[Cite as *Cabot 570 Polaris Parkway, L.L.C. v. Carlile, Patchen & Murphy L.L.P.*, 2015-Ohio-5110.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CABOT 570 POLARIS PARKWAY, LLC, ET AL.	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiffs-Appellants	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
CARLILE, PATCHEN & MURPHY, LLP, ET AL.	:	Case No. 15 CAE 02 0012
	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 13-CVA-090772

JUDGMENT: Affirmed

DATE OF JUDGMENT: November 30, 2015

APPEARANCES:

For Plaintiffs-Appellants

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For Defendants-Appellees

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Farmer, P.J.

{¶1} On May 20, 2004, Cabot 570 Polaris Parkway Property Manager, LLC and appellants herein, twenty-three tenants-in-common (hereinafter "appellants" or "TICs"), entered into a loan/mortgage agreement with Citigroup Global Markets Realty Corporation for the purchase of a commercial property.

{¶2} In June 2011, the parties were in default on the loan. On January 25, 2012, Bank of America, N.A., as successor in interest to Citigroup Global, filed a foreclosure action against the parties in Delaware County, Ohio (Case No. 12 CV 01 0086). On February 16, 2012, Timothy Kroll, CEO and owner of Cabot Investment Properties, LLC and Cabot 570, hired appellee, Carlile, Patchen & Murphy LLP, to represent all the defendants, including appellants, in the foreclosure action. All appellants were aware of the representation by the end of May 2012. Appellee was also representing Cabot Investment Properties, a similar Cabot property management company, and thirty TICs in a foreclosure action in the United States District Court for the Northern District of Ohio involving an Ashtabula commercial property.

{¶3} On June 20, 2012, TIC No. 7 left appellee's representation, suspecting Cabot 570 committed corporate malfeasance in managing the property leading to the foreclosure. TIC No. 7 consented to appellee's continued representation of the remaining appellants/TICs. TIC No. 7 filed motions for leave to file an amended answer, counterclaim, and cross-claim against Cabot 570.

{¶4} On July 16, 2012, TIC No. 7 issued a subpoena to PNC Bank, N.A., to produce any and all records regarding operating accounts held in the name of Cabot

570. Appellees opposed the motion. TIC No. 7 received the requested records on July 20, 2012.

{¶5} On August 9, 2012, TIC No. 7 withdrew its consent of appellee's continued representation of the remaining appellants/TICs. Appellee filed a motion to withdraw as counsel which was granted on September 18, 2012.

{¶6} On September 13, 2013, appellants filed a complaint against appellee and two attorneys in the firm, Joseph Patchen and Maria Guthrie, claiming legal malpractice. All parties filed motions for summary judgment. By judgment entry filed January 12, 2015, the trial court granted appellees' motion for summary judgment and denied appellants' motion, finding appellants failed to produce expert testimony to establish damages, and if there were damages, failed to establish a causal connection between appellees' actions and the damage.

{¶7} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶8} "THE COURT BELOW ERRED IN FINDING THAT PLAINTIFF-APPELLANTS FAILED TO PRODUCE REQUIRED EXPERT TESTIMONY AS TO THEIR $221,080 LOSS ARISING FROM APPELLEES' DELAYING DISCOVERY OF THEIR CABOT POLARIS PROPERTY MANAGER CLIENT'S THEFTS DUE TO THEIR FAILURE TO DISCLOSE THE JOINT REPRESENTATION TO THE APPELLANTS, THEIR FAILURE TO DISCLOSE TO APPELLANTS THAT THEY HAD BEEN NAMED AS DEFENDANTS IN THE POLARIS FORECLOSURE CASE AND BY DELAYING DISCOVERY OF THE THEFTS FURTHER BY ACTIVELY OPPOSING APPELLANT

TIC #7'S EFFORTS TO DISCOVER THE THEFTS FROM THE OPERATING ACCOUNT THROUGH THE ISSUANCE OF SUBPOENAS AND DISCOVERY MOTIONS."

II

{¶9} "THE COURT BELOW ERRED IN FINDING THAT PLAINTIFF-APPELLANTS FAILED TO PRODUCE REQUIRED EXPERT TESTIMONY AS TO THEIR $48,413.75 LOSS ARISING FROM APPELLEES' ACTIVE OPPOSITION TO TIC #7'S SUCCESSFUL EFFORTS TO OBTAIN COURT ORDERS REQUIRING PRODUCTION OF THE BANK STATEMENTS THAT DISCLOSED THE CABOT POLARIS PROPERTY MANAGER'S THEFTS FROM THE POLARIS OPERATING ACCOUNT."

III

{¶10} "THE COURT BELOW ERRED IN GRANTING DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT WHEN APPELLANTS PRESENTED EXPERT TESTIMONY OR THE BEST EVIDENCE ON EACH ELEMENT OF THEIR LEGAL MALPRACTICE CLAIMS AGAINST APPELLEES."

I, II, III

{¶11} Appellants claim the trial court erred in denying their motion for summary judgment and granting appellees' motion for summary judgment. Appellants claim the trial court erred in finding they failed to produce expert testimony to establish damages, and if there were damages, failed to establish a causal connection between appellees' actions and the damage. We disagree.

{¶12} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶13} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987). Despite appellants' argument relative to the trial court's findings, this court's standard of review is de novo.

{¶14} The complaint filed on September 13, 2013 alleged the following: 1) appellants collectively owned a commercial property known as 570 Polaris Parkway in Westerville, Ohio; 2) Cabot 570 and appellants had entered into an agreement with a

financial institution to purchase the property; 3) Cabot 570 managed the property; 4) on January 25, 2012, the financial institution filed a foreclosure action against Cabot 570 and appellants for failure to pay on the loan; 5) on February 16, 2012, appellees commenced representation of all the parties in the foreclosure action; 6) all appellants were aware of appellees' representation by the end of May 2012; 7) on June 29, 2012, TIC No. 7 retained independent counsel; 8) on September 18, 2012, the trial court granted appellees' motion to withdraw as counsel for the remaining appellants/TICs; 8) on July 10, 2013, the commercial property was sold for a sum greater than the amount owed.

{¶15} It is during this period of representation (February 16, 2012 to September 18, 2012) that appellants alleged a breach of duty of disclosure (Count 1), breach of duty of loyalty (Counts 2 and 3), breach of duty of competency (Count 4), and impermissible conflict of interest and legal malpractice (Count 5).

{¶16} Appellants alleged damages of $221,080 in losses from the sale/redemption of the property (Counts 1 and 2), and TIC No. 7 alleged damages of $48,414 in attorney fees incurred in the foreclosure action to file additional pleadings and discovery requests relative to the PNC operating account (Counts 3 and 4). The prayer for damages included $16,386 for the "incurrence of attorney fees and costs in prosecuting this action" and "$25,000 or such greater amount" for "exemplary or punitive damages."

{¶17} Based upon the facts as set forth in the complaint, the causes of action stem from appellees' representation of TIC No. 7 from February 16, to June 29, 2012, and the remaining appellants from February 16, to September 18, 2012. Appellants

factual claims for malpractice include non-disclosure that a foreclosure action had been filed, non-disclosure that appellees were representing them and had filed an answer on their behalf, and non-disclosure that appellees were also representing Cabot 570. Appellants argue the dual representation created a conflict of interest due to alleged improper accounting by Cabot 570 which arose in the Fall of 2011 and appellees' fees for representing them were paid by another. Appellants also allege, minus TIC No. 7, that appellees failed to advise of possible defenses to the foreclosure action.

{¶18} All parties filed motions for summary judgment. On August 1, 2014, in support of their motion, appellants filed the affidavit of Ann Lhota, the on-site sub-property manager of the commercial property. Ms. Lhota averred to the PNC operating account and irregular wire transfers by Cabot Investment Properties, LLC and Cabot 570 from September 16, 2008 to September 12, 2012, creating a shortfall in the account of $221,080. Also on August 1, 2014, appellants filed the affidavit of David Bryan, director of Bancsites, Inc., TIC No. 7. Mr. Bryan, a licensed Ohio attorney representing TIC No. 7, averred the following:

> 9. From May 21, 2012 to on or about June 15, 2012, TIC #7 made demands on Carlile, Patchen & Murphy, LLP for the documents it demanded of CIP [Cabot Investment Properties] on January 20, 2012, with an increasing emphasis on requesting bank statements from Cabot Property Manager's Operating Account. On May 22, 2012, defendant Joseph Patchen *asked its client, CIP, for permission* to meet with its TIC #7 client at the Polaris Building the next day. See Exhibit J hereto. During

this same period, TIC #7, after making a formal demand for same, received multiple assurances from Kroll and Joseph Patchen (*"Patchen"*) that its requests were reasonable and the documents would be received. Exhibits K and L hereto. (e-mail exchange between Patchen and Bryan, 5/30/2012)

10. On and after June 15, 2012, TIC #7 notified Carlile, Patchen & Murphy, LLP that it was hiring independent counsel to represent its interests in the Polaris Foreclosure Case and directed its independent counsel to prepare a motion requesting an order of the Court requiring Kroll to turnover the documents and records TIC #7 was seeking, to subpoena bank records from PNC Bank and to move the Court for leave to file a supplemental answer to the complaint that included, among other matters, cross-claims against Cabot Polaris Property Manager. See Exhibit A (Polaris Docket Sheet entries at 6/29/2012).

11. On July 13, 2012, Carlile, Patchen & Murphy, LLP filed opposition papers to TIC 7's motions, including a Contra Memorandum to the Motion for Turnover of property and on July 19, 2012 filed a Motion to Quash TIC #7's Subpoena of PNC Bank records, see Exhibits M and N hereto. (Memo Contra TIC #7 Motion for Turnover of Property filed 7/13/12 and Motion to Quash filed 7/19/2012).

12. After the July 19th hearing on the motions the Court granted TIC #7's motion to file cross-claims against Cabot Polaris Property Manager and ordered the parties to draft a consent entry permitting TIC

> #7 to obtain some of the bank statements it had been requesting. See Exhibit A hereto. (Docket Sheet @ 7/24/12)
>
> 13. On July 20, 2012, TIC #7 received bank statements from the Cabot Polaris Property Manager's Operating Account, including those from February 1, 2012 to June 30, 2012. See Exhibit G hereto. (Polaris Operating Account bank statements: 2/1/2012 to 9/30/2012). Upon receipt of the statements, TIC #7 became aware that Cabot Polaris Property Manager and/or Cabot Investment Properties, LLC had been misappropriating monies from the Polaris Operating Account during the Representation.

{¶19} Appellees argue appellants did not present expert testimony as to a breach of a professional duty. In *Zafirau v. Yelsky,* 8th Dist. Cuyahoga No. 89860, 2008-Ohio-1936, ¶ 27-28, our brethren from the Eighth District explained the following:

> It is well settled in Ohio that in order to prevail on a legal malpractice claim, a plaintiff must demonstrate through expert testimony, by a preponderance of the evidence, that the representation of the attorney failed to meet the prevailing standard of care, and that the failure proximately caused damage or loss to the client. This court recently discussed this principle in *Jarrett v. Forbes,* Cuyahoga App. No. 88867, 2007-Ohio-5072, when it summarized the Ohio Supreme Court decision of *Vahila v. Hall,* 77 Ohio St.3d 421, 674 N.E.2d 1164, 1997-Ohio-259, in

> stating: "[t]he Ohio Supreme Court defined the elements that must be established to make a case for legal malpractice. The Supreme Court made it clear that there must be a causal connection between the lawyer's failure to perform and the resulting damage or loss." *Forbes,* at paragraph 19.
>
> Expert testimony is required to sustain a claim of legal malpractice, except where the alleged errors are so simple and obvious that it is not necessary for an expert's testimony to demonstrate the breach of the attorney's standard of care. *Hirschberger v. Silverman* (1992), 80 Ohio App.3d 532, 538; *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112, 113, 461 N.E.2d 1295; *Rice v. Johnson* (1993), Cuyahoga App. No. 63648; *Cross-Cireddu v. Rossi* (2000), Cuyahoga App. No. 77268, 2000 Ohio App. LEXIS 5480.

{¶20} Further, "an affidavit from the defendant or acting attorney can suffice as a legally sufficient basis upon which to grant a motion for summary judgment absent an opposing affidavit of a qualified expert witness for the plaintiff. *See Hoffman v. Davidson* (1987), 31 Ohio St.3d 60, 62, 508 N.E.2d 958." *Aleshire v. Shamansky,* 5th Dist. Licking No. 08 CA 41, 2008-Ohio-5414, ¶ 15.

{¶21} In their motion for summary judgment filed September 2, 2014, appellees attached the affidavit of Karl H. Schneider, Esq. Attorney Schneider accepted as true the factual allegations in the complaint and opined legal malpractice did not occur:

9. Based on the facts presumed true and set forth herein, and in particular noting that no judgment was taken and no judicial finding or other adjudication was made adverse to the Plaintiffs during Defendants' retention period, Affiant is of the considered opinion that Defendants' conduct during its representation of the Plaintiffs did not proximately cause any provable or compensable damages to the Plaintiffs.

10. Based on the facts presumed true herein, and in particular the nature of the engagement of Defendants by Manager under Manager's authority, Affiant is of the further opinion that Defendants did not violate or breach the standard of care required of lawyers and in fact protected the record without prejudice to Plaintiffs.

{¶22} Appellees also attached the affidavit of Joseph Patchen, Esq., an appellee herein. Although self-serving, Attorney Patchen also opined legal malpractice did not occur:

15. The subject loan in the underlying case was an interest only loan with a balloon payment that had come due of roughly $12 million. Seeing that the loan was not paid upon maturity, the defendants were all in default with little or no substantive defense open to them.

19. Once CPM [Carlile, Patchen & Murphy] was relieved of the representation of TIC 7, TIC 7 consented to CPM's continued

representation of the Property Manager as well as the remaining TICs by letter dated July 10th, 2012.

20. TIC 7 then filed a number of pleadings, including emergency motions for turnover of property and leave to file an amended answer, counterclaim and cross-claim. CPM urged TIC 7 to not take an excessively aggressive course with the plaintiff as the defendants had no substantive or procedural defenses to a swift sale of the property by the plaintiff if they decided to pursue one.

21. Based upon the facts of the case, the best strategy was to avoid a quick liquidation by the lender, and allow further time to get renewal of leases for the property with the existing tenants and attempt to have the property fully leased. This would help negotiate the best refinancing of the property or workout with the lender.

22. At this time TIC 7 undertook a massive discovery request and motion to expedite discovery which jeopardized the slow and careful foreclosure process and negotiations between the TICs and plaintiff lender. TIC 7's actions hampered CPM's efforts to contest plaintiff lender's motion for summary judgment as well as CPM's actions to resist plaintiff's quick liquidation of the property. Such a speedy liquidation was in fact counter to the interest, intent and desires of all defendants, including TIC 7. These were interests CPM and I sought to protect through amiable and non-threatening dealings with plaintiff lender.

{¶23} In response, appellants filed the affidavit of Jonathan Cherry, Esq. on October 2, 2014. Attorney Cherry enumerated seven areas of appellees' failure to meet its fiduciary duty under "the standards of conduct applicable to Ohio attorneys in 2012." They include 1) the failure within a reasonable time to inform appellants of their representation and the limited scope of the representation; 2) the failure within a reasonable time to permit appellants to state their objectives regarding the foreclosure action; 3) the failure to communicate the fee arrangements; 4) the failure to keep appellants informed of the foreclosure action and failure to communicate with them prior to filing pleadings filed on their behalf; 5) the failure to inform appellants that they were entitled to the status of the operating account; 6) the opposition to the discovery requests of TIC No. 7 which was contrary to appellants' interests; and 7) the opposition to TIC No. 7's discovery requests when appellees knew the similar Cabot property management company was in contempt of court in the Ashtabula case for failing to turn over information of its respective operating account.

{¶24} Attorney Cherry concluded the following:

> 10. The Defendants failure to notify the Polaris TIC Owners of their representation of them in the Polaris Foreclosure Litigation and their active opposition to Cabot 570 Polaris Parkway 7, LLC's attempts to obtain information regarding the status of such accounts facilitated the Polaris Property Manager's continuing defalcations from the Polaris Property operating account in that such failure and opposition delayed the

> disclosure of the defalcations and the lender's closing of the account in favor of a Court appointed Receiver.

{¶25} As to malpractice and appellees' failure to fulfill its fiduciary duty, we find these competing affidavits raise a genuine issue of material fact. However, we note the Cherry affidavit does not give an opinion as to proximate cause and damages.

{¶26} Appellees challenged appellants' claim that appellees' actions proximately caused damages or that any damages had been established.

{¶27} Accepting appellants' allegations as true, as to TIC No. 7's claim for attorney fees, we find those fees were for the period when appellees were not representing TIC No. 7, after June 29, 2012, and through the disputed discovery process wherein appellees were defending the remaining appellants/TICs. Therefore, there is no causal connection, either remote or proximate. TIC No. 7's claim for damages was properly dismissed by the trial court.

{¶28} The $221,080 claim for damages is explained in the complaint as a sale/redemption loss:

> 3.16 Plaintiffs breaches of fiduciary duty and ethical lapses are the proximate cause of plaintiffs losing $221,080 from the Sale/Redemption of the Property; in that plaintiff's return on their investment would have been $221,080 higher but for the wrongful actions of the Defendants as described herein.

{¶29} Appellants also list the amount as the unlawful withdrawal from the PNC operating account:

> 4.5 Had Defendants contacted TIC #7 with respect to their undertaking the Representation, they would have discovered very quickly that a conflict of interest existed between the plaintiffs and Cabot Property Manager over TIC #7's requirement that Cabot Property Manager disclose the bank statements for the Property's operating account, a disclosure that would bring the Property Manager's defalcations to light before Cabot Property Managers unauthorized withdrawals from the Property operating account in the amount of $221,080.
>
> 4.6 But for Defendants wrongful abrogation of their duty, plaintiffs' recovery on their investment after the Sale/Redemption would have been $221,080 greater.

{¶30} The May 20, 2004 Property and Asset Management Agreement between appellants and Cabot 570, attached to the August 1, 2004 Bryan Affidavit as Exhibit F, provides for Cabot 570 to assume the following pertinent duties:

> 2.14 Miscellaneous Rights. The Property Manager is hereby authorized by the Tenants in Common to enter into and execute contracts and agreements by, for and on behalf of the Tenants in Common, in the ordinary course of the operation and management of the Property,

> including, but not limited to, contracts and agreements with subcontractors, suppliers, maintenance companies and other parties, provided that such contracts and agreements are not inconsistent with the Budget and the Operating Plan that have been approved by the Tenants in Common as provided herein, and contracts for the sale or lease of the Property and the refinancing of any debt encumbering the Property. The foregoing notwithstanding, the Property Manager may not without the prior consent of all of the Tenants in Common empowering and authorizing the Property Manager to do so (including their deemed consent or approval as provided for in Sections 1.2 and 2.6 hereof (i) execute any contract or agreement with respect to the sale of the Property or the financing or refinancing of any loan that encumbers the Property or (ii) except as provided in this Agreement, enter into any lease for all or any portion of the Property.

{¶31} Per this agreement, Cabot 570 assumed responsibility for all accounts, management, and notices to appellees (Section 2.5).

{¶32} From the Bryan affidavit, we can glean the following relative to the $221,080 damage claim:

> 5. In 2011, Cabot Polaris Property Manager's quarterly property reports became delinquent. TIC #7 became concerned over the delinquent reports and contacted CIP's Timothy Kroll (*"Kroll")* to obtain

information concerning the Polaris Property and the status of CIP's efforts to extend the mortgage note. Kroll gave excuses why the property reports were late and advised that CIP was still trying to extend the maturity date of the note. By January 20, 2012, the property reports remained delinquent and TIC #7 sent a written demand to Kroll for the reports and other information to assure TIC #7 that the Polaris Property accounts were intact. See Exhibit H hereto. (correspondence of 1/20/2012; Bryant to Kroll).

26. From September 16, 2008 until August 23, 2012 irregular withdrawals and deposits were taken from and deposited to the Polaris Operating Account by CIP, Ann Lhota of Kirco, in the ordinary course of her duties as the local on-the-ground property manager kept an account of such irregular withdrawals and deposits in the Polaris Operating Account in a separate Loan Account. See Lhota Affidavit at ¶ 6. On the first day of the Polaris Representation, the outstanding balance on the Loan Account was $270,257. *Id.* @ ¶ 10. During such Representation CIP withdrew an additional $221,080 from the Polaris Operating Account and, during such period, deposited into the account the sum of $264,551 (including $48,970 in unearned fee credits), which sum was less than the beginning balance of $270,257 outstanding on the first day of the Polaris Representation. *Id.* @ ¶¶ 11-14.

{¶33} The Lhota affidavit offers a historical view of the shortfalls in the operating account:

> 5. On September 16, 2008, without your Affiant's prior knowledge an unexplained irregular wire transfer withdrawal from the Operating Account was made by Cabot Investment Properties in the amount of $200,000. On October 1, 2008, without your Affiant's prior knowledge an unexplained irregular wire transfer deposited into the Operating Account was made by Cabot Property Manager in the amount of $38,000.
>
> 8. As shown by Exhibit A, as of July 24, 2011, the outstanding loan balance in the Loan Account was $238,687.
>
> 9. On or about July 24, 2011, your Affiant began having difficulties keeping the vendor accounts current due to the continuing Loan Advances and the unpaid Loan Account balance. To assist with cash flow, your Affiant began crediting the Loan Account with (instead of paying) fees owed to Cabot Property Manager under its Property Management Agreement with the owners of the Building.
>
> 10. As of February 16, 2012, the balance of the Loan Account was $270,257 which balance included the credits for Cabot Property Manager's fees. Without the credits for such fees, the balance of the Loan Account as of such date was $334,551.

11. From February 16, 2012, until the Operating Account was closed in September of 2012, the Loan Advances taken by Cabot Investments LLC totaled $221,080.

14. After applying all of the Loan Payments (with or without any fee credits) made into the Operating Account between February 16, 2012 until the account was closed on or about September 12, 2012 to the oldest unreimbursed outstanding Loan Advance, the shortfall in the Operating Account caused by the irregular Loan Advances taken during the same period was $221,080.

16. Cabot Investments LLC last made a Loan Payment on July 27, 2012 in the amount of $27,000 and last took a Loan Advance on August 23, 2012 in the amount of $32,580.

{¶34} Given the pattern of "defalcations" argued by appellants, the actual damages occurred prior to any representation by appellees. We therefore conclude any damages to appellants were not proximately caused by appellees' representation, either remote or proximate. As noted, appellants were aware of issues relating to the operating account prior to the foreclosure action.

{¶35} Upon review, we find the trial court did not err in granting summary judgment to appellees and in denying appellants' motion.

{¶36} Assignments of Error I, II and III are denied.

{¶37} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Delaney, J. and

Baldwin, J. concur.

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