

ORIGINAL

IN THE SUPREME COURT OF OHIO

MORRIS K. HINTON, : Case No. 2012-1292
 Plaintiff-Appellant, : First Appellate District
 v. : Case No.: C-120353
 :
 GARY F. FRANKE :
 :
 and :
 :
 GARY F. FRANKE CO., LPA, :
 Defendants-Appellees.

RESPONSE MEMORANDUM OF
 APPELLEES GARY F. FRANKE AND GARY F. FRANKE CO., LPA

Stephen A. Bailey (9456)
 Joel M. Frederic (79401)
 The Drew Law Firm Co., LPA
 One West Fourth Street, Suite 2400
 Cincinnati, Ohio 45202
 (513) 621-8210
 Fax No.: (513) 621-5444
 sbailey@drewlaw.com
 jfrederic@drewlaw.com

*COUNSEL FOR APPELLEES,
 GARY F. FRANKE AND
 GARY F. FRANKE CO., LPA*

Morris K. Hinton
 C.C.I. #305-942
 P.O. Box 5500
 Chillicothe, Ohio 45601
PRO SE APPELLANT

FILED
 AUG 10 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 AUG 10 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF FACTS	1
THIS CASE INVOLVES NO SUBSTANTIAL CONSITUTIONAL QUESTION AND NO MATTER OF GREAT OR PUBLIC INTEREST	4
ARGUMENT CONTRA APPELLANT’S PROPOSITIONS OF LAW	5
I. HINTON’S CASE WAS PROPERLY DISMISSED UPON APPEAL	5
Hinton’s Civ.R. 60(B) motion was an attempted substitute for a timely-filed notice of appeal	5
Hinton’s merits arguments asserted herein were waived	5
The First Appellate District had no jurisdiction to hear an untimely appeal	5
II. HINTON’S CIV.R. 60(B) MOTION WAS PROPERLY OVERRULED IN ANY EVENT	6
Still no attorney affidavit establishing legal malpractice	6
The “new evidence” was not proper Civ.R. 56(E) rebuttal evidence	6
The “new evidence” was not probative or outcome determinative	7
No newly-discovered evidence within the meaning of Civ.R. 60(B)	7
Equity militates against the application of Civ.R. 60(B)	7
CONCLUSION	8

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Adomeit v. Baltimore</i> , 39 Ohio App.2d 97, 316 N.E.2d 469 (8th Dist.1974).....	7
<i>Balsko v. Mislik</i> , 69 Ohio St.2d 684, 686, 433 N.E.2d 612 (1982).....	4, 5
<i>Bosco v. Euclid</i> , 38 Ohio App.2d 40, 43, 311 N.E.2d 870 (8th Dist.1974).....	5
<i>Demers v. Brown</i> , 343 F.2d 427, 428 (1st Cir.1965).....	5
<i>Doe v. Trumbull Cty. Children Services Bd.</i> , 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986)	5
<i>Elkins v. Elkins</i> , 11th Dist. No. 2011-T-0033, 2012-Ohio-1461	5
<i>Int'l Lottery Inc. v. Kerouac</i> , 102 Ohio App.3d 660, 657 N.E.2d 820 (1st Dist.1995)	5
<i>Kelly v. Coca-Cola Bottling Co.</i> , 1st Dist. No. C-030770, 2004-Ohio-3500	6
<i>Key v. Mitchell</i> , 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548 (1998).....	5
<i>Loukinas v. Roto-Rooter Servs. Co.</i> , 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶21 (1st Dist.)	6
<i>Ohio Neighborhood Fin. v. Stevens</i> , 2nd Dist. No. 10CA43, 2011-Ohio-2760	5
<i>State ex rel. The V Cos. v. Marshall</i> , 81 Ohio St.3d 467, 473-474, 1998-Ohio-329, 692 N.E.2d 198 (1998).....	6

STATEMENT OF THE CASE AND FACTS

Pro se plaintiff-appellant Morris K. Hinton, Jr., sued defendants-appellees Gary F. Franke and Gary F. Franke Co., LPA (collectively as “Franke”), and the City of Springdale, Ohio in *Hinton v. Franke, et al.*, Hamilton County C.P. No. A-1000931, wherein Hinton alleged that Franke had committed malpractice in the underlying case captioned *City of Springdale v. Hinton*, Hamilton County C.P. No. A-0506641.

Gary F. Franke has practiced law since 1985 and is admitted to practice before the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the U.S. District Court for the Southern District of Ohio.

In *Springdale v. Hinton*, the City of Springdale (“Springdale”) alleged that Hinton owned property located at 11771 Springfield Pike, Springdale, Ohio, that the four separate houses located on the property violated the city property maintenance code, that Hinton had been notified of the violations, and that the structures on Hinton’s property constituted a health hazard as well as an attractive nuisance to children. In the form of relief, Springdale requested that the court order the four houses to be demolished and that Hinton pay the demolition costs.

The Volunteer Lawyers for the Poor assigned Hinton’s case to Franke, and he agreed to defend Hinton on a pro-bono basis. Springdale’s complaint indicated that Gail Wilson has power of attorney for Hinton during his incarceration. After the case was assigned to Franke, he met with Gail Wilson to discuss how to answer Springdale’s complaint and such answer was timely filed.

In an attempt to prevent the demolition of the property and the costs being assessed against Hinton, Franke retained the services of a real-estate broker to see if the property could be

sold or repaired. It was determined that the cost of the repairs exceeded the value of the property.

Franke continued to defend the matter until the Court ordered the property to be demolished on November 4, 2008. Franke complied with all applicable standards of care of other attorneys in the same or similar circumstance, and he did not breach any standard of care proximately causing damages to Hinton.

The trial court proceedings in *Hinton v. Franke, et al.*, Hamilton County C.P. No. A-1000931

In his malpractice case, Hinton alleged that he was the owner of the property in question in *Springdale v. Hinton* and that Franke's negligent representation led to the court ordering the buildings to be razed at Hinton's cost.

The trial court issued a case scheduling order on August 25, 2010, setting the malpractice case for a bench trial on March 31, 2011. The court further ordered Hinton to identify his experts by October 11, 2010, to provide an expert report by November 1, 2010, and set January 31, 2011, as the cutoff date for discovery and dispositive-motion. The scheduling-order deadlines passed, and Hinton failed to identify an expert witness or provide an expert report as ordered by the court.

Franke moved for summary judgment contending (1) that Hinton had disregarded the court's order to identify an expert witness and provide an expert report in support of his legal malpractice claims; (2) that the breach of duty alleged by Hinton is beyond the common understanding of lay persons and is not obvious; and (3) that summary judgment was appropriate because Hinton had failed to provide expert testimony on the applicable standard of care and whether it was breached, and because he could not as a matter of law prove legal malpractice based on negligent representation.

The trial court on or about 2 March 2011 decided that expert testimony was necessary and graciously allowed Hinton until 31 March 2011 to voluntarily dismiss the case without prejudice or to file an attorney affidavit in opposition to Franke's summary-judgment motion: "Absent an affidavit by an attorney showing malpractice, the Plaintiff's claim cannot stand. On or about March 31, 2011, the Court shall enter an order *granting* Defendants' motion for summary judgment and dismissing the case with prejudice. On or before that date, the Plaintiff may voluntarily dismiss the case without prejudice under Civ. R. 41 (A) or file an affidavit of an attorney in opposition to Defendants' motion for summary judgment establishing malpractice on the part of Defendants."

The 31 March 2011 deadline came and went without Hinton having filed either an attorney affidavit or a voluntarily dismissal. Accordingly, the Court in a 4 April 2011 entry granted Franke's summary-judgment motion: "The Court gave Plaintiff until March 31, 2011 to either voluntarily dismiss the case without prejudice pursuant to Civ. R. 41(A) or to file an affidavit of an attorney in opposition to Defendants' Motion for Summary Judgment. Plaintiff has not filed either. Therefore, the Court hereby grants Defendants' motion for summary judgment and dismisses Plaintiff's case with prejudice. Costs are charged to the Plaintiff."

Importantly, Hinton did not timely appeal the 4 April 2011 entry in Franke's favor, nor has Hinton alleged that he did not received notice of the court's earlier March 2011 entry directing him to voluntarily dismiss without prejudice or file an attorney affidavit before 31 March 2011.

In lieu of a timely-filed direct appeal, Hinton on 24 January 2012 moved for relief from the 4 April 2011 entry of judgment under Civ.R. 60(B)(2) based on what was purported to be

“newly-discovered evidence.”¹ In overruling Hinton’s Civ.R. 60(B) Motion, the trial court noted that (1) the “new evidence” was a letter from disciplinary counsel for the Supreme Court of Ohio, which concluded that no disciplinary action was warranted against attorney Franke, (2) Hinton’s evidence was not new with respect to his claim for legal malpractice, and (3) Hinton had yet again failed to submit an affidavit of an attorney establishing that Defendants’ conduct fell below the standard of care. Hinton timely filed a notice of appeal from the 19 April 2012 entry overruling his motion for relief from judgment.

Proceedings in the Court of Appeals, *Hinton v. Franke, et al.*, First Appellate Dist. No. C-120353

In response to Hinton’s notice of appeal in Hamilton County C.P. No. A-1000931, Franke moved to dismiss the appeal on the basis that the Civ.R. 60(B) ruse was nothing more than an improper substitute for a timely-filed notice of appeal. The First Appellate District found Franke’s dismissal motion to be well taken and dismissed the appeal on 26 June 2012. 13 days later, Hinton moved to certify a conflict and applied for reconsideration pursuant to App.R. 25 and 26, and the First Appellate District overruled both on 1 August 2012.

NO SUBSTANTIAL CONSTITUTIONAL QUESTION
AND NO MATTER OF GREAT OR PUBLIC INTEREST

This case presents no constitutional question, substantial or otherwise, and it represents no matter of great or public interest. Moreover longstanding Ohio case law recognizes that the failure to file a timely notice of appeal waives the opportunity to later challenge the correctness of the court’s decision on the merits that could have been raised on direct appeal. And in dismissing Hinton’s appeal, the First Appellate District did not implicate prospective Ohio cases or litigants or the future workings of Civ.R. 60(B) and its applicability to newly-discovered evidence and its decision certainly does not run “contrary to the [‘]statutory scheme of Civil R.

¹ Less notably, Hinton also moved for change of venue and summary judgment, neither of which were well taken.

60(B)(2)['] ” as Hinton contends, nor does it foreclose the operation of remedial rules and legislation in furtherance of Rule 60(B)’s *just* application. Appellate dismissal was a straightforward and appropriate application of Ohio precedent and App.R. 3 and 4.

HINTON’S CASE WAS PROPERLY DISMISSED UPON APPEAL

Ohio Courts have long held that appellate dismissal is appropriate when a Civ.R. 60(B) motion was used as a substitute for a timely-filed notice of appeal. *Balsko v. Mislik*, 69 Ohio St.2d 684, 686, 433 N.E.2d 612 (1982) (A Civ.R. 60(B) motion cannot be used to circumvent or extend the time for filing an appeal.); *Doe v. Trumbull Cty. Children Services Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986); *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548 (1998); *Int’l Lottery Inc. v. Kerouac*, 102 Ohio App.3d 660, 657 N.E.2d 820 (1st Dist.1995); *Bosco v. Euclid*, 38 Ohio App.2d 40, 43, 311 N.E.2d 870 (8th Dist.1974); *Demers v. Brown*, 343 F.2d 427, 428 (1st Cir.1965); *Ohio Neighborhood Fin. v. Stevens*, 2nd Dist. No. 10CA43, 2011-Ohio-2760; *Elkins v. Elkins*, 11th Dist. No. 2011-T-0033, 2012-Ohio-1461, ¶17 (The trial court’s conclusion that the arguments advanced in appellant’s motion, should have been asserted on direct appeal from the original entry of summary judgment was upheld on appeal.).

A party improperly substitutes a Civ.R. 60(B) motion for a timely-filed appeal notice of appeal when he makes arguments therein merely challenging “the correctness of the court’s decision on the merits [that] could have been raised on appeal.” *See Balsko*, *supra*, 69 Ohio St.2d at 686. Indeed, the failure to timely file a notice of appeal generally creates a jurisdictional bar to entertain an appeal on its merits and without such timely filing, the Court of Appeals is “without jurisdiction” to entertain the appeal. *See Bosco*, *supra*, 38 Ohio App.2d at 43; App.R. 3 and 4(A). Such is the case here.

Hinton failed to timely appeal from the 4 April 2011 entry granting summary judgment in Franke's favor. Of course Hinton could have raised the propriety of the trial court's decision (entering judgment or concluding that an attorney affidavit was essential to Hinton's claims) on the merits in a direct appeal. He did not. Hinton's arguments herein should have been asserted on direct appeal from the original entry of summary judgment, and he has now waived all issues related thereto. As such, appellate dismissal was proper in this case. And even assuming appellate dismissal was improper, judgment for Franke was appropriate because the trial court did not abuse its discretion in overruling Hinton's Civ.R. 60(B) motion.

HINTON'S CIV.R. 60(B) MOTION WAS PROPERLY OVERRULED IN ANY EVENT

Although the First Appellate District did not have jurisdiction to entertain Hinton's appeal on his Civ.R. 60(B) motion—which was an artifice for a timely filed direct appeal—judgment for Franke was proper because the trial court did not abuse its discretion in overruling Hinton's motion. Again, Hinton did not timely appeal from the entry of judgment for Franke. Moreover, Hinton's substitute Civ.R. 60(B) motion did not attach an attorney affidavit; and his “new evidence” did not properly oppose summary judgment because it was not an affidavit and because the letter from the disciplinary counsel for the Supreme Court of Ohio concluded that no disciplinary action was warranted. In short, the “newly-discovered evidence” even when construed in a light most favorable to Hinton neither established legal malpractice nor met the criteria of acceptable Civ.R. 56(E) rebuttal evidence. (Civ.R. 56(E) permits other types of material, such as complaints and judgment entries, and transcript excerpts from a separate action, to be used to oppose a summary-judgment motion, but only if they are properly authenticated and referred to in a properly framed affidavit. See *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 473-474, 1998-Ohio-329, 692 N.E.2d 198; *Loukinas v. Roto-Rooter Servs. Co.*, 167

Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶21 (1st Dist.); *Kelly v. Coca-Cola Bottling Co.*, 1st Dist. No. C-030770, 2004-Ohio-3500, ¶31.)

Finally, Hinton's "evidence" is not newly-discovered evidence under Civ.R. 60(B)(2) because in initially failing to submit an attorney affidavit opposing summary judgment, Hinton did not exercise the reasonable or due diligence necessary to trigger the later application of Civ.R. 60(B)(2). See Civ.R. 60(B)(2) ("Newly discovered evidence [is evidence] which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B).") Hinton's Civ.R. 60(B) motion presented no new evidence or argument—as the trial court noted, "[Hinton] has presented nothing new on his claim for legal malpractice." Finally, the letter concluding that no disciplinary action was warranted against attorney Franke actually disproved Hinton's malpractice claims, further justifying judgment for Franke on the merits.

Hinton's Civ.R. 60(B) motion failed to establish a colorable claim for malpractice—that is, his "new evidence" is not outcome determinative, much less new. Thus even in light of Hinton's new evidence, summary judgment for Franke was proper and consequently the trial court did not abuse its discretion in overruling Hinton's Civ.R. 60(B) motion.

Moreover, equity militates against granting Hinton's Civ.R. 60(B) motion because throughout the course of litigation, he had failed to timely file expert reports, an attorney affidavit or voluntary dismissal, and a notice appeal from the judgment for Franke. Indeed, a Civ.R. 60(B) motion will only be granted "upon such terms as are just," and even then 60(B) relief is left to the trial court's sound discretion: "On motion and upon such terms as are just, the court *may* relieve a party from a final judgment." Civ.R. 60(B). (Emphasis added.) Even if Hinton can meet one of the Civ.R. 60(B) exceptions, which he has not and cannot, the lower courts' judgments must stand because this case does not advance the interests of justice under

Civ.R. 60(B). Civ.R. 60(B) relief is to be granted only in extraordinary situations, where the interests of justice call for it. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 316 N.E.2d 469 (8th Dist.1974). Thus Hinton's Civ.R. 60(B) motion was properly overruled on its merits because the interests of justice are not advanced when the movant has neglected to meet deadlines on multiple occasions and failed to present evidence—an attorney affidavit—indispensable to his claims. Consequently, even if Hinton's motion for relief from judgment was not a substitute for a timely-filed notice of appeal, his failure to present new evidence and his neglect of deadlines and of his case in general are fatal to his Civ.R. 60(B) motion.

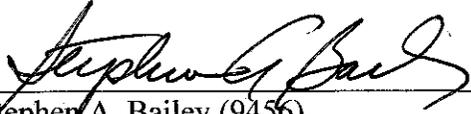
CONCLUSION

Hinton's appeal should be dismissed because his jurisdictional memorandum raises no substantial constitutional question, presents no matter of great or public interest, and disregards in his three propositions of law longstanding precedent—holding that appellate dismissal of a Civ.R. 60(B) motion is proper where such motion is a substitute for a timely-filed notice of appeal—and App.R. 3 and 4. And in any event judgment for Franke withstands appellate review on the merits because Hinton cannot satisfy Civ.R. 60(B) or identify extraordinary circumstance justifying its application, and because in this case equity militates against relief from judgment.

OF COUNSEL:

Joel M. Frederic (79401)
The Drew Law Firm Co., LPA
One West Fourth Street, Suite 2400
Cincinnati, OH 45202
Phone: (513) 621-8210
Fax: (513) 621-5444
Email: jfrederic@drewlaw.com

Respectfully submitted,

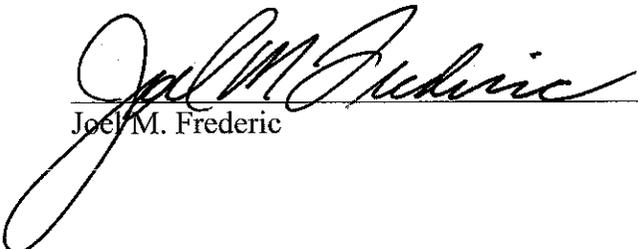


Stephen A. Bailey (9456)
The Drew Law Firm Co., LPA
One West Fourth Street, Suite 2400
Cincinnati, OH 45202
Phone: (513) 621-8210
Fax: (513) 621-5444
Email: sbailey@drewlaw.com
*Attorneys for Appellees, Gary F. Franke and
Gary F. Franke Co., LPA*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing by electronic mail and ordinary U.S. mail, postage prepaid, on August 8, 2012, upon the following:

Morris K. Hinton
C.C.I. #305-942
P.O. Box 5500
Chillicothe, Ohio 45601



Joel M. Frederic

205949