

IN THE SUPREME COURT OF OHIO

CASSANDRA WILTZ

Appellant,

vs.

CLARK, SCHAEFER, HACKETT,
et. al.

Appellees.

ON APPEAL FROM THE FRANKLIN
COUNTY COURT OF APPEALS,
TENTH APPELLATE DISTRICT

COURT OF APPEALS CASE
NO. 12-AP-000169

12-1527

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
CASSANDRA WILTZ (with A1 to A45 Appendix)

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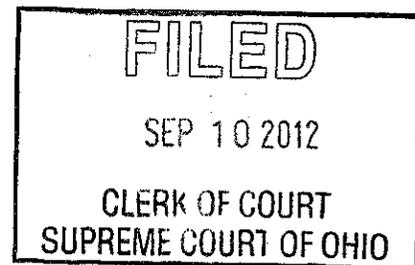


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Proposition of Law No. IV: It is an error and an abuse of discretion, for a Court of Appeals to dismiss an Appeal 'on the basis of an appellee's claim about non-service of an Appeal Brief', when the appellee did not support the claim with evidence, the Record shows that the appellant complied with Court rules regarding service, the order that dismissed the Appeal did not address the subject of 'presumption of service', and a hearing was not held.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is of public interest and great general interest and involves a substantial constitutional question, for the following reasons:

- (1) The Tenth District Court ruled that my explanation for not filing my Appeal Brief by its original due date was inadequate and was justification for dismissing the Appeal. The explanation that I had 'provided' and 'demonstrated' was that "my timely filed Motion for an Extension of the Due Date of my Appeal Brief tolled the time for filing my Appeal Brief, I filed my Appeal Brief on the day that my extension-request motion had proposed as the new due date, and the Court did not advise me that my extension-request motion had been denied until after the original due date for the Appeal Brief had lapsed and after I had already filed the Appeal Brief". The ruling that was made by the Tenth District Court is of public interest and great general interest, because it sets a new precedent that is inconsistent with rules of other Ohio District Courts, which dictate that a timely filed Motion for an Extension of the Due Date of an Appeal Brief *does* toll the time for filing the Brief. (See Proposition of Law #I.) When there is a lack of uniformity in decisions/rules that are made by Courts, there are conflicting precedents and the likelihood that more cases will need to come before District Courts (and will unnecessarily burden the Court system) is increased.
- (2) When a timely filed Motion for an Extension of a Due Date is not ruled on 'before the original due date lapses' and the action is subsequently dismissed "because the original due date was not met" (as occurred in this current case), the dismissal decision is erroneous, arbitrary, capricious, and unreasonable (as the Ninth District Court of Appeals has ruled) and the movant has been denied a constitutional due process right to be heard. (See Proposition of Law #II.)
- (3) For this current case, the Tenth District Court showed its interpretation of App.R. 26(2)(a),

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by allowing the panel that made the decision that was the subject of my Application for En Banc Consideration to determine “whether or not a conflict existed and the Court would convene en banc”. Other Ohio District Courts have interpreted App.R. 26(2)(a) to mean that the determination should be made by the ‘majority of the en banc Court’. (See Proposition of Law #V.) This issue is of public and great general interest, because Appellate rules are directives for all Courts to follow and are meant to be interpreted in a singular manner. When there are conflicting interpretations, the Supreme Court should decide which interpretation is appropriate.

(4) I was a denied my constitutional due process right to be heard and App.R. 25, App.R. 26, and the Appeal process were rendered meaningless, because the Tenth District Court denied my Applications for Reconsideration and En Banc Consideration and my Motion to Certify a Conflict, while erroneously stating that there were no inconsistencies between decisions, failing to ‘identify the cases’ and to ‘acknowledge/address the issues’ that were subjects of the Applications and Motions, and failing to acknowledge/correct its obvious error that I had brought to its attention. For example, there were 4 cases that were subjects of my Motion to Certify a Conflict, but the decision that denied my Motion would not identify or address/discuss a single one of the cases. (See also Proposition of Law #VI.) The decision that was made by the Tenth District Court is of interest to all citizens of Ohio, who have a right to expect that (when they participate in an Appeal) they will be afforded due process and the Appeal process will be meaningful. Whether or not the Supreme Court will address the subjects of the conflicts between the decision for this current case and the decisions for other cases (that the Tenth District Court would not address) is also an issue that is of public and great general interest, because there should be uniformity in decisions that are made by Courts (for the reason described in (1), above).

(5) An issue of this case concerns the fact that the trial Court refused ‘to docket’ and ‘to comply

with' the Court of Appeal's order that remanded the case to the trial Court (which was made because a prejudicial error had occurred) and the Court of Appeals failed and refused to compel compliance with the remand-order. (See Proposition of Law #VII). The Court of Appeals has a duty to compel compliance with its orders. When it refuses to perform its duty, the Supreme Court should exercise supervisory authority (by accepting jurisdiction of the case, so that the matter can be reviewed). Whether or not the Supreme Court will exercise such authority, is a subject that is of interest to all citizens of Ohio, who have a right to make an Appeal and to expect a meaningful Appeal process (where the Courts correct their errors and enforce their orders).

(6) Ohio citizens who make an Appeal have a right to expect that their evidence will be reviewed and their Appeal will be heard. Assignment of Error #6 of my Appeal Brief contains evidence to prove that the appellees are guilty of unlawful behavior, but my Appeal was not heard.

STATEMENT OF THE CASE AND FACTS

I filed an 8/6/10 complaint in Franklin County, which charges appellees with Retaliation, violating laws against discrimination and O.R.C. 4112.02, Negligence (that caused injury to me), and Intentional Infliction of Emotional Distress. My charges relate to the behavior of the appellees and agents for Moundbuilders (who are the appellees for Wiltz v. Moundbuilders Guidance Ctr et. al., Supreme Court Case #12-0922). The appellees filed a Summary Judgment Motion and Motion for a Judgment on the Pleadings. I was not served with the motions, was unaware that they had been made, and did not oppose them. The motions included known false/fraudulent claims, affidavits, and evidence. The trial Court made a 12/20/10 decision that dismissed the case, cited the fact that I did not respond to the motions as being the reason that the motions' arguments and evidence were deemed to be true, and (erroneously) did not consider a single assertion that was in my 8/6/10 complaint. On 1/19/11, I filed a Civ.R. 60(B) motion and a Notice of Appeal, for the

12/20/10 decision. On 2/24/11, the trial Court denied my 1/19/11 motion, in a decision that did not address (in any manner) the arguments and evidence of my 1/19/11 motion. On 3/28/11, I filed a Notice of Appeal, for the 2/24/11 decision. The Court of Appeals made an 11/1/11 decision, which denied my 2 Appeals and vacated the 2/24/11 decision that the trial Court did not have jurisdiction to make. I filed an 11/14/11 Motion for Reconsideration, in which I asked the Court of Appeals to remand the case 'so that my 1/19/12 Civ.R. 60(B) motion could be considered by the trial Court'. I filed a 12/20/11 Civ.R. 60(B) motion in the trial Court, which had arguments and evidence that were different from the arguments and evidence of my 1/19/11 motion, and I did not withdraw my 1/19/11 motion. On 12/22/11, the Court of Appeals remanded the case 'so that my 1/19/11 motion could be considered'. The trial Court failed to 'acknowledge the existence of' the remand decision and entry. The trial Court made a 1/30/12 decision that stated (on its face) that it was a denial only of my 12/20/11 motion and that did not address a single argument or piece of evidence from my 12/20/11 motion. On 2/6/12, I filed a motion in which I asked the trial Court to hear my 1/19/11 motion, as the 12/22/11 remand decision and 12/28/11 remand entry had directed it to do. The trial Court made a 2/23/12 decision that denied my 2/6/12 motion and falsely implied that a decision had already been made for my 1/19/11 motion. I filed a 2/28/12 Notice of Appeal, for the 1/30/12 and 2/23/12 decisions. On 3/23/12, I filed and served to the appellees a Motion for an Extension 'until 4/18/12' of the due date for my Appeal Brief. On 4/18/12, I filed and served an Appeal Brief and Appendix. On 4/20/12, I received an order that denied my 3/23/12 Motion for an Extension, which had been 'made' and 'put into the mail' on 4/17/12. On 4/30/12, I filed and served a Motion for Reconsideration of the 4/17/12 Decision and a Motion for Leave to File an Appeal Brief (which requested that the Court accept the Brief that I filed on 4/18/12 and which is referred to, in this current brief, as a "Motion

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for Leave to File an Appeal Brief Instanter"). On 5/7/12, I filed and served an Opposition to the appellees' 4/25/12 Motion to Dismiss the Appeal. On 5/9/12, the Court denied my 4/30/12 Motions and granted the Motion to Dismiss. On 5/21/12, I filed and served Applications for Reconsideration and En Banc Consideration and a Motion to Certify a Conflict. On 7/26/12, the Court denied my Applications and Motion. The following argument supports my position that the Court erred and abused its discretion, when making the 5/9/12 and 7/26/12 decisions.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A timely-filed Motion to Extend the Due Date of an Appeal Brief tolls the time for filing the Appeal Brief (and an Appeal Brief that is filed 'on the date that the extension request motion had proposed as the new due date' and 'while the appellant is waiting for a ruling on the extension request motion' is timely filed).

I filed my Appeal Brief on 4/18/12, for the following reasons: My Appeal Brief was originally due on 4/4/12, because App.R. 18(A) dictated that it was due 20 days after the Clerk mailed the Notice that indicated that the Record had been filed with the Court of Appeals, App.R. 14(C) dictated that 3 days should have been added to the period, and the Clerk mailed the Notice to me on 3/12/12. On 3/23/12, I filed and served to the appellees a Motion for an Order Extending 'Until 4/18/12' the Due Date of my Appeal Brief and Appendix, which was timely filed and met the requirements of Court rules. Among other things, my motion provided proof of illness, to support why I needed an extension. When I asked the staff of the Office of the Clerk (on 3/23/12) if filing the motion tolled the time for filing my Brief, I was advised that the question could not be answered. I noted that other Courts of Appeals in Ohio have rules (such as Loc.R. 18(A)(3) of the Ninth District) that dictate that filing a motion that requests an extension of the due date for an Appeal Brief does toll the time for filing the Brief. The Hamilton County Court of Appeals has also published a document called 'Frequently asked Questions and Answers', which is in the

Record for this current case. It states that a Motion to Extend the Time to File a Appeal Brief tolls the time for filing the Brief. The decision that denied my 3/23/12 motion was 'made in' and 'mailed to me in' the afternoon of 4/17/12 and was 'received by me in' the afternoon of 4/20/12 (as the 4/30/12 sworn Affidavit that I filed with the Court states). I did not know, when I filed my Brief at 9:47 am on 4/18/12, that my 3/23/12 extension request had been denied. Given that I had requested an extension 'until 4/18/12', my 4/18/12 filing did not represent undue delay in filing. The 4/17/12 decision that denied my 3/23/12 Motion for an Extension did not provide an explanation for the denial. I (therefore) filed a 4/30/12 Motion for Reconsideration of the 4/17/12 Decision, in which I 'stated' and 'demonstrated' the facts that are described in the preceding paragraph. The 5/9/12 entry that denied my 4/30/12 Motion for Reconsideration did not address (in any manner) the subject of my 3/23/12 extension request. The 5/9/12 entry did state (in response to my 4/30/12 Motion for Leave to File my Appeal Brief Instanter and in response to the appellees' Motion to Dismiss the Appeal) that my Appeal was dismissed because the Brief that I filed on 4/18/12 was filed 'late' and 'without leave of Court' and because 'my explanation for the alleged late-filing was not adequate or sufficient'. The 5/9/12 entry also would not acknowledge what my explanation for filing the Brief on 4/18/12 was, even though the explanation was described and demonstrated in both of my 4/30/12 Motions and in my 5/7/12 Opposition to the Motion to Dismiss. In truth, the 4/18/12 filing was not a late-filing (because my 3/23/12 motion tolled the time for filing my Brief), I filed a Motion for Leave to File the Brief 'when the Court advised me that my extension request was denied', and my explanation for the 4/18/12 filing was adequate/sufficient. (See Proposition of Law #II, concerning the fact that my explanation was adequate/sufficient.) I filed a 5/21/12 Application for Reconsideration of the 5/9/12 entry, in which I repeated my explanation for the 4/18/12 filing. The 7/26/12 decision that denied my

Application also would not address (in any manner) the subject of my 3/23/12 extension request.

Proposition of Law No. II: It is an error, a denial of a due-process right to be heard, and an abuse of discretion, for a Court of Appeals to fail to rule (before the due date for an Appeal Brief passes) on a timely-filed Motion for an Extension of the Due Date of the Appeal Brief, to deny the extension-request motion only after the original due date has lapsed, to fail to provide an explanation for the denial of the extension-request motion (which was unopposed and was supported with evidence of good causes for the request), to strike from the Record an Appeal Brief that was filed 'on the date that the extension-request motion had proposed as the new due date' and 'when the appellant was waiting for a ruling on the extension-request motion', and to make a decision that dismisses the Appeal, strikes the Appeal Brief from the Record, and denies a Motion for Leave to File the Appeal Brief Instantly (which was filed after the Court denied the extension-request motion) "when the appellant has meritorious claims" and "on the basis of claims that the Appeal Brief was filed late and without leave of Court and that the explanation for the alleged late-filing (which the Court refuses to identify and which concerns the fact that the appellant was awaiting a ruling on the extension-request motion) is inadequate and insufficient".

The 5/9/12 entry/decision indicates that denying my Motion for Leave to File an Appeal Brief Instantly and dismissing my Appeal (and granting the appellees' motion to strike my Appeal Brief from the Record) was justified because 'My Appeal Brief was due on 4/1/12 and I failed to adequately/sufficiently explain why I did not file it until 4/18/12'. These claims are erroneous, arbitrary, capricious, and unreasonable. Proposition of Law #I explains why my Appeal Brief was originally due on 4/4/12 and describes the explanation that I provided to the Court regarding why I did not file it until 4/18/12. A decision that was made by the Ninth District Court indicates that my explanation was adequate/sufficient. As I pointed out in my 5/21/12 Motion to Certify a Conflict, in GMAC Mtge., LLC v. Jacobs (196 Ohio App.3 167, 2011-Ohio-178), the plaintiff filed a Motion for Summary Judgment and the defendant filed a timely Motion for an Extension of the Due Date of the Response to that motion. The trial Court did not rule on the extension-request motion, before the Response period lapsed. After the Response period lapsed, the Court granted the Summary Judgment Motion and the defendant filed a Civ.R. 60(B) Motion for Relief, which was denied. The Court of Appeals indicated that it was an 'error' and that it may also have

been '**arbitrary, unreasonable, or unconscionable**', for the trial Court to fail to make a decision for the timely filed Motion for an Extension 'before the Response period lapsed' and to implicitly deny the motion and that the error did not require corrective action to be taken "only because it had been rendered harmless (by the defendant's inaction)". The Ninth District Court stated that

We note that we do not condone the trial Court's failure to expressly rule on Jacobs' timely motion for an extension. We recognize that the trial court's failure to rule put Jacobs into a predicament because he did not know whether his extension would be granted or if he would be required to submit his response to GMAC's summary judgment motion within the stationary time frame . . . even assuming that the trial court's implicit denial of Jacobs' motion was **arbitrary, unreasonable, or unconscionable** (emphasis added), Jacobs has not appealed the Court's denial of his Civ.R. 60(B) relief, in which the trial court determined that he did not have a meritorious defense. In light of that unchallenged determination, any **error by the court** (emphasis added) in implicitly denying the motion for extension of time is rendered harmless.

For this current case, I adequately/sufficiently 'explained' and 'demonstrated' to the Court that my timely Motion for an Extension was not ruled on 'before the original due date for my Appeal Brief lapsed' and I was not advised of the denial of my motion 'until after 4/18/12'. The arbitrary, capricious, and unreasonable behavior and error (of failing to rule on my motion, before the due date of my Appeal Brief had passed) was not 'harmless'. It caused the dismissal of my Appeal. It was also a denial of my due-process right to be heard. Furthermore, I have meritorious claims against the appellees (as I proved in Assignment of Error #6 of my 4/18/12 Appeal Brief and as I stated in my 3/23/12 Motion, 4/30/12 Motions, and 5/7/12 Opposition Brief). The Court has not stated that I do not have meritorious claims. The Court's arbitrary, capricious, and unreasonable behavior also included making 4/17/12 and 5/9/12 decisions that provided no reason for the denial of my unopposed extension-request motion (which provided evidence of 'good causes' for the request) and that would not acknowledge my explanation for filing my Appeal Brief on 4/18/12.

Proposition of Law No III: It is an error and an abuse of discretion, for a Court of Appeals to make a decision that denies a Motion for Leave to File an Appeal Brief Instantly, strikes the Appeal Brief from the Record, and dismisses the Appeal 'all on the basis of a claim that

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the Brief was filed late', when accepting the Brief that was filed would not cause prejudice to appellees, the decision did not address the subjects of 'prejudice to the appellees' and 'undue delay', and the Court has a history of ruling that "The Court prefers to hear cases on their merits and, when an intent to prosecute an Appeal has been demonstrated, a late-filed Brief should be accepted and a Motion for Leave to File a Brief should be granted 'if there is no apparent prejudice to the appellee' and 'even if there has been undue delay' ".

The 5/9/12 decision denied my Motion for Leave to File an Appeal Brief and granted appellees' Motion to Dismiss. In Perry v. Perry (7 Ohio App.3d 318, 455 N.E.2d 689) the Court stated that

This matter comes before the Court on appellee's motion to dismiss and appellant's motion for leave to file a brief. . . . Local R. 8(D) provides that appellant must "demonstrate that no undue delay and no prejudice to the appellee has been caused", by appellant's failure to file her brief timely. . . . Appellant stated in her brief that her failure to file a timely brief was due to inadvertence. . . . Although the appellant has not acted diligently, we do not feel that dismissal is warranted in this case. . . . In *Wilcox and Schlosser Co., L.P.A. v. O'Brien* (Feb 4, 1982), No. 81AP-788, unreported, . . . we stated: "Accordingly, appellant, while not acting diligently nor timely, has evinced an intent and effort to prosecute the appeal. While there has been undue delay, there is no apparent prejudice to appellee resulting from the undue delay. Under the circumstances of this case, the court finds that the interest of determining upon their merits appeals which have been prosecuted, even though untimely, justifies the granting of the appellant's motion to file his brief instante" . . . Similarly, in this case, appellant has made an effort to prosecute this appeal albeit in an untimely manner. As this court noted in *Wilcox*, we prefer to determine appeals upon the merits. In this case, appellee has suffered no apparent prejudice as a result of the delay and, therefore. . . the motion to file a brief is sustained.

I discussed and demonstrated the following facts/issues, in my two 4/30/12 motions, 5/7/12 Opposition to the Motion to Dismiss, and 5/21/12 Applications for Reconsideration and En Banc Consideration (where I pointed out that the 5/9/12 decision *overlooked* and failed to address the facts/issues): (1) There was no undue delay in filing my Appeal Brief on 4/18/12, for the reasons described in Proposition of Law #I, (2) I evinced an effort to prosecute the Appeal (by filing motions and briefs), (3) Filing my Brief on 4/18/12 did not cause prejudice to appellees and granting my 4/30/12 motions (and allowing the Brief that I filed on 4/18/12 to be accepted) would not cause prejudice, (4) As proof of the lack of prejudice, the appellees filed a 3/28/11 Response to my 3/23/12 Motion which stated that they did not oppose my request for an extension 'until

4/18/12' of the due date for my Brief and filed a 4/25/12 Motion that stated that they wanted a 20-day extension of the due date for their Response to my 4/18/12 Brief 'in the event that their Motion to Dismiss was denied'. They did not state that "if my 4/18/12 Brief was accepted 'for filing', they would be prejudiced", and (5) The Court did not state that there was undue delay, that I did not act diligently, that I did not demonstrate that there was 'no undue delay' and 'no prejudice to appellees', or that the 5/9/12 decision was made 'because of prejudice to appellees'. The 7/26/12 decision for my 5/21/12 Applications also *overlooked* the facts/issues described in the preceding paragraph. When discussing my Application for Reconsideration (only), the 7/26/12 decision merely stated (on its page 2) that the circumstances in Perry v. Perry justified granting the Motion for Leave to File a Brief and that the Court was not required to accept a Brief. The Court abused its discretion, made a decision that was arbitrary, capricious, and unreasonable, and failed to acknowledge that the circumstances in Perry v. Perry (ie: the appellant demonstrated that there was no prejudice to the appellee) are the same as the circumstances in this current case.

Proposition of Law No. IV: It is an error and an abuse of discretion, for a Court of Appeals to dismiss an Appeal 'on the basis of an appellee's claim about non-service of an Appeal Brief', when the appellee did not support the claim with evidence, the Record shows that the appellant complied with Court rules regarding service, the order that dismissed the Appeal did not address the subject of 'presumption of service', and a hearing was not held.

The 5/9/12 entry/decision states that my Appeal was dismissed because the appellees averred that they were not served with my Appeal Brief. In my 5/21/12 Applications for Reconsideration and En Banc Consideration and Motion to Certify a Conflict, I discussed and demonstrated the following facts/issues (and I pointed out that the 5/9/12 decision *overlooked* and failed to address these facts/issues): (1) My Certificate of Service (which is page 36 of my 4/18/12 Appeal Brief) and the 4/30/12 sworn Affidavit that I filed show that, when I filed and served my Appeal Brief on 4/18/12, I complied with App.R. 13(B), 13(C), and 13(D) (regarding service), (2) The appellees'

averment that they were not served (in their 4/25/12 Motion to Dismiss) was not supported with a sworn statement, affidavit, testimony, or any other type of evidence, (3) There was a presumption of a 4/18/12 service and the Record does not contain evidence to rebut the presumption, (4) Like the Courts did in other cases, the presumption of service should have been recognized and my Appeal should not have been dismissed, (5) In Wiltz v. Clarke, Schaefer, et. al. (2011-Ohio-5616), the defendants filed Motions to Dismiss my complaint, the trial Court made a 12/20/10 decision that dismissed my complaint and cited the fact that I did not respond to the motions as the reason that claims in the motions were deemed to be true, I filed a 1/11 Motion to Vacate the dismissal judgment (which included a sworn Affidavit that indicated that I was not served with the defendants' motions), and I averred in an Appeal Brief that I was not served. In an 11/1/11 decision, the Court of Appeals indicated that my sworn Affidavit could not be considered as part of the Record (because it was not in the Record 'at 12/20/10') and stated that ". . .Where the Record reflects that a party has followed Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence . . . Here, each motion included a certificate of service . . . As the defendants complied with Civ.R. 5, a presumption of proper service arose. At the time that the trial Court rendered its December 20, 2010 judgment, no *evidence in the record* (emphasis added) rebutted this presumption.", and (6) In decisions that were made by the Eighth District Court (in Rafalski v. Oates, 17 Ohio App.3d 65, 66, 477 N.E. 2d 1212), the Fifth District Court (in Thompson v. Scott Bayer, DBA Bayer Plumbing and Heating, 2011 WL 6119282 (Ohio App. 5 Dist.)), and the First District Court (in Infinity Broadcasting, Inc. v. Brewer, 2003-Ohio-1022) the Courts found that, when civil rules for service have been followed by a plaintiff, there is a presumption of service, the defendant has the burden of proving that service did not take place, and the defendant can rebut the presumption only with

evidence (such as an affidavit, a sworn statement, or testimony). In Infinity Broadcasting, Inc. v. Brewer (2003-Ohio-1022) the Court also held that, if evidence that supports the claim of non-service is presented, the Court has a duty to hold a hearing 'to assess the claim's credibility'.

The 7/26/12 decision for my 5/21/12 Applications and Motion also arbitrarily, capriciously, and unreasonably *overlooked* (and did not address) the facts/issues described in the paragraph above and erroneously stated (on page 2) that the 5/9/12 decision did not conflict with other decisions.

Proposition of Law No. V: The Court of Appeals erred and abused its discretion, by denying the appellant's Application for En Banc Consideration and failing to allow the majority of the en banc Court to decide if the Application would be considered en banc.

On page 2 of the 7/26/12 decision, the panel that made the 5/9/12 entry/decision stated that my 5/21/12 Application for En Banc Consideration was denied because 'the 5/9/12 journal entry does not conflict with the decisions made in Perry v. Perry or in Wiltz v. Clark, Schaefer, et. al. (2011-Ohio-5616)'. The 7/26/12 decision was erroneous, arbitrary, capricious, and unreasonable. (See Proposition of Law #VI.) The Court also erred, because it was the majority of the en banc Court that should have made the decision regarding whether or not a conflict existed. App.R. 26(2)(a) states that "Upon a determination that two or more of the decisions of the Court in which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc". As a reasonable person would conclude, when a panel ignores facts/issues that are the subjects of an Application for En Banc Consideration (as the panel did for this current case), it is not likely that the same panel would state that a conflict exists and allow the Application to be considered en banc. Although App.R. 26(2)(a) does not identify who should make the determination regarding whether or not a conflict exists, some District Courts have appropriately interpreted App.R. 26(2)(a) and developed rules (such as Loc.R. 26(D) of the Eighth District) and orders (such as the Ninth District's 3/16/11 En Banc Consideration Standing

Order), which indicate that the majority of the en banc Court should make the determination. That interpretation should also have been applied, for this current case.

Proposition of Law #VI: When a Court of Appeals denies Applications for Reconsideration and En Banc Consideration and a Motion to Certify a Conflict, while erroneously stating that there are no inconsistencies between decisions and while failing to 'identify the cases' and to 'acknowledge and address the issues' that were subjects of the Applications and Motion and to correct its obvious errors that were brought to its attention, the Court has erred, denied the movant's due process right to be heard, and abused its discretion and App.R. 25, App.R. 26, and the Appeal process have been rendered meaningless.

The Court of Appeals erred, abused its discretion, and made an arbitrary, capricious, and unreasonable decision, I was denied a due process right to be heard, and the Appeal process, App.R. 25, and App.R. 26 were rendered meaningless, because the Court made a 7/26/12 decision that ignored what was included in my 5/21/12 Applications and Motion.

Page 2 of the 7/26/12 decision stated that my Application for Reconsideration was denied, because I contended that the Court should have denied the appellees' Motion to Dismiss and the decision in Perry v. Perry does not require the Court to accept a late-filed Appeal Brief. In truth, my Application discussed the fact that the 5/9/12 decision included an *obvious error*, in stating that my Appeal Brief was due on 4/1/12. My Application addressed the fact that the 5/9/12 decision *overlooked* (and denied, without discussing) my 4/30/12 Motion for Reconsideration of the 4/17/12 Decision. My Application discussed the fact that the 5/9/12 decision stated that my explanation for filing my Appeal Brief on 4/18/12 was insufficient/inadequate, but *overlooked* (and did not acknowledge) what the explanation was. My application addressed the fact that the 5/9/12 decision *overlooked* (and did not discuss) my explanation regarding why my 4/30/12 Motion to File an Appeal Brief Instanter should have been granted. (See Proposition of Law #I, for the discussions about these subjects, which the 7/26/12 decision ignored.) My Application also described facts/issues that the 5/9/12 decision *overlooked*, regarding conflicts between the 5/9/12

decision and decisions made in 6 other cases. (See the following paragraph.)

Page 2 of the 7/26/12 decision stated that my Application for En Banc Consideration was denied because the 5/9/12 decision does not conflict with the decisions made in Perry v. Perry or Wiltz v. Clark, Schaefer, et. al.. The Court *erroneously* claimed that conflicts did not exist and abused its discretion, by *overlooking* (and not acknowledging) facts/issues related to these two cases. See Proposition of Law #III, related to the Perry v. Perry conflict. See Proposition of Law #IV, related to the Wiltz v. Clark, Schaefer, et. al. (2011-Ohio-5616) conflict. The 7/26/12 decision denied my Motion to Certify a Conflict, while *erroneously* stating (on pages 1 & 2) that there was no conflict between the 5/9/12 decision and 4 decisions of other Courts and while *overlooking* facts/issues and failing to even identify the cases that were subjects of my motion. See Proposition of Law #II, related to the GMAC Mtge. v. Jacobs conflict. See Proposition of Law #IV, related to the Infinity Broadcasting v. Brewer, Thompson v. Scott Bayer, and Rafalski v. Oates conflicts.

Proposition of Law #VII: It is an error and abuse of discretion, for a trial Court to refuse 'to docket' and 'to comply with' an order that remands a case to the trial Court (which was made because an error had occurred that was prejudicial to the appellant) and for the Court of Appeals to have knowledge of the non-compliance and to (instead of compelling compliance) erroneously dismiss the Appeal 'without hearing the Appeal on its merits'.

The appellees obtained a dismissal of my 8/6/10 complaint, by filing trial Court motions that included known false/fraudulent claims, affidavits, and evidence. I filed a 1/19/11 Civ.R. 60(B) motion that contained evidence to support that I was not served with the motions and to refute the false/fraudulent claims, affidavits, and evidence. The 11/1/11 decision stated (on its pages 7, 11, and 15) that the arguments and evidence in my first Appeal Brief could not be considered, because I submitted the evidence to the trial Court as part of my 1/19/11 motion and the Court of Appeals did not have jurisdiction to consider my 1/19/11 motion. After I asked the Court of Appeals to remand the case to the trial Court 'so that my 1/19/11 motion could be considered', a

12/22/11 decision and 12/28/11 entry granted my request 'pursuant to App.R. 12(D)', which was an acknowledgment that prejudicial error had occurred. The trial Court failed to 'docket' or to 'comply with' the 12/22/11 decision and 12/28/11 entry (and merely docketed on 12/28/11, for the second time, the 11/1/11 entry that denied my Appeal). I filed a 2/6/12 motion in the trial Court (which was not a Civ.R. 60(B) motion) in which I requested that the Court 'docket' and 'comply with' the remand decision and entry and hear my 1/19/11 motion. The trial Court made a 2/23/12 decision that denied my 2/6/12 motion, indicated that it would not hear my 1/19/11 motion, and falsely implied that my 1/19/11 motion had already been heard. I filed an Appeal of the 2/23/12 decision. Assignment of Error #4 of my 4/18/12 Appeal Brief concerned the trial Court's refusal 'to docket' and 'to comply with' the 12/22/11 decision and 12/28/11 entry and to hear my 1/19/11 motion. My 4/18/12 Brief asked the Court of Appeals to compel compliance. The Court of Appeals made a 4/26/12 sua sponte entry that stated that I should explain why Assignment of Error #4 of my Appeal Brief should not be summarily overruled. After I provided the explanation on 5/7/12, the Court made a 5/9/12 decision that granted the appellees' 4/25/12 Motion to Dismiss the Appeal 'without hearing the Appeal on its merits'. The 5/9/12 decision was erroneous, arbitrary, capricious, and unreasonable, because there was no legitimate reason to dismiss the Appeal (as is discussed in Propositions of Law #I, II, III, and IV), the 4/26/12 order demonstrated that the Court of Appeals was aware of my assertion that the trial Court had refused to 'docket' and 'comply with' the remand decision and entry, and App.R. 27 dictated that the decision and entry were mandates (that 'compliance with' should have been compelled).

CONCLUSION

Based upon all of the above, I respectfully request that this Court accept jurisdiction in this case.

Date 9/10/12 Cassandra Wiltz, Cassandra Wiltz, Pro Se

CERTIFICATION OF SERVICE

I certify that, on 9/10/12, a copy of this Memorandum in Support of Jurisdiction (with its A1 to A45 Appendix) was sent 'via ordinary mail' to each of the following:

David S. Bloomfield, Jr. and Ryan P. Sherman
Porter, Wright, Morris, and Arthur, LLP
41 South High Street, Suites 2800-3200
Columbus, OH 43215

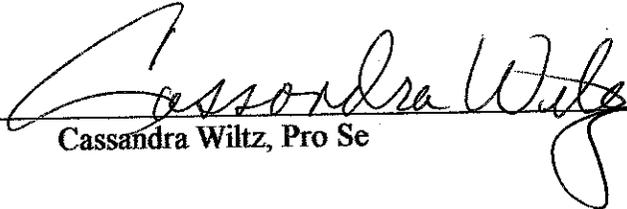
Attorneys for Appellees Schneider, Downs, and Company, Joseph Patrick, Roy Lydie, and Bradley P. Tobe

Thomas H. Pyper
Pyper, Alexander, and Nordstrom, LLC
7601 Paragon Road, Suite 301
Dayton, OH 45459

Attorney for Appellees Clark, Schaefer, Hackett, and Company and Kent D. Pummel

Date

9/10/12


Cassandra Wiltz, Pro Se

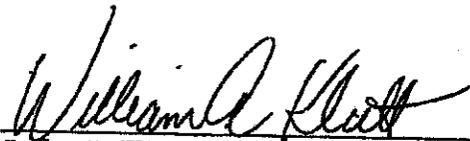
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY, OHIO
2012 MAY -9 PM 3:19
CLERK OF COURTS

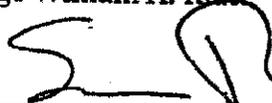
Cassandra Wiltz, :
Plaintiff-Appellant, :
v. : No. 12AP-169
Clark Schaefer Hackett & Co. et al., : (REGULAR CALENDAR)
Defendants-Appellees. :

JOURNAL ENTRY OF DISMISSAL

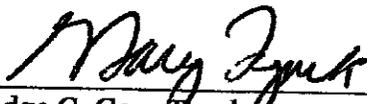
Appellees' April 25, 2012 motion to dismiss this appeal is granted and this appeal is dismissed for failure of appellant to timely file her brief or to adequately explain the basis for her failure to timely file a brief. Appellant's brief was originally due on April 1, 2012. Appellant's brief was not filed until April 18, 2012, and was not filed pursuant to proper leave of court. Appellees aver that the brief was never served upon counsel. Appellant's April 30, 2012 motion for leave to file her brief out of rule and application to reconsider the denial of her motion for extension of time are denied, appellant not sufficiently explaining the delay in filing her brief. Costs shall be assessed against appellant.



Judge William A. Klatt



Judge Susan Brown, P.J.



Judge G. Gary Wyack



IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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2012 JUL 26 PM 1:27
CLERK OF COURTS

Cassandra Wiltz, :
Plaintiff-Appellant, :
v. : No. 12AP-169
Clark Schaefer Hackett & Co. et al., : (C.P.C. No. 10CVH-08-11570)
Defendants-Appellees. : (REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on July 26, 2012

Cassandra Wiltz, pro se.

*Pyper & Nordstrom, LLC, and Thomas H. Pyper, for appellee
Clark Schaefer Hackett & Co. and Kent Pummel.*

*Porter Wright Morris & Arthur, LLP, and Ryan P. Sherman,
for appellees Schneider Downs & Co., Inc., Joseph Patrick,
Roy Lydic and Bradley P. Tobe.*

ON MOTIONS

KLATT, J.

{¶ 1} Plaintiff-appellant, Cassandra Wiltz, has filed a motion to certify a conflict pursuant to App.R. 25 and applications for reconsideration and consideration en banc pursuant to App.R. 26. For the following reasons, we deny Wiltz's motion and applications.

{¶ 2} Before certifying a conflict under App.R. 25, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be on the same question of law. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993). Here, Wiltz identifies four decisions from other

districts as conflicting with the journal entry of dismissal filed in this appeal on May 9, 2012. None of the cited decisions includes a holding that conflicts with the May 9, 2012 journal entry. Therefore, we deny Wiltz's motion to certify a conflict.

{¶ 3} When presented with an application for reconsideration filed pursuant to App.R. 26, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue that the court should have, but did not, fully consider. *Columbus v. Hodge*, 37 Ohio App.3d 68, 69 (10th Dist.1987). Relying on *Perry v. Perry*, 7 Ohio App.3d 318 (10th Dist.1982), Wiltz contends that this court should have denied the motion to dismiss filed by defendants-appellees, Schneider Downs and Co., Inc.; Clark Schaefer Hackett & Co.; Joe Patrick; Roy Lydic; Bradley Tobe; and Kent Pummel. In *Perry*, we held that the grant of an appellant's motion to file her brief out of rule is justified when there is no apparent prejudice to the appellee from the undue delay attributable to the appellant's failure to file a timely brief. *Id.* at syllabus. Although the circumstances described in *Perry* justify the decision to allow an appellant to file an untimely brief, nothing in *Perry* requires this court to accept a late-filed appellant's brief. Generally, this court has the discretion to dismiss an appeal when an appellant fails to timely file a brief. App.R. 18(C); Loc.R. 9. We appropriately exercised that discretion in this case. Therefore, we deny Wiltz's application for reconsideration.

{¶ 4} "[I]f the judges of a court of appeals determines that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, paragraph two of the syllabus. Here, the May 9, 2012 journal entry does not conflict with *Perry* or *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616. Therefore, we deny Wiltz's application for en banc consideration.

*Motion to certify a conflict and applications for reconsideration
and en banc consideration denied.*

BROWN, P.J., and TYACK, J., concur.

FILED
COURT OF APPEALS
FRANKLIN COUNTY OHIO

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2012 JUL 26 PM 1:35

CLERK OF COURTS

Cassandra Wiltz,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 12AP-169
v.	:	(C.P.C. No. 10CVH-08-11570)
	:	
Clark Schaefer Hackett & Co. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on July 26, 2012, it is the order of this court that appellant's motion to certify a conflict and applications for reconsideration and en banc consideration are denied.

KLATT, J., BROWN, P.J., & TYACK, J.

By: William A Klatt
 Judge William A. Klatt

Dwr

A4

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
COLUMBUS, OHIO
2012 APR 26 PM 1:16
CLERK OF COURTS

Cassandra Wiltz, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 12AP-169
 :
 Clark Schaefer Hackett & Co. et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

JOURNAL ENTRY

The court will examine appellees' April 25, 2012 motion to strike and dismiss on May 9, 2012. Appellees' briefs shall not be due until further order of this court. Appellant shall, in any response filed, show cause why Assignment of Error #4 should not be summarily overruled. The court reminds appellant that she is required to serve all pleadings on counsel for appellees pursuant to App.R. 13(B).



JUDGE

cc: Deputy Court Administrator
Court Assignment Commissioner

A5

FILED
IN THE COURT OF APPEALS OF OHIO
OFFICE OF APPEALS
COLUMBUS, OHIO

TENTH APPELLATE DISTRICT

2012 APR 17 PM 1:04

CLERK OF COURTS

Cassandra Wiltz, :

Plaintiff-Appellant, :

v. :

Clark Schaefer Hackett & Co. et al., :

Defendants-Appellees. :

No. 12AP-169

(REGULAR CALENDAR)

JOURNAL ENTRY

Appellant's March 23, 2012 motion for an extension of time to file her brief is denied.



JUDGE



IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 MAR 26 PM 1:02
CLERK OF COURTS

Cassandra Wiltz,

:

Plaintiff-Appellant,

:

v.

:

No. 12AP-169

Clark Schaefer Hackett & Co. et al.,

:

(REGULAR CALENDAR)

Defendants-Appellees.

:

JOURNAL ENTRY

Appellant's March 23, 2012 motion for leave to file a long brief, including an additional ten (10) pages, is denied.



JUDGE

off

A7

0A248 - X95

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CASSANDRA WILTZ,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 10CVH08-11570
	:	
CLARK SCHAEFER HACKETT & CO., et al.,	:	Judge Cain
	:	
Defendants.	:	

ENTRY DENYING ALL OUTSTANDING MOTIONS BEFORE THE COURT

Rendered this ___ day of February 2012.

CAIN, J.

Due to apparent confusion on the part of Plaintiff, the Court feels that it is necessary to issue a clarifying entry. It is hereby the order of the Court that all outstanding motions presently before the Court in this matter are DENIED. As stated in previous decisions, the Court is not going to vacate its December 20, 2010 decision dismissing Plaintiff's Complaint. The Court will not entertain any further motions from Plaintiff requesting such.

IT IS SO ORDERED.

Cassandra Wiltz
Plaintiff

Thomas H. Pyper
Counsel for Defendants, Clark Schaefer Hackett & Co. and Kent D. Pummel

David S. Bloomfield, Jr.
Ryan P. Sherman
Counsel for Defendants Schneider Downs & Co., Inc., Joseph Patrick, Roy Lydic, and Bradley P. Tobe

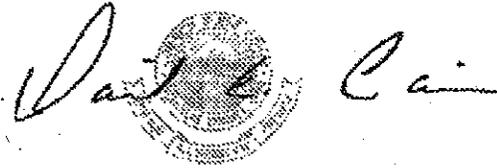
A8

0A248 - X96

Franklin County Court of Common Pleas

Date: 02-23-2012
Case Title: CASSANDRA WILTZ -VS- CLARK SCHAEFER HACKETT & COMPANY
Case Number: 10CV011570
Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge David E. Cain

Electronically signed on 2012-Feb-23 page 2 of 2

A9

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CASSANDRA WILTZ,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 10CVH08-11570
	:	
CLARK SCHAEFER HACKETT & CO., et al.,	:	Judge Cain
	:	
Defendants.	:	

DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, FILED DECEMBER 20, 2011

Rendered this ____ day of January 2012.

CAIN, J.

This matter is before this Court on Plaintiff's Motion for Relief from Judgment, filed December 20, 2011.¹ In an effort to be a good example to the parties, the Court will keep this decision as brief as possible. In the present motion, Plaintiff asks the Court for relief from its December 20, 2010 decision whereby it granted judgment in Defendants' favor and dismissed Plaintiff's Complaint. Plaintiff moves for this relief pursuant to Civ. R. 60(B). The Court has reviewed Plaintiff's motion and finds that she is not entitled to the relief she seeks. First, the Court is not of the opinion that Plaintiff has met the requirements of Civ. R. 60(B). Second, nothing in Plaintiff's current motion causes the Court to doubt its December 20, 2010 decision. After review and consideration, the Court finds Plaintiff's motion to be not well-taken, and is hereby DENIED.

¹ On January 3, 2012 Defendants filed a Motion to Strike Plaintiff's motion or in the alternative, Motion for Extension of Time to respond to Plaintiff's motion. Due to the fact that the Court is of the opinion that Plaintiff's motion fails on its face, the Court sees no reason to rule on Defendants' motion and it is hereby denied as MOOT.

A10

0A193 - I50

IT IS SO ORDERED.

Copies to:

Cassandra Wiltz
Plaintiff

Thomas H. Pyper
Counsel for Defendants, Clark Schaefer Hackett & Co. and Kent D. Pummel

David S. Bloomfield, Jr.
Ryan P. Sherman
Counsel for Defendants Schneider Downs & Co., Inc., Joseph Patrick, Roy
Lydic, and Bradley P. Tobe

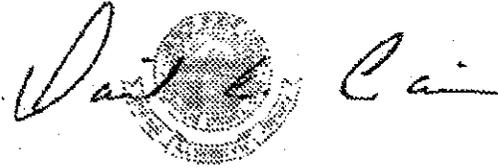
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0A193 - I51

Franklin County Court of Common Pleas

Date: 01-30-2012
Case Title: CASSANDRA WILTZ -VS- CLARK SCHAEFER HACKETT & COMPANY
Case Number: 10CV011570
Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge David E. Cain

A12

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 DEC 28 PM 12:35
CLERK OF COURTS

Cassandra Wiltz, :
 :
 Plaintiff-Appellant, :
 :
 v. :
 :
 Clark Schaefer Hackett & Co. et al., :
 :
 Defendants-Appellees. :

Nos. 11AP-64 ✓
and 11AP-282
(C.P.C. No. 10CVH-08-11570)
(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on December 22, 2011, it is the order of this court that appellant's application for reconsideration is granted in part and denied in part. After reconsidering our disposition of appeal No. 11AP-282, we remand this matter to the Franklin County Court of Common Pleas for proceedings consistent with law and our earlier decision.

KLATT, J., BRYANT, P.J., & TYACK, J.

By William A. Klatt
Judge William A. Klatt

m

Case J. V5

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
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FOR THE TENTH DISTRICT OF OHIO

2011 DEC 22 PM 12:58

CLERK OF COURTS

Cassandra Wiltz,	:	
	:	
Plaintiff-Appellant,	:	Nos. 11AP-64
	:	and 11AP-282
v.	:	(C.P.C. No. 10CVH-08-11570)
	:	
Clark Schaefer Hackett & Co. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

DECISION

Rendered on December 22, 2011

Cassandra Wiltz, pro se.

Pyper Alexander & Nordstrom, LLC, and Thomas H. Pyper, for appellees Clark Schaefer Hackett & Co., and Kent D. Pummel.

Porter, Wright, Morris & Arthur, LLP, David S. Bloomfield, Jr., and Ryan P. Sherman, for appellees Schneider Downs and Co., Inc., Joseph Patrick, Roy Lydic, and Bradley P. Tobe.

ON MOTION FOR RECONSIDERATION

KLATT, J.

{¶1} Plaintiff-appellant, Cassandra Wiltz, has filed an App.R. 26(A) application requesting that this court reconsider our decision in *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64 and 11AP-282, 2011-Ohio-5616. For the following reasons, we grant in part and deny in part Wiltz's application for reconsideration.

A14

{¶2} When presented with an application for reconsideration filed pursuant to App.R. 26, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue that the court should have, but did not, fully consider. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 69. An appellate court will not grant an application for reconsideration merely because a party disagrees with the logic or conclusions of the underlying decision *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-3128, ¶2; *Bae v. Dragoo and Assoc., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶2.

{¶3} In her application, Wiltz challenges our rulings in appeal No. 11AP-64, the appeal from the grant of defendants' motions for judgment on the pleadings and summary judgment, and appeal No. 11AP-282, the appeal from the denial of Wiltz's post-judgment motion. In appeal No. 11AP-64, Wiltz first argued that the trial court erred in not giving her notice of the date defendants' motions were deemed submitted to the court. We held that Loc.R. 21.01 of the Franklin County Court of Common Pleas provided Wiltz with adequate notice of that date. Wiltz now contends that Loc.R. 21.01 cannot apply to this case because defendants failed to serve her with their motions. This contention relies on Wiltz's averment, first made in her post-judgment motion, that she did not receive either of defendants' motions. As we held in our decision, we cannot decide the appeal of the judgment granting defendants' motions based on evidence that Wiltz added to the record after the trial court entered judgment. *Wiltz* at ¶13. Thus, in resolving appeal No. 11AP-64, our decision appropriately ignored Wiltz's post-judgment averments regarding the alleged failure of service.

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{¶4} Wiltz next argues that Loc.R. 21.01 cannot apply to her case because Judge Beverly Y. Pfeiffer, who later recused herself, was the judge on the date that the motions were deemed submitted. We cannot determine how Wiltz's argument on reconsideration differs from the argument in her appellate brief. Therefore, we direct Wiltz to paragraph 20 of our decision, in which we rejected this argument.

{¶5} Wiltz also takes issue with our determination that no law mandated that the court clerk notify her of the entry of recusal and transfer. Wiltz points to Civ.R. 58(B), and she asserts that that rule required the clerk to serve the entry on her. Pursuant to Civ.R. 58(B), the clerk must serve a "judgment" on the parties in the manner prescribed by Civ.R. 5(B) within three days of entering the judgment upon the journal. As used in Civ.R. 58(B), "judgment" means "a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code." Civ.R. 54(A). The order at issue here does not qualify as a final appealable order under R.C. 2505.02. *Grogan v. T.W. Grogan Co. Inc.* (2001), 143 Ohio App.3d 548, 557. Consequently, Civ.R. 58(B) does not apply. See *FIA Card Servs., N.A. v. Marshall*, 7th Dist. No. 10 CA 864, 2010-Ohio-4244, ¶30 (holding that Civ.R. 58(B)'s service requirement did not apply to an interlocutory order).

{¶6} In resolving Wiltz's second assignment of error in appeal No. 11AP-64, we held that a presumption of proper service arose because defendants complied with Civ.R. 5 when serving their motions. Wiltz now contends that defendants failed to sign the proofs of service attached to the motions in accordance with Civ.R. 11, as required by Civ.R. 5(D). Civ.R. 11 states that:

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number,

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telefax number, if any, and business e-mail address, if any, shall be stated. * * *

Here, all the necessary information appeared on the face of each motion. We thus conclude that the proofs of service substantially satisfied the requirements of Civ.R. 5(D) and 11.

{¶7} Wiltz also argues that we should have reversed the trial court's judgment because defendants made false and intentionally misleading claims about the contents of her complaint and concealed the true content of the complaint. Wiltz's complaint is part of the record, and thus the trial court could, and did, rely on it. Assuming defendants mischaracterized Wiltz's complaint in their motions, those mischaracterizations could not prejudice Wiltz because the trial court could evaluate the allegations in the complaint for itself.

{¶8} With regard to her third assignment of error in appeal No. 11AP-64, Wiltz merely repeats the argument she made in her brief. We direct her to paragraphs 31 through 34 of our decision. We decline to reconsider our analysis merely because Wiltz disagrees with it.

{¶9} Turning to appeal No. 11AP-282, Wiltz requests that this court explain why we overruled part of her first assignment of error. We rejected the portion of her assignment of error that contended that the trial court was biased because we lacked the authority to address it. The Chief Justice of the Supreme Court of Ohio has exclusive jurisdiction to determine a claim that a common pleas court judge is biased or prejudiced, and common pleas litigants must bring any challenge to a judge's objectivity via the procedure set forth in R.C. 2701.03. *Discover Bank v. Schiefer*, 10th Dist. No. 09AP-1178, 2010-Ohio-2980, ¶16; *Ford Motor Credit Co. v. Ryan & Ryan, Inc.*, 10th Dist. No

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09AP-809, 2010-Ohio-2905, ¶16. We rejected the portion of the assignment of error that alleged a due process violation because Wiltz premised the violation on the trial court's refusal to hear her request for Civ.R. 60(B) relief. The trial court could not hear Wiltz's request because it lacked jurisdiction to consider it. Thus, no due process violation occurred.

{¶10} Finally, Wiltz asks that we remand this case to the trial court. Pursuant to App.R. 12(D), we grant Wiltz the relief that she requests.

{¶11} For the foregoing reasons, we grant in part and deny in part Wiltz's application for reconsideration. After reconsidering our disposition of appeal No. 11AP-282, we remand this matter to the Franklin County Court of Common Pleas for proceedings consistent with law and our earlier decision.

*Application granted in part, denied in part;
cause remanded.*

BRYANT, P.J., and TYACK, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

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CLERK OF COURTS

Cassandra Wiltz,

Plaintiff-Appellant,

v.

Clark Schaefer Hackett & Co. et al.,

Defendants-Appellees.

Nos. 11AP-84

and

11AP-282

(C.P.C. No. 10CVH08-11570)

(REGULAR CALENDAR)

DECISION

Rendered on November 1, 2011

Cassandra Wiltz, pro se.

Pyper Alexander & Nordstrom, LLC, and Thomas H. Pyper, for appellees Clark Schaefer Hackett & Co., and Kent D. Pummel.

Porter, Wright, Morris & Arthur, LLP, David S. Bloomfield, Jr., and Ryan P. Sherman, for appellees Schneider Downs and Co., Inc., Joseph Patrick, Roy Lydic, and Bradley P. Tobe.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Cassandra Wiltz, appeals judgments of the Franklin County Court of Common Pleas in favor of defendants-appellees, Clark Schaefer Hackett & Company and Kent D. Pummel (together the "Clark defendants") and Schneider Downs and Co., Inc., Joseph Patrick, Roy Lydic, and Bradley P. Tobe (together the "Schneider

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defendants"). For the following reasons, we affirm the trial court's December 20, 2010 judgment, and we vacate the February 24, 2011 judgment.

{¶2} This action arises out of Wiltz's employment with Moundbuilders Guidance Center, Inc. ("Moundbuilders") as its controller. Wiltz's job duties included maintaining Moundbuilders' financial records. Moundbuilders engaged Clark Schaefer Hackett & Company to perform yearly audits of its financial statements for the 2003-2004, 2004-2005, 2005-2006, and 2006-2007 fiscal years. Pummel oversaw those yearly audits. Moundbuilders hired Schneider Downs and Co., Inc., to audit its financial statements for the 2007-2008 fiscal year. Apparently, Patrick, Lydic, and Tobe participated in that audit.

{¶3} Wiltz brought suit against defendants on August 6, 2010. In her complaint, Wiltz alleged that shortly after beginning her employment with Moundbuilders, she discovered that it maintained false and misleading financial records, and that it used those records to fraudulently obtain funding. Wiltz asserted that Moundbuilders understated expenses, overstated income, did not make needed financial adjustments, and failed to follow generally accepted accounting principles. According to Wiltz, Moundbuilders employees explained to her that the Clark defendants had assisted Moundbuilders with its improper accounting and reporting practices. Wiltz allegedly also discovered that Moundbuilders employees and board members, along with the Clark and Schneider defendants, agreed that: (1) "off-the-books" records would be used to prepare Moundbuilders' financial statements, (2) the general ledger would be corrected only at the end of the 2007-2008 fiscal year, and (3) the audit report for the 2007-2008 fiscal year would falsely state that Moundbuilders had no apparent internal control weaknesses over financial reporting and that any problems with Moundbuilders' accounting practices were

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not deliberate. According to Wiltz, the Schneider defendants carried out the latter two tasks.

{¶4} Wiltz also claimed that Jeff Forman, Moundbuilders' chief financial officer, instructed her to make erroneous journal entries in Moundbuilders' financial records. When Wiltz refused and objected to Moundbuilders' accounting practices, Forman and other Moundbuilders employees allegedly threatened, intimidated, and harassed her, and subjected her to differential treatment that Wiltz believed was racially motivated.¹ Wiltz then complained to Moundbuilders' board about the treatment that she had received and her belief that Moundbuilders engaged in improper accounting practices. According to Wiltz, her complaints caused certain Moundbuilders employees and board members to decide to terminate her employment. In her complaint, Wiltz asserted that this group advised defendants that they intended to retaliate against Wiltz for her complaints by firing her. The group also allegedly told defendants that they knew that Wiltz's complaints about Moundbuilders' accounting practices were valid, but they asked defendants to provide statements that the complaints were actually unsound and untrue. According to Wiltz, defendants agreed to the proposed scheme, and they then provided false statements to Moundbuilders, which Moundbuilders relied on to justify the termination of Wiltz's employment.

{¶5} Based on the allegations of the complaint, Wiltz asserted that defendants aided, abetted, incited, compelled, and/or coerced Moundbuilders to discharge her because of her race. Wiltz contended that these actions violated R.C. 4112.02. Wiltz

¹ In her complaint, Wiltz alleged that she is African American.

also asserted claims for professional negligence and intentional infliction of emotional distress.

{¶6} Originally, this case was assigned to Judge Beverly Y. Pfeiffer. Judge Pfeiffer, however, requested that the administrative judge reassign the case to another judge because she was a client of Clark Schaefer Hackett & Company. An entry dated December 13, 2010 indicates that the administrative judge approved the recusal and transferred the case to Judge David Cain.

{¶7} After answering Wiltz's complaint, the Clark defendants moved for summary judgment on all of Wiltz's claims. To support their motion, the Clark defendants relied on Pummel's affidavit. Pummel testified that Patrick Evans, the chief executive officer of Moundbuilders, faxed to him a copy of a letter from Wiltz criticizing Moundbuilders' accounting practices and a copy of a letter from Forman responding to Wiltz's criticisms. Pummel reviewed the letters and told Evans that the dispute between Wiltz and Forman appeared to have arisen from a miscommunication between them. At the request of a member of Moundbuilders' board, Pummel reiterated his opinion regarding the dispute to the entire board. Pummel also informed the board that certain criticisms Wiltz set forth in her letter had some validity. During these two conversations, neither Evans nor the board disclosed to Pummel that Moundbuilders was contemplating any employment-related discipline with regard to Wiltz. Additionally, neither Evans nor the board mentioned Wiltz's race. At the time of the two conversations, Pummel did not know Wiltz's race.

{¶8} Like the Clark defendants, the Schneider defendants also answered Wiltz's complaint. The Schneider defendants, however, then moved for judgment on the pleadings, not summary judgment. In large part, the Schneider defendants' arguments

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depended upon their assertion, supported by a letter attached to their answer, that Moundbuilders did not formally engage Schneider to perform the 2007-2008 audit until two months after Moundbuilders discharged Wiltz.

{¶9} Wiltz did not respond to either motion. On December 20, 2010, the trial court issued a decision and entry that granted both the Clark and Schneider defendants' motions.

{¶10} On January 19, 2011, Wiltz filed a notice of appeal from the December 20, 2010 judgment. On the same day, Wiltz also filed a motion before the trial court entitled "Motion for Order that Reconsiders, Reverses, and Grants Relief from the Judgment Dated 12/20/10, for an Order that Compels Defendants to Provide the Plaintiff with Copies of the Summary Judgment Motion and the Motion for Judgment on the Pleadings, and for an Order that Establishes a Due Date for the Plaintiff's Oppositions/Responses to the Summary Judgment Motion and the Motion for Judgment on the Pleadings." (R. at 69.) In the affidavit Wiltz filed with her motion, she averred that neither the Clark nor Schneider defendants had provided her with copies of their motions.

{¶11} On February 24, 2011, the trial court issued a decision and entry denying Wiltz's motion. Wiltz then appealed that judgment. We consolidated this second appeal with the appeal from the December 20, 2010 judgment.

{¶12} On appeal from the December 20, 2010 judgment, i.e., appeal No. 11AP-64, Wiltz assigns the following errors:

[1.] The trial Court erred, by dismissing the plaintiff's complaint (on the basis of motions of defendants) without providing the plaintiff with either a Notice of the Hearing Date for the Motions, a Notice of the Date that the Motions were Submitted to a New Trial Judge, or a Notice of the Date of the

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Recusal of the Judge who had a Conflict of Interest Related to the Case.

[2.] Fraud and misconduct of the defendants and of agents of the trial Court (including of a biased judge who had a conflict of interest related to the case) resulted in the plaintiff's inability to oppose the defendants' motions, a dismissal judgment (made solely because of the failure to oppose the motions) that is against the manifest weight of evidence in the Record, and denial of the plaintiff's due process right to be "heard" by the Court.

[3.] The trial Court erred, by making an order on the basis of a Summary Judgment motion that was prematurely made (and that the plaintiff was also unaware had been made).

¶13) Before addressing the merits of Wiltz's arguments, we must determine what evidence we may consider in reviewing Wiltz's appeal from the December 20, 2010 judgment. Appellate review is limited to the record as it existed at the time the trial court rendered its judgment. *Fifth Third Bank v. Financial S. Office Partners, Ltd.*, 2d Dist. No. 23762, 2010-Ohio-5638; *Cunningham v. Cunningham*, 5th Dist. No. 09-CA-25, 2010-Ohio-1397, ¶65; *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. No. 09AP-510, 2009-Ohio-6852, ¶15. See also *UAP-Columbus ██████████ v. Young*, 10th Dist. No. 09AP-646, 2010-Ohio-485, ¶32 ("Our review of summary judgment is limited solely to the evidence that was before the trial court at the time of its decision."). "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶13 (quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus). Likewise, "a reviewing court cannot consider evidence that a party added to the trial court record after that court's judgment, and then decide an appeal from the judgment based on the new evidence." *Paasewe* at ¶15. See also *Wallace v.*

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Mantych Metalworking, 189 Ohio App.3d 25, 2010-Ohio-3765, ¶10-11 (refusing to consider a deposition filed with the trial court after the court rendered the judgment being appealed); *Waterford Tower Condominium Assn. v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006-Ohio-506, ¶13 (refusing to consider evidence adduced to support a motion for reconsideration when reviewing the underlying judgment).

{¶14} In her appeal from the December 20, 2010 judgment, Wiltz relies extensively on documents and affidavit testimony that she submitted in support of her post-judgment motion. As none of that evidence was before the trial court when it rendered the December 20, 2010 judgment, we cannot consider that evidence in appeal No. 11AP-64.

{¶15} Also, as an initial matter, we note that some of the arguments that Wiltz sets forth in her appellate briefs do not correlate with any assignment of error. Pursuant to App.R. 12(A)(1)(b), appellate courts must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." Thus, generally, appellate courts will rule only on assignments of error, not mere arguments. *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶70. In the case at bar, we decline to address those arguments that are unrelated to any assignment of error.

{¶16} By Wiltz's first assignment of error, she argues that the trial court erred in not giving her notice of: (1) the hearing date for defendants' motions, (2) the date on which the motions were submitted to the trial court, and (3) the date of Judge Pfeiffer's recusal. None of these arguments have any merit.

{¶17} A trial court need not notify the parties of a non-oral hearing date, i.e., the date on which a motion for summary judgment is submitted for consideration, if a local

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rule of court provides sufficient notice of that date. *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, syllabus. While *Hooten* dealt specifically with a motion for summary judgment, we find that its logic extends to motions for judgment on the pleadings as well.

{¶18} The Franklin County Court of Common Pleas has adopted Loc.R. 21.01,² which states that:

All motions shall be accompanied by a brief stating the grounds and citing the authorities relied upon. The opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion. The moving party shall serve any reply brief on or before the 7th day after the date of service as set forth on the certificate of service attached to the served copy of the answer brief. On the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge. Oral hearings on motions are not permitted except upon leave of the Trial Judge upon written request by a party.

Pursuant to this rule, unless a party requests and receives leave for an oral hearing, the trial court resolves the motion through a non-oral hearing. A non-oral hearing occurs when the memoranda and supporting evidentiary materials are submitted to the court. *Hooten* at ¶9, fn. 1. Thus, in accordance with Loc.R. 21.01, a non-oral hearing occurs on the 28th day after the motion is filed.

{¶19} In the instant case, no party requested leave for an oral hearing, so defendants' motions received a non-oral hearing. Under the standard set by *Hooten*, Loc.R. 21.01 provides parties with adequate notice of the non-oral hearing date, i.e., the

² Civ.R. 6(D) specifies when a party must serve a motion and the notice of a hearing on the motion. However, Civ.R. 7(B)(2) gives trial courts the authority to enact a local rule of court that modifies the time frame set out in Civ.R. 6(D) and/or provides for the determination of motions without an oral hearing. *Hillbrand v. Drypers Corp.*, 87 Ohio St.3d 517, 519, 2000-Ohio-468. The Franklin County Court of Common Pleas employed that authority in adopting Loc.R. 21.01.

date on which motions are deemed submitted to the court. *Vahdat'bana v. Scott R. Roberts & Assoc. Co., L.P.A.*, 10th Dist. No. 07AP-581, 2008-Ohio-1219, ¶18. We thus conclude that Wiltz received adequate notice, and that the trial court did not err in failing to provide her additional notice.

{¶20} In so concluding, we reject Wiltz's argument that Loc.R. 21.01 did not apply to defendants' motions because a judge who later recused herself presided over the case on the date of the non-oral hearing. The assigned judge retains authority over a case until the recusal and transfer of the case to another judge is journalized on the record. *State v. Aderhold*, 9th Dist. No. 07CA0047-M, 2008-Ohio-1772, ¶13; *Frankart v. Frankart*, 3d Dist. No. 13-02-39, 2003-Ohio-1662, ¶19-20. Therefore, Judge Pfeiffer's recusal did not interfere with the operation of Loc.R. 21.01.

{¶21} Wiltz also complains that the trial court should have notified her of the date on which Judge Pfeiffer's recusal became effective. Wiltz cites no law, and we can find no law, that mandates such notification.³ The record contains an entry documenting Judge Pfeiffer's recusal and transfer of the case to Judge Cain. Parties to an action have a duty to keep themselves apprised of the entries on the record and to monitor the progress of their case. *CitiMortgage, Inc. v. Bumphus*, 6th Dist. No. E-10-066, 2011-Ohio-4858, ¶36; *Yoder v. Thorpe*, 10th Dist. No. 07AP-225, 2007-Ohio-5866, ¶13; *Honda v. Mid-West Restaurant Equip., Inc.* (May 22, 2001), 10th Dist. No. 00AP-842. Thus, Wiltz had constructive notice of the date of Judge Pfeiffer's recusal. See *Stewart v. Strader*, 2d Dist. No. 2008 CA 116, 2009-Ohio-6598, ¶19-22 (holding that an entry

³ Civ.R. 5(A) does not apply in this instance because the entry was not "required by its terms to be served." *Ohio Valley Radiology Assoc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 124 ("Civ.R. 5(A) does not require the service of orders unless the order is 'required by its terms to be served.'").

journalized on the docket provided the parties with constructive notice of the trial court's ruling); *Evans v. Mazda Motors of Am., Inc.*, 4th Dist. No. 08CA3118, 2007-Ohio-4622, ¶¶13-14 (same).

{¶22} In sum, we conclude the trial court did not need to notify Wiltz of the date on which defendants' motions were submitted to the trial court or the filing of the recusal entry. Accordingly, we overrule Wiltz's first assignment of error.

{¶23} By Wiltz's second assignment of error, she argues that the judgment against her was the result of the trial court's and defendants' fraud and misconduct. We disagree.

{¶24} Wiltz first alleges that Judge Pfeiffer engaged in fraud and misconduct because she waited four months after the filing of the complaint to recuse herself. Wiltz also alleges that Judge Pfeiffer and defendants somehow conspired to defeat Wiltz's action. Both allegations are baseless. Wiltz can point to no evidence that justifies her inference that Judge Pfeiffer intentionally delayed her recusal to cause the dismissal of Wiltz's claims. Likewise, Wiltz's conspiracy allegation rests on mere speculation. We caution Wiltz that future allegations made without "good ground" to support them can expose her to Civ.R. 11 sanctions.

{¶25} Second, Wiltz maintains that court personnel acted fraudulently when they informed her in November 2010 that no motions would be heard until Judge Pfeiffer recused herself. Assuming that such a representation was made, it was essentially correct. Judge Cain, not Judge Pfeiffer, considered and decided the motions at issue.

{¶26} Third, Wiltz argues that the initial submittal of defendants' motions to Judge Pfeiffer constituted fraud and misconduct. The motions were deemed submitted to Judge

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Pfeiffer by operation of local rule, not as a consequence of fraud or misconduct. Furthermore, while the motions were initially submitted to Judge Pfeiffer, they were decided by Judge Cain. Thus, no prejudice to Wiltz resulted.

{¶27} Fourth, Wiltz contends that defendants committed fraud and misconduct by not serving her with their motions. We reject this contention. Service upon a party may "be made by * * * mailing [a copy] to the last known address of the person to be served." Civ.R. 5(B). "Service by mail is complete upon mailing." *Id.* Where the record reflects that a party has followed the Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence. *Roberts v. Columbus City Police Impound Div.*, 10th Dist. No. 10AP-863, 2011-Ohio-2873, ¶11; *Paasewe* at ¶22.

{¶28} Here, each motion included a certificate of service that stated that a copy of the motion was mailed to Wiltz at the address listed on the complaint. As defendants complied with Civ.R. 5, a presumption of proper service arose. At the time the trial court rendered its December 20, 2010 judgment, no evidence in the record rebutted this presumption. Consequently, on appeal of the December 20, 2010 judgment, Wiltz cannot prove any fraud or misconduct in the service of the motions.

{¶29} Finally, Wiltz claims that the facts that defendants asserted in their motions were false and intentionally misleading. Wiltz, however, cites solely to evidence submitted with her post-judgment motion to rebut the facts presented by defendants. As none of Wiltz's evidence was in the record at the time the trial court entered judgment, we cannot consider it on appeal of that judgment. *Paasewe* at ¶15; *Waterford Tower*

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Condominium Assn. at ¶13. Therefore, we find Wiltz's attack on defendants' version of the facts unavailing.

¶30 In sum, we find no fraud or misconduct warranting a reversal of the December 20, 2010 judgment.⁴ Accordingly, we overrule Wiltz's second assignment of error.

¶31 By Wiltz's third assignment of error, she argues that the trial court erred in granting a motion for summary judgment filed before the expiration of the discovery period. We disagree.

¶32 Civ.R. 56 does not mandate that full discovery must be completed before a defending party moves for summary judgment. *Pinnacle Credit Servs., LLC v. Kuzniak*, 7th Dist. No. 08 MA 111, 2009-Ohio-1021, ¶21. To the contrary, Civ.R. 56(B) provides that, generally, "[a] party against whom a claim, counterclaim, or cross-claim is asserted * * * may, at any time, move * * * for a summary judgment in the party's favor." (Emphasis added.) Once the trial court sets an action for pretrial or trial, a defending party must receive leave of court to move for summary judgment. Civ.R. 56(B). However, Loc.R. 53.01 grants leave "in all civil cases to file summary judgment motions between the time of filing and the dispositive motion date, unless the Trial Judge decides otherwise by setting a different date." See also *Streets v. Chesrown Ents., Inc.*, 10th Dist. No. 03AP-577, 2004-Ohio-554, ¶5 (holding that no prejudicial error resulted from the trial court's consideration of a motion for summary judgment filed by the defending party prior to the dispositive motion date).

⁴ Some of Wiltz's claims of fraud and misconduct are the subject of the other two assignments of error. The action and inaction complained of in the other two assignments of error do not amount to error, much less fraud or misconduct.

{¶33} If a party moves for summary judgment before the completion of discovery, the responding party can request under Civ.R. 56(F) that the trial court stay ruling on the motion to allow further discovery. *Moore v. Kroger Co.*, 10th Dist. No. 10AP-431, 2010-Ohio-5721, ¶23; *BMI Fed. Credit Union v. Burkitt*, 10th Dist. No. 09AP-1024, 2010-Ohio-3027, ¶17. When a party fails to file a Civ.R. 56(F) motion, the trial court may rule on a motion for summary judgment, even if the responding party's discovery requests remain outstanding. *Id.*

{¶34} Here, the clerk's original case schedule set trial for August 17, 2011. The case schedule designated May 13, 2011 as the deadline for the filing of dispositive motions. The Clark defendants filed their motion for summary judgment well before the dispositive motion deadline, making it timely under Loc.R. 53.01. As Wiltz did not seek Civ.R. 56(F) relief, the trial court did not err in deciding the Clark defendants' motion before the discovery period lapsed. Accordingly, we overrule Wiltz's third assignment of error.

{¶35} We next turn to Wiltz's appeal from the February 24, 2011 judgment, i.e., appeal No. 11AP-282. In that appeal, Wiltz assigns the following errors:

[1.] The trial Court erred (and further demonstrated its bias against the plaintiff and denied the plaintiff due process), by making a 2/24/11 order that denied the plaintiff's Motion for an Order that Reconsiders, Reverses, and Grants Relief from the Judgment Dated 12/20/10, "after the plaintiff filed a Notice of Appeal and while the Appeal was pending" and when the Court did not have jurisdiction to make the order.

[2.] The trial Court erred (and further denied the plaintiff's due process right to be "heard" by the Court and demonstrated its bias against the plaintiff) by making a 2/24/11 order that treated the plaintiff's 1/19/11 motion, which was clearly identified as being a Civ. Rule 60(B) motion, only as a Motion for Reconsideration (and a legal nullity).

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[3.] The trial Court erred, by making a 2/24/11 order that is against the weight of evidence that is in the Record.

{¶36} By Wiltz's first assignment of error, she argues that the trial court lacked the jurisdiction necessary to rule on her post-judgment motion. As we stated above, Wiltz's post-judgment motion requested the trial court to "reconsider[], reverse[], and grant[] relief" from the December 20, 2010 judgment. (R. at 69.) In the memorandum supporting the motion, Wiltz asserted that she made her motion "in accordance with any Court Rule that allows parties to make a Motion for Reconsideration and with Rule 60(B)." (R. 68 at 1; emphasis sic.) Therefore, Wiltz's motion sought both reconsideration and Civ.R. 60(B) relief.

{¶37} The Ohio Rules of Civil Procedure do not provide for a motion for reconsideration of a final judgment. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus. Thus, a motion for reconsideration filed after a final judgment, as well as any ruling a trial court makes on that motion, are legal nullities. *Id.* at 380-81. See also *Kelley v. Stauffer*, 10th Dist. No. 10AP-235, 2010-Ohio-4522, ¶6; *Duncan v. Capitol S. Community Urban Redevelopment Corp.*, 10th Dist. No. 02AP-853, 2003-Ohio-1273, ¶20. In the case at bar, the trial court rendered a final judgment when it issued its December 20, 2010 decision and entry. Consequently, to the extent that Wiltz's post-judgment motion sought reconsideration of the December 20, 2010 judgment, it was a legal nullity. Likewise, to the extent that the February 24, 2011 judgment denied Wiltz reconsideration, it, too, was a legal nullity.

{¶38} In addition to seeking reconsideration, Wiltz's post-judgment motion also asked the trial court to grant Civ.R. 60(B) relief. A final judgment can be the subject of a Civ.R. 60(B) motion requesting relief from judgment. *Pitts* at 380; *Rose v. Zyniewicz*, 10th

Dist. No. 10AP-91, 2011-Ohio-3702, ¶15. However, once a party has appealed the underlying judgment, the trial court loses jurisdiction to consider a Civ.R. 60(B) motion for relief from judgment. *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 147. The trial court only acquires jurisdiction to consider a Civ.R. 60(B) motion if the appellate court remands the matter to the trial court for such consideration. *Id.*

{¶39} Here, Wiltz filed her notice of appeal from the December 20, 2010 judgment and her post-judgment motion on the same day. Wiltz did not ask for, and we did not initiate, a remand to the trial court for consideration of Wiltz's post-judgment motion. The trial court, therefore, lacked jurisdiction to render judgment on Wiltz's request for Civ.R. 60(B) relief. Consequently, to the extent that the February 24, 2011 judgment denied Wiltz Civ.R. 60(B) relief, it is a void judgment. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11 ("If a court acts without jurisdiction, then any proclamation by that court is void.").

{¶40} Given the foregoing, we sustain that portion of Wiltz's first assignment of error that asserts that the trial court lacked jurisdiction to render judgment on her request for Civ.R. 60(B) relief. We overrule the remainder of the first assignment of error. As our ruling on the first assignment of error renders the remaining assignments of error moot, we need not decide them.

{¶41} In summary, with regard to appeal No. 11AP-64, we overrule all of Wiltz's assignments of error, and we affirm the December 20, 2010 judgment of the Franklin County Court of Common Pleas. With regard to appeal No. 11AP-282, we sustain in part and overrule in part Wiltz's first assignment of error, and we find Wiltz's second and third

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assignments of error moot. Because the trial court lacked jurisdiction to render the February 24, 2011 judgment, we vacate it.

*Judgment affirmed in appeal No. 11AP-64;
judgment affirmed in part and sustained in part;
and judgment vacated in appeal No. 11AP-282.*

BRYANT, P.J., and TYACK, J., concur.

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 NOV -1 PM 12:39
CLERK OF COURTS

Cassandra Wiltz, :
 :
 Plaintiff-Appellant, :
 :
 v. :
 :
 Clark Schaefer Hackett & Co. et al., :
 :
 Defendants-Appellees. :

Nos. 11AP-64 ✓
and
11AP-282
(C.P.C. No. 10CVH08-11570)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 1, 2011, with regard to appeal No. 11AP-64, we overrule all of appellant's assignments of error, and we affirm the December 20, 2010 judgment of the Franklin County Court of Common Pleas. With regard to appeal No. 11AP-282, we sustain in part and overrule in part appellant's first assignment of error, and we find appellant's second and third assignments of error moot. Because the trial court lacked jurisdiction to render the February 24, 2011 judgment, we hereby vacate the trial court's judgment in case No. 11AP-282. Costs shall be equally assessed against the parties.

KLATT, BRYANT, P.J., and TYACK, J.

By William A. Klatt
Judge William A. Klatt

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

2011 FEB 24 AM 11:55

CASSANDRA WILTZ, :
Plaintiff, :

CLERK OF COURT'S

vs. :

Case No. 10CVH08-11570

CLARK SCHAEFER HACKETT & CO., et al., :
Defendants. :

Judge Cain

DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, FILED JANUARY 19, 2011

Rendered this 24th day of February 2011.

CAIN, J.

This matter is before this Court on Plaintiff's Motion for Reconsideration, filed January 19, 2011. In the present motion, Plaintiff asks the Court to reconsider its December 20, 2010 decision dismissing Plaintiff's Complaint. The Court will not do this. Plaintiff has presented nothing in the present motion that would cause the Court to change its decision to dismiss Plaintiff's Complaint. As such, Plaintiff's motion is not well-taken, and is hereby DENIED.

IT IS SO ORDERED.



David E. Cain, Judge

Copies to:

Cassandra Wiltz
Plaintiff

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Thomas H. Pyper
Counsel for Defendants, Clark Schaefer Hackett & Co. and Kent D. Pummel

David S. Bloomfield, Jr.
Ryan P. Sherman
Counsel for Defendants Schneider Downs & Co., Inc., Joseph Patrick, Roy Lydic, and Bradley P. Tobe

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FILED COURT OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

2010 DEC 20 PM 3: 22

CLERK OF COURTS

CASSANDRA WILTZ, :

Plaintiff, :

vs. :

Case No. 10CVH08-11570

CLARK SCHAEFER HACKETT & CO., et al., :

Judge Cain

Defendants. :

DECISION AND ENTRY GRANTING DEFENDANTS' CLARK SCHAEFER HACKETT & CO. AND KENT D. PUMMEL, MOTION FOR SUMMARY JUDGMENT, FILED OCTOBER 29, 2010

DECISION AND ENTRY GRANTING DEFENDANTS' SCHNEIDER DOWNS & CO., INC., JOE PATRICK, ROY LYDIC AND BRADLEY TOBE, MOTION FOR JUDGMENT ON THE PLEADINGS, FILED NOVEMBER 12, 2010

ENTRY DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

Rendered this 20th day of December 2010.

CAIN, J.

This matter is before this Court on the above two motions. Defendants, Clark Schaefer Hackett & Co. and Kent D. Pummel¹ (hereinafter the "Clark Defendants"), filed their Motion for Summary Judgment on October 29, 2010. Soon thereafter Defendants, Schneider Downs & Co., Inc., Joe Patrick, Roy Lydic and Bradley Tobe (hereinafter the "Schneider Defendants"), filed their Motion for Judgment on the Pleadings on November 12, 2010. These two motions are unopposed and are now ripe for decision.

The Court will begin by addressing the Clark Defendants' motion. Plaintiff, acting *pro se*, has initiated this action against both the Clark Defendants and the Schneider Defendants asserting causes of action for aiding and abetting discrimination in violation

¹ Mr. Pummel is an employee of Clark Schaefer Hackett & Co.

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of R.C. 4112.02, negligence and malpractice, and intentional infliction of emotional distress. The gist of Plaintiff's forty-two page Complaint is as follows. Plaintiff, who is African-American, was hired by Moundbuilders Guidance Center (hereinafter "Moundbuilders") on April 28, 2008 as its Controller. Shortly after her hiring, Plaintiff alleges that she discovered that Moundbuilders' Board and employees had a practice of *preparing and maintaining materially false and misleading financial records and reports*. She further alleges that they utilized inappropriate accounting practices and procedures; kept a "secret" set of "off-the-books" records; and used false and forged documents to obtain loans and to support a merger. Plaintiff alleges she also discovered that the Clark Defendants, an accounting firm, assisted Moundbuilders with the "improper and unethical accounting and reporting practices."

Plaintiff made verbal and written complaints to Moundbuilders' Officers regarding the accounting practices and, allegedly, their response was to subject her to threats, intimidation, harassment, and differential treatment due to her race. She then complained to the Board of Moundbuilders and contends that instead of addressing her issues, the Board hired the Clark Defendants to assist in concealing the improper accounting practices. According to Plaintiff, Moundbuilders' Board and Officers concocted a scheme to terminate her employment, which occurred on August 8, 2008 and in order to disguise their "retaliation," they asked the Clark Defendants to provide verbal and written statements characterizing Plaintiff's complaints as unsound, untrue, and indicative of her lack of accounting knowledge and skills. Plaintiff contends that the Clark Defendants acquiesced and made these statements knowing that they were false.

and would cause Plaintiff's termination and other injury. Plaintiff's causes of action against the Clark Defendants stem from these allegations.

Summary Judgment was established through Civ. R. 56 as a procedural device to terminate litigation when there is no need for a formal trial. Norris v. Ohio Std. Co. (1982), 70 Ohio St. 2d 1. The rule mandates that the following be established: (1) that there is no genuine issue of any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. Bostic v. Connor (1988), 37 Ohio St. 3d 144.

Summary Judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. A "party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." Dresher v. Burt (1996), 75 Ohio St. 3d 280, 293. Civ. R. 56(C) sets forth an exclusive list of documentary evidence that a court may consider when reviewing a motion for Summary Judgment.

In accordance with Civ. R. 56(E), when a properly supported motion for Summary Judgment is made, the nonmoving party may not rest upon the mere allegations or denials contained in the pleadings but must come forward with specific facts demonstrating a genuine issue of fact for trial. If the nonmoving party does not so respond, Summary Judgment, if appropriate, shall be entered against him.

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The Clark Defendants move the Court for Summary Judgment arguing that there is no evidentiary merit to Plaintiff's claims. In support of this contention, the Clark Defendants present the affidavit of Kent D. Pummel. According to Mr. Pummel, the Clark Defendants performed auditing services for Moundbuilders for its 2003 through 2007 fiscal years. See Affidavit of Kent D. Pummel at ¶4. On June 16, 2008, Moundbuilders' CEO faxed Mr. Pummel two documents: a letter written by Plaintiff concerning Moundbuilders' accounting practices and correspondence written by the CFO in response to Plaintiff's letter. Mr. Pummel reviewed these letters and, upon subsequent contact by Moundbuilders' CEO, informed him that the "situation described appeared to be an issue of miscommunication between" Plaintiff and the CFO. Id. at ¶7. Further, Mr. Pummel states that at no time was it made known to him that Moundbuilders was contemplating any employment-related discipline against Plaintiff. Finally, Mr. Pummel states that he was unaware of Plaintiff's race and this subject was never mentioned or discussed. Id. at ¶8.

On July 21, 2008, one of Moundbuilders' Board members contacted Mr. Pummel and inquired as to whether, due to his professional experience and familiarity with Moundbuilders' practices, he would be willing to discuss his impressions about the matters raised in the correspondences with Moundbuilders' Board of Trustees. Mr. Pummel agreed, and, within a few days, participated in a conference call where he again indicated that it appeared there was a miscommunication between Plaintiff and the CFO. He states that he also acknowledged there was some validity to some of Plaintiff's criticisms. Id. at ¶9. Mr. Pummel states that there was no mention of Plaintiff's race or of any disciplinary action during the conference call. Id. at ¶10. The Clark

Defendants had no further contact with anyone concerning Plaintiff until she filed a separate lawsuit against Moundbuilders. Id. at ¶11.

Plaintiff's Complaint alleges that the Clark Defendants were involved in and assisted Moundbuilders' racial discrimination and her unlawful termination. R.C. 4112.02(A) provides that it shall be an unlawful discriminatory practice "[f]or any employer, because of the race [or] color * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Under R.C. 4112.02(J), it is also unlawful "[f]or any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, * * * or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice."

Here, the undisputed evidence demonstrates that: (1) Plaintiff was hired by Moundbuilders after the Clark Defendants were no longer performing auditing services for the company; (2) the Clark Defendants were not aware of Plaintiff's race; and (3) Moundbuilders never discussed any employment-related discipline issues with the Clark Defendants. From these uncontroverted facts, reasonable minds could only conclude that the Clark Defendants in no way aided or abetted unlawful racial discrimination, and such a salacious charge against them is simply not warranted. Due to the fact that Plaintiff has not bothered to respond to the Clark Defendants' motion, there is nothing before the Court to contradict this determination.

In her Complaint, Plaintiff also asserts a claim against the Clark Defendants for negligence and/or accounting malpractice. It is clear not only from the undisputed

evidence, but also from Plaintiff's own Complaint, that she lacks standing to seek any relief pursuant to this claim. The Clark Defendants owed a duty of care to Moundbuilders, the entity that retained them, not Plaintiff. Furthermore, Moundbuilders and the Clark Defendants' professional relationship ended months before Plaintiff was even hired. Summary Judgment must be granted to the Clark Defendants as to this claim.

Plaintiff's final claim against the Clark Defendants is for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following four elements:

- 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
- 2) that the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' and was such that it can be considered as 'utterly intolerable in a civilized community;'
- 3) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and
- 4) that the mental anguish suffered by plaintiff is serious and of a nature that 'no reasonable [person] could be expected to endure it.'

Oglesby v. City of Columbus (2002, Franklin), 2002-Ohio-3784 at ¶10; quoting Irvine v.

Akron Beacon Journal (2002, Summit), 2002-Ohio-3191. The Tenth District Court of

Appeals has stated:

[w]e emphasize that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough. Only conduct that is truly outrageous, intolerable and beyond the bounds of decency is actionable; persons are expected to be hardened to a considerable degree of inconsiderate, annoying and insulting behavior. Insults, foul language, hostile tempers, and even threats must sometimes be tolerated in our rough and tumble society.

Strausbaugh v. Ohio Dept. of Trans. (2002, Franklin), 2002-Ohio-6627 at ¶14 (Citations omitted).

Upon review, the Court finds the evidence in this matter to be insufficient to support a finding that the Clark Defendants intentionally inflicted emotional distress upon Plaintiff. The Clark Defendants performed auditing services for Moundbuilders from 2003 to 2007. The only possible negative thing that the Clark Defendants said about Plaintiff was they felt that there was a miscommunication between Plaintiff and Moundbuilders' CFO. In fact, Mr. Pummel stated in his affidavit that he told Moundbuilders' Board that some of Plaintiff's criticisms were valid. Finally, there was never any discussion with the Clark Defendants as to Plaintiff's race or disciplinary action. Reasonable minds could only find that the Clark Defendants neither intended to cause, nor actually caused Plaintiff any emotional distress. Summary Judgment must be awarded to the Clark Defendants.

This brings the Court to the Schneider Defendants' Motion for judgment on the Pleadings. The Schneider Defendants were hired by Moundbuilders on October 20, 2008 to perform auditing services. This was two months after Plaintiff was terminated from her employment. The Court cannot figure out how the Schneider Defendants are in any way linked to the alleged discrimination that Plaintiff experienced two months before the Schneider Defendants were hired. Since this is so, the Court must grant the Schneider Defendants' motion and dismiss Plaintiff's claims against them. Due to the fact that Plaintiff has failed to respond to the Schneider Defendants' motion, there is nothing before the Court to contradict this determination.

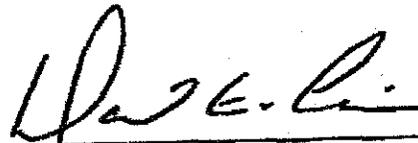
After review and consideration, the Court's ruling is as follows:

Defendants', Clark Schaefer Hackett & Co. and Kent D. Pummel, Motion for Summary Judgment is well-taken, and is hereby GRANTED.

Defendants', Schneider Downs & Co., Inc., Joe Patrick, Roy Lydic and Bradley Tobe, Motion for Judgment on the Pleadings is well-taken, and is hereby GRANTED.

It is hereby ORDERED that judgment is entered in this matter as to all Defendants. Plaintiff's Complaint is hereby DISMISSED WITH PREJUDICE in its entirety. There is no just cause for delay.

IT IS SO ORDERED.



David E. Cain, Judge

Copies to:

Cassandra Wiltz
Plaintiff

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