

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**BETH MILLER** )  
**NKA BETH KNECE** )  
Plaintiff-Appellant/Cross-Appellee, )

Case No. 11-1172

**vs.**

**NORMAN MILLER** )  
Defendant )

On Appeal and Cross Appeal from  
the Delaware  
County Court of Appeals,  
Fifth Appellate District  
Court of Appeals Case No.  
10 CAF 09 0074  
2011-Ohio-2649  
(Trial Court No. 04DR A 09 434)

**REBECCA S. NELSON-MILLER** )  
Administrator of the Estate of Norman )  
Leslie Miller )  
Appellee/Cross-Appellant )

\*\*\*\*\*

**MEMORANDUM IN RESPONSE OF  
APPELLANT/CROSS-APPELLEE BETH KNECE**

\*\*\*\*\*

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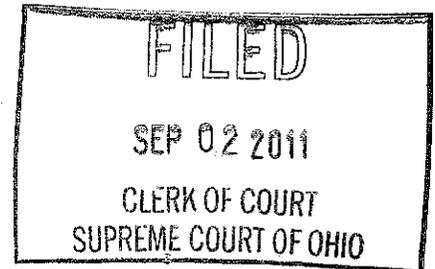
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Ex. 1 Affidavit of Judge Krueger

## **INTRODUCTION**

Appellee/Cross-Appellant's Appeal should be dismissed.

## **ARGUMENT IN OPPOSITION TO APPELLEE/CROSS-APPELLANT'S PROPOSITIONS OF LAW**

1. REGARDING APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW NO. 1 which reads:

"When a trial judge authorizes the magistrate to sign a judgment entry, the signature affixed by the magistrate on the judge's behalf satisfies the "signature" requirement of Civil Rule 58.

A trial judge cannot "authorize" a magistrate, clerk, secretary or anyone else to sign a final judgment entry. A trial judge cannot delegate that act. To do so would violate Article IV of the Ohio Constitution, as a magistrate is not "the court."

Under Civil Rule 1(A) the Ohio Supreme Court has made the Civil Rules of Procedure including Rule 58, binding on this Court. Further, Civ. R. 75(A) specifically makes the Civil Rules, with exceptions as noted therein, applicable to actions in the Domestic Relations Court. The signature mandate of Rule 58 is not listed as an exception. See Civ. R. 75, *passim*.

Under the Rules of Superintendence for the Courts of Ohio, specifically Rule 5, the Ohio Supreme Court has given its grace to the adoption of local rules by the State Courts. But it has also restricted that grace in that "... Local rules of practice shall not be inconsistent with rules promulgated by the Supreme Court." See Sup. R. 5(A). Accordingly, the trial Court could not and cannot adopt a rule that contravenes the signature requirement of Civ. R. 58(A).

There are numerous questions about the purported final entry in this matter, and it is incorrect of Appellee to state that the then parties had come to a full agreement. On

December 27 2004 a very interlineated and hurriedly scribbled “Memorandum of Agreement” was filed with the Clerk of the Delaware Court. Almost a year later on October 14, 2005 the Magistrate determined that the parties had never filed a final decree of divorce and *sua sponte*, by separate “Judgment Entry,” adopted and incorporated the “Memorandum of Agreement” as a “Judgment Entry Decree of Divorce”, and someone – perhaps the magistrate, erased the words “Memorandum of Agreement” on the original document in the court file.<sup>1</sup> The parties themselves never submitted an actual decree of divorce. At the 7-27-09 hearing on Appellant-Cross-Appellee’s *Motion to Vacate the Judgment Entry*, the parties stipulated that the “Memorandum of Agreement” and the “Shared Parenting Decree” filed on December 27, 2004 and the “Court’s” *sua sponte* “Judgment Entry” filed on October 14, 2005 were signed with Judge Krueger’s name being written by the Magistrate. On 7-20-09 Appellant served a subpoena on Judge Krueger to testify in the matter. Rather than appear, the Judge filed an affidavit on 7-27-09 which stated in pertinent part, that “The undersigned has no knowledge of the proceedings in the above captioned case and has no knowledge as to how or why a document was changed after filing.”<sup>2</sup> Therefore Judge Krueger never reviewed any of the “Judgment Entries” to which the Magistrate applied his name.

A Final Decree of Divorce, would ordinarily be a judgment because it terminates the case or controversy the parties have submitted to the trial court for resolution. *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 736 N.E.2d 101; *Aguirre v. Sandoval*, Stark App. No. 2010CA00001, 2010-Ohio-6006.

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<sup>1</sup> There is a docket entry in 04 DRA 09 434 for the “Memorandum of Agreement” on December 27, 2004, but no document with that name now appears in the file for that date.

<sup>2</sup> Exhibit 1 appendix, Judge Krieger’s affidavit.

Judgments that determine the merits of the case and make an end to it are generally final, appealable orders. *Harkai*, supra. There is no differentiation between an “agreed judgment” and “judgment” for purposes of finality. Appellate courts are given the jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Section 3(B)(2), Article IV, Ohio Constitution. For a judgment to be final and appealable, however, it must satisfy not only the requirements of R.C. 2505.02, and if applicable, Civ. R. 54(B), but also Civ.R. 58. Civ.R. 58(A) states,

“Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, \* \* \*, the court shall promptly cause the judgment to be prepared and, *the court having signed it*, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.” (Emphasis added.)

Civ.R. 53 does not permit magistrates to enter judgments. This is the function of the judge, not the magistrate. *Brown v. Cummins* (1997), 120 Ohio App.3d 554, 555, 698 N.E.2d 501; *In re K.K.*, Summit App. No. 22352, 2005-Ohio-3112, at ¶17; *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 217-218, 736 N.E.2d 101; *Kidd v. Higgins* (Mar. 29, 1996), Lake App. No. 95-L-112.

“...there can be no judgment unless and until it is signed by the court, that is by the judge personally. The affixing of the judge's name by some unknown person who then initials the ‘signature’ cannot meet the requirement by Civ.R. 58 that the court sign the judgment.” *Peters v. Arbaugh*, (1976), 50 Ohio App.2d 30, 361 N.E.2d 531, concurrence.

*Brackmann Communications, Inc. v. Ritter* (1987), 38 Ohio App.3d 107, 109, 526 N.E.2d 823, stands for the proposition that there are “clear requirements for formal final journal entry or order for appeal purposes.” The court in *Brackmann* held that,

In all civil cases appealed to this court, therefore, a formal final journal entry or order must be prepared which contains the following: 1. the case caption and number; 2. a designation as a decision or judgment entry or both; 3. a clear pronouncement of the court’s judgment and its rationale if the entry is

combined with a decision or opinion; 4. **the judge's signature**; 5. a time stamp indicating the filing of the judgment with the clerk for journalization; and, 6. where applicable, a Civ. R. 54(B) determination and Civ. R. 54(B) language. . . the Ohio Rules of Civil Procedure, including Civ.R. 58, must be followed and obeyed where they are applicable.” 38 Ohio App.3d 107, 109, 526 N.E.2d 823.

Judgments that are not properly journalized do not become “journalized with time,” if not promptly appealed.

*State ex rel. Engelhart v. Russo*, 2011-Ohio-2410 at ¶ 25 reiterated that

“It is axiomatic that a court speaks only through its journal and a judgment entry is effective **only when it has been journalized**. *San Filipo v. San Filipo* (1991), 81 Ohio App.3d 111, 610 N.E.2d 493; *State v. Ellington* (1987), 36 Ohio App.3d 76, 521 N.E.2d 504. Journalization of a judgment entry requires that: (1) the judgment is reduced to writing; (2) **signed by a judge**; and (3) filed with the clerk so that it may become a part of the permanent record of the court. *Id.* at 78.” (emphasis added)

In the instant case the trial Court did not have the power to render judgments without signature – delegating to others, not judges under Article IV, the power to sign judgments by having a magistrate sign the judge’s name on the original judgments.

Ohio Constitution § 4.01 In whom power vested: **The judicial power of the state** is vested in a supreme court, courts of appeals, **courts of common pleas** and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

Ohio Constitution § 4.04 Common pleas court:

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies **as may be provided by law**. (emphasis added)

Ohio Constitution § 4.05 Other powers of the Supreme Court

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, **which rules shall not abridge, enlarge, or modify any substantive right**. (emphasis added)

Ohio Constitution § 4.18 Powers and jurisdiction

The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

There is nothing in the Ohio Constitution that permits a judge to delegate his duties to a non-judge. A non-judge is not the Court, and cannot sign a judgment entry. Therefore, a purported judgment signed by a non-judge is not signed by the Court. It is a violation of the Ohio Constitution to hold that an entry signed by a non-Judge transmogrifies into an entry signed by the Court, if it has not been appealed in 30 days.

*Cycle Data Systems Inc. v. University of Dayton Law Student Bar*

*Association* 1979 Ohio App. LEXIS 8569 states:

“Nothing in Chapter 1925, Revised Code, makes any exception to Rule 4, Rules of Superintendence for Municipal Court, or to Rule 53 Ohio Rules [\*3] of Civil Procedure. There is nothing in the statute or in the rules which authorizes a referee to sign a judgment entry. Thus, at this stage of the record and proceedings there is no final order or judgment entry from which an appeal may be taken. Accordingly, the appeal must be dismissed without either an affirmance or a reversal. *Id.* (emphasis added)

Only Judges are authorized to exercise judicial power by Article IV of the Ohio State Constitution. If this Court reverses *Miller* on the issue of whether a Judge can “delegate” his signing duties, then virtually anyone – a magistrate, a referee, a clerk, a secretary – is a “Judge” with the powers of a Judge, including the power to sign a Judgment Entry, if a party does not notice or know that the entry must be signed by the **Court.**

It is therefore NOT a matter of public or great general interest for this Court to delve into whether a Judge can delegate his signing powers to a magistrate to achieve a final appealable order. Pursuant to Article IV of the Ohio State Constitution, he cannot. This Constitutional question has already been resolved, long ago.

1. REGARDING APPELLEE’S/CROSS-APPELLANT’S PROPOSITION OF LAW NO. 2 which reads:

“If the trial court fails to comply with the signature requirement of Civ.R. 58(A) by failing to personally sign the judgment entry, the resulting judgment is voidable, not void, and may be attacked only through a direct appeal. A party is estopped from collaterally attacking the validity of the judgment. (State ex rel. Leshner v Kainrad (1981), 65 Ohio St.2d 68, followed and extended)”

In the case of *State ex rel. Leshner v Kainrad*, the referee

“did not prepare a report as required by Civ. R. 53(E)(1). Appellant, therefore, was never given the opportunity to file objections, as is his right under Civ. R. 53(E)(2). Apparently, on the same day of the hearing, Referee Meal prepared a judgment entry, signed it, and had Judge Kainrad sign it with the following notation: ‘The Court upon review finds the Referee’s recommendations fair and equitable and hereby adopts same as an order of this Court.’”

This Court found the decree “voidable” and not “void”. But *Leshner* is different, because in *Leshner*, although there is a clear violation of Civ.R.53(E) in the denial of that Appellant’s right to a 14-day objection period – the Court actually SIGNED the judgment entry, so there was something to appeal. In *Miller*, not only did the Court NOT SIGN the judgment entry, but worse, the Magistrate herein pretended that the Court had signed the entries, by signing the Judge’s name over and over, when in fact, pursuant to the Judge’s own affidavit, the Judge had never reviewed any of the file.

“Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court.” *Yantek v. Coach Builders Limited, Inc.*, Hamilton App. No. C-060601, 2007-Ohio-5126, ¶9, citing *Quick v. Kwiatkowski*, Montgomery App.No. 18620, 2001-Ohio-1498, citing Sec. 5(B), Art. IV, Ohio Constitution.

A magistrate cannot sign a final judgment entry. See *State v. Waselich*, 2005-Ohio-6449. **Magistrates are not constitutional or statutory courts.** *Kwiatkowski v. Kwiatkowski*, 2001-Ohio-1498. The trial court is required to conduct an independent analysis of the issues considered by the magistrate. *Inman v. Inman*, 101 Ohio App.3d 115, 117, 118 655 N.E.2d 199 (Ohio App. 2 Dist. 1995). Before the magistrate’s decision becomes effective, the trial court has to review and adopt it. *Yantek v. Coach*

*Builders Ltd., Inc.*, 2007-Ohio-5126. As such, “. . . a magistrate’s decision that has not been adopted or modified by the trial court is not a final order” *Yantek v. Coach Builders Ltd., Inc.*, 2007-Ohio-5126; See *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 572, 2005-Ohio-1835, 828 N.E.2d 153, at ¶20. See *Parma v. Blatnica*, 2005-Ohio 194 (magistrate signed judgment entry on the “line demarcated for the judge’s signature”. The court held that the judgment entry was not a final appealable order because it was “merely a decision by the . . . magistrate that was never acted upon by the . . . judge.”); *State v. Brock*, 2003-Ohio-3199 - a judgment was signed by the magistrate. The judge was unable to be present and had the magistrate preside for the sole purpose of relaying the decision to the parties, however the judge’s signature on the journal entry was omitted. The court held that “[t]he failure of the trial judge to sign the judgment results in an improperly journalized judgment of conviction, and thus **there is no conviction at all and no appealable order.**” The civil rules are clear: "A magistrate's decision is not effective unless adopted by the court." Civ.R. 53(D)(4)(a). *Yantek v. Coach Builders Ltd., Inc.*, 2007-Ohio-5126.

In the present case, the Court *sua sponte* issued a Judgment Entry, which was signed with Judge Krueger’s name by Magistrate Sefcovic. There is no evidence that the Judge ever saw the magistrate’s decision prior to the signing of his name. There is much evidence that he did not. The Judge is supposed to conduct an “independent analysis” of the issues considered by the magistrate. Judges are cautioned against rubberstamping (adopting) a magistrate’s decision as a matter of course instead of conducting their own independent analysis. See *Hartt v. Munobe*, 67 Ohio St.3d 3, 6-7, 1993-Ohio-177, 615 N.E.2d 617. The “Judgment Entry” is not an effective order because it was never

adopted by the Court and the magistrate does not have the power to sign a final order. The “Agreed Entry-Decree of Divorce” is equally not an effective order for three reasons: because it was never adopted by the Court and the magistrate does not have the power to sign a final order, because it is a fabrication created by the magistrate of a different document, and because it was never journalized in the docket/journal of the court (only the original memorandum is docketed).

**R.C. 3105.10(A) Judgment.** The court of common pleas shall hear any of the causes for divorce or annulment charged in the complaint and may, upon proof to the satisfaction of the court, pronounce the marriage contract dissolved and both of the parties released from their obligations.

The court of common pleas is **the judge, not the magistrate**. In *Crane v. Teague*, 2005-Ohio-5782, the probate magistrates signed numerous documents designated as “Journal Entry” and “Order” on the judge’s signature line. These documents were not designated as a “Magistrate’s Decision” and were never reviewed by the trial court. The *Crane* court explains:

“{¶ 31} Before we address the appealability of specific orders, we should note that the “orders” of the magistrates in this case were ineffective because **magistrates do not have the power to enter orders** – at least not of the type that were issued. See *Brown v. Cummins* (1997), 120 Ohio App.3d 554, 555, 698 N.E.2d 501 (noting that magistrates do not have the power to enter orders or judgments). Under Loc. R. 86.1(A) of the Court of Common Pleas of Montgomery County, Probate Division, probate magistrates have the powers set forth in Civ. R. 53 and as set forth in any order of reference. Subsection (B) of Loc. R. 86.1 goes on to refer to magistrates “all matters, including pretrials, pertaining to guardianships, trusts, adoptions, civil commitments, and name changes.” Subsection (B) also states that the reference includes “all powers of the Court except as restricted by law.”

{¶ 32} One such restriction of law is found in Civ. R. 53. Under Civ. R. 53(C)(3)(a), magistrates have very limited power to enter orders without judicial approval. Such orders include pre-trial matters like discovery orders and temporary orders for spousal or child support under Civ. R. 75(N). In these situations, magistrates may enter an “order.” The pretrial order must be identified as a magistrate’s order and must be served on all parties or their attorneys. Civ. R. 53(C)(3)(c). When a pre-trial order is entered, Civil Rule 53 allows an appeal to the trial court though a motion to set aside the order. See Civ. R. 53(C)(3)(b).

{¶ 33} Magistrates may also make decisions in referred matters. Civ. R. 53(E) outlines the proper procedures for such situations, including a requirement that *the magistrate prepare, sign, and file a magistrate's decision. The decision is then to be served by the clerk on all parties or their attorneys.* Civ. R. 53(E)(1) (emphasis added). Parties may object to a magistrate's decision within fourteen days, and they may also file a request for findings of fact and conclusions of law under Civ. R. 52. In the latter event, objections may be filed after the magistrate files the findings of fact and conclusions of law. Civ. R. 53(E)(2) and (3).

{¶ 34} Significantly, Civ. R. 53(E) *does not give magistrates the ability to enter orders or judgments. This is a function of the judge, not the magistrate.* *Brown*, 120 Ohio App.3d at 555. See, also, *In re K.K.*, Summit App. No. 22352, 2005-Ohio-3112, at ¶17 (magistrate lacks authority to enter judgments), and *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 217-218, 736 N.E.2d 101 (Rule 53 allows magistrates to sign and file decisions, not judgments).

{¶ 35} As we noted, the entries or orders signed by magistrates were not designated either as “magistrate's orders” or as magistrate's decisions. The magistrates' decisions were also ineffective to the extent that they contained “orders” rather than findings. For example, the “Journal Entry Finding Sale Necessary, Ordering Appraisement & Granting Prayer of Complaint” ordered Crane to sell the real estate belonging to Bige Teague. However, the magistrate did not have the power to order the sale – or to grant “default judgment” on the complaint. The magistrate could make findings, but those findings would be interlocutory and subject to revision by the trial court until such time as the trial court issued its own judgment.

{¶ 36} Similarly, the “Journal Entry Confirming Sale & Ordering Deed” ordered and confirmed the sale of the property and ordered distribution of sale proceeds. Again, this entry, signed by a magistrate, is not a final judgment, because the magistrate did not have the power to enter judgment. Only the trial court can do that. The remaining entries in the file that are signed by magistrates lack finality for the same reason.”

As such the Judgment Entry, the “Agreed Judgment Entry-Decree of Divorce”, and every other entry signed by the Magistrate “as the Judge” are not final appealable orders, do not transmogrify into final appealable orders after 30 days, and are void.

Appellee/Cross-Appellant argues that the Millers had an agreement. Not really.

Settlement agreements are favored by law. However, it is still up to **the court** to determine whether the settlement agreement is contrary to the law. A settlement agreement is not enforceable if it is procured by fraud, duress, overreaching, or undue influence. *Walther v. Walther* (1995), 102 Ohio App. 3d 378, 383. Appellant testified

that she signed the agreement under duress. Transcript 7-27-09 p.48. When asked to define duress Appellant responded:

“He [in reference to Appellee Norman Miller] was in my house, he wouldn’t leave the premises. My lawyer said there was nothing I could do to get him out of my property. He was drinking obsessively, he was very aggressive to me and my daughter, and he threatened my life and my daughter’s. And I don’t want him in the house because I was for her and my safety. And my lawyer said there was nothing I could do to get him out. So, I’d sign anything to get him out.” Tr. 7-27-09 pp.48-9.

When asked if she read the agreement Appellant responded:

“I read it, but I don’t really think I understood it because I was under such duress. I mean, I got – I had to go see a doctor and get on nerve pills because of this man. And I was scared to death.” Tr. 7-27-09 p. 53.

Whether Appellee claims to have relied on the fatally defective documents or not, this assertion does not transmogrify magistrate’s decisions that *pretend to be* Judge’s Orders terminating the case, into Judge’s Orders that terminated the action.

“Various districts, including our own, have held that **a final judgment does not exist where the trial court fails to both adopt the magistrate’s decision and enter judgment stating the relief to be afforded.** *Hennis v. Hennis*, Clark App. No. 2002-CA-107, 2003-Ohio-5729, at ¶6; *White v. White*, Gallia App. No. 01CA12, 2002-Ohio-6304, at ¶14-15; *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153, at ¶20; *Lowe v. Phillips*, Montgomery App. No. 20590, 2005-Ohio-2514, at ¶13; and *Harkai*, 136 Ohio App.3d at 216-18. The reason for this is that orders are not court orders unless certain formalities are met. *Harkai*, 136 Ohio App.3d at 217. In addition, only judges, not magistrates, may terminate claims or actions by entering judgment. *Id.* at 218. See, also, *Brown*, 120 Ohio App.3d at 555.” *Crane v. Teague*, 2005-Ohio-5782 at ¶ 39. (emphasis added).

There is a tacit acknowledgement by Appellee that this practice of the Judge was wrong, and even violated the Constitution, but is yet a plea to the Ohio Supreme Court that for “practical considerations” this Court should overturn the Fifth District in a desire to avoid the perceived disruptive effects of the *Miller* holding. While it is appropriate to

give some consideration to the potential issues that may arise regarding the effect of the *Miller* ruling on others who have magistrate-signed judge's names on entries and orders, without judge's review, these potential issues should not dictate the outcome of this case, particularly given that this case does not involve other people's issues and this court has not had the benefit of adequate briefing on them. Furthermore, matters of convenience should not dictate this court's substantive decisions. We cannot conclude that acknowledgment of the continuing error in practice will result in chaos or that concerns regarding perceived chaos should prevent this Court holding that the actions of the trial court in this matter were clearly wrong and violated the Ohio Constitution.

Therefore, *State ex rel. Leshner v Kainrad* is inapposite to the instant case. It is therefore NOT a matter of public or great general interest for this Court to delve into whether a Magistrate can transmogrify into a constitutional or statutory court 30 days after signing the Judge's name to an Order, as suggested in Appellee/Cross-Appellant's Proposition of Law No. 2. Pursuant to Article IV of the Ohio State Constitution, a Magistrate cannot. This Constitutional question has already been resolved, long ago.

#### **CONCLUSION AND REQUEST FOR RELIEF**

WHEREFORE Appellant, based upon the foregoing facts and law stated herein, does respectfully request that this Court dismiss the Appellee/Cross-Appellant's appeal and hold it for naught. Appellant further prays for such other relief that she has previously requested in her Memorandum in Support of Jurisdiction and all such other relief that she may be entitled to by law and/or equity.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

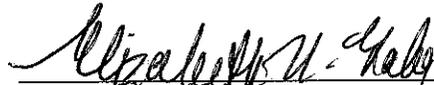
This is to certify that a true and accurate copy of the foregoing document was served upon Appellee/Cross-Appellant through her Attorneys of record,

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**ELIZABETH N. GABA**  
Attorney at Law

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

BETH E MILLER,

:

Plaintiff,

:

Case No. 04 DR A 09 0434

VS.

:

NORMAN L MILLER,

:

EVERETT H KRUEGER, JUDGE

Defendant.

:

MAGISTRATE LAUGHLIN

AFFIDAVIT

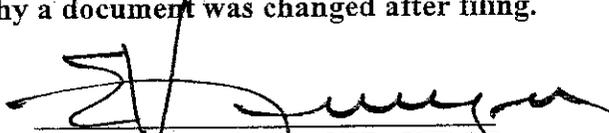
The undersigned, being duly sworn, submits the following:

The Affiant is a Judge of the Delaware County Common Pleas Court, General Division and Domestic Relations Division;

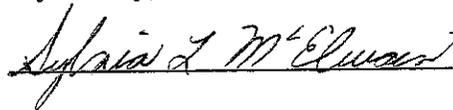
Lianne Santellani-Sefcovic was duly appointed as Magistrate to conduct all Domestic Relations proceedings;

As Domestic Relations' Magistrate, she was given authority only to sign my name to all judgment entries that were agreed to and approved by the parties;

The undersigned has no knowledge of the proceedings in the above captioned case and has no knowledge of how or why a document was changed after filing.

  
EVERETT H. KRUEGER, JUDGE

Sworn to before a Notary Public this 21<sup>st</sup> day of July, 2009.



DATED: July 21, 2009



SYLVIA L. McELWAIN  
Notary Public, State of Ohio  
My Commission Expires  
4-13-10