ORIGINAL

IN THE SUPREME COURT OF OHIO

KELLY M. VOCAIRE Plaintiff-Appellant and TAMERA OCHS ROTHSCHILD, TRUSTEE Movant-Appellant vs. STAFFORD & STAFFORD CO. LPA, VINCENT A. STAFFORD, and KENNETH J. LEWIS Defendants-Appellees	))))))))))))))))	Case No. 2011-1913 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 96302

MEMORANDUM IN SUPPORT OF JURISDICTION
OF MOVANT-APPELLANT, TAMERA OCHS-ROTHSCHILD, TRUSTEE

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

This case presents one of public or great general interest in the application of the "cognizable event" rule previously enunciated by the Ohio Supreme Court in cases of legal malpractice.

This Court has previously set forth the "cognizable event" rule in *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St. 3d 54, 538 N.E. 2d 398, at syllabus, wherein this Court stated, that "under Ohio R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Zimmie v. Calfee, Halter & Griswold*, supra. Thus, under this rule, the question is when did the client have knowledge or should have had knowledge not only that she has been injured in some way, but that the injury was caused by the conduct of her attorney.

While the specific question of when a "cognizable event" occurred is factual specific in any given case, in this case there exists a legal question which makes this case one of public or great general interest. Namely, the question is what is the proper application of this Court's legal standard to a factual scenario in which an attorney has concealed his prior negligence through misrepresentation, and due to that misrepresentation the prior negligence is not discovered until well after a year has passed after the cessation of the attorney-client relationship. Stated another way, when should a client be expected to know that she has been injured by her lawyer's conduct when that lawyer has covered up his conduct by misrepresentation.

In this case, the trial court dismissed Appellants' claims upon a determination that the claims were barred by the statute of limitations. On appellate review, the Eighth District Court of Appeals affirmed that determination and based its conclusion on an analysis of what knowledge the client, Kelly Vocaire, had when the attorney-client relationship ended. The Eighth District Court of Appeals concluded that because Vocaire had been dissatisfied with the services of her attorney at the time of the cessation of the attorney-client relationship, she should have investigated and determined the malpractice by her attorney within one year after the cessation of that relationship. However, by this conclusion, the appellate court has not applied the standard enunciated by this Court. Rather, the appellate court has imposed a burden on the client to have discovered the further facts of her attorney's malpractice within one year from that date arising from her dissatisfaction with her attorney's services. That is *not* the law previously set forth by this Court, and as such cannot be permitted to stand by this Court as precedent.

By its decision, the appellate court has essentially obliterated to nothing the "cognizable event" analysis previously set forth by this Court. The appellate court instead found that because Vocaire was "dissatisfied" with her attorney in other respects, all facts relative to his malpractice should have been learned and claims brought within one year from the date of cessation of the attorney-client relationship. By this decision, the appellate court sets a new precedent that would incorrectly analyze all future malpractice claims of clients against their lawyers and does not comply with the standard previously enunciated by this Court. Now, under this new standard enunciated by the Eighth District Court of Appeals, the statute of limitation begins to run on a legal malpractice claim when the lawyer-client relationship ends and the client is not satisfied with her attorney's services. It should be, as this Court has previously held, when the client

learns of facts which gives her reasonable cause to know that she has been injured by the attorney's conduct.

This case is one of public or great general interest because it is necessary for this Court to hear this matter to ensure the correct application of the correct standard for the determination of a "cognizable event" under this and other legal malpractice claims, and to ensure that the "cognizable event" analysis is not obliterated by a failure of the trial and appellate courts to apply this legal standard.

STATEMENT OF THE CASE AND FACTS

Appellant Kelly Vocaire (hereinafter "Vocaire") hired Appellee Vincent Stafford (hereinafter "Stafford") to represent her, twice, in relation to domestic relations issues of custody and support.

The first time was in February, 1998. After a period of time, when there had been no action on the Vocaire case from November 17, 1998 through September 14, 2000, Stafford sought to and was granted permission to withdraw from representing Vocaire on November 22, 2000. However, just prior to his withdrawal, Vocaire's ex-husband had filed a motion asking for a "final hearing" to be held, and served this motion on Stafford as Vocaire's attorney of record. The hearing involved custody and child support issues. Therefore, prior to being granted permission to withdraw, Stafford was ordered by the Stark County Domestic Court to notify Vocaire of the hearing scheduled for January 10, 2011. Stafford never notified her. The hearing went forward without her there to present her case or defend the claims made against her. Further, Vocaire was never served with the Order entered following this hearing.

Vocaire then began receiving notices from the Stark County Child Support Enforcement Agency that her child support obligation was $598.00 per month and these notices showed substantial arrearages. In August, 2002, Vocaire again hired Stafford to represent her in relations to issues of custody and support in the Stark County domestic relations court. Vocaire brought these support notices to the attention of Stafford, who assured her that the child support notices and arrearages were an "error" by the court. Stafford knew, but never informed Vocaire that a hearing had been held in January 2001 in her absence. Stafford knew, but never informed Vocaire that he was ordered by the trial court to advise her of the January 2001 hearing before he withdrew from representation of her the first time. Stafford knew that he had not advised her of

the hearing. However, Stafford chose to conceal his failure to advise her of the hearing. He told Vocaire that the child support was an error by the court. Vocaire believed her lawyer, and Stafford continued to represent her under the these auspices.

Stafford never did file any motions to correct the "error" by the court on the matter of child support and eventually, the relationship between Vocaire and Stafford came to an end when it terminated on September 15, 2004. At that point, Vocaire knew only what she had been told by Stafford and what she had surmised on her own – that the child support order was an "error" by the court that needed fixed. Vocaire also knew that Stafford had not accomplished that objective. Vocaire was dissatisfied with the services of Stafford in that regard. However, Vocaire had been given no reason to believe that a hearing on the matter of child support had occurred in her absence or that a child support order had been issued. She still did not know that Stafford had been ordered to advise her of that hearing.

Vocaire later learned first that a hearing had been held in her absence, second that the hearing resulted in an order of child support, including retroactive child support, with which she had not been served. These salient facts caused her to investigate further and she later learned that Attorney Vincent Stafford, had been ordered to advise her of the hearing. Nevertheless, she filed her legal action within one year of learning of the salient facts.

Vocaire filed her claim of legal malpractice against Appellees in the Cuyahoga County Court of Common Pleas. Because Vocaire had filed a bankruptcy, and Vocaire's claim accrued prior to the bankruptcy, Vocaire's claim was an asset of the bankruptcy estate. The bankruptcy was reopened, and Movant-Appellant, Tamera Ochs-Rothschild, sought to join in the legal action as the real party in interest. Defendants-Appellees filed a Motion to Dismiss on two grounds, including that the bankruptcy trustee was the real party in interest and had not been joined in the

action and upon the ground that the claim was barred by the statute of limitations. The trial court granted the Motion to Dismiss, but gave no indication as to the basis in its order. Plaintiff Kelly Vocaire and Movant Tamera Ochs-Rothschild, Trustee, filed an appeal of the trial court's decision to the Eighth District Court of Appeals. The Eighth District Court of Appeals affirmed the trial court's decision upon the ground that the claim was barred by the statute of limitations.

From this decision, Appellant Kelly Vocaire filed her appeal on November 10, 2011. Movant-Appellant, Tamera Ochs-Rothschild hereby joins in said appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: Where the complaint alleges misrepresentations made by a lawyer to his client to conceal his negligence, the discovery of facts inconsistent with the fraudulent misrepresentation is the "cognizable event" from which the statute of limitations begins to run on the claim of legal malpractice.

The appellate court reasoned that once the attorney-client relationship ended in dissatisfaction, with an objective having not been accomplished, that was the "cognizable event" for purposes of any legal malpractice claims that Vocaire had against her former attorney. The appellate court's logic was: "how would a reasonable person, dissatisfied with Stafford's efforts to correct this problem, have reacted?" That is simply not the standard enunciated by this Court. Nevertheless, the appellate court then concluded that "a reasonable person would not have waited almost three years to investigate why her child support payments increased by over $200 per month especially since the increased monthly obligation applied retroactively for a total "in excess of $45,000."

The appellate court's analysis is clearly flawed. Vocaire did not need to bring an investigation into why her child support payments had increased substantially or why her arrearage increased so dramatically because she had already sought the advice of her legal

counsel and she had already been told why by Stafford when he informed her that it was a record keeping error by the court that needed fixed. Vocaire had questions in regard to child support notices she was receiving. Upon receipt of those child support notices, she sought counsel and advice from her lawyer Vincent Stafford. Stafford informed her that there had been a record keeping error and that it was the fault of the court and the "error" needed corrected. (See Complaint, Paragraph 28-32.) Vocaire had no reason to suspect that in fact there was no "error" by the domestic court, but rather an appropriately entered order which had been entered in her absence and that she was absent because Stafford had failed to advise her of the hearing. It is correct to say that Stafford had not fixed the problem, but despite this fact, Vocaire had no reason to believe that Stafford had been dishonest with her about what caused the problem in the first place or that, in fact, Stafford had contributed to the problem by failing to advise her of the hearing that had occurred in January, 2001.

The questions posed by the appellate court in its decision highlight the clearly incorrect and erroneous analysis and standard the appellate court has applied in attempting to analyze this case under this Court's two-prong test for determining a "cognizable event."

The question is not "how would a reasonable person, dissatisfied with Stafford's efforts to correct this problem, have reacted?" Vocaire did react reasonably. She believed her attorney. She thereafter used her best efforts to represent herself and investigate the issue.

The proper question, rather, is at what point would a reasonable person, through the exercise of reasonable diligence, have cause to know that she had been injured by the conduct of her lawyer. In other words, what "event" would be sufficient to alert a reasonable person in Kelly Vocaire's shoes exercising reasonable diligence, that her own attorney had caused the deprivation of her due process and contributed to her injury by failing to advise her of a vital

hearing, and further that he had lied to her and concealed this fact from her for years. The appellate court incorrectly and without logic concluded that this "cognizable event" would have occurred when the attorney-client relationship ended unhappily, with Vocaire dissatisfied that Stafford had not been able to achieve the objective of correcting her child support issue. (The appellate court concluded that "by the time the attorney-client relationship terminated on September 15, 2004, Vocaire should have known the increased child support obligation was related to her attorney's act or nonact. . .")

Unfortunately, this incorrect analysis obliterates the entire "cognizable event" analysis. Using the appellate court's logic, when an attorney-client relationship ends in dissatisfaction without accomplishment of the goals, that then is the cognizable event for any malpractice claims against the attorney. This conclusion defies logic, and is not what this Court has previously held. Neither is it the rule of law which should be applied.

Again, at the time that Stafford ceased representing Vocaire on September 15, 2004, how could or would Vocaire have possibly known or had reason to know that Stafford had misrepresented to her all along the reason for the increased child support obligation. That he had known full well when he blamed the court for the error that in fact it was not an error by the court, but that a hearing had been held in Vocaire's absence resulting in the issuance of child support orders, and that he had failed to advise her of that hearing despite having been court ordered to do so.

Clearly there are distinctions to be made among the "injuries" suffered by Appellant Vocaire in this case – distinctions which were ignored by the trial court and Eighth District Court of Appeals, but distinctions which were vital to the analysis.

The claim for malpractice against Stafford was *not* only a claim for his failure to "take care of" the child support issue. Had this been the sole nature of the claim against Stafford, i.e., only for his failure to file a motion on behalf of his client in an effort to correct the child support issue, then the appellate court's logic would suffice as to that claim.

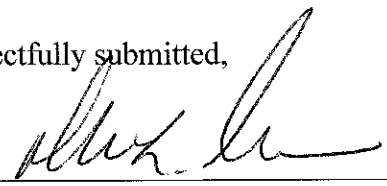
Rather, the claim for malpractice against Stafford was also, and more importantly, for his contribution in causing the child support issue *in the first place* – for his failure to notify Vocaire of the January 10, 2001, hearing at a point in time when she could have appeared and defended the claim. The subsequent misrepresentations were only part of the misconduct, and comprise the background upon which a court must analyze when the cognizable event occurred. No reasonable person in Kelly Vocaire's shoes had reason to know or should have known about this malpractice by Stafford until she found out that (1) a hearing had occurred in her absence on January 10, 2001; and (2) that the January 10, 2001 hearing issued an order pertaining to the matter of child support. This occurred on or about January 28, 2005. The Complaint was filed within one year of that date and is therefore within the applicable statute of limitations.

The appellate court's conclusion is erroneous and should be reversed, with this matter remanded to the trial court for further proceedings and trial on the claims of legal malpractice and fraud.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest, and Movant-Appellant, Tamera Ochs-Rothschild respectfully requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail on this 17th day of November, 2011, to the following:

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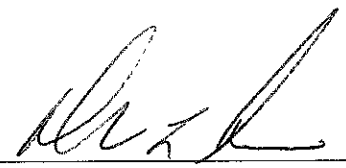

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96302

KELLY M. VOCAIRE

PLAINTIFF-APPELLANT

vs.

STAFFORD & STAFFORD CO., LPA, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-582893

BEFORE: Cooney, J., Jones, P.J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: September 29, 2011

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COLLEEN CONWAY COONEY, J.:

Plaintiff-appellant, Kelly Vocaire ("Vocaire"), appeals the trial court's denial of her motion to amend the complaint and the dismissal of her complaint against defendants-appellees, Stafford & Stafford Co. L.P.A., Vincent A. Stafford, and Kenneth J. Lewis (collectively referred to as "Stafford"). We find no merit to the appeal and affirm.

In this legal malpractice case, Vocaire alleges that Stafford negligently failed to notify her of a critical hearing date upon withdrawing as her counsel in proceedings pertaining to the custody and support of her child. The facts, as set forth in the complaint, are as follows:

Vocaire entered into an attorney-client relationship with Stafford in December 1997. She retained Stafford to, among other things, correct a child support order entered by the Stark County domestic relations court on February 11, 1998. On February 18, 1998, Stafford filed a motion to vacate the February 11, 1998 child support order, claiming it was entered in error.

Sometime in 2000, Stafford filed a motion for leave to withdraw as Vocaire's counsel. On November 6, 2000, the court scheduled a final hearing for January 10, 2001 and advised counsel that it would hear all pending motions, including Vocaire's motion to vacate the February 11, 1998 child support order. The court also ordered Stafford to notify Vocaire of the final hearing date before

it would approve the motion to withdraw. The domestic relations court granted Stafford's motion to withdraw as counsel on November 22, 2000. Vocaire alleges that because Stafford never advised her of the final hearing date, she did not appear for the hearing and the court substantially increased her child support obligation.

The complaint further alleges that in October 2001, "Vocaire began receiving notices from the Stark County Child Support Enforcement Agency showing her monthly child support obligation to be $598.00 per month and further showing substantial arrearages." When Vocaire brought the notices to Stafford's attention, she claimed Stafford falsely advised her that they would "'take care' of correcting the child support records and seek to amend the arrearages." However, Stafford never filed a motion to decrease the child support obligation and Vocaire continued to be in arrears.

Vocaire alleges that she learned "[s]ometime after October 2004" that the domestic relations court held the final hearing on January 10, 2001 without notice to her. According to the complaint, the parties' attorney-client relationship "finally" terminated on September 15, 2004, when Stafford again withdrew from its representation of Vocaire.

Vocaire filed the complaint in this case on January 27, 2006. Stafford filed a timely motion to dismiss, arguing that: (1) Vocaire lacked standing to

bring her claims because she was not the real party in interest; and (2) Vocaire's claims were barred by the statute of limitations. Stafford attached unverified copies of a docket from the U.S. Bankruptcy Court, Western District of Pennsylvania, to the motion to dismiss to demonstrate that Vocaire had previously filed a Chapter 7 bankruptcy petition. In its motion to dismiss, Stafford argued the trustee in bankruptcy, who was the real party in interest, was not a party to the case and Vocaire lacked standing to file suit on her own.[1] In response, Vocaire filed a motion for leave to amend the complaint, a brief in opposition to the motion to dismiss, and a notice of bankruptcy proceedings and motion to stay, which stayed the case indefinitely.

The trial court reactivated the case in April 2010, after Vocaire and the bankruptcy trustee obtained an order from the bankruptcy court terminating the stay and granting permission to pursue the claim. However, in December 2010, the trial court denied Vocaire's motion to join the bankruptcy trustee and granted Stafford's motion to dismiss. This appeal followed.

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[1] All of a debtor's property, including civil causes of action, is the property of the bankruptcy estate. *In re Cottrell* (C.A. 6, 1989), 876 F.2d 540, 542; 11 U.S.C.A. § 541; Civ.R. 17.

Although Vocaire raises two assignments of error, we find the second assigned error dispositive. In the second assignment of error, Vocaire argues the trial court erred in granting Stafford's motion to dismiss. She contends Vocaire should have been permitted to join the bankruptcy trustee pursuant to Civ.R. 17(A) and that her claims were not barred by the statute of limitations. We disagree.

We review the trial court's decision granting a motion to dismiss de novo. *Hughes v. Miller*, Cuyahoga App. No. 91482, 2009-Ohio-963. Civ.R. 12(B)(6) permits a party to file a motion to dismiss a complaint for failure to state a claim for relief. Civ.R. 12(B)(6) motions test the sufficiency of the complaint. *State ex rel. Horwitz v. Cuyahoga Cty. Court of Common Pleas, Probate Div.* (1992), 65 Ohio St.3d 323, 325, 603 N.E.2d 1005. In order for a court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond doubt that the moving party can prove no set of facts in support of his claim that would entitle him to relief. *Taylor v. London,* 88 Ohio St.3d 137, 139, 2000-Ohio-278, 723 N.E.2d 1089, citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

When reviewing a motion to dismiss for failure to state a claim, a court must accept the facts stated in the complaint as true and must construe all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk*

Co. (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. The court may not consider "matters outside the pleadings," unless the court converts the motion to dismiss into a motion for summary judgment. "The matters outside the pleadings are specifically enumerated in Rule 56," and all parties are "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Civ.R. 12(B); *S. Christian Leadership Conference v. Combined Health Dist.*, 191 Ohio App.3d 405, 2010-Ohio-6550, 946 N.E.2d 282, ¶30. Therefore, in our de novo review, we do not consider the unverified docket from the bankruptcy court concerning Vocaire's bankruptcy.[2]

The facts set forth in the complaint demonstrate that Vocaire's legal malpractice claim is barred by the statute of limitations. The statute of limitations for a legal malpractice claim is one year. R.C. 2305.11(A). A legal malpractice action accrues and the statute of limitations begins to run when

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[2] We are mindful that a trial court may take judicial notice of "appropriate matters" in considering a [Civ.R. 12(B)(6)] motion to dismiss for failure to state a claim. *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 16, 1996-Ohio-231, 661 N.E.2d 170. However, a trial court cannot take judicial notice of court proceedings in another case, and may not take judicial notice of prior proceedings in the court even if the same parties and subject matter are involved; a court may only take judicial notice of the proceedings in the immediate case. *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, ¶26. The rationale for the rule is that the appellate court cannot review the propriety of the trial court's reliance on such prior proceedings because that record is not before the appellate court. Id.; *Northpoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶15-17.

there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or nonact, and the client is put on notice of the need to pursue his possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later. *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, at syllabus.

A "cognizable event" is an event sufficient to alert a reasonable person that in the course of legal representation, his attorney committed an improper act. *Wozniak v. Tonidandel* (1997), 121 Ohio App.3d 221, 699 N.E.2d 555. In other words, a cause of action does not arise "until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured" by the defendant's conduct. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*,128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶14, citing *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581. "The rule entails a two-pronged test — i.e., actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant." Id., citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 87, 90, 447 N.E.2d 727. The statute of limitations does not begin to run until both prongs have been satisfied.

Vocaire claims Stafford was negligent in failing to notify her of the child support hearing held on January 10, 2001. However, Vocaire admits she began receiving notices from the Stark County Child Support Enforcement Agency showing that her monthly obligation had increased to $598 per month in October 2001. She further acknowledges that she complained about the increase to Stafford repeatedly "[f]rom August, 2002 through September 15, 2004," but claims they promised to "'take care' of correcting the child support records and seek to amend the arrearages."

The test for identifying a cognizable event is an objective one. *Woodrow v. Heintschel*, Lucas App. No. L-10-1206, 2011-Ohio-1840, ¶40. How would a reasonable person, dissatisfied with Stafford's efforts to correct this problem, have reacted? "The test necessarily takes into account all the relevant facts and circumstances." Id. A reasonable person would not have waited almost three years to investigate why her child support payments increased by over $200 per month especially since the increased monthly obligation applied retroactively for a total "in excess of $45,000."

Vocaire obviously suspected there was a problem because she admits she repeatedly asked her attorneys to correct it. By the time the attorney-client relationship terminated on September 15, 2004, Vocaire should have known the increased child support obligation was related to her attorney's act or nonact,

especially since they failed to "take care" of it as promised. Thus, the statute of limitations started running on September 15, 2004, at the very latest. Yet Vocaire did not file the complaint until January 27, 2006, well over one year later.

Therefore, the trial court properly dismissed the complaint as barred by the statute of limitations, and the second assignment of error is overruled. Therefore, the remaining issues regarding Vocaire's standing in light of her seeking to join the bankruptcy trustee and the denial of her motion to amend the complaint are moot.

Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Colleen Conway Cooney

COLLEEN CONWAY COONEY, JUDGE

LARRY A. JONES, P.J., and
EILEEN A. GALLAGHER, J., CONCUR