

IN THE SUPREME COURT OF OHIO

CASE NO. 06-540

NINA ZAPPITELLI, et al.
Plaintiffs-Appellees

-vs-

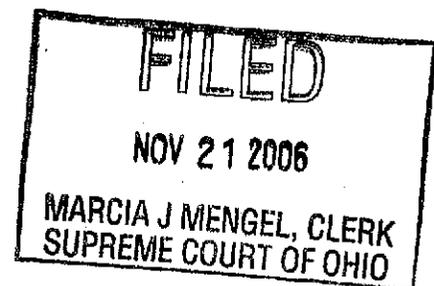
KAREN J. MILLER, et al.
Defendants-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS

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

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MEMORANDUM

The Appellees have filed a Motion to Strike Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal. Appellees, however, are essentially presenting a Reply Brief in support of their original Motion. Their Memorandum essentially attempts to counter Appellants' arguments in support of their Merit Brief, rather than pointing to any flaws in the response to the original Motion to Strike.

A review of the status of this case is in order. On September 19, 2006, Appellants filed their Merit Brief in this matter. Appellants briefed all of the issues that they had raised in their Memorandum in Support of Jurisdiction. As Appellants explained in their Merit Brief:

On August 2, 2006, this Court issued an order in which it accepted the Appeal on Proposition of Law No. 1, concerning the Court of Appeals' award of attorney fees, and dismissed the Zappitelli's cross-appeal as not involving any substantial constitutional question.

However, this Court's order did not dismiss the remaining Propositions of Law raised by the Millers, and did not indicate whether or not its order disposed of those Propositions of Law. Because the Court of Appeals had ignored the doctrine of *caveat emptor* and allowed issues of contract law and negligence to go to the jury, and because the Court of Appeals allowed a fraud claim to go to the jury despite the absence of any justifiable reliance by the Zappitellis, the Millers have briefed those issues as well to remedy a miscarriage of justice.

(Merit Brief of Appellant, p. 2).

While the Court's order explicitly dismissed the Cross Appeal arguments, it did not specifically dismiss Propositions of Law 2, 3 and 4, raised by Appellants, and did not explicitly invoke S. Ct. Prac. R. III, Section 6(C)(2) and limit argument to one issue.

This left open the question of the effect of the Court's Order accepting jurisdiction.

Appellants' Counsel took the next logical step when faced with a question regarding a Court order: Counsel sought the guidance of the Court. As noted in Appellants' Brief in Opposition to Appellees' Motion to strike Appellants' Merit Brief and Dismiss Appeal, Appellants' Counsel spoke to the office of the Court's staff attorney. While that officer would not offer an interpretation of the Court's order, that officer did note that the Court would ordinarily strike any portion of the brief that went beyond what the Court wished to hear.

Because this Court's Order remained unclear, Counsel for Appellants chose to brief every issue that was raised in the Memorandum in Support of Jurisdiction.

The Court below had completely ignored the doctrine of caveat emptor and the effect of purchasing a home in its "as is present physical condition."

The Court of Appeals completely ignored the justifiable reliance requirement of a claim for fraud, allowing a claim to go forward even where the purchasers were aware of the claimed defects in the home from the Residential Property Disclosure Form, their own inspection, and the report of their own retained home inspector.

The Court of Appeals allowed a fraud claim to proceed even where the purchasers did not rely upon the representations of the seller, but retained a home inspector to inspect the premises for them.

The Court of Appeals decision below contradicts the established precedent of other courts and puts all sellers of real property, even those like Dr. Miller, a retired Veterans' Administration Medical Doctor, who disclose defects in property, at risk. The error by the Court below was so manifest, and so unjust and completely opposite to the

long established precedent in the State of Ohio, that Counsel for Appellants felt he would be remiss to not address the issues raised if there was an opportunity to have the injustice visited upon Appellants by the Court below reversed.

Counsel for Appellants was aware that, should the Court decide that the Merit Brief went beyond its proper scope, the Court was capable of ignoring the arguments that were in excess of its Order accepting jurisdiction.

On October 6, 2006, Counsel for Appellees filed a Motion to Strike Appellants' Merit Brief and Dismiss Appeal, alleging that the Merit Brief had exceeded this Court's order accepting jurisdiction. On October 12, 2006, Appellants responded, setting forth the reasons why counsel decided to brief every issue in its Memorandum in Support of Jurisdiction. Appellants also argued that the entire argument should be heard by this Court. Appellants further noted that if their Merit Brief contained arguments beyond what this Court chose to hear, the Court should simply ignore those arguments.

There the matter should have rested. Both sides had set forth their arguments regarding the inclusion of Assignments of Error 2, 3 and 4 in Appellants' Merit Brief. However, one month after Appellants filed their Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal, Appellees have chosen to burden this Court with yet another motion to strike, this time a clumsily entitled Motion to Strike Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal.

The gist of this second Motion is the argument that Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal contained "impertinent material and arguments," (Motion, p. 1) specifically,

“misstatements of fact and legal arguments relating to propositions of law not accepted for review by this Court.” (Memorandum, p. 2).

The Motion is a waste of the Court’s time. The arguments raised in Appellants’ Brief in Opposition to Appellees’ Motion to Strike Appellants’ Merit Brief and Dismiss Appeal are judged by whether they are pertinent to **that Motion**. Since Appellees raised the issue of Appellants’ briefing Propositions of Law 2, 3, and 4 in their Merit Brief, Appellants’ arguments addressing the reasons for the inclusion of those Propositions of Law are clearly relevant to the response to that Motion. Counsel’s addressing those issues when Appellees themselves have put them at issue is clearly appropriate.¹

In fact, though, Appellees’ argument in their newest Motion is not with the Appellants’ Response to their first Motion to Strike, it is with the inclusion of certain arguments in the Merit Brief. Over and over again, Appellees label the arguments supporting Propositions of Law 2, 3, and 4, as being outside of the scope of this Court’s order accepting jurisdiction. That was the argument of their original Motion to Strike. Appellees make no argument that the Appellants’ support of those Propositions of Law was outside of the scope of the Motion to Strike. The current Motion is simply a clumsy attempt to insert an untimely Reply Brief in support of their original Motion onto the docket.

Appellees’ Motion to Strike Appellants’ Brief in Opposition to Appellees’ Motion to Strike Appellants’ Merit Brief and Dismiss Appeal should be denied.

¹ Appellees also cite deposition testimony given by Appellant, Lawrence Miller, stated that his attorney had told him 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 the case against me was flawed and a travesty of justice.” (Memorandum, p. 3). While Appellees try to twist this statement, it is, in fact, precisely what Appellants have argued all along. Because of the ambiguity in this Court’s order and the magnitude of the wrong done to the Millers, counsel chose to present all of the errors committed in the case to this Court.

Appellants' Brief in Opposition addressed the arguments set forth in Appellees' Motion, and there is simply no legal basis for striking Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal.

Moreover, the original Motion should be denied for the reasons set forth in Appellants' Brief in Opposition to Appellees' Motion to Strike Appellants' Merit Brief and Dismiss Appeal.

Respectfully submitted,



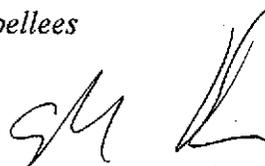
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 20th day of November, 2006, by regular

United States Mail to the following:

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