ORIGINAL

In the Supreme Court of Ohio

CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT,	:	Supreme Court Case No. 2013-1177
Appellee,	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
vs.	:	
GATOR MILFORD, LLC,	:	
Appellant.	:	Court of Appeals Case No.: CA2013-02-010

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Both this Court and the court of appeals below found that a conflict of law exists, yet Appellee's Brief does not answer the issue that this Court certified and ordered the parties to brief:

> "Whether actual knowledge and receipt of a judgment entry that is a final appealable order begins the 30-day time period during which to file an appeal, or does the 30-day period only begin following service and notation of service on the docket by the clerk of courts."

Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C., 136 Ohio St.3d 1490, 2013-Ohio-4140, 994 N.E.2d 461. Instead, Appellee dedicates the vast majority of its brief to arguing a separate question: "Was Appellant served with notice of the judgment in this case?" But that question does not lead toward a resolution of the unsettled issue of Ohio law that the decision below has created: is actual knowledge a substitute for service?

Appellee dodges this question. It is only on the ninth page of its brief that Appellee attempts a response to the actual certified issue. There, Appellee proclaims that both of the alternatives presented by the certified issue are, supposedly, incorrect. As to the first alternative presented by the certified issue, Appellee admits that actual knowledge and receipt of a judgment entry alone are not sufficient to begin the time for a party to appeal even though that was the reason the court below gave for dismissing Appellant's appeal. However, Appellee then also rejects the second alternative

presented by the certified issue (i.e. that the 30-day period can only begin following service and notation of service on the docket by the clerk of courts). *See* Appellee's Brief, p. 9.

Because Appellee offers no answer to the issue on which this Court has certified a conflict of law, Appellee is instead forced to argue that this case should be dismissed pursuant to S. Ct. Prac. R. 8.04 as improvidently certified. Relying on *State ex rel. Hughes v. Celeste,* 67 Ohio St.3d 429, 619 N.E.2d 412 (1993), Appellee claims that Appellant was in fact served with notice of the judgment in this case. Yet, Appellee made this precise argument in the proceedings below, and the court of appeals did not adopt it. Instead, the Twelfth District concluded that Appellant was not served, but it still dismissed the appeal because it determined that Appellant's actual knowledge of the judgment entry began the running of the time for appeal. This holding is squarely in conflict with the Tenth Appellate District in *Whitehall ex rel. Fennessy v. Bambi Motel, Inc.,* 131 Ohio App.3d 734, 723 N.E.2d 633 (10th Dist. 1998). In that case, the Tenth District concluded that the appellant had not been served, and that the appellant's actual knowledge of the judgment had no bearing on when the time to appeal began to run.

Thus, the decision below has created a conflict in Ohio law. There are two cases from different appellate districts addressing the timeliness of an appellant's appeal when an appellant had not been served with notice of the judgment. The Twelfth District has held that actual knowledge dispenses with the requirement of service; the

Tenth District disagrees. This Court should answer the certified issue in the negative and hold that actual knowledge is not an exception to the requirement that a judgment entry be served before a party's time to appeal begins.

LAW AND ARGUMENT

1. The Supreme Court of Ohio cases cited by Appellee do not resolve the issue certified as a conflict in this case.

Appellee dedicates a substantial portion of its brief to discussing three cases from the Supreme Court of Ohio, two of which do not bear on the issue that has been certified by this Court. The first case discussed at length by Appellee, *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 619 N.E.2d 412 (1993) is easily distinguished because in that case the Court determined that service had occurred. That is in stark contrast to both the opinion of the Twelfth District below, and the opinion of the Tenth District in the conflict case of *Bambi Motel, supra*. In both this case and in the conflict case, the appellate courts determined that service did not occur.

The second Supreme Court case cited and discussed at length by Appellee, *State ex rel. Pheils v. Pietrykowski*, 93 Ohio St.3d 460, 755 N.E.2d 893 (2001) need not be addressed because the judgment and opinion were quickly vacated by this Court following a motion for reconsideration. *State ex rel. Pheils v. Pietrykowski*, 93 Ohio St.3d 1232, 758 N.E.2d 1142 (2001)(granting a motion for reconsideration and vacating the prior judgment).

The final Supreme Court case cited by Appellee, *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), does indeed affect the analysis in this case; however, it does not address or resolve the certified conflict. In *In re Anderson*, this Court reaffirmed the plain language of App. R. 4(A) and Civ. R. 58(B). There, the Court held that the time for appeal never began to run because the trial court did not endorse on the judgment a direction to the clerk to serve all the parties, and the clerk never noted such service on the docket. *In re Anderson*, 92 Ohio St.3d at 67. In so holding, the Court affirmatively cited the Tenth District's opinion in *Bambi Motel*, the conflict case in this matter. *Id.* However, the issue of whether actual knowledge is a substitute for service was not implicated by the facts in *In re Anderson*. Thus, the Court in *In re Anderson* did not reference the portion of the *Bambi Motel* opinion holding that an appellant's actual knowledge of a judgment entry is insufficient to begin the running of the time for appeal. And that is the question now presented in this certified conflict case.

2. The prior history in this case confirms that a conflict exists.

Appellee's argument that there is no conflict in this case, based upon its contention that appellant was in fact served with notice of the judgment, is also belied by the prior history in this case.

In its order accepting jurisdiction in this case, this Court wrote, "[t]he court determines that a conflict exists." *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 136 Ohio St.3d 1490, 2013-Ohio-4140, 994 N.E.2d 461. Prior to that, the

court of appeals also determined that a conflict existed when it granted Appellant's motion to certify a conflict. At the appellate stage, Appellee made the same exact arguments regarding *Hughes* controlling and no conflict existing that it now makes to this Court. Despite these arguments, the court of appeals nevertheless certified a conflict. The court of appeals expressly phrased the certified question so as to focus the inquiry on whether actual knowledge is an exception to the service requirements of App. R. 4(A) and Civ. R. 58(B) – not on whether service had occurred given the facts of this case. And the court of appeals acknowledged the Tenth District's opinion in *Bambi Motel* as presenting a "direct conflict". *See* Entry Granting Motion to Certify a Conflict, T.d. 284, p. 1. If the court of appeals had accepted Appellee's argument that service occurred, then it would not have certified a conflict with the *Bambi Motel* case, a case in which no service ever occurred.

Finally, the trial court itself also rejected the basis for Appellee's contention that no conflict exists (i.e. that service occurred), when it stated on the record, that Rule "58(D) [sic] requires that the Court direct the clerk to serve notice of that judgment within three days and to note that on the appearance docket. I don't believe that has been done." Transcript of Proceedings on 1/18/2013, pp. 12-13; *see also Id.* at p. 13 ("you were served as a practical matter by my office, but you were not served by the clerk, which is what's required.").

At every single level in this case, the tribunals have rejected Appellee's citation to *Hughes* and argument that service has occurred. Accordingly, the prior history of this case further confirms that a conflict of law exists that must be resolved by this Court.

3. The multiple conflicting appellate decisions after *Hughes* also confirm that a conflict exists.

In arguing that *Hughes* controls and that this case should be dismissed pursuant to S. Ct. Prac. R. 8.04, Appellee is forced to argue that multiple appellate panels have "committed error" by diverging from Appellee's interpretation of the holding of *Hughes*. Appellee's Brief, p. 11; *but see Whitehall ex rel. Fennessy v. Bambi Motel, Inc.*, 131 Ohio App.3d 734, 723 N.E.2d 633 (10th Dist. 1998); *Beltz v. Beltz*, 2006-Ohio-1144, ¶¶74-76 (5th Dist.)(determining that "[a]ctual knowledge of the judgment * * * is not sufficient to start the time for appeal"); *Steel v. Lewellen*, 5th Dist. Fairfield No. 95CA53, 95CA54, 1996 Ohio App. LEXIS 2895 (5th Dist., May 16, 1996)(holding appellant's actual knowledge to be insufficient to begin the running of the time for appeal in the absence of formal notice in compliance with Civ. R. 58(B)); *In re Elliott*, 2004-Ohio-2770, ¶13 (4th Dist.) (holding that the time to appeal never began to run, even where appellant was mailed a copy of the judgment and had actual knowledge of the judgment, because actual knowledge of the judgment is not sufficient to start the time for appeal); *In re Elliott*, 2004-Ohio-2770, ¶13 (4th Dist.) ("neither constructive nor actual notice can substitute for formal notice in compliance with Civ. R. 58(B)"). All of these decisions were decided after *Hughes*. All of these decisions conclude that actual knowledge

cannot begin the running of the time for appeal if service does not occur in compliance with Civ. R. 58(B). And all of these decisions are now in conflict with the decision of the Twelfth District below, which relied on the fact that "appellant received actual notice of the court's ruling" when dismissing this appeal. *See Clermont County Trans. Improvement Dist. v. Gator Milford, LLC*, 12th Dist. Clermont No. CA2013-02-010 at *3 (May 15, 2013).

Appellee rightfully does not attempt to distinguish these other cases on the facts. Instead, Appellee is forced into the untenable position of claiming that fifteen judges on various courts of appeals in Ohio were simply wrong on the law. Such an argument is unpersuasive.

4. Appellee admits that the rationale used by the court of appeals below was erroneous.

Lost in the shuffle of Appellee denying that a conflict exists is the fact that Appellee now admits that "[a]ctual knowledge and possession of a judgment, without more, is not sufficient" to begin the running of the time for appeal. *See* Appellee's Brief, p. 9. Yet, this was the very reason that the Twelfth District below dismissed this appeal. The four-page Entry Granting Motion to Dismiss Appeal repeatedly references the facts that "appellant had actual notice" and that "appellant concedes that it received a copy of the trial court's decision/entry". *Clermont County Trans. Improvement Dist. v. Gator Milford, LLC*, 12th Dist. Clermont No. CA2013-02-010 (May 15, 2013). However, as the conflicting opinions above demonstrate, and as Appellee now concedes, these facts are wholly irrelevant when determining the timeliness of Appellant's appeal.

The Twelfth District's decision below was in error. If even Appellee cannot defend the rationale of the decision below, it must be reversed by this Court.

CONCLUSION

The court of appeals below erred in dismissing Appellant's appeal as untimely simply because Appellant had actual knowledge of the judgment entry. Appellant's actual knowledge of the judgment entry is no exception to the requirements under App. R. 4(A) and Civ. R. 58(B) that the clerk must serve notice of the judgment and docket the same. This Court should therefore reverse the judgment of the court of appeals, answer the certified conflict in the negative, and hold that in a civil case in which the final appealable order is not served within three days, the time for filing an appeal under App. R. 4(A) only begins to run upon service of the final judgment entry and a notation of service on the docket as set forth in Civ. R. 58(B). A party's actual knowledge of the judgment is no substitute for service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Appellant's Reply Brief has been served by ordinary U.S. mail this 3rd day of January, 2014 addressed to:

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