[Cite as *Cleveland Constr., Inc. v. Roetzel & Andress, L.P.A.*, 2011-Ohio-1237.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94973

CLEVELAND CONSTRUCTION, INC.

PLAINTIFF-APPELLANT

vs.

ROETZEL & ANDRESS, L.P.A.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-623345

BEFORE: S. Gallagher, P.J., Rocco, J., and Keough, J.

RELEASED AND JOURNALIZED: March 17, 2011

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant Cleveland Construction, Inc. ("CCI") appeals the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment to defendant-appellee Roetzel & Andress, L.P.A. ("R & A"). For the reasons stated herein, we affirm the judgment of the trial court.

{¶ 2} CCI filed a complaint against R & A on May 3, 2007, asserting claims of fraud, breach of fiduciary duty, negligent misrepresentation, civil aiding and abetting, and civil conspiracy. The claims arose from actions surrounding CCI's "bridge loan" of $2.5 million for a mixed-use development project called "Cornerstone."

{¶ 3} In July 2002, Joanne Schneider retained R & A to represent her and her companies in connection with Cornerstone. Pearl Development Co., LLC ("Pearl") was one of the companies formed to develop Cornerstone.

{¶ 4} In March 2003, CCI contracted with Pearl to be the construction manager for the Cornerstone project. Mark Small is an owner of CCI. R & A represented Small and CCI in several unrelated matters. CCI's project manager, Walt Sullivan, and vice president of construction, Keith Ziegler, both expressed their understanding that R & A represented Schneider and her companies on Cornerstone. CCI's internal counsel handled legal matters relating to Cornerstone for CCI.

{¶ 5} In October 2003, the Ohio Division of Securities ("ODS") sent Schneider and her husband a request for information pertaining to their sale of unregistered promissory notes from January 2000 through October 2003. Schneider met with R & A attorney Kenneth Lapine regarding the matter. Lapine instructed Schneider to stop selling promissory notes and to pay back the notes that were outstanding at that time.

{¶ 6} Schneider asserted in an affidavit that Lapine knew of her sale of promissory notes no later than August 2003 and that he knew the true extent of her debt in October 2003. Lapine stated that he turned over financial information provided by Schneider to the ODS but that he did not analyze these materials.

{¶ 7} Schneider testified at a March 2, 2004 ODS hearing that she had been selling promissory notes since the 1980s, she had sold over $7 million in outstanding promissory notes, she was current on all payments, and her net worth was over $33 million. She also stated the only notes she sold after Lapine advised her to stop were those that were already "works-in-progress."

{¶ 8} In May 2004, the ODS issued a "cease and desist" order that prohibited Schneider from selling any more promissory notes. After the cease and desist order was issued, the ODS "thought everything was okay." Lapine stated that he believed this was the end of Schneider's promissory note sales and he had no reason to believe otherwise. He also stated that he had no specific knowledge of notes sold prior to January 2000 that were still outstanding.

{¶ 9} As early as March 2004, CCI and the subcontractors on the Cornerstone development project were not being paid and the subcontractors were threatening to walk off the job. CCI knew that financing had not been

secured for the project and was concerned about the impact potential contractor liens would have on obtaining bank financing for the project.

{¶ 10} On June 28, 2004, Schneider called Sullivan of CCI and, according to Sullivan, told him she had obtained a construction loan from a lender known as "the Marshall Group" and that it would take about 30 days to get some cash. Sullivan relayed the information to Ziegler and indicated that "[Schneider] will be getting a confirmation letter by week's end."

{¶ 11} Small stated that R & A attorney David Gunning made repeated affirmations regarding Schneider's "vast personal wealth" and "substantial investment of her own personal wealth in Cornerstone." Small also stated that R & A attorneys Gunning and Lapine offered repeated assurances that securing construction financing was "only a matter of time" and that the delays were only a result of administrative "red tape." Lapine had represented that financing was "pretty much in place." Gunning indicated that he believed this information was accurate, he thought Schneider had put substantial equity into the project, and there were financial statements produced and signed by Schneider showing a substantial net worth.

{¶ 12} Small expressed that it was his understanding that R & A was representing the "construction team" and that he "thought they were representing my interest." A conflict waiver was never issued.

{¶ 13} In July 2004, a discussion was had concerning doing a bridge loan so the contractors could be paid. On July 14, 2004, Small emailed Gunning and told him that CCI was going to do a bridge loan. At this time, CCI was aware that no lender had made a commitment to Pearl to fund a construction loan. CCI representatives had observed a letter from Home Savings Bank, which was working with the Marshall Group, that indicated "a loan proposal, not a loan commitment" and that no contractual obligations had been made to fund a loan for Cornerstone. At this time, R & A was aware, but did not disclose, that the Marshall Group had rejected the loan.

{¶ 14} Notwithstanding the lack of a loan commitment, on July 14, 2004, representatives of CCI and Pearl met and CCI extended a $2.5 million loan to Schneider and Pearl. The meeting minutes do not reflect that any R & A attorneys were present. Further, R & A did not prepare the promissory note. The minutes reflect the following:

> **"At this time the funding for the project is not in place. Joanne [Schneider] stated that it would be 'at least 90 days' before any funding would be in hand. There were contractors that were calling about payment and could possibly file a lien on the job. In light of this fact, Cleveland Construction issues Joanne Schneider a check for 2.5 million dollars as a 'Bridge Loan' to assist in paying outstanding contractors' invoices."**

{¶ 15} Thereafter, CCI's internal counsel prepared a release form to be entered between the contractors and Pearl. Small emailed a copy of the

release to attorney Gunning, who responded, "I will get back to you." Gunning stated he reviewed the document on behalf of his client Pearl.

{¶ 16} After the loan was made, Small inquired with Gunning about the status of the loan. Gunning indicated in an email that "[w]e have six banks very interested in doing the loan." This was the first time CCI was made aware that the Marshall Group had declined financing.

{¶ 17} In August 2004, three months following the cease and desist order, attorney Lapine was notified by ODS that it had discovered Schneider was still selling unregistered notes. Lapine stated that this was the first notice he or R & A had that Schneider had continued to sell promissory notes. In November 2004, R & A learned, as a result of the ODS investigation, that Schneider had promissory notes outstanding in excess of $60 million and a negative net worth.

{¶ 18} In December 2004, the ODS filed a complaint against Schneider, who agreed to an injunction prohibiting further note sales. Matt Fornshell was appointed as the Special Master and also became the receiver of Schneider's personal assets. R & A began working with Fornshell on a note conversion plan that would allow note holders to receive interests in Pearl in exchange for their notes. The goal was to afford Schneider the ability to pay back her investors through revenues that would be generated by Cornerstone.

Days after the note conversion plan was filed with the ODS, the ODS informed R & A that Schneider was once again selling unregistered notes.

{¶ 19} The Schneiders were indicted on a total of 163 charges. The loan from CCI was never repaid.

{¶ 20} CCI filed this action against R & A. In the course of discovery, R & A filed a motion to have admission requests deemed admitted. The trial court issued orders on November 25, 2008, and January 23, 2009, that deemed some of the admission requests admitted.

{¶ 21} R & A filed a motion for summary judgment that was granted by the trial court. This appeal followed.

{¶ 22} CCI has raised two assignments of error for our review. Its first assignment of error challenges the trial court's decision to grant summary judgment.

{¶ 23} 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. 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.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 24} Insofar as CCI's claims arise from the professional relationship and R & A's representation of CCI, we agree with R & A's contention that these are nothing more than legal malpractice claims that are barred by the statute of limitations. Claims arising out of an attorney's representation, regardless of the label attached, constitute legal malpractice claims that are subject to the one-year statute of limitations set forth in R.C. 2305.11(A). *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, Franklin App. No. 10AP-290, 2010-Ohio-5872, ¶ 15.[1] Even if this were not the case, we still find R & A was entitled to summary judgment on the asserted claims.

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[1] Also, "a law firm does not engage in the practice of law and therefore cannot commit legal malpractice directly." *Natl. Union Fire Ins. Co. of Pittsburgh, P.A. v. Wuerth* (2009), 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 2. Therefore, "a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice." Id.

{¶ 25} First, CCI argues that R & A breached fiduciary duties owed to CCI as a concurrent client of R & A. A party asserting a breach of fiduciary duty claim must establish: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶ 19; see, also, *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235.

{¶ 26} The record reflects that R & A represented CCI and Small on matters unrelated to Cornerstone. Any duty that arose from that representation was limited to those undertakings and did not extend to matters regarding Cornerstone or the bridge loan.

{¶ 27} A "fiduciary" has been defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." (Internal citation and quotation omitted.) *Strock*, at 216. Moreover, "[a]n attorney's duty to his or her client exists in relation to the scope of representation sought by the client and undertaken by the attorney." *Advanced Analytics Labs. v.Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, 773 N.E.2d 1081, ¶ 34. A fiduciary relationship cannot be unilateral and may be created informally only when both parties understand that a special trust or confidence has been reposed.

See *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 286, 390 N.E.2d 320.

{¶ 28} The record reflects that R & A's representation of CCI was limited to matters unrelated to Cornerstone. Representatives of CCI acknowledged their understanding that R & A represented Schneider and her companies on Cornerstone, and that CCI's internal counsel handled legal matters relating to Cornerstone for CCI. R & A had no duty to investigate or to bring to CCI's attention matters relating to Schneider's sales of promissory notes, the ODS investigation, the status of funding for the Cornerstone project, the financial position of Schneider, or any other matter for which R & A had not been engaged.

{¶ 29} Additionally, there is no evidence in the record that R & A provided legal advice to CCI on matters pertaining to Cornerstone. Although Small sent R & A the release form to review, that document involved R & A's client Pearl and was reviewed by Gunning on behalf of Pearl. Small's unilateral belief that R & A was representing his interests is insufficient to create a fiduciary relationship on matters for which R & A was never retained.[2]

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[2] It has been recognized that "the Ohio Code of Professional Responsibility * * * contains no express requirement of client consultation before limiting the scope of representation. * * * [P]rior to the adoption of the Model Rules, Ohio rules set no requirement that an attorney and client consult prior to limitation of the scope of representation." *Future Lawn, Inc. v. Steinberg*, Lucas App. No. L-08-1030,

{¶ 30} CCI also maintains that R & A owed fiduciary duties to its clients pursuant to Ohio Code of Prof.Resp., DR 5-105. CCI argues that R & A failed to disclose that it represented Schneider as its sole client on Cornerstone, never discussed with CCI any conflicts of interest that arose from its concurrent representation of Schneider, and never obtained a waiver from CCI. CCI points to the opinion of its expert, Richard Alkire, who made conclusions regarding R & A's breach of fiduciary obligations to CCI.

{¶ 31} We do not find that CCI's expert report creates a factual dispute. The existence of a duty may be determined as a matter of law by the court. *Fornshell v. Roetzel & Andress, L.P.A.*, Cuyahoga App. Nos. 92132 and 92161, 2009-Ohio-2728, ¶ 44. "It is the function of the court to determine whether, '* * * the law imposes upon the defendant any legal duty to act or to refrain from acting for the protection of the plaintiff. * * * Restatement of the Law 2d, Torts (1965) 153, Section 328 B, Comment e. Accord, Keeton, Prosser and Keeton on Torts (1984) 236. Consequently, the submission of "expert" opinion on this issue is neither dispositive, nor gives rise to a factual dispute.'" *Future Lawn, Inc.* at ¶ 30.

{¶ 32} The former DR 5-105 applies to the representation of multiple clients when "the exercise of [the lawyer's] independent professional judgment in behalf of a client will be or is likely to be adversely affected by

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2008-Ohio-4127, ¶ 33.

his representation of another client." Even if R & A's concurrent representation of Schneider and CCI were determined to be a violation of Ohio's ethical rules, a violation of a disciplinary rule, without more, does not establish a claim for breach of fiduciary duty.

{¶ 33} We find, as a matter of law, that R & A's fiduciary duty to CCI extended only to the unrelated matters for which it was actually engaged. No duties arose outside the scope of that representation.

{¶ 34} Second, CCI contends that R & A committed fraud and made negligent misrepresentations. A claim of fraud requires proof of the following elements: "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49, 570 N.E.2d 1076.

{¶ 35} We recognize, as did the trial court, that "[o]rdinarily in business transactions where parties deal at arm's length, each party is presumed to have the opportunity to ascertain relevant facts available to others similarly situated and, therefore, neither party has a duty to disclose material

information to the other." *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 101, 519 N.E.2d 363. While certain circumstances may establish a duty to speak, those circumstances are not present in this case.

{¶ 36} We have already determined that R & A did not have a fiduciary duty to disclose information on matters outside the scope of its representation of CCI and that there was no mutual understanding that a special trust or confidence had been reposed in connection with Cornerstone or the bridge loan. Further, R & A was not a party to the $2.5 million bridge loan. The bridge loan was an arms-length business transaction between CCI and Pearl, and the record reflects that R & A was not involved in that transaction.

{¶ 37} There is also a lack of evidence to show that representations concerning Schneider's substantial wealth and personal investment in Cornerstone were made falsely or with reckless disregard of their falsity. The record reflects that R & A believed what it told CCI about Schneider's wealth and her ability to obtain financing for Cornerstone. Schneider testified at the ODS hearing that her net worth was over $33 million. While she provided financial information to R & A in connection with the ODS investigation, R & A submitted the requested information but had no duty to analyze these materials. As this court found in a related matter involving Schneider's Ponzi scheme:

"[T]he undisputed evidence indicates that R & A advised Schneider to stop selling the notes in October 2003. Despite receiving this advice, Schneider continued with the illegal sales and, as properly noted by the trial court, 'was the perpetrator of the unlawful financing.' Indeed, the undisputed evidence of record indicates that Schneider purposely continued with her unlawful scheme despite Lapine's advice that she stop selling notes, continued despite the Securities cease-and-desist order, and continued despite the agreed preliminary injunction.

"The evidence likewise refutes the receiver's contention that the law firm had reason to know of the Ponzi scheme from a review of the 2000-2003 records submitted to the Securities Division. It is undisputed, however, that the Securities Division, the enforcement agency charged with overseeing such transactions, did not determine that the securities exceeded the Schneiders' net worth until well after the 2003 hearing and after completing its December 2004 calculations. Moreover, the extent of the Ponzi scheme was not established until the completion of the forensic audit in late 2005. We therefore reject this contention.

"As to the receiver's claim that the firm had a duty to conduct an investigation of Schneider to determine whether the financing scheme was legitimate, we concur with the trial court's conclusion that the firm had no such duty. The privileged nature of the attorney-client relationship is intended to promote trust between the parties in order to facilitate the provision of legal services and the administration of justice. ***State v. Doe*****, Montgomery App. No. 19408, 2002-Ohio-4966. We cannot**

> **countenance a rule that would require attorneys to conduct an extensive audit and investigation of its clients for actual financial solvency and possible criminal conduct and to report the results of such investigation to third parties. * * * "**

Fornshell, 2009-Ohio-2728, at ¶ 46-48.

{¶ 38} Additionally, any representations concerning Schneider's ability to finance the Cornerstone project amounted to future predictions. Generally, "a claim of fraud cannot be predicated upon promises or representations relating to future actions or conduct. Representations concerning what will occur in the future are considered to be predictions and not fraudulent misrepresentations." (Internal citations and quotations omitted.) *Martin v. Ohio State Univ. Found.* (2000), 139 Ohio App.3d 89, 98, 742 N.E.2d 1198. Upon our review, we find the evidence fails to support a fraud claim.

{¶ 39} A claim of negligent misrepresentation requires the following: "'One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or

competence in obtaining or communicating the information.'" *Delman v. Cleveland Hts.* (1989), 41 Ohio St.3d 1, 4, 534 N.E.2d 835, quoting Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1).

{¶ 40} Here, R & A did not offer information for the guidance of CCI on the bridge-loan transaction. The record reflects that R & A did not represent CCI on this matter and CCI's internal counsel handled the legal issues for CCI with regard to the bridge loan and the Cornerstone project. At the time the bridge loan was made, CCI knew that no bank had committed to a loan for the Cornerstone project. CCI decided to make the loan because contractors were not being paid. Therefore, the record fails to support a negligent misrepresentation claim.

{¶ 41} Third, CCI claims that there is evidence that supports its civil conspiracy and civil aiding and abetting claims. "In a civil aiding and abetting case, a plaintiff must show two elements: (1) knowledge that the primary party's conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act. In order to establish the tort of civil conspiracy, the following elements must be proven: (1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself. An action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed." (Internal

citations omitted.) *O'Brien v. Olmsted Falls*, Cuyahoga App. Nos. 89966 and 90336, 2008-Ohio-2658, ¶ 41.

{¶ 42} The record in this case is devoid of evidence that R & A was in any manner involved in Schneider's unlawful activities. Furthermore, the record does not support the underlying claims presented in this action.

{¶ 43} We conclude that R & A is entitled to summary judgment on all claims raised in the complaint. CCI's first assignment of error is overruled.

{¶ 44} CCI's second assignment of error challenges the trial court's decision to strike certain responses to requests for admissions and to order each matter be deemed admitted. The admission requests in question are numbers 5, 6, 11, 12, 13, 18, 19, 32, and 37.

{¶ 45} Pursuant to Civ.R. 36, an answer must specifically deny each matter of which an admission is requested or detail the reasons why such matter cannot be admitted or denied truthfully. Lack of information or knowledge cannot be given as a reason for failure to admit or deny unless the answering party states that he has made reasonable inquiry and that information known or readily obtainable by him is insufficient to enable him to admit or deny. The party requesting the admissions may move for an order with respect to the answers or objections. If the court determines that an answer does not comply with the requirements of Civil Rule 36, it may order that the matter is admitted. Civ.R. 36(A)(2) and (3).

{¶ 46} Admission requests 5 and 6 asked CCI to admit that Ken Lapine and no other R & A attorney was present at the July 14, 2004 meeting. This was the meeting at which CCI issued the bridge loan to Schneider. CCI stated it was unable to admit or deny these requests, "[a]fter reasonable inquiry, based upon information known or readily available[.]" The trial court initially deemed these matters admitted on November 25, 2008. Notwithstanding this ruling, CCI attempted to correct the deficient response. CCI's counsel asserted in a corrected brief that CCI representatives recollected Mr. Lapine's attendance for all or a portion of the July 14, 2004 meeting. However, CCI's own minutes of the meeting do not reflect that an R & A attorney was present at the meeting, and the deposition testimony of CCI representatives does not establish otherwise. On January 23, 2009, the trial court again deemed admission requests 5 and 6 admitted.

{¶ 47} Our review reflects that CCI's admission response failed to comply with Civ.R. 36 because it did not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." See Civ.R. 36(A)(2). "Failure to incorporate in the response the language mandated by Civ.R. 36 and failure to detail in writing both the actual effort made and the reasons why the known information is insufficient to enable the responding party to admit or deny will result in an admission." *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261, 270, 337 N.E.2d 806; *Stephens*

v. City of Cleveland (Feb. 1, 1990), Cuyahoga App. No. 56419. Accordingly, the trial court properly deemed the matters admitted. CCI's after-the-fact attempt to cure the deficiency was rejected by the trial court because no factual basis was offered to rebut the meeting minutes. As no compelling reason was offered to avoid the admission, we find it was well within the trial court's discretion to deem these requests admitted.

{¶ 48} Admission requests 11, 12, and 13 pertained to CCI's knowledge on July 14, 2004 that no lender, including the Marshall Group and Home Savings Bank, had made a commitment to fund a construction loan. CCI answered these requests with an answer of "denied." If a simplistically stated admission request contains a single assertion of fact, a general denial will probably be a sufficiently specific response to "meet the substance of the requested admission." See *Rickels v. Goyings*, Paulding App. No. 11-07-09, 2008-Ohio-2119, ¶ 24; *Maryland Cas. Ins. Co. v. Haffey* (Dec. 24, 1980), Cuyahoga App. No. 42254, at *2.

{¶ 49} We find that CCI provided a proper response to admission requests 11, 12, and 13 and that the trial court improperly deemed these matters admitted. Nevertheless, we find the error was harmless as the factual matters were otherwise established by the evidence in the record. The minutes of the July 14, 2004 meeting reflect that Schneider told CCI that "funding for the project is not in place." Additionally, CCI representatives

observed the letter from Home Savings Bank that reflected "a loan proposal, not a loan commitment."

{¶ 50} The remaining admission requests are not pertinent to the summary judgment disposition in this matter. Admission requests 18 and 19 concerned whether R & A was a financial institution or had control over any financial institution's decision to make a construction loan to Pearl. Admission requests 32 and 37 related to CCI's pay application under its contract with Pearl, which is a matter pertaining to damages. Any error pertaining to these requests would amount to harmless error. See Civ.R. 61.

{¶ 51} Accordingly, CCI's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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 common pleas 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
KATHLEEN ANN KEOUGH, J., CONCUR