

ORIGINAL

IN THE SUPREME COURT OF OHIO

BETH A. WILHELM KISSINGER,

Appellee,

v.

JEFFREY R. KISSINGER,

Appellant.

10-0992

On Appeal from the Summit
County Court of Appeals, Ninth
Appellate District

Court of Appeals Case No. 25105

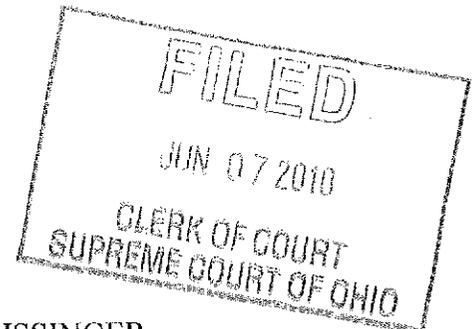
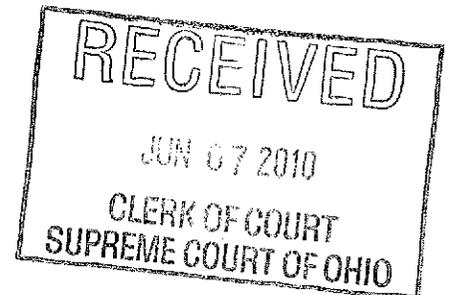
NOTICE OF CERTIFIED CONFLICT OF APPELLANT
JEFFREY R. KISSINGER

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NOTICE OF CERTIFIED CONFLICT

Appellant Jeffrey R. Kissinger gives notice to the Supreme Court of Ohio that he is appealing the ruling from the Summit County Court of Appeals, Ninth Appellate District, entered in *Kissinger v. Wilhelm-Kissinger*, Case No. 25105, on April 15, 2010. On May 21, 2010, the Summit County Court of Appeals, Ninth Appellate District certified a conflict between its April 15, 2010 judgment and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02A-482, 2003-Ohio-585, on the following issue: "Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order."

Appellant requests that the Supreme Court of Ohio consolidate this cause with Supreme Court Case No. 2010-0493, Appellant's discretionary appeal of an earlier judgment in the same proceeding.

WHEREFORE, Appellant respectfully requests that this Court accept jurisdiction over this case and reverse the decision of the Ninth District Court of Appeals.

Respectfully submitted,



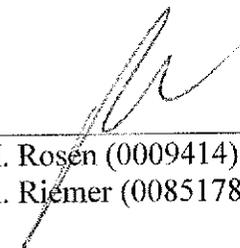
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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail on June 2nd, 2010, to Counsel for Appellee:

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STATE OF OHIO

COURT OF APPEALS
DANIEL M. HERRIGAN
)ss:

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT

2010 MAY 21 AM 11:52

BETH A. WILHELM-KISSINGER

C.A. No. 25105

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

JEFFREY R. KISSINGER

Appellant

JOURNAL ENTRY

Appellant, Jeffrey Kissinger, has moved this Court to certify a conflict between its April 15, 2010, judgment and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02CA-482, 2003-Ohio-585. Specifically, Mr. Kissinger has proposed that a conflict exists on the following issue:

“Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order.”

Beth Wilhelm-Kissinger has not responded in opposition.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Upon review, we conclude that this Court's decision conflicts with the judgment of the Tenth District Court of Appeals and that the conflict is on a rule of law, not on the facts of the two cases. Both cases involved an appeal from the denial of a motion to disqualify counsel in a divorce proceeding. The two judgments, however, reached different conclusions as to the finality of the order appealed. The Tenth District held:

"Because the denial of a motion to disqualify counsel in a divorce action affects a substantial right in a special proceeding, the order is final and appealable as defined in R.C. 2505.02(B)(2), and, therefore, we have jurisdiction to hear the appeal."

Crockett at ¶10.

In contrast, this Court held in its April 15, 2010, journal entry:

"[B]ecause an order denying a motion to disqualify counsel may be effectively reviewed after final judgment, it follows that such an order does not affect a substantial right under *Southside Community Develop. Corp. v. Levin* for purposes of R.C. 2505.02(B)(2)." * * * [W]e conclude that the order appealed is not a final, appealable order * * * .

As Mr. Kissinger has demonstrated that a conflict exists between this District and the Tenth District, the motion to certify a conflict is granted. Accordingly, this Court certifies a conflict between the districts on the following legal issue:

"Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order."



Judge

Concur:
Belfance, J.
Carr, J.

STATE OF OHIO

COURT OF APPEALS
DANIEL M. HORRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

2010 APR 15 AM 7:57

BETH A. WILHELM-KISSINGER

C.A. No. 25105

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

JEFFREY R. KISSINGER

Appellant

JOURNAL ENTRY

On February 1, 2010, this Court dismissed this appeal for lack of jurisdiction. Specifically, the Court held that the order appealed, which denied appellant's motion to disqualify appellee's counsel, was not final and appealable under R.C. 2505.02(B)(4) and Ohio case law.

Appellant has now moved this Court to certify a conflict between the Court's February 1, 2010, dismissal and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02CA-482, 2003-Ohio-585. Alternatively, appellant asks the Court to reconsider the February 1, 2010, order and to review the finality of the order appealed under R.C. 2505.02(B)(2). Because our February 1, 2010, order considered finality only under R.C. 2505.02(B)(4), we grant the motion for reconsideration. We will now review our jurisdiction under subsections (B)(2) and (B)(4) of R.C. 2505.02.

R.C. 2505.02(B)(2) provides that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it *** affects a substantial right made in a special proceeding or upon a summary application in an action after judgment[.]" The order appealed here was issued in the context of a divorce proceeding

and, therefore, was made in a special proceeding. See *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379 (1994).

The order does not, however, "affect a substantial right." An order "affects a substantial right" only if appropriate relief would be foreclosed in the future absent immediate appeal. *Southside Community Develop. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665. The Supreme Court has consistently held that an order denying a motion to disqualify counsel is not immediately appealable because appropriate relief could be obtained at the end of the proceedings. See *Bernbaum v. Silverstein*, 62 Ohio St.2d 445 (1980); *Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 42-43 (1984) (both decided prior to the 1998 amendments to R.C. 2505.02, but relevant as to availability of appropriate relief.). See also *Othman v. Heritage Mut. Ins. Co.*, 158 Ohio App.3d 283, ¶15 (2004).

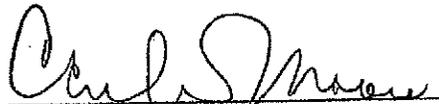
In both *Russell* and *Bernbaum*, the Supreme Court concluded that the denial of disqualification of counsel could be effectively reviewed after final judgment and, therefore, appropriate relief would not be foreclosed absent immediate appeal. The court explained:

"[A]ppellants contend that such postponed review would not be effective, because the disclosures which would have occurred could not be remedied by a second trial. This same argument was addressed and disposed of in Comments, The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts, 45 Univ. of Chicago L.Rev. 450. In advocating that review of such orders by federal courts of appeals await final judgment, the commentator observes, at page 457, that " * * * (t)his remedy may be less than ideal from the movant's point of view, * * * because damage from an attorney's improper disclosure of confidences perhaps might never be fully corrected * * *. The disclosure problem, however, is no more curable by an immediate appeal; the challenged attorney will generally have had ample opportunity to disclose all that he knows before he is disqualified upon appeal."

Bernbaum, at 448. Accordingly, because an order denying a motion to disqualify counsel may be effectively reviewed after final judgment, such an order does not affect a substantial right and is not final and appealable under R.C. 2505.02(B)(2).

For the same reason, the order fails to meet the finality requirements for a provisional remedy under R.C. 2505.02(B)(4). An order that grants or denies a provisional remedy is immediately appealable only if “[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4)(b). See, also, *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶9-10. As stated above, an order that denies a motion to disqualify counsel does not foreclose an appropriate remedy in an appeal from final judgment. Accordingly, the order appealed lacks finality under R.C. 2505.02(B)(4), as well. *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37, 41, citing *Bernbaum* at 448. See, also, *Mattison v. Khalil*, 6th Dist. No. L-07-1393, 2008-Ohio-716, at ¶20-24; *Lava Landscaping, Inc. v. Rayco Mfg. Inc.* (Jan. 20, 2000), 9th Dist. No. 2930-M.

Upon reconsideration of the February 1, 2010, order, therefore, we conclude that the order appealed is not a final, appealable order under either R.C. 2505.02(B)(2) or R.C. 2505.02(B)(4). Furthermore, because we have reconsidered the February 1, 2010, order and issued a new determination of this matter, appellant’s motion to certify a conflict between that order and *Crockett v. Crockett* is denied as moot.


Judge

Concur:
Belfance, J.
Carr, J.

[Cite as *Crockett v. Crockett*, 2003-Ohio-585.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dorcas A. Crockett,	:	
	:	
Plaintiff-Appellee,	:	No. 02AP-482
	:	
v.	:	(REGULAR CALENDAR)
	:	
Paul B. Crockett,	:	
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on February 6, 2003

Baker & Hostetler, and Barry H. Wolinetz, for appellee.

Jerrold W. Schwarz, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

KLATT, J.

{¶1} Defendant-appellant, Paul B. Crockett, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, overruling appellant's motion to disqualify counsel and imposing sanctions. For the reasons that follow, we affirm that judgment.

{¶2} By complaint filed May 16, 2001, appellant's wife, plaintiff-appellee Dorcas A. Crockett, filed for a divorce from appellant. In the divorce proceedings, appellant argued that, before the filing of the complaint, his mother, Kaoruko Crockett ("Kaoruko"), quit-claimed to him her entire interest in real property located at 2001 Merryhill Drive. Following that transfer, appellant and appellee sold the Merryhill property and used a portion of the proceeds to buy the current marital residence. Therefore, appellant contended that a portion of the current marital residence was his separate property. However, appellee submitted an affidavit signed by Kaoruko, which stated that the transfer of the Merryhill property was intended as a gift to the entire family, including appellee, thereby supporting appellee's assertion that the entire value of the marital residence should be considered marital property.

{¶3} After submission of the affidavit, appellant filed a motion to disqualify appellee's counsel, Barry H. Wolinetz. Appellant claimed that Wolinetz's testimony was necessary to determine the validity of the affidavit and whether Kaoruko signed it under duress. After a hearing, the trial court overruled appellant's motion, finding that appellant failed to show that there was any conflict of interest, that Wolinetz was a necessary witness, or that Kaoruko was under any pressure, duress or undue influence when she signed the affidavit. The trial court further determined that the motion was frivolous and awarded appellee \$1,000 in reasonable and necessary attorney fees incurred in defending appellant's motion pursuant to Civ.R. 11.

{¶4} Appellant appeals, assigning the following errors:

{¶5} "1. The Court erred in ordering a Civil Rule 11 sanction because Appellant/Defendant failed to establish a basis for his Motion to Disqualify; yet, pursuant to DR5-102, the Court refused to allow Appellee/Plaintiff's counsel to fully testify.

{¶6} "2. The Court erred as a matter of law imposing sanctions pursuant to Civil Rule 11 with no finding in the record or Entry that the Appellant/Defendant acted willfully or in bad faith.

{¶7} "3. The Court erred in ordering Appellant/Defendant to pay Civil Rule 11 sanctions."

{¶8} As an initial matter, we must determine whether the order appealed from is a final appealable order. Appellee contends it is not. Article IV, Section 3(B)(2) of the Ohio Constitution limits this court's appellate jurisdiction to the review of final orders. Absent a final order, this court is without jurisdiction to affirm, reverse, or modify an order from which an appeal is taken. *General Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20; R.C. 2501.02.

{¶9} Pursuant to R.C. 2505.02(B)(2), an order that affects a substantial right made in a special proceeding is a final appealable order. It is well-established that the denial of a motion to disqualify counsel affects a substantial right. *Russell v. Mercy Hospital* (1984), 15 Ohio St.3d 37, 39; *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445, 446 [footnote 2]. Therefore, the key question presented here is whether the order denying appellant's motion to disqualify counsel was made in a special proceeding.

{¶10} To determine whether the order at issue was made in a special proceeding, we must examine the nature of the underlying action. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.* (1997), 78 Ohio St.3d 118, 123. Orders that are entered in actions that were recognized at common law or in equity and were not created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02. *State ex rel. Papp v. James* (1994), 69 Ohio St.3d 373, 379. The underlying action in this case is an action for divorce. There was no common-law right of divorce. Divorce is purely a matter of statute. *Id.* at 379; *Briggs v. Briggs* (Jan. 23, 1997), Franklin App. No. 96APF11-1523; *Hollis v. Hollis* (1997), 124 Ohio App.3d 481, 484. Divorce, therefore, has been described as a "special statutory proceeding." *State ex rel. Papp*, *supra*, at 379; *Dansby v. Dansby* (1956), 165 Ohio St. 112, 113. Because the denial of a motion to disqualify counsel in a divorce action affects a substantial right in a special proceeding, the order is final and appealable as defined in R.C. 2505.02(B)(2), and, therefore, we have jurisdiction to hear the appeal.

{¶11} Appellee cites *Bernbaum*, *supra*, for the proposition that the denial of a motion to disqualify counsel is not a final appealable order. Although that was the holding in *Bernbaum*, it should be noted that the order at issue in *Bernbaum* was not entered in a special proceeding. Therefore, *Bernbaum* is clearly distinguishable from the case at bar.

{¶12} Having determined that we have jurisdiction to hear the appeal, we turn to appellant's first assignment of error, wherein he contends that the trial court erred by refusing to allow him to fully examine appellee's counsel at the hearing on appellant's motion to disqualify. At the outset, we note that the trial court has the inherent authority to supervise members of the bar appearing before it, and this necessarily includes the power to disqualify counsel in specific cases. *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33-34; *Mentor Lagoons*, supra, at 259. Disqualification " 'is a drastic measure which should not be imposed unless absolutely necessary.' " *Spivey v. Bender* (1991), 77 Ohio App.3d 17, 22, quoting *Gould, Inc. v. Mitsui Mining & Smelting Co.* (N.D. Ohio 1990), 738 F.Supp. 1121, 1126. The trial court has wide discretion in the consideration of motions to disqualify counsel. *Royal Indemnity*, supra. The determination of the trial court will not be reversed upon appeal in the absence of an abuse of discretion. *Centimark Corp. v. Brown Sprinkler Serv., Inc.* (1993), 85 Ohio App.3d 485; *Musa v. Gillette Communications of Ohio, Inc.* (1994), 94 Ohio App.3d 529. 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.

{¶13} Appellant argues that Wolinetz's testimony was necessary to determine the circumstances surrounding the execution of Kaoruko's affidavit. Only after examining Wolinetz would appellant know whether Wolinetz's testimony would be prejudicial to his [Wolinetz's] client's interest. Appellant misunderstands the essence of a motion to disqualify opposing counsel. A motion to disqualify counsel is to be used when "a lawyer learns or it is obvious" that counsel may be called as a witness, not to determine whether he should be called; that is the purpose of discovery. *Morgan v. N. Coast Cable Co.* (Nov. 15, 1990), Cuyahoga App. No. 57209, affirmed (1992), 63 Ohio St.3d 146 (reversing disqualification of counsel at early stage of proceedings when discovery had not been completed because it was impossible to say whether attorney would be a witness).

{¶14} It is also apparent that Wolinetz's testimony was not necessary to establish the facts surrounding the execution of Kaoruko's affidavit. There is no reason why these

facts could not be established through the testimony of other witnesses, including Kaoruko and the notary. Moreover, the questioning of Wolinetz that was permitted by the trial court during the hearing established that Wolinetz's testimony would not be prejudicial to his client's interest. Therefore, Wolinetz's continued representation of appellee was consistent with DR-5-102(B), which permits an attorney to represent a client even though he learns he may be called as a witness by the opposition "until it is apparent that his testimony is or may be prejudicial to his client." DR-5-102(B); *Jackson v. Bellomy* (1995), 105 Ohio App.3d 341, 348-349.

{¶15} It is the burden of the party moving for disqualification of an attorney to demonstrate that the proposed testimony may be prejudicial to that attorney's client and that disqualification is necessary. *Pilot Corp. v. Abel*, Franklin App. No. 01AP-1204, 2002-Ohio-2812, at ¶13; *Mentor Lagoons, Inc. v. Teague* (1991), 71 Ohio App.3d 719, 724. Appellant did not show that Wolinetz's testimony would be prejudicial to appellee and it was obvious that any testimony Wolinetz might supply could be obtained from other witnesses. See *Wasserman, Wasserman, Bryan & Landry v. The Midwestern Indemnity Co.* (Nov. 21, 1986), Lucas App. No. L-86-135 (reversing disqualification of counsel when testimony that would have been presented by attorney could be provided by other witnesses); cf. *Sneary v. Baty* (Aug. 14, 1996), Allen App. No. 1-96-13 (reversing disqualification of attorney when attorney's testimony would not have been necessary). Appellant failed to meet his burden and, under these circumstances, the trial court did not abuse its discretion in limiting the scope of inquiry during the hearing on appellant's motion to disqualify or in denying the motion to disqualify. Therefore, appellant's first assignment of error is overruled.

{¶16} Appellant's second assignment of error alleges that the trial court erred in imposing sanctions pursuant to Civ.R.11, because it failed to make a finding that appellant acted willfully or in bad faith. We agree that sanctions are not supportable under Rule 11 in the absence of a finding that the filing was willful. *Bruggeman v. Bruggeman* (Nov. 22, 2000), Montgomery App. No. 18084, citing *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290. However, based upon the trial court's finding that appellant's motion was frivolous, we affirm the sanction based upon R.C. 2323.51.

{¶17} We note that appellee's request for sanctions was premised on both Civ.R.11 and R.C. 2323.51. The trial court specifically found that appellant's motion to disqualify counsel was frivolous. Although the trial court's judgment entry granted sanctions premised on a violation of Civ.R.11, this court may affirm a judgment on a legal basis other than those used by the lower court when the evidentiary basis on which the appellate court relies was fully adduced before the trial court. *State v. Peagler*, 76 Ohio St.3d 496, 1996-Ohio-73; *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614-615. Here, the evidentiary basis for finding a violation of R.C. 2323.51 was fully adduced before the trial court.

{¶18} A court may award reasonable attorney fees to any party in a civil action who is adversely affected by another party's frivolous conduct. R.C. 2323.51(B)(1). Frivolous conduct is the conduct of a party which satisfies either of the following: (1) It obviously serves merely to harass or maliciously injure another party to the civil action, or (2) it is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. R.C. 2323.51(A)(2)(a). As opposed to an award of sanctions pursuant to Civ.R.11, an award granted under R.C. 2323.51 does not require a finding that appellant acted willfully. *Ceol*, supra, at 291.

{¶19} A trial court is required to engage in a two-part inquiry when presented with a R.C. 2323.51 motion for sanctions. Initially, it must determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. Second, if the conduct is found to be frivolous, the trial court must determine what amount, if any, of reasonable attorney fees necessitated by the frivolous conduct is to be awarded to the aggrieved party. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 232-233. Whether or not to impose sanctions once frivolous conduct is found rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id.*; *Riley v. Langer* (1994), 95 Ohio App.3d 151.

{¶20} In the present case, the trial court made the following findings in support of its award of attorney fees: (1) there was nothing obvious that [Wolinetz] needed to be called or should be called as a witness; (2) there was no showing of any possible

prejudice to the defendant if Wolinetz would be called as a witness; (3) there was no showing of a conflict; (4) there was nothing presented pursuant to DR-5-102(B) that counsel may be called as a witness; (5) no evidence was presented supporting defendant's motion; (6) no evidence was presented that in any way indicated that Wolinetz's representation would be prejudicial to plaintiff; (7) there were alternate methods available to defendant for obtaining information about the preparation and execution of the affidavit; (8) defendant failed to make a case whatsoever, to support his motion; (9) defendant did not meet his burden of proof and his motion was frivolous.

{¶21} Given these express findings, the trial court did not abuse its discretion in finding appellant's motion to disqualify frivolous and awarding appellee its reasonable and necessary attorney fees in defending the motion. Appellant's second assignment of error is overruled.

{¶22} Finally, appellant contends in his third assignment of error that the trial court erred in ordering appellant, rather than appellant's attorney, to pay Civ.R. 11 sanctions. As we discussed above, we have affirmed the trial court's imposition of sanctions based upon R.C. 2323.51. An award of sanctions under R.C. 2323.51(B)(4) may be made against a party, the party's counsel of record, or both. *Ron Scheiderer & Assoc. v. London* (1998), 81 Ohio St.3d 94, 95. Therefore, the trial court did not err in making an award of sanctions against appellant rather than his attorney. Appellant's third assignment of error is also overruled.

{¶23} In conclusion, having overruled appellant's three assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

TYACK and BOWMAN, JJ., concur.
