

IN THE SUPREME COURT OF OHIO

JAMES P. KUHN	)	CASE NO. 2014-0601
	)	
Appellant	)	
	)	
v.	)	
	)	
KELLY L. KUHN nka COTTLE	)	
	)	
Appellee	)	

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APPELLEE'S REVISED MOTION TO STRIKE  
APPELLANT'S MOTION FOR RECONSIDERATION

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Counsel for Guernsey County Bar Association  
*Amicus Curiae*

Robert Roe Fox (0042179)  
Leiby Hanna Rasnick  
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Counsel for Appellee  
Kelly L. Kuhn nka Cottle

The Appellee, Kelly L. Kuhn nka Cottle, moves this Court for an Order striking the Motion for Reconsideration filed by the Appellant, James P. Kuhn. For cause, Appellant has violated S.Ct.Prac.R.3.11(E).

On August 4, 2015, Counsel for Appellee received by regular U.S. Mail a document entitled *Amicus Curiae*, Guernsey County Bar Association, Memorandum in Support of Appellant Motion for Reconsideration. This is the first time that counsel for Appellee became aware that a Motion for Reconsideration may have been filed by Appellant.

Counsel for Appellee immediately reviewed this Court' docket and determined the Motion for Reconsideration had been filed by Appellant on July 24, 2015, the same day the *Amicus Curiae* Memorandum was submitted. Though not impossible, it is highly unlikely the *Amicus Curiae* Memorandum could have been prepared without reviewing the Motion for Reconsideration, as the former referenced the latter though they were filed the same date. This suggests concerted action on the part of these parties.

Regardless, no Motion for Reconsideration was served upon Appellee's counsel by Appellant. A copy of same was immediately retrieved on-line and reviewed. Interestingly, though *Amicus Curiae* counsel *certified* that he served the Memorandum in Support upon Appellee's counsel by regular U.S. mail on July 24, 2015, the envelope in which the pleading was served is dated July 30, 2015.

Counsel for Appellee immediately telephoned counsel for Appellant, attempting to resolve this issue. The receptionist indicated counsel was in a meeting. Counsel for Appellee left his contact information.

On August 4, 2015, at approximately 4:00 P.M., counsel for Appellant returned counsel for Appellee's telephone call regarding the service issue herein, which was made

approximately six (6) hours earlier. An Affidavit memorializing the content of a voice mail left by counsel for Appellant is attached hereto as Exhibit 1 and incorporated by reference.

In short, counsel for Appellant “thought” that she had sent the service copy via electronic mail. However, no prior pleadings had been served by Appellant upon Appellee by e-mail. Counsel for Appellant further “thought” that it had also been sent by regular mail. Counsel for Appellant apologized if that had not occurred. The apology is admirable but it is not what is contemplated by the rules regarding service.

There was no indication in the voicemail that there existed a cover letter, facsimile cover sheet, or other form of memorialization that service had been made upon Appellee.

Absent an outright admission of the failure to serve a pleading upon another party, it would be rare to have such overwhelming evidence that service had not occurred.

Regardless of the intent of Appellant or his counsel, the rule is clear that service must be timely made. It was not in this instance.

Another interesting fact surrounding service of the Motion for Reconsideration is that if, by chance, either counsel attempted to serve the pleadings by e-mail that would have been no more successful. Both counsel for Appellant and *Amicus Curiae* counsel note the wrong e-mail address for Appellee’s counsel on their pleadings.

Appellee has always responded timely to any pleading filed in this matter, never requesting any extension to file a document herein. There is no reason whatsoever Appellee wouldn’t have submitted a response to the Motion for Reconsideration had it been served.

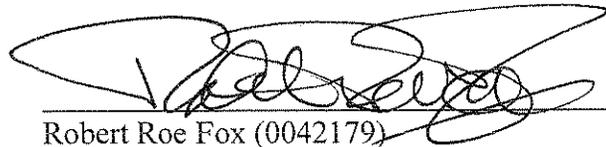
Appellee originally argued that the subject matter of the appeal was not of great public interest. The Supreme Court of Ohio dismissed the appeal as improvidently allowed as this matter merely involved the property division of a bonus received several years into the parties’

marriage. The respective Memorandums in support of the Motion for Reconsideration, reviewed by counsel for Appellee for the first time August 4, 2015, reveal a continued lack of any factual or legal support for the reconsideration of this matter.

Attached hereto as Exhibit 2 and incorporated by reference is an Affidavit in further support of the facts contained herein.

Appellee respectfully requests that the Motion for Reconsideration filed by Appellant be stricken pursuant to S.Ct.Prac.R.3.11(E). Alternatively, Appellee asks for a reasonable extension to respond to Appellant's Motion for Reconsideration.

Respectfully Submitted,



Robert Roe Fox (0042179)

**LEIBY HANNA RASNICK**

**TOWNE EVANCHAN PALMISANO & HOBSON, LLC**

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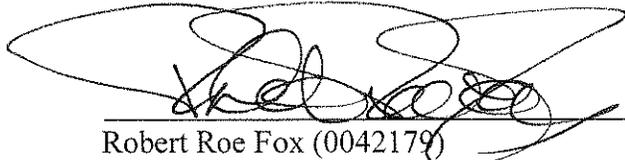
(330) 253-1261 – *facsimile*

[rfox@neolaw.biz](mailto:rfox@neolaw.biz)

*Counsel for Appellee Kelly L. Kuhn nka Cottle*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon Ms. Stephanie L. Mitchell, Esq., 139 West Eighth Street, P.O. Box Cambridge, Ohio, 43725-0640, and Mr. Joel Blue, Esq., 819 Steubenville Avenue, Cambridge, Ohio, 43725, on this 6<sup>th</sup> day of August, 2015, via regular U.S. mail.

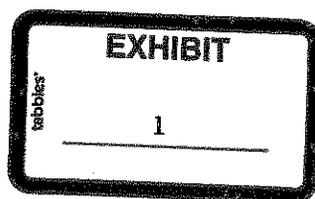
A handwritten signature in black ink, appearing to read "Robert Roe Fox", is written over a horizontal line. The signature is highly stylized and cursive.

Robert Roe Fox (0042179)  
Counsel for Appellee Kelly L. Kuhn nka Cottle

**AFFIDAVIT OF ROBERT ROE FOX**

I, Robert Roe Fox, being first duly sworn, depose and state as follows:

1. I am 18 years of age and under no legal disability;
2. I am a partner in the law firm of Leiby, Hanna, Rasnick, Towne, Evanchan, Palmisano & Hobson, LLC;
3. I am the only attorney who has worked on the matter styled *James P. Kuhn v. Kelly L. Kuhn nka Cottle*, filed with the Supreme Court of Ohio, Case No. 2014-0601;
5. On August 4, 2015, I became aware through the efforts of my paralegal that an Amicus Curiae, Guernsey County Bar Association, a Memorandum in Support of Appellant's Motion for Reconsideration had been filed in the above-referenced matter;
6. At no time prior to August 4, 2015, did I become aware that Appellant had filed a Motion for Reconsideration;
7. Immediately upon discovering that a Motion for Reconsideration had been filed by Appellant, I telephoned counsel for Appellant seeking an explanation of what had occurred;
8. Approximately six (6) hours later, my telephone call was returned, though I was in Court at the time and could not take the call;
9. Counsel for Appellant left a voice mail message, still retained in my possession, indicating that (1) she apologized if I did not receive a copy of the Motion for Reconsideration and (2) she "thought we were e-mailing it" and "mailing a copy to you" when the Motion was filed eleven (11) days earlier;
10. Appellant has never e-mailed any service copies to Appellee, whether at the Supreme Court or Appellate Court level;



11. When we received the Memorandum in Support from *Amicus Curiae*, the Certificate of Service indicated it was sent to us on July 24, 2015, although the postmark on the envelope indicated July 30, 2015; and

12. To date, counsel for Appellee has yet to receive a service copy of the Motion for Reconsideration from Appellant.

FURTHER AFFIANT SAYETH NOT.

  
ROBERT ROE FOX

STATE OF OHIO            )  
                                  )        SS  
COUNTY OF SUMMIT    )

Sworn to before me and subscribed in my presence this 5<sup>th</sup> day of August, 2015.

  
NOTARY PUBLIC

My Commission Expires:

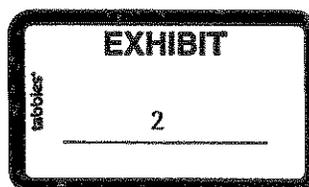


**SHARON E. DYER**  
Notary Public - State of Ohio  
My Commission Expires 10/30/2015

**AFFIDAVIT OF KRISTINA V. FOX**

I, Kristina V. Fox, being first duly sworn, depose and state as follows:

1. I am 18 years of age and under no legal disability;
2. I am a paralegal in the law firm of Leiby, Hanna, Rasnick, Towne, Evanchan, Palmisano & Hobson, LLC, and have been so employed since June, 2013;
3. One of my main duties as a paralegal in the office is the daily opening and date-stamping of the mail received by Attorney Robert Roe Fox;
4. No other person in the office is authorized to open the mail for Attorney Fox;
5. On August 4, 2015, upon opening the day's mail, I noticed a document entitled *Amicus Curia*, Guernsey County Bar Association, Memorandum in Support of Appellant Motion for Reconsideration filed in the matter styled *James P. Kuhn v. Kelly L. Kuhn nka Cottle*, filed with the Supreme Court of Ohio, Case No. 2014-0601;
6. No cover letter accompanied the document sent by the Guernsey County Bar Association;
7. I immediately date-stamped the back page of the document; true and accurate copies of the first and back pages are attached hereto as Exhibits A and B and incorporated by reference;
8. I further maintained the envelope in which we received the Memorandum in Support filed by the Guernsey County Bar Association which shows a postmarked date of July 30, 2015, a true and accurate copy of which is attached hereto as Exhibit C and incorporated by reference;
9. A review both the Motion for Reconsideration and Memorandum in Support filed by *Amicus Curiae* indicate an incorrect e-mail address for Attorney Fox;



10. I immediately brought this to the attention of Attorney Fox, both of us reviewing the Supreme Court docket relative to same and determining for the first time a Motion for Reconsideration had been filed by Appellant;

11. August 4, 2015, was the first date that we were made aware that the Appellant, James P. Kuhn, had filed a Motion for Reconsideration with the Supreme Court of Ohio;

12. Attorney Fox immediately telephoned counsel for Appellant in order to ascertain why service had not been made as certified in the Motion for Reconsideration in this matter;

13. The receptionist answered the telephone, indicating that counsel for Appellant was in a meeting but would return the call;

14. As of this writing approximately two (2) hours later that telephone call has not been returned;

15. I specifically deny that this office received service of the Motion for Reconsideration and had same occurred I would have been the person to have first seen it and date stamped it;

16. This office has timely responded to all documents filed by Appellant in this matter; and

17. This office has never sought an extension of time to respond to documents filed by Appellant.

FURTHER AFFIANT SAYETH NOT.

  
KRISTINA V. FOX

STATE OF OHIO            )  
                                  )  
COUNTY OF SUMMIT      )       SS

Sworn to before me and subscribed in my presence this 6<sup>th</sup> day of August, 2015.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

Elizabeth A. Young  
Resident Summit County  
Notary Public, State of Ohio  
My Commission Expires: 07/25/2019

IN THE SUPREME COURT OF OHIO

JAMES P. KUHN  
APPELLANT,

CASE NO. 2014-0601

v.

KELLY L. KUHN NKA COTTLE,  
APPELLEE

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AMICUS CURIAE, GUERNSEY COUNTY BAR ASSOCIATION, MEMORANDUM IN  
SUPPORT OF APPELLANT MOTION FOR RECONSIDERATION

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PRESIDENT, GUERNSEY COUNTY  
BAR ASSOCIATION

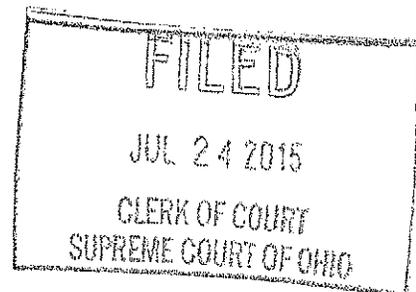
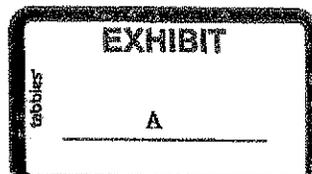
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1

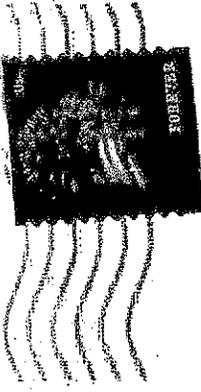


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EXHIBIT  
B



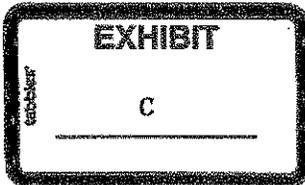
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30 JUL 2015 PM 11 L

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