The Supreme Court of Ohio

CASE ANNOUNCEMENTS

December 30, 2022

[Cite as *12/30/2022 Case Announcements #10*, 2022-Ohio-4809.]

RECONSIDERATION OF PRIOR DECISIONS

2021-0761. State v. Schubert.
Licking App. No. 2020 CA 00040, 2021-Ohio-1478. Reported at __ Ohio St.3d __, 2022-Ohio-4604, __ N.E.3d __. On motion for reconsideration. Motion denied.

Donnelly, J., concurs, with an opinion.
Kennedy, Fischer, and DeWine, JJ., dissent, with an opinion.
Fischer, J., dissents, with an opinion.

DONNELLY, J., concurring.

{¶ 1} I agree unreservedly with the majority's decision to deny the motion for reconsideration in this case. I write separately, however, to express my surprise at the dissenting justices' newfound appreciation of a party's opportunity to file a memorandum opposing a motion for reconsideration. Waiting for memoranda opposing motions for reconsideration is not unlike waiting for the sun to rise. We know exactly what is going to happen: the sun is going to rise, and the parties opposing reconsideration are going to extol the virtues of the opinion that determined that their side carried the day. If the motion for reconsideration itself does not persuade us to reconsider our decision, nothing that the party who opposes reconsideration might say is going to convince us to grant reconsideration. (Deciding to grant reconsideration before the party opposing reconsideration has been heard is an entirely different matter.)

{¶ 2} This court has a historied practice of accelerating internal timelines during election years based on the reasonable understanding that, to the extent possible, motions for

reconsideration should be decided by the same court that decided the case on the merits. For example, this court ruled on 31 motions for reconsideration between December 18, 2020, and the end of that year. In some of those cases, the court considered and ruled on the motion before the time for filing a memorandum in opposition had expired. Notably, the three justices who dissent today participated in this court's rulings on the motions for reconsideration in all of those cases (except for two cases in which Justice Fischer recused himself). None of the dissenting justices objected to this court's decision at the end of 2020 to rule on those motions before the opposing party's response time had expired, nor did any of them file a dissenting opinion in 2020 on the grounds they raise today, presumably because they agreed at that time that "the interests of justice warrant[ed] immediate consideration [of the motions] by the Supreme Court," S.Ct.Prac.R. 4.01(C). The dissenters' sudden and inconsistent concern about the injustice that may occur by ruling on motions for reconsideration before the composition of the court changes strikes me as disingenuous.

{¶ 3} The motion for reconsideration filed in this case—like all the others this court has ruled on this month—is properly before us and has been properly resolved by a majority of the court.

KENNEDY, FISCHER, and DEWINE, JJ., dissenting.

{¶ 4} The Rules of Practice of the Supreme Court of Ohio permit a party to file a motion for reconsideration within ten days after entry of this court's judgment. S.Ct.Prac.R. 18.02(A). Our rules also afford a party opposing reconsideration the same amount of time to respond to the motion. S.Ct.Prac.R. 18.03(A). Because, under the circumstances of this specific case, nothing in the Rules of Practice gives this court the authority to deny a party opposing reconsideration the opportunity to be heard, we dissent.

{¶ 5} S.Ct.Prac.R. 4.01 sets forth the general rules for filing a "[m]otion for order or relief." S.Ct.Prac.R. 4.01(B)(1) establishes the deadline for a party to file a response to such a motion: "If a party files a motion with the Supreme Court, any other party may file a response to the motion within ten days from the date the motion is filed, unless otherwise provided in these rules or by order of the Supreme Court." And S.Ct.Prac.R. 4.01(C) provides that "[t]he Supreme Court may act upon a motion before the deadline for filing a response to the motion, if the interests of justice warrant immediate consideration by the Supreme Court."

{¶ 6} S.Ct.Prac.R. 18.02(A) provides a specific deadline for filing a motion for reconsideration, stating that "[e]xcept as provided in S.Ct.Prac.R. 12.08(B), any motion for reconsideration must be filed within ten days after the Supreme Court's judgment entry or order is filed with the Clerk of the Supreme Court." And S.Ct.Prac.R. 18.03(A) affords a party opposing reconsideration an opportunity to be heard: "Except as provided in S.Ct.Prac.R. 12.08(B), a party opposing reconsideration may file a memorandum in response to a motion for reconsideration within ten days of the filing of the motion."

{¶ 7} The default rule, then, is that the party opposing a motion for reconsideration may file a response to the motion within the time parameters of the rule. S.Ct.Prac.R. 4.01(C) creates a limited exception to this default rule, providing that a motion may be acted upon immediately, *but only if the interests of justice warrant it*.

{¶ 8} The "interests of justice" involve "[t]he proper view of what is fair and right in a matter in which the decision-maker has been granted discretion." *Black's Law Dictionary* 971 (11th Ed.2019). It has been said that " '[j]ustice is even-handed and equally administered to all, irrespective of any and all considerations.' " (Brackets added in *Clay*.) *State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office*, 152 Ohio St.3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 39, quoting *Koppelman v. Commr. of Internal Revenue*, 202 F.2d 955, 956 (3d Cir.1953) (Kalodner, J., dissenting).

{¶ 9} There are few opinions from this court discussing when expedited review is warranted. In *State ex rel. Shemo v. Mayfield Hts.*, we granted expedited consideration under former S.Ct.Prac.R. XIV(4)(C), the predecessor to S.Ct.Prac.R. 4.01(C). 93 Ohio St.3d 1, 4, 752 N.E.2d 854 (2001). In that case, the party seeking expedited review had allegedly been deprived of economically viable use of property for over nine years; this court had ruled in favor of the movant in prior litigation regarding the zoning classification of the property, and the failure to act on the motion immediately could have caused irreparable harm. *Id.* In *State ex rel. Taft-O'Connor '98 v. Franklin Cty. Court of Common Pleas*, we expedited our consideration of a case reviewing a trial court's restraint on campaign speech. 83 Ohio St.3d 487, 488, 700 N.E.2d 1232 (1998). We explained: "Given the proximity of the November election and the statewide importance of the issue involved, we find that this cause merits the requested expedited consideration." *Id.; see also State ex rel. Bona v. Orange*, 85 Ohio St.3d 18, 21, 706 N.E.2d 771 (1999) (discussing cases in which we granted motions to expedite in advance of an election).

{¶ 10} But even in those cases, we did not deny the opposing party the opportunity to respond. And in this case, there is nothing to warrant expedited consideration of the motion for reconsideration that would justify denying the opposing party an opportunity to be heard. Notably, the movant in this case did not even ask the court to expedite consideration of the motion for reconsideration. And there is no suggestion that irreparable harm will result if the court waits a few days for the opposing party to respond. There are simply no facts before us that suggest that the interests of justice warrant this court's immediate consideration, sua sponte, of the motion for reconsideration.

{¶ 11} What sets this case apart from the numerous motions for reconsideration this court has decided recently without expediting them sua sponte? A change in the court's membership is imminent, and the majority must believe that it would be *an injustice* for a different composition of this court to rule on a motion for reconsideration than decided the case on original submission. But that fact, standing alone, does not warrant expedited review.

{¶ 12} In *Jezerinac v. Dioun*, this court addressed what happens when a case is decided by a court of appeals and a motion for reconsideration is considered after a member of the original panel leaves the bench. 168 Ohio St.3d 286, 2022-Ohio-509, __ N.E.3d __, ¶ 1. The question was whether that judge's successor could hear the motion when App.R. 26(A)(1)(c) provides that a motion for reconsideration "shall be considered by the panel that issued the original decision." *Id.*

{¶ 13} This court's holding that the successor could hear the motion was unanimous. We explained that "[a] court's identity is wholly independent from the specific individuals who make up its personnel. Thus, a 'court as an entity remains the same, regardless of any change in personnel.' " *Id.* at ¶ 17, quoting *Cincinnati v. Alcorn*, 122 Ohio St. 294, 297, 171 N.E. 330 (1930). This court continued:

> The independent existence of courts and panels separate and apart from their particular members is crucial to the continuity of the judiciary itself. A judge exercises judicial authority only by virtue of the office he occupies during his active tenure on the bench. * * * The judicial authority belongs to the office, not the judge.

Id. at ¶ 19.

{¶ 14} The same is true for this court and its members. The interests of justice therefore do not warrant expediting review of the motion for reconsideration filed in this case simply because it was filed when a changeover in the court's membership is at hand. It is not *an injustice* for a court composed of different members to hear a motion for reconsideration. It is a situation contemplated by our Constitution, which provides for six-year terms of office for justices. *See* Ohio Constitution, Article IV, Section 6(A). Despite a change in membership, the court as an entity remains the same. And because the interests of justice require the fair and evenhanded treatment of parties before this court, the interests of justice also demand that motions for reconsideration that are filed this month be treated the same as motions for reconsideration that were filed last month. After all, " '[j]ustice is served by the consistent and methodical application of the law.' " *State v. LaRosa*, 165 Ohio St.3d 346, 2021-Ohio-4060, 179 N.E.3d 89, ¶ 64 (Donnelly, J., concurring in part and dissenting in part), quoting *State v. Tijerina*, 3d Dist. Defiance No. 4-02-01, 2002-Ohio-2979, ¶ 11.

{¶ 15} S.Ct.Prac.R. 18.03(A) affords the opposing party an opportunity to respond to a motion for reconsideration. This court has allowed countless other parties the opportunity to respond to motions for reconsideration without expediting consideration of their cases sua sponte. And the interests of justice do not warrant expedited consideration here simply because a change in the membership of this court is approaching. Consequently, we dissent from the majority's decision today to advance and rule on the motion for reconsideration that was filed in this case without allowing the opposing party the opportunity to respond.

FISCHER, J., dissenting.

{¶ 16} I fully join the opinion dissenting from the court's entry denying the motion for reconsideration that was filed in this case for the reasons stated therein and for the reasons stated in my own opinion dissenting from the court's entry denying reconsideration in *State v. Haynes*, ___ Ohio St.3d ___, 2022-Ohio-4776, ___ N.E.3d ___, ¶ 16-26 (Fischer, J., dissenting).
