[Cite as *Konarzewski v. Ganley, Inc.*, 2009-Ohio-5827.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92623

WILLIAM KONARZEWSKI, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GANLEY, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED
AND REMANDED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-647589

BEFORE: Sweeney, J., Rocco, P.J., and Jones, J.

RELEASED: November 5, 2009

JOURNALIZED:

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiffs-appellants, William Konarzewski and Rachel McCormick (collectively, "plaintiffs"), appeal the trial court's denial of their motion to certify a class action. After reviewing the facts of the case and pertinent law, we affirm in part and reverse and remand in part.

{¶ 2} On March 10, 2007, Rachel McCormick ("McCormick") bought a used 2006 Dodge Charger from Ganley, Inc. ("Ganley"), a car dealership located at 7115 Brookpark Road, Parma, Ohio. As part of the transaction, McCormick signed three standard form agreements: a Motor Vehicle Purchase Contract ("purchase agreement"); a Retail Installment Sales Contract ("RISC"); and a Conditional Delivery Agreement ("CDA"). Additionally, the transaction included a $2,000 trade-in credit for William Konarzewski's ("Konarzewski") 1996 Ford F150 pick-up truck. After signing the forms, McCormick left the dealership in the Charger.

{¶ 3} The RISC that McCormick signed states that it is the entire agreement between the parties, that Ganley will finance the transaction, and that Ganley "assigns its interest in this contract to WFS Financial, Inc." However, the CDA that McCormick signed states that it is incorporated into the agreement between the parties and that the transaction is conditional "pending financing approval."

{¶ 4} On March 15, 2007, Ganley notified McCormick that it could not obtain financing for the transaction. Ganley wanted an additional $7,000 to secure financing according to the payment schedule in the RISC. McCormick

disputed this, contending that the RISC bound Ganley to finance the transaction under the terms agreed upon in the RISC. Ganley disagreed with McCormick, arguing that the CDA made the transaction conditional upon financing approval. Ganley representatives demanded that McCormick return the Charger, threatening to get the police involved if she did not comply. McCormick alleges that the Parma police called her multiple times regarding returning the Charger, and that Ganley also called her employer and her lawyer. According to McCormick, who was pregnant during this time, on March 28, 2007, she was put on bed rest by her doctor due to the dispute with Ganley.

{¶ 5} On April 12, 2007, Ganley contacted McCormick again and offered to finance the transaction under the terms of the RISC. McCormick declined this offer, returned the Charger to Ganley, and got Konarzewski's truck back.

{¶ 6} On January 16, 2008, plaintiffs filed suit against Ganley,[1] alleging violations of the Ohio Consumer Sales Practices Act ("CSPA"), violations of the Ohio Retail Installment Sales Act ("RISA"), breach of contract, fraud, intentional infliction of emotional distress, gross negligence, and wrongful identification. On October 20, 2008, plaintiffs filed a motion to certify a class action for the CSPA claims, defining the purported class as follows:

{¶ 7} "All consumers, who from within two years prior to the commencement of this action to the present, purchased or attempted to purchase

[1]Plaintiffs sued Ganley, Inc., as the dealership that sold them the Charger, and Ganley Management Co., as the representative of all Ganley corporations that use both

a vehicle from Defendants or any dealership owned, operated, managed, or controlled by Ganley Management Co., which transaction involved the use of a RISC together with a CDA."

{¶ 8} On December 5, 2008, the court denied plaintiffs' motion to certify a class action. Additionally, the court granted partial summary judgment in favor of plaintiffs, finding that Ganley violated various provisions of the CSPA and the RISA.

{¶ 9} Plaintiffs appeal the court's denial of their motion for class certification and raise four assignments of error, which we will address together:

{¶ 10} "I. The trial court abused its discretion in holding that Bill and Rachel did not meet the 'typicality' requirement of Civ.R. 23(A)(3), when the claims of Bill and Rachel and the class arise from the same business practice of Ganley.

{¶ 11} "II. The trial court abused its discretion in holding that Bill and Rachel did not meet the requirement of an identifiable class, when they limited the proposed class definition to those consumers who engaged in a transaction with Ganley involving both a RISC and CDA.

{¶ 12} "III. The trial court abused its discretion in holding that Bill and Rachel did not meet the requirements of Civ.R. 23(B)(3).

{¶ 13} "IV. The trial court abused its discretion [by] failing to consider whether class certification would be appropriate under Civ.R. 23(B)(2)."

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the RISC and the CDA, presumably in anticipation of class certification.

{¶ 14} A trial court has broad discretion in determining whether to certify a class action, and an appellate court should not reverse this determination absent an abuse of discretion. *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200. However, the trial court's discretion must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67.

{¶ 15} Before a class may be certified, the trial court must make seven affirmative findings: (1) an identifiable class must exist and the definition of the class must be unambiguous (identity and definition); (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all the members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); (6) the representative parties must fairly and adequately protect the interests of the class; and (7) the class must be maintainable under one of the three requirements found in Civ.R. 23(B). See *Hamilton*, supra, at 79-80; *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91; Civ.R. 23.

{¶ 16} The Ohio Supreme Court has stressed that "[c]lass action certification does *not* go to the merits of the action." *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233 (emphasis in original).

{¶ 17} In the instant case, the court conducted a detailed analysis of three of the Civ.R. 23 factors, finding that plaintiffs failed to: (1) properly identify and define the class; (2) show their claims were typical of the class; and (3) show the

class was maintainable under Civ.R. 23(B)(3) because individual issues predominated over issues common to the class members. For these reasons, the court denied plaintiffs' request for class certification.

Identity and definition

{¶ 18} To properly identify a class, "the description [must be] sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Hamilton*, supra, at 71-72 (internal citation omitted). In the instant case, the court found that plaintiffs' proposed class was too indefinite and uncertain to meet this standard. "Plaintiffs ask that the class be defined to include both individuals who purchased vehicles from Ganley dealerships and those who attempted to purchase vehicles. To include individuals who attempted to purchase vehicles is to search for the unidentifiable. How does one define an attempt? Is merely inquiring about a car or entering into negotiations sufficient? Is it necessary that a purchase agreement be signed? Plaintiffs do not say." *Konarzewski v. Ganley, Inc*. (Dec. 5, 2008), Cuyahoga County Common Pleas Case No. CV-647589.

{¶ 19} A review of plaintiffs' motion for class certification shows that they further identify and define their class with two narrowing criteria: "(1) the consumer was a customer of a Ganley Dealership, and (2) the consumer signed a RISC and CDA during the identified time period." [2] We find that it is

[2]It is unclear why this concise yet specific explanation of plaintiffs' proposed class was not part of the class definition, rather than the phrase "purchased or

administratively feasible to determine whether someone is a member of this class. A class certification does not need to identify specific members; rather, it must provide "a means to identify such persons * * *." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63.

{¶ 20} Ganley argues that plaintiffs' attempt at creating a class of "all consumers" is overly broad and similar attempts have been rejected by Ohio courts. Ganley's argument is without merit for two reasons. First, the proposed class definition does not encompass "all consumers." Rather, it encompasses all Ganley customers who signed a RISC and a CDA from January 2006 through the present. This Court previously upheld a trial court's analysis concluding that a similar class was properly identified and defined:

{¶ 21} "The court need only look to the actions or practices of [the defendant] to determine whether an individual is a member of the proposed class. * * * [The defendant] has records of all individuals who previously signed such 'buyer's agreement[s]' * * *. As such, it would be administratively feasible to determine whether a particular person is a member of the class." *Washington v. Spitzer Mgt., Inc.*, Cuyahoga App. No. 81612, 2003-Ohio-1735.

{¶ 22} Second, Ganley attempts to direct attention to irrelevant issues, arguing, inter alia, that some proposed class members never purchased a vehicle, some understood the RISC and the CDA, and some were able to obtain financing.

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attempted to purchase."

However, these issues are not germane to the identification and definition of the proposed class. The issue is whether the class is identifiable, not whether the degree of damages suffered by potential class members is variable.

{¶ 23} Furthermore, although unnecessary to defining a class, we note that the trial court granted partial summary judgment to plaintiffs, determining that Ganley's RISC, when executed with the CDA, is unconscionable and deceptive on its face under provisions of the CSPA and RISA; thus, liability ensues. The court also determined that Ganley's delivery of a car under the CDA is deceptive and violates provisions of the CSPA. Ganley does not dispute that these same form documents are used at all Ganley dealerships as part of everyday business. Accordingly, a putative class member's understanding of the documents and the details of each sales transaction is, once again, irrelevant to claims in which liability has already been determined.[3] See, also, *Crye v. Smolak* (1996), 110 Ohio App.3d 504; *Dantzig v. Sloe* (1996), 115 Ohio App.3d 64 (holding that damages need not be proven in an individual action under the CSPA).

{¶ 24} Accordingly, we hold that the trial court abused its discretion in denying class certification based on the proposed class's identification and definition.

{¶ 25} Plaintiff's second assignment of error is sustained.

Named representative

[3]Ganley has not appealed the court's granting partial summary judgment in favor of plaintiffs.

{¶ 26} Although the court did not expressly analyze this factor, it stated the following in its December 5, 2008 denial of plaintiffs' class certification: "Plaintiffs have demonstrated sufficient evidence for a jury to conclude that defendant Ganley, Inc. has committed violations of the Consumer Sales Practices Act which would permit awarding $200 for particular violations. Those consequential interests are sufficient to establish standing to sue both as an individual and as representative of a class."

Typicality

{¶ 27} Civ.R. 23(A)(3) states that the class representative — in this case, plaintiffs — must have claims that are typical of the class. The Ohio Supreme Court has held that "the requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 484, 2000-Ohio-397 (citing 5 Moore's Federal Practice (3 Ed.1977) 23-92 to 23-93, Section 23.24[1]). However, typical does not mean identical. "Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying

fact patterns which underlie individual claims." *Baughman*, at 88 Ohio St.3d at 485 (quoting 1 Newberg on Class Actions (3 Ed.1992) 3-74 to 3-77, Section 3.13).

{¶ 28} In the instant case, the court found that plaintiffs' claims were not typical of the proposed class's claims because McCormick's allegation of suffering "severe emotional distress arising from Ganley's efforts to repossess the motor vehicle is a significant and, perhaps, unique aspect of her claim." The court further reasoned that the emotional injuries "considerably outweigh any claim for monetary damages related to the common Consumer Sales Practice[s] Act violations which form the basis of the requested class action."

{¶ 29} The court focused on whether plaintiffs' class action claims predominate over plaintiffs' individual claims. However, the issue under the typicality prong of a class certification analysis is whether plaintiffs' class claims are typical of the claims of the class sought to be certified. As far as typicality is concerned, we find that plaintiffs' class claims arose from Ganley using standard form contracts that patently violate the CSPA and RISA. This same conduct gives rise to the claims of the other putative class members, and the claims are governed by the same legal theory. See *Cope*, at 82 Ohio St.3d at 429 (holding that class certification is encouraged when "numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all * * *" and the judicial process may be alleviated "of the burden of multiple litigation involving identical claims") (internal citation omitted).

{¶ 30} Accordingly, the court abused its discretion when it found that plaintiffs' claims were atypical of the proposed class's claims.

{¶ 31} Plaintiffs' first assignment of error is sustained.

Civ.R. 23(B) requirements for a maintainable class

{¶ 32} When the threshold requirements of Civ.R. 23(A) are met, a court must determine if the action can be maintained under one of the provisions in Civ.R. 23(B). In the instant case, plaintiffs seek class certification under both Civ.R. 23(B)(2), which relates to injunctive or declaratory relief, and Civ.R. 23(B)(3), which controls actions for damages. The Ohio Supreme Court has held that class certification is not appropriate under Civ.R. 23(B)(2) "where the injunctive relief is merely incidental to the primary claim for money damages * * *." *Wilson v. Brush Wellman, Inc*., 103 Ohio St.3d 538, 2004-Ohio-5847, at ¶17.

{¶ 33} In the instant case, the court determined that "[t]he predominant remedy sought by [plaintiffs] * * * is damages." Therefore, the court limited its analysis to Civ.R. 23(B)(3). Because we find, infra, that a class action can be maintained under Civ.R. 23(B)(3), it is superfluous to determine whether a class action can be maintained under Civ.R. 23(B)(2). Therefore, we find no error in the trial court's determination to forego a Civ.R. 23(B)(2) analysis. See, also, R.C. 1345.09(B) and (D) (allowing plaintiffs in CSPA class actions to recover "damages or other appropriate relief * * * [including] a declaratory judgment [or] an injunction * * *").

{¶ 34} Plaintiffs' fourth assignment of error is overruled.

{¶ 35} Civil Rule 23(B)(3) states that a class action is maintainable when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action."

{¶ 36} In the instant case, plaintiffs seek to litigate the CSPA violations in a class action; all other causes of action plaintiffs seek to litigate individually. Plaintiffs' claims for RISA violations, breach of contract, fraud, intentional infliction of emotional distress, gross negligence, and wrongful identification have no bearing on whether a class action is an appropriate method to litigate the CSPA claims. Therefore, our analysis is restricted to the CSPA claims, and the balancing test weighs the common issue of liability against the individual question of damages.

{¶ 37} In *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313, the Ohio Supreme Court held that "in determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions

merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." Additionally, the Court held that "[w]hile potential dissimilarity in remedies is a factor to be considered in determining whether individual questions predominate over common questions, that alone does not prevent a trial court from certifying a cause as a class action." *Vinci v. Am. Can Co.* (1984), 9 Ohio St.3d 98, 101. See, also, *Ojalvo,* at 12 Ohio St.3d 230; *Lowe v. Sun Refining & Marketing Co.* (1992), 73 Ohio App.3d 563, 573 (holding that "bifurcation can be employed by the trial court to individualize these damage claims. The benefits of proceeding as a class action to prevent duplication of evidence, conserve judicial resources and provide individuals with lesser claims access to judicial disposition of those claims outweigh any benefit which could be derived from other methods of adjudication").

{¶ 38} In *Schmidt*, supra, at 728, the Ohio Supreme Court further explained the proper analysis under Civ.R. 23(B)(3): "'[T]he predominance test * * * involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interest and the economy that can be achieved by allowing a multiple party dispute to be resolved * * * [as] a class action * * *.' 7A Wright & Miller, Federal Practice and Procedure (1972) 44, 47, Section 1777. The trial court must evaluate the relative importance of the individual versus the common issues because it is only where the common issues predominate that economies can be achieved by means of the

class action device. If there are too many individual issues, a class action could easily degenerate in practice into multiple lawsuits, which would increase management difficulties and the risk of confusion. Where denial of class certification is grounded in substantial part upon the complexity of the individual issues presented and upon the unmanageability of the action, the trial court's decision will not be disturbed unless it is shown to have been clearly wrong.

{¶ 39} In the instant case, the court first found that "[t]he nature or existence of any loss may differ greatly among different members of the class." We have already determined that Ganley's liability for the CSPA violations is an issue common to both plaintiffs and other potential class members. The only issue related to the class that would require an individual determination is the issue of damages. As disparity in damages alone is not enough to deny class certification, we find that the common issue of liability predominates over the individual issue of damages. See, also, *Cope,* at 82 Ohio St.3d, at 429-30 (holding that the predominance requirement is met "when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position"). (Internal citation omitted.)

{¶ 40} Here, the court found that plaintiffs' non-class action claims — namely, RISA violations, breach of contract, fraud, intentional infliction of emotional distress, gross negligence, and wrongful identification — predominate over plaintiffs' class action claims. The court denied class certification after

finding that injuries from plaintiffs' individual claims "considerably outweigh any claim for monetary damages related to the common Consumer Sales Practice[s] Act violations which form the basis of the requested class action."

{¶ 41} While "the interest of members of the class in individually controlling the prosecution * * * of separate actions" is a factor to considered under Civ.R. 23(B)((3)(a), this determination is not dispositve of class maintainability. See *Hamilton,* at 82 Ohio St.3d at 74 (holding that "[t]he fact that appellants present additional claims for failure of their loans to amortize within [their] intended term does not preclude their representation of" the class); *Martin v. Grange Mut. Ins. Co.* (Dec. 17, 2004), Geauga App. No. 2004-G-2558, at ¶49 (holding that "the trial court has wide discretion in applying various procedural devices used to manage a class action, including: the creation of appropriate subclasses, bifurcation of common and individual liability issues, or severance"); Civ.R. 23(C)(4) (stating that "[w]hen appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class * * *").

{¶ 42} Accordingly, we find error in the court's determination that this class action does not meet the requirements of Civ.R. 23(B)(3).

{¶ 43} Plaintiffs' third assignment of error is sustained.

Class actions under the CSPA and R.C. 1345.09(B)

{¶ 44} Although plaintiffs satisfy the Civ.R. 23 requirements for certifying a class action, we must turn to the CSPA to determine the scope of class actions for violations of this consumer rights statute.

{¶ 45} Pursuant to R.C. 1345.09(B),[4] class actions are authorized for violations of the CSPA; however, the scope of available damages is limited. The statute states that if liability is established, "the consumer may rescind the transaction or recover, *but not in a class action*, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or *recover damages or other appropriate relief in a class action* under Civil Rule 23 * * *." (Emphasis added.)

{¶ 46} The court in the instant case correctly found that R.C. 1345.09(B) precludes treble or statutory damages in class actions. In other words, class action plaintiffs must prove actual damages under the CSPA. *Washington*, at

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[4] Ganley does not dispute on appeal that plaintiffs met the R.C. 1345.09(B) requirement that "a consumer may qualify for class-action status only when a [defendant] acted in the face of prior notice that its conduct was deceptive or unconscionable." *Marrone v. Philip Morris USA, Inc.,* 110 Ohio St.3d 5, 2006-Ohio-2869, at ¶9. See *Cartier v. Brown Credit Lot* (Apr. 4, 2005), Toledo Muni. Court Case No. CVI 04-24578 (declaring that various practices similar or identical to Ganley's practices violated the CSPA and the RISA); O.A.C. 109:4-3-16(B)(22) (declaring it a deceptive and unfair practice to "[f]ail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer's signature on the written contract with the dealer"); O.A.C. 109:4-3-16(B)(30) (declaring it a deceptive and unfair practice to "[d]eliver a motor vehicle to a consumer pursuant to a sale which is contingent upon financing without a written agreement stating the parties' obligations should financing not be obtained").

2003-Ohio-1735, at ¶5 (affirming the trial court's statement that "'Ohio's CSPA specifically authorizes class actions and limits damages * * * to *protect defendants* from huge * * * awards * * *. By doing so, the CSPA essentially encourages class certification where appropriate"') (emphasis in original); *Searles v. Germain Ford of Columbus, L.L.C.*, Franklin App. No. 08AP-728, 2009-Ohio-1323, at ¶22 (concluding that "[t]he fact that statutory damages are not available in a class action indicates proof of actual damages is required before certification of an R.C. 1345.09 class action is proper").

{¶ 47} In the instant case, plaintiffs' proposed class definition is inconsistent with the limitations on damages found in R.C. 1345.09(B). To comply with R.C. 1345.09(B), the purported class must be narrowed and could consist of, for example, Ganley customers who, within a specified period of time, signed a RISC and a CDA, and, as a result, suffered actual damages.[5] Given this hypothetical "quick fix," the court, under these unique circumstances, abused its discretion by failing to modify the class to conform to R.C. 13254.09(B).

{¶ 48} In *Ritt v. Billy Blanks Enterprises*, Cuyahoga App. No. 80983, 2003-Ohio-3645, at ¶21, this Court held that "the trial court should have modified

[5]There is evidence in the record that McCormick is not the only potential class member who suffered actual damages. For example, Ganley's subprime finance manager stated that Ganley often delivered cars to customers before financing was approved, which "means you may have to switch cars, you may need a cosigner, it may mean you need more money down, it may mean the interest rate is higher. * * * A good part of them you call back and you get them approved with more money or a different car." Additionally, Ganley's special finance manager stated that,"* * * [I]f I didn't deliver the vehicles before the financing is approved, I'd probably lose three-fourths of my business."

the class description so that all plaintiffs were sufficiently identifiable. * * * The failure of the trial court to modify the class itself or to allow plaintiffs to modify it constitutes an abuse of its discretion and thus a reversible error." The *Billy Blanks* court also held that the Ohio Supreme Court's decision in *Warner,* supra, "not only permits but encourages the trial court to modify what is otherwise an unidentifiable class." Id. at ¶20.

{¶ 49} We emphasize that our finding is limited to the instant case because certification of plaintiffs' class is appropriate under all requirements of Civ.R. 23 and plaintiffs failure to meet the additional requirement of actual damages unique to CSPA claims can be rectified with little effort by narrowing the class definition. Furthermore, pursuant to Civ.R. 23(C)(4), subclasses may be created when appropriate if repetitive damage patterns appear. Therefore, we find that the court erred by denying class certification rather than modifying, or giving plaintiffs the opportunity to modify, the class to fit R.C. 1345.09. We recognize that failure to modify a class will not typically be deemed an abuse of discretion; however, under the unique circumstances of this case, we find that the court erred.

{¶ 50} Judgment affirmed as to Assignment of Error IV only. Judgment denying class certification is reversed and remanded for proceedings consistent with this opinion.

Judgment affirmed in part and reversed and remanded in part.

It is ordered that appellants recover of appellees their 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.

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JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A JONES, J., CONCUR