IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| F. BENJAMIN RIEK III, | ) | |
| | ) | On Appeal from the Cuyahoga |
| APPELLANT | ) | County Court of Appeals, |
| | ) | Eighth Appellate District |
| V. | ) | |
| | ) | Court of Appeals |
| CARL MONASTRA, | ) | Case No. 91024 |
| | ) | |
| APPELLEE | ) | |

09-0323

# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT F. BENJAMIN RIEK III


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SUPREME COURT OF OHIO

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## EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case present three critical issues regarding the division of fees among attorneys of different law firms upon the conclusion of a representation. The issues invoke an interpretation of DR2-107(A) and its mandatory requirements for dividing earned fees. The first issue is whether a fee grievance arbitration panel is required to follow the requirements of DR2-107(A) when determining an arbitration between lawyers of different firms. The second issue focuses on what remedy is available when it appears from an award that the panel did not follow the requirements of DR2-107(A) including the availability of the attorney to seek review pursuant to R.C. 2711.11 in the common pleas court. Finally, this appeal raises the question or whether a fee grievance arbitration panel may award an excessive fee in violation of DR2-106.

In this case, the court of appeals failed to address these issuesand affirmed the trial court judgment on the basis that appellant was seeking to appeal an arbitration award relying on this court's decision in *Shimko v. Lobe,* 103 Ohio St.3d 59, 2004-Ohio-4202. In *Shimko,* this court held that "an arbitration award rendered pursuant to DR2-107(B) is final, binding and unappealable.."

Appellant asserts that this case presents just the sort of problem that arises from a blanket statement that no appeal lies from a fee arbitration award. In this matter, there was no evidence presented by the appellee to satisfy each of the requirements of DR2-107(A) in order to support a division of fees. The issues presented in this appeal were not reached in the *Shimko* decision where the parties had not yet even had an arbitration. The central issue in *Shimko* was whether an attorney could be compelled to arbitrate a fee dispute with another attorney. In answering in the affirmative, this court did not discuss

how such an arbitration was to be conducted and what proof would be required in order to meet the requirements of DR2-107(A).. When such proof was not offered by the appellee as to each element of that rule, an award was issued which bears no relationship to the time expended by appellee and requires this appellant to pay an excessive fee. The amount of the fee awarded, $18,000.00 does not comport with the fees incurred based on appellee's hourly rate or on his claim to be entitled to a 40% division of the fees earned by the appellant whom prosecuted the underlying pregnancy discrimination case to settlement.

The net effect of the court of appeals refusal to address the issues raised in this case leads to the complete control over the division of attorney's fees to the un-reviewable fee grievance arbitration panels of local bar associations. While DR2-107 provides for such panels to settle disputes such as this one, they unintended result of the *Shimko* decision, is to prevent any review of these awards to insure that the proper division was made in accordance with DR2-106 and Dr2-107. Such a ceding of this court's authority to regulate the practice of law was not an intended consequence of *Shimkmo.* R.C. 2111.11 provides a ready mechanism for permitting review of fee arbitration awards since it permits a trial court to modify an award when there has been an evident miscalculation of the award as has happened in the instant matter. If bar associations are to be charges with the responsibility of conducting fee dispute arbitrations, there awards must be subject to the same limited review of arbitration awards in order to determine that the panel's award comports with the Disciplinary Rules.

## STATEMENT OF FACTS

Defendant Appellee Carl Monastra was retained by Sharon Havachak to represent her in a paternity action in the Lorain County Court of Common Pleas against the putative father, J.D. Turza. In the course of his representation, Monastra became aware that Turza had been Havachak's employer when she became pregnant and promptly teminated her employment when she informed him of the pregnancy. Since Monastra's practice focuses primarily on domestic relations, he contacted Plaintiff- Appellant who is a Certified Specialist in Labor and Employment Law and referred the discrimination case to him. The client entered into a Representation Agreement with Appellant that provided for a forty (40%) percent contingency in the event of settlement or obtaining a verdict. There was no written agreement between the client, plaintiff or defendant setting forth how the attorneys' fees were to be divided between counsel at the end of the litigation.

A complaint was filed in the Lorain County Court of Common Pleas pursuant to R.C. 4112.99 alleging pregnancy discrimination and retaliation. The complaint was signed by Appellant and did contain the name of Appellee as co-counsel. As the discrimination case proceeded through discovery, Appellant performed all of the pretrial work including the depositions of relevant witnesses and the drafting of trial documents and the preparation of the witnesses for the trial that was scheduled for March 15, 2004. On the morning that trial was to commence, a settlement was reached bewtwwen Havanchak and her employer, Gutter Helmet and Turza. While the discrimination case was proceeding, Monastra continued to represent Havachak in the still pending paternity action. As a result of the settlement, Appellant earned a fee of $54,000.00.

When the settlement had finally been collected from Turza, Appellee demanded forty (40%) percent of the earned fee fro referring the matter to Appellant. Plaintiff-

Appellant offered to pay Appellee according to his itemized statement for the work her performed in the discrimination case, but that offer was rejected. After the parties were unable to settle this dispute, it was submitted to an arbitration panel pursuant to the Fee Grievance Committee of the Cuyahoga County Bar Association. Hearings were held on two different dates, November 6, 2006 and September 18, 2007. Each party submitted position statements and the two member panel issued an award on October 4, 2007 awarding Monastra a fee of $18,000.00 without providing any explanation or calculations to support its award. Among the evidence presented to the panel was Appellee's own billing statement setting forth the amount of time he expended on the discrimination case. Form his own records, Monastra expended some 32 hours and a lodestar fee of $4,326.00. Yet despite his limited work, he sought a fee of some $21,600.00 or forty percent of the $54,000.00 fee earned by Appellant.

**Proposition of Law No.1**

A Fee Grievance Arbitration Panel Must Follow The Requirements of DR2-107(A) In Dividing Fees Between Lawyers Of Different Firms.

Since the parties are not attorneys within the same firm, any division of fees must be in accordance with DR 2-107(A). Permitting fee splitting for simply making a referral seems wasteful since the referring attorney provides little or no service to the client beyond making the referral itself. *Bd. Of Comm'rs on Grievances & Discipline,* Op. 92-1 (Application Exhibit D-3). Allowing compensation for the referral may increase client costs without affording the client any additional benefits *(Id.)*; *Bd. Of Comm'rs on Grievances & Discipline,* Op. 91-5 (Application Exhibit D-4). DR 2-107(A) states as follows:

(A) Division of fee by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

(1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client and all lawyers who assume responsibility for the representation;

(2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client; and

(3) The total fee is reasonable.

The fee awarded by the panel does not reflect the requirements of this rule. In particular, defendant did not present any signed written agreement executed by the client, Monastra and Appellant that outlined the terms of the division of fees as required by DR 2-107(A)(2). Monastra also failed to place into evidence any written agreement again signed by all parties, reflecting the alternative approach permitted by this rule setting forth the terms of division by all attorneys who assumed responsibility. Without one or the either of these two required written agreements, there can be no proper division of fees under this rule.

The requirement of a written disclosure signed by the client and the attorneys is set forth in Opinion 2003-3 of the *Bd. Of Comm'rs on Grievances & Discipline.* The syllabus of that opinion states:

> "Regardless if whether the division of fees is to be in proportion to the services performed or based in assuming responsibility, each lawyer and the client must sign a written disclosure of the terms of the division and the identity of all lawyers sharing the fee."

In this matter, no such agreement existed. Therefore the panel had no basis to award fees to Monastra since there was no written disclosure of the manner of the division signed by

all involved. Thus the award of the panel is not in accordance with DR 2-107(A)'s requirements. Any reliance by Monastra that *King v. Housel* (1990), 52 Ohio St.3d 228, 230 for the proposition that an attorney may not assert the failure to have a written agreement as required by DR 2- 107(A) may not be used by an attorney as a shield to avoid payment is misplaced. The actual quote from the decision states in full, "The rule is not meant to be used as a shield by an attorney in violation thereof to avoid enforcement of a valid fee agreement." Since Monastra has sought to obtain a finder's fee as set forth by his calculation of the 40% fee (Exhibit A) to which he believes he is entitled, there is no valid fee agreement. See *Spayd, supra.*

The burden to obtain the required written disclosure rests upon the referring attorney as recognized by the Ohio Supreme Court in *King v. Housel* (1990), 52 Ohio St.3d 228, 230. It is incumbent on the attorney who was originally hired to prepare the proper disclosures for signature by client and the attorneys. *Disciplinary Counsel v. Zingarelli* (1999), 89 Ohio St.3d 210, 219-20. Defendant failed to assume his responsibility which resulted in the failure to produce such a document upon which the panel could rely for their award. There is simply no document that sets forth the terms of the division of the fees in the underlying matter. Without such a disclosure, there can be no basis to divide fees in accordance with DR 2-107(A). In fact without such an agreement, the dispute between these parties does not even fall under this rule.

Both the trial court and the court of appeals failed to address this issue. As a result, Mr. Monastra has been awarded a fee in violation of the mandatory requirements of DR2-107(A).

**Proposition of Law No. 2**

If A Fee Grievance Arbitration Panel Fails To Follow The Requirements Of DR2-107(A), A Motion To Modify Pursuant To R.C. 2711.11(A).

The Ohio Supreme Court has held that a reviewing court will vacate or modify an award, "only when the arbitrator has overstepped the bounds of his authority." *Bd. Of Trustees of Miami Twp. V. Fraternal Order of Police* (1998), 81 Ohio St.3d 269, 271. The language "reflects the General Assembly's concern that the arbitrator operate only within the bounds of the authority granted to them within the underlying agreement." *Citibank S. Dakota, N.A. v. Wood,* 169 Ohio App.3d 269, 280, 2006-Ohio-5755, ¶ 33. In this matter, the panel exceeded their authority by issuing an award that was not in accordance with DR2-107(A)'s requirement that a fee award must be in proportion with the services provided. In of the purposes of DR2-107 is to prohibit the sharing of fees where there is a lack if services performed or responsibility to the client. *Spayd v. Turner, Granzow & Hooelkamp* (1985), 19 Ohio St.3d 55, 62. The service and responsibility referred to in this rule relate to an actual participation in or work in the case. *Kingv. Housel* (1990), 52 Ohio St.3d 228, 230.

As shown by Monastra's own hourly billing this does not even approximate the $18,000.00 awarded. In its review, a trial court is limited to determining if there has been an error as a matter of law. *Union Twp. Bd. Of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112* (2001), 146 Ohio App.3d 456, 459. The failure to issue an award in accordance with DR2-107(A) constitutes such an error of law.

Under the other relevant statute, R.C. 2711.11(A), a trial court may modify an arbitration award if there has been an evident miscalculation of the figures or an evident material mistake in the description of any person, thing, or property referred to in the

award. In addressing a motion to modify under this statute, a trial court may not pass upon the substantive merits of the arbitration award absent evidence of material mistake or extensive impropriety." *Lynch v. Holcomb* (1984), 16 Ohio App.3d 223, 224. The award issued by the panel is not supported by the evidence submitted by Monastra. His only evidence of the amount of a fee to which he is entitled consists of a billing statement which shows only some $4326.00 in fees by the March 15, 2004 settlement of the case . Yet the panel awarded $18,000.00 to him, a figure which has no basis for support in the record. Having established that the award lacks any basis or foundation, the appealing party has overcome the presumption of validity of the award. *Cf Queen City Lodge No. 69, Fraternal Order of Police v. Cincinnati* (1992), 63 Ohio St.3d 403, 407. Such an award represents a mistake by the panel in calculating the Appellee's portion of the fees in the underlying case.

In addressing a R.C. 2711.11 motion to modify, the substantive merits of the original award are not reviewable on appeal absent a material mistake. Modification and correcting an award is the correct statutory remedy when a court finds that an arbitrator based any part of an award on an evident miscalculation of figures under R.C. 2711.11(A). *Fostoria v. Ohio Patrolmen's Benevolent Assn.*, 2004-Ohio-1945, ¶¶ 21, 23. That is the situation in the instant action that justifies the modification of the award to award Monastra no more than $4326.00 in fees. To do otherwise would be to award him a clearly excessive fee in violation of DR2-106(A)'s prohibitions since the award of the panel bears no relationship to Monatra's own billing statement, the actual work he performed in the discrimination suit or the benefit he provided to the client. See, DR2-106(B)(1) and (4).

**Proposition of Law No. 3**

A Fee Grievance Arbitration Panel May Not Award An Excessive Fee To An Attorney In Violation Of DR2-106

Appellee Monastra sought to receive a finder's fee based on a formula that he was entitled to receive 40% of the fee earned by Appellant for the prosecution of the underlying pregnancy discrimination case. This calculation is set forth in Exhibit A to the Application. Under this proposal, he believed he was entitled to a fee of $21,600.00 based upon 40% of the $54,000.00 fee earned in the underlying case. The award of $18,000.00 does not reflect an award based upon the actual hours expended by defendant according to his billing statement filed before the arbitration panel (Copy of the billing statement as Exhibit B to the Applicant). Instead the award more closely resembles defendant's position at the arbitration that he was entitled to 40% of the fee earned by plaintiff in the amount of $21,600.00. This amount is more than six times the hourly based fee based on Monastra's billing statement. At the hearing Monastra agreed that he was not entitled to any more hourly fees after the case settled on the morning of trial on March 15, 2004. An award of 40% of the fee earned in a case constitutes a finder's fee in violation of the Disciplinary Rules. There was no agreement that spells out the terms of any fee division between the parties. Any division of fees between the parties is governed by DR2-107.

The purpose of DR 2- 107 was to prohibit the sharing of fees where there is a lack of services performed or responsibility to the client. *Spayd v. Turner, Granzow & Hollenkamp* (1985), 19 Ohio st.3d 55, 62. The service and responsibility referred to in the rule relate to the actual performance in or work on the case. *King v. Housel* (1990), 52 Ohio St.3d 228, 230. Appellant has been willing to pay Monastra a fee for the work he performed during the course of the representation in accordance with DR 2- 107(A)(1)'s

division of fees based upon the work he performed. The billing statement sets forth those fees through the March 15, 2004 settlement date.

Without any basis in the arbitration record, the panel awarded Monastra $18,000.00. This is clearly an excessive award as it is more than three times the fees set forth in his itemized bill through March 15, 2004 (Exhibit B). The panel's award is clearly excessive as it provided Monastra with a windfall in violation of DR 2-106(A)'s prohibition not to enter into an agreement to collect an excessive fee. This award is excessive since any lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee as defined by DR 2-106(B)'s criteria.

This rule spells out the factors to be used as guides in determining the reasonableness of the fee:

> (1) The time and labor required, the novelty and difficulty Of the questions involved, and the skill requisite to Perform the legal services properly;
>
> (2) The likelihood, if apparent to the client, that the acceptance Of the particular employment will preclude other employment By the lawyer;
>
> (3) The fee customarily charged in the locality for similar Legal services;
>
> (4) The amount involved and the results obtained;
>
> (5) The time limitations imposed by the client or by the Circumstances;
>
> (6) The nature and the length of the professional relationship With the client;
>
> (7) The experience, reputation, and ability of the lawyer or Lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

As with the written disclosure requirement, there was no evidence satisfying any of these guidelines submitted by Appellee at the arbitration. The party moving for attorney's fees has the burden to present sufficient evidence of the services performed and the reasonable value thereof. *Braglin v. Crock*, (7th Distr.), 2005-Ohio-6935, ¶ 17. Additionally, the Ohio Supreme Court requires that a trial court [or an arbitration panel] explain how it reached its figure. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 144-45.

The only evidence upon which the panel could make a calculation was Appellee's billing statement. Thus the panel did not have before it the necessary information upon which to render an $18,000.00 award that would not violate DR 2-107(B)(3)'s prohibition of an excessive fee being awarded under DR 2-107(A). There was no evidence submitted by Appellee regarding DR2 -106's elements that were his burden to meet. Since this information was not submitted by defendant, the award issued by the panel was not issued under DR 2-107(A). Because the panel's award did not arise under DR 2-107, the prohibition against filing an appeal does not apply.

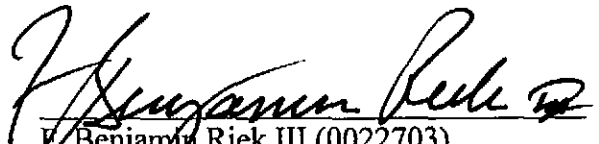
In addition, the award was not based on a division of the work performed by each party in accordance with DR 2-107(A)(1). As set forth below, Monastra only expended some 35 hours while the case was pending. Of this time, certain work was performed in the paternity action he handled through his own office. This included several hearings that were not connected to the discrimination case. The lack of any relationship of the time actually expended and the fee awarded raise a strong inference that the panel awarded a finder's fee as required by DR 2-107(A)(1) proportionality mandate.

The final basis for asserting that the *Shimko* decision does not apply to the instant matter is the arbitration agreement itself. The parties executed an agreement provided by the Cuyahoga Bar Association (Exhibit G). The agreement does not set forth any terms requiring the panel to following the mandates of DR 2-107(A)'s requirements. This lack of direction precludes any argument by defendant that the award issued in this matter arises under DR 2-107 and thus can not be appealed to this court pursuant to R.C. 2711.10(B) and (C).

## CONCLUSION

WHEREFORE for the foregoing reasons, since this case involves matters of public and great interest, appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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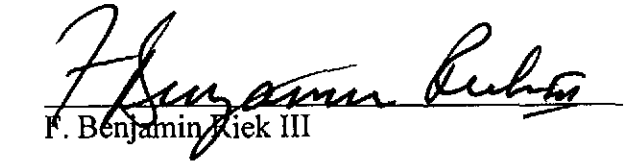
## Certificate of Service

A copy of the foregoing Memorandum in Support of Jurisdiction was served by first class mail, postage prepaid to Carl Monastra, Appellee, 75 Public Sq., Suite 1000, Cleveland, OH 44113 on this 17th day of February, 2009.



F. Benjamin Riek III

DEC 2 9 2008

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 91024**

## F. BENJAMIN RIEK, III

PLAINTIFF-APPELLANT

vs.

## CARL MONASTRA

DEFENDANT-APPELLEE

CA08091024
55294122

**JUDGMENT:**
**AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-640405 and CV-640511

**BEFORE:** Cooney, P.J., Blackmon, J., and Boyle, J.

**RELEASED:** December 18, 2008

**JOURNALIZED:** DEC 2 9 2008

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

DEC 29 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

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

DEC 18 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____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 COUNSEL
FOR ALL PARTIES-COSTS TAXED

COLLEEN CONWAY COONEY, P.J.:

Plaintiff-appellant, F. Benjamin Riek, III ("Riek"), appeals the trial court's decision to confirm an arbitration award. For the following reasons, we affirm.

In 2002, Sharon Havachak retained defendant-appellee, Carl Monastra ("Monastra"), to represent her in a wrongful discharge and discrimination case. Monastra referred the case to Riek and the two attorneys allegedly made an oral agreement that Riek would pay Monastra forty percent of any attorney fees collected, minus costs. After the case settled, Monastra demanded his share of the attorney fees, which he argued was $21,600. Riek offered to pay Monastra for the time he worked on the case, which amounted to just under $7,000.

Monastra and Riek were unable to settle their dispute. Monastra filed a complaint with the Cuyahoga County Bar Association and the attorneys agreed to submit to binding arbitration pursuant to DR 2-107(B). DR 2-107 provides:

"(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

"(1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;

"(2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;

"(3) The total fee is reasonable.

"(B) In cases of dispute between lawyers arising under this rule, fees shall be divided in accordance with mediation or arbitration provided by a local bar association. Disputes that cannot be resolved by a local bar association shall be referred to the Ohio State Bar Association for mediation or arbitration."

The bar association's arbitration panel held a hearing and awarded Monastra $18,000.

Riek filed a motion to vacate or modify the arbitration award in common pleas court. Monastra filed an application to confirm the award and the two cases were consolidated. The trial court granted Monastra's application to confirm the arbitration award, finding that the arbitration award was final, binding upon the parties, and unappealable.

Riek now appeals to this court, raising three assignments of error for our review. Within each assignment of error, Riek argues that the trial court erred by failing to modify or vacate the arbitration award. His main complaint is that Monastra failed to obtain a written agreement with him.

R.C. 2711.09 states in relevant part that "[a]t any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected ***as prescribed in sections 2711.10 and 2711.11 ***."

In *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, 813 N.E.2d 669, the Ohio Supreme Court held that "an arbitration award rendered pursuant to DR 2-107(B) is final, binding upon the parties, and unappealable." Since the bar association's decision was final, binding, and unappealable, we find that the trial court acted correctly in confirming the award.

Riek argues that *Shimko* is not binding on this case because the arbitrators did not base the award on the mandatory requirements of DR 2-107(A) which include a written agreement. Essentially, Riek is requesting that this court rearbitrate the case. In accordance with *Shimko*, however, we are without authority to do so.

Therefore, we overrule the assignments of error.

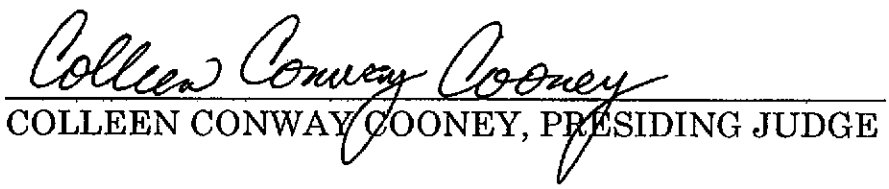
Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court 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.



COLLEEN CONWAY COONEY, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MARY J. BOYLE, J., CONCUR