

IN THE SUPREME COURT OF OHIO

CASE NO. 06-540

NINA ZAPPITELLI, et al.
Plaintiffs-Appellees

-vs-

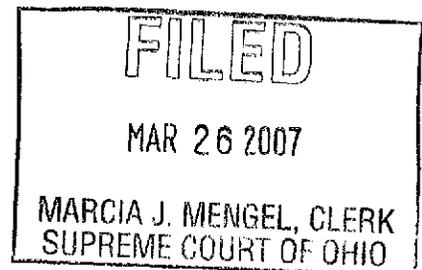
KAREN J. MILLER, et al.
Defendants-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS

MOTION TO SET SUPPLEMENTAL BRIEFING SCHEDULE SUBSEQUENT TO
ORAL ARGUMENT

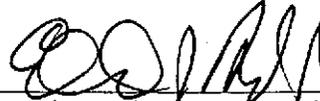
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Now comes Appellants who move this Court to set a Supplemental Briefing Schedule after Oral Argument, in the interest of Justice, in order to allow the Court to more fully consider Propositions of Law 2, 3, and 4, for the reasons set forth in the attached Memorandum which is hereby incorporated by reference as if fully rewritten.

Respectfully submitted,



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Attorney for Appellants

MEMORANDUM

Appellants have moved this Court to set a Supplemental Briefing Schedule after Oral Argument, in the interest of Justice, in order to allow the Court to more fully consider Propositions of Law 2, 3, and 4.

At Oral Argument the Chief Justice stated, after other Justices had shown their interest in the other Propositions of Law, besides Proposition 1, that “I am not prepared to decide {these other issues} without Supplemental Briefing”.

Following the Court’s suggestion and in response to the inquiries by other members of the Court, Appellants hereby request that a Supplemental Briefing schedule be ordered in the interest of Justice, since the lower Court’s decisions in reference to Propositions of Law 2, 3, and 4 are of extreme public importance to all homeowners in the State, and because they are directly in opposition to this Court’s long standing Jurisprudence regarding the issues of *Caveat Emptor* as to the sale of residential real estate in this State, as stated in *Layman v. Binns*, (1988) 135 Ohio St. 3d 176, and directly against this Court’s Jurisprudence regarding the necessity of detrimental reliance in Fraud actions, as stated in *Gaines v. PreTerm- Cleveland, Inc.* (1987), 33 Ohio St. 3d 54.

The lower Court’s decisions are directly in conflict with rulings of this Court and all the other Courts’ of Appeal, including their own 8th Appellate District regarding both these doctrines. There is no basis in Law or Fact for the 8th District Court’s holdings which are in direct conflict with at least six previous holdings by that same Court. The lower Court’s decisions completely obliterate the long standing doctrines of *Caveat Emptor* and detrimental reliance.

The Appellate Court, as stated in Oral Argument, without any basis in the Law decided to award Attorney fees to the Appellees in direct contradiction to the Jury Instructions and Interrogatories drafted by Appellee's counsel, adopted by the Court, and submitted to the jury. Moreover, the entire ruling, with all due respect, had no basis in the Law whatsoever, and was issued as a result of a run-a-way judicial panel interested in finding for the admittedly unfortunate homeowner at any cost, including this Court's Jurisprudence.

This Court originally issued an order accepting jurisdiction on the appeal in this case based upon one of the four propositions of law advanced by Appellants, involving the award of Attorneys' fees. However, this Court's order did not dismiss the remaining Propositions of Law raised by the Millers.

The Court of Appeals ignored this Court's prior Jurisprudence, and specifically the doctrine of *Caveat Emptor*, and allowed issues of contract law and negligence to go to the jury, where there was an "as is" purchase agreement as the result of the Appellees waiver of the Purchase Agreement Inspection Contingency after the completion of a professional inspection by the Appellees which reported evidence of basement water problems, which had previously been disclosed by the Appellants, and admittedly recognized by the Appellees in their own inspection. Additionally, the Court of Appeals allowed a fraud claim to go to the jury despite the absence of any justifiable reliance by the Appellees in direct contravention of this Court's previous Jurisprudence.

Because of this direct abrogation of this Court's previous Jurisprudence, Appellants briefed those issues as well to remedy a miscarriage of justice, which is of grave public importance to all homeowners of the State of Ohio.

In response to the arguments put forward by Appellants, Appellees filed a Motion to Strike the Appellants' Merit Brief and Dismiss Appeal, which Appellants opposed. While those Motions were pending, Appellees filed their Merit Brief. However, despite the additional propositions of law being raised in Appellants' Merit Brief, Appellees deliberately chose to address only the Attorneys' fee issue in their Brief. After filing their Merit Brief, Appellees filed a Motion to Strike the Memorandum in Opposition to their Motion to Strike, essentially rearguing their original Motion to Strike. This Court denied all of Appellees' Motions on December 13, 2006. As stated at Oral Argument, the Appellees did not respond, because the Law is completely opposite to their position on these additional important issues.

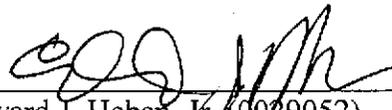
Appellants strongly feel that the issues contained in the Second, Third, and Fourth Propositions of Law should be heard and determined by the Court. Under the doctrine of *Caveat Emptor* once the inspection contingency conditions are removed from a real estate purchase agreement, and the property is accepted "as is", only an action for active fraud can be maintained. The opinion of the Court of Appeals completely undermines that doctrine and creates potential liability for sellers of real property under passive fraud, negligence and contract theories, where none had existed before.

Moreover in reference to the Fraud finding, the Court of Appeals also ignored one of the elements of fraud: the requirement that the person detrimentally rely upon the alleged false representation. Here, the Zappittellis could not show detrimental reliance because they inspected the property themselves, and hired a professional inspector, all of whom stated that they noticed and reported the very defects that Appellants disclosed to the best of their ability, that Appellees claim gave rise to the fraud claim.

The opinion by the Court of Appeals is a travesty, and this Court should accept Supplemental Briefs on these issues so that a miscarriage of justice can be avoided.

Therefore, Appellants move the Court for an order to set a Supplemental Briefing Schedule after Oral Argument, with said briefs limited to the issues raised in Appellants' Second, Third, and Fourth Propositions of Law, in the interest of justice.

Respectfully submitted,



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