

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

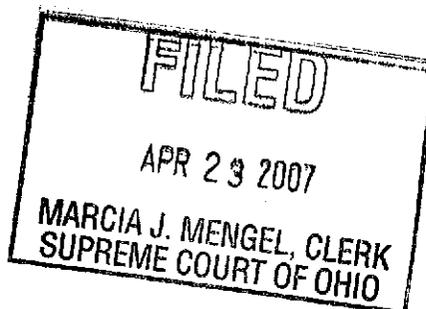
APPELLEES' COMBINED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO
APPELLANTS' MOTION TO SET SUPPLEMENTAL BRIEFING
SCHEDULE SUBSEQUENT TO ORAL ARGUMENT

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**COMBINED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO
APPELLANTS' MOTION TO SET SUPPLEMENTAL BRIEFING
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Appellants' Motion to Set Supplemental Briefing Schedule Subsequent to Oral Argument does not comply with the rules of this Court, and accordingly should be stricken. Specifically, the Appellant's Motion violates Rule IX, Section 9 of the Rules of Practice of the Ohio Supreme Court which states:

Unless ordered by the Supreme Court, the parties **shall not tender for filing** and the Clerk shall not file any additional briefs or other materials relating to the merits of the case after the case has been orally argued. If a relevant authority is issued by a court other than the Supreme Court after oral argument, a party may file a citation to the relevant authority but shall not file additional argument. (Emphasis added.)

At no point during or subsequent to the Oral Arguments held before this Court have the parties been ordered to file any additional briefs or other materials. Appellants have attempted to circumvent this Rule by intentionally mischaracterizing the statements made by the Chief Justice admonishing Appellant's Counsel to stay on point and limit his argument to only those issues accepted for review by the Court. Appellees have already pointed out Appellants' previous mischaracterizations, misquotes, and quotes taken out of context in its previous filings with this Court, and now, incredulously, Appellants mischaracterize and quote out of context the admonishment by the Chief Justice to limit his argument to the issue before the Court, as somehow an invitation to file the present Motion out of rule. Specifically, when Counsel for Appellant started arguing issues not accepted for review by this Court, Chief Justice Moyer stated to Appellants' Counsel:

Let me just stop you there, that issue is not before us. . . . We allowed this case on Proposition of Law # 1, the attorney fee issue. Our order was clearly on Proposition # 1 only. Please respond to Proposition # 1 only and the argument that a finding of fraud equals bad faith.

In Appellants' Counsel's rebuttal argument, he again attempted to argue issues not accepted by the Supreme Court for review, and again Chief Justice Moyer attempted to focus Counsel's argument to the issue accepted by the Court by posing the question "How do we get there on the issue that is

before us? I know that is what you would like, but how do we get there on this issue?" Appellants' brief suggests these admonishments to stay focused on the issue before the Court and to use his argument time to address Proposition # 1 was in some way an invitation to revisit the entire jurisdiction issue previously addressed by this Court.

Appellants' Motion seeks to have this Court reconsider its ruling granting jurisdiction on Proposition of Law # 1, the only proposition of law briefed by both parties and addressed at oral argument. Appellants are, however, well outside the time period permitted by this Court's rules for filing of a Motion for Reconsideration. This Court's Rules of Practice provide:

... a motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry or order is filed with the Clerk. In expedited election cases, a motion for reconsideration may be filed within three days after the Supreme Court's judgment entry or order is filed with the Clerk and shall be served by personal service or by facsimile transmission on the date of filing. A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal. .

Rule XI, Section 2 of the Rules of Practice of the Ohio Supreme Court

On August 2, 2006, this Court issued its ruling on the Appellants' Notice of Appeal and corresponding Memorandum in support, and issued the following order: "Upon consideration of the jurisdictional memoranda filed in this case, the Court hereby accepts the appeal on Proposition of Law No. 1." Cuyahoga App. No. 85895, 2006-Ohio-279. Justices Resnick, Pfeifer and O'Donnell dissented and would not have accepted Proposition of Law 1. Only Justice Lanzinger would have accepted all the other issues of law. Notwithstanding that 6 out of the 7 Supreme Court Justices declined to hear Appellants' appeal on all of its propositions of law, as they attempted in their Merit Brief, Appellants again attempt to untimely and improperly move this Court to reconsider its limited grant of jurisdiction only as to Proposition of Law 1. Clearly,

pursuant to this Court's Rules, any Motion by Appellants to Reconsider this Court's limited grant of jurisdiction to Proposition of Law # 1 must have been made back in August of 2006, not April of 2007, after full briefing of the issue allowed by this Court, and post Oral Arguments. Appellants' Counsel's attempt to chastise Appellees for not addressing other Propositions of Law not accepted by this Court for review is incredulous considering this Court's clear and unequivocal decision to grant jurisdiction on only Proposition of Law #1. Appellees refuse to acknowledge the repeated efforts of Appellants to obfuscate the issues accepted for review by this Court in their continued presentment of irrelevant arguments, mischaracterizations of fact, and vitriolic attacks on the decision of the Court of Appeals.

In filing Appellants' Motion to Set Supplemental Briefing Schedule Subsequent to Oral Argument, clearly a poorly veiled Motion for Reconsideration of this Court's August 2006, order accepting this appeal on Proposition of Law I only, Appellants claim some entitlement to same based upon what they characterize as a "travesty" and a "serious miscarriage of justice." The real travesty here, obviously lost on Appellants, is that a working class mechanic and his family, pooling all their worldly resources with their recently widowed mother-in-law/mother, who had just lost her husband of 50+ years, in order to buy one house so they could care for their ailing and elderly mother/mother-in-law, was blatantly defrauded by Appellants. Appellees now live in a house saturated with mold, inflicted with serious drainage, flooding and wet basement problems, that neither they, nor the City can afford to remedy; nor can they sell the house that has now been on the market for 4 years without a single offer.

Appellants' Motion to Set Supplemental Briefing Schedule ignores the specific finding of fraud by the jury and argues that the Appellees' claims should be barred by the doctrine of caveat

emptor. The case law cited by the Appellants in support of the application of caveat emptor clearly states that the doctrine cannot be applied where the seller has perpetrated a fraud on the buyer:

To make the doctrine operate fairly, courts have established certain conditions upon the rule's application. We summarize and adopt these conditions as follows: (1) the defect must be open to observation or discoverable on reasonable inspection, (2) the purchaser must have an unimpeded opportunity to examine the property and (3) the vendor may not engage in fraud.

Layman v. Binns, 135 Ohio St.3d 176, 177 (1988). The jury specifically found that the Appellants had engaged in active fraud by consciously misrepresenting the condition of the home.

ORC 5302.30, requires that sellers of residential real property disclose defects in the property which are within their actual knowledge. Not only does ORC 5302.30 create a duty to disclose, but the statute requires sellers to make disclosures in good faith, which is defined as "honesty in fact." ORC 5302.30 (A)(1) and (E)(1). Appellants wrongfully argue that because a Residential Property Disclosure form was completed, there can be no detrimental reliance. They argue this despite the fact that the jury below specifically found that the statements made on the Residential Property Disclosure form were false and intended to mislead the Appellees. Appellants have been specifically found by a jury of their peers to have actively defrauded the Appellees and that 1) the Appellees proved by a preponderance of the evidence that Appellants fraudulently concealed and/or misrepresented material defects affecting the property, 2) that the Appellants fraudulently concealed and/or misrepresented such facts on the Residential Property Disclosure Form, 3) that such fraudulent concealment and/or misrepresentations were done with the intent of misleading the Appellees, 4) that Appellees were, in fact, misled by such concealment, 5) that Appellees justifiably relied upon such fraudulent concealment, and 6) that Appellees suffered damages as a proximate result of such fraudulent concealment and/or misrepresentations. Tr. pp. 1103-06, Appellees' Supp. pp. 9-12 and 24-30.

Appellants' recent motion, again attacking the Court of Appeals, fails to set forth the operative facts which led the jury to make the findings set forth above, including that within eight

days after Appellees took possession of the keys to the property, and prior to moving in, Appellees discovered that, as a result of drainage problems, the basement of the property was flooded and the land surrounding the residence on the Property was engulfed in raging water several feet deep. Appellees also discovered from their neighbors that this flooding problem was long standing in nature as the Property had been subjected to repeated flooding for years. Appellees immediately notified Appellants, through their real estate agent, of their intention to rescind the Agreement. Tr. pp. 78-79, Appellee's Supp. p. 2-3. Counsel for the Appellees contacted the Sellers, and Appellants' attorney in an effort to resolve this matter as soon as the discrepancies between the Residential Property Disclosure Form and the actual condition of the Property were realized. Pl. Trial Exhibits 31, 32, and 35, Appellees' Supp. pp. 14-18. Appellants refused to take responsibility for the concealment of the defects in the home, forcing Appellees to file suit.

After the suit was filed and during the course of discovery, Appellees became aware of the presence of active mold in the basement of the Property and the fact that a third party, who had previously agreed to purchase the Property, had abandoned a contract to purchase the property due to the presence of mold less than one month prior to Appellees' purchase of the property. Appellants also affirmatively acknowledged receiving the mold report confirming the existence of active mold spores in their basement several days prior to completing the Residential Property Disclosure Form, and that Appellants made a conscious decision to state "mildew was cleaned" instead of "mold was remediated." Tr. p. 244-46, 254-255, Appellees' Supp. p. 4-6, 33-34. Appellants, rather than accepting responsibility now that they were caught in their own lie, and thereby limit the damages to Appellees, instead forced the Appellees to incur substantial legal fees in order to make themselves whole.

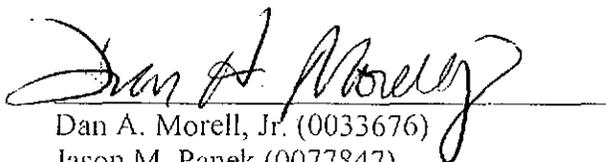
The travesty in this case is the fraud perpetrated by the Appellants and their continued failure to acknowledge responsibility for their misrepresentations made to the Appellees to induce them to purchase real estate with material defects. Even now Appellants' force Appellees to incur

additional attorneys fees in responding to the irrelevant arguments of Appellants filed out of rule on issues of law not accepted by this Court for review.

CONCLUSION

Based upon the authority and arguments set forth herein, Appellees move this Honorable Court to Strike Appellants' Motion to Set Supplemental Briefing Schedule Subsequent to Oral Argument (Motion for Reconsideration of Jurisdiction) as the Motion violates this Court's Rules as to timeliness of Motions for Reconsideration. The Appellants' Motion should also be struck as an unsolicited filing on the merits, submitted after oral arguments, which is prohibited by the Court's rules. In the alternative, Appellees move the Court to deny Appellants' Motion to Set Supplemental briefing schedule and effectively allow this Court's August 2, 2006, ruling on jurisdiction to stand without the untimely, Motion for Reconsideration sought by Appellants' Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 23, day of April, 2007 a copy of the foregoing Appellees' Combined Motion to Strike and Brief in Opposition to Appellants' Motion to Set Supplemental Briefing Schedule Subsequent to Oral Argument was sent by ordinary U.S. Mail to:

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