[Cite as *Gonzalez v. Graves*, 2015-Ohio-1791.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Jenna Gonzalez, Trustee	Court of Appeals No. OT-14-023
Appellee	Trial Court No. 12CV409H
v.	
Michele A. Graves, Trustee	**DECISION AND JUDGMENT**
Appellant	Decided: May 8, 2015

* * * * *

José C. Feliciano and David Proaño, for appellee.

Jerome Cook, Anne Owings Ford, and Joseph Muska, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} In this declaratory judgment action, appellant, Michele A. Graves,[1] appeals from the judgment of the Ottawa County Court of Common Pleas, following a bench trial, in which the trial court declared that appellee, Jenna Gonzalez,[2] may make improvements to a 600 square foot section of an easement located on Graves's property. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} Graves is the owner of Sublot 2 of the Miller Subdivision in Put-in-Bay. Gonzalez is the owner of Sublot 1. The properties are accessible by what is commonly known as "Mike's Drive," a private, one-lane access road from State Route 357. Mike's Drive runs in a northwesterly direction, and terminates at the entrance to Gonzalez's property. Graves's property is immediately adjacent to Gonzalez's property, with the front of Graves's property running along the northerly side of Mike's Drive.

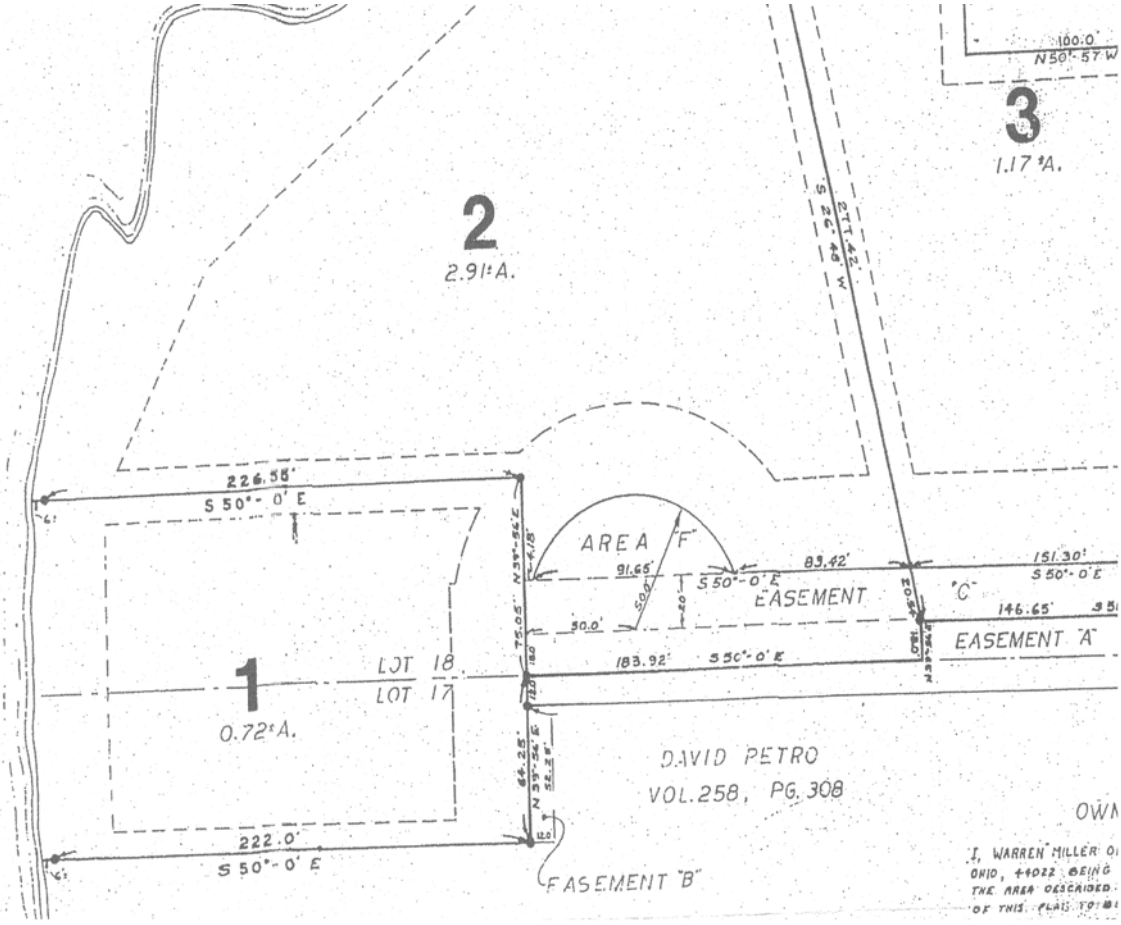
{¶ 3} The exact composition of Mike's Drive as it is described on the recorded subdivision plat, and the ownership of the land on which Mike's Drive is located, is the subject of some dispute. For our purposes, it is sufficient to note that a tract of land, spanning the entire length of Graves's property where it abuts the edge of the pavement

[1] As trustee for the TRUST FOR THE BENEFIT OF GREGORY D. GRAVES also known as the GREGORY D. GRAVES IRREVOCABLE TRUST DATED NOVEMBER 1, 2000.

[2] As trustee for the JENNA GONZALEZ REVOCABLE INTER VIVOS TRUST DATED MAY 22, 1989, AS AMENDED.

of Mike's Drive, is dedicated in the plat as part of Easement "C." *See* Fig. 1. The dedication states, in pertinent part, "I, Warren Miller * * * being the owner of all the land contained in the area described hereon do hereby acknowledge the making of this plat to be my free act and deed and I hereby dedicate 'Easement "C"', as shown on this plat, to the use of the owners of the lots shown hereon, their heirs and assigns, forever." The plat further notes that "Easements A B & C are for ingress and egress." The parties agree that the deeds in the chain of title following the subdivision do not specifically say or describe Easement "C." However, the parties also agree that the deeds refer back to the subdivision plat and state that they are subject to easements of record.

Fig. 1.



{¶ 4} On August 3, 2012, Gonzalez initiated this present action by filing a complaint for declaratory and injunctive relief, seeking an order from the court that would permit Gonzalez to improve Easement "C" by adding a paved area. Gonzalez stated that without the improvement, the current layout of Mike's Drive prevents vehicles from turning around, such that vehicles must either enter or exit Gonzalez's property travelling in reverse for the entire length of Mike's Drive, or turn around midway down Mike's Drive on someone else's private property. The proposed improvement would alleviate this problem by adding additional space for vehicles to maneuver.

{¶ 5} Before filing an answer, Graves moved to dismiss the complaint under Civ.R. 12(B)(1) on the grounds that the trial court lacked subject-matter jurisdiction over the declaratory judgment action because Gonzalez failed to join all persons who have an interest that would be affected by the declaration, as required by R.C. 2721.12(A). Similarly, Graves moved to dismiss the complaint pursuant to Civ.R. 12(B)(7) because Gonzalez failed to join all necessary parties under Civ.R. 19.

{¶ 6} Specifically, Graves identified that Gonzalez failed to join the owner of Sublot 3, which is also burdened by Easement "C." In addition, Graves argued that Gonzalez was required to join the other 17 property owners along Mike's Drive because Gonzalez's proposed construction would constitute a turnaround, which the recorded plat provided for in Area "F," but which was permitted only upon Mike's Drive becoming a public road. Graves stated that Gonzalez's turnaround would violate the intent of the sub-divider, and would alter the nature of Mike's Drive by encouraging public travel,

increasing maintenance costs, and converting the character of the private road to that of a public road. Thus, Graves contended that all property owners along Mike's Drive have an interest in the proceedings. Alternatively, Graves argued that instead of improving Easement "C," Gonzalez could pave Mike's Drive to its full width of 30 feet within Easement "A," or pave the area described as Easement "B." Graves asserted that many of the landowners had installed landscaping along Mike's Drive within Easement "A," and thus would be impacted by Gonzalez expanding the width of Mike's Drive. Therefore, for that reason, Graves concluded that the other property owners must be made parties to the declaratory judgment action.

{¶ 7} Gonzalez, in response, argued that the other property owners do not need to be made parties to the action because they do not have a "legally protectable" interest.

{¶ 8} On March 21, 2013, the magistrate issued its decision, denying Graves's motion to dismiss. Graves filed objections to the magistrate's decision, which the trial court overruled, noting that Graves had failed to timely file a transcript from the proceedings before the magistrate.

{¶ 9} While the motion to dismiss was still pending, Gonzalez moved for partial summary judgment on the issue of whether Easement "C" burdens Graves's real property. Attached to the motion for summary judgment was a certified copy of the recorded subdivision plat, the deeds along the chain of title for the property, and a professional survey.

{¶ 10} Graves opposed the motion for partial summary judgment. Graves argued that the dedication in the plat was insufficient as a matter of law to create Easement "C" without corresponding language defining the rights and obligations of the parties being included in the deeds.

{¶ 11} On June 27, 2013, the trial court granted Gonzalez's motion for partial summary judgment, finding that Easement "C" was created by the recorded subdivision plat, that Graves's property is clearly the servient estate, and that Gonzalez's property is the dominant estate.

{¶ 12} Before the trial court had entered its decision on the motion for partial summary judgment, Graves filed her answer denying the claims asserted by Gonzalez in the complaint.[3] Following the grant of partial summary judgment to Gonzalez, the matter then proceeded to a three-day bench trial on the remaining issues.

{¶ 13} At trial, Gonzalez submitted testimony and evidence showing that guests, vendors, and service providers had difficulty accessing her property, and on some occasions had sustained damage to their vehicles while attempting to back into or out of Gonzalez's property. Testimony was elicited that Gonzalez is seeking to add 600 square feet of additional pavement to the section of Easement "C" closest to her property. Notably, the portion of land on which the pavement would be added is located outside of

[3] Graves also asserted two counterclaims, which are not the subject of this appeal. The first was a trespass claim based on an alleged encroachment of Gonzalez's fence onto Graves's property. The second was for trespass, nuisance, and damage to real property allegedly caused by surface water and septic tank effluent flowing from Gonzalez's property onto Graves's property.

Graves's fence line, but in an area that contains significant landscaping. For her part, Graves presented testimony that other alternatives exist, such as expanding the width of the existing Mike's Drive, or using a portion of Easement "B." Further, Graves argued that Gonzalez could remedy her problem by paving an additional area on Gonzalez's own property, or by moving her gate.

{¶ 14} Following the trial, on May 15, 2014, the trial court entered its amended decision and judgment entry. The court found that Gonzalez is seeking an order permitting the improvement of 600 square feet of property that is indisputably within Easement "C." The court further found that the current improvements to Easement "C" do not permit Gonzalez to reasonably enjoy her ingress and egress rights, and that the proposed additional improvement is reasonable, and is designed to ensure that Gonzalez will be able to use and enjoy Easement "C" for its intended purpose. Accordingly, the trial court declared that Gonzalez may make improvements on up to 600 square feet of Easement "C." Those improvements may include asphalt, cement, or other form of surface paving.

B. Assignments of Error

{¶ 15} Graves has timely appealed the trial court's amended judgment entry, and now asserts three assignments of error for our review:

1. The Trial Court Erred When It Failed To Dismiss The Complaint Filed by Appellee Gonzalez For Lack Of Subject Matter Jurisdiction.

2. The Trial Court Erred When It Failed To Dismiss The Complaint Filed By Appellee Gonzalez For Her Failure To Join Indispensable Parties Pursuant to Civ.R. 19(A).

3. The Trial Court Erred When It Declared Easement C To Be An Express Easement Over Sublot 2 And Then Converted The Generic Ingress and Egress Easement Into A Prohibited Turnaround Easement In Derogation of The Plain Meaning Of The Miller Subdivision Plat And The Express Intentions of The Subdivider And The Ottawa County Regional Planning Commission.

II. Analysis

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

{¶ 16} We review a trial court's decision regarding motions to dismiss for lack of subject-matter jurisdiction de novo. *Dargart v. Ohio Dept. of Transp.*, 171 Ohio App.3d 439, 2006-Ohio-6179, 871 N.E.2d 608, ¶ 12 (6th Dist.). "When ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction, trial courts must determine whether a claim raises any action cognizable in that court." *Id.*, citing *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989).

{¶ 17} Here, Graves argues that the trial court lacked subject-matter jurisdiction because Gonzalez failed to join all interested persons as parties to the declaratory judgment action. R.C. 2721.12(A) provides, "[W]hen declaratory relief is sought under

this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." "The absence of a necessary party constitutes a jurisdictional defect which precludes a Court of Common Pleas from properly rendering a declaratory judgment." *City of Cincinnati v. Whitman*, 44 Ohio St.2d 58, 337 N.E.2d 773 (1975), paragraph one of the syllabus. "[W]hether a nonparty is a necessary party to a declaratory-judgment action depends upon whether that nonparty has a legally protectable interest in rights that are the subject matter of the action." *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 15.

{¶ 18} We find the Ohio Supreme Court's decision in *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 328 N.E.2d 395 (1975), to be particularly instructive. In that case, the Ohio Supreme Court held that neighboring landowners were not necessary parties to a property owner's declaratory judgment action challenging a zoning determination. The court reasoned that although the neighboring landowners "may have a *practical* interest in the outcome of a declaratory judgment action attacking the constitutionality of zoning as it applies to a specific parcel of property, * * * they have no *legal* interest in the outcome." (Emphasis added.) *Id.* at 273.

{¶ 19} Similarly, here, Gonzalez's proposed improvement to Easement "C" theoretically may have a practical impact on the surrounding landowners by changing the

nature of Mike's Drive.[4] However, because the improvement is to occur entirely on that portion of Easement "C" located on Graves's property, the surrounding landowners do not have a legally protectable interest in the subject matter of the action. Furthermore, Graves's argument that the landowners' rights may be impacted if Gonzalez expands the pavement on Easement "A," or improves Easement "B" introduces issues that were not before the trial court as Gonzalez was seeking a declaratory judgment relevant only to Easement "C" located on Graves's property. Therefore, we hold that the surrounding landowners are not necessary parties to the declaratory judgment action, and thus Gonzalez's failure to name them as parties did not deprive the trial court of subject-matter jurisdiction.

{¶ 20} Accordingly, Graves's first assignment of error is not well-taken.

B. Motion to Dismiss for Failure to Join Indispensable Parties

{¶ 21} We initially note that Graves's entire argument in support of her second assignment of error states that she "incorporates by reference, as if fully rewritten herein, her Motion to Dismiss (R-15) and her Reply Brief in Support of her Motion to Dismiss (R-33) relative to the failure of [Gonzalez] to join indispensable parties pursuant to Civ.R. 19(B). [Graves] also incorporates her law and argument in support of Assignment of Error No. 1 as if fully rewritten herein." Because Graves does not separately argue her

[4] We do not express a view regarding the validity of Graves's assertion that the proposed improvement will increase the amount of public traffic and correspondingly increase the maintenance costs of Mike's Drive.

second assignment of error, we are entitled to disregard this assignment of error. *See* App.R. 12(A)(2) ("The court may disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as required under App.R. 16(A)."). Nevertheless, in the interest of justice, we will address the merits of her assignment.

{¶ 22} As with motions to dismiss for lack of subject-matter jurisdiction, we review a trial court's ruling on a Civ.R. 12(B)(7) motion to dismiss for failure to join a party under Rule 19 or Rule 19.1 de novo. *Jones v. Jones*, 179 Ohio App.3d 618, 2008-Ohio-6069, 903 N.E.2d 329, ¶ 39 (3d Dist.). Civ.R. 19(A) provides,

> A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.

{¶ 23} Notably, the Ohio Supreme Court has applied the same "legally protectable interest" standard for whether a party is necessary in a declaratory judgment action under R.C. 2721.12(A) in determining whether a person must be joined as a necessary party pursuant to Civ.R. 19(A). *See Rumpke* at ¶ 23. Therefore, for the same reasons as discussed above describing why the 17 other landowners do not have a legally protectable interest, we hold that the trial court did not err when it denied Graves's Civ.R. 12(B)(7) motion to dismiss.

{¶ 24} Accordingly, Graves's second assignment of error is not well-taken.

C. Ingress and Egress Easement

{¶ 25} In her third and final assignment of error, Graves first argues that the trial court erred as a matter of law when it determined that Easement "C" is an express easement. Graves contends that because Easement "C" is not described in any deed, but rather was created by the recorded subdivision plat and incorporated into the deeds by reference, it is an implied easement.

{¶ 26} Gonzalez, in response, argues that Easement "C" is an express easement because it is expressly created in the recorded subdivision plat, which sufficiently evinces the grantor's intent to create the easement, defines the location of the easement, and sets forth the rights and obligations of the parties with respect to the easement.

{¶ 27} Upon consideration of the parties' arguments, we find that we do not need to resolve the issue of whether the easement is express or implied. Regardless of the

manner of its creation, the law is clear, and the parties acknowledge, that an easement for ingress and egress exists over the portion of Graves's property shown in the plat as Easement "C." *See Myers v. McCoy*, 5th Dist. Delaware No. 2004CAE07059, 2005-Ohio-2171 (recorded subdivision plat that stated, "[A]ccess for ingress and egress is hereby granted for Lot 294 and Lot 295 over the 60.0 strip of land situated between said lots," created an express easement); *Liebing v. Sauber*, 6th Dist. Sandusky No. S-96-050, 1997 WL 640601, *3 (Oct. 10, 1997) ("An implied easement for the purposes of a road can be established by virtue of the original lots in a subdivision having been purchased with reference to a plat showing said road.").

{¶ 28} Furthermore, Graves's stated reason for why the distinction is important is inapplicable to the present action. Graves asserts that the distinction is material because implied easements are subject to R.C. 711.24 and *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 695 N.E.2d 728 (1998). R.C. 711.24 provides a procedure to allow a property owner to replat his or her land so long as the change does not injuriously affect any lots on the streets or alleys, or within the plat, unless all the owners of the affected lots consent to the change. In *Clagg*, the Ohio Supreme Court held that "an implied easement in a private street, created by reference to a subdivision plat depicting and dedicating the street to the lot owners of a subdivision, is statutorily limited so that an owner of land within the subdivision may unilaterally change the course of the street subject to the requirements set forth in R.C. 711.24." *Clagg* at 281.

{¶ 29} Graves suggests that because Easement "C" is an implied easement, she can unilaterally move the easement in accordance with *Clagg* and the procedures under R.C. 711.24, a remedy that she states she is pursuing. However, the applicability of R.C. 711.24 is not before us. Gonzalez is not the owner of the land on which Easement "C" is located, and Gonzalez is not seeking to replat the land. Instead, the narrow issue we must address is whether Gonzalez is entitled to improve the existing Easement "C," which is dedicated for ingress and egress, by adding an additional 600 square feet of pavement to it.

{¶ 30} In general, "[a]n easement is a right without profit, * * * which the owner of one estate may exercise in or over the estate of another for the benefit of the former." *Yeager v. Tuning*, 79 Ohio St. 121, 124, 86 N.E. 657 (1908). "Easements may be created by express grant, by implication, by prescription, or by estoppel." *Kienzle v. Myers*, 167 Ohio App.3d 78, 2006-Ohio-2765, 853 N.E.2d 1203, ¶ 17 (6th Dist.). "Further, where the language granting the easement is clear and unambiguous, it is presumed that the deed expresses the intent of the parties." *Shikner v. Stewart*, 6th Dist. Ottawa No. OT-09-015, 2010-Ohio-1478, ¶ 24, citing *Esteph v. Grumm*, 175 Ohio App.3d 516, 2008-Ohio-1121, 887 N.E.2d 1248, ¶ 10 (4th Dist.). "The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement." *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App.3d 57, 66, 740 N.E.2d 328 (4th Dist.2000), citing *Day, Williams & Co. v. RR. Co.*, 41 Ohio St. 392 (1884).

However, "[a]n easement holder may not increase the burden upon the servient estate by engaging in a new and additional use of the easement." *Crane Hollow* at 67.

{¶ 31} We review the trial court's determination, following a bench trial, that the proposed additional pavement is "necessary in order to ensure the enjoyment of the easement for ingress and egress to [Gonzalez's] property," under a manifest weight of the evidence standard. *See Walbridge v. Carroll*, 172 Ohio App.3d 429, 2007-Ohio-3586, 875 N.E.2d 144, ¶ 23 (6th Dist.) (applying a manifest weight standard to a trial court's judgment following trial that the scope of an easement permitted the dominant estate to use the easement for any reasonable purpose). When reviewing a decision in a civil case for being against the manifest weight of the evidence, we apply the same standard used in criminal cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23. That is, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, 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 [judgment] must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In weighing the evidence, we must be mindful of the presumption in favor of the finder of fact:

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every

> reasonable presumption must be made in favor of the judgment and the finding of facts. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Eastley* at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶ 32} Here, Gonzalez presented testimony that guests and service providers had difficulty accessing the property, and that at least one of the service providers had sustained damage to his vehicle in attempting to back into or out of Gonzalez's driveway. Further, the testimony revealed that for larger vehicles, it was necessary to turn around on another person's private property further up Mike's Drive in order to access Gonzalez's property. In addition, Gonzalez offered testimony that the additional pavement would only be used for vehicles to turn around in when entering or exiting the property, and would not be used for parking. Therefore, we cannot say that the trial court clearly lost its way when it determined that the improvement to Easement "C" is necessary for Gonzalez to enjoy her reasonable ingress and egress rights.

{¶ 33} Moreover, we do not find persuasive Graves's argument that the proposed improvement is in direct conflict with the subdivision plat and the location of the contemplated turnaround in Area "F." Area "F" is not being improved, and no

turnaround is being constructed on that property. Instead, the trial court implicitly found that vehicles turning around on the additional pavement on Easement "C" is consistent with the purpose of ingress and egress, and necessary for the dominant estate to enjoy the use of the easement. *Crane Hollow*, 138 Ohio App.3d at 66, 740 N.E.2d 328. We hold that this finding is not against the manifest weight of the evidence.

{¶ 34} Accordingly, Graves's third assignment of error is not well-taken.

III. Conclusion

{¶ 35} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Graves is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE