IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND	:	**Case No.: 09-0441**
	:	
Appellant	:	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
v.	:	
	:	
WASHINGTON MUTUAL BANK, A DIVISION OF JP MORGAN CHASE NA	:	**Court of Appeals Case No. 91379**
	:	
Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CITY OF CLEVELAND

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SUPREME COURT OF OHIO

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A: City of Cleveland vs. Washington Mutual Bank, Opinion January 22, 2009

B: City of Cleveland vs. Washington Mutual Bank, Judgment Entry, January 22, 2009

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents one of the single most critical issues regarding the future ability of municipalities across the state to respond to the dire circumstances brought about by the foreclosure crisis. Specifically, the Eighth District Court of Appeals (hereinafter, "8th District") decision jeopardizes the ability of the criminal justice system to resolve misdemeanor cases charged by complaint which would otherwise linger unresolved, due to the refusal of organizational defendants to appear in court and the inability of the court to compel their appearance. In *City of Cleveland v. Destiny Ventures* (hereinafter, "*Destiny Ventures*"), the 8th District upheld a trial in absentia where the defendant was charged via a complaint and summons.[1] However, in the within case, a different panel of the Court overruled the trial in absentia procedure because it stated that O.R.C. §2941.47 did not apply to complaints, the same form of charging instrument that was used in *Destiny Ventures* where the Court had upheld the trial. The conflict between the two cases is therefore apparent. This Court has recently held that when there is an intradistrict conflict a Court of Appeals must convene en banc to resolve cases which it determines are in conflict.[2] Despite that mandate, the 8th District did not convene an en banc hearing to resolve this blatant conflict. Moreover, the 8th District ignored clear statutory authority, including O.R.C. §2941.35, which apply O.R.C. §2941.47 to misdemeanor complaints.

The decision in *City of Cleveland v. Washington Mutual Bank* (hereinafter, "*Washington Mutual*") jeopardizes the ability of municipalities across the state to resolve cases involving negligent corporations that refuse to respect the authority of the court. The City of Cleveland is mired in a crisis with an unprecedented number of deteriorated properties owned by negligent

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[1] *City of Cleveland v. Destiny Ventures* (Sept. 11, 2008), Cuyahoga App. No. 91018, unreported (jurisdictional motions pending in case 2008-2230).
[2] *McFadden v. Cleveland State University* (2008) 120 Ohio St.3d 54 at 59.

corporations, who neither correct violations when ordered, nor respond to demands to appear in Court to answer criminal charges stemming from their refusal to correct such conditions.

Due to their lack of physical presence, corporations have an incomparably greater ability than individual defendants to thwart the resolution of criminal cases. Consequently, Ohio has codified the legal necessity of corporate trials in absentia through ORC §2941.47, made applicable to misdemeanors charged by complaints through O.R.C. §2941.35.

STATEMENT OF THE CASE AND FACTS

On April 7, 2008, after serving the Defendant numerous times over more than a year's span of time in an unsuccessful effort to bring the Defendant into Court to answer criminal charges against it, the Clerk of Courts entered a plea of not guilty on behalf of the Defendant. The case proceeded to trial without a physical representative of the Defendant per O.R.C. §2941.47. The City heard testimony from the City of Cleveland Housing Inspector Lori Williams regarding the presence of the violations on property the Defendant owned at 3464 West 119th Street, Cleveland Ohio. She testified that she had generated a written order from Building and Housing stemming from an inspection on August 25, 2006. The order provided the compliance dates of September 5, 2006 and September 28, 2006, by which the Defendant had to resolve the violations on the order. Inspector Williams further testified that the violations were still unresolved on the last charged date of January 24, 2007; that she had verified the Defendant owned the premises throughout the entire cited period; and that the Defendant had received notice of those violations. The trial court found the Defendant guilty.

The trial court considered the number of days out of compliance, and sentenced the Defendant to a $100,000 fine, well below the maximum fine of $705,000. Despite its failure to appear and answer the charges to that point, Defendant filed a timely appeal on April 29, 2008.

On December 31, 2008, the 8th District announced its decision to vacate and remand the case. It did so on the grounds that O.R.C. §2941.47 did not apply to a misdemeanor case charged by a complaint. The City timely filed an application for reconsideration on January 9, 2009. The Court denied the application and journalized its decision on January 22, 2009.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I Where an intradistrict conflict exists, the appellate court must convene en banc to resolve the conflict.

This Court, in *McFadden v. Cleveland State University*, has previously held that a Court of Appeals must convene en banc to resolve any conflict between two or more decisions of the court that the judges determine are in conflict.[3] This Court went on to rule that any party may appeal to this Court under an abuse-of-discretion standard when the party feels the Court of Appeals erred in making the determination of whether to rule en banc or not.[4]

Here, the 8th District ruling in *Washington Mutual* was directly in conflict with its earlier decision in *Destiny Ventures*.[5] In *Destiny Ventures*, the City relied on the same form of charging instrument as relied upon in *Washington Mutual* and charged the same level of misdemeanors as charged in the present case. In *Destiny Ventures*, the Court specifically upheld the validity of the trial conducted without the presence of a representative of the corporation by relying upon O.R.C. §2941.47.[6] "R.C. 2941.47 specifically states that once an appearance is made or a plea is entered, the corporation is before the court until the case is disposed of."[7] Indeed, the 8th District, in *Washington Mutual*, recognized the inconsistency in its Journal Entry that denied the

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[3] *McFadden v.Cleveland State Univ.* (2008) 120 Ohio St.3d 54 at 59.
[4] *Id.*
[5] See *Cleveland v. Destiny Ventures, L.L.C.*, 2008-Ohio-4587 at 17.
[6] O.R.C. 2941.47.
[7] *Id.*

City's Application for Reconsideration.[8] The Journal Entry in *Washington Mutual* held that it's decision in *Destiny Ventures* had "assumed, but not decided", that O.R.C. §2941.47 applied to misdemeanors prosecuted by complaint. In actuality, the result of that assumption is the existence of two decisions with completely different meanings. "(A)ll court of appeals decisions are applicable precedent unless and until they are formally overruled".[9] Clearly, without an en banc decision to reconcile the positions of the two cases, both decisions linger as contradictory but valid law.

<u>Proposition of Law No. II</u> O.R.C. §2941.35 and the rules of statutory construction authorize a misdemeanor trial in absentia where the service and pleading requirements of R.C. 2941.47 have been met.

The 8th District held in the instant case that O.R.C. §2941.47 did not apply to the Washington Mutual case because the Defendant was charged with a complaint and the Court determined that O.R.C. §2941.47 only applied to indictments and informations. In making this ruling it also ruled that an indictment or information is "a procedure reserved for felony prosecutions, see Crim.R. 7".[10] However, the third paragraph of Ohio Crim.R. 7 notes that "[a] misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas." This provision in the criminal rules directly conflicts with the apparent finding of the Court that the use of indictments or information is reserved to felony prosecutions. While not altering its decision, the Court seemed to recognize its error in its judgment entry in response to the City's Application for Reconsideration, when it noted "misdemeanors may be prosecuted

[8] See Appendix B
[9] *McFadden v.Cleveland State Univ*, supra at 58.
[10] See Appendix A at 8.

by indictments".[11] Thus, the 8th District's judgment entry conflicts with its own ruling that it refused to reconsider.

Moreover, under the broad language of O.R.C. §2941.35, the procedures detailed in O.R.C. §2941.47 which authorize trials without the presence of a physical representative of the corporation, are made applicable to misdemeanor prosecution. O.R.C. §2941.35 provides that "(p)rosecutions for misdemeanors may be instituted by a prosecuting attorney by affidavit or *such other method* as is provided by law in such courts as have original jurisdiction in misdemeanors. Laws as to form, sufficiency, amendments, objections, and exceptions to indictments and as to the service thereof apply to such affidavits and warrants issued thereon."[12] (emphasis added) By using the phrase "such other method", the Legislature applied the rules for felony prosecution to misdemeanor prosecutions regardless of the charging instrument used. Under O.R.C. §2941.35, the processes governing felony prosecution also apply to misdemeanors prosecutions even if a different charging instrument is utilized.

The application of felony prosecution methods to misdemeanor cases has been recognized in a number of cases.[13] In *City of Cleveland v. Ely*, the Supreme Court heard an appeal from a defendant who failed to argue until the trial of his case that there were defects in the charges.[14] Defendant was charged with a misdemeanor by an affidavit.[15] O.R.C. §2941.29 provided that such an argument was only appropriate through pretrial motion for indictments and informations.[16] The Supreme Court, in ruling against the defendant, recognized that those

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[11] See Appendix B.
[12] O.R.C. §2941.35
[13] See *City of Trotwood v. Wyatt*, Not Reported in N.E.2d, 1993 WL 9714, Attached as Exhibit G and *State v. Ross* 36 Ohio App.2d 185, Attached as Exhibit H.
[14] *City of Cleveland v. Ely*, 1963 174 Ohio St. 403 at 404-405.
[15] *Id.*
[16] O.R.C. 2941.29.

statutory provisions were made applicable to misdemeanors utilizing different charging instruments through O.R.C. §2941.35.[17]

In addition to the independent justification found under O.R.C. §2941.35, it is clear that the form and nature of an information is virtually identical to the complaint used in the present case. O.R.C. §2941.03 provides:

> An indictment or information is sufficient if it can be understood therefrom:
>
> (A) That it is entitled in a court having authority to receive it, though the name of the court is not stated;
>
> (B) If it is an indictment, that it was found by a grand jury of the county in which the court was held, or if it is an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;
>
> (C) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;
>
> (D) That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;
>
> (E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

A complaint filed in municipal court therefore meets all the statutory elements of an information, except that it was not signed by the prosecutor. Therefore, the statutory distinction between an information and a complaint is minimal at best. A ruling based upon such a minimal distinction would run counter to the obvious intent of the statute to apply to any criminal charge. As complaints and informations are statutorily authorized to be utilized in the same situations and

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[17] *City of Cleveland v. Ely*, 1963 174 Ohio St. 403 at 404-405.

for the same purposes, there is no observable policy reason to limit the application of O.R.C. §2941.47 to indictments and informations. The function and use of informations is inseparable from complaints, and its form differs only through the presence of a single signature. This Court has earlier held that the interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections.[18] Because a complaint is substantially the same as an information, even if O.R.C. §2941.35 did not exist, the Court should still accept the use of complaints in lieu of informations as consistent with O.R.C. §2941.47.

State law and the rules of court anticipate that the processes governing felony prosecution apply to misdemeanor prosecution. As such, the 8th Districts decision in this case must be overturned.

<u>Proposition of Law No. III</u> O.R.C. §2938.12 and Crim. R. 43 are not relevant considerations as R.C. 2941.47 is determinative.

After ruling that O.R.C. §2941.47 was not applicable to the instant case, but instead only applicable to felony cases or cases charged by information or indictment, the appellate court went on to rule that O.R.C. §2938.12 and Ohio Crim.R. 43 provided guidance on the proper course of action when corporations refuse to appear in misdemeanor cases. However, neither statute specifically defines the rules for the presence of defendants in trials for corporate defendants. O.R.C. §2938.12 provides a general rule for misdemeanor prosecution but makes no specific reference to the treatment of corporations. Notably, O.R.C. §2941.021 provides the same general rule, that the defendant must be present in court in order to be prosecuted, for *felony* prosecutions. Both O.R.C. §2938.12 and §2941.021 require the defendant to be present. However, neither of these general statutes specifically address corporate defendants.

Similarly, Ohio Crim. Rule 43 does not directly specify all applicable rules for

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[18] *Johnson's Markets, Inc. v. New Carlisle Dept.* (1991) 58 Ohio St.3d 28 at 35

corporations. It codifies a specific rule that permits trials in absentia against defendents when they have voluntarily absented themselves after commencement of proceedings. However, later in the rule, Crim. Rule 43 clearly separates the corporate entity from other defendants when it notes that corporations may be represented by attorneys for all purposes. The analysis reconciling criminal rules to statutes is similar to the one reconciling statutes with other statutes. A court must decide if the rule and statute are in conflict.[19] If there is a conflict, the criminal rule will give way to the statute when the rule modifies a substantive right.[20] Criminal Rule 43 can be read without a conflict with O.R.C §2941.47, since corporations are not specifically named. Even if it could not, by defining the rules for proceeding with a case without a corporate officer or attorney, the statute impacts upon a substantive right and Criminal Rule 43 would not apply.

O.R.C §2941.47 was an specific statute distinctive from general statutes, created exclusively for the difficulties presented by organizational defendants in resolving felony and misdemeanor charges. This Court has already noted that when any court construes statutes, it must harmonize the multiple statutes and fully apply each statute unless they are hopelessly and irreconcilably conflicting.[21] Moreover, even if conflict is found between multiple statutes which deal with the same subject matter, where one is of more generality and one is of more specificity, Ohio law is clear that "they shall be construed, if possible, so that effect is given to both".[22] Here, it is clear that O.R.C. §2941.47 is the only statute that deals solely with how to handle corporations that fail to appear after service. Therefore, the specific requirements contained in

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[19] State v. Hayden (1992) 81 Ohio App.3d 272 at 276.
[20] OH Const. Art. IV, § 5 (B)
[21] *Couts v. Rose* (1950), 152 Ohio St. 458 at 461
[22] *Johnson's Markets, Inc. v. New Carlisle Dept.*, supra at 36, citing ORC Ann. 1.51.

O.R.C. §2941.47 should be applied to the instant case over the general, nonspecific provisions found in O.R.C. §§2938.12 and 2941.021. O.R.C. §2941.47's provisions should govern the treatment of the corporate defendant in this case, which mandates resolution of the case through trial when appropriate as in the present case. Through O.R.C. §2941.47, the legislature recognizes that a corporation has no true physical presence, and thus refines the broader rules by defining corporate presence as determined by the successful initial service of the criminal charge. The corporation's own failure to have a physical representative present at a hearing or trial does not preclude the completion of the case, including completion by trial, as in this case.

CONCLUSION

In conclusion, it is clear that the 8th District's decision in *Washington Mutual* was not only wrong, but wrong in a way that could have a dramatically negative impact upon all municipalities struggling to hold banks and other organizations accountable for misdemeanor crimes for which they fail to appear. The 8th District failed to decide the case en banc, even though it contradicted an earlier decision from the 8th District. It incorrectly limited the scope of O.R.C. §2941.47 to indictments or informations in felony prosecutions, despite the existence of O.R.C. §2941.35 which incorporates the terms of O.R.C. §2941.47 to include any misdemeanor proceedings. It also failed to read multiple statutes and rules of varying degrees of generality and specificity in harmony with each other. O.R.C. §2941.47 provides the specific method of prosecuting corporate defendants, as the provisions of O.R.C. §2938.12, O.R.C. §2941.021, and Crim. R. 43 provide only general rules. In neglecting these facts in its decision, the 8th District leaves the City of Cleveland and other municipalities without a way to ensure that cases filed against organizations which flout the jurisdiction of the Court will not linger unresolved. Therefore, this case involves matters of public and great general interest. The Appellant requests

that this court accept jurisdiction in this case so that important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was mailed by U.S. regular mail, postage prepaid to the following on March 5th, 2009.

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EXHIBIT A

JAN 2 2 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91379

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

WASHINGTON MUTUAL BANK

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 005057

BEFORE: Rocco, J., Sweeney, A.J., and Boyle, J.

RELEASED: December 31, 2008

JOURNALIZED: JAN 2 2 2009

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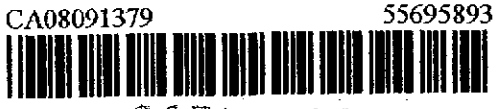

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FILED AND JOURNALIZED
PER APP. R. 22(E)

JAN 22 2009

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 31 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

KENNETH A. ROCCO, J.:

Defendant-appellant, Washington Mutual Bank, appeals from its misdemeanor conviction under the City's Codified Ordinances for building and housing code violations. Appellant contends that the court erred by proceeding with a trial in absentia, by finding that the evidence was sufficient to support its conviction, by failing to adequately consider all of the relevant sentencing factors, and by imposing an excessive sentence. Appellant further argues that it received ineffective assistance of counsel. We agree that the court erred by trying appellant in absentia. Therefore, we vacate the judgment and remand for further proceedings.

The record in this case reveals that appellant was cited in a complaint filed in the Cleveland Municipal Court with (1) failing to comply with the order of the director of building and housing as stated in a violation notice dated August 29, 2006, and (2) violation of Cleveland Codified Ordinance sections 369.13 and 369.15. A summons was issued February 7, 2007 commanding the defendant to appear on May 1, 2007. A United States Postal Service return receipt indicates that it was received by Deanne Kessler at Washington Mutual, c/o CSC-Lawyers Inc. Ser [sic], 50 Broad Street, Suite #1800, Columbus, Ohio 43215 on February 12, 2007. Appellant apparently did not appear and a capias was issued, bond being set at $10,000.

On November 13, 2007, the court entered a judgment entry scheduling this matter for trial on November 26, 2007 and instructing the clerk to appear at the hearing and enter a not guilty plea on this organizational defendant's behalf if the defendant did not appear. The court further stated that it would proceed to trial immediately. However, for reasons not apparent on the record, the court entered a not guilty plea for the defendant and continued the matter for pretrial on December 7, 2007. A pretrial was held on that date, and the matter was continued again to January 18, 2008.

On January 18, 2008, attorney Romi T. Fox moved the court for an order allowing her to withdraw from the case, indicating that she had been unable to make contact with appellant and that appellant no longer owned the property. The court granted this motion. It then scheduled the matter for trial in absentia on February 11, 2008. On February 11, the court continued the matter again to March 3, 2008, instructing the clerk to reissue a summons to the appellant for that date. A summons apparently was issued, addressed to "Washington Mutual Corp. Service, 50 Broad St. Suite #1800, Columbus, OH 43215." It is not clear how the summons was served. Another capias was issued after appellant failed to appear on March 3, 2008.

The matter was set for trial again on April 7, 2008, again accompanied by an order that if the defendant did not appear, a not guilty plea would be entered

on its behalf and the court would proceed to trial. On April 7, 2008, a trial was conducted, after which the court found appellant guilty and fined it $100,000.

In its first assignment of error, appellant complains that the court erred by proceeding to trial in absentia, emphasizing its right to be present at all stages of the trial. See Crim.R. 43. The city urges that appellant's failure to appear by an officer or by counsel in response to the summons authorized it to proceed to trial in absentia pursuant to R.C. 2941.47.

R.C. 2941.47 provides: "When an indictment is returned or information filed against a corporation, a summons commanding the sheriff to notify the accused thereof, returnable on the seventh day after its date, shall issue on praecipe of the prosecuting attorney. Such summons with a copy of the indictment shall be served and returned in the manner provided for service of summons upon corporations in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any other county of the state, upon the president, secretary, superintendent, clerk, treasurer, cashier, managing agent, or other chief officer thereof, or by leaving a copy at a general or branch office or usual place of doing business of such corporation, with the person having charge thereof. Such corporation shall appear by one of its officers or by counsel on or before the return day of the summons served and answer to the indictment or information by motion,

demurrer, or plea, and upon failure to make such appearance and answer, the clerk of the court of common pleas shall enter a plea of 'not guilty.' Upon such appearance being made or plea entered, the corporation is before the court until the case is finally disposed of. On said indictment or information no warrant of arrest may issue except for individuals who may be included in such indictment or information."

R.C. 2941.47 does not apply here. Appellant was not charged by indictment or information (a procedure reserved for felony prosecutions, see Crim.R. 7). It was charged by a complaint. Therefore, R.C. 2941.47 does not apply.

R.C. 2938.12 describes the circumstances under which the court may conduct a trial in absentia in a misdemeanor case: "A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, but no right shall exist in the defendant to be so tried. If after trial commences a person being tried escapes or departs without leave, the trial shall proceed and verdict or finding be received and sentence passed as if he were personally present." Also see R.C. 2945.12.

Crim.R. 43 also informs our decision. This rule was recently amended, effective July 1, 2008, after the trial and judgment in this case. We quote the

pertinent part of the rule in effect at the time of trial: "The defendant shall be present at the arraignment and every stage of the trial * * *, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes."

These provisions allow a trial in absentia to occur either at the express request of the misdemeanor defendant or upon the defendant's voluntary absence after trial has begun. They do not allow the court clerk to enter a plea on the defendant's behalf nor do they allow for a trial of a corporate defendant in absentia when the defendant has never appeared in the case.[1] Accordingly, we must vacate the judgment of conviction and sentence and the not guilty plea entered on appellant's behalf by the clerk, and remand for further proceedings.

Vacated and remanded.

It is ordered that appellant recover of appellee 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

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[1]We recognize that this decision leaves a difficult gap in the law: there is neither a provision for enforcing a summons issued to a corporate defendant in a misdemeanor case (as there is for individual defendants, see R.C. 2935.11) nor is there a provision for proceeding in absentia. However, we cannot issue advisory opinions, and therefore can provide no guidance on this issue.

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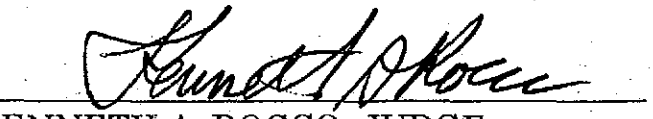
judgment into execution.

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



KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, A.J., and
MARY J. BOYLE, J., CONCUR

EXHIBIT B

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CITY OF CLEVELAND

Appellee

COA NO. 91379 | LOWER COURT NO. 2007 CRB 005057

CLEVELAND MUNI.

-vs-

WASHINGTON MUTUAL BANK, ET AL.

Appellant

MOTION NO. 417208

Date 01/22/2009

Journal Entry

APPELLEE'S APPLICATION FOR RECONSIDERATION IS DENIED. OUR RECENT DECISION IN CLEVELAND V. DESTINY VENTURES, LLC, CUYAHOGA APP. NO. 91018, 2008-OHIO-4587, ASSUMED, WITHOUT DECIDING, THAT R.C. 2941.47 APPLIED TO A MISDEMEANOR PROSECUTION BY COMPLAINT. IT DOES NOT COMPEL US TO RECONSIDER OUR DECISION HERE.

WE WILL NOT ADDRESS THE HYPOTHETICAL QUESTION WHETHER R.C. 2941.47 MAY APPLY TO MISDEMEANOR PROCEEDINGS INITIATED BY INDICTMENT. WHILE MISDEMEANORS MAY BE PROSECUTED BY INDICTMENT, THIS CASE WAS NOT.

RECEIVED FOR FILING
JAN 22 2009
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge JAMES J. SWEENEY, Concurs

Judge MARY J. BOYLE, Concurs

Judge KENNETH A. ROCCO