

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL, :  
PLAINTIFF-APPELLEE, : Case No. 13-0980  
vs. : Court of Appeals Case No. 12CA6  
MARK E. ROTHWELL, ET AL :  
DEFENDANTS-APPELLANTS :

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**MEMORANDUM CONTRA APPELLANT'S MOTION FOR RECONSIDERATION OF  
THE SUPREME COURT OF OHIO'S REFUSAL TO ACCEPT JURISDICTION**

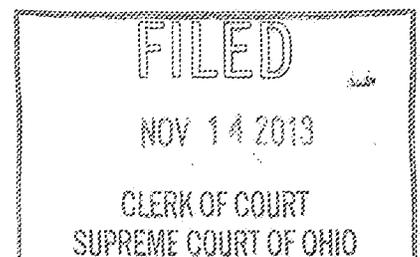
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**RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION OF THE  
SUPREME COURT OF OHIO'S REFUSAL TO ACCEPT JURISDICTION**

It should be noted that a discretionary appeal to the Ohio Supreme Court will only be granted if there is a substantial Constitutional question or if the case involves issues of public or great general interest. See *Noble v. Colwell* (1989), 44 Ohio St. 3d 92. In his initial filing to this Court, Appellant did not set forth a single substantial Constitutional question argument. Appellant only asserted that this case involved issues of public or great general interest. On October 23, 2013, this Honorable Court appropriately declined to accept jurisdiction to entertain the instant appeal.

Appellant seems to have now flip-flopped on his position and indicates this case involves a substantial Constitutional question. This case involves nothing more than Appellant's failure to follow applicable court rules, legal procedure and law. There are no substantial Constitutional questions at issue.

Appellant has essentially filed a new Memorandum in Support of Jurisdiction now alleging a substantial Constitutional question under the guise of a motion for reconsideration. Appellant presents the same arguments in his motion for reconsideration as he did in his initial Memorandum in Support of Jurisdiction. He merely now alleges that a substantial Constitutional question is involved.

A Motion for Reconsideration is not a tool for taking another bite at the apple. It is not a substitute for filing a second Memorandum in Support of Jurisdiction. It is not a way to bypass the 15-page limit for a Memorandum in Support of Jurisdiction by filing a 24-page motion for reconsideration. S.Ct.Prac.R. 18.02 specifically states that a motion for reconsideration shall not constitute a re-argument of the case. Re-arguing his case is precisely what Appellant has done in his motion for reconsideration.

As such, Appellee respectfully requests that Appellant's Motion for Reconsideration be denied and that jurisdiction, once again, be declined.

**RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT**

Appellant insists that the Trial Court and Appellate Court herein refused to make any judicial review of his case based upon the absence of a recording of the proceedings and trial transcript. Appellant's argument is without merit.

Appellant did not comply with Civ.R. 53(D)(3)(b)(iii) and App.R. 9(C). He failed to provide the Trial Court and Appellate Court with a transcript of the trial court proceedings or an affidavit or statement of the evidence. Despite Appellant's failure in this regard, a judicial review of his case did, in fact, take place.

When ruling on objections, with or without a transcript or affidavit, *Civ. R. (53)(D)(4)* provides that the trial court "may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter."

However, "in cases where the objecting party fails to provide a transcript or affidavit, the trial court is limited to an examination of the [magistrate's] conclusions of law and recommendations, in light of the accompanying findings of fact only *unless the trial court elects to hold further hearings.*" *Weitzel v. Way*, 2003 Ohio 6822 (Ohio Ct. App., Summit County Dec. 17, 2003); 2003 Ohio App. LEXIS 6153 at \*P18 citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418, 680 N.E.2d 1305. In addition, "regardless of whether a transcript has been filed, the trial judge always has the authority to determine if the [magistrate's] findings of fact are sufficient to support the conclusions of law drawn therefrom [and] come to a different legal conclusion *if* that conclusion is supported by the [magistrate's] findings of fact." *Weitzel* at P18, citing *Wade*, 113 Ohio App.3d at 418, quoting *Hearn v. Broadwater* (1994), 105 Ohio App.3d 586, 664 N.E.2d 971.

In this case, the Trial Court Magistrate issued a Decision with extensive Findings of Fact and Conclusions of Law. Citation to O.R.C. 3105.171 was made. Because Appellant failed to request or file a transcript of the proceedings, the Trial Court was limited to an examination of the Magistrate's conclusions of law and recommendations, in light of the accompanying findings of fact. See *Weitzel at \*P18*. The Trial Court properly found no error on the part of the Magistrate and the Appellate Court properly affirmed the Trial Court's Decision.

Appellant cites *In the Matter of the Estate of Julia Stanford*, 2010 Ohio 569, in support of his position. *Stanford* is distinguishable from the within case. Appellant herein filed full objections, never once indicating that he would be filing additional or supplemental objections. His 'Request for Transcript' was not timely filed.

In fact, Appellant states in his Motion for Leave to Have Transcript Ordered filed December 20, 2011, that "**Defendants (sic) Objections are not fact based. While it may be stated that fact and legal objections are so intertwined that all Objections are fact and law based, counsel for Defendant and Defendant had determined and viewed that the Objections are matters of a non-fact basis. There is not a difference of and/or about facts...Again these are all exhibit based and not transcript requiring matters**" (Emphasis added). See pp. 2-3 of Motion filed December 20, 2011.

Appellant further states as follows in his Memorandum of Defendant Contra Plaintiff's Objections to the Motion for Leave to Order Trial Transcript filed January 3, 2012: "**In the instant case Defendant had predicated all Objections upon and based solely and exclusively upon the admitted Exhibits...All Defendant (sic) Objections are solely Exhibit based...Defendant does not believe that any such testimonial evidence is relevant nor does any testimonial evidence**

**reflect(s) upon the issues presented in Defendants (sic) Objections.**” (Emphasis added). See pp. 2-3 of Memorandum filed January 3, 2012.

These statements contained in Appellant’s own pleadings and properly a part of the record for current consideration show, as a fact and without doubt, that Appellant never had any intention of ordering the trial transcript in that he believed the trial court could simply review trial Exhibits to decide the matter.

The bottom line is that any hampering of the lower courts’ ability to review Appellant’s case was limited by Appellant’s non-compliance with legal rules and procedure. Nevertheless, a judicial review did take in accordance with applicable rule and law. As such, there exists no substantial Constitutional question nor is this case one of substantial public or general interest. Appellant’s Motion for Reconsideration must be denied and jurisdiction declined again.

**RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 1: Have the Appellant’s procedural and substantive due process rights, guaranteed under the United States Constitution and Ohio Constitution, been violated by the Trial Court, when a verbatim record was not made, as required by Ohio Civil Rule 53, Supreme Court Rules of Superintendence and Local Rules and as a result, should a re-hearing on the merits have been proper and ordered by the Trial Court?**

Appellant, again, incorrectly asserts that the trial court is *required* to create a verbatim record of all judicial activity.

In *Franklin v. Franklin*, 2012 Ohio 1814 (Tenth District), Husband argued that the trial court erred when it failed to make a record of the proceedings, thereby hampering the court's ability to review the proceedings. The appellate court disagreed. Husband presented no authority for the proposition that a domestic court is required to make a record of the final hearing before issuing a decree.

Sup. R. 11(A) states “Proceedings before any court and discovery proceedings *may* be recorded by stenographic means, phonographic means, photographic means, audio electronic

recording devices, or video recording systems. The administrative judge may order the use of any method of recording authorized by this rule.” *Emphasis added.* The rule clearly does not require every proceeding to be recorded. *See Levengood v. Levengood*, 5th Dist. No. 1998AP100114, 2000 Ohio App. LEXIS 2425 (June 7, 2000) (Sup.R. 11 does not require every proceeding to be recorded).

As the court in *Levengood* pointed out, the Staff Notes to Sup.R. 11(A) provide 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.” See also O.R.C. 2301.20 requiring the court of common pleas to provide a reporter upon request of a party or their attorney.

Civ. R. 53 (D)(7) states, “[e]xcept as otherwise provided by law, all proceedings before a Magistrate shall be recorded *in accordance with procedures established by the court.*” *Emphasis Added.*

Pickaway County Local Rule 16.02 sets forth absolutely *no* recording procedures, stating “[a]ll referenced proceedings shall conform to the requirements of Ohio Civil Rule 53.”

In *Franklin*, Husband did not contend that any such request was made by any party. Therefore, it was found that the trial court did not err when it failed to record the proceedings, and Husband's assignment of error was overruled.

In the instant case, despite Appellant's self-serving “assertions” that he requested a recording of the proceedings, the record establishes that Appellant made no such request for a record pursuant to Sup. R. 11(A). Absent a request from a party to do so, no *requirement* exists that a trial court must create a verbatim record,

Therefore, Appellant's procedural and substantive due process rights were not violated. There are no constitutional questions at issue in this case and this case is not one of great public or

general importance. Appellant's motion for reconsideration should be denied and jurisdiction, again, declined.

**RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 2: Have the Appellant's procedural and substantive due process rights, guaranteed under the United States Constitution and the Ohio Constitution, been violated by the Trial Court, where a verbatim record was thought to be made, found not to be capable of being made, and the fact concealed to Appellant by the Court and Court personnel during the entire appeal process, thus denying Appellant of any substantive review of the magistrate's decision and, if so, should a re-hearing be granted to Appellant?**

Appellant unbelievably accuses the Trial Court and the Appellate Court of misconduct, when, in fact, it was Appellant's own failures that potentially limited the Trial Court's review of the matter. Given the following timeline in this case, Appellant's accusations are unfounded and defamatory. Consider the following: October 28, 2011: Magistrate's Decision with Findings of Fact and Conclusions of Law issued; November 14, 2011: Appellant files FULL objections to the Magistrate's Decision. (Appellant DID NOT request or file a copy of the transcript in conjunction with the filing of his full objections nor did he file an affidavit of the evidence pursuant to Civ. R. 53(D)(3)(b)(iii).); November 29, 2011: Decision and Entry overruling Appellant's objections and affirming the Magistrate's Decision; December 20, 2011: Appellant, for the first time orders a copy of the trial transcript and filed a motion for leave to have said transcript made available to the trial court for consideration. (This request was denied as the court had already issued its decision.); February 29, 2012: Judgment Entry-Decree of Divorce issued by Trial Court; March 27, 2012: Appellant files Notice of Appeal in the Fourth District Court of Appeals, indicating in his docketing statement, praecipe and notice to the court reporter that he intended to file a complete transcript of the proceedings; April 11, 2012: Court Reporter files an affidavit stating that a record of the four-day final divorce hearing was not available due to a malfunction of the courtroom recording equipment; May 8, 2012: Notice of Transmission of the Record filed indicating that a transcript of the

proceedings was not included. (Briefs were subsequently filed by both parties.); August 30, 2012: Oral arguments held; September 5, 2012: Appellant files a motion requesting he be permitted to file a statement of the evidence on appeal. (Appellant's request was denied as briefs had already been submitted and oral arguments held.)

There was no conspiracy, complicity, wrong doing or concealment on the part of the Trial Court or the Fourth District Court of Appeals, or any personnel therein. Appellant had legal remedies available to him at all stages of the litigation. Appellant should have filed a 'Request for Transcript' with the Trial Court when he determined that he would be filing objections, or at the very latest when he filed his full objections to the Magistrate's Decision. *He failed in this regard.* On Appeal, he should not have waited until *after* oral arguments, when the case was ripe for decision, to request permission to file an Affidavit of the Evidence. The lower courts' ability to review Appellant's case, to his satisfaction, was only limited by Appellant's own failure to provide an Affidavit of the Evidence pursuant to Civ. R. 53(D)(3)(b)(iii) and App. R. 9(C).

Appellant's procedural and substantive due process rights were not violated in this case. There is no Constitutional question to be answered when a party fails to avail himself of the legal remedies available. Appellant's Motion for Reconsideration should be denied and jurisdiction, again, declined.

**RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 3: Have Appellant's procedural and substantive due process rights, guaranteed under the United States Constitution and Ohio Constitution, been violated when, after the trial court, through the court's own personnel is/was fully and throughout the relevant periods aware that no record can/could be produced, proceeds with final judgment, making no required independent judicial review, instead basing said judgment on Appellant's failure to obtain a transcript, a transcript which did not exist, could not exist, and if so, should a re-hearing on the merits be granted to Appellant?**

With regard to Appellant's allegations against the Trial Court and its personnel, Appellee incorporates all arguments as set forth in 'Response to Appellant's Proposition of Law No. 2.' There

is absolutely no proof whatsoever of any wrongdoing on the part of the Trial Court or its personnel. As eloquently stated in its May 3, 2013 Decision and Entry, page 4, the Fourth District Court of Appeals stated:

“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.”

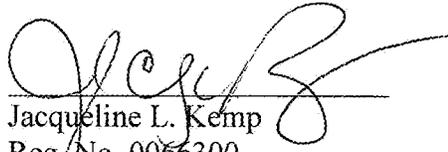
With respect to Appellant’s complaint that the Trial Court failed to conduct an “independent judicial review,” Appellant incorporates all argument set forth in Appellee’s ‘Response to Appellant’s Memorandum in Support.’ As discussed above, a review of Appellant’s objections was conducted by the Trial Court. Any limit on that review was a result of Appellant’s failure to timely file a ‘Request for Transcript’ as well as his failure to comply with Civ.R. 53(D)(3)(b)(iii) and App.R. 9(C).

Appellant’s procedural and substantive due process rights were not violated. There are no Constitutional questions at issue in this case and this case is not one of great public or general importance. Appellant’s motion for reconsideration should be denied and jurisdiction, again, declined.

### **CONCLUSION**

Based upon the foregoing argument and law, Appellee respectfully requests that this Court deny Appellant’s Motion for Reconsideration and, once again, decline to accept jurisdiction. This case does not involve matters of public or great interest nor does it involve a substantial Constitutional question.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was sent by regular United States mail on the 14th day of November, 2013 to Kinsley F. Nyce, Esq., Attorney for Appellant, 550 East Walnut Street, Columbus, Ohio 43215.



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