ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID L. KENNEDY, *et al*,	*	11-0381
Appellees,	*	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
vs.	*	
JOHN PELZER, *et al*,	*	**Court of Appeals Case No. C-100228**
Appellants.	*	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS DAVID L. KENNEDY AND SANDRA L. KENNEDY

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEES DAVID L. KENNEDY AND SANDRA L. KENNEDY

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

This case presents an issue of critical importance to the interest of justice in Ohio: whether complete documents are required to be reviewed by a trial court or appellate court in order to render a judgment based on the evidence contained therein.

This case was terminated in the Trial Court by the granting of summary judgment to the three defendants, Appellees John and Cathy Pelzer (the "Pelzers") and Appellee Susan Lemon Lehr ("Lehr"). That decision was premised on the alleged failure of Appellants to provide evidence of prior knowledge of defects in the home they purchased from the Pelzers, whose property was listed by and sold by Lehr. Appellant moved the Trial Court for reconsideration, pointing out that the trial court had obviously overlooked the expert report entered as evidence during the deposition of Appellant David Kennedy. The Trial Court, however, rendered judgment in favor of all defendants/appellees.

Appellants timely appealed the decision of the Trial Court, and in reviewing the record on appeal discovered several discrepancies, including the omission of all exhibits to David Kennedy's deposition, most notably the expert report upon which Appellants relied in objecting to the trial court's decision. Appellants immediately moved the Court of Appeals for a correction of the record, proffering the exhibits and other documents which had been omitted and compromised. The Court of Appeals granted Appellants' request for an extension of time in which to file their brief, and eventually ruled that the record on appeal was to be corrected, but

not as to the exhibits to David Kennedy's deposition. Appellants had, by this time, also moved the Trial Court for correction of the record, but the time for filing Appellants' brief was rapidly approaching and in the interest of complying with the Court of Appeals' order, Appellants filed a brief, noting at the outset that the record on appeal was not complete.

It should be noted that the action in the Court of Appeals was on the accelerated calendar. The Court of Appeals rendered its judgment in favor of Appellees herein without benefit of the full record before it. Such an action is against public policy, renders the decision manifestly unjust, and constitutes manifest error on the part of the Court of Appeals.

The instant action is a case of public or great general interest. Accordingly, this Court should accept jurisdiction of this case to prevent further injustice to others by conclusively determining that exhibits to a deposition are a part of the trail court's record when the deposition is filed and that any decision rendered in the absence of any such exhibit, when such an exhibit is relied upon by any party, is manifestly unjust and manifestly erroneous, and must be reversed and remanded for consideration of the omitted evidence.

II. STATEMENT OF THE CASE AND FACTS

This case arises from the failure of the Trial Court and subsequently the Court of Appeals to permit correction of the record before those courts, thus terminating the actions in favor of Appellees.

Appellants argued to both courts that they had indeed proffered evidence of Appellees' prior knowledge of defects existing on real property purchased by Appellants, despite Appellees' denial of same. That evidence was in the form of an expert report attached to the deposition of Appellant David Kennedy. David Kennedy's deposition was filed by one or more Appellees, but

the exhibits thereto were omitted from that filing. This omission was unknown to Appellants until they appealed the trial court's decision, as Appellants relied upon the filing of the complete deposition, which they confirmed via the Clerk of Court's online docket. The docket only contains the cover page for any deposition filed, not the entire deposition.

When Appellants discovered this omission, as well as other discrepancies with the record on appeal, they immediately moved the Court of Appeals for a correction of the record. They also later moved the Trial Court for a correction of the record. The Court of Appeals granted that motion as to all documents exclusive of the deposition exhibits. The Trial Court did not rule on Appellants' unopposed motion until well after the extended time had run for the filling of Appellant's brief, and after all Appellees had submitted responsive briefs.

Appellants did note in their brief that the record on appeal was deficient. Despite this missing piece of evidence, the Court of Appeals ruled against Appellants, determining that they had proffered no evidence of Appellees' prior knowledge of defects on the real property in question.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

<u>Proposition of Law No. 1</u>: Manifest injustice occurs when a party is granted summary judgment based on an incomplete record from which vital evidence has been omitted.

The Ohio Rules of Civil Procedure, Rule 56(C) requires a trial court to consider on a motion for summary judgment, in addition to other evidence, "depositions, ***, timely filed in the action, ***." Civ.R.56(C). No definition of deposition is set forth in those rules, although the civil rules do specify that examination and cross-examination are to proceed "as permitted at the trial" and that "evidence objected to shall be taken subject to the objections." Civ.R. 30(C).

These latter provisions suggest that exhibits are part of and integral to filed depositions, but do not state so explicitly.

To proceed to a judgment against any party in the absence of properly submitted evidence as an exhibit to a deposition is manifestly unjust. Not only do the Rules of Civil Procedure and Rules of Evidence permit a party to proffer expert evidence on which it may rely in making its case, simple justice so dictates.

Therefore, this Court should accept jurisdiction of this appeal in order to clarify and make certain that all litigants are entitled to properly submitted evidence, including that submitted during a deposition.

Proposition of Law No. 2: Failure of a reviewing court to permit correction of the record on appeal when vital evidence has been omitted from the record constitutes manifest error.

The Ohio Rules of Appellate Procedure, Rule 9, permits correction of a record on appeal. However, the Court of Appeals in this matter did not wait for the Trial Court to correct the record, but instead maintained the timing for briefing while the Trial Court did not rule on Appellants' motion for correction of the record until after all briefs had been filed in the Court of Appeals – one month after Appellants filed their unopposed motion.

This delay on the part of the Trial Court and failure to acknowledge and stay the proceedings by the Court of Appeals led to manifest error, as the entire proper record on appeal was not considered. Additionally, the Court of Appeals, in ruling on specific documents to be included in the record on appeal, but not all, led to manifest error.

IV. CONCLUSION

Litigants are entitled to have their properly-entered evidence heard in determining

judgment against them. This did not happen below, and will lead to manifest injustice and manifest error in the future as well if not corrected.

For these reasons, this case involves matters of public and great general interest and a substantial constitutional question. Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via U.S. Mail to the following this _____ day of March, 2011:

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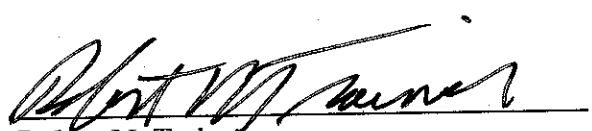


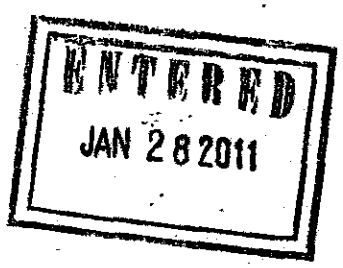
Robert N. Trainor

APPENDIX

Judgment Entry of the Hamilton County Court of Appeals
(Jan. 28, 2011)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DAVID L. KENNEDY	:	APPEAL NO. C-100228 TRIAL NO. A-0807688
and	:	
SANDRA L. KENNEDY,	:	*JUDGMENT ENTRY.*
Plaintiffs-Appellants,	:	
vs.	:	
JOHN PELZER,	:	
CATHY PELZER,	:	
and	:	
SUSAN LEMON LEHR,	:	
Defendants-Appellees.	:	



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiffs-appellants, David L. Kennedy and Sandra L. Kennedy, appeal the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendants-appellees, John Pelzer, Cathy Pelzer, and Susan Lemon Lehr, in a dispute over the sale of a home.

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

This case involves the presence of mold in a house that the Kennedys purchased from the Pelzers. Lehr was the Pelzers' real estate agent in the transaction.

The Kennedys and the Pelzers entered into a contract for the sale of the house in August 2006. The disclosure form executed by the Pelzers indicated that there had been a leak repaired in a basement wall, but it indicated no other defects. The Kennedys had a whole-house inspection performed, and the parties closed on the sale in January 2007.

In early 2008, the Kennedys began renovating a second-floor hall bathroom. When they removed a portion of the tile floor, they discovered the presence of mold. Professional testing later revealed significant levels of mold throughout the house. The Kennedys left the home after receiving the test results.

The Kennedys sued the Pelzers and Lehr, asserting breach of contract and breach of warranty as well as several other claims for fraud and negligence.

In their depositions, the Kennedys acknowledged that their damages arose from the presence of the mold and the necessity of remediating the mold condition to render the house habitable. They conceded that, but for the presence of the mold, they would have remained in the house.

The Kennedys presented no evidence that the Pelzers had been aware of the mold in the hall bathroom. Nonetheless, they contended that the Pelzers had actual knowledge of certain conditions that they had failed to disclose. Among these conditions were the presence of a treated termite tunnel near the foundation of the house, the presence of a crack in the basement behind a paneled wall, and a leak in the master bathroom that had been repaired.

The trial court entered summary judgment in favor the Pelzers and Lehr, holding that they there was no evidence that they had known about the mold, and that none of the undisclosed conditions had proximately caused the mold condition

in the house. The court overruled the Kennedys' motion for relief from the summary judgment.

In their first assignment of error, the Kennedys now argue that the trial court erred in entering summary judgment in favor of the Pelzers and Lehr.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.[2] This court reviews the granting of summary judgment de novo.[3]

R.C. 5302.30 requires the seller of real estate to disclose any information that he possesses concerning a material defect in the premises.[4] This duty applies only to those conditions that are within the actual knowledge of the seller.[5] And even where there is a breach of the duty, the buyer bears the burden of demonstrating that an act or omission on the part of the seller proximately caused damages.[6]

In this case, the Kennedys failed to demonstrate that the Pelzers had actual knowledge of the conditions that led to their damages. The Kennedys produced no evidence that the Pelzers had been aware of the mold in the hall bathroom, and the Kennedys themselves had lived in the house for approximately one year before they discovered the condition.

Nonetheless, the Kennedys argue that the Pelzers' knowledge of the other undisclosed conditions rendered summary judgment inappropriate.

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[2] See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[3] *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶6.
[4] See *Riggins v. Bechtold*, 1st Dist. No. C-010541, 2002-Ohio-3291, ¶7.
[5] Id.
[6] *Niermeyer v. Cook's Termite & Pest Control, Inc.*, 10th Dist. No. 05AP-21, 2006-Ohio-640, ¶38.

We find no merit in this argument. The Kennedys failed to produce evidence that the undisclosed conditions had been the proximate cause of the mold condition. Although they offered evidence that moisture in general can engender mold, they did not produce evidence that the repaired leak in the master bedroom or the leak in the paneled room had given rise to the mold problem in this specific case. And they offered no evidence to link the previous termite infestation to the presence of mold.

The trial court was therefore correct in concluding that the absence of proximate cause was fatal to the Kennedys' claims. For these same reasons, the trial court properly entered summary judgment in favor of Lehr.

In their second and final assignment of error, the Kennedys contend that the trial court erred in overruling their motion for relief from judgment.

To prevail on a motion under Civ.R. 60(B), the moving party must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B); and (3) the motion is made within a reasonable time, and where the grounds for relief are under Civ.R. 60(B)(1), (2), or (3), not more than one year after the entry of the judgment from which relief is sought.[7] A trial court's ruling on a Civ.R. 60(B) motion will not be reversed absent an abuse of discretion.[8]

Here, we find no abuse of discretion. The Kennedys assert that there had been "mistake or inadvertence" on the part of the trial court under Civ.R. 60(B)(1) in failing to consider all of the evidence before it. We are not persuaded.

First, it is evident from its context that Civ.R. 60(B)(1) relates to mistake, inadvertence, or excusable neglect on the part of the movant, not on the part of the

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[7] *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.
[8] *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶7.

trial court. Second, the Kennedys have not met their burden of showing any dereliction by the trial court in the case at bar.

Civ.R. 56(C) requires a trial court to examine and consider all depositions to determine their contents.[9] But in this case, the Kennedys have failed to demonstrate that the trial court disregarded any material that was filed with the motion for summary judgment or with the Civ.R. 60(B) motion for relief from judgment. Moreover, the Kennedys have not alleged that the trial court failed to review any material relevant to the pivotal issue of proximate causation. And in any event, our de novo review of the record convinces us that summary judgment was appropriate.

Accordingly, we overrule the second assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and **DINKELACKER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on January 28, 2011
per order of the Court Patrick Dinkelacker.
Presiding Judge

[9] See, e.g., *Moravec v. Hobeika* (Dec. 24, 1998), 1st Dist. No. C-980136.