

**IN THE SUPREME COURT OF OHIO**

<b>The Golf Club of Dublin,</b>	)	<b>10-1122</b>
	)	
<b>Appellant,</b>	)	<b>On Appeal from the Delaware</b>
	)	<b>County Court of Appeals,</b>
<b>v.</b>	)	<b>Fifth Appellate District</b>
	)	
<b>General Electric Capital</b>	)	<b>Court of Appeals</b>
<b>Corporation,</b>	)	<b>Case No. 09 CAE 12 0107</b>
	)	
<b>Appellee.</b>	)	

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**MEMORANDUM IN SUPPORT OF JURISDICTION**  
**OF APPELLANT THE GOLF CLUB OF DUBLIN, LLC**

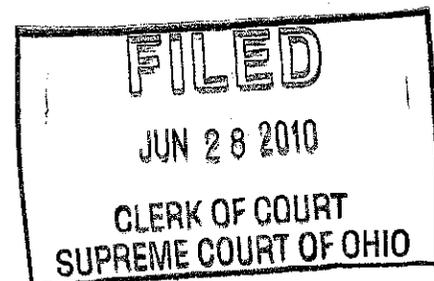
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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

This case presents a critical issue as our country faces its greatest economic challenges since the Great Depression. According to U.S. News & World Report, foreclosure filings were reported on more than 2.8 million properties in 2009, up 21 percent from 2008 and up 120 percent from 2007. “Strategic Defaults and the Foreclosure Crisis”, US News and World Report, January 19, 2010

It is common in business foreclosures for the creditor to seek the appointment of a receiver, as General Electric Capital Corporation (“GECC”) did in this case. Also typical is that the receiver will appoint a management company, as occurred here. The result is the addition of three layers of new expenses: (1) the receiver’s fees; (2) the fees paid to the receiver’s legal counsel; and, (3) the manager’s fees.

In many cases, it is the addition of these fees that pushes businesses past the tipping point, so that they become liquidated rather than rehabilitated. Because of the severity of the consequences of the appointment of a receiver taking management away from the owners and adding additional layers of expense, that the clear law of Ohio permitting immediate appeal of receivership orders must remain sacrosanct.

The decision of the court of appeals threatens this right, gives clear Ohio law and sticks a dagger in the heart of an owner’s right to immediate review of a receivership order. This urgently needs correction by this court.

If allowed to stand, the decision of the court of appeals would turn Ohio law on its head and be a devastating blow to businesses trying to survive in this economy, and a huge victory for the banking institutions that themselves brought on the problem our country and our citizens now face.

The conclusion of the court of appeals is contrary to all legal authority.

### **STATEMENT OF THE CASE AND FACTS**

Plaintiff-Appellee General Electric Capital Corporation (“GECC”) filed a Complaint in the Court of Common Pleas of Delaware County on June 9, 2009. In the Complaint, GECC alleged that Defendant-Appellant The Golf Club of Dublin (“GCD”) had defaulted on a promissory note and loan agreement, that it was entitled to judgment on the note, enforcement of its claimed security interests including a mortgage on the leasehold interest of GCD in the Franklin County, Ohio land upon which GCD property was situated, and that it was entitled to the appointment of a receiver. (Complaint, Doc. 06/09/2009).

On June 11, 2009, due to a Bankruptcy filing, a Suggestion of Stay was filed. (Doc. 06/11/2009). A Motion to Reactivate was filed by GECC on October 9, 2009 (Doc. 10/09/2009), and the matter was reactivated by Judgment Entry of October 13, 2009 (Doc. 10/13/2009).

On October 16, 2009, GCD filed its Motion to Transfer Venue for the reason that the only applicable venue provision contained in Civ.R. 3 required that the action be venued in Franklin County – the counsel in which the land was located. (Doc. 01/16/2009).

A hearing was held on October 19, 2009. (Transcript<sup>1</sup> filed herein). On December 9, 2009, the trial court denied the motion of GCD to transfer venue (Doc. 12/09/2009) and granted the motion of GECC to appoint a receiver, appointing Reg Martin of Martin Management Services, Inc. as receiver (Doc. 12/09/2009). On December 29, 2009, GCD filed its timely appeal from the order appointing a receiver (Doc. 12/29/2009).

### ARGUMENT

**Proposition of Law No. 1:** It is important public policy to allow the immediate appeal of an order appointing a receiver

Had the trial court not appointed a receiver in this case, Appellant GCD concedes that its order denying GCD's motion to transfer venue would not have been a final appealable order. *Mansfield Family Restaurant v. CGS Worldwide, Inc.*, 2000 Ohio App. Lexis 6187 (Ohio App. 5<sup>th</sup> Dist. 2000). For later treatment, see *Mansfield Family v. CGS Worldwide*, 2001 Ohio App. Lexis 3526 (Ohio App. 5<sup>th</sup> Dist., 2001). However, having made an order appointing a receiver, which clearly is a final appealable order *Mandalaywala v. Zaleski* (1997), 124 Ohio App. 3d 321, 329; See also, *Jamestown Village Condominium Owners Ass'n v. Market Media Research, Inc.* (1994), 96 Ohio App. 3d 678, 689, it has given the Court of Appeals jurisdiction to consider the propriety of its order appointing a receiver by examining whether the case was properly venued in Delaware County.

It is undisputed that the land subject to the foreclosure action brought by Plaintiff-Appellee GECC is situated totally within the boundaries of Franklin County, Ohio. The sole legal basis for GECC's claim that venue is proper is that the "principal place of

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<sup>1</sup> Hereafter "Tr \_\_\_\_\_".

business” of GCD is in Delaware County, Ohio, and the finding of the trial court was based upon that determination.

There is no evidence in the record that the principal place of business of GCD is in Delaware County. The attachments to the Complaint are not evidence. “Documents which are not sworn, certified or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court”. *Zeedyk v. The Agricultural Society of Defiance Bounty, Inc.* 2004 Ohio 6187, ¶19 (Ohio App. 3d Dist., 2004) Internal Citations omitted. In addition, the affidavit of Bret Adams shows that when ownership of GCD changed and a new operating agreement was executed, that operating agreement, attached to the Adams Affidavit, clearly showed the principal place of business to be in Franklin County. The operating agreement dated effective July 18, 2007, reads in part: “3.2 **Principal Office.** The principal office of the Company shall be located at 5805 Eitherman Road, Dublin, Ohio 43016....”

The language of Civ. R. 3(B)(2) is in the present tense. It requires that suit be brought where “the defendant has his or her principal place of business.” (Emphasis added). It does not provide for venue where the defendant once had its principal place of business. Thus, even if GECC had produced evidence, which it failed to do, that the principal place of GCD had once been in Delaware County, it is undisputed that the principal place of business of GCD at the time of the alleged default was in Franklin County.

GECC produced no evidence about venue. No one testified to authenticate the documents upon which GECC relies. Thus, the only evidence that could have been

considered by the Court was the affidavit of Bret Adams, to which no one objected. That affidavit clearly shows that the principal place of business of GCD is in Franklin County.

There is no evidence in the record to support the trial court's finding that "this Court has jurisdiction over this matter, that GCD's principal place of business is located in Delaware County, Ohio, and that venue is appropriate in this Court pursuant to Civil Rule 3(B)(2)." (Emphasis Added) Revised Entry and Order Granting Plaintiff's Motion for Order Appointing Receiver<sup>2</sup>, p. 2. (Doc. 12/09/2009)

This case is on all fours with the facts in *First Select Corporation v. Mullins*, 2001 Ohio App. LEXIS 2497 (Ct. of App. 10<sup>th</sup> Dist., 2001). In that case, the defendant-appellant Mullins filed two motions for change of venue. In support of her first motion, "she established her claim by submitting an affidavit attesting that she had not resided in Franklin County since 1991." *Id.* \*2. While plaintiff-appellee First Select argued that there was activity of Mullins in Franklin County, it "did not supplement these arguments with supporting evidence, *i.e.* an affidavit, a signed application, a signed credit card receipt." *Id.* The court noted that First Select "was required to submit supporting evidence to properly refute appellant's claim". *Id.*

By contrast, in support of its motion for change of venue, GCD submitted the affidavit of Bret Adams, who authenticated an operating agreement entered into when ownership of GCD changed in 2007. That operating agreement specified that the principal place of business of GCD is 5805 Eitherman Road, Dublin, Ohio 43016 – a Franklin County address. Thus, the only evidence regarding the principal place of business of GCD is found in the Adams Affidavit and the operating agreement attached to that affidavit. J That evidence shows the principal place of business of GCD is in

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<sup>2</sup> The docket does not disclose the existence of a prior Entry that this Revised Entry purports to revise.

Franklin County. By contrast, GECC introduced no evidence regarding the principal place of business of GCD. The court was required to consider the Adams Affidavit. As stated in McCormac, Ohio Rules of Civil Practice 2d, Section 6.18:

...it is obvious that outside materials, such as affidavits, answer to interrogatories, and depositions, must be considered in deciding the motion [for change of venue]. Use of such material is contemplated by Civil Rules.

As cited in *First Select Corporation v. Mullins*, supra, at \*5.

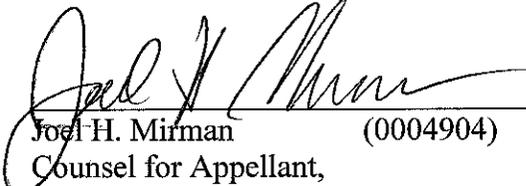
Further, “[t]he place of making of a contract is irrelevant to the issue of where the cause of action arose for its breach; the controlling place is that of the breach.” *Grange Mut. Cas. Co. v. Thompson* (1990), 61 Ohio App. 3d 190, 191. See also, *Atwood Resources, Inc. v. Lehigh* (1994), 98 Ohio App. 3d 293, 299. Thus, the court must look at venue in the present tense - when the alleged cause of action arose.

At the hearing before the trial court, counsel for GCD specifically referred to the Adams Affidavit and the attached operating agreement and as evidence of the location of the principal place of business of GCD (Tr. 4-5). There was no objection to that affidavit. Accordingly, even if it were to be held, contrary to Judge McCormac’s treatise and supporting case law, that the affidavit may have been inadmissible, that objection was waived. See *State v. Petro* (1947), 148 Ohio St. 474, 500, cited with approval in *State of Ohio v. Trewartha*, 2006 Ohio 5040, 2006 Ohio App. LEXIS 5165 (Ohio App. 10<sup>th</sup> Dist., 2006) \*11 (“When hearsay testimony is admitted without objection it may properly be considered and given its natural probative effect as if it were in law admissible, the only question being with regard to how much weight should be given to it.”).

**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

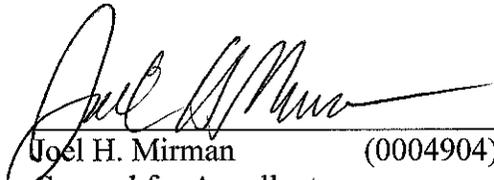
Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for appellee Justin Ristau, at Bricker & Eckler, 100 South Third Street, Columbus, Ohio 43215 this \_\_\_ day of June 2010.

  
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The Golf Club of Dublin, LLC

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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GENERAL ELECTRIC CAPITAL  
CORPORATION

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Plaintiff-Appellee

JUDGES:  
Hon. William B. Hoffman, P. J.  
Hon. Sheila G. Farmer, J.  
Hon. John W. Wise, J.

-vs-

Case No. 09 CAE 12 0107

THE GOLF CLUB OF DUBLIN, LLC

Defendant-Appellant

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 09 CVE 06 0765

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED  
2010 MAY 13 AM 10:42  
JAN ANTONOPLOS  
CLERK

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*Wise, J.*

{¶1} This is an appeal by Plaintiff-Appellant The Golf Club of Dublin, LLC from the December 9, 2009, Judgment Entry of the Delaware County Common Pleas Court granting Defendant-Appellee General Electric Capital Corporation's motion to appoint a receiver.

{¶2} This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶3} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

{¶4} This appeal shall be considered in accordance with the aforementioned rule.

**STATEMENT OF THE FACTS AND CASE**

{¶5} The relevant facts are as follows:

{¶6} Appellant, The Golf Club of Dublin, LLC, (hereinafter referred to as "GCD") is an Ohio limited liability company which owned and operated a golf course by the same name and related club activities.

{¶7} In July 2007, GCD entered into a Loan Agreement with Appellee General Electric Capital Corporation ("GECC") for a loan of up to \$8.5 million in connection with

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the golf course.<sup>1</sup> The Note and other supporting loan documents evidencing GCD's obligations to GECC are secured by the Mortgage. As demonstrated by the acknowledgements attached to the Mortgage and other Loan Documents, the documents providing the basis for this litigation were executed in Delaware County.

{¶18} On June 9, 2009, following GCD's default of its obligations under the Note, Mortgage and other Loan Documents, GECC filed a Complaint for Foreclosure in the Delaware County Court of Common Pleas (the "Complaint"), seeking judgment on a certain Promissory Note (the "Note"), foreclosure of an Open-End Leasehold Mortgage, Security Agreement and Fixture Filing (the "Mortgage"), and to enforce other rights under the related Loan Documents.

{¶19} Contemporaneous with the Complaint for Foreclosure, GECC also filed a Motion for Immediate Appointment of Receiver.

{¶10} Hours before a scheduled hearing on the receivership motion, an involuntary Chapter 11 bankruptcy petition was filed pursuant to 11 U.S.C. § 303 against GCD (the "Chapter 11 case"). Counsel for the Chapter 11 petitioning creditors also filed a Suggestion of Stay in the trial court requesting that the matter be stayed as a result of the automatic stay imposed by 11 U.S.C. § 362.

{¶11} Based on the Suggestion of Stay, the hearing on GECC's Motion for Immediate Appointment of Receiver was continued and this case was placed on the court's inactive docket.

{¶12} Less than two weeks after the imposition of the stay, GECC filed an Emergency Motion for Relief from Stay in the Chapter 11 case. GECC asked that the

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<sup>1</sup> The land which is the subject of the foreclosure is owned by the City of Dublin and leased to GCD.

bankruptcy court modify the automatic stay imposed by 11 U.S.C. § 362 to allow the instant case to proceed in the trial court for the limited purpose of seeking the appointment of a receiver over GCD.

{¶13} On September 25, 2009, the bankruptcy court entered an Unopposed Order Granting General Electric Capital Corporation's Motion for Relief from the Automatic Stay (the "Unopposed Order").

{¶14} On October 9, 2009, based on the Unopposed Order, GECC moved the trial court to return the case to its active docket for the purpose of allowing GECC to seek the appointment of a receiver over GCD.

{¶15} By Judgment Entry filed October 13, 2009, the trial court granted the motion and set an October 19, 2009, hearing date on GECC's motion to appoint receiver.

{¶16} On October 16, 2009, GCD filed a Motion to Transfer Venue to the Franklin County Common Pleas Court.

{¶17} On October 19, 2009, GECC filed its Opposition to GCD's motion to transfer venue. GCD filed its Reply on the same day.

{¶18} On October 19, 2009, the trial court held a hearing on GECC's Motion for Immediate Appointment of Receiver and GCD's Motion to Transfer Venue.

{¶19} On December 9, 2009, the trial court entered a Revised Entry and Order Granting Plaintiff's Motion for Order Appointing Receiver.

{¶20} By separate Order entered December 9, 2009, the trial court also denied GCD's Motion to Transfer Venue.

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{¶21} Appellant The Golf Club of Dublin now appeals, assigning the following errors for review:

**ASSIGNMENTS OF ERROR**

{¶22} "I. THE DELAWARE COUNTY COURT OF COMMON PLEAS ERRED WHEN IT APPOINTED A RECEIVER IN A CASE THAT WAS NOT PROPERLY VENUED IN DELAWARE COUNTY.

{¶23} "II. THE DELAWARE COUNTY COURT OF COMMON PLEAS ERRED WHEN IT BASED ITS APPOINTMENT OF A RECEIVER ON ITS ERRONEOUS DETERMINATION THAT VENUE WAS PROPER IN DELAWARE COUNTY WHEN THERE WAS NO EVIDENCE IN THE RECORD TO SUPPORT THAT DETERMINATION.

{¶24} "III. THE DELAWARE COUNTY COURT OF COMMON PLEAS ERRED WHEN IT BASED ITS APPOINTMENT OF A RECEIVER ON ITS ERRONEOUS DETERMINATION THAT VENUE WAS PROPER IN DELAWARE COUNTY WHERE THE CLAIM OF PROPER VENUE RELIED UPON AN ARGUMENT, UNSUPPORTED BY EVIDENCE, THAT THE PRINCIPAL PLACE OF BUSINESS OF THE DEFENDANT HAD BEEN IN DELAWARE COUNTY AT THE TIME PRIOR TO WHEN THE ALLEGED CAUSE OF ACTION AROSE."

I., II., III.

{¶25} As Appellant's assignments of error are interrelated and all assign error to the finding of proper venue and the appointment of a receiver in Delaware County, we shall address such assignments of error simultaneously.

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{¶36} "(b) The 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.

{¶37} "(5) An order that determines that an action may or may not be maintained as a class action." R.C. §2505.02(B)

{¶38} We find that R.C. §2505.02(B)(1) does not apply because the trial court's judgment in the case sub judice does not determine the action or prevent a judgment. The question of venue or choice of forum is procedural and does not decide a party's claims. See *Duryee, et al v. Rogers* (Dec. 16, 1999), Cuyahoga App. No. 74963, unreported, 1999 WL 1204875.

{¶39} Likewise, this was not an order in a special proceeding or upon a summary application in an action after judgment, nor was it an order that vacated or set aside a judgment or granted a new trial. See *Id*; R.C. §2505.02(B)(2) & (3). Nor does the order involve a determination as to whether a class action may be maintained. R.C. §2505.02(B)(5).

{¶40} The only possible applicable section is paragraph 4, regarding provisional remedies. "Provisional remedy" means "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence." R.C. §2505.02(A)(3). The statutory definition does not specifically refer to proceedings to transfer venue, nor are any of the listed proceedings akin to a transfer of venue. See *Duryee, supra*. The basic purpose of R.C. §2505.02(A)(3) in categorizing certain types of preliminary decisions of a trial court

as final, appealable orders is the protection of one party against irreparable harm by another party during the pendency of the litigation. *Id.*

{¶41} We find that a decision by a trial court denying a motion for transfer of venue does not involve the same degree of risk of irreparable harm to a party as the decisions made in the types of actions listed under R.C. §2505.02(A)(3). The types of provisional remedies listed under R.C. §2505.02(A)(3) include decisions that, when made preliminarily, could decide all or part of an action or make an ultimate decision on the merits meaningless or cause other irreparable harm.

{¶42} This Court has previously held that the denial of a request to change venue is not a final, appealable order. *Mansfield Family Restaurant v. CGS Worldwide, Inc.* (Dec. 28, 2000), Richland App.No. 00-CA-3. In *Mansfield*, this Court stated:

{¶43} "The decision to deny a change of venue does not result in any of the types of irreparable harm just listed. There is an adequate legal remedy from a decision denying a change of venue, after final judgment. In other words, it may be expensive to get the cat back in the bag, if a trial court errs when it denies a change of venue, but it can be done." See also *Buxton v. Mancuso*, Knox County App.No. 09 CA 22, 2009-Ohio-6839.

{¶44} We therefore find that a denial of a motion to transfer venue is not a final, appealable order.

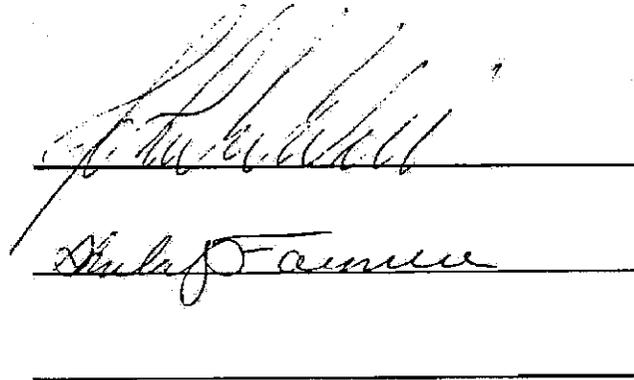
{¶45} Accordingly, we find that the December 9, 2009, Judgment Entry is not a final, appealable order.

{¶46} For the reasons stated in the foregoing opinion, the appeal of the judgment of the Court of Common Pleas of Delaware County, Ohio, is dismissed for lack of jurisdiction.

By: Wise, J.

Farmer, J., concurs.

Hoffman, P. J., dissents.



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JUDGES

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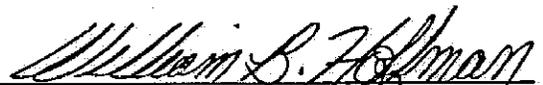
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*Hoffman, P.J., dissenting*

{147} While I acknowledge and agree with the majority Appellant is indirectly challenging the trial court's interlocutory order denying a change of venue, I, nevertheless, disagree with its decision to dismiss this appeal for want of a final appealable order.

{148} It is well settled the appointment of a receiver is a final appealable order. *Jamestown Village Condominium Owners Ass'n. v. Market Media Research, Inc.* (1994), 96 Ohio App.3d 678; *Mandalaywala v. Zaleski* (1997), 124 Ohio App.3d 321; *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503,

{149} Because Appellant's claim of error in the appointment of the receiver is based solely on the claim of improper venue, I would find that such claim is insufficient, as a matter of law, to reverse the trial court's appointment of a receiver; therefore, I would affirm the trial court's decision.



HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

GENERAL ELECTRIC CAPITAL  
CORPORATION

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Plaintiff-Appellee

-vs-

THE GOLF CLUB OF DUBLIN, LLC

Defendant-Appellant

JUDGMENT ENTRY

Case No. 09 CAE 12 0107

For the reasons stated in our accompanying Memorandum-Opinion, the appeal of the judgment of the Court of Common Pleas of Delaware County, Ohio, is dismissed.

Costs assessed to Appellant.

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JUDGES

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DELAWARE COUNTY, OHIO  
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