

IN THE SUPREME COURT OF OHIO

EMERY MARTIN, et al.,

Plaintiffs-Appellees

vs.

**LAKE MOHAWK PROPERTY
OWNERS ASSOCIATION, INC.,
et al.,**

Defendants-Appellants.

) **On Appeal From the Carroll County**
) **Court of Appeals, Seventh Appellate**
) **District**

) **Court of Appeals**
) **Case No. 06-CA-841**

) **08 - 0082**
)

MEMORANDUM IN SUPPORT OF JURISDICTION

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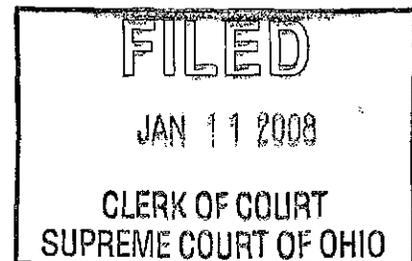


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**STATEMENT OF THE PUBLIC AND GREAT
GENERAL INTEREST IN THE CASE**

This case presents this Court with two independent issues of public and great general interest. First, the Seventh District Court of Appeals exceeded its authority when it ordered the trial court to award damages though the finder-of-fact explicitly and repeatedly found that Plaintiffs had not met their burden of proving damages. Second, the Seventh District Court of Appeals has incorrectly applied the law of the case doctrine.

The public has an interest in the consistency of judicial opinions, and the case at hand presents an instance where that consistency has been lost. Courts of appeal must articulate standards of review and then adhere to those standards of review to maintain the consistency of the judiciary. Our legal system is founded, in part, upon the principle that deference is to be given to the finder-of-fact because the finder-of-fact is in the best position to assess the credibility of the individuals who testify before them and to weigh the evidence. A reviewing court is not to supplant its opinion of testimony for that of the finder-of-fact. In the case at hand, the Seventh District Court of Appeals supplanted its opinion of the trial testimony for that of the finder-of-fact, which in this case was the Carroll County Court of Common Pleas.

Plaintiffs have complained that they have been damaged by their neighbors' violation of a set-back requirement on new home construction. Upon hearing the evidence, the trial court found that Plaintiffs' evidence on damages was "flawed",¹ "at best speculation",² and colored by "bias,"³ and it found that Plaintiffs "failed to carry their burden of proof as to money damages by a preponderance of the evidence."⁴ Nevertheless, the Seventh District Court of Appeals read the

¹ Trial Court's Findings of Fact and Conclusions of Law, p.9.

² Trial Court's Findings of Fact and Conclusions of Law, p.9.

³ Trial Court's Findings of Fact and Conclusions of Law, p.9.

⁴ Trial Court's Findings of Fact and Conclusions of Law, p.10.

court transcripts *de novo* and decided that damages should have been awarded “anywhere from \$33,750 to \$125,000.”⁵ It stated that “[w]hile the trial court may have determined that [the Plaintiffs’ damages] computation was flawed, it should not have completely disregarded [the] testimony.”⁶ The Seventh District decided that it was not satisfied with the trial court’s *factual* determination and, therefore, reviewed the evidence *de novo* and substituting its own factual determination in place of the trial court’s finder-of-fact.

In doing so, the Seventh District’s opinion conflicts with its own decisions and decisions of this Court regarding the deference courts of appeal owe to the finder-of-fact. The Seventh District’s substitution of its own judgment for that of the finder-of-fact flies in the face of the appellate standards established by this Court in *State v. Awan*⁷ and *C.E. Morris Co. v. Foley Const.*⁸; this Court has repeatedly held that an appellate court must not question the finder-of-fact’s choices regarding the weight of evidence or credibility of witnesses. Such arbitrary reviews of facts upon appeal undermine and erode the consistency of decisions which the public expects from its judiciary.

The second issue of public and great general interest is the incorrect application of the law-of-the-case doctrine. In the first appellate decision in this case, *Lake Mohawk I*⁹ the Seventh District reviewed the propriety of a Civ.R. 41(B)(2) dismissal of Plaintiffs’ case *prior to the presentation of any evidence of damages*. The Seventh District inexplicably made the factual finding that “it is clear that the Martins’ suffered some damages...The question remains as to the amount of damages.”¹⁰ *Lake Mohawk I* concluded with an order for the trial court to hold a

⁵ *Martin v. Lake Mohawk Prop. Owners’ Ass’n, Inc.*, 2007-Ohio-6432, ¶29. (“*Lake Mohawk II*”).

⁶ *Lake Mohawk II*, ¶67.

⁷ *State v. Awan* (1986), 22 Ohio St.3d 120.

⁸ *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279.

⁹ *Martin v. Lake Mohawk Prop. Owners’ Ass’n, Inc.*, 2005-Ohio-7062. (“*Lake Mohawk I*”).

¹⁰ *Lake Mohawk I*, ¶91.

hearing as to the amount of damages. Given that no evidence of damages was previously presented to the trial court, the parties were given an opportunity to submit evidence on that issue.

After a trial on the amount of damages was had, the finder-of-fact found that Plaintiffs “failed to carry their burden of proof as to money damages by a preponderance of the evidence.”¹¹ In *Lake Mohawk II*, the Seventh District found that, under the law-of-the-case doctrine, it was error for the trial court to find that Plaintiffs “were not entitled to damages after [the Seventh District previously] stated that they were entitled to some damages.”¹²

This case presents this Court with a unique opportunity to establish the limits of the law-of-the-case doctrine and to settle whether the doctrine applies only to *legal* questions in subsequent proceedings or *all matters*. The trial court’s finder-of-fact reached a different *factual* conclusion regarding damages than had been previously reached by the appellate court. There is a conflict even in this Court’s jurisprudence regarding this matter. In *Nolan v. Nolan*, this Court held that “the doctrine provides that the decision of a reviewing court in a case remains the same on the *legal questions* involved for all subsequent proceedings.”¹³ But in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, this Court held that “the judgment of the reviewing court is controlling on the lower court as to *all matters* within the compass of the judgment.”¹⁴ If this Court finds that the law-of-the case doctrine applies to every factual assertion made by an appellate court or each piece of *obiter dicta*, as the Seventh District has asserted, it would eviscerate the purpose and function of the finder-of-fact at the trial court level.

¹¹ Trial Court’s Findings of Fact and Conclusions of Law, p.10.

¹² *Lake Mohawk II*, ¶50.

¹³ *Nolan v. Nolan* (1984), 35 Ohio St.3d 1, 3 (emphasis added); see also *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160 (“the [trial] court is bound to adhere to the appellate court’s determination of *applicable law*”) (emphasis added).

¹⁴ *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97.

The case at hand presents an opportunity for this Court to decide two issues: (1) this Court can establish the limits of the law-of-the-case doctrine and hold that an appellate court's opinion of the facts or dicta is not binding upon the lower courts' finder-of-fact and (2) this Court can address the Seventh District's erroneous substitution of its opinion of the evidence for that of the finder-of-fact.

STATEMENT OF THE CASE AND FACTS

This case arose from the violation of a building code establishing a set-back requirement for houses with frontage on Lake Mohawk in Carroll County. Plaintiffs-Appellees, five members of the Martin Family ("the Martins"), own a house on Lot 1043. When neighboring Lot 1042 was purchased by Defendant-Appellants, Robert and Nancy Mizerik ("the Mizeriks"), they began building a residence that violated Lake Mohawk Property Owners' Association's ("LMPOA") building code. The code contained a restriction that required new residences to be positioned no more than ten feet closer to the lake than its neighbors.

The Martins brought an action in the Carroll County Court of Common Pleas seeking injunctive relief and damages for an alleged loss of view and privacy.¹⁵ The Martins sought judgment against their neighbors, the Mizeriks, and LMPOA for its approval of the Mizerik's building plans and its alleged failure to enforce the building code. At the first trial on the matter, held on November 19, 2004, the Martins presented their case-in-chief, but did not present any evidence or testimony on the monetary damages or loss of market value to their home that they allegedly suffered. At the close of the Martins' case-in-chief, the trial court granted the Defendant-Appellants' motion for dismissal under Civ. R. 41(B)(2) on the grounds that (1) injunctive relief was not appropriate, (2) the building code restriction was not violated, and (3)

¹⁵ Carroll County Court of Common Pleas, Case No. 04 CVH 23875.

that the “Martins failed to present any competent evidence of any alleged monetary loss they claim to have sustained, including any diminution in the market value of the property.”¹⁶

On appeal, the Seventh District affirmed in part and reversed in part the trial court's decision. The appellate court affirmed the finding that injunctive relief was inappropriate, and it found that (1) according to the plain language of the building code, the restriction was violated and (2) that “it is clear that the Martins’ [sic] suffered some damages for loss of privacy and partial loss of a lake view...The question remains as to the amount of their damages.”¹⁷ The latter finding, a factual conclusion, was made by the Seventh District without the benefit of any trial testimony or trial evidence on the question of the value of the loss of view.¹⁸

When the appellate court remanded the case to the trial court for a hearing “on the issue of the *amount* of damages that are appropriate,” it asked the trial court to determine the proper damage award.¹⁹ Indeed, one of the primary complaints of the Martins in *Lake Mohawk I* was that the trial court had not given them an opportunity to present evidence of damages. The appellate court in *Lake Mohawk I* found that the trial court had failed to allow the Martins to present evidence of damages, yet it paradoxically concluded that “*some damages*” were appropriate.²⁰

During the second trial on damages, the trial court ruled that the appropriate measure of damages would be diminution in market value as a result of the alleged loss of a lake view.²¹ For their case-in-chief, the Martins presented the testimony of just two persons: Patricia Martin, a co-

¹⁶ *Lake Mohawk I*, ¶73.

¹⁷ *Lake Mohawk I*, ¶91.

¹⁸ Indeed, it was one of the Martins’ assigned errors on appeal that the trial court had precluded them from presenting the relevant evidence.

¹⁹ *Lake Mohawk I*, ¶91-92 (emphasis added).

²⁰ *Lake Mohawk I*, ¶91-92 (emphasis added).

²¹ The parties thoroughly briefed this issue, and the trial court granted LMPOA’s pretrial motion *in limine*. Trial Court’s Findings of Fact and Conclusions of Law, p.7.

plaintiff and Glenn Miller, a real-estate appraiser. Ms. Martin testified as to the diminished value of her home under the “owner-opinion” rule, but she admitted that she had not viewed any comparable properties to determine whether they had an obstructed or full view of Lake Mohawk.²² Finding that she had “a bias and a direct interest” in the case, and finding that her opinion was “at best speculation,” the court, as finder-of-fact placed no weight on her opinion.²³

Glenn Miller, testified for the Martins as to the value of *a* lake view; he compared similar properties *with a view* of Lake Mohawk from nearby properties *with no view*.²⁴ Notably, he did not testify as to the value of the Martin’s property, either before or after the building of the Mizerik’s home.²⁵ He offered no opinion as to the present market value or the diminution in market value of the Martin’s home.²⁶ At trial, Glenn Miller testified:

- Q: ...[Y]ou were not hired to conduct an appraisal of the Martin’s property?
A: I was not.
Q: And in fact you did not conduct an appraisal of the Martin’s property?
A: I did not.
Q: ...[Y]ou could have conducted an appraisal of the Martin’s property. Correct?
A: Yes.
...
Q: But you did not do that?
A: I did not.²⁷

The trial court, as finder-of-fact found that Mr. Miller’s opinion did not provide any objective evidence of a diminution in market value; there was no basis for determining the market value of the home. Therefore, the finder-of-fact did not assign any weight to his opinion.²⁸

Not only did the finder-of-fact explain why the Martins’ evidence of diminution was less than credible, but it also found that Defendant-Appellants’ expert witness gave highly credible

²² Trial Court’s Findings of Fact and Conclusions of Law, p.8-9.

²³ Trial Court’s Findings of Fact and Conclusions of Law, p.8-9.

²⁴ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

²⁵ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

²⁶ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

²⁷ Trial Court Transcript, September 8, 2006, Vol.1, p.61:14 - 62:7.

testimony on how the Mizerik's removal of trees on their lot may have actually *increased* the Martin's view of the lake.²⁹ The trial court explicitly and lucidly found that the Martins had failed to meet their burden of proof. The trial court correctly found out that the Martins, as plaintiffs were required to meet their burden of proof and to show, by a preponderance of the evidence, that they had sustained a diminution in value of their property.³⁰ The finder-of-fact concluded that the amount of damages was zero dollars. In doing so, the trial court followed the appellate court's instruction that it determine the amount of damages.

Upon appeal for the second time, the Seventh District held in *Lake Mohawk II*, that the trial court had ignored the law-of-the-case by disregarding its statement in *Lake Mohawk I* that the Martins had sustained some damages.³¹ The Seventh District held that its factual conclusion had become the law-of-the-case and that, apparently, the Martins were not expected to prove damages by a preponderance of evidence.³² Although the Seventh District correctly noted that "the weight to be given to [a party's] opinion is for the trier of fact,"³³ the appellate court proceeded to recite evidence and testimony that the trial court had explicitly found to be "flawed",³⁴ "at best speculation",³⁵ and colored by "bias."³⁶ It chided the trial court for disregarding the testimony of Glenn Miller and Patricia Martin, and it stated that it was an error for the trial court to have found credible the testimony of Defendant-Appellants' expert witness.³⁷

²⁸ Trial Court's Findings of Fact and Conclusions of Law, p. 9.

²⁹ Trial Court's Findings of Fact and Conclusions of Law, p. 9-10.

³⁰ Trial Court's Findings of Fact and Conclusions of Law, p.10.

³¹ *Lake Mohawk II*, ¶52.

³² *Lake Mohawk II*, ¶53.

³³ *Lake Mohawk II*, ¶59.

³⁴ Trial Court's Findings of Fact and Conclusions of Law, p.9.

³⁵ Trial Court's Findings of Fact and Conclusions of Law, p.9.

³⁶ Trial Court's Findings of Fact and Conclusions of Law, p.9.

³⁷ *Lake Mohawk II*, ¶61-62.

Also of note is that Carroll County Common Pleas Judge William Martin, the finder-of-fact in this case, has since retired, and that bench is now filled by a predecessor judge. Allowing the Seventh District's opinion to stand would essentially give Plaintiffs a second trial before an entirely new finder-of-fact, the very definition of the maxim that a litigant should not "get two bites at the apple."

The Seventh District's reversal of the finder-of-fact in *Lake Mohawk II* contains instructions for the new finder-of-fact to make some award of damages. Regardless of the testimony and facts and evidence, the appellate court has mandated that those damages should be in the range of \$33,750 to \$125,000.³⁸ Essentially, the court instructs the next finder-of-fact to consider the evidence, adopt the Plaintiffs' evidence, and award damages.³⁹ The court goes so far that it commands the finder-of-fact to make an award of damages and even suggest a range of damages. It does all this before the next finder-of-fact has even reviewed the evidence, and this mandate completely obliterates the trial court's right to re-weigh the evidence. The right of the trial court to re-weigh the evidence is guaranteed by R.C. § 2321.18.⁴⁰

The appellate court has clearly reviewed the evidence *de novo*, explained what it believes is the correct interpretation of that evidence, and remanded this matter to the trial court with the instruction that damages be awarded accordingly. Essentially, the Seventh District reviewed the evidence *de novo* and awarded damages—such action clearly exceeds the authority of a reviewing court.

LMPOA seeks to appeal this decision.

³⁸ *Lake Mohawk II*, ¶29, 65.

³⁹ *Lake Mohawk II*, ¶91, 67, 61-62.

Proposition of Law 1:

A Finder-of-Fact Is Not Required to Follow Factual Assertions or Obiter Dicta Contained in an Appellate Decision Under the Law-of-the-Case Doctrine.

The Seventh District found that the decision of Judge Martin, as finder-of-fact at the trial court, was an abuse of discretion because it did not follow the law-of-the-case. This “law-of-the-case,” as set forth in *Lake Mohawk I*, consisted of a factual assertion by that court that “it is clear that the Martins’ [sic] suffered some damages for loss of privacy and partial loss of a lake view...The question remains as to the amount of their damages.”⁴¹ A factual assumption or dicta made by an appellate court, however, cannot be called the law-of-the-case. As the finder-of-fact, Judge Martin was charged with ensuring that all elements of the Martin’s case were proven by a preponderance of the evidence, and he was free to find that the Martins did not meet their burden of proof. A finder-of-fact cannot and should not be constrained by factual assertion, obiter dicta in a previous appellate decision.

This Court has never determined precisely to what the law-of-the-case doctrine extends. This Court held in *Nolan v. Nolan*, that “the doctrine provides that the decision of a reviewing court in a case remains the same on *the legal questions* involved for all subsequent proceedings.”⁴² Similarly, in *Hawley v. Ritley*, this Court held that a “[trial] court is bound to adhere to the appellate court’s determination of *applicable law*.”⁴³ These definitions of the doctrine put clearly note that it is settled legal questions that must be applied by the trial court. Yet in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, this Court noted that

⁴⁰ “The same trial court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case.” R.C. § 2321.18 (2007).

⁴¹ *Lake Mohawk I*, ¶91.

⁴² *Nolan v. Nolan* (1984), 35 Ohio St.3d 1, 3 (emphasis added).

⁴³ *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160 (emphasis added).

“the judgment of the reviewing court is controlling on the lower court as to *all matters* within the compass of the judgment.”⁴⁴

The law-of-the-case doctrine clearly prevents an appellate court from determining the facts before they have been heard at the trial court level. First, it should be clear from its very name that the *law-of-the-case* doctrine is meant to apply to questions of *law* decided by the appellate courts and not to facts of the case. Second, this Court’s jurisprudence on this issue has made it clear that, if the facts change at trial, the doctrine does not apply. In *Gohman v. City of St. Bernard*, this Court defined the law-of-the-case doctrine as:

a rule of general application that the decision of an appellate court in a case is the law of that case on the point presented...provided the facts and issues are substantially the same as those on which the first decision rested.⁴⁵

Similarly, in *Blakemore v. Blakemore*, this Court held that, when new facts are presented to the trial court that were unavailable to the appellate court, the law-of-the-case doctrine does not apply.⁴⁶

Moreover, this Court has held that it is reversible error for an appellate court to strictly enforce the doctrine when it is clearly not appropriate. In *Hawley*, this Court cautioned that “the doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.”⁴⁷ Here, injustice has clearly resulted. Not only have the Martins been given a reprieve from failing to present any credible evidence of diminution in value of their property, but they will get to try their case anew before a different finder-of-fact. Additionally, the Martins have been spared their burden of proving the existence of damages by the preponderance of the evidence—the appellate court has done that for them.

⁴⁴ *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97.

⁴⁵ *Gohman v. City of St. Bernard* (1926), 111 Ohio St. 726, 730 (citing 4 Corpus Juris, p.1093) (reversed on other grounds *New York Life Ins. Co. v. Hosbrook* (1935), 130 Ohio St. 101).

⁴⁶ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

The appellate court's mandate in *Lake Mohawk I* was made before any trial testimony or evidence had been presented on the question of diminution in value. "Given the evidence in the record that was carefully reviewed by the trial judge", the appellate court should not have insisted on deference to its factual finding and "was incorrect in substituting its judgment for that of the trial court."⁴⁸

Proposition of Law 2:

A Finder-of-Fact Is Within Its Right to Determine Facts that Conflict With Factual Statements or Obiter Dicta from Prior Appellate Decisions.

By making factual findings prior to the introduction of any evidence showing damages, the Appellate Court exceeded its authority in *Lake Mohawk I*. But when the Seventh District insisted in *Lake Mohawk II* that the finder-of-fact was bound to accept those findings after the finder-of-fact had heard all the evidence on the Martin's damages, it trampled on the right of the finder-of-fact to weigh the evidence and substituted its own opinion of the facts.

Deference to the fact finder's unique position in assessing, weighing, and evaluating the evidence is incumbent upon courts of appeal, and it has long been the practice of the Ohio Supreme Court. As this Court has recognized, "[t]he choice between credible witnesses and their conflicting testimony rests *solely* with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact."⁴⁹ The rationale for this limited standard of review has been consistently and repeatedly articulated by the Ohio Supreme Court. As this Court explained in *Davis v. Flickinger*, "[t]he reason for this standard of review is that the trial

⁴⁷ *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 160.

⁴⁸ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

⁴⁹ *State v. Awan* (1986), 22 Ohio St.3d 120, 123 (emphasis added).

judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page.”⁵⁰

The question before the Seventh District was whether Judge Martin’s decision was supported by some competent, credible evidence.⁵¹ However, that question had to be answered without substituting the appellate court’s opinion for those of the finder-of-fact. The Seventh District failed to assign the proper deference to the trial court’s factual findings, and it instead pushed its own opinion of the evidence—an opinion that seemed to be set in concrete since *Lake Mohawk I*, before the evidence was even heard.

The Seventh District cited to what it believed were redeeming points in the testimony by Plaintiff’s trial witnesses, and it cited to criticisms of Defendants’ witnesses.⁵² It spent considerable time touting Plaintiff’s witnesses’ credentials, and excused away the shortcomings of their testimony with statements like: “[w]hile the trial court may have determined that Miller’s computation was flawed, it should not have completely disregarded his testimony.”⁵³ However, only Judge Martin could assess the credibility of Plaintiff’s witnesses’ testimony, and the court is free to believe all, part of, or none of the testimony from witnesses that appear before it.⁵⁴ Only Judge Martin was able to accept or to reject this testimony. The Seventh District completely ignored the fact that Judge Martin concluded that Plaintiff’s witnesses’ testimony was not believable; the finder-of-fact found these witnesses’ testimony to be “flawed”,⁵⁵ “at best speculation”,⁵⁶ and colored by “bias.”⁵⁷ It also found Defendant-Appellee’s expert witness’s

⁵⁰ *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418 (emphasis added).

⁵¹ *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 280 (“...judgments supported by some competent, credible evidence...will not be reversed as being against the manifest weight of the evidence”).

⁵² *Lake Mohawk II*, ¶54-63.

⁵³ *Lake Mohawk II*, ¶67.

⁵⁴ *State v. Nichols* (1993), 85 Ohio App.3d 65, 76.

⁵⁵ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

⁵⁶ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

testimony to be credible. That witness testified that there was no evidence of a diminution in market value and that the Martin's view was actually improved by the Mizerik's development of their lot.

Proposition of Law 3:

An Appellate Court Must Not Reverse Factual Judgments that are Supported by Some Competent, Credible Evidence.

An appellate court may only determine factual issues in a non-jury civil case when “a judgment or final order rendered by the trial court is against the manifest weight of the evidence.”⁵⁸ Where there is “competent, credible evidence to support the trial court’s findings, [an appellate court] cannot reverse its findings as being against the manifest weight of the evidence.”⁵⁹ Therefore, in order to find that a trial judgment was against the manifest weight of the evidence, an appellate court must find that there was no competent, credible evidence supporting it.

In this case, the Seventh District reversed the factual finding of the Carroll County court as an abuse of discretion.⁶⁰ First, Appellate Rule 12(C) states that such judgments can only be reversed if they are against the manifest weight of the evidence; the abuse of discretion standard simply falls short of that.⁶¹ Second, the Seventh District did not find that there was no competent, credible evidence supporting the finder-of-fact’s judgment. Rather, the court

⁵⁷ Trial Court’s Findings of Fact and Conclusions of Law, p.9.

⁵⁸ App.R. 12(C).

⁵⁹ *State v. Awan* (1986), 22 Ohio St.3d 120, 123.

⁶⁰ *Lake Mohawk II*, ¶¶ 65, 68.

⁶¹ App.R. 12(C).

acknowledged that the finder-of-fact based its' decision on the testimony of the Defendant-Appellants' expert witness, and it never disputes that this was competent, credible testimony.⁶²

It was reversible error for the appellate court to reject the finder-of-fact's assessment of the credibility and weight of the testimony presented by the parties. Moreover, the Seventh District failed to comply with App.R. 12(C) and apply the requisite standard of review.

CONCLUSION

As the finder-of-fact, the Carroll County Court of Common Pleas had the sole duty and responsibility to assess the credibility of testimony related to the diminution in value. The Lake Mohawk Property Owners Association respectfully submits that the Seventh District usurped the role of the finder-of-fact and substituted its assessment of Plaintiff's witnesses' testimony for that of the trial judge.

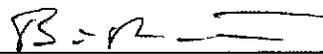
Moreover, the Lake Mohawk Property Owners Association respectfully asserts that the Seventh District Court of Appeals erred when it reversed the factual findings of the trial court under the law-of-the-case doctrine. This doctrine simply does not apply to statements of fact or obiter dicta made by an appellate court earlier in the case; it does not apply to facts decided upon by the appellate court prior to the actual presentation of facts presented at trial; and the doctrine certainly cannot be employed as a substitute for the plaintiffs' burden to meet prove these facts by a preponderance of the evidence.

For these reasons, this case involves matter of public and great general interest. The appellant requests that this Court grant jurisdiction and hear this case so that the important issues presented in this case will be reviewed on their merits.

⁶² *Lake Mohawk II*, ¶¶ 58, 61-62,

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent this 1st day of January, 2008 to:

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Lake Mohawk Property Owners' Association

STATE OF OHIO, CARROLL COUNTY
IN THE COURT OF APPEALS

FILED

SEVENTH DISTRICT

NOV 29 2007

EMERY MARTIN, ET AL.,)
)
 PLAINTIFFS-APPELLANTS,)
)
 VS.)
)
 LAKE MOHAWK PROPERTY)
 OWNERS ASSOCIATION, INC., ET)
 AL.,)
)
 DEFENDANTS-APPELLEES.)

COURT OF APPEALS
CARROLL COUNTY, OHIO

CASE NO. 06-CA-841

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court
Case No. 04-CVH-23875

JUDGMENT: Affirmed in Part
Reversed in Part and Remanded

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: November 28, 2007

DONOFRIO, J.

{¶1} Plaintiffs-appellants, Emery Martin and his family, appeal from two Carroll County Common Pleas Court judgments, the first granting defendants-appellees', Robert and Nancy Mizerik's, motion for dismissal and the second finding in favor of defendant-appellee, Lake Mohawk Property Owner's Association (the Association), on the issue of damages.

{¶2} This case has already been before this court once. *Martin v. Lake Mohawk Property Owner's Assn.*, 7th Dist.04-CA-815, 2005-Ohio-7062. The facts as stated therein are as follows.

{¶3} "Five members of the Martin family are owners of a house on Lot 1043 which fronts Lake Mohawk in Carroll County. The lake's high water line is 154 feet from the closest point of the Martin's home. The Mizeriks purchased Lot 1042 in order to construct a lake front residence. Both lots are 295 feet deep. Lot 1041, on the other side of the Mizeriks' new property, is vacant.

{¶4} "The Mizeriks wanted to build an L-shaped house that was physically sixty-two feet deep at its deepest point. And, they wished to build it a mere ninety-four feet from the lake's high water mark; more than fifty feet closer to the lake than the Martins' house. However, the Association's building code contains a restriction that applies to all structures and reads as follows:

{¶5} "Any new residence or remodeling must be positioned on the property so as to vary 10 feet or less in depth from it's [sic] neighboring residences. See exhibit for formula.' Section (A)(6)(c).

{¶6} "The exhibit incorporated into this restriction is entitled, 'New Residence Depth.' A formula is listed for lake front property in order to determine the minimum distance from the nearest part of the structure to the high water line. The example use of the formula assumes that there are two existing houses, House A and House C, and solves for the new house to be constructed between the existing houses. An example shows House A at 80 feet from the high water line and House C at 100 feet from the high water line. Using these figures, the formula proceeds: House A 80 +

House C $100 = 180 \div 2 = 90 - 10 = 80$, meaning the new house must be at least 80 feet from the high water line.

{117} "In February 2003, the Mizeriks wrote a letter to the Association noting that the Association's building inspector did not believe their plans fit with the present 10 foot allowance. They thus asked for a variance. In April 2003, the Association responded that a variance would not be necessary as long as the Mizeriks constructed their house at least 92 feet from the high water line of the lake. To arrive at this number, the Association applied the formula even though Lot 1041 was vacant. The Association imputed a distance from the water of 50 feet for the vacant lot merely because that is the absolute minimum distance a house can be from the water line as per the lake's warranty deed. Thus, their application of the formula proceeded as follows: ' $154 \text{ ft} + 50 \text{ ft} = 204 \div 2 = 102 - 10 = 92 \text{ ft}$.'

{118} "A copy of the Association's response was sent to the Martins. An attorney for the Martins immediately responded that the formula had been misconstrued and asked that they be permitted to present their objections at a board of directors meeting. The parties met with the community manager at the building site in May 2003. In a follow-up letter, the Martins advised that they were considering the request to compromise on the shorter minimum distance from the water line but they wanted to see plans to determine how high the Mizeriks' house would rise in their view.

{119} "Regardless, a building permit was issued on May 3, 2004, and the Mizeriks began construction. When the Martins realized that the Mizeriks still intended to place the closest portion of their house 94 feet from the high water mark, they complained. The Association ordered that construction stop, but then changed its mind after complaints from the Mizeriks' builder.

{1110} "On May 14, 2004, Emery and Patricia Martin filed a complaint for a preliminary and permanent injunction against the Mizeriks and the Association. On June 9, 2004, the court held a hearing on the request for a preliminary injunction.

The Martins called the Association's building inspector to testify. When questioned about the restriction containing the ten foot depth variation, he stated:

{¶11} "I have applied the formula to all residences. * * * You can't go by the formula and the paragraph. They, they would sort of contradict each other. Quite honestly, I didn't even know it said 10 feet or less." (06/09/04 Tr. 17).

{¶12} "Due to the court's time restraints, this was the only witness. The court concluded that it had not heard enough to grant or deny a preliminary injunction but they were out of time for the day. (06/09/04 Tr. 44). The court then advised that it was combining the preliminary injunction hearing with an accelerated merits hearing for the permanent injunction as per Civ.R. 65(B)(2). This hearing was set for June 16, 2004.

{¶13} * * *

{¶14} "Finally, the trial was held on November 19, 2004. After the Martins presented their case in chief, the defense filed a Civ.R. 41(B)(2) motion to dismiss. The court orally granted the motion. * * *

{¶15} "When addressing the permanent injunction, the court found it significant that the Mizeriks' residence was essentially complete and that the Martins failed to seek a temporary restraining order and never obtained the preliminary injunction. The court noted that it would not order a house to relocate where provisional relief could have been timely achieved if proper. The court concluded that the issuance of a permanent injunction at this time would be inequitable due to the passage of time and change in circumstances.

{¶16} "In addition, the court concluded that the formula in the code had been properly applied and that it incorporated the ten foot depth restriction. The court noted that the variance committee and the building inspector independently arrived at decisions that the placement complied with the formula. Thus, the court found the actions for permanent injunction and for monetary damages both failed." Id. at ¶3-16.

{¶17} This court found that the ten-foot depth restriction and formula were unambiguous and that the Mizeriks violated the restriction when they built their house with more than a ten-foot depth differential from the Martins' house. Id. at ¶32-33. We further concluded, however, that the court did not err in denying the Martins' request for a permanent injunction ordering the Mizeriks to demolish their house and rebuild. Id. at ¶54. We found that the Martins' diminished lake view and lack of privacy caused by the location of Mizeriks' house could be compensated monetarily. Id. at ¶52. Finally, we concluded that the trial court erred in disallowing the Martins the time to present expert realtor testimony to establish their damages. Id. at ¶90. Therefore, we affirmed in part, reversed in part, and remanded the matter to the trial court for a hearing solely on the amount of damages. We had found that the Martins suffered some damages for loss of privacy and partial loss of a lake view with a substituted view of the back of a house and driveway.

{¶18} The trial court set the matter for a hearing. The Association and the Mizeriks filed motions in limine asking the court to exclude any evidence of attorney's fees and costs and any evidence of damages other than the value of the Martins' property before the construction of the Mizeriks' house and the value of the Martins' property after the construction of the Mizeriks' house. The court denied the motion regarding attorney's fees and costs and granted the motion regarding other evidence of damages. It allowed the Martins to proffer for the record the evidence they would have presented.

{¶19} The court subsequently held the damages hearing. At the conclusion of the Martins' case-in-chief, the Mizeriks moved for a dismissal pursuant to Civ.R. 41(B)(2). The court took the motion under advisement and later granted it at the conclusion of the evidence. It found that the Martins, in their complaint, never asserted a claim against the Mizeriks for money damages.

{¶20} The court later entered judgment in favor of the Association finding that the Martins failed to prove that they were entitled to any damages. It stated that the

Martins did not prove that their privacy was diminished or that their property value had decreased due to the construction of the Mizeriks' home.

{¶21} The Martins filed a timely notice of appeal on December 19, 2006.

{¶22} The Martins raise four assignments of error, the first of which states:

{¶23} "THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER PLAINTIFF'S [sic.] 'COST TO CURE' EVIDENCE FOR DAMAGES."

{¶24} The trial court refused to consider the Martins' "cost-to-cure" evidence. This evidence included estimates of what it would cost to move the Martins' home forward in order to restore their view of the lake. The court granted the Mizeriks' and the Association's motion in limine to limit the Martins' evidence only to the difference in the market value of their property before and after the completion of the Mizeriks' home. The court allowed the Martins to proffer their cost-to-cure evidence for the record.

{¶25} The Martins note that they asserted a claim for breach of contract. They argue that the standard remedy in a breach of contract case is specific performance. Because specific performance in this case is impossible or impracticable, they argue that equivalent money damages are warranted. Therefore, they assert that the court should have considered their evidence as to what it would cost to move their house to improve their lake view. The Martins argue that moving their house forward is the closest they can get to being placed in the same position they would have been had the Mizeriks not breached the housing restriction.

{¶26} The general rule for measuring damages to real property is found in *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 140 N.E. 356, paragraph five of the syllabus:

{¶27} "[I]f the injury [to the property] is of a permanent or irreparable nature, [the owner is entitled to recover] the difference in the market value of the property as a whole, including improvements thereon, before and after the injury. If restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury

and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure."

{¶128} In this case, the Martins proffered their cost-to-cure evidence. They presented the testimony of H.B. Kazak, who testified as to the cost to move the Martins' house approximately 70 feet forward to restore their view of the lake. Kazak testified as to all of the costs that would be involved in moving the Martins' house including the actual cost of moving the structure, the masonry work, the sewer work, the permits, etc. The total of all of the costs would be approximately \$156,000. (Tr. 25, 32-38; Ex. 19A-19G).

{¶129} As we will see later, the value of the Martins' house before the Mizeriks built and the value of the Martins' house after the Mizeriks built diminished anywhere from \$33,750 to \$125,000. Thus, the evidence demonstrated that the most the difference in market value was of the Martins' house before and after the injury was \$125,000. Because the cost of restoration exceeds the difference in market value before and after the injury, the difference in market value is the proper measure of damages pursuant to *Ohio Collieries*, supra.

{¶130} Furthermore, in their amended complaint, in addition to a claim for irreparable harm to their property, the Martins raised a breach of contract claim and requested an award of damages, "including any diminution in the market value of their home and lot, their attorneys [sic.] fees and costs to be paid by the [Association]."

{¶131} The Martins contend that because specific performance in this case is impossible, moving their house to improve their view is the next best thing. However, the Martins never alleged in their amended complaint that they were entitled to "cost-to-cure" damages so that they could move their house.

{¶132} The cost-to-cure damages in this case are special damages. "Special damages' are damages of such a nature that they do not follow as a necessary consequence of the injury complained of." *Gennari v. Andres-Tucker Funeral Home*,

Inc. (1986), 21 Ohio St.3d 102, 106, 488 N.E.2d 174. A party must specifically state special damages in the complaint. Civ.R. 9(G). Moving an entire house does not follow as a necessary consequence from a breach of the Association rules. Instead, it is more likely that if a breach occurred, damages could be recovered for the loss of value to the property and/or specific performance of the contract.

{¶33} In general, specific performance can be awarded if there was a valid enforceable contract that was breached. *Shaffer v. Shaffer*, 3d Dist. No. 8-05-18, 2006-Ohio-1997, at ¶25. However, courts will not issue a decree of specific performance where such performance is impossible. *Settles v. Invesco Real Estate Partnership* (Dec. 4, 1989), 12th Dist. No. CA89-03-047. In those cases, an award of damages may be warranted. *Id.*

{¶34} In *Martin*, 2005-Ohio-7062, at ¶54, we found that "the harm incurred by demolition of the home and displacement of its residents is disproportionate to the harm incurred by the existing construction's effect of a diminished view and lack of privacy." Therefore, we concluded that the trial court did not err in denying an injunction with orders to demolish and relocate the Mizerik residence. Thus, we found specific performance of the contract in this case to be unreasonable and determined that the Martins could be compensated monetarily.

{¶35} "The general measure of damages in a breach of contract case is the amount necessary to put the non-breaching party in the position that the party would have occupied had the breach not occurred." *Loop v. Hall*, 4th Dist. No. 05CA3041, 2006-Ohio-4363, at ¶23. In this case, had the Mizeriks not built their house in violation of the ten-foot rule, the value of the Martins' house would have remained the same. But because the Mizeriks did not comply with the ten-foot rule, their house now obstructs the Martins' view of the lake. This diminished lake view decreased the value of the Martins' property. Thus, under this breach of contract theory, the measure of damages is the same as the general rule for damages to real property. The Martins are entitled to the difference in the value of their house before the Mizeriks built and the value of their house after the Mizeriks built. This will put

the Martins in the same position monetarily as they would have been had the Mizeriks not built their house in violation of the ten-foot rule.

{¶36} Therefore, the trial court did not err in disallowing the Martins from presenting cost-to-cure evidence. Accordingly, the Martins' first assignment of error is without merit.

{¶37} The Martins' second assignment of error states:

{¶38} "EVEN IF DEFENDANTS' LIABILITY WERE BASED SOLELY ON TORTIOUS INJURY TO REAL PROPERTY, THE TRIAL COURT ERRED WHEN IT FAILED TO RECOGNIZE THAT THE MARTIN HOME QUALIFIES AS AN EXCEPTION TO THE GENERAL DAMAGES RULE."

{¶39} Here the Martins argue that even if the general rule as stated in *Ohio Collieries*, supra, applies, two exceptions apply to their situation.

{¶40} First, they argue that equity can require an exception when the general damages rule does not fully compensate the injured party. Second, the Martins argue that restoration costs may be recovered in excess of diminution of market value when the injured party intended to use the property for residential or recreational purposes. They contend that they provided evidence of the unique aspect of the injury to their property as demonstrated by Plaintiff's Exhibits 31 and 32, which are photographs of the view of the lake from their house before and after the construction of the Mizeriks' house. Before the construction of the Mizeriks' house, the Martins' view was looking out into trees with a full view of the lake through the trees. After the construction, their view is now of the Mizeriks' house and a small portion of the lake.

{¶41} In reply, the Mizeriks argue that an exception to the general rule of damages may not be taken until the plaintiff *first* proves the value of their property before and after the injury to their property. Because they allege that the Martins failed to establish "before" and "after" values for their property, the Mizeriks argue that the Martins cannot move on to apply an exception.

{¶42} As will be discussed below, the Martins did offer evidence to establish approximate before and after values for their home by way of two witnesses' testimony. Thus, the Mizeriks' argument on this point must fail.

{¶43} The Martins argue that because they intended to use their property for recreational and residential purposes, they were entitled to recover restoration costs in excess of the diminution in value. They rely on *Coldsnow v. Hartshorne*, 7th Dist. No. 01-CO-65, 2003-Ohio-1233, *Fantozzi v. Henderson*, 8th Dist. No. 87270, 2006-Ohio-5590, and *Apel v. Katz* (1998), 83 Ohio St.3d 11, 697 N.E.2d 600, for support.

{¶44} In *Coldsnow*, 2003-Ohio-1233, this court held that in a case involving a violation of R.C. 901.51, which prohibits anyone from cutting down trees on another's property, restoration/replacement cost of the trees is a proper measure of damages when the injured party intended to use the property for residential or recreational purposes, according to their personal tastes and wishes. *Id.* at ¶9. Because the plaintiff in that case used his property for recreational purposes, we concluded that he was not required to first show a diminution in value of the land before receiving restoration damages. *Id.* Additionally, when the defendant attempted to rely on a case that did not deal with a R.C. 901.51 claim and instead dealt with fraud in selling a home, we stated that the case was "completely inapplicable." *Id.* at ¶22.

{¶45} In *Fantozzi*, 2006-Ohio-5590, the Hendersons filed a counterclaim for trespass and an R.C. 901.51 violation. They argued that the Fantozzis trespassed onto their property, cut down their trees, regraded a portion of their property, and erected a fence on their property. The trial court ruled in favor of the Fantozzis and the Hendersons appealed. The Eighth District noted that an exception applied to the general rule of damages providing "that restoration costs may be recovered in excess of diminution in fair market value when real estate is held for noncommercial use, when there are reasons personal to the owner for seeking restoration, and when the diminution in fair market value does not adequately compensate the owner for the harm done." *Id.* at ¶17. However, the court did not apply the exception because

the Hendersons did not demonstrate that they used the injured area of their property. Id. at ¶18.

{¶46} In *Apel*, 83 Ohio St.3d 11, a case involving damages for trespass arising from a dispute over an easement, the Apels argued that the trial court erred by not instructing that the Katzs' damages were limited to the diminution in fair market value of the property caused by the Apels' conduct. The Ohio Supreme Court disagreed and stated that some flexibility in the general rule is permissible in the ascertainment of damages suffered in the appropriate situation. Id. at 20.

{¶47} These cases all involved actions to recover damages for injury to real property as the result of trespass. Two of them involved cutting down trees belonging to a neighboring property owner and the other involved a roadway over the property. In this case however, there was no trespass and no physical damage. The damage was limited to a blocked lake view resulting from construction on the Mizeriks' property. The Mizeriks never trespassed onto or physically damaged the Martins' property. Thus, these cases are distinguishable. In fact, this court stated in our previous decision, "actual encroachment upon a neighbor's property is much more violative of property rights than the alleged violation of a depth variant restriction." *Martin*, 2005-Ohio-7062, at ¶52. The Martins have cited to no cases where the cost to cure is an appropriate measure of damages when there is no encroachment on the neighbor's land. Accordingly, the Martins' second assignment of error is without merit.

{¶48} The Martins' third assignment of error states:

{¶49} "THE TRIAL COURT ERRED IN FAILING TO AWARD DAMAGES TO PLAINTIFFS."

{¶50} The Martins argue that the trial court erred in determining that they were not entitled to damages. They first assert that the trial court failed to follow the law of the case because the trial court found that they were not entitled to damages after this court stated that they were entitled to some damages.

{¶51} The law of the case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.

{¶52} In our previous decision, this court stated: "[I]t is clear that the Martins' suffered some damages for loss of privacy and partial loss of a lake view with a substituted view of the back of a house and a driveway. The question remains as to the amount of their damages." *Martin*, 2005-Ohio-7062, at ¶91. We determined that the Martins were entitled to some damages. We remanded this case so that the court could determine what amount of damages the Martins were entitled to. Per our decision, it became the law of the case that the Martins were entitled to some amount of damages.

{¶53} At one point during the damages hearing, the trial court stated: "This case was reversed solely for the purpose of determining an amount of damages, *if any*, that are appropriate." (Tr. 205; Emphasis added.) And in its findings of fact and conclusions of law, the court found that the Martins did not prove that their property value had been diminished. By these statements, the trial court ignored this court's determination that the Martins were in fact entitled to some damages. And by awarding no damages to the Martins the trial court further ignored our previous decision.

{¶54} Because the trial court failed to award the Martins any damages, we will move on to consider the evidence presented. Three witnesses' testimony is relevant here: Glenn Miller, Patricia Martin, and Staci Kamp.

{¶55} Miller is a real estate appraiser and a former realtor. Miller opined that when the Mizeriks built their house, the Martins lost 45 percent of their lake view. (Miller Tr. 38). He stated that this loss of view resulted in a decrease in value because potential buyers of lakefront property want a good view. (Miller Tr. 39). According to Miller, the blockage by the Mizerik house resulted in a \$75,000 decrease in the Martins' property value. (Miller Tr. 51).

{¶56} Miller based his opinion on the sale of a comparable house to the Martins' house, known as 180 Cheyenne Trail, and other comparable houses with a limited lake view and without a lake view. (Miller Tr. 16). Miller took these comparable sales and then made monetary adjustments to them to make them as similar as possible to the subject property, which in this case was 180 Cheyenne Trail. (Miller Tr. 20). He made an adjustment to those properties that did not have any lake frontage in the amount of \$75,000. (Miller Tr. 20-21). Miller stated that he used the value of \$75,000 based on "market experience" and the statistical data contained in his report. (Miller Tr. 70, 107-108). Miller used recently sold houses to reach his opinion as to the value of the damage to the Martins' property because these houses had been tested on the open market. (Miller Tr. 24). Miller also visited the Martin property to observe their view. (Miller Tr. 38). However, Miller did not conduct an actual appraisal of the Martins' house. (Miller Tr. 44, 61).

{¶57} Miller testified that in his opinion, the Martins' house was worth \$422,500 before the Mizeriks built their house. (Miller Tr. 48). He based this opinion on the fact that 180 Cheyenne Trail, a very similar property, sold for this amount. (Miller Tr. 48, 50). Miller further opined that after the Mizeriks built their house, the Martins' house was worth \$347,500. (Miller Tr. 54-55). He attributed the reduction in value to the lake view obstruction caused by the Mizeriks' house. (Miller Tr. 55).

{¶58} Staci Kamp, a real estate appraiser, testified for the Mizeriks and the Association. She opined that Miller's opinion was not valid because he failed to follow federal guidelines in making his adjustments. (Tr. 319-320). She stated that Miller made adjustments to his comparables that exceeded 100 percent when the guidelines state that the comparable should not be used if the adjustment exceeds 25 percent. (Tr. 321).

{¶59} The court also considered Mrs. Martin's testimony. Mrs. Martin is one of the parties and is also a realtor. Under the owner-opinion rule, an owner is permitted to testify concerning the value of her property without being qualified as an expert because she is presumed to be familiar with it from having purchased or dealt

with it. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 605 N.E.2d 936, at paragraph two of the syllabus. The weight to be given to the owner's opinion is for the trier of fact. *Wurzelbacher v. Colerain Twp. Bd. of Trustees* (1995), 105 Ohio App.3d 97, 100, 663 N.E.2d 713.

{¶60} Mrs. Martin testified that she did a market analysis for her property using three comparable properties that had recently sold, including 180 Cheyenne Trail. (Tr. 76-77). Mrs. Martin testified that she believed that the value of her property before the Mizeriks built their house was approximately \$425,000. (Tr. 100-101, 189). However, after the Mizeriks built their house, Mrs. Martin opined that her house was now worth approximately \$299,000 to \$325,000. (Tr. 101, 189). In other words, Mrs. Martin opined that the construction of the Mizerik home diminished the value of her property by approximately \$100,000 to \$125,000. (Tr. 101, 189).

{¶61} Finally, the court considered Kamp's testimony. She looked at all of the properties she could find on Lake Mohawk that had recently sold, regardless of value. (Tr. 295). She also observed the Martin and Mizerik homes. (Tr. 299). Kamp concluded that the construction of the Mizerik home did not decrease the value of the Martin home. (Tr. 307-308). In fact, she opined that because the Mizeriks removed trees from their property that were blocking the Martins' lake view, the Mizeriks actually increased the value of the Martin home. (Tr. 307-308, 309). However, she then stated that in her opinion, the Mizeriks' home did not affect the value of the Martins' home. (Tr. 310). In reaching her opinion, Kamp did not evaluate the Martins' property with any comparable properties. (Tr. 332-33, 335).

{¶62} Miller opined that Kamp's opinion and report were not useful in this case because she did not evaluate the damage to the Martins' property based on other specific comparable sales in the Lake Mohawk area. (Miller Tr. 27). He opined that Kamp's report was simply a "generic narrative" of Lake Mohawk properties. (Miller Tr. 27).

{¶63} Based on this evidence, the trial court made the following conclusions. It concluded that Mrs. Martin's opinion was speculative at best because she admitted

that she never entered onto her comparable properties to view the lake and, therefore, her owner-opinion was flawed. For this reason and because she was a co-plaintiff with a direct interest in this case, the court stated that it placed no weight on Mrs. Martin's opinion. The court further stated that it placed no weight on Miller's testimony. It reasoned that Miller stated that the Martin property would be worth \$75,000 less with no lake view at all. It further pointed out that Miller stated that he was retained in order to establish the value of the lake view and did not conduct an appraisal of the Martin property. The court stated that Miller's testimony did not establish the value of the Martins' property immediately before and after the construction of the Mizeriks' home. Thus, the court concluded that the Martins failed to carry their burden of proof as to damages.

{¶64} Generally a reviewing court will not reverse a trial court's decision regarding its determination of damages absent an abuse of discretion. *Kaufman v. Byers*, 159 Ohio App.3d 238, 823 N.E.2d 530, 2004-Ohio-6346, at ¶37. Abuse of discretion connotes more than an error of law; it implies that the trial court's judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶65} In this case, the trial court abused its discretion in deciding not to award any damages to the Martins. As noted above, in our previous decision this court determined that the Martins were entitled to some monetary damages. However, the trial court awarded them nothing.

{¶66} Furthermore, although the Association argues that the Martins failed to present any evidence of the value of their house before and after the Mizeriks built, this simply is not true. While the Martins did not present an appraisal value of their home before and after the Mizeriks built, they did submit testimony by two witnesses as to the before and after values. Both Miller and Mrs. Martin testified as to the approximate values before and after the Mizeriks built their house. Miller testified that the Martin house was worth \$422,500 before the Mizeriks built and \$347,500

after the Mizeriks built. And Mrs. Martin testified that her house was worth approximately \$425,000 before and \$299,000 to \$325,000 after.

{¶67} Additionally, the trial court stated that it would not give any weight to Miller's testimony because Miller testified that he valued a lake view at \$75,000. He then stated that this was the amount that the Martins were damaged by the Mizeriks obstructing their view, even though the Martins retained a partial lake view. While the trial court may have determined that Miller's computation was flawed, it should not have completely disregarded his testimony. It could have determined what 45 percent of the \$75,000 figure was and awarded the Martins that amount since Miller stated that the Martins' view was reduced by 45 percent.

{¶68} For these reasons, the trial court abused its discretion in determining that the Martins were not entitled to any damages.

{¶69} Finally, the Martins contend that they also presented sufficient evidence that the court should have awarded them attorney's fees and costs. They assert that both the Mizeriks and the Association acted with bad faith and malice. The Martins claim that when the Mizeriks were faced with this lawsuit and a potential injunction, they went ahead with the construction of their home in conscious disregard of the Martins' rights. And as to the Association, the Martins assert that it failed to enforce its own restrictions and allowed itself to be intimidated by the Mizeriks' general contractor.

{¶70} The standard of review on the issue of attorney fees is abuse of discretion. *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 160, 648 N.E.2d 488.

{¶71} It is well-settled law that if there is no statutory provision for attorney fees, the prevailing party is not entitled to fees under the American rule unless the party against whom the fees are to be assessed is found to have acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons. *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 314, 649 N.E.2d 1219, citing *Sorin v.*

Warrensville Hts. School Dist. Bd. Of Edn. (1976), 46 Ohio St.2d 177, 181, 347 N.E.2d 527.

{¶72} In this case, there is no statutory provision for attorney fees. Therefore, unless the Martins proved that the Association and the Mizeriks acted in bad faith, or in the other manners listed above, then they were not entitled to attorney fees. The following evidence is relevant.

{¶73} When asked whether she believed the Association acted with the intent to injure her, Mrs. Martin responded, "[t]hey wouldn't have known by acting in the manner that they did that the result would be we would be injured." (Tr. 152). And in her deposition, which was brought out at the hearing, Mrs. Martin stated, "I don't believe that they [the Association] maliciously figured to make us miserable." (Tr. 154). And Mrs. Martin testified that before the Mizeriks began construction, the parties had a meeting to go over the facts and try to work out a reasonable solution. (Tr. 181).

{¶74} Additionally, Scott Noble, the manager of the Association, testified. He stated that when the Association applied its formula for the depth variance, it applied the same practice in this case as it had in every other instance. (Tr. 243). Noble also testified that when he learned that the Martins had continuing issues with the Mizeriks' construction, he asked the Mizeriks' contractor to halt construction for two weeks before the foundation had even been laid. (Tr. 241-42).

{¶75} This testimony supports the court's decision not to award attorney fees to the Martins. The evidence demonstrates that the Association did not apply its formula any differently in this case than it had in other cases. Furthermore, when the Association became aware of the Martins' continuing objection to the construction, Noble attempted to delay construction in order to give the parties time to reach an agreement. And Mrs. Martin herself testified that she did not believe that the Association acted with the intent to harm her.

{¶76} Additionally, the Martins presented little, if any, evidence that the Mizeriks acted in bad faith. Before commencing construction, the Mizeriks were a

party to the meeting to try to work out a solution with the Martins. Furthermore, when the Mizeriks began construction, they had the proper permits and the permission of the Association. And while the Martins had instituted this lawsuit, no temporary injunction or other court order was in place that would restrict the Mizeriks from proceeding with construction. Given these facts, it was not unreasonable for the trial court to deny the Martins' request for attorney fees and costs.

{¶77} Accordingly, the Martins' third assignment of error has merit as it relates to damages. It is without merit as it relates to attorney fees and costs.

{¶78} The Martins' fourth assignment of error states:

{¶79} "THE TRIAL COURT ERRED WHEN IT DISMISSED DEFENDANTS ROBERT AND NANCY MIZERIK PURSUANT TO CIV.R. 41(B)(2)."

{¶80} Here the Martins once again argue that the trial court did not follow the law of the case. They point out that in their previous appeal they raised the issue of the Mizeriks' Civ.R. 41(B)(2) dismissal. This court reversed that aspect of the trial court's judgment and remanded the matter for a damages hearing. Thus, the Martins argue that the trial court was limited to determining the amount of damages that they were owed and could not dismiss the Mizeriks.

{¶81} The Martins next contend that their amended complaint in which they sought "such other equitable relief as the Court may determine is just under the circumstances," was sufficient to put the Mizeriks on notice that they were seeking any appropriate remedy, including monetary damages.

{¶82} An appellate court reviews a trial court's decision to dismiss a complaint under Civ.R. 41(B) for an abuse of discretion. *Knight v. Nowak*, 9th Dist. No. 04CA008564, 2005-Ohio-2302, at ¶13.

{¶83} In *Martin*, 2005-Ohio-7062, the Martins appealed the Civ.R. 41(B)(2) dismissal of both the Association and the Mizeriks. At that time, the trial court dismissed the Mizeriks, along with the Association, because it found that they properly applied the formula and did not violate the ten-foot depth restriction. We reversed, finding that they improperly applied the formula and violated the depth

restriction. However, we determined that the trial court did not err in denying injunctive relief. After our reversal, both the Association and the Mizeriks were reinstated as defendants in this case.

{¶84} This time the trial court dismissed the Mizeriks because it found that the Martins' claim for money damages was asserted only against the Association and not the Mizeriks. The court found that in their amended complaint the Martins asserted one claim for an injunction/equitable relief against the Mizeriks and the Association and a second claim for breach of contract and money damages against only the Association.

{¶85} Civ.R. 54(C) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings." However, the Ohio Supreme Court has stated: "Under Civ.R. 54(C), a party is not limited to the relief claimed in the pleadings, except when judgment by default is entered or when a judgment for money is sought and awarded." *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 325 N.E.2d 544, at paragraph three of the syllabus.

{¶86} In their amended complaint, the Martins asserted two claims, the first for injunctive relief and the second for breach of contract. In their prayer for relief, the Martins requested:

{¶87} "[A] permanent injunction * * * which will require that the Mizeriks relocate their new construction * * *; for their attorneys [sic.] fees, costs and costs [sic.]; and, for such other equitable relief as the Court may determine is just under the circumstances. If the Court determines that for some reason the LMPOA [the Association] Building Codes are not enforceable in this instance, the Martins request an award of adequate damages including any diminution in the market value of their home and lot, their attorneys [sic.] fees and costs to be paid by the LMPOA [the Association]."

{¶88} Additionally, in the body of their claim against the Mizeriks, the Martins asserted "[t]he Mizeriks' new construction will cause irreparable harm to the Martins"

and "the Mizeriks' new construction will considerably diminish the value of the Martins' property." (Amended complaint ¶6).

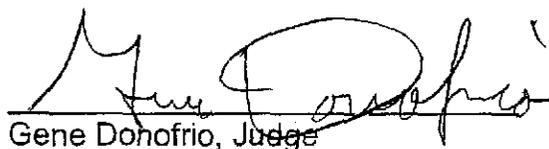
{¶89} These statements in the Martins' complaint coupled with their claim for "such other equitable relief" was sufficient to constitute a claim for money damages against the Mizeriks. Furthermore, this court already determined that the Mizeriks were to be reinstated as defendants in this case as it proceeded to a damages hearing. Thus, the trial court should not have granted the Mizeriks' Civ.R. 41(B)(2) motion.

{¶90} Accordingly, the Martins' fourth assignment of error has merit.

{¶91} For the reasons stated above, the trial court's judgment is hereby affirmed in part, reversed in part, and remanded. The court's judgment denying attorney's fees and costs is affirmed. The court's judgment dismissing the Mizeriks is reversed. The Mizeriks are reinstated as defendants in this case. The court's judgment finding that the Martins are entitled to no damages is reversed. The matter is hereby remanded so that the trial court can determine the appropriate amount of damages to which the Martins are entitled.

Vukovich, J., concurs.
Waite, J., concurs.

APPROVED:


Gene Dohofrio, Judge

FILED

STATE OF OHIO, CARROLL COUNTY
IN THE COURT OF APPEALS

DEC 27 2005

SEVENTH DISTRICT

COURT OF APPEALS
CARROLL COUNTY, OHIO

EMERY MARTIN, et al.,)
)
 PLAINTIFFS-APPELLANTS,)
)
 - VS -)
)
 LAKE MOHAWK PROPERTY)
 OWNER'S ASSOCIATION, et al.,)
)
 DEFENDANTS-APPELLEES.)

CASE NO. 04 CA 815

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 04CVH23875.

JUDGMENT: Affirmed in Part, Reversed in Part
and Remanded.

APPEARANCES:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 23, 2005

VUKOVICH, J.

{¶1} Plaintiffs-appellants Emery Martin and his family appeal the decision of the Carroll County Common Pleas Court which granted the motion to dismiss filed by defendants-appellees Lake Mohawk Property Owner's Association and Robert and Nancy Mizerik. The dismissal was entered as per Civ.R. 41(B)(2) after the Martins' presented their case in chief. The threshold issue on appeal concerns the interpretation of a depth restriction in the Association's "building code." The Martins also argue that the court should have granted a preliminary and a permanent injunction and should have allowed their witness to give expert testimony on the diminution in value of their residence.

{¶2} For the following reasons, we hold that the trial court failed to apply the disputed restriction in the manner required by its plain terms. The court's decisions on the preliminary and permanent injunctions were not erroneous. However, due to the plain language of the restriction and the court's preclusion of testimony on damages combined with a refusal to permit the plaintiffs' case to run more than three hours, this case is reversed and remanded for a new hearing on damages for violation of the depth restriction.

STATEMENT OF THE FACTS

{¶3} Five members of the Martin family are owners of a house on Lot 1043 which fronts Lake Mohawk in Carroll County. The lake's high water line is 154 feet from the closest point of the Martin's home. The Mizeriks purchased Lot 1042 in order to construct a lake front residence. Both lots are 295 feet deep. Lot 1041, on the other side of the Mizeriks' new property, is vacant.

{¶4} The Mizeriks wanted to build an L-shaped house that was physically sixty-two feet deep at its deepest point. And, they wished to build it a mere ninety-four feet from the lake's high water mark; more than fifty feet closer to the lake than the Martins' house. However, the Association's building code contains a restriction that applies to all structures and reads as follows:

{¶15} "Any new residence or remodeling must be positioned on the property so as to vary 10 feet or less in depth from it's [sic] neighboring residences. See exhibit for formula." Section (A)(6)(c).

{¶16} The exhibit incorporated into this restriction is entitled, "New Residence Depth." A formula is listed for lake front property in order to determine the minimum distance from the nearest part of the structure to the high water line. The example use of the formula assumes that there are two existing houses, House A and House C, and solves for the new house to be constructed between the existing houses. An example shows House A at 80 feet from the high water line and House C at 100 feet from the high water line. Using these figures, the formula proceeds: $\text{House A } 80 + \text{House C } 100 = 180 / 2 = 90 - 10 = 80$, meaning the new house must be at least 80 feet from the high water line.

{¶17} In February 2003, the Mizeriks wrote a letter to the Association noting that the Association's building inspector did not believe their plans fit with the present 10 foot allowance. They thus asked for a variance. In April 2003, the Association responded that a variance would not be necessary as long as the Mizeriks constructed their house at least 92 feet from the high water line of the lake. To arrive at this number, the Association applied the formula even though Lot 1041 was vacant. The Association imputed a distance from the water of 50 feet for the vacant lot merely because that is the absolute minimum distance a house can be from the water line as per the lake's warranty deed. Thus, their application of the formula proceeded as follows: " $154 \text{ ft} + 50 \text{ ft} = 204 / 2 = 102 - 10 = 92 \text{ ft}$."

{¶18} A copy of the Association's response was sent to the Martins. An attorney for the Martins immediately responded that the formula had been misconstrued and asked that they be permitted to present their objections at a board of directors meeting. The parties met with the community manager at the building site in May 2003. In a follow-up letter, the Martins advised that they were considering the request to compromise on the shorter minimum distance from the water line but they wanted to see plans to determine how high the Mizeriks' house would rise in their view.

{¶9} Regardless, a building permit was issued on May 3, 2004, and the Mizeriks began construction. When the Martins realized that the Mizeriks still intended to place the closest portion of their house 94 feet from the high water mark, they complained. The Association ordered that construction stop, but then changed its mind after complaints from the Mizeriks' builder.

{¶10} On May 14, 2004, Emery and Patricia Martin filed a complaint for a preliminary and permanent injunction against the Mizeriks and the Association. On June 9, 2004, the court held a hearing on the request for a preliminary injunction. The Martins called the Association's building inspector to testify. When questioned about the restriction containing the ten foot depth variation, he stated:

{¶11} "I have applied the formula to all residences. * * * You can't go by the formula and the paragraph. They, they would sort of contradict each other. Quite honestly, I didn't even know it said 10 feet or less." (06/09/04 Tr. 17).

{¶12} Due to the court's time restraints, this was the only witness. The court concluded that it had not heard enough to grant or deny a preliminary injunction but they were out of time for the day. (06/09/04 Tr. 44). The court then advised that it was combining the preliminary injunction hearing with an accelerated merits hearing for the permanent injunction as per Civ.R. 65(B)(2). This hearing was set for June 16, 2004.

{¶13} Various occurrences then delayed the accelerated hearing for five months. For instance, the Martins sought to amend their case to a class action since the inspector stated that he does and will continue to ignore the restriction regarding ten foot depth variation. The Mizeriks filed a motion to dismiss or for summary judgment. A motion hearing was scheduled and then continued on the request of the Association. That motion hearing was held on June 30, 2004. The court denied the class certification and overruled the motion to dismiss. The defense then filed a successful motion to join the Martins' children who were discovered to be joint owners of the property. On August 3, 2004, the Martins amended their complaint to name their children as fellow plaintiffs. New answers were filed. In September 2004, the case was set for trial on November 3 but was later continued on request of the Association.

{¶14} Finally, the trial was held on November 19, 2004. After the Martins presented their case in chief, the defense filed a Civ.R. 41(B)(2) motion to dismiss. The court orally granted the motion. The court journalized its dismissal in a November 29, 2004 judgment entry from which this appeal was taken. The Martins had previously requested findings of fact and conclusions of law, which were filed by the court on January 10, 2005. See Civ.R. 41(B)(2) (the court shall make findings of fact and conclusions of law if requested by a party after dismissal in a non-jury action).

{¶15} When addressing the permanent injunction, the court found it significant that the Mizeriks' residence was essentially complete and that the Martins failed to seek a temporary restraining order and never obtained the preliminary injunction. The court noted that it would not order a house to relocate where provisional relief could have been timely achieved if proper. The court concluded that the issuance of a permanent injunction at this time would be inequitable due to the passage of time and change in circumstances.

{¶16} In addition, the court concluded that the formula in the code had been properly applied and that it incorporated the ten foot depth restriction. The court noted that the variance committee and the building inspector independently arrived at decisions that the placement complied with the formula. Thus, the court found the actions for permanent injunction and for monetary damages both failed. The Martins are the appellants herein, and the Mizeriks and the Association are the appellees.

Civ.R. 41(B)(2) DISMISSAL

{¶17} First, we shall explain the effect of a Civ.R. 41(B)(2) dismissal. The Mizeriks' appellee's brief purports to set forth the trial court's standard when reviewing this motion to dismiss as follows: when dismissing for failure to state a claim it must appear beyond doubt from viewing the evidence that the plaintiff can prove no set of facts entitling him to relief. However, the Mizeriks' statement of the law is incorrect.

{¶18} As the Association's brief points out, a Civ.R. 41(B)(2) dismissal in a civil non-jury trial is more akin to judgment after trial than to an actual dismissal. Civ.R. 41(B)(2) provides that after the plaintiff in a bench trial completes his presentation of evidence, the defendant can move for dismissal on the ground that the facts and law show no right to relief. The court can then determine the facts and render judgment.

Contrary to the Mizeriks' short argument, the court is not limited to viewing the complaint as in cases of a Civ.R. 12(B)(6) dismissal.

{¶19} Rather, in a trial without a jury, Civ.R. 41(B)(2) allows the trial court to determine the facts by weighing the evidence and to render judgment against the plaintiff at the close of plaintiff's case. *Leseganich v. United Steel Workers of America* (Sept. 9, 1987), 7th Dist. No. 86CA128. The trial court's dismissal of a case on this ground generally will not be set aside unless erroneous as a matter of law or against the manifest weight of the evidence just as if the entire trial proceeded. *Id.* The premise behind the rule is if the court in a bench trial disbelieves the plaintiff's facts or disagrees with the plaintiff's urged application of the law, then there is no reason to hear the defendant's case. Thus, we continue our review as in any case where judgment is rendered for the defendants after a regular trial on the merits.

THRESHOLD ISSUE

{¶20} The main issue we must consider is whether the Mizeriks' house was built in violation of Section (A)(6)(c) of the building code. This issue is presented under the Martin's second assignment of error when discussing the propriety of a permanent injunction. But, it seems best to conduct our de novo review of this legal issue first.

{¶21} The Martins argue that the court erred as a matter of law in its interpretation and application of the Association's building code. They urge that the Mizeriks' construction at a depth from the high water line varying more than ten feet from their house is a clear violation of Section (A)(6)(c) of the building code. The Martins contend that Section (A)(6)(c) is an unambiguous restriction which should be applied, not construed. Thus, they urge that the court should not have considered the interpretation and past practice of the zoning inspector and the variance committee. They note that the formula deals with distance from the high water line where there are two neighboring houses and does not provide for a situation where there is only one neighboring house. They conclude that the formula cannot be read to totally wipe out the concise ten foot depth restriction.

{¶22} The Association counters that the formula, which is incorporated into the restriction, cannot be totally ignored. They argue that the ten foot depth restriction is a

component of the formula and that the formula is to be applied in all cases. The Mizeriks respond to all three assignments of error with a mere one page of general arguments and do not add anything of substance to this issue.

{¶23} As in the case of all contracts, deeds or other written instruments, the construction of the writing is a matter of law which is reviewed de novo. *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576. If the writing is clear and unambiguous, it shall be applied as written, rather than interpreted or constructed. *LJ Minor Corp. v. Breitenbach* (1996), 77 Ohio St.3d 168, 171.

{¶24} If a portion of a writing is unclear and can reasonably be construed in more than one contradictory manner, it is said to be ambiguous. *Hunker v. Whiteacre-Greer Fireproofing Co.*, 155 Ohio App.3d 325, 2003-Ohio-6281, ¶12. It is only where the writing is ambiguous that extrinsic evidence can be used to determine the intended meaning of the writing. *Id.* at ¶13. In which case, the court could inquire the object sought to be attained by the disputed portion of the writing, the circumstances under which it was written, the history of its enactment, any former provision substituted by this provision, the effect and consequences of each construction, and any administrative construction. See R.C. 1.49 (setting forth rules of statutory construction for ambiguous laws, which applies nicely in many other interpretation settings).

{¶25} Where language in a real property restriction is ambiguous, courts are encouraged to adopt the construction which least restricts the free use of the land. *Gennari v. Andres-Tucker Funeral Home, Inc.* (1986), 21 Ohio St.3d 102, 103; *Houk v. Ross* (1973), 34 Ohio St.2d 77, ¶2 of syllabus, 90. In any event, if the language in a real property restriction is clear, the court must simply enforce it as written. *Cleveland Baptist Assn. v. Scovil* (1923), 107 Ohio St. 67, 72. See, also, *Haller v. Hickory Creek Homeowners Assn.* (Dec. 14, 2001), 1st Dist. No. C-010332; *Catawba Orchard Beach Assn., Inc. v. Basinger* (1996), 115 Ohio App.3d 402, 408 (6th Dist.).

{¶26} We are faced with the question of whether the clear language of the first sentence in Section (A)(6)(c) is made ambiguous by the last sentence which directs the reader to the formula in an exhibit and where that formula allows a variance of more than a ten foot depth differential. In doing so, we must determine whether the

formula was properly applied where there was an existing house in *only one* of the neighboring lots.

{¶27} It seems clear that the formula is only to be applied where there are existing houses on both sides of the new house. There is no need to resort to the formula to apply a ten foot depth restriction when there is only one neighbor. A conflict in applying the ten foot rule only arises, giving rise to the need for a formula, when two houses on either side of a vacant lot have diverse depths making it impossible to comply with the ten foot rule as to both neighbors. The restriction is clear. The formula and the example include the depth of *two* neighboring residences. Here, there is no neighboring residence for the "House C" blank in the formula and, thus, the formula is inapplicable.

{¶28} Once again Section (A)(6)(c) provides: "Any new residence or remodeling must be positioned on the property so as to vary 10 feet or less in depth from it's [sic] neighboring residences. See exhibit for formula." It explicitly states neighboring "residences," and the formula explicitly states "House" C. There is no neighboring "residence" or "house" on Lot 1041. Thus, the party building on Lot 1042 must only consider their existing neighbor's residence on Lot 1043.

{¶29} Imputation of a placement of fifty feet from the high water line for a nonexistent residence is clearly improper and disingenuous. (In fact, if the owner of Lot 1041 built before the Mizeriks, there is no indication he could have built a mere fifty feet from the water; rather, an exhibit seems to show that Lot 1041 has an existing neighbor on the far side requiring a much further setback for Lot 1041, even using the Association's misguided formula application.)

{¶30} The formula specifically contains two existing "house[s]." The general existence of a fifty foot minimum setback from the lake does not give rise to the ability of the building party with a vacant lot on one side to pretend that his nonexistent neighbor has a house with a mere fifty foot setback and insert this fifty foot figure into a formula created to compromise where there are existing neighboring dwellings on both sides. The application advanced by the Association and the Mizeriks renders the ten foot rule nonexistent; merely because the number 10 is subtracted in the formula does not make the ten foot rule merged out of existence.

{¶31} In fact, rather than merely finding the formula inapplicable where there is only one neighbor, the formula could be properly applied to arrive at the same conclusion as ignoring it. The formula with only one residence as applied to this case would actually be: $154 + 0 = 154 / 1 = 154 - 10 = 144$. This application of the formula arrives at the same ten foot depth variant as applying the restriction without using the formula.

{¶32} Either way, the language at issue is clear and unambiguous. A new neighbor cannot build his house with more than a ten foot depth variation from his neighboring residences unless there is more than one neighboring residence and the formula provides for a different figure regarding the minimum depth on the lot. If there is only one neighboring residence because the other neighbor's lot is vacant, the rule and the formula arrive at a ten foot maximum depth differential.

{¶33} The restriction protects existing houses from new neighbors building in front of their houses and impeding their view of the lake. Here, the Martins were left unprotected by their Association and their neighbors who are members of that Association. They had a right to seek enforcement of the Associations' building code. See, e.g., *Ormond v. Rollingbrook Estates Homeowners Assn.* (Dec. 7, 2000), 8th Dist. No. 76482, citing *Wallace v. The Clifton Land Co.* (1915), 92 Ohio St. 348. The plain language of the restriction established the Martins' claim on the merits. As such, the threshold issue is resolved in the Martins' favor, and their second assignment of error is thus sustained in pertinent part.

ASSIGNMENT OF ERROR NUMBER ONE

{¶34} We shall next address the Martins first assignment of error, which alleges:

{¶35} "THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION."

{¶36} In seeking a preliminary injunction, the following four factors are relevant: (1) there is a substantial likelihood of success on the merits, (2) the plaintiff will suffer irreparable harm if the injunction is not granted, (3) no third parties will be unjustifiably harmed by an injunction, and (4) the public interest will be served by an injunction. *Blakeman's Valley Office Equip., Inc. v. Bierdman*, 152 Ohio App.3d 86, 2003-Ohio-

1074, ¶19. See, also, *Rock of Ages Memorial, Inc. v. Braido* (Feb. 8, 2002), 7th Dist. No. 00BA50. No one factor is dispositive as the court balances the equities involved. *Id.* at 20-21. The court must be convinced of the injunction's propriety by clear and convincing evidence. *Id.* The court's judgment granting or denying a motion for a preliminary injunction is said to be reviewed for an abuse of discretion. *Id.* at ¶22.

{¶37} The Martins urge that they presented sufficient evidence of irreparable harm and likelihood of success on the merits for the court to grant a preliminary injunction at the June 9, 2004 hearing. They point out that the court was presented with evidence of the ten foot depth restriction and the fact that it was not applied outright. They note that the court wished to hear more about an alleged agreement between the parties or possible administrative remedies and urge that such concerns were reasons to grant the preliminary injunction rather than merely continue the hearing, especially knowing that the Mizeriks were continuing with their construction.

{¶38} The Association points out that the trial court did not actually deny the motion for a preliminary injunction at the June 9, 2004 hearing. Rather, the court had advised prior to the beginning of the hearing that they would not have enough time to present the entire case that day.

{¶39} Only the building inspector's testimony was presented. Other witnesses were present to testify, but time constraints prevented their testimony on that day. Even if the Martins established a likelihood of success on the merits by presenting the building code and the fact of the improper application, *the Martins did not purport to have completely presented their case. And, the defense had no opportunity to present its case at that hearing.* See, e.g., *City of Cleveland v. K.O. Drugs Boxing Acad.* (Nov. 19, 1998), 8th Dist. No. 74681; *Sea Lakes, Inc. v. Sea Lakes Camping, Inc.* (1992), 78 Ohio App.3d 472, 476 (11th Dist.); *Security First Group, Inc. v. Smith* (Feb. 13, 1990), 10th Dist. No. 89AP-176 (all holding that an evidentiary hearing with notice to the defendant is required). Because the defense is entitled to be heard on the matter of the preliminary injunction, the court did not err in refusing to grant a preliminary injunction at that time. Any arguments referring to the time involved in finally having the hearing to the request are addressed below. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶40} The Martins' second assignment of error contends:

{¶41} "THE TRIAL COURT ERRED IN REFUSING TO GRANT A PERMANENT INJUNCTION."

{¶42} The Martins argue that the court should not have relied on the fact that construction was complete in order to deny injunctive relief forcing a relocation of the residence. The Martins also suggest that if the court would have granted their request for a preliminary injunction, then the court could not have relied on the fact that construction is complete to deny their request for a permanent injunction. It seems they are combining some arguments from the first assignment of error with some timeliness arguments to counter the court's reliance on the absence of a preliminary injunction. We already addressed why the preliminary injunction could not have been granted at the June 9, 2004 hearing. Thus, we are left with the Martins' apparent complaint that they should not be held accountable for the delay in bringing the case to hearing.

{¶43} First, we note that no objection was made to the court's continuation of the preliminary injunction hearing or to consolidation of that hearing with the hearing on the permanent injunction, which the court accelerated. The court scheduled that consolidated and accelerated hearing to take place within the week. Yet, the Martins' request for class action status impeded the ability to hold the hearing as scheduled.

{¶44} Then, the case had to be continued due to discovery that the Martins' children were joint owners, who were not disclosed in the complaint. Thereafter, the Martins amended their complaint to add their children.

{¶45} Additionally, when the Association sought continuances, the Martins did not object. In fact, the Association's September 23, 2004 motion for a continuance states that the Martins consented to continue the scheduled trial. Finally, the Martins did not insist on an earlier trial date or continued acceleration after their amended complaint was filed.

{¶46} Under the facts and circumstances existing herein, the failure to hold a timely hearing (at a time before construction was at a level where the court would determine there was no turning back) shall not be attributed to the court.

{¶47} Still, the Martins urge that a party should not be able to avoid injunctive relief by continuing to construct in the face of a pending injunction action. The Martins ask that an injunction issue requiring the Mizeriks to demolish and relocate their house and blame the extremity of the result on the Associations' and the Mizeriks' own disregard for the lawsuit.

{¶48} A permanent injunction is an equitable remedy granted only where there is irreparable injury and no adequate remedy at law such as monetary damages. See, e.g., *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, ¶75 (noting the traditional rules of equity for issuing an injunction). The party seeking the injunction must prove entitlement to that relief by clear and convincing evidence. *Collins v. Moran*, 7th Dist. No. 02CA218, 2004-Ohio-1381, ¶18.

{¶49} It has been stated that the purpose of an injunction is to avoid a future injury rather than fix a past wrong. See *id.* See, also, *State ex rel. Great Lakes College, Inc. v. Ohio St. Med. Bd.* (1972), 29 Ohio St.2d 198, 201. Still, a mandatory injunction can be issued, for instance, to order removal of an encroachment from neighboring property. See *Busch v. Vosler* (May 27, 1997), 12th Dist. No. CA96-09-14.

{¶50} In determining whether to grant an injunction, the court utilizes a balancing process to weigh the equities involved. *Franklin Cty. Dist. Bd. of Health v. Paxton*, 152 Ohio App.3d 193, 2003-Ohio-1331, ¶25. In weighing these equities, courts have refused to order destruction of costly structures as a matter of economic waste, especially where the owner relied upon the assurances of building officials that the structure complied with all relevant codes. *Miller v. W. Carrollton* (1993), 91 Ohio App.3d 291 (where the appellate court devised a more rational solution than destruction of a car wash built in violation of codes), citing various cases from other states dealing with requests to have structures torn down.

{¶51} The appellate court should not disturb the trial court's decision on such a matter absent an abuse of discretion. *Garono v. State* (1988), 37 Ohio St.3d 171 (also noting that such an injunction is an extraordinary remedy). The decision to grant injunction relief in each case revolves around the particular facts and circumstances and the court's view of the reasonableness of a drastic remedy in each situation. As

aforementioned, an injunction in general is an extraordinary remedy; a mandatory injunction to remove a constructed residence is even more extraordinary. See, e.g., *Spring Valley Investments v. Rite Aid of Ohio, Inc.* (Apr. 14, 2000), 2d Dist. No. 17982 (reversing an order to destroy a Rite Aid store constructed in violation of a restriction).

{152} We first note that actual encroachment upon a neighbor's property is much more violative of property rights than the alleged violation of a depth variant restriction. We then point out that destruction of an essentially completed lake house, which allegedly cost over \$300,000 to build, can be labeled economic waste where the harm is a partially obstructed peripheral view of a lake and a lack of privacy, the loss of which could be compensated in monetary damages.

{153} As the trial court noted, the Martins did not seek a temporary restraining order and caused or acceded too much of the delay in having their case finally heard. The Martins contend that the Mizeriks' action to continue construction pending the suit should not relieve them from relocation. Yet, the Mizeriks were not barred by any court order and had been issued a "building permit" with multiple assurances that their plans complied with the code. See *Miller*, 91 Ohio App.3d at 298, citing 32 Tex. L.Rev. 521 (where Professor Van Hecke reviewed forty-two denials of injunctions to remove structures and noted that good faith is often predicated on reliance of advice of counsel or zoning officials). We do note that there were no actual "officials" involved as this is a housing association and we also note that the Mizeriks themselves initially interpreted the formula in the same manner as the Martins. However, an order to destroy their residence was not mandated in this case.

{154} In conclusion, the harm incurred by demolition of the home and displacement of its residents is disproportionate to the harm incurred by the existing construction's effect of a diminished view and lack of privacy. The trial court reasonably balanced the equities to find that the offending house may remain. As such, the trial court did not err or abuse its discretion in failing to grant the extraordinary remedy of a mandatory injunction with orders to demolish and relocate a costly residence.

ASSIGNMENT OF ERROR NUMBER THREE

{155} The Martins third and final assignment of error provides:

{¶56} "THE TRIAL COURT ERRED IN DENYING THE PLAINTIFFS AN OPPORTUNITY TO PRESENT EVIDENCE OF DAMAGE TO THE MARKET VALUE OF THEIR HOME."

{¶57} The final hearing was set for a 9:00 a.m. one day bench trial on November 19, 2004. When court opened that morning, the court advised that the Martins would have half the day and the defense would have the other half. (11/19/04 Tr. 4). Opening statements were waived. The Martins first presented the testimony of the Association's building inspector.

{¶58} Relevant to this assignment, the building inspector testified that various photographs represented in Plaintiffs' Exhibit 18 were a fair representation of what the Mizeriks' house looks like from the Martins' house. (11/19/04 Tr. 52-53). Some of these photographs were taken from the Martins' fairly elevated deck. Some show the Martins' hot tub in the corner of their deck with a view of *the back* of the Mizeriks' house and driveway when looking directly left or even slightly left. The photographs establish that a great portion of the Martins' view of the lake is completely obstructed by the Mizeriks' violative placement of their long L-shaped house which is physically sixty feet deep at its deepest point. The view from the Martins' walkout basement is even worse.

{¶59} Next, the Martins presented the testimony of a surveyor whose company surveyed the Martins' property before the Mizeriks' house was built. The surveyor had also taken measurements in July 2004 to determine the distance between the Martins' and the Mizeriks' houses. He stated that the rear wall of the Mizeriks' house is over fifty feet from the lake front of the Martins' house. (11/19/04 Tr. 86). (It is even a further differential from the front of the Mizeriks' house to the front of the Martins' house; other testimony established that they vary in distance from the high water mark by well over the ten foot restriction.) The surveyor noted that he was also at the Martins' house the day before the hearing. He stated that he stood on the deck and below it at ground level. The surveyor identified the photographs and opined that the Mizeriks' home obstructs the Martins' view stating:

{¶60} "Well, yeah, if you're standing on the deck the first thing you see is the house. You can't see the lake, I mean * * * you can't see the lake if you, you know, if

you're looking in that direction you see the house. You don't see the water." (11/19/04 Tr. 88).

{¶61} The Martins' third witness was the Association's former counsel who refuted the defense's claim that the Martins had agreed to the location of the Mizeriks' house. Each of the Martins' witnesses was cross-examined by both the Association's counsel and the Mizeriks' counsel.

{¶62} Just before the Martins called their fourth witness to the stand, the court advised that it was 11:55 a.m., that a one hour lunch would take place at noon, and that the Martins thus only had five minutes remaining to prove their case. The Martins' counsel prayed for more time. Yet, the court refused this request, opining that they should have asked for more than a one day trial when the assignment notice was issued and that the defense had the right to their half day which would end at 4:00 p.m. (11/19/04 Tr. 117-118). Apparently then, the trial court believed that a one day trial cannot last more than six hours.

{¶63} Thus, the Martins attempted to rush through a realtor's testimony in their allotted five minutes. The realtor's testimony established that he has been licensed since 1995. He currently sells between ten and fifteen pieces of property per year at Lake Mohawk. He is also a property owner at the lake. In fact, he served as lake manager in 1995 and 1996, which is the position that oversees the building inspector. (11/19/04 Tr. 119). He was asked to describe the purpose and the enforcement of the ten foot depth restriction during his tenure; however, the court sua sponte found such testimony to be irrelevant. (11/19/04 Tr. 120-121).

{¶64} The realtor then revealed that he was the agent who sold the Mizeriks their lot. He testified that he has viewed the houses belonging to the Martins and Mizeriks from the water and from the road. In fact, he drove by them that morning. (11/19/04 Tr. 121). The following then took place:

{¶65} "Q. In the presence, in your opinion, based on your opinion as a broker and a sales person who makes his living selling these lots in Lake Mohawk, does the presence of the Mizerik home, in your opinion, have a material adverse effect on the Martins?

{¶66} "OBJECTION [by the Mizeriks' counsel]: Objection, your Honor.

{¶167} "THE COURT: Sustained.

{¶168} "Q. Could it have?

{¶169} "OBJECTION [by the Mizeriks' counsel]: Objection, your Honor.

{¶170} "THE COURT: That's even worse. Sustained again. Move on."

(11/19/04 Tr. 121-122).

{¶171} After Counsel asked a few more questions about the restriction, the court asked the defense if they had any questions of the realtor. The Mizeriks' attorney presented an exhibit which was an appraisal of the Martin's house from the county auditor's office and tried to have the realtor read the home's appraised value. However, the court sua sponte stated that the question was irrelevant. (11/19/04 Tr. 124). The court then recessed at 12:07 and resumed at 1:10 p.m. The plaintiffs' exhibits were admitted, and the defense successfully moved for the Civ.R. 41(B)(2) dismissal.

{¶172} The court's November 29, 2004 decision stated that the Martins failed to demonstrate a right to relief. The court then released findings of fact and conclusions of law on January 10, 2005. In its findings of fact, the court found that restriction and formula were properly applied and then stated, "There is no evidence in the record to support the Martins' claim that they have sustained monetary damages as a result of the Mizerik home construction." Relevant to this issue, the court stated in its conclusions of law:

{¶173} "Martins failed to present any competent evidence of any alleged monetary loss they claim to have sustained, including any diminution in the market value of their property.

{¶174} "G) Martins failed to meet their burden of proof at trial relative to any of the claims asserted in their Amended Complaint either for injunctive relief or, alternatively, for monetary damages."

{¶175} Under their third assignment of error, the Martins complain that the court would not allow them to inquire about money damages. Specifically, they urge that the realtor should have been permitted to testify on how the value of the Martins' home is affected by the Mizeriks' violation.

{¶76} The Association responds by arguing that a proper foundation was not laid for the realtor's expert opinion. The Association claims that there was no testimony that the realtor experienced the view from the Martins' property or how that view changed. The Association contends that the realtor had no greater knowledge of the view than any passerby and that an expert must have specialized knowledge in order to properly give an expert opinion, citing Evid.R. 702.

{¶77} Evid.R. 702 provides that a witness may testify as an expert if all of the following apply:

{¶78} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶79} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶80} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. [If the testimony reports the result of a procedure, test, or experiment, factors are then recited to ensure the testimony is reliable]."

{¶81} First, Evid.R. 702(A) is satisfied because testimony on diminished market value of a property due to a loss of view and loss of privacy is a matter beyond the knowledge or experience possessed by laypersons. See, e.g., *Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 282 (1st Dist.). Second, no one argues that this realtor is not qualified under Evid.R. 702(B) to testify as to market values on various properties on Lake Mohawk. See *id.* (where the expert had years of experience of downtown realty, he could opine on fair market value). As aforementioned, he has been a licensed realtor for nine years, he sells ten to fifteen parcels on this lake per year, he is a property owner at the lake himself, he sold the parcel in question, and he previously served as the lake manager for over a year.

{¶82} It is basically Evid.R. 702(C) that the Association relies upon. They seem to believe that "specialized information" refers to the intimacy level the realtor developed with the subject of the case. They urge that the information cannot be considered "specialized" if it could be viewed by anyone driving by in a car or boat.

{¶83} However, the rule's use of the phrase "specialized information" refers to the principles and methods employed to arrive at a decision. Here, the testimony was not going to report the result of a procedure, test, or experience. The testimony was intended to be based upon specialized information obtained from the realtor's experience in selling Lake Mohawk properties and houses. See *Banks*, 143 Ohio App.3d at 282 (explaining that "specialized information" refers to whether the expert has learned a reliable method for determining market values in a certain area).

{¶84} The possible failure to stand on a deck does not mean that the expert does not possess "specialized information" which he can call upon to calculate market values in general. Nor does it constitute deficient methodology. This witness personally observed the Mizeriks' lot when it was vacant because he actually sold it to the Mizeriks. He personally observed both houses from the lake. He also personally observed both residences from the road. In fact, he drove by that morning to refresh his observations.

{¶85} Expert testimony can be based upon evidence introduced at trial or upon personal observation. Evid.R. 703. One can perceive the extremely forward placement of the Mizeriks' house from the road or from the lake and then use one's specialized knowledge of the lake property values with regards to vistas and privacy to calculate an opinion on the effect the Mizeriks' violative construction had on its neighboring residence.

{¶86} Also important to our evaluation of the foundational issue is the fact that there was no jury involved and the fact that the Martins were given a mere five minutes to present this witness's testimony. They first wished to elicit testimony regarding his knowledge of the application of the ten foot depth restriction. The realtor expressed his familiarity with the restriction and its purpose. The realtor noted his personal observations of the relevant properties from various viewpoints. The Martins then tried to elicit his expert opinion on the effect of the Mizeriks' house placement on their house's market value.

{¶87} With the rushed atmosphere and refusal to give any extra time, an extended foundation was impossible. They were not even given time to present their own testimony on the diminished value of their residence. A property owner is

permitted to testify as to the value of their own property without being qualified as an expert. *Tokles & Son, Inc. v. Midwestern Indem. Co.* (1992), 65 Ohio St.3d 621, 625. Further, the Martins had subpoenaed two other witnesses including the current lake manager, but they were precluded from questioning them due to the three hour time limit placed on their case in chief.

{¶88} Moreover, the objection, which was presented by the Mizeriks' attorney, was not specific. And, the court's response was unenlightening. The Association, who is the only party that responds to the Martins' appellate complaint on this issue, did not participate in the objection at trial. The grounds of the objection and the reason for the court's sustaining of the objection are unknown. The party objecting should state the reason with particularity unless the grounds are apparent from the record. Evid.R. 103(A)(1) (punishing the objector if he later appeals).

{¶89} In considering the court's statements throughout, it seems as if the court thought the testimony was irrelevant or speculative because the court believed that the formula was properly applied. Yet, the restriction and formula had not been properly applied by the Association and the Mizeriks, and the court erred in upholding their application. Thus, the realtor's testimony was relevant to the issue of damages. As aforementioned, the only argument set forth by an appellee regarding this issue on appeal revolves around Evid.R. 702; however, that rule was sufficiently satisfied.

{¶90} Accordingly, this assignment of error has merit. The Martins were rushed to present their expert testimony concerning money damages. Even so, the foundation presented was sufficient, especially under the circumstances. The realtor's testimony was relevant to the issue of damages. Thus, the realtor should have been permitted to render his expert opinion. A substantial right of the Martins' was affected by the rushed finale and the exclusion of their only chance to present evidence of damages.

{¶91} Moreover, this court is already reversing on the merits of the Martins' claim and holding that the plain language of the restriction was in fact violated. Now that we have explained the proper application of the restriction and the formula, it is clear that the Martins' suffered some damages for loss of privacy and partial loss of a lake view with a substituted view of the back of a house and a driveway. The question

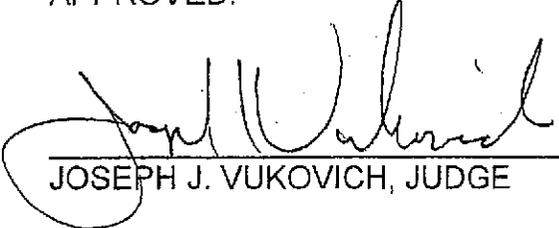
remains as to the amount of their damages. They should not have been precluded by objection and time from presenting their evidence on this topic.

{¶92} For the foregoing reasons, the judgment of the trial court is hereby affirmed in part, reversed in part and this cause is remanded for a new hearing solely on the issue of the amount of damages that are appropriate.

Donofrio, P.J., concurs.

Waite, J., concurs.

APPROVED:



JOSEPH J. VUKOVICH, JUDGE

IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
CARROLL COUNTY, OHIO

FILED

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EMERY MARTIN, et. al.

Plaintiffs

vs.

LAKE MOHAWK PROPERTY
OWNERS ASSOCIATION, INC., et. al.

Defendants

Case No. 04-CVH-23875

CARROLL COMMON PLEAS
WILLIAM R. WOHLWEND

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JUDGE WILLIAM J. MARTIN

JUDGMENT ENTRY

The Court, having granted defendants, Robert Mizerik and Nancy Mizerik's, oral motion under Civ. R. 41(B)(2) at the conclusion of the evidence and all parties having rested their respective cases, and further

The Court having made its Findings of Fact and Conclusions of Law on November 29, 2006, which adopted and incorporated in full the Findings of Fact and Conclusions of Law as submitted by defendants, Mizerik on November 13, 2006, and further

The Court now journalizes and docketes the above matters into a final judgment entry, it is hereby:

ORDERED, ADJUDGED, and DECREED, that judgment is hereby rendered pursuant to Civil Rule 41(B)(2) in favor of defendants, Robert Mizerik and Nancy Mizerik, as and against the plaintiffs, Emery Martin and Patricia Martin, at the conclusion of the evidence, all parties having rested, and the Court adopts and enters judgment of its Findings of Fact and Conclusions of Law, dated November 29, 2006, as if fully rewritten herein.

SO ORDERED.

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William J. Martin
WILLIAM J. MARTIN, JUDGE
COURT OF COMMON PLEAS
CARROLL COUNTY, OHIO

Approved By:

Kenneth Wood

Kenneth Wood OSCR 0005761
Attorney for Defendants:
Robert and Nancy Mizerik

Copy To:
Bruce H. Wilson, Esq.
Brian R. Mertes, Esq.

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STATE OF OHIO)
)
CARROLL COUNTY)

SS:

IN THE COURT OF COMMON PLEAS
WILLIAM R. WOHLWEND

CASE NO. 04 CVH 23875

EMERY MARTIN, ET AL.,

Plaintiffs,

-vs-

LAKE MOHAWK PROPERTY
OWNERS ASSN., INC., ET AL.,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(Re: MIZERIK)

Consistent with the partial remand entered by the Seventh District Court of Appeals on December 23, 2005 (ordering "a new hearing solely on the issue of the amount of damages that are appropriate"), this court conducted a bench trial on that issue on September 8 and November 3, 2006.

At the conclusion of the plaintiffs' case-in-chief, defendants Mizerik orally moved for a dismissal as to them pursuant to Civ. R. 41(B)(2). That motion was taken under advisement pending the presentation of the defendants' cases-in-chief.

At the conclusion of the evidence and all parties having then rested their respective cases, the court orally granted the Mizeriks' Civ. R. 41(B)(2) motion, and dismissed this case only as to them (see transcript ruling attached hereto). Counsel for the Mizeriks was instructed to submit a judgment entry accordingly.

On November 9, 2006, plaintiffs Martin filed a written request for findings of fact and conclusions of law per Civ. R. 41(B)(2) and 52.

On November 13, 2006, defendants Mizerik filed their "proposed" findings of fact and conclusions of law.

On November 20, 2006, this court entered judgment for the defendants Mizerik, consistent with the November 3, 2006 bench ruling, in a Judgment Entry submitted by Mizeriks' attorney.

The court hereby adopts, and incorporates herein, the Findings of Fact and Conclusions of Law submitted on November 13, 2006 by defendants Mizerik, the same being factually and legally correct.

Additionally, the court notes that the Martins' original complaint, filed May 14, 2004, contained one cause of action which only sought the following equitable demand (prayer for relief):

“Wherefore, Martins request a preliminary and permanent injunction directing the LMPOA to enforce the provisions of its Building Code, and preventing the Mizeriks from completing their planned new construction in violation of the LMPOA Building Code” (5-14-04 Complaint, p. 4; emphasis added).

On August 3, 2004, with leave of court (see J.E. 8-3-04), plaintiffs Martin filed an Amended Complaint setting forth two (2) separate and distinct causes of action, to wit: for a permanent injunction (“Claim One”) and for a money judgment predicated on a theory of breach of contract (“Claim Two”). The money judgment claim was newly added. This Amended Complaint was duly answered by all defendants.

“Pleadings” include a “complaint” (Civ. R. 7(A)). Civil R. 15 refers only to the amendment of “pleadings”.

It is axiomatic that in Ohio an “amended” pleading substitutes for, or replaces, the original pleading which is deemed abandoned (refer to: *McCormac & Solimine, Ohio Civil Rules Practice (3d. Ed., 2003), sec. 9.10; Steiner v. Steiner (1993), 85 Ohio App. 3d. 513, 519; accord: Tinlin v. White, Carroll App. No. 680, dec. 9-20-99, unreported*).

Examining then the plaintiffs' August 3, 2004 Amended Complaint, their demand (prayer for relief) on page 5 reads:

“Wherefore, the Martins request a permanent injunction directing the LMPOA to enforce the provisions of its Building Code . . . [Claim One]. If the Court determines that for some reason the LMPOA Building Codes are not enforceable in this instance, the Martins request an award

of adequate damages including any diminution in the market value of their home and lot, their attorneys fees and costs to be paid by the LMPOA [Claim Two]" (emphasis added).

Neither before, during, nor after trial did plaintiffs Martin move to amend the above demand/prayer.

As to Claim One, this court denied injunctive relief at the original trial held on November 19, 2004. The Court of Appeals affirmed that decision (*Martin v. LMPOA, et al., Carroll App. No. 04 CA 815, dec. 12-23-05, unreported*). As the "law of the case", issues relating to Claim One are not before us.

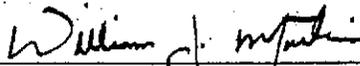
As to Claim Two, appearing as paragraphs No. 7 through 12 inclusive of plaintiffs' Amended Complaint, the Martins assert that LMPOA, Inc. breached its contract with them, to wit: the LMPOA "constitution". As a result, plaintiffs seek a money judgment damage award, their attorney fees, and costs "to be paid by the LMPOA" (demand/prayer, supra).

Claim Two asserts a cause of action for breach of contract between the Martins against LMPOA, Inc. only. Plaintiffs Martin have no privity of contract with defendants Mizerik, and consequently, cannot recover a money damage judgment from the Mizeriks on a contract theory.

Claim Two does not assert a cause of action against the Mizeriks, nor does plaintiffs' demand/prayer specifically seek a money damage judgment from them or any other affirmative relief.

In Ohio, a claimant is limited to the relief claimed in his demand for a "money judgment" unless he amends that demand per Civ. R. 54(C). The Ohio Supreme Court has held that, under the Civil Rules of Procedure, a plaintiff is generally entitled to the relief which is proved, rather than that demanded, except in cases when a judgment by default is entered or when a money damage judgment is sought (see: *Ohio Civil Rules Practice, supra, at sec. 5.05; Raimonde v. VanVlerah (1975), 42 Ohio St. 2d. 21, Syllabus Three*).

Accordingly, defendants Mizerik were entitled to a Civ. R. 41(B)(2) dismissal.



William J. Martin, Judge

cc: Atty. Bruce H. Wilson
Atty. Kenneth Wood
Atty. Brian R. Mertes