

ORIGINAL

SUPREME COURT OF OHIO

FIRSTMERIT BANK, N.A.

Plaintiff/Appellee

vs.

WILLIAM M. WOOD, ET AL.

Defendants/Appellants

CASE NO. 09-2304

ON APPEAL FROM THE LORAIN
COUNTY COURT OF
COMMON PLEAS, NINTH
APPELLATE DISTRICT
(CASE NO. 06CV145416)

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

William F. Kolis, Jr., Counsel of Record
(No. 0011490)
Rachelle Kuznicki Zidar (No. 0066741)
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, OH 44011-1262
(440) 930-8000 Main
(440) 930-8098 Fax

Attorneys for Defendants/Appellants,
William M. Wood and Vicki Wood

Rosemary Taft Milby, Esq.
Matthew G. Burg, Esq.
Jennifer M. Monty, Esq.
Weltman Weinburg & Reis, Co., L.P.A.
323 West Lakeside Avenue, Suite 200
Cleveland, OH 44113-1099
(216) 685-1040 (Main)
(216) 363-6914 (Fax)

Attorneys for Plaintiff/Appellee,
FirstMerit Bank, N.A.

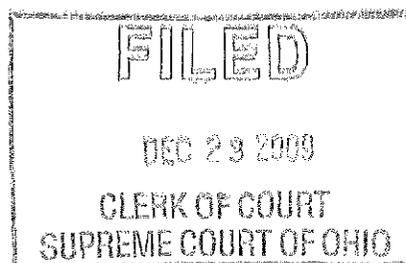


TABLE OF CONTENTS

	<u>Page(s)</u>
I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL INTEREST.	1
II. STATEMENT OF THE CASE AND FACTS.....	2
III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	4
Proposition of Law No. 1: Due process requires reasonable notice be given an Appellant who has complied with the mandates of Appellate Rules 9 and 10 that an item is missing from the record on appeal.	4
IV. CONCLUSION.....	15

I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL INTEREST.

The Ninth District Court of Appeals' decision has deprived Appellants William and Vicki Wood their due process right to have their appeal heard on the merits and imposes an impractical and unreasonable burden upon all litigants to an appeal. Here, the Court of Appeals declined to address the merits of the case due to an alleged incomplete record although Appellants fully complied with the mandates of Appellate Rules 9 and 10 governing transmission of the record. Specifically, Appellants were notified by the Appellate Court on two separate occasions that the record had been transmitted and was complete. Thereafter, the matter was fully briefed and argued. Only upon issuance of the Decision and Journal Entry on November 9, 2009, were Appellants first notified that a pleading was apparently missing from the record.

Appellants submit that traditional notions of due process require an appellate court to notify appellants who have otherwise complied with the duties imposed by Appellate Rules 9 and 10 if items are missing from the record. The failure to do so is tantamount to the deprivation of an appeal, which is an acknowledged property right, without due process of law. The decision of the Ninth District Court of Appeals imposes an impractical and unduly burdensome obligation upon every appellant to conduct a physical examination of the record in every appeal to ensure that all items have been properly transmitted from the trial court or risk an adverse decision due to an incomplete record. The Civil Rules do not require this degree of oversight by an appellant, but rather contemplate an opportunity to correct or modify the record where necessary. App. R. 9(E). This is impossible, however, if an appellant is not given reasonable notice of an omission.

This case presents the Court with an opportunity to clarify when an appellant's duty to transmit the record has been satisfied pursuant to Appellate Rules 9 and 10 and what notice an appellant is entitled to if something goes awry in the transmittal process.

II. STATEMENT OF THE CASE AND FACTS.

Appellee FirstMerit Bank, N.A. filed a Complaint against Defendants on March 3, 2006. The Clerk of Courts issued the Summons and Complaint to Appellants via certified mail on March 10, 2006. On April 7, 2006, the certified mail to Appellants was returned unclaimed. Thereafter, Appellee filed a request for service by ordinary mail and the Clerk issued the Summons and Complaint to Appellants by ordinary mail. On July 28, 2006, Appellee filed a Motion for Default Judgment which was granted by the trial court on August 17, 2006. Although the docket does not indicate that the attempts at ordinary mail service were returned, Appellants filed a Motion to Vacate with affidavits on March 17, 2009, denying receipt of the Summons or Complaint. Indeed, Appellants maintain that they first learned of the action when they received notice to appear for a debtor's examination. On April 29, 2009, the trial court denied Appellants' Motion to Vacate. Appellants filed a Notice of Appeal on May 14, 2009.

In accordance with Appellate Rules 9 and 10, Appellants also filed a Praecipe instructing the Clerk of the Lorain County Court of Common Pleas to immediately assemble and transmit the record in the case to the Ninth District Court of Appeals. The Praecipe further advised the Clerk that the record would include only the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries. Appellants also filed a docketing statement repeating these instructions. On or about June 8, 2009, attorneys for Appellants were notified by the Clerk that the Complaint was missing from the record of the trial court. Accordingly, Appellants filed a Motion for Extension of Time to File the Record certifying that a Complaint was submitted to the Clerk for transmittal on or about June 11, 2009.

The trial court docket reflects that the transcript and journal entries, together with all original papers, were received and filed with the Appellate Court on June 23, 2009. A notice was issued by the Court of Appeals for the Ninth Judicial District certifying the receipt of the record. Further, on July 10, 2009, the Appellate Court issued the following Magistrate's Order:

The appellants have moved for an extension of time to file the record. The motion is denied as moot. The record was made complete on July 23, 2009. The appellants' brief is due on or before July 13, 2009.

(signed)
C. Michael Walsh
Magistrate

Exhibit A, Magistrate's Order.

The Brief of Appellants was filed on July 13, 2009. Thereafter, the Brief of Appellee and a Reply Brief were filed, and an oral argument addressing the merits of the case was had on October 9, 2009. On November 9, 2009, the Court of Appeals issued its Decision and Journal Entry affirming the judgment of the Lorain County Court of Common Pleas against Appellants on the grounds that the record was incomplete. Specifically, the decision advised that the record did not contained the Motion to Vacate with attached affidavits. Exhibit B, Decision and Journal Entry. Appellants filed a Motion for Reconsideration on November 18, 2009. This motion is still pending.¹ This appeal follows.

¹ The filing of a motion for reconsideration does not extend the deadline for filing a notice of appeal to the Supreme Court after entry of an appealable judgment. App. R. 26(A).

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.

Proposition of Law No. 1: Due process requires reasonable notice be given an appellant who has complied with the mandates of Appellate Rules 9 and 10 that an item is missing from the record on appeal.

Article IV of the Ohio Constitution provides for the establishment of an appellate court system with jurisdiction in any cause on review. Section 3(B)(2). Further, Chapter 2505.03 of the Ohio Revised Code provides in pertinent part as follows:

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a Court of Common Pleas, a Court of Appeals, or the Supreme Court, whichever has jurisdiction.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

The Ohio Rules of Appellate Procedure further provide for an appeal as of right within the time allowed by Appellate Rule 4. As this Court has previously acknowledged: "By developing a process of appellate review, *states provide litigants with a property interest in the right to appeal*. Clearly, litigants cannot be deprived of this right without being granted due process of law." *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St. 3d 80, 85. [Emphasis added.]

Traditional notions of due process inherent in the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require that those whose interests in life, liberty or property are adversely affected by government action are entitled to due process. *State ex. rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St. 3d 56, 2006-Ohio-4437, ¶ 45.

[A]t its core, procedural due process under both the Ohio and United States Constitutions requires, at minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right. *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed. 2d 113. Further, the opportunity to be heard must occur at a meaningful time and in a meaningful matter.

Id., citing *State v. Cowan*, 103 Ohio St. 3d 144, 2004-Ohio-4777, ¶ 8.

In *Atkinson*, this Court stated "on a more practical level, procedural due process places upon the government ***the duty to give reasonable notice***, and an opportunity to be heard, to those whose interests in life, liberty or property are adversely affected by governmental action." 37 Ohio St. 3d at 85, citing Tribe, *American Constitutional Law* (2 Ed. 1988), 683, Section 10-8 [Emphasis added].

In *Atkinson*, this Court expanded the prior holding of *Moldovan v. Cuyahoga Cty. Welfare Dept.* (1986), 25 Ohio St. 3d 293 that "[t]he opportunity to file a timely appeal pursuant to App. R. 4(A) is rendered meaningless when reasonable notice of an appealable order is not given," and went on to promulgate rules with respect to issuance of notice of a final appealable judgment. In *Atkinson*, appellants' counsel did not receive notice of the final order until well after 30 days after judgment was entered. Specifically, the court signed and filed the judgment entry on November 12, 1986, but it was not received by appellant's counsel until January 9, 1987, more than 30 days after the entry. Although appellants filed a notice of appeal on January 22, 1987, the court of appeals sustained a motion to dismiss the appeal for lack of jurisdiction on the basis that the appeal was not timely filed pursuant to Appellate Rule 4(A). In reviewing the matter, ***this Court rejected appellees' argument that appellants failed to exercise due diligence by regularly checking the status of the case with the trial judge.*** This Court further recognized that without a filed judgment entry, there is no way for a party to fully comply with App. R. 3(D), which requires the notice of appeal to specify the order appealed from. In considering appellee's

argument that sought to put the burden on appellant for determining when judgment was rendered. The Court stated:

The other way for appellants to demonstrate diligence would be to call the trial court each day to see if and when the judge signed the entry. This is not only impractical and unnecessarily burdensome, but it should also be apparent that such a course of action might also be against an appellant's best interests.

Atkinson, 37 Ohio St. 3d 80, 83.

Although *Atkinson* deals with notice of a final decision, identical due process implications are raised by the failure to notify an appellant of a missing item in the record when an appellant has fully complied with the rules governing transmission of the record. It is well settled that it is the duty of the appellant to take action to enable the clerk to assemble and transmit the record on appeal. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197 (transcript of proceedings); App. R. 9; App. R. 10. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *Knapp*, 61 Ohio St. 2d at 199, citing *State v. Skaggs* (1978), 53 Ohio St. 2d 162. The question is, how much must an appellant do to satisfy this requirement.

The Rules of Appellate Procedure provide a plethora of reading material concerning the transmission of the record on appeal. An examination of the rules relevant to Appellants' predicament is required.

App. R. 9 addresses the record on appeal. It provides in pertinent part:

(A) Composition of the record on appeal

The original papers and exhibits thereto filed in the trial court, the transcript, of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered

At the time of filing the notice of appeal, *the appellant, in writing, shall order* from the reporter a complete transcript or transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk.

Unless the entire transcript is to be included, *the appellant, with notice of appeal, shall file with the clerk of the trial court and serve on the appellee* a description of the parts of the transcript that the appellant intends to include in the record, *a statement that no transcript is necessary*, or a statement that a statement pursuant to either App. R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. [Emphasis added]

Thus, the foregoing rule defines the content of the record and an appellant's duty to order a transcript, if any, and file a statement with the clerk of the trial court indicating what the record will contain.² In compliance with App. R. 9, Appellants in this matter filed a Praecipe requesting the clerk of the Lorain County Court of Common Pleas to assemble and transmit the record to the Ninth District Court of Appeals. The Praecipe further advised the clerk of the Court of Common Pleas that the record would include only the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries. In compliance with App. R. 3(E) and local rule, a Docketing Statement was also filed indicating the contents of the record. Both the Docketing Statement and the Praecipe were filed on May 14, 2009, the same date the Notice of Appeal was filed.

App. R. 9(E) addresses correction or modification of the record. It states:

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference, shall be submitted

² App. R. 9 goes on at great length with respect to an appellant's options concerning a transcript of proceedings. These provisions are not relevant here as there was no need for a transcript in this matter.

to and settled by that court and the record made to conform to the truth. *If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.* All other questions as to the form and content of the record shall be presented to the court of appeals. [Emphasis added]

App. R. 9(E) clearly contemplates liberal correction, modification and supplementation of the record by either party, the trial court or the appellate court either before or after the record is transmitted.

App. R. 10 specifically addresses the transmission of the record. It states in pertinent part as follows:

(A) Time for transmission; duty of appellant

The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the clerk of the court of appeals when the record is complete for the purposes of appeal, or when 40 days, which is reduced to 20 days for an accelerated calendar case, have elapsed after the filing of the notice of appeal and no order extending time has been granted under subdivision (C). *After filing the notice of appeal, the appellant shall comply with the provisions of Rule 9(B) and shall take any other action necessary to enable the clerk to assemble and transmit the record.*

(B) Duty of the clerk to transmit the record

The clerk of the trial court shall prepare the certified copy of the docket and journal entries, assemble the original papers (or in the instance of an agreed statement of the case pursuant to Rule 9(D) the agreed statement of the case), and transmit the record upon appeal to the clerk of the court of appeals within the time stated in Subdivision (A). The clerk of the trial court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness.

Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the court of appeals. The clerk of the trial court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals and shall note the transmission on the appearance docket.

The record shall be deemed to be complete for the purposes of appeal under the following circumstances:

(1) When the transcript of proceedings is filed with the clerk of the trial court.

(2) When a statement of the evidence or proceedings, pursuant to Rule 9(C) is settled and approved by the trial court, and filed with the clerk of the trial court.

(3) When an agreed statement in lieu of the record, pursuant to Rule 9(B) is approved by the trial court, and filed with the clerk of the trial court.

(4) Where appellant, pursuant to Rule 9(B) designates that no part of the transcript of proceedings is to be included in the record or that no transcript is necessary for appeal, after the expiration of 10 days following service of such designation upon appellee, unless appellee has within such time filed the designation of additional parts of the transcript to include in the record.

(5) When forty days have elapsed after filing of the last notice of appeal, and there is no extension of time for transmission of the record.

(6) When twenty days have elapsed after filing of the last notice of appeal in an accelerated calendar case, and there is no extension of time for transmission of the record.

(7) Where the appellant fails to file either the docketing statement or the statement required by App. R. 9(B) 10 days after filing the notice of appeal. [Emphasis added]

Accordingly, App. R. 10 obliges ***an appellant*** to "take any other action necessary to enable the clerk to assemble and transmit the record" and the ***clerk of the trial court*** to actually prepare and transmit the record. It is not solely the appellant that is responsible for

transmission, but the process is a joint effort between the appellant and clerk's office. This can result in an appellant being at the proverbial mercy of an overburdened clerk or simple human error. Thus the reason for App. R. 9(E) permitting liberal correction of the record.

App. R. 11 addresses the docketing of the appeal and filing of the record. It provides in pertinent part:

Upon receipt of the record, the clerk shall file the record, and shall immediately give notice to all parties of the date on which the record was filed.

App. R. 11(B).

In this matter, a review of Appellants' efforts to ensure timely transmission of the record reveals no lack of due diligence. Rather, Appellants fulfilled the duties imposed upon them by Appellate Rules 3, 9 and 10 by filing a Docketing Statement and Praecipe on the same date that the Notice of Appeal was filed advising the clerk that the record consisted only of the original papers and exhibits filed of the trial court and a certified copy of the docket and journal entries. Further, in response to a Notice of Missing Items in the Record received by Appellants' counsel from the clerk of the trial court that the Complaint was missing from the record, Appellants' counsel filed a Motion for Extension of Time to File the Record on June 24, 2009, certifying that a copy of the Complaint was submitted to the clerk.³ Appellants further advised in the Motion for Extension of Time that additional time was needed to process the record due to a backlog in the clerk's office.

On July 10, 2009, Magistrate C. Michael Walsh issued an Order stating the Appellants' Motion for Extension of Time was moot, because the record was made complete on June 23, 2009. Exhibit A, Magistrate's Order. Indeed, the Lorain County Court of Common

³ App. R. 10(C) permits an extension of time to transmit the record for good cause shown.

Pleas' case docket sheet for the appellate action indicates that on June 23, 2009, a transcript of the docket and journal entries, *together with all original papers* were received and filed and notification was sent to attorneys of the filing of the record. Appellant separately received notice from the appellate court that the record was filed and consisted of a transcript of docket and journal entries *together with all original papers from the common pleas case*. In reliance upon these communications from both the court of common pleas and the appellate court that the record had been filed and was complete, Appellants filed their brief, a reply brief, and appeared for oral argument. It was not until the Court issued its opinion on November 9, 2009, that Appellants learned for the first time that the Motion to Vacate with attached affidavits filed in the trial court had somehow gone missing from the record. Exhibit B, Decision and Journal Entry, p.

3. In rendering its decision, the Appellate Court stated:

We begin by noting that pursuant to App. R. 9(A), the record on appeal must contain '[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court[.]' ***It is the appellant's duty to transmit the transcript of proceedings to the court of appeals. App. R. 10(A); Loc. R. 5(A).*** This duty falls to the appellant because the appellant has the burden of establishing error in the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 199. In the absence of an adequate record, we must presume regularity in trial court proceedings. *Id.* ***The record before this Court does not contain the defense motion to vacate or the accompanying affidavit. As these pleadings are necessary for a determination of the Woods' assignments of error, this Court must presume the regularity in the trial court's proceedings and affirm the judgment of the trial court.***

Decision and Journal Entry, p. 3, ¶ 5 [Emphasis added].

In contrast to the Appellate Court's opinion, Appellants met the obligations imposed upon them by Appellate Rules by filing a Docketing Statement and Praecipe, along with their Notice of Appeal specifying the items to be included in the record and requesting its timely

transmission to the Appellate Court. Appellants even filed a Motion for Extension of Time to file the record when it was notified by the clerk that the Complaint was missing. Thereafter, Appellants were notified by two separate communications, a Notice signed by the deputy clerk that the record had been filed in the Court of Common Pleas on June 23, 2009; and the Magistrate's Order of July 10, 2009, that the record was complete and Appellants' Motion for Extension of Time to file the record was moot. Exhibit A, Magistrate's Order. Appellants had every reason to rely upon this Notice and Order concerning the record on appeal.

As in *Atkinson*, where this Court recognized it was both impractical and unnecessarily burdensome to expect a party to call a trial court each day to see if and when a judge signed an entry for purposes of determining when a notice of appeal should be filed, it is likewise impractical and unnecessarily burdensome to require every appellant to physically inspect the record on appeal to ensure it contains every item listed thereon after complying with Appellate Rules 3, 9, and 10. This is particularly true after Appellants have been notified by both the trial court and the appellate court that the record has been transmitted and made complete. Yet, this is precisely what the decision of the Ninth District Court of Appeals requires.

Local Rule 5(A) of the Ninth District Court of Appeals mirrors App. R. 9 to a great extent, but contains the following additional language:

It is the duty of the appellant to arrange for the timely transmission of the record, including any transcripts of proceedings, App. R. 9(C) statement, or App. R. 9(D) statement, as may be appropriate, and ***to ensure that the appellate court file actually contains all parts of the record that are necessary to the appeal.*** [Emphasis added]

Loc. R. 5(A).

To the extent that the Ninth District Court of Appeals interprets the highlighted language to mean that every appellant is duty bound to physically inspect the record on appeal to

ensure that it is complete, said rule is in conflict with Appellate Rules 9 and 10 that define an appellant's duty and the trial court's corresponding duty to transmit the record, and specifically App. R. 9(E), that provides for liberal correction of the record. Indeed, in *CMK, Ltd. v. Lorain Cty. Bd. of Commrs*, 2003-Ohio-4700, the Ninth District Court of Appeals granted a motion for reconsideration where the court upheld the trial court decision on the basis that certain exhibits were not included with the record on appeal. The appellate court granted the motion because the trial court had possession of the exhibits, but failed to deliver them to the clerk for timely transmission to the appellate court. Similarly, in this matter, the trial court had possession of the Motion to Vacate with attached affidavits, but the Motion was apparently not transmitted to the appellate court or was misplaced after said transmission. Appellants should have been put on notice of this event to permit them a reasonable opportunity to correct or supplement the record pursuant to App. R. 9(E). A rule requiring attorneys or *pro se* parties to inspect each and every record on appeal or risk suffering an adverse decision due to an incomplete record is a violation of due process, as defined by *Atkinson* and its predecessor. Due process requires reasonable notice be given before a property interest, in this case an appeal, is adversely affected. Such a requirement is also totally impractical. Indeed, the logistical nightmare that would ensue by requiring parties or their attorneys to wade through what are often times voluminous records to check for completeness in every appeal would make the daily phone calls eschewed by the Court in *Atkinson* look like a minor annoyance in comparison.

Under Section 5(B), Article IV of the Ohio Constitution, local rules may not be inconsistent with any rule governing practice or procedure promulgated by the Ohio Supreme Court. *Vance v. Roedersheimer* (1992), 64 Ohio St. 3d 552, 554. This would include the Ohio Rules of Appellate Procedure. Accordingly, to the extent that Local Rule 5(A) puts an unreasonable and onerous burden upon appellants to physically inspect the record at the

courthouse or risk an adverse decision, such rule is in conflict with the Ohio Rules of Appellate Procedure and therefore, invalid.

Unlike the circumstances presented in *Knapp, supra*, (upon which the appellate court relied) where appellants therein did not avail themselves of the procedures provided for in the appellate rules when a verbatim transcript is unavailable, Appellants herein were diligent in specifying the items consisting of the record and requesting its timely transmission pursuant to the rules. They should not be punished because, through no fault of their own and unbeknownst to them, a portion of the record had gone missing. They were not notified of its omission until after the matter had been fully briefed and argued and the Court issued its decision. Declining to hear Appellants' case on the merits under these circumstances constitutes a deprivation of their due process rights insofar as they were entitled to reasonable notice that the record was incomplete and should have been given an opportunity to correct or supplement the record under App. R. 9(E). The failure to give Appellants reasonable notice flies in the face of this Court's reasoning, in *Atkinson*, that acknowledged the inherent human limitations involved in the practice of law and unrealistic expectation that every attorney or party be physically present at the courthouse on a daily basis to monitor the progress of his or her case. This is especially so in this matter where Appellants were actually notified by the clerk that the record had been filed and indeed was complete, and the Appellate Court went so far as to overrule Appellants' Motion for Extension of Time to transmit the record on the grounds that said Motion was moot, again certifying the "completeness of the record."

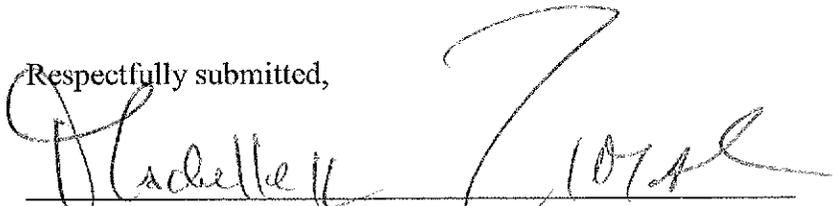
Appellants have been twice denied their day in court. As detailed in their Motion to Vacate, they were never apprised of the action against them until after judgment was rendered. Likewise, they were never notified of an omission in the record until a decision was issued by the Appellate Court. This Court "has repeatedly emphasized the fundamental tenant that courts

should strive to decide cases on their merits. See e.g., *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St. 2d 189, 23 O.O. 3d 210, 431 N.E. 2d 644; *Fisher v. Mayfield* (1987), 30 Ohio St. 3d 8, 30 OBR 16, 505 N.E. 2d 975. This laudable policy is totally frustrated by the dismissal of an appeal on purely technical grounds without regard to the nature of the error or the fact that it was made in good faith." *National Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St. 3d 14, 15. 505 N.E. 2d 980. Although the Appellate Court did not dismiss the appeal in this matter, the decision based upon an incomplete record and a local rule that unfairly puts the entire burden of "record completeness" upon the Appellants likewise fails to address the merits of the case and infringes upon Appellants' due process rights.

IV. CONCLUSION.

For the foregoing reasons, Appellants respectfully request this Court to accept jurisdiction of this matter.

Respectfully submitted,



William F. Kolis, Jr. (No. 0011490)

E-mail wkolis@wickenslaw.com

Rachelle Kuznicki Zidar (No. 0066741)

E-mail rzidar@wickenslaw.com

WICKENS, HERZER, PANZA, COOK & BATISTA CO.

35765 Chester Road

Avon, OH 44011-1262

(440) 930-8000 Main

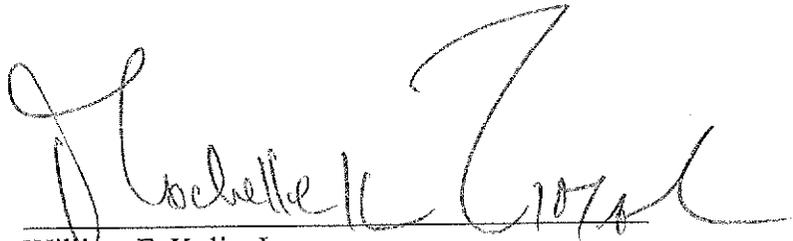
(440) 930-8098 Fax

ATTORNEYS FOR DEFENDANTS/APPELLANTS,
WILLIAM M. WOOD AND VICKI WOOD

PROOF OF SERVICE

This is to certify that a copy of the foregoing Appellants' Memorandum in Support of Jurisdiction has been sent by ordinary United States mail, postage prepaid, on this 22nd day of December, 2009, to:

Rosemary Taft Milby, Esq.
Matthew G. Burg, Esq.
Jennifer M. Monty, Esq.
Weltman Weinburg & Reis, Co., L.P.A.
323 West Lakeside Avenue
Suite 200
Cleveland, OH 44113-1099

A handwritten signature in cursive script, appearing to read "William F. Kolis, Jr.", written over a horizontal line.

William F. Kolis, Jr.
Rachelle Kuznicki Zidar

STATE OF OH

COUNTY OF LORAIN

COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

Appellee

v.

WILLIAM M. WOOD, et al.

Appellants

FILED
LORAIN COUNTY

C.A. No. 09CA009586

2009 JUL 10 A 10:15

COURT OF COMMON PLEAS
LORAIN COUNTY
RON NABAKOWSKI

9th APPELLATE DISTRICT

MAGISTRATE'S ORDER

The appellants have moved for an extension of time to file the record. The motion is denied as moot. The record was made complete on June 23, 2009. The appellants' brief is due on or before July 13, 2009.



C. Michael Walsh
Magistrate

2 pab/7-7-09

STATE OF OHIO)
COUNTY OF LORAIN)
FIRSTMERIT BANK, N.A.

Appellee

v.

WILLIAM M. WOOD, ET AL.

Appellants

COURT OF APPEALS
FILED IN THE COURT OF APPEALS
LORAIN COUNTY NINTH JUDICIAL DISTRICT
2009 NOV -9 A 11:01
CLERK OF COMMON PLEAS
RON HASAKOWSKI
9th APPELLATE DISTRICT

C.A. No. 09CA09586

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 06CV145416

DECISION AND JOURNAL ENTRY

Dated: November 9, 2009

MOORE, Presiding Judge.

{¶1} Appellants, William and Vicki Wood appeal from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 3, 2006, Appellee, FirstMerit Bank, filed a complaint against the Woods. On March 10, 2006, the Lorain County Clerk of Courts sent the complaint to the Woods via certified mail at the address listed on the complaint. The complaint was returned unclaimed. The Lorain County Clerk of Courts then sent the complaint by ordinary mail, again to the address listed on the complaint. The Woods did not respond to the complaint, and on July 28, 2006, FirstMerit filed a motion for default judgment. The motion was unopposed. The trial court granted the motion. Subsequently, on January 17, 2007, FirstMerit obtained an order for examination of judgment debtor. On January 31, 2007, the Woods were personally served with notice of the examination at the address to which the original complaint was sent. The debtor

examination was held on February 2, 2007. On February 10, 2009, First Merit filed a writ of execution, which was again personally served on the Woods. The Woods filed a request for a hearing. Prior to the hearing on the writ, the Woods filed a motion to vacate the default judgment. On April 29, 2009, the trial court denied the Woods' motion. The Woods timely appealed this decision. They have raised two assignments of error, which we have combined for ease of review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, AND ABUSED ITS DISCRETION WHEN IT DISREGARDED [THE WOODS'] UNCHALLENGED SWORN STATEMENTS THAT THEY DID NOT RECEIVE SERVICE OF PROCESS AND DENIED [THE WOODS'] MOTION TO VACATE THE DEFAULT JUDGMENT WITHOUT EVIDENCE OF ACTUAL SERVICE OF PROCESS IN DIRECT CONTRAVENTION OF NINTH DISTRICT COURT OF APPEALS' PRECEDENT."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT BASED ITS DENIAL OF [THE WOODS'] MOTION TO VACATE ON CIV.R. 60(B) RATHER THAN UTILIZING ITS INHERENT POWER TO VACATE A JUDGMENT THAT WAS VOID AB INITIO."

{¶3} In their two assignments of error, the Woods contend that the trial court erred in denying their motion to vacate the default judgment. We do not agree.

{¶4} The Woods specifically contend that the trial court erred when it disregarded their affidavit that they did not receive service of the initial complaint and when it based its denial of the motion to vacate on Civ.R. 60(B) rather than utilizing its inherent power to vacate a judgment. In other words, they contend that the trial court should have vacated the default judgment because the trial court did not have personal jurisdiction over them and therefore the default judgment was void. We do not agree.

{¶5} We begin by noting that pursuant to App.R. 9(A), the record on appeal must contain “[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court[.]” It is the appellant’s duty to transmit the transcript of proceedings to the court of appeals. App.R. 10(A); Loc.R. 5(A). This duty falls to the appellant because the appellant has the burden of establishing error in the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. In the absence of an adequate record, we must presume regularity in the trial court proceedings. *Id.* The record before this Court does not contain the defense motion to vacate or the accompanying affidavit. As these pleadings are necessary for a determination of the Woods’ assignments of error, this Court must presume regularity in the trial court’s proceedings and affirm the judgment of the trial court. Accordingly, the Woods’ assignments of error are overruled.

III.

{¶6} The Woods’ assignments of error are overruled. The judgment of the Lorain County Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the