

ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID L. KENNEDY, et al.

Appellees,

v.

JOHN PELZER, et al.

Appellants

* **CASE NO. 11-0381**
* **On Appeal from the**
* **Hamilton County Court of Appeals**
* **First Appellate District**
* **Court of Appeals Case No. C-100228**
*

**RESPONSE OF APPELLEE/DEFENDANT, SUSAN
LEMON LEHR TO APPELLANTS' JURISDICTIONAL
MEMORANDUM**

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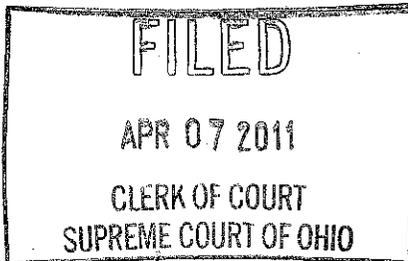


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I. THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Appellants invite this Court to exercise discretionary jurisdiction to review the fundamental and longstanding underpinnings of Civil Rule 56. Appellants' chief complaint is they failed to supplement a deposition with an "expert" report (i.e., a home inspection report) and believe the trial court and appellate court did not give the report its due consideration. The report, however, was attached to Plaintiffs' opposition memorandum. This case is not a case of public or great general interest for the following reasons.

First, Appellants' lawyer attached the report he now complains about to Appellants' opposition memorandum at the trial court level. Appellees moved to strike those documents; however, the trial court overruled that motion. As such, the documents were not only part of the briefing, but were specifically brought to the trial court's attention.

As demonstrated by the deposition testimony of Appellants, however, the inspection report did not change the legal analysis with respect to proximate cause because the report did not concern the pivotal issue of whether a causal connection existed between a repaired master bathroom leak and the mold damages claimed by Appellants. Thus, exercising discretionary jurisdiction over this appeal would elevate a "red herring" argument to an unnecessary height, possibly resulting in a remand to the lower courts on an issue that would ultimately make no difference in the proximate cause analysis.

Second, neither the trial court nor the appellate court committed a manifest injustice, nor did those courts commit error in deciding the proximate cause issue based on the record before them. Appellants complain because they lost at the trial court and appellate court levels, which is understandable. Appellants, however, had ample opportunity to convince the trial court and the appellate court a genuine issue exists with respect to proximate cause, but were unconvincing in that effort.

Plaintiffs even asked the trial court to reconsider the summary judgment decision. Appellants moved the appellate court to permit supplementation of the record with respect to the home inspection report, which was denied. Thus, Appellants' arguments have been reviewed at least three different times with the "missing" documents actually being part of the record, with the same result each time – summary judgment in favor of Lehr.

The undisputed facts confirm the trial court and appellate court properly granted summary judgment on the issue of Plaintiffs failing to prove proximate cause. Thus, this is not a case of public or great general interest.

Far from the "injustice" and "error" Appellant's attach to the Appellate Court's decision, the First District, like the Hamilton County Court of Common Pleas, decided proximate cause did not exist because Appellants failed to present evidence that a specific purported defect was causally linked to the specific damages Appellants claim. Appellants' jurisdictional memorandum makes broad assertions about general purported "defects" with the home. Significantly, the undisputed, dispositive facts demonstrate that the repaired leak in the upstairs master bathroom, i.e., the only problem of which Susan Lemon Lehr had actual knowledge, did not cause the mold damage resulting in Appellants moving out of the home.

As the sellers' realtor, Susan Lemon Lehr did not have an obligation under Ohio law to disclose anything for which she lacked actual knowledge. Furthermore, the repaired leak in the master bathroom is not causally linked to Plaintiffs' damages. There is no manifest injustice or error, the First District properly upheld the trial court's decision, and this is not a case of public or great general interest. Accordingly, Appellee Susan Lemon Lehr respectfully requests this Court refuse jurisdiction over this discretionary appeal.

II. ARGUMENT REGARDING EACH PROPOSITION OF LAW

As stated by Appellants:

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

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.

A. Statement of Facts

The First District reviewed the trial court's summary judgment decision *de novo*.¹ The exhibits and their irrelevance to the undisputed, dispositive facts were discussed in the court filings at the trial court level, the appellate court level, and at oral arguments before the First District. Those facts remain unchanged.

On April 13, 2008, Appellants filed suit against Defendants-Appellees, John and Cathy Pelzer (the "Pelzers") and Defendant-Appellee, Susan Lemon Lehr ("Lehr"). They alleged five causes of action against Lehr (fraud/fraudulent misrepresentation, negligent misrepresentation, unjust enrichment and negligence). On August 28, 2009, Lehr moved the trial court for summary judgment with respect to each claim asserted against her by the Kennedys.

On February 16, 2010, the Hamilton County Court of Common Pleas entered its Decision granting summary judgment in favor of Lehr. The trial court found the lack of proximate cause between water issues in the master bathroom, which were repaired, and the Kennedys' claimed damages justified summary judgment. The trial court also determined the absence of actual knowledge by Lehr of any purported defects justified summary judgment because Ohio law does not require disclosing the absence of actual knowledge. The final judgment entry in favor of Lehr was filed on March 10, 2010.

On April 8, 2010, the Kennedys appealed. The parties briefed the issues. On January 28, 2011, the First District upheld the trial court's decision.

Significantly, the appellate court found:

¹ *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St. 3d 102, 105, 1996-Ohio-336; *Walker v. Hodge*, No. C-090535, 2010-Ohio-1989 (1st Dist.).

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 [their] 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.

Furthermore, the First District found:

The Kennedys failed to produce evidence that the undisclosed conditions had been the proximate cause of the mold condition. Although [the Kennedys] 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.

Thus, the trial court correctly concluded that the absence of proximate cause was fatal to the Kennedys' claims. Those same reasons justified summary judgment in favor of Lehr.²

Appellants' lawsuit revolves around their purchase of the residential property located at 1772 Loisdale Court, Cincinnati, Ohio, and damages claimed because of mold. Appellants had the house tested for mold over one year after moving into it. The testing allegedly showed mold in the basement, hall bathroom and two of the bedrooms, not the master bathroom. Appellants then moved out because of the mold. Appellants sought damages for mold remediation, medical expenses due to mold exposure and other expenses. There was no evidence of mold in the master bath or in the kitchen, and there is no evidence that any of the alleged damages have any causal connection with any water issue in the master bathroom.

Lehr was not Appellants' agent. Lehr did not meet Appellants before the closing. Lehr's legal obligations, with respect to the alleged cause of Appellants' damages (i.e., the presence of mold in the home) simply required Lehr to disclose what she actually knew about the presence of

² January 26, 2011 Judgment Entry of First Appellate District, p. 4 (attached to Appellants' jurisdictional memorandum).

mold in the home. Yet, there is no evidence that Lehr had knowledge of any mold in the house before it was sold to Appellants.

At no time prior to making the offer and/or closing on the property did the Kennedys have any direct conversation with Lehr; nor did they ask their agent to follow-up with anything in particular with Lehr.³ Their agent, Bob Wetterer, prepared the Contract to Purchase.⁴

The Kennedys closed on the property in January of 2007, and did not move in until February 1, 2007.⁵ During the five months between their offer and moving into the property (August 2006-February 2007), the home was vacant and the Kennedys had complete access to the home.⁶

Several months after the Kennedys moved in, the downstairs bathroom toilet leaked. While Mrs. Kennedy was carrying laundry downstairs, she “got wet in the basement” and looked up, there was water coming down and she guessed that the seal in the toilet came off, “so [the Kennedys] went ahead and gutted the bathroom.”⁷

The Kennedys also had another water intrusion in the basement, which was because of a natural accumulation of snow.⁸ Mrs. Kennedy explained that the grade at the property goes downhill from left to right, which probably caused the water infiltration in the basement from the snow.⁹

The Kennedys also had a leak in the upstairs hall bathroom and had that water leak repaired. The Kennedys did not see any dark areas, dirty areas, black areas or anything like that on the floor or subfloor when they redid the small bathroom on the first floor.¹⁰ Indeed, it never

³ D. Kennedy Dep., Td 52, 53-45, 60, 85, 92, 97, 116, 340; S. Kennedy Dep., Td. 50, 51-36, 86, 177, 182, 203.

⁴ D. Kennedy Dep., Td 52, 53-82.

⁵ D. Kennedy Dep., Td 52, 53-26; S. Kennedy Dep., Td. 50, 51-25.

⁶ See generally, S. Kennedy Dep., Td. 50, 51-200-201, 204.; D. Kennedy Dep., Td 52, 53-112-117.

⁷ S. Kennedy Dep., Td. 50, 51-41-42.

⁸ S. Kennedy Dep., Td. 50, 51-53-54.

⁹ S. Kennedy Dep., Td. 50, 51-53-54.

¹⁰ S. Kennedy Dep., Td. 50, 51-210-211.

crossed the Kennedys' minds that they had a water leak and it could be causing mold.¹¹ It was a one-time problem, the Kennedys fixed it and it "shouldn't be a mold problem."¹²

Sometime in 2008 (more than a year after they moved into the home), the Kennedys attempted to fix the problem in the hall bathroom (aka the kids' bathroom). They decided to remove all of the tile because the bathroom was so outdated.¹³ At that point in time, the Kennedys discovered issues in the hall bathroom.¹⁴ Eventually, the Kennedys decided to have mold testing conducted.

With respect to the mold testing, the Kennedys claim the highest mold counts were in the kids' hall bathroom.¹⁵ The Kennedys believe the mold in the hall bathroom was caused by a water problem in the hall bathroom.¹⁶ Importantly, the Kennedys are not claiming, and they have no evidence to suggest, the water problem in the master bathroom caused the mold in the hall bathroom.¹⁷

There were also mold readings allegedly showing mold in their daughter's bedroom. The Kennedys believe the mold air levels in that bedroom were caused by what happened in the hall bathroom.¹⁸

The mold testing also allegedly revealed positive mold levels in the basement.¹⁹ According to the Kennedys, the numerous cracks in the foundation are responsible for causing the mold in the basement.²⁰

¹¹ S. Kennedy Dep., Td. 50, 51-211.

¹² *Id.*

¹³ S. Kennedy Dep., Td. 50, 51-214-215.

¹⁴ *Id.*

¹⁵ S. Kennedy Dep., Td. 50, 51-218.

¹⁶ S. Kennedy Dep., Td. 50, 51-219.

¹⁷ S. Kennedy Dep., Td. 50, 51-219.

¹⁸ S. Kennedy Dep., Td. 50, 51-220.

¹⁹ S. Kennedy Dep., Td. 50, 51-220.

²⁰ S. Kennedy Dep., Td. 50, 51-220-221.

The Kennedys have no evidence that Lehr knew there was mold in the house.²¹ According to Mrs. Kennedy, if a leak is repaired right away and taken care of, there would not be a chance of mold in the house.²²

Lehr had no knowledge of the hall bathroom leak. In fact, the only thing Lehr knew about was the master bathroom leak that was repaired.²³ It is also undisputed that the Kennedys knew about the leak in the basement.²⁴

Significantly, the Kennedys moved out before they even noticed any problems with the master bathroom.²⁵ The Kennedys have no evidence that there was ever water intrusion in the master bathroom prior to the Kennedys moving out.²⁶

The Kennedys' primary concern with respect to the master bath is that it apparently leaked to the kitchen ceiling. This focus is a red herring because there is no evidence to suggest that the master bathroom leak was not fixed. Indeed, the leak in the master bathroom had been fixed and was not a problem.²⁷ At every point leading up to the closing at which Lehr was in the home, she did not observe any evidence that the master bathroom leak presented any type of problem for the property and believed it had been fixed.²⁸

B. The First District Court of Appeals Did Not Commit Manifest Injustice or Error in Affirming Summary Judgment in Favor of Appellees

1. Regardless of whether the home inspection report was physically attached to the deposition, Appellants attached it to their opposition memorandum, quoted it and made arguments supported by it.

Regardless of Appellants' failure to confirm the actual home inspection report was attached to the depositions filed with the trial court, Appellants attached the "missing"

²¹ S. Kennedy Dep., Td. 50, 51-222.

²² S. Kennedy Dep., Td. 50, 51-222.

²³ See, Lehr Dep., Td. 49-27-28, 36-37.

²⁴ Lehr Dep., Td. 49-27-28, 36-37.

²⁵ S. Kennedy Dep., Td. 50, 51-216-217.

²⁶ S. Kennedy Dep., Td. 50, 51-217.

²⁷ C. Pelzer Dep. Td. 55-24, 42, 52-53.

²⁸ Lehr Dep., Td. 49-27-28, 36-37.

documents to their opposition memorandum, quoted directly from the documents and made arguments based on the documents. Appellees moved to strike the attachments and the trial court overruled the motion. There is no dispute that Appellants' opposition memorandum and its attachments were also before the appellate court.

Appellants' appellate brief is also littered with footnotes referencing the exhibits identified as the inspection report and emails which were attached to Plaintiffs' opposition memoranda at the trial court level.²⁹ Significantly, Appellants also quoted directly from the report at the appellate court level.³⁰ Thus, there was no injustice and/or error because the appellate court and the trial court had the text of the purported "missing" documents, regardless of whether the copy of the report used in a deposition was attached to the deposition.

2. There was no injustice or error because Appellants failed to timely satisfy their burden under Civil Rule 56.

Civil Rule 56 reads in pertinent part:

(C) . . . The adverse party, prior to the day of hearing, may serve and file opposing affidavits. 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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

(E) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

²⁹ July 30, 2010 Brief for Plaintiffs-Appellants, pp. 4, 5, 6 (fns. 18, 20-32).

³⁰ *Id.*

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**.³¹

Roughly 15 years ago, this Court confirmed the burden placed upon the moving and non-moving party in the context of a summary judgment motion. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

To accomplish the movant's task, the movant must be able to point to evidentiary materials of the type listed in Civil Rule 56(C) that a court is to consider in rendering summary judgment.³² While the movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed.³³ As such, the moving party cannot make conclusory assertions, without backing those assertions by some evidence of the type listed in Civil Rule 56(C), which affirmatively shows that the non-moving party has no evidence to support the party's claims.³⁴

The movant bears the initial burden of informing the Court of the basis for its motion, specifically pointing to evidence, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on any of the essential elements of the non-movant's claims.³⁵ In turn, the non-movant maintains a reciprocal burden as outlined in Rule 56(E), to set forth specific facts showing that there is a genuine issue for trial.³⁶

The foregoing principles have been firmly established in Ohio jurisprudence for more than 30 years.³⁷

³¹ Ohio R. Civ. P. 56(C), (E) (emphasis added).

³² *Id.* at pp. 292-293.

³³ *Id.* at p. 293.

³⁴ *Id.* at p. 293.

³⁵ *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293.

³⁶ *Id.*

³⁷ *Id.* at 294; *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 114-115; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66.

In the present case, Appellees supported their summary judgment motion with the sworn deposition testimony of the Plaintiffs, Defendant Susan Lemon Lehr, and the Pelzer Defendants, to demonstrate the lack of a causal connection between the repaired water leak in the master bathroom and the mold damages claimed by Plaintiffs. The same sworn deposition testimony also provided the undisputed facts concerning the lack of actual knowledge by Lehr of any other purported defects with the property. As such, more than 30 years of Ohio Supreme Court precedent and the express text of Civil Rule 56 shifted the burden of pointing to specific facts showing a genuine issue for trial to Plaintiffs.

As such, the Rule 56(E) burden made it incumbent upon Appellants to confirm the home inspector's report was part of the record. Appellants attached the document they now complain about to their opposition memorandum. Injustice and/or error does not attach to the trial court's decision, nor does it attach to the Appellate Court's decision where the documents now complained about were actually part of the record.

Nothing in Civil Rule 56 suggests the movant is required to confirm anything more than the portions of the record relied upon by the movant are properly before the trial court. Appellees did not rely on the home inspection report because it was irrelevant to the undisputed dispositive facts. As such, the non-movant (i.e., Appellants) had the burden of supplementing the record with the inspection report. Appellants did so. It makes no difference that the report was attached to the opposition memorandum. The significance to this appeal is that the report was part of the record and was not struck from the record, even though the trial court had the opportunity to strike it.

3. The "missing" documents do not change the undisputed dispositive facts.

Appellants make general references to "damages" and immaterial "defects". However, the documents at issue fail to address the specific evidence offered by Lehr in regard to causation

and lack of knowledge. Thus, the Kennedys failed to satisfy their burden under Civil Rule 56 and the expert's report did not change Appellant's admissions on the critical facts.

The Kennedys were charged with offering evidence to challenge the undisputed material facts concerning the lack of causation and lack of actual knowledge. The "evidence" referred to by the Kennedys does not change the analysis. As outlined above, the Kennedys' own sworn deposition testimony deals the fatal blow to their claims. While the Kennedys' "documentary evidence", i.e., the expert report and the emails, may be significant in a case where basement leaks or termites or leaks in the hall bathroom are relevant, those facts are immaterial in this case.

III. CONCLUSION

Based on the foregoing, there was no manifest injustice and there was no manifest error at the trial court or appellate court levels. Both courts properly applied Civil Rule 56 principles to the undisputed facts of this case and correctly determined summary judgment was appropriate in favor of Lehr. Therefore, Lehr respectfully requests this Court deny Appellants' request to accept this appeal under this Court's discretionary jurisdiction.

Respectfully submitted,

 (0070870)
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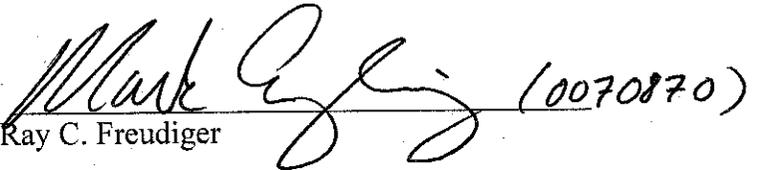
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 6th day of April, 2011, via regular U.S. mail upon the following:

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