

**ORIGINAL**

IN THE OHIO SUPREME COURT

State ex rel Joseph McGrath,  
Relator-Appellant,  
-VS-  
Judge: Robert McClelland,  
Respondent-Appellees, et al.

) Supreme Court Case No., 12-0737  
)  
) Eighth Judicial District Court of  
) Appeal's Case No., C.A. 097209

\*\*\*

---

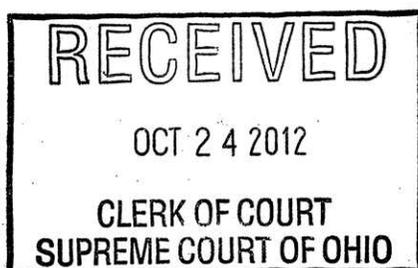
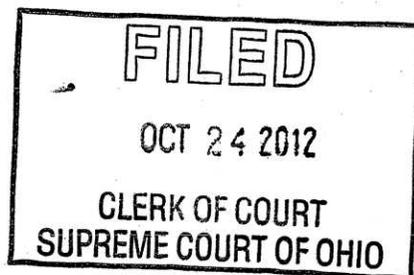
**APPELLANT, JOSEPH MCGRATH'S MOTION FOR  
RECONSIDERATION**

---

FOR THE RESPONDENTS-APPELLEES  
Cuyahoga County Prosecutor's Office  
Assistant Prosecuting Attorney  
James E. Moss, Esq.,  
1200 Ontario Street  
Cleveland, Ohio 44113

FOR THE RELATOR-APPELLANT

Joseph McGrath  
2500 South Avon Belden Road  
Grafton, Ohio 44044



## RECONSIDERATION

The Relator-Appellant, Joseph McGrath, acting in propria persona moves the Ohio Supreme Court pursuant to it's "inherent powers" and Ohio S.Ct. R. Prac., 11.2, the Ohio and United States Constitutions to Grant this motion for reconsideration.

Just recently via the LEXIS system Joseph McGrath discovered that on 10-17-2012 the Ohio Supreme Court dismissed in part and affirmed in part the lower court judgment as being an appeal not commenced within 45 days per Ohio S.Ct. R. Prac., 2.2 (1)(a)(b) thereby divesting the court of jurisdiction to decide the case and that Ohio Civ. R. 60 (B) does not extend the time to appeal.

Per Ohio S.Ct. R. Prac., 2.2 (1)(a) the notice of appeal to the Ohio Supreme Court shall be within forty-five days from the entry of the judgment being appealed. And per Section (B)(2) of this Rule "a date stamped copy of the court of appeal's judgment entry that is being appealed shall be attached to the notice of appeal."

Moreover, per Section (A)(3)(i)(ii) of this Rule if a Stay of the lower court judgment is requested, once again a copy of the journal entry and opinion from the lower court shall be attached to the motion for stay.

Here is where our problem comes in. The Clerk of Court for the Eighth Judicial District ..."refused to serve Joseph McGrath with a copy of the Jan. 13th, 2012 journal entry and opinion rendered by the Eighth District Court of Appeal's, pursuant to Ohio Civ. R. 5, and/or 58 (B)..."

Joseph McGrath wrote to them and requested for a copy and was informed the cost would be \$1.70. Therefore, Joseph McGrath filed a motion on 3-19-2012, filed on 3-21-2012 captioned."...Relator's Motion for Court to Re-Issue Judgment Entry from the Denial of Motion for Relief From Judgment, Ohio Civ. R. 60 (B), Instanter..."

Within this motion Joseph McGrath informed the Eighth District Court of

Appeal's that the Clerk had requested \$1.70 for a copy of the 1-13-2012 Journal Entry and Opinion (typhographical error of 3-13-2012 within the motion). See (C.A. No., 097209 Docket at March 21, 2012).

The Court denied the motion.

Pursuant to Ohio S.Ct. R. Prac., 2.2, without a copy of the 1-13-2012 Journal Entry and Opinion to attach to the Notice of Appeal and Stay, the Clerk of the Ohio Supreme Court won't even file the documents. The only notice of anything out of the Eighth District Clerk was a post card.

On April 16th, 2012, Joseph McGrath filed another motion with the Eighth District Court of Appeal's captioned "...Motion by Relator, pro se, for Court to direct Clerk of Court to Serve All Journal Entries and Opinion and journal entry from denial of Relator's Second Motion for Relief From Judgment on 4-10-2012..." See (C.A. No., 097209 Docket at April 16th, 2012).

The Court denied the motion.

Eventually, the Clerk served Joseph McGrath with a copy of the 1-13-2012 journal entry and opinion and thereafter a notice of appeal with request for Stay was filed in the Ohio Supreme Court.

An original action is considered a civil action. State ex rel Suater v. Grey, 117 Ohio St.3d 465, 884 N.E.2d 1062, at (¶11). However, when the Clerk of the Court of Appeal's fails and/or refuses to serve a copy of the journal entry and opinion as they did in this case, the time to appeal to the Ohio Supreme Court does not toll. Id. at syllabus 4, 5.

The Eighth District Court of Appeal's Docket supports this material fact that the Clerk did not serve the journal entry and opinion from the 1-13-2012 dismissal of the writ.

Therefore, there was no possible way Joseph McGrath could have timely filed a notice of appeal with the Ohio Supreme Court within the 45 day period mandated by Ohio S.Ct. R. Prac., 2.2.

Based on the conduct of the Clerk of Court's failure and/or refusal to timely serve a copy of the 1-13-2012 journal entry and opinion, Joseph McGrath could commence an original action complaint in mandamus, per Grey, supra in order to compel the Court to re-issue that opinion. Moreover, the Court herein could take judicial notice of this fact and remand this case back to the lower court with instructions to do just that, as the issue was raised below. State ex rel Hilltop Basic Res., v. City of Cincinnati, 118 Ohio St.3d 131, 886 N.E.2d 839 at (¶18)(motion for relief from judgment can be filed to create a sufficient record for the court's resolution of issues below).

The appellate jurisdiction of the Ohio Supreme Court is a Constitutional right. Art. IV § 2 (B)(2)(a)(i).

The Ohio Supreme Court has Ohio Constitutional power vested in it by Art. IV § 5 (B) to prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify and substantial right.

In State ex rel Lapp Roofing & Sheet Metal Co., v. Indus. Comm'n, 117 Ohio St.3d 179, 882 N.E.2d 911, 2008 Ohio LEXIS 518 (HN1) this court held the important function served by rules of procedure in maintaining the prompt, orderly and effective administration of justice is thwarted when a party is suppressed, misled or unfairly prejudiced by an opponents application of a given rule.

In De Hart v. Aetna Life Ins., Co., 69 Ohio St.2d 189, 431 N.E.2d 644 (1982), 1982 Ohio LEXIS 557 (reversed) the Ohio Supreme Court held it is a fundamental tenent of judicial review in Ohio that Courts should decide cases on the merits. Judicial discretion must be carefully and cautiously exercised before the Supreme Court will uphold an outright dismissal of a case on purely procedural grounds. (HN5).

For arguendo, even if the issues raised in the merit brief could not be decided (and they can) the Civ. R. 60 (B) motion for failure to serve the 1-13-2012 Journal Entry and Opinion is grounds enough to send this case back

down to the Eighth District Court of Appeal's so they can re-issue the 1-13-2012 journal entry and opinion the Clerk refused to timely serve, pursuant to City of Cincinnati, and Grey, supra. Ohio S.Ct. R. Prac., 2.2 does not preclude this and the Court has Constitutional jurisdiction to do so.

Moreover, the Ohio Supreme Court in State ex rel Beacon Journal Pub., Co., v. Donaldson, 63 Ohio St.3d 173, 586 N.E.2d 101 holds a court may rule on an otherwise moot case where the issues raised are capable of repetition, yet evading review. A case is capable of repetition where there is a reasonable expectation that the same complaining party will be subjected to the same action again. The Eighth District had no jurisdiction to declare Joseph McGrath to be a vexatious litigator pursuant to statute and that judgment is void. Patton v. Diemer, 35 Ohio St.3d 68, 70. Moreover, the entire judgment subject to the mandamus action is void ab initio and therefore the Ohio Supreme Court has "inherent power" to vacate the void judgment and decide this case. Cincinnati Sch Dist., Bd., of Ed., v. Hamilton Cnty Bd of., 87 Ohio St.3d 363 at [\*368], citing Diemer, supra and Van DeRyt v. Van DeRyt, 6 Ohio St.2d 31, 36.

Wherefore, the Relator-Appellant prays the Court grants this motion.

Respectfully submitted,

\_\_\_\_\_  
Joseph McGrath  
2500 South Avon Belden Road  
Grafton, Ohio 44044

SERVICE

A true copy of the foregoing was sent out today 10-18-2012 by regular U.S. mail to the Cuyahoga County Prosecutor's Office at 1200 Ontario Street, Cleve., Ohio 44113.

Respectfully submitted,

\_\_\_\_\_  
Joseph McGrath