

ORIGINAL

REQUESTED CONSOLIDATED RECORD NOS. 2011-1457 AND/ 2011-1485

IN THE OHIO SUPREME COURT

RENE MAYS, Individually and as	:	Case No. CI0201102848
Fiduciary of the Estate of Galon Howard,	:	Court of Appeals No. 11-1145
Deceased, et al.,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	
	:	
TOLEDO HOSPITAL, et al.,	:	
	:	
and	:	
	:	
Mercy St. Anne's Hospital, et al.	:	
	:	
Defendants-Appellees.	:	

APPELLANT RENE MAYS' MOTION FOR A DETERMINATION THAT A CONFLICT EXISTS AND/OR A FINDING THAT THE APPELLANT HAS DEMONSTRATED THAT THE COURT OF APPEALS JUDGMENT OF AUGUST 18, 2011, IS IN CONFLICT WITH A JUDGMENT OF THE COURT OF APPEALS FOR CLARK COUNTY PURSUANT TO S. CT. PRAC. R. 4.2(D)

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DEC 01 2011
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On November 28, 2011, the Sixth District Court of Appeals issued a judgment denying Appellants motions for reconsideration and motion to certify a conflict to the Supreme Court of Ohio. A true and accurate copy of that order is attached hereto as Exhibit 1 for this Court's review. If a court of appeals does not find such conflict, as in this case, exist and hence refuses to certify the case to the Supreme Court its findings and action is in that respect final. See, *Wolfe v. Richards*, 127 Ohio St. 63 (Ohio, 1933).

If the Supreme Court determines that a conflict exists, it will issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed. S. Ct. Prac. R. 4.2(D). If the Supreme Court determines that a conflict exists, such action brings the entire case to this court for review, and this court is not limited to a consideration of the single error with respect to which has certified the case for review. See, *Pettibone v. McKinnon*, 125 Ohio St. 605 (1932). Because the Appellant has demonstrated that the Court of Appeals August 18, 2011 judgment created a conflict with a judgment of Court of Appeals for Clark County. See, *Denham v. New Carlise*, 86 Ohio St. 3d 594,1999-Ohio-128. Therefore, this Court should determine that a conflict exists pursuant to the provisions contained in S. Ct. Prac. R. 4.2(D). Accordingly, for the foregoing reasons, the appellant's motions for reconsideration and her motion to certify a conflict to this Court should be found well-taken and ordered granted as a matter of law. Article IV, Section 2(b)(2)(a) of the Ohio Constitution.

On September 8, 2011, and on October 11, 2011, the Appellant filed two separate motions asking the Sixth District Court of Appeals to reconsider its August 18, 2011 judgment denying her motion for reconsideration. Appellant asserted that the Court of

Appeals judgment denying reconsideration failed to consider the trial court's July 27, 2011 judgment, which granted summary judgment based on the dismissal of appellant's personal claims pursuant to R.C. 4705.01 without prejudice. Appellant argued that the July 27, 2011 judgment, not mentioned in the Court of Appeals August 18, 2011 judgment, became a final appealable order, or otherwise transformed the June 7, 2011 interlocutory judgment of the trial court into a final appealable order based on the dismissal of appellant's personal claims pursuant to R.C. 4705.01 without prejudice. See, *Denham v. New Carlise*, 86 Ohio St. 3d 594,1999-Ohio-128, at the syllabus #1. Therefore, the July 27, 2011 judgment transformed the June 7, 2011, judgment into a final appealable order. See, *Denham v. New Carlise*, 86 Ohio St. 3d 594,1999-Ohio-128, at the syllabus #1. Accordingly, the Appellant's September 8 and October 11, 2011 motions for reconsideration should have been found well-taken and ordered granted by the Court of Appeals. Id.

On September 19, 2011, the Appellant filed a motion with the Court of Appeals to certify a conflict with a judgment of the Court of Appeals for Clark County. See, App. R. 25(A); *Denham v. New Carlise*, 86 Ohio St. 3d 594,1999-Ohio-128, at the syllabus #1. Therefore, Appellant's September 19, 2011 motion to certify a conflict should have been found well-taken and ordered granted by the Court of Appeals because she had demonstrated that the Court of Appeals judgment created a clear conflict with the judgment of the Court of Appeals for Clark County. See, App. R. 25(A); *Denham v. New Carlise*, 86 Ohio St. 3d 594,1999-Ohio-128, at the syllabus #1.

Appellant submits that her motion to certify a conflict to the Supreme Court filed with the Court of Appeals was filed late or more than the ten-day period prescribed by

App. R. 25(A) due to excusable neglect. A court may extend the time for good cause, on a motion made after the time has expired if the party failed to act because of excusable neglect. Ohio Civil Rule 6(b). This motion serves as such motion to extend time for filing such motion to certify a conflict. Appellant's motion to certify a conflict arises from the Court of Appeals August 18, 2011 judgment. The Court of Appeals denied Appellant's motion for reconsideration on August 18, 2011, Appellant did not file her motion to certify a conflict until September 19, 2011, 31 days after the clerk entered the August 18, 2011 judgment denying Appellant's motion for reconsideration, for good cause, because she was in the process of preparing and filing her notice of appeal, her responses to Appellees' motions for sanctions, and her motion to reverse the Court of Appeals judgment of August 18, 2011 and her motion to remand for further proceedings in this Court. See, above-captioned requested consolidated Case Nos. 2011-1457 and/ 2011-1485. Therefore, the Appellant should be excused because she failed to act for good cause shown because of excusable neglect as evidenced herein. Ohio Civil Rule 6(b).

Clearly, the Appellant has called to the attention of this Court an obvious error in the Court of Appeals decision or raised an issue for this Court's consideration that was either not considered at all or was not fully considered by the Court of Appeals when it should have been. App. R. 26(A); *Matthews v. Matthews*, (1981), 5 Ohio App. 3d 140 at paragraph two of the syllabus. Therefore, this Court should overturn the Court of Appeals unlawful, unjust and unreasonable judgment of November 28, 2011. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983); *Nunley v. City of Los. Angeles*, 52 F. 3d 792, 794 (9th Cir. 1995). As a result, this Court should determine that a conflict exists

pursuant to the provisions contained in S. Ct. Prac. R. 4.2(D). Accordingly, for the foregoing reasons, the appellant's motions for reconsideration and her motion to certify a conflict to this Court should be found well-taken and ordered granted as a matter of law. Article IV, Section 2(b)(2)(a) of the Ohio Constitution.

WHEREFORE, appellant respectfully submits that the Court of Appeals order of November 28, 2011 is unlawful, unjust and unreasonable and should be reversed because justice so requires it in this action. The case should be remanded to the Court of Appeals with instructions to correct the errors complained of herein. In the alternative, this Court should issue an order determining that a conflict exists, or otherwise issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed. S. Ct. Prac. R. 4.2(D). An order is respectfully requested.

Respectfully submitted,
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Plaintiff-Appellant-pro-se

PROOF OF SERVICE

This is to certify that a copy of the foregoing of Rene Mays was sent via ordinary U.S. Mail or via facsimile this _____ day of November, 2011 to:

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Dated: 11/29/2011

Rene Mays Pro Se
Plaintiff-Appellant-pro-se

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2011 NOV 28 P 3:44
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rene Mays, Individually and as Fiduciary
of the Estate of Galon Howard, Deceased,
et al.

Court of Appeals No. L-11-1145

Trial Court No. CI0201102848

Appellant

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided:

NOV 28 2011

This matter is before the court on several pro se motions filed by appellant, Rene Mays.¹ By way of background, on July 20, 2011, this court dismissed appellant's appeal

¹Those motions are: (1) September 8, 2011 "Motion for Leave to File an Amended Notice of Appeal," (2) October 11, 2011 "Motion for Leave to File the Attached Proposed Amended Notice of Appeal * * * Alternatively Motion to Reconsider," (3) September 19, 2011 "Motion to Certify a Conflict," and (4) November 4, 2011 "Motion to Reconsider * * * or Alternatively Reverse and Remand."

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EX. 11"

1.

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of the June 7, 2011 judgment of the Lucas County Court of Common Pleas, which denied appellant's extension of time to file a Civ.R. 10(D) affidavit of merit, for lack of a final appealable order. On August 18, 2011, this court issued a judgment denying appellant's motion for reconsideration.

"Reconsideration" of an Order Denying
a Motion for Reconsideration

In two of appellant's motions, appellant is asking the court to reconsider its August 18, 2011 judgment denying appellant's motion for reconsideration. The court will treat these motions, filed September 8, 2011, and October 11, 2011, as motions asking the court to "reconsider" its August 18 judgment.

Appellant asserts that this court's August 18 judgment denying reconsideration fails to consider the trial court's July 27, 2011 judgment, which dismissed appellant's complaint *without prejudice*. Appellant argues that the July 27 judgment, not mentioned in the court's August 18 judgment, transformed the June 7, 2011 interlocutory judgment of the trial court into a final appealable order.

Appellant's arguments fail for two reasons. First, the Rules of Appellate Procedure do not provide for the filing of a motion for reconsideration based upon the denial of a previous motion for reconsideration. See App.R. 26. Second, since the party has a right to refile a lawsuit, the dismissal of a complaint without prejudice is generally not a final appealable order under R.C. 2505.02. See *Hughley v. Southeastern Correctional Inst.*, 5th Dist. No. 10CA43, 2010-Ohio-5497, ¶ 10. See, also, *Canady v.*

SCANNED

Taylor, 10th Dist. No. 07AP-982, 2008-Ohio-2801, ¶ 9. (A judgment dismissing a complaint without prejudice for failure to comply with Civ.R. 10(D) is not a final appealable order under R.C. 2505.02.) Therefore, the July 27 judgment did not transform the June 7 judgment into a final appealable order. Appellant's September 8 and October 11 motions for reconsideration are found not well-taken.

Motions to Certify a Conflict

On September 19, 2011, appellant also filed a motion with this court to certify a conflict to the Supreme Court of Ohio. Appellant tendered a proposed order in conjunction with that motion, which was erroneously file-stamped by the clerk. On November 3, 2011, this court sua sponte issued an order striking the proposed file-stamped order. Appellant filed a motion for reconsideration of this court's judgment striking the file-stamped order.

We will first address the September 19 motion to certify a conflict. This motion also fails for two reasons. Appellant's motion to certify a conflict was not filed within the ten-day period prescribed by App.R. 25(A). Appellant's motion to certify a conflict arises from the court's August 18, 2011 decision. Although the court denied appellant's motion for reconsideration on August 18, 2011, appellant did not file her motion to certify a conflict until September 19, 2011, 31 days after the clerk entered the August 18 judgment denying appellant's motion for reconsideration. This is well outside the ten-day period prescribed by App.R. 25(A).

Second, appellant also failed to demonstrate that the court's August 18 judgment created a conflict with a judgment of another court of appeals. See App.R. 25(A). Therefore, appellant's September 19 motion to certify a conflict is found not well-taken.

We will next address appellant's November 4 motion for reconsideration. In ruling on a motion to reconsider, this court follows *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, where paragraph two of the syllabus states:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App.R. 26, construed.)"

Upon review of appellant's November 4 motion, and having found the September 19 motion to certify a conflict not well-taken, we find appellant has not called to the attention of the court an obvious error in its decision or raised an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. Therefore, appellant's November 4 motion for reconsideration is found not well-taken.

In summation, appellant's motions for reconsideration, and her motion to certify a conflict are denied. It is so ordered.

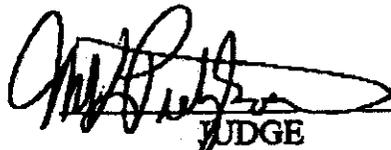
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Rene Mays, Individually and as
Fiduciary of the Estate of Galon
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v. Toledo Hospital, et al.
L-11-1145

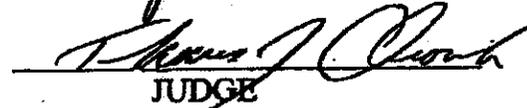
Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.

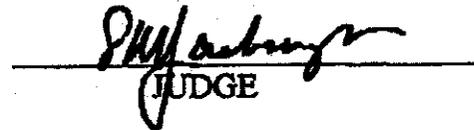
Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE