No. 2014-1034

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
ATHENS COUNTY, OHIO
CASE NO. 13CA47

SCOTT AUFLICK,
Administrator of the Estate of BARBARA AUFLICK, Deceased,
Plaintiff-Appellant,

v.

HEALTHCARE INDUSTRIES CORP.,
d/b/a HICKORY CREEK OF ATHENS, et al.,
Defendants,

and

51 THE PLAINS, INC.
d/b/a HICKORY CREEK REHABILITATION CENTER,
Defendant-Appellee.

APPELLEE 51 THE PLAINS, INC. d/b/a HICKORY CREEK REHABILITATION CENTER'S MEMORANDUM OPPOSING JURISDICTION

Gordon D. Evans, III (0074221)
(Counsel of Record)
THE DONAHEY LAW FIRM
495 South High St., Suite 100
Columbus, OH 43215
Tel: 614.224.8166 / Fax: 614.849.0475
E-mail: gevans@donaheylaw.com

Michael C. Skouteris (PHV-1578-2012)
SKOUTERIS WALK, PLLC
431 S. Main St., Suite 200
Memphis, TN 38103
Tel: 901.526.2254 / Fax: 901.526.4740
E-mail: mskouteris@skouteriswalk.com

Attorneys for Plaintiff-Appellant
Scott Auflick, etc.

Susan M. Audey (0062818)
(Counsel of Record)
Ernest W. Auciello (0030212)
Jane F. Warner (0074957)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 441135-7213
Tel: 216.592.5000 / Fax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
ernest.auciello@tuckerellis.com
jane.warner@tuckerellis.com

Attorneys for Defendant-Appellee
51 The Plains d/b/a Hickory Creek
Rehabilitation Center

TABLE OF CONTENTS

Page

I. THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC AND GREAT GENERAL INTEREST. 1

II. COUNTERSTATEMENT OF THE CASE AND FACTS 3

A. Auflick sues Hickory Creek and others; several claims are dismissed via summary judgment and a jury ultimately returns a verdict in favor of Hickory Creek on the wrongful-death claim 3

B. Auflick files the first appeal (case number 12CA27), but the Fourth District dismisses for lack of a final appealable order. 3

C. Auflick files a second appeal (case number 13CA47) but the Fourth District dismisses for failure to prosecute; Auflick files an untimely application for reconsideration, which the court denies 4

III. ARGUMENT 6

A. Counterproposition of Law No. 1 6

An appellate court properly denies an application for reconsideration when it is untimely; failure to apprise the appellate court of a change of address is not an extraordinary circumstance that excuses timely filing. 6

1. Auflick's application for reconsideration is untimely 7

2. No extraordinary circumstances exist that would extend the time for filing the application 7

a. Failure to provide the appellate court with a change of address is not an extraordinary circumstance 8

b. Failure to monitor the docket is not an extraordinary circumstance. 10

c. Failure to timely file an application after receiving actual notice, or request an extension to do so under Rule 14(B), is not an extraordinary circumstance 11

B. Counterproposition of Law No. 2 12

An opening brief filed in a since-dismissed appeal cannot be considered as the opening brief in a subsequent appeal. 12

Page

IV. CONCLUSION 13

PROOF OF SERVICE 14

I. This case does not involve an issue of public and great general interest.

There is no public or great general interest in a court's routine application of well-established law to facts. Here, Appellant Scott Auflick, as administrator of the estate of Barbara Auflick, merely asks the Court to find that the Fourth District Court of Appeals erred when it denied his untimely application for reconsideration and dismissed his appeal for failure to take any action whatsoever to prosecute the appeal. Not only did the Fourth District correctly apply well-established rules of appellate procedure in denying Auflick's application, but this Court is not an error-correcting court even if otherwise. Instead, to invoke this Court's jurisdiction under S.Ct.Prac.R. 5.02(A)(3) as Auflick claims he seeks, he must identify some "question of public or great general interest" involved in this case.

Auflick did not do so, nor can he. He has identified no new or novel legal theory that he is advancing nor has he otherwise demonstrated how accepting this case will impact litigants beyond the parties to this lawsuit. On the contrary, he merely restates well-established principles of Ohio appellate procedure involving applications for reconsideration under App.R. 26(A) and claims that these routinely applied principles should be forgiven in this case because of "exceptional circumstances" and "unforeseeable technicalities." But there is nothing "exceptional" or "unforeseeable" about failing to advise a court of a change of address, failing to monitor a docket for more than three months after filing a notice of appeal, and failing to timely file an application for reconsideration despite having sufficient time to do after receiving actual notice of a court's dismissal notice. There is no affront to the "integrity" of the judicial system, as Auflick argues, merely because an appellate court properly follows Rule 26(A) and an appellant does not.

And the Fourth District did so here. Rule 26(A) requires a party to file an application for reconsideration within ten days after the clerk has both mailed the appellate court's judgment and entered a notation on the docket that it had done so. Although the clerk did both here, Auflick did not file his application for reconsideration until well past the ten-day deadline. He claims his counsel did not receive notice of the appellate court's judgment of dismissal or its earlier order to show cause because counsel had moved and that this constitutes extraordinary circumstances under App.R. 14(B) excusing his untimely application. But even though Auflick never moved for an extension of time as required by App.R. 14(B), once he and his counsel learned of the dismissal—which they admit was well before the expiration of the ten-day time period—Auflick still did not file the application (or request an extension to do so) until well past the ten-day deadline. And although Auflick claims his counsel notified the *Supreme Court* of his change in address for pro hac vice purposes, he took no steps to inform the *Fourth District Court of Appeals*. Nor did counsel monitor the docket, which had plainly noted the show-cause order and dismissal entry, and their mailing to the address Auflick provided when he filed his notice of appeal.

The Ohio Rules of Appellate Procedure exist to give order to appellate proceedings and govern all proceedings in appellate courts in this state. The Fourth District properly applied these rules in denying Auflick's application for reconsideration. Auflick's untimely attempt to reinstate an appeal he had taken no action whatsoever to prosecute is justified under the rules of appellate procedure and presents no issue of public or great general interest. Appellee 51 The Plains, Inc. d/b/a Hickory Creek Nursing Center (Hickory Creek)—having *long ago* received judgment in its favor on all counts—therefore asks this Court to decline jurisdiction and finally put this litigation to rest.

II. Counterstatement of the case and facts

A. Auflick sues Hickory Creek and others; several claims are dismissed via summary judgment and a jury ultimately returns a verdict in favor of Hickory Creek on the wrongful-death claim.

This case has a long and tortuous history that is not accurately represented in Auflick's memorandum in support of jurisdiction. Nor does Auflick attach all relevant judgment entries that would accurately show how this case progressed—and Hickory Creek is prohibited from doing so under S.Ct.Prac.R. 7.03(B). Distilled to its salient facts, Auflick refiled several claims against Hickory Creek and two other defendants—Healthcare Industries Corporation and Tandem Healthcare, Inc.—in January 2011 alleging that the defendants' conduct caused his mother's October 2006 death. As it did in the originally filed action, Hickory Creek moved for partial summary judgment on Auflick's survival-related claims on statute-of-limitations grounds, which the trial court granted just as it had done in the originally filed action before Auflick voluntarily dismissed it.

The case eventually proceeded on the remaining claims against Hickory Creek and the other defendants. By the time of trial, however, only the wrongful-death claim against Hickory Creek remained to be tried by the jury. Contrary to the representations in Auflick's memorandum, the jury *did not* find in Auflick's favor "on liability and injuries" (*see* Auflick Mem. at 4); instead, the jury returned a verdict in favor of Hickory Creek and the trial court thereafter entered judgment on that verdict on August 27, 2012.

B. Auflick files the first appeal (case number 12CA27), but the Fourth District dismisses for lack of a final appealable order.

After the trial court entered judgment on the verdict, Auflick appealed the order granting Hickory Creek partial summary judgment on the survival claims. He did not,

however, challenge the order entered in the *refiled* action. Instead, he challenged the order granting partial summary judgment in the *originally filed* and since-dismissed action.

In any event, the Fourth District dismissed the appeal for lack of a final appealable order because the record contained no entry or order resolving the wrongful-death claim against Tandem, nor did the court's August 27 judgment contain any Rule 54(B) certification. *Auflick v. Healthcare Industries Corp.*, 4th Dist. Athens No. 12CA27, 2013-Ohio-3860. Auflick moved for reconsideration, again representing that the claims against Tandem were settled before trial. But without an explicit entry to that effect or any Rule 54(B) certification, the court would not speculate and denied reconsideration.

C. Auflick files a second appeal (case number 13CA47) but the Fourth District dismisses for failure to prosecute; Auflick files an untimely application for reconsideration, which the court denies.

Rather than simply file a notice of dismissal of the claims against Tandem in the trial court, Auflick obtained another judgment entry that purported to satisfy Rule 54(B). Again seeking to challenge the order granting partial summary judgment to Hickory Creek, Auflick filed another notice of appeal on December 2, 2013. *See* Auflick Mem., 5/6/14 Entry. He filed a docketing statement, praecipe, and statement of assignment of errors on the same date along with the notice of appeal. The trial court record was subsequently filed a few weeks later on December 16, 2013, making Auflick's opening brief due 20 days later, or no later than January 6, 2014.

Contrary to the statements in his memorandum in support of jurisdiction (Auflick Mem. at 1, 8), Auflick *did not* file any opening brief. Nor did Auflick request any extension of time to do so. Two months after the record had been filed, the appellate court ordered Auflick to show "good cause for enlargement of briefing time, together with the brief and

assignment of error" within ten days of court's order. Again, Auflick filed no brief and requested no extension of time. Almost a month later, with no response from Auflick, the court dismissed the appeal for failure to prosecute.

On April 7, 2014 (not April 3, 2014 as Auflick represents[1])—well past the ten-day deadline—Auflick again applied for reconsideration. He advanced two independent bases for reconsideration. First, he argued that he had moved his office in mid-December 2013 and therefore never received notice that the record had been filed, that the court ordered him to show cause, or that the court dismissed the appeal. In his application, he said the only way he learned of the dismissal was when he was "notified by his client by text message on March 25, 2014." *See also* Auflick Mem., 5/6/14 Entry. He claimed that he gave his new address when he renewed his pro hac vice status with the Supreme Court of Ohio, but made no mention of informing the clerk for the Fourth District of any change in address. Indeed, from the time Auflick filed his notice of appeal on December 2, 2013 until the court dismissed the appeal more than three months later, there was—again contrary to Auflick's representations in his memorandum in support of jurisdiction—*no* communication from Auflick or his counsel informing the court of any change in address of either. He argued alternatively that he timely filed his opening brief in the first appeal—in October 2012—and since the issues were the same, this filing should suffice for his opening brief in the second appeal.

---

[1] Again, Auflick misrepresents the facts and states that he filed his application for reconsideration on April 3, 2014. *See* Auflick Mem. at 5, 8, 12. This is untrue. The docket reflects that the application was filed on April 7, not April 3. The docket is viewable online and can be accessed at http://coc.athensoh.org/eservices/?x=Z6fQDd4Paz9uIjmVhzCvLxRuuS-6ufoJm6ESQPHUNGJwqq0mHYmPbK3KAQDVZ34nSPF*KyHIcUQvLW6j530N5w.

The appellate court was unpersuaded. It found Auflick's application for reconsideration untimely and that no extraordinary circumstances existed. *See also* Auflick Mem., 5/6/14 Entry. As for Auflick's change-of-address argument, the court noted that Auflick failed to notify the clerk or any address change and that it was not the court's duty to ensure that a party's mailing address has not changed. *Id.* And lastly, the court found that Auflick neither requested leave to file a late motion for reconsideration, nor otherwise showed extraordinary circumstances especially where Auflick's counsel was aware of the dismissal "seven days before the deadline for filing the motion" and yet failed to timely file it or request an extension to do so. *Id.*

III. Argument

A. Counterproposition of Law No. 1

An appellate court properly denies an application for reconsideration when it is untimely; failure to apprise the appellate court of a change of address is not an extraordinary circumstance that excuses timely filing.

App.R. 26 governs applications for reconsideration and provides a ten-day time frame within which to request reconsideration. It provides, in relevant part:

> Application for reconsideration of any cause * * ** submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

App.R. 26(A).

1. Auflick's application for reconsideration is untimely.

The judgment entry dismissing the appeal was entered March 12, 2014 and notes that the clerk sent a copy of this judgment to Auflick's counsel on that same date, noting "cc" to Michael Skouteris, Auflick's counsel of record. Under App.R. 26(A) and 14(C) (the three-day mail rule), the time to file an application for reconsideration would have expired on March 25, 2014. The clerk thereafter entered a separate notation noting that it served Auflick's counsel again on March 19, 2014. Using the March 19 date as the beginning date, the time for filing an application for reconsideration under App.R. 26(A) and 14(C) expired on April 1, 2014. Contrary to Auflick's representations to this Court (*see* Auflick Mem. at 12), the April 1 deadline includes the three days for mailing allowed under App.R. 14(C). Auflick, however, did not file his application for reconsideration until April 7, 2014—well after the time required to do so under App.R. 26(A).

2. No extraordinary circumstances exist that would extend the time for filing the application.

App.R. 14(B) permits an enlargement of time to file an application for reconsideration *upon motion* showing of extraordinary circumstances. The rule provides:

> For good cause shown, the court, *upon motion*, may enlarge * * * the time prescribed by these rules * * * or may permit an act to be done after the expiration of the prescribed time. * * * Enlargement of time to file an application for reconsideration * * * pursuant to App.R. 26(A) shall not be granted except on a showing of extraordinary circumstances. (Emphasis added.)

App.R. 14(B).

Auflick filed no motion for enlargement of time and instead filed only an out-of-rule application for reconsideration. Even so, Auflick's argument that he could not have complied with the ten-day rule in App.R. 26(A) because he did not receive notice of the March 12 judgment fails for three reasons. First and second, Ohio law makes clear that it is Auflick's duty to prosecute his appeal with diligence and that failure to timely file a brief is cause for dismissal. App.R. 18(C); Loc.R. 9(D) of the Fourth Appellate Judicial District. Prosecuting an appeal with diligence includes not only monitoring the docket, but providing the clerk with notice of any address changes. Auflick did neither here. And lastly, Auflick had actual notice of the dismissal well within the time to request reconsideration yet waited until well past that time to file it.

a. **Failure to provide the appellate court with a change of address is not an extraordinary circumstance.**

Auflick argues that he notified the "Ohio Court of Appeals Clerk's Office" of his change of address when he renewed his pro hac vice status and that the "Registration History of the Ohio Court of Appeals Clerk's Office" correctly notes his counsel's new address. *See* Auflick Mem. at 1, 5, 9. There is no "Ohio Court of Appeals Clerk's Office" as Auflick represents. Instead, an out-of-state attorney renewing pro hac vice status does so in the *Supreme Court of Ohio*, not a nonexistent "Ohio Court of Appeals Clerk's Office" as Auflick argues. And it is the Registration History maintained in the Supreme Court of Ohio—not the Fourth District Court of Appeals—that contains Auflick's counsel's pro hac vice registration history. Noting a change of address when renewing pro hac vice status in the Supreme Court of Ohio is not giving notice of a change of address to the clerk for the Fourth District Court of Appeals. Auflick essentially argues that had the clerk for the Fourth District searched the records of the Supreme Court to confirm Auflick's counsel address, it

would have seen that counsel's address had changed and would have sent the notice to the address on file with the Supreme court instead of the address on record in the Fourth District.

This argument has no merit. The clerk has a duty only to send copies of judgment entries "to counsel of record for a party to the appeal at the last known address of counsel as listed in the court of appeals' record." Loc.R. 14(B) of the Fourth Appellate Judicial District. The last known address provided by Auflick's counsel of record—Michael Skouteris—is that listed on Auflick's notice of appeal to the Fourth District and on record there. The docket reflects nothing from Auflick or his counsel showing that there has been any address different than that already provided to the court. Neither the court nor the Clerk's Office has any duty to scour the Supreme Court records to ensure that the address provided by Auflick's counsel is current. Instead, the duty is upon Auflick to inform the court of any change in address. *State ex rel. Halder v. Fuerst,* 118 Ohio St.3d 142, 2008-Ohio-1968, ¶ 6 ("[A] party bears the burden of formally notifying the court of a change of address; the clerk is not charged with the duty of perusing the record to ensure that a party's mailing address has not changed.").

There is nothing exceptional or unforeseeable about the consequences of an attorney's change of address. Offices move regularly and diligent counsel take steps to notify courts of any change in address in all pending cases and to otherwise have mail forwarded. That Auflick's counsel failed to do so here does not make foreseeable consequences unforeseeable or otherwise make ordinary circumstances extraordinary.

Auflick's reliance on *Reichert v. Ingersoll,* 18 Ohio St.3d 220 (1985), does not change this result. Misstating the facts of this case, Auflick stated in his memorandum that the

appellant in Reichert "submitted a late motion for reconsideration." *See* Auflick Mem. at 7. This is untrue—*Reichert* has nothing to do with an untimely filed application for reconsideration. On the contrary, the appellant in that case timely requested reconsideration and sought to supplement the record with omitted portions of the transcript that would have supported reconsideration. The Supreme Court ultimately held that the appellate court should have granted reconsideration and considered the omitted portion of the transcript. *Reichert*, 18 Ohio St.3d at 222. This case provides no support for Auflick's argument that an application's untimeliness should be disregarded so the merits of the case can be reached.

Nor does it excuse what Auflick characterizes as "procedural deficiencies" over which he or his counsel had no control. *See* Auflick Mem. at 8-9. Although the court reporter in *Reichert* was at fault for failing to include the omitted portions of the transcript, Auflick and his counsel here had all the control over informing the Fourth District of any change in address and yet they did not do so. And Auflick controlled the timing of the request for reconsideration, choosing instead to file it *after* the application's deadline even though he had actual notice well before that deadline expired.

b. **Failure to monitor the docket is not an extraordinary circumstance.**

Parties to an action "are charged with the duty to keep themselves apprised of entries upon the docket and to monitor the progress of the suit." *CitiMortgage, Inc. v. Bumphus*, 197 Ohio App.3d 68, 2011-Ohio-4858, ¶ 36 (6th Dist.); *see also Deutsche Bank Natl. Trust v. Lagowski*, 7th Dist. Belmont No. 10 BE 28, 2012-Ohio-1684, ¶ 49. Indeed, the appellate rules provide explicit due dates for the filing of the record and appellant's brief and assignment of errors once that record is filed. *See* App.R. 10(A) (providing 40 days to

file the record after the filing of a notice of appeal docketed on the regular calendar); App.R. 11(B) (providing for the notice of the filing of the record); App.R. 18(A) (providing 20 days for an appellant to file the opening brief after the Rule 11(B) notice has been filed in an appeal docketed on the regular calendar).

Despite the explicit deadlines imposed by the appellate rules, Auflick did nothing after he filed his notice of appeal on December 2, 2013 until he filed his untimely application for reconsideration on April 7, 2014. He did not inform the Fourth District of any change of address, he did not monitor the docket, and he did not file his opening brief and assignment of errors. Given the clear mandates of the appellate rules, Auflick cannot reasonably expect that more than three months would go by and nothing would be expected of him in pursuing his appeal. This undue delay prejudices Hickory Creek—a party who *long ago* received a favorable judgment and verdict. It should be allowed to put this litigation to rest.

c. **Failure to timely file an application after receiving actual notice, or request an extension to do so under Rule 14(B), is not an extraordinary circumstance.**

Auflick's counsel admitted in the application for reconsideration that his client sent him a text message on March 25 informing him that the appeal had been dismissed. ("Appellant's counsel **did not receive** * * * the March 12, 2014 order dismissing the appeal **until notified by his client by text message on March 25, 2014**.") (Emphasis sic.); *see also* Auflick Mem. at 5. The Fourth District noted this admission in its entry denying reconsideration. *See* Auflick Mem., 5/6/14 Entry.

Despite Auflick's duty to inform the court of any change in address as well as to monitor the docket, Auflick was aware that the appeal had been dismissed well before the

April 1 deadline to request reconsideration under App.R. 26(A). Although App.R. 14(B) permits a court to extend to the time to file an application for reconsideration if extraordinary circumstances are shown, there is nothing extraordinary about failing to request reconsideration when there is still time to do so or to otherwise seek an extension under Rule 14(B) if circumstances permit. Auflick did neither. Instead, he waited until well past the April 1 deadline to file an untimely request for reconsideration. Because it was out of rule and no extraordinary circumstances were present, the Fourth District properly denied Auflick's untimely application for reconsideration.

B. Counterproposition of Law No. 2

An opening brief filed in a since-dismissed appeal cannot be considered as the opening brief in a subsequent appeal.

In an attempt to save his appeal in the Fourth District, Auflick intimates that the opening brief he filed in October 2012 in the first appeal—an appeal that the Fourth District fully and finally dismissed on October 24, 2013—is sufficient to qualify as his opening brief in the second appeal. *See* Auflick Mem. at 4.

It is not. The first appeal was a separate case—case number 12CA27—that has since been dismissed. It is over. Auflick cannot rely on filings in a since-dismissed case to resurrect *this* case. *See Curtin v. Mabin*, 8th Dist. Cuyahoga App. No. 89993, 2008-Ohio-2040, ¶ 9; *Kulikowski v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga App. Nos. 80102-80103, 2002-Ohio-5460, ¶ 56. He could have timely filed a brief used in another appeal as his opening brief in this case but he cannot merely ask a court to consider a brief filed in another case that has since been dismissed as his brief on appeal here.

IV. Conclusion

No public or great general interest is at stake here. The Fourth District applied well-established appellate law in denying Appellant Scott Auflick's application for reconsideration. Appellee 51 The Plains, Inc. d/b/a Hickory Creek Nursing Center therefore respectfully requests that this Court decline jurisdiction in this case.

Respectfully submitted,

Susan M. Audey (0062818)
(Counsel of Record)
Ernest W. Auciello (0030212)
Jane F. Warner (0074957)
TUCKER ELLIS LLP
950 Main Ave., Suite 1100
Cleveland, OH 441135-7213
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
ernest.auciello@tuckerellis.com
jane.warner@tuckerellis.com

Attorneys for Defendant-Appellee
51 The Plains d/b/a Hickory Creek
Rehabilitation Center

PROOF OF SERVICE

A copy of the foregoing was served on July 17, 2014 per S.Ct.Prac.R. 3.11(B) by mailing it by United States mail to:

Gordon D. Evans, III
THE DONAHEY LAW FIRM
495 South High St., Suite 100
Columbus, OH 43215

Michael C. Skouteris
SKOUTERIS WALK, PLLC
431 S. Main St., Suite 200
Memphis, TN 38103

Attorneys for Plaintiff-Appellant Scott Auflick, etc.

One of the Attorneys for Defendant-Appellee
51 The Plains d/b/a Hickory Creek
Rehabilitation Center