

ORIGINAL

IN THE SUPREME COURT OF OHIO

DAVID L. KENNEDY, et.al.	:	Case No. 2011- 0381
	:	(Discretionary Appeal – Non-Felony)
Appellants,	:	
	:	On Appeal from the
	:	Hamilton County Court of Appeals,
vs.	:	First Appellate District
	:	
JOHN PELZER, CATHY PELZER,	:	Court of Appeals Case No. C-100228
and SUSAN LEMON LEHR,	:	
	:	
Appellees.	:	

REPLY MEMORANDUM OF APPELLEES JOHN PELZER AND CATHY PELZER

**IN RESPONSE TO NOTICE OF APPEAL AND
MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS DAVID L. KENNEDY AND SANDRA L. KENNEDY**

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

The Trial Court granted Summary Judgment to Defendants-Appellees John Pelzer and Cathy Pelzer (the "Pelzers") and to Defendant-Appellee Susan Lemon Lehr. The Court of Appeals affirmed the Trial Court. Plaintiffs-Appellants David Kennedy and Sandra Kennedy (the "Kennedys") assert that because certain exhibits were allegedly omitted from a deposition of David Kennedy, most notably an expert report, that the Trial Court and Court of Appeals did not consider a complete record, and that therefore, the decisions those courts rendered were against public policy, manifestly unjust, and constitute manifest error. Accordingly, Appellants assert that this case is a case of public or great general interest.

To the contrary, Appellees the Pelzers assert that this is not a case of public or great general interest, because the Trial Court and Court of Appeals determined that the substantive facts, to which the allegedly omitted material related, were not relevant to the basis for the grant of the Summary Judgment. Appellant-Plaintiff David Kennedy described the substance of the allegedly omitted materials in his deposition testimony. The exhibits duplicated the matters to which he already testified. Thus, the substance of the allegedly omitted materials was before both the Trial Court and the Court of Appeals in his deposition testimony. His deposition was before both the Trial Court and Court of Appeals as part of the record.

The decision rendered by the Trial Court in granting Summary Judgment was based on other grounds, thus rendering the allegation of omitted materials moot to the questions before the

Trial Court and the Court of Appeals. For this reason, this case poses no issues of public or great general interest. Since the allegedly omitted material was deemed not relevant, the issue raised by Appellants of allegedly omitted materials is simply moot.

II. STATEMENT OF THE CASE AND FACTS

The Trial Court granted Summary Judgment in favor of Appellees based upon a finding that there was no proximate causation between Appellants Kennedys' alleged claims and the actions of Appellees. The Trial Court and the Court of Appeals determined that the facts to which the allegedly omitted materials related, and which were substantively described in the deposition of Appellant David Kennedy, were unrelated to that issue. Appellants specifically brought the alleged omission of the exhibits to the attention of the Court of Appeals during oral argument. The Court of Appeals determined that "the Kennedys have failed to demonstrate that the trial court disregarded any material that was filed with the motion of summary judgment ... (m)oreover, the Kennedys have not alleged that the trial court failed to review any material relevant to the pivotal issue of proximate causation."¹ The Court of Appeals further noted that "in any event, our *de novo* review of the record convinces us that summary judgment was appropriate."²

III. ARGUMENT *CONTRA* PROPOSITIONS OF LAW RAISED BY APPELANTS

Appellants' Assertion of 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.

The Court of Appeals was advised and aware of the alleged omission of materials. It reviewed the record in light of that alleged omission, and specifically stated that the material,

¹ Opinion, Court of Appeals, at 5.

² *Id.*

which Appellant-Plaintiff David Kennedy substantively described in his deposition testimony, was not relevant to the pivotal issue of proximate causation. No injustice occurred. If the record was incomplete as alleged by Appellants, the Court of Appeals deemed such omission to be not vital. There was no injustice, manifest or otherwise.

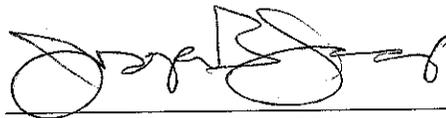
Appellants' Assertion of Proposition of Law No. 2: Failure of a reviewing court to permit correction of the record on appeal when vital evidence has been omitted from the record constitutes manifest error.

The Court of Appeals was advised and aware of the alleged omission of materials. The Court of Appeals acted within its discretion during its *de novo* review to determine that such alleged omission in the record was not relevant to the basis on which the Trial Court granted Summary Judgment. There was no error, manifest or otherwise.

IV. CONCLUSION

For the reasons stated above, there is no issue of public or great general interest. There certainly is no constitutional question. Accordingly, Appellees the Pelzers submit that there is no reason for this Court to accept jurisdiction of this case for review.

Respectfully submitted,



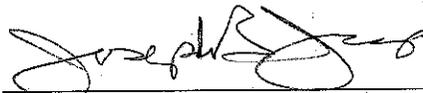
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CERTIFICATE OF SERVICE

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