[Cite as *Casey v. Erie Ins. Co.*, 2020-Ohio-4067.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JANICE CASEY, INDIVIDUALLY, ETC.,	:	
	:	
Plaintiff-Appellant,	:	No. 109056
v.	:	
ERIE INSURANCE COMPANY, ET AL.,	:	
Defendants-Appellees.		

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 13, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-880327

Appearances:

Paul W. Flowers Co., L.P.A., and Paul W. Flowers; Plevin & Gallucci Co., L.P.A., David R. Grant, and Frank L. Gallucci, III, *for appellant*.

Gallagher Sharp, L.L.P., Gary L. Nicholson, and Richard C.O. Rezie, *for appellees* Derrek and Joy Supple.

Curtin Law L.L.C., Cynthia K. Curtin, and Jacob P. Nicholas, *for appellee* State Farm Mutual Automobile Insurance Company.

MARY EILEEN KILBANE, J.:

{¶ 1} Janice Casey ("Casey"), individually and as a legal representative of Joseph C. Casey, deceased ("Decedent"), appeals the granting of two summary judgment motions in favor of two defendants in this case: Derrek and Joy Supple ("Supples") and State Farm Mutual Automobile Insurance Company ("State Farm"). After careful consideration of the record and the arguments, we affirm the granting of both motions.

Facts of the Complaint

{¶ 2} This wrongful death and survivorship action arose out of a motor vehicle accident that occurred on June 5, 2015, in Avon, Ohio. Casey alleges in her complaint that the Decedent was catastrophically injured in the accident.

{¶ 3} The Decedent was employed by Heights Driving School, Inc., ("Heights"). On the day of the accident, he was seated in the passenger seat of a Heights' vehicle, a 2005 Kia Optima, ("the Kia"), observing and instructing a teenage student driver. The Kia was struck by another vehicle in Avon, Ohio, at the intersection of Detroit and Jaycox Roads. This other vehicle was being driven by the sixteen-year-old defendant, K.M., who had failed to stop at a red light.

{¶ 4} At the time of the accident, K.M. was working for the Supples as a babysitter. June 5, 2015, was to be her first and only day. K.M. spoke to Joy Supple, ("Joy"), in May 2015 about the Supples' need for a babysitter. Joy communicated that K.M. would need a driver's license to babysit. K.M. notified the Supples that she had a driver's license. She also told the Supples that she had another job working

at Marc's in North Ridgeville; she was only available to work around her job at Marc's. Joy was comfortable with that arrangement and the two reached a tentative agreement that K.M. would receive $60.00 per day for babysitting.

{¶ 5} On June 1, 2015, Joy sent K.M. an email that included a proposed schedule for the month of June, which included the schedule for the Supples' other babysitter. Sometime before June 5, K.M. met the Supples' daughters, ages 8 and 13.

{¶ 6} On the morning of June 5, 2015, K.M. arrived at the Supples' home to begin babysitting. In addition to the two children, a friend of the daughters had stayed overnight, and Joy asked K.M. to watch that child as well. K.M. informed Joy that she had a shift at Marc's in the afternoon and would need to leave early; Joy asked that K.M. drop off the children's friend, and then drive her two daughters to Joy's office before proceeding to Marc's. K.M. agreed.

{¶ 7} On the afternoon of June 5, 2015, the Decedent was scheduled to give driving instructions to M.M., a sixteen-year-old student. M.M. was picked up by another student for his lesson — the Decedent was seated in the passenger seat of the Kia that was equipped with an extra set of emergency brakes for the instructor. M.M. drove to the other student's home, dropped him off, and continued his lesson with the Decedent. After two hours, M.M. drove eastbound on Detroit Avenue to pick up the next student.

{¶ 8} K.M. had been following the directions of the three children to drive the friend home. She drove into the Jaycox and Detroit road intersection without

stopping for a red light signal, colliding with the Kia that M.M. and the Decedent were operating.

{¶ 9} The Decedent suffered multiple injuries, including broken ribs, a cracked sternum, a fractured pelvis, and many contusions. He was hospitalized for several months and passed away twenty months after the collision.

Procedural History and Summary of the Arguments

{¶ 10} Heights had a motor vehicle insurance policy issued by Erie Insurance Company ("Erie"). The Caseys also had personal and umbrella auto coverage from State Farm, which included underinsured motorists ("UIM") protection.

{¶ 11} On May 15, 2017, Casey filed a complaint in the Cuyahoga County Court of Common Pleas against four defendants: Erie, State Farm, K.M., and the Supples. Casey raised separate claims for negligence against K.M. (Claim One), joint and derivative liability against the Supples (Claim Two), Underinsured Motorist ("UIM") coverage against Erie (Claim Three), breach of contract and bad faith against Erie (Claim Four), and UIM coverage against State Farm (Claim Five).

{¶ 12} Answers were submitted denying liability to a certain extent and interposing various cross-claims. Those cross-claims are not at issue in this appeal and so we will not address them.

Claim Two and the Supples' Motion for Summary Judgment

{¶ 13} On March 26, 2018, the Supples filed a motion for summary judgment arguing that there are no genuine issues of material fact with respect to

the issue of vicarious liability. Claim Two also alleged that K.M. was "acting in furtherance of a joint enterprise or venture with Defendants Derrek and Joy Supple." The Supples' response has continually been that this element of Claim Two is properly considered as an element of the vicarious liability claim given that the Supples were allegedly employing K.M.

{¶ 14} The Supples argued in their motion that K.M. was an independent contractor and that there were no genuine issues of material fact as to that point. Their brief references both the deposition of K.M. and Joy, and while the depositions are not completely synchronized, they match on the essential points. Namely, that the Supples do not run a childcare business, that K.M. was only babysitting for extra money, and that any babysitting would have to fit with K.M.'s schedule working at Marc's grocery store. K.M. was also never paid for her work on June 5, and has never asked the Supples to pay her.

{¶ 15} On April 25, 2018, Casey responded to their motion for summary judgment. Casey argued that there was a factual question of whether the Supples owed a duty to the Decedent, and that reasonable minds could infer that the Supples were jointly liable for the accident. Her argument is that Joy "directed an inexperienced teenage driver to transport three young children to an unfamiliar destination" and that it was foreseeable that "the teenage driver would be seriously distracted while taking directions from potentially rambunctious juveniles."

{¶ 16} Casey further argued that because of the extent of instruction given to K.M. by the Supples there were genuine issues of material fact as to whether she was

an employee or an independent contractor. Casey pointed out that Joy had told K.M. what the three children could eat, had told her the rules for the house and the pool, and had asked her to drive the friend home and then her two children to her office before K.M. went to work at Marc's.

{¶ 17} On May 3, 2018, the Supples responded to Casey's brief in opposition. In their response they argued that Casey was conflating two forms of liability: respondeat superior and joint tortfeasor liability. They argued that respondeat superior liability occurs when an employee engages in negligent behavior and liability falls on the employer solely as a result of the employer-employee relationship. They argued that this theory was incompatible with a joint tortfeasor theory that would require the Supples to have endorsed K.M.'s behavior in order to accomplish a negligent act.

{¶ 18} On June 8, 2018, the trial court granted the motion for summary judgment. The court found that K.M. was an independent contractor and that the Supples were not involved in a joint childcare venture with K.M.

State Farm's motion for summary judgment

{¶ 19} On March 26, 2018, State Farm filed a motion for summary judgment. In that motion State Farm acknowledged that the facts of the accident and the injuries incurred are not the focus of State Farm's Summary Judgment request— rather the motion pertained solely to insurance coverage.

{¶ 20} At the time of the accident, the Decedent had two insurance policies with State Farm: a personal automobile insurance policy and an umbrella policy.

State Farm argues that neither policy covered the decedent's accident and that there are no genuine issues of material fact that would call that argument into question.

{¶ 21} According to the deposition of Casey, the Decedent had been employed as a Heights instructor for several years. He worked often, sometimes five or six days a week. According to Casey, the Decedent used the same vehicle every day, the Kia.

{¶ 22} The Decedent never used his personal vehicle while educating students because he was required to operate a car with a passenger braking system. While his personal vehicle was covered under his personal insurance with State Farm, Heights had insurance coverage through Erie.

{¶ 23} State Farm argued that the Decedent was not covered by his personal insurance contract because of a "regular use" exception in the contract. The terms of the contract state that the personal insurance policy does not cover damages resulting from injuries that occur "while any insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of you or any resident relative if that motor vehicle is not your car, a newly acquired car, or a temporary substitute car."

{¶ 24} The Kia is not the car listed in the Decedent's personal policy. State Farm argues that the Kia was both furnished to and available for the regular use of the Decedent and therefore there is no coverage.

{¶ 25} State Farm also argued that the umbrella policy does not cover the Decedent because the umbrella policy is only activated if the underlying coverage is also active.

{¶ 26} Erie also filed a motion for summary judgment on March 26, 2018. In that motion, Erie did not dispute that the Decedent qualified as insured under the contract with Heights Driving School.

{¶ 27} Erie did argue, however, that the Decedent was also covered under State Farm's policy and that State Farm should bear one-third of any underinsured motorist coverage amounts owed. On April 25, 2018, Erie submitted a brief in opposition to State Farm's motion for summary judgment. Casey adopted these arguments in response to State Farm on April 25, 2018.

{¶ 28} Erie, and subsequently Casey, argues that either the Kia was not available for the "regular use" of the Decedent or, alternatively, there are genuine issues of material fact as to whether it was available for "regular use." Erie argued that the student drivers were using the vehicle at the time of the accident and that determining "regular use" is a very fact specific inquiry.

{¶ 29} On June 8, 2018, the trial court granted State Farm's motion for summary judgment and denied Erie's motion for summary judgment as moot.

Disposition of the case

{¶ 30} On August 8, 2018, counsel notified the trial court that all remaining claims had been settled with the remaining two defendants, K.M. and Erie. The case was to be dismissed with prejudice pending Probate Court approval.

{¶ 31} On September 18, 2019, by stipulation of the parties, the case was dismissed with prejudice.

{¶ 32} On September 27, 2019, Casey filed a notice of appeal seeking further review of the August 8, 2018 and September 18, 2019 Journal Entries as well as "all other adverse and appealable rulings in this action."

{¶ 33} She has presented two assignments of error, both concerning the granting of summary judgment.

Assignments of Error I

> The trial court erred as a matter of law, by granting summary judgment in favor of Defendants-Appellees Derrek and Joy Supple.

Assignment of Error II

> The trial court erred as a matter of law, by granting summary judgment in favor of Defendant-Appellee, State Farm Mutual Automobile Insurance Company.

Summary judgment

{¶ 34} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12 (8th Dist.).

{¶ 35} Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (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 construing the 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. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United*, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 36} The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 696 N.E.2d 201 (1998). Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶ 37} With these principles in mind, we proceed to consider whether the trial court's grant of summary judgment was appropriate and find that it was.

The Supples' motion for summary judgment

{¶ 38} In their motion for summary judgment the Supples argued that K.M. is an independent contractor and that there are no genuine issues of material fact

that suggest otherwise. Further, the Supples argued that Casey failed to adequately allege a joint tortfeasor claim, and, even if she had, they cannot be joint tortfeasors both as a matter of fact and of law.

Independent Contractor

{¶ 39} The well-settled test used to determine whether an employed person is an independent contractor or an employee is as follows:

> The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created.

Bobik v. Indus. Comm., 146 Ohio St. 187, 191, 64 N.E.2d 829 (1946), quoting *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943), paragraph two of the syllabus.

{¶ 40} In analyzing whether a person is an independent contractor or an employee, the court should consider, but is not limited to, the following factors:

> (1) Whether the one employed is engaged in a distinct occupation or business; (2) whether the worker or the employer supplies the place and requisite instrumentalities; (3) whether the work is done by a specialist requiring a particular skill; (4) the method of payment whether by the time or by the job; (5) the length of time for which the person is employed; (6) whether the work is a part of the regular business of the employer; (7) whether the employer or the employed controls the detail and quality of the work; and (8) the terms of any pertinent agreements or contracts between the parties.

Lenart v. Doversberger, 8th Dist. Cuyahoga Nos. 65372 and 65373, 1994 Ohio App. LEXIS 2063 (May 12, 1994).

{¶ 41} Further, we have found that all indicia of an employment relationship in a given case must be assessed together as a whole. *Vajda v. St. Paul Mercury Ins. Co.*, 8th Dist. Cuyahoga No. 80917, 2003-Ohio-160, citing *Harman v. Schnurmacher*, 84 Ohio App.3d 207, 211, 616 N.E.2d 591 (11th Dist.1992).

{¶ 42} In this case, it is clear that K.M. is correctly classified as an independent contractor. While we are not bound to the decision of the trial court in any way, we find its analysis as to K.M.'s status enlightening. The court stated in its judgment:

> First, a teenage babysitter is not engaged in a distinct occupation or business. [K.M.] testified she was babysitting for extra money. It was not her occupation or business. Second, while a babysitter is entrusted with someone's children, it can hardly be said to be work requiring special skill. There was no testimony of any training or certification. Third, [K.M.] provided an important instrumentality, her automobile, to perform the duties for which she was hired, specifically transporting the children to and from activities as well as Mrs. Supple's job. Fourth, this was [K.M.'s] first time babysitting for this family. She never babysat for them again. Next, it is undisputed that [K.M.] was never paid for the one time she babysat for the Supples. The final factor, whether the work is part of a regular business, clearly points to [K.M.] being an independent contractor. It is neither a regular business for [K.M.] or the Supples.

{¶ 43} Added to the above facts is an equally critical piece of evidence — K.M. informed the Supples that she could only babysit for them when she was not scheduled to work at Marc's. In fact, the day of the accident, K.M. told Joy that she would have to cut the babysitting short so that she could go work at Marc's. K.M. was in complete control of her babysitting schedule.

{¶ 44} Casey does not dispute this narrative, but instead tries to amplify a few facts. Casey argues that because Joy told K.M. what the children should eat, the house and pool rules, and then asked her to drive the children to Joy's office before leaving for her job, the Supples were in control. To support this proposition, Casey relies on a fragment from a 1955 Ohio Supreme Court case. In explaining what "right to control" meant the Ohio Supreme Court stated if the erstwhile employer "is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor." *Councell v. Douglas*, 163 Ohio St. 292, 126 N.E.2d 597 (1955), paragraph one of the syllabus. Casey argues that because Joy provided some minimal instruction rather than just leaving her children with K.M. without saying anything, then the Supples were not interested merely in "the ultimate result."

{¶ 45} *Councell* does not make "the ultimate result" the ultimate test for determining whether a person is an independent contractor; the language is merely descriptive. We have decades of cases that explain that numerous factors are used to determine whether an independent contractor is under the control of someone.

{¶ 46} Casey does not offer any cases that support her conclusion that a babysitter is an employee or any cases that would suggest minimal instruction — weighed together with "all indicia of an employment" — creates a genuine issue of material fact in this case.

{¶ 47} Ultimately, K.M. was working for extra money, money she never received, all the while prioritizing her job at Marc's. This was a typical babysitting job; K.M. was an independent contractor.

Joint tortfeasor

{¶ 48} Casey's claim against the Supples clearly included an allegation that the Supples were vicariously liable under the doctrine of respondeat superior. However, there are also elements of a more nebulous claim — that K.M. was "acting in furtherance of a joint enterprise or venture" with the Supples. In its motion for summary judgment as well as its reply to Casey's opposition, the Supples argue that this is an unsubstantiated allegation of joint tortfeasor liability that Casey improperly conflates with respondeat superior. The trial court appears to have taken a similar view in assessing whether there was any joint or several liability, focusing on respondeat superior and finding that the Supples and K.M. were not involved in any joint childcare venture. In conducting our de novo review of the evidence, we agree that the elements of joint tortfeasor liability are not present and that Casey presented no evidence to suggest a genuine issue of material fact.

{¶ 49} We have defined a joint tortfeasor as:

> one who actively participates, cooperates in, requests, aids, encourages, ratifies, or adopts a wrongdoer's actions in pursuance of a common plan or design to commit a tortious act.

Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist., 90 Ohio App.3d 215, 223, 628 N.E.2d 143 (8th Dist.1993), citing Prosser, *Law of Torts* (4th Ed.1978) 292, Section 46.

{¶ 50} Casey argues that active negligence, in this case driving through a stoplight, can create joint liability. But, in order for joint liability to apply here, K.M. and the Supples would need to have encouraged K.M. to negligently drive through a stop light. That theory of liability simply does not flow from the facts that Casey provides this court.

{¶ 51} Instead, Casey suggests that the Supples "facilitated" K.M.'s negligence by asking her to drive their children in the first place. That is, quite simply, not what a joint tortfeasor is. K.M. was a licensed Ohio driver operating her own vehicle; she did not form a plan with the Supples to drive through a red light or even to negligently drive. In suggesting the Supples were liable for her negligence, Casey asks this court to stretch the definition of joint tortfeasor well past its breaking point.

{¶ 52} The Supples' motion for summary judgment was properly granted. There are no genuine issues of material fact and the Supples are entitled to judgment as a matter of law. The first assignment of error is overruled.

State Farm

{¶ 53} State Farm argues that the Decedent's policy includes an exclusion that means he is not entitled to personal UIM coverage and, because there is no underlying coverage, he is also not entitled to coverage under the Casey's umbrella policy. State Farm argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. We agree.

{¶ 54} The Casey's personal Auto Policy through State Farm contained the following provision:

> UNINSURED MOTOR VEHICLE COVERAGE
> * * *
> Exclusions
> THERE IS NO COVERAGE
> * * *
> FOR DAMAGES ARISING OUT OF AND RESULTING FROM BODILY INJURY TO ANY INSURED WHILE ANY INSURED IS OPERATING OR OCCUPYING A MOTOR VEHICLE OWNED BY, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF YOU OR ANY RESIDENT RELATIVE IF THAT MOTOR VEHICLE IS NOT YOUR CAR, A NEWLY ACQUIRED CAR, OR A TEMPORARY SUBSTITUTE CAR.

{¶ 55} The overriding purpose of the regular use exclusion is to protect insurance companies from insured individuals purchasing coverage on one vehicle and then using that coverage for protection while continually driving non-owned vehicles for which no premium was paid. *Ohio Cas. Ins. Co. v. Travelers Indemn.*, 42 Ohio St. 2d 94, 97, 326 N.E.2d 263 (1975). Ohio law acknowledges "that insureds often drive non-owned vehicles on trips where driving chores are shared, or around town for short trips in a friend's or relative's car. Hence, the construction placed upon the term 'regular use' in family policies is quite favorable to the insured." *Id.*

{¶ 56} The Ohio Supreme Court accordingly defined "regular use" as frequent, steady, constant, or systematic use of the vehicle. *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 589, 635 N.E.2d 19 (1994). In this case there is some question over whether the Decedent always used this particular Kia. However, that is not a question we need to answer. "[I]t is well settled that an automobile will be

excluded under such policy provisions although it is only one of a group of automobiles from which an automobile is regularly furnished to the named insured by his employer." *Kenney v. Emp.'s Liab. Assur. Corp., Ltd.*, 5 Ohio St.2d 131, 134, 214 N.E.2d 219 (1965).

{¶ 57} In attempting to prove no genuine issue of material fact, State Farm draws heavily from the deposition of Janice Casey herself. Casey stated that her husband worked five to six days a week, putting in many hours. She said that he had been with Heights Driving School for several years, perhaps more than five. The Decedent never used his personal vehicle to instruct students, instead exclusively using a Heights' vehicle with a dual braking system. She further testified that the vehicle, the Kia, was kept at the Caseys' house, and that the Decedent usually used that same Kia to instruct students. M.M., the student-driver at the time of the accident, testified that he had used the Kia, or a similar vehicle, for each of his four lessons.

{¶ 58} State Farm argues that this constitutes "regular use" and we agree. In contrast, Casey does not provide any evidence that the Decedent did not have regular use of the vehicle, instead suggesting that the Decedent was merely a passenger, that there is no evidence that the Caseys used the vehicle for personal use, and that we do not have enough evidence that he used the car frequently.

{¶ 59} We note initially that the policy explicitly excludes occupants of the vehicle as well as operators, so whether the Decedent was operating the car is immaterial. Furthermore, this court has previously stated that the "fact that [the

insured] did not have unlimited use of the vehicle for both work-related and personal purposes is irrelevant" to the determination of whether a vehicle was available for the insured's regular use. *Pickering v. Nationwide Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 82512, 2003-Ohio-4076, ¶ 22.

{¶ 60} Casey relies on several cases to bolster his argument that the Decedent's use of the vehicle does not constitute regular use, including two from this district that she alleges involve far more proof of use. *See Pickering*, 2003-Ohio-4076 (UPS mail truck was used five days a week for two years); *Liggins v. White*, 8th Dist. Cuyahoga No. 96167, 2011-Ohio-4417 (field technician drove the same AT&T work van for two years). Neither of these cases offers "more proof"; according to the evidence provided by both parties, the Decedent operated and occupied the same or a similar vehicle for several years, five to six days a week. And, even if we found that other cases displayed more frequent "regular use," that does not diminish the frequency in this case.

{¶ 61} There are no genuine issues of material fact and State Farm is entitled to judgment as a matter of law. The motion for summary judgment was properly granted.

Failure of preservation

{¶ 62} State Farm also argued that Casey failed to preserve her arguments for appeal. In reply to State Farm's motion for summary judgment, Casey did file a response. However, that response adopted "by reference the reasons and argument to be submitted by Defendant Erie Insurance in response to the Motion."

{¶ 63} Having already concluded that State Farm's motion for summary judgment was properly granted we decline to rule on this alternative theory.

{¶ 64} Accordingly, we affirm the decisions of the trial court.

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.

_____
MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR