[Cite as *Kaufman v. Young*, 2017-Ohio-9179.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105761

JOSH S. KAUFMAN

PLAINTIFF-APPELLEE

vs.

BRADLEY YOUNG, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-842421

BEFORE: Jones, J., E.A. Gallagher, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 21, 2017

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LARRY A. JONES, SR., J.:

{¶1} Defendants-appellants Bradley Young and Laurel Young appeal several of the trial court's judgments in this case that (1) denied the Youngs' motion to enforce the settlement agreement; (2) granted the motion of plaintiff-appellee Josh Kaufman, Trustee of the Joyce Kaufman 2012 Irrevocable Trust ("Trust") to strike the Youngs' reply brief in support of the Youngs' motion to enforce the settlement agreement; (3) denied the Youngs' motion for reconsideration on the judgment striking their reply brief; and (4) denied as moot Josh's motions to quash subpoenas. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual Background

{¶2} The record establishes, as mentioned, that Josh was the Trustee of the subject Trust. Josh is one of Joyce's five children. Defendant Laurel Young is another one of Joyce's children, and was married to defendant Bradley Young.

{¶3} In 2011, Laurel and Bradley executed and entered into a demand promissory note with Joyce in the principal amount of $3,890,000 together with interest at the rate per annum equal to the federal short-term rate. In 2012, Joyce assigned to Josh, as Trustee, all of her rights, title, and interest in the note.

{¶4} In 2015, Josh, as Trustee, filed this action against the Youngs. At the time this action was filed, Joyce was deceased. Josh sought repayment of the principal amount of the note, plus interest, from the Youngs under theories of breach of contract and

quantum merit.

{¶5} In February 2016, the parties entered into a settlement agreement. The trial court retained jurisdiction to entertain any post-judgment motions. In March 2017, the Youngs filed a motion to enforce the settlement agreement. They also issued subpoenas to Phillip Babtiste, C.P.A. and Cohen & Co., Ltd., an accountant and accounting company, respectively, who provided services to the Trust. Josh opposed the Youngs' motion to enforce the settlement agreement, and the Youngs requested leave to file a reply brief to his opposition, which was granted instanter.

{¶6} Josh then sought to strike the Youngs' reply brief, which the trial court granted. The Youngs sought reconsideration of the trial court's decision to strike their reply; the trial court denied their request for reconsideration. The trial court also denied the Youngs' motion to enforce the settlement agreement. Josh also filed a motion to quash the subpoenas issued to accountant Babtiste and Cohen & Co., which the trial court denied as moot.

The Settlement Agreement

{¶7} The general terms of the parties' settlement agreement, which were filed along with the February 2016 dismissal, substantively provided as follows:

> The defendants, Laurel and Bradley Young, agree to pay plaintiff, Josh Kaufman, Trustee of [the] December 21, 2012 Irrevocable Joyce Kaufman Trust, the sum of $3,250,000.00, to be paid by certified check, on or before 4 pm on February 12, 2016.
> The claims in this case, to-wit: CV15-842421 are hereby released upon payment, and the note will be marked satisfied and returned, on or before February 19, 2016.

Formal release containing customary terms to follow. The parties further agree that the payment and settlement contemplated herein will not be used or disclosed in pending or future litigation, except for purposes of enforcement of this particular settlement agreement.

{¶8} The parties' fully executed settlement agreement and release provided in relevant part as follows:

WHEREAS, the Parties desire to settle and compromise fully and completely the claims and defenses raised in the Note Litigation on the following terms and conditions.

NOW, THEREFORE, in consideration of their mutual covenants and undertakings herein, and for good and valuable consideration, the adequacy of which is hereby acknowledged upon payment, the parties agree as follows:

1) Settlement Payment. The Defendants, Laurel K. Young and Bradley R. Young, agree to pay Plaintiff, Josh S. Kaufman, Trustee of the Joyce S. Kaufman 2012 Irrevocable Trust U/T/A Dated 12/21/2012, for the benefit of the 2012 Trust, the sum of $3,250,000, to be paid by certified check * * * no later than 4:00 p.m. on February 12, 2016. * * *

2) Satisfaction of the Note. Upon payment with good funds, the Plaintiff will, by no later than February 19, 2016 at 4:00 p.m., deliver to the Defendants the original Note bearing language to the effect that the Note "is paid, satisfied and the obligation due thereunder is discharged."

* * *

5) Release of Defendants. Upon payment with good funds of the consideration referenced in Paragraph 1 herein, Plaintiff releases and discharges Defendants Laurel and Bradley Young, together with their agents, heirs, family members, legal representatives, successors, assigns, beneficiaries, executors, and trustees, from any and all obligations relating to the Note and the claims asserted in the Note Litigation, and hereby acknowledges that said Note obligation is satisfied in full.

6) Entire Agreement. This Agreement is the entire agreement between the Parties relating to the Note Litigation and supersedes all prior and contemporaneous written or oral negotiations, communications, and

agreements relating to the Note Litigation.

* * *

> **13) <u>Joint Preparation of Agreement.</u>** This Agreement shall not be construed against the Parties preparing it, but shall be construed as if it were prepared jointly by all persons and entities affected thereby, and any uncertainty or ambiguity, or both, shall not be interpreted against any such person or entity.

(Emphasis sic.)

After Execution of the Agreement

{¶9} The record demonstrates, and it is not disputed, that the Youngs timely paid Josh $3.25 million. The following writing was indicated on the Note: "This Note is paid, satisfied and the obligation due hereunder is discharged."

{¶10} After the Youngs' payment, Josh caused an Internal Revenue Service ("IRS") 1099-C "cancellation of debt" form to be issued to Laurel, claiming that Laurel had $640,000 of additional income for the year 2016 because of the "cancellation of debt" she owed to Josh as Trustee of the Trust. The Youngs contested the need for the form, contending that no debt was ever cancelled; rather, according to the Youngs, the parties agreed that the note obligation was satisfied in full. The Youngs contended that the form opened them to scrutiny by the IRS, and asked Josh to withdraw or issue a revised one for "zero."

{¶11} Josh declined, however, maintaining that the form was issued on the advice of accounting professionals at Cohen & Co. After the parties were unable to resolve the dispute, the Youngs filed their motion to enforce the settlement agreement and issued

subpoenas for the accountant and the accounting firm.

The Youngs' Motion to Enforce the Settlement Agreement

{¶12} As an exhibit to their motion to enforce the settlement agreement, the Youngs attached the February 9, 2016 "redline" draft of the agreement, in which all references to "debts" and "loans" were deleted. They also submitted an affidavit from Gary Bleiweiss, a certified public accountant, in which he averred that the Trust was not even authorized to have issued a 1099-C form, the settlement agreement and release did not give rise to a cancellation of debt, and Josh had a duty to withdraw the form.

The Youngs' Reply Brief in Support of their Motion and Josh's Motion to Strike it

{¶13} Josh opposed the Youngs' motion to enforce the settlement agreement and the Youngs sought leave to file a reply brief. The day after their request for leave, the trial court granted the request and deemed the reply brief filed as of that date. The following day, Josh filed a motion to strike the Youngs' reply brief; the trial court granted Josh's motion. The Youngs sought to have the court reconsider its decision to strike its reply brief, but the court denied the request. The backdrop to the reply brief being stricken is generally set forth below.

{¶14} In his opposition to the Youngs' motion to enforce the settlement agreement, Josh contended, among other things, that "[s]imply because an entity is not a mandatory filer under the Instructions to Form 1099-C does not indicate that there should not be a filing." In support of his contention, he cited *Cavoto v. Hayes*, No. 08 C 6957, 2009 U.S. Dist. LEXIS 96868 (N.D.Ill. Oct. 19, 2009), a case from the district court of the Northern

District of Illinois. In their reply, the Youngs stated that the proposition from *Cavoto* that Josh relied on was vacated on appeal in *Cavoto v. Hayes*, 634 F.3d 921 (7th Cir.2011).

{¶15} In Josh's motion to strike, he argued that the Youngs' contention that the relevant portion of *Cavoto* had been vacated was a "material misrepresentation," and that the Seventh Circuit had "merely affirmed on other grounds." The trial court granted Josh's motion to strike without elaboration.

Josh's Motion to Quash the Subpoenas

{¶16} After receiving the 1099-C form, the Youngs issued subpoenas to Cohen & Co. and Phillip Baptiste, the Trust's accounting firm and accountant, respectively. Josh filed a motion to quash the subpoenas, contending that the subpoenas were "patently over broad and [improperly sought] private information * * * pertaining to the Trust's finances." Josh also contended that Laurel and Bradley lacked standing to "inquire into the affairs of the Trust," and because the case was inactive, they "likely lack[ed] jurisdiction to issue such a subpoena pursuant to the jurisdiction of [the trial] court."

{¶17} The trial court denied the Youngs' motion to enforce the settlement agreement without elaboration and, as such, denied the motion to quash as moot.

II. Assignments of Error

{¶18} The Youngs now raise the following four assignments of error for our review:

> I. The trial court erred when, on or about April 11, 2017, it denied the defendants' motion to enforce their settlement agreement.
>
> II. The trial court erred when, on or about April 5, 2017, it granted the

plaintiff's motion to strike their reply in support of their motion to enforce settlement agreement.

III. The trial court erred when, on or about April 5 (or 6), 2017, it denied the defendants' motion for reconsideration.

IV. The trial court erred when, on or about April 11, 2017, it refused to enforce the defendants' subpoenas to non-parties Cohen & Co., Ltd. Phillip J. Babtiste, C.P.A.

III. Law and Analysis

{¶19} We first address the trial court's jurisdiction to consider the Youngs' motion for reconsideration.

> A trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement.

Infinite Sec. Solutions, L.L.C. v. Karam Props. II, 143 Ohio St.3d 34, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 34. Here, after the parties entered into their February 2016 settlement agreement, the trial court retained jurisdiction to entertain any post-judgment motions. Thus, the motion to enforce the settlement agreement was properly before the trial court.

{¶20} We next consider the trial court's decision to strike the Youngs' reply brief. As mentioned, in Josh's opposition to the Youngs' motion to enforce the settlement agreement, he cited *Cavoto v. Hayes*, No. 08 C 6957, 2009 U.S. Dist. LEXIS 96868 (N.D. Ill. Oct. 19, 2009), to support his contention that even though an entity is not required to file a 1099-C form, it is not prohibited from doing so.

{¶21} In *Cavoto*, Mary Lou Hayes, Cavoto's former mother-in law, filed a 1099-C form, stating that she had discharged an unpaid $30,000 debt from Cavoto. Hayes'

daughter and Cavoto had been married and were in financial trouble. Hayes allowed them to use her American Express credit card, and they did, charging over $30,000 on it. Cavoto and the daughter later divorced, and Cavoto promised Hayes that he would pay her $30,000 for the debt. He never paid, however, and Hayes paid the balance due in full.

{¶22} On the advice of another one of her daughters, who was a CPA, Hayes filed a 1099-C form with the IRS, reporting that she had discharged the $30,000 debt. Cavoto sued Hayes under a federal statute that creates a cause of action against anyone who "'willfully files a fraudulent information return with respect to payments purported to be made.'" *Cavoto*, 634 F.3d at 923, quoting 26 U.S.C. section 7434. The district court did not agree with Cavoto's claims that a 1099-C form filed by someone other than a financial entity is necessarily fraudulent, that Hayes was prohibited from filing the form, or that her filing the form was equivalent to her filing a false return. *Cavoto*, 2009 U.S. Dist. LEXIS 96868 at *9 - *10.

{¶23} On appeal, the Seventh Circuit Court of Appeals did not address the filing of the 1099-C form, because it found,

> as it turns out, whether or not the Form 1099-C was misleading is irrelevant. The remedy created by §7434 is limited in scope * * * and [does] not include returns relating to the cancellation if indebtedness, i.e., a Form 1099-C. This limitation was overlooked by the district court, which should have dismissed Cavoto's lawsuit outright * * * for failure to state a claim.

Id. at 924.

{¶24} In their reply brief, the Youngs stated, referring to *Cavoto*, that Josh "cited to foreign case law that has been vacated." The Youngs footnoted *Pitcher v. Waldman*,

2012 U.S. Dist. LEXIS 152087 (S.D. Ohio Oct. 23,2012), stating that the "Seventh Circuit set aside its reasoning * * * in affirming the judgment."

{¶25} Upon review, that characterization could also be deemed misleading. The Seventh Circuit did not overrule the district court's finding that even though an entity (or person, as in *Cavoto* and here) is not required to file a 1099-C form, doing so is not necessarily fraudulent or prohibited, so long as the information stated on the form is accurate. *Cavoto* at 923. Rather, the court found that Cavoto's complaint should have been dismissed for failure to state a claim. *Id.* at 924.

{¶26} Further, the Youngs' motion for reconsideration of the trial court's decision to strike their reply was also misleading. In their request for reconsideration, the Youngs contended that they never said that the "case itself had been vacated, only its reasoning, and they clearly explained with a citation to *Pitcher* why this is so."

{¶27} The cited footnote in *Pitcher* corresponds to the district court's opinion in *Cavoto* setting forth the elements needed to establish a claim of tax fraud under the relevant federal statute. The footnote states that

> [i]ronically, although *Cavoto* [district court opinion] is cited and relied upon by both parties, the Seventh Circuit set aside its reasoning when, in affirming the judgment, it noted that the 1099-C form in that case is not an "information return" within the meaning of the federal statute at issue.

Pitcher at fn. 7.

{¶28} Thus, the Youngs' contention that they cleared up any confusion over the

circuit court decision in *Cavoto* with the footnote in *Pitcher* could also be deemed misleading. The reference in *Pitcher* to "setting aside" equated to "not considering" or "for other reasons"; it had nothing to do with overruling or vacating the district court's judgment as the Youngs had implied in their opposition.

{¶29} Civ.R. 11 states that "[e]very pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record * * *." An attorney's signature "constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

{¶30} Civ.R. 11 uses a "subjective standard" of "bad faith" that goes beyond mere bad judgment; it sanctions conduct amounting to "dishonest purpose," "moral obliquity," "a breach of a known duty through some motive of interest or ill will," or that "partakes of the nature of fraud * * * with an actual intent to mislead or deceive another." *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 8. A trial court's decision to sanction under Civ.R. 11 is reviewed for an abuse of discretion. *Id.* at ¶ 9.

{¶31} Upon review, and for the reasons stated above, we find no abuse of discretion in the trial court's decision to strike the Youngs' reply brief or to deny their request that their reply brief be reinstated. In sum, the propositions for which they cited *Cavoto* and *Pitcher* could be deemed misleading. Although the court could have ignored

the Youngs' arguments relative to the two cases, it was within its discretion to strike the reply brief altogether and we decline to second-guess its decision. The second and third assignments of error are therefore overruled.

{¶32} Thus, we now consider, reviewing the Youngs' motion to enforce the settlement agreement and Josh's opposition to it, whether the trial court erred in denying the motion, as they contend in their first assignment of error.

{¶33} The standard of review to be applied to a ruling on a motion to enforce a settlement agreement depends primarily on the question presented. *Kaple v. Benchmark Materials*, 3d Dist. Seneca No. 13-03-60, 2004-Ohio-2620, ¶ 4. If the question is an evidentiary one, this court will not overturn the trial court's finding if there was sufficient evidence to support such finding. *Chirchiglia v. Bur. of Workers Comp.*, 138 Ohio App.3d 676, 679, 742 N.E.2d 180 (7th Dist.2000). If the dispute is a question of law, an appellate court must review the decision de novo to determine whether the trial court's decision to enforce the settlement agreement is based upon an erroneous standard or a misconstruction of the law. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St. 3d 501, 502, 660 N.E.2d 431 (1996).

{¶34} The Youngs contended in their motion that Josh

> materially violated the Settlement Agreement and Release, and he has refused to cure that violation, so [the Youngs] request [the trial court] to order him to do so, and they request that [the trial court] determine as a matter of law that there was no cancellation of debt by way of this Settlement * * *.

As the Youngs presented a question of law, we review de novo.

{¶35} A settlement agreement is viewed as a particularized form of a contract. *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982). It is "a contract designed to terminate a claim by preventing or ending litigation and * * * such agreements are valid and enforceable by either party." *Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972). Further, settlement agreements are highly favored in law. *State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 197, 363 N.E.2d 1387 (1977).

{¶36} To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear. *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). However, the Ohio Supreme Court has acknowledged that

> "all agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make."

Kostelnik v. Helper, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 6, quoting 1 Corbin on Contracts (Perillo Rev.Ed.1993) 530, Section 4.1.

{¶37} In support of their motion, the Youngs attached the redline draft of the settlement agreement, in which all references to "debts" and "loans" were deleted. They also submitted the affidavit of accountant Bleiweiss, who averred that, in his professional opinion, the Trust was not even authorized to have issued a 1099-C, the settlement agreement and release did not give rise to a cancellation of debt, and Josh had a duty to withdraw the form. It was the Youngs' contention that because the note was "paid in full," there was no cancellation of debt for which a 1099-C form should have issued; in

other words, the settlement was not a taxable event.

{¶38} In opposition to the Youngs' motion, Josh agreed that the differential between the note and settlement amounts was not addressed in the settlement agreement, but contended that the Youngs' tax obligations were between the Youngs and the IRS; it was not up to the court to "write a new provision into the Settlement Agreement that would make it easier for [the Youngs] to shield knowledge of the transaction from the taxing authorities, based almost entirely on a self-serving affidavit from their own accountant."

{¶39} If the terms of a settlement agreement are disputed or there is a dispute about the existence of a settlement agreement, the trial court must hold an evidentiary hearing prior to confirming the settlement. *Rulli*, 79 Ohio St.3d at 377.

{¶40} Upon review, the Youngs presented sufficient evidence to at least warrant a hearing on whether the settlement agreement had been breached by Josh. The agreement was silent about the issue of a 1099-C form. Although Josh is correct that ultimately the issue of the Youngs' tax obligation will be between the Youngs and the IRS, he opened the door to the issue by filing the 1099-C form, an action the Youngs contended at oral argument was to "stick it to them," in what has been contentious litigation, in this case and other cases, amongst Joyce's children after her death. Thus, on the particular facts of this case, the first assignment of error is well taken.

{¶41} Because of our resolution of the first assignment of error, we find that Josh's motion to quash the subpoenas should not have been denied as moot. This court reviews

a trial court's ruling on a motion to quash a subpoena for an abuse of discretion. *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). "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*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶42} Ohio discovery rules, like their federal model, are designed to favor the fullest opportunity to perform complete discovery. *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 85, 523 N.E.2d 902 (8th Dist.1987). A trial court does, however, have discretion in controlling the discovery process. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57, 295 N.E.2d 659 (1973). Nevertheless, such discretion is not without limits, and an appellate court will reverse a trial court's decision to extinguish a party's right to discovery if such a decision is improvident and affects the discovering party's substantial rights. *Bellinger v. Weight Watchers Gourmet Food Co.*, 142 Ohio App.3d 708, 717, 756 N.E.2d 1251 (5th Dist.2001); *Smith v. Klein*, 23 Ohio App.3d 146, 151, 492 N.E.2d 852 (8th Dist.1985); *Rossman v. Rossman*, 47 Ohio App.2d 103, 110, 352 N.E.2d 149 (8th Dist.1975).

{¶43} As grounds for his motion to quash, Josh contended that the subpoenas issued by the Youngs were "patently over broad" and sought "private information improperly from Cohen & Co., Ltd. pertaining to the Trust's finances." Josh also contended that the Youngs had no standing to inquire into the affairs of the Trust or to issue post-judgment subpoenas.

{¶44} The subpoenas issued by the Youngs were not to needlessly "inquire into the affairs of the Trust," as Josh contends. When the Youngs brought the proprietary of the 1099-C form to the attention of Josh's counsel, the response received was that Josh was "advised by his tax advisor that he [had] a duty to report the transaction [and that] the reduction in the note [was] a taxable event" for the Youngs. Thus, the Youngs issued the subpoenas to the accountant and his firm, seeking to obtain information relative to the filing of the 1099-C form. The duces tecum in both of subpoenas issued requested the following:

> 1. Your complete file regarding or relating to a 1099-C issued by the Joyce S. Kaufman 2012 irrevocable Trust (u.t.a. dated 12/21/12) to Ms. Laurel K. Young in January of 2017 for fiscal year 2016.
>
> 2. Any communications between Cohen & Co. officer, partner, shareholder or employee and Mr. Josh S. Kaufman or his agents or employees from February 2, 2016 to the present in any format and by any means that relate to the aforementioned Trust, the Note at issue, the 1099-C at issue, and/or Ms. Laurel ("Lori") K. Young or her husband, Mr. Bradley R. Young.

{¶45} The requests therefore were limited to information specifically regarding the 1099-C form and information after the case was dismissed because it was settled; as such, the requests were generally sufficiently narrowed to the issue at hand. To the extent that the requests could be construed as "overreaching" or seeking confidential information, the trial court should inspect the information to determine if that is true.

> Some documents will undoubtedly be privileged or will be protected by work-product doctrine, and conversely some will not. To distinguish between protected and unprotected materials, the trial court should have, at a minimum, conducted an evidentiary hearing or undertaken an in camera review of the case file.

Grace v. Mastruserio, 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608, ¶ 34 (1st Dist.).

{¶46} In light of the above, the fourth assignment of error is well taken and sustained.

IV. Conclusion

{¶47} The trial court did not err by striking the Youngs' reply brief or by denying their motion for reconsideration; the second and third assignments of error are therefore overruled and that portion of the trial court's judgment is affirmed. The trial court erred by summarily denying the Youngs' motion to enforce the settlement agreement without affording them the opportunity to conduct discovery. The first and fourth assignments of error are therefore sustained. The judgments denying the motion for reconsideration and granting the motion to quash are reversed. The case is remanded so that the Youngs may proceed with discovery in the manner stated above, after which, the trial court shall reconsider whether there is merit to their motion to enforce the settlement agreement.

It is ordered that appellant and appellee share the 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 Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, SR., JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR