

IN THE SUPREME COURT OF OHIO

NINA M. ZAPPITELLI, et al., : Case No. 2006-0540  
: :  
Appellee, : On Appeal from the  
: : Cuyahoga County Court  
vs. : of Appeals, Eighth Appellate  
: : District  
KAREN J. MILLER, et al., : :  
: : Court of Appeals  
Appellant. : Case No. CA-05-085895

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APPELLEES' MOTION TO STRIKE APPELLANTS' BRIEF IN OPPOSITION TO  
APPELLEES' MOTION TO STRIKE APPELLANT'S MERIT BRIEF AND DISMISS  
APPEAL

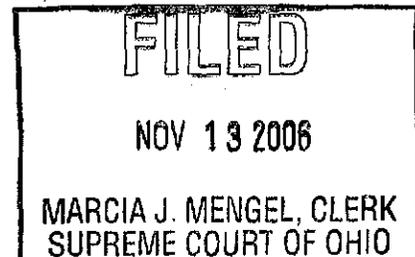
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DAN A. MORELL, JR. (0033676)  
JASON M. PANEK (0077847)  
DAN MORELL & ASSOCIATES CO., L.P.A.  
250 Spectrum Office Building  
6060 Rockside Woods Boulevard  
Independence, Ohio 44131  
(216) 573-6666 / fax (216) 573-6999

*Attorneys for Appellees*  
*Nina M. Zappitelli, Tony J. Zappitelli,*  
*and Maria Capretta*

EDWARD J. HEBEN JR. (0029052)  
STEVEN L. PAULSON (0030044)  
The Life Building, Suite 200  
3740 Euclid Avenue  
Cleveland, Ohio 44115  
(216) 431-5297 / fax (216) 391-3278

*Attorneys for Appellants*  
*Karen J. Miller and Lawrence W. Miller*

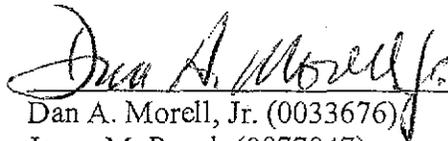


**MOTION TO STRIKE APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES'  
MOTION TO STRIKE APPELLANT'S MERIT BRIEF AND DISMISS APPEAL**

Now come Plaintiffs/Appellees, Nina Zappitelli, et al. (hereinafter "Appellees"), by and through undersigned counsel, and move this Honorable Court to strike Appellants' Brief in Opposition to the Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal for the reason that it contains impertinent material and arguments irrelevant to the present appeal and again violates the Order of this Court accepting jurisdiction as well as Ohio S. Ct. Prac. R. III, Sec. 6(C)(2).

A Memorandum in support of this Motion is attached hereto and incorporated herein.

Respectfully submitted,



Dan A. Morell, Jr. (0033676)

Jason M. Panek (0077847)

DAN MORELL & ASSOCIATES, CO. L.P.A.

250 Spectrum Office Building

6060 Rockside Woods Boulevard

Independence, Ohio 44131

Ph: (216)573-6666 Fax: (216)573-6999

*Attorneys for Appellees, Nina M. Zappitelli,  
Tony J. Zappitelli and Maria Capretta*

## MEMORANDUM

On September 19, 2006, Appellants filed their Merit Brief in the instant matter. The Merit Brief, however, contained erroneous statements of fact as well as legal arguments relating to propositions of law clearly not accepted for review by this Court and in violation of Ohio S. Ct. Rule IV, Section 3 (B). On October 6, 2006, Appellees' responded to Appellants' deliberate attempt to circumvent the Rules of this Court by forwarding a Motion To Strike Appellants' Merit Brief And Dismiss Appeal to this Court and to Appellants' Counsel. On October 19, 2006, Appellees then filed their Merit Brief addressing only Proposition of Law No. 1 which was accepted for review by this Court.

This Court's docket reflects that on October 13, 2006, Appellees' Motion to Strike, as well as Appellants' Brief in Opposition to Appellees' Motion to Strike, were filed. Appellants Brief in Opposition to Appellees' Motion to Strike, again, in deliberate violation of the rules of this Court, presents erroneous misstatements of fact and legal arguments relating to propositions of law not accepted for review by this Court.

The present Motion, Appellees' second Motion to Strike, is in response to the Appellants continued and deliberate violation of this Court's orders and rules promulgated in its Brief in Opposition To Appellees first Motion to Strike. The only appropriate and proportionate response to the Appellants' arrogant disregard for this Court's jurisdictional ruling is to strike Appellants' Brief in Opposition and Appellants' Merit Brief in their entirety and dismiss the present appeal. It is clear that Appellants' Brief in Opposition is a thinly veiled attempt to supplement and reargue Appellants' Memorandum in Support of Jurisdiction as to propositions of law Nos. 2, 3, and 4, previously rejected by this Court. From the first paragraph of Appellants' Brief In Opposition to Appellees' Motion To Strike and for the largest part of same, Appellants argue that the Court of Appeals decision, and this Court's ruling on jurisdiction, were in error. Very little

of Appellants' Brief in Opposition actually address the arguments presented by Appellees' Motion to Strike. Instead, three pages of the five page Brief address only the Appellants' contention that this Court should revisit its denial of jurisdiction on unaccepted propositions of law.

Further evidence of Appellants' deliberate attempt to utilize Appellants' Brief in Opposition To Appellees' Motion To Strike as a renewed Memorandum in Support of Jurisdiction as to propositions of law Nos. 2, 3 and 4, not accepted by this Court came to light during the November 6, 2006, deposition of Appellant Lawrence Miller in a companion lawsuit Appellants' filed against their former attorney and Realtor. See Lawrence W. Miller, et al. vs. Coldwell Banker Hunter Realty, et al., Cuyahoga County Court Of Common Pleas, Case No. 06 CV 589925, (2006). The following exchange between Coldwell Banker's attorney and Appellant Lawrence Miller provides a window into the Appellants' motivation and rationale in deliberately over-briefing this Court in Appellant's Merit Brief, outside of the issues accepted by this Court, and again in its Brief in Opposition to Appellees' Motion to Strike:

- Q. Has it been made known to you by anyone, any attorney, that on October 13th, 2006, and I'm reading from the Supreme Court docket, that your opponents, the Zappitellis and Mrs. Capretta, filed a motion to strike your appellate brief?
- A. Was it brought to my attention? I probably received documents that said that. I stopped reading all this stuff.
- Q. Has it been made known to you through any source that Mr. Heben briefed all issues in the case in the entire trial instead of just proposition of law number 1, which was the attorney's fees, thus violating the Supreme Court's acceptance of the case on review?
- A. My understanding, from the best that I can recall in any communication regarding this, had to do with Ed Heben saying that the Court did not deny that he could present it, specifically, and therefore he was going to try to present it because he believed that the case against me was flawed and a travesty of justice, I think he said.

Q. So he deliberately went ahead and ignored the Supreme Court, which was only to brief attorney fees, then briefed the entire case and put that into court?

A. I understand what he did, he felt it would have been of some value and they'd accept it and overturn it.

Deposition of Lawrence W. Miller by Brenden Delay, Esq., transcript pp. 27-28, (November 6, 2006), attached hereto as Exhibit "1."

Based on Appellant Miller's sworn testimony, there can be no doubt that in briefing the propositions of law not accepted on appeal, rather than the only issue accepted for review by this Court, Appellants' have intentionally violated the Supreme Court Rules. This violation is predicated on Appellants' arrogant presumption that they can deliberately circumvent the orders and rules of this Court to fit their purpose.

Finally, on November 9, 2006, Appellants filed their Reply Brief and have once again argued propositions of law not accepted by this Court for review. While Appellants' Brief in Opposition to Appellee's Motion to Strike argued that these extraneous additional propositions of law did not prejudice the Appellees, Appellants Reply suggests that the Appellees disciplined lack of response to these unaccepted propositions should be taken as evidence the Court should rule in Appellants' favor on these unaccepted propositions of law.

Appellees have filed the instant Motion to move this Court to strike Appellants' Brief In Opposition To Appellees' Motion To Strike Appellants' Merit Brief And Dismiss Appeal.

S. Ct. Prac. R. IV, Section 3 (B) provides that a party's merit brief may not contain fact or argument relating to issues not accepted for review by the Court:

In their merit briefs, the parties shall brief only the issues identified in the order of the Supreme Court as issues to be considered on appeal, and those issues shall be clearly identified in the table of contents, in accordance with S. Ct. Prac. R. VI, Section 2(B)(1).

Although this Court has already denied review of Appellants' Propositions of Law Nos. 2, 3 and 4, Appellants continue to improperly attempt to put facts and legal arguments before this Court

in support of the aforementioned Propositions of Law. Appellants' first attempt was made by way of their Merit Brief and now again in their Brief in Opposition to Appellees' Motion to Strike.

The opening line of Appellants' Brief In Opposition To Appellees' Motion To Strike Appellants' Merit Brief And Dismiss Appeal acknowledges that " On August 2, 2006, this Court issued an order which stated that the Court 'accepts the appeal on Proposition of Law No. 1.' " Notwithstanding this acknowledgment, Appellants demonstrate their continued presumptuous arrogance exhibited throughout these proceedings by first advising the Supreme Court what its own journal entry states, or should have stated, and then attempting to present immaterial substantive arguments on issues clearly not accepted to be heard by this Court. In their attempt to justify this effort, they incredulously cite as authority, on no less than three separate occasions, an alleged *ex parte* discussion with an anonymous Supreme Court Staff Attorney, as to what the Supreme Court should or would do if a Merit Brief was submitted that did not comply with the Supreme Court's Rules of Practice. It is hard to believe a Supreme Court Staff Attorney would commit to Appellants what the Supreme Court would do if a Merit Brief was submitted contrary to the Rules of Court to the extent that Appellant was "secure in the knowledge" that this Court would only strike the offending portion of the brief that went beyond the scope of this Court's order. To suggest that an unidentified Staff Attorney committed this Court to a position, or in some way expressed how this Court was likely to treat a motion submitted out of rule strains credulity. This Court certainly has the authority to, at its discretion, strike the full Merit Brief and/or dismiss the Appeal and to also to strike Appellants' Memorandum In Opposition To Appellees Motion To Strike Appellants' Merit Brief and Dismiss Appeal.

Appellants' reliance on an alleged *ex parte* discussion with an unnamed Staff Attorney as authority and justification for presenting arguments on issues not accepted by this Court and, in

essence, as a guarantee that this Court would not dismiss Appellants' Appeal, is indefensible and an abrogation of Appellants' responsibilities and obligations to comply with the Rules of the Supreme Court and is furthermore immaterial to this Court's authority to grant a Motion to Strike. As this Court has stated, "these rules are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto." Drake v. Bucher (1966), 5 Ohio St.2d 37, citing Sullivan v. Holbrook, 211 Mo. 99, 104, 109 S.W. 668.

Had this Court intended review of any other issues it is clear that this Court would have set forth additional accepted Propositions of Law in its Order accepting jurisdiction. For Appellants to argue that this Court, by not explicitly denying review of Appellants' Propositions of Law numbers 2, 3 and 4, has actually accepted for review such Propositions of Law, is a pretentious attempt by Appellants to circumvent the Order of this Court, is redundant in that the issue has already been determined, and should not be tolerated. This Court has repeatedly insisted on strict compliance with its rules and orders. See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2005), 105 Ohio St.3d 1211; *Ohio Heritage Dev. Co. v. Portage Cty. Bd. Of Elections* (2000), 90 Ohio St.3d 1436; *Drake v. Bucher* (1966), 5 Ohio St.2d 37. Therefore, in light of Appellants' impertinent disregard of this Court's Order accepting only Proposition of Law No. 1 for review and redundant arguments in support of jurisdiction, not only should Appellants' Brief in Opposition To Appellees' Motion To Strike be stricken as redundant and immaterial, but Appellants' Merit Brief should be stricken for Appellants' deliberate failure to strictly comply with the Court's Order and the Rules of Procedure. Should this Court deny Appellees' instant Motion to Strike and accept Appellants' disguised Brief in Opposition To Appellees' Motion To Strike, clearly intended as a renewed Supplemental Memorandum in

Support of Jurisdiction as to Propositions of Law Nos. 2, 3, and 4, Appellees will continue to be prejudiced by Appellants' repeated irrelevant, erroneous and misleading statements to this Court.

It is also not appropriate for Appellants to deliberately attempt to circumvent the issues accepted for Appeal by this Court for the stated reason that the seriousness of the error believed to have been perpetrated by the Appellate Court somehow justified briefing "all aspects of the case." Appellants Brief, Page 2. While our system of jurisprudence permits appeals of decisions one does not agree with, the vilified and cavalier attack upon the Court of Appeals with language referring to their findings as "an abomination," clearly seems to have crossed the line.

Appellants' Brief in Opposition, p. 2.

Not only is it improper for Appellants to again attempt to argue immaterial substantive issues not accepted for appeal by this Court because it disagrees with the Court of Appeals, but to do so in a Brief In Opposition To Appellees' Motion To Strike and to again misstate facts at the same time is inexcusable, scandalous, and impudent. For instance, Appellants state in their Brief that "The Court of Appeals allowed a fraud claim to proceed even where the purchasers did not rely upon the representations of the seller, . . . ." Appellants' Brief in Opposition, p. 2. In fact, the jury specifically found that the Appellees did rely upon the fraudulent misrepresentations of the Appellants and justifiably so relied. See Tr. 1103-06, Appellees' Supp., pp. 9-12. Appellants then make the misleading and simply erroneous claim that Appellees "were aware of the claimed defects in the home from the Residential Property Disclosure Form." See Appellants' Brief in Opposition, p. 2. This statement is completely erroneous as the jury at trial specifically found that the Appellants fraudulently concealed and/or misrepresented facts on the disclosure form. See Tr. 1103-06, Appellees' Supp., pp. 9-12. To state that the Appellees' were aware of defects in the home from the Residential Property Disclosure Form when the jury has specifically found Appellants to have committed fraud in the completion and presentment of said Form is a total

fabrication of the underlying facts of this case and a deliberate attempt by the Appellants to once again deceive this Court.

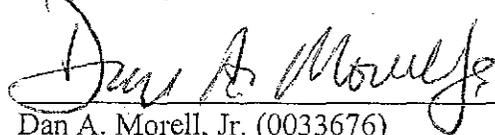
It is due to these repeated fabrications and misrepresentations to this Court, coupled with Appellants disregard for the Supreme Court Rules of Practice, that Appellees move this Court to Strike Appellants' Brief in Opposition To Appellees' Motion To Strike as well as Appellants' Merit Brief in its entirety. Not only have the Appellants ignored this Court's Order granting review only of Proposition of Law No. 1, but Appellants seek to improperly influence this Court by including in their Merit Brief, and now in their Brief in Opposition To Appellees' Motion To Strike, unrelated arguments and repeated misstatements of fact intended to improperly sway the opinion of this Court.

Appellants have argued that this Court could choose to merely strike any additional unnecessary material instead of granting Appellees' Motion to Strike. This is simply not a proportionate response to the many, serious, deliberate and calculated transgressions committed by the Appellants in the present case. This Court granted Appellants the privilege to seek its review of Proposition of Law No. 1, and neither this Court nor Appellees should not have to sort through portions of Appellants' Merit Brief and Brief in Opposition To Appellees' Motion To Strike to separate the relevant, accepted arguments and true statements of fact, from the irrelevant, misstated facts, and arguments on propositions of law that were not accepted. Further, the burden and prejudice placed on Appellees by Appellants' failure to abide by this Court's Order and its rules of Court, is significant as Appellees must also sort out the relevant from the irrelevant and the true from the untrue. Appellants suggestion that no prejudice inures to the Appellees due to Appellants irreverent and supercilious extraneous arguments and irrelevant and misstated facts again shows Appellants' condescension toward Appellees and this Court.

## CONCLUSION

Based upon the authority and arguments set forth herein, Appellees move this Honorable Court to Strike Appellants' Memorandum in Opposition To Appellees' Motion To Strike Appellants' Merit Brief And Dismiss Appeal due to Appellants' unjustified refusal and failure to comply with this Court's Order of August 2, 2006, accepting only Proposition of Law No. 1 for review, as the appropriate resolution to eliminate the prejudice imposed upon Appellees due to Appellants' conduct. This would permit the decision of the Eighth District Court of Appeals to stand as the law of this case.

Respectfully submitted,



Dan A. Morell, Jr. (0033676)

Jason M. Panek (0077847)

DAN MORELL & ASSOCIATES, CO. L.P.A.

250 Spectrum Office Building

6060 Rockside Woods Boulevard

Independence, Ohio 44131

Ph: (216)573-6666 Fax: (216)573-6999

*Attorneys for Appellees, Nina M. Zappitelli,  
Tony J. Zappitelli and Maria Capretta*

CERTIFICATE OF SERVICE

I certify that on the 10, day of November, 2006 a copy of the foregoing Motion to Strike Appellants' Memorandum in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal was sent by ordinary U.S. Mail to:

Edward J. Heben Jr. (0029052)  
HEBEN & ASSOCIATES  
3740 Euclid Avenue  
Cleveland, Ohio 44115  
(216) 431-5297 / fax (216) 391-3278

*Attorneys for Appellants*  
*Karen J. Miller and Lawrence W. Miller*

  
DAN MORELL & ASSOCIATES CO., L.P.A.  
*Counsel for Appellees*

The State of Ohio,  
County of Cuyahoga.

IN THE COURT OF COMMON PLEAS

Lawrence W. Miller, M.D.,  
et al.,

Plaintiffs,

-vs-

Case No. 06 CV 589925

Coldwell Banker Hunter Realty, et al.,      Judge Michael Russo

Defendants.

- - -

Excerpt Transcript

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Deposition of LAWRENCE W. MILLER, M.D., a  
Plaintiff herein, being called by the Defendant  
Hugh Morgan as if upon cross-examination under the  
statute, and taken before Kristin A. Beutler, RPR  
and Notary Public for the State of Ohio, pursuant  
to the further stipulations of counsel herein  
contained, on Monday, the 6th of November, 2006,  
at 9:30 a.m. at the offices of Mazanec, Raskin &  
Ryder, City of Cleveland, County of Cuyahoga, and  
State of Ohio.

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Ta

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1 Q. I respect --

2 A. So I paid the bill.

3 Q. Doctor, I respect you work in the Army Reserves  
4 plus your contract work, you're working harder than most  
5 doctors, plus you're working obstetrics, you're working  
6 very hard, I know that, but for my question --

7 A. To answer your question, I pay the bill.

8 MR. BOLES: Do you have anything that  
9 pertains to this case?

10 MR. DELAY: Yes, I do. Thank you for  
11 pushing me forward to that.

12 Q. Has it been made known to you by anyone, any  
13 attorney, that on October 13th, 2006, and I'm reading from  
14 the Supreme Court docket, that your opponents, the  
15 Zappitellis and Mrs. Capretta, filed a motion to strike  
16 your appellate brief?

17 A. Was it brought to my attention? I probably  
18 received documents that said that. I stopped reading all  
19 this stuff.

20 Q. Has it been made known to you through any source  
21 that Mr. Heben briefed all issues in the case in the entire  
22 trial instead of just proposition of law number 1, which  
23 was the attorney's fees, thus violating the Supreme Court's  
24 acceptance of the case on review?

25 A. My understanding, from the best that I can recall

1 in any communication regarding this, had to do with Ed  
2 Heben saying that the Court did not deny that he could  
3 present it, specifically, and therefore he was going to try  
4 to present it because he believed that the case against me  
5 was flawed and a travesty of justice, I think he said.

6 Q. So he deliberately went ahead and ignored the  
7 Supreme Court, which was only to brief attorney fees, then  
8 briefed the entire case and put that into court?

9 A. I understand what he did, he felt it would have  
10 been of some value and they'd accept it and overturn it.

11 Q. Do you intend to pay for that unnecessary work?

12 MR. BOLES: Objection.

13 A. I don't know if it's necessary or unnecessary. He  
14 has advised me with his legal training that this is in our  
15 best interest and we need to pursue this, so I have.

16 Q. Now, who has written the briefing, is it truly the  
17 Akron law firm that did the briefing but Edward Heben  
18 signed it?

19 A. I haven't any idea.

20 Q. Did you ask that?

21 A. No.

22 Q. Have you received itemized bills per month from  
23 Edward Heben or his associate or his law firm?

24 A. I get bills somewhat similar to the ones that Hugh  
25 Morgan has sent me periodically for a variety of different

## CERTIFICATE

1  
2 The State of Ohio,  
3 County of Cuyahoga.  
4

5 I, Kristin a. Beutler, RPR a Notary Public  
6 within and for the State of Ohio, duly  
7 commissioned  
8 And qualified, do hereby certify that the  
9 within-named witness, {WWW}, was by me first duly  
10 sworn to testify to the truth, the whole truth,  
11 and nothing but the truth in the cause aforesaid;  
12 that the testimony then given by the  
13 above-referenced witness was by me  
14 Reduced to stenotype in the presence of said  
15 witness, afterwards transcribed, and that the  
16 foregoing is a true and correct transcription of  
17 the testimony so given by the above referenced  
18 witness.  
19

20 I do further certify that this deposition  
21 was taken at the time and place in the foregoing  
22 caption specified and was completed without  
23 adjournment.  
24  
25

Tackla &amp; Associates

1 I do further certify that I am not a  
2 relative, counsel or attorney for either party, or  
3 otherwise interested in the event of this action.  
4

5 IN WITNESS WHEREOF, I have hereunto set my  
6 hand and affixed my seal of office at Cleveland,  
7 Ohio this 9th day of November, A.D., 2006.  
8  
9  
10  
11

12 Kristin Beutler, RPR, Notary Public  
13 within and for the State of Ohio.  
14 My Commission expires October 8, 2011  
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