

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

08-0053

ISKANDER ABI ABDALLAH)

Plaintiff/Appellant,)

v.)

DOCTOR'S ASSOCIATES, INC.)

Defendant/Appellee.)

CASE NO.

On Appeal from Eighth District
Court of Appeals, Case No. 89157

Cuyahoga County Court of Common
Pleas Case No. CV-597969

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
ISKANDER ABI ABDALLAH

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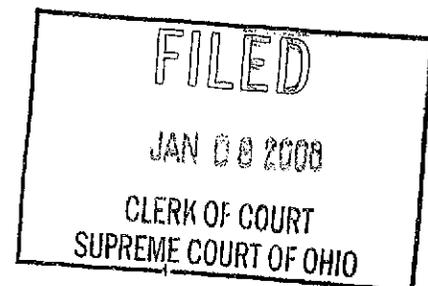


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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST.

The Appellant respectfully submits that this case involves issues which entail procedural questions concerning reasonable reliance and whether it is a question for the jury or the trial court. Since many causes of action involve questions of “reasonableness”, the Appellant respectfully submit that the holding in the case at bar, wherein the Trial Court made such a determination in resolving a Civ. R. 12(B)(6) motion, is of great significance and if allowed to stand constitute a new departure in Ohio law from prior precedent.

In the case at bar, Appellant clearly stated a claim in his Complaint upon which relief could be granted. However, the Trial Court granted Appellee’s 12(b)(6) Motion to Dismiss by reasoning that Appellant’s **reliance** on Appellee’s misrepresentations was not reasonable. However, the reasonableness of Appellant’s reliance upon Appellee’s misrepresentations is normally considered a jury question under prior law that should not have been considered or decided by the Trial Court. In the matter before the Trial Court, Appellant’s reasonable reliance is a disputed question of fact and therefore it was improper for the Trial Court to determine that the Appellant’s reliance on Appellee’s misrepresentations was unreasonable.

In light of the above, the Appellant respectfully submits that the issue presented in this case is both timely and significant. Consequently, the Appellant respectfully submits that the Court should accept jurisdiction of this matter and order that full briefing be conducted.

STATEMENT OF THE CASE

This matter came before the Cuyahoga County Common Pleas Court upon the filing of Appellant, Alex Abi Abdallah's (hereinafter referred to as "Mr. Abdallah") Complaint on August 4, 2006. In the Complaint, Shirley Robichaud and Doctor's Associates, Inc. were both named as defendants. On October 30, 2006 Mr. Abdallah and Defendant Robichaud filed a Joint Motion to Dismiss Defendant Robichaud from the action which the trial court construed as a stipulation for dismissal pursuant to 41(A) and dismissed Defendant Robichaud from the action with prejudice on December 4, 2006.

Defendant Doctor's Associates, Inc. (hereinafter referred to as "DAI") moved for a dismissal of the action on November 9, 2006. Following Mr. Abdallah's Brief in Opposition to Dismissal and supplements filed by both parties, the Trial Court granted DAI's Motion to Dismiss pursuant to Civ.R.12(B)(6), but with no reasoning provided, on December 6, 2006. It is also important to note that DAI attached at least one document that was outside the pleadings in their Supplement to their Motion to Dismiss. Although the attached document pertained to Count V of the Complaint, it was nevertheless improper under Civ.R.12(B)(6) and should not have been considered.

Appellant appealed to the Eighth District Court of Appeals. On November 26, 2007, the Court of Appeals journalized its Opinion affirming the Judgment of the Trial Court. This appeal follows.

II. STATEMENT OF THE FACTS

Mr. Abdallah has been the owner and operator of Subway® Franchise # 7782

(hereinafter referred to as "Franchise 7782") since 1997 when Mr. Abdallah's company, Abdallah, Inc., purchased the franchise from Target Foods, Inc. DAI is the parent corporation which owns the Subway® Restaurant business. Mr. Abdallah and Shirley Robichaud were the sole shareholders in Abdallah, Inc. when Abdallah, Inc. purchased Franchise 7782. A franchise agreement was then executed between Shirley Robichaud and DAI for Franchise 7782. The franchise agreement requires an actual person to be named as the franchisee rather than a corporation. Therefore, Shirley Robichaud was named as the franchisee.

On December 31, 1998, Shirley Robichaud sold her 50% share in Abdallah, Inc. to Abdallah, Inc., making Mr. Abdallah the sole shareholder in Abdallah, Inc. Shirley Robichaud then moved out of state and has had no involvement in operation of Franchise 7782 nor has she acted as the franchisee of Franchise 7782 in any way since December 31, 1998. DAI has dealt exclusively with Mr. Abdallah concerning all matters relating to the operation of Franchise 7782 since December 31, 1998 and was aware that Mr. Abdallah was operating as the store's franchisee since that time. Such matters include accepting royalties and advertising fees from Mr. Abdallah, corresponding with Mr. Abdallah regarding franchise operating standards and compliance with the franchise agreement. These duties are the sole responsibility of the franchisee. Furthermore, when corporate inspections of Franchise 7782 revealed that the franchise was allegedly not meeting standards established by the franchise agreement, those concerns were presented to Mr. Abdallah to remedy and not Shirley Robichaud.

Despite DAI being fully aware that Shirley Robichaud had no interest in Franchise 7782 and that Mr. Abdallah was acting as the store's franchisee, DAI, nonetheless, initiated arbitration proceedings pursuant to the franchise agreement against Shirley Robichaud in 2003. DAI sought to have the franchise agreement terminated for Franchise 7782's lack of compliance with certain

standards established by the franchise agreement. Mr. Abdallah attempted to intervene in the arbitration proceeding as the real party in interest, but his request was objected to by DAI and the arbitrator denied the request. Shirley Robichaud made no attempt whatsoever to participate in the 2003 arbitration proceeding. The 2003 arbitration proceeding ended without the arbitrator ever issuing a decision regarding compliance with the franchise agreement. Thus, Franchise 7782 remained in operation and DAI continued to deal exclusively with Mr. Abdallah regarding all matters relating to the franchise.

In May of 2006, DAI again initiated an arbitration proceeding against Shirley Robichaud for non-compliance with the franchise agreement despite being fully aware that Mr. Abdallah was the real party in interest. Having been previously denied the opportunity to participate, Mr. Abdallah did not request to participate in the 2006 arbitration. The 2006 arbitration resulted in an arbitrator's award that terminated the franchise agreement for Franchise 7782. Shirley Robichaud never made any attempt to participate in the arbitration and DAI was the only party that presented any evidence. Thus, the arbitrator's award was essentially a default judgment.

Mr. Abdallah then filed his Complaint against DAI, alleging, *inter alia*, that DAI should be equitably estopped from not recognizing Mr. Abdallah as the franchisee of Franchise 7782 and from enforcing the arbitration agreement because DAI's misrepresented, by way of its exclusive dealings with Mr. Abdallah regarding all duties of the franchisee, that DAI recognized Mr. Abdallah as the franchisee of Franchise 7782.

Such other facts as are relevant are contained in the "Argument" portion of this Memorandum.

ARGUMENT

PROPOSITION OF LAW NO. I: THE QUESTION OF THE REASONABLENESS OF A PARTY'S CONDUCT IS A QUESTION FOR DETERMINATION BY THE TRIER OF FACT AND MAY NOT BE RESOLVED IN A MOTION TO DISMISS MADE PURSUANT TO CIV. R. 12(B)(6).

Count IV of Mr. Abdallah's Complaint alleged a claim of equitable estoppel against DAI. Specifically, Count IV alleges that DAI, being fully aware that Shirley Robichaud had no interest in Franchise 7782, misrepresented through its actions in dealing exclusively with Mr. Abdallah on all matters related to Franchise 7782, including those duties which are the sole responsibility of the franchisee, that DAI recognized Mr. Abdallah as the franchisee of Franchise 7782. Mr. Abdallah relied upon DAI's misrepresentation that he was recognized as the franchisee. Mr. Abdallah's reliance was reasonable and his reliance has proven to be, and is now, detrimental to him. When these well pleaded allegations of equitable estoppel are viewed in light of the facts set forth in Mr. Abdallah's Complaint, it is evident that the trial court committed error in dismissing Mr. Abdallah's Complaint pursuant to 12(B)(6). As stated by the court in **Andres v. Perrysburg** (1988), 47 Ohio App.3d 51, 56:

A prima facie case for equitable estoppel requires the plaintiff to prove four elements: (1) that the party knowingly made a false representation or concealment of a material fact (or at least took a position contrary to that now taken); (2) that the representation must be made in a misleading manner with the intention or expectation that another would rely on it to act; (3) that the plaintiff actually relied on the representation; and (4) that plaintiff relied to his detriment so much that unless the party is estopped from asserting the truth or a contrary position, plaintiff would suffer loss.

The facts set forth in Mr. Abdallah's Complaint established a valid equitable estoppel claim and, therefore, the trial court erred as a matter of law in dismissing the Complaint pursuant to Civ.R.12(B)(6).

The fact that DAI conducted all business regarding Franchise 7782 through Mr. Abdallah

and made it his responsibility to address issues of non-compliance with the franchise agreement, duties which are the responsibility of the franchisee, established that DAI knowingly made the false representation to Mr. Abdallah that it considered him to be the franchisee. These facts were clearly pleaded in Mr. Abdallah's Complaint and must be considered as true pursuant to the mandates of Civ. R. 12(B)(6). Thus, the first element toward establishing a valid equitable estoppel claim is well pleaded in Mr. Abdallah's Complaint.

DAI knew that Shirley Robichaud was absent from all operations regarding Franchise 7782 and further knew that Mr. Abdallah was operating as and considered himself to be the franchisee of Franchise 7782. Therefore, when DAI accepted royalties and advertising fees from Mr. Abdallah and made it his responsibility to bring Franchise 7782 into compliance with the franchise agreement, DAI was intentionally misleading Mr. Abdallah to believe that it recognized him as the franchisee with the expectation that Mr. Abdallah would rely upon its misrepresentation. These facts were clearly plead in Mr. Abdallah's Complaint and must be considered as true. Thus, the second element toward establishing a valid equitable estoppel claim was well pleaded in Mr. Abdallah's Complaint.

Mr. Abdallah's reliance upon DAI's misrepresentations was undisputable. As stated above, Mr. Abdallah paid substantial amounts of royalties and advertising fees to DAI in connection with the operation of Franchise 7782. Additionally, Mr. Abdallah undertook the responsibility of complying with the franchise agreement requirements to the best of his abilities. These facts are clearly plead in Mr. Abdallah's Complaint and must be considered as true. Thus, the third element toward establishing a valid equitable estoppel claim is well pleaded in Mr. Abdallah's Complaint.

Additionally, Mr. Abdallah's reliance upon DAI's misrepresentations coupled with DAI's current refusal to recognize Mr. Abdallah as the franchisee of Franchise 7782 and

enforcement of the arbitration award, placed Mr. Abdallah in a position where he stood to lose the business that was his sole source of income and upon which his entire livelihood had been based since 1997. These facts are clearly plead in Mr. Abdallah's Complaint and must be considered as true. Thus, the fourth element toward establishing a valid equitable estoppel claim was well pleaded in Mr. Abdallah's Complaint.

With regard to the reasonableness of Appellant's claims, Appellant's Complaint clearly alleged that Appellant did reasonably rely upon Appellee's misrepresentations and Appellant asserts that the reasonableness of Appellant's reliance upon Appellee's misrepresentations was a jury question that should not be considered or decided by the Trial Court. In the matter before the Trial Court, Appellant's reasonable reliance was a disputed question of fact and, therefore, it was improper for the Trial Court to determine that the Appellant's reliance on Appellee's misrepresentations was unreasonable.

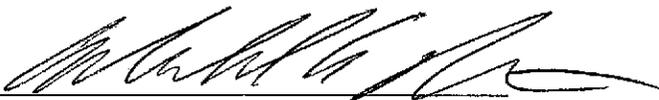
Prior authority to support the assertion that in an estoppel claim the reasonableness of a plaintiff's reliance upon a defendant's misrepresentations is a jury question is found in the cases **Hale et al. v. Volunteers of America** (2004), 158 Ohio App.3d 415, 816 N.E.2d 259, and **Kelly v. Georgia Pacific Corp.** (1989), 46 Ohio St. 3d 134, 54 N.E. 2d. 1244. In **Hale**, the First District Court of Appeals held that whether reliance was reasonable and foreseeable in an estoppel claim are generally questions of fact for a jury to resolve. **Hale**, 158 Ohio App.3d 415, 429. And in **Kelly**, this Court, in addressing whether an employee's reliance upon an employer's representations was reasonable, held that the reasonableness of an employee's reliance on such assurances was a question of fact for the jury. **Kelly**, 46 Ohio St. 3d 134, 140. This holding was followed by the Eighth District Court of Appeals in **Wallace v. Gray Drug, Inc.** (1990), unreported, 1990 WL 121500 (Ohio App. 8th Dist. 1990). Although each of the above cited cases specifically concerned claims of promissory estoppel, the requirement to show that

plaintiff's reliance was reasonable is exactly the same in claims for equitable estoppel as it is in cases involving equitable estoppel . It therefore follows that the reasonableness of Appellant's reliance on Appellee's misrepresentations was unquestionably a matter for a jury to decide.

CONCLUSION

In light of the above, Appellant respectfully submits that the judgment of the Eighth District Court of Appeals is unlawful, unwise and constitutes a bold departure from holdings in prior Ohio cases. Consequently, this Court should accept jurisdiction of this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction**, is being served via regular U.S. Mail, postage prepaid on this 7th day of January, 2008, upon:

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NOV 26 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89157

**ISKANDER ABI ABDALLAH,
AKA, ALEX**

PLAINTIFF-APPELLANT

vs.

DOCTOR'S ASSOCIATES, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-597969

BEFORE: Stewart, J., Celebrezze, A.J., and McMonagle, J.

RELEASED: November 15, 2007

JOURNALIZED: NOV 26 2007

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

NOV 26 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

NOV 15 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNCIL
FOR ALL PARTIES-COSTS TAG

MELODY J. STEWART, J.:

Plaintiff-appellant, Iskander Abdallah, appeals the trial court's decision to grant defendant-appellee's, Doctor's Associates, Inc. ("DAI"), Civ.R. 12(B)(6) motion dismissing appellant's complaint. Having reviewed the motion, pleadings, briefs, and applicable law, we affirm the judgment of the trial court dismissing the complaint.

The standard for an appellate court reviewing a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. The court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56. However, the court need not presume the truth of "unsupported conclusions." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 193.

A motion to dismiss should be granted "only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover," or, in the case of a complaint seeking relief

under a contract attached pursuant to Civ.R. 10(D), where the “writing presents an insuperable bar to relief.” *Fairview Realty Investors v. Seacair, Inc.*, Cuyahoga App. No. 81296, 2002-Ohio-6819, citing *Slife v. Kundtz Properties* (1974), 40 Ohio App.2d 179, 185-186. Dismissals under Civ.R. 12(B)(6) are proper where the language of the writing is clear and unambiguous. *Id.*

On August 4, 2006, appellant filed his complaint. In it he raised claims of breach of contract, promissory estoppel, and equitable estoppel (Counts I-III) against defendant Shirley Robichaud (“Robichaud”), and a claim of equitable estoppel (Count IV) against DAI. Additionally, appellant sought to vacate an arbitration award granted on July 20, 2006 to DAI which terminated the franchise agreement between DAI and Robichaud (Count V). Appellant attached numerous documents to the complaint, including the franchise agreement.

Appellant voluntarily dismissed all claims against Robichaud¹ and proceeded on Counts IV and V. On November 9, 2005, DAI filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim upon which relief may be granted. On December 6, 2006, the trial court granted the motion

¹ On October 30, 2006, appellant and Robichaud filed a joint motion to dismiss Robichaud from the action which the trial court construed as a stipulation for dismissal pursuant to Civ.R. 41(A).

and dismissed the action. Although the trial court's judgment dismissed both Count IV and Count V, appellant has appealed only the dismissal of Count IV, the equitable estoppel claim against DAI. For that reason, we need not consider any issues relating to the July 20, 2006 arbitration award which was the subject of Count V.²

The facts as alleged in the complaint and documents attached to it, which we are required to accept as true for the purposes of this review, are as follows.

In June 1997, appellant and Robichaud each owned a 50% interest in Abdallah, Inc. ("Abdallah"). Abdallah entered into a contract with Target Foods, Inc., owned by Louis Achkar, for the purchase of his Subway sandwich shop in Oakwood, Ohio, identified as Subway Franchise No. 7782.

DAI is the corporation that owns and licenses the use of the Subway trade and service marks. On August 13, 1997, DAI entered into a written franchise agreement with Robichaud which stated that the agreement was being executed as a result of the transfer of Franchise No. 7782 from Louis Achkar.

² Appellant attached a copy of the arbitrator's order to the complaint. On appeal, appellant argues that DAI improperly attached a copy of the judgment of the U.S. District Court order affirming the award to his Civ.R. 12(B)(6) motion and the trial court erred in not converting the motion to a motion for summary judgment. However, appellant did not appeal the dismissal of Count V relating to the arbitration award. Having confined his appeal to the issue of equitable estoppel, we need not and do not consider the District Court's ruling.

According to the terms of the written franchise agreement, only a natural person, not a corporation, may be a party to the franchise agreement and recognized as a "franchisee." The franchisee may then assign the right to operate the store to a corporation, but remains personally liable under the agreement. The franchisee may sell his franchise rights, but only with prior written approval of DAI and only according to the terms expressly stated in the written agreement. Any disputes arising under the agreement are subject to arbitration after exhaustion of written dispute resolution procedures.

In November 1998, Robichaud executed a "Limited Power of Attorney To Sell or Transfer A Franchise" which gave appellant the authority to represent Robichaud in the sale or transfer of the Subway franchise. Then, in December 1998, Robichaud resigned from Abdallah, Inc. and sold her shares in that corporation to appellant. Appellant did not use the authority given to him to sell or transfer Robichaud's interest in the franchise, and on July 25, 2003, Robichaud rescinded appellant's power of attorney.

In May 2003, DAI instituted arbitration proceedings against Robichaud for breach of the franchise agreement. Appellant sought to intervene in the arbitration action. DAI objected to appellant's participation and stated that appellant and Abdallah, Inc. were strangers to the franchise agreement signed

by Robichaud and lacked standing in the arbitration. The arbitrator agreed with DAI and denied appellant's participation.

In May 2006, DAI again instituted an arbitration proceeding against Robichaud seeking termination of the franchise agreement per the terms of the agreement. Appellant did not seek to intervene in this proceeding, apparently concluding that it would be futile based on the ruling in the 2003 arbitration that he lacked standing. On July 20, 2006, the arbitrator issued an order terminating the agreement and ending Robichaud's right to operate a Subway franchise.

EQUITABLE ESTOPPEL

Appellant's complaint seeks a declaration that he is the lawful franchisee of Subway Franchise No. 7782 and that DAI is equitably estopped from denying his right to the franchise. Appellant asserts that the execution of the limited power of attorney by Robichaud and the transfer of her shares in Abdallah, Inc. served to make appellant the sole owner, operator, and franchisee of Subway Franchise No. 7782. Appellant argues that his complaint states a claim for equitable estoppel against DAI and should not have been dismissed under Civ.R.12(B)(6).

In *Ohio State Bd. of Pharm. v. Frantz*, 51 Ohio St.3d 143, the Ohio Supreme Court stated: "The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." *Id.* at 145 (internal citations omitted).

Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment. *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 34. Equitable estoppel is therefore "a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped party." *First Fed. Sav. & Loan Assn. v. Perry's Landing, Inc.* (1983), 11 Ohio App.3d 135.

In order to state a claim for equitable estoppel, appellant's complaint must state sufficient facts to demonstrate (1) that DAI made a factual misrepresentation; (2) that it was misleading; (3) that it induced actual reliance

which was reasonable and in good faith; and (4) which caused detriment to the relying party. *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379, 607 N.E.2d 492.

Even assuming all of the facts alleged in the complaint to be true and making all reasonable inferences from these facts in appellant's favor, we find it is beyond doubt that appellant can prove no set of facts in support of his claim which would entitle him to relief. The express terms of the written documents attached to appellant's complaint demonstrate that there is simply no way appellant could reasonably and in good faith believe that he was the franchisee under the franchise agreement for Subway Franchise No. 7782.

The facts demonstrate that appellant participated in establishing Robichaud as the "franchisee" of Subway Franchise No. 7782 in 1997. He was aware of the express terms of the contract and operated the shop under those terms. Appellant had the opportunity between November 1998 and July 2003 to legally effectuate the transfer of Robichaud's franchise rights to himself under the transfer clause of the agreement, but did not do so.

The legal right to use the Subway trade or service mark in the operation of Subway Franchise No. 7782 is controlled by the terms of the written agreement for that franchise. That written agreement "presents an insuperable

bar to appellant's relief." The trial court did not err in dismissing appellant's claim for equitable estoppel against DAI. Appellant's single assignment of error is overruled and the judgment of the trial court affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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



MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR