

IN THE SUPREME COURT OF OHIO

MORRIS G. OSCHERWITZ, M.D.

Plaintiff-Appellant.

v.

CINCINNATI CENTER FOR
PSYCHOANALYSIS, INC. et. al.

Defendants-Appellees

Case No.

07 - 0221

ON APPEAL FROM HAMILTON
COUNTY COURT OF APPEALS
FIRST APPELLATE DISTRICT

CASE NO.: C060831

PLAINTIFF-APPELLANT'S JURISDICTIONAL MEMORANDUM

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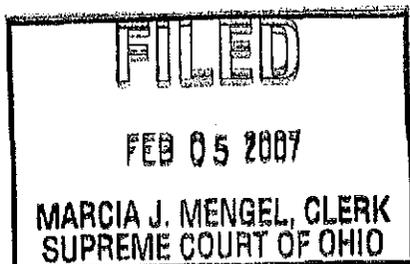


TABLE OF CONTENTS

INTRODUCTION..... 1

STATEMENT OF THE CASE AND OF THE FACTS..... 2

A. Statement of the Facts..... 2

B. Procedural History..... 3

**WHY THIS APPEAL PRESENTS AN ISSUE
OF PUBLIC AND GREAT GENERAL INTEREST..... 4**

PROPOSITIONS OF LAW..... 5

**First Proposition of Law: An order compelling discovery
over an objection based on a privilege described in
R.C. §2317.02 is immediately appealable under
R.C. §2505.02 (A)(3)..... 5**

**Second Proposition of Law: The denial of a protective order
based on Ohio Revised Code §2317.02 is immediately appealable
if the patient is not a party to the proceeding..... 8**

CONCLUSION..... 10

CERTIFICATE OF SERVICE..... 11

INTRODUCTION

This case involves the statutory right of a patient to have his or her medical information kept confidential. Plaintiff, a psychiatrist, sought a protective order against defendants, plaintiff's former partners and landlords, whom he was suing for tortious interference and anticompetitive conduct. Plaintiff moved for the protective order after defendants stated their intention to pursue, via plaintiff's deposition, information involving a patient who received psychiatric treatment from plaintiff.

The psychiatric patient is not a party to this litigation and the information pertaining to her is not relevant. Defendants sought it strictly to harass and embarrass plaintiff. At all times, the nonparty patient owned the privilege. She never has waived it and does not wish her information to be disclosed. Neither defendants nor the trial court took any meaningful steps to protect her confidential information.

Plaintiff filed an appeal from the trial court's order permitting the deposition to proceed. He did so to protect his psychiatric patient from disclosure of statutorily protected confidential information. The denial of a protective order motion based on the physician-patient privilege is appealable immediately under the controlling Ohio statute, R.C. § 2505.02(A)(3). Nevertheless, the court of appeals held that the order in this case was not appealable and dismissed plaintiff's appeal from it for lack of jurisdiction.

Peculiar language in the trial court's order makes the appealability issue in this case technically a matter of first impression. But it is eminently capable of repetition absent this Court's intervention because the court of appeals' reasoning would apply to any discovery order involving any objection based on any privilege. In ordering the discovery to proceed over plaintiff's privilege objection, the trial court inserted into its entry language to the effect that "nothing in this order permits any invasion of any privilege." In moving to dismiss the appeal,

defendants argued that inclusion of this language was enough to prevent an immediate appeal, despite R.C. § 2505.02(A)(3). If this dismissal stands, a trial court could always prevent an immediate appeal from a discovery order under R.C. § 2505.02(A)(3) simply by inserting such meaningless language into its entry.

STATEMENT OF FACTS AND OF THE CASE

A. Statement of Facts

For almost twenty-five years, plaintiff Morris G. Oscherwitz, M.D. ("Oscherwitz") has maintained his psychiatry practice in an office building located at 3001 Highland Avenue, Cincinnati. Dr. Oscherwitz was an original partner who provided money to build and develop the office. The partners invested in the building to create a special environment conducive to the practice of psychiatry. Dr. John MacLeod, until recently the president of defendant Cincinnati Center for Psychoanalysis, Inc. ("the Center"), specially designed the building to permit psychiatrists to treat patients and maintain their practices. The building has a very good ratio of five professionals for each administrative person, nicely designed offices of an appropriate size offering privacy and excellent soundproofing, onsite parking, convenient access to hospitals, and a unique private library devoted to psychoanalysis.

Despite his interest in the partnership that owns the building and his long-term commitment to 3001 Highland Avenue, the Center and the partnership decided to oust Dr. Oscherwitz and his practice from the building. On November 10, 2005, the Center ordered Dr. Oscherwitz to vacate his office. When the Center issued its mandate, approximately five months remained on his lease, with which Dr. Oscherwitz was in full compliance. Dr. Oscherwitz refused to accept the forced eviction.

On January 25, 2006, the Center again demanded that Dr. Oscherwitz leave his office, setting a deadline of March 31, 2006. This devastated him because the eviction inevitably would

impair his practice and prevent him from taking advantage of the benefits of the building and the services provided to tenants.

B. Procedural History

Dr. Oscherwitz filed suit against the Center and the partnership before the eviction deadline to stop them from interfering with his professional practice. His complaint includes claims of tortious interference and unlawful anticompetitive conduct and seeks both damages and an injunction preventing defendants from terminating his lease. After the suit was filed, Dr. Oscherwitz and defendants reached an agreement concerning when he had to vacate the building. The parties then proceeded to the merits of his claims.

Dr. Oscherwitz alleges that the eviction will harm his existing patients and encourage them to seek psychiatric treatment elsewhere, and will deprive him of access to new patients. Defendants individually and collectively have acknowledged that evicting him will inure to their economic benefit by allowing individual members of the practice to secure more business through referrals.

Despite the straightforward nature of the complaint, defendants informed Dr. Oscherwitz's counsel that they would make inquiries at his deposition regarding an alleged ethics matter between Dr. Oscherwitz and the psychiatric patient mentioned above, forcing him to seek a protective order to prevent the inquiries. As noted above, Dr. Oscherwitz's patient is not a party to this action. All parties to this litigation have acknowledged that she desires to maintain any matter involving Dr. Oscherwitz as confidential.

On April 7, 2006, Dr. Oscherwitz filed his motion for a protective order to prevent inquiry into information regarding the psychiatric patient identified above. His motion was

based on the statutory physician-patient privilege.¹ On September 7, 2006, the trial court denied the motion.² On October 3, 2006, Dr. Oscherwitz filed a timely notice of appeal to the Court of Appeals for the First Appellate District.³ Defendants filed a motion to dismiss the appeal for lack of a final, appealable order. The court of appeals granted the motion on December 21, 2006.⁴ Plaintiff filed a motion for reconsideration, which the court of appeals denied.⁵

**WHY THIS CASE PRESENTS AN ISSUE
OF PUBLIC AND GREAT GENERAL INTEREST**

This appeal seeks this Court's guidance concerning preservation of the physician-patient privilege and the meaningful application of R.C. §§ 2505.02 to discovery allowed in spite of this privilege. Dr. Oscherwitz submits that the only logical way to read R.C. § 2505.02(A)(3) is that an order compelling discovery over an objection based on this privilege is immediately appealable.⁶

This Court jealously has protected the physician-patient privilege. For example, the Court has held that this privilege is important and supersedes the right of the public to gain access to governmental records. In discussing the tension between the right to know and patient confidentiality, the Court held that the

Public Records Act serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy. However, even in a society where an open government is considered essential to maintaining a

¹ R.C. § 2317.02

² A copy of the Order denying Plaintiffs' Motion is attached as Exhibit "A."

³ A copy of the Notice of Appeal is attached Exhibit "B."

⁴ A copy of the Dismissal is attached as Exhibit "C."

⁵ A copy of the Denial is attached as Exhibit "D."

⁶ *State ex rel. Mulholland v. Schweikert*, 99 Ohio St.3d 291, 2003-Ohio-3650, ¶ 13 (recognizing that a decision rejecting a protective order for "allegedly" privileged records is a final, appealable order); *State ex rel. Butler County Children Servs. Bd. v. Sage*, 95 Ohio St.3d 93, 2002-Ohio-1494; *King v. American Standard Ins. Co.*, 2006 WL 3113733 (6th Dist., Lucas Cty.), ¶ 20 ("if the judgment orders a party to disclose allegedly privileged material, it is appealable pursuant to R.C. 2505.02(A)(3) and (B)(4)"); *Mid-American Nat'l Bank v. Cincinnati Insurance Co.* (1991), 74 Ohio App.3d 481, 485-486.

properly functioning democracy, not every iota of information is subject to public scrutiny. Certain safeguards are necessary.⁷

The dismissal of plaintiff's appeal jeopardizes the privilege and the ability of patients to enjoy it. This is an appeal from an order permitting discovery over plaintiff's objection based on the privilege. Such an order must be immediately appealable under R.C. § 2505.02(A)(3).

PROPOSITIONS OF LAW

First Proposition of Law: An order compelling discovery over an objection based on a privilege described in R.C. §2317.02 is immediately appealable under R.C. § 2505.02(A)(3).

Dr. Oscherwitz invoked R.C. § 2317.02 in seeking a protective order. He based his motion on defendants' representations that they were seeking information concerning one of his patients. When the trial court denied his motion, he sought immediate appellate review based on R.C. § 2505.02(A)(3).

To be immediately appealable, an order must satisfy R.C. § 2505.02. This section provides in relevant part that an order granting a "provisional remedy" is immediately appealable if "the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."⁸ In seeking dismissal of the appeal, defendants did not argue that Dr. Oscherwitz could secure meaningful or effective appellate review of this discovery order later. Rather, they argued, in effect, that the discovery order appealed from did not constitute a "provisional remedy" under R.C. § 2505.02.

Section 2505.02 defines a "provisional remedy" as including any "proceeding ancillary to an action, including, but not limited to, a proceeding for . . . discovery of privileged matter . . ."⁹ Defendants' position below was that the order appealed from did not constitute a provisional

⁷ *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 438, 2000-Ohio-213

⁸ R.C. § 2505.02(B)(4)(b).

⁹ R.C. § 2505.02(A)(3).

remedy – and thus was not appealable – for the simple reason that the trial judge’s entry did not purport to compel plaintiff to disclose any “privileged matter.” In fact, as defendants’ motion to dismiss the appeal repeatedly pointed out, the trial judge’s entry included language to the effect that defendants could not inquire into privileged matters. This language, defendants claim, was enough to render R.C. § 2505.02(A)(3) inapplicable because that section only applies to orders permitting discovery of privileged matters.

Defendants’ argument overlooks the fact that plaintiff objected to the discovery based on a privilege that is broad enough to encompass the entire matter in question. That puts the order permitting the discovery within the ambit of appealable orders under R.C. § 2505.02(A)(3).¹⁰ That the trial judge personally did not believe the matter he ordered Dr. Oscherwitz to disclose was “privileged” is insufficient to take the order outside the ambit of appealable orders under R.C. § 2505.02(A)(3). The case law is littered with examples of appeals from discovery orders in which the trial judge did not believe that the material to be compulsorily disclosed was privileged.¹¹ Even in those cases where the appellate court eventually agreed with the trial judge that the material was not privileged, the court of appeals nevertheless took jurisdiction over the appeal and disposed of it on the merits, rather than dismissing it as having been taken from a nonappealable order. The only logical way to read R.C. § 2505.02(A)(3) is that an order compelling discovery over an objection based on privilege is immediately appealable.¹²

¹⁰ See cases cited in footnote 6, *supra*.

¹¹ See footnote 6, *supra*.

¹² *State ex rel. Mulholland v. Schweikert*, 99 Ohio St.3d 291, 2003-Ohio-3650, ¶ 13 (recognizing that a decision rejecting a protective order for “allegedly” privileged records is a final, appealable order); *State ex rel. Butler County Children Servs. Bd. v. Sage*, 95 Ohio St.3d 93, 2002-Ohio-1494; *King v. American Standard Ins. Co.*, 2006 WL 3113733 (6th Dist., Lucas Cty.), ¶ 20 (“if the judgment orders a party to disclose allegedly privileged material, it is appealable pursuant to R.C. 2505.02(A)(3) and (B)(4)”); *Mid-American Nat’l Bank v. Cincinnati Insurance Co.* (1991), 74 Ohio App.3d 481, 485-486.

In this instance, the court of appeals essentially construed R.C. § 2505.02 as requiring a party appealing a discovery order to make a threshold showing that his privilege claim is valid, in order to get inside the door of the court of appeals. Such a construction would eviscerate the portion of R.C. § 2505.02 that makes immediately appealable an order in “a proceeding for . . . discovery of privileged matter”¹³

Furthermore, defendants’ reliance on the ostensibly limiting language in the trial judge’s entry is entirely misplaced. The trial judge’s statement, in effect, that his order would not permit defendants to inquire into any privileged matters is at best a meaningless encapsulation of the trial judge’s point-of-view on the privilege issue. To be sure, the trial judge’s point-of-view was that compelling plaintiff to disclose information about his relationship with his patient would not impinge upon any privilege. Defendants shared that point-of-view. There is no question, however, that plaintiff’s point-of-view was diametrically opposed. He objected to the disclosure *based on privilege*. This is precisely the stuff that appeals under R.C. § 2505.02(A)(3) are made of.

If inclusion of language in an entry to the effect that “nothing in this order permits any invasion of any privilege” were enough to prevent an immediate appeal under R.C. § 2505.02(A)(3), the party prevailing on a motion to compel disclosure of an allegedly privileged matter would always include such language in the proposed entry. Suppose, for example, that a plaintiff’s attorney deposing the CEO of a corporate defendant asks in the CEO’s deposition if the CEO ever discussed with anyone whether or not the corporation actually engaged in the alleged misconduct. Suppose further that the only such discussion was an allegedly privileged conversation between the CEO and the corporation’s attorney. Under the bizarre reasoning advanced by defendants below and accredited by the court of appeals, the trial judge in such a

¹³ R.C. § 2505.02(A)(3).

case could reject the corporation's privilege claim, order the CEO to divulge the conversation, and cut off the defendant's right to appeal the privilege ruling immediately merely by stating in his entry, "Nothing in this entry shall permit the plaintiff to inquire into any privileged matters." This cannot be the law. The Court should take jurisdiction in order to affirm the primacy of R.C. § 2505.02(A)(3) and should hold that, regardless whether the trial judge personally believes his order permitting discovery does not impinge upon a privilege, the fact that the judge issues an order permitting discovery over a privilege objection is enough to trigger an immediate appeal under this statute.

Second Proposition of Law: The denial of a protective order based on R.C. §2317.02 is immediately appealable if the patient is not a party to the proceeding.

Another flaw in the court of appeals' order dismissing the appeal is its inherent assumption that the owner of the privilege was a party in the litigation. In this case, the patient who owns the privilege is not a party. Plaintiff owes a duty to protect his patient's privilege, including the filing of an interlocutory appeal. Neither defendants nor the trial court took any meaningful steps to protect the nonparty patient. Under these circumstances, it is incumbent on the court of appeals to review the denial of a protective order motion that sought to protect the nonparty privilege holder's rights.

Defendants in the lower court proceedings recognized implicitly if not explicitly that the information they seek is highly confidential and should remain so. In fact, defendants blocked efforts by Dr. Oscherwitz to secure the same type of information regarding another nonparty. The fundamental consideration, therefore, is not whether disclosure will injure the physician but whether disclosure will injure the patient and violate her rights.

Section 2505.02(A)(3) expressly provides that an order allowing discovery of a privileged matter is an ancillary proceeding that is immediately appealable. The physician, in

this case Dr. Oscherwitz, is obligated to assert the privilege on behalf of his patient when, as in this instance, she is not a party to the litigation.

While we acknowledge that a patient owns the privilege, we cannot see the sense in charging a medical professional with confidentiality, then eviscerating their ability to protect that confidentiality. *See Id.* at ¶13. Appellees' argument that a valid court order somehow precludes appellate review is unpersuasive because Appellants are "aggrieved" because they have been adversely affected by the trial court's order. *Furthermore, without the opportunity for appellate review, it is not a foregone conclusion that the trial court's order is valid.* Therefore, we find that medical professionals generally, and Appellants specifically, have standing to appeal a discovery order that requires them to violate the mandate of the statutory physician-patient privilege.¹⁴ (Emphasis added.)

In the proceedings below, neither court sufficiently considered the interests of the patient. The statutory test to determine whether an order immediately is appealable is whether the patient is aggrieved and whether the patient has a meaningful remedy following a final judgment.¹⁵ An order that allows the disclosure of any information that concerns the physician-patient relationship certainly will deny the patient the opportunity to enjoy any meaningful remedy after a final judgment. Thus, to the extent the trial court's order might adversely affect the patient's privilege, immediate appellate review is imperative.

Defendants' conduct during earlier depositions in this case demonstrates that the non-party patient has an important interest in preserving the confidentiality of the matter involving her. For example, defendants' counsel cautioned plaintiff's counsel that he should refrain from inquiring into a physician's relationship with a patient, in order to preserve confidentiality. Now that the shoe is on the other foot, Dr. Oscherwitz's patient should be no less entitled to the confidentiality guaranteed by the privilege. More to the point of this appeal, once information concerning the ethics matter involving the patient is disclosed, the patient cannot unring the

¹⁴ *Northeast Ohio Nephrology Assoc., Inc.* (2005), 164 Ohio App.3d 829, 834, 2005-Ohio-6914.

¹⁵ R.C. §2505.02(B)(4)(b).

proverbial bell. Once Dr. Oscherwitz is forced to disclose the matter at his deposition, the confidentiality to which the patient is entitled will be lost forever.

The broad view of privilege, therefore, is that a trial court must consider the perspective of the nonparty patient when deciding an objection based on the physician-patient privilege. The trial court's order failed to define or consider privilege from the patient's perspective. The court of appeals should have retained jurisdiction over Dr. Oscherwitz's attempt to secure immediate review of the trial court's order, which disregarded his patient's privilege.

CONCLUSION

For the foregoing reasons, Dr. Oscherwitz respectfully asks this Court to accept jurisdiction over this matter and provide guidance as to when an order permitting discovery despite a privilege objection becomes a final, appealable order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Paul M. De Marco

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D69916083

SEP 07 2006
Dennis S. Helmick
DENNIS S. HELMICK, Judge
9/7/06

ENTERED
SEP 07 2006

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Trial Attorney for Defendants
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and 3001 Highland Avenue Limited Partnership

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MORRIS G. OSCHERWITZ, M.D.,	:	CASE NO. A0601875
Plaintiff	:	Judge Helmick
v.	:	
CINCINNATI CENTER FOR PSYCHOANALYSIS, INC., ET AL.,	:	ORDER DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER
Defendants.	:	
	:	
	:	

This matter is before the Court on the motion of Plaintiff, Morris G. Oscherwitz, M.D., for a protective order pursuant to Rule 26(C) of the Ohio Rules of Civil Procedure. Having considered the memoranda filed by the parties and the arguments of counsel on July 19, 2006 and being fully advised in the premises, the Court finds that Plaintiff's motion is not well taken and should be denied. Accordingly,

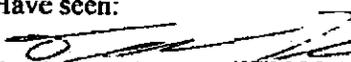
Plaintiff's motion for a protective order is hereby denied. However, Defendants are directed, in conducting Plaintiff's deposition, not to inquire of Plaintiff with respect to any communications between Plaintiff and any of his patients concerning Plaintiff's medical

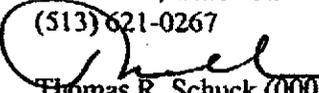
EXHIBIT
"A"

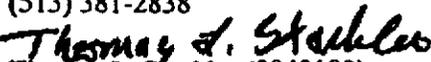
treatment, diagnosis, or medical advice to such patient or such patient's communications to Plaintiff in the relation of patient to physician which are privileged under R.C. § 2317.02.

Judge

Have seen:


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IN THE SUPREME COURT OF OHIO

MORRIS G. OSCHERWITZ, M.D. : Case No.
: :
Plaintiff-Appellant. : ON APPEAL FROM HAMILTON
: COUNTY COURT OF APPEALS
: FIRST APPELLATE DISTRICT
v. :
: :
CINCINNATI CENTER FOR : CASE NO.: C060831
PSYCHOANALYSIS, INC. et. al. :
: :
Defendants-Appellees :
: :

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT MORRIS G.
OSCHERWITZ, M.D.

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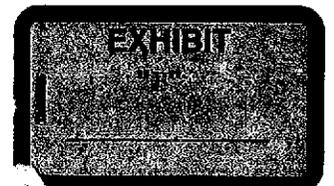
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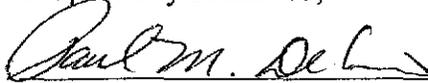
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Plaintiff-Appellant Morris G. Oscherwitz, M.D hereby gives notice of appeal to the Supreme Court of Ohio from the Entry of Dismissal of the Hamilton County Court of Appeals, First Appellate District, entered in the Court of Appeals case No. C-060831 on December 21, 2006.

This case presents a matter of public and great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

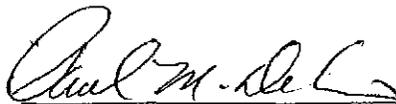
I hereby certify that a copy of Plaintiff-Appellants' Notice of appeal was served by ordinary United States Mail and via facsimile on the following person(s) this 2nd day of February 2007.

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**Counsel for Cincinnati Psychoanalytic
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Paul DeMarco, Esq.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MORRIS G. OSCHERWITZ, M.D.,

APPEAL NO. C-060831
TRIAL NO. A-0601875

Appellant,

vs.

**ENTRY OVERRULING MOTION FOR
RECONSIDERATION OF DISMISSAL**

CINCINNATI CENTER FOR
PSYCHOANALYSIS, INC., et al.,

Appellees.

This cause came on to be considered upon the motion of the appellant filed herein for reconsideration and upon the response thereto.

The Court, upon consideration thereof, finds that the motion is not well taken and is hereby overruled.

To The Clerk:

Enter upon the Journal of the Court on JAN 24 2007 per order of the Court.

By: 
Acting Presiding Judge

(Copies sent to all counsel)



IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MORRIS G. OSCHERWITZ, M.D.,

APPEAL NO. C-060831
TRIAL NO. A-0601875

Appellant,

vs.

ENTRY OF DISMISSAL

CINCINNATI CENTER FOR
PSYCHOANALYSIS, INC., et al.,

Appellees.

This cause came on to be considered on the motion of the appellees filed herein for an order of this Court dismissing the appeal, and upon the response thereto.

The Court, upon consideration thereof, finds that said motion is well taken and is granted.

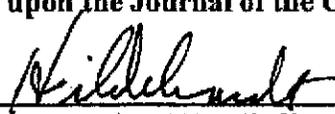
WHEREFORE, it is ordered and decreed that the appeal is dismissed.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

HENDON, J. AND WINKLER, J., CONCUR;
PAINTER, J., DISSENTS

To The Clerk:

Enter upon the Journal of the Court on DEC 21 2006 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)