

Circuit Court for Anne Arundel County
Case No. C-02-CV-21-000558

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1380

September Term, 2021

FELICIA DANTZLER

v.

CROYDON PET HOSPITAL, LLC, ET AL.

Wells, C.J.,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: October 25, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of the death of the appellant Felicia Dantzler’s cat within 24 hours of being seen by appellees, Croydon Pet Hospital, LLC and Dr. Oluwaseyi Sobowale, a veterinarian (hereafter, “Croydon”). Dantzler filed a complaint in the District Court of Maryland located in Anne Arundel County and requested a jury trial. Because of the jury trial request, the District Court transferred the case to the Circuit Court for Anne Arundel County.

Croydon filed a motion to dismiss or, in the alternative, to transfer the case back to the District Court, alleging it was legally impossible for Dantzler’s complaint to meet the \$15,000.00 threshold required for a jury trial based on the statutory cap of \$10,000.00 for damages arising from the tortious injuring or killing of a pet. CTS. & JUD. PROC. (“CJP”) § 11-110. The circuit court denied the motion to dismiss but granted Croydon’s motion to transfer and sent the case back to the District Court.

Dantzler filed this timely appeal. She submits two questions for our review, which we have consolidated and rephrased for clarity into one question¹: Did the circuit court err in remanding Dantzler’s complaint to the District Court on the ground that CJP § 11-110 limits the total available damages from all of Dantzler’s claims to \$10,000.00?

We answer “yes”, vacate the circuit court’s transfer order, and remand for further proceedings consistent with this opinion.

¹ Dantzler’s verbatim questions presented are:

- I. Did the circuit court err in remanding Appellant’s complaint to the District Court, essentially, depriving Appellant of a jury trial?
- II. Can a new cause of action arise when a Defendant engages in conduct, subsequent to an act that may be covered under CJP § 11-110?

FACTUAL AND PROCEDURAL BACKGROUND

The essential facts and procedural history of this case are not complicated or in dispute. After 18-year-old Sunny, a domestic long-haired cat, had been away from Dantzler's home "off and on" for about a year, he returned home with his fur "extremely matted." Dantzler took him for what in her brief and her complaint she describes as "a standard grooming appointment" at Croydon. The staff-person at Croydon recommended a "hygiene cut" because of the cat's extensively matted fur. Even though Sunny was at Croydon for grooming, at some point during the visit Dr. Sobowale, who had treated Sunny before, performed a physical examination. According to Dantzler's complaint, the doctor found that Sunny weighed 6.5 pounds and was "emaciated." Dr. Sobowale recommended blood work be performed as well as a course of treatment.

Sunny became aggressive when the staff at Croydon tried to perform the grooming procedure and Dr. Sobowale suggested that Sunny be sedated. Dantzler agreed. After the grooming was performed, Dantzler retrieved Sunny and took him home. According to Dantzler's complaint, upon arriving home, Sunny was listless and "was not acting like himself." Dantzler called Dr. Sobowale, who explained that Sunny was likely recovering from the effects of the anesthetic. According to Dantzler, Dr. Sobowale assured Dantzler that it was okay for her to go to work, which she did.

When she returned home, Dantzler discovered that Sunny had passed away. Distraught, Dantzler and her brother took Sunny's remains to Croydon to ask Dr. Sobowale what might have caused Sunny's death. Receiving what she considered unsatisfying

answers from Dr. Sobowale, Dantzler left Croydon but agreed with Dr. Sobowale that Sunny’s remains be cremated.²

Upon returning home and conducting a search on the internet, Dantzler learned that she could request a necropsy into the cause of Sunny’s death and immediately called Croydon to request one. Croydon declined and, per their prior conversation, reiterated that Sunny’s remains would be cremated. After contacting an out-of-state veterinary laboratory about conducting a necropsy, Dantzler spoke to Dr. Sobowale who agreed to release Sunny’s remains so that the necropsy could be performed. The results of the necropsy indicated that Sunny suffered from a variety of ailments.

Dantzler subsequently sued Croydon and Dr. Sobowale. Her second amended complaint, the operative one here, listed six counts. Count One claimed compensatory damages under CJP § 11-110. Count Two requested similar damages under a bailment theory. Count Three made a claim of “negligent and intentional misrepresentation” against Dr. Sobowale and Croydon. These first three counts demanded damages of \$10,000.00 each.

Count Four alleged that both defendants had committed negligent acts associated with Dantzler’s request for a necropsy for which she demanded \$75,000.00. Count Five made a similar allegation and request for damages but under a theory of gross negligence. Count Six alleged that Croydon negligently hired and supervised Dr. Sobowale as well

² We fully understand that Dantzler later contended that she was essentially tricked into agreeing to the cremation. Her position will be fully discussed later in this opinion.

Croydon’s office manager, who was unnamed. No specific monetary damages were claimed in Count Six.

Croydon moved to dismiss the complaint or, alternately, to transfer the case to the District Court. Essentially, Croydon argued that each of Dantzler’s counts related to Sunny’s death. Consequently, all of the claims would collapse into CJP § 11-110 and, at most, according to Croydon, Dantzler’s claimed damages could amount to no more than \$5,000.00. According to Croydon, because the maximum recovery was below the jurisdictional limit for the circuit court, the case belonged in the District Court. Dantzler disagreed with Croydon’s assessment. She argued that while some of her claims alleged Croydon’s tortious conduct directly related to Sunny’s death, other counts alleged injury due to conduct that occurred *after* Sunny’s death, were not subject to the statutory cap, and were sufficient to have her case tried by a jury.

After a hearing on Croydon’s motion, the circuit court declined to dismiss the complaint, but remanded the case to the District Court. The circuit court’s decision seemingly rested on its reading of *Anne Arundel County v. Reeves*, 474 Md. 46 (2021), and the court’s finding that all of Dantzler’s claims stemmed from Sunny’s death and would have been worth no more than \$5,000.00. Dantzler then filed this timely appeal.

STANDARD OF REVIEW

The central issue in this appeal is whether the circuit court properly interpreted the statute limiting the right of a plaintiff to recover damages for the tortious injury or death of a pet. In this instance we review the trial court’s decision without deference. “We review *de novo* the trial court’s decision on this question of statutory interpretation”: “how far

[the] cap [of CJP § 11-110] reaches.” *Brooks v. Jenkins*, 220 Md. App. 444, 465–66 (2014). In other words, this Court independently assesses the correctness of the circuit court’s interpretation and, ultimately, application of the statute to the facts presented.

DISCUSSION

A. Parties’ Contentions

Dantzler contends the circuit court erred in remanding the case to the District Court based on its reading and application of CJP § 11-110 and the court’s assessment that the total available damages to Dantzler was \$5,000.00. Although Dantzler concedes the statute does in fact limit claims “relating to the injury and subsequent death of Sunny” to \$10,000.00, she counters that her complaint also contained claims premised on separate actions Croydon took after Sunny’s death, which are not limited by the statute. Consequently, Dantzler argues her complaint satisfied the amount in controversy for the circuit court to retain jurisdiction and conduct a jury trial.

Croydon counters that the circuit court properly remanded the case to the District Court in light of the Court of Appeals’ holding in *Reeves*, where the Court held that the compensatory damages delineated in CJP § 11-110 are exhaustive, such that the statute “does not allow recovery for noneconomic damages stemming from the tortious injury or death of a pet.” 474 Md. at 59–60. Specifically, Croydon asserts Dantzler’s claims all stem from the alleged tortious death of Sunny, and therefore cap Dantzler’s potential recovery for Sunny’s death at \$10,000.00.

Analysis

Finality

Preliminarily, we address the issue of finality, which neither party has raised but which merits discussing. Generally, only final judgments are appealable. A final judgment exists only when (1) the court intends for the judgment to constitute an unqualified final disposition of the matter; (2) the court adjudicates all of the claims of the parties; and (3) the clerk properly records the judgment in accordance with Maryland Rule 2-601. *Royal Fin. Servs., Inc. v. Eason*, 183 Md. App. 496, 499 (2008). In this case, arguably, the circuit court has not finally disposed of the merits of the case but has only issued a jurisdictional ruling. On the other hand, the court’s ruling effectively barred Dantzler from a jury trial and otherwise removed her from the circuit court.

We conclude that the court’s action was a final judgment. For guidance we look to the holding in *Carroll v. Hous. Opportunities Comm’n*, 306 Md. 515 (1986). In *Carroll*, the appellee sued the appellant in the District Court. *Carroll*, 306 Md. at 518. The appellant demanded a jury trial, and the case was moved to circuit court. *Id.* The circuit court determined it did not have subject matter jurisdiction and remanded to the District Court, and appellant appealed that remand. *Id.* at 519. The Court of Appeals held that decision was a final, appealable judgment:

In the briefs and at oral argument, the parties raised a question as to whether the circuit court's order denying [appellant] a jury trial and remanding the case to the District Court is appealable. The appellant argued that the order is appealable, not as a final judgment in the traditional sense, but under the collateral order doctrine. In our view, no issue concerning the

collateral order doctrine is presented, because the circuit court's order is a final judgment terminating the litigation.

This case differs from those where a court denies a party's demand for a jury trial but where the same court will hear the initial trial on the merits without a jury. Under those circumstances, the order denying a jury trial would not be a final judgment in the traditional sense. Such an order could be appealed before a decision on the merits only if it satisfied the collateral order doctrine.

In the present case, however, the circuit court's orders denied [appellant] all relief in the circuit court; they completely terminated the action in circuit court, remanding the case to the District Court for trial. Nothing was left to be done in the circuit court. Accordingly, the order was a final appealable judgment.

Id. at 520 (emphasis added) (internal citations omitted); *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 299–300 (2015). In this respect, Dantzler's case is virtually identical to Carroll's. We conclude that the circuit court's order here transferring the case to the District Court is a final appealable order.

Amount in Controversy Requirements for Circuit Court Jurisdiction and Jury Trial

Next, we note that the District Court of Maryland has exclusive original civil jurisdiction in actions where the damages do not exceed \$30,000.00. CJP § 4-401(1). For civil actions where the damages are greater than \$5,000.00 but are less than \$30,000.00, a plaintiff may file suit in either the District Court or the circuit court. *Id.* § 4-402(d)(1)(i). A party may only demand a jury trial where the amount in controversy exceeds \$15,000.00. *Id.* § 4-402(e)(1).

CJP § 11-110 limits damages resulting from the injury or death of a pet

Courts & Judicial Proceedings § 11-110, “Damages for injuries or death caused to pets,” provides:

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) “Compensatory damages” means:

- (i) In the case of the death of a pet, the fair market value of the pet before death and the reasonable and necessary cost of veterinary care; and
- (ii) In the case of an injury to a pet, the reasonable and necessary cost of veterinary care.

(3)

- (i) “Pet” means a domesticated animal.
- (ii) “Pet” does not include livestock.

Compensatory damages

(b)(1) A person who tortiously causes an injury to or death of a pet while acting individually or through an animal under the person's ownership, direction, or control is liable to the owner of the pet for compensatory damages.

(2) The damages awarded under paragraph (1) of this subsection may not exceed \$10,000.

This Court and the Court of Appeals have reported two opinions that address the scope of the limitation CJP § 11-110 places on recoverable damages relating to the tortious injury or death of a pet: *Brooks* and *Reeves*, both previously cited. Before discussing these cases, we note that the parties do not actually seem to disagree in their interpretation of the statute. In her brief to this Court, Dantzler argues that Croydon’s “assertion was correct that the claims relating to the injury and subsequent death of Sunny were limited in accordance with CJP § 11-110, and [Dantzler] conceded that fact in her response to their Motion to Dismiss.” The parties disagree about the application of the statute to the facts at hand. Dantzler argues that her complaint contained claims relating to harm(s) separate from the

death of Sunny, so some of her alleged damages would be outside the scope of CJP § 11-110. We now discuss the two relevant cases.

In *Brooks*, a law enforcement officer arrived at the Jenkins family home to execute an arrest warrant for their son. 220 Md. App. at 448. Soon after arriving, the officer shot the Jenkins' family dog, Brandi, thinking it was going to attack him. *Id.* at 450. Before the Jenkinses left to take the dog to the vet, they told the officers not to enter the home. *Id.* at 451. Despite this warning, the officers entered after they had left. *Id.* The Jenkinses sued the deputies raising several counts, addressing both the shooting of Brandi and the deputies' illegal entry into their home. *Id.* at 451–52. Regarding the shooting of Brandi, the Jenkinses brought a claim of trespass to chattel and a claimed violation of Article 24 of the Maryland Declaration of Rights (due process). *Id.* at 452. The jury found for the Jenkinses on both claims and awarded Mr. and Mrs. Jenkins \$10,000.00 in economic damages and \$100,000.00 in non-economic damages each. *Id.* at 453–54. Of the deputies' numerous post-trial motions, the court denied all relief except it reduced the economic damages for shooting Brandi from \$20,000.00 to \$7,500.00 under the cap then in effect in CJP § 11-110. *Id.* at 455. The deputies appealed, arguing, in part, that the circuit court should have capped all damages related to the shooting of Brandi to \$7,500.00—not only the economic damages. *Id.* at 464. This Court affirmed the circuit court's application of the statutory damages to the trespass to chattel claims only—not the non-economic damages assigned to the constitutional violations—explaining:

[W]e see no suggestion . . . that the legislature intended to limit recovery for constitutional torts, or any others for that matter, more broadly than the pets-as-property damage limitation we see on the face of the language.

Id. at 470.

Seven years later in *Reeves*, Reeves sued Anne Arundel County after a law enforcement officer shot and killed his dog. 474 Md. at 55. The jury found that the officer was grossly negligent in shooting the dog, and awarded Reeves \$500,000.00 in economic damages and \$750,000.00 in noneconomic damages. *Id.* at 58. Additionally, the jury awarded Reeves \$10,000.00 in economic damages after finding that the officer committed a trespass to chattel by shooting the dog. *Id.*

Although the jury also found Reeves’ constitutional rights had been violated, it did not award Reeves any damages on these counts. *Id.* at 57. The circuit court reduced the award for trespass to chattel from \$10,000 to \$7,500 pursuant to CJP § 11-110 (under the cap then in effect). *Id.* at 58. On appeal, this Court affirmed the reduction of damages for trespass to chattel under CJ § 11-110, but also held that CJP § 11-110 did not limit Reeves’ total available damages to the capped amount in the statute. *Id.* at 58-59. Reeves could recover for noneconomic damages as well, at least where the tortfeasor was grossly negligent. *Id.*

The Court of Appeals reversed and allowed Reeves to recover only \$7,500.00:

[W]e hold that CJP § 11-110 limits the recovery for compensatory damages to the amount specified by that statute and does not allow for recovery of noneconomic compensatory damages stemming from the tortious injury or death of a pet.

...

[U]nder the single recovery rule, we . . . hold that Mr. Reeves may not recover any damages under the gross negligence claim.

Id. at 52–53, 76. The Court reasoned:

Although ‘tortiously’ is not defined in [CJP § 11-110], negligence, gross negligence, and trespass to chattels are torts. As such, the statute applies to cases of gross negligence and trespass to chattel where the injury is to a pet.

...

Here, Mr. Reeves’ gross negligence and trespass to chattel claims are premised on the same set of operative facts. They are thus alternative legal theories for the same recovery. Therefore, Mr. Reeves is entitled to one recovery as compensation.

474 Md. at 62-63, 68.

Critically, the Court distinguished the case before it from *Brooks*:

In this way, this case is distinguishable from the decision in *Brooks v. Jenkins*, on which Mr. Reeves relies. In *Brooks*, the Court of Special Appeals explained the scope of its holding as follows:

“We hold only that [CJP § 11-110] does not limit the Jenkinse’s total recovery for the constitutional tort to the capped value of their pet’s vet bills.” 220 Md. App. at 471, 104 A.3d 899.

Here, CJP § 11-110 did not work to cap Mr. Reeves’ constitutional claim damages to the value of veterinary bills or Vern’s fair market value. Rather, the jury awarded no damages at all for those claims. *See Reeves*, 2019 WL 5606605, at *13 (Friedman, J., dissenting) (“The jury assigned no value to the denial of Mr. Reeves’ constitutional rights. The jury did, however, assign a value to the destruction of Mr. Reeves’ dog. Therefore, the injury to the dog is the only injury upon which Mr. Reeves can recover.”).

As a result, the analysis of *Brooks* is inapposite, and the only injury for which Mr. Reeves can recover is the death of his dog, which is limited to the capped amount in CJP § 11-110.

Reeves, 474 Md. at 68–69 (cleaned up). In short, the Jenkinse’s claimed two distinct harms: the first was a harm to their property—the shooting of Brandi—in the form of a common law trespass to chattels claim, and the second was a harm to their state constitutional due process rights—the shooting of Brandi by state agents—in the form of claimed violation of Article 24 of the Maryland Declaration of Rights. As Judge Nazarian explained in

Brooks, “nothing about CJ[P] § 11-110 vitiated [the Jenkins’] existing right to recover, on appropriate proof, whatever non-pet damages they could prove, including their non-economic damages, for the Deputy’s grossly negligent violation of their constitutional right.” 220 Md. App. at 470.

By contrast, in *Reeves*, although Reeves raised constitutional claims, the jury did not award any damages for those violations. The parties disagreed whether damages must be cabined under CJP § 11-110 where two common law claims—trespass to chattel and gross negligence—were both founded on the harm to Reeve’s property (his dog). Because both claims were for the tortious shooting of Reeves’ dog, and would have remedied the same harm, the Court of Appeals held the total available damages between the two were subject to the statutory cap. The holdings of *Brooks* and *Reeves* are not inconsistent.

After applying the holdings in *Brooks* and *Reeves* to the facts of this case, we conclude that all tort claims where the alleged harm resulted in Sunny’s death—in legal terms, an injury to Dantzler’s property—are subject to CJP § 11-110’s cap on damages. Clearly, no constitutional claims are present in this case as no state agents were involved. The more precise question is whether all of Dantzler’s claims are founded on the same harm suffered—the destruction of her property by the death of Sunny, alleged at Croydon’s hands, or does Dantzler allege that Croyden committed harms against her, distinct from causing or directly arising from Sunny’s death.

Whether Dantzler’s complaint alleged any harms distinct from the death of Sunny

Here, the circuit court appeared to dispose of Dantzler’s claims without considering whether all of the counts were unrelated to Sunny’s death because the court did not

announce its rationale for finding that the circuit court did not have jurisdiction. Based on the hearing transcript, we cannot fully determine the court’s reasoning for limiting the damages to \$5,000.00 and sending the case for a trial in the District Court, which has exclusive jurisdiction for controversies amounting to less than \$5,000.00. *See* CJP § 4-402. On remand, to fully assess Dantzler’s complaint and its potential viability under *Brooks* and *Reeves*, the circuit court should address questions such as these: 1) Did all of Dantzler’s claims arise from the same operative facts—i.e., those relating to Croydon’s alleged tortious killing of Sunny? 2) If not, then which claims are not subject to CJP §11-110’s cap? 3) Does the aggregate amount in controversy of all of the viable claims allow them to be tried by a jury? 4) Even if the only viable claims relate to Sunny’s death are capped under CJP § 11-110, would Dantzler prefer her case tried in the circuit court or the District Court? We explain more fully.

Dantzler’s second amended complaint—the operative complaint in this case—raised six counts. Under a heading “CLAIMS AS TO THE INJURY AND SUBSEQUENT DEATH OF SUNNY” are “COUNT ONE – PROPERTY DAMAGE - § 11-110” and “COUNT TWO – BAILMENT.” The facts alleged under both counts relate to Croydon’s allegedly negligent treatment of Sunny which Dantzler alleges led to his death.

Under a second heading—“CLAIMS OF FELICIA DANTZLER” are counts three through six. Under “negligent and intentional misrepresentation,” Dantzler quotes Croydon’s website as saying it provides “quality veterinary care and exceptional customer service” and “high level safety to animals,” and asserts the website concealed the fact that

Croydon employed incompetent employees such as Dr. Sobowale. Dantzler asserts she “relied to her detriment” on these misrepresentations. But the complaint does not specify what harm Dantzler suffered. The immediate implication seems to be that Dantzler allegedly relied on the veterinarian staff’s statements and then agreed to have Sunny treated at Croydon. If this is the case, this allegation would not provide different operative facts and the limitation on damages in CJP § 11-110 would still apply.

But in two of the counts, Counts Four and Five, Dantzler includes among this list of alleged misrepresentations that Croydon “fail[ed] to inform [Dantzler] that she could obtain a necropsy.” Although Croydon’s alleged deficiency would not have occurred had Sunny not died, we conclude this allegation suggests a harm distinct from Sunny’s death because it supposedly occurred after his death. Thus, if the circuit court found it to be distinct and an adequately pled, cognizable claim—which we do not decide—it would allege an injury not cabined by CJP § 11-110.

Count Four, which alleges negligence, recounts, in part, the following facts as its basis for Croydon’s breach of duty and Dantzler’s injury:

After Sunny’s death, [Croydon] attempted to coerce [Dantzler] into cremating Sunny to conceal his negligence. In addition, when [Dantzler] attempted to have a necropsy performed, [Croydon] refused, and upon information and belief, scheduled Sunny’s remains to be picked up for cremation.

...

As a result of [Croydon’s] actions after Sunny’s death, [Dantzler] suffered emotional and mental anguish.

Again, if the circuit court were to find this claim was grounded in operative facts distinct from the death of Sunny, and if the court finds that the count is an adequately pled,

cognizable claim, it would not be subject to the limitations of CJP § 11-110. The facts alleged for Count Five of gross negligence are similar in that Dantzler alleges that Croydon deceived her about the possibility of performing a necropsy and alleges that Dr. Sobowale essentially tried to “cover his tracks,” in “coercing” Dantzler into agreeing to cremate Sunny. Again, we make no determination about the merits of this or any of Dantzler’s other claims. Such an assessment would have to be made after a hearing on a motion for summary judgment or as the ultimate decision of the trier of fact.³

Finally, in *Reeves*, because both the trespass to chattel and gross negligence claims were founded on the same exact facts and injury to property—the Reeves’ dog—the Reeves’ recovery was limited to only those damages permitted for the tortious killing of a pet under CJP § 11-110. As we noted at oral argument, from the transcript of the hearing on the motion to dismiss, it appears as if the circuit court, essentially, granted Croydon summary judgment. Based on our reading of the hearing transcript, the court pre-

³ Regarding Count Six for negligent hiring and supervision, Dantzler alleged Dr. Sobowale and the office manager were unfit and/or incompetent, and that Croydon acted unreasonably in hiring and retaining them. The complaint does not specify whether the resulting harm was Sunny’s death after receiving care from these Croydon employees, or Dantzler’s emotional distress after a lack of communication from these employees regarding the availability of necropsy after Sunny’s death. Dantzler alleges only that she “has suffered harm as a result.” Having already determined Dantzler’s complaint may have raised a claim not cabined by the damage limitation of CJP § 11-110 based on the facts stated in the counts for negligent/intentional misrepresentation, negligence, and gross negligence, we need not decide whether the same potential exists under this count. Instead, we leave it up to the circuit court to make this determination or, perhaps, to begin by first assessing whether this count would amount to an adequately pled claim, and then, if it would, to determine whether it refers to a harm distinct from Sunny’s death.

determined the value of Dantzler’s claim, rather than assess whether her pleadings alleged facts and damages sufficient to permit her to have a jury decide her case.

Equally important, if the circuit court had determined that the only viable claims were those that Dantzler alleged under CJP § 11-110, then Dantzler could still have her case tried in the circuit court with the judge as the trier of fact. CJP § 4-402(d)(1)(i) does not mandate transfer to the District Court under such circumstances. That statute allows a plaintiff like Dantzler to elect whether she would prefer to have her case heard “in the District Court or in a trial court of general jurisdiction, if the amount in controversy exceeds \$5,000, exclusive of prejudgment or post-judgment interest, costs, and attorney’s fees if attorney's fees are recoverable by law or contract.” Although Dantzler’s claim and this appeal focused on her right to a jury trial, she may elect to have her case heard in the circuit court as it has concurrent jurisdiction with the District Court in controversies between \$5,000.00 and \$10,000.00.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEE TO PAY THE COSTS.