[Cite as *Jones v. Cleveland Clinic Found.*, 2021-Ohio-1095.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MADORA JONES, ADMR. OF THE ESTATE OF REDON JONES, :

Plaintiff-Appellant, :

No. 107030

v. :

THE CLEVELAND CLINIC FOUNDATION, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 1, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-16-861773

Appearances:

The Mellino Law Firm, L.L.C., Christopher M. Mellino, Meghan C. Lewallen, and Calder Mellino; Paul W. Flowers Co., L.P.A., Paul W. Flowers, and Louis E. Grube, *for appellant*.

Roetzel & Andress, L.P.A., R. Mark Jones, Stephen W. Funk, and Tammi J. Lees, *for appellees*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This matter is before this court on remand from the Ohio Supreme Court in *Jones v. Cleveland Clinic Found.*, 161 Ohio St.3d 337, 2020-Ohio-3780, __

N.E.3d __, for further review of our decision released January 31, 2019.[1] The Ohio Supreme Court has remanded the matter to this court for consideration of the second, third, and fourth assignments of error raised by plaintiff-appellant Madora Jones ("appellant"), administrator of the estate of ReDon Jones ("ReDon"). After a thorough review of the record and law, this court affirms the judgment of the trial court.

I. Factual and Procedural History

{¶ 2} The pertinent facts of this matter, as set forth in *Jones I*, are as follows:

> On June 25, 2012, appellant escorted ReDon to the emergency room at Hillcrest Hospital in Mayfield Heights, Ohio. For approximately one week prior to June 25, ReDon had been experiencing pains in the left side of his chest and appellant feared that ReDon was having a heart attack. While in the emergency room, ReDon was evaluated and an electrocardiogram ("EKG") was administered to determine a possible source of the chest pains. However, the EKG did not show any ST elevations.
>
> The following day, June 26, after the emergency room evaluations, ReDon was transferred to an observation area (known as the clinical division unit) where he continued to complain about chest pains. Here, a physician, Dr. Avrum Jacobs ("Dr. Jacobs") evaluated ReDon and, after completing his evaluation, Dr. Jacobs discharged ReDon. Dr. Jacobs had concluded that ReDon had experienced "chest pain of unknown [origin], with no evidence of acute coronary syndrome."
>
> The following day, June 27, ReDon had a follow-up appointment with Dr. Jacobs. At this follow-up appointment, Dr. Jacobs had originally intended to perform a nuclear stress test, however, because of ReDon's claustrophobia, this particular test was not administered. At this time, no further testing was performed on ReDon. Dr. Jacobs had him return a week later, on July 2, for another test, a stress echo test.

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[1] *Jones v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 107030, 2019-Ohio-347 ("*Jones I*").

> On July 9, 2012, appellant had apparently planned to take ReDon back to the emergency room at Hillcrest Hospital because ReDon continued to experience chest pains. On the morning of July 9, ReDon suffered a heart attack at the family home. ReDon was transported by ambulance to Hillcrest Hospital but, tragically, he was pronounced dead after being transported to Hillcrest.

Jones I at ¶ 2-5.

{¶ 3} Appellant filed a wrongful death and medical malpractice claim against appellees. Prior to trial, appellees The Cleveland Clinic Foundation, Cleveland Clinic Health System-East Region d.b.a. Hillcrest Hospital, and Avrum Jacobs, M.D. (collectively "appellees") filed a motion in limine seeking to preclude appellant from eliciting medical opinions from nonphysician witnesses. Among the witnesses appellees sought to preclude was Stacie Kachline ("Kachline"), a cardiac sonographer. Kachline had been designated the Civ.R. 30(B)(5) witness for appellee Cleveland Clinic. During her deposition, Kachline opined as to whether a stress test would be considered diagnostic if the patient did not reach 85 percent of his or her maximum heart rate. Appellees argued in their motion that because she was not a physician, Kachline was not competent to provide such testimony. Appellant argued that Kachline was testifying about her knowledge as a representative of the Cleveland Clinic and was not offering a medical opinion.

{¶ 4} Prior to trial commencing, counsel and the court conducted a discussion on the record of pending motions in limine, including the above issue regarding Kachline's testimony. The court held the motion in abeyance until it could look more closely at the issue and the deposition testimony.

{¶ 5} Following jury selection, but prior to opening statements, counsel and the court returned to a discussion of the motion in limine regarding Kachline. The court stated its ruling on the motion as follows:

> THE COURT: She can testify concerning The Clinic's requirements and standards performing the test; and, obviously, she can get up to say that the gold standard, or whatever it was, was 85. Am I correct, 85 percent?
>
> [APPELLANT'S COUNSEL]: Yes.
>
> THE COURT: However, she cannot testify as to the validity of the diagnostic value of any of the tests. Which means that rendering a medical opinion goes beyond the 30(B)(5) designation. An examination of the test results and their value is within the province of a medical expert for both Plaintiffs and the Defendants, not a 30(B)(5) witness on conducting the test. That is my ruling as to that; okay?

{¶ 6} The case proceeded and appellant did not seek to present Kachline's testimony, nor did she proffer the excluded evidence prior to the conclusion of the trial.

{¶ 7} During deliberations, the jury had questions and certain issues arose, which are not relevant to this remand. Ultimately, the jury found in favor of appellees.

{¶ 8} Appellant timely appealed, raising four assignments of error:

> I. The trial court erred to the prejudice of [appellant] in failing to declare a mistrial when one of more jurors abandoned their strongly held beliefs regarding the weight and effect of the evidence merely for the purpose of returning a verdict and avoiding additional jury deliberations.
>
> II. The jury's verdict in favor of [appellees] was against the manifest weight of the evidence.

> III. The trial court erred to the undue prejudice of [appellant] in precluding [appellant's] full use at trial of the rule 30(B)(5) deposition testimony of [appellee].
>
> IV. The trial court erred in failing to grant [appellant's] motion to compel production of [appellees'] hospital policies, procedures, and protocols, and to award appropriate sanctions against [appellees] thereby depriving [appellant] of a fair trial.

{¶ 9} We sustained the first and third assignments of error, rendering the remaining assignments of error moot. The matter was remanded to the trial court for a new trial. Appellees appealed our decision to the Supreme Court of Ohio, which reversed and remanded the matter to this court with instructions to consider appellant's second and fourth assignments of error and make a further determination regarding the third assignment of error ("*Jones II*"). On remand, we permitted the parties to submit supplemental briefing as to the remanded assignments of error. Accordingly, this opinion will address the second, third, and fourth assignments of error, regarding manifest weight of the evidence, the 30(B)(5) testimony, and appellant's motion to compel, respectively.

II. Law and Analysis

{¶ 10} Preliminarily, we note that appellant argues in her supplemental brief that the law-of-the-case doctrine precludes this court from considering again assignments of error Nos. 3 and 4. Appellant contends that the Supreme Court of Ohio only accepted jurisdiction over the proposition of law regarding the failure to declare a mistrial, and thus, this court's prior analysis of assignments of error Nos. 3 and 4 in *Jones I* are now the law of the case. We disagree with appellant's assessment.

{¶ 11} At the conclusion of its opinion in *Jones II*, the court acknowledged that the issues regarding the motion in limine and the discovery motions were beyond the propositions of law accepted for review. However, the court further stated that it was compelled to specifically address them "in order to appropriately frame a remand order." *Jones II* at ¶ 34.

{¶ 12} With regard to appellant's assignment of error regarding the motion in limine, in *Jones I*, we determined that the trial court erred in granting the motion in limine and precluding a portion of the testimony of Kachline. The Ohio Supreme Court acknowledged this ruling, but further ordered on remand that we were to address whether appellant was prejudiced by the trial court's ruling, "that is, whether the jury would have arrived at a different verdict were it not for the purported error." *Id.* at ¶ 36.

{¶ 13} In addition, the court observed that we had declined to rule on the assignment of error regarding the discovery motions and had ordered the trial court to consider them upon remand. The court noted that appellants had argued that any motion not ruled upon by the trial court is presumed to be overruled. The court stated that this argument should be addressed to this court upon remand.

{¶ 14} Thus, contrary to appellant's position, analysis of the issues regarding the motion in limine and the discovery motions is not precluded by the law-of-the-case doctrine. The parties' arguments regarding the third and fourth assignments of error will therefore be considered and analyzed below along with her second assignment of error, which we had declined to rule upon earlier.

{¶ 15} For ease of discussion, we will address appellant's assignments of error out of order.

A. Motion to Compel

{¶ 16} In her fourth assignment of error, appellant argues that the trial court erred in failing to grant her motion to compel the production of discovery documents and failing to grant her motion for sanctions.

{¶ 17} In *Jones I*, we held that the trial court did not rule on appellant's motions to compel and for sanctions. *Id*. at ¶ 59. This court cited the trial court's October 13, 2017 journal entry, which provided that appellant's "motion to compel, motion for sanctions and request for an oral hearing * * * is held in abeyance pending compliance with the court's standing orders on discovery disputes[.]" Because the trial court had not ruled upon the merits of these motions, this court declined to do so in *Jones I*.

{¶ 18} In *Jones II*, the Supreme Court of Ohio instructed this court on remand to consider appellees' argument that (1) generally, when a trial court fails to rule on a pretrial motion, it is presumed that the trial court overruled the motion, and (2) any error concerning appellant's motions to compel and for sanctions was not prejudicial. *Jones II* at ¶ 37, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998).

{¶ 19} On October 13, 2017, the trial court issued the following notice:

> PLAINTIFF'S MOTION TO COMPEL, MOTION FOR SANCTIONS AND REQUEST FOR AN ORAL HEARING, FILED 10/05/2017, IS HELD IN ABEYANCE PENDING COMPLIANCE WITH THE

> COURT'S STANDING ORDERS ON DISCOVERY DISPUTES, AVAILABLE ONLINE. NOTICE ISSUED[.]

{¶ 20} The record does not reflect, nor does appellant even argue, that she ever complied with this notice. Thus, the trial court was fully justified in declining to rule on her motions. As noted by the Supreme Court, it has long been held that a trial court's failure to rule upon a motion results in the presumption that the motion was denied. *See Wingfield v. Howe*, 8th Dist. Cuyahoga No. 85721, 2006-Ohio-276, ¶ 18, citing *Marshall* at syllabus.

{¶ 21} In our view, appellant's failure to comply with the court's standing order regarding discovery disputes, particularly after being notified by the trial court that the motion would not be ruled upon until she did, equates to invited error. "Pursuant to the invited error doctrine, a party may not take advantage of an error on appeal that the party invited or induced." *Mentch v. Cuyahoga Cty. Pub. Library Bd.*, 8th Dist. Cuyahoga No. 105963, 2018-Ohio-1398, ¶ 25, citing *State v. Armstrong*, 8th Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 69. By failing to comply with the proper procedure for discovery disputes, appellant invited any error and any resulting prejudice therefrom. Accordingly, this assignment of error is overruled.

B. Motion in Limine

{¶ 22} In her third assignment of error, appellant argues that the trial court erred in precluding her from using appellee's deposition testimony at trial pursuant to Civ.R. 30(B)(5).

{¶ 23} Prior to trial, appellees filed a motion in limine seeking to "preclud[e] [appellant's] counsel from attempting to elicit medical opinions from the non-physician witnesses that will be called to testify at trial, including but not limited to [Kachline] * * * [.]" Appellees filed this motion anticipating that appellant's counsel "may attempt to elicit incompetent opinions" from these witnesses and "any opinions from non-physicians relative to medical issues would not meet the Evid.R. 702 [expert witness testimony] requirements."

{¶ 24} Following jury selection but prior to opening statements, the court informed counsel on the record that Kachline's deposition testimony would be limited to the Cleveland Clinic's requirements and standards in performing the stress test and that she would not be permitted to testify as to the validity of the diagnostic value of any of the tests. Appellant did not present any of Kachline's deposition testimony at trial.

{¶ 25} In *Jones I*, 2019-Ohio-347, this court held that the trial court erred in granting the motion in limine that precluded appellant from introducing a portion of the deposition testimony of Kachline. In *Jones II*, 2020-Ohio-3780, the Supreme Court of Ohio noted that this court did not discuss whether appellant suffered any prejudice as a result of the trial court's ruling. Accordingly, the Supreme Court of

Ohio instructed this court to "determine whether [appellant] was prejudiced by the trial court's limitation on the use of the cardiac sonographer's testimony." *Id.* at ¶ 36.

{¶ 26} A motion in limine is essentially a request to limit or exclude evidence or testimony at trial. *State v. Winston*, 71 Ohio App.3d 154, 158, 593 N.E.2d 308 (2d Dist.1991); *Thakur v. Health Care & Retirement Corp. of Am.*, 6th Dist. Lucas No. L-08-1377, 2009-Ohio-2765. However, "'[a]n appellate court need not review the propriety of a trial court's ruling on [a motion in limine] unless the claimed error is preserved by an objection, proffer, or ruling on the record[.]'" *Gagliano v. Jihad Kaouk*, 8th Dist. Cuyahoga No. 96914, 2012-Ohio-1047, ¶ 24-26, quoting *State v. Grubb*, 28 Ohio St.3d 199, 203, 503 N.E.2d 142 (1986). In *Grubb*, the Supreme Court of Ohio explained that a motion in limine has an interlocutory or tentative nature, which requires the party opposing the motion to affirmatively raise the issue at the appropriate time during the trial; otherwise, any error caused by the exclusion of the evidence is forfeited. As a result,

> it is incumbent upon a [party], who has been temporarily restricted from introducing evidence by virtue of a motion in limine, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal.

{¶ 27} In *Jones I,* we stated that "[a]t trial, appellant attempted to have Kachline's deposition testimony read into the record as part of her case in chief." *Id.* at ¶ 51. However, upon closer examination of the record and the circumstances of when the court's ruling occurred, it is apparent that this discussion occurred

following jury selection, but prior to opening statements. Appellant never actually attempted to enter any of Kachline's deposition testimony into evidence nor did she proffer or attempt to revisit the court's ruling on the motion in limine during her case in chief.

{¶ 28} The "failure to timely advise a trial court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Because appellant never proffered the subject deposition testimony nor even sought to introduce any of Kachline's deposition testimony at the appropriate time during the trial, she waived any error caused by the court's granting of the motion in limine. Therefore, we overrule the third assignment of error.

C. Manifest Weight

{¶ 29} In her second assignment of error, appellant argues that the jury's verdict in favor of appellees was against the manifest weight of the evidence.

{¶ 30} In *Jones I*, this court did not address appellant's manifest weight challenge. In *Jones II*, the Supreme Court of Ohio instructed this court to determine whether the jury's verdict was against the manifest weight of the evidence on remand. *Id.* at ¶ 38.

{¶ 31} In her supplemental brief, appellant does not specifically address the manifest weight argument, aside from arguing that it would be rendered moot based upon the law-of-the-case doctrine, an argument that we already found meritless. In

her original merit brief, however, appellant cited the following evidence to demonstrate that the jurors lost their way:

> 1) ReDon had a strong family history of cardiac disease. His father died at age 48 of a heart attack, and his mother died at age 60 to a heart attack.
>
> 2) ReDon had multiple risk factors for cardiac disease, including obesity, diabetes, hypertension, hyperlipidemia, sleep apnea, and cigarette smoking, as well as the fact that ReDon was male and African-American.
>
> 3) ReDon presented to the emergency room of Hillcrest Hospital on June 25, 2012, with complaints of intermittent left-sided chest pain of one weeks' origin. The emergency room doctor described ReDon's chest pain as "pressure and dull."
>
> 4) ReDon continued to complain of chest pain while being evaluated in both the hospital's emergency room and observation unit. These complaints of chest pain were occurring while ReDon was at rest.
>
> 5) An EKG performed in the emergency room did not show any ST elevations; this finding is consistent with unstable angina.
>
> 6) Blood tests taken in the emergency room showed that ReDon's Troponin levels were not elevated. This finding is also consistent with unstable angina.
>
> 7) Given ReDon's multiple risk factors, the location of his chest pain, and the results of his EKG and blood work, ReDon's most reasonable diagnosis was unstable angina. Unstable angina is a highly lethal medical condition and heralds an impending heart attack.
>
> 8) Dr. Jacobs was consulted to determine whether ReDon's chest pain was caused by a heart condition.
>
> 9) As was his custom, Dr. Jacobs instructed his nurse to assess ReDon in the CDU before he arrived on the scene. The template prepared by Dr. Jacobs' nurse cataloguing her evaluation of ReDon is missing from the Hillcrest Hospital records and this piece of paper was purportedly shredded at some undefined point in time.

10) When Dr. Jacobs first saw ReDon in the CDU on the morning of June 26, 2012, he wrote in his consultation note that ReDon "had something funny in his chest" and "[i]t was squeezing." Dr. Jacobs also documented that ReDon "has not had any pain since Sunday evening," a statement that was contradicted by the emergency room nurses' notes of the day before.

11) Dr. Jacobs discharged ReDon from the hospital on June 26, 2012, with a diagnosis of "chest pain of etiology unknown." At no time did Dr. Jacobs ever determine the cause of ReDon's ongoing chest pain from that date forward.

12) Prior to hospital discharge, appellant insisted that ReDon undergo a cardiac catheterization, but Dr. Jacobs countered that such a test was not necessary. Instead, Dr. Jacobs ordered a nuclear stress test to be performed in his medical office on June 27, 2018.

13) Because ReDon was not able to tolerate his nuclear stress test due to claustrophobia, Dr. Jacobs scheduled a stress echo test for the patient for July 2, 2012.

14) A stress echo, when performed correctly, is only 75-80% accurate when the patient exercises to 85% of their maximum capacity. ReDon was unable to exercise enough to reach 85% of his maximum capacity. Following completion of the stress echo, Dr. Jacobs comforted ReDon, reassuring him that he possessed the heart of a twenty-year-old and discharged ReDon from his care one week before his fatal heart attack, telling him no further follow up was necessary.

15) After the stress echo, Dr. Jacobs had no further contact with ReDon. Dr. Jacobs never did determine the root cause of ReDon's left-sided chest pain, and he never referred ReDon to any non-cardiac specialists to resolve the issue.

16) A physician cannot visualize the coronary arteries, only the heart muscle, when utilizing a stress echo test. Cardiac catheterization can tell whether the coronary arteries are blocked with 100% certainty. No other test has that capability.

17) According to the testimony of defense expert Dr. David Bach, "heart catheterization gives you anatomy; it is the road map and tells you what the arteries look like, whether there is narrowing or blockage, and how many vessels are involved." Similarly, according to the testimony of

> plaintiff's expert, Dr. John MacGregor, catheterization is the "gold standard where you get a clear picture of the arteries that supply the heart with blood and you won't miss it."
>
> 18) Hillcrest Hospital and Cleveland Clinic Main Campus both had the facilities, resources, and personnel to perform catheterization and stenting in 2012. If necessary, Dr. Jacobs could have referred ReDon in follow-up to one of his partners who worked as an interventional cardiologist.
>
> 19) According to ReDon's autopsy, ReDon experienced a total of three myocardial infarctions — two smaller heart attacks prior to the one that killed him. The autopsy also confirmed that the source of ReDon's three heart attacks was a 90% blockage in ReDon's right coronary artery.
>
> 20) Cardiac catheterization should have been performed on ReDon. It would have detected the 90% blockage. Angioplasty should then have been performed to supply blood flow past the blockage thereby preventing all three heart attacks.

{¶ 32} In response, appellees argue that both appellant and appellees presented expert testimony on the issue of whether ReDon required a cardiac catheterization. Appellees contend that their expert refuted appellant's expert's opinion that there was no evidence of ischemia. The jury was required to weigh the testimony of the competing experts and choose to accept it or reject it.

{¶ 33} Regarding manifest weight of the evidence, the Supreme Court of Ohio has explained:

> Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the [trier of fact] that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

Eastley v. Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997).

{¶ 34} In determining whether a judgment is against the manifest weight of the evidence,

> we examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered.

Gerston v. Parma VTA, L.L.C., 8th Dist. Cuyahoga No. 105572, 2018-Ohio-2185, ¶ 58.

{¶ 35} "In weighing the evidence, we are guided by a presumption that the findings of the trier of fact are correct." *Id*. at ¶ 59. This presumption arises because the trier of fact had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 36} As noted by appellant, the pivotal question in this matter was "whether [ReDon] required a cardiac catheterization, given his strong family history, numerous personal risk factors, presenting complaints of left-sided chest pain, and a desire to undergo the heart procedure." In attempting to assist the jury in answering this question, both appellant and appellees provided expert testimony. Consequently, the jury was presented with competing opinions from qualified experts regarding what constituted the applicable standard of care and whether that

standard of care was breached by Dr. Jacobs under the circumstances. The jury ultimately answered an interrogatory finding that Dr. Jacobs did not fall below the accepted standards of care in his treatment of ReDon.

{¶ 37} Following a complete and careful review of the record, we cannot say that, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. During the trial, the jury was presented with conflicting expert opinions regarding the standard of care and evidently determined that Dr. Jacobs and his medical expert witness, Dr. Bach, were more credible. Because there was competent, credible evidence to support the jury's verdict, this court will not second guess their findings.

{¶ 38} Thus, we find that the jury's verdict was not against the manifest weight of the evidence, and we decline to disturb it. *See, e.g., Welsh v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 94068, 2011-Ohio-448, ¶ 42 (where testimony of competing experts with opposite opinions was presented to the jury such that the evidence was susceptible to more than one interpretation, the jury's verdict was not against the manifest weight of the evidence); *O'Connor v. Fairview Hosp.*, 8th Dist. Cuyahoga No. 98721, 2013-Ohio-1794, ¶ 58 (where jury was presented with competing opinions as to the cause of plaintiff's injuries, jury's verdict in favor of plaintiff and against hospital on medical malpractice claim was not against the manifest weight of the evidence). Appellant's second assignment of error is therefore overruled.

III. Conclusion

{¶ 39} The trial court did not err in denying appellant's motion to compel, and appellant waived any error in the court's partial granting of the motion in limine to exclude a portion of Kachline's deposition testimony. Finally, the jury's verdict was not against the manifest weight of the evidence. All of appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

{¶ 40} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

FRANK D. CELEBREZZE, JR., JUDGE

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