[Cite as *Sites v. Sites* , 2010-Ohio-2748.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

WENDY A. SITES, nka BANACH,	:	
	:	
Plaintiff-Appellant,	:	Case No. 09CA19
	:	
vs.	:	**Released: June 3, 2010**
	:	
MARK A. SITES,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Jennifer J. Joseph, Deborah L. McNinch, and Courtney Karn, Columbus, Ohio, for Appellant.

Mark A. Sites, Ironton, Ohio, Appellee pro se.[1]

McFarland, P.J.:

{¶1} Appellant appeals the Lawrence County Common Pleas court's decision denying her motion to modify the parties' prior allocation of parental rights and responsibilities. She asserts that the trial court abused its discretion by failing to find that a sufficient change in circumstances had occurred to warrant a change in the designation of the children's residential parent. Because the testimony presented at the hearing fails to substantiate a credible change in circumstance that has materially and adversely affected

[1] Sites did not file an appellate brief in the instant matter.

the children, the trial court did not abuse its discretion by denying appellant's motion to modify the prior allocation. Furthermore, because the trial court did not find the threshold requirement of a change in circumstances, appellant's assertion that the trial court abused its discretion by failing to consider the children's best interests is without merit.

{¶2} Appellant further asserts that the trial court abused its discretion by overruling her motion for a psychological evaluation. Because nothing in the record indicates that any of the parties have a mental health issue, the trial court did not abuse its discretion by overruling her motion.

{¶3} Appellant next contends that the trial court abused its discretion by overruling her motion to modify child support. Because the trial court did not enter a decision regarding this motion, we decline to consider the merits of the motion in the first instance. Accordingly, we overrule appellant's four assignments of error and affirm the trial court's judgment.

I.

FACTS

{¶4} On May 14, 2008, the parties divorced, and the trial court incorporated into its decree the parties' shared parenting plan that they signed in January of 2008. The shared parenting plan designated appellee the residential parent for school purposes of the parties' three minor children

and allocated parenting time to appellant. In particular, due to appellant's impending relocation to Minnesota, the plan allocated parenting time to her primarily when the children had extended school breaks, i.e., summer and Christmas vacation. The parties' shared parenting plan required appellant to pay child support in the amount of $401.43 per month and required appellee to provide health insurance for the children.

{¶5} Approximately one month after the court entered the divorce decree, appellant filed a motion to modify the prior allocation of parental rights and responsibilities. She alleged that the following constituted a change in circumstances: "Since the Children have been living with the Defendant beginning on January 15, 2008, their grades have significantly dropped, they are missing numerous days of school, they are being left home alone, they are all sleeping in the same bed as the Defendant, they are not being taken to the Doctor when they are sick, and they are not allowed to speak with [appellant] during the designated times in the Shared Parenting Plan."

{¶6} On February 27, 2009, appellant filed a motion for a psychological evaluation. On April 21, 2009, the magistrate denied appellant's motion for psychological evaluation.

{¶7} On April 24, 2009, the guardian ad litem filed a report. In it, she noted appellant's claimed change in circumstances and that she spoke with all three children. The guardian reported that: (1) the oldest child, A., was emotional about appellant's motion to modify; (2) the middle child, M., has been consistent in his wish to remain in Ironton; (3) the youngest child stated he would like to move to Minnesota; (4) the children are good students and engage in extracurricular activities; (5) both parents have appropriate homes; (6) the boys sleep with appellee in his bed, but do so by choice and she found no reports of inappropriate behavior; and (7) she found no evidence of any physical or mental health issues of any parties involved. The guardian investigated appellant's claim that appellee prevents her from talking to the children by phone, but the children advised the guardian that they talk to appellant every day. The guardian recognized that appellee had been evicted, but that he obtained new employment and a new residence. The guardian found no reason to change the children's residential parent.

{¶8} The magistrate subsequently held a hearing, and on May 7, 2009, the magistrate denied appellant's motion to modify the prior allocation. The magistrate noted that he conducted an in camera interview of the children and found that the older two children "expressed an unqualified desire to

live with their dad," while the youngest would like to live with appellant.

The magistrate summarized the other facts as follows:

> "[A.] got a D in school this year, but now gets A's and B's.
>
> Sometimes [appellee] is close by while [A.] talks to [appellant] on the phone and can't say whatever it is she would like to say.
>
> The boys sleep with [appellee] while [A.] has her own room. Actually, the boys have their own beds but choose to sleep with [appellee].
>
> [Appellee] has had several jobs in the last two years, and was evicted once. This may or may not be related to mom's being $2,000 behind in child support at one time.
>
> [Appellee] used to leave the two boys home for 10 minutes while he took [A.] to the bus stop—now he takes them all together.
>
> [Appellee] us [sic] made unnecessary comments about mom leaving the kids."

{¶9} The magistrate found that appellant's complaints do not "come close to being a change in circumstances. The fact is that the children are thriving under dad's care in all respects. The report of the guardian ad litem bears this out in considerable detail."

{¶10} On May 20, 2009, appellant filed objections to the magistrate's decision and later filed supplemental objections. She objected to the magistrate's decision because: (1) the magistrate failed to consider the condition of appellee's house; (2) the magistrate failed to find that the children's grade fluctuations constitute a change in circumstance; (3) the magistrate failed to find that the boys sleeping in appellee's bed constitutes a

change in circumstance; (4) the magistrate failed to find that appellee's switching jobs five times in a year constitutes a change in circumstance, (5) the magistrate failed to find that appellee's eviction constitutes a change in circumstance; (6) the magistrate improperly determined that appellant's child support arrearage may have been responsible for appellee's eviction; (7) the magistrate failed to find that appellee leaving the children home alone constitutes a change in circumstance; (8) the magistrate failed to find that appellee's interference with appellant's telephone communication and parenting time constitutes change in circumstance; (9) the magistrate failed to find that the youngest child's desire to live with appellant constitutes a change in circumstance; and (10) the magistrate failed to find that appellee's refusal to take the children to doctor constitutes a change in circumstance

{¶11} On June 23, 2009, the trial court overruled appellant's objections to the magistrate's decision and overruled appellant's motion to modify the parties' shared parenting plan so as to designate appellant the children's residential parent.

II.

ASSIGNMENTS OF ERROR

{¶12} Appellant time appealed the trial court's judgment and raises four assignments of error.

First Assignment of Error:

"The trial court abused its discretion and erred as a matter of law by failing to find a change of circumstances in support of plaintiff-appellant's motion for reallocation of parental rights and responsibilities pursuant to R.C. 3109.04(E)(1)(a)."

Second Assignment of Error:

"The trial court abused its discretion and erred as a matter of law by failing to consider the best interests of the children and the harm likely to be cause by a change of environment pursuant to Ohio Revised Code 3109.04(E)(1)(a)."

Third Assignment of Error:

"The trial court abused its discretion and erred as a matter of law by overruling plaintiff-appellant's motion for psychological evaluation pursuant t Ohio Civil Rule 35 and by failing to issue a magistrate's decision pursuant to Ohio Civil Rule 53."

Fourth Assignment of Error:

"The trial court abused its discretion and erred as a matter of law in overruling plaintiff-appellant's motion for modification of child support."

III.

ANALYSIS

A

FAILURE TO FILE APPELLATE BRIEF

{¶13} We first observe that appellee did not file an appellate brief. If an appellee fails to file an appellate brief, App.R. 18(C) authorizes us to accept an appellant's statement of facts and issues as correct, and then

reverse a trial court's judgment as long as the appellant's brief reasonably appears to sustain such action. See *Sprouse v. Miller*, Lawrence App. No. 06CA37, 2007-Ohio-4397, at fn.1. In other words, an appellate court may reverse a judgment based solely on a consideration of an appellant's brief. See id., citing *Helmeci v. Ohio Bur. of Motor Vehicles* (1991), 75 Ohio App.3d 172, 174, 598 N.E.2d 1294; *Ford Motor Credit Co. v. Potts* (1986), 28 Ohio App.3d 93, 96, 502 N.E.2d 255; *State v. Grimes* (1984), 17 Ohio App.3d 71, 71-72, 477 N.E.2d 1219. In the case at bar, appellant's brief does not reasonably appear to support a reversal of the trial court's judgment.

B

MOTION TO MODIFY PRIOR ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES

{¶14} Appellant's first two assignments of error challenge the trial court's decision denying her motion to modify the prior allocation of parental rights and responsibilities. Because the same standard governs our analysis of these two assignments of error, we have combined them.

{¶15} In her first assignment of error, appellant asserts that the trial court abused its discretion by determining that a change in circumstances had not occurred. In her second assignment of error, appellant argues that

the trial court abused its discretion by failing to consider the children's best interests and by failing to consider whether the benefits in changing the residential parent would outweigh any potential harm.

1

Standard of Review

{¶16} We review a trial court's decision regarding a modification of a prior allocation of parental rights and responsibilities with the utmost deference. *Davis v. Flickinger* (1995), 77 Ohio St.3d 415, 418, 674 N.E.2d 1159; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846. Consequently, we can only sustain a challenge to a trial court's decision to modify parental rights and responsibilities upon a finding that the trial court abused its discretion. *Davis*, supra. In *Davis*, the court defined the abuse of discretion standard that applies in custody proceedings as follows:

> "'Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing court. (*Trickey v. Trickey* [1952], 158 Ohio St. 9, 47 O.O. 481, 106 N.E.2d 772, approved and followed.)' [*Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178, syllabus].
>
> The reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. As we stated in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 10 OBR 408, 410-412, 461 N.E.2d 1273, 1276-1277:

> 'The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. * * *
>
> * * *
>
> * * * A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal, especially to the extent where the appellate court relies on unchallenged, excluded evidence in order to justify its reversal.'
>
> This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well."

Id. at 418-419.

2

Standard for Modifying a Prior Allocation of Parental Rights and Responsibilities

{¶17} R.C. 3109.04(E)(1) governs the modification of a prior allocation of parental rights and responsibilities and states:

> (E)(1)(a) The court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification

> is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:
>
> (i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.
>
> (ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.
>
> (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

This statute "creates a strong presumption in favor of retaining the residential parent." *Alessio v. Alessio*, Franklin App. No. 05AP-988, 2006-Ohio-2447, at ¶11, quoted in *Thebeau v. Thebeau*, Lawrence App. No. 07CA34, 2008-Ohio-4751, at ¶26. The statute thus prohibits a trial court from modifying a prior allocation of parental rights and responsibilities unless the court makes a threshold finding that a change in circumstances has occurred. See *In re Braydon James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, at ¶15; *Davis*, 77 Ohio St.3d at 417. Without this threshold change in circumstances finding, a court need not proceed with an analysis of the child's best interests under R.C. 3109.04(E)(1) or with any of

the factors outlined in R.C. 3109.04(E)(1)(a). See *Cowan v. Cowan*, Washington App. No. 04CA5, 2004-Ohio-6119, at ¶ 16.

{¶18} A change in circumstances generally means that an event, occurrence, or situation has arisen since the prior decree that has materially and adversely affected the child. See *Thebeau* at ¶29; *In re D.M.*, Cuyahoga App. No. 87723, 2006-Ohio-6191, at ¶ 35; *Stout v. Stout*, Union App. No. 14-01-10, 2001-Ohio-2293; *Rohrbaugh v. Rohrbaugh* (2000), 136 Ohio App.3d 599, 604-05, 737 N.E.2d 551. However, this change in circumstances cannot be slight or inconsequential. See *Thebeau* at ¶29. Rather, it must be substantive and significant. Id.; see, also, *Bragg v. Hatfield*, 152 Ohio App.3d 174, 2003-Ohio-1441, 787 N.E.2d 44, at ¶ 23 ("The change [of circumstances] must be significant-something more than a slight or inconsequential change."). The requirement for finding a substantive and significant change in circumstances is to "'spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the children a 'better' environment. [R.C. 3109.04(E)(1)] is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that he or she

can provide a better environment.'" *Davis*, 77 Ohio St.3d at 418, quoting *Wyss v. Wyss* (1982), 3 Ohio App.3d 412, 416, 445 N.E.2d 1153.

{¶19} In the case at bar, the trial court did not abuse its discretion by concluding that the evidence failed to show that a change in circumstances had occurred. The trial court did not outline the exact reasons underlying its decision. However, in the absence of a proper Civ.R. 52 request for findings of fact and conclusions of law, it had no independent duty to do so. Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." The failure to request findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. See *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 801, 673 N.E.2d 188; *Wangugi v. Wangugi* (Apr. 12, 2000), Ross App. No. 2531; *Ruby v. Ruby* (Aug. 11, 1999), Coshocton App. No. 99CA4. When a party fails to request findings of fact and conclusions of law, we ordinarily presume the regularity of the trial court proceedings. See, e.g., *Bunten v. Bunten* (1998), 126 Ohio App.3d 443, 447, 710 N.E.2d 757; see, also, *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 356, 421 N.E.2d

1293; *Security Nat. Bank and Trust Co. v. Springfield City Sch. Dist. Bd. of Educ.* (Sept. 17, 1999), Clark App. No. 98-CA-104; *Donese v. Donese* (April 10, 1998), Green App. No. 97-CA-70. This means that we generally must presume that the trial court applied the law correctly and must affirm if some evidence in the record supports its judgment. See, e.g., *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.* (1989), 62 Ohio App.3d 657, 577 N.E.2d 383; see, also, *Yocum v. Means*, Darke App. No. 1576, 2002-Ohio-3803, at ¶7 ("The lack of findings obviously circumscribes our review."). As the court explained in *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 130, 562 N.E.2d 929:

> "[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence. The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'"

See, also, *Bugg*; *McCarty v. Hayner*, Jackson App. No. 08CA8, 2009-Ohio-4540, at fn.1. Consequently, in the case at bar, we will presume the

regularity of the trial court proceedings, in the absence of evidence to the contrary.

{¶20} Here, the trial court essentially did not find appellant's allegations of changed circumstances to be credible. Appellant attempted to show that appellee has interfered with her visitation and communication with the children. However, the evidence does not appear to entirely support her claim. The testimony showed that appellee sometimes requested his daughter to shorten her phone call with appellant so that she could do her homework. Moreover, although the youngest child expressed a desire to relocate to his mother's residence, the court determined that the child, due to his young age, was not fully capable of expressing his wishes. The court thus discounted his desire. Appellant also alleged that appellee lived in deplorable conditions, yet there is no evidence in the record to substantiate this claim and the trial court apparently disbelieved appellant's allegation. The guardian ad litem interviewed the children, teachers, and others involved in their lives and none raised any concern about the children's well-being while in appellee's custody. Appellant alleged that appellee left the children home alone, yet the testimony shows that he did so only on a few occasions for a short period of time while he took the oldest child to the bus stop. Appellant claimed that appellee yells at the children, yet there is

no evidence that any discipline measures he may use adversely and materially affect the children. Appellant asserted that the children's grades dropped, yet again, the testimony fails to support this claim. The evidence shows a temporary drop in the oldest child's grade in one class (which seemed to correlate with her parents' marital discord), but also demonstrates that she quickly rebounded and that the children are generally good to above-average students. Appellant's claim that appellee fails to take the children to the doctor is unsubstantiated. Appellant argued that appellee was evicted from his residence. However, the evidence shows that his eviction followed (and may have been a result of) appellant's failure to pay approximately $2,000 in accumulated child support. Furthermore, appellant found a new residence. Appellant also argued that appellee does not have job stability. Again, however, she failed to show that his job situation materially and adversely affects the children. She presented no evidence that he remained unemployed or without sufficient income to properly care for the children. Appellant further claimed that the children have frequent school absences, yet she failed to show that any alleged frequent absences have materially and adversely affected the children's schoolwork. Appellant additionally alleged that a change in circumstances had occurred because the two boys sleep with appellee in the same bed. Again, however, she has not

shown that this arrangement materially and adversely affects the children. The guardian ad litem specifically testified that she uncovered no evidence of inappropriate conduct with the sleeping arrangement but instead found it to be the boys' decision. In short, the trial court did not abuse its discretion by determining that appellant failed to present any credible evidence of any change that has materially and adversely affected the children's lives. The only adverse effect apparent in the record is appellant's daughter's anxiety she expressed after appellant filed her motion to modify the prior allocation of parental rights and responsibilities. The guardian ad litem stated that the daughter, being of sufficient maturity, expressed concern regarding the conflict between her parents. However, we observe that at least some of the daughter's anxiety resulted when appellant sought to modify the prior allocation so that appellant would be designated the children's residential parent.

{¶21} Because the trial court did not abuse its discretion by determining that appellant failed to show that a substantive change in circumstances had occurred, it had no need to examine any other factor under R.C. 3109.04(E)(1).

{¶22} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

C

MOTION FOR PSYCHOLOGICAL EVALUATION

{¶23} In her third assignment of error, appellant argues that the trial court abused its discretion by overruling her motion for psychological evaluation and by failing to issue a magistrate's decision.

{¶24} R.C. 3109.04(C) provides: "Prior to trial, the court * * * may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations." Furthermore, Civ.R. 35(A) authorizes a court to order a party to undergo a mental examination. The rule states:

> When the mental or physical condition * * * of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or person by whom it is to be made.

{¶25} Neither the statute nor the rule is mandatory. Rather, both are permissive. See *Ward v. Ward*, Stark App. No.2005-CA-00118, 2006-Ohio-851, at ¶4 (stating that the "granting of a psychological evaluation lies in the trial court's sound discretion"); *Harness v. Harness* (2001), 143 Ohio App.3d 669, 675, 758 N.E.2d 793 (stating that "[t]he use of the word 'may'

in the statute clearly indicates that the decision whether or not to order psychological evaluations is up to the discretion of the trial court"). Therefore, the decision to order an evaluation is within the sound discretion of the trial court, and we will not reverse its decision absent an abuse of discretion. See *Sinsky v. Matthews* (Aug. 8, 2001), Summit App. No. 20248. An abuse of discretion constitutes more than an error of law or judgment; rather, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶26} In the case at bar, nothing in the record shows that the trial court's refusal to order a psychological evaluation was unreasonable, arbitrary, or unconscionable. There is no evidence to suggest that any of the parties involved have mental health issues that required evaluation. The guardian ad litem's report explicitly states that none of the parties' mental health is at issue. Consequently, the trial court properly exercised its discretion and denied appellant's request.

{¶27} Moreover, we reject appellant's argument that the magistrate failed to prepare a decision regarding the denial of her motion. The docket entries submitted on appeal show that the magistrate entered a decision on April 21, 2009, that overruled appellant's motion.

{¶28} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

D

MOTION TO MODIFY CHILD SUPPORT

{¶29} In her fourth assignment of error, appellant contends that the trial court abused its discretion by overruling her motion to modify child support.

{¶30} In the case at bar, the trial court did not enter a decision regarding appellant's motion to modify child support.[2] Because the trial court did not consider this issue, we decline to consider it. See *Lang v. Holly Hill Motel, Inc.*, Jackson App. No. 05CA6, 2005-Ohio-6766, at ¶22, citing *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (stating that "we, as an appellate court, should not first consider an argument that the trial court did not address") ; see, also, *Murphy* ("If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court."). In short, because the trial court did not render a decision on appellant's motion to modify child support, we have nothing to review. Our decision is not to

[2] Because the trial court's decision denying appellant's motion to modify the prior allocation of parental rights and responsibilities includes appropriate Civ.R. 54(B) language, we conclude that its decision is a final, appealable order, even though the court's decision did not dispose of both appellant's motion to modify child support and motion to modify the prior allocation.

be construed as any indication of our opinion regarding the merits of appellant's motion. Instead, we simply have nothing at this point to review and we, as a reviewing court, decline to be the court to decide the merits of her motion in the first instance.

{¶31} Accordingly, we overrule appellant's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Lawrence County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion as to Assignments of Error I, II, and III; Concurs in Judgment Only as to Assignment of Error IV.

For the Court,

BY: ____________________________
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.