

Original
ORIGINAL

IN THE SUPREME COURT OF OHIO

L. Mitchell, Guardian for)
Bertha L. Washington,)
an incompetent)

10-0208

Plaintiff-Appellant,) On Appeal from the Cuyahoga)
County Court of Appeals)
v.) Eighth Appellate District)

Western Reserve Area Agency)
on Aging)

) Court of Appeals Case No.)
) 08-091546)

MEMORANDUM ON STATE OF JURISDICTION

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For Plaintiff-Appellant:

For Defendant-Appellee,

FILED
FEB 07 2010
CLERK OF COURT
SUPREME COURT OF OHIO

~~Memorandum~~

On December 12, 2009 and December 17, 2009, the Eighth District Court of Appeals re-wrote its opinion and changed its ruling/decision dated October 15, 2009, all without any additional evidence being considered from the lower court records, while incorrectly basing its decision on a "hearing", purportedly, on Appellee's Motion for Sanctions filed September 23, 2009. No such hearing was ever held. No such hearing is reflected in the docket of the Court of Appeals. However, this court granted and incorporated whatever purportedly took place during that hearing into its decision, which was re-written with a new decision date of December 17, 2009. The Eighth District Court of Appeals changed its decision to reflect several new changes from its decision dated October 15, 2009, all without proper jurisdiction or authority, and without holding the hearing it references in its Entry dated December 16, 2009. The following 3 differences were delineated in the December 17, 2009 decision:

1. The Court now found, and incorporated into its new decision dated December 17, 2009, without further evidence than was available to the court when it wrote its October 15, 2009

decision, that there was a hearing on Appellee's Motion for Sanctions filed September 23, 2009. No such hearing ever took place. Thus, the Court of Appeals, in re-writing its decision, relied on a non-existent hearing.

2. That Appellant did NOT file its Appeal with a one year period in that it had until November 22, 2007 to do so (original decision appealed from was dated November 22, 2006). Appellant's attorney's, Egidijus Marcinkevicius and Brenda T. Bodnar, filed their Motion For Relief From Judgment on November 26, 2007. As this was the Thanksgiving weekend, this was the first date the court was open following the actual date of November 22, 2007, which occurred on the Thanksgiving holiday when the court was closed. Thus, according to the computations of Appellant's attorneys listed above, they correctly and timely filed the Motion for Relief From Judgment within the prescribed time of one year.

3. That based on Appellant filing its Motion for Relief from Judgment on November 26, 2007, it was untimely as the motion was NOT filed within one year of the judgment from which relief was sought, the Eighth District Court of Appeals therefore, as a direct and proximate result, granted Appellee's Motion for Sanctions (which was NOT granted in its first Decision dated

October 15, 2009).

4. As a direct result of finding that the appeal was filed after the one year period, the Court of Appeals then re-wrote their decision/Opinion to reflect a change of the wording of "THE COURT FINDS THERE WERE REASONABLE GROUNDS FOR THIS APPEAL" to now read, "...AND AFTER THE HEARING ON APPELLANT'S MOTION FOR SANCTIONS, WE RECONSIDER AND FIND THAT THERE WERE NO REASONABLE GROUNDS FOR THIS APPEAL".

For the Eighth Circuit Court of Appeals to change its ruling, without further explanation in its entry or legal authority supporting that determination is unfettered power and control that Appellant requests this court to review, along with the fact that its decision was contrary to the evidence presented in the lower court that Appellee never paid monies to the Ward, Bertha L. Washington, although ordered twice to do so, and thus the court-appointed guardian, T. Mitchell was authorized by statute to collect debts due the Ward. (Note: To date, Appellee has still NOT paid these monies, although due and owing into perpetuity by statute.)

Although Appellee WRAAA/Nowak raised the issue of sanctions before the trial court and briefly alluded to the sanctions issue on appeal, the trial court denied his motion. (See record on

appeal). Attorney Nowak did not specify this issue as an Assignment of Error in any appellate matters stemming from that ruling in the trial court, including in his Motion for Sanctions dated September 23, 2009. The Appellate Court gave him sanctions against Appellant anyway, again without authority.

Nothing in the record establishes that WRAAA/Attorney Nowak notified Washington/Attorney Mitchell by certified mail of the hearing, where DEFAULT JUDGMENT totaling \$32,154.79 was granted on November 9, 2006 at 2 p.m. as attorney fees due to Nowak, personally, pursuant to RC 2323.51 and Civil R. 11. On appeal, Nowak has also changed the caption on this case.

On appeal, WRAAA/Nowak did not specify nor raise the issue of the outcome of the Motion for Sanctions, filed on September 23, 2009, in his request to change the wording on this court's October 15, 2009 decision. Appellee did not provide any arguments or support in his appellate brief for the changes this court adopted in granting Appellee's Motion for Reconsideration dated October 22, 2009.

Appellate Rule 16 requires an Appellant's Brief to contain a statement of the assignments of error set forth for review and an argument with respect to each assignment of error. The Appellee Answer Brief responds to those delineated issues. Where

arguments have not been adequately set forth for review, an appellate court is not required to address them. See App.R.16; App.R. 12. Bellefontaine v. Miller, 3d Dist. No. 8-08-32, 2009-Ohio-2818, Para.34. It is not appropriate for an appellate court to construct the legal arguments in support of a litigants' appeal. See Petro v. Gold, 166 Ohio App.3d 371, 2006-Ohio-943, Para. 94.

"If an argument exists that can support {an} assignment of error, it is not {an appellate} court's duty to root it out." Id., quoting Cardone v. Cardone, 9th Dist. No. 18349, 1998 WL 224934.

Accordingly, as Appellee did not set forth this argument in his Answer Brief, and Appellant did not raise these arguments in an assignment of error in the appellate brief, this court should not have addressed it. There was no jurisdiction for this court to do so sua sponte, or upon Appellee's request.

Based on the above, Appellant requests that this court reverse the Eighth District Court of Appeals decision dated December 16, 2009 and December 17, 2009, order that there was a reasonable grounds for the Appeal in that Appellee had failed, and continues to fail to pay monies due the Ward's estate as ordered upon Appellee by the Ohio Department of Job and Family Services in its two decisions dated March 2000 and June

2000 and order the lower court to properly hold a hearing as to the DEFAULT JUDGMENT rendered against the Court-Appointed Guardian, L. Mitchell, on behalf of the ward, Bertha L. Washington, which was achieved only when Appellee failed to send the required notice to L. Mitchell, which was to be by CERTIFIED MAIL, and to which Appellee has never produce one scintilla of evidence that Appellee ever noticed L. Mitchell of the hearing, in violation of law. For the reasons set forth here within, Appellant requests that this court review this matter. Appellant had a right to be noticed of the hearing where a default judgment was rendered, and to defend the guardianship's assertion that monies were due the Ward. Further, Appellant requests that this court reverse the Eighth District Court of Appeals for the reasons listed in numbers 1 to 3 referenced within.

Respectfully submitted,

L. Mitchell

L. Mitchell, Esq. (0007205)
Guardian for Bertha L.
Washington (now deceased)
P.O. Box 08531
Cleveland, Ohio 44108
For Plaintiff-appellant

SERVICE

A copy of the following Notice of Appeal and Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail,

postage pre paid, to Dale Nowak, Esq. 1375 E. 9th St., Ste. 1700
Cleveland, OH 44114 this 29th day of January 2010.

L. Mitchell

L. Mitchell (0007205)

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

L. MITCHELL, GUARDIAN FOR BERTHA W.

Appellant

COA NO.
91546

LOWER COURT NO.
2002 ADV0059296

PROBATE COURT DIVISION

-vs-

WESTERN RESERVE AREA AGENCY ON AGING

Appellee

MOTION NO. 427553

Date 12/16/2009

Journal Entry

MOTION BY APPELLEE FOR RECONSIDERATION IS GRANTED. THE OCTOBER 15, 2009 JOURNAL ENTRY AND OPINION IS CORRECTED TO REFLECT THAT APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT WAS FILED OVER A YEAR FROM THE DATE OF JUDGMENT FROM WHICH SHE SOUGHT RELIEF. ALSO, THE FOLLOWING SENTENCE ON THE LAST PAGE OF THE OCTOBER 15, 2009 JOURNAL ENTRY AND OPINION WHICH READS, "THE COURT FINDS THERE WERE REASONABLE GROUNDS FOR THIS APPEAL[.]" NOW READS "BASED UPON THE BRIEFS IN THIS APPEAL AND AFTER THE HEARING ON APPELLEE'S MOTION FOR SANCTIONS, WE RECONSIDER AND FIND THAT THERE WERE NO REASONABLE GROUNDS FOR THIS APPEAL." SEE JOURNAL ENTRY AND OPINION DATED DECEMBER 17, 2009.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES - COSTS TAXED

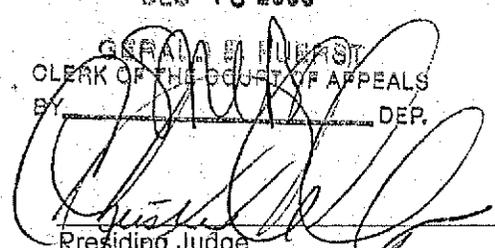
RECEIVED FOR FILING

DEC 16 2009

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

Judge MELODY J. STEWART, Concur

Judge ANN DYKE, Concur


Residing Judge
CHRISTINE T. MCMONAGLE

MEMORANDUM

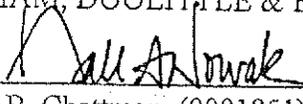
Appellee WRAAA respectfully moves this Honorable Court to reconsider *only* the parts of its opinion which at page 10 found that there were reasonable grounds for this appeal, and which at page 8 found that "Mitchell's motion was filed within one year of the judgment from which she sought relief,"

The grounds for this motion are contained in WRAAA's separate motion for sanctions, filed September 23, 2009, which are incorporated herein by reference for sake of brevity.

WRAAA respectfully requests that this Court find that there were no good grounds for the appeal brought by Appellant Mitchell herein.

Respectfully submitted,

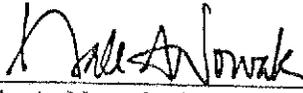
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP

By: 

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Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was served via Certified Mail and U.S. Mail, postage pre-paid to LuAnn Mitchell, Esq., P.O. Box 08531, Cleveland, Ohio 44108, this 22nd day of October, 2009.


Dale A. Nowak (0014763)

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91546

LUANN MITCHELL, GUARDIAN FOR BERTHA
WASHINGTON

PLAINTIFF-APPELLANT

vs.

WESTERN RESERVE AREA AGENCY
ON AGING

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Court Division
Case No. 2002 ADV0059296

BEFORE: McMonagle, P.J., Stewart, J., and Dyke, J.

RELEASED: December 17, 2009

JOURNALIZED: December 17, 2009

FOR APPELLANT

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 28(A)
RECEIVED

DEC 17 2009

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

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

DEC 17 2009

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

ON RECONSIDERATION¹

CHRISTINE T. McMONAGLE, P.J.:

Plaintiff-appellant, Luann Mitchell, guardian for Bertha Washington,² has filed a notice of appeal with four May 1, 2008 judgment entries from the probate court attached. Relevant to our consideration is the judgment denying Mitchell's motion for relief from judgment.

BACKGROUND

The record before us, as established during years of protracted litigation, demonstrates the following. In 1999, Mitchell, an Ohio attorney,³ was appointed by probate court as guardian of the person and estate of Washington. At the time Mitchell was appointed, Washington was in her 90's, lived at home, and was enrolled in Ohio's "PASSPORT" program. Defendant-appellee, the Western Reserve Area Agency on Aging (the "Agency"), was the company responsible for administering the PASSPORT program. According to the program's regulations,

¹The original announcement of decision, *Mitchell v. W. Res. Area Agency on Aging*, 2009-Ohio-5477, released October 15, 2009, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(E); see, also, S.C.Prac.R. II, Section 2(A)(1).

²Mitchell was removed as guardian of Washington's estate in October 2003, but remained guardian of Washington's person until her death in November 2003.

³Mitchell's license was suspended for 18 months (with the final 12 months suspended on conditions) in April 2008 because of her conduct in this case. *Cleveland Bar Assn. v. Mitchell*, 118 Ohio St.3d 98, 2008-Ohio-1822, 886 N.E.2d 222.

Washington was to be afforded health-care benefits only while she resided at home; the benefits would terminate if she became confined to a nursing home or rehabilitation facility.

Beginning in November 1999, Washington had to reside in a rehabilitation facility. In mid-December 1999, the Agency terminated her enrollment in PASSPORT. Mitchell filed an appeal of the Agency's termination; a state hearing officer subsequently determined that the Agency had lawfully terminated Washington from the program. The officer noted, however, that when a recipient of the program files a timely appeal, the Agency could not terminate her benefits until the state officer's decision.

Mitchell then initiated another administrative appeal, again challenging Washington's termination in the program, and also asserting a new claim for reimbursement for benefits during the pendency of the appeal. Washington's termination in the program was upheld, but the Agency was ordered to reimburse her for health-care expenses she paid from February 5, 2000 (the date she was discharged from the rehabilitation facility) through March 28, 2000 (the date of the hearing officer's decision in the initial appeal).

Beginning in July 2000, the Agency attempted to obtain documentation from Mitchell regarding Washington's health-care expenses for the time covered in the reimbursement order. Its attempts were unsuccessful.

In April 2001, Mitchell filed an ex-parte motion with the probate court seeking to have the court enforce the reimbursement order. Mitchell claimed that Washington had \$31,527 in reimbursable expenses. During a hearing, Mitchell produced a one-page document listing expenditures for Washington's health care in the amount of \$29,577. She did not provide documentation to corroborate the expenditures, or even names of the health care providers, and the one-page document was rejected as insufficient by the Ohio Department of Aging, the agency responsible for approving reimbursement. Further requests by the Agency to Mitchell for appropriate documentation were unsuccessful. The probate court dismissed the action for lack of jurisdiction in January 2002. Mitchell did not appeal.

In February 2002, Mitchell filed a complaint for declaratory judgment in probate court, again claiming \$31,527 in reimbursable expenses on Washington's behalf. Attempts were again made by the Agency to obtain documentation from Mitchell in regard to Washington's expenses, but the attempts were again unsuccessful.

In June 2002, while the declaratory judgment action was still pending in probate court, Mitchell filed an "emergency proceeding" in the General Division of the Cuyahoga County Common Pleas Court, seeking an order reducing Washington's claim of \$31,527 of reimbursable expenses to judgment. Two days

later, Mitchell voluntarily dismissed the declaratory judgment action which had been pending in probate court. The general division trial court dismissed the “emergency proceeding” after a hearing.

In July 2002, the Agency filed a motion in probate court for attorney fees and sanctions. The motion was denied in October 2003, without a hearing. Also denied was an application made by Mitchell for guardian and attorney fees for a collection action she had successfully litigated on behalf of Washington’s estate.⁴ The Agency and Mitchell both appealed, and this court reversed both judgments. *Mitchell v. W. Res. Area Agency on Aging*, Cuyahoga App. Nos. 83837 and 83877, 2004-Ohio-4353.

A hearing on the Agency’s motion was had on remand, and the Agency was awarded \$42,815.79 in attorney fees and expenses as sanctions against Mitchell. Mitchell’s application for guardian and attorney fees was granted, but her request for \$5,000 was reduced to \$1,525. Mitchell appealed, and this court reversed the \$42,815.79 award to the Agency, but affirmed the \$1,525 award to her. *Mitchell v. W. Res. Area Agency on Aging*, Cuyahoga App. No. 86708, 2006-Ohio-2475.

On remand again, a hearing was held on November 9, 2006. Mitchell failed to appear for the hearing, and after the court determined that notice of the

⁴*Mitchell v. Anderson*, Probate Court Case No. 2000 ADV0037282.

hearing had been sent to her, the Agency presented evidence. In an entry dated November 22, 2006, the court awarded judgment in favor of the Agency and against Mitchell in the amount of \$32,154.79. Mitchell appealed to this court, but the action was dismissed because of her failure to transmit the record. *Mitchell v. W. Res. Area Agency on Aging* (Feb. 16, 2007), Cuyahoga App. No. 89206. The Agency thereafter attempted to collect its judgment from Mitchell; Mitchell was found in contempt of court because she failed to provide discovery.

MOTION FOR RELIEF FROM JUDGMENT

On November 26, 2007, Mitchell filed a motion for relief from the November 22, 2006 judgment, in which she contended that she never received notice of the November 9, 2006 hearing. A hearing was held on the motion on April 23, 2008, and Mitchell testified to the following: (1) she was living in Florida in November 2006; (2) she did not inform the court of a forwarding address in Florida because she did not have a “permanent” residence there; rather, she lived in various places, either house-sitting for people or temporarily staying with friends; (3) she maintained a post-office box in Cleveland while she was in Florida, and allowed two people (one of whose first name she did not even know) to have access to the box. She did not request either person to forward her mail to her—sometimes they were “gracious enough to send it,” but it was “not something done on a regular or consistent basis”; (4) she filed her motion for

relief when she did because she needed time “to shop to find an attorney who [was] willing to volunteer their time and secretarial assistance to get something done on [her] behalf”; and (5) she did not file the motion herself, even though she was a licensed attorney at the time, because she was “not going to file any motions on [her] behalf when it comes to you [i.e., the Agency’s attorney].”

The court denied Mitchell’s motion for relief and this appealed followed.

We review Civ.R. 60(B) motions for relief from judgment upon an abuse of discretion standard. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Civ.R. 60(B) allows a court to grant relief from a final judgment, order, or proceeding for the following reasons:

“(1) mistake, inadvertence, surprise or excusable neglect;

“(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial * * *;

“(3) fraud * * *, misrepresentation or other misconduct of an adverse party;

“(4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

“(5) any other reason justifying relief from judgment.”

The rule also provides that “[t]he motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.” Civ.R. 60(B).

To prevail on a motion for relief from judgment, the movant must demonstrate that: “(1) the party has a meritorious defense or claim to present if the relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and (3) the motion is made within a reasonable time * * *.” *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150, 351 N.E.2d 113. If any of these requirements are not met, the trial court must overrule the Civ.R. 60(B) motion. *Rose Chevrolet* at 20.

The trial court denied the motion because it found that it was not made within a reasonable period of time as required by Civ.R. 60(B). Upon review, we hold that the trial court did not abuse its discretion by denying the motion.

Mitchell did not state in her motion upon which of the enumerated grounds under Civ.R. 60(B)(1)-(5) it was based, but her attorney argued excusable neglect (Civ.R. 60(B)(1)) at the hearing. Motions filed pursuant to

Civ.R. 60(B)(1), (2) or (3) must not only be filed within one year of the judgment, but also within a reasonable time, and courts have found Civ.R. 60(B) motions untimely even though they were filed within one year of judgment. See *Walnut Equip. Leasing Co., Inc. v. Saah* (Feb. 21, 2001), Lorain App. No. 00CA007600; *Hughes v. Ohio Energy Cincinnati, Inc.* (June 29, 2001), Greene App. No. 2001-CA-13; *Stickler v. Ed Breuer Co.* (Feb. 24, 2000), Cuyahoga App. Nos. 75176, 75192 and 75206; and *Morgan v. Dye* (Dec. 10, 1998), Franklin App. No. 98AP-414, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 316 N.E.2d 469.

In this case, Mitchell's motion was filed over a year from the date of the judgment from which she sought relief. Thus, to the extent that Mitchell's motion was based on Civ.R. 60 (B)(1-3), it was untimely. Moreover, to the extent that the motion was based on Civ.R. 60(B)(4) or (5), it was also untimely. The record indicates that Mitchell was aware of the judgment against her soon after it was entered on November 22, 2006, because she filed a notice of appeal on December 22, 2006 (the case was dismissed in February 2007 because she failed to transmit the record). Mitchell's delay in filing the motion for relief because she had to find an attorney who would volunteer his time because she did not want to deal with the Agency's attorney did not qualify as a ground for granting relief. In particular, the record demonstrates that at various times in this

extensive litigation Mitchell acted without other counsel (in instances that personally implicated her) against the same attorney, even as recent as when she filed her December 22 notice of appeal.

Moreover, Mitchell's claim that she did not receive notice of the hearing date did not qualify as a ground for relief. It goes without citation that attorneys (and pro se parties) are obligated to inform a court before which they have a case or cases pending of any change of address, and keep themselves apprised of the proceedings. Mitchell did neither. She moved to Florida without providing the court a forwarding address, and did not have a system in place for receiving her mail from her Cleveland post-office box. ("If the party or her attorney could have controlled or guarded against the happening of the particular failure at issue, the neglect is not excusable." *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536, 706 N.E.2d 825.)

Finally, Mitchell did not demonstrate that she had a meritorious defense or claim to present if relief was granted. Mitchell's statement that "she may have been able to present evidence to the court that the amount that the court ultimately awarded on November 9th was incorrect," was insufficient to demonstrate a meritorious defense.

In light of the above, the first assignment of error is overruled.

NOVEMBER 22, 2006 JUDGMENT

For her second assignment of error, Mitchell argues that the trial court failed to follow the instructions of this court upon remand in 2006, which resulted in the November 9 hearing and November 22 judgment. We are without jurisdiction to consider the argument.

As already mentioned, Mitchell filed an appeal of the November 22 judgment, but it was dismissed because she failed to transmit the trial court record. *Mitchell*, Cuyahoga App. No. 89206. Mitchell did not appeal the dismissal to the Ohio Supreme Court. As such, her argument in this appeal relative to the November 22 judgment is untimely and we are without jurisdiction to consider it. Accordingly, the second assignment of error is overruled.

Judgment affirmed.

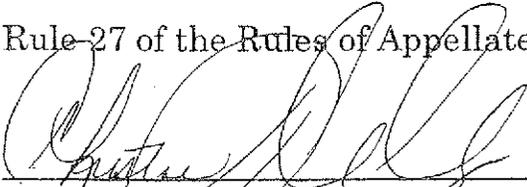
It is ordered that appellee recover from appellant costs herein taxed.

Based upon the briefs in this appeal and after the hearing on appellee's motion for sanctions, we reconsider and find that there were no 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.



CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANN DYKE, J., CONCUR