

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>ex rel.</i> Meigs County Home)	Case No. 2015-1719
Rule Committee, by its members, Paul K.)	
Strauss, Gregory D. Howard, Dennis Jay)	
Sargent, Kathy Lynn Sargent, and Marsha)	Court of Appeals No. 15CA9
Nagy Whitton,)	
Appellant,)	
-vs-)	
County of Meigs, Board of Commissioners,)	.
Appellee.)	
)	
)	
)	
	*)	

**RESPONSE OF APPELLANT MEIGS COUNTY HOME RULE
COMMITTEE IN OPPOSITION TO APPELLEE MEIGS COUNTY
BOARD OF COMMISSIONERS' 'MOTION TO STRIKE'**

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Committee Members, Relators-Appellants

BACKGROUND

This is a direct appeal of denial of a writ of mandamus from a case initiated in the Meigs County Court of Appeals, Fourth Appellate District.

On December 14, 2015, Appellant Meigs County Home Rule Committee filed its merit brief. At the time, Appellant's counsel certified service of the brief upon Appellee, the Meigs County Board of Commissioners, but a review of the case file on February 1, 2016 revealed that Appellee had not been served the brief in accordance with the Supreme Court procedural rules.

Appellant immediately and on its own initiative served the brief on February 1, 2016 upon Appellee via electronic mail. Appellant's counsel on that date then filed an "Amended Certificate of Service," which the Clerk noted on the docket on February 2, 2016 as a "Notice of Corrected Service of Appellant's Merit Brief." Appellee Meigs County Board of Commissioners then filed the pending "Motion to Strike" on February 16, 2016.

ARGUMENT IN OPPOSITION TO 'MOTION TO STRIKE'

When Appellant's counsel discovered his admitted error in failing to properly serve Appellant's merit brief on Appellee, he quickly corrected it by email service of the brief upon Appellee's counsel.

S.Ct.Prac.R. 3.11(E) addresses the matter of failure to provide service. Subsection (1) authorizes a party which is "adversely affected" when a party fails to serve a party to a case to move to strike the belated brief. Although the Meigs County Board of Commissioners have moved to strike, they have specified no "adverse affects" from the omission by Appellant Home Rule Committee to have served its brief in December 2015 when it was filed.

In S.Ct.Prac.R. 3.11(E)(2), this Court provides that:

(2) If the Supreme Court determines that service was not made as required by this

rule, it may strike the document or, if the interests of justice warrant, order that the document be served and impose a new deadline for filing any responsive document. If the Supreme Court determines that service was made as required by this rule or that service was not made but the movant was not adversely affected, it may deny the motion to strike.

Here, Appellant rectified the situation without court intervention, weeks before the motion to strike. Service was not made, the movant was not adversely affected, and the mistake was cleared up voluntarily by Appellant.

The Court has held that where a party finds it did not properly serve a brief and takes prompt corrective action to serve it via one of the approved means, there is no prejudice and the recipient's motion to strike is denied. *State ex rel. Wellington v. Kobly*, 858 N.E.2d 798, 112 Ohio St.3d 195, 2006-Ohio-6571, ¶ 12 (2006), citing *State ex rel. Antonucci v. Youngstown City School Dist. Bd. of Edn.*, 87 Ohio St.3d 564, 566, 722 N.E.2d 69, 71 fn. 1¹ (2000) (counsel claiming prejudice from nonservice of brief knew of briefing schedule but waited until reply brief time had expired before first raising objection). Similarly, former S.Ct.Prac.R. XIV(2)(D)(2)) was deemed to permit the Court "to deny a motion to strike an improperly served pleading when the complaining party has not been adversely affected" in expedited election cases. *State ex rel. McCord v. Delaware Cty. Bd. of Elections*, 106 Ohio St.3d 346, 2005-Ohio-4758, 835 N.E.2d 336, ¶ 18-21 (2005).

Appellee Meigs County Board of Commissioners has demonstrated no adverse effects to itself from Appellant's error, and in this circumstance, the Court should deny Appellee's motion.

¹⁴“Even if Antonucci's counsel had not received a copy of the board's mailed brief, he should have realized from the service of the amicus curiae brief, which he admits receiving, that the board had filed a brief and that the reply brief would soon be due. In fact, the *amicus curiae* brief expressly adopted the statements of case and facts of the board's merit brief. Instead, Antonucci waited until the time to file a reply brief had expired to raise the purported failure of service, and we perceive no prejudice from denying Antonucci's motion.”

Appellant expressly concurs that the interests of justice would be served were the Court to accord Appellee the 30-day briefing opportunity authorized by S.Ct.Prac.R. 16.05(C)(1)(b) so that this case may proceed to a merits decision.

WHEREFORE, Appellant Meigs County Home Rule Committee prays the Court deny the “Motion to Strike,” and that it reinstate an appropriate briefing schedule to allow Appellee to respond on the merits..

Respectfully submitted,

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Co-counsel for Meigs County Home Rule
Committee Members, Appellant

CERTIFICATION

I hereby certify that on February 26, 2016, I emailed a copy of the foregoing “Response of Appellant Meigs County Home Rule Committee in Opposition to Appellee Meigs County Board of Commissioners’ ‘Motion to Strike’” via electronic mail to Colleen S. Williams, Esq., Meigs County Prosecutor, at cwilliams@meigscountyprosecutor, and to Jeremy Fisher, Esq., Assistant Meigs County Prosecutor, at jfisher@meigscountyprosecutor.com. Further, I

deposited the Brief into the Ohio Supreme Court's electronic filing system, and in accordance with its procedures and protocols, it was to be served upon counsel for Appellee.

/s/ Terry J. Lodge
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Co-counsel for Appellant