IN THE SUPREME COURT OF OHIO

ERIKA KLEINFELD,	:	Case Number: 09-0403
	:	
Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
-*v*-	:	
	:	
HUNTINGTON NATIONAL BANK, et al.,	:	Court of Appeals Case Number CA-08-090916
	:	
Appellees,	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ERIKA KLEINFELD

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

The case presented for consideration by this Court is a case of public and great general interest because it provides this Court with a four-fold opportunity to decide and/or clarify several important procedural aspects governing Civ. R. 56(C) motions for summary judgment, Civ. R. 12(B)(6) motions to dismiss, and Civ. R. 15(A) amended pleadings.

With respect to Civ. R. 56(C), this case presents an opportunity for this Court: (1) to expand and solidify its holding in *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, by mandating that, when affirming summary judgment, a reviewing court must specifically identify the evidence in the record cited by the movant that supported summary judgment before that court can address the sufficiency or insufficiency of evidence presented by the nonmoving party; (2) to clarify its holding in *Byrd v. Smith* (2006), 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47 regarding the sufficiency of affidavits submitted in opposition to summary judgment motions, where such affidavits are not contradicted by previous deposition testimony; and (3) to further clarify summary judgment practice under Civ. R. 56 by determining whether affidavits submitted by a party in opposition to summary judgment need be supported by other documentary evidence so as to suffice to demonstrate the existence of a genuine issue of material fact for trial. Stated alternatively, this Court, should it accept jurisdiction, may decide whether Civ. R. 56(E) disallows a reviewing court to usurp the role of the jury in weighing or disregarding affidavits submitted in opposition to summary judgment, where such affidavits do not contradict previous deposition testimony, regardless of whether such affidavits are supported by additional documentary evidence. In this respect, the Eighth District's ruling improperly altered the well-established rules of summary judgment by requiring that Appellant's affidavit be supported by additional documentary evidence, evidence in fact not specifically authorized by

Civ. R. 56, in order to present a fact issue for trial; the Eighth District's decision effectively allowed it to transform summary judgment review into an exercise of appellate trail practice addressing issues of weight and sufficiency of evidence rather than determining whether such evidence demonstrated the existence of a fact issue for trial.

This case also presents a matter of public and great general interest because it gives this Court an opportunity to address an issue of first impression under Civ. R. 15(A), namely: whether a party, after filing a motion for leave to amend a complaint in an existing case, but before such motion is disposed, may proceed to bring that claim separately in a second lawsuit, or whether that party's only recourse in bringing such claim is through the granting of a Civ. R. 15 leave to amend in the existing action. In other words, this Court can decide whether the filing of a separate lawsuit, in lieu of amending a complaint in an existing lawsuit, constitutes an impermissible attempt to circumvent the amendment provisions of Civ. R. 15, or whether a second action is appropriately filed, notwithstanding Civ. R. 15, where the second action presents an otherwise viable cause of action, not barred by the statute of limitations, and not based on the same set of facts as the claims in the prior case. The answer to this question will have broad implications in pleading practice, especially where, as some jurisdictions have concluded, the denial of a motion to amend a complaint has *res judicata* preclusive effect on later attempts to bring that claim via subsequent lawsuit.

A final and related matter involves the proper differentiation between motions for summary judgment and motions to dismiss, from the standpoint that the Eighth District's decision superimposed an evidentiary standard upon its *de novo* review of the dismissal of a consolidated case under Civ. R. 12(B)(6). Specifically, after improperly weighing and disregarding affidavit testimony in its summary judgment analysis in one case, the Eighth

District proceeded to employ that improper analysis and reasoning on its review of a Civ. R. 12(B)(6) dismissal of a second, consolidated case, thereby imposing an evidentiary standard upon Appellant's opposition to a Civ. R. 12(B)(6) motion to dismiss in a separate case. This issue acquires even greater significance should this Court conclude that a Party may maintain a separate action through the filing of a new complaint rather than through the amendment provisions of Civ. R. 15(A), given that separately filed cases, even if consolidated, would maintain their separate identity, thereby having implications upon final appealable orders under R.C. 2505.02 and Civ. R. 54(B).

STATEMENT OF THE CASE AND FACTS

This appeal arises from multiple orders of the Cuyahoga County Court of Common Pleas, case captioned Erika Kleinfeld v. Huntington National Bank, et. al, consolidated Case Nos. CV-404730, CV-526833, CV-599182, CV-604994, and CV-630879, wherein the trial court (1) granted Summary Judgment in Favor of Huntington in Case No. 604994, (2) granted Appellee Beckett & Chambers' Motion to Dismiss in Case No. 599182, and (3) granted Huntington's Motion to Dismiss in Case No. 630879. The Eighth District subsequently affirmed these judgments on appeal in Appellate No. 90916, opinion released December 11, 2008 and journalized January 14, 2009, giving rise to this present discretionary appeal to this Court.

The controversy itself arose from an unrelated cognovit judgment awarded to Huntington and against an individual named Lawrence Lomaz and one of Lomaz's companies, Pacific Financial Services of America.[1] Huntington initiated its collection proceedings on its judgment and on August 19, 2003 obtained a writ of execution pursuant to R.C. §2329.09. Thereafter, on October 15, 2003 Huntington filed a "Motion for Order to Allow Sheriff to Forcibly Enter

[1] This case bears the originating Case No. 404730; all other case numbers involved herein bore no relation to the 404730 case other than that they stemmed from subsequent collection efforts on behalf of Huntington.

Property and for Emergency Order of Possession," requesting therein that the court allow the Sheriff to forcibly enter the premises designated in its Alias Instructions attached thereto, that premises being 2249 Elm Street, Suite 502, Cleveland, Ohio 44113 ("the Elm Street apartment" or "the Apartment").

Appellant unaware of these of these proceedings, on January 1, 2004 signed a residential lease agreement for the Elm Street apartment, which had previously been rented by Lomaz. In tandem with her signing the lease agreement, Ms. Kleinfeld also purchased various furniture located in the Apartment from Lomaz, for $2,000.00. However, because Lomaz still did considerable business in Cleveland, Ms. Kleinfeld agreed to rent Lomaz a single office located in the Elm Street apartment for Lomaz to use for his business at those times Lomaz was present in Cleveland.

On January 5, 2004, the trial court in Case No. 404730 granted Huntington's forcible entry motion, authorizing the Cuyahoga County Sheriff's Office ("CCSO" or "the Sheriff") to enter the Elm Street residence and to seize, levy, inventory, appraise, advertise and sell any and all goods and chattels owned by Laurence D. Lomaz a.k.a. Larry Lomaz. Subsequent to the court's order, on March 9, 2004, two of Huntington's attorneys accompanied the Sheriff's deputies to preside at the forcible entry and execution. The deputies proceeded to tag and inventory property in the apartment. In the meantime, Appellant learned of this action and returned to the Elm Street apartment so as to object to the levy, duly informing Huntington's attorneys and the Sheriff's deputies that the Elm Street apartment was her private residence and that she owned many of the tagged items.

The January 12, 2004 order authorized the CCSO to seize and levy all property in the apartment belonging to Mr. Lomaz. While Mr. Lomaz did have some property in the apartment

(duly seized by the CCSO), Huntington's action also perfected the seizure of various personal property to which Appellant claimed ownership. Although Appellant vehemently objected to this levy, which took place over the course of two days, the CCSO proceeded to seize all property in the apartment, including Appellant's, and removed the property, which then was stored at Appellee Beckett & Chambers' ("B & C") facility. No dispute exists that neither the CCSO nor Huntington's attorneys, as officers of the court, initiated proceedings mandated by R.C. 2329.84.[2]

Unable to obtain relief pursuant to R.C. 2329.84, Appellant filed an action for conversion and trespass against Huntington, Case No. 526833, which was involuntarily dismissed and refilled as Case No. 604994. Appellant also filed a separate replevin action against B & C, Case No. 599182. All cases became consolidated. B & C filed a Motion to Dismiss in 599182, which the trial court granted, one business day after current counsel for Appellant filed a notice of appearance in the case.[3] Thereafter, Huntington filed a Motion for Summary Judgment in Case Nos. 526883 and 604994.[4] While the Motion for Summary Judgment was pending, Appellant sought leave to amend her complaint in Case No. 604994 to add a claim for abuse of process.[5]

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[2] The Court of Appeals erroneously cited R.C. 2329.091 as the governing statute in the case of a wrongful levy of a writ of execution; however, 2329.091 applies only to judgment debtors, not third parties. Huntington has argued that Appellant waived objection by not requesting a hearing. This is incorrect. R.C. 2329.84 clearly mandates that the levying officer, upon notice by the objecting party, effectuate such a hearing. As no hearing took place, no determination of ownership occurred. See *infra* at Proposition of Law No. I.

[3] This dismissal, which the Court of Appeals affirmed, is not the subject of this present appeal.

[4] While Appellant's claims were involuntarily dismissed in 526833 due to failure of service upon Huntington, Huntington's counterclaims remained pending in the case. For this reason, Case No. 526833 remained an active case at the time Appellant refilled her conversion claims as Case No. 604994, after which the two became consolidated.

[5] This new claim was based primarily on Huntington's "alter ego" theory it had advanced during its motion practice, i.e., that Appellant was merely a "straw man" that Lomaz was using to thwart Huntington's collection efforts and to bring surrogate lawsuits against it. It should be noted that at this point in time, Appellant was represented by new counsel, who is also undersigned counsel.

Before the trial court ruled on the motion for leave, Appellant initiated a separate lawsuit against Huntington, Case No. 630879, asserting her claim for abuse of process as a single cause of action; Huntington thereafter filed a Motion to Dismiss Case No. 630879. The trial court granted both motions.

On appeal, the Eighth District affirmed both summary judgment and 12(B)(6) dismissal. In so affirming, the Court of Appeals made several errors, to wit: (1) it improperly placed the initial burden upon Appellant, the non-moving party, to demonstrate a genuine issue of material fact with respect to her ownership of the seized property; (2) it disregarded the affidavit testimony of Appellant submitted in opposition to summary judgment, labeling it "self-serving" and insufficient "absent documented proof of the purchase"[6] from Lomaz; (3) it concluded that Appellant's abuse of process complaint in Case No. 630879 "circumvent[ed] the rules for amending a complaint" under the Civil Rules, and therefore "was properly dismissed"[7]; and (4) it separately concluded that "even if [Appellant's] third complaint [for abuse of process] was properly filed," that such complaint failed to state a claim upon which relief could be granted "based upon [the affirmation of summary judgment in favor of Huntington . . . . in that] [Appellant] cannot demonstrate valid ownership of the property at issue."[8]

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A Court of Appeals, when affirming a trial court's grant of summary judgment, must specifically identify the evidence of the type listed in Civ. R. 56(C) upon which it makes the determination that the moving party has demonstrated the absence of a genuine issue of material fact before it can determine that the requisite burden has shifted to the non-moving party under *Dresher v. Burt*.

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6 See Opinion at p. 7

7 See Opinion at pp. 8, 10

8 See Opinion at p. 11

Fundamental to summary judgment practice under Civ. R. 56(C) is the concept of burden. Over ten years ago, this Court modified and/or clarified the burden analysis in *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. This decision solidified summary judgment practice by mandating (1) that the party moving for summary judgment always bears the initial responsibility of demonstrating the absence of a genuine issue of material fact for trial, (2) that such moving party may meet this burden only by pointing to specific evidence of the type listed in Civ. R. 56(C), and (3) that absent such a demonstration, the movant's burden is not met, and the non-moving party bears no reciprocal burden to produce any evidence under Civ. R. 56(E). This Court made clear that only where the moving party meets its initial burden does the evidentiary burden shift to the nonmoving party under Civ. R. 56(E). In this respect, Civ. R. 56(E) specifically permits the nonmoving party to respond "by affidavit or otherwise provided in this rule."

Amazingly, the Court of Appeals cited *Dresher* and proceeded to not only ignore it, but to impermissibly reverse the analysis by placing the initial burden upon Appellant, the non-moving party. In its decision, the Court of Appeals identified the summary judgment issues as follows: "The only relevant questions before this court are whether Huntington obtained a valid order of possession authorizing it to seize the property and whether [Appellant] can demonstrate proof of ownership of the property."[9]

The Court of Appeals neglected to place the burden on Huntington to identify those portions of the record in the case before it that demonstrated the lack of a genuine issue of

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[9] See Opinion at p. 7. While the Eighth District found the Order valid, it failed to consider the propriety of its execution. Indeed, this failure is especially egregious in light of the fact that no R.C. 2329.84 procedure occurred. Furthermore, the issue of proper execution formed one of the bases of Appellant's abuse of process claim, i.e., the perversion of otherwise validly initiated legal proceedings. See *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 1994-Ohio-503, 626 N.E.2d 115.

material fact regarding ownership of the seized property. Instead of requiring Huntington to identify evidence demonstrating that all the seized property belonged to Lomaz, the Court of Appeals required Appellant, the non-moving party, to demonstrate "proof of ownership." Apparently, the Court of Appeals felt that the Order of Possession, which by its terms permitted execution and levy upon all property belonging to "Lawrence D. Lomaz," sufficed to eliminate any burden on the part of Huntington to demonstrate proper execution thereof. However, the Order of Execution did not constitute proper Civ. R. 56(C) evidence of ownership. In fact, rather than absolving Huntington of its burden, the Order of Possession actually created the very issue of fact before the trial court, i.e., whether the property seized belonged to the judgment debtor Lomaz or rather belonged to Appellant; this must be especially true given the absence of an R.C. 2329.84 determination of ownership.[10] This being the case, the Court of Appeals wrongfully concluded that the Order of Possession itself met Huntington's initial *Dresher* burden to demonstrate Lomaz's ownership of the levied property, thereby shifting the burden to Appellant to demonstrate affirmative proof of ownership.

The Court of Appeals' decision demonstrates a fundamental misunderstanding of proper summary judgment analysis under *Dresher*: to conclude that an Order of Possession which on its face specified the seizure of property belonging to the judgment debtor Larry Lomaz, constitutes Civ. R. 56(C) evidence of proper execution thereon, i.e., evidence that all property seized pursuant thereto actually belonged to Lomaz, renders the procedure set forth in R.C. 2329.84 meaningless. In the absence of the procedure to determine ownership mandated by R.C. 2329.84, this conclusion becomes manifest error. As such, this case presents a matter of public and great general interest in that it allows this Court to further clarify summary judgment

[10] Indeed, had a proper 2329.84 determination of ownership occurred, the present controversy would most likely never have arisen, at least not in its current form.

standard by mandating that a reviewing court specifically identify proper Civ. R. 56(C) evidence presented by the party moving for summary judgment before it proceeds to analyze the evidence presented by the nonmoving party. Appellant prays that this Court accept jurisdiction on this crucial and fundamental issue.

> **<u>Proposition of Law No. II</u>: Upon finding that a moving party has satisfied its initial burden under *Dresher*, a reviewing court may not determine the weight or sufficiency of an affidavit submitted by the party opposing summary judgment unless it finds that such affidavit contradicts previous discovery materials submitted by that non-moving affiant, nor can a reviewing court require that such affidavit be supported by additional documentary evidence so as to sufficiently demonstrate the existence of a genuine issue of material fact under Civ. R. 56.**

While Proposition of Law No. II also relates to proper summary judgment analysis, it differs from Proposition No. I in that, assuming Huntington had presented evidence to satisfy its initial *Dresher* burden, the Eighth District, upon shifting that burden, improperly weighed the evidence submitted by Appellant, in clear violation of the limited role of the reviewing court in summary judgment analysis. In particular, this second proposition presents the question of whether a court of appeals may disregard affidavits properly submitted under Civ. R. 56(E) in favor of other documentary evidence, thereby taking upon itself the role of trier of fact through considering the weight and sufficiency of evidence and the credibility of affiants instead of limiting its examination to the existence of genuine issues of material fact for trial.

Proper summary judgment analysis dictates that a Civ. R. 56 motion does not serve as a device whereby a court may try the sufficiency of issues of fact, but rather, serves only as a device whereby to determine whether triable issues of fact exist. *Viock v. Stowe-Woodward* (Erie Cty. 1983) 13 Ohio App.3d 7, 13 Ohio B. Rep. 8, 467 N.E.2d 1378; *Lee v. Grant* (Sept. 28, 2000), Cuyahoga App. No. 77135; *Haller v. O'Donnell* (Sept. 9, 1993), Franklin App. No. 93AP-216;; *Flowers v. McCants* (Sept. 25, 1986), Cuyahoga App. No. 50876, citing *Viock* and

Napier v. Brown (Montgomery Cty. 1985), 24 Ohio App.3d 12, 24 Ohio B. Rep. 33, 492 N.E.2d 847. Resolving issues of credibility or reconciling ambiguities and conflicts in witness testimony falls outside the province of summary judgment. *Martin v. Gahanna* (May 31, 2007), Franklin App. No. 06AP-1175, 2007-Ohio-2651, citing *Napier*; *Moskovitz v. Progressive Ins. Co.* (Lake Cty. Com. Pl. 2004), 128 Ohio Misc.2d 10, 2004-Ohio-3100, 811 N.E.2d 174.

In *Aglinsky v. Cleveland Builders Supply Co.* (Cuyahoga Cty. 1990), 68 Ohio App.3d 810, 816-817, 589 N.E.2d 1365, a panel of the Eighth District Court held: "[i]n the absence of a finding by the trial court the affidavit [presented in opposition to summary judgment] was made in bad faith pursuant to Civ. R. 56(G), it must be considered truthful for summary judgment review. * * * Issues of credibility of affiants are not issues properly decided or disposed of by a motion for summary judgment." The *Aglinsky* Court required reversal of summary judgment where the party opposing the motion submitted evidence of the type listed in Civ. R. 56(E), "without determining the credibility of the [affiant] and resolving doubts and construing evidence most favorably for the nonmoving party." Id. at 817; see also *Smedley v. Dunkin Doughnuts, Inc.* (December 17, 1998), Cuyahoga App. No. 73740 (on a motion for summary judgment, the court should not weigh the evidence or assess the credibility of witnesses); *Even v. Krawitz* (May 1, 1997), Cuyahoga App. No. 70632; *Merchants Advance, L.L.C. v. Boukzam* (Sept. 25, 2008), Cuyahoga App. No. 90287, 2008-Ohio-4860 (**Boyle, J.**, dissenting).

It is important to note that the holding in *Aglinsky* was addressed by this Court in *Byrd v. Smith* (2006), 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47. Specifically, *Aglinsky* involved affidavit testimony submitted in opposition to a motion for summary judgment that contradicted the affiant's previous answers to interrogatories. The *Aglinsky* court reasoned that this discrepancy merely created an issue of credibility that could only be resolved by the trier of

fact. The Court in *Byrd* rejected this rule of law as an absolute bar to summary judgment, and held at paragraph three of the syllabus:

> An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment.

The *Byrd* decision modified *Aglinsky* only to the extent that *Aglinsky* required a finding by the trial court of bad faith under Civ. R. 56(G) before it could disregard an affidavit submitted in opposition to a summary judgment motion. *Byrd* allowed a court to disregard affidavit testimony where such testimony contradicted previous deposition testimony, irregardless of an accompanying finding of bad faith. Otherwise, the rule of law as stated in *Aglinsky* remains the law of the Eighth District. Thus, where a nonmoving party submits an affidavit in opposition to a motion for summary judgment, the court may only assess the credibility of the affiant and weigh the evidence submitted where such affidavit contradicts previous deposition testimony. Absent this, a reviewing court may not afford the affidavit any less weight or evidentiary value simply because it is not supported by other documentary evidence. See *Smith v. L.J. Lewis Enterprises, Inc.* (Sept. 28, 2001), Trumbull App. No. 2000-T-0052, 2001-Ohio-4291 at * 4 (courts are not to engage in the weighing of the evidence in summary judgment, rather they are to accept the allegations of the non-moving party as true); *Hudson v. East Cleveland* (March 10, 1994), Cuyahoga App. No. 65924 at * 2 ("[t]o grant summary judgment because a party's position is supported by more numerous and more credible affidavits, is actually weighing the evidence, and that the court cannot do").

Moreover, in this case, Appellant's affidavit was entirely consistent with her previous deposition testimony, testimony taken during a hostile deposition as on cross-examination. Because her affidavit remained consistent with her deposition testimony, this affidavit is of no

less evidentiary value, for the purposes of summary judgment, than it would be if supported by other documentary evidence; this Court should therefore clarify and/or extend the *Byrd* holding to disallow a trial court or reviewing court from arbitrarily disregarding or otherwise weighing the value of affidavit testimony simply because such testimony is submitted by the non-moving litigant and is not supported by any other documentary evidence. Weight and sufficiency issues must remain the sole province of the trier of fact.

Proposition of Law No. III: Civ. R. 15(A) does not present the sole means with which to bring a viable claim, nor does Civ.R. 15(A) preclude the initiation of a separate lawsuit while a motion to amend remains pending in a previous case.

In its opinion, the Eighth District reached the sweeping and altogether unprecedented conclusion that the leave provisions of Civ. R. 15(A) preclude a party from asserting an otherwise viable claim in a separate lawsuit, and that any attempt to do so constitutes an impermissible circumvention of Civ. R. 15(A), therefore making dismissal appropriate under Civ. R. 12(B)(6). Not surprisingly, the court cited no authority for this proposition, and Appellant is aware of no court in this state that has reached a similar conclusion.

While the allegations contained in the proposed amended complaint filed in Case No. 604994 were substantially identical to the allegations brought in Case No. 630879, to conclude that the new case represented an attempt to circumvent the leave provisions contained in Civ. R. 15(A) not only constitutes a unprecedented contraction in procedural jurisprudence, but also ignores the fundamental nature of a cause of action. Every cause of action is independent and self-sufficient. In this respect, while all claims of right embraced in a single cause of action must be prosecuted simultaneously, a litigant cannot be required to prosecute simultaneously all of its multiple causes of action even though they relate to the same subject matter. Thus, a litigant may bring a separate suit on each separate cause of action even if joinder of the separate causes

is permissible. *Norwood v. McDonald* (1943), 142 Ohio St. 299, 312, 27 Ohio Op. 240, 52 N.E.2d 67; see also *Hart v. Guardian Trust Co.* (Cuyahoga Com. Pl. 1945), 52 Ohio Law Abs. 225, 75 N.E.2d 570, 586 ("It is a well recognized principal of procedural law that causes of action which may be joined in one action also may be the subject matter of separate suits").

Apparently, the Eighth District concluded that, as a matter of procedure, the only way Appellant could prosecute her separate cause of action for abuse of process was through a Civ. R. 15(A) amendment in Case No. 604994. Although Appellant had in fact sought to amend her complaint in that case, such was done as the most efficient way to bring this claim; it was not, however, the only way. Plaintiff brought her claim for abuse of process within the applicable statute of limitations. The cause of action stood alone, required different sets of facts to be proven, and was viable. See *Norwood, supra* at paragraph four of syllabus and at 306-307 (determining whether a second action is based upon the same cause of action as that litigated in a former suit for *res judicata* purposes).[11] While not dispositive of the issue, the rationale in *Norwood* remains instructive as to the distinction between separate causes of action and multiple theories of recovery based on the same transaction—e.g., contract and tort claims on the one hand and contract and unjust enrichment claims on the other. *Norwood* thus remains good law for the proposition that distinct causes of action may be maintained as separate lawsuits, subject to the provisions of Civ. R. 18(A) (permissive joinder of claims) and Civ. R. 42 (discretionary consolidation of actions).

[11] This Court has since overruled the second paragraph of *Norwood* in *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, but only to the extent that *res judicata* bars subsequent claims that relate to the same transaction or occurrence; because Case No. 630879, while perhaps stemming from the execution of the Order of Possession, nevertheless required different sets of proofs and therefore did not rest upon the "same nucleus of operative facts" as her conversion claims, such case remained a separate cause of action properly brought through the filing of a new complaint.

Proposition of Law IV: When presented with a Civ. R. 12(B)(6) motion to dismiss, a reviewing court may not superimpose the evidentiary standards of Civ. R. 56 upon the pleading requirements governing Civ. R. 8, especially where the reviewing court bases its ruling on an improper disregard of summary judgment evidence.

The Eight District, after affirming dismissal of Case No. 630879 under its newly created interpretation of Civ. R. 15, as addressed in Proposition of Law No. III above, alternately held that even if Case No. 630879 did not represent an impermissible circumvention of the Civil Rules warranting dismissal, that Appellant could nevertheless not prevail on Huntington's Civ. R. 12(B)(6) motion because Appellant could not prove ownership of the seized property. In reaching this separate conclusion, the Eighth District compounded its erroneous summary judgment analysis by then superimposing that faulty analysis upon a Civ. R. 12(B)(6) motion, and by so doing, did away with the pleading requirements of Civ. R. 8 in favor of actual evidentiary determinations. In other words, the Eighth District grafted Civ. R. 56 evidentiary requirements upon Appellant's opposition to Huntington's motion to dismiss, concluding that not only must Appellant plead some set of facts that if true would entitle her to relief, but upon so pleading, must also demonstrate evidence that she could so prove these facts. This is, again, an unprecedented distortion of the well-established principles underlying Civ. R. 8 and Civ. R. 12(B)(6).

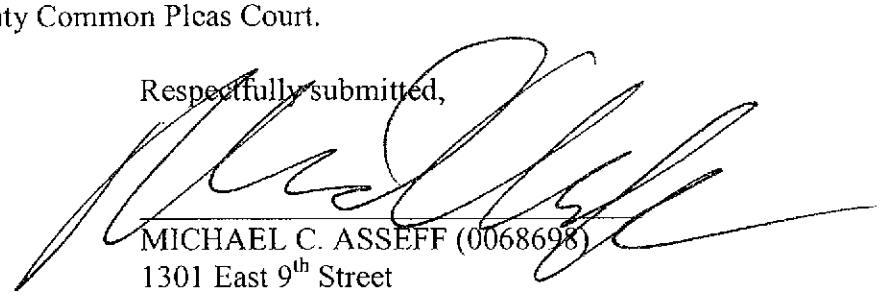
Specifically, because this Court improperly disregarded Appellant's affidavit, it then concluded that "nothing in [Appellant's abuse of process complaint] could survive a 12(B)(6) motion challenge because she can prove no set of facts that give her a legal right to the property." This ruling amounts to fact-finding, an undertaking entirely improper on summary judgment, and egregiously improper on a Civ. R. 12(B)(6) motion. Certainly, a tremendous difference exists with respect to what set of facts Appellant can prove and what her evidence

submitted in opposition to an unrelated motion for summary judgment does or does not demonstrate. Apparently, the Eighth District believed that Appellant under no circumstances can prove any set of facts that would demonstrate her ownership of the property seized, based only upon its impermissible rejection of a properly submitted affidavit. This finding flies in the face of the remedy provided by R.C. 2329.84, which allows for a trial to determine ownership. In this respect, under R.C. 2329.84, the prosecution of a writ of execution itself creates the fact issue—it does not determine it, as the Eighth District concluded (see discussion at Proposition of Law No. I, *supra*). The Eighth District never held that Appellant's abuse of process claim was inadequately pled; it simply made a finding of fact based on its disregard of her affidavit and concluded that she could under no circumstances prove ownership of the levied property. This is manifestly improper, and an unprecedented breach of the well-settled standards governing both Civ. R. 56 and Civ. R. 12.

CONCLUSION

For the foregoing reasons and in accordance with the facts and authorities set forth herein, this Court should accept jurisdiction and reverse the decisions of the Eighth District Court of Appeals and the Cuyahoga County Common Pleas Court.

Respectfully submitted,



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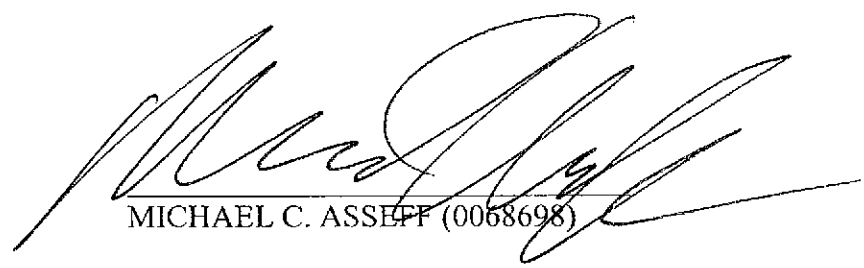

MICHAEL C. ASSEFF (0068698)

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90916

ERIKA KLEINFELD

PLAINTIFF-APPELLANT

vs.

HUNTINGTON NATIONAL BANK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-404730, CV-526833, CV-599182,
CV-604994, and CV-630879

BEFORE: Celebrezze, J., McMonagle, P.J., and Boyle, J.

RELEASED: December 11, 2008

JOURNALIZED: JAN 14 2009

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

JAN 1 4 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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

DEC 1 1 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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

FRANK D. CELEBREZZE, JR., J.:

Appellant, Erika Kleinfeld ("Kleinfeld"), brings this appeal challenging the trial court's dismissal of her cases against appellees, The Huntington National Bank ("Huntington") and Becket & Chambers Inc. ("B&C"); its grant of summary judgment in favor of Huntington; and, its denial of her motion to disqualify Huntington's counsel.[1] After a thorough review of the record, and for the reasons set forth below, we affirm.

In March 2000, Huntington obtained a cognovit judgment in excess of $500,000 against Lawrence Lomaz, personally, and against his company, Pacific Financial Services of America, Inc. (Case No. CV-404730). Certificates of judgment were filed in Cuyahoga, Portage, Mahoning, and Ashtabula counties. Huntington attempted to collect on its judgment without success.

On August 19, 2003, Huntington obtained an order in aid of execution, authorizing the Cuyahoga County Sheriff's Office ("CCSO") to seize personal property[2] ("property") from Lomaz's apartment on Elm Street, Cleveland, Ohio ("the apartment"). The CCSO attempted to enter the apartment on four

[1]Case Nos. CV-404730, CV-526833, CV-599182, CV-604994, and CV-630879 have been consolidated for the purposes of this appeal; however, Kleinfeld is not a party in Case No. CV-404730.

[2]Lomaz's personal property included some furniture, inventory from a business he owned, and other unidentified items.

occasions,[3] all without success. It is undisputed that Lomaz lived and had an office in the apartment on all four of the occasions when the CCSO attempted entry.

On October 15, 2003, Huntington moved the court for an order of possession and to allow the CCSO to forcibly enter the apartment to execute on the August 19, 2003 order. The court scheduled a hearing on Huntington's motion for November 14, 2003. Lomaz filed two motions to continue the hearing, but never filed an opposition to the underlying motion. The court rescheduled the hearing twice, and the hearing was ultimately held on January 5, 2004.

On January 1, 2004, Lomaz began subletting the apartment to Kleinfeld. Kleinfeld signed a Replacement Lease, which placed her name as lessee on the original lease. Lomaz retained a key to the apartment and kept some of his clothing there. Kleinfeld testified in her deposition that she purchased the personal property that Lomaz had in the apartment for the sum of $2,000. She also testified that she paid Lomaz $1,000 in December 2003 and $1,000 in July 2004. Kleinfeld testified that she never got a receipt for her payments, and she has no documentation of any kind evidencing her purchase.

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[3]August 25, 2003; September 18, 2003; October 9, 2003; and October 14, 2003.

At the January 5, 2004 hearing, Lomaz appeared with counsel and opposed the forcible entry motion on the basis that he no longer lived at the apartment. On January 12, 2004, the court granted Huntington's motion for an order of possession and for forcible entry, which authorized the CCSO to enter the apartment for the purpose of seizing the property Lomaz owned and kept at the apartment at the time the original execution was ordered on August 19, 2003.

On March 9 and 10, 2004, two deputies from the CCSO entered the apartment. The deputies were accompanied by two of Huntington's attorneys, a locksmith, and movers from B&C, as required by the CCSO. The deputies began tagging and seizing the property. On both dates, Kleinfeld arrived and claimed that the property in the apartment was hers, although she could not produce evidence of ownership. Specifically, Kleinfeld told the deputies that the property had previously belonged to Lomaz, but that as of December 31, 2004, all the property belonged to her. B&C stored the property that was seized from the apartment.

Although Kleinfeld objected to the seizure, instead of following the procedure provided in R.C. 2329.091, she filed a complaint against Huntington on April 1, 2004 (Case No. CV-526833). Kleinfeld failed to properly serve Huntington; nonetheless, Huntington answered and counterclaimed against

Kleinfeld for conversion and replevin on the basis that she had unlawfully removed several thousand dollars worth of property after the CCSO deputies left on March 9th and before they returned March 10th. Kleinfeld's complaint was dismissed on September 29, 2006 for failure to prosecute.

On August 17, 2006, Kleinfeld filed a replevin action against B&C (Case No. CV-599182). On October 20, 2006, Kleinfeld refiled her complaint against Huntington alleging trespass, wrongful entry, conversion, and replevin (Case No. CV-604994). On June 14, 2007, Kleinfeld moved to amend her complaint to add a claim for abuse of process, which Huntington opposed. The trial court did not rule on the motion to amend.

On June 25, 2007, Huntington filed a motion for summary judgment in Case No. CV-604994. On August 6, 2007, Kleinfeld filed a third complaint against Huntington alleging abuse of process (Case No. CV-630879), which was nearly identical as the claim she had attempted to add in Case No. CV-604994. On September 27, 2007, Huntington filed a motion to strike Kleinfeld's third complaint or in the alternative to dismiss Case No. CV-630879. On November 16, 2007, Kleinfeld moved the court to disqualify Huntington's attorneys on the basis that they were necessary witnesses at trial. Huntington opposed Kleinfeld's motion to disqualify. B&C filed a motion to dismiss Case No. CV-599182, which Kleinfeld did not oppose.

On December 21, 2007, the trial court granted Huntington's motion for summary judgment and motion to dismiss; granted B&C's motion to dismiss; and denied Kleinfeld's motion to disqualify Huntington's counsel. Huntington dismissed without prejudice its action against Kleinfeld in Case No. CV-526833.

Review and Analysis

Kleinfeld timely filed her notice of appeal. She raises four assignments of error for review, three of which pertain to her claims against Huntington and the last of which pertains solely to B&C.

Summary Judgment

"I. The trial court erred in granting defendant-appellee Huntington National Bank's motion for summary judgment in Consolidated Case No. [CV-] 604994."

In her first assignment of error, Kleinfeld argues that the court erred when it granted Huntington's motion for summary judgment against her. She specifically argues there were genuine issues of material fact which precluded summary judgment. We disagree.

"Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (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, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim.*" Id. at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving

party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto County Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

The only relevant questions before this court are whether Huntington obtained a valid order of possession authorizing it to seize the property and whether Kleinfeld can demonstrate proof of ownership of the property.

The trial court granted Huntington an order of possession on January 12, 2004, which was never challenged. The CCSO executed on that order on March 9 and 10, 2004. Despite the claims in her self-serving affidavit that she purchased the property from Lomaz, absent documented proof of the purchase, Kleinfeld has not established a genuine issue of material fact to defeat summary judgment. Furthermore, her sublease on the apartment, which she did provide,

does not entitle her to the presumption that the property located within it is hers.

The trial court did not err by granting summary judgment in favor of Huntington. Kleinfeld's first assignment of error is overruled.

Abuse of Process

"II. The trial court erred in dismissing appellant's abuse of process claim in Consolidated Case No. [CV-]630879."

In her second assignment of error, Kleinfeld argues that the court erred by granting Huntington's motion to dismiss Case No. CV-630879. She argues that she has sufficiently pleaded the elements of an abuse of process claim. We disagree.

Kleinfeld focuses solely on whether the factual allegations as pleaded in her complaint, if taken as true, support a claim for abuse of process. Although she correctly sets forth the standard under Civ.R. 12(b)(6), she conveniently ignores the fact that she violated Civ.R. 15(A) and Loc.R. 8(D) by circumventing the rules for amending a complaint.

Civ.R. 15(A) states: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within

twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." See, also, Loc.R. 8(D).

In Case No. CV-604994, Kleinfeld attempted to amend her complaint to include a claim for abuse of process by filing a motion for leave to file a first amended complaint. Her motion was filed on June 14, 2007, after discovery was cut off, a dispositive motion date of June 25, 2007 was set, and a trial date of August 22, 2007 was set. The trial court never granted Kleinfeld leave to file her amended complaint. In *Brown v. FirstEnergy Corp.*, 159 Ohio App.3d 696, 2005-Ohio-712, 825 N.E.2d 206, the court denied a plaintiff's motion for leave to amend because it was filed almost three years after the original complaint and after dispositive motions had been filed.

We note that Kleinfeld filed her first complaint against Huntington in 2004. Despite the court's dismissal for failure to prosecute, this case, including Huntington's counterclaim, had been active for over three years by the time Kleinfeld filed her motion for leave to amend in Case No. CV-604994. Discovery

had been completed, and the case was set for trial. We do not find that the court erred in effectively denying her motion for leave to amend by failing to rule on it.

This leads us to analyze whether the court erred in dismissing Kleinfeld's third complaint, which adds a claim for abuse of process, the exact claim she tried to add in her proposed amended complaint. We find that Kleinfeld was attempting to circumvent the civil rules, and her complaint was properly dismissed.

Even if her third complaint was properly filed, we agree with Huntington that Kleinfeld failed to state a claim upon which relief can be granted. 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.*, 65 Ohio St.3d 545, 1992-Ohio-73, 605 N.E.2d 378. It is well-settled that "when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584.

While the factual allegations of the complaint are taken as true, "[u]nsupported conclusions of a complaint are not considered admitted *** and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v.*

Capots (1989), 45 Ohio St.3d 324, 544 N.E.2d 639. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

Since factual allegations in the complaint are presumed true, only the legal issues are presented, and an entry of dismissal on the pleadings will be reviewed de novo. *Hunt v. Marksman Prod., Div. of S/R Indus., Inc.* (Mar. 22, 1995), Summit App. No. 16679.

Based on our disposition of Kleinfeld's first assignment of error, we cannot hold that Kleinfeld is entitled to relief on her claim for abuse of process. Huntington has a valid order of possession, and Kleinfeld cannot demonstrate valid ownership of the property at issue. Nothing in her third complaint could survive a Civ.R. 12(b)(6) motion challenge because she can prove no set of facts that give her a legal right to the property. Therefore, we overrule Kleinfeld's second assignment of error.

Disqualification of Counsel

"III. The trial court erred in denying appellant's motion to disqualify appellee Huntington National Bank's counsel in Consolidated Case No. [CV-] 630879."

In her third assignment of error, Kleinfeld argues that the trial court should have disqualified Huntington's lawyers because their presence at the apartment on March 9 and 10, 2004 created a conflict of interest. She claims that, because of their presence, she planned to call them as witnesses in the case. Our disposition of the previous assignments of error renders this argument moot.

Claims Against Becket & Chambers

"IV. The trial court erred in dismissing appellant's claims against appellee Becket & Chambers, Inc. in Consolidated Case No. [CV-]599182."

In her fourth assignment of error, Kleinfeld argues that the court erred by failing to hold a hearing as mandated by R.C. 2737.07(A); therefore, dismissal of her case against B&C was improper. B&C contends that dismissal was proper because Kleinfeld had not demonstrated ownership of the property, and her argument on appeal was waived for failure to raise it below. We find no merit in Kleinfeld's argument.

Kleinfeld cannot raise for the first time on appeal arguments she failed to raise in the trial court below. See *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71, 679 N.E.2d 706. Kleinfeld never filed an opposition to B&C's motion to dismiss, so she waived any arguments she may

may have had. Nonetheless, we find that the trial court did not err by granting B&C's motion.

R.C. 2737.07(A) states: "Upon the filing of the motion for an order of possession pursuant to section 2737.03 of the Revised Code, the court shall cause the matter to be set for hearing within twenty days thereafter and the respondent shall be notified in accordance with section 2737.05 of the Revised Code." Kleinfeld correctly notes that the language of the statute is mandatory as it relates to the court holding a hearing; however, she ignores the reference within this section to R.C. 2737.03, which requires a movant to submit an affidavit providing, among other things, a description of the property, the specific interest of the movant in the property, and proof that the property is not seized under execution of judgment. R.C. 2737.03.[4]

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[4]R.C. 2737.03 states in full: "Any party to an action involving a claim for the recovery of specific personal property, upon or at any time after commencement of the action, may apply to the court by written motion for an order of possession of the property. The motion shall have attached to it the affidavit of the movant, his agent, or his attorney containing all of the following:

"(A) A description of the specific personal property claimed and the approximate value of each item or category of property claimed;

"(B) The specific interest of the movant in the property and, if the interest is based upon a written instrument, a copy of that instrument;

"(C) The manner in which the respondent came into possession of the property, the reason that the detention is wrongful and, to the best of the knowledge of the movant, the reason, if any, that the respondent may claim the detention is not wrongful;

"(D) The use to which the respondent has put the property, as determined by the movant after such investigation as is reasonable in the circumstances;

We have already determined in her case against Huntington that Kleinfeld cannot demonstrate a claim of ownership of the property in question, nor can she prove that the property was seized under an invalid order of possession. In fact, in her affidavit attached to her complaint, Kleinfeld does not provide a description of the property, but states instead that she cannot identify the property with specificity because it was removed from the apartment two years ago. She does not and cannot provide the approximate value of each item of property, but she estimates the total value to be in excess of $15,000, despite having testified she paid $2,000 for it. Further, she states her interest in the property is based on her having leased the apartment from Lomaz, but she does not and cannot provide how she has a specific interest in the property itself. Kleinfeld failed to state a claim upon which relief could be granted.

The trial court did not err when it granted B&C's motion to dismiss. Kleinfeld's fourth assignment of error is overruled.

Judgment affirmed.

"(E) The extent, if any, to which the movant is or will be damaged by the respondent's detention of the property;

"(F) To the best of the movant's knowledge, the location of the property;

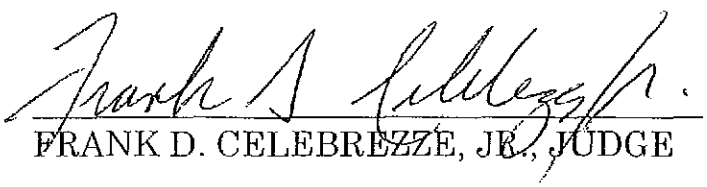
"(G) That the property was not taken for a tax, assessment, or fine pursuant to statute, or seized under execution of judgment against the property of the movant or, if so seized, that it is statutorily exempt from seizure."

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



FRANK D. CELEBREZZE, JR., JUDGE

CHRISTINE T. McMONAGLE, P.J., and
MARY JANE BOYLE, J., CONCUR