IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL., DANIEL P. McKINNEY,	:	
Appellant,	:	Case No. 08-1404
v.	:	On Appeal from the Defiance County Court of Appeals, Third Appellate District
DEFIANCE COUNTY COURT OF COMMON PLEAS,	:	
Appellee.	:	Court of Appeals Case No. 4-08-14

MERIT BRIEF OF APPELLANT DANIEL P. McKINNEY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT

Proposition of Law No. I: Findings under R.C. 2953.21(G) are determined by the ultimate facts set forth in the language of the document 5

Proposition of Law No. II: A moving party is entitled to relief under Rule 60(B)(3)and(5) of the Ohio Rules of Civil Procedure where misrepresentation by an officer of the court results in the unjust operation of a judgment 10

CONCLUSION 13

CERTIFICATE OF SERVICE 13

APPENDIX Appx.pg.

Notice of Appeal to Ohio Supreme Court (S.Ct. No. 08-1404) 1

Affidavit of Indigency 3

Journal Entry Third Dist.Ct.App. (3d Dist No. 4-08-14), July 11, 2008 4

Journal Entry Third Dist.Ct.App. (3d Dist. No. 4-08-14), May 16, 2008 6

New Haven Corner Carry Out, Inc. v. Clay Distrib. Co., 2002 WL 1299759, 2002-Ohio-2726, (3d Dist. No. 13-01-30 8

TABLE OF AUTHORITIES

Cases **Page**

Albright v. Hawk, 52 Ohio St. 362 (1895)..... 9

Baker v. All States Life Ins. Co., 96 N.E.2d 787 (1950)..... 9

Blakemore v. Blakemore, 5 Ohio St.3d 172 (1983)..... 10

Caruso-Ciresi, Inc. v. Lohman, 5 Ohio St.3d 64 (1983)..... 12

Colley v. Bozell, 64 Ohio St.2d 243 (1980)..... 13

Coulson v. Coulson, 5 Ohio St.3d 12 (1983)..... 13

Doe v. Trumbull County Children Svc. Bd., 28 Ohio St.3d 128 (1986)..... 12

Feller-O.msted Co. v. J. Ritchie & Sons, Inc., 119 Ohio App. 148 (1963) 6

Freeman v. Westland Builders, Inc., 2 Ohio App.3d 212 (1981)..... 8

GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St.2d 146 (1976) 10

National Amus., Inc. v. Springdale, 53 Ohio St.3d 60 (1990)..... 12

New Haven Corner Carry Out, Inc. v. Clay Distrib. Co.,
2002 WL 1299759, 2002-Ohio-2726, 3d Dist. No. 13-01-30..... 8

State v. Colon, 118 Ohio St.3d 26 (2008)..... 11

State v. Frazier, 115 Ohio St.3d 139 (2007)..... 11

State v. Harrington, 172 Ohio App.3d 575 (2007)..... 10

State v. Lawson, 103 Ohio App.3d 307 (1997)..... 6

State v. Mattox, 8 Ohio App.2d 65 (1966)..... 7

State v. Kapper, 5 Ohio St.3d 36 (1983)..... 7

State v. McKinney, 2004 WL 2334318..... 2

State v McKinney, 105 Ohio St.3d 1561 (2005)(Table)..... 7

State v. Schlee, 117 Ohio St.3d 153 (2008)..... 13

State v. Skelnar, 71 Ohio App.3d 444 (1991)..... 8

Sttae v Smith, 117 Ohio St.3d 447 (2008)..... 2

State v. McNeill, 137 Ohio App.3d 34 (2000)..... 8

State v Perry, 10 Ohio St.2d 175 (1967)..... 9

State v. Virgi, 84 Ohio App. 15, 81 N.E.2d 295 (1948)..... 10

State ex rel. Carrion v. Harris, 40 Ohio St.3d 19 (1988)..... 6

State ex rel. Gyurcsik v. Angelotta, 50 Ohio St.2d 345 (1977),..... 10

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001)..... 11

Volodkevich v. Volodkevich, 35 Ohio St.3d 152 (1988)..... 12

Wiley v. Gibson, 125 Ohio App.3d 77 (1997)..... 12

Strack v. Pelton, 70 Ohio St.3d 172 (1994)..... 10

Statutes **Page**

OHIO RULES OF CIVIL PROCEDURE

Rule 5 4

Rule 58 4

Rule 60(B) ..... passim

OHIO REVISED CODE

2911.02 1

2913.02 1

2913.51 1

2921.331(B) 1

2953.21 ..... passim

STATEMENT OF FACTS

This case comes before this Court upon the attempt of appellant Daniel P. McKinney ("McKinney") to obtain the remedy of relief from judgment pursuant to Civ.R. 60(B)(3) and (5) from the decision of the Third District Court of Appeals of Ohio denying his petition for writ of mandamus. As relator on behalf of the State of Ohio, McKinney petitioned for writ of mandamus to compel the trial court below to issue adequate findings of fact and conclusions of law concerning the disposition of his petition for post conviction relief pursuant to Ohio Revised Code Section 2953.21(G).

On July 7, 2003, the Defiance County Grand Jury indicted McKinney on one count of robbery, in violation of Ohio Revised Code Sec. 2911.02(A)(2), one count of aggravated theft, in violation of Ohio Revised Code Sec. 2913.02(A)(1)&(4), one count of receiving stolen property, in violation of Ohio Revised Code Sec. 2913.51(A), and two counts of failure to comply with order or signal of a police officer, in violation of Ohio Revised Code Sec. 2921.331(B). On January 29, 2004, a jury found McKinney guilty as charged in the indictment. On March 15, 2004, McKinney was sentenced to a term of incarceration of eight years for the offense of robbery, four years for the offense of aggravated theft, one and one-half years for the offense of receiving stolen property, five years imprisonment for the offense of failure to comply with order or signal of police officer, a felony of the third degree, and one and one-half years for the offense of failure to comply with order or signal of police officer, a felony in the fourth degree. The charges arose from a single incident absent separate animus. Nonetheless, the trial court ordered the sentences to be served consecutively, for a total prison term of twenty years.

McKinney, pro se, filed a notice of appeal in the Third District Court of Appeals for Defiance County, Ohio. The appellate court dismissed the appeal

finding that the court lacked jurisdiction because the judgment being appealed was not a final order. Additionally, during the sentencing hearing the trial court failed to advise McKinney of his right to appointed counsel on appeal pursuant to Rule 32(B)(3)(b) of the Ohio Rules of Criminal Procedure.

Upon the trial court's issuance of its final judgment order, McKinney, pro se, again filed a timely notice of appeal in the Third District Court of Appeals. In the Opinion dated October 18, 2004, the Ohio Court of Appeals affirmed in part and reversed in part the judgment and sentence of the trial court. Specifically, the Ohio Appeals Court reversed the judgment and sentence of the trial court as to the charge of receiving stolen property. Although McKinney raised the double jeopardy issue on the duplicative convictions for robbery and theft, as so recently held by this Court in State v. Smith (2008), 117 Ohio St.3d 447, 884 N.E.2d 595, as well as the duplicative convictions for the primary and lesser included offenses of failure to comply under R.C. 2921.331(B), the appellate court affirmed the judgment of the trial court in all other respects. State v. McKinney, 2004 WL 2334318, *8-10. The case was remanded to the trial court as to the remaining charges without the receiving stolen property charge.

On December 17, 2004, McKinney, pro se, filed a petition to vacate or set aside the judgment of conviction and sentence in the Defiance County Common Pleas Court and set forth the following claims for relief:

> 1. McKinney was denied his Sixth Amendment to the United States Constitution right to be present at all critical stages of the jury trial proceeding.
>
> 2. McKinney was denied his Sixth Amendment to the United States Constitution right to compulsory process, which infringed upon his right to a fair trial.
>
> 3. McKinney was denied his Sixth Amendment to the United States Constitution right to the effective assistance of counsel, thereby denying him a fair trial. (Supp. 1.)

In support of his post conviction petition, McKinney submitted evidentiary materials that included: (1) Defiance County Common Pleas Court Judgment Entry of December 8, 2003 (Supp. 5.); (2) Defiance County Common Pleas Court Docket Sheet of January 13, 2004 Subpoena of Dr. James Cleary (Supp. 7.); (3) Affidavit of Dr. James Cleary (Supp. 8.); and, (4) Affidavit of McKinney (Supp. 10.) The December 8, 2003 judgment entry misrepresented that McKinney "appeared in Court represented by Counsel..." when in actuality McKinney was purposely impeded from his Sixth Amendment right to presence at each material stage of the jury trial process. The hearing on motions to compel, suppress, and dismiss (Supp. 11-14.) were allegedly held on December 1, 2003 (Supp. 5.) while McKinney was refused transport as an indigent pretrial detainee of the county jail.

On January 11, 2005, the State filed a motion to dismiss and response in opposition to McKinney's post conviction petition. (Supp. 15.) Where the State's response was untimely in violation of R.C. 2953.21(D), and thereby failed to demonstrate good cause shown necessary to enlarge the time, McKinney filed his motion to strike and for summary judgment. (Supp. 16.) In support thereof, McKinney submitted a copy of the trial court docket sheet that showed the December 8, 2003 disposition of his motions to dismiss and compel. (Supp. 17.)

On January 26, 2005, the trial court found McKinney indigent and appointed counsel to represent McKinney on his post conviction and the remand of his conviction and sentence by the appellate court. (Supp. 18.) On January 31, 2005, appointed counsel moved for a continuance of the post conviction relief portion of the hearing. (Supp. 18.) Where McKinney had informed appointed counsel that a writ of habeas corpus had been filed pro se in federal court relevant to the remaining federal constitutional issues raised on direct appeal yet denied by the Ohio Court of Appeals, appointed counsel advised McKinney that his post conviction petition and any appeal in state court would remain suspended until final adjudication of his federal writ of habeas corpus. On

January 31, 2005, the trial court granted the motion and continued the post conviction relief portion of the hearings. (Supp. 18.)

Furthermore, on January 31, 2005, the trial court entered its judgment relevant to the January 27, 2005 re-sentencing hearing concerning the remand of McKinney's case by the Ohio Court of Appeals. (Supp. 18.) Additionally, the trial court issued a warrant to have McKinney transported into the custody of the Ohio Department of Rehabilitation and Corrections on January 31, 2005. McKinney was thereby transported to the Lebanon Correctional Inst. ("Le.C.I.") where he has remained to date. (Supp. 18.)

On April 22, 2008, McKinney filed his petition for writ of mandamus with the Third District Ohio Court of Appeals pursuant to R.C. 2731.03. McKinney sought the remedy of mandamus to compel Appellee to the discharge of its function to issue findings of fact and conclusions of law pursuant to R.C. 2953.21(G) concerning his previously filed petition for post conviction relief.

On May 7, 2008, Appellee filed a response to McKinney's petition for writ of mandamus and thereby attached a copy of the judgment entry of the trial court dated February 23, 2005 denying McKinney's post conviction petition. Where proper service was not made to McKinney nor his counsel pursuant to Rules 5 and 58 of the Ohio Rules of Civil Procedure, McKinney was not made aware of the judgment entry until having received Appellee's response to his writ of mandamus petition. The trial court's journal entry demonstrates that service was allegedly provided to the Corrections Center of Northwest Ohio. (Supp. 19.) This is in violation of Civ.R. 5(B) where the trial court was aware that the last known address of McKinney was with the Ohio Department of Rehabilitation and Corrections, as so evidenced by its warrant transport order of January 31, 2005. (Supp. 18.) Further, this stands in violation of Civ.R. 58 where the trial court failed to provide service to counsel for McKinney. All McKinney understood was that his "post conviction portion of hearing" remained continued

until the final adjudication of his federal writ of habeas corpus as of April 12, 2008 as so advised by his court appointed counsel. (Supp. 18.)

On May 16, 2008, the Third District Ohio Court of Appeals entered its journal entry dismissing McKinney's petition for writ of mandamus. The appellate court ruled that the February 23, 2005 judgment entry "is clearly sufficient to provide any required findings of fact and conclusions of law***" regarding McKinney's post conviction petition. (Supp. 20.)

McKinney thereby filed his motion for relief from judgment pursuant to Civ.R. 60(B)(3)and(5). Where the May 16, 2008 ruling of dismissal was made before McKinney had an opportunity to oppose the May 7, 2008 response of Appellee, the motion for relief from judgment set forth that the judgment entry of February 23, 2005 stood as a misrepresentation that amounted to fraud on the court. If relief were granted McKinney possessed a meritorious claim and defense. McKinney was entitled to relief pursuant to Civ.R. 60(B) where the December 8, 2003 judgment entry of Appellee misrepresented that McKinney "appeared in Court represented by Counsel***", which thereby amounted to fraud on the court. (Supp. 5.) Additionally, where a document under R.C. 2953.21(G) is determined by its language, not its label, relief from judgment under Civ.R. 60(B) should have been granted where the judgment entry of February 23, 2005 failed as findings under R.C. 2953.21(G) regarding all of the ultimate facts deemed determinative of McKinney's post conviction petition.

On July 11, 2008, the court of appeals overruled McKinney's motion for relief from judgment. (Supp. 22.) The appeal as of right to this Court follows.

ARGUMENT

Proposition of Law No. I: Findings under R.C. 2953.21(G) are determined by the ultimate facts set forth in the language of the document.

A document under R.C. 2953.21(G) is determined by its language,

not its label, in determining whether it is sufficient. State v. Lawson, 103 Ohio App.3d 307 (1997); State ex rel. Carrion v. Harris, 40 Ohio St.3d 19 (1988). Consequently, the decision of the court of appeals errs in holding that the February 23, 2005 judgment entry of Appellee (Supp. 24.) suffices as findings of fact and conclusions of law pursuant to R.C. 2953.21(G) because said entry remains fatally absent all of the ultimate facts deemed determinative of the underlying post conviction record pertinent to this case. Feller-Olmsted Co. v. J. Ritchie & Sons, Inc., 119 Ohio App. 148, 150 (1963).

As R.C. 2953.21(G) confers a duty on Appellee to make adequate findings of fact, this duty arises in conjunction with the mandatory statutory language of R.C. 2953.21(C) that governs what a trial court must consider when making a factual determination of a timely filed petition under division (A)(2), to wit:

> In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript.
>
> R.C. 2953.21(C) (emphasis added).

As opposed to being a declaration of the ultimate facts in the underlying post conviction case, the judgment entry of Appellee (Supp. 24.) merely provides an ambiguous overview of the claims absent reference to the controlling trial court record, transcript, or the court's journal. Given literal interpretation of legislative intent relevant to what "the court shall consider" in applying the statutory language of R.C. 2953.21(C), where the record herein clearly demonstrates that Appellee at no time inspected the court's journal entries nor the court reporter's transcript no adequate findings of the ultimate facts of the case were ever made. As stated above, on January 31, 2005 Appellee continued the post conviction portion of the hearings. (Supp. 18.) However, the court's journal fails to reflect that Appellee ordered the transcript between the date

of the continuance (Supp. 18, Entry: 1/31/05.) and that of the February 23, 2005 judgment entry thereby dismissing the post conviction petition without holding a hearing. (Supp. 19, Entry: 2/23/05.)

Most importantly, the fact that the alleged hearing on McKinney's motions to dismiss, suppress, and compel of December 1, 2003 (Supp. 5.) was never made part of the record, neither for direct appellate review to the court of appeals or pursuant to the rules of this Court under S.Ct.Prac.R. V(1) (See: State v. McKinney, 105 Ohio St.3d 1561 (2005)(Table)) or otherwise, then it was therefore not possible for Appellee to have performed the duty of adequate findings under R.C. 2953.21(G).

In addition, where the court's journal shows that McKinney was granted an order to be provided a transcript at State expense on appeal due to his being indigent (Supp. 28, Entry: 3/02/04.), further inspection of the court's journal clearly demonstrates that the alleged hearing held in McKinney's involuntary absence on his motions to dismiss, suppress, and compel were at no time ever transcribed by the court reporter. (Supp. 29, Entry: 6/07/04.)

This Court has long held that a trial court may dismiss the petition absent a hearing only if the supporting evidentiary material is directly contradicted and refuted by the record in the case. State v. Kapper, 5 Ohio St.3d 36 (1983). In following said stare decisis the appellate courts below have found a trial court's failure to review the transcript under R.C. 2953.21(C) to be plain error. In citing R.C. 2953.21(C) as mandating a duty of the court to review "the court reporter's transcript," the Sixth District Court of Appeals explained that a "trial judge must review the transcript and cannot rely on personal memory of the prior proceedings***." State v. Mattox, 8 Ohio App.2d 65, 67 (1966).

Where the post conviction petition of McKinney demonstrated a prima facie case of the denial of his substantial rights as guaranteed by the United States and Ohio Constitutions, it was the duty of Appellee to review the record so

that adequate findings of fact and conclusions of law could be made. State v. McNeill, 137 Ohio App.3d 34, 43 (2000). Given the nature of the Sixth Amendment guarantee to presence at each material stage of the jury trial and compulsory process to effect defense witness testimony, the denial of which formed the core basis of McKinney's post conviction claims, it stands as an impossibility that any findings of ultimate facts could suffice that obviously omits reference to the trial court record, journal and transcript that unequivocally supports McKinney's prima facie claims as true.

The decision of the appellate court, if allowed to stand, would result in conflict among the respective Ohio Court of Appeals by holding that a trial court is not required of its duty to inspect the court records, journal, or transcript necessary to execute findings of fact that reflect the evidence deemed pertinent to the case. Freeman v. Westland Builders, Inc., 2 Ohio App.3d 212, 214 (1981).

Judicial review of the trial court record below not only immediately shows the February 23, 2005 judgment entry (Supp. 24.) to be insufficient to amount to finding of fact under R.C. 2953.21(G), said document is fatally deficient to suffice as a judgment entry as a matter of law. Specifically, where the State failed to timely file its response under R.C. 2953.21(D), and thereby failed to move to show good cause for the delay, McKinney filed his motion to strike and for summary judgment. (Supp. 16) Consequently, Appellee's judgment entry (Supp. 24.) denying post conviction is insufficient toward demonstrating the discharge of its duty mandamus would compel, where it fails to address motion of McKinney to disqualify for failure to timely respond as R.C. 2953.21(D) holds. State v. Wiles, 126 Ohio App.3d 71 (1998); State v. Skelnar, 71 Ohio App.3d 444 (1991).

Although Appellee relied on the decision of the Third District Court of Appeals in New Haven Corner Carry Out, Inc. v. Clay Distrib. Co., 2002 WL 1299759,

2002-Ohio-2726, No. 13-01-30 (3d Dist. 2002) in response to McKinney's writ of mandamus, where said case law holds that findings of fact must be "found separately from the conclusions of law" only supports McKinney's claims for mandamus relief. By thus applying the rationale of the appellate court, the judgment entry of Appellee remains inadequate where no such separate findings were made referencing McKinney's motion to disqualify as R.C. 2953.21(D) so mandates.

Moreover, given that Appellee's judgment entry was "adopted from" the prosecutor's untimely opposition motion practically verbatim, this stands improper as adequate findings of fact because any appellate review of said judgment entry is fatal "to ensure that it is completely accurate." Id., at paragraph 67 of the syllabus. This Court has long held that the mere recital of the claims of law argued by the prosecutor on motion to dismiss post conviction petition is inadequate to suffice as Appellee's duty to issue the requisite findings of fact mandated by R.C. 2953.21(G). Albright v. Hawk, 52 Ohio St. 362 (1895).

In light of the well settled precedent of this Court in State v. Perry, 10 Ohio St.2d 175 (1967) and its progeny, inspection of the files and records in a post conviction case exist as critical to any adequate adjudication thereof. For well over a half-century and beyond Ohio appellate jurists have held that findings and conclusions should respond to all material or determinative issues in the case. Baker v. All States Life Ins. Co., 96 N.E.2d 787, 58 Ohio Law Abs. 366, 371 (App. 1950). Applying the unmistakable language of R.C. 2953.21(C) as it relates to findings of fact under R.C. 2953.21(G), this Court should find the judgment entry of Appellee as inadequate as findings of fact and conclusions of law (Supp. 24.) given Appellee's obvious failure to inspect the record and files pertinent to the case nor having responded to all material issues deemed determinative to the case.

Proposition of Law No. II: A moving party is entitled to relief under Rule 60(B)(3) and (5) of the Ohio Rules of Civil Procedure where misrepresentation by an officer of the court results in the unjust operation of a judgment.

To prevail on a motion for relief from judgment under Civ.R. 60(B) of the Ohio Rules of Civil Procedure, a party must demonstrate that (1) he or she has a meritorious defense or claim and that (2) circumstances arose under Civ.R. 60(B)(1)-(5). GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146 (1976). As to the catch-all provision of Civ.R. 60(B)(5), this Court has held that Civ.R. 60(B)(5) reflects "the inherent power of a court to relieve a person from the unjust operation of a judgment." State ex rel. Gyurcsik v. Angelotta, 50 Ohio St.2d 345, 346 (1977).

This Court reviews a court's order related to a motion for relief from judgment pursuant to Civ.R. 60(B) for an abuse of discretion. Strack v. Pelton, 70 Ohio St.3d 172, 174 (1994). To establish an abuse of discretion, a party must show that the court's attitude is unreasonable, arbitrary or unconscionable and was not merely an error of law or judgment. Blakemore v. Blakemore, 5 Ohio St.3d 217, 219 (1983). However, Ohio appellate jurists have long held that "abuse of discretion" by a court does not necessarily mean ulterior motive, arbitrary conduct or willful disregard of a litigant's rights, but may mean failure to apply principle of law applicable to the situation, if prejudice thereby results to the litigant. State v. Virgi, 84 Ohio App. 15, 81 N.E.2d 295 (Ohio App. 1948).

In this case, McKinney's petition for post conviction relief demonstrated errors of federal and state constitutional magnitude and resulting prejudice that thereby entitled him to relief. State v. Harrington, 172 Ohio App.3d 575 (2007). Appellee was clearly apprised of the Sixth Amendment right to presence at all critical stages of the jury trial process of which Appellee's December

8, 2003 judgment entry (Supp. 5.) materially misrepresented McKinney's alleged presence at hearing on motions to suppress, compel, and dismiss. (Supp. 11-14.) The trial court's journal reflects December 8, 2003 as the date of entry of the court's judgment regarding the misrepresented hearing of December 1, 2003. (Supp. 17.)

Where Appellee, as an officer of the court, issued a fraudulent document (Supp. 5.) purporting that McKinney was in attendance at the alleged December 1, 2003 hearing on motions to dismiss/suppress (Supp. 11.) and compel (Supp. 13.), when McKinney was actually involuntarily impaired from attendance by acts of Appellee, this stands as a critical stage of the jury trial proceedings where a Sixth Amendment Confrontation Clause violation is invoked. United States v. Novaton, 271 F.3d 968, 998 (11th Cir. 2001). Said due process impairment denied the compulsory subpoena of defense witnesses and to thereby confront hostile State witnesses. (Supp. 7.) Most specifically, the motion to dismiss (Supp. 11.) for failure to charge an offense in violation of R.C. 2911.02(A)(2) raised a constitutional issue directly parallel to the recent decision of this Court in State v. Colon, 118 Ohio St.3d 26 (2008). Consequently, the presence of McKinney at the December 1, 2003 hearing was thereby mandated as a condition of due process to the extent that a fair and just hearing was thwarted by his absence. State v. Frazier, 115 Ohio St.3d 139 (2007).

In light of the foregoing, McKinney moved the court of appeals for relief from judgment of the court's May 16, 2008 Order (Supp. 20.) dismissing McKinney's petition for writ of mandamus. McKinney is entitled to relief from judgment under Civ.R. 60(B)(3)and(5) where he showed Appellee's response by way of judgment entry (Supp. 24.) involved material misrepresentations amounting to fraud on the court. Said misrepresentation proved critical toward any adequacy of the February 23, 2005 judgment entry (Supp. 24.) submitted by Appellee in support of having properly discharged its duty of findings of fact under R.C. 2953.21(G).

The ruling of the appellate court denying relief from judgment errs where it holds that McKinney's claims were "based upon vague and unsupported allegations of fraud" and that he only sought "reconsideration of the judgment." Such is actually far from the judicial mark. In actuality, on motion for relief from judgment McKinney pointed out to the court that he was not made aware of the February 23, 2005 judgment entry (Supp. 24.) until submitted by Appellee in response to his petition for writ of mandamus. As a result thereof, McKinney was unable to set forth fully the issues relevant to the misrepresentations of said judgment entry that would demonstrate its being insufficient under R.C. 2953.21(G) prior to the decision of the appellate court. Therefore, McKinney did not merely reiterate arguments which concerned the merits of the case and which could have been raised on appeal. Doe v. Trumbull County Children Services Board, 28 Ohio St.3d 128 (1986); National Amusements, Inc. v. Springdale, 53 Ohio St.3d 60 (1990). Contrarily, McKinney demonstrated operative facts of fraud upon the court he was previously unable to litigate that entitled him to relief pursuant to Civ.R. 60(B)(3)and(5). Caruso-Ciresi, Inc. v. Lohman, 5 Ohio St.3d 64 (1983). This therefore stands as that rare case where those substantial grounds exist to justify relief. In such a rare case where the court of appeals should have granted relief based on Civ.R. 60(B)(3)and(5), the denial of same resulted in manifest injustice. Wiley v. Gibson, 125 Ohio App.3d 77 (1997). To thereby do so reflects the inherent power of courts to relieve a person from the unjust operation of a judgment. Volodkevich v. Volodkevich, 35 Ohio St.3d 152 (1988).

In this case the trial judge and prosecutor, as officers of the court, drafted a fraudulent document that material misrepresented McKinney's presence at the December 1, 2003 hearing when McKinney was actually involuntarily refused attendance in effort to subvert his Sixth Amendment right. (Supp. 5.) Wherefore, given the participation of the trial judge and prosecutor in a case which gives

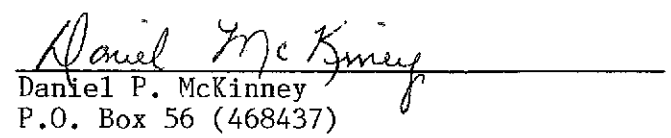
rise to appearance of impropriety and bias this thereby constitutes grounds for relief from judgment. Id.

For purposes of Civ.R. 60(B) McKinney meets his burden of alleging a meritorious claim, where the decision of the court would have been different except for the misrepresentation by officers of the court. Colley v. Bozell, 64 Ohio St.2d 243, 247, fn.3. (1980). Consequently, this case exhibits an appropriate circumstance where this Court may vacate a judgment vitiated by a fraud upon the court. Coulson v. Coulson, 5 Ohio St.3d 12 (1983), paragraph one of the syllabus. Civ.R. 60(B)(3)and(5) allows relief from judgment or order based on "fraud***, misrepresentation or other misconduct of an adverse party," or "any other reason justifying relief from the judgment." State v. Schlee, 117 Ohio St.3d 153 (2008).

CONCLUSION

The decision is fundamentally wrong and undermines the structure and purpose of findings of fact and conclusions of law pursuant to R.C. 2953.21(G). Further, where operative facts were set forth demonstrating fraud upon the court, the decision of the court of appeals denying relief under Civ.R. 60(B)(3)and(5) amounts to an abuse of discretion. The decision below should be reversed to support the uniform application of Civ.R. 60(B).

Respectfully submitted,



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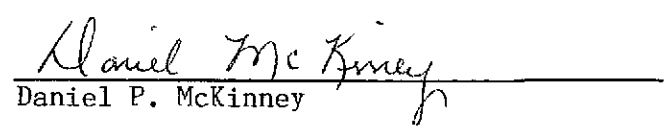
Certificate of Service

I hereby certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel of Appellee, Russell Herman, 607 W. 3d St., Defiance, OH 43512 on September 10, 2008.



Daniel P. McKinney

APPENDIX

IN THE SUPREME COURT OF OHIO

08-1404

STATE OF OHIO, EX REL., DANIEL P. McKINNEY,	:	CASE NO. _____
Appellant,	:	On Appeal from the Defiance County Court of Appeals, Third Appellate District
v.	:	
DEFIANCE COUNTY COURT OF COMMON PLEAS,	:	Court of Appeals Case No. 4-08-14
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT DANIEL P. McKINNEY

FILED
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APPENDIX

Notice of Appeal of Appellant Daniel P. McKinney

Appellant Daniel P. McKinney hereby gives notice of appeal to this Supreme Court of Ohio from the judgment of the Defiance County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No. 4-08-14 on July 11, 2008.

This case originated in the Court of Appeals pursuant to S.Ct.Prac.R. II(A)(1), raises a substantial ocnstitutional question and is one of public or great general interest.

Respectfully submitted,

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APPELLANT IN PRO SE

Certificate of Service

I hereby certify that a copy of this Notice of Appeal and relevant documentation was sent by ordinary U.S. Mail to counsel for appellee, Russell R. Herman (#0068709), Asst. Pros. Atty., 607 West Third St., Defiance, OH 43512, by deposit with the Lebanon Correctional Inst. legal mail staff, first class postage prepaid, on this 15th day of July, 2008.

Daniel P. McKinney
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Attachment not scanned

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

DEFIANCE COUNTY

STATE OF OHIO, EX REL.,
DANIEL P. McKINNEY,

RELATOR,

v.

DEFIANCE CO. COURT OF
COMMON PLEAS,

RESPONDENT.

FILED
IN COURT OF APPEALS
DEFIANCE COUNTY, OHIO
JUL 1 1 2008
CLERK OF COURTS

CASE NO. 4-08-14

JOURNAL
ENTRY

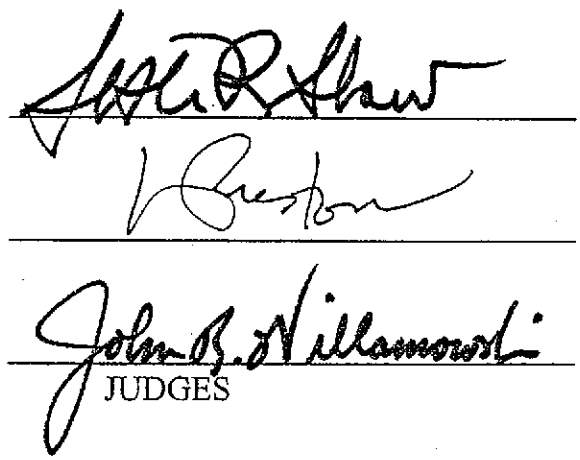
120391

This cause comes before the court upon Relator's motion for relief from judgment pursuant to Civ.R. 60(B)(3) and (5).

Upon consideration the court finds that, based upon vague and unsupported allegations of fraud and "subversion" by Respondent, Relator makes clear his disagreement with this court's judgment and asserts that his petition for writ of mandamus was wrongly dismissed and should have been granted. By so asserting, the court finds that the motion, in effect, seeks reconsideration of the judgment. It is well settled that Civ.R. 60(B) is not a substitute for appeal and a party may not merely reargue the same contentions that were rejected in the judgment. See *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599. Respondent's judgment

denying Relator's petition for post conviction relief included sufficient findings of fact and conclusions of law. Accordingly, the motion is not well taken.

It is therefore **ORDERED** that Relator's motion for relief from judgment be, and the same hereby is, overruled.



JUDGES

DATED: July 11, 2008

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

DEFIANCE COUNTY

STATE OF OHIO, EX REL.,
DANIEL P. McKINNEY,

RELATOR,

v.

DEFIANCE CO. COURT OF COMMON PLEAS,

RESPONDENT.

CASE NO. 4-08-14

FILED
IN COURT OF APPEALS
DEFIANCE COUNTY, OHIO
MAY 16 2008
CLERK OF COURTS

JOURNAL ENTRY

119314

This cause comes before the Court upon Relator's petition for writ of mandamus and Respondent's motion to dismiss the petition.

Relator seeks a writ of mandamus compelling Respondent to issue findings of fact and conclusions of law concerning the disposition of Relator's December 17, 2004 petition for post conviction relief. Respondent alleges that there is no clear legal duty to issue what has already been done. Respondent attaches the February 23, 2005 judgment entry, four pages in length, denying Relator's motion for post conviction relief. The judgment concludes by noting the same shall constitute the court's findings of fact and conclusions of law.

Upon consideration of same, the Court finds that the Respondent's February 23, 2005 judgment is clearly sufficient to provide any required findings

of fact and conclusions of law concerning the disposition of Relator's petition for post conviction relief. It is well settled that a court of appeals may take judicial notice of an entry attached to a motion to dismiss, and that mandamus will not lie to compel the performance of a duty that has already been performed. *State ex rel. Nelson v. Russo*, 89 Ohio St.3d 227, 2000-Ohio-141; *State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 1998-Ohio-541; *State ex rel. Konoff v. Shafer*, 80 Ohio St.3d 294, 1997-Ohio-119.

Accordingly, Relator has no clear legal duty to any relief that was already provided in a timely manner and the motion to dismiss is well taken.

It is therefore **ORDERED** that Relator's petition for writ of mandamus be, and hereby is, dismissed at the costs of the Relator for which judgment is hereby rendered.

JUDGES

DATED: May 16, 2008

/jlr

C

New Haven Corner Carry Out, Inc. v. Clay Distrib. Co.
Ohio App. 3 Dist.,2002.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Third District, Seneca County.
NEW HAVEN CORNER CARRY OUT, INC., Plaintiff-Appellant,
v.
CLAY DISTRIBUTING COMPANY, Defendant-Appellee.
No. 13-01-30.

May 28, 2002.

Service station filed action against fuel distributor seeking to invalidate distribution agreement alleging material breach and impossibility of performance, and fuel distributor filed counterclaim for failure to pay money owed under contract. The Court of Common Pleas, Seneca County, granted summary judgment for fuel distributor on service station's claim of impossibility, and following trial, entered judgment for fuel distributor on all remaining counts. Service station appealed. The Court of Appeals, Hadley , J., held that: (1) contract remained enforceable, even though, sometime during initial term of agreement, common carrier rate upon which gross profit and price term of contract were based ceased to be published; (2) trial court could adopt almost verbatim proposed findings of fact and conclusions of law submitted by fuel distributor; (3) trial court was not required to use only terms that were found in record to characterize certain evidence; (4) service station waived right to object to fuel distributor's calculation of gross profit, which precluded service station from asserting arguments with respect to price of diesel fuel, freight rates, and entitlement to share with fuel distributor shrinkage allowance, credit card fee, and advertising fee; (5) fuel distributor did not breach contract by illegally mixing fuels provided to service station; (6) no manifest injustice occurred as result of service station's submission of entire breach of contract action to trial court, rather than jury, and thus unpreserved allegation that service station was coerced into waiving jury was not grounds for reversal; (7) two contradictory judgment amounts did not form basis for new trial, when corrected; and (8) fact that judgment entry was partially adopted from fuel distributor's proposal was not basis for new trial.

Affirmed.

West Headnotes

[1] Sales 343 ⟹195

APPENDIX

8

343 Sales
343IV Performance of Contract
343IV(D) Payment of Price
343k195 k. Excuses for Default or Delay. Most Cited Cases

No evidence supported claim that service station did not intend to be bound by contract for sale of fuel upon failure of original terms, and thus contract remained enforceable, even though, sometime during initial term of agreement, common carrier rate upon which gross profit and price term of contract were based ceased to be published, which left parties without ability to make

agreed-upon price adjustments according to original terms of contract, where fuel distributor began using actual freight rate to determine price, parties operated under agreement on daily basis for many years, and parties continued to operate under agreement, even after pricing indices became unavailable.

[2] Trial 388 ⚷393(2)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k393 Preparation and Form in General
388k393(2) k. Preparation by or for Court. Most Cited Cases

Trial court could adopt almost verbatim proposed findings of fact and conclusions of law submitted by fuel distributor at conclusion of trial on service station's breach of contract claim, where service station did not show that facts or law taken up were erroneous.

[3] Trial 388 ⚷393(1)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k393 Preparation and Form in General
388k393(1) k. In General. Most Cited Cases

Trial court, in findings of fact and conclusions of law in contract dispute, was not required to use only terms that were found in record to characterize certain evidence, given that service station, which alleged breach of contract by fuel distributor, failed to show how it was in any way prejudiced by trial court's terms.

[4] Estoppel 156 ⚷118

156 Estoppel
156III Equitable Estoppel
156III(F) Evidence
156k118 k. Weight and Sufficiency of Evidence. Most Cited Cases

Service station waived right to object to fuel distributor's calculation of gross profit in breach of contract action, which precluded service station from asserting arguments with respect to price of diesel fuel, freight rates, and entitlement to share with fuel distributor shrinkage allowance, credit card fee, and advertising fee, where service station's primary witness, who was also formerly president of fuel distributor, admitted that at time when calculations for gross profit were altered with respect to diesel fuel and freight rates, neither he nor anyone else at service station complained, no objection was lodged until after fuel distributor's president became involved with service station exclusively, and similar testimony was provided with regard to issues of shrinkage allowance, credit card fee, and advertising fee.

[5] Sales 343 ⚷166(1)

343 Sales
343IV Performance of Contract
343IV(C) Delivery and Acceptance of Goods
343k165 Quality, Fitness, and Condition of Goods
343k166 In General
343k166(1) k. In General. Most Cited Cases

Fuel distributor did not breach contract by illegally mixing fuels provided to service station, even though some of fuel distributors mixed fuels, once fuel distributor employee directed driver to mix fuels, and mixing of diesel and gasoline was illegal and once caused damage, where fuel distributor paid for damage caused by mixing gasoline and diesel, contract did not prohibit mixing, and

mixing was not illegal when octane rating on tank reflected minimum octane in tanks.

[6] Appeal and Error 30 ⚷1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In General. Most Cited Cases

Service station was not entitled to relief from judgment for fuel distributor in breach of contract action, even though service station asserted quantity of errors, given that appellate court could not justify reversal by cumulative minor errors without showing of prejudice for each individual error.

[7] Appeal and Error 30 ⚷201(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k201 Mode and Conduct of Trial or Hearing
30k201(1) k. In General. Most Cited Cases

Appeal and Error 30 ⚷883

30 Appeal and Error
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k883 k. Assent to Proceeding. Most Cited Cases

No manifest injustice occurred as result of service station's submission of entire breach of contract action to trial court, rather than jury, and thus unpreserved allegation that service station was coerced into waiving jury was not grounds for reversal of judgment for fuel distributor, even though trial court did not answer each jury interrogatory, given that parties agreed that number of questions of law needed to be decided by court before case was submitted to jury, at conclusion of trial, court stated that it would take approximately one week to resolve issues, both parties agreed on record to remove case from jury for resolution of all issues by trial court, and service station's counsel indicated that trial court did not have to answer interrogatories. Rules Civ.Proc., Rules 38 , 39 , 52 .

[8] New Trial 275 ⚷61

275 New Trial
275II Grounds
275II(E) Irregularities or Defects in Verdict or Findings
275k61 k. Decision and Findings of Court. Most Cited Cases

Two contradictory judgment amounts in original judgment for fuel distributor in breach of contract action against service station, namely finding of $280,050.42 in damages, and later finding of $293,769.35 in damages, did not form basis for new trial, where trial court later corrected itself and agreed that $280,050.42 was correct amount. Rules Civ.Proc., Rule 52 .

[9] New Trial 275 ⚷61

275 New Trial

275II Grounds
275II(E) Irregularities or Defects in Verdict or Findings
275k61 k. Decision and Findings of Court. Most Cited Cases
Fact that trial court's judgment entry, including 34 pages and 176 paragraphs of findings of fact and conclusions of law, was partially adopted from fuel distributor's proposal in breach of contract action with service station, was not basis for new trial, given that findings and conclusions were adequate to provide basis for appeal and to aid appellate court in review. Rules Civ.Proc., Rule 52 .

[10] **Sales 343 ⚷415**

343 Sales
343VIII Remedies of Buyer
343VIII(C) Actions for Breach of Contract
343k414 Evidence
343k415 k. Presumptions and Burden of Proof. Most Cited Cases
Service station never made prima facie case of breach of contract by fuel distributor, and thus burden never shifted to fuel distributor to rebut prima facie case.

Civil Appeal from Common Pleas Court.
John T. Barga , Attorney at Law, Reg. # 0018295, Tiffin, OH, for Appellant.
John D. Parker , Attorney at Law, Reg. # 0025770, Sarah E. Thomas , Attorney at Law, Reg. # 0070119, Cleveland, OH, for Appellee.

OPINION

HADLEY , J.
*1 {¶ 1} The plaintiff/appellant, New Haven Corner Carryout Incorporated ("New Haven" or "the appellant"), appeals several judgments of the Seneca County Court of Common Pleas, all of which were adverse to the appellant. Based on the following, we affirm the judgment of the trial court.

{¶ 2} This case arises out of a contract dispute between the appellant, a service station, and its fuel distributor, Clay Distributing Company ("Clay" or "the appellee"). On February 1, 1990, the parties entered into a Distribution Agreement ("the agreement"), whereby Clay was to deliver gasoline and diesel fuel to New Haven for sale at the service station. Pursuant to the agreement, the appellant is required to remit a check each day to Clay for the actual daily fuel sales registered on its pumps. Within twenty days of the end of each month, Clay must pay to New Haven one-half of the gross profit derived from the sale of diesel fuel and gasoline.

{¶ 3} George R. Paul was president of Clay from 1987 until September 1995. Just prior to 1987, Mr. Paul was the sole shareholder in Clay; however, he sold all but one of his shares to William F. Beck before becoming president. In 1990, the year the station opened, Mr. Paul acquired a fifty percent shareholder interest in New Haven, acting as a silent partner. Thus, Mr. Paul was the president of Clay and a major stockholder in New Haven at the time that the parties entered into the agreement. In fact, his signature appears on the document in his capacity as president of Clay.

{¶ 4} Mr. Paul became president of New Haven in 1996, after his resignation from Clay. He claimed that, upon examining the station's books, he found several irregularities, including a problem with Clay's computation of "gross profit." Ultimately, New Haven filed suit against Clay seeking to invalidate the agreement. New Haven's complaint alleged material breach and impossibility of performance. Clay counterclaimed for failure to pay money owed under the contract.

{¶ 5} Clay moved for summary judgment on New Haven's claim of impossibility. New Haven also moved for summary judgment. On March 29, 2001, Clay's motion was granted and New Haven's was denied. The case then proceeded to jury trial on April 18, 2001 on the claim for material breach of contract and the cross-claim. At the trial's conclusion, the case was removed from the jury

for determination of all issues by the court. On June 25, 2001, the court found for Clay on all issues.

{¶ 6} The appellant filed a Motion for New Trial on July 3, 2001, which was denied by a September 26, 2001 judgment entry. The appellant now brings this appeal, asserting three assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

{¶ 7} The trial court committed reversible error when it overruled Plaintiff's Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment as to count one of Plaintiff's complaint.

*2 {¶ 8} The appellant claims that the trial court erred when it simultaneously granted the appellee's motion for summary judgment and denied the appellant's motion as to the appellant's claim of impossibility of performance. Based on the following, we disagree with the appellant.

Standard of Review for Summary Judgment

{¶ 9} In considering an appeal from the granting of a summary judgment, our review is *de novo,* giving no deference to the trial court's determination.[FN1] Accordingly, we apply the same standard for summary judgment as did the lower court.[FN2]

FN1. *Schuch v. Rogers* (1996), 113 Ohio App.3d 718, 720, 681 N.E.2d 1388 .

FN2. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411 .

{¶ 10} Summary judgment is proper when, looking at the evidence as a whole (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party.[FN3] The initial burden in a summary judgment motion lies with the movant to inform the trial court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[FN4] Those portions of the record include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action .[FN5]

FN3. Civ.R. 56(C) ; *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 686-87, 653 N.E.2d 1196 .

FN4. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264 .

FN5. Civ.R. 56(C) .

{¶ 11} Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ.R. 56(C) , indicating that a genuine issue of material fact exists for trial.[FN6] The nonmoving party may not merely rely on the pleadings nor rest on allegations, but must set forth specific facts that indicate the existence of a triable issue.[FN7]

FN6. *Dresher v. Burt,* 75 Ohio St.3d at 293, 662 N.E.2d 264 .

FN7. *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 .

Impossibility of Performance

[1] {¶ 12} This particular aspect of the dispute centers around the mechanism by which gross profit is determined under the agreement. In the agreement, "gross profit" is defined as the difference between the retail price and the "delivered cost" of the fuel. Also provided are definitions of "delivered cost" for both gasoline and diesel fuel. The agreement reads, in relevant part,

{¶ 13} "The delivered cost of gasoline shall be Marathon Petroleum Company's Toledo rack price plus $.025 per gallon for a period of two years. The rate of $.025 per gallon will be adjusted every two years to reflect a proportionate increase or decrease in the published Common Carrier Rate of Refiner's Transport of Toledo, Ohio.

{¶ 14} "The delivered cost of diesel fuel shall be Marathon Petroleum Company's Bellevue rack price plus $.015 per gallon for a period of two years. The rate of $.015 per gallon will be adjusted every two years to reflect a proportionate increase or decrease in the published Common Carrier Rate of Refiner's Transport of Toledo, Ohio."

*3 {¶ 15} Around 1994, the United States Environmental Protection Agency ("EPA") enacted regulations that classified diesel fuel into two categories based on sulfur content. The EPA regulations mandated that only low sulfur diesel fuel could be used in over-the-road vehicles, the only type of vehicles to which New Haven sells diesel fuel. Subsequent to the enactment of these regulations, in October 1994, Marathon's Bellevue facility stopped selling diesel fuel for over-the-road vehicles. Consequently, it no longer posted a price for this type of fuel. Unable to abide by the agreement's original terms, Clay began to purchase diesel fuel from Marathon's Toledo terminal, using its price for the purpose of calculating profits.

{¶ 16} Some time during the initial term of the agreement, Refiner's Transport of Toledo, Ohio went out of business. Therefore, it stopped publishing a Common Carrier Rate. This left the parties without the ability to make the agreed-upon adjustment according to the original terms of the contract. The appellee began using the actual freight rate that it incurred in order to determine "delivered cost" under the agreement.

{¶ 17} Impossibility of performance arises where, after parties enter into a contract, an unforeseen event renders impossible the performance of contractual duties of one or both of the parties.[FN8] Absent contrary contractual terms, either party can often avoid an agreement when governmental activity renders its performance impossible or illegal.[FN9]

FN8. *Truetried Service Co. v. Hager* (1997), 118 Ohio App.3d 78, 87, 691 N.E.2d 1112 .

FN9. *Glickman v. Coakley* (1984), 22 Ohio App.3d 49, 52, 488 N.E.2d 906; *London & Lancashire Indem. Co. of America v. Board of Comm'rs. Of Columbiana Cty.* (1923), 107 Ohio St. 51, 140 N.E. 672, syllabus.

{¶ 18} The appellant argues that the formula for determining gross profit was a material element of the agreement. Therefore, performance under the agreement became legally impossible after the passage of the EPA regulation and further when the Refiner's Transport stopped publishing a Common Carrier Rate because the agreed-upon definition of delivery cost for diesel and gasoline no longer existed. Because the federal law and the abolition of the published Common Carrier Rates were events that could not have been foreseen by the parties, the appellant urges that it be excused from performance under the agreement.

{¶ 19} The parties are in accord that the original pricing mechanisms contained in the contract have failed. However, the appellee contends that this failure does not render the agreement impossible to perform. Rather, argues the appellee, a "reasonable price" should be imposed on the parties in order to permit completion of the contract. The appellee cites *Oglebay Norton Co. v. Armco, Inc.* [FN10] In *Oglebay*, the operator of a steel shipping company brought an action against a long-time customer for enforcement of a contract whereby the plaintiff provided services to the defendant for shipment of steel. Both the primary and secondary pricing mechanisms in the contract had failed. Nevertheless, after a lengthy bench trial, the trial court found that the parties intended to be bound even upon such a failure and imposed what it determined to be a "reasonable price."

FN10. (1990) 52 Ohio St.3d 232, 556 N.E.2d 515 .

*4 {¶ 20} We agree with the appellee that *Oglebay* may permit the trial court to impose a "resonable price" on the parties here so

that the agreement could be fulfilled. However, *Oglebay* makes clear that such a disposition is only appropriate where the parties have evidenced an intent to be bound despite the failure of pricing terms.[FN11] "Whether parties intend[ ] to be bound, even upon failure of the pricing mechanisms [in a contract], is a question of fact properly resolved by the trier of fact."[FN12]

FN11. *Id.* at 235, 556 N.E.2d 515 .

FN12. *Id.*, citing *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, 106, 443 N.E.2d 161 .

{¶ 21} The appellee has presented evidence that the parties did intend to be bound even though the pricing terms failed. Specifically, the appellee notes that, as in *Oglebay,* the parties operated under the agreement on a daily basis for many years. More significantly, the parties continued to operate under the agreement even after the pricing indices became unavailable.

{¶ 22} The appellant, on the other hand, contends that when the pricing mechanisms failed, New Haven began to question the appellee about how it was calculating gross profit, but received no satisfactory explanation. Finally, in 1999, it commenced legal action to resolve the issue. However, the evidence presented by New Haven in support of this claim reveals that these inquiries commenced only after Mr. Paul became president of New Haven in 1996. As the appellant points out, the pricing term for diesel fuel failed in October of 1994 and the freight rate for gasoline was no longer published as of 1995. This makes it clear that the parties operated under the agreement for a number of months without the benefit of the original pricing terms and without objection. Thus, the appellant fails to direct us to any evidence that, if believed, supports its claim that it did not intend to be bound upon failure of the original terms. Therefore, reasonable minds could only conclude that the appellee was entitled to summary judgment.

{¶ 23} Accordingly, the appellant's first assignment of error is not well-taken and is hereby denied.

ASSIGNMENT OF ERROR NO. II

{¶ 24} The trial court committed reversible error when it found in favor of the defendant and against the plaintiff at trial.

[2] {¶ 25} The appellant argues in this second assignment of error that the trial court's judgment in favor of the appellee was against the manifest weight of the evidence. We disagree with the appellant.

{¶ 26} The appellant takes issue with the fact that the trial court adopted "almost verbatim" the Proposed Findings of Fact and Conclusions of Law submitted by the appellee at the conclusion of trial. As the appellee points out, a trial court may properly adopt as its own a party's proposed findings of law, so long as it has thoroughly read the document to ensure that it is completely accurate in fact and law.[FN13] Therefore, the trial court's adoption of the appellee's findings of fact and conclusions of law is not in error unless the appellant can show that the facts or law taken up were erroneous. Although the appellant has made no specific argument to that effect, we will address the accuracy of the court's findings in our review for manifest weight of the evidence.

FN13. *Clark v. Smith* (1998), 130 Ohio App.3d 648, 659, 720 N.E.2d 973, citing *Adkins v. Adkins* (1988), 43 Ohio App.3d 95, 539 N.E.2d 686, at paragraph three of the syllabus.

*5 {¶ 27} It is axiomatic that, in the case of a civil trial, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence.[FN14] Furthermore, the well-settled proposition that evaluating evidence and assessing credibility are primarily for the trier of fact [FN15] is equally true in a bench trial because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."[FN16] Therefore, absent extreme circumstances, an appellate court will not second guess determinations of weight and credibility.

FN14. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; *C.E. Morris Co. v. Foley Constr. Co.*

(1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

FN15. *Ostendorf-Morris Co. v. Slyman* (1982), 6 Ohio App.3d 46, 47, 452 N.E.2d 1343 .

FN16. *Seasons Coal Co. Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 .

{¶ 28} The issue before the trial court was whether either of the parties materially breached the agreement. New Haven claimed that Clay's alleged breaches entitled New Haven to terminate the agreement and to receive monetary damages. Clay, on the other hand, sought enforcement of the contract and money damages. We note at the outset that the appellant takes issue with nearly all of the trial court's 176 findings of fact and conclusions of law, which appear in the June 25, 2001 judgment entry. We will address only those findings and conclusions that pertain to the essential elements of the case.

[3] {¶ 29} A number of the issues raised by the appellant address what this Court would describe as the semantics of the trial court's judgment entry. The appellant objects to the fact that, in several places in its entry, it uses terms that are not found in the record to characterize certain evidence. The appellant fails to show how it was in any way prejudiced by this practice. Absent a showing of prejudice, we will not require the trial to use the exact language from the transcript in formulating its judgment entry.

[4] {¶ 30} New Haven argues that the trial court should not have applied the doctrine of waiver in this case to preclude it from asserting certain arguments regarding several provisions of the agreement in support its claim for breach of contract. Specifically, the trial court found that waiver applied to preclude the appellant's claim with respect to the price of diesel fuel, freight rates, and its entitlement to share with Clay the shrinkage allowance, credit card fee, and the advertising fee.

{¶ 31} Waiver is defined as a voluntary relinquishment of a known right.[FN17] Waiver need not be established through express statement in a contract; it may also be inferred through the acts and conduct of the parties.[FN18] However, the party relying on implied waiver has the burden of showing by a preponderance of the evidence that a waiver, through clear and unequivocal acts or conduct, did occur.[FN19]

FN17. *Chubb v. Bureau of Workers' Comp.* (1998), 81 Ohio St.3d 275, 278, 690 N.E.2d 1267 .

FN18. *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, syllabus.

FN19. *Id.*

{¶ 32} At trial, the appellant's primary witness, Mr. Paul, admitted on cross-examination that at the time when the calculations for gross profit were altered with respect to diesel fuel and freight rates, neither he nor anyone else at New Haven complained. In fact, no objection was lodged until after Mr. Paul stepped down as Clay's president and became involved with New Haven exclusively.

*6 {¶ 33} Similar testimony was provided with regards to the issues of shrinkage allowance, credit card fee, and the advertising fee. According to Mr. Paul, the parties have been dealing with each of these items in a particular way for a number of years. Again, the appellant objected to the practices only after Mr. Paul left Clay and became president of New Haven. Ironically, Mr. Paul also admitted that, while at Clay, he at least knew of all and possibly implemented some of the various practices about which New Haven now complains. Based on Mr. Paul's testimony alone, we conclude that, by the manifest weight of the evidence, the appellee showed that a waiver, through clear and unequivocal acts or conduct, did occur.

{¶ 34} The appellant also contends that it showed by the manifest weight of the evidence that the appellee was improperly determining "gross profit." However, because we agree with the trial court's finding that the appellant waived its right to object to the appellee's calculation of "gross profit," the propriety the formula used is irrelevant. Therefore, we need not address this argument.

[5] {¶ 35} The appellant claims that the manifest weight of the evidence shows that Clay illegally mixed gasoline of different octane

ratings and that it illegally mixed diesel fuel with gasoline, thus materially breaching the agreement. We note at the outset that, regardless of the legality of these acts, there is nothing in the agreement that expressly prohibits Clay from either mixing gasoline of different octane ratings or mixing diesel fuel with gasoline. Therefore, it was not against the manifest weight of the evidence to find that neither of these acts amount to breach of contract. Moreover, the manifest weight of the evidence does not show that Clay violated any laws.

{¶ 36} There was evidence presented at trial that the some of the appellee's drivers mixed a lower octane with a higher octane fuel. In fact, Mr. Douglas Beck, President of Clay, testified that, while it was not company policy, on at least one occasion someone at Clay instructed a driver to perform this type of mixing.

{¶ 37} Mr. John Grant, a regional manager for Marathon testified briefly that combining one octane with another is illegal. There was no testimony regarding what actual law prohibited this mixing. Moreover, other testimony showed that mixing is not necessarily illegal as long as the fuel in each of the tanks meets the minimum octane rating required by law. Mr. Paul's testimony revealed that the octane rating on each of the tanks indeed reflects a minimum octane rating. The appellant could not establish the actual octane rating of the tanks before the lower octane was added to the tank. Therefore, it could not to establish that the mixing of octane levels caused the rating in the tanks to fall below the legal minimum.

{¶ 38} With regards to the mixing of diesel fuel with gasoline, no testimony established that this practice was, in fact, illegal. Although the evidence revealed that damage was caused on one occasion when this happened, it also showed that the appellee paid these damages.

*7 [6] {¶ 39} The appellant fails to show how the rest of the alleged errors it cites in support of this assignment of error affect the ultimate outcome of the case. In order for a reviewing court to justify a reversal, the record must reflect that the errors asserted prejudiced the party seeking the reversal.FN20 As the appellee points out, Ohio has expressly rejected the theory that cumulative minor errors warrant reversal.FN21 Thus, even if we determined that some of the trial court's findings were erroneous, we could not reverse based on quantity of errors alone. Rather, there must be a showing of prejudice for each individual error. Because we find that the appellant was not prejudiced by any of the court's findings, we decline to address the remaining arguments individually.

FN20. *Suchy v. Moore* (1972), 29 Ohio St.2d 99, 102, 279 N.E.2d 878 .

FN21. *Nicholas v. Yellow Cab Co.* (1962), 116 Ohio App. 402, 412, 180 N.E.2d 279 .

{¶ 40} Accordingly, the appellant's second assignment of error is not well-taken and is hereby overruled.

ASSIGNMENT OF ERROR NO. III

{¶ 41} The trial court committed reversible error when it overruled Plaintiff's motion for a new trial.

{¶ 42} For its final assignment of error, the appellant presents several arguments regarding why the trial court should have granted its motion for a new trial. We will address each of these arguments in turn. Certain of the appellant's arguments regarding its motion for a new trial essentially contend that the trial court erred as a matter of law, while others raise questions about the court's weighing of evidence. Because these two types of arguments require different standards of review, we will divide them accordingly.

Asserted Errors of Law

{¶ 43} When a new trial is requested on the basis that an error of law was committed, a reviewing court does not make a determination of whether or not the trial court abused its discretion, as the trial court is not exercising discretion when reviewing a

motion for a new trial on this basis.[FN22] Thus, a reviewing court will not reverse the decision of the trial court overruling a motion for new trial when the challenged action was not error or was not prejudicial.[FN23]

FN22. *Sanders v. Mt. Sinai Hospital* (1985), 21 Ohio App.3d 249, 487 N.E.2d 588; *Rhode v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685 .

FN23. *Sanders,* supra.

[7] {¶ 44} The appellant first argues that it was essentially coerced into withdrawing its jury demand and submitting the case to the trial court for determination. Civ.R. 38 , which governs the right to trial by jury, reads in relevant part:

{¶ 45} "(B) Demand.

{¶ 46} "Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. * * * *

{¶ 47} "(C) Specification of issues.

{¶ 48} "In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action."

*8 {¶ 49} Civ.R. 39, also relevant to this case, states as follows:
{¶ 50} "(A) By jury

{¶ 51} "When trial by jury has been demanded as provided in Rule 38 , the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to the court."

{¶ 52} The parties agreed throughout the proceedings in this case that a number of questions of law needed to be decided by the court before the case was submitted to a jury. At the conclusion of the trial, the court stated that it would take approximately one week to resolve these issues, due in part to the case's complexity and in part to the trial court's other commitments. This meant that the jury would be recalled after only after the court ruled on the various issues. Upon this revelation, both parties agreed on the record to remove the case from the jury for resolution of all issues by the trial court. The appellant contends that it effectively had no choice but to withdraw its jury demand and that it only did so to avoid wasting time, money, and resources.

{¶ 53} The appellant did not raise this objection at trial, notwithstanding the fact that its counsel clearly had notice and opportunity to object at the time the issue was raised. "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed."FN24 Unless we find plain error, we must uphold the jury waiver. Plain errors constitute any "errors or defects affecting substantial rights [and] may be noticed although they were not brought to the attention of the court."[FN25] To determine whether the trial court committed plain error, the reviewing court must determine whether, "but for the error, the outcome of the trial clearly would have been otherwise."[FN26] Although the plain error doctrine is primarily applied in criminal cases, its application to civil cases may be necessary in " 'extremely rare situations * * * to prevent a manifest miscarriage of justice * * *.' " [FN27] Upon review of the record, we find that no manifest injustice occurred as a result of the decision to submit the entire case to the trial court.

FN24. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706 .

FN25. Crim.R. 52(B) .

FN26. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

FN27. *O'Connell v. Chesapeake & Ohio R.. Co.* (1991), 58 Ohio St.3d 226, 229-30, 569 N.E.2d 889 .

{¶ 54} The appellant claims that it was deprived of due process because the trial court failed to answer each and every one of the appellant's jury interrogatories. According to the appellant, it withdrew its jury demand upon the express condition that the trial court would answer the interrogatories.

*9 {¶ 55} At the conclusion of the trial, the following conversation took pace between the court and the appellant's attorney, Mr. Barga:

{¶ 56} "THE COURT: * * * * Mr. Barga had a list of questions and interrogatories. I had indicated that I would answer those * * * *. So, that we're clear, *I did not agree to answer each and every one the, of those questions specifically* * * * *. Is that a correct recitation of what was discussed in my office? (EMPHASIS ADDED)

{¶ 57} "MR. BARGA: Yes, I believe it is. * * * "

{¶ 58} Thus, the appellant not only failed to object to the trial court's decision not to address each of its interrogatories, its attorney affirmatively agreed to this decision on the record. The only condition to dismissing the jury that the appellant made on the record was that it be permitted to revise its exhibit 25, which contained its calculation of the monetary damages suffered by New Haven.

{¶ 59} The Ohio Rules of Civil Procedure do not require a court to answer jury interrogatories after a bench trial. In fact, pursuant to Civ.R. 52 , a trial court may enter a verdict without issuing any supporting findings of fact and conclusions of law, unless requested to do so in writing by a party. Thus, there is no legal reason why the trial court should be made to answer the appellant's interrogatories. Accordingly, the appellant's contention that it is entitled to a new trial due to this issue is without merit.

[8] {¶ 60} The appellant next asserts that it is entitled to a new trial because the trial court entered two contradictory judgment amounts in its original judgment entry. Specifically, on page two of the entry, the court granted judgment for Clay against New Haven in the amount of $280,050.42. However, on page thirty-four of the same entry, the trial court finds damages for Clay in the amount of $293,769.35. Later, in its Journal Entry on Plaintiff's Motion for New Trial, the trial court corrects itself, agreeing with the appellant that the amount of the judgment on page thirty-four of the judgment entry was incorrect and should have read $280,050.42. Accordingly, we fail to see how the appellant was prejudiced by the trial court's initial error. The appellant is not entitled to a new trial based on this issue.

[9] {¶ 61} The appellant argues that the trial court's a adoption of the appellee's Proposed Findings of Fact and Conclusions of Law violated Civ.R. 52 , which states:

{¶ 62} "When questions of fact are tried by the court without a jury, judgment may be general * * * unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law."

{¶ 63} The purpose of Civ.R. 52 is " 'to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment.' " FN28 In light of its purpose, while there is no precise rule regarding compliance with Civ.R. 52 , the findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law . FN29

FN28. *In re Adoption of Gibson* (1986), 23 Ohio St.3d 170, 172, 492 N.E.2d 146, quoting *Werden v. Crawford* (1982), 70 Ohio St.2d 122, 124, 435 N.E.2d 424 .

FN29. *Stone v. Davis* (1981), 66 Ohio St.2d 74, 85, 419 N.E.2d 1094 .

***10** {¶ 64} The trial court's **judgment entry** which contained it **findings** of **fact** and **conclusions** of **law** was 34 pages long and contained 176 paragraphs, each of which **constituted** a separate finding. Regardless of whether these findings were partially adopted from the appellee's proposal, they are certainly adequate to provide the appellant with basis for appeal and to aid this Court in its review of this case. The appellant cannot show that it is entitled to a new trial based on this issue.

Asserted Errors of Fact

{¶ 65} Where questions of fact are involved, the decision as to whether a motion for new trial should be granted lies within the sound discretion of the trial court, and the ruling will not be reversed upon appeal absent a showing of an abuse of discretion.FN30 Thus, in reviewing a trial court's ruling on a motion for a new trial, an appellate court should view the evidence before it in a light favorable to the trial court's action, where the trial court's decision involves factual determinations.FN31 An abuse of discretion connotes more than an error of judgment; rather, it indicates that the trial court's attitude was unreasonable, unconscionable, or arbitrary.FN32

FN30. *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184, 454 N.E.2d 976 .

FN31. *Sanders v. Mt. Sinai Hospital* (1985), 21 Ohio App.3d 249, 253, 487 N.E.2d 588 .

FN32. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218 .

[10] {¶ 66} The appellant argues that trial court should have found the appellee failed to rebut that appellant's prima facia showing of breach of contract. This argument cannot be sustained based on our previous finding that the trial court's judgment was not against the manifest weight of the evidence. The trial court did not find that the appellant established its breach of contract claim. Hence, the burden in the case never shifted to the appellee. Therefore, the trial court did not abuse its discretion in determining that New Haven was not entitled to a new trial based on this issue.

{¶ 67} The appellant contends that the trial court abused its discretion by adopting, in large part, the appellee's Proposed Findings of Fact and Conclusions of Law, and that, consequently, it is entitled to a new trial. As we noted in the previous assignment of error, it is not improper for a trial court to adopt a party's proposed findings of fact and conclusions of law, as long as the document is reviewed to ensure that it is completely accurate.FN33 Because we have already reviewed the trial court's findings, we hold that the trial court did not abuse its discretion by not granting a new trial based on this issue.

FN33. *Slyman,* 6 Ohio App.3d at 47, 452 N.E.2d 1343 .

{¶ 68} Based on the foregoing, the appellant's third assignment of error is not well-taken and is hereby denied.

{¶ 69} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW , P.J., and BRYANT, J., concur.
Ohio App. 3 Dist.,2002.

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