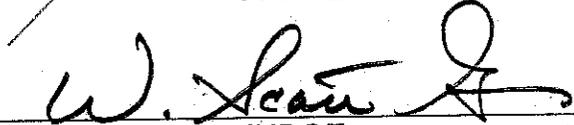
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DELAWARE COUNTY, OHIO
FILED

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JAN ANTONIOPLOS
CLERK



JUDGE



JUDGE



JUDGE

Court of Appeals
Delaware Co., Ohio

I hereby certify the within be a true
copy of the original on file in this office.

Jan Antonoplos, Clerk of Courts
By  Deputy