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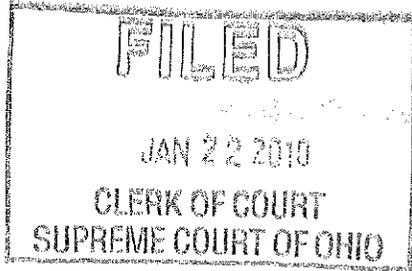
IN THE SUPREME COURT OF OHIO

CASE NO. 2009-2304

FirstMerit Bank, N.A.,)	(On Appeal from the
)	Ninth Appellate District,
Plaintiff/Appellee,)	Lorain County, Ohio,
)	Case No. 09CA009586)
vs.)	
)	
William M. Wood, et al.,)	
)	
Defendants/Appellants.)	
)	

MEMORANDUM IN RESPONSE TO JURISDICTION

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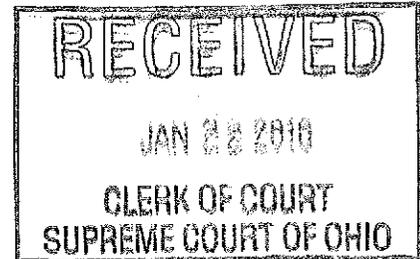


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I. EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Defendants/Appellants, William and Vicki Wood (hereinafter the “Woods”), are merely seeking to deflect their responsibilities in this case despite express rules of practice setting forth their duties on appeal. The facts and circumstances herein are specific to this action only and will not benefit future application of the Rules or procedure. Moreover, there is no substantial constitutional question because due process is protected provided an appellant complies with the appellate and local rules of practice.

In the Ninth Appellate District, and in any Ohio Appellate District, appellants are put on notice of their responsibilities when prosecuting an appeal, which includes familiarizing themselves with the general appellate rules and the respective local rules. Due process is satisfied because litigants are put on notice of the rules of practice. Here, the Woods’ knew, or should have known, that, coupled with the general appellate rules, they had the additional duty to ensure that all portions of the record necessary to their appeal were included. They were notified, however, they seemingly did not ensure that the motion to vacate was part of the record upon transmission or seek leave to supplement the record to include same. Consequently, when their case was heard the appellate court was limited to what was provided in the record.

II. STATEMENT OF THE CASE AND FACTS

The facts of this case are important in that they demonstrate that this case involved specific circumstances, instead of a universal scenario that requires intervention. Therefore, the Ninth Appellate District’s holding was limited to these specific circumstances.

Plaintiff/Appellee, FirstMerit Bank, N.A. (hereinafter “FirstMerit”), brought this action when it filed its complaint against the Woods in March 2006. Certified mail service being “unclaimed”, the summons and complaint was sent by ordinary mail. There was no further indication regarding the ordinary mail service, including that the service failed, so FirstMerit moved for default judgment. The trial court granted judgment on August 17, 2006 and the Civ. R. 58(B) notice was mailed shortly thereafter. Subsequently, FirstMerit requested a debtor’s examination and same was held in February 2007. Each of the foregoing items was served to the Woods at the same address. Approximately two years after the debtor’s examination the Woods moved to vacate the judgment, which was denied. The Woods appealed.

During the appellate proceedings, the Woods requested that the trial court record be transmitted to the appellate court. The record was made complete upon service and receipt of the original papers and exhibits from the trial court clerk to the appellate court. Indeed, it is presumed that the trial court clerk sent the portions of the record it had. There was no allegation or incident wherein the trial court clerk failed to transmit a portion of the record (i.e., that something was left behind), which distinguishes the instant matter from *CMK, Ltd. vs. Bd. of County Comm’rs*, 2003-Ohio-4388. Further, the trial court clerk numbered the documents comprising the record in accordance with App. R. 10(B). The motion to vacate was numbered but not circled on the list of documents. The list was known to both parties as demonstrated by citation to the documents in the appellate briefs. Critically, the Woods did not review the record after transmission to the appellate court.

The Ninth Appellate District reviewed the record before it and issued a decision referring to its local rule and well-established precedent:

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.

FirstMerit Bank, N.A. v. Wood, Ninth App. Dist. No. 09CA09586, 2009-Ohio-5889, ¶15.

From this decision the Woods moved for reconsideration, which was pending when the instant appeal was filed. They improperly seek the jurisdiction of this Court to determine whether they were given due process. But their case is limited to the facts and circumstances that they seemingly complied with general appellate rules but failed to comply with the additional local appellate rule. Although FirstMerit contends it should be denied, a motion for reconsideration is a better vehicle for the relief sought as this case is only of a substantial great interest to the Woods, and not to Ohio practice generally. Therefore, this Court should decline jurisdiction.

III. LAW AND ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. 1: On appeal, the Appellants received due process in that they were notified of the rules of practice and given the opportunity to be heard but were relegated to the record on appeal as they failed to ensure that the necessary portions of the record for their assignments were included.

Parties may be "heard" after perfecting their appeal on the portions of the record that are transmitted to the appellate court. The general appellate rules create duties upon an appellant to identify those portions of the record to be transmitted to the appellate

court and to “take any action necessary to enable the clerk to assemble and transmit the record.” App. R. 9(B) and 10(A).

The Ninth District employs a safeguard, which, in essence, is a greater responsibility placed upon an appellant. See Ohio Ninth Dist. Ct. App. R. 5(A) (hereinafter “Loc. App. R. ___”). And an appellant is required to know this Rule when practicing before the court. In the Rule, an appellant, knowing its case the best, must “ensure that the appellate court file *actually* contains all parts of the record that are necessary to the appeal.” (emphasis added). The Ninth District has sustained this requirement. See *City of Lorain v. Hodges*, Ninth Dist. App. No. 06CA008920, 2007-Ohio-456, ¶6; *State v. Barnes*, Ninth App. Dist. No. 06CA009034, 2007-Ohio-2460, ¶5; and *State v. Sawyer*, Ninth App. Dist. No. 05CA0089-M, 2006-Ohio-4308, ¶9. It is not a departure from the general rules, but an extension. And it must be given effect because it was specifically included by the court.

Such a requirement reasonably imputes responsibility upon an appellant instead of a court clerk who is unfamiliar with a case. If upon review of the record an appellant discovers that a document is missing an appellant is provided mechanisms for supplementing the record. See App. R. 9(E) and Loc. App. R. 5(A)(3).

The local rule is practical – it leaves to an appellant the responsibility to make sure the appellate court has the necessary portions of the record to decide whether their appeal has merit. Further, it erases the blame-game that may occur should a challenge be alleged concerning the record as transmitted. Failure to follow some of the appellate and/or local rules may warrant a detrimental result or dismissal of an appeal. Here, the

Woods must accept the result of their own failure. To hold otherwise would disrupt the integrity of the judicial system and freedom of courts to run their dockets.

Appellate courts are permitted to prescribe local rules of practice that are not in conflict with statute or rules of this Court. R.C. 2501.08. This Court noted the reason:

courts are vested with inherent power to establish rules for regulating their proceedings and for facilitating the administration of justice. 7 Ruling Case Law, 1023. 11 Ohio Jurisprudence, 756. This power exists independently of statute, and its exercise is especially to be commended at this time when the constantly increasing volume of litigation necessitates maximum efficiency in expediting court work lest justice be delayed and thereby virtually denied. However, it is equally fundamental that such rules must not contravene either the organic law or a valid statute; and likewise they must be reasonable in their operation.

Meyer v. Brinsky (1935), 129 Ohio St. 371, 373-374, 195 N.E. 702, 703. The local rule at issue does not ignore other general appellate rules of practice. The general rules provide that an appellant request that the record be transmitted and take any steps to assist the clerk in assembling the record. The local rule goes one step further by requiring that an appellant make sure that the transmitted documents received by the appellate court actually contain those documents which are necessary for an appellant's appeal. The general rule and local rule work in tandem in that they both place the duty upon the appellant to make sure the appellate court has what it needs. It is reasonable to demand such a duty because it is the appellant who has brought the appeal.

Therefore, due process was provided because they were notified of the applicable rules and were entitled to a hearing. See *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶6, 773 N.E.2d 502 (due process requires that an individual be given notice and an opportunity to be heard before being deprived of a significant property interest).

The Woods were provided notice and the opportunity to be heard but they failed to apply all of the applicable rules, at their own peril. Indeed, the rules are provided in several places, most accessibly on-line. Due process ensured notification of same, for which an appellant has a duty to apply. It is here where the Woods failed. They neglected to ensure inclusion of the portions of the record necessary for their assignments of error. An appellant cannot establish a denial of due process when, after notice and the opportunity to be heard, they simply failed to follow the procedure to avail themselves of such opportunity. *Meyers v. First Nat'l Bank* (1981), 3 Ohio App. 3d 209, 210.

The Fifth Appellate District further noted:

In dismissing an appeal to the Ohio Supreme Court because of violation of the rules of practice of the Supreme Court of Ohio, the Supreme Court stated a rationale that echos [sic] here:

There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch of the court's business. But our over-arching concern is that the legitimate interests of litigants be protected to the utmost. To this end, our profession is committed, and adherence to our rules should be dedicated.

Drake v. Bucher, 5 Ohio St. 2d 37, 34 Ohio Op. 2d 53, at 39 and 55, (1966). See also *Shore v. Chester*, 40 Ohio Ap. 2d 412, 69 Ohio Op. 2d 368, (1974), noting that 'court rules are made to be followed, both by the court and by counsel, not ignored . . . counsel should be able to rely upon duly adopted court rules.' 23 Ohio Jur. 3d, Courts and Judges, Section 489.

State v. Williams (Feb. 14, 1984), Fifth App. No. 42-CA-83, 1984 Ohio App. LEXIS 12279, *5. Loc. App. R. 5(A) was not intended to bail out litigants from purported clerk error; rather, it was intended to ensure that any purported clerk error would not disrupt the "clear and logical manner" in which cases are presented.

This case is specific – the Woods did not satisfy their Loc. App. R. 5(A) obligation of ensuring that the motion to vacate was in the record. They seek relief from that failure alone. It simply is not a case of great interest nor does it concern a substantial constitutional question. Here, a review of the record on appeal by the Woods would have revealed that the motion to vacate was not included in the record and a request to supplement under App. R. 9 or Loc. App. R. 5 could have been made. The clerk is not to blame as there are no specific duties to notify appellants of missing items. Indeed, App. R. 9(E) merely provides mechanisms and indicates a trial court, an appellate court, or a litigant *may* direct that the omission be corrected. Read together with Loc. App. R. 5(A), that duty falls upon the appellant. The “questions” at issue now could have and should have been determined and resolved prior to an ultimate decision being rendered by the appellate court and the persons charged with the duty to ensure said “questions” were resolved were the Woods, and the Woods alone.

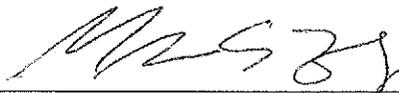
The fact-specific holding of the Ninth Appellate District in the above-captioned matter, which is in conformity with the well-established case law in Ohio, will have little if any significant impact beyond the parties to this case. Accordingly, FirstMerit requests that this Honorable Court deny jurisdiction in this matter and summarily dismiss the Woods’ notice of appeal.

IV. CONCLUSION

Based on the foregoing reasons, this case does not involve matters of public or great general interest. Therefore, Appellee, FirstMerit Bank, N.A. respectfully requests that this Honorable Court decline to exercise its discretionary jurisdiction over this case, and instead summarily dismiss Appellants’ notice of appeal.

Respectfully submitted,

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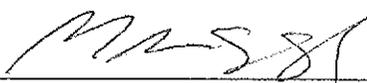
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction was sent this

20TH day of January, 2010, by regular U.S. Mail to:

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