

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-2253

State ex rel. Glenda L. Hill-Foster,
Relator,

In the Court of Appeals of Ohio

v.

TENTH APPELLATE DISTRICT

Industrial Commission of Ohio,
Respondent.

Case No.14AP-335

Notice of Appeal

Glenda L. Hill-Foster, Pro se
Appellant
6800 Albany Glen
New Albany, Ohio 43054
614-589-8688

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FILED
DEC 30 2014
CLERK OF COURT
SUPREME COURT OF OHIO

State ex rel. Glenda L. Hill-Foster,

Relator,

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TENTH APPELLATE DISTRICT

No.14AP-335

The date the court of appeals filed the judgment entry with the clerk was November 19, 2014.

The case originated in the court of appeals.

The case is one of jurisdiction.

The case is one of public or great interest.

A handwritten signature in cursive script, reading "Glenda L. Hill-Foster", with a horizontal line extending to the right from the end of the signature.

Glenda L. Hill-Foster

CERTIFICATE OF SERVICE

I, Glenda L. Hill-Foster do swear or declare that on this date, 12-30-14, 2014, I have served the enclosed NOTICE OF APPEAL on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

The names and addresses of those served are as follows:

Brian D. Hall (0029425), Porter, Wright, Morris & Arthur, LLP
41 South High Street, 32nd Floor, Columbus, Ohio 43215,

And

Kevin J. Reis (0008669) Worker's Compensation Section
150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12-30, 2014.



Glenda L. Hill-Foster

IN THE SUPREME COURT OF OHIO

State ex rel. Glenda L. Hill-Foster,

In the Court of Appeals of Ohio

Relator,

v.

TENTH APPELLATE DISTRICT

Industrial Commission of Ohio,

Respondent.

Case No. 14AP-335

Memorandum in Support

Glenda L. Hill-Foster, Pro se
Appellant
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614-589-8688

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Tenth Appellate District (November 19, 2014)

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672 F. 1023, October 28, 1987.

Copeland v. Bureau of Workers Compensation, 2011 - Ohio - 813.

O'Stricker v. Jim Walter Corp., 4 Ohio St.3d 84, 447 N.2d 727 (1983((syl. ¶ 2).

Rowland v. White Castle System, Inc. (1986), Franklin App. No. 86AP-188,

Druley v. Keller (1966), 14 Ohio Misc. 81."

STATUTES AND RULES:

Statute of Limitations - ORC4123.52

R.C. 2305.10

R.C. 4123.52

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

1. Because the statute of limitation had expired. I feel this is true then the whole minority population is unaware and being degraded. Because of the so called accusations in the minutes it is degrading. There is no denial that a life altering injury resulted in not being able to work. But, the Hearing Officer and Kevin Reis states that he could not believe that a person would not know and the presiding attorney stated in the minutes that he has a license and also the court records confirm that the hearing not me which was degrading to me in questioning "who did I think I was" this could relate to anyone. The court records confirm that Hearing Office and Kevin Reis stated the attorneys that I attempted to have represent me were well versed: well-known also well experienced attorneys with Worker's Compensation law of Ohio. These same attorneys' verbally indicated that I had time to take action and because of me being spiritually grounded, I accepted what I was told. I believe I was verbally coerced into believing my rights to appeal was within the statute of limitations this could relate to anyone.
2. Without inadequate or no health insurance at all and was refused medical care by physicians. I believe no one should be treated as I was, should the Government Budgets/Bureaucracy and Corporate Profits determine how all citizens are treated when they have dire medical needs?
3. In the process of trying to appeal, because of the legal terminology called the "mailbox rule" it is presumed that if any official states that they mailed something, it cannot be rebutted. Because of this rule affecting everyone why should this be attributed to the United States.
4. Because of the nature of the process every minority in the United States could be considered by this discriminatory action. Office antics in the work place should not be condoned as an approval to make a decision for the proper handling of a personal matter rather than a business decision which is why the minority is mishandled. Leading to my being forced to resign because of a personal decision and not business from my job on October 6, 2003. The Industrial Commission is wrong because of the mishandling of procedures pertaining to my livelihood are being misinterpreted because of my award letter from Social Security Administration stating that as of June 2009. Even though I had to wait for the Industrial Commission's decision for something in writing is another reason why it is an injustice to me and the public which puts a burden on anyone that is unaware that they can appeal. To reiterate, they kept me appealing without question. Social Security resolved that I was disabled as of June 2009. I believe that I am morally right because the denial and the circumstances do not mitigate the injury that was suffered. Does it relieve all responsible party from its moral obligations to pay for any loss wages and medical expenses?

STATEMENT OF THE CASE AND FACTS

1. The petitioner was an employee of NetJets from January 18, 1999 thru October 6, 2003. The petitioner was a Flight Support Coordinator, supporting eight ((8)) flight analyst.
2. I don't agree the supervisor's neighbor, who was hired to do the same job in Fleet Support but was only given minimal duties each day. According to ADA regulations reasonable accommodations were not provided, because this same person refused to follow work related requests. Being mentally stressed, overloaded, coupled with job duty changes, the rehabilitation process did not change my job function just the attitude of the coworkers. Being physically and mentally overwhelmed I believed physical therapy was all I needed to get better because of not knowing the difference between a personal or a business decision and why I am continuing to fight and appeal for any minority in this instance.
3. The conditions created industrial related stress in the work place as well as in the body of the petitioner resulting in this injury.
4. The petitioner was told by Workers Compensation Bureau that she could not file for unemployment and Workers Compensation Benefits at the same time.
5. From November 2003 to November 2009 the petitioner had inadequate insurance and was refused medical care by physicians.
6. The petitioner made an attempt at self-rehabilitation that failed.
7. Approximately 11-14-2009 the petitioner had high end medical insurance coverage and was now able to seek qualified medical treatment.
8. As recent as October 25, 2013 the petitioner underwent a 5 hour surgery on left shoulder (arthroscopy, shoulder, sub acromial).
9. The petitioner had lumbar spine fusion surgery March 4-6, 2010, and cervical disk, neck spine fusion surgery on November 10, 2011. The petitioner has incurred extensive medical costs.
10. On July 13, 2012 the petitioner filed an IC-52 Request for .522/.52 Relief with Ohio Industrial Commission.

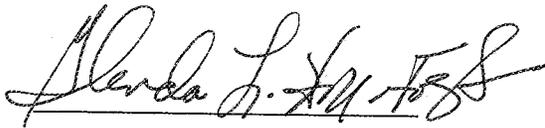
11. The petitioner presented doctors notes that indicated that petitioner had requested both physical and occupational therapy.
12. The claim was denied on the basis that the statute of limitations has expired which was wrongfully decided because of scanning documents and not reading the facts. There was no denial that the petitioner had suffered a life altering injury that resulted in not being able to work.
13. Statute of Limitations – ORC4123.52 Argument: Moldovan V. Lear Ziegler, Inc.; Ohio northern District Court – 672 F. 1023, Oct. 28, 1987 IV. Count1, Par 2. Defendants move for summary judgment on the basis that the statute of limitation had expired. As evidence, they pointed to Moldovan's claim for Worker's Compensation, on which Moldovan states that he first noticed his symptoms in 1978. (The affidavit of William J. Pruneski, exhibit 1) However, that same form also states that the diagnosis was not made until March 12, 1986. This suit was filed on May 16, 1986 just over two months after the diagnosis. The Ohio Supreme Court has ruled that [w]hen an injury does not manifest itself immediately the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant for the purposes of the statute of limitation contained in R. C. 2305.10. O'Stricker v. Jim Walter Corp., 4 Ohio St.3d 84, 447 N.2d 727 (1983) (syl. Par 2). Because the only evidence presented to the court on this issue is Moldovan workers compensation claim, and because the court must view all evidence in the light most favorable to the party opposing summary judgment, it must deny the motion on the ground.
14. The petitioner diagnosis was not made until 11-30-2009 because of bureaucracy.
15. The petitioner did not know the cumulative effect the injury was having on her body and her life until this moment. This is the first time her condition /diagnosis were articulated by and expert orthopedic physician. The petitioner argues that the diagnosis was good cause to reopen the claim under the rule that the Industrial Commission has continuing jurisdiction.
16. Copeland v. Bureau of Worker's Compensation, 2011 – Ohio – 813. Par 17. We have some guidance on this issue from our brethren from the Tenth District Rowland v. White Castle System, Inc. (1986), Franklin App. N0.86AP-188, wherein they reviewed and 11 year time span between injury and claim reactivation vis a vis R.C. 4123.52. they noted a letter sent to the bureau of

Worker's compensation at the time of the injury included medical bills which appellate payment for 11 years later: Par 18 "although we find it difficult to understand why the appellate allowed and inordinate period of time to lapse before taking any action, he was entitled as a matter of law to have the requested fees paid. Based on the facts before this court, we find that the bills were properly submitted to the bureau and the ten year statute of limitations in R.C. was tolled. *Druley v. Keller* (1966), 14 Ohio Misc. 81."

Conclusion

For the reasons discussed above, this case involves matters of public and great general interest and a jurisdictional question. 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,

A handwritten signature in cursive script, appearing to read "Glenda L. Hill-Foster".

Glenda L. Hill-Foster

Date: 12/30/14

CERTIFICATE OF SERVICE

I, Glenda L. Hill-Foster do swear or declare that on this date, 12 - 30, 2014, I have served the enclosed MEMORANDUM IN SUPPORT on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

The names and addresses of those served are as follows:

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And

Kevin J. Reis (0008669) Worker's Compensation Section

150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12-30-, 2014.



Glenda L. Hill-Foster

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel. Glenda L. Hill-Foster, :
Relator, :
v. : No. 14AP-335
Industrial Commission of Ohio, : (REGULAR CALENDAR)
Respondent.] :

MAGISTRATE'S DECISION

Rendered on November 19, 2014

Glenda L. Hill-Foster, pro se.

Michael DeWine, Attorney General, and Kevin J. Reis, for respondent.

IN MANDAMUS

ON RESPONDENT'S MOTION TO DISMISS

Relator, Glenda L. Hill-Foster, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied her request for relief under R.C. 4123.52 and/or R.C. 4123.522, and ordering the commission to find that she is entitled to that relief, and further ordering the commission to accept her medical evidence and reevaluate her claim.

Findings of Fact:

1. Relator was employed at Net Jet Service, Inc. ("Net Jets") from December 20, 1999 through October 3, 2003 when she left for reasons which are not reflected in the evidence.

2. In October 2003, relator filed a First Report of Injury form ("FROI-1") alleging that she sustained a work-related injury some time in January 2001. Relator's FROI-1 alleged unspecified injuries to her "neck, rotator cup [sic], shoulder [and] arm."

3. Relator completed a second FROI-1 alleging that she sustained a work-related injury some time in January 2002. This FROI-1 alleges unspecified injuries to "all other; multiple body parts N/A." Relator described the cause of her injury:

The job I perform [and] the overload of work in a daily basis caused me my injuries. The job I did was enough for 1 person [and] a part time person[.] The overload increased tremendously over a year and a half. I asked for help [and] got none due to the fact that (temp) the person I was to get help, she determined her schedule [and] (?) [sic] she could not work with me. So I was left to do the work by myself.

4. Net Jets rejected relator's claim on grounds that she was no longer employed by Net Jets and had never reported a work-related injury at the time alleged.

5. The Ohio Bureau of Workers' Compensation ("BWC") sent letters to relator, Net Jets, and Joan E. King, D.O., the physician listed on relator's FROI-1. The letters requested that relator, Net Jets, and Dr. King submit medical documentation to support relator's FROI-1.

6. In an order mailed November 7, 2003, the BWC disallowed relator's claim because "[m]edical documentation was not submitted to establish a causal relationship." The order notified relator that she had 14 days from the receipt of the order to file an appeal with the commission.

7. Relator did not file an appeal within 14 days nor did relator provide medical documentation in support of her FROI-1.

8. According to the stipulation of evidence, relator sought legal advice from Stephen L. Mindzak, Attorney at Law, in October 2005, The Bainbridge Firm and Eric A. Jones in August 2009, and from Philip J. Fulton Law Office in December 2012. Each of these three attorneys filed representation notices; however, none of them filed any motion or took any action on relator's behalf.

9. In June 2012, relator filed a notice of appeal with the commission and noted the following reason for the appeal: "To present medical documentation to establish a causal relationship to claim on behalf of the injured worker's claim for the injury descriptions of neck, rotator cuff, shoulder, arm." In her appeal, relator also sought relief under R.C. 4123.52 and/or R.C. 4123.522, and stated the basis of such relief was: "Other

(please see attached document of explanation)." (No explanation nor any other documentation appears to have been attached to relator's motion.)

10. A notice of hearing was sent to relator informing her that her request for relief under R.C. 4123.52 and/or 4123.522 would be heard before a staff hearing officer ("SHO") on Thursday, November 15, 2012.

11. At the time of the hearing, relator filed another form indicating that relief under R.C. 4123.522 was requested because she did not receive a copy of an order dated July 13, 2012. Relator did not indicate what entity issued the order which she did not receive and, neither relator nor the BWC has presented a copy of any order dated July 13, 2012. Relator indicated this order was mailed to an incorrect address.

12. The matter was heard before an SHO on November 15, 2012 and the SHO denied relator's request for relief under R.C. 4123.52 and/or 4123.522 as follows:

The Injured Worker filed an Ohio Workers' Compensation claim on 10/04/2003. This claim was denied by [the] Bureau of Workers' Compensation order of 11/07/2003. The Injured Worker never appealed this decision.

There is evidence in the record that the Injured Worker sought legal advice related to this claim in 2005 and again in 2009. Both Attorneys contacted by the Injured Worker are well known experienced Attorneys well versed in Ohio Workers' Compensation law. Neither Attorney took any action regarding this claim.

The Injured Worker has taken no action in this claim. The Injured Worker's claim was denied back in 2003, close to a decade ago. The Injured Worker should have received a copy of the denial order back in 2003. The Injured Worker should have reasonably known years ago that her claim had been denied. Even if the Injured Worker did not receive the order in 2003, and the evidence does not establish that presumption, the Injured Worker should have known multiple years ago that her claim had been denied. The Injured Worker's complete failure to pursue her rights in any timely fashion is now a bar to her request for .522 [sic] relief.

Ohio Revised Code 4123.522 states in part: "If any person to whom a notice is mailed fails to receive the notice and the commission, upon hearing, determines that the failure was due to cause beyond the control and without the fault or neglect of such person or his representative and that such person or his representative did not have actual knowledge of the import of the information contained in the notice, such person may take

the action afforded to such person within twenty-one days after the receipt of the notice of such determination of the commission. Delivery of the notice to the address of the person or his representative is prima-facie evidence of receipt of the notice by the person."

The relief sought by the Injured Worker shall not be granted unless the Injured Worker or her representative did not have actual knowledge of the import of the * * * information contained in the notice. The Injured Worker twice contacted competent attorneys well versed in the Ohio Workers' Compensation law. The Injured Worker clearly was aware of the Bureau of Workers' Compensation order of 11/07/2003 and the fact that her claim had been denied. Further, the Injured Worker has not established that she did not receive a mailed copy of the Bureau of Workers' Compensation order of 11/07/2003.

The Injured Worker has failed to establish a basis for the [Industrial Commission] to find continuing jurisdiction over this claim under Ohio Revised Code 4123.52. The Injured Worker's six page statement asking for the right to "re-appeal" her case was * * * read, but her statement does not establish a legal basis for the [Industrial Commission] to exercise continuing jurisdiction over the claim.

The claim was denied in 2003 and the [Industrial Commission] does not have continuing jurisdiction to reconsider the matter.

13. After the SHO determined there was no basis for exercising continuing jurisdiction or to reconsider relator's denied claim under R.C. 4123.522, an ex parte order was issued dismissing relator's appeal as untimely.

14. Thereafter, relator filed the instant mandamus action in this court. With her evidentiary packet (to which respondent did not stipulate), relator has submitted medical records some which date back to 2003. Some of these documents appear to be office notes from doctors and operative reports. Further, relator has included statements from Blue Cross/Blue Shield showing payment for various medical procedures. None of these documents appear to have been filed with either the BWC or the commission.

15. On July 14, 2014, the commission filed a motion to dismiss arguing that this is a right to participate case and not an extent of disability case, and this court does not have jurisdiction.

16. The matter is currently before the magistrate on respondent's motion to dismiss and relator's request for a writ of mandamus.

Conclusions of Law:

For the reasons that follow, it is this magistrate's decision that this court should deny respondent's motion to dismiss and further deny relator's request for a writ of mandamus.

The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975). As such, a complaint for writ a of mandamus is not subject to dismissal under Civ.R. 12(B)(6), if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being

asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995).

In its motion to dismiss, respondent argues that relator's failure to appeal the disallowance of her claim in 2003 bars her from being able to bring this mandamus action. Respondent asserts that relator's option was to follow R.C. 4123.512, and file a complaint in the Franklin County Court of Common Pleas ("common pleas court"). Because relator's claim was never allowed, respondent contends that this is a "right to participate" case and not an "extent of disability case." As such, respondent contends that the common pleas court has jurisdiction and this court does not.

In a sense, respondent is correct. Relator's claim has never been allowed. However, relator has asserted that she did not receive a copy of the November 7, 2003 order which denied her claim. As such, relator was not prohibited from bringing a mandamus action asserting that the commission abused its discretion when it did not grant her relief pursuant to R.C. 4123.522 and, as such, respondent's motion to dismiss should be denied.

R.C. 4123.522 provides, in pertinent part, as follows:

The employee, employer, and their respective representatives are entitled to written notice of any hearing, determination, order, award, or decision under this chapter * * *. An employee, employer * * * is deemed not to have received notice until the notice is received from the industrial commission or its district or staff hearing officers, the administrator, or the bureau of workers' compensation by both the employee and his representative of record, both the employer and his representative of record[.]

If any person to whom a notice is mailed fails to receive the notice and the commission upon hearing, determines that the failure was due to cause beyond the control and without the fault or neglect of such person or his representative and that such person or his representative did not have actual knowledge of the import of the information contained in the notice, such person may take the action afforded to such person within twenty-one days after the receipt of the notice of such determination of the commission. Delivery of the notice to the address of the person or his representative is prima-facie evidence of receipt of the notice by the person.

R.C. 4123.522 provides "a rebuttal presumption, sometimes called the 'mailbox rule' that, once a notice is mailed, it is presumed to be received in due course." *Weiss v. Ferro Corp.*, 44 Ohio St.3d 178, 180 (1989). In order to successfully rebut that presumption, the party alleging the failure to receive notice must prove that:

(1) the failure of notice was due to circumstances beyond the party's or the party's representative's control, (2) the failure of notice was not due to the party's or the party's representative's fault or neglect, and (3) neither the party nor the party's representative had prior actual knowledge of the information contained in the notice.

Relator has not submitted an affidavit nor has she submitted other evidence to establish all the elements necessary to rebut the presumption of delivery under R.C. 4123.522. To the extent that relator checked the box on the form indicating that the order was mailed to an incorrect address, relator never explains when she left the Westerville, Ohio address listed on her FROI-1, and to which the order was mailed. While relator does currently provide a different address in New Albany, Ohio, relator has not indicated when she moved to that address and, had she moved during the pendency of the action in 2003, relator has not demonstrated that she submitted a change of address form so the order would be mailed to the proper address. As such, relator has not demonstrated that any failure of notice was due to circumstances beyond her control.

Based on the foregoing, it is this magistrate's decision that this court should deny respondent's motion to dismiss. However, inasmuch as relator has failed to demonstrate that the commission abused its discretion in denying her relief pursuant to either R.C. 4123.52 and/or 4123.522, this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

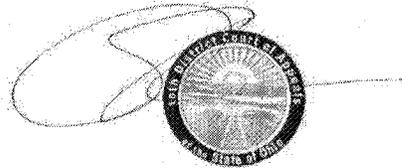
NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

Tenth District Court of Appeals

Date: 11-19-2014
Case Title: GLENDA HILL-FOSTER -VS- OHIO INDUSTRIAL COMMISSION
Case Number: 14AP000335
Type: MAGISTRATES DECISION

So Ordered

The image shows a handwritten signature in black ink, which appears to be 'S. Brooks', written over a circular official seal. The seal contains the text 'TENTH DISTRICT COURT OF APPEALS' and 'FRANKLIN COUNTY OHIO' around a central emblem.

/s/ Magistrate Stephanie Brooks