

IN THE SUPREME COURT OF OHIO

JAMES SPENCER

Plaintiff-Appellee

Vs.

FHI Inc., et alia

Defendants-Appellants

- * Case No: 10-2138
- *
- * On appeal from the
- * Miami County Court of Appeals
- * Second Appellate District
- *
- * Court of Appeals
- * Case No: 09CA00044

PLAINTIFF-APPELLEE JAMES SPENCER'S MEMORANDUM IN
OPPOSITION TO MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT MARSHA RYAN, ADMINISTRATOR,
BUREAU OF WORKERS' COMPENSATION.

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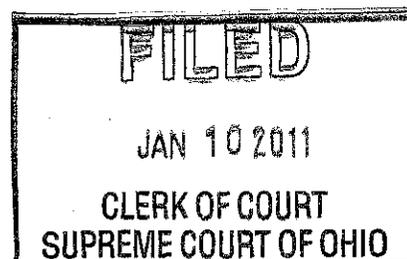


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INTRODUCTION

This case involves a case where an injured worker appealed an adverse decision first to the Darke County court of Common Pleas, and then, upon realizing the proper venue was in Miami County, to the Miami County Court of Common Pleas. The Plaintiff Appellee had inadvertently omitted the Administrator of the BWC as a party. He attempted to correct this issue by amending the petition and serving all parties, including the administrator. When his case was dismissed by both the Darke County Court and the Miami County Court due to a lack of jurisdiction, he appealed to the Second District Court of Appeals. The Second District overruled the trial court on December 10, 2010 holding, among other things, that the Administrator had effectively waived the jurisdictional argument by answering the complaint, thus admitting to notice the appeal.

The Administrator now seeks to appeal this matter to the Supreme Court of Ohio, on the grounds that this matter has been decided solely on the basis that the requirement of notice to the Administrator is jurisdictional, under Ohio Revised Code § 4123.512(B), and that there is a split of authority between the Second District and the Sixth Districts concerning the jurisdictional requirements of O.R.C. § 4123.512.(B) However, the Second District, in its decision regarding the Employer's Motion to Certify a Conflict which was filed on January 6, 2010, indicated that its decision essentially rested the fact that that the Administrator Waived the notice requirements when it filed an answer to the Plaintiff-Appellee's Amended Complaint. Since the Second District's decision is not based on the area of alleged conflict of jurisdiction. The jurisdictional question posed by

the Administrator as it applies to this case is not ripe for review by this court, and therefore jurisdiction should be denied.

STATEMENT OF FACTS

Plaintiff was denied a Worker's Compensation Claim for an injury he sustained while working for Defendant employer. *James Spencer v. FHI, LLC et al.*, (2nd Dist.) Case 09-CA-44 2010-Ohio-5288. His claim was denied on June 6, 2009. *Id. at para. 2.*

Plaintiff filed a notice of appeal to Darke County Court of Common Pleas, naming FHI as the Defendant. He did not at that time name or serve the Administrator. *Id at Paras. 2, 3.* Plaintiff believed he had served the administrator, due to a misunderstanding about the distribution list on a Bureau order. FHI then moved to dismiss due to lack of subject matter jurisdiction, stating that the Notice of appeal was fatally defective under R.C. 4123.512(B). *Spencer at Para 4.* Spencer then moved to amend, and did so, serving all parties including the Administrator, who then answered the amended complaint. *Id. at Para 3, 5, 6.* The Court of Common Pleas then dismissed the complaint.

After Plaintiff's motion for Reconsideration was denied, the Plaintiff then appealed to the Second District Court of Appeals in Miami County, who reversed the Miami County Court of Common Pleas, noting that the Trial Court's reliance on *Olaru v Fed. Ex. Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376 was misplaced, due to factual differences, and that court's reliance on *Day v. Noah's Ark Learning Center*, Delaware App. No. 01-CVE—12-068, 2002-Ohio-4245, which it said were inapposite to the case at hand. See *Spencer at Para 27, 28.* The Second District also clearly stated the appearance by the Administrator, in the form of an answer, indicated

sufficient notice of the appeal to satisfy the Requirements of 4123.512. This position was reiterated in the Second District's denial of the Employer's and Administrator's motion to certify a conflict. See *James Spencer v. FHI LLC, Decision & Entry (Second District, January 6, 2011.)*

THIS CASE IS NOT OF GREAT OR PUBLIC GENERAL INTEREST

This case is not of general or public interest because it did not generate a split of authority as the Administrator urges in its argument set forth in its Memorandum In Support of Jurisdiction. As noted in its Decision of January 6, 2011, the Second District relied on the case of *Wells v Chrysler Corporation (1984) 15 Ohio St. 3d. 21* to support its finding that any jurisdictional defect was waived by the Administrator's voluntary appearance in the action filed in the common pleas court, so that any jurisdictional basis for a dismissal are no longer in play. Therefore, the Administrator's assertion that this decision implicates a split of authority is misplaced and as such should not be the basis for this court to accept discretionary jurisdiction.

ARGUMENT

The Administrator's assertion that the proposition of law is required because this case relied on an alleged conflict of authority between the Second and Sixth Districts is misplaced, as the Second District relied on an alternative holding, and as such, this issue is not properly before this court.

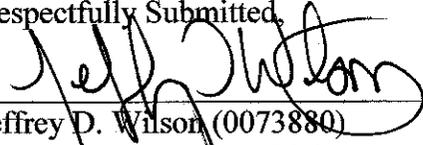
The Second District decided this case based upon the idea that that when the Administrator filed her answer to the Plaintiff's amended complaint in the court of common pleas, it acknowledged it had received notice, and waived the defense of jurisdictional defect. See *Spencer opinion, at Para. 24*. The Second District relied on

Wells v Chrysler Corporation (1984) 15 Ohio St. 3d.21, 24 in support of its holding that the filing of an answer waived the jurisdictional defect argument. The Second District further noted that the cases typically used to support the argument that failure to name the administrator is incurably fatal to an appeal were inapposite in this particular case, due to the unique set of facts. *Spencer opinion at Para 27, 28.* The Cases relied upon by the employer and the Bureau, as noted by the Second District Court of Appeals, all involved situations wherein the plaintiffs failed to a notice of appeal at all. This is not the case here, as Plaintiff Spencer clearly filed his appeal. This, coupled with the waiver of the jurisdictional argument by the Administrator's Answer, sets this case apart, and removes it from the arena of the alleged conflict between the Second and Sixth Districts, with regard to the jurisdictional proposition of law urged by the Administrator. As such, this court should not accept jurisdiction of this particular case.

CONCLUSION

For the forgoing reasons, this court should deny jurisdiction, because the case below was not decided in contradiction to authority, but rather on the issue of the Administrator's waiver of the defense of jurisdiction by the filing of her answer. Therefore, the issue as framed by the Administrator's Memorandum in support of Jurisdiction is not properly before this court.

Respectfully Submitted,


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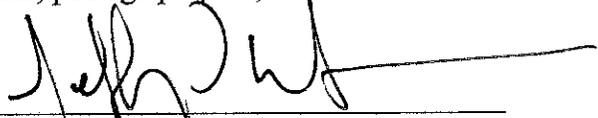
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CERTIFICATE OF SERVICE

A photocopy of the foregoing motion for reconsideration was forwarded on January 10, 2011 by ordinary United States mail, postage prepaid, to the addressees below.



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APPENDIX

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JAN A. MOTTINGE
CLERK OF COURT

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER	:	
Plaintiff-Appellant	:	C.A. CASE NO. 09-CA-44
vs.	:	T.C. CASE NO. 09-988
	:	(Civil Appeal from
FHI, LLC, et al.	:	Common Pleas Court)
Defendants-Appellees	:	

OPINION

Rendered on the 29th day of October, 2010.

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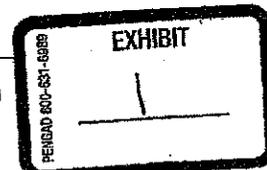
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GRADY, J.:

Plaintiff, James Spencer, appeals from an order dismissing
his R.C. 4123.512 appeal from a decision of the Industrial
Commission and overruling his motion for leave to amend his
petition.

Spencer filed a workers' compensation claim against Freight



Handlers, Inc. ("FHI") for a left shoulder injury he allegedly suffered on October 23, 2008, while lifting at his employment with FHI in Miami County. Spencer's claim ultimately was denied by the Industrial Commission on June 6, 2009.

3
On August 7, 2009, Spencer filed a notice of appeal pursuant to R.C. 4123.512 in the Court of Common Pleas of Darke County. Spencer's notice of appeal did not name the Administrator of the Bureau of Workers' Compensation ("Administrator") as a party to the appeal, and Spencer failed to serve a copy of the notice of appeal on the Administrator "at the central office of the bureau of workers' compensation in Columbus" as required by R.C. 4123.512(B). On September 3, 2009, Spencer filed the petition required by R.C. 4123.512(D), but he neither served a copy on the Administrator nor named the Administrator as a party in the petition.

4
On September 11, 2009, FHI filed a motion to dismiss for lack of subject matter jurisdiction and/or for failure to join a necessary party based on Spencer's failures to name the Administrator as a party and serve the Administrator with a copy of the notice of appeal. Alternatively, FHI's motion sought to transfer the case to the Common Pleas Court of Miami County for decision on its motion to dismiss, because Spencer's injury occurred in Miami County, not in Darke County. R.C. 4123.512(A) requires the notice of appeal to be filed in "the court of common pleas of the county in which the injury was inflicted ***."

5
In response to FHI's motion, Spencer filed a motion for

6
leave to amend his petition and to transfer the case to the Miami County Court. Spencer attached an amended petition to his motion for leave to amend and served a copy of the amended petition on the Administrator at the central office of the bureau of workers' compensation in Columbus. On October 8, 2009, the Court of Common Pleas of Darke County transferred the case to the Court of Common Pleas of Miami County pursuant to R.C. 4123.512(A).

7
On October 27, 2009, the Administrator filed an Answer to Spencer's amended petition. Two days later, the Court of Common Pleas of Miami County granted FHI's motion to dismiss for lack of subject matter jurisdiction and overruled Spencer's motion to amend his petition. Spencer filed a timely notice of appeal.

ASSIGNMENT OF ERROR

8
"THE TRIAL COURT ERRED WHEN IT HELD IT LACKED SUBJECT MATTER JURISDICTION TO HEAR APPELLANT JAMES SPENCER'S NOTICE OF APPEAL."

The trial court found that it lacked subject matter jurisdiction to decide Spencer's appeal "because the Plaintiff did not name the Administrator as a party in the notice of appeal and did not serve the notice as required by O.R.C. 4123.512(B)."

The trial court concluded:

9
"Since neither Court had jurisdiction, the defect cannot be corrected by the amendment of the pleadings or otherwise. The safe harbor provision of O.R.C. 4123.512(A) which allows the transfer of the case to a court with proper venue and jurisdiction does not apply because neither the Darke County Common Pleas Court or this Court ever had subject matter

jurisdiction.

20
"Accordingly, the Court lacks subject matter jurisdiction. The motion for leave to amend the complaint is moot and therefore overruled." (Dkt. 3.)

11
R.C. 4123.512(A) confers a right on a claimant to appeal from an order of the Industrial Commission to the court of common pleas of the county in which the alleged injury occurred. R.C. 4123.512(A) further provides:

12
"The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

13
"If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction."

14
Spencer filed a notice of appeal in the Court of Common Pleas of Darke County. The notice should have been filed in the Court of Common Pleas of Miami County, where the injury occurred. Although at one point in time this would have resulted in a dismissal for lack of subject matter jurisdiction, *Heskett v. Kenworth Truck Co.* (1985), 26 Ohio App.3d 97, R.C. 4123.512(A)

now contains a safe harbor provision that required the transfer of Spencer's appeal from Darke County to Miami County. Further, R.C. 4123.512(A) provides that "[t]he filing of the notice of appeal with the court is the only act required to perfect the appeal." Therefore, if Spencer's notice of appeal complied with the jurisdictional requirements of R.C. 4123.512(B), he could rely on his filing date in Darke County and his notice of appeal would be timely filed pursuant to R.C. 4123.512(A).

R.C. 4123.512(B) provides for the contents of the notice of appeal and identifies the parties to the appeal:

"The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

"The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates."

It is undisputed that the contents of Spencer's notice of appeal satisfied the five requirements that the first paragraph

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of R.C. 4123.512(B) imposes. However, neither the notice of appeal nor the subsequent petition that Spencer filed pursuant to R.C. 4123.512(D) named the Administrator as a party. Neither was the Administrator served with a copy of the notice of appeal in the manner that R.C. 4123.512(B) requires. Instead, copies were mailed to an attorney in Cincinnati who apparently represented the Bureau of Workers' Compensation in the proceedings before the Industrial Commission.

19
In *Jarmon v. Ford Motor Company* (April 30, 1996), Franklin App. No. 95APE10-1377, the Tenth District held that the failure to name the Administrator as a party did not deprive the court of common pleas of subject matter jurisdiction:

20
"In oral argument, Ford relied upon the R.C. 4123.512(B) language that 'the administrator [of the bureau of worker's compensation], the claimant, and the employer shall be parties to the appeal ***,' asserting plaintiff's letter did not comply with R.C. 4123.512(B) because the letter did not name the administrator as a party. Despite Ford's construction, R.C. 4123.512(B) provides separate requirements for a valid notice of appeal and for naming parties to the appeal itself. *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 104, 181 N.E.2d 814; *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527, unreported, citing *Milenkovich*, supra. According to the plain language of the statute, the notice of appeal must state only the five factors set forth above; it need not state the administrator's name. *Goricki*, supra. The court's

jurisdiction depends on timely filing the notice of appeal, not on naming within the notice the administrator or the necessary parties to the appeal itself. *Goricki, supra*, citing *Singer Sewing Machine, supra*. [] Accordingly, plaintiff's failure to name the administrator in her letter does not warrant dismissal for lack of jurisdiction." (Emphasis in original.)

As noted in *Jarmon*, the Ninth and Eleventh Districts have also held that the naming of the Administrator as a party is not a jurisdictional requirement when filing a notice of appeal. *Karnofel v. Cafaro Management Co.* (June 26, 1998), Trumbull App. No. 97-T-0072 (citations omitted); *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527; *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 181 N.E.2d 814.

We agree with these other appellate districts that a failure to name the Administrator in the notice of appeal or to serve the Administrator with the notice of appeal does not deprive a court of common pleas of subject matter jurisdiction to hear an R.C. 4123.512 appeal. R.C. 4123.512(A) provides that the filing of a notice of appeal perfects an appeal authorized by that section. The first paragraph of R.C. 5123.512(B) identifies the matters the notice must contain in order to be valid: the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom. Failure to include these matters in a notice of appeal which is filed may be fatal to the court's jurisdiction because the notice is then not valid. The content requirement is

analogous to App.R. 3(D), which specifies the contents of a notice of appeal to this court.

23

The second paragraph of R.C. 4123.512(B), wherein the requirements concerning naming and serving the Administrator are established, were set apart from the "contents" requirements of the first paragraph by the General Assembly when it adopted R.C. 4123.512(B). That separation suggests a different purpose. That purpose is addressed by that section: to allow the Administrator to advise the employer of possibly adverse consequences if the employer fails to actively participate in the appeal, instead relying on the Administrator. That purpose may yet be served by allowing the appellant to amend the notice of appeal and the subsequent petition required by R.C. 4123.512(D) and subsequently to serve the Administrator.

24

Alternatively, an appearance by the Administrator, as in the present case, demonstrates that the Administrator was put on notice to the extent that R.C. 4123.512(B) requires. In *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21, the claimant filed a timely notice of appeal but failed to include the name of the employer in the text of the notice of appeal. The trial court granted the employer's motion to dismiss on jurisdictional grounds. The Supreme Court reversed, holding:

25

"[T]he purpose of a notice of appeal is to set forth the names of the parties and to advise those parties that an appeal of a particular claim is forthcoming. This notice of appeal clearly satisfied this purpose. Indeed, Chrysler Corporation

answered this notice with a motion to dismiss. There was no demonstrated surprise or prejudice." *Id.* at 24.¹

26 Although the requirements in the second paragraph of R.C. 4123.512(B) regarding the Administrator are not jurisdictional, they nevertheless establish the Administrator as a necessary party for purposes of Civ.R. 19(A). That rule provides that if a necessary party is not joined "the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7)." That result is the preferred alternative to a dismissal for failure to join a necessary party. *Congress Lake Club v. Witte*, Stark App. No. 05CA0037, 2006-Ohio-59.

27 The trial court cited the following cases in support of its decision to dismiss the appeal on jurisdictional grounds: *Olaru v. Fed Ex Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376; *Brown v. Liebert Corp.*, Franklin App. No. 03AP-437, 2004-Ohio-841; *Day v. Noah's Ark Learning Center*, Delaware App. No. 01-CVE-12-068, 2002-Ohio-4245; and *Gdovichin v. Geauga Cty. Hwy. Department* (1993), 90 Ohio App.3d 805. We believe these cases are inapposite and unpersuasive.

28 In *Brown*, *Day*, and *Gdovichin*, the plaintiffs failed to file a notice of appeal at all. Rather, the plaintiffs instead filed petitions or complaints contemplated by R.C. 4123.512(D). The

¹ Accord: *Wethington v. University of Cincinnati Hospital* (April 9, 1999), Hamilton App. No. C-980656 (noting that the University of Cincinnati, like Chrysler, answered the notice of appeal with a motion for summary judgment, demonstrating that it had actual notice of the appeal).

R.C. 4123.512 appeals were dismissed on jurisdictional grounds because the petitions or complaints were insufficient to constitute a notice of appeal. There is no question, however, that Spencer filed a notice of appeal. Therefore, we believe that the trial court's reliance on *Brown, Day, and Gdovichin* is misplaced. Further, in *Olaru*, the Sixth District adopted the judgment of the trial court as its own. The trial court in turn relied on the decision in *Day*, which we believe is inapposite to the facts before us.

29
The assignment of error is sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and BROGAN, J. concur.

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Abigail K. White, Esq.
Colleen Erdman, Esq.
Hon. Jeffrey M. Welbaum

FILED
MIAMI COUNTY
COURT OF APPEALS

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JAN A. NOTTING
CLERK OF COUR

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER
Plaintiff-Appellant

C.A. CASE NO. 09-CA-44

vs.

T.C. CASE NO. 09-988

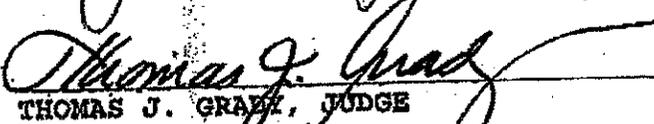
FINAL ENTRY

FHI, LLC, et al.
Defendants-Appellees

Pursuant to the opinion of this court rendered on the
29th day of October, 2010, the judgment of the trial
court is Reversed and the matter is Remanded to the trial court
for further proceedings consistent with the opinion. Costs are
to be paid as provided in App.R. 24.


MARY E. DONOVAN, PRESIDING JUDGE


JAMES A. BROGAN, JUDGE


THOMAS J. GRAETZ, JUDGE

SR. 17 P. 39

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Common Pleas Court
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IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER
Plaintiff-Appellant : C.A. CASE NO. 09-CA-44
vs. : T.C. CASE NO. 09-988
FHI, LLC, et al.
Defendants-Appellees :

.....
DECISION AND ENTRY

Rendered on the 6th day of January, 2011.
.....

PER CURIAM:

This matter is before the court on two motions to certify a conflict to the Supreme Court filed pursuant to App.R. 25. The motions were filed by Defendant-Appellee Freight Handlers, Inc., and by the Attorney General on behalf of the Administrator of the Bureau of Worker's Compensation.

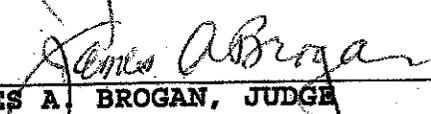
The movants contend that our decision in the present case is in conflict with the decision of the Sixth District Court of Appeals in *Olaru v. FedEx Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376. The alleged conflict concerns whether the provisions of R.C. 4123.512(B) regarding naming the administrator as a party to an action on an appeal to the common pleas court filed pursuant to that section and serving a copy of the notice of appeal in the action on the administrator are jurisdictional.

We acknowledge that our holding herein and the holding in *Olaru*, at least with respect to their outcomes concerning the question of jurisdiction, are in conflict. However, we also held in the present case that the jurisdictional defect was waived by the administrator's voluntary appearance in the action filed in the common pleas court, citing the holding in *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21. Because of our reliance on those alternative grounds, the jurisdictional issue in the present case was decided on facts different from those in *Olaru*. To qualify for certification, "the alleged conflict must be on a rule of law-not facts." *Whitelock v. Gilbane Building Company* (1993), 66 Ohio St.3d 594.

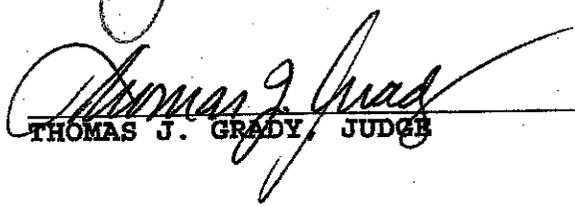
The motions to certify are Denied.



 MARY E. DONOVAN, PRESIDING JUDGE



 JAMES A. BROGAN, JUDGE



 THOMAS J. GRADY, JUDGE

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