

IN THE SUPREME COURT OF OHIO

AMANDA HELWIG, *et al.*

Appellants,

vs.

HOMEWOOD HOMES, INC., *et al.*,

Appellees,

Case No. 09-0986

On Appeal From the Franklin County
Court of Appeals, Tenth Appellate District
Court of Appeals Case No. 08 APE 05 406

**HOMEWOOD HOMES, INC.'S RESPONSE TO THE MEMORANDUM IN SUPPORT
OF JURISDICTION OF APPELLANTS AMANDA AND BRYAN HELWIG**

Todd H. Neuman (0059819)
Rick L. Ashton (0077768)
ALLEN KUEHNLE STOVALL & NEUMAN LLP
17 South High Street, Suite 1220
Columbus, Ohio 43215-4100
Telephone: (614) 221-8500
Facsimile: (614) 221-5988
E-mail: neuman@aksnlaw.com
E-mail: ashton@aksnlaw.com
*Counsel for Appellee,
Homewood Homes, Inc.*

John M. Gonzales, Esq. (0038664)
Robert J. Behal Law Offices, LLC
501 South High Street
Columbus, Ohio 43215
Telephone: (614) 464-2025
Facsimile: (614) 224-8708
*Counsel for Appellants,
Bryan and Amanda Helwig*

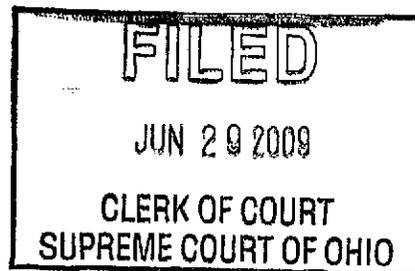


TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW	4
<i>Proposition of Law No. 1: The Initiation of an action against a homeowner for violation of a restrictive covenant, with the ulterior motive of suppressing that homeowner’s constitutionally protected freedom of speech, is a clear case of abuse of the legal process</i>	<i>4</i>
<i>Proposition of Law No. 2: When a homebuilder has, separate and apart from a contract to build a home, intentionally made fraudulent misrepresentations concerning the construction of the home, a separate tort action for fraud exists and the homeowner may recover damages in tort based on the cost of repair even if such costs parallel the repair costs for breach of contract</i>	<i>5</i>
A. The Helwigs’ Second Proposition Of Law Is Procedurally Flawed	5
B. The Helwigs’ Second Proposition Of Law Is Inaccurate	6
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

	Page
<u>Ohio State Courts</u>	
<i>Midvale Coal Co. v. Cardox Corp.</i> (1949), 152 Ohio St. 437	9
<i>Textron Fin. Corp. v. Nationwide Mut. Ins. Co.</i> (1996), 115 Ohio App.3d 137	7
<i>Turner v. Salvagnini America, Inc.</i> (2008), 2008 Ohio 3596	9
<i>Van Zant v. May-Coleman & Associates, Inc.</i> (1983), 1983 Ohio App. LEXIS 15064	5, 8
<i>Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.</i> (1994), 68 Ohio St.3d 294	4
<u>Ohio Federal Courts</u>	
<i>Battista v. Lebanon Trotting Assoc.</i> (C.A.6, 1976), 538 F.2d 111	7
<i>Wolfe v. Continental Cas. Co.</i> (C.A.6, 1981), 647 F.2d 705	7
<u>Other Authorities</u>	
S. Ct. Prac. R. II, Section 1(A)(3)	1

**EXPLANATION OF WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This discretionary appeal falls well short of the “public or great general interest” standard contained in S. Ct. Prac. R. II, Section 1(A)(3). At best, this case concerns limited disputes as to (1) the Helwigs’ admitted violation of a specific deed restriction, and (2) ability to recover tort-based remedies in addition to breach of contract, without the benefit of evidence demonstrating separate tort-based duties and damages. Nor can anyone claim that this factbound application of settled law warrants the scarce time and devoted attention of this Court. Review should be denied, and the case resolved at the local, not the statewide, level.

Amanda and Bryan Helwig (the “Helwigs”) – who admit they violated the deed restrictions for their subdivision – request review of the unanimous decision of the Tenth District Court of Appeals holding that Homewood Homes, Inc’s (“Homewood”) pursuit of injunctive relief and defamation damages, based upon a deed restriction violation, did not rise to an abuse of process claim. In support of their petition, the Helwigs point to neither a split among the appellate courts in this state nor any question of law on which this Court has not already developed well-established principles. Rather, they claim their First Amendment rights, if any, should go unbridled despite presenting no evidence suggesting that Homewood had an ulterior motive in suppressing the Helwigs’ speech. In fact, the Helwigs agreed, via the deed restrictions, to limit their own speech rights. While the Helwigs may disagree with the unanimous decisions of all the courts below, that alone surely is not sufficient to create a question of public or great general interest.

Similarly problematic is the Helwigs’ request for review of another established legal tenet with universal acceptance – that in conjunction with a breach of contract claim, a litigant may

only receive damages for torts when that litigant has proven separate tort-based duties and tort-based damages. Applying this straightforward standard, the Court of Appeals correctly determined that the Helwigs had failed to meet their burden; the majority finding no evidence of a tort-based duty, and the concurrence finding no evidence of tort-based damages. The Helwigs now request this Court to contort established law, apply non-existent facts, and utilize remedies never before used on the claims litigated by the Helwigs. And to do so, no less, in the restricted context of “misrepresentations” made by “homebuilders” only. Under these circumstances, further review simply is not warranted.

The Helwigs’ petition utterly fails. They cannot show either that their case falls within this Court’s established standards for granting a request for discretionary review or even that three judges of the appellate court made any error at all in applying established law to the facts of this case.

STATEMENT OF THE CASE AND FACTS

This case involves disputes between a home builder, Homewood, and the home buyers, the Helwigs. It began when the Helwigs posted a sign in front of their yard that read “Do Not build with Ambassador¹ or Trinity! Look at my driveway and sidewalk, then stop by and ask me why.” The sign’s placement in front of the Helwigs’ home violated the deed restrictions for the subdivision. Homewood filed suit and obtained both a temporary restraining order and an agreed preliminary injunction requiring the Helwigs to remove the sign. Homewood also pursued damages related to defamation claims against the Helwigs. The Helwigs then filed counterclaims against Homewood alleging both breach of contract and a tort-based fraudulent

¹ Ambassador Homes is a division of Homewood. For purposes of this Memorandum, the distinction is irrelevant and is adequately referenced as “Homewood”.

misrepresentation claim. Both claims stemmed from a March 4 letter labeled Exhibit K², referenced in the appellate decision as Joint Exhibit 1, and subsequently determined to be a contract by the trial court. The Helwigs also brought an abuse of process claim stemming from Homewood's pursuit of injunctive relief and defamation damages.

The parties' claims then proceeded to a four day trial. After the Helwigs rested, the trial court denied Homewood's motion for a directed verdict on, among other things, the Helwigs' misrepresentation claim, and dismissed the Helwigs' abuse of process claim. The jury returned its verdict in favor of Homewood on its claim to enforce the deed restriction and awarded damages to the Helwigs on their contract and misrepresentation claims – awarding attorneys fees and punitive damages.

Problematic for the Helwigs, however, was that their fraudulent misrepresentation claim was identical in duty and damages to their contract claims. In Ohio, the existence of a contract action prohibits tort claims based on the same facts. At trial, the Helwigs failed to prove (or even argue) any separate tort-based duties or damages.

On appeal, after careful analysis of the standard applicable to a motion for a directed verdict, all the members of the appellate panel agreed that the Helwigs' failed to prove the necessary elements of their misrepresentation claim – the majority relying in the Helwigs' failure to prove an independent tort duty (Op. 8); the concurrence relying on the Helwigs' failure to prove independent tort damages (Op. 19). All the members of the appellate court also agreed that the Helwigs were unable to satisfy the elements for a claim of abuse of process as “there was no evidence that the action [brought by Homewood] was perverted to attempt to accomplish an ulterior purpose for which it was not designed.” Op. 15. The appellate court then ordered the

² For purposes of consistency, Exhibit K is the exhibit identification used in the trial court proceedings.

trial court to grant Homewood's motion for directed verdict and upheld the trial court's dismissal of the Helwigs' abuse of process claim.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law No. 1: The Initiation Of An Action Against A Homeowner For Violation Of A Restrictive Covenant, With The Ulterior Motive Of Suppressing That Homeowner's Constitutionally Protected Freedom Of Speech, Is A Clear Case Of Abuse Of The Legal Process

Even the most cursory reading of this proposition of law demonstrates that it provides no justification for review by this Court. On its face, this proposition of law simply couches the facts of this case in the context of the applicable standard of an abuse of process claim, without any factual support. See *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298 (stating the elements for an abuse of process claim). Simply stated, the Helwigs' presupposition that Homewood somehow had an ulterior motive cannot be supported by the record below. Nor once these extraneous facts are removed from the issue can the Helwigs identify any confusion in the courts of appeals or any unresolved question of law. This can only be because the appellate court's decision in this case implicates no novel legal issue and is nothing more than the application of straightforward facts to a straightforward legal standard.

Without regard to their proposition of law, the Helwigs seemingly attempt to revive their abuse of process claim by disputing not the standard, but the factual application of the standard – particularly, whether the Helwigs provided sufficient proof as to any alleged ulterior motive of Homewood. As found by the trial court and affirmed by the court of appeals, there was simply no evidence that the suit filed by Homewood was perverted to attempt to accomplish an ulterior purpose for which it was not designed. Rather, both courts found that Homewood had a legitimate purpose in two respects: (1) in preventing any more signs and more violations of the

deed restrictions, and (2) seeking damages on account of the defamation claim. Further, it was the Helwigs themselves who agreed to the very deed restrictions which prevent written statements such as the one they now attempt to use as a basis of appeal to this Court. As this case comes to the Court, in short, the lynchpin of the Helwigs' contention – a finding of an ulterior motive – is missing.

Not surprisingly, the Helwigs cite no case law that supports their position. Indeed, the Helwigs themselves seem to be confused about what exactly they hope this Court will review under this proposition of law. The discussion in their petition has little to do with the proposition of law it follows. It certainly provides no basis on which this Court should take jurisdiction.

Proposition of Law No. 2: When A Homebuilder Has, Separate And Apart From A Contract To Build A Home, Intentionally Made Fraudulent Misrepresentations Concerning The Construction Of The Home, A Separate Tort Action For Fraud Exists And The Homeowner May Recover Damages In Tort Based On The Cost Of Repair Even If Such Costs Parallel The Repair Costs For Breach Of Contract

A. The Helwigs' Second Proposition Of Law Is Procedurally Flawed

The initial problem with the Helwigs' second proposition of law is a procedural one. At no point in the trial court or in the appellate court have the Helwigs advanced the "benefit of the bargain" damages theory they are advocating now. In the Helwigs' current view, and presuming a separate tort-based duty has been established³, the appellate court should have attempted to discern tort-based damages through a "benefit of the bargain" analysis. The problem is, the Helwigs never made any such argument to either the trial court or the appellate court. And indeed, the cases on which the Helwigs rely used the "benefit of the bargain" damages calculation only in the context of a fraud in the inducement allegation. *See Van Zant v. May-Coleman & Associates, Inc.* (1983), 1983 Ohio App. LEXIS 15064, at *5 (stating that, "[w]here

³ Which, as demonstrated below, a majority of the Court of Appeals rejected.

there is fraud in the inducement of the purchase or exchange of property, Ohio courts have adapted ... the ‘benefit of the bargain rule.’”) At no point in this litigation have the Helwigs alleged fraud in the inducement or ever raised the issue of “benefit of the bargain damages.”

It is not this Court’s practice to grant review of an issue or allegation that has not been raised below, and that the lower courts never had an opportunity to address. On this ground alone, the Helwigs’ second proposition of law should be denied.

B. The Helwigs’ Second Proposition of Law Is Inaccurate

Under their second proposition of law, the Helwigs fail to show any great public interest or ambiguity in the law. Instead, they frame the issue with facts unsupported by the record, through a theory never once advanced in the courts below (“benefit of the bargain rule”), all for a proposition of law that finds universal rejection in Ohio courts (the recovery of parallel damages for tort and contract). Nor does the limited nature and context of this proposition of law (homebuilder representations only) lend itself to this Court’s established jurisprudence of accepting and pronouncing broad-based legal principles, not individualized case-specific decisions.

The Court of Appeals correctly applied settled law from this Court to grant Homewood’s motion for a directed verdict on the Helwigs’ claim of misrepresentation. After a detailed discussion of the standard applicable to a motion for a directed verdict, the Court of Appeals reversed the Helwigs’ claim of fraudulent misrepresentation, not because of an alternative view of disputed facts, but because the appellate court found that the Helwigs failed to satisfy the legal elements of a fraudulent misrepresentation claim when brought in conjunction with a breach of contract claim.

In disposing of the Helwigs' claim, the court reiterated that "[t]he existence of a contract action * * * excludes the opportunity to present the same case as a tort claim." Op. at 7, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151, quoting *Wolfe v. Continental Cas. Co.* (C.A.6, 1981), 647 F.2d 705, 710, discretionary appeal not allowed (1996), 78 Ohio St.3d 1425. This rule of law finds its genesis in the "venerable rule that the motive of a breaching party to a contract is irrelevant * * * and would allow parties to convert contract actions into actions in tort by attacking the motive of the breaching party." *Battista v. Lebanon Trotting Assoc.* (C.A.6, 1976), 538 F.2d 111, 118.

As the Court of Appeals explained, after the breach of contract cause of action was established – based on the letter from Homewood to the Helwigs as to the Tyvek House Wrap and windows – the Helwigs were unable to carry their additional burden of proof as to their fraudulent misrepresentation claim by showing an independent tort duty and independent tort damages. Op. at 8, 19. Under such circumstances it would have been error for the Court of Appeals to let the verdict stand.

Each of the Helwigs' efforts (Petition at 8-12) to suggest that the record contains sufficient evidence to carry their burden fails. First, the March 4 letter regarding installation of the windows and Tyvek did not make independent assurances, and the Helwigs did not prove a tort-based duty, substantively distinct from the home purchase contract. The Helwigs were already contractually obligated to buy the home, the letter did not change the contractual duties. Op. 7-8. The parties were always obligated by the original contract. Op. 8. Even the Helwigs admitted that "[c]learly, the Plaintiffs were already *contractually obligated* to properly install the windows and Tyvek." The Tenth District Court of Appeals correctly applied established law in

finding that the Helwigs failed to identify a tort-based duty independent from their breach of contract claim.

Even more deficient is the Helwigs' theory of separate tort-based damages. As the record abundantly reflects, and as recognized in the concurring opinion of Judge Sadler, "there is no evidence that the Helwigs suffered damages proximately caused by the fraud that were distinct from their damages caused by Homewood's breach of contract." Op. at 19. The fact that no separate damages were presented by the Helwigs for the misrepresentation claim was confirmed and highlighted during the closing argument for the Helwigs. During the closing argument, the Helwigs' counsel stated: "Here's the difficult part from a legal. We've asked you for basically the same damages but two different ways to get there." Most conspicuously, this improper overlap is apparent in the statement that, "[n]ow, all you can award us is \$9,900. If you say, John, we think it's a breach of contract on those three items, and we also think it's the misrepresentation, you can't double it up. We just get what we asked for, the \$9,900." These closing statements illustrate the distorted basis on which the Helwigs presented their case and highlight their failure to prove any damages beyond those provided by contract.

Left with no record to support their burden as to separate tort-based damages, the Helwigs now wish to apply, for the first time, the "benefit of the bargain" rule. For support, the Helwigs contend that the Tenth District Court of Appeals decision in *Van Zant* "compares favorably with this case." Juris. Memo p. 11. The Helwigs, however, neglect to mention that the Plaintiffs in *Van Zant* brought their case under a fraud in the inducement theory, *Van Zant*, 1983 Ohio App. LEXIS at *5, not a breach of contract theory coupled with a fraudulent misrepresentation theory, as the Helwigs do here. The Helwigs have never alleged fraud in the inducement as a theory of recovery – a theory that would render the home purchase contract void

only upon proof of fraud. *See Turner v. Salvagnini America, Inc.* (2008), 2008 Ohio 3596, at *P22. Quite the contrary, the Helwigs have steadfastly maintained that the contracts in question were valid, but breached by Homewood. In the end, the Helwigs have never provided any evidence of separate tort-based damages. Without any support, they now invite this Court to re-write Ohio law in permitting them to: (1) advance, for the first time, a theory never presented to the trial court and appellate court below, and (2) to do so by ascribing a fraud in the inducement damages calculation to a fraudulent misrepresentation claim that has been brought in addition to a breach of contract claim. This Court should decline the Helwigs' nonsensical invitation.

A common theme in the Helwigs' second proposition of law is that it distorts well-established Ohio legal principles. Their request for "parallel damages" is no exception. "A double recovery against a defendant for a single injury is frowned upon by the courts." *Midvale Coal Co. v. Cardox Corp.* (1949), 152 Ohio St. 437, 451, overruled on other grounds. The Helwigs present no argument or case law support to disregard this established and common-sensical legal tenet.

In the final analysis, this is a breach of contract case. Litigants unable to file tort claims, including punitive damages, under existing law would simply do so under the holding of this case. Claims once barred thus would spring to life, and no longer would Ohio law respect the longstanding truth that separate and distinct tort-based duties and damages must exist prior to a party being subject to tort claims and punitive damages. A ruling suggested by the Helwigs would ultimately subject defendant after defendant in breach of contract cases to tort-based damages. This would be a very steep and slippery slope.

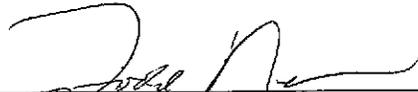
At the end of the day, this case is about breach of contract, and the Helwigs' assertion to the contrary simply reflects a request to create liability where there is none. Again, the Helwigs

identify no confusion among the Courts of Appeals and no novel issue of law that requires clarification.

CONCLUSION

For the foregoing reasons, the jurisdictional statement should be denied.

Respectfully submitted,



Todd H. Neuman (0059819)
Rick L. Ashton (0077768)
ALLEN KUEHNLE STOVALL & NEUMAN LLP
17 South High Street, Suite 1220
Columbus, Ohio, 43215-4100
Telephone: (614) 221-8500
Facsimile: (614) 221-5988
E-mail: neuman@aksnlaw.com
E-mail: ashton@aksnlaw.com
Counsel for Appellees Homewood Homes, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Homewood Homes, Inc.'s Response To The Memorandum In Support Of Jurisdiction Of Appellants Amanda And Bryan Helwig* has been served via ordinary mail, this 29th day of June, 2009, upon the following:

John M. Gonzales, Esq. (0038664)
Robert J. Behal Law Offices, LLC
501 South High Street
Columbus, Ohio 43215
*Counsel for Appellants,
Bryan and Amanda Helwig*



Rick L. Ashton