IN THE SUPREME COURT OF OHIO

TODD DEVELOPMENT CO., INC., et al.	:	Sup. Ct. Case No. 2007-0041
Plaintiffs-Appellants,	:	On Appeal from the Warren County Court of Appeals, Twelfth Appellate District
vs.	:	
SONNY D. MORGAN, et al.	:	Court of Appeals Case No. CA2005-11-124
Defendants-Appellees.		

REPLY BRIEF OF APPELLANTS

Gary J. Leppla (0017172)
Eric S. Thompson (0071596)
LEPPLA ASSOCIATES
2100 S. Patterson Blvd.
Dayton, Ohio 45409-0612
(937) 294-5959
(937) 294-4411 (Fax)

COUNSEL FOR APPELLANTS
SONNY D. MORGAN, et al.

James A. Matre (0021265)
Kerrie K. Matre (0069740)
MATRE & MATRE CO., LPA
225 Pictoria Drive, Suite 200
Cincinnati, Ohio 45246
(513) 671-6333
(513) 671-1234 (Fax)

COUNSEL FOR APPELLEES, TODD DEVELOPMENT, INC., et al.

FILED
JUN 05 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	iii
ARGUMENT IN REPLY	1
CONCLUSION	4
PROOF OF SERVICE	4

TABLE OF AUTHORITIES CITED

CASES: PAGE

Barrand, Inc. v. Whataburger, Inc. (2006), 214 S.W.3d 122..... 2, 3

Celotex Corporation v. Catrett (1986), 47 U.S. 317..... 1, 3

Criss v. Bitzegaio (1981), 420 N.E.2d 221, 1981 Ind. LEXIS 749..... 2

GEC Financial Corporation v. Jaffarian (1995), 79 Hawaii 516, 904 p.2d 530 3

John Doe v. Roman Catholic Church of Nashville (2004), 154 S.W.3d 22.... 3

OTHER AUTHORITIES:

Civ. R. 1(B)..... 1

Civ. R. 12(B)..... 1

Civ. R. 56..... 1

ARGUMENT IN REPLY

The proposition of law proposed by Appellees is contrary to the Ohio Rules of Civil Procedure and their underlying purpose. The Rules of Civil Procedure "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ. R. 1(B). Appellees' proposed rule of law unduly burdens summary judgment practice.

Summary judgment is properly regarded not as a disfavored procedural shortcut, but as an integral part of the Civil Rules as a whole. Celotex Corp. v. Catrett (1986), 47 U.S. 317, 327. Before the shift to "notice pleading" motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial without the attendant unwarranted consumption of public and private resources. Id. Following the advent of "notice pleading" the motion to dismiss seldom fills this function anymore, and its place has been taken by the Motion for Summary Judgment. Id. "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Id.

The expeditious administration of justice is not aided by a rule of procedure which would require a plaintiff or counterclaimant moving for summary judgment on its own claims to demonstrate the absence of a material issue of fact on each and every one of the non-moving party's affirmative defenses. Pursuant to Civ. R. 12(B) a party must

set forth its affirmative defenses in its answer otherwise they are waived. A party acting in good faith may, to prevent waiver, plead numerous affirmative defenses which are not borne out by discovery and ultimately abandoned. A rule requiring a moving party to negate each and every affirmative defense in its motion for summary judgment will cause unnecessary expense and impede the administration of justice.

Appellants' proposition of law, which reflects the law in Texas and Indiana, is consistent with the purposes of the Rules of Civil Procedure and modern pleading practice. The instant matter is not, as Appellee contends, distinguishable from the Indiana Supreme Court's holding in Criss v. Bitzegaio (1981), 420 N.E.2d 221, 1981 Ind. LEXIS 749. In Criss the plaintiff filed a complaint against defendants seeking a resulting trust. Id. at 1223. The defendants pled the affirmative defenses of lack of consideration, statute of frauds, statute of limitations, laches and estoppel. Id. The plaintiff moved for summary judgment and the defendants failed to set forth any evidence in support of the affirmative defenses. The decision in Criss is not, as Appellees contend, based upon a distinction between "questions of law" and "questions of fact." The decision is based upon the principal that "the burden of pleading and proving any affirmative defense is on the defendants." Id. at 224.

Appellees also are unable to differentiate the instant matter from the holding in Barrand, Inc. v. Whataburger, Inc. (2006), 214 S.W.3d 122. In this recent decision the Texas Court of Appeals applied the rule that "where the plaintiff moves for summary judgment in an action in which the defendant has pleaded an affirmative defense, he is entitled to have his summary judgment if he demonstrates by evidence that there is no material factual issue upon the elements of his claim, unless his opponent comes forward

with a showing that there is such a disputed fact issue upon the affirmative defense." Id. As the Barrand Court noted, this rule can "be easily traced through the jurisprudence of the Texas Supreme Court at least as far back as 1959." Id. The well-tested rule of the Texas Supreme Court expedites the administration of justice by requiring the non-moving party to set forth evidence regarding only those affirmative defenses which it feels are meritorious.

Appellees' reliance on John Doe v. Roman Catholic Church of Nashville (2004), 154 S.W.3d 22 and GEC Financial Corporation v. Jaffarian (1995), 79 Hawaii 516, 904 P.2d 530 is misplaced. The former is a decision in a case where the defendant moved for summary judgment against the plaintiff. The issue of whether a party moving for summary judgment on its own claim or a counterclaim bears the initial burden of demonstrating the lack of any issue of material fact regarding the non-moving party's affirmative defenses is not addressed. GEC Financial Corporation is not a decision from the Supreme Court of Hawaii. It is a decision by the Intermediate Court of Appeals which does not reply upon any supreme court authority from that state. The relevant authority from State Supreme Courts that have addressed this issue holds that the moving party does not bear the initial burden of addressing the non-moving party's affirmative defenses.

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses… ." Celotex Corporation v. Catrett supra. at 323-324. A rule requiring the plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims to bear the initial burden of addressing the non-moving party's affirmative defenses defeats this purpose by requiring

the moving party to address affirmative defenses that were plead merely to avoid waiver. A more just and balanced rule would allow the non-moving party to raise the affirmative defenses that it believes to be meritorious. Such was not done in a timely fashion by defendant below.

CONCLUSION

A rule requiring a plaintiff or counterclaimant moving for summary judgment granting affirmative relief on its own claims to bear the initial burden of addressing the non-moving party's affirmative defenses is inconsistent with the Ohio Rules of Civil Procedure and the policy underlying these rules.

Respectfully submitted,

LEPPLA ASSOCIATES

Gary J. Leppla (0017172)
Eric S. Thompson (0071696)
2100 S. Patterson Blvd.
Dayton, Ohio 45409-0612
(937)294-5959

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon James A. Matre, Esq./Kerrie K. Matre, Esq., Matre & Matre, Co., LPA, 225 Pictoria Drive, Suite 200, Cincinnati, Ohio 45246 via ordinary U.S. Mail on this 4 day of June, 2007.

Gary J. Leppla