

IN THE SUPREME COURT OF OHIO

CASE NO. 06-540

NINA ZAPPITELLI, et al.
Plaintiffs-Appellees

-vs-

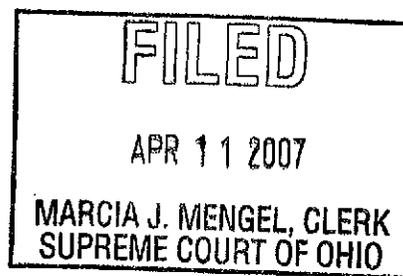
KAREN J. MILLER, et al.
Defendants-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS

AMENDED MOTION TO SET SUPPLEMENTAL BRIEFING SCHEDULE
SUBSEQUENT TO ORAL ARGUMENT

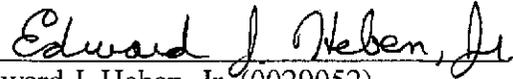
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Now comes Appellants who move this Court to set a Supplemental Briefing Schedule after Oral Argument, in the interest of Justice, in order to allow the Court to more fully consider Propositions of Law 2, 3, and 4, for the reasons set forth in the attached 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 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, and in direct conflict to the Jury Verdict, apparently because a juror asked a question regarding punitive damages and attorney fees.

Moreover, the entire ruling on all issues, with all due respect, had no basis in Ohio Law whatsoever, and was issued as a result of a run-a-way court and 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 has the plenary authority to now accept the additional issues for review to prevent a judicial travesty, and to follow through upon the statement of the Chief Justice and establish a supplemental briefing schedule on the other issues presented to this Court, all in the necessary pursuit of that illusory, but important, concept of **Justice**.

The Court of Appeals ignored this Court's prior Jurisprudence in *Layman* 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.

The Judgment of the Eighth District Court of Appeals in this case on this issue is, as stated in Appellees Motion to Certify, in conflict with Judgments pronounced on the same question by the Court of Appeals for the Ninth District, sitting in Summit County, in the case of *Kaye v. Buehrle* (1983), 8 Ohio App. 3d 381, the Court of Appeals for the Eleventh District, sitting in Lake County, in the case of *Vilk v. Radley*, Case No. 13-087, August 18, 1989, and the Court of Appeals for the Fifth District, sitting in Tuscarawas County, in the case of *Haney v. Warner*, Case No. 96AP080066, August 15, 1997.

The issue upon which a conflict arises is whether a plaintiff can maintain an action for negligence or breach of contract based upon the failure to disclose a defect in property when the purchase agreement has an “as is” provision. Here the Lower Court found that Appellees could maintain contract and negligence actions despite an “as is” clause. These three Courts of Appeal all hold that only an action for active fraud can be maintained when there is an “as is” provision to the purchase agreement.

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 in *Gaines*.

The Court of Appeals ignored one of the elements of fraud: the requirement that the person detrimentally rely upon the alleged false representation. Here, the Appellees could not show detrimental reliance because they inspected the property themselves, hired a professional inspector, and testified that they personally noticed, received a professional’s report, and the Defendants’ Disclosure concerning the very defects that Appellees claim gave rise to the fraud claim.

The Judgment of the Eighth District Court of Appeals in this case on this issue is, as stated in Appellees Motion to Certify, in conflict with a judgment pronounced on the same question by the Court of Appeals for the Ninth District, sitting in Summit County, in the cases of *Broida v. McGlumphey*, 2002 Ohio 4738 (September 11, 2002, 9th District) and *Costaras v. Serle* (January 21, 1998), Summit App. No. 18387, and by the Court of Appeals for the Ninth District, sitting in Lorain County, in the case of *Black v. Constantino* (1996), 117 Ohio App. 3d 40.

The issue upon which the conflict arises is whether a plaintiff in an action for fraud based upon a home sale can show justifiable reliance on statements made in a Residential Property Disclosure Form where the plaintiff is placed on notice of the defects by the Residential Property Disclosure Form, his or her own observation, and/or a home inspection, or where the home sale is contingent upon a home inspection.

In all three cases, the Court determined, in a case for fraud on a home purchase, that there can be no detrimental reliance upon the Residential Property Disclosure Form where the purchaser is on notice of the defect, either through the Residential Property Disclosure Form, his or her own inspection, or through hiring a home inspector.

Here the Lower Courts found that a plaintiff claiming fraud could show justifiable reliance, despite a Residential Property Disclosure Form that alerted the purchaser to the claimed defect, the purchasers' own observation of the defects, and a home inspection that also noted the defects, directly in conflict with the other Appellate Courts which considered this issue.

Because of the direct abrogation of this Court's previous Jurisprudence, Appellants briefed those issues as well to this Court in an attempt to remedy a serious

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 to Appellant's Merit Brief on these Issues, because the Law is completely opposite to their position on these additional important issues.

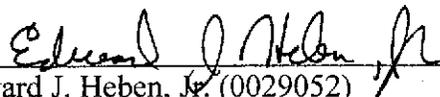
Appellants strongly feel that the issues contained in the Second, Third, and Fourth Propositions of Law should be heard and determined by the Court. Under the doctrines of *Caveat Emptor* and detrimental reliance, once the inspection contingency conditions are removed from a real estate purchase agreement, and the property accepted "as is", only an action for active fraud can be maintained, and only if there is detrimental reliance.

The opinion of the Court of Appeals completely undermines these doctrines and creates potential liability for sellers of real property under passive fraud, negligence and contract theories, where none had existed before.

The rulings by the Trial Court and the Court of Appeals are a travesty, and this Court should accept Supplemental Briefs on these issues so that a miscarriage of justice can be avoided, and this Court's previous jurisprudence of approximately twenty (20) years ago be ratified and applied.

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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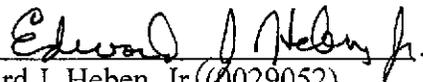
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 10th day of April, 2007, by regular United States Mail to the following:

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