

IN THE SUPREME COURT OF OHIO

Kida Newell, :
 :
 Appellant, : On Appeal from the Jackson County
 : Court of Appeals, Fourth Appellate
 : District
 v. :
 : Court of Appeals Case No. 06CA19
 City of Jackson, Ohio, et al., :
 :
 Appellees. : **07-1930**

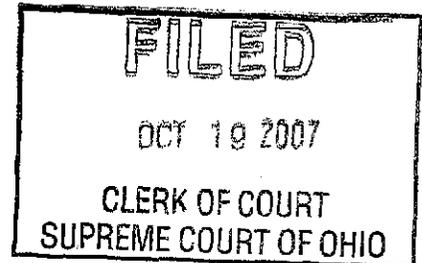
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT KIDA NEWELL

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Proposition of Law No. 1: In reviewing a trial court’s dismissal of a
declaratory judgment action seeking relief for a governmental agency’s
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND WHY LEAVE TO APPEAL SHOULD BE GRANTED AND
WHY APPELLANT SHOULD BE GRANTED ADDITIONAL REVIEW

This cause presents an issue that is critical to maintenance of fair and honest government of political subdivisions. The question is whether a reviewing court should rule on a declaratory judgment action, and grant relief to the extent possible, where a separate quo warranto action is necessary to unseat a fire chief appointed by a civil service commission in violation of the Sunshine Law, O.R.C. section 121.22.

Ohio's Sunshine Law is designed to assure that governmental agencies and subdivisions operate in a fair and effective fashion, under full public scrutiny. In White v. Clinton Cty. Bd. of Comm'rs. (1996), 76 Ohio St. 3d 416, 667 N.E.2d 1223, this court held that the Sunshine Law prevents important decisions from being made behind closed doors. Id. at 420. The Sunshine Law enables the public to observe and understand the actions of their elected officials. Id. at 418. The court went on to say, "these principles are a bedrock of our society and are essential to our popular form of government." Id.

Moreover, the statutes that make up the Sunshine Law ". . . shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." O.R.C. § 121.22(A).

In the case under consideration, the Civil Service Commission of the City of Jackson failed to publicly announce its meetings regarding the hiring of a new fire chief or keep records of those meetings. The Appellant filed a declaratory judgment action asking that the newly appointed chief be dismissed and that she be granted additional remedies against the Civil

Service Commission under the Sunshine Law. When the trial court dismissed the action, the Appellant filed a separate claim in the court of appeals quo warranto seeking removal of the fire chief, and appealed that portion of the court's decision to dismiss her claims for damages pursuant to the Sunshine Act. The court of appeals affirmed.

Where a failure to follow the dictates of the Sunshine Act results in no penalty to the governmental body at fault, as in this case, the public's interest in observing and ensuring the fairness of the procedures followed is thwarted, and its interest in governmental affairs is heavily implicated.

In this case, the court of appeals determined that Newell's action should have been filed quo warranto, because the remedy she sought personally—the removal of the fire chief and retesting of the candidates—was identical to that she sought on behalf of the public because the elements of proof in both cases were the same. This ruling negatively affects the public's confidence in government, as the court of appeals had no jurisdiction in quo warranto to grant the remedies available under the Sunshine Law.

Public confidence in government is essential to maintaining the public respect upon which the system relies.

STATEMENT OF THE CASE AND FACTS

Sometime in April, 2004 the chief of the City of Jackson, Ohio's fire department announced his resignation, effective June 30, 2004. That same month, at a meeting on April 8, 2004, William E. Williams was appointed chairman of the Jackson Civil Service Commission. Williams had only recently been appointed to the Commission, whose other members were Urias Hall and Max Ross.

The April 8, meeting was “informal, although several items were discussed, such as organization and the opening for the fire chief’s position. There is no record of any public announcement that the April 8, meeting would occur, and no notes were taken.

Sometime after April 8, 2004, the Jackson City Safety Director notified Williams that the fire chief would be resigning and that the Commission would have to meet. Other members of the Commission were notified of the meeting, to be held on April 27, 2004. As in the case of the April 8, 2004 meeting, there is no record of any public announcement and no record of the meeting.

At the April 27, 2004 meeting, the commissioners discussed the upcoming vacancy in the fire chief’s position and decided to give an exam. Williams testified that the members of the Commission did not put the issue up to a vote, nor did he recall a vote ever being taken by the Commission.

An exam was ordered and Williams received it on August 16, 2004. Williams kept it at his home. Neither Williams nor Hall could recall if another meeting was held until October 8, 2004, at which time, according to Williams, he set the date for the exam. Nevertheless, a notice was put together and posted sometime in September, 2004 asking for applications to be submitted between September 16 and October 18, 2004. Williams was unable to explain this discrepancy. However, Hall’s affidavit, attached to the Complaint in this action as Exhibit C indicates that both he and Williams were involved in setting the examination date.

On October 8, 2004 a meeting was held regarding applicants for the examination. Only Hall and Williams attended, according to Williams, but Hall said that all three members were present. There was no public announcement of the meeting, and no minutes were kept or

approved. Though Williams could not recall reviewing the applications, on that date he and Hall signed a letter directed to Douglas Reed, one of the applicants, asking for clarification of his residence. Later, on October 14, 2004, Williams and Hall wrote back to Reed, in response to his clarification of his residence, that he was not eligible to be fire chief. There is no record of any meeting of the Commission being held between the dates of October 8, 2004 and October 14, 2004 regarding a vote on Reed's application, nor is there any record of a public announcement. No minutes were taken or approved.

Williams and Hall attempted to administer the test on October 18, 2004 but decided against it because a fire detained some of the applicants. They then rescheduled the exam for October 21, 2004. No formal meeting was held, no announcement was made, and no minutes were taken and approved.

Williams and Hall resigned from the Commission before October 21, 2004, and the test was not given in 2004. During his time as chairman of the Commission, Williams could not recall that minutes were ever taken and approved, nor whether meetings were announced to the public. Nor did Hall ever see any minutes.

After Hall and Williams resigned, the Commission was reconstituted and Tom Perry became its chairman. He received notice of the next meeting of the Commission, scheduled for December 8, 2004 by telephone. There is no record that the December 8, 2004 meeting was announced to the public, although there is some evidence that it was, and minutes were taken. They were signed by Mr. Perry on December 16, 2004 without a meeting and there is no record they were ever approved by the Commission.

On January 27, 2005, the Commission held a meeting, but did not discuss the fire chief

position. Nevertheless, the examination was held on February 7, 2005, even though the Commission apparently did not vote on the issue. After the examination, the Commission chose Douglas Reed to fill the position.

In short, meetings of the Jackson Civil Service position were undertaken without public notice, without a record being made or approved, and often decisions were undertaken without a vote.

On appeal, the Jackson County Court of Appeals determined that, since removal of the fire chief could only be accomplished through a quo warranto action for which the trial court did not have jurisdiction, the other remedies available to the trial court, such as declaring the civil service exam itself null and void, granting statutory damages, attorneys fees and cost, were likewise unavailable, thus depriving the public of its remedy of deterring future misconduct by government officials

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: In reviewing a trial court's dismissal of a declaratory judgment action seeking relief for a governmental agency's failure to conform with statutory requirements in appointing a new fire chief, an appellate court should separately decide whether the commission failed to comply and grant relief accordingly, rather than ignore the violations because the complaint asked for relief on other grounds.

The trial court dismissed the action pursuant to its reading of Levinsky v. Boardman Twp. Civil Service Commission, 2004 Ohio 5931. The case is correctly decided by the trial court with respect to all issues except the allegation that the Commission failed to comply with the open meetings act, Ohio Revised Code section 121.22.

Ohio Revised Code section 121.22(C) states:

All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting. The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

A public body is defined by Ohio Revised Code section 121.22(B) as:

Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.

The Jackson Civil Service Commission is a public body by this definition.

Where the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend, the sunshine law requires that minutes of the meeting be recorded. State ex rel. Cincinnati Post v. City of Cincinnati, (1996), 76 Ohio St. 3d 540, 543, 668 N.E.2d 903. Ohio Revised Code section 121.22(B)(2) defines a "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members." In this case, members of Commission agreed to attend various meetings related to the examination and hiring of a new fire chief. No minutes were kept, and there is no record of any votes taken.

Ohio Revised Code section 121.22(I) manifestly grants jurisdiction to a court of common pleas to hear complaints of violations or threatened violations of the statutory

provisions and provides that, upon a finding of a violation or threatened violation, the court enjoin further violations, pay \$500, court costs and reasonable attorney's fees to the complaining party.

Moreover, Ohio Revised Code section 121.22(F) provides in relevant part:

Every public body shall, by rule, establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings.

The Commission's failure to provide public notification of the time and place of its regular meetings and the time place and purpose of its regular meetings voids its actions with regard to the examination and hiring of applicants for the position.

Ohio Revised Code section 121.22(H) provides:

A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

In this case, the Jackson Civil Service Commission's failure to give public notice of its meetings voids its actions with regard to the fire chief position. Appointment of Douglas Reed to the post was void ab initio. See, e.g. Doran v. Northmont Bd. of Educ. (2002), 147 Ohio App. 3d 268, 271, 770 N.E.2d 92; Hoops v. Jerusalem Twp. Bd. of Trustees (April 10, 1998) Lucas App. Case No. L-97-1240 (unreported).

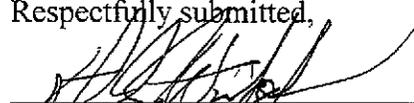
While the trial court did not have jurisdiction to unseat the fire chief, it did have jurisdiction to void the civil service exam, grant statutory damages, attorneys fees and costs. The appellate court did not have any jurisdiction to grant these remedies.

The court of appeals should have reversed the decision of the trial court with regard to statutory damages, attorney fees and costs, and remanded with instructions.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The need for fundamental fairness in the judicial system, for persons like the Appellant, who are accused of felonies, is important both for the public and the integrity of the judicial system. The Appellant requests that the court grant jurisdiction and allow this case so that the important issue presented in this case will be reviewed on the merits.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction was served this 18th day of October, 2007, upon the following:

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

Kida Newell,

Plaintiff-Appellant,

v.

City of Jackson, Ohio, et al.,

Defendants-Appellees.

FILED
Court Of Appeals
Jackson Co Ohio

SEP 06 2007

Seth I. Michael, Clerk
Dep.

Case No. 06CA19

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

William R. Biddlestone & David J. Winkelmann, BIDDLESTONE, WINKELMANN, BRADFORD & BAER CO., LPA, Athens, Ohio, for appellant.

Kevin L. Shoemaker, SHOEMAKER, HOWARTH & TAYLOR, LLP, Columbus, Ohio, for appellees.

Kline, J.:

{¶1} Kida Newell appeals the judgment of the Jackson County Court of Common Pleas dismissing her cause of action for lack of subject matter jurisdiction. Newell filed a "COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF" against the City of Jackson ("City"), the Civil Service Commission ("Commission"), and Doug Reed. She sought Reed's removal as fire chief by alleging (1) Reed lived outside the district and (2) the Commission violated the Sunshine Law. She asked the court to void the results of the fire chief examination that Reed passed (and she failed) and order the Commission to conduct another exam. The trial court characterized Newell's complaint as one seeking quo warranto relief and dismissed it for lack of subject matter jurisdiction. On appeal, Newell agrees that the trial court lacks subject matter

jurisdiction over her quo warranto action to remove Reed as fire chief. However, she contends that the trial court does have jurisdiction to consider an alleged Sunshine Law violation and that the trial court erred in dismissing that portion of her complaint.

Because the overall substance of Newell's complaint contains a cause of action for quo warranto relief (for Reed's ouster from office), we disagree. Accordingly, we affirm the judgment of the trial court.

i.

{¶2} Newell is a firefighter for the City. When the previous fire chief resigned, the City's Commission did not maintain a list of eligible persons for the position. To fill the position, the Commission conducted an examination. Reed received the only passing score on the examination and the City subsequently appointed Reed fire chief.

{¶3} Thereafter, Newell filed a complaint against the City, the Commission, and Reed, alleging that the Commission should not have allowed Reed to take the exam because he did not live in the applicable fire district. She further alleged that the Commission failed to follow the requirements of R.C. 121.22, Ohio's Sunshine Law, thus, invalidating any action of the Commission and the City in appointing Reed to the fire chief position.

{¶4} Newell seeks a declaration that the City's fire chief position is vacant. She also seeks an injunction enjoining the City from hiring Reed, forcing the Commission to hold another examination for the position, allowing Newell to sit for another examination, and forcing the City to "appoint a qualified individual to the position of Fire Chief as required by Ohio Revised Code section 124.44."

{¶15} The City and Reed moved to dismiss the action for lack of subject matter jurisdiction, pursuant to Civ.R. 12(B)(1) and Civ.R. 12(H)(3), on the grounds that Newell's complaint, in fact, seeks quo warranto relief and that the court of common pleas has no jurisdiction over such an action. Instead, they assert that the courts of appeal and the Ohio Supreme Court have original jurisdiction over such actions pursuant to the Ohio Constitution and the Ohio Revised Code.

{¶16} The court granted the motion to dismiss, holding that it "lacked jurisdiction to hear a Quo Warranto action, the jurisdiction of which is granted to the Courts of Appeal and the Ohio Supreme Court."

{¶17} Newell appeals the trial court's dismissal asserting the following assignment of error: "THE TRIAL COURT ERRED IN DISMISSING THE ACTION FOR LACK OF JURISDICTION AS THE DISMISSAL RELATES TO VIOLATIONS OF THE OPEN MEETINGS ACT."

II.

{¶18} Sections 2 and 3, Article IV, of the Ohio Constitution give the Ohio Supreme Court and the Courts of Appeal original jurisdiction to consider a writ of quo warranto. *State ex rel. Battin v. Bush* (1988), 40 Ohio St.3d 236, 238. See, also, R.C. 2733.03. Further, "[c]ommon pleas courts cannot order declaratory or injunctive relief which effectively provides quo warranto relief and thereby circumvent this specialized remedy." *Beasley v. City of East Cleveland* (1984), 20 Ohio App.3d 370; see, also, *Levinsky v. Boardman Twp. Civ. Serv. Comm.*, Mahoning App. No. 03 MA 36, 2004-Ohio-5931; 79 Ohio Jur.3d, Quo Warranto, Section 6. "In order for a writ of quo

warranto to issue, a relator must establish (1) that the office is being unlawfully held and exercised by respondent, and (2) that relator is entitled to the office. (Cites omitted.)” *State ex rel. Paluf v. Feneli* (1994), 69 Ohio St.3d 138, 141. The exclusive action to test the right to an office is quo warranto. *Levinsky* at ¶27.

{¶9} Newell agrees that the trial court does not have subject matter jurisdiction over her quo warranto action seeking Reed’s removal from office. Instead, she contends that the trial court erred in dismissing the part of her complaint alleging that the Commission failed to comply with the Sunshine Law. She asserts that the trial court does have subject matter jurisdiction to hear a complaint involving the Sunshine Law and maintains that she is entitled to \$500, costs and attorney fees as a result of those violations.

{¶10} R.C. 121.22(l)(1) provides that “[a]ny person may bring an action to enforce” the Sunshine Law, and “[u]pon proof of a violation or threatened violation * * * in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.” See, also, *McVey v. Carthage Township Trustees*, Athens App. No. 04CA44, 2005-Ohio-2869, ¶8. Pursuant to R.C. 121.22(l)(2)(a), if the trial court “issues an injunction pursuant to division (l)(1) * * *, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (l)(2) of this section, reasonable attorney’s fees.”

{¶11} The City, Commission, and Reed, however, claim that despite allegations of Sunshine Law violations, the core of Newell's complaint seeks quo warranto relief. The crux of their argument is that Newell did not state a separate cause of action for a violation of the Sunshine Law. Instead, they maintain that Newell's allegation of a Sunshine Law violation is one reason Newell provides to support her quo warranto cause of action for Reed's removal.

{¶12} "The existence of the trial court's subject matter jurisdiction is a question of law[.]" *Yazdani-Isfehiani v. Yazdani-Isfehiani*, 170 Ohio App.3d 1, 2006-Ohio-7105, ¶20. We review questions of law de novo. *Id.*

{¶13} "[W]hen dealing with extraordinary writs, it is imperative to look to substance over form* * *." *Levinsky* at ¶31. The reason behind such an approach is because "[v]irtually every challenge to another's title to a public office can be phrased as a declaratory relief action seeking interpretation of some underlying constitutional or legislative provision. If that ploy were allowed, counsel could avoid the mandated quo warranto remedy which must be filed in designated appellate courts.' (Cite omitted.)" *Id.*

{¶14} As such, once a person has already taken public office, the only appropriate remedy to remove that person is "an action for quo warranto." *Plotts v. Hodge* (1997), 124 Ohio App.3d 508, 513. "If the trial court still had jurisdiction to consider a complaint for declaratory judgment or injunction after the replacement was seated * * * the trial court would, in effect, be permitted to tread upon the exclusive jurisdiction of the appellate courts and the Supreme Court of Ohio in quo warranto because the

declaratory judgment would of necessity determine many of the very issues that must be ruled upon in a quo warranto proceeding.” *Id.* The *Plotts* rationale applies here.

{¶15} Here, Newell filed a “COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF” in the common pleas court. She prayed for the following relief:

1. Declare the rights and obligations of the parties as follows:
 - a. That the failure of the defendant Commission to follow the requirements of § 121.22 of the Ohio Revised Code renders any actions taken by the commission void.
 - b. That the action taken by the City in hiring the current Fire Chief based on the void actions of the Commission is also invalid and void and that the position of Fire Chief of the Jackson City Fire Department be declared vacant.
 - c. That the examination given February 7, 2005 for the position of Fire Chief be declared void and a new examination for that position must be given.
2. Issue preliminary and permanent injunctive relief as follows:
 - a. Enjoin the hiring of Doug Reed as Fire Chief of the Jackson City Fire Department.
 - b. Mandatorily enjoin the defendant Commission to hold a written competitive promotional examination for the position of Fire Chief and certify the results thereof to the appointing authority forthwith;
 - c. Enjoin the defendant Commission to permit the plaintiff to sit for said examination and to refuse to allow persons who do not meet the residency and work location requirements from sitting for said examination;
 - d. Enjoin the defendant City, the appointing authority, to appoint a qualified individual to the position of Fire Chief as required by Ohio Revised Code section 124.44.
3. Order an award of reasonable attorneys’ fees, statutory penalties and costs to the plaintiff.

{¶16} Newell's complaint on its face is couched as a request for declaratory judgment and injunctive relief. However, the substance of her pleading asks the court to remove Reed from the office of fire chief. In addition, it seeks to enjoin the City from filling the position until another examination is given to fill the position. For that to occur, the court must first remove Reed for a proper reason. Newell claims that two reasons for Reed's removal are that (1) he does not live within the fire district and (2) the Commission violated the Sunshine Law. However, as we stated earlier, common pleas courts cannot order declaratory or injunctive relief that effectively provides quo warranto relief and circumvents this specialized remedy. See, also, *Unirea Societatilor Romane Carpatina of Cleveland v. Suba* (1998), 130 Ohio App.3d 538, 541.

{¶17} Newell's alleged Sunshine Law violation claim is not "separate and discrete" from her dismissed quo warranto action. Compare *School Dist. Bd. of Edn. v. Edn. Serv. Ctr.*, 158 Ohio App.3d 253, 2004-Ohio-4256, ¶18. In *School Dist.*, a local school district challenged resolutions that created a new school district on the grounds that the resolutions were adopted in violation of the Sunshine Law and because the resolutions did not comply with R.C. 3311.26, which "governs the creation of new local school districts." *Id.*, at ¶¶4, 14. This court held that the local school board's Sunshine Law claim was "separate and discrete" from R.C. 3311.26. Thus, the local school board had standing to pursue its Sunshine Law claims despite its lack of standing to challenge the creation of a new school district under R.C. 3311.26 because the focus of the Sunshine Law claim was "on the process used to adopt the resolution[.]" not a challenge to "the contents of the resolution." *Id.* at ¶18.

{¶18} However, here, Newell's Sunshine Law claim and quo warranto action both focus on whether the Commission "complied with the open-meeting requirements." *Id.* Stated differently, the elements that Newell must prove to establish a Sunshine Law violation are elements that must be proved in a quo warranto action. Therefore, unlike *School Dist.*, Newell's Sunshine Law claim is not "separate and discrete" from the quo warranto action. See *id.* at ¶¶18-19.

{¶19} Further, injunctive relief is not proper in this case because Reed has already taken office as fire chief. The *Plotts* court held that "the trial court could not issue an injunction to prevent events that had already occurred, the vote [to] oust appellant and the seating of his replacement, and is specifically deprived of jurisdiction to issue an order to oust the replacement from the seat." *Plotts* at 513. The *Plotts* holding is sensible in light of the purpose behind the equitable remedy of an injunction, which is "to prevent future injury and not to redress past wrongs." *Athens Metro. Housing Auth. v. Pierson*, Athens App. Nos. 01CA28, 01CA29, 2002-Ohio-2164.

{¶20} Therefore, if the City wrongfully appointed Reed because (1) Reed lived outside the district and (2) the Commission violated the Sunshine Law, then the proper course to effect Reed's removal is through a quo warranto action.

{¶21} Consequently, because Newell's complaint challenges Reed's title to public office and seeks his removal, we find that the substance of Newell's complaint seeks quo warranto relief, over which the common pleas court lacks subject matter jurisdiction.

{¶22} Accordingly, we overrule Newell's assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment Only.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: 

Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.