

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

Steven M. Brickner

Appellant

vs.

Benjamin M. Wittwer, et al.

Appellees

**11-0301**

Court of Appeals  
Case No. 6-10-12

**On Appeal from the  
Third Appellate District**

\*\*\*\*\*

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT**

\*\*\*\*\*

Counsel for Appellant

Barga, Jones & Anderson, Ltd.  
John T. Barga (0018295)  
Susan M. Jones (0046755)  
120 Jefferson Street  
Tiffin, OH 44883  
Telephone: (419) 447-0507  
Telefax: (419) 447-1335  
E-mail: bargalaw@rrohio.com

Counsel for Appellees

Sharri Rammelsberg for  
Benjamin M. Wittwer  
Brandon B. Rainier  
P.O. Box 58181  
Cincinnati, OH 45258  
Telephone: (513) 281-0002  
Telefax: (513) 221-5836

**RECEIVED**  
FEB 23 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
FEB 23 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT

GENERAL INTEREST .....3

STATEMENT OF THE CASE AND FACTS .....3

PROPOSITION OF LAW NO. 1

**A trial court, without request from a non-responding party, does not possess the unilateral discretion to relieve that party from the legally binding effect of the conclusively established facts, when that party failed to respond in any manner to Civil Rule 36 Requests for Admissions. ....6**

PROPOSITION OF LAW NO. 2

**When the only issues before the court are factual, a trial court is bound to accept facts conclusively established pursuant to Civil Rule 36 when determining a motion pursuant to Civil Rule 56. ....8**

CONCLUSION.....11

PROOF OF SERVICE.....13

APPENDIX:

Judgment Entry & Opinion of the Court of Appeals, Third Appellate District, Hardin County, Ohio, date January 10, 2011

Judgment Entry of the Hardin County Municipal Court, dated May 4, 2010

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST**

The decisions of the Hardin County Municipal Court and the Third District Court of Appeals violate the mandates of Civil Rule 1, Civil Rule 36, Civil Rule 56 and Ohio case law.

These decisions have public and great general interest because:

a) These decisions do not follow Ohio law, and conflict with the uniform application of Ohio law, which requires Civil Rule 36 established facts to be accepted and admitted into evidence for all purposes by the trial court;

b) These decisions do not follow Ohio law, and conflict with the uniform application of Ohio law, which requires a Civil Rule 56 motion be granted when the only issues before the trial court are factual and those facts have been conclusively established;

c) These decisions weaken and lessen the value of Civil Rule 36 trial practice in Ohio, because they leave in doubt the effectiveness and the applicability of such practice in our legal system;

d) These decisions weaken and lessen the value of Civil Rule 56 trial practice in Ohio, because they leave in doubt the effectiveness and the applicability of such practice in our legal system;

e) These decisions contradict the rights of all judges and practicing attorneys in the State of Ohio to have Ohio law consistently and uniformly applied in every case.

Appellant Brickner respectfully requests this Supreme Court to accept jurisdiction over this case, because protecting the integrity of the Ohio Civil Rules has great importance to the Ohio system of jurisprudence.

**STATEMENT OF THE CASE AND FACTS**

On February 17, 2010, Appellant Brickner served *Requests for Admissions* on Appellees Wittwer and Rainier. Appellees Wittwer and Rainier did not answer or object to any of the *Requests*. On April 2, 2010 Appellant Brickner filed *Notices of Admitted Facts* as to Appellees Wittwer and Rainier. Appellees Wittwer and Rainier did not file any motion requesting the withdrawal or amendment of the admissions. Appellees Wittwer and Rainier did not respond in any manner to either the *Requests for Admissions* or the *Notices of Admitted Facts*.

These are the facts that were submitted, established and admitted by Appellees Wittwer and Rainier with regard to their liability and the amount of damages they owed prior to denial of the Appellant's Motion for Summary Judgment by the trial court:

**Fact No. 1:** You entered into a one year Rental Contract for 320 Liberty Street, Ada, Ohio beginning August 1, 2008 and ending July 31, 2009 by Appellees Wittwer and Rainier:

**Fact No. 2:** The Rental Contract required you to pay \$225.00 per month, due the third day of each month.

**Fact No. 3:** The Rental Contract contained a late fee of 10% of the rent, if rent payment was received after the 7<sup>th</sup> day of the month.

**Fact No. 4:** The Rental Contract contained a late fee of \$3.00 per day, if rent payment was received after the 7<sup>th</sup> day of the month.

**Fact No. 5:** The Rental Contract required you to pay for all utilities, including water.

**Fact No. 6:** You paid a security deposit of \$225.00.

**Fact No. 7:** You left 320 Liberty Street, Ada, Ohio for a school break that began on February 28, 2009 and turned the thermostat down, causing the furnace to stop running and stop producing heat.

**Fact No. 8:** Upon your return to 320 Liberty Street, Ada, Ohio, you found water throughout the home caused by frozen water in the lines that caused the water lines to break.

**Fact No. 9:** You and the other renters were in exclusive possession, control and use of the property at the time the water lines broke.

**Fact No. 10:** You never conveyed to the Plaintiff that you had ever experienced a problem with the furnace at the residence.

**Fact No. 11:** Upon the Plaintiff's arrival at the residence on March 8, 2009, the thermostat was turned off.

**Fact No. 12:** You were negligent when you turned the thermostat down causing the furnace to stop running and stop producing heat while in exclusive control and possession of the property.

**Fact No. 13:** As a result of you turning down the thermostat, the water in the lines froze and the water pipes broke.

**Fact No. 14:** As a result of the water pipes breaking and the water leaking, there was substantial water damage to the property.

**Fact No. 15:** The Plaintiff provided you the opportunity to be housed elsewhere while the property was being repaired.

**Fact No. 16:** You chose to live elsewhere at your own expense during the time the property was being repaired.

**Fact No. 17:** Plaintiff and his agents repaired the property during March and April 2009 at a cost of \$5,194.07.

**Fact No. 18:** You were informed that the property was repaired and habitable commencing May 1, 2009.

**Fact No. 19:** You failed to return to the property and fulfill the terms of your Rental Contract.

**Fact No. 20:** You signed correspondence to Plaintiff dated April 7, 2009 stating you would not be returning to the property and returned your key to the property.

**Fact No. 21:** You mailed the correspondence described in paragraph 18 above on April 17, 2009.

**Fact No. 22:** (*for Appellee Wittwer*) You failed to claim your certified mail, but received Plaintiff's correspondence by regular mail.

**Fact No. 22:** (*for Appellee Rainier*) You or someone on your behalf received Plaintiff's certified mail on May 15, 2009 which itemized damages showing that your security deposit would not be returned.

**Fact No. 23:** You failed to pay rent for March, April, May, June and July 2009 totaling \$1,125.00.

**Fact No. 24:** You failed to pay the \$840.44 water bill for the property.

**Fact No. 25:** You failed to pay \$5,869.07, or any amount, for the cost of repairing the water damage to the property.

On April 13, 2010 Appellant Brickner filed a Motion for Summary Judgment against Appellees Wittwer and Rainier, supported by a Brief, the *Notices of Admitted Facts* and an Affidavit of Appellant Brickner. Appellees Wittwer and Rainier did not respond in any manner or otherwise defend Appellant Brickner's Motion of Summary Judgment. On May 4, 2010 the trial court, without explanation, denied the unopposed Motion for Summary Judgment.

## PROPOSITION OF LAW NO. 1

**A trial court, without request from a non-responding party, does not possess the unilateral discretion to relieve that party from the legally binding effect of the conclusively established facts, when that party failed to respond in any manner to Civil Rule 36 Requests for Admissions.**

Civil Rule 36, Requests for Admissions, sets forth a method for establishing facts in litigation. It is designed to simplify trial practice, lessen costs and legal expenses for litigants and promote an efficient administration of justice. While Civil Rule 36 is initially a procedural rule, it can, if used properly, become a rule of substance, establishing facts for the trial court and eliminating the need for further proof at trial.

Civil Rule 36 reads in part:

**Rule 36. Requests for Admission**

**(A) Availability; procedures for use.** A party may serve upon any other party a written request for the admission . . .

(1) . . . . The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . .

**(B) Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . .

According to Civil Rule 36(A), *Requests for Admissions* must be answered within twenty-eight days. It is well settled law in Ohio that if a party fails to respond within this allotted time, the facts as alleged are conclusively established. Civil Rule 36(B); Dobbelaere v. Cosco, Inc. (1997), 120 Ohio App.3d 232, 244, 697 N.E.2d 1016, 1024; Tucker v. McQuery, 2000-Ohio-61, 107 Ohio Misc.2d 31, 736 N.E.2d 569 (Ohio Comm. 1999); National Check Bureau, Inc. v. Esque, 2008-Ohio-692 No. 89556 (OH CA8). It is also well settled law in Ohio that

unanswered *Requests for Admissions* render the matter requested conclusively established for the purpose of the suit. Cleveland Trust Co. v. Willis (1985), 20 Ohio St.3d 66, 485 N.E.2d 1052.

A responding party is required to respond to a *Requests for Admissions* in one of two manners. The responding party must answer (admit or deny) or object and explain his objection, if he wishes to avoid an admission. Equitable Life Assur. Soc. of U.S. v. Kuss Corp., 17 Ohio App.3d 136, 477 N.E.2d 1193 (Ohio App. 3 Dist. 1984). The failure to respond in any manner to *Requests for Admissions* will result in the requests becoming admissions against the non-responding party. St. Paul Fire & Marine Ins. Co. v. Battle (1975), 44 Ohio App.2d 261, 271, 337 N.E. 2d 806.

Any matter admitted under Civil Rule 36 is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. Civil Rule 36(B); Rickels v. Goyings, 2008-Ohio-2119, No. 11-07-09 (OHCA3).

### ARGUMENT

Appellees Wittwer and Rainier did not respond in any manner to the *Requests for Admissions*, nor did they move the trial court for permission to withdraw or amend the admissions contained in the *Notices of Admitted Facts*. As a result of Appellees Wittwer and Rainier failing to meet their legal obligation, the material facts set forth in the *Requests for Admissions* and the *Notices of Admitted Facts* were conclusively admitted and accepted as true. Appellees Wittwer and Rainier admitted to their liability and the amount of damages they owed.

Civil Rule 36 and Ohio case law are very clear. A trial court under the circumstances of this case does not have any discretion regarding the admissibility of “conclusively established facts.” Just as in Cleveland Trust Co. v. Willis, supra., the trial court in this case did not have any discretion to ignore established facts. The trial court was required by Ohio law to admit and

accept as true, the established facts for all purposes in this case, especially when the trial court ruled on Appellant Brickner's Motion for Summary Judgment after Appellees Wittwer and Rainier admitted their liability and the damages they owed.

## PROPOSITION OF LAW NO. 2

**When the only issues before the court are factual, a trial court is bound to accept facts conclusively established pursuant to Civil Rule 36 when determining a motion pursuant to Civil Rule 56.**

Civil Rule 56, Summary Judgment Practice, sets forth a method for resolving litigation without a trial. It is designed to simplify trial practice, expedite litigation and free the court and parties from the additional time and expense incurred in the preparation and conduct of a trial. While Civil Rule 56 is initially a procedural rule, it can, if used properly, become a rule of substance, eliminating the need for a trial.

Civil Rule 56 reads in part:

**(C) Motion and proceedings.** . . . *Summary judgment shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, *written admissions, affidavits*, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered* except as stated in this rule. . . . (emphasis added)

**(E) Form of affidavits; further testimony; defense required.** . . . When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the party's pleadings*, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party. (emphasis added)

A motion for summary judgment will be granted if the court, upon viewing the inferences to be drawn from the underlying facts set forth in the pleadings, depositions, answers to interrogatories, written admissions, and affidavits in a light most favorable to the party opposing the motion, determines (1) that no genuine issue of material fact remains to be litigated, (2) that the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion and (3) that the moving party is entitled to judgment as a matter of law. Civil Rule 56(C); Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

The party moving for summary judgment bears the initial burden of advising the court that summary judgment is appropriate, demonstrating, from the record, the absence of a genuine issue of material fact on the essential element(s) of the claims and defenses. Once the moving party has met this burden, the non-moving party then has a reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings, but must set forth specific facts, by the means listed in Civil Rule 56(C) and 56(E), showing that a triable issue of fact exists.

Dresher v. Burt, supra.

Civil Rule 56(C) provides that written admissions are sufficient to support the grant of a motion for summary judgment. See Civil Rule 56(C) and Klesh v. Reid (1994), 95 Ohio App. 3d 664, 643 N.E. 2d 571. In National Check Bureau, Inc. v. Esque, supra., defendant failed to respond to plaintiff's request for admissions, where "The consequence of [defendant's] failure to timely respond to the request for admissions was that there was no genuine issue of material fact as to the validity of [plaintiff's] claim." Id at paragraph 7.

Not only is it well settled law in Ohio that unanswered *Requests for Admissions* render the facts requested conclusively established for purposes of the suit, see Cleveland Trust Co. v.

Willis, supra., but that a motion for summary judgment may be based on such established and admitted facts. St. Paul Fire & Marine Ins. Co. v. Battle (1975), 44 Ohio App.2d 261, 337 N.E.2d 806. Where a party files written *Requests for Admissions*, a failure of the opposing party to timely answer the *Requests* constitutes a conclusive admission pursuant to Civil Rule 36. These established facts can be used by a trial court in a summary judgment proceeding. Dobbelaere v. Cosco, Inc., 120 Ohio App.3d 232, 697 N.E.2d 1016 (Ohio App. 3 Dist. 1997).

### ARGUMENT

Appellees Wittwer and Rainier did not respond in any manner to Appellant Brickner's Motion for Summary Judgment and they did not meet their burden of demonstrating to the trial court that a genuine issue of material fact existed. It is clear from the record that there was no genuine issue of material fact at the time the trial court rendered its decision. The Civil Rule 36 admitted facts of Appellees Wittwer and Rainier regarding their liability and the amount of damages they owed, in conjunction with Appellant Brickner's Motion for Summary Judgment, Brief and Affidavit, and Appellees Wittwer and Rainier's failure to respond or defend Appellant Brickner's Motion for Summary Judgment, conclusively established that there was no genuine issue of material fact before the trial court. At the time the trial court rendered its decision on Appellant Brickner's Motion for Summary Judgment, Appellees Wittwer and Rainier had admitted their liability and the amount of damages they owed.

In its Judgment Entry and Opinion, paragraph 14, the Appellate Court stated:

*"[t]he evidence adduced at trial (emphasis added) revealed the existence of genuine issues of material fact concerning the issues raised in Appellant's motion for summary judgment with regard to the appropriate amount of damages owed him by Appellees Wittwer and Rainier."*

However, this matter *should have never proceeded to trial*. Even if Appellees Wittwer and Rainier offered testimony at trial (no transcript of the trial was placed before the Appellate

Court and is therefore not part of the record and could not have been considered by the Appellate Court), the mandates of Civil Rule 56(C) specifically state that the Court can only look to the “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations, if any” filed *at the time when the motion for summary judgment is ruled upon*. Appellees Wittwer and Rainier had filed nothing when the trial court ruled on Appellant Brickner’s Motion for Summary Judgment and the Appellate Court was restricted to the record of this case as it existed when the ruling was made.

### CONCLUSION

The trial court did not follow the mandates of Civil Rule 36, when it ignored the established material facts regarding Appellees Wittwer and Rainier’s liability and the amount of damages they owed that were conclusively admitted, for all purposes, in this case.

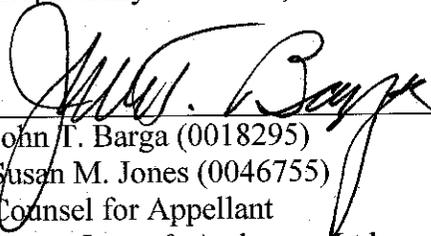
The trial court did not follow the mandates of Civil Rule 56, when it denied Appellant Brickner’s uncontested Motion for Summary Judgment, where there were no genuine issues of material fact.

Relying on information not part of the record and cases easily distinguished from the case at bar (in the instant case, Appellant Brickner’s Motion for Summary Judgment was uncontested while the cases cited by the Appellate Court were vigorously contested), the Appellate Court mistakenly affirmed the trial court’s decision.

The Civil Rules prescribe the procedures to be followed in all Ohio trial courts. See Civil Rule 1. The judges and practicing attorneys in the State of Ohio are entitled to, and have the right to, expect the law of Ohio to be consistently and uniformly applied in every case.

The decisions of the Hardin County Municipal Court and the Third District Court of Appeals do not comport with the philosophy or the mandates of Civil Rules 1, 36 and 56.

Respectfully submitted,



---

John T. Barga (0018295)  
Susan M. Jones (0046755)  
Counsel for Appellant  
Barga, Jones & Anderson, Ltd.  
120 Jefferson St.  
Tiffin, OH 44883  
Telephone: (419) 447-0507  
Telefax: (419) 447-1335  
E-mail: [bargalaw@rrohio.com](mailto:bargalaw@rrohio.com)

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Memorandum and Appendix were forwarded electronically and by regular mail on the 22<sup>nd</sup> day of February, 2011 upon the following:

- Sharri Rammelsberg, Attorney for Brandon B. Rainier and Benjamin M. Wittwer, P O Box 58181, Cincinnati, Ohio 45258;
- John A. Kissh, Jr., Attorney for Jeffrey M. Busching, 515 West Hobart Avenue, Findlay, Ohio 45840.



---

John T. Barga (0018295)  
Counsel for Appellant

A P P E N D I X

Judgment Entry & Opinion of the Court of Appeals, Third Appellate District, Hardin County, Ohio

Judgment Entry of the Hardin County Municipal Court dated May 4, 2010

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
HARDIN COUNTY

JAN 10 2011

*Carrie L. Haudenschild* Clerk  
Hardin Co. Court of Appeals

STEVEN M. BRICKNER,

CASE NO. 6-10-12

PLAINTIFF-APPELLANT,

v.

BENJAMIN M. WITTWER, ET AL.,

JUDGMENT  
ENTRY

DEFENDANTS-APPELLEES.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE ORIGINAL	
<i>Entry/opinion</i>	FILED IN THIS OFFICE
<i>Carrie L. Haudenschild</i> HARDIN COUNTY CLERK	
BY:	<i>CH</i>

*[Signature]*  
\_\_\_\_\_  
*[Signature]*  
\_\_\_\_\_

*John B. Hillamowd*  
\_\_\_\_\_  
JUDGES

DATED: January 10, 2011  
/jnc

JAN 10 2011

*Cynthia L. Houdenshield, Clerk*  
Hardin Co. Court of Appeals

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
HARDIN COUNTY

---

STEVEN M. BRICKNER,

PLAINTIFF-APPELLANT,

CASE NO. 6-10-12

v.

BENJAMIN M. WITTWER, ET AL.,

OPINION

DEFENDANTS-APPELLEES.

---

Appeal from Hardin County Municipal Court  
Trial Court No. CVF 0900633

Judgment Affirmed

Date of Decision: January 10, 2011

---

APPEARANCES:

*John T. Barga and Susan M. Jones* for Appellant

*John A. Kissh, Jr. and Sharri Rammelsberg* for Appellees

**ROGERS, P.J.**

{¶1} Plaintiff-appellant, Steven M. Brickner, appeals the judgment of the Hardin County Municipal Court awarding him monetary compensation for damages sustained to one of his rental properties and unpaid rent. On appeal, Brickner argues that the trial court erred when it overruled his motion for summary judgment, and that the trial court erred when its judgment entry did not include the specific oral pronouncements made by the court during the bench trial. Based on the following, we affirm the judgment of the trial court.

{¶2} Defendants-appellees, Benjamin M. Wittwer, Brandon B. Rainier, and Jeffrey M. Busching, entered into a one-year lease to rent Brickner's property located at 320 Liberty Street in Ada, Ohio. During the first week in March 2009, while the lease was in effect, Wittwer, Rainier, and Busching travelled out town for Spring Break, leaving the rental property unoccupied. Prior to leaving town, they turned off the thermostat which caused the water in the pipes to freeze and burst. As a result, the broken pipes leaked a significant amount of water into Brickner's rental property.

{¶3} Upon returning to the premises on March 8, 2009, the appellees discovered standing water throughout the house and called Brickner to report the damage. Brickner arrived at the property and observed running water flowing out of several walls which had completely soaked the carpeted areas. Brickner offered

to house the appellees in another residence while he repaired the water damage. The appellees declined Brickner's offer and chose to live with a friend.

{¶4} During the remainder of March and April 2009, Brickner worked to repair the damage caused by the broken pipes. Brickner notified the appellees that the repairs on the rental residence would be completed by the first week of May 2009, and that the appellees could move back onto the premises at that time. In mid-April 2009, the appellees notified Brickner in writing that they would not return to the rental residence, claiming that they had been constructively evicted. The appellees returned their keys to Brickner the same day.

{¶5} In October 2009, Brickner filed a complaint for monetary damages against Wittwer, Rainier, and Busching. Brickner alleged that the appellees were responsible for \$5,194.07 in damages to the rental premises, and \$840.44 for unpaid utilities. Brickner also claimed that each of the appellees owed him \$1,125.00 for unpaid rent in addition to accrued late fees and penalties for the remainder of the lease, which comprised of the months of March, April, May, June and July of 2009. Appellees Wittwer and Rainier jointly filed an answer to the complaint and also asserted a counterclaim. Wittwer and Rainier's counterclaim alleged that Brickner "unlawfully" evicted them from the premises and claimed they were owed damages due to their displacement. Appellee Busching filed his answer separate from Wittwer's and Rainier's asserting the affirmative defense of

contributory negligence and a counterclaim for the refund of rent and his security deposit.

{¶6} Brickner subsequently served each appellee with a request for admissions pursuant to Civ.R. 36. Appellee Busching responded to the request, however, Appellees Wittwer and Rainier failed to answer or object to the requests. Consequently, Brickner filed a Notice of Admitted Facts as to Appellees Wittwer and Rainier with the trial court.

{¶7} In April 2010, Brickner filed a motion for summary judgment against Appellees, Wittwer and Rainier, which the trial court ultimately overruled. The case proceeded to bench trial in June 2010. On July 22, 2010, the trial court entered its judgment in favor of Brickner. The trial court found that the water damage to the premises was due to the appellees' action of turning down the thermostat during the winter, which caused the pipes to freeze and burst. However, the trial court also found that the appellees gave proper notice of termination as stated in the parties' lease, and therefore were only responsible for March and April 2009 rent. The trial court awarded Brickner monetary damages in the amount of \$2,416.51 plus court costs and interest.

{¶8} It is from this judgment that Brickner now appeals, asserting the following assignments of error for our review.

*Assignment of Error No. I*

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT-APPELLEES [SIC] BENJAMIN M. WITWER AND BRANDON B. RAINIER FILED ON APRIL 13, 2010.**

*Assignment of Error No. II*

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN ITS WRITTEN ENTRY, DATED JULY 22, 2010, FILED SEVEN (7) WEEKS AFTER THE CONCLUSION OF THE TRIAL, DID NOT REDUCE TO WRITING THE TRIAL COURT'S DECISION AS ANNOUNCED IN OPEN COURT ON JUNE 1, 2010 AT THE CONCLUSION OF THE BENCH TRIAL.**

*First Assignment of Error*

{¶9} In his first assignment of error, Brickner argues that the trial court erred when it denied his motion for summary judgment against Appellees Wittwer and Rainier. Specifically, Brickner maintains that because Wittwer and Rainier failed to respond to his requests for admissions, there was no genuine issue of material fact as to the validity of his claim for monetary damages against them.

{¶10} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis

for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, ¶25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.*, 69 Ohio St.3d 217, 222, 1994-Ohio-92. Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine issue as to any material fact; (2) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; and, therefore, (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶11} The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument. *Id.* at 292. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings. *Id.*; Civ.R. 56(E).

{¶12} In the present case, the trial court denied Brickner's motion for summary judgment against Appellees Wittwer and Rainier in its May 4, 2010 Judgment Entry. In June 2010, the case proceeded to a bench trial. Despite Brickner's contention that he was entitled to judgment as a matter of law, it is evident from the record that the issue of damages remained a genuine issue of material fact before the trial court. In making its damages determination, the trial court reviewed the rental lease to construe the parties' rights and responsibilities under the agreement. The trial court also reviewed several documents evidencing the damages allegedly suffered by both parties as a result of the broken water pipes, including documentation that Brickner's insurance had already compensated him for a significant amount of the water damage repair. The trial court ultimately awarded Brickner a lump sum which included the damage caused by the broken pipes, specifically the sum not reimbursed by his insurance, and other incidental damages caused by the appellees while living in the rental residence. The trial court also determined that the appellees properly terminated their tenancy in mid-April 2009 in accordance with the lease, which provided for a month-to-month tenancy. Consequently, the trial court found that the appellees were only responsible for the unpaid rent for the months of March and April 2009, and not for the remaining five months of the lease as Brickner's complaint alleged.

{¶13} Moreover, in *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, the Supreme Court of Ohio held that when a motion for summary judgment is denied because the trial court found that there were material issues of fact, an ensuing trial will moot (or render harmless) any error in that decision. *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 156. As the Court noted in *Continental*, Civ.R. 61 provides that no error in any ruling is ground for disturbing a judgment unless the refusal to do so appears to the court to be inconsistent with substantial justice. *Id.* at 155-156 (finding that substantial justice was done where the full and complete development of the facts at trial [as opposed to the limited factual evidence elicited in discovery] showed a genuine issue for the trier of fact). See, also, *Bobb Forest Prods., Inc. v. Morbank Indus., Inc.*, 151 Ohio App.3d 63, 2002-Ohio-5270, ¶ 41 (stating that even if certain issues were purely legal, if other genuine issues of material fact were presented at trial, which would leave the verdict unaffected, then any error is harmless).

{¶14} Our review of the record reveals that substantial justice was done at the trial court level following the trial on the merits. The evidence adduced at trial revealed the existence of genuine issues of material fact concerning the issues raised in Brickner's motion for summary judgment with regard to the appropriate amount of damages owed to him by Appellees Wittwer and Rainier. As such, the trial mooted any error in the trial court's prior decision to deny summary

judgment. Accordingly, we conclude that the trial court's denial of Brickner's motion for summary judgment did not constitute reversible error.

{¶15} Brickner's first assignment of error is, therefore, overruled.

Second Assignment of Error

{¶16} In his second assignment of error, Brickner argues that the trial court erred when it entered judgment via its July 2010 judgment entry because the entry differs significantly from the trial court's decision announced in open court at the conclusion the June 2010 bench trial. Brickner maintains that the July 2010 judgment entry should have included the oral pronouncements made by the trial court at the bench trial.

{¶17} It is well established that a trial court speaks only through its journal entries and not by oral pronouncement. *State v. King* (1994), 70 Ohio St.3d 158, 162; *Glick v. Glick* (1999), 133 Ohio App.3d 821, 831; *In re Adoption of Klonowski* (1993), 87 Ohio App.3d 352, 357. Accordingly, a judge's written or oral pronouncement is not recognized as an action of a court unless it is entered upon the journal. *Boyle v. Pub. Adjustment & Constr. Co.* (1950), 87 Ohio App. 264, 268. On appeal, Brickner cites no authority to support his contention that the trial court's judgment entry must conform to the oral pronouncements made by the trial court.

{¶18} Based on the foregoing authority, the trial court did not enter judgment until the journalizing of its July 2010 judgment entry. Therefore, the parties are bound by the decision rendered in that judgment entry and not the oral pronouncements made during the bench trial.

{¶19} Brickner's second assignment of error is, therefore, overruled.

{¶20} 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*

**PRESTON, J., and WILLAMOWSKI, J., concur.**

**/jlr**

IN THE HARDIN COUNTY MUNICIPAL COURT  
KENTON, OHIO

Brickner, Steven M

Plaintiff(s),

vs.

Wittwer, Benjamin M

Defendant.

FILED

Case No: CVF 0900633

2010 MAY 14

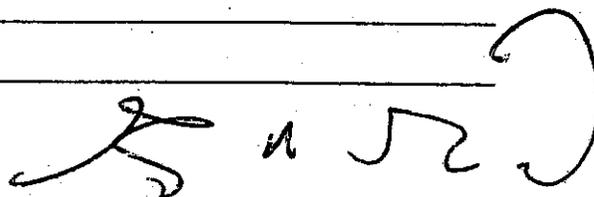
Sherman, Judge

Pretrial Entry

JF 3078

.....  
This matter came on for pretrial hearing on 05/04/2010

- (x) Plaintiff was represented by John T. Barga
- (x) Defendants <sup>was</sup> represented by John A. Kirch, Jr. + Sharrin Rammels
- ( ) Interrogatories to be filed by \_\_\_\_\_
- ( ) Discovery deadline \_\_\_\_\_
- ( ) Matter assigned for Second Pretrial on \_\_\_\_\_  
at \_\_\_\_\_
- (x) Matter assigned for Trial to Court on 6-1-10  
at 1:30 pm.
- ( ) Matter assigned for Jury Trial on \_\_\_\_\_  
at \_\_\_\_\_
- (x) Other: all motions are denied.

  
Judge Gregory A. Grimslid