

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-653

FILED
AUG 08 2014
CLERK
SUPREME COURT

BRIDGETT WRIGHT (NOW ROONEY)

APPELLANT

-vs-

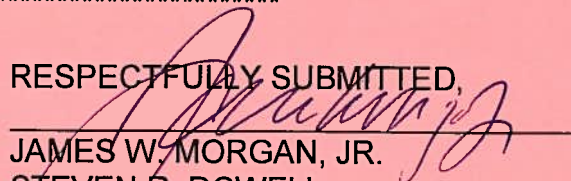
OR SOLUTIONS, INC., et al

APPELLEES

ON DISCRETIONARY REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2012-CA-001956

ON APPEAL FROM THE KENTON CIRCUIT COURT, FOURTH DIVISION
CASE NO. 09-CI-03566

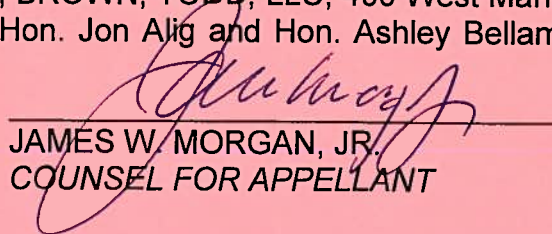
BRIEF FOR APPELLANT

RESPECTFULLY SUBMITTED,


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served on the 7th day of August, 2014 by federal express to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Ave., Room 235, Frankfort, KY 40601-3415; and by U.S. First-Class mail to: Hon. Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Patricia Summe, Judge, Kenton Circuit Court, 236 Madison Avenue, Covington, KY 41011; Hon. Richard S. Cleary, Hon. Kathleen B. Wright and Hon. Griffin Terry Sumner, FROST, BROWN, TODD, LLC, 400 West Market Street, Suite 3200, Louisville, KY 40202 and Hon. Jon Alig and Hon. Ashley Bellamy, 414 Licking Pike, Wilder, KY 41076.



JAMES W. MORGAN, JR.
COUNSEL FOR APPELLANT

INTRODUCTION

This is a case involving an appeal from the Kenton Circuit Court, after dismissal on motion for summary judgment, to the Kentucky Court of Appeals, that was dismissed after the Court of Appeals concluded that Appellant appealed from an interlocutory order, notwithstanding the entry of a *nunc pro tunc* order by the trial court. This Court accepted discretionary review of the Court of Appeals' order of dismissal, presumably to clarify disparate rulings on the issue in the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant requests oral argument in this case. The Appellant believes that oral argument would assist the court in its decision in this case.

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STATEMENT OF THE CASE

In January 2007, Russell Swigart, (hereinafter "Swigart") was employed by Appellee, OR Solutions, Inc., (hereinafter "ORS"), a privately held medical equipment company where he had been employed for several years as a district sales manager. At that time, he lived in the Commonwealth of Virginia; where ORS is based. Prior to his employment with ORS, Swigart had a history of erratic and violent behavior, domestic violence and extreme cruelty to prior paramours and their pets dating back many years which was known to ORS management; but not known by Appellant, Bridgett Wright, (hereinafter "Wright"). TR at 183-209. Prior to Wright's filing of the initial lawsuit in the Kenton Circuit Court, but after the events forming the basis of the underlying lawsuit, ORS was purchased by Appellees, Medical Equipment Company and Ecolab, Inc. For purposes of clarity, all Appellee corporate entities, as former employers of both Swigart and Wright, are hereinafter collectively referred to as "ORS".

Swigart interviewed and hired Wright to fill a field sales position on or about January 5, 2007. Deposition of Bridgett Wright. Appendix G at p. 29-30. She was assigned to a district that included southern Ohio, Kentucky and a portion of West Virginia; in other words he placed her under his direct supervision. Appendix G at p. 36.

Within weeks of her initial employment, Swigart began making romantic overtures to Wright that were resisted. TR at p. 1-6. However, after threats from Swigart that he could, and would, have her fired, Wright consented to a personal relationship with him outside of the workplace. TR at p. 1-6. Very shortly thereafter, Wright ended their brief, dating relationship because of Swigart's erratic behaviors. He

consumed alcohol excessively; was dishonest; had major mood swings; compulsive behavior; and was aggressive. Wright Depo. at p. 67.

Unfortunately for Wright, her termination of the relationship opened up a Pandora's Box. After weeks of attempting to cease personal contact with Swigart, it seemed as if he had accepted her decision. With that, the pressure for a relationship and the erratic behavior subsided. TR at p. 1-6. However, several weeks later, in July and then again in August 2007, Swigart in an unwelcome and unsolicited manner, again commenced his efforts to cultivate a relationship with Wright, over her strenuous objections. TR at p. 1-6.

In early September 2007, Swigart began a continuous and sustained campaign of harassment and intimidation specifically designed to cause Wright extreme emotional distress. By December 2007, despite her refusal to acknowledge him, she was still receiving unwanted emails and text messages from Swigart. TR at p. 1-6.

In January 2008, Wright learned that Swigart had been spreading rumors about her to co-workers. After reporting this to management, Wright decided not to involve Human Resources. Swigart later called Wright in a histrionic, agitated state asking her for specifics about whom she had heard the rumors from and telling her he had been reported to management. Due to Swigart's excessive screaming and cursing at her, Wright terminated the telephone conversation and immediately notified ORS, requesting a new supervisor. Her request was granted. TR at p. 1-6.

Eventually, in March 2008 Swigart abruptly resigned his position from ORS while at a company function in Anaheim, California after a heated discussion with management. TR at p. 1-6.

From April 2008 to August 2008, Swigart stalked Wright by sending her numerous and unwanted text messages telling her things like he was in Northern Kentucky (where Wright lived) and he knew about Federal Express shipments to her home and other similar things designed to let her know he was watching her. TR at p. 1-6.

On September 25, 2008, while Wright was out of town on business in Ashland, Kentucky, Swigart began sending her numerous and harassing text messages, threatening revenge for "breaking his heart". TR at p. 1-6. In these messages, Swigart told Wright that he "hated" her, he "wanted her dead", he "knew where she lived and worked" and told Wright she "would get what she had coming". TR at p. 1-6. Importantly, at the time of these messages, Swigart could not have known Wright was out of town. At 10:50 PM the messages ceased. The most salient of these text messages are as follows:

- 8:52 PM I hope you die you piece of trash whore
- 8:59 PM I hope you and your retarded boyfriend are real happy together, you filthy pussy squirtin bitch
- 9:02 PM You should be ashamed of yourself, the way you used me to make yourself feel better after Brian dumped your sorry ass
- 9:08 PM Well you, like everyone else, is gonna get exactly what you deserve. I know where you work and where you live you dirty filthy whore. I know why Brian dumped u
- 9:35 PM I moved here for YOU
- 10:29 PM Frank and Pig have seen better days. You should get home

and clean up the mess I'm now dead because of you. This should teach you to fuck with peoples (sic) emotions.

10:42 PM I stabbed your cats to death. Pig put up a good fight but Frank went out like a bitch. I hope your happy you worthless pile of shit

10:45 PM I hate you

10:49 PM I hope you die like I'm about to die you whore I LoVeD (sic) you!

TR at p. 1-6.

Wright immediately notified her family and police department of these communications. When her home was investigated, she learned that Swigart had broken into the patio/deck door of her second story condominium by creating a "ladder" with her downstairs neighbor's patio furniture. While inside Wright's home, he obtained one of her knives and brutally killed two of her three pet cats, Frank and Pig. Before leaving, he used their carcasses to spread blood and bloody fur about her home, walls and clothing. TR at p. 1-6.

Swigart was later charged with and convicted of one count of burglary, first degree and two counts of cruelty to animals. After jury selection, he waived his right to trial, entered pleas of guilty to the indictment and received a twelve (12) year prison sentence. He remains incarcerated.

As a result of these actions, Wright underwent counselling, paid for by ORS and tried to continue with her employment. However, continued employment with ORS was counter-productive to her counselling and her employment with ORS was

constructively terminated.

Wright filed her original complaint against Swigart only in the Kenton Circuit Court, Fourth Division on November 23, 2009. TR at p. 1-6. On July 1, 2011, Wright amended her complaint to include ORS, Medical Company, Inc. and Ecolab, Inc. TR 23-32.

During that litigation, she learned from a former ORS manager that prior to her employment with ORS, Swigart's past, violent history was known to management, but that ORS failed to take any actions to warn or protect women in their employ from him despite requests from the former manager to do so. TR at 183-209.

On March 16, 2012, ORS filed its motion for summary judgment arguing that Wright's claims against ORS and the other corporate entities were time barred. TR at 94-138. Wright submitted her timely response and on August 31, 2012, the trial court entered its order sustaining ORS's motion for summary judgment, dismissing all of Wright's claims against all of the corporate Appellees herein. Appendix at F.

Wright then filed a timely motion to Alter, Amend or Vacate the summary judgment order and on October 22, 2012 the trial court entered its order overruling Wright's motion. Appendix at E.

Neither of the trial court's orders contained the finality language found in Cr. 54.02.

On November 9, 2012, Wright filed her Notice of Appeal designating Swigart and all three corporate parties as Appellees. TR at 334-336.

On December 17, 2012, ORS filed a Motion to Dismiss Wright's appeal in the Court of Appeals, arguing that her appeal was premature because it was not taken from a final and appealable order.

Before dismissing the corporate parties, the trial court had originally scheduled the matter for trial on January 15, 2013. TR at 84-85. After the trial court dismissed all corporate parties, counsel for Wright and counsel for Swigart, the only remaining defendant, participated in pretrial discussions with the trial court relative to the trial date and the impact the dismissals had upon it. During the discussions, the trial court indicated that it had been and was its intention to conserve time and effort by permitting an appeal of the corporate dismissals to be finalized before it proceeded to trial against the only remaining Defendant, Swigart. Counsel for the corporate defendants/appellees were not involved in this pretrial conference because at that point, they had been dismissed from the lawsuit.

On December 20, 2012, the trial court entered its *sua sponte, nunc pro tunc* order that included the necessary finality language. Appendix at D. In this Order, the trial court explained, "...the court clearly envisioned that the appeal of the summary judgment and order overruling the Plaintiffs Motion to Alter, Amend or Vacate the summary judgment would proceed to a conclusion before trial on the claims against the individual, Russell A. Swigart."

On December 21, 2012, Appellant filed her designation of record in the trial court. TR at 337-338.

On or about December 22, 2012, Appellant filed her response in the Court of Appeals to ORS's Motion to Dismiss the Appeal, citing and relying upon the December

20, 2012 *nunc pro tunc* order.

On January 11, 2013 the Kenton Circuit Court certified the record on appeal. TR at 339.

On January 22, 2013 Wright filed motions for leave to correct the certified record on appeal and to supplement her prehearing statement. The Kenton Circuit Clerk did not include Wright's deposition as part of the certified record because the court reporter had not filed the original with the clerk. Importantly, because Wright's deposition had not been filed with the trial court, it could not have reviewed it prior to dismissing all of her claims on ORS's Motion for Summary Judgment. Therefore, Wright sought leave to supplement the pre hearing statement with the addition of that single issue. That is the reason citations to her testimony are not to the record.

On or about January 31, 2013, ORS filed its response to Wright's motion for leave to correct the certified record on appeal and to supplement her prehearing statement.

On April 26, 2013, the Court of Appeals granted ORS's Motion to Dismiss the Appeal, holding that Copass v. Monroe County Medical Foundation, Inc. 900 S.W.2d 617 (Ky.App. 1995) required dismissal. The Court then denied Wright's motion for leave to correct the certified record on appeal and to supplement her prehearing statement as moot. Appendix at C.

On March 8, 2013, Wright filed a Motion for Reconsideration in the Court of Appeals, arguing that the court's reliance on Copass was misplaced and, notwithstanding that the December 20, 2012 *nunc pro tunc* order retroactively granted finality, the relation-forward rule nonetheless rendered the Notice of Appeal timely filed

as of the date the trial court overruled Wright's Motion to Alter, Amend or Vacate.

On or about May 17, 2013, ORS filed its Response to Wright's Motion to Reconsider, arguing, *inter alia*, that the *nunc pro tunc* order could not retroactively grant finality to a non-final order. In its response, ORS incorrectly inferred that Wright obtained the *sua sponte, nunc pro tunc* order *ex parte*.

On or about May 28, 2013, Wright filed her Reply to Response to Motion to Reconsider to rebut the inference of *ex parte* contact by explaining that the trial court recognized its error during a legitimate proceeding, with notice to all parties in the case at the trial court level at that time.

On August 16, 2013 the Court of Appeals denied Wright's Motion to Reconsider, modified its previous, April 26, 2013 Order and granted ORS's Motion to Dismiss, reasoning, 1) that the *nunc pro tunc* rule cannot be used to retroactively grant finality to an order that was not originally designated as final, and 2) that the relation-forward rule does not render a prematurely filed Notice of Appeal timely upon the entry of an order granting finality.

On September 16, 2013, Wright filed her Motion for Discretionary Review with this Court arguing, *inter alia*, that in denying Wright's Motion to Reconsider, the Court of Appeals completely and inexplicably ignored controlling precedent established by this Court in Johnson v. Smith, 885 S.W.2d 944 (Ky. 1994).

On or about October 17, 2013 ORS filed its Response to Wright's Motion for Discretionary Review.

On June 11, 2014, this Court granted Wright's request for Discretionary Review.

ARGUMENT

I. THE RELATION FORWARD RULE RENDERED WRIGHT'S NOTICE OF APPEAL TIMELY FILED.

The Court of Appeals' use of Copass v. Monroe County Medical Foundation, Inc. 900 S.W.2d 617 (Ky.App.1995) in this litigation is completely misplaced and confusing. It committed obvious error when it relied upon language in that case after it determined that the language used was merely dicta (i.e. a recitation of the procedural history of the case). Additionally, the Court of Appeals completely ignored this Court's well-settled, precedent when it held that the relation-forward rule did not render Wright's Notice of Appeal timely filed as of the date the trial court overruled her Motion to Alter, Amend or Vacate. As noted by Judge Thompson in his dissent, "Although there may be some procedural differences between this case and Johnson v. Smith, 885 S.W.2d 944 (Ky. 1994), our Supreme Court held that a notice of appeal relates forward to the time when a final judgment is entered."

On that issue, the majority of the Court of Appeals stated "We would agree that this is an area of law which could use some clarification. In addition, a good case could be made for extending the relation-forward rule to the facts of the current case." (See Appendix B, p. 8) That is Wright's exact position in this appeal. However, Judge Thompson said it best in his dissent. "Numerous unpublished opinions of our Court have decided this issue (relation forward) on opposite extremes. The consequences of the majority opinion are that the merits of this appeal will never be decided because the good faith effort by the trial judge to enter a *nunc pro tunc* order to correct a deficiency in the original judgment has now caused the deadline for filing a notice of appeal from that *nunc pro tunc* order to expire. Further, legal negligence actions may be filed

against attorneys who have made good faith efforts to file appeals." (See Appendix B, p. 14)

In its first order dismissing Wright's appeal, the Court of Appeals cited Copass without revealing its rationale for doing so. In his dissenting opinion, Judge Thompson correctly pointed out that there was no basis for relying upon Copass in this case because "the Copass opinion does not state that the prior dismissal (in Copass) was a correct interpretation of the law, and its previous decision was rendered prior to the Supreme Court's Johnson v. Smith, 885 S.W.2d944 (Ky.1994) decision."

Wright further illustrated for the Court, in her Motion for Reconsideration, that the language relied upon by the Court of Appeals was *dicta* and that the true holding in Copass centered on whether the appeal (in that case) should be dismissed on the grounds of improper venue; not lack of a final and appealable order. Indeed, the Copass Court ultimately did just that. Thus, the opinion of the Copass Court did not relate to the issue of the effect of a *nunc pro tunc* order on the finality of a judgment for the timeliness of the filing of a notice of appeal and was therefore improperly relied upon by the Court of Appeals.

Oddly, the Court of Appeals then modified its previous order by agreeing with Wright that its prior reliance on Copass was misplaced. "Upon further consideration, we concede that the language which we cited from Copass is *dicta* and is not controlling authority". But then, the Court of Appeals inexplicably changed course in mid-stream and in spite of Wright's logical and legally correct argument, goes on to incorrectly state that the "...language (in Copass) accurately states the law concerning

the application of the *nunc pro tunc* rule. {See Appendix B, p. 2} It does not.

Other panels of the Court of Appeals have properly applied the relation forward/*nunc pro tunc* rule under similar situations. Audas v. Audas, 2005 WL 564102 (Ky.App.2005), a much more recent case than Copass and decided after this Court's ruling in Johnson v. Smith 885 S.W.2d 994 (Ky. 1994) is just such an instance. Although unpublished, the Court of Appeals allowed an appeal to proceed when a *nunc pro tunc* Order was entered in the trial court which clarified the finality of a prior order from which an appeal was taken. Specifically, in that case, an order was entered on September 23, 2003 relative to the amendment of a Qualified Domestic Relations Order. The Appellant in that case filed a notice of appeal on October 21, 2003. Despite the fact that the September 23, 2003 order was not final, this court directed the parties to show cause why the appeal should not be dismissed as having been taken from a non-final order.

The response to the show cause established that although the record of the trial court did not reflect the finality of the September 23, 2003 order, the impression and/or intention of the court was that the order was final. The trial court thereafter entered a *nunc pro tunc* Order on December 14, 2004 clarifying the September 23, 2003 order as a final and appealable order in order to remove any question as to its' interlocutory nature. Thereafter, the Court of Appeals properly allowed the appeal to proceed on the merits.

Thus, with the application of existing law, the Court of Appeals was obligated to apply the relation forward rule which would have rendered Wright's appeal timely filed. This would have permitted her appeal to be heard on the merits; an oft-stated policy of Kentucky's appellate courts.

II. IN ADDITION TO PREMATURELY TERMINATING WRIGHTS APPEAL, THE COURT OF APPEALS' ERROR IN FAILING TO FOLLOW KENTUCKY SUPREME COURT PRECEDENT ESTABLISHED IN JOHNSON V. SMITH DEPRIVES TRIAL COURTS OF THE AUTHORITY TO REGULATE THEIR OWN TRIAL DOCKETS.

In addition to committing error by relying upon Copass to justify the dismissal of Wright's appeal, the Court of Appeals compounded that problem and committed further error by refusing to extend the relation-forward rule to Wright's situation. In this case, when it entered the order granting ORS's Motion for Summary Judgment, the trial court's expectation that its decision would be appealed to determine its validity prior to a trial on the merits with the only remaining Defendant, Swigart, was clear to all involved, including the Court of Appeals. This was, and remains, the most efficient manner to proceed because otherwise, there is a risk of requiring two separate trials with no other legitimate reason for bifurcation. Although Wright contends that the order from which she filed her Notice of Appeal was final and appealable, the Court of Appeals was not required to dismiss her appeal because even if her Notice of Appeal was premature, the Court should have related it forward to the order denying the Appellant's Motion to Alter, Amend or Vacate.

This Court has held on more than one occasion that premature appeals should relate forward to final appealable orders. Johnson v. Smith, 885 S.W.2d 944 (Ky.1994). That rule has been followed in a variety of situations since. Specifically, in Whittaker v. Wright, 969S.W.2d 209 (Ky.1998), this Court allowed a Notice of Appeal to relate forward when an appeal was deemed premature to a post judgment motion. Also, this Court did not require an Appellant to re-file a new Notice of Appeal from a re-entered final judgment in James v. James, 313 S.W.3d 17 (Ky. 2010). Importantly, in James, this Court held that dismissal of the appeal was contrary to precedent and

the Civil Rules allowing notices of appeal to relate forward.

To further solidify Wright's argument, various panels of the Kentucky Court of Appeals have also allowed relation-forward from a non-final order. Clark v. Commonwealth, Cabinet for Health and Family Services, 170 S.W.3d 426 (Ky.App. 2005). Finally, in N.L. v. W.F., 368 S.W.3d 136 (Ky.App.2012), the Court of Appeals concluded that even though the order appealed from was interlocutory, that did not mean the appeal should be dismissed. Indeed, that Court recently relied upon N.L. when it held that a prematurely filed Notice of Appeal should relate forward and not require dismissal. Oakley v. Oakley 391 S.W.3d 377 (Ky.App. 2012).

The decision of the Court of Appeals not only harms Wright immediately and future litigants, but it also usurps the inherent authority of a trial court to regulate its own docket, and the appellate courts of Kentucky to protect the rights of litigants. In Ready v. Jamison, 705 S.W.2d 479 (Ky.1986), this Court declared that there is a compelling interest in maintaining an orderly appellate process, but that the penalty for breach of a rule should have a reasonable relationship to the harm caused. Thus, a sanction imposed should bear some reasonable relationship to the seriousness of the defect. The court further indicated that the policy behind its decision is to reconcile and to further three (3) significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal. Id. at 482. All three (3) of these significant, legitimate objectives will be achieved by allowing Wright's appeal to proceed; with no prejudice whatsoever to these corporate Appellees.

It was clearly the intention of the trial court, and the understanding of all parties involved, that an appeal would be taken from the entry of the summary judgment

dismissing the claims against the corporate Appellees prior to proceeding to trial against Swigart, the remaining individual defendant. This, coupled with the fact that permitting the dismissal of Wright's appeal to survive will cause her to suffer an extreme hardship while denying her constitutional right to an appeal, underscores the urgency of this situation.

The *nunc pro tunc* Judgment and Order, properly entered by the trial court, *sua sponte*, stated that, "the court clearly envisioned that the appeal of the summary judgment and order overruling the Plaintiffs' Motion to Alter, Amend or Vacate the summary judgment would proceed to a conclusion before trial on the claims against the individual, Russell A. Swigart." Obviously, the trial court made its intentions known when it entered the *nunc pro-tunc sua sponte* judgment and order that ORS's Motion for Summary Judgment, was a final and appealable order, but that it failed to include the required finality language. Importantly, these facts are completely in line with the majority in the underlying Court of Appeals opinion. "The purpose of the (*nunc pro tunc*) rule is to record some act of the court done at a former time which was not carried into the record. The power of the court to make such entries is restricted to placing into the record evidence of judicial action which was actually taken. Appendix at B, p. 4. The trial court actually entered the Summary Judgment secure in the belief and intent that it would be appealed and tested on the merits in the Court of Appeals and/or this Court. The trial court's intentions should not be ignored as Appellees urge this Court to do.

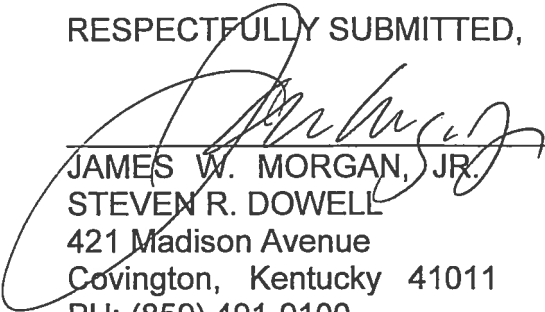
Finally, if this opinion of the Court of Appeals is left intact, it completely eviscerates a trial court's inherent authority to, on its own motion, correct its record. The Court of Appeals' opinion in this case is slated to be published and will have a

systemic and detrimental impact on future litigants, as well as trial courts, because adherence to it removes a trial court's legitimate, inherent authority to foster and encourage judicial economy by permitting final decisions affecting one or more parties in multi-party litigation, to reach finality before holding a trial on the merits where all claims can be properly tested.

CONCLUSION

For all of the forgoing reasons, Wright respectfully requests this Court to REVERSE the decision of the Court of Appeals permitting her to proceed with her appeal on the propriety of the trial court's summary judgment dismissing the claims of all corporate parties. Additionally, Wright respectfully requests this court to grant her requests to supplement the record and the prehearing statements.

RESPECTFULLY SUBMITTED,



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APPENDIX

August 16, 2013 Court of Appeals Order Denying Motion To Reconsider; Modifying Previous Order; and Disposing of Motions.	A
August 16, 2013 Court of Appeals Opinion and Order Dismissing	B
April 26, 2013 Court of Appeals Order	C
December 20, 2012 trial court Nunc Pro-Tunc Judgment and Order	D
October 23, 2012 trial court Order denying Motion to Alter, Amend or Vacate	E
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