

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0980

MICHELLE ROTHWELL,  
PLAINTIFF-APPELLEE

ON APPEAL FROM THE COURT  
OF APPEALS, FOURTH  
APPELLATE DISTRICT,  
PICKAWAY COUNTY OHIO  
CASE NUMBER 12CA6

V.

MARK E. ROTHWELL, ET AL  
DEFENDANTS-APPELLANTS

SUPREME COURT CASE NO.

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

MARK E. ROTHWELL, ET AL

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**WHY THIS APPEAL AND UNDERLYING CASE IS A MATTER OF PUBLIC AND OR GREAT GENERAL INTEREST AND DETERMINATION NECESSARY TO APPELLANT AND PUBLIC'S FAITH IN IMPARTIAL JUSTICE AND JUDICIAL REVIEW**

Because of the following unique facts and statement of Law this case may be a case that is one of first impression. The fact pattern herein is different and unlike specifics of previous cases that at first blush seem similar. The Trial Courts actions in preventing availability kept secret well through the early stages of the Appellate process have created for Appellant an extreme miscarriage of justice.

Every day: whether one of four (4) final hearing days, or several partial days, Motions, counsel for Appellant and Magistrate would confer; Magistrate would then, without fail at each start, begin to and then record each session, listen on speaker to hear the system was working, and then proceed. On each subsequent restart of each session and start of each day of trial, Counsel Nyce repeated this request to the Magistrate and she repeated the testing procedure and assured counsel and parties that the proceedings were being actually and accurately recorded. The system was on Magistrates bench-desk area. A record hearing was assured; but no. In the Court room, there was never any malfunction of the recording equipment and in testing the Magistrate and those present heard the system had recorded upon playback checking.

This cause of action creates issues of importance to the public and general interest based upon the need to clarify what processes are required when a Trial Court refuses to make any Judicial review of the Magistrates Decision solely because, a transcript was not ordered (it was three times) and "that a transcript was not provided the Trial Court", when the Court or its' personnel is solely the cause of there being no transcript available.

The Trial Court was well aware that a transcript had been ordered-sought and the Court was also aware, from at least August 16, 2011 (the same time frame as the case before this Court) that the Courts recording system "were not properly recorded" in several if not many other and (or possibly all) cases in

2011. The Court did not, and does not, comply with Supreme Court requirements to assure both recordings are made as well as dual backup and secure record retention is accomplished.

**Proposition of Law 1:** A most critical aspect of the judicial process is the requirement that a verbatim record be created for virtually all judicial activity. The “record” must be created and then maintained by the trial Court. This failure is a Procedural Due Process denial to Appellant.

In the instant case the Court refused to provide judicial review of the Magistrates Decision despite timely Objections being filed by Appellant. Then the Court concealed for an additional six months afterward until April 11, 2012 that it was not Appellant counsels failure to order a transcript and provide same that was the cause, but instead that the Court had not ever had the ability to provide the judicial record or a transcript. The Court had never complied with creating or maintaining back up electronic processes that could be consulted. The Court knew and concealed from August 2011 forward to April 11, 2012 that its system, subsequent to the Magistrate and Trial counsel assuring the recordings were actually made, was not functioning to assure recording, and historic maintenance thereafter.

Despite counsel for Appellant seeking to supplement the Trial Court record, and then upon appeal as well, such Motion(s) was denied. The Appellate Court then overlooked the matter that not having the transcript was solely caused by the Court itself and having denied Appellant supplement the record (once by refusing to review anything that was not upon the docket of the Trial Court case) then refusing denying Appellant Motion to accomplish exactly what the Appellate Court was requiring, that the Appellant supplement the record, the matters have never been Judicially Reviewed.

By April 11, 2012 when the Court first disclosed what only the Court knew from August 2011 that no transcript was possible the Appellants process were blocked and refused any opportunity to readjust.

**Proposition of Law 2:** Where there is absolutely no maintained record of oral testimony to review is it even a matter capable of review or must the Court instead refer the matter for a full rehearing.

Solely as a result of the Trial Courts actions: Appellants divorce, Final Hearing, and Magistrate Decision have never been Judicially Reviewed.

## STATEMENT OF THE CASE AND FACTS

Plaintiff, Michelle L. Rothwell filed Complaint for Divorce December 30, 2009 Common Pleas Court of Pickaway County. February 11, 2010 Defendant, Mark E. Rothwell filed Answer and Counterclaim.

April 23, 2010, joint motion for continuance filed, granted, seeking private marriage counseling. Oddly, on the court's docket, the case was categorized as CLOSED, it was not.

November 11, 2010 at a status conference, the parties wanted to pursue Divorce proceedings resumed. March 4, 2011, Court set final hearing dates April 25 and 25, 2011, Motions, Issues, divisions of property heard before Magistrate Branham. Two additional final hearing dates were set, June 9 and 10, 2011.

Interesting to note, on the Court's docket, June 9, 2011, this matter was listed CLOSED despite the final day of trial being set for the following day, June 10, 2011 and the Magistrate's decision would not be rendered and journalized until October 28, 2011 and Judge's final Judgment and Decree of Divorce was not journalized-filed until February 29, 2012.

On September 14, 2011, Defendant's Counsel delivered a written request for transcript to the Clerk of Courts office of Pickaway County. Counsel was informed by an employee of the clerk's office that they would put the request in the Court Reporter's mailbox/inbox for Reporters review. This Court Reporter was later identified as Alice Malott, who interestingly also is identified by the court as "Court Secretary." A few days after this written request was delivered, Counsel Nyce spoke by telephone with Ms. Malott to determine the approximate costs of the transcript and how long it would take to complete. Counsel was informed that Reporter would get back to him with further information. Reporter never called Counsel back. On October 11, Counsel Nyce had delivered, by Appellant, a second written request to the Clerk's office for a transcript. Appellant also stated he had hand-delivered a copy to Ms. Malott's office in the chamber area of the Court and Judge. Again, Counsel Nyce followed up with a

telephone call, message, to Ms. Malott to determine the cost and the time period. Defendant's Counsel adhered exactly to Local Rule 17 which states that all requests for transcripts "be made in writing".

On October 28, 2011 Magistrate rendered a decision, in Findings of Fact and Memorandum of Law. Defendant timely filed objections to the decision by the Magistrate on November 14, 2011. On November 18, 2011, Counsel, Paralegal delivered a third written request for transcript to the Clerk's office and again Paralegal hand-delivered a copy directly to the court reporter office in Chamber. The paralegal delivering the written request to the Clerks office was told that if Paralegal delivered the second copy upstairs to the Court (which had been done previous) that he would be arrested. The paralegal did however deliver the third request to chambers, for Ms. Malott.

Again Counsel, Nyce, followed up with a phone call to Ms. Malott to request price for the transcript and when it would be completed. Counsel, Nyce, thought it was very odd that a court reporter would not give him a quote on fees and request a deposit. On November 29, 2011 the Judge rendered his decision, denying the Defendant's Objections, noting in his decision, "... that a final transcript was not requested by the Defendant. Lacking a transcript, this Court will rely only on the findings of fact outlined in the Magistrate's Decision and evidence contained in the file." Quite frankly, the Defendant and Defendant's Counsel were flabbergasted and at a loss, since they had made three written requests to the clerk's office and to the Court Reporter/Court Secretary herself, both written and by telephone and were never informed that a transcript would not be produced.

Defendants Objections were not reviewed by the Trial Court. Objections detailed that there were "errors in the Magistrates Decision" that were not a matter of dispute but double listings, items not dealt with, making all assets not included and similar ministerial matters.

Again, for the fourth time, on December 20, 2011 Defendant now filed a Motion for leave to have the transcript ordered by the court and made available to the court for its review, prior to the court

making its final decision in the case. Such Motion was the result of a comment by the Court (in contravention of Rule 17 transcript requirements) that the Court refused even to read the Objections of Defendant to the Magistrates Decision because no Motion for a transcript was filed. The court never ruled on this Motion.

Of course the Court could not rule upon the Motion as the Court alone was aware that the Court would continue to conceal until April 11, 2012 that a transcript was never available and rather than bring counsel in and manage the events that were not the failures of counsel further ensnared Appellant in a process impossible of resulting in a Judicial Review of Appellants case.

**Proposition of Law 3:** The Trial Court is complicit in having created the problem of there being no record of the final hearing and then there being no backup recording the Court cannot demand from Appellant presentation of the impossible transcript as prerequisite to the Trial Court Judge reviewing the Appellants Objections to the Magistrates decisions.

On February 29, 2012 the Court rendered final decision. The Judge's decision, and the Magistrate's prior decision, failed to include the required factors found in Ohio Revised Code Section 3105.171, cited for the division and distribution of property to the parties.

This Judges decision was a duplication-validation and not a review of the Magistrate's decision. Defendant found numerous financial errors made by the Magistrate and Judge in the decision were uncorrected. The Court did not address the lack of transcript, lack of any other evidence, nor rule on Defendant's Motion for Transcript in the final decision. Many property items of the parties were left unallocated.

On March 27, 2012 Defendant timely filed his Notice of Appeal to the Fourth Appellate District and again, for the fifth time, requested that the transcript be produced, forwarded to the Appeals Court for its review. Finally, on April 11, 2012, Court Reporter/Court Secretary, Ms. Alice Malott, filed a Sworn Affidavit with the Court stating that no record of the four separate days of testimony was available to be transcribed, because of a "malfunction of the recording equipment." (Emphasis added)(See attached copy.) Between September 14, 2011 and April 11, 2012, a period of almost seven

months, and after five separate requests for a transcript, the court reporter finally “admitted” that no such record ever existed. At no time, NEVER, during this seven month period, did the court reporter or the clerk’s office, or any court personnel make it known to Defendant, Defendant’s counsel, or Counsel’s employee, and that no record existed. To the contrary, in “only one” (each date December 7 and 20, 2013) conversation with both Ms. Malott, and/or Clerk of Court employee, they stated that a record “did exist”, and that the transcript length was being evaluated with an estimate being created and deposit required. Over seven months, Magistrate rendered a decision without a transcript; the Judge ruled on objections and made a final ruling on the case, stating specifically, that it was Defendant’s own fault for not obtaining the transcript for Court review.

Known to all Court personnel, Trial Court-Judge, Magistrate(s), Clerk of Courts, Court Reporter & Court Secretary Malott, and some other counsel, that this Court had numerous other cases where the Courts recording systems had appeared to be working during hearings-trials but upon later examination had failed to historically preserve testimony. Such cases include 2006 DV 163 and 2011 40070 Yinger v. Yinger, among them. The Court and Magistrate declared a mistrial and another hearing was immediately undertaken in Yinger.

In the case before this Court, the Trial Court concealed the matter through many months and then the Court of Appeals would not order rehearing and worked excruciating circuitous patterns to wrongly blame counsel for Appellant for not having taken steps to obtain a transcript. A transcript was impossible of attainment and then stating supplementing the absent transcript should have occurred, when the Court itself was refusing to allow any supplement. The Court of Appeals Judge Harsha (now recused from the case, possibly recused from all cases originating from Pickaway County, because of conflicts, all of which existed and were evident from well before the filing of Appellants Appeal) Harsha overturned the Decision of the Appellate Court Magistrate that allowed Appellant to Supplement the

Record, overruling the Appellate Magistrate and Denying Appellant the ability to Supplement the Record in the absence of the Transcript.

In addition there are other errors of the Trial Court Magistrate, Trial Court; all required legal elements in concluding the case were not followed. Mandatory processes and requirements that had the Trial Court and Appellate Court refused to deal and not afford Appellant Judicial Review.

No judicial review has ever been made of Appellants Trial Court case and claims.

**Proposition Of Law 4:** When the Court and Clerks Office takes an active role in permitting a case to proceed after the Court is aware, but Appellant is not aware, that no judicial record exists and no transcript may ever be created must that case and final hearing be considered upon Appeal solely upon the documents presented or possible of presentation at Court of Appeals, as De Novo Trial, or must the Appellate Court refer the case for rehearing.

On January 29, 2013 the Court of Appeals for the Fourth Appellate District rendered its decision and denied all assignments of error set forth by Appellant-Defendant. On February 11, 2013 the Defendant-Appellant filed Motion for Reconsideration and Application for En Banc Consideration pursuant to Appellate Rules 26(A)(1) and 26(A)(2).

On May 3, 2013 the Court of Appeals for the Fourth Appellate District rendered its decision and denied Defendant-Appellant's Motion for Reconsideration and Application for En Banc Consideration. This decision by the court was based primarily on lack of transcript, the alleged failure of the Defendant to request and obtain a transcript, and the alleged failure of the Defendant to file an Affidavit of Evidence regarding what transpired in the trial court, which each Court had denied Appellant from filing.

The Defendant-Appellant now files this appeal with the Ohio Supreme Court.

#### **ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW**

One of the most critical aspects of the judicial process is the requirement that a "verbatim record" be created for virtually all judicial activity. The Trial Court erred as a matter of law and in conflict with the requirements of the Ohio Supreme Court in not creating an Ohio law and Supreme Court sanctioned

format for the taking (assuring the taking of) and maintenance of a “verbatim record”. The Trial Court is itself complicit in having first created the lack of a required verbatim record. Counsel would gladly have avoided the rancor and extensive work required to attempt the impossible, “get the un gettable transcript”.

**Proposition Of Law 5:** The Trial Court erred as a matter of law and in conflict with the evidence in the grant of assets and liabilities of the parties in contravention of the evidence presented at final hearing (trial) undisputed assets and the liabilities fairly allocated in accord with the documentary and testimonial evidence presented at the final hearing by fact and expert witnesses. § ORC 3105.171; to do otherwise is reversible error.

Phillips v. Phillips 2006 Ohio 2098 (2006), Ohio Appeals courts have continuously held that it is plain reversible error if the trial court fails to cite and enumerate the factors contained in Ohio Revised Code Section 3105.171

Civ R 53 (D) (4) (d) provides the following: “if one or more objections to a magistrates decision are timely filed, the court shall rule on those objections.” In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law”. Yazdani-Isfahani v Yazdani-Isehani, 2012 Ohio 1031, page 3, ¶8 (Fourth Dist. Athens County 2012).

“In ruling on objections the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly applied the law.” Significantly Civ R 53 (D) (4) (d) “contemplates a de novo review of any issue of fact or law a magistrate has determined when an appropriate objection is timely filed.” Supra, Yazdani-Isfahani, page 3, ¶8 (Fourth Dist. Athens County 2012).

In Sinclair v Sinclair 182 Ohio App 3d 691, 2009 Ohio 3106 (May 18 2009 Fourth Dist. Athens County) this Court in detailing the standard of review by the lower Court indicates: When applying the abuse of discretion (¶7) standard, we may not substitute our judgment for that of the trial Court. An abuse of discretion is more than an error of judgment. Rather it indicates that a ruling was unreasonable, arbitrary or unconscionable. (The Sinclair Court cited various source precedents). The instant case

requires the acceptance of the Defendant-Appellant argument that the Trial Courts actions were all of these underlined errors. There can be no alternative when here is no record to conclude otherwise.

Sinclair ¶9 .... The Trial Court could not consider its own observations as evidence in deciding a case. Such is what both the Trial Court did and what this Court of Appeals must also do to allow the decision of the Magistrate not be reversed and the matter remanded for re-hearing, de novo.

Sinclair ¶10 .... There can be no taking of judicial notice of proceedings before the Trial Court and certainly the Trial Court itself cannot assert a judicial notice argument of the Courts own unfailing accuracy and fairness in a case void of such evidentiary elements upon which the judicial process of this Court may be ascertained (We know the Trial Court are fair so let's just let this one slide. That outcome cannot be ascertained. ) upon Appeal.

“If it is no in the record, it did not happen”..... The appellate court judges read the verbatim transcript that says exactly what happened in trial. They also read and review the “record” (all of the pleadings and rulings that were filed in the trial court). Then, they review all the law that applies to the controversy that has prompted the appeal. Finally, they determine whether errors of law occurred in the trial court, and whether those errors are serious enough that the judgment of the trial court should be reversed. If the judges find that the trial court did not err, or that the errors were not serious enough to warrant a reversal, they will “affirm” the trial court’s decision. The judges’ decision, in written form, analyzes the parties’ arguments, declares what law controls the case, and rules on how that law applies to the facts of the case. The written decision of the court of appeals becomes “the law” for that particular district.

The Appellate Court, upon review, must assure and not guess nor rely upon the expected good intentions of the Magistrate and or Court each of the following:

- ▶ Sufficiency of the Evidence. Is the evidence strong enough to support the judgment?

▶ Manifest Weight of the Evidence. Was the decision on the Trial Court against the weight of evidence upon specific points and or issues and the also in the aggregate?

▶ Abuse of Discretion. Was the Trial Court arbitrary or unreasonable in a way that results in unfairness denying a party that causes an unjust result?

▶ Plain Error, Harmless Error or Invited Error

Appellant asserts all of the stated elements are demonstrable to the Appellate Court in the trial testimony of four days duration.

The Ohio Supreme Court, Sup. R. 11 (A-F), “requires” that a record of proceedings be made and maintained. There is no wiggle room in the Rule for waiving these requirements.

In addition to these Supreme Court Rules the Court has been assertive in assisting the Courts by detailing in the Standards Committee of the Supreme Court of Ohio Advisory Committee on Technology and the Courts a well written and easily read Court Room Record process and practice guide.

While there appears to be some very limited basis for allowing past testimony to be presented when a transcript is not available these exceptions do not permit the framing of four full days of extensive lay and expert final hearing testimony. In these very limited cases (unlike the instant case) ... there must be substantial narration of the material facts. *Summons v State*, 5 Ohio St 325 (1856) or *Schomer v State*, 47 Ohio App 84, 16 Ohio L. Abs 449, 190 NE 638 (Butler Co. 1933). In addition all the material testimony of the former witness (es) must be given which bears upon the matter in issue. *Donald v State*, 21 Ohio CC 124, 11 Ohio CD 483 (Brown Co 1900). Such a detailed rendering is as impossible as the Court providing a verbatim transcript.

Due process is to be permitted a review of the Courts actions upon specific transcript. Appellant has been severely prejudiced in his ability to argue for the modification and or reversal of the decision of the Trial Court. Appellant is now bared from making all available arguments as a result of the transcript being unavailable.

The Appellate Court, on pages 1 & 2 of the January 29, 2013 Judgment, asserts in broadly general and completely errant misstatements of the Docketed Filings and fact various assertions, the following:

Appellant essentially contends in his first and second assignments of error that the trial court erred in failing to record the four day final divorce hearing. This is not even remotely the facts nor does this even distantly reflect the issues regarding the recordings and/or processes leading to obtaining or not obtaining a transcript in the case before this Court. The trial court did absolutely record all of the proceedings, all four days. No issue exists that every part of the four day final hearing was recorded. The trial court did not comply with the Ohio Supreme Court requirements to have a safe secure recording back up procedure and processes. That trial long concealed a series of court failures and a deliberate obfuscation for more than six months is the sole cause of there being no transcript.

That the trial court's division of assets and liabilities of the parties was in contravention of the evidence presented at the final hearing. This is certainly accurate and clearly one of the arguments of Appellant. Then however, this court proceeds unjustly and unreasonably to conclude; Because the trial court was not required to record the proceedings absent a request by one of the parties to do so, we cannot conclude that the trial court erred. A request was made and every day and during every day recording was assured.

Such is a spurious issue. This depiction in an unneeded defense of the Trial Court and its staff give pause to the considerations of the Court goes well beyond any Docketed matters with these false

assertions. The Court did record and is the sole recorder of the Court proceedings and no Rule is to the contrary. Such are elements of concerns regarding impropriety-impartiality.

Further, in the absence of a transcript, because Appellant failed to provide as affidavit of the evidence ..... in conjunction with his objections to the magistrates decision, and also failed to file a statement of the evidence .... We must presume the regularity of the proceedings below.

There is no regularity of the trial court's actions in the case before this Court in any manner. The trial court would not allow any review of Objections without a transcript (that the trial court itself made impossible and knew could not be created, but the trial court kept that secret) and no ability to file affidavits at that level was allowed. This court has previously determined that only a transcript may be considered and affidavits, while an element within the civil rules is noted, this Fourth District has required a transcript. Other Districts disallow the filing of any affidavits and rely solely upon a transcript "and a review of the documents and items appearing upon the docket of the trial court". This court has not read and has not reviewed the documents that were transmitted and are a part of the docketed objections, evidence and exhibits. That review is this courts duty and obligation; avoided completely in the instant case. See Exhibit # 3 the Decision and Entry of Judge Knece, November 29, 2011. Despite the Judge knowing the Court's system had malfunctioned in numerous (many) cases, including Appellants, the Judge refuses to even read the Objections filed by Appellant to the Magistrate's Decision stating that a transcript had not been requested. This pronouncement was false, was known to be false when written, and is contrary to the required review established by the Fourth Appellate District as detailed herein infra by the Judge of a Magistrates Decision.

Specific Relief Sought: Remand to the Trial Court for Final Re-Hearing to be fully conducted and recorded, permitting transcription if later sought.

With the duplicity of the Trial Court in arriving at this long unnecessary juncture in the case, merely Ordering the Trial Court to now review the Magistrate's Decision would not suggest fairness and or impartiality.

No judicial review has ever been made of Appellant's claims in the divorce. Such is required.

EMERSON W. MAYS, et al., Plaintiffs-Appellees v. MICHELE ROBINETTE MORAN, et al., Defendants-Appellants Nos. 97CA2385 & 97CA2386. 99-LW-1430 (4th) Court of Appeals of Ohio, Fourth District, Ross March 18, 1999 whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. See *Ottawa Cty. Bd. Of Commrs. v. Marblehead* (1995), 102 Ohio App.3d 306, 318. Here, after reviewing the record, we find that we made an obvious error regarding the ownership of the real estate. Thus, we need to revisit our analysis in the third assignment of error because we found that Moran had standing based on her ownership interest in the real estate.

182 Ohio App.3d 691 (Ohio App. 4 Dist. 2009) 914 N.E.2d 1084, 2009-Ohio-3106 SINCLAIR, Appellant, v. SINCLAIR, Appellee. Nos. 08CA16, 08CA25. Court of Appeals of Ohio, Fourth District, Athens. May 18, 2009 further, "consideration of evidence outside the record is inappropriate and can constitute reversible error." *In re Estate of Visnich*, 11th Dist. No. 2005-T-0128, 2006 WL 3000427, at ¶ 15, citing *Boling v. Valecko* (Feb. 6, 2002), 9th Dist. No. 20464, 2002 WL 185182. "[I]t is an abuse of discretion for a court to conduct its own investigation and consider its own observations as evidence in deciding a case."

This Court of appeals in the instant case states and relies upon information not upon the Docket and suggests independent investigation in creating an incorrect but salving view of the Trial Courts flawed practices.

State v. Stanley, 11th Dist. No. 2007-P-0104, 2008-Ohio-3258, 2008 WL 2582641, at ¶ 28. " It is axiomatic that the trier of fact must only consider evidence in the record." In re K.B., 12th Dist. No. CA2006-03-077, 2007-Ohio-1647, 2007 WL 1041427, at ¶ 24.

Sinclair, the [914 N.E.2d 1086] reviewing court's standard of review is abuse of discretion. The Trial Court in never reached any Judicial review decision and the absence of such is absolute abuse of discretion.

Walters v. Walters, 150 Ohio App.3d 287, 2002-Ohio-6455, 780 N.E.2d 1032, at ¶ 10; Williamson v. Williamson, 180 Ohio App.3d 260, 2008-Ohio-6718, 905 N.E.2d 217, ¶ 37. Abuse of discretion is more than an error of judgment. Rather, it indicates that a ruling was unreasonable, arbitrary, or unconscionable. This Trial Court decided to make no judicial decision based as the Court stated because there was no transcript. No transcript, as a result solely of the Courts own actions. Appellant never had any opportunity to recover from these deceptions which are unreasonable, arbitrary and unconscionable.

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. Furthermore, when applying the abuse-of-discretion standard, we may not substitute our judgment for that of the trial court. Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. The Trial Court was wrong in not disclosing to Appellant counsel that a transcript was not available and never would be. Then counsel could have considered options. That follows through to the Fourth Appellate Court as well.

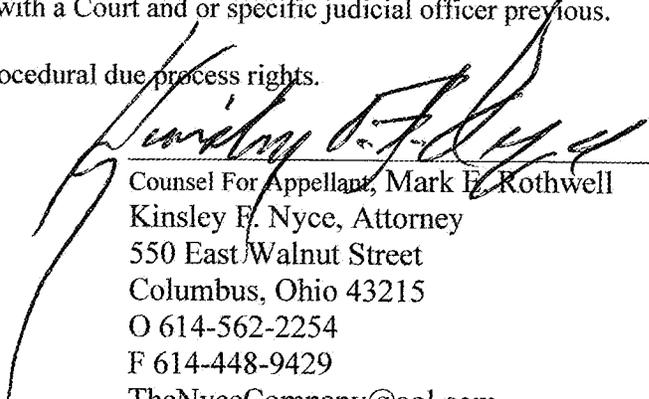
The Ohio Supreme Court has held that in this unique type of situation where there was an accidental omission of part of a transcript, reconsideration should be allowed in light of the accidentally omitted transcript portion. Reichert v. Ingersoll (1985), 18 Ohio St.3d 220, 222-23. The Court emphasized the policy of settling cases on their merits and App.R. 9(E), which provides that an appellate court may direct the correction of an omission in the record. Id. Thus, we will allow appellee to supplement the

record on appeal with the accidentally omitted portion of the transcript. Here there is NO transcript possible. What correction but retrial of the Final Hearing is possible or fair? None.

2005-Ohio-2116, Stadium Lincoln-Mercury, Inc., Plaintiff, v. Heritage Transport, Defendant/Third-Party Plaintiff-Appellant, v. Great American Insurance Company, Third-Party Defendant-Appellee. No. 04 MA 67, 05-LW-1722 (7th) Court of Appeals of Ohio, Seventh District April 25, 2005 Heritage filed a document titled "Application for Reconsideration Pursuant to Ohio Rule of Appellate Procedure 26" on April 1, 2005, within the ten day period described in the Rule. That document claimed that we should reconsider our decision due to "an internal inconsistency," Such issues are addressed in the En Banc review for such reflections.

### CONCLUSION

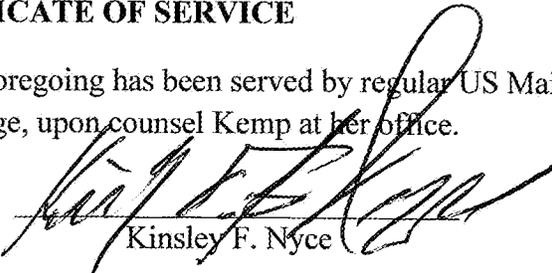
Appellant has never been afforded a Judicial Review and ORC statutorily complaint findings of fact and conclusions of law. Appellants defense of the case have been thwarted solely by Court processes and deliberate and or intentional actions unfair to the parties. Appellant seeks the Supreme Court reverse the decision and remand. Remand with additional direction; Appellant seeks a final hearing, full final testimonial and evidentiary rehearing (de novo) upon the record conducted by a neutral Court as assigned by the Ohio Supreme Court and the High Court process for assignment when a conflict exists with a Court and or specific judicial officer previous. Any other alternative outcome is a denial of Appellants procedural due process rights.



Counsel For Appellant, Mark E. Rothwell  
Kinsley F. Nyce, Attorney  
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Columbus, Ohio 43215  
O 614-562-2254  
F 614-448-9429  
TheNyceCompany@aol.com

### NOTICE OF CERTIFICATE OF SERVICE

I certify that a true copy and accurate copy of the foregoing has been served by regular US Mail this 17<sup>th</sup> day of June 2013, and of course we paid the postage, upon counsel Kemp at her office.



Kinsley F. Nyce

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL,  
PLAINTIFF-APPELLEE

V.

MARK E. ROTHWELL, ET AL  
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE COURT  
OF APPEALS, FOURTH  
APPELLATE DISTRICT,  
PICKAWAY COUNTY OHIO  
CASE NUMBER 12CA6

SUPREME COURT CASE NO.

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**EXHIBIT 1**

**DECISION AND JUDGMENT ENTRY, JANUARY 29, 2013**

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IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PICKAWAY COUNTY

2013 JAN 29 AM 10:43

JAMES W. DEAN  
CLERK OF COURTS  
PICKAWAY COUNTY

MICHELLE L. ROTHWELL,	:	
	:	
Plaintiff-Appellee,	:	Case No. 12CA6
	:	
vs.	:	
	:	
MARK E. ROTHWELL, ET AL.,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
Defendants-Appellants.	:	

APPEARANCES:

Kinsley F. Nyce, Columbus, Ohio, for Appellant, Mark E. Rothwell.

Jacqueline L. Kemp, Kemp, Schaeffer & Rowe Co., L.P.A., Columbus, Ohio, for Appellee.

McFarland, P.J.

{¶1} Appellant, Mark E. Rothwell, appeals the judgment entry of the Pickaway County Court of Common Pleas, Division of Domestic Relations, issuing a decree of divorce as between Appellant, and Appellee, Michelle L. Rothwell. Here, Appellant essentially contends in his first and second assignments of error that the trial court erred in failing to record the four day final divorce hearing. Appellant further contends in his third assignment of error that the trial court's division of assets and liabilities of the parties was in contravention of the evidence presented at the final hearing. Because the

trial court was not required to record the proceedings absent a request by one of the parties to do so, we cannot conclude that the trial court erred. As such, Appellant's first and second assignments of error are overruled.

Further, in the absence of a transcript, because Appellant failed to provide an affidavit of the evidence pursuant to Civ.R. 53(D)(3)(b)(iii) in conjunction with his objections to the magistrate's decision, and also failed to file a statement of the evidence pursuant to App.R. 9(C) on appeal, we must presume the regularity of the proceedings below. Thus, Appellant's third assignment of error is also overruled. Accordingly, the decision of the trial court is affirmed.

#### FACTS

{¶2} The parties were married on November 14, 1998, and separated on November 14, 2009. Appellee, Michelle Rothwell, filed a complaint for divorce on December 30, 2009, naming as defendants her husband and Appellant herein, Mark Rothwell, as well as Grove City Garage Door, Inc., the company jointly owned by the parties. Appellant, Mark Rothwell, filed his answer and counterclaims to the complaint for divorce on February 11, 2010. Discovery between the parties ensued and the matter was scheduled for a final divorce hearing before the magistrate beginning on April 25,

2011.<sup>1</sup> After the presentation of evidence, the parties' respective counsel submitted written closing arguments.

{¶3} On October 28, 2011, a magistrate's decision, including findings of fact and conclusions of law, was filed which divided the parties' marital assets and debt. Appellant filed his objections to the magistrate's decision on November 14, 2011. Appellee in turn filed her response to Appellant's objections, as well as her own objections. A review of the record reveals that Appellant did not request or file a copy of the transcript in conjunction with the filing of his objections. Further, in the absence of the transcript, Appellant also failed to file an affidavit of the evidence pursuant to Civ.R. 53(D)(3)(b)(iii). On November 29, 2011, the trial court issued a decision and entry overruling Appellant's objections and affirming the magistrate's decision. In reaching its decision, the trial court stated as follows:

“It is noted that a transcript of the final hearing was not requested by the Defendant. Lacking a transcript, this Court will rely on the findings of fact outlined in the Magistrate's Decision and the evidence contained in the file.”

Subsequently, on December 20, 2011, Appellant filed a motion for leave to have the transcript he had ordered that same day made available to the trial

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<sup>1</sup> The final hearing consisted of four days of testimony taken on April 25, April 26, June 9, and June 10, 2011.

court for consideration. Appellee opposed the motion. The trial court implicitly denied Appellant's motion by virtue of its issuance of a judgment entry – decree of divorce on February 29, 2012.

{¶4} Appellant filed his notice of appeal on March 27, 2012, indicating in his statement, praecipe, and notice to the court reporter that he intended file a complete transcript of the proceedings. Subsequently, on April 11, 2012, the court reporter filed an affidavit stating that a record of the four days of the final divorce hearing was not available, due to a malfunction of the recording equipment. Further, a notice of transmission of the record was filed on May 8, 2012, indicating that it did not include a transcript of the proceedings. Appellate briefs were filed and the matter was heard on oral argument August 30, 2012. Then, on September 5, 2012, Appellant filed a motion requesting that he be permitted to file a statement of the evidence on appeal. By a magistrate's order dated September 12, 2012, this Court initially granted Appellant's motion; however, upon the objection of Appellee and after further consideration, we denied Appellant's motion, because the matter had already been submitted for decision. Thus, the appeal proceeded without a transcript, or an alternative App.R. 9(C) statement of the evidence.

## ASSIGNMENTS OF ERROR I AND II

{¶5} Because Appellant's first and second assignments of error advance essentially the same argument, we will address them together. As stated above, taken together, Appellant's first and second assignments of error essentially contend that the trial court erred in failing to record the parties four day final divorce hearing. In support of this argument, Appellant cites us to the Supreme Court of Ohio Sup.R. 11(A)-(F), which he claims "requires" that a record of proceedings be made and maintained. Appellant further argues that because the trial court failed to record the proceedings, this Court should remand the matter for a new final hearing. Based upon the following reasons, we disagree.

{¶6} Sup.R. 11 governs "Recording of proceedings" and provides in section (A) that "[p]roceedings before any court and discovery proceedings *may* be recorded \* \* \*." (Emphasis added). The applicable version of this rule was adopted in 1997 and is still currently in effect. Contrary to Appellant's argument, the 1997 Staff Notes which accompany the rule state that "[i]n civil matters, there is no obligation to record the proceedings before the court. However, the court must provide a means of recording the proceedings in a civil matter upon the request of a party." The Staff Notes

further state that “R.C. 2301.20 requires the court of common pleas to provide a reporter on request of a party or their attorney.”

{¶7} The Tenth District Court of Appeals recently addressed an argument similar to the one raised by Appellant in *Franklin v. Franklin*, 10<sup>th</sup> Dist. No. 11AP-713, 2012-Ohio-1814. In response, the *Franklin* court determined that Sup.R. 11 “clearly does not require every proceeding to be recorded.” *Franklin* at ¶ 13; citing *Levengood v. Levengood*, 5<sup>th</sup> Dist. No. 1998AP100114, 2000 WL 874720, (June 7, 2000). As in *Franklin*, Appellant does not contend that a record was requested by one of the parties. Further, the version of R.C. 2301.20 that was in effect at the time of the hearing at issue provided that a trial court shall provide a shorthand reporter in civil cases upon the request of either party.<sup>2</sup> Thus, although the record reveals that the trial court did, in fact, attempt to record the proceedings, neither Sup.R. 11 or the applicable version of R.C. 2301.20 required the trial court to record the proceedings absent a specific request by one of the parties.

{¶8} Although not raised by Appellant, we additionally note Civ.R. 53(D)(7), which is entitled “Recording of proceedings before magistrates,” states that “[e]xcept as otherwise provided by law, all proceedings before a

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<sup>2</sup> R.C. 2301.20 has since been amended and the current version, which became effective September 10, 2012, provides that “[a]ll civil and criminal actions in the court of common pleas shall be recorded.”

magistrate shall be recorded in accordance with procedures established by the court.” Our research reveals that the local rules of the Pickaway County Court of Common Pleas, Domestic Relations Division, did not expressly require the recordation of the proceedings at issue, but instead simply state under Rule 16.02, with respect to magistrates, “[a]ll referenced proceedings shall conform to the requirements of Ohio Civil Rule 53.” Further, while this Court’s own rules provide in App.R. 9(A)(2) that “[t]he trial court shall ensure that all proceedings of record are recorded by a reliable method,” App.R. 9(B)(4) contemplates situations in which “no recording was made.”

{¶9} For example, App.R. 9(B)(4) provides that “[i]f no recording was made, or when a recording was made but is no longer available for transcription, App.R. 9(C) or (D) may be utilized.” App.R. 9(C) is entitled “Statement of the evidence or proceedings when no recording was made, when the transcript of proceedings is unavailable, or when a recording was made but is no longer available for transcription,” and provides as follows:

“If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection. The

statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10 and the appellee may serve on the appellant objections or propose amendments to the statement within ten days after service of the appellant's statement; these time periods may be extended by the court of appeals for good cause. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

App.R. 9(D) provides yet another alternative, allowing the parties to submit and "agreed statement as the record on appeal."

{¶10} Our review of the record before us indicates that the four day final divorce hearing held before the magistrate was not recorded. Based upon the affidavit of the court reporter, it appears there was a malfunction with the recording equipment. Additionally, as set forth above, Appellant does not claim that either party requested that the proceedings be recorded.

{¶11} As already set forth, Sup.R. 11 does not require magistrates to record proceedings, and the version of R.C. 2301.20 that was in effect at the time of the proceedings at issue only required recordation upon the request of one of the parties. Further, although Civ.R. 53 speaks to the recordation of proceedings before magistrates, it simply requires that “all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.” The local rules of the Pickaway County Court of Common Pleas, Domestic Relations Division, do not specify that these proceedings must be recorded. Finally, although this Court’s own appellate rules contemplate that such proceedings be recorded, the rules also provide alternatives on appeal when no such recording was made. Appellant did not avail himself of those alternatives until well after the time in which they would have been appropriate, which was far too late.

{¶12} In light of the foregoing, because there was no clear mandate requiring the magistrate to make a record of the proceedings, we cannot conclude that the trial court erred. Further, even assuming *arguendo* that the trial court did err in failing to make a record of the proceedings, there were alternatives to recreate the record available to Appellant under App.R. 9(C) or (D), which he did not timely take advantage of. Thus, even if we had found error on the part of the trial court, we would not have granted

Appellant the relief requested, which was to have the matter remanded for a new hearing. Accordingly, Appellant's first and second assignments of error are overruled.

### ASSIGNMENT OF ERROR III

{¶13} In his third assignment of error, Appellant contends that the trial court erred as a matter of law and in conflict with the evidence in the grant of assets and liabilities of the parties, and in contravention of the evidence presented at the final hearing. Appellant claims that lay and expert trial testimony was not utilized adequately by the magistrate. Appellant also mentions this Court's inability to consider this argument absent the trial testimony.

{¶14} Appellee responds by initially pointing out the fact that Appellant has failed to properly brief or present any argument regarding this assignment of error. We agree. Appellant has not separately argued each assignment of error. In fact, while the purported assignments of error each number several pages in length, there is only one argument section which simply appears to summarize the role of the appellate court in general.

{¶15} The only information in Appellant's seventeen page brief that provides any specific information regarding the trial court's division of the parties' assets and liabilities appears in the statement of the facts section, and

consists of several bullet points alleging inaccuracies, without any accompanying explanation or argument. App.R. 12(A)(2) authorizes us to disregard any assignment of error that a party fails to argue separately. Nevertheless, in the interests of justice, we would ordinarily attempt to consider this assignment of error on its merits. However, as alluded to above and as will be more fully discussed below, due to the lack of a transcript or App.R. 9(C) or (D) statement, our review is severely limited.

{¶16} In his third assignment of error, Appellant appears to complain that the magistrate, whose decision the trial court adopted, erred in its division of the parties' assets and liabilities. Initially, we must address the standard of review. Civ.R. 53(D)(3)(b)(i) provides that a party "may file written objections to a magistrate's decision within fourteen days of the filing of the decision \* \* \*." Civ.R. 53(D)(3)(b)(iii) further provides that "[a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all evidence submitted to the magistrate relevant to that finding *or an affidavit of that evidence if a transcript is not available.*" (Emphasis added). As discussed above, a transcript was not available. If an objecting party fails to provide the trial court with the transcript of the proceedings before the magistrate, the appellate court is precluded from considering the

transcript of the magistrate's hearing. *State ex. rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995).

{¶17} Our review of the record further reveals that Appellant also failed to file an affidavit of the evidence, which alternative was required under Civ.R. 53(D)(3)(b)(iii) in the absence of a transcript. The trial court may properly adopt a magistrate's factual findings without further consideration when the objecting party fails to provide the court with a transcript of the magistrate's hearing or other relevant material to support their objections. *In re Maxwell*, 4<sup>th</sup> Dist. No. 05CA2863, 2006-Ohio-527, ¶ 27, citing *Proctor v. Proctor*, 48 Ohio App.3d 55, 60, 548 N.E.2d 287 (1988), in turn citing *Purpura v. Purpura*, 33 Ohio App.3d 237, 515 N.E.2d 27 (1986).

{¶18} In addition, not only did Appellant fail to provide an affidavit of the evidence in support of his objections to the magistrate's decision at the trial court level, he also failed to file a timely statement of the evidence pursuant to App.R. 9(C) on appeal. App.R. 9 requires that the party challenging the trial court's decision prove the alleged error through references to the record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). It is an appellant's duty to provide a record of the trial court's proceedings that is necessary for the resolution of his

appeal even if, through no fault of the appellant, a verbatim transcript of the proceedings below is unavailable. *Buckley v. Ollila*, 11th Dist. No. 98-T-0177, 2000 WL 263739, \*2 (Mar. 3, 2000).

{¶19} Since there was no transcript of the hearing or some other acceptable alternative as set out in App.R. 9, Appellant cannot demonstrate the claimed error, and this Court must presume the regularity of the trial court proceedings as well as the validity of its judgment. See *Pryor v. Pryor*, 4<sup>th</sup> Dist. No. 09CA3096, 2009-Ohio-6670, ¶24; *Childers v. Childers*, 4<sup>th</sup> Dist. No. 05CA3007, 2006-Ohio-1391, ¶23; *Eastwood v. Eastwood*, 5<sup>th</sup> Dist. No. 06-CA-0066, 2007-Ohio-3096, ¶ 26, quoting *E. Cleveland v. Dragonette*, 32 Ohio St.2d 147, 149, 290 N.E.2d 571, (1972) (“ ‘Without a transcript or an App.R. 9 substitute, “[a] party, having the duty of instituting the preparation of the record for the purpose of appeal, may not sit idly by and then predicate reversal upon the basis of a ‘silent record.’ ”). Accordingly, we overrule Appellant’s third assignment of error.

{¶20} Having failed to find merit in any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

Kline, J., concurring.

{¶21} I respectfully concur in judgment only. In my view, the relevant issue is Appellant's failure to comply with Civ.R. 53(D)(3)(b)(iii). "When a party fails to file a transcript of evidence *or a Civ.R. 53(D)(3)(b)(iii) affidavit*, our review is limited to determining whether the trial court abused its discretion when applying the law to the facts." (Emphasis added.) *Liming v. Damos*, 4th Dist. No. 08CA34, 2009-Ohio-6490, ¶ 17; *see also State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995). Therefore, as to Appellant's third assignment of error, I would find that the trial court did not abuse its discretion. Furthermore, because Appellant failed to comply with Civ.R. 53(D)(3)(b)(iii), we may not consider any evidence other than the trial court's findings of fact. *See id.; Ragins v. Dains*, 10th Dist. No. 12AP-124, 2012-Ohio-5089, ¶ 9 ("We are \* \* \* precluded from considering anything that was not before the trial court when it overruled appellant's objection to the magistrate's decision."). Therefore, I would simply find that Appellant's first-and-second assignments of error are irrelevant.

{¶22} Accordingly, I respectfully concur in judgment only.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

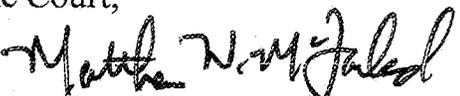
Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.  
Exceptions.

Harsha, J.: Concurs in Judgment and Opinion.

Kline, J.: Concurs in Judgment Only with Opinion.

For the Court,

BY: 

Matthew W. McFarland  
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL,  
PLAINTIFF-APPELLEE

V.

MARK E. ROTHWELL, ET AL  
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE COURT  
OF APPEALS, FOURTH  
APPELLATE DISTRICT,  
PICKAWAY COUNTY OHIO  
CASE NUMBER 12CA6

SUPREME COURT CASE NO.

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**EXHIBIT 2**

**COURT APPEALS DOCKET, 2013**

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2012CA0006 VS. ROTHWELL, MICHELLE L ROTHWELL, MARK E			
File Date	03/27/2012	Case Status	Open
		Case Status Date	03/27/2012
		Case Disposition	Undisposed
		Case Disposition Date	

Party Information				
Party Name	Party Alias(es)	Party Type	Attorney(s)	Attorney Phone
ROTHWELL, MICHELLE L		Plaintiff	Kemp, Jacqueline L	(614)224-2678
ROTHWELL, MARK E		Defendant	Nyce, Kinsley F	(614)562-2254
GROVE CITY GARAGE DOOR INC		Defendant	Nyce, Kinsley F	(614)562-2254

Financial Entries				
Receipt #	Date	Received From	Amount Paid	
39114	06/04/2013	KINSLEY F NYCE	60.00	
	<u>Payment</u>		<u>Fee</u>	
	CHECK	60.00	COST	60.00
38899	05/21/2013	DA	72.00	
	<u>Payment</u>		<u>Fee</u>	
	DR DEPOSIT APPLIED	72.00	COST	72.00
31800	03/27/2012	KINSLEY F NYCE	85.00	
	<u>Payment</u>		<u>Fee</u>	
	CHECK	85.00	DEPOSIT	72.00
			FILING FEES	13.00

Docket Entries	
Date	Text
05/21/2013	COSTBILL SENT TO ATTY NYCE (APPELLANT MARK ROTHWELL)
05/07/2013	ISSUED COPY OF DECISION AND ENTRY ON MOTION TO CERTIFY CONFLICT, FOR RECONSIDERATION AND FOR EN BANC CONSIDERATION TO KINSLEY NYCE @ 1601 W FIFTH AVE & JACQUELINE KEMP @ 88 WEST MOUND ST Receipt: 39114 Date: 06/04/2013
05/03/2013	DECISION AND ENTRY ON MOTION TO CERTIFY CONFLICT, FOR RECONSIDERATION AND FOR EN BANC CONSIDERATION FILED (FOUR (4) COPIES TO COURT OF APPEALS) (COPY OF SAME GIVEN TO JUDGE KNECE) Receipt: 39114 Date: 06/04/2013
03/01/2013	APPELLANT RESPONSE TO APPELLEE RESPONSE IN OPPOSITION TO APPLICATION FOR CERTIFICATION OF A CONFLICT FILED; FOUR (4) COPIES OF SAME SENT TO COURT OF APPEALS FILED
03/01/2013	APPELLANT RESPONSE TO APPELLEE RESPONSE IN OPPOSTION TO APPLCATION FOR RECONSIDERATION AND EN BANC RECONSIDERATION WITH CERTIFICATE OF SERVICE FILED; FOUR (4) COPIES OF SAME SENT TO COURT OF APPEALS
02/21/2013	APPELLEE'S MEMORANDUM CONTRA APPELLANT'S MOTION/APPLICATION FOR RECONSIDERATION PURRUSANT TO APP. R. 26(A)(1) AND APPLICATION FOR EN BANC CONSIDERATIN PURUSANT TO APP R 26(A)(2) FILED; FOUR (4) COPIES OF SAME SENT TO

## COURT OF APPEALS

- 02/21/2013 APPELLEE'S MEMORANDUM CONTRA APPELLANT'S MOTION/APPLICATION FOR RECONSIDERATION PURSUANT TO APP. R. 26 (A)(1) AND APPLICATION FOR EN BANC CONSIDERATION PURSUANT TO APP R 26(A)(2) FILED 4 COPIES MAILED TO COURT OF APPEALS
- 02/20/2013 APPELLEE'S RESPONSE / BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO CERTIFY A CONFLICT PURSUANT TO APP.R.25 (A), CERTIFICATE OF SERVICE FILED (FAXED COPY)
- 02/20/2013 APPELLEE'S MEMORANDUM CONTRA APPELLANT'S MOTION/APPLICATION FOR RECONSIDERATION PURSUANT TO APP R. 26(A)(1) AND APPLICATION FOR EN BANC CONSIDERATION PURSUANT TO APP. R. 26(A)(2) FILED (FAXED COPY)
- 02/11/2013 MOTION OF APPELLANT MARK ROTHWELL, TO CERTIFY A CONFLICT AND CERTIFICATE OF SERVICE FILED ( 4 COPIES GIVEN TO CA )
- 02/11/2013 MOTION , APPLICATION OF APPELLANT MARK ROTHWELL, FOR RECONSIDERATION AND APPLICATION FOR EN BANC CONSIDERATION, CERTIFICATE OF SERVICE AND EXHIBITS 1-5 FILED ( 4 COPIES MAILED TO CA )
- 01/30/2013 MANDATE GIVEN TO CLERK OF COMMON PLEAS COURT Receipt: 39114 Date: 06/04/2013
- 01/30/2013 ISSUED COPY OF DECISION AND JUDGMENT ENTRY TO ATTYS JACQUELINE KEMP AND KINSLEY FRAMPTON NYCE Receipt: 39114 Date: 06/04/2013
- 01/29/2013 DECISION AND JUDGMENT ENTRY FILED Receipt: 39114 Date: 06/04/2013
- 11/19/2012 ISSUED COPY OF ENTRY DENYING MOTION FOR RECONSIDERATION TO JACQUELINE KEMP AND KINSLEY NYCE VIA REGULAR US MAIL Receipt: 38899 Date: 05/21/2013 Receipt: 39114 Date: 06/04/2013
- 11/19/2012 ORDER DENYING MOTION FOR RECONSIDERATION FILED (FOUR COPIES GIVEN TO COURT OF APPEALS) Receipt: 38899 Date: 05/21/2013
- 10/17/2012 MEMORANDUM CONTRA TO OBJECTION TO MAGISTRATE'S ORDER , MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, & PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR PERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED (FOUR COPIES TO COURT OF APPEALS)
- 10/16/2012 MEMORANDUM CONTRA TO OBJECTION TO MAGISTRATE'S ORDER , MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, & PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR PERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED (FOUR COPIES TO COURT OF APPEALS) (FAXED COPY)
- 10/10/2012 OBJECTION TO MAGISTRATE'S ORDER WITH ATTACHMENTS FILED
- 10/01/2012 MAILED COPIES OF MAGISTRATE'S ORDER TO ATTORNEY KINSLEY NYCE AND JACQUELINE KEMP BY REGULAR US MAIL
- 09/27/2012 4 COPIES OF MAGISTRATE'S ORDER FILED 9/27/12 SENT TO COURT OF APPEALS
- 09/27/2012 MAGISTRATE'S ORDER GRANTING APPELLEE MICHELLE ROTHWELL MOTION FOR RECONSIDERATION OF MAGISTRATE'S ORDER AND DENYING APPELLANT'S MOTION TO FILE STATEMENT OF EVIDENCE FILED Receipt: 38899 Date: 05/21/2013
- 09/24/2012 MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER AND CERTIFICATE OF SERVICE FILED ( 4 COPIES TO CA )
- 09/20/2012 MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, CERTIFICATE OF SERVICE AND ATTACHMENTS FILED ( COPIES MAILED TO CA )
- 09/19/2012 FAXED COPY OF MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012 , CERTIFICATE OF SERVICE AND ATTACHMENTS FILED ( COPIES SENT TO JUDGE HARSHA CA )
- 09/17/2012 MAGISTRATE'S ORDER FILED ON 9/12/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE BY REGULAR MAIL Receipt: 38899 Date: 05/21/2013
- 09/13/2012 PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR PERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED FOUR COPIES SENT TO COURT OF APPEALS
- 09/12/2012 MAGISTRATE'S ORDER GRANTING APPELLANT'S MOTION TO FILE A STATEMENT OF EVIDENCE FILED FOUR COPIES OF ORDER SENT TO JUDGE HARSHA'S OFFICE Receipt: 38899 Date: 05/21/2013
- 09/05/2012 MOTION , MEMORANDUM AND CERTIFICATE OF SERVICE FILED ( 4 COPIES AND ENTRY FOR SIG SENT TO CA )
- 08/07/2012 CASE FOLDER GIVEN TO CONNIE RICHARDS COURT ADMR COURT OF APPEALS, CIRCLEVILLE OFFICE
- 07/31/2012 COPIES OF MAGISTRATE'S DECISION FILED ON 7/27/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE Receipt: 38899 Date: 05/21/2013

07/27/2012 MAGISTRATE'S ORDER - APPELLEE'S MOTION TO STRIKE THE BRIEF OF APPELLANT OR IN THE ALTERNATIVE TO STRIKE ALL PORTIONS OF THE BRIEF THAT PERTAIN TOMATTERS OUTSIDE OF THE RECORD IS DENIED AT THIS TIME FILED COPIES SENT TO JUDGE HARSHA Receipt: 38899 Date: 05/21/2013

07/23/2012 REPLY BRIEF OF DEFENDANT-APPELLANT MARK E ROTHWELL AND OPPOSITION TO APPELLEE MOTION TO STRIKE AND CERTIFICATE OF SERVICE FILED ( COPIES MAILED TO JUDGE HARSHA )

07/12/2012 MOTION TO STRIKE THE BRIEF OF APPELLANT OR, IN THE ALTERNATIVE, TO STRIKE ALL PORTIONS OF THE BRIEF THAT PERTAIN TO MATTERS OUTSIDE OF THE RECORD FILED Attorney: Kemp, Jacqueline Lee (66300)

07/12/2012 APPELLEE BRIEF OF PLAINT-APPELLEE, MICHELLE L ROTHWELL FILED FOUR COPIES OF APPELLEE BRIF SENT TO COURT OF APPEALS

06/28/2012 COPIES OF ENTRY GRANTING APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF ON OR BEFORE 7/31/12 FILED ON 6/25/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE Receipt: 38899 Date: 05/21/2013

06/25/2012 ENTRY GRANTING APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE A BRIEF TO 7/12/12 FILED COPIES SENT TO JUDGE HARSHA Receipt: 38899 Date: 05/21/2013

06/22/2012 MEMORANDUM CONTRA APPELLEES MOTION FOR EXTENSION TO FILE INITIAL BRIEF BEYOND JUNE 18, 2012 FILED ON JUNE 18, 2012 , MEMORANDUM IN SUPPORT AND ATTACHMENTS FILED ( 4COPIES TO CA )

06/18/2012 MOTION FOR EXTENSION OF TIME TO FILE APPELLEES BRIEF, MEMORANDUM IN SUPPORT AND CERTIFICATE OF SERVICE FILED; FOUR (4) COPIES OF SAME GIVEN TO COURT OF APPEALS

06/15/2012 COPY OF SUPERSEDEAS BOND RECEIVED FROM CLERK OF COMMON PLEAS & FILED (09DV335) COPIES SENT TO JUDGE HARSHA

06/12/2012 COPIES OF MAGISTRATE'S DECISION FILED ON 6/8/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE Receipt: 38899 Date: 05/21/2013

06/08/2012 MAGISTRATE'S ORDER - GRANTING APPELANT'S REQUEST FOR ORAL ARGUMENT FILED COPIES SENT TO JUDGE HARSHA Receipt: 38899 Date: 05/21/2013

05/29/2012 BRIEF OF DEFENANT-APPELLANT MARK E ROTHWELL, CERTIFICATE OF SERVICE AND EXHIBITS 1-5 FILED; FOUR (4) COPIES OF SAME GIVEN TO COURT OF APPEALS

05/25/2012 COPIES OF MAGISTRATE'S ORDER FILED ON 5/22/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE Receipt: 38899 Date: 05/21/2013

05/25/2012 COPIES OF MAGISTRATE'S ORDER FILED ON 5/22/12 SENT TO Receipt: 38899 Date: 05/21/2013

05/22/2012 MAGISTRATE'S ORDER/DENYING APPELLANT'S MOTION TO STAY EXECUTION PENDING OUTCOME OF APPEAL FILED COPIES SENT TO JUDGE HARSHA Receipt: 38899 Date: 05/21/2013

05/18/2012 MOTION TO STAY AND ENTRY FOR EXECUTION, MEMORANDUM AND CERTIFICATE OF SERVICE FILED ( 4 COPIES AND ENTRY FOR SIGNATURE MAILED TO CA )

05/08/2012 NOTICE OF TRANSMISSION OF RECORD SENT TO JACQUELIEN KEMP, KINSLEY NYCE & JUDGE KNECE Receipt: 38899 Date: 05/21/2013

05/08/2012 RECORD WITH ALL ORIGINAL PLEADINGS RECEIVED FROM TRIAL COURT & FILED

03/30/2012 NOTICE STATING DEFICIENCIES HAVE BEEN REMEDIED SENT TO JUDGE HARSHA

03/30/2012 COPY OF JUDGMENT ENTRY DECREE OF DIVORCE FOR NOTICE OF APPEAL SENT TO JUDGE HARSHA

03/29/2012 COPY OF JUDGMENT ENTRY DECREE OF DIVORCE FOR NOTICE OF APPEAL RECEIVED FROM TRIAL COURT & FILED

03/27/2012 DEFICIENCY NOTICE FILED SENT TO KINSLEY NYCE & JUDGE HARSHA

03/27/2012 COPIES OF NOTICE OF APPEAL, SERVICE, EXHIBIT A, STATEMENT, PRAECIPE FOR COMPLETE TRANSCRIPT & NOTICE TO COURT REPORTER, SERVICE & CIVIL DOCKET STATEMENT SENT TO JUDGE HARSHA & JACQUELINE KEMP

03/27/2012 CIVIL DOCKET STATEMENT FILED

03/27/2012 DEPOSIT Receipt: 31800 Date: 03/27/2012 KNISLEY F NYCE

03/27/2012 INITIAL APPEAL FILING FEES Receipt: 31800 Date: 03/27/2012

03/27/2012 COPIES OF NOTICE OF APPEAL, SERVICE, EXHIBIT A, STATEMENT, PRAECIPE FOR COMPLETE TRANSCRIPT & NOTICE TO COURT REPORTER, SERVICE & DOCKET SHEET RECEIVED FROM TRIAL COURT & FILED Receipt: 38899 Date: 05/21/2013

## COURT OF APPEALS

- 02/21/2013 APPELLEE'S MEMORANDUM CONTRA APPELLANT'S MOTION/APPLICATION FOR RECONSIDERATION PURSUANT TO APP. R. 26 (A)(1) AND APPLICATION FOR EN BANC CONSIDERATION PURSUANT TO APP R 26(A)(2) FILED 4 COPIES MAILED TO COURT OF APPEALS
- 02/20/2013 APPELLEE'S RESPONSE / BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO CERTIFY A CONFLICT PURSUANT TO APP.R.25 (A), CERTIFICATE OF SERVICE FILED (FAXED COPY)
- 02/20/2013 APPELEE'S MEMORNDUM CONTRA APPELLANT'S MOTION/APPLICATION FOR RECONSIDERATION PURSUANT TO APP R. 26(A)(1) AND APPLICATION FOR EN BANC CONSIDERATION PURSUANT TO APP. R. 26(A)(2) FILED (FAXED COPY)
- 02/11/2013 MOTION OF APPELLANT MARK ROTHWELL, TO CERTIFY A CONFLICT AND CERTIFICATE OF SERVICE FILED ( 4 COPIES GIVEN TO CA )
- 02/11/2013 MOTION , APPLICATION OF APPELLANT MARK ROTHWELL, FOR RECONSIDERATION AND APPLICATION FOR EN BANC CONSIDERATION, CERTIFICATE OF SERVICE AND EXHIBITS 1-5 FILED ( 4 COPIES MAILED TO CA )
- 01/30/2013 MANDATE GIVEN TO CLERK OF COMMON PLEAS COURT Receipt: 39114 Date: 06/04/2013
- 01/30/2013 ISSUED COPY OF DECISION AND JUDGMENT ENTRY TO ATTYS JACQUELINE KEMP AND KINSLEY FRAMPTON NYCE Receipt: 39114 Date: 06/04/2013
- 01/29/2013 DECISION AND JUDGMENT ENTRY FILED Receipt: 39114 Date: 06/04/2013
- 11/19/2012 ISSUED COPY OF ENTRY DENYING MOTION FOR RECONSIDERATION TO JACQUELINE KEMP AND KINSLEY NYCE VIA REGULAR US MAIL Receipt: 38899 Date: 05/21/2013 Receipt: 39114 Date: 06/04/2013
- 11/19/2012 ORDER DENYING MOTION FOR RECONSIDERATION FILED (FOUR COPIES GIVEN TO COURT OF APPEALS) Receipt: 38899 Date: 05/21/2013
- 10/17/2012 MEMORANDUM CONTRA TO OBJECTION TO MAGISTRATE'S ORDER , MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, & PLAINTIFF-APPELLEE'S MEMORANDUM IN IPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR PERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED (FOUR COPIES TO COURT OF APPEALS)
- 10/16/2012 MEMORANDUM CONTRA TO OBJECTION TO MAGISTRATE'S ORDER , MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, & PLAINTIFF-APPELLEE'S MEMORANDUM IN IPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR PERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED (FOUR COPIES TO COURT OF APPEALS) (FAXED COPY)
- 10/10/2012 OBJECTION TO MAGISTRATE'S ORDER WITH ATTACHMENTS FILED
- 10/01/2012 MAILED COPIES OF MAGISTRATE'S ORDER TO ATTORNEY KINSLEY NYCE AND JACQUELINE KEMP BY REGULAR US MAIL
- 09/27/2012 4 COPIES OF MAGISTRATE'S ORDER FILED 9/27/12 SENT TO COURT OF APPEALS
- 09/27/2012 MAGISTRATE'S ORDER GRANTING APPELLEE MICHELLE ROTHWELL MOTION FOR RECONSIDERATION OF MAGISTRATE'S ORDER AND DENYING APPELLANT'S MOTION TO FILE STATEMENT OF EVIDENCE FILED Receipt: 38899 Date: 05/21/2013
- 09/24/2012 MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER AND CERTIFICATE OF SERVICE FILED ( 4 COPIES TO CA )
- 09/20/2012 MOTION/APPLICATION FOR RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTEMBER 12, 2012, CERTIFICATE OF SERVICE AND ATTACHMENTS FILED ( COPIES MAILED TO CA )
- 09/19/2012 FAXED COPY OF MOTION/APPLICATION FRO RECONSIDERATION OF THE MAGISTRATE'S ORDER ISSUED SEPTMEBER 12, 2012 , CERTIFICATE OF SERVICE AND ATTACHMENTS FILED ( COPIES SENT TO JUDGE HARSHA CA )
- 09/17/2012 MAGISTRATE'S ORDER FILED ON 9/12/12 SENT TO JACQUELINE KEMP & KINSLEY NYCE BY REGULAR MAIL Receipt: 38899 Date: 05/21/2013
- 09/13/2012 PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTON FOR PRERMISSION TO FILE A STATEMENT OF EVIDENCE AND/OR PROCEEDINGS FILED FOUR COPIES SENT TO COURT OF APPEALS
- 09/12/2012 MAGISTRATE'S ORDER GRANTING APPELLANT'S MOTION TO FILE A STATEMENT OF EVIDENCE FILED FOUR COPIES OF ORDER SENT TO JUDGE HARSHA'S OFFICE Receipt: 38899 Date: 05/21/2013
- 09/05/2012 MOTION , MEMORANDUM AND CERTIFICATE OF SERVICE FILED ( 4 COPIES AND ENTRY FOR SIG SENT TO CA )
- 08/07/2012 CASE FOLDER GIVEN TO CONNIE RICHARDS COURT ADMR COURT OF APPEALS, CIRCLEVILLE OFFICE
- 07/31/2012 COPIES OF MAGISTRATE'S DECISION FILED ON 7/27/12 SENT TO JACWUELINE KEMP & KNISLEY NYCE Receipt: 38899 Date: 05/21/2013

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL,  
PLAINTIFF-APPELLEE

V.

MARK E. ROTHWELL, ET AL  
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE COURT  
OF APPEALS, FOURTH  
APPELLATE DISTRICT,  
PICKAWAY COUNTY OHIO  
CASE NUMBER 12CA6

SUPREME COURT CASE NO.

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**EXHIBIT 3**

**COURT APPEALS DECISION AND ENTRY ON MOTIONS TO CERTIFY  
CONFLICT AND FOR RECONSIDERATION AND FOR EN BANC  
CONSIDERATION MAY 3, 2013**

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IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PICKAWAY COUNTY

2013 MAY -3 PM 12:35

JAMES W. MOHAM  
CLERK OF COURTS  
PICKAWAY COUNTY

Michelle L. Rothwell,	:	Case No. 12CA6
Plaintiff-Appellee,	:	<b><u>DECISION AND ENTRY ON</u></b>
v.	:	<b><u>MOTIONS TO CERTIFY CONFLICT,</u></b>
	:	<b><u>FOR RECONSIDERATION AND</u></b>
	:	<b><u>FOR EN BANC CONSIDERATION</u></b>
Mark E. Rothwell, et al.,	:	
Defendants-Appellants.	:	

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APPEARANCES:

Kinsley F. Nyce, Columbus, Ohio, for Appellant Mark E. Rothwell.

Jacqueline L. Kemp, Kemp, Schaeffer & Rowe Co., L.P.A., Columbus, Ohio for Appellee Michelle L. Rothwell.

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McFarland, P.J.

Appellant Mark E. Rothwell has filed a motion to certify a conflict pursuant to App.R. 25(A), a motion for reconsideration pursuant to App.R. 26(A)(1), and an application for en banc consideration pursuant to App.R. 26(A)(2). Appellee Michelle L. Rothwell has filed responses opposing the motions and application, and Appellant has filed replies in support of the motions and application. Upon consideration, we **DENY** the motions and the application.

I.

First, we consider Appellant's motion to certify a conflict pursuant to App.R. 25(A). In support of his motion, Appellant argues that this Court's decision affirming the judgment entry of the Pickaway County Court of Common Pleas, Division of Domestic Relations, issuing a divorce decree between the parties is in conflict with three

decisions from this Court and a decision from the Tenth District Court of Appeals.

Article IV, Section 3(B)(4) of the Ohio Constitution provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question *by any other court of appeals in the state*, the judges shall certify the record of the case to the supreme court for review and final determination.

(Emphasis added.) See, also, App.R. 25.

Before we can certify a judgment for review and final determination, three conditions must be met before and during the certification of a case to the Supreme Court of Ohio pursuant to Article IV, Section 3(B)(4):

1. 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 upon the same question;
2. The alleged conflict must be on a rule of law – not facts; and
3. The journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeal.

*Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellant contends that our decision in this matter is in conflict with three of our earlier decisions: *Mays v. Moran*, 4th Dist. Nos. 97CA2385 & 97CA2386, 1999 WL 181400 (Mar. 18, 1999); *Sinclair v. Sinclair*, 182 Ohio App.3d 691, 2009-Ohio-3106 (4th Dist.); and *Yazdani-Isfehani v. Yazdani-Isfehani*, 4th Dist. No. 11CA1, 2012-Ohio-1031. Significantly, in order for a conflict to be certified to the Supreme Court of Ohio for review, the conflict must be between our decision and *the judgment of a court of*

*appeals of another district.* Because these cases are not from another district, we have no authority to certify a conflict based upon them even assuming arguendo that one exists.

Appellant also contends that our decision conflicts with the Tenth District Court of Appeals' decision in *Aronhalt v. Castle*, 10th Dist. No. 12AP-196, 2012-Ohio-5666. We disagree. In *Aronhalt*, the Tenth District Court of Appeals held that "[a]bsent an objection, a trial court has the discretion to consider unauthenticated documents when rendering summary judgment." *Id.* at ¶ 14 (citations omitted). Our decision here involved the trial court's review of a magistrate's decision and objections thereto absent a transcript. It had nothing to do with summary judgment or the evidence that could be considered in deciding such a motion. Because the cases do not even involve the same legal issue, we conclude that our judgment is not in conflict with *Aronhalt*.

Appellant's motion to certify a conflict pursuant to App.R. 25(A) is **DENIED**.

## II.

Next, we consider Appellant's motion for reconsideration pursuant to App.R. 26(A)(1). App.R. 26(A) does not provide specific guidelines for appellate courts to use when determining whether a prior decision should be reconsidered. *State v. Wong*, 97 Ohio App.3d 244, 246 (4th Dist. 1994). "The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist. 1981).

An application for reconsideration is not designed for use in instances where a

party disagrees with a judgment of an appellate court. Instead, it is intended to provide a party with the opportunity to prevent a miscarriage of justice where an appellate court makes an obvious error or renders a decision that is unsupported by the law.

Appellant's counsel has used the motion for reconsideration, as well as his other filings, to launch unfounded criticisms against this Court and the trial court. He accuses both courts of altering the record and failing to read or review his objections and other transmitted documents, rather than acknowledging that his own failure to provide the appropriate affidavit of the evidence pursuant to Civ.R. 53(D)(3)(b)(iii) led to the limited ability of the trial court to review the magistrate's decision.

Appellant has not raised issues in any of his filings that were not originally considered by this Court or called our attention to any errors in our decision. He contends that the trial court's division of assets and liabilities was in contravention of the evidence presented at the final hearing. However, yet again, we remind Appellant that he failed to provide the trial court with either the transcript – which was apparently unattainable – or an affidavit summarizing the evidence in lieu of a transcript. Appellant seems to argue that the trial court should have simply taken him at his word that the magistrate erred in dividing the parties' assets and liabilities, and relied exclusively on various documents Appellant provided to the trial court – even without an appropriate context – to sustain his objections.

Appellant fails to recognize that Civ.R. 53(D)(3)(b)(iii) states “[a]n objection to a factual finding \* \* \* shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.” (Emphasis added.) And, as we noted in our decision, the trial court may

properly adopt a magistrate's factual findings without further consideration when the objecting party fails to provide the court with a transcript of the magistrate's hearing or other relevant material to support their objections. *In re Maxwell*, 4th Dist No. 05CA2863, 2006-Ohio-527, ¶27, citing *Proctor v. Proctor*, 48 Ohio App.3d 55, 60, 548 N.E.2d 287 (1988), in turn citing *Purpura v. Purpura*, 33 Ohio App.3d 237, 515 N.E.2d 27 (1986). Because all the objections Appellant made to the magistrate's decision were based on factual findings, rather than legal determinations, the trial court's review of the magistrate's decision was hampered by Appellant's failure to provide an affidavit of the evidence presented at the hearing. And, in turn, our review of the trial court's decision was limited.

Appellant's motion for reconsideration is without merit and is **DENIED**.

### III.

Finally, Appellant has filed an application for en banc consideration pursuant to App.R. 26(A)(2). App.R. 26(A)(2)(a) states:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the court of appeals judges in an appellate district may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

Before addressing the merits of Appellant's application, we note that Appellant requested that Judge William H. Harsha recuse himself from further deliberations in this case. On March 5, 2013, Judge Harsha issued a notice of recusal. We further note

that Judge Roger L. Kline, who was on the original panel that decided this appeal, is no longer on the Court because his judicial term expired on February 8, 2013. Therefore, Appellant is receiving a de facto consideration en banc in that all the judges of this Court – both at the time the decision was issued and at present time – have considered his arguments.

In support of his application for en banc consideration, Appellant argues that the decision in this matter conflicts with this Court's decision in *Yazdani-Isfehiani v. Yazdani-Isfehiani*, 4th Dist. No. 11CA1, 2012-Ohio-1031. In *Yazdani-Isfehiani*, we reversed the trial court's spousal support award because we concluded that the trial court inappropriately reviewed the magistrate's decision under an abuse of discretion standard rather than conducting an independent review as required by Civ.R. 53(D)(4)(d).

We disagree with Appellant's contention that our decision conflicts with *Yazdani-Isfehiani*. Appellant never asserted that the trial court employed an improper standard of review over the magistrate's decision. In fact, Appellant claims that the trial court did not review the magistrate's decision at all despite the trial court's explicit finding that "[the magistrate] properly considered all evidence and testimony presented at the hearing in rendering her Decision.:" The *Yazdani-Isfehiani* decision does not mention whether a transcript of the magistrate's hearing was provided to the trial court for review in that case or what evidence the trial court relied on when it reviewed the magistrate's decision. Therefore, we find that the issues involved in these two cases are entirely different and there is no conflict between our decisions.

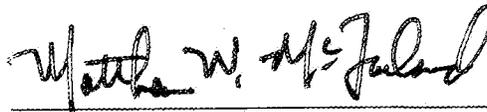
In further support of his application, Appellant again cites the Tenth District Court

for reconsideration pursuant to App.R. 26(A)(1), and application for en banc consideration pursuant to App.R. 26(A)(2) are all **DENIED**.

The Clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail. **IT IS SO ORDERED.**

Abele, J. & Hoover, J.: Concur.

FOR THE COURT,



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Matthew W. McFarland  
Presiding Judge

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL,  
PLAINTIFF-APPELLEE

V.

MARK E. ROTHWELL, ET AL  
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE COURT  
OF APPEALS, FOURTH  
APPELLATE DISTRICT,  
PICKAWAY COUNTY OHIO  
CASE NUMBER 12CA6

SUPREME COURT CASE NO.

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**EXHIBIT 4**

**2006 DV 163 and 2011 40070 Yinger v. Yinger**

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IN THE COURT OF COMMON PLEAS, PICKAWAY COUNTY, OHIO  
GENERAL DIVISION/JUVENILE DIVISION

2011 AUG 16 PM 3:45

Ashley Rose Yinger	:	Case No. 2006DV163	JAMES W. DEAN CLERK OF COURTS PICKAWAY, COUNTY
Plaintiff	:	Case No. 201140070	
vs.	:	<b>ENTRY DECLARING MISTRIAL AND ESTABLISHING TEMPORARY PARENTING TIME</b>	
Jeffrey Alan Yinger, et al.	:		
Defendant.	:		

This matter is before the Court this 16<sup>th</sup> day of August, 2011 for a hearing on Maternal Grandparents Complaint filed in the Juvenile Court on March 15, 2011, and for a hearing on all pending motions. Jeffrey Yinger was present with his attorney, Laura Peterman. Robert and Shari Sander were present with their attorney Gary Gottfried.

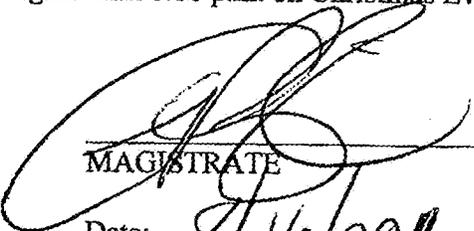
The Court has determined that due to an equipment malfunction, the four prior days of trial were not properly recorded. Accordingly, the Court is declaring a mistrial as the Judge will not have the benefit of a transcript to review the Magistrate's Decision.

In the interim, the Court is issuing the following with respect to parenting time for the parties:

1. Jeffrey Yinger (Father") shall be designated the temporary residential parent and legal custodian of Nataley Yinger, DOB 3/21/2006.
2. Commencing August 25, 2011, Robert and Shari Sander ("The Sanders") shall be entitled to parenting time every other week from Thursday after school through Monday morning. They shall have the authority to pick the child up from school every other Thursday and Friday and shall deliver the child to school every other Monday. The Sanders are also granted parenting time on Thursday of the "off week" at which time they may pick

the child up from school and deliver her back to school on Friday morning.

3. The Sanders shall have parenting time with the child for the Thanksgiving holiday from 6:00 p.m. on the day before the holiday until 6:00 p.m. on Thanksgiving Day and over the Christmas break beginning at 12:00 p.m. the day after the school break begins until 8:00 p.m. on Christmas Eve.

  
MAGISTRATE

Date: 8/16/2011

COPIES TO:

Gary J. Gottfried, Esq.  
Laura M. Peterman, Esq.  
Edward L Pfau, Esq.

*Jc22 Pg 437-438*