

**IN THE SUPREME COURT OF OHIO**

EMMILLIE RADCLIFF )  
983 Hilbish Avenue )  
Akron, OH 44221 )

Petitioner/Cross-appellee )

vs. )

STEEN ELECTRIC, INC. )  
1484 Main Street )  
Cuyahoga Falls, OH 44221 )

and )

ROBERT STEEN )  
c/o Steen Electric Inc. )  
1484 Main Street )  
Cuyahoga Falls, OH 44221 )

Respondents/Cross-appellants )

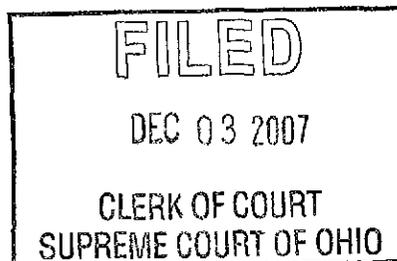
and )

THEODORE GOUMAS )  
3842 Woodthrush Road )  
Akron, OH 44333 )

Respondent. )

CASE NO.: 2007-2107

On appeal from the Court of Appeals  
for Summit County, Ninth Judicial District  
Case No. 23460 (September 28, 2007)



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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF RESPONDENTS/CROSS-APPELLANTS STEEN ELECTRIC, INC. ET AL.**

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## I. STATEMENT OF PUBLIC OR GREAT GENERAL INTEREST

This case involves several issues relating to both employment and procedural law in Ohio that are of compelling interest to the state and public, necessary for this Court's recent jurisprudence on wrongful discharge in violation of public policy, and also would constitute plain error and injustice to permit the appellate decision to remain viable. This Court's granting of *certiorari* on Steen's cross-appeal is vital for the reasons below.

The Ninth District's decision is confusing at best, but holds in part that a plaintiff is permitted to pursue an independent claim of wrongful discharge in violation of public policy based on Chapter 4112, in direct contravention of this Court's recent holding in *Leininger v. Pioneer Latex*, 2007-Ohio-4921. As this Court has consistently held since 2002, a plaintiff asserting the tort of wrongful discharge in violation of the public policy must prove the jeopardy element, in this case meaning that without a common-law tort claim for wrongful discharge based upon a sexually hostile work environment, Ohio's clear policy against sexual harassment would be violated. However, as this Court held in *Leininger*, the Ohio Civil Rights Act provides full remedies for actual or constructive discharge based on hostile environment sexual harassment. Appellee simply cannot prove the jeopardy element of a wrongful discharge tort. Thus, this case presents the opportunity and need to correct the decision of the Ninth District and properly apply this Court's recent holding in *Leininger*.<sup>1</sup>

Second, this Court to further develop the law as it pertains to wrongful discharge in violation of public policy in Ohio by answering the question of whether a plaintiff

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<sup>1</sup> Throughout the appeal, Appellants Steen argued this issue based on *Wiles v. Medina Auto Parts*, 2002-Ohio- 3994, 96 Ohio St. 3d 240. The *Leininger* decision was also provided to the appellate court as a supplemental authority shortly before the decision in this case, but to no avail.

must introduce evidence at trial that he or she was an employee at-will, assuming he or she is even entitled to a claim of wrongful discharge in violation of public policy, pursuant to such holdings in *Strausbaugh v. Ohio Dep't. of Transportation* (8<sup>th</sup> Dist), 150 Ohio App. 3d 438, 449 P 32, and *Kusens v. Pascal, Inc.* (6<sup>th</sup> Cir. 2006), 448 F.3d 349, 364 (plaintiff in a wrongful discharge claim must prove she was an at-will employee).

Third, this Court's intervention and vacation of the Ninth District's decision resurrecting the hostile environment claim under Chapter 4112 was clearly in error. As plainly shown by the orders of the trial court, the court *overruled* directed verdict on the statutory claim and thus the Ninth District had no jurisdiction to entertain any appeal on that claim by Appellee. If this decision were permitted to stand, an appellate court could render a determination of fact based on the denial of directed verdict which the plaintiff later elected not to submit to the jury, but only tried to resurrect for the first time on appeal and at oral argument. This is in direct contravention of R.C. 2505.02, which holds that denials of dispositive motions (such as directed verdict) are not final appealable orders and reviewing courts are without jurisdiction to hear them.

Moreover, a plaintiff cannot as a matter of law raise an issue on appeal that was never decided or submitted to the jury -- by the plaintiff's own election at trial. The procedural posture of this case, and the substantive holdings of the appellate court, would reduce to the absurd if permitted to stand. The vital public interest in justice, clarity, and consistency with this Court's precedent must be preserved, and the lone only way to do so is to vacate the appellate court decision reinstate the original decision and verdict, in line with *Leininger* and R.C. 2505.02.

## II. STATEMENT OF THE CASE AND PERTINENT FACTS

This cross-appeal is not about the facts of the case, but about the applicable law and procedural posture of this case at the time the Ninth District rendered its decision – several days after this Court’s decision in *Leininger*.

Petitioner/Cross-appellee Emmilie Radcliff (“Radcliff”) filed this case on November 7, 2002 against Respondents/Cross-appellants Steen Electric, Inc., owners Robert Steen (collectively referred to as “Steen”), and a non-employee, Respondent Theodore Goumas (“Goumas”). Radcliff alleged the following claims against Steen: 1) common-law wrongful discharge in violation of public policy (based on a theory of hostile work environment causing her constructive discharge), 2) intentional infliction of emotional distress, 3) negligent infliction of emotional distress, 4) negligent hiring and/or retention, 5) age discrimination; and 6) assault against Robert Steen and Goumas. Goumas counterclaimed with a claim of defamation and request for punitive damages.

It is undisputed that Count One of the Complaint against Steen was for “wrongful discharge” and Radcliff factually alleged that she was subjected to a hostile environment and constructively discharged. No mention of any statute or Chapter 4112 was made in the wrongful discharge count or anywhere in the complaint with respect to Radcliff’s alleged constructive discharge based on hostile work environment.<sup>2</sup>

Steen moved for summary judgment on all claims, which was granted by the trial court except as to the assault claims against Robert Steen and Theodore Goumas individually. A jury trial was held on the assault claims in 2005, adducing most of the

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<sup>2</sup> In contrast, in Count 5 of the complaint, Radcliff specifically cited and invoked R.C. 4112.02 and 4112.99 as the basis for her age discrimination claim, making them direct statutory claims.

evidence of the alleged hostile work environment though no such claim was tried. After a very short deliberation, a unanimous jury found for the defendants.

Radcliff appealed the summary judgment on the wrongful (constructive) discharge based on hostile work environment and the IIED claim; she did not appeal either the verdicts or her other employment claims. The Ninth District Court of Appeals reversed summary judgment as to both Radcliff's IIED and wrongful discharge claims. As part of its decision, the first appellate court stated in its opinion that as to Count I: "Appellant [Radcliff] asserted that the Steen brothers were employers within the meaning of 4112.01(A)(2). Accordingly, this Court construes her complaint within R.C. Chapter 4112." (Exhibit C, Opinion and Decision, Case No. 22407 ("*Radcliff I*,"), P 16).

In August 2006, second trial commenced on Radcliff's wrongful discharge and IIED claims, as well as her hostile environment under Chapter 4112. After the close of evidence, Steen moved for directed verdict, arguing: 1) Radcliff never pleaded a separate hostile environment/constructive discharge claim under Chapter 4112; 2) there was no wrongful discharge claim in violation of public policy on the authority of *Wiles*; 3) there was no wrongful discharge claim in violation of public policy because Radcliffe never put forth evidence that she was an "at-will" employee – indeed, she testified that she was not at-will and had been promised a job until her retirement at age 65; and 4) Radcliff had not shown sufficient evidence on which to prevail factually on any of her claims.

At the directed verdict argument, Radcliff's counsel argued that, although he had pleaded Count I as a wrongful-discharge/public-policy claim, he also meant to include an additional "statutory" hostile environment claim." The trial court agreed and specifically

overruled directed verdict on the “statutory” hostile work environment/constructive discharge claim, also finding that the Ninth District had, in its first opinion, properly “construed” that there was a Chapter 4112 claim. (Ex. B, Directed Verdict Order, at 9-11; 17). Indeed, the trial court expressly found that the Ninth District in its first opinion had found the existence of a statutory claim based on the “totality” of the pleadings. (*Id.* at 17).

The trial court also denied directed verdict on the IIED claim. However, the trial court granted directed verdict on the wrongful discharge claim in violation of public policy, finding that Radcliff had failed to prove she was an at-will employee and had indeed argued her status was *not* at will, based on the authority of *Strausbaugh v. Ohio Dep’t. of Transportation* (8<sup>th</sup> Dist), 150 Ohio App. 3d 438, 449 P 32, and *Kusens v. Pascal, Inc.* (6<sup>th</sup> Cir. 2006), 448 F.3d 349, 364 (plaintiff must plead and prove she was at-will).<sup>3</sup>

The parties proceeded to present their jury instructions and extensively went over them with the trial court. Both parties agreed to the final instructions without objection. However, the statutory 4112 hostile-environment claim *was never presented to the jury, nor were any instructions for that claim given.* This was done without objection or comment by Radcliff’s attorney, and it is undisputed that the lone claims submitted to the jury (and also subjects of the closing arguments) were the IIED claim and Mr. Goumas’ defamation claim against Radcliff – which was tried at the same time as the case against

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<sup>3</sup> The trial court considered but rejected arguments based on *Wiles v. Medina Auto Parts*, 2002-Ohio-3994, 96 Ohio St. 3d 240. This issue is now rendered moot in the wake of *Leininger*, 2007-Ohio-4921, which held that there can be no common-law wrongful discharge tort based on Chapter 4112 claims, which provide the full panoply of remedies.

Petitioners Steen.

Thus, it is undisputed that Radcliff, whether through neglect or election, never presented the alleged “statutory claim” under Chapter 4112 to the jury. Nor did she appeal on this issue – indeed, such an appeal is foreclosed by R.C. 2505.02 – as there was no final appealable order or verdict on the Chapter 4112 claim from which to appeal.

After deliberating less than 45 minutes, the jury unanimously returned a verdict in favor of Steen on the lone IIED claim, and also unanimously found for Goumas on his defamation *per se* claim against Radcliff, awarding Goumas \$36,600 in compensatory damages and \$5,000 in punitive damages because Radcliff had falsely accused him of exposing his penis to her and her son, a non-employee who was present on the day in question.<sup>4</sup>

After the second trial, Radcliff filed a notice of appeal, appealing the following orders of the court: 1) judgment on the jury verdicts; 2) nunc pro tunc amended judgment on jury verdicts; 3) judgment awarding attorneys fees; 4) opinion and judgment entry regarding Radcliff’s JNOV motion; and 5) “all additional orders and judgment now appealable.” (Exhibit A, Notice of Appeal). Notably, only No. 5 of the Notice of Appeal related to Steen, et al; all of the other assignments of error related to Goumas’ claim of defamation *per se* against Radcliff, and the jury’s verdict in favor of Goumas.

Moreover, in the Notice of Appeal Radcliff did not even directly invoke or appeal the directed verdict in this case, but only vaguely relied on “all other appealable” orders. As the record makes clear, Radcliff, by election or neglect, never presented her viable Chapter 4112 statutory hostile-environment /constructive discharge claim to the jury; nor

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<sup>4</sup> The trial court later awarded Goumas’ counsel \$28,890 in attorney fees following a fee hearing.

did she appeal or object to the lack of jury instructions presented to the jury on the Chapter 4112 claim. Yet, on appeal (particularly at oral argument), she argued that she had been “denied” the hostile environment constructive discharge “statutory claim,” as noted in the Ninth District’s second opinion. In its decision, the Ninth District, like the trial court itself, separated the claims, finding two claims in Count I of Radcliff’s complaint: (Ex. A, *Radcliff II*, Case No. 23460, P. 20):

Initially, we note, as the trial court did, that it is unclear what type of claim Appellant alleged in her complaint. On appeal, Appellant argues that her claim was a “statutory constructive discharge claim [based on hostile environment]....Appellant’s complaint, therefore, appears to have combined two separate claims: a claim under R.C. 4112.02 or R.C. 4112.99 for sexual harassment *and* a claim for wrongful discharge in violation of public policy.

Thus, the appellate court construed two separate claims from Count I of Radcliff’s complaint: 1) statutory hostile environment/constructive discharge claim, and 2) wrongful discharge in violation of public policy. *Id.* At PP. 20-21.

However, the appellate court in its opinion ignored the fact that the trial court had *already likewise* construed Count I as two separate claims, one statutory and one common-law, and *denied* directed verdict on the statutory hostile environment claim. Further, the appellate court failed to address the fact that Radcliff had elected not to submit her statutory wrongful discharge claim to the jury and only submitted the IIED claim.<sup>5</sup>

The Ninth District’s opinion is confusing, but appears to have reversed on *both claims*, neither of which is viable. (Ex. A, Opinion and Decision, Case No. 23460, PP

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<sup>5</sup> Indeed, it is clear from then-appellee Steens’ briefing at the second appeal that Steen had no notice that Radcliff had appealed or intended to appeal anything other than the directed verdict on the claim of wrongful discharge in violation of public policy.

19-21). In reaching its decision, the Ninth District did not address or even mention the express order of the trial court *overruling Steens' motion for directed verdict on Radcliff's Chapter 4112 claim* and almost exclusively referred back to its prior decision relating to the dismissal of this claim at the summary judgment stage of the proceedings.

Nor did the court of appeals discuss the fact that Radcliff had failed to prove that she was an at-will employee entitling her to maintain a wrongful discharge claim. Rather, it relied on its past decision reversing summary judgment on the hostile-environment/constructive discharge claim, indicating that, based on that past opinion, Steen was not even permitted to move for directed verdict at the trial. (Ex. A, Opinion and Decision, Case No. 23460, P 24 (“Accordingly the trial court had before it the same evidence that had been presented at the summary judgment stage of the proceedings.”)).<sup>6</sup>

Robert Steen and Steen Electric, Inc. now seek the jurisdiction of this Court to consider the issues raised by the Ninth District Court of Appeals' decision in as matter of public interest and concern, legal consistency, and also in the interests of justice. Since Radcliff's appeal raises issues strictly relating to Goumas's defamation claim against her, Steen's have no position relating to Radcliff's appeal.

### III. LAW AND ARGUMENT

#### Proposition of Law No. 1:

**There is no tort of wrongful discharge in violation of public policy based upon allegations of a sexually hostile work environment culminating in**

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<sup>6</sup> This also is not true; far more evidence and testimony, as well as exhibits, were presented at trial than at summary judgment, including testimony by Radcliff's son that she was a "tough old gal" and not fazed in the slightest by the isolated incident, as well as the undisputed finding as a matter of law during evidence that Goumas had not exposed himself to Radcliffe –which formed a large part of the discussion in the Ninth District's first opinion, *Radcliff I*, at PP. 31-37, and conceded in *Radcliff II* that the exposure never occurred. (Ex. A, *Radcliff II*, at P. 24).

**constructive discharge, as there are adequate remedies under the Ohio Civil Rights Act, per this Court's recent decision in *Leininger v. Pioneer Nat'l. Latex*, 2007-Ohio-4921.**

Turning first to the Ninth District's apparent reversal of the trial court's granting of directed verdict on the common-law wrongful/constructive discharge claim, under the authority and jurisprudence of this Court and the progeny of *Wiles* and, more directly, *Leininger*, the Ninth District erred in holding that Radcliffe was permitted to pursue both "statutory" and common-law wrongful discharge claims based on Chapter 4112.

In *Leininger*, this Court has expressly declared that there is no wrongful/constructive discharge based public policy found in Chapter 4112. *Id.*, at P12-P13, citing *Painter v. Graley*. (1994), 70 Ohio St.3d 377, 384, 1994 Ohio 334, 639 N.E.2d 52 and *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70, 1995 Ohio 135, 652 N.E.2d 653. Specifically, when a statutory scheme contains a full array of remedies, the underlying public policy will not be jeopardized if a common-law claim for wrongful discharge is not recognized based on that policy. *Id.*, at P27; *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 2002 Ohio 3994, 773 N.E.2d 526. Moreover, R.C. 4112.99 also provides an independent statutory civil action to seek redress for any form of discrimination identified in Chapter 4112. *Id.* citing *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056.

The Ninth District clearly erred in reversing the wrongful discharge claim contra this Court's case law – and indeed, contra to the Ninth District's own precedent. See *Coon v. Tech. Constr. Specialties, Inc.*, 2005 Ohio 4080 (no wrongful discharge claim premised on R.C. 4123.90, which affords adequate remedies).

Thus, the Ninth District's decision contravenes directly this Court and established public policy in the State of Ohio. *Certiorari* is necessary to ensure that this anomalous decision is not permitted to stand.

**Proposition of Law No. 2:**

**In order to prevail on a wrongful discharge claim, a Plaintiff is required to show that he or she was an at-will employee.**

The district court properly granted directed verdict on the wrongful discharge claim because Radcliff never adduced or put into evidence she was at-will; rather, it is undisputed she testified that she was *not* at will and had been promised employment through age 65.

To establish a claim for tortious violation of public policy, a plaintiff has to prove that (s)he was an employee at will. *Kusens v. Pascal Co.* (6th Cir. 2006), 448 F.3d 349, 364 citing *Strausbaugh v. Ohio Dept. of Transportation* (2002), 150 Ohio App.3d 438, 449, 2002 Ohio 6627, 782 N.E.2d 92, 100 *Haynes v. Zoological Soc. of Cincinnati* (1995), 73 Ohio St.3d 254, 258, 652 N.E.2d 948, 951; *Woods v. Miamisburg City Schools* (S.D. Ohio 2003), 254 F. Supp. 2d 868, 877 ("Although Ohio recognizes claims for discharge in violation of public policy, Ohio courts have repeatedly rejected attempts to expand that claim beyond the discharge of an at-will employee.").

Moreover, outside of the context of issues of contractual employment, there is no presumption that any employment is automatically "at will." *Kusens*, 448 F.3d at 366, ("However, these breach of contract cases do not control in questions concerning the burden of proof in a public policy tort claim."), citing *Mers v. Dispatch Printing Company* (1985), 19 Ohio St. 3d 100, 103, 19 Ohio B. 261, 483 N.E.2d 150, 153 and

other cases where the question of whether an employment contract was at issue.

In this case, as noted by the trial court when granting Steens' motion for directed verdict on Radcliff's wrongful discharge claim, there was no evidence that Radcliff was an at-will employee – quite the opposite in fact by her own testimony. Thus, the trial court was correct in applying this standard to the instant case.

**Proposition of Law No. 3:**

**An appellate court is without jurisdiction, pursuant to R.C. 2505.02, to decide an appeal of a claim where directed verdict under Chapter 4112 is denied, because such a denial is not a final, appealable order.**

A clear reading of the orders and directed verdict transcript of this case, as well as Radcliff's Notice of Appeal, show that the Ninth District plainly erred in determining that the trial court had not considered Appellee's Chapter 4112 claim – indeed the trial court *specifically* ordered it could go to a jury. The fact that Radcliffe chose not to submit it to the jury is dispositive of this aspect of her appeal, because there simply was nothing to appeal *on*.

Pursuant to RC 2505.02, an order is final and appealable only if it affects a substantial right, and in effect determines an action and *prevents judgment*. See *State ex rel. Hughes v. Celeste*, (1993) 67 Ohio St.3d 429, 619 N.E.2d 412. See, also, *Meyer v. Daniel* (1946) 147 Ohio St. 27, 67 N.E.2d 789 (an order denying judgment notwithstanding the verdict is not final and appealable); *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23 (order denying summary judgment is not final appealable); *Celebreeze v. Netzley* (1990) 51 Ohio St.3d 89, 554 N.E.2d 1292 (denial of summary judgment is not a final appealable order); *Polikoff v. Adam* (1993), 67 Ohio

St.3d 100, 616 N.E.2d 13 (generally, denial of motion to dismiss is not a final order and therefore not appealable).

In the instant case it is very clear that 1) the trial court construed Radcliff as having pleaded both a statutory Chapter 4112 claim and a common-law wrongful discharge claim in Count I of her complaint – as did the Ninth District court in its opinion in *Radcliffe II*. (See Ex. B, Directed Verdict, at 11, 17). Indeed, the court specifically ordered:

The Court: It's wrongful discharge slash or dash sexual harassment in the workplace. This invokes a whole set of laws, 4112 and the case law there under\*\*\*If he were to amend his complaint right now and add, by interlineations, 4112, you don't have an argument. \*\*\* I'm going to overrule your motion, but in the event of an adverse verdict, I invite you to renew that. \*\*\*

Steens' Counsel: Thank you, Your Honor. We do have more motions. Again, this is on the wrongful discharge claim. Dismissal is also warranted because the plaintiff never put in evidence of At-Will Employment in her case in chief and dismissal for that is required....\*\*\*

The Court to Radcliffe's counsel: Why didn't you put evidence of the wrongful discharge in?

Radcliff Counsel: I think we did, Your Honor. I think that these are hyper technical arguments that the Court of Appeals –

The Court: They are. They are technical. I'm not going to say hyper, but they are technical. Sixth Circuit case law [relying on Ohio law] evidently is and binding case law, particularly in the context of the public policy wrongful discharge. \*\*\* Our own Court of Appeals here relied heavily on the Sixth Circuit.<sup>7</sup> \*\*\*

The trial court again reiterated denial of directed verdict on the statutory 4112 hostile environment/constructive discharge claim (Ex. B. at 17, 23), but reserved ruling on the wrongful discharge claim until after lunch (*Id.* at 18). Upon reconvening, the trial court

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<sup>7</sup> In actuality, the *Kusens* Sixth Circuit case relied on the Ohio opinion in *Strausbaugh*, not the other way around, though it is irrelevant to the decision of the trial court.

directed verdict against Radcliff on the wrongful discharge claim. (Ex. B, Directed Verdict, at p. 3(a), at end).

Despite both the trial court's findings that Count I of the complaint actually comprised two claims – one statutory and one common-law wrongful discharge, Radcliff never submitted either claim to the jury. Yet, Radcliff (indirectly) appealed the directed verdict by her sweeping claim in her notice of appeal “All additional orders and judgment of the court *now appealable*.”

As an initial matter, filing of a notice of appeal is the jurisdictional prerequisite to a valid exercise of appellate jurisdiction. See *Wigton v. Lavender* (1984), 9 Ohio St. 3d 40, 43; R.C. 2505.04. This rule in no way counteracts or contradicts applicable rules of Ohio appellate procedure. See *Id.*, see, also, App. R. 3(B) and 4(A). Moreover, a notice of appeal “. . . shall designate the judgment, order or part thereof appealed from . . .”. App. R. 3(D). While Radcliff's notice of appeal did not expressly identify the directed verdict as an order being appealed from, it was clear from her notice of appeal and her brief that she was: 1) appealing the directed verdict granted by the trial court, and 2) not appealing the trial court's denial of Steens' directed verdict motion as to the statutory Chapter 4112 claim. Since the trial court only directed a verdict against her as to her common law wrongful discharge claim, this is the only possible employment-related claim she could appeal, for it was the only final, appealable order rendered with respect to her claims against Steen, save her adverse verdict on the IIED claim, which Radcliff admittedly abandoned on appeal.

In short, the question of whether Radcliff's complaint included a statutory

Chapter 4112 claim – in addition to the dismissed wrongful discharge claim -- was a non-issue at the appellate court. The appellate court was without jurisdiction to hear the statutory constructive discharge claim for the precise reason that it was never dismissed by the trial court.

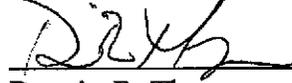
Indeed, it would appear that the appellate court did not review the record or order on the directed verdict of the wrongful discharge claim, because it argued the trial court had “failed” to separate the two claims in Count I, when in fact the trial court expressly found two separate claims. (Exhibit A, *Radcliff I*, Opinion and Decision, PP. 20-24).

Thus, the Ninth District lacked jurisdiction to reverse the undismissed but waived statutory claim, and also committed plain error in doing so. Moreover, it also erred by stating, in essence, that Steen, et al, were prevented from moving for directed verdict on the lack of evidence in the case based on its prior opinion reversing summary judgment in *Radcliff I*. It is axiomatic that an appellate court’s prior decision on summary judgment cannot be used as a bullet-proof shield to protect against a party’s failure to produce evidence to support their claim or defense during the actual trial of the matter.

#### **IV. CONCLUSION AND RELIEF SOUGHT**

Based on the foregoing, Appellees/Cross-appellants Steen, et al., respectfully request that this Court grant them *certiorari* and hear the full appeal on the merits interests of the public, legal consistency in Ohio, and simple justice.

Respectfully submitted,



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ATTORNEYS FOR  
RESPONDENTS/CROSS-  
APPELLANTS  
STEEN ELECTRIC, INC.,  
ROBERT STEEN

### CERTIFICATE OF SERVICE

A copy of the foregoing was sent to Kevin Breen, Attorney for Petitioner/Cross-Appellee Emmelie Radcliff, at his office located at The Hermes Building, 43 E. Market street, Suite 202, Akron, Ohio 44308, and Ida McDonald, Attorney for Respondent Theodore Goumas, at her office located at 265 South Main Street, First Floor Akron, Ohio 44308 via regular U.S. mail this ~~28~~<sup>30</sup> day of November, 2007.

  
Dennis R. Thompson

STATE OF OHIO ) COURT OF APPEALS  
 ) DANIEL M. HOPKIN THE COURT OF APPEALS  
 ) ss: NINTH JUDICIAL DISTRICT  
COUNTY OF SUMMIT ) 2007 SEP 28 AM 8: 01

EMMILIE K. RADCLIFF ) SUMMIT COUNTY ) YA. No. 23460  
 ) CLERK OF COURTS

Appellant

v.

STEEN ELECTRIC, INC., et al.

Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2002 11 6330

DECISION AND JOURNAL ENTRY

Dated: September 28, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Judge.

{¶1} Appellant, Emmilie Radcliff, has appealed from the judgment of the Summit County Court of Common Pleas which granted directed verdicts to Appellees. This Court affirms in part and reverses in part.

I.

{¶2} Though this Court thoroughly laid out the underlying facts of this action in the first appeal of this matter, see *Radcliff v. Steen Elec., Inc.* (“*Radcliff I*”), 9th Dist. No. 22407, 2005-Ohio-5503, we reiterate the pertinent facts herein for ease of reference.

{¶3} Appellant worked as a bookkeeper at Appellee, Steen Electric, Inc. (“Steen Electric”), for twenty-seven years before ending her employment on August 23, 2002. During the late afternoon of that day, Appellant’s adult son, Kenny Forrer, came to Steen Electric to pick up Appellant and drive her home. Appellee Theodore Goumas, a personal friend and business associate of Appellees Robert and William Steen (“the Steen brothers”), was on Steen Electric premises at the time Forrer entered the premises to pick up Appellant. At that time, a series of incidents took place, which precipitated Appellant’s filing of her complaint on November 7, 2002.

{¶4} In her complaint, Appellant alleged that Mr. Goumas exposed his penis to her and to others; that Mr. Goumas used a banana to simulate a penis; and that Mr. Goumas asked Appellant whether she wanted the banana “for a snack on your way home.” Appellant further alleged that Mr. Goumas acted with the prior knowledge and consent of and at the direction of Steen Electric and the Steen brothers.

{¶5} Based on these allegations, Appellant alleged five counts in her complaint, to wit: Count One: wrongful termination of employment, i.e., constructive discharge premised on Appellees’ maintenance of a hostile work environment due to sexual harassment in the workplace; Count Two: negligent and/or intentional infliction of emotional distress; Count Three: age

discrimination; Count Four: negligent hiring, retention and supervision; and Count Five: assault.

{¶6} Steen Electric and the Steen brothers filed an answer and a single counterclaim, alleging that Appellant's claims were frivolous pursuant to R.C. 2323.51. Theodore Goumas filed an answer and three counterclaims, alleging that Appellant's claims were frivolous (without specific reference to R.C. 2323.51) and that Appellant's claims were filed for the purpose of slandering and libeling Goumas.

{¶7} Appellant filed a motion for summary judgment on each of the counterclaims. Additionally, Steen Electric and the Steen brothers filed a motion for summary judgment on their behalf and purportedly on Mr. Goumas' behalf in relation to Appellant's claims. The trial court granted Appellees' motion for summary judgment as to Count One (wrongful termination), Count Two (negligent infliction of emotional distress), Count Two (intentional infliction of emotional distress) as to all Steen defendants, Count Three (age discrimination), Count Four (negligent hiring, retention and supervision), and Count Five (assault) as to Steen Electric and William Steen. The trial court denied Appellees' motion for summary judgment as to Count Two (intentional infliction of emotional distress) as to Theodore Goumas, and Count Five (assault) as to Robert Steen. Appellant's final two claims were set for trial. The trial court also granted summary judgment in Appellant's favor on the claims of frivolous conduct. The

trial court, however, did not grant summary judgment on Goumas' claim for defamation.

{¶8} This Court reversed the trial court's grant of summary judgment on Appellant's claims of wrongful discharge through sexual harassment and intentional infliction of emotional distress as to the Steen defendants. While that appeal was pending, a jury trial was held on Appellant's claim of assault against Robert Steen and on her intentional infliction of emotional distress claim against Goumas. At the conclusion of that trial, the jury found for both defendants.

{¶9} The trial court then proceeded with a jury trial on Appellant's claim of wrongful discharge due to a hostile work environment and her claim of intentional infliction of emotional distress as to the Steen defendants. The trial also included Goumas' claim for defamation. At the conclusion of the trial, Appellees moved for directed verdicts on each of Appellant's claims. The trial court granted a directed verdict on those claims. As a result, Appellant's remaining claims were dismissed. Goumas' claim for defamation was submitted to the jury, and the jury awarded him \$70,490 for his defamation claim. Appellant moved for judgment notwithstanding the verdict, and that motion was denied by the trial court. Appellant has timely appealed the trial court's judgment, raising two assignments of error for review.

## II.

{¶10} In both of her assignments of error, Appellant contends that the trial court erred in granting directed verdict on her claims and by denying her motion for judgment notwithstanding the verdict on Goumas' defamation claim. Accordingly, we first detail our standard of review.

{¶11} Pursuant to Civ.R. 50(A)(4), a trial court is authorized to grant a directed verdict only when:

“[A]fter construing the evidence most strongly in favor of the party against whom the motion is directed, [the court] finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.”

When ruling on a motion for a directed verdict, the court considers the sufficiency of the evidence. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119, reversed on other grounds (1999), 85 Ohio St.3d 457.

“When a motion for a directed verdict is entered, what is being tested is a question of law; that is, the legal sufficiency of the evidence to take the case to the jury. This does not involve weighing the evidence or trying the credibility of witnesses; it is in the nature of a demurrer to the evidence and assumes the truth of the evidence supporting the facts essential to the claim of the party against whom the motion is directed, and gives to that party the benefit of all reasonable inferences from that evidence.” *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68; see, also *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-85.

{¶12} If the party opposing the motion for a directed verdict fails to present evidence on one or more of the essential elements of a claim, a directed verdict is

proper. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695. However, where evidence is presented such that reasonable minds could come to differing conclusions, the court should deny the motion. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275. Under the “reasonable minds” portion of Civ.R. 50(A)(4), the court is only required to consider whether there exists any evidence of probative value in support of the elements of the non-moving party’s claim. See *Coleman v. Excello-Textron Corp.* (1989), 60 Ohio App.3d 32, 40; *Ruta*, 69 Ohio St.2d at 69. This Court applies the same standard when evaluating a motion for judgment notwithstanding the verdict. *Rondy, Inc. v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21608, 2004-Ohio-835, at ¶5.

#### ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN DENYING PLAINTIFF’S MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE COUNTERCLAIM OF DEFENDANT THEODORE GOUMAS FOR DEFAMATION.”

{¶13} In her first assignment of error, Appellant asserts that the trial court erred in denying her motion for judgment notwithstanding the verdict on Goumas’ claim for defamation. We disagree.

{¶14} For Goumas to prevail on his claim of defamation, the evidence must establish (1) a false and defamatory statement concerning him, (2) publication of the statement, (3) fault, and (4) harm. *Earl v. Nelson*, 9th Dist. No. 04CA008622, 2006-Ohio-3341, at ¶24, citing *Williams v. Gannett Satellite*

*Information Network, Inc.*, 1st Dist. No. C-040635, 2005-Ohio-4141, at ¶5. Where the complaint alleges defamation per se, damages are presumed. *Williams* at ¶7. In order to establish a claim of defamation per se, Goumas was required to show that the words used in Appellant's statements fell into one of three categories, the relevant category being "the imputation of a charge of an indictable offense involving moral turpitude or infamous punishment[.]" *Id.* at ¶8.

{¶15} Prior to this trial, Appellant's claim for assault against Goumas was resolved by a jury trial which resulted in a verdict in favor of Goumas. As a result of that trial, the trial court held that issue preclusion prevented Appellant from arguing that Goumas had exposed his penis to her. On appeal, Appellant has not challenged that ruling by the trial court. Accordingly, we accept as true that Goumas did not expose himself to Appellant.

{¶16} Moreover, the evidence is undisputed that Appellant told others that Goumas had exposed himself to her. While Appellant argues that her statements were privileged because they were made in legal pleadings, this ignores the remaining evidence. Appellant admitted during her testimony that she told friends that Goumas exposed himself. Both Robert Steen and Inez Cames, employees of Steen Electric, testified that Appellant told them that Goumas had exposed his penis to her. Accordingly, uncontroverted evidence before the trial court indicated that Appellant had published false statements about Goumas.

{¶17} Moreover, the statements made by Appellant fit within the classic definition of defamation per se as they impute a crime to Goumas. R.C. 2907.09(A)(1) prohibits public indecency and provides as follows: “No person shall recklessly do any of the following, under circumstances in which the person’s conduct is likely to be viewed by and affront others who are in the person’s physical proximity and who are not members of the person’s household: \*\*\* Expose the person’s private parts[.]” Appellant’s statements directly and falsely imputed this crime to Goumas. Furthermore, contrary to Appellant’s assertions, it is irrelevant to our analysis that charges were not filed against Goumas based upon Appellant’s statements. As noted above, the elements of defamation per se do not require charges to be filed.

{¶18} Finally, as Goumas established that Appellant’s statements were defamatory per se, damages are presumed. Additionally, on appeal, Appellant has not challenged the amount of the damages awarded to Goumas. Accordingly, the evidence presented in the trial court established that Appellant published false statements about Goumas which imputed the crime of public indecency. The trial court, therefore, did not err in denying Appellant’s motion for judgment notwithstanding the verdict on Goumas’ claim for defamation.

#### **ASSIGNMENT OF ERROR II**

**“THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANTS STEEN ELECTRIC, INC., ROBERT STEEN AND WILLIAM**

STEEN ON PLAINTIFF'S CLAIM FOR CONSTRUCTIVE DISCHARGE."

{¶19} In her second assignment of error, Appellant asserts that the trial court erred in granting a directed verdict on her claim of wrongful termination. This Court agrees.

{¶20} Initially, we note, as the trial court did, that it is unclear what type of claim Appellant alleged in her complaint. On appeal, Appellant argues that her claim was a "statutory constructive discharge claim." In her complaint, Appellant alleged that the Steen brothers were employers as defined in R.C. 4112.01(A)(2). Appellant then captioned her count as "Wrongful Termination of Employment." Moreover, within that count, Appellant averred that the Steen brothers maintained a hostile work environment which constituted "unlawful sexual harassment in the workplace in violation of law and Ohio public policy." Appellant's complaint, therefore, appears to have combined two separate claims: a claim under R.C. 4112.02 or R.C. 4112.99 for sexual harassment *and* a claim for wrongful discharge in violation of public policy. However, this Court has previously "construe[d] her complaint within the context of R.C. Chapter 4112." *Radcliff I* at ¶16. Accordingly, the trial court was bound to construe the complaint in the same manner.

{¶21} The type of claim raised by Appellant is of vital importance to our analysis. Contrary to the trial court's conclusion, at-will employment is not a requirement to filing suit under R.C. Chapter 4112. A thorough review of case

law indicates that the at-will requirement only arises in a claim for wrongful discharge based upon public policy. In contrast, all employees are protected by the anti-discrimination regulations contained in R.C. Chapter 4112. As such, the trial court incorrectly concluded that Appellant could not maintain this action due to her failure to prove and plead that she was an at-will employee.

{¶22} As this Court previously determined that Appellant's complaint invoked R.C. Chapter 4112, we review the propriety of the trial court's directed verdict under that statutory scheme.

{¶23} This Court previously determined that a genuine issue of fact existed regarding Appellant's claim. *Radcliff I* at ¶16-38. With respect to her initial burden of demonstrating an intentional discriminatory practice, this Court previously held that Appellant "presented evidence of a collaborative effort between the Steen brothers and Goumas to subject appellant to \*\*\* sexually explicit conduct and conversations soon before she was to have taken a leave of absence from Steen Electric." *Id.* at ¶22. This evidence was introduced at trial as well. In fact, Goumas admitted at trial that he had used a banana to simulate a penis and had discussed his prank with the Steen brothers prior to performing it. This Court went on to hold that:

"[A]n employee's exposure to a penis, as well as another object used to simulate a penis, in the workplace, constitutes the type of harassment which would make an employee's resignation reasonably foreseeable.

“This court finds that this may be especially true when that conduct is perpetrated by a nonemployee with the tacit consent of the employer. In addition, appellant has presented evidence to demonstrate that the working conditions were so intolerable as to compel a reasonable person to resign.” *Id.* at ¶26-27.

¶24 This Court recognizes that the trial court herein established as a matter of law that Goumas did not expose himself to Appellant. As such, the facts presented herein differ slightly from when we reviewed *Radcliff I*. However, our directed verdict standard of review is nearly identical in nature to our summary judgment review. We must only determine whether there exists any evidence of probative value in support of the elements of the non-moving party’s claim. As noted above, Appellant presented evidence of discriminatory intent. Moreover, this Court previously determined that Appellant had provided evidence on each of the prongs of her claim of a hostile work environment. See *Radcliff I* at ¶31-37. This same evidence was presented at trial through Appellant’s testimony. Accordingly, the trial court had before it the same evidence that had been presented at the summary judgment stage of the proceedings. This Court determined that such evidence was sufficient to present to a jury. The trial court’s directed verdict ignores that conclusion. The trial court, therefore, erred in directing a verdict on Appellant’s claim. Appellant’s second assignment of error is sustained.

## III.

{¶25} Appellant's first assignment of error is overruled. Appellant's second assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

---

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to Emmilie Radcliff and the Steen defendants (Steen Electric, Inc., Robert Steen, and William Steen)

  
WILLIAM R. BAIRD  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

KEVIN J. BREEN, Attorney at Law, for Appellant.

DENNIS R. THOMPSON and CHRISTY BISHOP, Attorneys at Law, for Appellees, Steen Electric, Inc., Robert Steen, and William Steen.

IDA MACDONALD, Attorney at Law, for Appellee, Theodore Goumas.

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

- - -

EMMILIE RADCLIFF, )  
Appellant, )  
vs. ) C.A. No. 22407  
STEEN ELECTRIC, INC., ) VOLUME II  
et. al., )  
Appellees. )

- - -

BE IT REMEMBERED that upon the hearing of the excerpted above-entitled matter held at Summit County Courthouse - Civil Division, Akron, Ohio, and commencing on Wednesday the 23rd day of August, 2006, at 9:00 o'clock a.m., the following proceedings were had.

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3  
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9 On Behalf of the Appellee  
10 Theodore Goumas:

11 Law Offices of Ida MacDonald

12  
13 By: Ida MacDonald, Attorney at Law  
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17 On Behalf of the Appellee  
18 Steen Electric, Inc.:

19 Thompson & Bishop

20  
21 By: Dennis R. Thompson, Attorney at Law  
22 Christy B. Bishop, Attorney at Law  
23 2719 Manchester Road  
24 Akron, Ohio 44319

25  
- - -

1       \*\*\*

2                       THE COURT: You have any questions,  
3       counsel?

4                       MS. BISHOP: Yes, I do, Your Honor.  
5       At this time we'd like to make a motion for  
6       directed verdict. First, on the claim of  
7       wrongful discharge and violation of public  
8       policy. We have several bases for this, but,  
9       first, is a legal bases.

10                      As a matter of law, no wrongful  
11       discharge claim exists, because there's no  
12       jeopardy element. This is an issue of law for  
13       the Court and should be decided before this  
14       claim goes to a jury and we believe it  
15       adjudicates the claim all together. The  
16       authority for this is Wiles v Medina Auto Parts,  
17       Inc., 96 Ohio St.3d 240, specifically page 244;  
18       Koon versus Technical Construction Specialties,  
19       Inc., 9th District 2005. The number is 2005  
20       Ohio 4080 and Luz v Fairview Hospital, which is  
21       directly on point. 8th District 2004, 156 Ohio  
22       App.3d 387.

23                      Now, there must be four elements to  
24       succeed. Clarity and jeopardy are the two  
25       elements that are legal.

1 THE COURT: Say that again.

2 MS. BISHOP: Clarity and jeopardy  
3 are two legal elements. Clearly there's a  
4 clarity of element, we succeed at that.

5 THE COURT: There's a what?

6 MS. BISHOP: Clarity element, that  
7 hostile environment violates the public policy  
8 of Ohio. The jeopardy element is what's at  
9 issue here. The plaintiff chose to file the  
10 claims under wrongful discharge in violation of  
11 public policy rather than under the statute,  
12 which provides all of the remedies. That  
13 statute is R.C. 4112.02.

14 THE COURT: Can I see his complaint?  
15 Can I see exactly what he said? You know,  
16 counsel, that the Court of Appeals invoked the  
17 statute in its opinion.

18 MR. BREEN: It did invoke the  
19 statute, but it ignored the Wiles argument. It  
20 has since come done with Koon v Technical  
21 Construction, which is dispositive on this case,  
22 and, by the way, was our case, we were plaintiff  
23 in that case, dealing with very limited remedies  
24 under statutes.

25 THE COURT: You lost.

1                   MR. THOMPSON: Took away the jury  
2 verdict.

3                   MS. BISHOP: And that's on Workers'  
4 Compensation Retaliation, which has very few  
5 remedies, not even a jury trial.

6                   MR. THOMPSON: Has fewer remedies  
7 than 4112, but what they said was that gives  
8 adequate remedies, therefore, you have no public  
9 policy tort, because the statute itself provides  
10 adequate remedies.

11                   MS. BISHOP: And I'd like to direct  
12 your attention to this complaint, in particular  
13 where under Count Three, he invokes the statute  
14 for age discrimination yet under Count One,  
15 wrongful discharge, he does not.

16                   THE COURT: Aren't you on notice  
17 pleading here?

18                   MS. BISHOP: No. That is not the  
19 law. The law is -- the plaintiff has been put  
20 on notice of this since prior to the summary  
21 judgment of the last case -- well, this case,  
22 but years ago and also at appeals. In Lewis the  
23 plaintiff ignored doing anything or really  
24 arguing against it and the count was dismissed.  
25 The same happened in Wiles where it was bases on

1 the FMLA.

2 THE COURT: I'm looking for the  
3 Court of Appeals reference. I think this copy  
4 is --

5 MR. BREEN: It's paragraph 16,  
6 judge, on page 7.

7 THE COURT: Here it is. Here's what  
8 the Court of Appeals said, "In Count One of her  
9 complaint appellant alleged that appellees  
10 constructively discharged her by creating a  
11 hostile work environment, due to sexual  
12 harassment in the workplace. Appellant asserted  
13 that the Steen brothers were employers within  
14 the means of 4112.01(a)2. According to this  
15 court construes her complaint within the context  
16 of R.C. Chapter 4112.

17 MS. BISHOP: Context, and that's a  
18 correct -- that's correct by the court. You  
19 construe it under the context. In other words,  
20 the wrongful discharge claim is going to mirror  
21 what the context of what the statute says.

22 THE COURT: Did you argue that point  
23 in court?

24 MR. THOMPSON: We briefed it --

25 MS. BISHOP: We briefed it, and they

1 just didn't -- I think they missed it. I don't  
2 know.

3 THE COURT: I don't think they  
4 missed it. I think that -- let me make this  
5 legal proposition. If you're a pleading  
6 practitioner, you draft a complaint and you say  
7 wrongful discharge, sexual harassment in the  
8 workplace, don't you, don't you if so facto  
9 invoke the statute?

10 MS. BISHOP: Yes. You base -- base  
11 it on statute, but you do not file it underneath  
12 the statute. What the Court is concerned about  
13 here is a wide reaching wrongful discharge in  
14 violation of public policy. They're trying to  
15 narrow it down. What they say is this, whether  
16 or not you invoke the statute -- for example, in  
17 Wiles, they invoke the FMLA. They used the  
18 statute, but they did not file under it.

19 THE COURT: They invoked what?

20 MS. BISHOP: They invoked FMLA,  
21 Family Medical Leave Act.

22 MR. THOMPSON: Which was the sole  
23 source of public policy.

24 MS. BISHOP: Yeah, it's the sole  
25 source of public policy, as in this case, they

1 through it out. Because the Court says, "Look,  
2 you should have done it under the statute, you  
3 didn't, we're not going to create a public  
4 policy exception for something that you already  
5 had full remedies for.

6 THE COURT: What about notice  
7 pleading? When you say hostile work  
8 environment/sexual harassment in the workplace,  
9 what makes that valid and alive is the statute.

10 MR. THOMPSON: You need a whole set  
11 of jury instructions on hostile work  
12 environment. You haven't instructed them under  
13 4112 not under wrongful discharge. He's always  
14 admitted to wrongful discharge.

15 THE COURT: He's what?

16 MR. THOMPSON: Always admitted it's  
17 a wrongful discharge tort.

18 THE COURT: What do you say it is?

19 MR. THOMPSON: That's what we say it  
20 is. That's what I'm saying. What he's trying  
21 do at this point is say --

22 THE COURT: It's wrongful discharge  
23 slash or dash sexual harassment in the  
24 workplace. This invokes a whole set of laws,  
25 4112 and the case law thereunder.

1                   MS. BISHOP: Since this case came  
2 back there have been, literally, a dozens of  
3 cases all over the state of Ohio that found  
4 exactly this. You have a choice, the plaintiff  
5 I mean, to invoke under the statute or to try  
6 and rely on wrongful discharge, public policy.  
7 The court says you cannot do that, as a matter  
8 of law --

9                   THE COURT: I'm going to allow it.

10                   MS. BISHOP: -- because it doesn't  
11 jeopardize the law because there's already  
12 statute in place.

13                   THE COURT: This is based on new  
14 case law that's come down since?

15                   MS. BISHOP: No, it's not. Some of  
16 it's new. Some of it's old. Wiles is from  
17 2002, which is why we raised it to begin with.

18                   THE COURT: You're not caught by  
19 surprise, are you? I mean, you know the theory  
20 of his case.

21                   MR. THOMPSON: Because it doesn't  
22 pass --

23                   THE COURT: He magically invokes  
24 4112. You don't have argument.

25                   MS. BISHOP: I don't understand what

1 you mean, sir.

2 THE COURT: If he were to amend his  
3 complaint right now and add, by interlineation,  
4 4112, you don't have an argument.

5 MS. BISHOP: Well, if he were to  
6 amend his complaint to add 4112 --

7 MR. THOMPSON: The wrongful  
8 discharge claim still falls off.

9 THE COURT: Why?

10 MR. THOMPSON: Because you can't run  
11 by side. It's one or the other. You have a  
12 choice. You pick one or the other.

13 MS. BISHOP: At this point we would  
14 argue against --

15 MR. THOMPSON: Or 4112. It's  
16 different elements for each.

17 THE COURT: What are the elements?

18 MR. THOMPSON: For wrongful  
19 discharge you have the two elements at law,  
20 clarity and jeopardy, then you have to prove  
21 causation and that there's no justifiable  
22 legitimate overriding business reason, those are  
23 fact issues. The first two issues are jeopardy  
24 and clarity.

25 MS. BISHOP: Jeopardy cannot be met

1 here.

2 MR. THOMPSON: Under hostile work  
3 environment you've got to prove severe or  
4 pervasive, you've got the objective standard and  
5 the reasonable standard. You've got all that  
6 that goes in there.

7 MS. BISHOP: He still have to prove  
8 that, but in addition, these other things,  
9 because he chose to file under wrongful  
10 discharge, violation of public policy. It's  
11 very, very clear in the law of Ohio.

12 MR. THOMPSON: The jeopardy element  
13 is a matter of law.

14 THE COURT: Do you agree with me  
15 that the Court of Appeals has, evidently,  
16 corrected that deficiency?

17 MS. BISHOP: No, I do not. What the  
18 Court of Appeals said was he's basing the  
19 wrongful discharge claim on the statute -- on  
20 what the content of the statute is. The  
21 protections that it affords.

22 THE COURT: I'm going to overrule  
23 your motion, but in the event of an adverse  
24 verdict, I invite you to renew that.

25 MS. BISHOP: Thank you, Your Honor.

1 We do have more motions. Again, this is on the  
2 wrongful discharge claim.

3 Dismissal is also warranted because  
4 the plaintiff never put in evidence of At-Will  
5 Employment in her case in chief and dismissal  
6 under that is required. Authority for this just  
7 came out. It's called Kusens, K-u-s-e-n-s,  
8 Pascelco, Inc. 448 F.3d 349 Sixth Circuit 2006.

9 THE COURT: And what does it say?

10 MS. BISHOP: It says -- what it did  
11 is it threw out -- it overturned the verdict in  
12 favor -- how much was it, Denny? It was nine  
13 hundred and some thousand dollars. It was  
14 almost a million dollars on behalf of the  
15 plaintiff because the plaintiff never put into  
16 her case in chief that she was At-Will on  
17 wrongful discharge action. It also threw it out  
18 based on Wiles.

19 It's cited -- it's very harsh, but  
20 that's the law. It cited this case from Ohio,  
21 Strausbauch, S-t-r-a-u-s-b-a-c-h, the Ohio  
22 Department of Transportation, 150 Ohio App.3d  
23 438, "You must plead, in proof, the plaintiff  
24 was At-Will for wrongful discharge.

25 THE COURT: What do you say about

1 that?

2 MR. BREEN: Your Honor, all of these  
3 arguments have been made already prior to the  
4 Court of Appeals. We have the Court of Appeals'  
5 decision. There has been no motion for  
6 reconsideration to the extent they believe  
7 there's later authority that changes the  
8 validity of this decision. They have not moved  
9 for reconsideration of the Court of Appeals'  
10 decision.

11 THE COURT: The time has long gone  
12 for that.

13 MS. BISHOP: We don't need to move  
14 for reconsideration of any decision. We can  
15 raise this now. It's a matter of law.

16 MR. BREEN: I'm just saying this has  
17 never been -- nothing like this has been raised  
18 in the Court of Appeals to the extent that this  
19 decision that we got in 2005 is somehow not  
20 valid; nor has there been any filing in this  
21 court to that extent.

22 MS. BISHOP: Your Honor, the  
23 wrongful discharge claim could not be raised  
24 because it was never tried, so we can't argue  
25 what he has or hasn't put into his case.

1                   THE COURT: Why didn't you put  
2 evidence of the wrongful discharge in?

3                   MR. BREEN: I think we did, Your  
4 Honor. I think that these are hyper technical  
5 arguments that the Court of Appeals --

6                   THE COURT: They are. They are  
7 technical. I'm not going to say hyper, but they  
8 are technical. Sixth Circuit case law evidently  
9 is and binding case law, particularly, in the  
10 context of this public policy wrongful  
11 discharge.

12                   MR. BREEN: There's a body of law  
13 about that, but --

14                   THE COURT: Our own Court of Appeals  
15 here relied heavy on the Sixth Circuit.

16                   MR. BREEN: I know, but, as I say, I  
17 think that --

18                   THE COURT: You specialize in this  
19 area of the law. I don't know why you -- all  
20 you have to ask her -- when I ask the defense,  
21 the defendant brothers, are they At-Will, you  
22 want to reopen your case for that purpose?

23                   MS. BISHOP: Your Honor, we would  
24 object to that. He's rested. I've made my  
25 motion. As a practitioner, he ought to be aware

1 of this.

2 MR. BREEN: Whether or not somebody  
3 is at-will employee is a legal question, anyhow.  
4 If I were to say, "Are you an at-will employee,"  
5 ultimately, that's what courts decide. That's  
6 not a factual question.

7 THE COURT: Give me an opinion of  
8 the Court of Appeals decision.

9 Paragraph 17, and I quote, "Ohio  
10 courts 'Apply federal law precedent interpreting  
11 Title VII of the 1964 Civil Rights Act to cases  
12 involving violations of R.C Chapter 4112.'"

13 MR. BREEN: Correct.

14 THE COURT: Yet you did not have any  
15 reference to 4112 at all, and I'm giving you the  
16 benefit of the doubt because you did mention it  
17 in the context of another count, but here we are  
18 -- you haven't indicated at-will employment.  
19 Let me see that case.

20 MS. BISHOP: I have another case,  
21 also, just very quickly, I'd like to get on the  
22 record. It came out from the Southern District  
23 of Ohio in April. It's Stange, S-t-a-n-g-e,  
24 versus Deloitte & Touche, and that is Case  
25 Number 2:05CV590, and that case held, as well,

1 that the harassment case had an at-will remedy  
2 already existed at law for wrongful discharge --  
3 this just came out.

4 THE COURT: It said what?

5 THE WITNESS: Adequate remedy  
6 already existed at law for harassment --

7 THE COURT: What is it?

8 MS. BISHOP: No wrongful discharge.

9 THE COURT: Intentional infliction?

10 MS. BISHOP: No. No. It's a  
11 harassment case. Hostile environment, I'm  
12 sorry.

13 THE COURT: Say it again.

14 MS. BISHOP: There was already an  
15 adequate remedy at law.

16 THE COURT: What is it? What is the  
17 adequate remedy?

18 MS. BISHOP: Chapter 4112.

19 THE COURT: Well, that's what he  
20 invoked in his other count, so I'm giving him  
21 the benefit of the doubt.

22 MS. BISHOP: Same exact facts are  
23 here.

24 THE COURT: I'm more interested in  
25 this other point that you've raised.

1 Off the record.

2 (Discussion off the record.)

3 MS. BISHOP: There also talk about  
4 at-will employment as well on the issue.

5 THE COURT: That's the point I'm  
6 interested in, at-will.

7 MS. BISHOP: It talks about --

8 THE COURT: Rightly or wrongly I'm  
9 giving Mr. Breen the benefit of the doubt on  
10 4112, a, because the Court of Appeals did and,  
11 b, because I believe that it was correctly done  
12 because he did invoke it in part of the totality  
13 in the pleadings.

14 MS. BISHOP: Well, that's the  
15 language of the case and the holding was they  
16 reversed on that issue.

17 THE COURT: Well, what do you say,  
18 Counselor?

19 MR. BREEN: Couple of things; one is  
20 there's no -- I repeat that I think this is a  
21 hyper technical argument and that there's no  
22 reference whatsoever in the Court of Appeals'  
23 decision that somehow that is disqualifying.

24 In addition, whether or not somebody  
25 is an employee at-will is a legal question.

1 It's not factual. The presumption in Ohio --

2 THE COURT: You just say things  
3 without realizing what the courts have said.

4 MR. BREEN: The presumption in Ohio  
5 is that employment -- everybody's employment is  
6 at-will unless you have a contract. There's no  
7 evidence -- there has been no evidence that Mrs.  
8 Radcliff was a contract employee.

9 THE COURT: Well, they cite a case  
10 called Strausbaugh, S-t-r-a-u-s-b-a-u-g-h,  
11 versus The Ohio Department of Transportation,  
12 150 Ohio App.3d 438, 449. There's also a  
13 citation, the Internet citation, 2002 Ohio 6627,  
14 782 Ne.2d 92, 100(2002).

15 MS. BISHOP: Your Honor, this is the  
16 case, and I've marked the language.

17 THE COURT: Well, I'm going to take  
18 this under advisement during the lunch hour. I  
19 think to think about this. I think this is a  
20 serious point and may have no choice but to  
21 grant directive verdict on this.

22 MR. BREEN: I take them all  
23 seriously, Your Honor. Keep in mind that she  
24 became an employee in 1975 and I think that's  
25 the relevant time to look at what her status is

1 at Steen Electric.

2 MS. BISHOP: We disagree.

3 THE COURT: I don't know what her  
4 status is. You didn't ask her. You didn't ask  
5 anyone else.

6 MR. BREEN: What I'm suggesting is  
7 that if they're suggesting changes in the law  
8 and there's some pleading requirements after for  
9 her employment relationship when Steen Electric  
10 began, it's not applicable.

11 THE COURT: The case cited is  
12 Strausbauch decided in 2002.

13 MR. BREEN: And Mrs. Radcliff  
14 started working in 1975.

15 MS. BISHOP: That would mean that no  
16 law would apply?

17 THE COURT: What does that have to  
18 do with it? That doesn't have to do with  
19 anything.

20 MR. BREEN: Her status is defined,  
21 at that time, and the law is defined, at that  
22 time, as to these requirements.

23 THE COURT: Do you have any other  
24 motions?

25 MS. BISHOP: Yes, I do. As a matter

1 of matter, this is still dealing with the  
2 wrongful discharge, no reasonable juror could  
3 find for the plaintiff. I want to rely on  
4 Hampel v Food Ingredients Specialties, Inc., 89  
5 Ohio St.3d --

6 THE COURT: The defendant is  
7 actually Nestles.

8 MS. BISHOP: Oh, really. Ohio St.3d  
9 169, Judge Curran's case. "The plaintiff has to  
10 prove that the harassment was directed at her.  
11 That the harassment was unwelcomed. It was  
12 based on sex. Can't be of a personal nature.  
13 Severe or pervasive enough to alter her working  
14 conditions such that a reasonable person would  
15 have perceived it as sexual harassment and that  
16 the plaintiff perceived it as sexual harassment  
17 and the employer knew or should have known about  
18 the harassment."

19 THE COURT: All right. I understand  
20 your argument and it's -- also, I understand it;  
21 especially, because it's part of the charge and  
22 it's a factual argument that he didn't meet that  
23 proof and I'm going to allow you to perfect the  
24 record on that. I don't need anymore.

25 MS. BISHOP: All right. Number four

1 under wrongful discharge. There's no  
2 constructive discharge element here.  
3 Constructive discharge is not a claim in and of  
4 itself; it's derivative. It has to rely on  
5 something. Under *Mouzy v Kelly Services*, 75  
6 Ohio St.3d 578, they talk about inevitability  
7 and this has been by several courts been  
8 interpreted as -- here's one cite, *Hatfield v*  
9 *Supporting Counsel of Preventative Effort*, and  
10 that's 2004 Ohio 1478, "Where the employer's  
11 particular conduct would make a reasonable  
12 person believe that termination was imminent  
13 without that threat, actual or implied,  
14 resulting resignation is not in discharge," so  
15 we argue under that theory, as well.

16 THE COURT: Overruled.

17 MS. BISHOP: All right. On the IIED  
18 claim, intentional infliction of emotional  
19 distress, first of all, number one, this is an  
20 issue of law. It's clearly the law of Ohio  
21 where an agent is exonerated. The principle  
22 cannot be libel.

23 Now, it's very, very clear the  
24 plaintiff, throughout this entire litigation,  
25 has referred to Mr. Goumas as the agent of the

1 two principles, Bill and Bob Steen. The case I  
2 cite for this, aside from Hampel's two-issue  
3 rule which has already been covered, is Comer v  
4 Risko, that's C-o-m-e-r, R-i-s-k-o, 106 Ohio  
5 St.3d 185. The Court said this, "An agent who  
6 committed the tort is primarily libel for its  
7 actions while the principle is merely  
8 secondarily libel. Liability for the tortious  
9 conduct flows through the agent by virtue of the  
10 agency relationship to the principle. If  
11 there's no liability assigned to the agent, it  
12 logically follows that there's no liability  
13 imposed on the principle through the agent's  
14 actions.

15 THE COURT: What year is that case?

16 MS. BISHOP: That case is 2005.

17 That's standard --

18 THE COURT: That's standards  
19 Meecham's law of agency, but I think, factually,  
20 in this case -- well, let me present that by  
21 saying that that doctrine comes in when you have  
22 active versus passive liabilities.

23 In the context of this case, you  
24 have two control persons who actively  
25 participated in, allegedly, in some scheme to

1 pull a prank and so that's a different context.

2 MS. BISHOP: How does the agency  
3 theory come in? Plaintiff has been talking  
4 about that.

5 THE COURT: The argument would be  
6 that they participated in the prank, actively  
7 participated. Let me give you an example. If  
8 you have respondeat superior agent is driving --  
9 servant, we'll use a legal term. Servant  
10 meaning an employee as opposed to independent  
11 contractor -- is driving a truck on company  
12 business and the master's not with him, not  
13 directing him at that time, and he commits  
14 negligence and, allegedly, and he's exonerated,  
15 that exonerates the master, correct?

16 MR. THOMPSON: It does. Where's the  
17 evidence of the record that these guys  
18 participated in any scheme? Where did they get  
19 that evidence in?

20 THE COURT: I'm not saying they did.  
21 I'm saying the plaintiff claims that they did.

22 MR. THOMPSON: There's been no  
23 evidence.

24 THE COURT: One of the brothers -- I  
25 have to get this straight. One of the brothers

1     went outside and told the plaintiff's son to  
2     come in.

3                   MR. THOMPSON: With no knowledge of  
4     what the prank was. It wasn't directed to her.

5                   THE COURT: The jury is allow to  
6     draw inferences.

7                   MR. BREEN: Not only that, Your  
8     Honor, but you remember that Ted Goumas  
9     testified that he met with both Bob and Bill, or  
10    either of them, right before this prank, said  
11    that he was going to prank him.

12                  THE COURT: There's abundant  
13    evidence that the two of them -- one of the  
14    brothers -- I want to see if I'm correct here.  
15    Who's Bill and who's Bob?

16                  MR. THOMPSON: Bill is the one with  
17    the mustache. Bob is the one with the glasses.

18                  THE COURT: Bill took them down to  
19    the office, or was it Bob? Bob took everybody  
20    down to the office. Bill went outside or Bob  
21    went outside? Bob did everything, maybe Bill  
22    did nothing.

23                  MR. THOMPSON: But it still wasn't  
24    directed to Emmilie Radcliff. There's not one  
25    shred of evidence that anything was directed to

1 Emmilie Radcliff.

2 THE COURT: Well, the people can  
3 draw inferences.

4 Overruled on that point.

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2                   MS. BISHOP:  If I may, Your Honor.

3                   THE COURT:  This is the ruling of the  
4       Court, "The motion for directed verdict on Count  
5       One for wrongful discharge is granted."

6                   MS. BISHOP:  Thank you, Your Honor.

7                   THE COURT:  The motion for directed  
8       verdict on Count Two for intentional infliction  
9       of emotional distress is denied.

10                   Now, what other motions are pending?

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COPY

STATE OF OHIO

APPELLATE DIVISION  
) OCT 19 2005

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT

2005 OCT 19 AM 8:03

EMMILIE K. RADCLIFF

SUMMIT COUNTY C.A. No. 22407  
CLERK OF COURTS

Appellant

v.

STEEN ELECTRIC, INC., et al.

Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 02-11-6330

DECISION AND JOURNAL ENTRY

Dated: October 19, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Emmilie Radcliff, appeals from two orders out of the Summit County Court of Common Pleas. In the first, the trial court granted summary judgment in favor of appellees, Steen Electric, Inc., Robert Steen and William Steen, on certain of appellant's claims. In the second, a visiting judge, sitting by assignment, bifurcated the trial on appellant's remaining claims and

Theodore Goumas' counterclaims.<sup>1</sup> This Court affirms, in part, and reverses, in part.

I.

{¶2} Appellant worked as a bookkeeper at Steen Electric, Inc. ("Steen Electric") for twenty-seven years, before ending her employment on August 23, 2002. During the late afternoon of that day, appellant's adult son, Kenny Forrer, came to Steen Electric to pick up appellant and drive her home. Theodore Goumas, a personal friend and business associate of Robert and William Steen ("the Steen brothers"), was on Steen Electric premises at the time Mr. Forrer entered the premises to pick up appellant. There were a series of incidents at Steen Electric on August 23, 2002, which compelled appellant's filing of her complaint on November 7, 2002.

{¶3} In her complaint, appellant alleged that Mr. Goumas exposed his penis to her and to others; that Mr. Goumas used a banana to simulate a penis; and that Mr. Goumas asked appellant whether she wanted the banana "for a snack on your way home." Appellant further alleged that Mr. Goumas acted with the prior knowledge and consent and at the direction of Steen Electric and the Steen

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<sup>1</sup> Theodore Goumas was named as a defendant in the case below, and appellant raised an assignment of error in regard to the status of his counterclaims. Mr. Goumas did not file an appellate brief in this matter.

brothers. Based on these allegations, appellant alleged five counts in her complaint, to wit: Count One: wrongful termination of employment, i.e., constructive discharge premised on appellees' maintenance of a hostile work environment due to sexual harassment in the workplace; Count Two: negligent and/or intentional infliction of emotional distress; Count Three: age discrimination; Count Four: negligent hiring, retention and supervision; and Count Five: assault.

{¶4} Steen Electric and the Steen brothers filed an answer and a single counterclaim, alleging that appellant's claims were frivolous pursuant to R.C. 2323.51. Theodore Goumas filed an answer and three counterclaims, alleging that appellant's claims were frivolous (without specific reference to R.C. 2323.51) and that appellant's claims were filed for the purpose of slandering and libeling Goumas.

{¶5} Appellant filed a motion for summary judgment on the counterclaims of all four defendants.<sup>2</sup> Appellant argued that there was evidence to support her claim that all four defendants created a hostile work environment and

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<sup>2</sup> Appellant moved the trial court for summary judgment "on the Counterclaims filed by Defendants, Steen Electric, Inc., Robert Steen, William Steen and Theodore Goumas." Throughout the body of appellant's motion, however, she consistently referred to "Defendants' counterclaim" alleging frivolous conduct within the meaning of R.C. 2323.51, in the singular.

that she had established a prima facie case of age discrimination. In conclusion, appellant requested summary judgment on "Defendants' counterclaim alleging frivolous conduct." Appellant failed to address Mr. Goumas' two counterclaims alleging defamation.

{¶6} Only appellees Steen Electric and the Steen brothers responded to appellant's motion for summary judgment on the counterclaims. Mr. Goumas failed to file a response.

{¶7} Steen Electric and the Steen brothers filed a motion for summary judgment on their behalf and purportedly on Mr. Goumas' behalf in relation to appellant's claims. This Court takes well appellant's argument that, pursuant to Civ.R. 11, Mr. Goumas had no motion for summary judgment pending before the trial court; because neither Mr. Goumas nor his attorney signed any motion for summary judgment on his behalf. Appellant responded in opposition to appellees' motion for summary judgment.

{¶8} The trial court issued its order on the motions for summary judgment on September 15, 2004, considering appellees' motion as a motion in regard to Theodore Goumas, as well. The trial court granted appellees' motion for summary judgment in favor of appellees as to Count One (wrongful termination), Count Two (negligent infliction of emotional distress), Count Two (intentional infliction of emotional distress) as to all Steen defendants, Count Three (age discrimination), Count Four (negligent hiring, retention and supervision), and Count Five (assault)

as to Steen Electric and William Steen. The trial court denied appellees' motion for summary judgment as to Count Two (intentional infliction of emotional distress) as to Theodore Goumas, and Count Five (assault) as to Robert Steen.

{¶9} The trial court further issued its ruling on appellant's motion for summary judgment, stating in its entirety:

"Defendant has filed a counterclaim alleging malicious prosecution asserting there is no basis in law or fact for Plaintiff to bring this action. Plaintiff has filed a motion for summary judgment on the counterclaim. Defendant has replied.

"Pursuant to the findings above, the court finds that the Plaintiff does have a basis in law to bring this action. Therefore, Plaintiff's motion for summary judgment on the counterclaim is GRANTED."

{¶10} The remaining pending claims were scheduled for trial on September 21, 2004, before a visiting judge, sitting by assignment of the Ohio Supreme Court. There is no dispute that the visiting judge ordered bifurcation of trial on appellant's remaining claims and Mr. Goumas' counterclaims immediately prior to the commencement of trial, although there is no written order to that effect issued prior to trial. On October 20, 2004, the visiting judge issued an order, journalizing the jury's verdicts in favor of Robert Steen and Theodore Goumas in regard to appellant's claims. The visiting judge further recited the following:

"Prior to commencing the jury trial, the court ordered bifurcation of Defendant Theodore Goumas' counterclaim and trial proceeded only on Plaintiff's claims. Therefore, the counterclaim of Defendant Goumas remains pending in this court as a separate, independent cause of action."

It is not clear from the visiting judge's order of October 20, 2004, which of Mr. Goumas' counterclaims were bifurcated for later trial.

{¶11} Noting that all of appellant's claims had proceeded to final judgment, the visiting judge ordered that the October 20, 2004 order be final and appealable. Appellant timely appeals, raising three assignments of error for review.

## II.

### ASSIGNMENT OF ERROR I

**"THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR CONSTRUCTIVE DISCHARGE BASED UPON HOSTILE WORK ENVIRONMENT."**

{¶12} Appellant argues that the trial court erred by granting summary judgment in favor of appellees on appellant's claim alleging wrongful discharge. This Court agrees.

{¶13} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶14} Pursuant to Civ.R. 56(C), summary judgment is proper if:

- (1) No genuine issue as to any material fact remains to be litigated;
- (2) the moving party is entitled to judgment as a matter of law; and
- (3) it appears from the evidence that reasonable minds can come to

but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶15} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party’s pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶16} In count one of her complaint, appellant alleged that appellees constructively discharged her by creating a hostile work environment due to sexual harassment in the workplace. Appellant asserted that the Steen brothers were employers within the meaning of R.C. 4112.01(A)(2). Accordingly, this Court construes her complaint within the context of R.C. Chapter 4112.

{¶17} Ohio courts “apply federal law precedent interpreting Title VII of the 1964 Civil Rights Act to cases involving violations of R.C. Chapter 4112.”

*Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89, 95.

{¶18} The Sixth Circuit Court of Appeals has established the standards by which appellant might prove her constructive discharge claim based on sexual harassment.

“A finding of constructive discharge in this circuit requires an inquiry into both the objective feelings of the employee and the intent of the employer....This court has...held that ‘proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge, there must be other aggravating factors.’ We have also required some inquiry into the employer’s intent and the reasonably foreseeable impact of its conduct on the employee....Thus it would appear that the courts have been trying to create a two pronged test whereby the feelings of the reasonable employee would not be enough to show discharge without at least some foreseeability on the part of the employer.” (Omission sic.) *Wheeler v. The Southland Corp.* (C.A.6, 1989), 875 F.2d 1246, 1249.

{¶19} The *Wheeler* court continued that

“the constructive discharge issue depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer’s conduct upon the employee. This court has also endorsed the well recognized rule in labor relations that a man is held to intend the foreseeable consequences of his conduct. Therefore, an employee can establish a constructive discharge claim by showing that a reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged.” (Internal citations omitted.) *Id.*

{¶20} Accordingly, to prevail on her claim of constructive discharge premised on a hostile working environment based on sexual harassment, appellant must “show that a reasonable employer would have foreseen that she would

resign, given the sexual harassment she faced.” *Id.* Appellant, however, must first make the threshold showing that appellees engaged in intentional discriminatory practices, where her claim of constructive discharge is premised on sexual harassment. *Hixson v. Norfolk S. Ry. Co.* (June 10, 1996), C.A.6 No. 94-5832.

{¶21} The incidents at Steen Electric underlying appellant’s claim include Mr. Goumas’ alleged exposure of his penis in front of appellant and Mr. Goumas’ inquiry to Kenny Forrer in front of appellant whether Mr. Forrer would like the banana, which Goumas had earlier used to simulate a penis, for a snack. Appellant further testified at deposition that Robert Steen forcibly grabbed and threatened her to prevent her from leaving Steen Electric premises, as Goumas and the Steen brothers were engaging in a conversation describing sexually explicit conduct. While the Steen brothers deny any prior knowledge of the nature of Goumas’ planned prank, Robert Steen and Theodore Goumas both admitted at their depositions that the Steen brothers knew that Mr. Goumas intended to play a prank on Mr. Forrer when he arrived to pick up appellant because of their understanding that Mr. Forrer had commented that Mr. Goumas was a homosexual.

{¶22} Appellant has presented evidence of a collaborative effort between the Steen brothers and Mr. Goumas to subject appellant to a series of incidents of sexually explicit conduct and conversations soon before she was to have taken a leave of absence from Steen Electric. Accordingly, a genuine issue of material

fact exists regarding whether appellees possessed the necessary threshold discriminatory intent. *Hixson*, supra.

{¶23} The question remains whether a reasonable employer would have foreseen appellant's resignation under the circumstances. This Court therefore looks to any aggravating factors to establish the foreseeability of appellant's resignation.

{¶24} In this case, the nature of the conduct was an aggravating factor. See *Wheeler*, 875 F.2d at 1250. The Steen brothers knew that Mr. Goumas intended to play a prank on appellant's son in retaliation for alleged comments that Mr. Forrer made regarding Mr. Goumas' sexual orientation. One of the Steen brothers sought out Mr. Forrer in the parking lot and lied by telling him that appellant had requested that he come inside, knowing that Goumas intended to play some prank. There is evidence that the Steen brothers attempted to compel appellant to submit to the on-going harassment by forcibly restraining her liberty. Appellant testified that, notwithstanding her attempts to break free and flee, Robert Steen grabbed her and threatened her, stating that "nasty things could happen to little old widow women like [appellant]."

{¶25} These incidents occurred at the end of appellant's last day before she planned to take a leave of absence to address some personal matters involving, in part, her grief arising out of her husband's recent death. Appellant testified that

the stress of the harassment caused her fear and nightmares, and precluded her from leaving her home.

{¶26} This Court finds that an employee's exposure to a penis, as well as another object used to simulate a penis, in the workplace, constitutes the type of harassment which would make an employee's resignation reasonably foreseeable.

{¶27} This Court finds that this may be especially true when that conduct is perpetrated by a non-employee with the tacit consent of the employer. In addition, appellant has presented evidence to demonstrate that the working conditions were so intolerable as to compel a reasonable person to resign. See *Zimmerman*, 75 Ohio St.3d at 449. Accordingly, this Court finds that genuine issues of fact exist in regard to appellant's claim alleging constructive discharge arising out of a hostile work environment premised on sexual harassment.

{¶28} Appellees further argue in their motion for summary judgment that constructive discharge in the harassment context will not lie where the employee refuses to allow the employer to remedy the alleged harassment which gave rise to the employee's quitting. Appellees cite their attempts to apologize to appellant after the incident as evidence of their intent to remedy the situation.

{¶29} None of the cases cited by appellees involve a situation where the sole owners and officers of the business collaborated in and, in fact, facilitated the harassing conduct. In both *Queener v. Windy Hill Ltd. Co.* (Dec. 20, 2001), 8th Dist. Nos. 78067 and 78217, and *Tackas-Davis v. Concorde Castings, Inc.* (Dec.

15, 2000), 11th Dist. No. 99-L-035, the harassment was perpetrated by an independent contractor and mere employee, respectively, and had to be brought to the attention of the company. In *Biles v. Ohio Bur. of Emp. Servs.* (1995), 107 Ohio App.3d 114, the appellant believed she had been terminated, when in fact she had not. This Court does not find appellees' argument persuasive. Rather, this Court finds that it is nonsensical to require that an employee must allow the employer to remedy a situation, where there is evidence that the employer himself facilitated the harassment. This is not the case, where appellees might have counseled, placed on probation or fired the offending employees, because they were the offending employees. Under these circumstances, this Court finds that appellant need not have allowed appellees the opportunity to remedy the situation before she might sustain a claim for constructive discharge.

{¶30} Appellees further argued in their motion for summary judgment that appellant cannot establish a claim for hostile work environment, because the harassment was isolated, was not directed towards her, was not based on sex, and could not reasonably have been known by the employer. Appellees also argued that appellees were not provided with an opportunity to take prompt corrective action. This Court finds that appellees' arguments lack merit.

{¶31} To prevail on a claim of hostile work environment sexual harassment, appellees argue that appellant must prove the following:

"(1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe

or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, paragraph two of the syllabus.

{¶32} The Supreme Court continued:

"In order to determine whether the harassing conduct was 'severe and pervasive' enough to affect the conditions of the plaintiff's employment, the trier of fact, or the reviewing court, must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment." *Id.* at paragraph five of the syllabus.

{¶33} Appellees presented evidence that appellant herself had engaged in incidents of sexual harassment, including making sexually-based comments regarding others while working at Steen Electric, inferring that appellant would not find Mr. Goumas' pranks and the Steen brothers' comments unwelcome. Appellant testified, however, that she was shocked, angered and frightened by Goumas' and the Steen brothers' conduct and comments. Mr. Forrer also testified that appellant expressed shock at the site of Mr. Goumas' exposure of his penis and that she rushed to leave the premises after the incidents. Mr. Forrer averred in an affidavit that appellant was crying and shaking as they left Steen Electric. Accordingly, a genuine issue of material fact exists as to the unwelcome nature of the conduct.

{¶34} Mr. Goumas testified that he informed the Steen brothers that he intended to play a prank on appellant's son in retaliation for alleged comments Mr. Forrer made regarding Mr. Goumas' sexual orientation. Robert Steen was further aware that Mr. Goumas intended to play the prank on Mr. Forrer when he was on Steen Electric premises to pick up appellant and that Mr. Goumas had been using a banana to simulate a penis. In addition, there is evidence to indicate that appellant would likely witness any prank on her son due to the reason for Mr. Forrer's presence on Steen property and his proximity to appellant. Appellant also testified that her son is a homosexual and that the Steen brothers knew that. Robert Steen denied knowing at the time of the incident that Mr. Forrer was a homosexual. Under the circumstances, this Court finds that a genuine issue of material fact exists regarding whether the harassment was based on sex.

{¶35} Appellees argued in their motion for summary judgment that the incidents on the sole day of August 23, 2002, could not as a matter of law constitute severe or pervasive harassing conduct. This Court disagrees.

{¶36} In this case, in reviewing the totality of the facts and surrounding circumstances, there is evidence that appellees collaborated with and facilitated Mr. Goumas' retaliatory acts against Mr. Forrer at a time when he would be in his mother's (appellant's) company. There is evidence to indicate that the Steen brothers attempted to compel Mr. Forrer and appellant to submit to the on-going harassment by forcibly restraining appellant's liberty. The incidents occurred at a

time when the Steen brothers knew that appellant was planning to leave the company for at least a period of time and that they had another employee who had been trained to assume appellant's job responsibilities. Under those circumstances, there was no risk to Steen Electric should appellant have refused to return to work after the incidents. Further, while company-sanctioned simulation of a penis with a banana by Mr. Goumas cannot reasonably be considered mild conduct, appellant further alleged that Goumas exposed his actual penis to her, ostensibly within the context of a prank in retaliation for an alleged remark by appellant's son. A review of the totality of the circumstances indicates that a genuine issue of material fact exists regarding whether appellees' conduct was sufficiently severe to affect any matter relating to appellant's employment at Steen Electric.

{¶37} Finally, the Steen brothers' alleged collaboration and facilitation of Mr. Goumas' exposure, simulation of a penis and sexual innuendo, coupled with the Steen brothers' alleged comments regarding bestiality, present a question of fact regarding whether the harassment was committed by supervisors of Steen Electric. In addition, there is no dispute that the Steen brothers knew that Mr. Goumas intended to play a prank on Mr. Forrer when it was likely that appellant would be present. There was further evidence to indicate that the Steen brothers understood that Mr. Goumas intended to play the prank in retaliation for alleged comments Mr. Forrer had made in regard to Goumas' sexual orientation. Not only

did the Steen brothers fail to try to dissuade Mr. Goumas from playing any pranks, there is evidence that they attempted to restrain appellant to allow Mr. Goumas to engage in the harassing conduct. Accordingly, genuine issues of material fact remain in regard to the final element.

{¶38} Because appellant has presented appropriate evidence to rebut appellees' evidence regarding the claim alleging constructive discharge, the trial court erred in granting summary judgment in favor of appellees in regard to count one. Appellant's first assignment of error is sustained.

#### **ASSIGNMENT OF ERROR II**

**"THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, STEEN ELECTRIC, INC., ROBERT G. STEEN AND WILLIAM STEEN ON PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."**

{¶39} Appellant argues that the trial court erred in granting summary judgment in favor of Steen Electric and the Steen brothers on appellant's claim alleging intentional infliction of emotional distress. This Court agrees.

{¶40} To prevail on a claim of intentional infliction of emotional distress, appellant must demonstrate:

"1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' and was such that it can be considered as 'utterly intolerable in a civilized community;' 3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that

'no reasonable man could be expected to endure it.'" *Pappas v. United Parcel Serv.* (Apr. 11, 2001), 9th Dist. No. 20226.

{¶41} The Ohio Supreme Court, quoting the Restatement of the Law 2d, Torts (1965), Section 46, Comment d stated:

"It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

"The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. \*\*\* There is no occasion for the law to intervene in every case where some one's feelings are hurt." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America* (1983), 6 Ohio St.3d 369, 374-75.

{¶42} This Court has further stated

"[i]n order to constitute serious emotional distress for the purposes of an intentional infliction of emotional distress claim, the injury that is suffered must surpass upset or hurt feelings, and must be such that 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.'" *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. No. 21499, 2003-Ohio-7190, at ¶35, quoting *Davis v. Billow Co. Falls Chapel* (1991), 81 Ohio App.3d 203, 207.

{¶43} A review of the record indicates that both Robert and William Steen, who each own 50% of Steen Electric and hold three officer positions between the

two of them, knew that Mr. Goumas intended to play a prank on Kenny Forrer. Mr. Goumas testified at his deposition that he spoke to both Steen brothers about his intent to "prank" Mr. Forrer, because Robert Steen had earlier told him that Mr. Forrer thought he was a homosexual. The Steen brothers knew that Mr. Goumas intended to play a prank on Mr. Forrer, and Robert Steen testified at his deposition that he saw Mr. Goumas use a banana to simulate a penis in the Steen Electric conference room in the presence of Steen's daughter and prior to Goumas' interaction with Mr. Forrer. Goumas subsequently asked Mr. Forrer if he would like to take the banana home for a snack. Inez Cames, a Steen Electric employee at the time, testified at her deposition that William Steen told her afterwards that they had intended this joke for Mr. Forrer. Under these circumstances, it is not unreasonable to believe that the Steen brothers knew that Mr. Goumas' prank on Mr. Forrer would involve sexual overtones.

{¶44} The evidence indicates that the Steen brothers knew that Mr. Goumas intended to play the prank on Mr. Forrer on the premises of Steen Electric at a time when Mr. Forrer was there to pick up appellant. Although appellant had told a co-worker to tell her son to stay in the parking lot, Mr. Forrer entered the Steen Electric building and told appellant that William Steen had told him that appellant wanted to see him inside. Mr. Forrer entered the building and remained with appellant. Under these circumstances, it is not unreasonable to believe that appellant would witness any prank which Goumas might play on Mr. Forrer.

{¶45} Appellant testified at deposition that she witnessed Mr. Goumas exposing his penis in the conference room, while she averred in affidavit that Goumas exposed his penis while standing in her doorway. Appellant further averred that she saw Mr. Goumas pull a rotten banana out of his pants and ask her son whether he wanted the banana for a snack on his way home.

{¶46} Mr. Forrer averred in affidavit that Robert Steen invited him into the conference room for pizza, that he declined, and that he then observed Mr. Goumas exiting the conference room and shaking his penis at Forrer. Mr. Forrer averred that he then heard appellant exclaim, "Oh, my God." While Mr. Goumas admitted to simulating a penis with a banana, he denied exposing his penis at any time at Steen Electric.

{¶47} There is substantial credible evidence to indicate that appellant was essentially blind in one eye and was suffering visual impairment in her other eye at the time of the incident. It is unclear whether she saw Mr. Goumas' penis or merely a banana, which she believed to be his penis. Regardless, however, this Court finds as a matter of law that the exposure of a penis or simulated penis in a work environment for the purpose of retaliation rises to the level of extreme and outrageous conduct. In addition, there is evidence to indicate that appellees sanctioned Mr. Goumas' sexually oriented prank in the presence of appellant. That an employer might sanction such behavior in the workplace in retaliation for

Mr. Forrer's rumored comment about Goumas' sexual orientation is also intolerable in a civilized community.

{¶48} Appellees asserted in their motion for summary judgment that appellant could not demonstrate that she had suffered serious mental anguish as a result of the incident. In support, appellees appended to their motion a response from Dr. Eric Geisler to the Rehabilitation Services Commission, Bureau of Disability Determination, transcribed September 30, 2002, regarding his diagnosis of appellant. Dr. Geisler referenced appellant's mental impairments, stating:

"[Appellant] is currently suffering from an anxiety-related problem secondary to her new blindness and loss of independence. Her capacity to understand and her memory, as well as sustained concentration and persistence, as [sic] unaffected. Social interaction and adaptation are severely affected by her new blindness and the accompanying anxiety."

Dr. Geisler made no reference to any anxiety that appellant may have been suffering as a result of the incident at Steen Electric.

{¶49} Appellant testified that she suffered hysteria, overwhelming fear and nightmares as a result of her exposure to Goumas' penis and simulated penis at Steen Electric. She swore in regard to an interrogatory that she saw Dr. Geisler in regard to her mental distress arising from the incident and that he prescribed a sedative to calm her nerves. Although self-serving testimony alone is insufficient to substantiate a claim for emotional distress, appellant presented additional evidence of her mental anguish, as observed by third parties. See, *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 2004-Ohio-6074, at ¶41 (holding that

the testimony of lay witnesses acquainted with the plaintiff may be offered to show significant changes they have observed in regard to the plaintiff's emotional makeup, in lieu of expert testimony.)

{¶50} Mr. Forrer averred in affidavit that appellant was crying and shaking as they drove home after the incident. Caroline VanHorn, a longtime friend of appellant, averred that she observed that appellant was very upset and could not talk without crying the day after the incident. Notwithstanding appellant's failure to present any expert testimony in support of her claim for emotional distress, the sworn statements of Mr. Forrer and Ms. VanHorn serve to raise a genuine issue of material fact in this regard.

{¶51} Based on the evidence, this Court finds that genuine issues of material fact remain in regard to appellant's claim against Steen Electric and the Steen brothers regarding her claim for intentional infliction of emotional distress. Accordingly, the trial court erred in granting summary judgment in favor of appellees in that regard and dismissing appellant's claim for intentional infliction of emotional distress. Appellant's second assignment of error is sustained.

### **ASSIGNMENT OF ERROR III**

**"THE TRIAL COURT ERRED IN ITS ORDER OF OCTOBER 20, 2004 BIFURCATING THE COUNTERCLAIM OF DEFENDANT, GOUMAS WHEN THAT COUNTERCLAIM HAD ALREADY BEEN DISMISSED AT SUMMARY JUDGMENT IN THE COURT'S PRIOR ORDER OF SEPTEMBER 15, 2004."**

{¶52} Appellant argues that the visiting judge, who heard the matter at trial, erred when he recognized that Mr. Goumas had counterclaims remaining, notwithstanding the assigned judge's order of September 15, 2004, wherein she granted appellant's motion for summary judgment "on the counterclaim." This Court disagrees.

{¶53} This Court has carefully scrutinized appellant's motion for summary judgment. Appellant clearly sought summary judgment in her favor in regard to the counterclaims of Steen Electric, the Steen brothers and Theodore Goumas. Appellant only argued, however, in support of summary judgment on the counterclaims alleging frivolous conduct. Appellant failed to present any evidence or argument in her motion for summary judgment regarding Mr. Goumas' defamation counterclaims, i.e., his independent counterclaims for libel and slander. Appellant admits in her appellate brief that Mr. Goumas "included claims for defamation in his counterclaim."

{¶54} The trial court granted appellant's motion for summary judgment expressly in regard to the counterclaim(s) alleging frivolous conduct. The trial court did not address Mr. Goumas' counterclaims alleging defamation.

{¶55} Notwithstanding Mr. Goumas' failure to respond to appellant's motion for summary judgment, because appellant did not present any evidence in regard to Goumas' defamation counterclaims, appellant necessarily did not meet her burden under *Dresher* to show that no genuine issue of material fact existed in

regard to those counterclaims. Where appellant failed to move for summary judgment in regard to Mr. Goumas' counterclaims alleging libel and slander, the trial court necessarily could not have granted summary judgment in regard to those counterclaims. Accordingly, the visiting judge did not err in finding that counterclaims remained, which might be bifurcated at trial.

{¶56} Appellant argues that the trial court's law clerk informed him by telephone that all counterclaims had been dismissed. There is no record of such in the record before this Court. As appellant correctly asserts, a court speaks only through its journal entries, and not through mere oral pronouncements. *State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, paragraph one of the syllabus. Further, this Court has held that such journal entries must be construed the same as other written instruments, i.e., by according the language of the journal entry its ordinary meaning. *Trifiletti v. Wolford* (Nov. 8, 2000), 9th Dist. No. 99CA007513. Where the journal entry is not ambiguous, it requires no interpretation or construction. *Id.*

{¶57} In this case, the trial court's September 15, 2004, order clearly grants appellant's motion for summary judgment only in regard to any frivolous conduct counterclaims, although the trial court did not distinguish between the counterclaims. Indeed, appellant failed to request summary judgment in regard to any other counterclaims besides those alleging frivolous conduct. Appellant concedes that Mr. Goumas filed counterclaims alleging defamation. As those

counterclaims were not disposed by the trial court's ruling on the motions for summary judgment, they remained pending for trial. Appellant's third assignment of error is sustained, in part, and overruled, in part.

### III.

{¶58} Appellant's first and second assignments of error are sustained. Appellant's third assignment of error is sustained, in part, and overruled, in part. While Mr. Goumas' counterclaim for frivolous conduct was dismissed, his defamation counterclaims remain pending. The judgment of the Summit County Court of Common Pleas is affirmed, in part, and reversed, in part, and remanded for further proceedings consistent with this decision.

Judgment affirmed, in part,  
reversed, in part,  
and cause remanded.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

  
DONNA J. CARR  
FOR THE COURT

MOORE, J.  
CONCURS

SLABY, P.J.  
DISSENTS

APPEARANCES:

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