

IN THE SUPREME COURT OF OHIO

11-0517

T.M.

Appellant,

vs.

J.H.

Appellee.

On Appeal from the Lucas County Court
of Appeals, Sixth Appellate District

Court of Appeals
Case Nos. L-10-1014 and L-10-1034

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TONYA S. MOSIER

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

This cause presents the overriding issue of whether, consistent with the Ohio Constitution, a court of limited statutory jurisdiction acting beyond its lawful jurisdiction may deprive an unwed mother of custody over her minor child. The following four critically important and recurring issues of public or great general interest arise therefrom:

1. May a Juvenile Court *sua sponte* transmute a child support case brought by the local child support enforcement agency against an unwed father, into a child custody case against a non-party unwed mother, where no parentage action is pending?
2. Does a Juvenile Court lack jurisdiction to adjudicate child custody issues in a child support case pending against the father, to which an unwed mother is not a party, upon a mere motion served on the mother, where such issues were never framed in any custody complaint ever served on the mother?
3. When a court of appeals correctly determines that it is without jurisdiction because no Final Judgment was entered below, is it jurisdictionally permissible for the court of appeals to specify the particular terms of the Final Judgment required to be entered by the trial court upon remand?
4. When appellate jurisdiction is timely challenged by motion or assigned error, must the court of appeals first determine its own jurisdiction, before ruling on the merits?

Each of these four issues is of jurisdictional significance to the operation and administration of justice by all Ohio courts of limited, statutory jurisdiction. The latter two issues are particular to the functioning of the Courts of Appeals under the Ohio Constitution, and to the Supreme Court of Ohio's supervisory authority over the courts of appeals.

Under the logic of both decisions entered below, the Juvenile Court possesses jurisdiction to adjudicate custody issues, and every unwed mother in Ohio is continually at risk of losing custody over her minor children, in any pending case in Juvenile Court, even in: (1) a case to which the unwed mother is unrepresented by legal counsel and is not a party; (2) upon a mere "motion," without any pleading properly commencing a custody proceeding ever having been

served upon her; (3) even though the pending Juvenile Court case does not involve child custody issues, and (4) even though the custody issues are first raised by motion, after all of the issues framed by the pleadings have already been fully adjudicated. That imposes 18 years of risk upon every unwed mother in Ohio who, for whatever reason, happens to come before a Juvenile Court. What actually happened to the unwed mother below and what most certainly will recur in Ohio to other unwed mothers hereafter unless the errand decision below is reversed, is as draconian as it is transparently, manifestly unjust.

All of these jurisdictional errors were raised below before any custody hearing commenced, but all jurisdictional objections were essentially ignored by both courts. Timely challenges were raised in the court of appeals by four separate motions, and in three assignments of error, but the court of appeals simply refused to rule on the merits of any of the four jurisdictional motions, and thereafter reformulated the three assignments of error contrary to their literal language, and based on the court's own erroneous reformulation, refused to rule on the three jurisdictional assignments of error as actually worded.¹

Justice Alice Robie Resnick, in *In re Byard* (1996) 74 Ohio St. 3d 294, 297, wrote presciently about these very issues (albeit there arising under the Uniform Reciprocal Enforcement of Support Act (URESA)):

In an action commenced pursuant to URESA, the custodial parent requesting support enforcement has no notice that visitation and custody issues will be raised. This lack of notice may place the custodial parent at a considerable legal disadvantage. The custodial parent's interests in collecting child support pursuant to URESA are represented by the Child Support Enforcement Agency ("CSEA") through the county prosecutor's office. R.C.3115.16(B); R.C. 3115.22(A). Once the issues of custody *** are introduced into the proceedings, CSEA's and the custodial parent's interests diverge. Unless the custody *** action is properly

¹ The court of appeals erroneously asserted that appellant had framed the wrong issue, an assertion contradicted by the language of the actual assignments of error, but even if true would not create appellate jurisdiction otherwise non-existent. Appendix B, pp. 10, 13-16.

initiated, the custodial parent has no notice that this issue will be addressed by the court and therefore no reason to obtain proper independent legal representation.

That rationale unanimously embraced by this Court in *Byard* was correct then, remains correct, and should be adopted dispositively in the appeal now before this Court.

STATEMENT OF THE CASE AND FACTS

Even though the order here on appeal is a child custody order, the trial court case below was a child support case, not a custody case; it was commenced by the local child support enforcement agency (“LCCSEA”) filing a complaint for child support against an absent, unwed father, Appellee Haaser. On May 5, 2008, an order was entered with the consent of the father, whereby the father agreed to begin providing child support for the baby he had previously abandoned. Final Judgment on that Complaint for Support, the only pleading ever properly before the Juvenile Court in the proceeding below, was entered on June 16, 2008. Appellant contends that all proceedings conducted thereafter are a nullity, but the Court of Appeals simply refused to rule on that issue.

Multiple jurisdictional defects were interjected by the trial court’s transmutation of a child support action into a custody dispute. Most notably, on May 9, 2008, the father filed a “Motion” for custody, seeking an adjudication of custody issues based on a “Motion” filed in a support case against the father to which the mother was not even a party, and in which no “Complaint” for custody was ever filed, and in which no attempt was ever made at compliance with the minimum requisites of a “Complaint for Custody” as required by Juvenile Rule 10(B) and (D) and the Ohio Revised Code. Although unrepresented by legal counsel for various periods of time, the mother raised multiple jurisdictional objections, before any responsive pleading was interposed on her behalf, as permitted by the Juvenile Court Rules. Her objections were summarily rejected first by the trial court, and then (*sub silentio*) by the appellate court,

without any court offering any credible rationale to how jurisdiction over custody issues against the non-party mother could possibly have been invoked under this scenario.²

Beginning May 9, 2008 and continuing for the next 31 months, the trial court continued to exercise jurisdiction over custody issues, notwithstanding that the Final Order on child support---the only issues properly framed in the only pleading properly before the trial court---had been fully adjudicated by the May 5, 2008 consent order, adopted as the Final Order and entered June 16, 2008 against the father, nearly a year before the trial on custody had commenced.

Over the mother's continuing repeated objections, the Magistrate conducted a trial on custody issues on March 30, April 23, July 8 and July 9, 2009. The Magistrate even continued to conduct the custody trial after the reference had been withdrawn from her by order entered July 7, 2009. Notably, this was the only trial that the mother was given, and it was conducted by a Magistrate Judge acting without lawful jurisdiction, conducted in principal part after the reference had been withdrawn.

On the last day of the trial, the Magistrate ordered an immediate change of temporary custody, and by Decision entered four months later, on November 4, 2009, based on the trial she conducted in part after withdrawal of the reference from her, ordered full, permanent residential custody to be awarded to the father.

² The Magistrate who conducted the "custody trial," the only evidentiary hearing any Judge ever held on the mother's precious constitutional rights to the upbringing of her minor child, acting after the reference had been withdrawn, asserted so-called "equitable jurisdiction" as a basis for adjudicating custody, notwithstanding the prior express rejection of that non-existent doctrine by the Supreme Court of Ohio. *In re Gibson (1991) 61 Ohio St. 3d 168, 172*. The Court of Appeals stated no rationale at all for its exercise of jurisdiction over custody issues, and expressly declined to rule on multiple assignments of error and four separate motions challenging jurisdiction, apparently believing that no decision on the jurisdictional issues raised repeatedly by Appellant is required before ruling on the merits.

The Visiting Judge, Judge Ray, by order entered December 22, 2009 affirmed the custody determination in favor of the father, without conducting a trial or taking any other evidence, but since the order contained no provision for child support, it was a non-final, non-appealable order. (See Opinion and Judgment of the Sixth District dated November 29, 2010, Appendix C hereto.) So, on January 12, 2010, the Magistrate simply signed Judge Cubbon's name to a newly created support order and entered it that date as the purported Final Judgment, even though: (1) Judge Cubbon had not authorized the Magistrate to do so, and in fact Judge Cubbon had previously recused herself; and (2) the Magistrate's signing of the previously recused Judge Cubbon's name to the January 12, 2010 Final Judgment amounted to quasi-judicial review by the Magistrate over her own November 4, 2009 custody Decision, contrary to law and Due Process in multiple obvious respects.

The timely appeal in this case arose out of the purported Final Judgment entered January 12, 2010 in which the Magistrate had, without lawful authority, signed Judge Cubbon's name---an obviously void order. The mother's legal counsel devoted much of the next year filing motions and briefs trying to persuade the trial court or the Court of Appeals to vacate the obviously void January 12, 2010 Final Judgment, and included it as an assigned error. The appellate court steadfastly refused to do so, denying multiple motions to dismiss on grounds otherwise than on the merits, in a series of orders declining to address its own (and the trial court's) obvious lack of jurisdiction over the January 12, 2010 order, or indeed, over any custody issues.³

On September 21, 2010, after a new visiting judge had been assigned, the trial court *sua*

³ Appellant filed Motions to Dismiss for lack of jurisdiction with the Court of Appeals on June 4, 2010, August 3, 2010, August 30, 2010 and October 18, 2010. All were denied without being considered or decided by the Court of Appeals substantively on the merits.

sponte vacated the January 12, 2010 void Final Judgment on custody and support. The Court of Appeals thereupon interceded and, unfortunately, interjected multiple additional layers of further jurisdictional error into the proceedings, in particular by its order entered November 29, 2010 (Appendix C hereto) which held: (1) the trial court's *sua sponte* order vacating the January 12, 2010 Final Judgment was itself void, as an appeal of that order was then pending; (2) the Court of Appeals itself finally *sua sponte* vacated the January 12, 2010 Final Judgment as signed by a "recused judge" without jurisdiction; and (3) most importantly, the Court of Appeals' order dated November 29, 2010 directed the trial court to enter a new final order, albeit on terms dictated by the Court of Appeals itself, as follows:

The juvenile court's December 22, judgment "adopts" the magistrate's decisions, states the dates of the magistrate's decisions, and is a separate document from these decisions. *** But while it appears the juvenile court believed it properly entered a final judgment on all necessary issues, the December 22 judgment does not specify the terms of the child support obligation the magistrate imposed on T.M. Therefore, we conclude the December 22 judgment does not comply with all of the requirements of Civ.R.53.

Therefore, in the interests of judicial economy, the court remands this case to the Lucas County Court of Common Pleas, Juvenile Division, for a period of 14 days to enter a final judgment under Civ.R.53 which adopts the magistrate's decisions specified in the December 22, 2009 judgment, and addresses the juvenile court's final custody determination, the visitation schedule, and the support obligation with respect to the parties' minor child. (emphasis supplied) (Appendix C hereto)

Thus, remarkably, the Court of Appeals, acting without any Final Judgment before it thus patently without jurisdiction except to dismiss and remand the appeal, instead **purported to direct the trial court to enter a particular final judgment on terms dictated and specified with particularity by the Court of Appeals**, and prejudicial to Appellant, without benefit of any review by any judicial officer acting with lawful judicial power. The court of appeals' action was unprecedented under Ohio law.

The trial court on December 17, 2010 entered the new final judgment, in compliance with and on the terms the Court of Appeals (unlawfully) had just dictated. The Mother and the maternal grandfather on January 18, 2011 took timely appeals of the trial court's newly-entered Final Order; those appeals remain pending before the Sixth District, styled L-10-1115, and briefing has not yet commenced.

Compounding the multiple substantive and procedural irregularities endemic to this case, on January 21, 2011 the Court of Appeals entered its Decision and Judgment Entry on the custody issues in this appeal, from the non-final custody order of the trial court entered **December 22, 2009**. The Court of Appeals was patently without jurisdiction to enter its Decision and Judgment Entry here on appeal; its decision was entered while an appeal of the actual Final Order dated December 17, 2010 was still pending, and before any briefing on that timely and validly framed appeal had been commenced. Despite the fact that Appellant pointed out this error by motion for reconsideration and *en banc* determination, the Court of Appeals' reaffirmed its January 21, 2011 decision on reconsideration by order entered February 14, 2011, without mentioning or discussing any of these preclusive jurisdictional issues. The appellate court gave no reason why it believed it had jurisdiction over a non-final order, when an appeal of the actual Final Order remain pending in another appeal (L-11-1015), and while the custody and support issues arising from the actual final order remain pending to this day, unaddressed and unbriefed.

This case is about the serial usurpation of judicial power first by the trial court and then the Court of Appeals, in derogation of the Ohio Constitution and statutory law.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When A Court of Appeals Determines In A Pending Appeal That No Final Judgment Has Yet Been Entered, It Is Without Jurisdiction To Specify The Particular Terms Of The Final Judgment To Be Entered By The Trial Court On Remand.

The Court of Appeals, after correctly recognizing and holding that the January 12, 2010 Final Judgment on custody (signed by the Magistrate in the name of the previously recused Judge Cubbon) was void, committed a series of Jurisdictional errors. The first error was that rather than simply remanding the case back to the trial court the case for entry of a valid, lawful Final Order, it instead directed the trial court to enter a final order on particular terms specified by the Court of Appeals. See Appendix C at p. 3, order of Court of Appeals of 11/29/10, quoted above at page 6. The unlawful specification of the terms of the Final Order to be entered by the trial court occurred after the Court of Appeals had just expressly acknowledged that it did not have any Final Order before it. (Appendix C at p. 3). As such, the Court of Appeals possessed no lawful jurisdiction permitting it to adjudicate any substantive issue, much less to dictate the specific terms of the custody and child support order (the trial court's Final Order) required to be entered, thereby precluding trial court review of the Magistrate's support determination. Remarkably, the Court of Appeals' Decision and Judgment here on appeal is from a custody order of the trial court dated December 22, 2009, an order which the Court of Appeals previously held is not a Final Order. It is well established that an order must be final before it can be reviewed by an appellate court. See, Section 3(B)(2), Article IV, Ohio Constitution; *General Acc. Ins. Co. v. Insurance Co. of N. Am* (1989), 44 Ohio St.3d 17, 20, 540 N.E. 2d 266.. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. *Davison v. Rini* (1996), 115 Ohio App. 3d 688, 692, 686 N.E. 2d 278; *Richards v. Simmons*, Highland App. No. 01Ca5, 2002-Ohio-1829.

The Court of Appeals' Decision and Judgment does not explain why or how the appellate court possesses jurisdiction to issue an appellate decision on the merits from a non-final order of

the trial court. Under the Ohio Constitution, it possesses no such jurisdiction or authority.⁴ This order was prejudicial to Appellant because it specified the terms of the support order to be entered, without any review by any judicial officer (in the trial or appellate courts) acting pursuant to lawful judicial power. (The Magistrate's support order which the trial court was ordered to adopt imputed income to the mother, despite her being unemployed.)

On December 17, 2010 the trial court entered a Final Judgment, in compliance with the terms the Court of Appeals had just dictated in its November 29, 2010 decision. The mother and maternal grandfather took timely appeals of that December 17, 2010 Final Judgment, which remain pending before the Sixth District, styled L-11-1015.

Compounding the multiple substantive and procedural irregularities endemic to this case, on January 21, 2010 the Court of Appeals entered its Decision and Judgment Entry on the custody issues in this appeal, from the non-final custody order of the trial court dated December 22, 2009. The Court of Appeals was patently without jurisdiction to enter a Final Judgment from an admittedly non-final order, while the appeal of the actual Final Judgment dated December 17, 2010 was still pending, and before any briefing in that timely appeal had commenced. The Court of Appeals' Decision and Judgment here on appeal does not mention or discuss any of these preclusive jurisdictional issues, or suggest why the appellate court believed it had jurisdiction over a non-final custody order, while a separate, subsequent appeal of the actual Final Order on custody and support remains pending in another appeal, and the issues arising therefrom remain unaddressed, not yet briefed, and never decided by any court acting with jurisdiction.

While the Court of Appeals certainly possessed jurisdiction to determine its own

⁴ The November 29, 2010 Order of the Court of Appeals stated: “[I]n the interest of judicial economy, the court remands this case *** to enter a final judgment***which adopts the magistrate’s decisions specified in the December 22, 2009 judgment *** and the support obligation with respect to the parties’ minor child.

jurisdiction, after correctly determining in its November 29, 2010 Order that it lacked appellate jurisdiction because no final order was before it, the Court of Appeals acted patently without jurisdiction in specifying the terms upon which the trial court final order was to be entered, instead of simply dismissing the appeal. See generally *N. Canton v. Hutchinson* (1996), 75 Ohio St. 3d 112, 114. The only jurisdiction the Court of Appeals lawfully possessed was to decide its own jurisdiction, and when it determined it lacked jurisdiction, its judicial power was at an end. *Id.* The further action taken in specifying the terms of the support order to be entered was a clear usurpation of judicial power, not constitutionally conferred. As that order was entered absent lawfully conferred jurisdiction, it is void. *Patton v. Diemer* 1988, 35 Ohio St. 3d 68.

Proposition of Law No. II: The Court Of Appeals Is Without Jurisdiction To Issue A Decision And Judgment On The Merits From A Custody Order Previously Determined By The Same Court Of Appeals To Be A Non-Final Order.

For all of the reasons discussed above in Propositions of Law No. 1, the Court of Appeals possesses no appellate jurisdiction over non-final orders, such as the December 22, 2009 custody order on which the Court of Appeals' Final Judgment entered January 21, 2011 is explicitly predicated. Appendix B, p. 9 at ¶25.

Final Orders generally are ones leaving no issues to be determined. The Court of Appeals expressly held in its November 29, 2010 order that the trial court's December 22, 2009 custody orders was a non-final order, yet it proceeded to adjudicate custody issues from that same December 22, 2009 custody order, even though it was non-final, and even though an appeal was timely taken (and is still pending) from the subsequent actual Final Order of December 17, 2010.

The Court of Appeals action, issuing an opinion and determining appellate rights predicated on a non-final order, is unprecedented. Fundamental and long settled appellate authority precludes a Court of Appeals from exercising jurisdiction over a non-final order.

A decision rendered by a court acting without jurisdiction or beyond its lawful jurisdiction is unauthorized by law. *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, 183-184 (“It is thus well-settled that a decision rendered by a court without jurisdiction is unauthorized by law and amounts to usurpation of judicial power.”).

The Court of Appeals’ wrongful assumption of jurisdiction was especially prejudicial where, as here, it was undertaken during the pendency of the appeal from the actual final order, in that it essentially finessed (and rendered moot) not only the assigned error in the pending appeal in Case No. L-10-1014, but also circumvents any meaningful challenge to the December 17, 2010 actual final order concurrently now on appeal in Case No. L-11-1015.

Proposition of Law No. III: The Court Of Appeals Is Without Jurisdiction To Decide The Merits Of An Appeal From A Non-Final Order, When A Separate Subsequently Filed Appeal Of The Actual Final Judgment Remains Pending Without Decision.

Appellant adopts and incorporates by reference Propositions of Law Nos. I and II, above.

Proposition of Law No. IV: A Court Of Appeals Cannot Properly Decide An Appeal On The Merits Without First Determining Its Own Appellate Jurisdiction, When Jurisdiction Is Timely Raised By Motion Or Assignment Of Error Challenging The Exercise Of Jurisdiction.

Appellant timely raised, by assignment of error and by motions, multiple challenges to the jurisdiction of the appellate court over custody issues. None of those jurisdictional challenges was ever actually decided on the merits. In addition to the four motions noted in footnote 3 above, Appellant also raised the following jurisdictional assignments of error:

Assignment of Error Number 1: “The Juvenile Court, a Court of limited statutory jurisdiction, erred by acting without jurisdiction in purporting to decide parenting issues between unwed parents, issues requiring determination in a proceeding defined by statute, when the statutory prerequisites necessary to establish jurisdiction to decide such issues were not observed.”

Assignment of Error Number 2: “The Juvenile Court, in a proceeding brought by a child support enforcement agency solely to enforce a child support obligation of an unwed father, erred by continuing to act after its jurisdiction ceased by virtue

of entry of a final judgment on all issues framed by the pleadings”; and

Assignment of Error Number 3: “The Juvenile Court erred by acting without jurisdiction in purporting to adjudicate custody issues against a non-party.”

The Sixth District Court simply declined to rule on the challenges to its jurisdiction. Instead of actually deciding on the multiple jurisdictional issues timely and properly raised by Appellant, the Court of Appeals simply stated that Appellant Tonya Mosier had raised the wrong statute to challenge jurisdiction. (Decision and Judgment entered January 21, 2011 at p. 16, ¶67) Notably, however, the actual wording of the assignments of error framed by Tonya Mosier (quoted above) refutes the Court of Appeals’ assertion. The Court of Appeals erred both by refraining from deciding the jurisdictional issues, and by erroneously reformulating Appellant’s actual assignments of error. The Court of Appeals cannot lawfully ignore the challenge to its own jurisdiction; it was (and is) duty bound to decide a timely challenge to its own appellate jurisdiction before ruling on the merits of an appeal (*State ex rel. White v. Cuyahoga Metropolitan Housing Authority* (Ohio 1997), 79 Ohio St. 3d 543, 544). See also: *Osborn v. State of Ohio*, Case No. 01-LW-3814 (6th Dist. 2001) (when a trial court below lacks jurisdiction, so too does the Court of Appeals.) It was the constitutional duty of the Sixth District Court of Appeals to determine its own jurisdiction before ruling on the merits of the appeal. Its failure to do so was in derogation of the most basic, fundamental jurisdictional principles.

Proposition of Law No. V: R.C. 3111.13(C) Does Not Confer Jurisdiction On Juvenile Courts To Transmute *Sua Sponte* A Child Support Action Against An Unwed Father Into A Custody Dispute Against The Mother, After Entry of Final Judgment Against The Unwed Father On The Support Issues Framed In The Child Support Action, Where Parentage Was Never Disputed.

The trial court erroneously assumed that it possessed jurisdiction over the custody issues because of R.C. 3111.13(C), the parentage statute applicable to the determination of parental status. That rationale is just wrong, because it is well settled that a child support proceeding is

not a “parentage action.” *Demore v. Demore*, 2008 Ohio 1328, 2008 W.L. 754891 (11th App. Dist. 2008) (“**This is not a parentage action; it is an action for child support.**”) Moreover, R.C. 2151.231 also forecloses the Court’s assertion; the statute specifies that:

“The child support enforcement agency...may bring an action in a juvenile court requesting the court to issue an order requiring a parent of the child to pay an amount for the support of the child without regard to the marital status of the child’s parents. ...” Further, “the parties to an action under this section may raise the issue of the existence or nonexistence of a parent-child relationship, **unless...an acknowledgement of paternity signed by the child’s parents has become final...**”

A “parentage” proceeding is one in which the parentage of a minor child is put in issue and disputed. In contrast, in the child support proceeding below, it had already been administratively determined beforehand, and conceded by all, that Haaser was the father, and Tonya the mother; that is even acknowledged in the first paragraph of the Complaint for Child Support filed by LCCSEA on January 10, 2008, which states:

“an acknowledgment of Paternity affidavit **was registered and finalized** with the Centralized Paternity Registry between the Defendant [Haaser] and the minor child, Arianna ****” (Complaint To Set Support, p.1)

As paternity was administratively determined in advance and judicially admitted by the father when he consented to the support order, parentage was not at issue in the proceeding below.

In any event, the Courts in Ohio have long recognized and directly held that a proceeding for child support is **not** a “parentage” proceeding. *Demore v. Demore, infra; Slaughter v. Slaughter III*, 2009-Ohio-6110, 2009 W.L. 3862411 (“Nor can we find that the filing of a child support action under the UIFSA constitutes a child custody proceeding that would convey to the trial court subject matter jurisdiction over custody issues.”)

And finally, the reported cases unanimously hold that an unwed father seeking visitation (i.e., “parenting time rights) under R.C. 3109.12 **cannot** proceed by motion, but must file a

Complaint meeting the applicable requisites of the statute and the Civil Rules. See, e.g., *Borkosky v. Mihailoff* (3rd App. Dist. 1999), 132 Ohio App. 3d 508. Any suggestion that a full custody adjudication may be obtained by merely filing a motion, while lesser rights to visitation can only be obtained by the filing of a Complaint, would turn law and logic upside down, on its head.

Moreover, R.C. 2151.231 by its terms precludes the court in a child support proceeding from adjudicating custody issues, when parentage was not disputed in the support action (having been resolved before the complaint for support was filed), and no complaint for custody was ever filed, as here.

This Court's prior decision in *Pegan v. Crawmer* (1996) 76 Ohio St. 3d 97, also directly supports Appellant's position, in that it cites with approval to a previous Ohio Supreme Court case, *Pasqualone v. Pasqualone* (1980) 63 Ohio St.2d 96, which held that compliance with statutory pleading requirements for a custody proceeding was a "mandatory jurisdictional requirement." *Pegan*. at 100. Thus, neither the statute nor the case cited by the trial court supports its *sua sponte* transmutation of a support complaint against the father into a custody proceeding against the mother.

In rendering its Decision and Judgment on custody, the Court of Appeals did not even address the main jurisdictional issue, noting merely: "the improper exercise of jurisdiction appellant claims is based on a statute inapplicable to the present circumstances." (Appendix B, Decision and Judgment, page 16, ¶67) The Court of Appeals' observation begs the question, mischaracterizes Appellant's actual assigned errors and briefing, and more importantly, wrongfully avoids making any determination of whether any lawful basis exists under Ohio law for reaching a custody determination when the trial court's jurisdiction was never properly

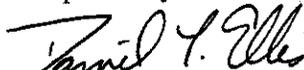
invoked. The parentage statute upon which the trial court relied, R.C. 3111.13(C), is equally “inapplicable to the present circumstances,” as no parentage proceeding was ever commenced. Absent some lawful statutory basis, neither the trial court nor the Court of Appeals could lawfully exercise jurisdiction to adjudicate custody issues. The appellate court’s ruling on the merits of the custody issues, without first determining the multiple threshold jurisdictional issues raised both by motion and by assigned error, was unlawful and contrary to bedrock appellate principles and precedent.

As no parentage case was pending and no Complaint for child custody in compliance with R.C. 2151.23(A)(2), R.C. 3111.13(C) or R.C. 3109.042 was before the Court, the Juvenile Court’s jurisdiction over custody issues in the underlying proceedings was never lawfully invoked. The absence of lawful jurisdiction renders the Juvenile Court’s custody determination a nullity. Neither the Juvenile Court nor the Court of Appeals could lawfully make any ruling whatsoever affecting the rights of the mother or her minor child on custody issues. Nor could the Court of Appeals lawfully decide the merits of Appellant’s appeal without first determining the threshold issue of its own jurisdiction.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and 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,

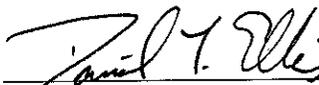


Daniel T. Ellis,

Counsel For Appellant Tonya S. Mosier

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail, postage prepaid, on March 31, 2011 to counsel for Appellees, Dennis P. Strong, Esq. 5600 Monroe St., Bldg. B, #202, Sylvania, Ohio 43560; Charles S. Rowell, Esq., 520 Madison Ave., Ste 955, Toledo, Ohio 43604; Jill Wolff, Esq. Lucas County Children Services, 705 Adams St., Toledo, Ohio 43604 and to Stephen B. Mosier, *pro se*. 3450 E. Sunrise Dr. #140, Tucson, Arizona 85718.



Daniel T. Ellis

COUNSEL FOR APPELLANT,
TONYA S. MOSIER

APPENDIX A

Decision and Judgment of the Lucas County Court of Appeals (Feb. 14, 2011)

FILED
COURT OF APPEALS
2011 FEB 14 P 2:44
COMMON PLEAS COURT
BERNARD GUILTY
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

T.M.

Court of Appeals Nos. L-10-1014
L-10-1034

Appellant

Trial Court No. JC 08-177645

v.

J.H.

DECISION AND JUDGMENT

Appellee

Decided: FEB 14 2011

* * * * *

This matter is before the court on the motion on appellant, T.M., for reconsideration, en banc rehearing and to certify a conflict.

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or not fully considered by the court when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. "A motion for reconsideration is not designed for use in instances when a party merely disagrees with the conclusions reached and the logic used

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by the appellate court." *In re Richardson*, 7th Dist. No. 01-CA-78, 2002-Ohio-6709, ¶ 2, citing *Audia v. Rossi Bros. Funeral Home, Inc.* (2001), 140 Ohio App.3d 589.

Appellant has reargued her appeal in excruciating detail, yet has failed to bring to our attention any unconsidered issue or obvious error. Accordingly, appellant's motion for reconsideration is not well-taken.

"Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the court of appeals judges in an appellate district may order that an appeal or other proceeding be considered en banc. * * * Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App.R. 26(A)(2)(a).

Appellant fails to articulate what other decision of this court conflicts with the principal decision, instead she argues that our procedural rulings antecedent to consideration on the merits were flawed. This is insufficient to merit en banc rehearing. Accordingly, appellant's motion pursuant to App.R. 26(A)(2) is not well-taken.

Section 3(B)(4), Article IV of the Ohio Constitution requires that when a court of appeals finds itself in conflict with another court of appeals on the same question of law, that court must certify its decision and the record of the matter to the Supreme Court of Ohio for a resolution of the question. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

Although, in this instance, appellant cites two cases, *Engineering Excellence, Inc. v. Northland Assoc., L.L.C.*, 10th Dist. No. 10AP-402, 2010-Ohio-6535, ¶ 9, and *In the matter of S.M.*, 8th Dist. No. 81566, 2004-Ohio-1243, ¶ 30, both of these cases concern an appellate court's decision at various points of the case that the case was not based on a final appealable order. Neither case concerns a court's inherent ability to control the flow of its cases or to determine its own jurisdiction.

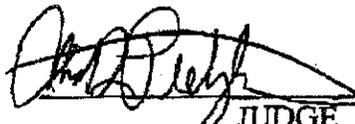
Appellant contends, not that this court did not have jurisdiction by virtue of a final appealable order when we entered our decision, but that we were required to earlier dismiss the case for lack of jurisdiction. We find nothing in either of the cases cited that would conflict with our decision. Accordingly, appellant's motion to certify a conflict is not well-taken.

Appellant's motions to reconsider, rehear en banc and to certify a conflict are denied.

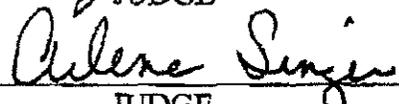
Mark L. Pietrykowski, J.

Arlene Singer, J.

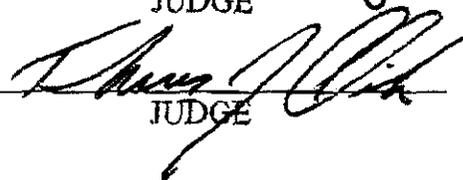
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE

APPENDIX B

Decision and Judgment of the Lucas County Court of Appeals (Jan. 21, 2011)

RECEIVED
JAN 24 2011
HAYES SOLOWAY P.C.

FILED
COURT OF APPEALS
2011 JAN 21 A 8:03
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

T.M.

Court of Appeals Nos. L-10-1014
L-10-1034

Appellant

Trial Court No. JC 08-177645

v.

J.H.

DECISION AND JUDGMENT

Appellee

Decided: JAN 21 2011

Daniel T. Ellis and Frederick E. Kalmbach, for appellants T.M.
and Lydy & Moan, LTD.

Stephen B. Mosier, pro se, and for appellant Hayes Soloway P.C.

Dennis P. Strong, for appellee J.H.

Charles S. Rowell, Jr., for appellee Ann Baronas, Guardian ad Litem.

SINGER, J.

{¶ 1} This is a consolidated appeal from judgments of the Lucas County Court of
Common Pleas, Juvenile Division, designating the father of a child the residential,

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custodial parent and exacting sanctions against law firms representing the child's mother. For the reasons that follow, we affirm, in part, and reverse, in part.

{¶ 2} Appellant mother, T.M., and appellee father, J.H., are the parents of now four year-old A.H. A.H.'s father and mother were not married at the time of her birth. They nonetheless lived together for a number of months after the birth, at which point J.H. left. In 2007, J.H. was adjudicated A.H.'s father in an administrative proceeding.

{¶ 3} On January 10, 2008, the Lucas County Child Support Enforcement Agency ("LCCSEA") filed a complaint in the trial court seeking a child support order for A.H. LCCSEA and T.M. were the named plaintiffs and J.H. the defendant. J.H. eventually answered the complaint and interposed a counterclaim for custody of the child and establishment of a support order. Accompanying the counterclaim was a motion seeking the same result. T.M., through counsel, responded with her own motion requesting that she be designated the residential and custodial parent of the child. The trial court entered an interim support order and appointed attorney Ann Baronas to be A.H.'s guardian ad litem.

{¶ 4} At an October 15, 2008 parental rights hearing, a magistrate ordered both parents to attend parenting classes and granted J.H. visitation on Tuesdays and Wednesdays. On October 24, 2008, J.H. filed a show cause motion, accusing T.M. of refusing to allow J.H.'s court ordered visitation. Following a hearing, the court entered a judgment clarifying the responsibilities of the parties with respect to visitation. Trial was set for March 2009.

{¶ 5} In the intervening time, T.M.'s original counsel sought and was granted leave to withdraw. For a period, T.M. represented herself, until attorney Thomas Goodwin entered an appearance on her behalf a few weeks before trial. Shortly thereafter, T.M.'s father, attorney Stephen B. Mosier, moved to intervene seeking grandfather visitation or, alternatively, custody. Stephen Mosier would later withdraw his intervention motion and enter an appearance as co-counsel for appellant mother.

{¶ 6} On March 19, 2009, the guardian ad litem filed her report and recommendation. The guardian observed that the child was healthy and without special needs. With respect to the parents, the guardian noted that appellant mother was uncooperative in allowing appellee father visitation from the outset, refused to comply with the court's visitation order for a full week after the order and attempted to file municipal court criminal charges against appellee father to prevent visitation. Moreover, appellant mother would appear with the child while appellee father was at work and come unannounced to appellee father's home during visitation for "specious reasons."

{¶ 7} The guardian suspected that appellant mother had mental health issues and noted a recommendation from a court diagnostic psychologist that the mother have a mental health assessment and treatment. The guardian ad litem concluded that it was in the best interest of the child that appellee father be immediately named the residential parent and legal custodian, and that both parents attend parenting classes.

{¶ 8} While attorney Mosier's motion to intervene was pending, and prior to his entry of appearance in representation of his daughter, he filed a flurry of motions,

including motions to view the guardian's and psychologist's reports, to permit appellant mother to review the same reports, for appellant mother to have copies of the audiotapes of prior hearings and to dismiss appellee father's "motion" for custody for want of subject matter jurisdiction. Most of these motions would later be renewed by appellant attorney Mosier or other counsel for appellant mother and rejected, or at least not granted to appellant mother's satisfaction.

{¶ 9} Just prior to Easter in 2009, appellee father called the guardian ad litem to propose a visitation modification for the holiday. Appellee father told the guardian that he was able to obtain Easter Sunday off work and hoped to arrange holiday visitation on that day. The guardian agreed to attempt to assist and, according to her testimony, visited the office of appellant mother's attorney. Appellant mother happened to be there at the time.

{¶ 10} The guardian later testified that appellant mother indicated that she had plans for Sunday afternoon, but that she did not object to a Saturday visitation. Appellant mother also indicated that she wanted the child on her birthday, Tuesday, which would have been appellee father's regular visitation day. After some discussion between the guardian, appellant mother's attorney and appellee father's attorney, who was reached by telephone, the lawyers concluded that it would be a fair compromise to permit appellee father to have the child from 9:00 a.m. Saturday morning until 11:00 a.m. on Sunday. Appellant mother would keep the child on Tuesday with appellee father's schedule set back a day. Appellant mother apparently agreed to this arrangement.

{¶ 11} According to appellee father's testimony, when his attorney advised him of this plan, he called the guardian immediately. Appellee father told the guardian that he was scheduled to work all day Saturday and that rescheduling his work to accommodate the day change the next week was not practical. Appellee father informed the guardian that he would rather return to the previously ordered regular visitation schedule. According to the guardian, she advised appellee father to notify appellant mother and his counsel of his decision. It is undisputed that he did this.

{¶ 12} On Tuesday, when appellee father arrived to pick up A.H. for regular visitation, appellant mother refused to cooperate. Appellee father called the guardian ad litem to advise her of appellant mother's refusal to abide with the original visitation order. The guardian then called appellant mother and her lead attorney, leaving messages with both to return her call. The lead attorney was on vacation and did not immediately respond. According to the guardian, appellant mother returned the call, but refused to speak to the guardian unless her father, who by now was her co-counsel, joined the call.

{¶ 13} Appellant mother's father was initially without any knowledge of the situation, but eventually, after talking to his daughter, told the guardian that appellant mother believed there had been an agreement reached at her lead counsel's office and that appellant mother was uncertain how to proceed when appellee father called to say there would be no change in visitation. When she did not receive any response from her call to her lead attorney, appellant mother elected to follow her attorney's last instruction, which

was based on the office agreement. This entailed appellant mother keeping A.H. on what would have been appellee father's usual day to have the child.

{¶ 14} The guardian ad litem would later testify that she believed that appellant mother was "trying to play ostrich," pretending that appellee father never called her and doing "exactly" what her lawyer last told her, irrespective of the changed circumstances. As a result, the guardian filed a second supplemental report to the court, detailing the episode and reiterating her recommendation that appellee father be named custodial parent. The guardian also suggested that the court consider granting appellee father temporary custody pending completion of the trial.

{¶ 15} Appellant mother responded with an "emergency motion," drafted by appellant attorney Mosier, to compel the guardian ad litem to supplement her report and "other relief." In the motion, appellant mother asked the court to compel the guardian to disclose the existence of an agreement concerning Easter visitation reached with the guardian's direct participation, explain why the guardian advised appellee father to contact appellant mother outside the presence of counsel for the purpose of persuading appellant mother to rescind the agreement and to explain why the guardian's failure to inform the court of the "agreement" and its terms "* * * does not constitute a direct and egregious violation of her Duties of Candor and Truthfulness to the Court * * *." Appellant mother characterized the guardian's report as containing "multiple highly material misrepresentations and omissions of facts" and called for the immediate removal of the guardian, referral of the guardian to a bar grievance committee, an order that the

guardian reimburse appellant mother costs and attorney fees and other unspecified sanctions.

{¶ 16} The guardian ad litem responded with the entry of appearance of counsel to represent her. The guardian also sent notice to the parties that the fees of the guardian's counsel would be taxed as guardian fees.

{¶ 17} The next hearing date set in the continuing trial was April 23, 2009. Prior to that time both of appellant mother's attorneys sought to withdraw, ostensibly to testify at the hearing regarding the events prior to Easter. Both also submitted to the court declarations concerning those events. Substitute counsel's motion for a continuance was overruled and the matter proceeded as scheduled. This proceeding concerned the Easter visitation incident.

{¶ 18} Following the hearing, the magistrate denied appellant mother's motion to compel the guardian to supplement her report and to remove the guardian. The magistrate ordered her original visitation agreement amended to incorporate the standard juvenile court holiday schedule and directed that child exchange be at a neutral site. The order did not change appellant mother's status as residential parent.

{¶ 19} Appellant mother moved to set aside the magistrate's order, complaining of the denial of her motion for a continuance and evidentiary rulings within the hearing and reiterating her allegation that the guardian attempted "to defraud the Court, by multiple material misrepresentations and material omissions of relevant facts, concerning [what the guardian] deceitfully characterized as a 'refusal' by [appellant mother] to permit * * *

visitation * * *." (Emphasis sic.) Appellant mother also moved the court to assess sanctions against appellee father's counsel.

{¶ 20} While appellant mother's motion was pending, she filed a motion challenging the magistrate's authority to issue subsequent orders while the decision from the April 23 hearing was "on appeal." Appellant mother also moved to disqualify the magistrate. On July 1, 2009, the judge to whom the case had originally been assigned recused herself. A retired juvenile judge was appointed visiting judge in her stead. The first action of the visiting judge was to deny appellant mother's motion to disqualify the magistrate.

{¶ 21} On July 9, 2009, the parental rights and responsibilities hearing continued. No transcript of that hearing is in the record, but as a result of those proceedings the magistrate ordered an immediate change of possession of A.H. to appellee father. In her findings of fact related to this hearing, the magistrate noted that appellant mother has significant mental health history, has had outbursts in the courtroom, including once bolting from the room, and had engaged in violent behavior with at least four persons, including her mother and brother.

{¶ 22} Appellant mother filed objections and a motion to set aside the magistrate's July 9 order. Concurrently, she applied to this court for writs of prohibition and mandamus. Appellant mother sought orders prohibiting the juvenile court from proceeding with the case and mandating the return of A.H. to her mother. We denied the writs and dismissed appellant mother's complaint. *State ex rel. T.M v. Fornof*, 6th Dist.

No. L-09-1192, 2009-Ohio-5618, affirmed, *State ex rel. Mosier v. Fornof*, 126 Ohio St.3d 47, 2010-Ohio-2516.

{¶ 23} Meanwhile, another incident at the neutral site for visitation exchange resulted in the site staff calling police to cope with appellant mother's disruptive behavior. As a result, appellee father moved for, and following a hearing, was granted an order that further visitation between appellant mother and A.H. be supervised. Appellant mother again responded with a motion to set aside the order.

{¶ 24} On November 4, 2009, the magistrate entered her final decision. Appellee father was designated the residential parent and legal custodian of A.H. The magistrate ordered appellant mother to pay \$215.45 plus processing charge for monthly child support. Appellant mother filed objections to this decision.

{¶ 25} On December 22, 2009, the visiting judge assigned to the case issued a global judgment disposing of all outstanding matters. The court found all of appellant mother's objections, motions to set aside and motions to stay not well-taken and affirmed the prior orders and decisions of the magistrate. This is the judgment at issue in one of the appeals now before us.

{¶ 26} On January 11, 2010, counsel for the guardian ad litem moved that the attorney fees accrued in service of the guardian be taxed to the law firms representing appellant mother as sanctions pursuant to Civ.R. 11.

{¶ 27} On January 26, 2010, the trial court found the guardian's motion for sanctions well-taken and entered a joint and several judgment in the amount of \$8,748.50

against the law firms of appellant mother's counsel. This is the second judgment at issue in this consolidated appeal.

{¶ 28} Appellant mother sets forth the following eight assignments of error:

{¶ 29} "1. The Juvenile Court, a Court of limited statutory jurisdiction, erred by acting without jurisdiction in purporting to decide parenting issues between unwed parents, issues requiring determination in a proceeding defined by statute, when the statutory prerequisites necessary to establish jurisdiction to decide such issues were not observed.

{¶ 30} "2. The Juvenile Court, in a proceeding brought by a child support enforcement agency solely to enforce a child support obligation of an unwed father, erred by continuing to act after its jurisdiction ceased by virtue of entry of final judgment on all issues framed by the pleadings.

{¶ 31} "3. The Juvenile Court erred by acting without jurisdiction in purporting to adjudicate custody issues against a non-party.

{¶ 32} "4. The Juvenile Court erred by entering orders signed by proxy, by or on behalf of a Judge previously recused from all further proceedings.

{¶ 33} "5. The Juvenile Court erred by conducting proceedings under a Magistrate judge after a reference to the Magistrate had been withdrawn.

{¶ 34} "6. The Juvenile court erred by entering an order purporting to retroactively reinstate reference to a Magistrate Judge, with respect to a proceeding previously conducted by the Magistrate Judge acting after reference had been withdrawn.

{¶ 35} "7. The Juvenile Court erred by improperly interfering with a party's rights to counsel.

{¶ 36} "8. The Juvenile Court erred by denying the Appellant due process and fundamental fairness in the proceedings by:

{¶ 37} "precluding Appellant from reviewing the guardian ad litem's reports and the psychologist's report, key evidence considered by the court in making its determination of child custody, and prohibiting Appellant's counsel from discussing such evidence with appellant prior to the evidentiary hearing; and .[sic]

{¶ 38} "denying Appellant's counsel's request for a stay and/or continuance to allow counsel to review audio tapes of hearings that took place prior to counsel's representation of the Appellant thereby impairing counsel's ability to adequately prepare for the evidentiary hearing."

{¶ 39} Appellants Hayes Soloway P.C. and Stephen B. Mosier assert the following six assignments of error;

{¶ 40} "Assignment of Error Number 1

{¶ 41} "The Juvenile Court errs by imposing Rule 11 sanctions without conducting an evidentiary hearing as mandated by that rule.

{¶ 42} "Assignment of Error Number 2

{¶ 43} "The Juvenile Court errs by awarding attorney's fees in favor of a non-party movant, when the literal language of Rule 11 grants 'standing' only to 'parties' to seek such an award.

{¶ 44} "Assignment of Error Number 3

{¶ 45} "The Juvenile Court errs as a matter of law in assessing Rule 11 sanctions purportedly based on a motion first filed nearly 19 months after entry of final judgment, and without any lawful continuing jurisdiction, during proceedings which are a legal nullity.

{¶ 46} "Assignment of Error Number 4

{¶ 47} "Insofar as Rule 11 sanctions may only be assessed against a party or its individual counsel, the Juvenile Court errs in assessing Rule 11 sanctions against non-party law firms.

{¶ 48} "Assignment of Error Number 5

{¶ 49} "The Juvenile Court errs in awarding attorney's fees which bear no causal relationship to any wrongful conduct as defined by Rule 11.

{¶ 50} "Assignment of Error Number 6

{¶ 51} "Where a guardian *ad litem* makes material misrepresentation of fact to the court in connection with a purported emergency motion and interrelated custody recommendations and where multiple good grounds are shown to exist supporting and fully warranting factually accurate criticism of the guardian's of said conduct, such criticism is not sanctionable conduct under Rule 11 as a matter of law."

{¶ 52} Appellant law firm Lydy & Moan, LTD, interpose the following five assignments of error:

{¶ 53} "1. The Juvenile Court erred by imposing Rule 11 sanctions without conducting an evidentiary hearing.

{¶ 54} "2. The Juvenile Court erred by awarding attorneys' fees in favor of a non-party when Rule 11 grants standing only to a party to seek an award under Rule 11.

{¶ 55} "3. The Juvenile Court erred in assessing Rule 11 sanctions against a law firm insofar as Rule 11 sanctions may be only assessed against a party or his counsel.

{¶ 56} "4. The Juvenile Court erred in awarding attorneys' fees which are not argued or shown to be in any way causally related to any wrongful conduct of a party or his counsel.

{¶ 57} "5. The Juvenile Court erred as a matter of law when it held the challenge to its subject matter jurisdiction (the appeal on behalf of appellant's client during its pendency) was 'without basis in law or fact' because it was divested of jurisdiction."

I. Jurisdiction

{¶ 58} We shall discuss appellant mother's first three assignments of error together.

{¶ 59} Once appellee father had entered his counterclaim for custody, appellant mother, on numerous occasions, attempted to challenge the jurisdiction of the court to hear the case. Initially, she argued that, because R.C. 3109.12 provides that one who has been found to be the father of a child, "** * * may file a complaint * * ** for reasonable parenting time rights * * *" (emphasis added), the filing of a complaint is statutorily

prerequisite to the exercise of a court's jurisdiction. Since appellee father did not file a complaint, appellant mother argued, any action by the trial court is void.

{¶ 60} Later, appellant mother set forth an alternative argument concerning the trial court's jurisdiction, suggesting that she was never more than a "nominal" plaintiff in the child support case. Even though her name appeared in the caption of the action as a plaintiff, the real party was the LCCSEA. Appellant mother cites Morganstern and Sowald, Baldwin's Ohio Domestic Relations Law (2009) Section 22:24 (which in turn cites and quotes Op. No. 90-10 (June 15, 1990) Ohio Sup.Ct. Bd. of Commrs. on Grievances and Discipline) for the proposition that the LCCSEA represents the interests of the state, not the custodial parent. Since appellant mother did not have the power to settle, dismiss or compromise the child support claim, she argues, she was a party in name only, necessitating that appellee father take the statutory steps to initiate a custody action before she can be bound by a determination.

{¶ 61} To some extent these issues have been addressed. When the trial court ordered temporary custody of A.H. to appellee father, appellant mother applied to this court for writs of prohibition and mandamus, seeking to bar the trial court's further consideration of the case and to compel the surrender of the child to appellant mother. The foundation of appellant mother's plea for relief was the trial court's lack of jurisdiction.

{¶ 62} We denied the writs, concluding that absent the trial court's patent and unambiguous lack of jurisdiction the writs should not issue. Since, pursuant to R.C.

2151.23(A), a juvenile court has jurisdiction to determine the custody of any child not the ward of another court, the juvenile court was not unambiguously without jurisdiction.

State ex rel. T.M., supra, 2009-Ohio-5618, at ¶ 8.

{¶ 63} When appellant mother appealed that decision, the Supreme Court of Ohio affirmed, noting that appellant mother's reliance on any intricacies in R.C. 3109.12 was misplaced because that statute deals with "parenting time" rather than custody. *State ex rel. Mosier*, 2010-Ohio-2516, ¶ 6. What appellee father sought was custody. "Therefore, Mosier's claim alleges, at best, an error in the court's exercise of its jurisdiction rather than a lack of subject-matter jurisdiction." Id at ¶ 7.

{¶ 64} "'Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.' The term encompasses jurisdiction over the subject matter and over the person. * * *. It is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'

{¶ 65} "The term 'jurisdiction' is also used when referring to a court's exercise of its jurisdiction over a particular case. The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11-12. (Citations omitted.)

{¶ 66} Jurisdiction over a particular case is an elusive concept, defined best by example. A common pleas court is a court of general jurisdiction and has subject matter jurisdiction over crimes committed by an adult. Nevertheless, where the common pleas

court fails to strictly comply with procedures in a capital case, such as the failure to utilize a statutorily mandated three judge panel, it is an improper exercise of jurisdiction over the case. *Id.*, syllabus.

{¶ 67} This example is similar to that which appellant mother claims here.

However, the improper exercise of jurisdiction appellant claims is based on a statute inapplicable to the present circumstances. *State ex rel. Mosier*, 2010-Ohio-2516, ¶ 6. In any event, appellant mother's assertion of lack of subject matter jurisdiction is unavailing. *Id.* at ¶ 4.

{¶ 68} Appellant mother's argument with respect to personal jurisdiction is similarly unpersuasive. Appellant mother asserts that she is only a "nominal" plaintiff because the LCCSEA represents not her, but the state. In support, she indirectly cites a 1990 Board of Grievances advisory opinion. The question there was not whether the child support recipient was a party to an enforcement action, but who the child support agency attorney represented.

{¶ 69} At the time, there was concern that, if the agency lawyer represented the child support obligee, a conflict might exist should custody change and the former obligor became the obligee. The Board of Grievances concluded that the state has a strong interest in the enforcement of child support obligations and it is, therefore, the state that is the CSEA's client. The opinion recognized that the state and the obligee are separate parties that may have conflicting interests. Thus, the board recommended that, "[t]he custodial parent therefore should be informed at the outset that the CSEA attorney

represents the state and that the custodial parent should obtain counsel." Op. 90-10, supra.

{¶ 70} The state and the obligee, in this case appellant mother, have related but distinct interests in a child support enforcement action. Consequently, the case caption, which lists the LCCSEA and appellant mother as separate plaintiffs, would appear accurate. Moreover, while appellant mother's role was initially passive, after appellee father interposed his counterclaim for custody, she obtained counsel who entered an appearance, filed numerous motions and actively participated in the proceedings. Such participation would constitute a waiver of any challenge to in personam jurisdiction even had appellant mother not been an original named plaintiff. *Maryhew v. Yova* (1984) 11 Ohio St.3d 154, 156.

{¶ 71} Accordingly, the trial court had both personal and subject matter jurisdiction in this matter and there is nothing to suggest that the court improperly exercised jurisdiction over the case. Appellant's first three assignments of error are not well-taken.

II. Acts After Recusal

{¶ 72} On two occasions after the original trial judge recused herself, she signed judgment entries on the case from which she had removed herself. In her fourth assignment of error, appellant mother suggests this was error.

{¶ 73} An order signed by a judge who has recused himself or herself from a case is void because the judge possessed no authority to act on behalf of the court. *In re B.D.*,

11th Dist. Nos. 2009-L-003, 2009-L-007, 2010-Ohio-2299, ¶ 76. A void judgment has no legal force or effect. *Hague v. Hague*, 11th Dist. No. 2008-A-0069, 2009-Ohio-6509, ¶ 37. For a judgment or order to constitute reversible error on appeal it must have operated to the prejudice of the appellant. *Smith v. Flesher* (1967), 12 Ohio St.2d 107, paragraph one of the syllabus. Since the orders apparently signed in error had no legal force and no action was taken pursuant to them, appellant could not have been prejudiced by them. Accordingly, appellant's fourth assignment of error is not well-taken.

III. Magistrate Referral

{¶ 74} In her fifth and sixth assignments of error, appellant maintains that the magistrate acted without authority in the interim between the recusal of the original judge on the case and the magistrate's reappointment by the visiting judge.

{¶ 75} The entry of the original judge's recusal was journalized on July 7, 2009. On July 8, 2009, the visiting judge signed a judgment that overruled appellant mother's motion to disqualify the magistrate and continued the referral of the case to the magistrate. That entry was journalized on July 9, 2009, the same day as the magistrate's hearing on allocation of parental rights and responsibilities of the parties and the date of the magistrate's decision granting appellee father possession of the child.

{¶ 76} Appellant insists that the hearing actually commenced on July 8, 2009. The record does not support that assertion. Moreover, even were that true, the visiting judge's re-referral of the case to the magistrate occurred concurrently and the magistrate took no action until July 9, 2009, the day the order of re-referral was journalized. On this record,

we find that the magistrate had authority to act at all times. Accordingly, appellant mother's fifth and sixth assignments of error are not well-taken.

IV. Interference with Counsel

{¶ 77} In her seventh and eighth assignments of error, appellant mother suggests that the trial court interfered with her right to counsel by 1) refusing to appoint her counsel at the state's expense, 2) denying her trial transcripts and/or copies of hearing audiotapes at state's expense, 3) restricting her personal access to psychological and guardian ad litem reports and prohibiting counsel from discussing these reports with her, and 4) denying her motion for a continuance when her co-counsel elected to withdraw in order to testify about the Easter visitation incident.

{¶ 78} Appellant regularly confuses the posture of these proceedings, referring to this as a permanent custody action. It is not. "Permanent custody" is a term of art referring to the ultimate disposition of a termination of parental rights action. In such a proceeding, the parental rights of a natural parent is wholly abrogated without any residual rights or responsibilities and "permanent custody" ordinarily is awarded to a children's services agency antecedent to adoption. R.C. 2151.011(B)(30).

{¶ 79} This is a proceeding for legal custody of a child who is not a ward of any other court in the state, pursuant to R.C. 2151.23(A)(2). *State ex rel. Mosier, supra*, at ¶ 4. Legal custody, "* * *" vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food,

shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. * * *." R.C. 2151.011(B)(19). When a parent loses legal custody of a child, he or she retains certain residual parental rights including visitation. That parent also retains the right to request return of legal custody in the future. *In re Nice* (2001), 141 Ohio App.3d 445, 455. Legal custody is determined by that which is the best interest of the child. *In re Bell*, 7th Dist. No. 04 NO 321, 2005-Ohio-6603, ¶ 37.

{¶ 80} Appellee father's counterclaim for custody is the equivalent of a request for an initial determination of custody in a domestic relations proceeding. The result is that a proceeding under R.C. 2151.23(A)(2) is considered a civil matter, excepted from any entitlement to appointed counsel for an indigent party as might be the case in other juvenile court proceedings. R.C. 2151.352. Concomitantly, a party to such a proceeding is no more entitled to transcripts, copies or other items at the expense of the state than would a party to a civil proceeding. Consequently, the trial court did not err in denying appellant mother's requests for such material at the public's expense.

{¶ 81} Appellant mother also complains that the trial court violated Sup.R. 48 concerning the availability of guardian ad litem reports when it limited inspection of the supplemental guardian reports and psychological reports to counsel. Appellant mother also complains that she was prejudiced when she was denied access to digital recordings of prior hearings to copy or transcribe at the state's expense.

{¶ 82} As we have already noted, this is a civil matter to which parties are not entitled to services that are taxed to the public. Concerning the availability of the

guardian and psychological reports, Sup.R. 48(F)(2) provides with respect to the guardian ad litem's report:

{¶ 83} "In domestic relations proceedings involving the allocation of parental rights and responsibilities, the final report shall be filed with the court and made available to the parties for inspection no less than seven days before the final hearing unless the due date is extended by the court. Written reports may be accessed in person or by phone by the parties or their legal representatives. A copy of the final report shall be provided to the court at the hearing. The court shall consider the recommendation of the guardian ad litem in determining the best interest of the child only when the report or a portion of the report has been admitted as an exhibit."

{¶ 84} In contrast, appellee father points to Juv.R. 32(C), which states:

{¶ 85} "A reasonable time before the dispositional hearing, or any other hearing at which a social history or physical or mental examination is to be utilized, counsel shall be permitted to inspect any social history or report of a mental or physical examination. The court may, for good cause shown, deny such inspection or limit its scope to specified portions of the history or report. The court may order that the contents of the history or report, in whole or in part, not be disclosed to specified persons. If inspection or disclosure is denied or limited, the court shall state its reasons for such denial or limitation to counsel."

{¶ 86} Sup.R. 48(F) provides for the availability to the parties of guardian ad litem reports. Juv.R. 32(C) declares social histories and reports of physical and mental

examinations, absent good cause shown, are ordinarily available only to counsel.

Clearly, the trial court acted in conformity with Juv.R. 32(C) with respect to restricting access to the parties' psychological reports.

{¶ 87} Arguably, a guardian ad litem's report contains a social history. But Sup.R. 48(F) specifically deals with a guardian ad litem's report in "domestic relations proceedings involving the allocation of parental rights and responsibilities * * *." It is a rule of construction that where general and special provisions cannot be reconciled, the special provision prevails. R.C. 1.51. Applying this rule to the present situation, it would appear that the trial court should have made the guardian ad litem's report available to appellant mother.

{¶ 88} Nevertheless, for this denial of access to constitute reversible error, it must also be shown that the error was prejudicial to appellant. App.R. 12(B). Appellant mother has not persuasively articulated the manner in which her inability to personally view the guardian's report operated to her prejudice. From the time the report was issued until the conclusion of the case, appellant mother was represent by counsel, frequently co-counsel, who were permitted access to the report and its various supplements. Throughout the case, the recommendation of the guardian was no secret, nor were the grounds for that recommendation. Given this access by counsel to the documents, we can conceive of no manner in which appellant mother's inability to personally view the documents harmed her case.

{¶ 89} Finally, appellant mother complains that the trial court abused its discretion when it denied her motion for a continuance for the April 23, 2009 hearing. This is the hearing at which appellant mother's co-counsel withdrew, ostensibly to provide factual testimony as to the events surrounding the Easter visitation incident. Appellant mother insists that she suffered a disadvantage, because her replacement counsel had inadequate time to prepare for the hearing.

{¶ 90} The decision to grant or deny a continuance rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. An abuse of discretion is more than an error of judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 91} In the present matter, there was a long-standing hearing date set, rescheduling of which would have involved the coordination of the parties, the court, the guardian ad litem and many attorneys. Moreover, since the reason for the request for a continuance was the withdrawal of co-counsel to provide witness testimony, the preparation and timing of the request with respect to new counsel was in the hands of the party requesting a continuance. Additionally, since the co-counsel who had withdrawn were available in the courtroom to assist substitute counsel, the need for extensive preparation appears lessened. We might also add that, having reviewed the transcript of the proceeding, substitute counsel appears to have been fully prepared. Balancing all of these factors, we can only conclude that the court acted within its discretion when it

denied appellant mother's motion for a continuance. Accordingly appellant mother's seventh and eighth assignments of error are not well-taken.

V. Attorney Sanctions

{¶ 92} On January 26, 2010, the trial court, without a hearing, ruled on the motion from counsel for the guardian ad litem that the attorney fees incurred by the guardian be assessed to the law firms that represented appellant mother. The trial court found the motion well-taken. In doing so, the court found that appellant Stephen Mosier, as a partner in the firm of appellant law firm Hayes Soloway P.C., signed pleadings accusing the guardian ad litem of unethical conduct and requesting that she be referred to a bar grievance committee. The court further found that appellant attorney Mosier filed a declaration with the court "purportedly under oath," the content of which was defamatory and scandalous. The court concluded that appellant attorney Mosier's acts "were specious and scandalous matter within the meaning of Civ.R. 11."

{¶ 93} The court further found that Daniel Ellis, as a partner in appellant law firm Lydy & Moan LTD, advanced the allegations of Steven Mosier which were found to be "baseless and untrue." Further, the court found that Lydy & Moan repeatedly filed challenges to the jurisdiction of the court which were "without basis in law or fact."

{¶ 94} Both appellant law firms assert in their first assignment of error that the trial court erred in assessing Civ.R. 11 sanctions without first conducting a hearing.¹ In material part, Civ.R. 11 provides:

{¶ 95} "Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name * * *. The signature * * * constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."

{¶ 96} Citing cases related to frivolous conduct sanctions imposed pursuant to R.C. 2323.51, appellant law firm Hayes Soloway P.C. insists that fundamental fairness requires that, before a court imposes a sanction, it must conduct a hearing to provide the party opposing sanctions an opportunity to establish a good faith basis for his or her pleading. While no hearing is required to deny such a motion, due process demands such a hearing when an award may be made. The same principles apply with respect to a

¹Appellant Lydy & Moan LTD, intent on arguing the merits of the Civ.R. 11 sanction, never actually addresses its first assignment of error.

Civ.R. 11 sanction, appellant law firm insists. Consequently, the trial court's order imposing sanctions should be vacated and the matter remanded for a hearing.

{¶ 97} Appellee guardian ad litem responds, arguing that there was no need for a hearing in this matter, or alternatively that the April 23, 2009 hearing was sufficient to satisfy any hearing requirement. Appellee guardian notes that the trial court waited for approximately two weeks to rule on her motion. When neither law firm responded, the court issued what appellee guardian characterizes as the equivalent of a default judgment. Additionally, appellee guardian asserts, appellant law firms' accusation of that the guardian ad litem engaged in unethical conduct was scandalous per se when found unsupported after the April 23 hearing.

{¶ 98} We are not persuaded that there should be a significant difference in the manner in which R.C. 2323.51 sanctions and Civ.R. 11 sanctions are imposed. The principal difference between these provisions is that broader sanctions may be imposed under the rule, but these sanctions may only be imposed upon attorneys or, in certain circumstances, pro se litigants. *Shaffer v. Mease* (1991), 66 Ohio App.3d 400, 409, 410. Both provisions require that, prior to the imposition of sanctions, the trial court must conduct a hearing. *Sandberg v. Crouch*, 2d Dist No. 21342, 2006-Ohio-4519, ¶ 156; *Rondini v. Semen*, 11th Dist. No. 2002-L-017, 2002-Ohio-6590, ¶ 7; *Cic v. Nozik* (July 20, 2001), 11th Dist. No. 2000-L-117. "[B]oth Civ.R. 11 and R.C. 2323.51 require the trial court to conduct an evidentiary hearing at which the parties and counsel must be given the opportunity to present any evidence relevant to the issues raised before

imposing sanctions." *Nozik v. Sanson* (June 8, 1995), 8th Dist. No 68269. It is an abuse of discretion to award attorney fees without such a hearing. *Goff v. Ameritrust Co.* (May 5, 1994), 8th Dist. Nos. 65196, 66016.

{¶ 99} In this matter, it is undisputed that the trial court never held a hearing at which those against whom sanctions were sought were afforded an opportunity to explain their actions. Accordingly, appellant law firms' first assignment of error is well-taken.

{¶ 100} Both appellant law firms raise issues in their remaining assignments of error which are best raised first before the trial court. Given that this matter must be remanded for a sanction hearing, those issues are not yet ripe and are found moot.

{¶ 101} On consideration whereof, the judgments of the Lucas County Court of Common Pleas, Juvenile Division, are affirmed, in part, and reversed, in part. This matter is remanded to said court for further proceedings in conformity with this decision. Court costs pursuant to App.R. 24 are assessed to appellant mother in case No. L-10-1014 and to appellee guardian ad litem in case No. L-10-1034.

JUDGMENTS AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

T.M. v. J.H.
C.A. Nos. L-10-1014
L-10-1034

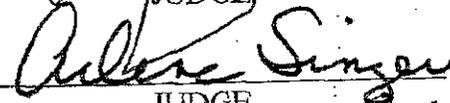
Mark L. Pietrykowski, J.

Arlene Singer, J.

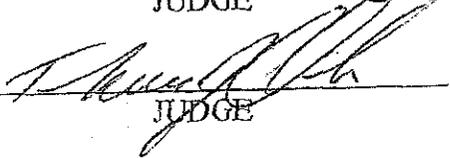
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

APPENDIX C

Decision and Judgment of the Lucas County Court of Appeals (Nov. 29, 2010)

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CLERK OF COURTS

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HAYES SOLOWAY P.C.

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

T.M.

Court of Appeals Nos. L-10-1014
L-10-1034

Appellant

Trial Court No. JC 08-177645

v.

J.H.

DECISION AND JUDGMENT

Appellee

Decided: NOV 29 2010

This matter is before the court on appellants', Lydy & Moan, LTD. and T.M., "Motion for Entry of an Order Correcting the Record and Dismissing this Appeal." Appellants assert that there is no final appealable order before this court because the issue of child support remains outstanding. Appellee, J.H., filed a memorandum in opposition to appellants' motion.

This custody dispute has previously been before the court on numerous occasions. In this court's January 11, 2010 decision (case No. L-09-1288), the court stated that a juvenile court's custody determination does not become a final order until all remaining

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issues, including child support, are determined with finality.¹ *Id.* See, also, *Christian v. Johnson*, 9th Dist. No. 24327, 2009-Ohio-3863, ¶ 9.

The magistrate entered a series of orders: April 22, 2009, May 11, 2009, May 29, 2009, June 9, 2009, July 9, 2009, July 17, 2009, July 28, 2009, September 15, 2009, and November 4, 2009. The magistrate addressed all outstanding issues with finality in these orders, including custody, visitation, and support. T.M. filed several objections to each of these decisions.

On December 22, 2010, the juvenile court issued a nine-page decision adopting each of the magistrate's decisions and overruling all of T.M.'s objections to the magistrate's orders. In "adopting" the magistrate's decisions, the juvenile court also specifically stated it was issuing a final custody determination and a final order with respect to T.M.'s visitation rights. It appeared the juvenile court believed it was issuing a final appealable custody determination.

One of the magistrate's orders, which the juvenile court adopted, designates T.M. as the support obligor and orders T.M. to make child support payments of \$219.76 per month. And while the juvenile court "adopted" the magistrate's decision on support determination, the question is whether the juvenile court sufficiently detailed, for

¹In our July 15, 2010 decision, the court stated the January 12, 2010 judgment was a final appealable order. However, the court was incorrect as it appears the January 12 judgment was signed by, or on behalf of, Judge Cubbon, who previously recused herself. See *In re B.D.*, 11th Dist. Nos. 2009-L-003, 2009-L-007, 2010-Ohio-2299, ¶ 76.

purposes of Civ.R. 53, the support obligation it was imposing in the December 22 judgment.

In *Sabrina J. v. Robbin C.* (Jan. 26, 2001), 6th Dist. No. L-00-1374, unreported, this court held:

"[A]n order of a trial court which merely adopts a magistrate's decision and enters it as the judgment of the court is not a final appealable order. * * * [T]o be final, an entry of judgment by the trial court pursuant to Civ.R. 53(E)(4) must:

"1. pursuant to subsection (b), 'adopt reject or modify' the magistrate's decision and should state, for identification purposes, the date the magistrate's decision was signed by the magistrate,

"2. state the outcome (for example, 'defendant's motion for change of custody is denied') and contain an order *which states the relief granted so that the parties are able to determine their rights and obligations by referring solely to the judgment entry*, and,

"3. be a document separate from the magistrate's decision." (Emphasis added.)

The juvenile court's December 22 judgment "adopts" the magistrate's decisions, states the dates of the magistrate's decisions, and is a separate document from these decisions. It also sets forth some of the relief granted (final custody determination and visitation order). But while it appears the juvenile court believed it properly entered a final judgment on all necessary issues, the December 22 judgment does not specify the terms of the child support obligation the magistrate imposed on T.M. Therefore, we

conclude the December 22 judgment does not comply with all of the requirements of Civ.R. 53.

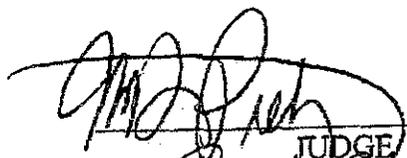
Therefore, in the interests of judicial economy, the court remands this case to the Lucas County Court of Common Pleas, Juvenile Division, for a period of 14 days to enter a final judgment under Civ.R. 53 which adopts the magistrate's decisions specified in the December 22, 2009 judgment, and addresses the juvenile court's final custody determination, the visitation schedule, and the support obligation with respect to the parties' minor child.

The clerk of the Lucas County Court of Common Pleas, Juvenile Division, shall notify this court when the juvenile court issues a final judgment and it has been entered on the court's journal. All due dates and proceedings in this court are stayed pending further order of the court. Appellants' motion to dismiss is found not well-taken and denied. It is so ordered.

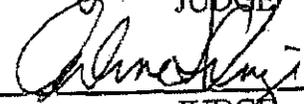
Mark L. Pietrykowski, J.

Arlene Singer, J.

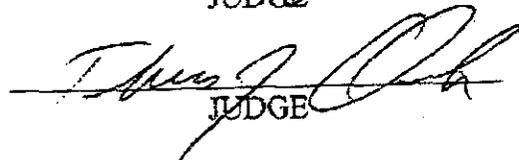
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE