**[Cite as *Albrecht v. Marinas Internatl. Consol., L.P.*, 2010-Ohio-5732.]**

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| STATE OF OHIO )<br>)ss:<br>COUNTY OF SUMMIT ) | IN THE COURT OF APPEALS<br>NINTH JUDICIAL DISTRICT |
| NANETTE ALBRECHT, et al.<br><br>Appellants/Cross-Appellees<br><br>v.<br><br>MARINAS INTERNATIONAL CONSOLIDATED, LP, d/b/a/ SANDUSKY HARBOR MARINA<br><br>Appellee/Cross-Appellant | C. A. No. 25246<br><br>APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-09-6672 |

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

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BELFANCE, Presiding Judge.

**{¶1}** Plaintiffs-Appellants/Cross-Appellees Nanette Albrecht, trustee, and Donald Albrecht (collectively "the Albrechts") and Plaintiff-Appellant Allstate Property & Casualty Insurance Company ("Allstate") have appealed the ruling of Summit County Court of Common Pleas, which granted summary judgment in favor of Defendant-Appellee/Cross-Appellant Marinas International Consolidated, LP, dba Sandusky Harbor Marina ("the Marina"). For the reasons set forth below, we reverse.

I.

**{¶2}** Nanette Albrecht is the trustee of a trust which was the title owner of a forty-foot Formula, 2000 model year boat which was purchased new for approximately $258,000. Upkeep of the boat fell primarily upon Mrs. Albrecht's husband, Donald. In the fall of 2007, Donald Albrecht entered into an agreement with the Marina whereby the Marina would store the boat

until the 2008 boating season and winterize the boat for $2200. Subsequently, the Marina sent Donald Albrecht a form to complete listing various storage and winterization options. The winterization portion of the agreement included options to winterize the generator, the air conditioner, and engine, among other things. Notably the form did not include a box to check to winterize the intake strainer. After Donald Albrecht began to check items off, he became concerned that the total price would add up to more than the $2200. Thus, he called Susan Ohly, an employee at the Marina. During the conversation, he asked her how he was supposed to complete the form because he wanted the boat to be winterized. According to Donald Albrecht, Susan Ohly told him not to worry about it, the Marina would take care of it. Susan Ohly does not remember that conversation. Although she acknowledged that the total price for the winterization was $2200, she further stated the winterization would include those winterization services listed on the form selected by Donald Albrecht. Donald Albrecht completed the form and returned it to the Marina. Donald Albrecht did not check the box to have the generator winterized.

**{¶3}** When Donald Albrecht was billed for the services, he was not billed for the agreed upon $2200 price. The Marina did agree to honor the agreed upon price after Albrecht called to complain. Susan Ohly testified that it is the practice of the Marina to send customers bills for the sum total of the cost of all the services selected, regardless of what price was previously discussed. She stated that only if customers called to question the bill would the Marina ensure that the bill reflected the prior agreement.

**{¶4}** In May 2008, after putting the boat back into the water, the Marina called Donald Albrecht to inform him that his boat had started sinking and that the Marina was pumping water out of it. Bolts to an intake strainer on the boat had frozen and broke, causing the boat to take on

water. Albrecht alleges that the alarms on the boat were going off one day before the Marina called to tell him his boat was sinking. The Albrechts filed a claim with their insurance company, Allstate, and Allstate paid the Albrechts approximately $35,000 to cover the damages. Subsequently, without making any repairs to the boat, the Albrechts sold the boat for $65,000 and, after a commission was subtracted, they received $63,000 from the sale.

**{¶5}** On September 24, 2008, the Albrechts filed a complaint against the Marina for negligence, breach of the bailment agreement, fraud, and violations of the Ohio Consumer Sales Practices Act ("CSPA"). Additionally, the Albrechts sued Allstate for breach of fiduciary duty. Allstate answered and filed a cross-claim against the Marina. Subsequently, the Albrechts dismissed their claim against Allstate, and Allstate was realigned as a party plaintiff.

**{¶6}** The Marina moved for summary judgment with respect to the Albrechts' and Allstate's claims. Its motion was thereafter granted by the trial court. The Albrechts have appealed raising five assignments of error for our review, and Allstate has appealed raising two assignments of error for our review.

II.

**{¶7}** We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

**{¶8}** On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. Id. at 293.

III.

**ALLSTATE'S ASSIGNMENTS OF ERROR**

ASSIGNMENT OF ERROR I

> "The trial court erred in granting summary judgment to [the Marina] and against [Allstate], on Allstate's subrogation claim."

**{¶9}** In Allstate's first assignment of error, it asserts that the trial court erred in granting summary judgment to the Marina on Allstate's subrogation claim. We agree.

**{¶10}** The trial court relied upon this Court's opinion in *Valley Forge Ins. Co. v. Premier Recyclers Plastics, Inc.*, 9th Dist. No. 22633, 2005-Ohio-6317 and concluded that the Albrechts waived any subrogation rights Allstate had against the Marina.

**{¶11}** The paragraph at issue in the instant matter is on the back of the winterization and storage agreement. It is in small print that is not separated by headings or bold face type from the remainder of the information listed on that page. It states:

> "Marina shall not be responsible for or have any liability whatsoever for any loss, damage, personal injury or loss of life or property within the control of the Marina, its employees or its agents *in connection with* (1) the company's premises or the use of its storage space, (2) the owners [sic] vessel, motor, cradle, accessories, including outboard motors, dock box, fenders, tools, and associated equipment; (3) any loss due to fire, theft, vandalism, collision, marina equipment failure, windstorm, rain, tornado, or any other casualty loss. Owner agrees to cover *the aforesaid risks* by appropriate insurance coverage without subrogation against [the Marina]." (Emphasis added.)

**{¶12}** In *Valley Forge Ins. Co.*, this Court held that a mutual waiver of a subrogation clause in a commercial lease was valid as it was clear and unambiguous and there were no

factual disputes as to the intent of the parties with respect to that clause. Id. at ¶¶11, 13-14. We note that the facts in *Valley Forge Ins. Co.* are markedly different than those of the instant matter. To begin with, *Valley Forge Ins. Co.* involved a commercial lease. See id. at ¶2. In addition, the waiver at issue in *Valley Forge Ins. Co.* is strikingly different than the waiver at issue in this case. Unlike the waiver in the instant matter, the waiver in *Valley Forge Ins. Co.*: (1) is clear; (2) waives all rights of subrogation of the insurer; and (3) provides that both sides will *mutually* waive their respective insurer's rights to subrogation. See id. at ¶11. Assuming without deciding that: (1) our holding in *Valley Forge Ins. Co*. is applicable to the facts of the instant case; and (2) that the "waiver" itself is valid and enforceable, we cannot conclude that the waiver clearly and unambiguously covers the damage at issue.

**{¶13}** The Supreme Court of Ohio has explained that:

> "[an] insurer and subrogee * * * succeeds to all rights and the benefit of all remedies available to [the insured]. However, an insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured. Accordingly, since [the insurer's] remedies are limited to those possessed by [the insured], our inquiry must focus on the damages claimed by [the insured] and whether [the insured] itself would be able to recover from [the defendant] for same." (Internal citations and quotations omitted.) *Chemtrol Adhesives, Inc. v. Am. Manufacturers Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 42.

As this Court noted in *Valley Forge Ins. Co.*, "[i]t is well settled that the language of a contract is to be construed in accordance with its plain and ordinary meaning." Id. at ¶12. Assuming, without deciding, that the last sentence of the paragraph at issues constitutes a valid waiver of subrogation, it is only a waiver of the risks previously listed in the paragraph. Further, those risks listed do not cover what the Albrechts and Allstate allege caused the damage to the boat. The Albrechts and Allstate do not claim that the damage was due to "fire, theft, vandalism, collision, marina equipment failure, windstorm, rain, tornado, or any other casualty loss." See *Kay v. Pennsylvania R. Co.* (1952), 156 Ohio St. 503, paragraph three of the syllabus ("Where,

in a contract of indemnity, general words follow specific terms, the meaning of the general words will, under the rule of *ejusdem generis*, be limited to things of the same kind, class or nature as those specifically enumerated.") Nor do the Albrechts or Allstate claim that the damage was connected to "the company's premises or use of its storage space." In addition, we cannot say that the second phrase: "in connection with * * * the owners [sic] vessel, motor, cradle, accessories, including outboard motors, dock box, fenders, tools, and associated equipment[]" clearly covers the loss alleged; this is so partially because that item is poorly drafted and confusing. It is not clear to this Court what circumstances the second item in the paragraph would cover.

**{¶14}** The Supreme Court has stated that "clauses limiting the liability of the drafter are ordinarily to be strictly construed[.]" *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44, 47. In addition, "[c]ontracts of indemnity purporting to relieve one from the results of his negligence must be construed strictly [and] [t]he intention to provide such indemnification must be expressed in clear, unequivocal terms." *Kay*, 156 Ohio St. 503, at paragraphs one and two of the syllabus. Further, "[a]s a general proposition, attempts to excuse liability for negligence by contract are disfavored in the law. This is especially true in the case of bailments made in the course of a general dealing with the public." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 832. Reading the paragraph at issue would not cause a reasonable person to understand that the Marina was disclaiming liability for its own negligence, which is in part what the Albrechts and Allstate allege.

**{¶15}** Therefore, in light of all of the above, we conclude that the trial court erred in concluding that the Albrechts waived all of Allstate's subrogation rights and thereby erred in

granting summary judgment in favor of the Marina. We sustain Allstate's first assignment of error.

IV.

ASSIGNMENT OF ERROR II

> "The trial court erred in granting summary judgment to the Marina and against [the Albrechts]."

**{¶16}** In Allstate's second assignment of error, it asserts that the trial court erred in granting summary judgment to the Marina on the Albrechts' claim. Although this Court notes that Allstate inappropriately attempts to combine all of the Albrechts' assignments of error into one of its assignments of error, see App.R. 16(A)(7); Loc.R. 7(B)(7), because the Albrechts likewise have raised these issues, they will be discussed below.

V.

**THE ALBRECHTS' ASSIGNMENTS OF ERROR**

ASSIGNMENT OR ERROR I

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISMISSING THE ALBRECHTS' NEGLIGENCE AND FRAUD CLAIMS ON THE BASIS OF A MISCHARACTERIZATION OF THE PHYSICAL DAMAGE TO THE BAILED PROPERTY AS BEING AN ECONOMIC LOSS FOR WHICH THERE COULD BE NO RECOVERY AS A MATTER OF LAW ON ANY TORT CLAIM.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' NEGLIGENCE CLAIM BASED UPON THE COURT'S FACTUAL FINDING THAT THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT DESPITE DEFENDANT'S ADMISSION THAT THE BOAT DAMAGE WAS ITS FAULT."

**{¶17}** In the Albrechts' first and second assignments of error, they assert that the trial court erred in granting summary judgment on their fraud and negligence claims. Because the

trial court did so on a basis not specified by the Marina in its motion for summary judgment, we agree.

**{¶18}** The trial court granted summary judgment on the Albrechts' negligence and fraud claims based upon a conclusion that the economic loss rule applied to bar the Albrechts' claims. The Marina, however, did not argue in its motion for summary judgment that the economic loss rule applied. The Supreme Court of Ohio has stated that "[i]t is reversible error to award summary judgment on grounds not specified in the motion for summary judgment." (Internal quotations and citation omitted.) *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, at ¶27; see, also, *Butler v. Harper*, 9th Dist. No. 21051, 2002-Ohio-5029, at ¶28. "By relying on an unargued summary-judgment ground," the court denied the opposing side "a meaningful opportunity to respond." *State ex rel. Sawicki* at ¶27. Thus, this Court sustains the Albrechts' first and second assignments of error. See *Butler* at ¶28.

VI.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S [SIC] BREACH OF CONTRACT CLAIM BASED UPON ITS OWN FACTUAL FINDING THAT DEFENDANT PROPERLY PERFORMED ALL SERVICES REQUIRED UNDER THE CONTRACT AS A MATTER OF LAW."

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN IMPOSING THE EVIDENTIARY BURDEN UPON PLAINTIFFS TO PROVE THAT DEFENDANT DID NOT EXERCISE ORDINARY CARE WITH RESPECT TO THE BOAT PLAINTIFFS ENTRUSTED TO DEFENDANT'S EXCLUSIVE CARE AND CUSTODY."

**{¶19}** The Albrechts' third and fourth assignments of error address the portion of the trial court's ruling granting summary judgment to the Marina on the Albrechts' bailment claim.

**{¶20}** We begin by noting that the Albrechts did not bring a cause of action specifically for breach of contract relative to the winterization services. The Albrechts' complaint states causes of action for negligence, bailment, fraud and violations of the Ohio Consumer Sales Practices Act. The Albrechts allege in their bailment claim that the Marina breached the bailment agreement, not that the Marina failed to perform the winterization services. Despite this fact, the trial court and the parties focus almost exclusively on whether the winterization services were appropriately performed under the agreement. The focus of our analysis, however, will be on whether it was appropriate to grant summary judgment to the Marina on the Albrechts' breach of bailment claim.

> "The bailee for hire is obligated by law to exercise ordinary care in the safekeeping of the bailor's property. The bailee also promises to return the property undamaged upon the termination of the bailment. Therefore, the bailor can sue the bailee for breach of either duty, the duty of redelivery or the duty of exercising ordinary care." (Internal citations and quotations omitted.) *David v. Lose* (1966), 7 Ohio St.2d 97, 98.

To establish a prima facie case of breach of a bailment contract, the bailor, in this case the Albrechts, must establish: "(1) the contract of bailment, (2) delivery of the bailed property to the [Marina] and (3) failure of the [Marina] to redeliver the bailed property undamaged at the termination of the bailment." Id. at 99.

**{¶21}** These points are well established in the record. There is no dispute that a bailment contract existed, no dispute that the boat was delivered to the Marina, and no dispute that the property was not returned undamaged.

**{¶22}** "In an action by a bailor against a bailee based upon a breach of the contract of bailment, where the bailor proves delivery of the bailed property and the failure of the bailee to redeliver upon legal demand therefor, a prima facie case of want of due care is thereby established and the burden of going forward with the evidence shifts to the bailee to explain his

failure to redeliver [the property in an undamaged condition]." (Citation and internal quotations omitted.) Id. at 99-100. Thus, in order to escape liability, the Marina must assert and prove some affirmative defense. A bailee's non-negligence may be asserted as an affirmative defense. Id. at 100.

**{¶23}** Testimony from Allstate's expert, Ben Gommel, as well as testimony from Donald Albrecht, indicates that the cause of the boat sinking was a leak caused by the intake strainer not being drained of water, causing it to freeze over the winter. There is some evidence indicating that the intake strainer has some connection to the generator. Testimony from the Marina suggests that the Marina did not winterize the intake strainer because Donald Albrecht did not check the box next to generator on the form contract. We note that there was no box to check to winterize the intake strainer. Donald Albrecht, however, testified that the intake strainer is a filter that leads to the generator. While Albrecht agreed that he would expect the intake strainer to be winterized if the generator was being winterized, he did not make any statements suggesting that if the generator was not winterized he would not expect the intake strainer to be winterized. Nonetheless, even assuming that the Marina did not have a duty under the winterization contract to winterize the intake strainer, a genuine dispute of material fact exists with respect to whether the Marina exercised ordinary care in putting the boat back into the water when it had knowledge that it did not winterize the intake strainer. This is particularly true due to the absence of testimony discussing whether the Marina inspected the boat prior to placing into the water. Additionally, Donald Albrecht stated in his deposition testimony that an individual informed him that warning alarms had been going off on his boat the day before the Marina called to inform him it was sinking. Thus, there is a dispute of fact as to whether the Marina exercised ordinary care in failing to discover and/or respond promptly to the warning

sirens. Accordingly, there is a genuine issue of material fact as to whether the Marina exercised ordinary care under the circumstances.

**{¶24}** Further, as discussed above in Allstate's first assignment of error, we cannot say that the Albrechts accepted the risk of the loss under the provisions of the paragraph contained in the winterization and storage agreement. Accordingly, the trial court erred in granting summary judgment on the Albrechts' bailment claim.

VII.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' FRAUD AND CSPA CLAIMS."

**{¶25}** In the Albrechts' fifth assignment of error, they argue that the trial court erred in dismissing their fraud and CSPA claims.

**{¶26}** We begin with the observation that the portion of the trial court's entry that the Albrechts quote for this assignment of error addresses only the Albrechts' CSPA claim and not their fraud claim. In addition, this Court already concluded above that the trial court erred in dismissing the Albrechts' fraud claim based upon the economic loss rule. Therefore, our analysis will focus solely on the Albrechts' CSPA claim.

**{¶27}** The Albrechts alleged in their opposition to the Marina's motion for summary judgment that the Marina "had Don[ald] Albrecht sign an incomplete form which contained terms that bore no relationship whatsoever to the actual agreement for the winterization and storage of the boat[]" and that it was a violation of the CSPA for the Marina "to instruct [Donald Albrecht] to sign an incomplete form * * * which failed to integrate and accurately reflect the

actual terms of the parties' agreement." The trial court concluded that "[s]uch claims are clearly barred by the parol evidence rule."

**{¶28}** Essentially, the Albrechts contend that the Marina agreed to winterize and store the boat for $2200. According to Donald Albrecht, the winterization would include whatever the boat needed to have done to be winterized. Thus, Donald Albrecht averred that he was confused when he received the form which had boxes to check to indicate what he did and did not want winterized. Because various services were listed on the form with a distinct price, Albrecht discovered that the price of the items he had checked would exceed the agreed price of $2200. According to Donald Albrecht, that is why he called the Marina's employee, Sue Ohly, and asked her about the form. Ohly told Albrecht not to worry about it, so Albrecht signed the form and sent it back.

**{¶29}** It is true that the Supreme Court of Ohio has concluded that the parol evidence rule applies to CSPA claims. See *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, at paragraph two of the syllabus. Thus, "absent proof of fraud, mistake, or other invalidating cause, a consumer may not present extrinsic evidence contradicting the parties' final written contract to prove a violation of that act." Id.

**{¶30}** The parol evidence rule provides that "a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing." (Internal quotation and citation omitted.) *Bellman v. Am. Internatl. Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, at ¶7. Thus, "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented *as the complete and accurate integration of that contract,* evidence, whether parol or otherwise, of antecedent understandings and negotiations

will be not be admitted for the purpose of varying or contradicting the writing." (Emphasis in original.) *Figetakis v. Smith* (Mar. 4, 1998), 9th Dist. No. 18393, at *5. "A contract that appears to be a complete and unambiguous statement of the parties' contractual intent is presumed to be an integrated writing." *Bellman* at ¶11. "[T]he absence of an integration clause does not preclude a finding that all or part of a contract is, in fact, an integrated writing[.]" Id.

**{¶31}** In this Court's opinion in *Figetakis*, we examined whether a written agreement, that did not contain an integration clause, was integrated. *Figetakis* at *5. The plaintiff in *Figetakis* sought to recover under a prior oral agreement between the parties, despite the existence of a written document. Id. at *1-*2. The trial court concluded that the agreement was integrated, and therefore, likewise concluded that the prior oral agreement was unenforceable. Id. at *4. This Court reversed the trial court's decision, determining that genuine issues of material fact existed because: (1) the parties' conduct raised questions concerning whether the written agreement represented a complete understanding of the parties' agreement; and (2) because an issue of material fact existed with respect to whether the oral agreement continued to be performed following execution of the written document. Id. at *5.

**{¶32}** In the instant case, the written agreement at issue does not include an integration clause. In addition, there are many facts which suggest that the agreement was not integrated. First, there is no box on the form to check to winterize the intake strainer. Notably, there is evidence which suggests that the Marina relied in part on oral discussions to determine the contours of the services to be performed and the timing of those services. For example, despite the fact that oil change was checked off on the form, the Marina called to see if Albrecht wanted an oil change. Also, despite the fact that the agreement specified that the boat would "be launched on or about May 1st[,]" the Marina called to determine when Albrecht wanted the boat

launched. Arguably, as the boat was launched in late May, it was launched well after the date stated in the agreement. In addition, the Marina called to ask if it could put gas in the boat in order to transport the boat from the Marina to Albrecht's dock; the agreement only specifies that the boat will be launched, not that it will be launched and transported somewhere outside of the Marina. Further, Susan Ohly from the Marina testified that it was the general practice of the Marina to send out a bill which used itemized pricing, instead of the base figure that the was orally discussed. The Marina did not have a system to catch these discrepancies, and thus, generally the customer would have to call to receive the orally agreed to price. This suggests that as a general practice, the Marina does not treat the written agreement as being integrated. Finally, Albrecht testified that someone from the Marina admitted that the damage to the boat was the Marina's fault, an admission that would not make sense if the winterization and storage agreement as written represented the complete agreement of the parties.

**{¶33}** As such, we conclude that a genuine issue of material fact exists with respect to whether the agreement is fully integrated and thus it was error for the trial court to conclude that parol evidence was inadmissible. See *Figetakis* at *6. Therefore, it was inappropriate for the trial court to grant summary judgment to the Marina on the CSPA claim on those grounds.

VIII.

**{¶34}** In light of the foregoing, we reverse the judgment of the trial court granting summary judgment to the Marina on Allstate's and the Albrechts' claims.

Judgment reversed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee/Cross-Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

BRIAN GREEN and JAMES A. MARX, Attorneys at Law, for Appellant.

DAVID P. BERTSCH, Attorney at Law, for Appellants/Cross-Appellees.

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