

EN BANC PROCEEDINGS
(Updated July 2013)

Local Appellate Rule 26 governs en banc proceedings in the Eighth District. The current text of this rule can be found at the Local Rules tab. On the following pages are (1) a brief summary of the en banc decisions issued by the Eighth District Court of Appeals since 2010, and (2) a sampling of some of the decisions issued by the court on party applications for en banc consideration.

En Banc Decisions of the Eighth District
2010 through July 2013

The following summary is intended to be descriptive only. It is not legal advice or a legal opinion on which the reader may rely. Readers must review the decisions themselves and reach their own conclusions. They may not rely upon this summary to accurately describe or explain the court's holding. Copies of these opinions may be obtained through the Ohio Supreme Court's website at <http://www.sconet.state.oh.us/ROD/docs/>

Cleveland Heights v. Lewis, 187 Ohio App.3d 786, 2010-Ohio-2208, 933 N.E.2d 1146.

Held: A misdemeanant who unsuccessfully moved the trial court to stay execution of his sentence served the sentence involuntarily; hence, his appeal from the conviction and sentence was not rendered moot by service of the sentence. (11 judges concur; 1 concurring opinion; 1 dissenting opinion.)

Affirmed, *Cleveland Heights v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, 953 N.E.2d 278.

Sampson v. Cuyahoga Metro. Hous. Auth., 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 98.

Held: R.C. 2744.09 precludes a political subdivision from claiming sovereign immunity as a defense to an intentional tort claim by an employee that arises out of the employment relationship. (5 judges concur; 1 concurs in judgment only without opinion; 2 dissenting opinions.)

Affirmed, *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, 966 N.E.2d 247.

State v. Damion Burke, 188 Ohio App.3d 777, 2010-Ohio-3597, 936 N.E.2d 1019.

Held: The odor of marijuana alone provided probable cause for a warrantless search of the passenger compartment of a vehicle for contraband, even after the occupant was placed under arrest. (7 judges concur, 1 separate concurring opinion; 1 dissent without opinion; 1 dissenting opinion.)

Discretionary appeal not allowed, 127 Ohio St.3d 1485, 2010 Ohio 6371, 939 N.E.2d 183.

Snider-Cannata Interests, LLC v. Ruper, 190 Ohio App.3d 347, 2010-Ohio-5309, 941 N.E.2d 1242.

Held: Trial court order granting summary judgment in favor of the defendant impliedly denied plaintiff's request for declaratory relief. Therefore, the order was final and appealable. (8 judges concur; 1 separate concurring opinion in which 7 judges concur; 1 dissent with separate opinion; 1 dissent without opinion.)

Northpoint Properties, Inc. v. Charter One Bank, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, 2011 Ohio App. LEXIS 2206.

Held: The measure of damages on a fraud claim in connection with a sale of commercial real estate is not limited to the difference between the actual market value of the property at the date of sale and its value as it was represented to be. *Krantz v. Schwartz* (1992), 78 Ohio App.3d 759, abrogated. The appropriate inquiry is whether competent evidence of damages has been presented to establish with reasonable certainty an amount sufficient to fully and fairly compensate the aggrieved party, and this may include evidence of the cost of repair and/or the difference in the value of the premises. (10 judges concur; 1 judge concurs in part and dissents in part with separate opinion; 1 judge recuses.)

State v. Williams, 195 Ohio App.3d 807, 2011-Ohio-5650, 961 N.E.2d 1203.

Held: Testimony about sexual acts that occurred 12 years prior to the charged crimes was not admissible to prove the defendant's intent, as an exception to Evid.R. 404(B). Other acts evidence was also inadmissible to show a "scheme, plan, or system" when identity was not at issue and when the challenged testimony did not form the immediate background of the charged crimes. Although there was sufficient evidence to sustain appellant's convictions, the admission of the other acts evidence constitutes reversible error. (7 judges concur; 1 separate concurring opinion; 1 separate opinion concurring in part; 1 dissenting opinion.)

Reversed, *State v. Williams*, 134 Ohio St.3d 521, 2012 Ohio 5695, 983 N.E.2d 1278,

DiGiorgio v. Cleveland, 196 Ohio App.3d 575, 2011 Ohio 5824, 964 N.E.2d 495.

Held: Denial of a motion to dismiss or for judgment on the pleadings on sovereign immunity grounds is a final appealable order, even if the order does not explain the basis for the court's decision. (10 judges concur; 1 separate opinion concurring in part, dissenting in part.)

Discretionary appeal not allowed, 131 Ohio St.3d 1484, 2012 Ohio 5695, 983 N.E.2d 1278.

State v. Nash, 8th Dist. Cuyahoga No. 96575, 2012 Ohio 3246, 973 N.E.2d 353.

Held: R.C. 2929.15(A)(2) requires probation department supervision of a defendant placed on community control supervision only when there is

a condition that must be overseen or a term during which the defendant's conduct must be supervised. (9 judges concur, 2 dissenting opinions.)

Discretionary appeal not allowed, 2012 Ohio 5459, 2012 Ohio LEXIS 3038.

State v. Rogers, 8th Dist. Cuyahoga No. 98292, 2013 Ohio 3235, 2013 Ohio App.LEXIS 3326.

Held: Where a facial question of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge. A trial court commits plain error in failing to inquire and determine whether such offenses are allied offenses of similar import. (11 judges concur; 2 concurring opinions, 1 dissent.)

Sample En Banc Orders

1. En banc application granted:

[94020](#) Northpoint Properties Inc. v. Charter One

2. En banc consideration granted sua sponte:

[95945](#) DiGiorgio v. Cleveland

3. En banc application mooted by reconsideration:

[93299](#) State v. Melton

[93772](#) State v. Wilson

[94661](#) DeCuzzi v. Westlake

4. En banc application mooted by nunc pro tunc entry:

[95128](#) State v. Harris

5. Alleged conflict did not arise from appellate entry (nunc pro tunc):

[93835](#) State v. Parker

6. En banc does not apply to original actions.

[97209](#) State ex rel McGrath v. McClelland

7. En banc application dismissed as untimely:

[97304](#) McGrath v. Dean

8. En banc application alleges an error, not a conflict:

[94555](#) Klocker v. Zeiger

[93923](#) State v. Huber

[94748](#) Dzina v. Dzina

9. No conflict found:

[93599](#) Westlake v. Filiaggi (prejudice from cumulative vs. individual error)
[94114](#) Maloof-Wolf v. Wolf (factually distinguished)
[94259](#) JDI Murray Hill v. Flynn Properties (exception to rule)
[94356](#) Peffer v. Cleveland Clinic Found. (prejudice)
[94919](#) Vassil v. Gross & Gross (distinguished)
[95243](#) State v. Duane Smith (distinguished)
[95422](#) State v. Collins (distinguished)
[98197](#) Morgan Stanley Credit v. Fillinger
[98364](#) Briggs v. Wilcox (different application of law to facts)

10. Conflict not dispositive:

[94743](#) State v. Butler
[96413](#) Ford Motor Credit v. Agrawal

11. En banc review not necessary to secure or maintain uniformity

[95763](#) Southworth v. Northern Trust

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
93299

LOWER COURT NO.
CP CR-327341

COMMON PLEAS COURT

-vs-

ANDRE MELTON

Appellant

MOTION NO. 437681

Date 09/23/2010

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS GRANTED. THE JOURNAL ENTRY AND DECISION RELEASED JULY 22, 2010 IS HEREBY VACATED AND SUBSTITUTED WITH THE JOURNAL ENTRY AND OPINION ISSUED ON SEPTEMBER 23, 2010. MOTION TO REHEAR THIS EN BANC IS RENDERED MOOT AND MOTION TO CERTIFY CONFLICT IS DENIED.

Presiding Judge KENNETH A. ROCCO,
Concurs

Judge PATRICIA A. BLACKMON, Concurs

Judge ANN DYKE

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

CITY OF WESTLAKE

Appellee

COA NO.
93599

LOWER COURT NO.
09 CRB 0481

ROCKY RIVER MUNI.

-vs-

KATHLEEN FILIAGGI

Appellant

MOTION NO. 438087

Date 11/19/2010

Journal Entry

This matter is before the court on appellee's application for en banc consideration, which was combined with appellee's application for reconsideration, as required by App.R. 26 and with appellee's motion to certify a conflict. Pursuant to App.R. 26(A)(2), Loc. App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve legitimate conflicts on a point of law within our district through en banc proceedings should the court determine that such a conflict exists.

The panel's decision found that cumulative errors deprived appellant of a fair trial. The cases cited by appellant – *State v. McCuller*, Cuyahoga App.

No. 86592, 2006-Ohio-302, *State v. Reddy*, Cuyahoga App. No. 92924, 2010-Ohio-3996, and *State v. Elliott*, Cuyahoga App. No. 91999, 2009 Ohio 5816 – do not conflict with any legal proposition stated by the panel. Cumulative errors may deprive a defendant of a fair trial even if the individual errors singularly would not constitute prejudicial error. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256. Therefore, the motion for en banc consideration is denied.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
ANN DYKE, J.,
LARRY A. JONES, J.,
MARY EILEEN KILBANE, J.,
CHRISTINE T. MCMONAGLE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. LOWER COURT NO.
93772 CP CR-518393

COMMON PLEAS COURT

-vs-

ERIC WILSON

Appellant

MOTION NO. 438909

Date 12/09/2010

Journal Entry

APPLICATION BY APPELLANT FOR EN BANC CONSIDERATION IS DENIED AS MOOT. SEE JOURNAL ENTRY AND OPINION ISSUED ON RECONSIDERATION THIS SAME DATE.

Judge MARY EILEEN KILBANE, Concurs

Administrative Judge
SEAN C. GALLAGHER

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. LOWER COURT NO.
93835 CP CV-521078

COMMON PLEAS COURT

-vs-

MICHAEL PARKER JR.

Appellant

MOTION NO. 444609

Date 06/09/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant's application was filed after a nunc pro tunc ruling on a timely-filed application for reconsideration. The nunc pro tunc entry corrected two statements of fact in the court's opinion. Pursuant to App.R. 26(A)(2)(c), "a party may seek en banc consideration within ten days of the entry of any judgment or order of the court ruling on a timely filed application for reconsideration * * * if an intra-district conflict first arises as a result of that judgment or order." The alleged conflicts appellant claims did not first arise as a result of the judgment on reconsideration. Therefore, appellant's application is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
93923

LOWER COURT NO.
CP CR-521813

COMMON PLEAS COURT

-vs-

JOSEPH HUBER

Appellant

MOTION NO. 439630

Date 01/06/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26 , Loc. App.R. 26(A)(2), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant contends there is a conflict between the panel's decision in the present appeal and the decision in a prior appeal in *State v. Beranek*, Cuyahoga App. No. 76260 (Dec. 14, 2000). The *Beranek* decision was based on the Ohio Supreme Court's decision in *State v. Deal* (1990), 17 Ohio St.2d 17, 19, 244 N.E.2d 742. Appellant does not allege a conflict among the cases in

this district. He alleges an error in the panel's decision. Therefore, appellant's application for en banc consideration is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Judge Ann Dyke retired from the court effective November 30, 2010.

Judge Christine T. McMonagle retired from the court effective December 31, 2010.

Judge Kathleen Keough joined the court after this matter was ready for decision, and did not participate in this decision.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

NORTHPOINT PROPERTIES INC.

Appellant

COA NO.
94020

LOWER COURT NO.
CP CV-494961
CP CV-589150

COMMON PLEAS COURT

-vs-

CHARTER ONE BANK, ET AL.

Appellees

MOTION NO. 441287

Date 02/11/2011

Journal Entry

This matter is before the court on appellees/cross-appellants' application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26(A)(2), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decision of this court on any issue that is dispositive of the case in which the application is filed.

Appellees/cross-appellants' application for en banc consideration is granted. We find a conflict exists between the panel's decision in this case and our previous decision in *Krantz v. Schwartz* (1992), 78 Ohio App.3d 759,

605 N.E.2d 1321, on a dispositive issue: whether a plaintiff alleging fraud in a commercial transaction is limited to recovery of the difference between the value of the property as represented and the value as actually delivered.

The parties may each submit a brief to the court regarding this issue, not more than 10 pages in length, on or before February 25, 2011. No responsive briefing is permitted. The parties should particularly address the question whether the measure of damages is or should be different in a commercial and non-commercial setting.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

FAYE J. MALOOF-WOLF

Appellee

COA NO.
94114

LOWER COURT NO.
CP DR-299737

-vs-

COMMON PLEAS COURT

ROBERT O. WOLF

Appellant

MOTION NO. 442317

Date 04/04/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision in this case and this court's previous decisions in *Vail v. Vail*, Cuyahoga App. No. 83145, 2004-Ohio-2158 ("*Vail I*"), and *Vail v. Vail*, Cuyahoga App. Nos. 85587 and 85590, 2005-Ohio-4308 ("*Vail II*"). The differing terms of the parties' agreements in the two cases lead to a different result.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

MARY J. BOYLE, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

JDI MURRAY HILL, LLC

Appellee

COA NO.
94259

LOWER COURT NO.
CP CV-557338

COMMON PLEAS COURT

-vs-

FLYNN PROPERTIES, LLC, ET AL.

Appellants

MOTION NO. 440444

Date 01/27/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26(A)(2), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decision of this court on any issue that is dispositive of the case in which the application is filed.

Appellant argues that the panel's decision in this case conflicts with this court's decisions in *Walters v. Hawken School* (August 27, 1998), Cuyahoga App. No. 73051 and *Kingsmen Ent., Inc. v. Kasunic* (Feb. 17, 1994), Cuyahoga App. No. 64720. These cases held that the court of appeals lacked jurisdiction when the trial court judgments at issue were void because they were issued in violation of the automatic bankruptcy stay, 11 U.S.C. §362(a).

The application of equitable principles to override the automatic stay does not conflict with the general rule that orders issued in violation of the automatic stay are void; it is simply an exception to it. *Lowenborg v. Oglebay Norton Co.*, Cuyahoga App. No. 88396, 88397, 2007-Ohio-3408. Therefore, appellant's application for en banc consideration is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

JASON PEFFER, ET AL.

Appellants

COA NO.
94356

LOWER COURT NO.
CP CV-496855

COMMON PLEAS COURT

-vs-

CLEVELAND CLINIC FOUNDATION, ET AL.

Appellees

MOTION NO. 441947

Date 03/15/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26(A)(2), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

There is no conflict between the panel's decision in this case and the decision in *Shapiro v. Kilgore Cleaning & Storage Co.* (1959), 108

Ohio App. 402, 156 N.E.2d 866. Both the panel in this case and the court in *Shapiro* found that improper closing arguments had been made; the only difference is that the court in *Shapiro* found prejudice while the court here did not. Prejudice must necessarily be determined on a case-by-case basis. Accordingly, appellant's application for en banc consideration is denied.

PATRICIA A. BLACKMON, JUDGE

Concurring:

FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

MARY J. BOYLE, J.,
SEAN C. GALLAGHER, J.,
MARY EILEEN KILBANE, A.J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

THOMAS G. KLOCKER

Appellant

COA NO. LOWER COURT NO.
94555 CP CV-637240

COMMON PLEAS COURT

-vs-

ROBERT ZEIGER, ET AL.

Appellee

MOTION NO. 439659

Date 12/21/2010

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26 , Loc. App.R. 26(A)(2), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant contends there is a conflict between the panel's decision in the present appeal and the decision in a prior appeal in this case, *Klocker v. Zeiger*, Cuyahoga App. No. 92044, 2009-Ohio-3102. Appellant argues that the

trial judge was required to decide the issues as delineated in the prior appeal, and this court should have required it to do so.

Appellant does not describe a conflict among the decisions of this court on a dispositive issue. Rather, he suggests that a statement made in the prior appeal constitutes the law of the case, binding in all subsequent proceedings. This alleged error in the panel's decision is not appropriate for en banc consideration.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
LARRY A. JONES, J.,
MARY EILEEN KILBANE, J.,
CHRISTINE T. MCMONAGLE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Judge Ann Dyke retired from this court effective November 30, 2010.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

KIM DECUZZI

Appellee

COA NO. LOWER COURT NO.
94661 CP CV-687617

COMMON PLEAS COURT

-vs-

CITY OF WESTLAKE

Appellant

MOTION NO. 439306

Date 12/16/2010

Journal Entry

APPELLANT'S ALTERNATIVE MOTION FOR EN BANC CONSIDERATION IS DENIED AS MOOT IN LIGHT OF THIS COURT'S ORDER GRANTING APPELLANT'S MOTION FOR RECONSIDERATION/CLARIFICATION AND THE JOURNAL ENTRY AND OPINION ISSUED THIS SAME DATE.

Judge MARY EILEEN KILBANE, Concurs

Administrative Judge
SEAN C. GALLAGHER

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. LOWER COURT NO.
94743 CP CR-529756

COMMON PLEAS COURT

-vs-

WILLIE BUTLER

Appellant

MOTION NO. 443096

Date 04/20/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We do not find the alleged conflict between the panel's decision in this case and *State v. Howard*, Cuyahoga App. No. 85500, 2005-Ohio-5135, to be dispositive of the present case. Even without the panel's reliance on the evidence of the victim's surprise as proof of stealth, the opinion cites other evidence of trespass by force, stealth, or deception. Therefore, appellant's application is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

COLLEEN CONWAY COONEY, J., and
SEAN C. GALLAGHER, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

DANIEL A. DZINA

Appellee

COA NO. LOWER COURT NO.
94748 CP D-263220

-vs-

COMMON PLEAS COURT

NANCY B. DZINA

Appellant

MOTION NO. 443650

Date 05/12/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant argues that the panel decision contravenes the law of the case. At most, this argument claims an error in the panel decision. It does not allege a conflict between two or more decisions of this court. Accordingly, appellant's application is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Abstaining:

MARY J. BOYLE, J.

Recused:

FRANK D. CELEBREZZE, JR., J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

LAWRENCE W. VASSIL

Appellant

COA NO. LOWER COURT NO.
94919 CP CV-688844

COMMON PLEAS COURT

-vs-

GROSS & GROSS, LLC., ET AL.

Appellee

MOTION NO. 444122

Date 05/25/2011

Journal Entry

This matter is before the court on appellee’s application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel’s holding and the court’s prior decisions in *Szabo v. Goetsch*, Cuyahoga App. No. 88125, 2007-Ohio-1147, *Easterwood v. English*, Cuyahoga App. No. 82538, 2003-Ohio-6859, and *Tolliver v. McDonnell*, 155 Ohio App.3d 10, 2003-Ohio-5390, 798 N.E.2d 1176. The fact that the cognizable event triggering the statute of limitations need not be a judicial determination does not mean that a judicial determination cannot be the triggering event. Accordingly, appellees’ application is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95128

LOWER COURT NO.
CP CR-510551, CR-506498

-vs-

COMMON PLEAS COURT

MARIO HARRIS

Appellant

MOTION NO. 439303

Date 11/19/2010

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26(A)(2), Loc. App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve legitimate conflicts on a point of law within our district through en banc proceedings should the court determine that such a conflict exists.

Appellee argues that the panel's decision in this case conflicts with our previous holdings in *State v. Toney*, Cuyahoga App. No. 90605, 2008-Ohio-6473, ¶11, and *State ex rel. Davis v. Cuyahoga County Common Pleas Court*, Cuyahoga App. No. 93814, 2010-Ohio-1066, ¶8. These cases hold that "[*State v. Baker*], 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163] requires a

full resolution of those counts for which there were convictions. It does not require a reiteration of those counts and specifications for which there were no convictions, but were resolved in other ways, such as dismissals, nolle counts, or not guilty findings.” *Davis*, at ¶8.

The appellee’s application for en banc consideration pertains to the panel decision journalized on November 4, 2010. This journal entry and opinion determined that the trial court’s judgment entry was not final and appealable because it “failed to account for the disposition of the counts that were nolle and for the order of forfeiture recorded in the first entry .” On November 15, 2010, the panel entered a corrected judgment which stated instead that “since the second judgment entry fails to account for the order of forfeiture recorded in the first entry, it is not a final appealable order.” The corrected journal entry and opinion is consistent with *Toney* and *Davis*. Therefore, the motion for en banc consideration is denied in light of the panel’s corrected journal entry and opinion.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., CONCURS

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. LOWER COURT NO.
95243 CP CR-532637

COMMON PLEAS COURT

-vs-

DUANE SMITH

Appellant

MOTION NO. 445837

Date 07/21/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision in the present case and *State v. Young*, Cuyahoga App. No. 79243, 2002-Ohio-2744, on the question whether a police officer-witness improperly vouched for a fact witness. The police officer-witness here did not testify that the fact witness was telling the truth, as occurred during the jury trial in *Young*. Therefore, the cases are factually distinguishable. Appellant's application for en banc consideration is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
95422

LOWER COURT NO.
CP CR-529965, CR-533453

COMMON PLEAS COURT

-vs-

TONY COLLINS

Appellant

MOTION NO. 445220

Date 08/02/2011

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision in this case and *State v. Jordan* (1992), 73 Ohio App.3d 524. The defendant in *Jordan* did not receive a shipment of drugs as the defendant in this case did, so the cases are factually distinguishable. We also find no conflict between the panel's decision and *State v. Thomas* (Mar. 15, 1979), Cuyahoga App. No. 38315. The charge in *Thomas* was possession of a narcotic for sale, not trafficking as defined by R.C. 2925.03(A)(2). Therefore, appellant's application for en banc consideration is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

John D. Southworth

Appellant

COA NO.
95763

LOWER COURT NO.
CP CV-688175

COMMON PLEAS COURT

-vs-

Northern Trust Securities, Inc.

Appellee

MOTION NO. 446335

Date 09/01/2011

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Although the panel's decision conflicts with *Langlois v. W.P. Hickman Systems, Inc.*, Cuyahoga App. No. 86930, 2006-Ohio-3737, the panel's decision is in accord with the weight of authority in this district on the question of how to prove a prima facie case of age discrimination in the context of a reduction in force. Therefore, we find that en banc consideration is not "necessary to secure or maintain uniformity of decisions within the district." App.R. 26(A)(2)(a).

Furthermore, the panel's decision does not conflict with *Ramacciato v. Argo-Tech Corp.*, Cuyahoga App. No. 84557, 2005-Ohio-506, *Chiles v. Cuyahoga Community College* (Dec. 5, 1996), Cuyahoga App. No. 70658, or *Wilson v. Precision Environmental Co.*, Cuyahoga App. No. 81932, 2003-Ohio-2873, ¶29. The panel found appellant met its burden of proving a prima facie case through indirect evidence of

discrimination, as these cases allow. Therefore, appellant's application for en banc consideration is denied.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

NICHOLAS DIGIORGIO, ET AL.

Appellees

COA NO.
95945

LOWER COURT NO.
CP CV-700625

COMMON PLEAS COURT

-vs-

CITY OF CLEVELAND, ET AL.

Appellants

MOTION NO. 447652

Date 09/16/2011

Journal Entry

Pursuant to App.R. 26, a majority of the en banc court has determined that there is a conflict among prior decision of this court on the question whether the unexplained denial of a motion to dismiss and/or for judgment on the pleadings on sovereign immunity grounds is a final appealable order. Compare *Young v. Cuyahoga Cty. Bd. of Mental Retardation & Dev. Disabilities*, Cuyahoga App. No. 95955, 2011-Ohio-2291; *Wade v. Stewart*, Cuyahoga App. No. 93405, 2010-Ohio-164; and *Grassia v. Cleveland*, Cuyahoga App. No. 91013, 2008-Ohio-3134, with *Fink v. Twentieth Century Homes, Inc.*, Cuyahoga App. No.94519, 2010-Ohio-5486; and *Parsons v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 93523,

2010-Ohio-266. This issue may be dispositive of the present case.

Accordingly, the court, sua sponte, designates this matter for en banc review.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

FRANK D. CELEBREZZE, JR., J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

Ford Motor Credit Co.

Appellant

COA NO.
96413

LOWER COURT NO.
CP CV-536588

COMMON PLEAS COURT

-vs-

Sudesh Agrawal

Appellee

MOTION NO. 450760

Date 02/01/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant urges that the panel's decision conflicts with our decision in *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, 2004 WL 1119619 on the question whether a party is necessarily damaged by a breach of contract. We find this issue is not dispositive of this appeal. The case is before the court on the limited question whether the action may be maintained as a class action. R.C. 2505.02(B)(5). Regardless of our

determination of the issue appellant raises here, the case would proceed as a class action with respect to the Civ.R. 23(B)(2) class and the Civ.R. 23(B)(3) class as to statutory damages. Therefore, appellant's application is denied.

PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

Concurring:

MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE EX REL., JOSEPH MCGRATH

Relator

COA NO.
97209

ORIGINAL ACTION -vs

JDG. ROBERT MCCLELLAND, ET AL.

Respondent

MOTION NO. 451589

Date 02/06/12

Journal Entry

Relator's en banc motion filed January 24, 2012 is denied. The appellate rules concerning en consideration do not apply to original actions. App.R. 1; Loc.App.R. 26.

Judge MELODY J. STEWART, Concur

Administrative Judge
PATRICIA A. BLACKMON

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

JOSEPH MCGRATH

Appellant

COA NO.
97304

LOWER COURT NO.
CP CV-716670

COMMON PLEAS COURT

-vs

JAMES DEAN, ET AL.

Appellee

MOTION NO. 454116

Date 04/16/12

Journal Entry

Motion by Appellant for rehearing en banc was not timely filed. App.R. 26 requires that an application for en banc consideration must be filed within ten days after the clerk mailed the judgment or order in question to the parties and made a note on the docket of the mailing as required by App.R. 30. The judgment was mailed to the parties and noted on the docket on March 29, 2012. The motion for rehearing en banc was filed April 12, 2012. Therefore, the application is denied.

MELODY J. STEWART, Concur

Administrative Judge
PATRICIA A. BLACKMON

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MORGAN STANLEY CREDIT CORP., ETC.

Appellee

COA NO.

LOWER COURT NO.

98197

CP CV-736882

COMMON PLEAS COURT

-vs-

JUDY M. FILLINGER, AKA, ETC., ET AL.

Appellants

MOTION NO. 459010

Date 11/08/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel's decision here and the decision in *Ohio Savings Bank v. H.L. Vokes Co.*, 54 Ohio App.3d 68, 560 N.E.2d 1328 (8th Dist. 1989). The panel here determined that the party claiming fraud must allege that she relied upon the allegedly fraudulent statement. By contrast, the panel in *Vokes* held that the person claiming fraud need not be in privity with the person who made the allegedly false statement. Privity and reliance are independent concepts. Therefore, the application for en banc consideration is denied.

MELODY J. STEWART, JUDGE

Concurring:

PATRICIA A. BLACKMON, A.J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J.

Dissenting:

SEAN C. GALLAGHER, J.

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Court of Appeals of Ohio, Eighth District
County of Cuyahoga
Andrea Rocco, Clerk of Courts

TRACY A. BRIGGS, F.K.A. MOELICH

Appellant

COA NO.
98364

LOWER COURT NO.
CP CV-746206

COMMON PLEAS COURT

-vs-

DARLENE A. WILCOX, D.B.A. DARLENE A.
WILCOX, L.L.C.

Appellee

MOTION NO. 464547

Date 06/07/2013

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find there was no majority opinion in this case. Two of the three panel members issued independent opinions reflecting their reasons for reaching the conclusion they did. There is no conflict between a "decision of this court" and the previous decisions in *Case v. Landskroner & Phillips Co., L.P.A.*, 8th Dist. No. 78147, 2001 Ohio App.LEXIS 1987 (May 3, 2001) and *Crystal v. Wilsman*, 151 Ohio App.3d 512, 2003-Ohio-427, 784 N.E.2d 764.

Moreover, there is no conflict in the law between the opinions issued in this case and in *Case* and *Crystal*. All of these opinions apply the test set forth in *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989) for assessing when a cause of action for malpractice accrues. They reached different conclusions based on the same law and the particular facts of each case. Such case-specific judgments on the application of law to fact do not raise a question affecting the uniformity of decisions in this district. Therefore, appellant's application is denied.

MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

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