[Cite as *Macon v. Ohio Dept. of Job & Family Servs.*, 2009-Ohio-3229.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mary H. Macon,	:	
Appellant-Appellant,	:	
v.	:	No. 08AP-1036 (C.P.C. No. 07CVF10-14526)
Ohio Department of Job and Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2009

Mary H. Macon, pro se.

Richard Cordray, Attorney General, *Timothy A. Lecklider*, and *Pooja Alag Bird*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, Mary H. Macon, appeals from the judgment of the Franklin County Court of Common Pleas affirming the order of the State Personnel Board of Review ("SPBR"), which affirmed appellant's removal from her position with appellee, Ohio Department of Job and Family Services ("ODJFS"). For the following reasons, we affirm.

{¶2} Appellant commenced employment with ODJFS on December 10, 2001. At the time of her removal on November 21, 2005, appellant was in a classified civil service

position as bureau chief and at the highest classified exempt position within ODJFS. On July 15, 2005, Deputy Director Kimberly Liston ("Liston") presented appellant with her annual performance evaluation. Pursuant to appellee's policy, employees are afforded three steps to appeal an evaluation. Displeased with her evaluation, appellant requested a Step 1 review of her evaluation on July 20, 2005, and said request was denied on August 16, 2005. Appellant then requested a Step 2 review of the evaluation that again was denied. Appellant filed a Step 3 request for evaluation by the Department of Administrative Services ("DAS"), and was notified by letter dated October 28, 2005, that DAS denied the same.

{¶3} On July 26, 2005, Judith McNabb ("McNabb"), returned from disability leave and was assigned as appellant's administrative assistant. According to McNabb, appellant discussed her performance evaluation appeal (hereafter "appeal"), and used McNabb's time to aid appellant in pursuit of her appeal. McNabb described that appellant had her proofread memoranda, organize materials, and conduct voluminous copying of documents, all in support of appellant's appeal. McNabb testified that, on one occasion, appellant called her at home on a weekend and asked McNabb to help organize documents for the appeal. Also, on September 22, 2005, appellant asked McNabb to drive her downtown for a meeting with appellant's supervisors and had McNabb wait until appellant called McNabb to pick her up after the meeting.

{¶4} Concerned about the amount of time being devoted to appellant's appeal and about the tasks to which she was being assigned, McNabb contacted Liston, who suggested McNabb meet with Liston's administrative assistant, Susan Beamer. On September 29, 2005, McNabb met with Ms. Beamer, Assistant Deputy Director Keith

Nichols ("Nichols"), and Labor Relations Officer Deborah Connolly. As a result of this meeting, McNabb submitted a written statement with respect to her concerns, and ODJFS commenced an investigation.

{¶5} Subsequent to the investigation, Liston requested that ODJFS Labor Relations proceed with a pre-disciplinary meeting. Said meeting was held, and appellant was removed effective November 21, 2005, for neglect of duty, dishonesty, failure of good behavior, and insubordination.

{¶6} Appellant appealed her removal to SPBR. After a hearing, an Administrative Law Judge ("ALJ"), issued a report and recommendation finding that appellee did not prove insubordination, but did prove the allegations of neglect of duty, dishonesty, and failure of good behavior. In so finding, the ALJ recognized that the matter came down to the testimony of appellant and McNabb and that appellant was not credible. In her decision, the ALJ stated the following:

> * * * Appellant Macon used the power of her position to assign Ms. McNabb, a subordinate, to spend the majority of her time working on an issue personal to Appellant Macon and not in furtherance of the business of the bureau. Appellant Macon was dishonest in her motives, intimidated her subordinate, neglected her duties and exhibited a failure of good behavior by trying to absolve herself of any wrong doing by trying to cast Ms. McNabb in a bad light.

(ALJ Report and Recommendation at 18-19.)

{¶7} The SPBR reviewed the matter along with appellant's objections to the ALJ's report and recommendation. After such review, the SPBR adopted the ALJ's recommendation that appellant's removal be affirmed. Appellant appealed to the common pleas court pursuant to R.C. 119.12. On December 27, 2008, the trial court

affirmed the SPBR's decision and found the ALJ's report and recommendation was not unlawful or unreasonable, nor against the manifest weight of the evidence. The trial court also concluded the SPBR's decision was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶8} This appeal followed, and appellant brings the following six assignments of error for our review:

> 1. THE LOWER COURT ERRED IN CONCLUDING THAT MS. MACON'S TERMINATION WAS LAWFUL AS THE UNCONTROVERTED EVIDENCE AT HEARING ESTABLISHED THAT THERE IS NO STATE LAW, ADMINISTRATIVE RULE, POLICY, DIRECTIVE, WORK RULE OR OTHER PRACTICE THAT PROHIBITS A STATE EMPLOYEE FROM ENGAGING IN THE PERFORMANCE EVALUATION REVIEW PROCESS DURING STATE TIME AND, THEREFORE, A PERSON MAY NOT BE PUNISHED FOR VIOLATING A NON-EXISTENT LAW, RULE OR POLICY.
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> 2. THE LOWER COURT ERRED IN CONCLUDING THAT THE OUTCOME OF A PERFORMANCE EVALUATION REVIEW SOLELY BENEFITS THE INTEREST OF AN EMPLOYEE AS THE HISTORY OF THE CIVIL SERVICE SYSTEM IN OHIO CLEARLY ESTABLISHES THAT A PROPERLY FUNCTIONING AND RELIABLE MERIT SYSTEM BENEFITS ALL THE PEOPLE OF THE STATE.
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> 3. THE LOWER COURT ERRED IN FINDING THAT MS. MACON ABUSED HER AUTHORITY AND SPENT EXCESSIVE STATE TIME AND RESOURCES ON THE PERFORMANCE EVALUATION REVIEW AS THE EVIDENCE ELICITED AT THE HEARING ESTABLISHED THAT MS. MACON AND HER SUBORDINATE SPENT NEGLIGIBLE WORK TIME ON THE PERFORMANCE EVALUATION APPEAL AND NEITHER WAS EVER ACCUSED OF FAILING TO PERFORM THEIR JOB DUTIES.
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> 4. THE LOWER COURT ERRED IN CONCLUDING THAT THE ADMINISTRATIVE LAW JUDGE'S REPORT AND

> RECOMMENDATION COMPORTED WITH THE LAW AS THE FACTS CLEARLY ESTABLISHED THAT PROGRESSIVE DISCIPLINE WAS WARRANTED FOR A FIRST TIME VIOLATION OF A NON-EXISTENT AND NON-ARTICULATED LAW, RULE, OR POLICY THAT IN NO WAY AFFECTED MS. MACON IN PERFORMING HER JOB DUTIES.
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> 5. THE LOWER COURT ERRED IN FAILING TO FIND THAT MS. MACON WAS IMPROPERLY DISCIPLINED TWICE FOR THE SAME OFFENSE WHEN THE FACTS SHOW THAT SHE RECEIVED A LETTER OF REPRIMAND ON OCTOBER 4, 2005 THAT WAS PLACED IN HER PERSONNEL FILE AND WAS THEN SUBSEQUENTLY TERMINATED BASED ON THE SAME FACTUAL ALLEGATIONS CONTAINED IN THE WRITTEN REPRIMAND.
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> 6. THE LOWER COURT ERRED IN CONCLUDING THAT MS. MACON WAS AFFORDED ADEQUATE DUE PROCESS UNDER THE LAW AS THE ORDER OF REMOVAL CONTAINED NOTHING MORE THAN A RECITATION OF R.C. § 124.34(A) AND DID NOT PROPERLY PLACE MS. MACON ON NOTICE OF THE SPECIFIC REASONS FOR HER TERMINATION AS REQUIRED BY LAW.

{¶9} Prior to addressing these assigned errors, we must first address appellant's motion to supplement the record filed after oral arguments were heard in this matter. The information with which appellant seeks to supplement the record consists of Bureau of Employment Services Customer Surveys that, according to appellant, are "critically relevant." (Apr. 24, 2009 Motion at 1.) Aside from this conclusory statement, however, appellant provides no basis for why this court should grant her motion or why this issue was not timely raised. Further, to the extent this motion can be construed as a suggestion that the ALJ wrongfully denied admission of this evidence, we note that this issue has not previously been raised and, as such, is waived. See *Leslie v. Ohio Dept. of*

Dev., 171 Ohio App.3d 55, 2007-Ohio-1170. Accordingly, appellant's motion to supplement the record is denied.

{¶10} We now address appellant's assigned errors. In an administrative appeal, pursuant to R.C. 119.12, the common pleas court considers the entire record and determines whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

> * * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570-71.

{¶11} The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Though the findings of the agency are not conclusive, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts. *Maurer v. Franklin Cty. Treasurer*, 10th Dist. No. 07AP-1027, 2008-Ohio-3468, ¶15, citing *Univ. of Cincinnati* at 111; see also *Jones v. Franklin Cty. Sheriff*

(1990), 52 Ohio St.3d 40, 43, quoting *Graziano v. Amherst Exempted Village Bd. of Edn*. (1987), 32 Ohio St.3d 289, 293 (stating " 'due deference must be accorded to the findings and recommendation of the [ALJ] * * * because it is the [ALJ] who is best able to observe the demeanor of the witnesses and weigh their credibility' ").

{¶12} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the agency's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the agency's order was in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶13} In her first assignment of error, appellant contends it was error for the trial court to conclude her termination was lawful because there is no rule, policy or other directive that explicitly prohibits a state employee from engaging in the activities in which she did, i.e., working on her performance evaluation appeal during work hours. Hence, appellant does not dispute that she worked on her appeal while at work but, rather, it is appellant's contention that, because there is no directive disallowing such conduct, she was without notice that such conduct was in any way prohibited.

{¶14} However, there is more involved with appellant's termination than appellant expending a nominal amount of work time on her appeal as she asserts under this assigned error, and this matter concerns more than a violation of a "non-existent" work rule. Appellant's removal was based not simply on appellant pursuing her appeal during work hours, but on expending excessive amounts of time that resulted in a neglect of her duties. Appellant's removal was also based on her utilizing McNabb's time and intimidating McNabb in a manner deemed to be an abuse of a subordinate. We recognize appellant disagrees with McNabb's version of events; however, such disputes of fact are to be resolved by the ALJ.

{¶15} The primary witnesses to testify at the hearing were appellant and McNabb. McNabb testified that appellant and McNabb worked on appellant's appeal in some form or another on a daily basis. According to McNabb, she was asked by appellant to discuss the matter, to sort through e-mails, to put files together, to print things, to proofread materials, and to provide her opinion with respect to the appeal.

{¶16} McNabb testified that on one occasion appellant had a meeting to attend with her supervisors at the state office tower. Appellant asked McNabb to drop her off at the downtown meeting and to wait until appellant called to be picked up. After the meeting, appellant described to McNabb that she requested the meeting be timely because she had ridden with McNabb who was also attending a meeting downtown. This, according to McNabb, was completely untrue, as McNabb had no reason to be downtown at that time and was there only because of appellant's request.

{¶17} On another occasion, appellant asked McNabb to go downtown to file appellant's appeal. A few minutes later, however, appellant called McNabb again and

said she did not feel comfortable with that because appellant did not want anyone to see McNabb doing that for her. So, instead, appellant asked if McNabb would drive downtown and meet appellant in the parking garage with the appeal.

{¶18} At another time, appellant called McNabb at home on a Sunday and asked if McNabb would help organize documents for appellant's appeal. Additionally, McNabb testified that appellant began making comments to McNabb indicating that McNabb's supervisors were "watching" her. After appellant became aware that McNabb had met with supervisory personnel regarding the use of her time, McNabb testified appellant came to her and said that maybe McNabb returned from her disability leave too soon and that maybe she should think about going back on disability leave.

{¶19} Appellant testified to the contrary and that the amount of time spent on her appeal was negligible. Appellant testified she did ride downtown to a meeting with McNabb, but it was because McNabb indicated she could go downtown and pick something up for her husband. According to appellant, though she did call McNabb at home on a Sunday, it was to offer McNabb a place to go because McNabb previously indicated she and her son would just be driving around that day. Appellant disputed McNabb's testimony that she asked McNabb to work on anything during that phone conversation. Appellant also testified McNabb must have misunderstood many of the comments made by appellant because at no time was she trying to be intimidating.

{¶20} The ALJ simply found appellant's testimony to not be credible, a finding within the ALJ's province as trier of fact. *Long v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-691, 2009-Ohio-643, ¶48. In assessing credibility, the ALJ noted several examples of the inconsistent nature of appellant's testimony. Based on the problems

noted by the ALJ, the ALJ was not arbitrary in her credibility determinations. The ALJ examined the record, discussed the testimony of the witnesses, including appellant's inconsistencies, and made a credibility determination, all of which are within the ALJ's province as trier of fact. See *Maurer*, supra, at ¶20. Though appellant reargues her version of the facts to us, as she did to the trial court, such is not a reason to reverse the trial court's judgment. Accordingly, we overrule appellant's first assignment of error.

{¶21} In her second assignment of error, appellant contends the trial court's statements that "[c]onducting mandatory employee reviews is a function that furthers the interest of the employer" and "[a]n appeal of the outcome of such review by an individual employee furthers the interest of the employee" are in error. To support her argument, appellant proceeds to direct us to a number of potential and tangential employer benefits that may result if an employee successfully overturns a poor performance evaluation on appeal.

{¶22} While an employer may arguably receive some tangential benefit from an employee's appeal of a performance review, there can be no doubt that pursuit of the same is voluntary and primarily furthers the interest of the employee. Moreover, regardless of these challenged statements, the finding of the trial court was that appellant spent an excessive amount of time on her appeal to the detriment of appellee. The evidence also demonstrated that not only did appellant utilize her own time, but also that of McNabb, appellant's subordinate. Thus, even if the challenged statements of the trial court were in error, reversal would not be warranted. Accordingly, we overrule appellant's second assignment of error.

{¶23} In her third assignment of error, appellant contends it was error for the trial court to find appellant spent an excessive amount of state time and resources on her appeal because the evidence actually established appellant and McNabb devoted "negligible" work time on the appeal.

{¶24} The amount of time spent on appellant's appeal came from the testimony of two persons – appellant and McNabb. As previously stated, the testimony established that appellant had McNabb work on appellant's appeal for a number of hours each day over the course of several weeks. Though appellant attempts to direct us to inconsistencies within McNabb's testimony, we reiterate that it was within the province of the ALJ as trier of fact to assess credibility and determine the weight of the evidence. McNabb was subject to cross-examination during the hearing on all the issues appellant currently raises before us, and appellant presented her version of facts to the ALJ as well. We have already found the ALJ was not arbitrary in her credibility determinations and, as a result, we overrule appellant's third assignment of error.

{¶25} In her fourth assignment of error, appellant contends it was error for the trial court to conclude the ALJ's report and recommendation comported with law, as the facts establish progressive discipline rather than removal was warranted. Under Ohio Adm.Code 124-1-02(U), progressive discipline is defined as:

> [T]he act of disciplining an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offense, a short suspension for the second offense, and a longer suspension or removal for the third offense. The severity of the offense may negate the use of progressive discipline.

{¶26} Appellant, however, never raised this issue before the trial court. A party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings. *Leslie*, supra (applying this tenet of law to administrative proceedings), citing *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960. See also *King v. Ohio Dept. of Job & Family Servs.*, 9th Dist. No. 22576, 2005-Ohio-4939.

{¶27} Even if we were to address this issue, we could only conclude it is without merit. Nichols testified at the hearing that the disciplinary grid serves as a recommendation for discipline, but is not mandatory. Secondly, it is clear that certain offenses could warrant severe discipline such as removal, even for a first offense. According to Nichols, there may be mitigating or aggravating circumstances that alter how the grid is followed. Nichols testified that appellant was in a high position of trust as a bureau chief and was responsible for more than 70 employees and three major M.I.S. systems. As such, in Nichols' opinion, such a position calls for the "highest ethical and professional standards" and appellant's actions constituted an "egregious offense." (Tr. 159.) Hence, even if we were to consider this assigned error, we would overrule it because the grid providing for progressive discipline is discretionary, not mandatory, and there is evidence of aggravating circumstances in the record. See *Gaither-Thompson v. Ohio Civ. Rights Comm.*, 176 Ohio App.3d 493, 2008-Ohio-2559 (while R.C. 124.34 describes the procedures governing an agency's termination of an employee in the classified civil service, it does not require the agency to follow the rules of progressive discipline unless the agency agrees otherwise in a collective-bargaining agreement);

Swigart v. Kent State Univ., 11th Dist. No. 2004-P-0037, 2005-Ohio-2258; *Carmichael v. State Personnel Bd. of Review* (June 10, 1993), 10th Dist. No. 92AP-1707.

{¶28} For the foregoing reasons, appellant's fourth assignment of error is overruled.

{¶29} In her fifth assignment of error, appellant contends the trial court erred in failing to find appellant was improperly disciplined twice for the same offense.

{¶30} According to appellant, a letter dated October 14, 2005 constituted a written reprimand for appellant " 'using state time, state resources and other staff for personal work on a performance evaluation appeal.' " (Appellant's brief at 28.) Therefore, according to appellant, her termination a month later for the same offense is barred by the merger and bar rule of Ohio Adm.Code 124-3-05, which provides:

> (A) All incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed, of which an appointing authority has knowledge and for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority. Incidents occurring after the incident for which a non-oral disciplinary action is being imposed, but prior to the issuance of the non-oral disciplinary order, are not merged and may form the basis for subsequent discipline.
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> * * *
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> (2) For purposes of this rule, non-oral discipline includes written reprimands and suspension orders. It does not include a written memorandum of oral counseling or written warnings.
>
> (B) Except as provided in rules 124-3-01 and 124-9-04 of the Administrative Code, once discipline is imposed for a particular incident, that incident shall not be used as the basis for subsequent discipline.
>
> (C) Upon written notice to the employee, an appointing authority may rescind non-oral discipline. Rescission of non-

> oral discipline under this rule shall not be a bar to issuing another non-oral discipline based upon the same allegations.

{¶31} Appellant contends her November 21, 2005 termination should have been merged into and barred by the written reprimand received on October 4, 2005. Though the letter is not titled a written reprimand, appellant contends it contains all the indicia, and, therefore, should be considered the same. The trial court reviewed the letter and found it does not mention any sanctions and does not convey any suggestion that it is disciplinary in nature, and, thus, the merger and bar rule is inapplicable. We agree.

{¶32} Nichols testified at the hearing that the letter was not discipline, and the letter itself states:

> It has come to our attention that you have been using state time, state resources and other state staff for personal work on a performance evaluation appeal. This letter puts you on notice that utilizing state employees on state time for your personal business is improper and such actions will not be tolerated. Your actions in this matter may result in discipline up to and including removal.
>
> Further, any retaliatory actions against employees under your supervisory authority or inappropriate comments regarding the Deputy Director or any other management personnel will result in disciplinary action, up to and including removal.

(Oct. 4, 2005 letter at 1.)

{¶33} As evidenced, the letter contains reference to possible future discipline, but is not itself disciplinary in nature. Because the letter is not a written reprimand or other disciplinary measure, the merger and bar does not apply, and appellant's fifth assignment of error is overruled.

{¶34} In her sixth assignment of error, appellant contends it was error for the trial court to conclude that she was afforded adequate due process when she was not properly placed on notice of the specific reasons for her termination. As explained in *Emanuel v. Columbus Recreation & Parks Dept.* (1996), 115 Ohio App.3d 592, because classified state civil servants can be removed only for cause, they possess a property interest in continued employment, which right is protected by the Due Process Clause of the Fourteenth Amendment. To comply with such due process requirements, "an appointing authority is required to afford an employee certain protections before terminating employment, including oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to be heard before being terminated." Id. at 597, citing *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 546-48, 105 S.Ct. 1487, 1495-97; *Seltzer v. Cuyahoga Cty. Dept. of Human Servs.* (1987), 38 Ohio App.3d 121, 122.

{¶35} As the trial court found, the record undisputedly reflects appellant was given a pre-disciplinary hearing notice containing not only notice of the charges, but also a description of the evidence underlying the same. Further, the record undisputedly reflects appellant was given an opportunity to be heard, and that appellant was aware of her post-termination administrative rights and procedures. Finally, we point out that appellant was given full opportunity to present evidence and challenge her removal before the SPBR and the common pleas court. *Swigart* ¶49, citing *Loudermill*, 470 U.S. at 547, 105 S.Ct. at 1496, fn. 12 (" 'the existence of post-termination procedures is relevant to the necessary scope of predetermination procedures' "); *Robinson v. Springfield Loc. School Dist. Bd. of Edn.* (2001), 144 Ohio App.3d 38, 44 ("a minimal opportunity to be heard at a

pretermination hearing is sufficient where the employee is entitled to a full evidentiary hearing post-termination"). Based on the foregoing, we are unable to find appellant was not afforded the requisite due process prior to her termination, and we overrule appellant's sixth assignment of error.

{¶36} Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports the SPBR's decision upholding appellant's discharge from employment, we overrule appellant's six assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Motion to supplement denied;
judgment affirmed.

BRYANT and BROWN, JJ., concur.