[Cite as *Stern v. Stern*, 2003-Ohio-3293.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LANSON O. STERN, ET AL.,	)	
	)	
PLAINTIFFS-APPELLEES,	)	
	)	
VS.	)	CASE NO. 02-JE-17
	)	
LOUIS J. STERN, ET AL.,	)	OPINION
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court Case No. 95-CV-90
JUDGMENT:	Reversed and remanded
APPEARANCES:	
For Plaintiffs-Appellees:	(no brief)
For Defendants-Appellants:	Louis J. Stern, pro se HC2 Box 111 Wasola, Missouri 65773

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: June 19, 2003

DONOFRIO, J.

{¶1} Defendants-appellants, Louis and Laura Stern, appeal from a judgment of the Jefferson County Common Pleas Court awarding plaintiffs-appellees, Lanson and Joyce Stern, $1,195.13 plus costs.

{¶2} This case has been before this court on numerous occasions.[1] A restatement of the facts and history as set out in *Stern 2* is appropriate.

{¶3} "The parties to this action are brothers Lanson and Louis Stern and their respective spouses. The brothers' father, Warren Stern, once owned two parcels of property in Jefferson County. One parcel was small and was completely surrounded by the other, much larger parcel of property. Houses stood on both properties. The small parcel could be accessed from the main road only via a long driveway that cut through the large parcel. Water and sewage service to the small property was similarly and necessarily accessed through the large parcel.

{¶4} "In 1989, Warren transferred the small parcel to Appellee, Lanson Stern. In April 1994, after Warren had passed away, Appellant Louis Stern purchased the large parcel at auction. Appellant later sold the large parcel of property to another brother, Steven Stern and his wife, Mary Lou.

{¶5} "The parties agree that Appellees had easements over Appellants' land to obtain access to the property, use of a septic system, and use of a spring to supply water to Appellees' house. Unfortunately, bad blood has persisted between these two brothers for many years.

{¶6} "On March 1, 1995, Appellees filed a complaint against Appellants. The complaint alleged that on February 23, 1995, Appellants violated Appellees' easement

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[1] This case was before this court in *Stern v. Stern* (Dec. 21, 1999), 7th Dist. No. 97-JE-68, and *Stern v. Stern* (Dec. 12, 2001), 7th Dist. No. 00-JE17. It was then before this court for reconsideration in *Stern v.*

by destroying the pipe that connected Appellees' house to its septic system. The complaint charged that Appellants destroyed the pipe intentionally and maliciously, thereby depriving Appellees of their right to quiet enjoyment of their property. Appellees sought monetary and injunctive relief.

{¶7} "On March 16, 1995, Appellees amended their complaint claiming that Appellants had denied them access to their residence by digging a ditch approximately two feet wide and three feet deep between the edge of Appellees' access road and their house. Appellees again maintained that Appellants undertook this action maliciously and with the intent to deprive them of their right to the quiet enjoyment of the property. Appellees sought to obtain a declaration of permanent easements over Appellants' property and demanded a jury trial.

{¶8} "Appellants neglected to file an answer to the amended complaint until August 8, 1995. That pleading did not include a jury demand. In the interim, the parties filed an array of motions and continuances regarding a temporary restraining order, including an agreed indefinite continuance of proceedings which they filed on May 4, 1995.

{¶9} "On April 18, 1997, the trial court set the matter for a jury trial to commence on June 17, 1997. That scheduling order indicates that Appellees were reconsidering their jury demand. Nevertheless, the court noted that, '[t]his matter will still be tried to a jury unless all parties waive the jury.' The matter was then continued a number of times over the ensuing months.

Stern (Feb. 7, 2002), 7th Dist No. 00-JE-17. For easier reference, these cases will be referred to as *Stern 1*, *Stern 2*, and *Stern 3* respectively.

{¶10} "On July 8, 1997, the trial court granted Appellees' request for leave to again amend their complaint to add the new owners of the servient estate, Steve H. Stern and his wife Mary Lou Stern, as defendants in the case. Appellants submitted an answer to this amended complaint on August 7, 1997. This time, the answer included a jury demand.

{¶11} "The trial court bifurcated the trial into legal (i.e., damages) and equitable (i.e., injunctive) issues and scheduled trial on the equitable claims for October 9, 1997. The equitable issues were resolved in favor of Appellees and their permanent easements over the property.

{¶12} "The legal issues were scheduled for jury trial on October 31, 1997. The day before trial, Appellees withdrew their jury demand. Subsequently, on October 31, 1997, the trial court issued an order granting what amounted to a default judgment against Appellants in the amount of $44,835. Appellants appealed and this Court reversed, concluding that the trial court had issued a default judgment without proper notice to the party against whom the default had been taken, and remanded the matter for further proceedings. See *Stern v. Stern* (December 21, 1999), Jefferson App. No. 97-JE-68, unreported.

{¶13} "On remand, the matter was again set for trial, this time to commence on February 24, 2000. Appellees had submitted proposed jury instructions, but on the day of trial, they sought to withdraw their jury demand and have the matter heard by the trial court. The trial court allowed Appellees' request. First, though, it struck Appellants' earlier answers to the complaints as untimely. This Court has been unable to locate a written motion seeking to strike Appellants' answers to Appellees'

complaint and amended complaint, nor does it appear that there was ever a hearing on such a request. The only indication that such motion was even made and granted is reflected by the following comments uttered just before trial:

{¶14} "'* * * both answers are late and are stricken.

{¶15} "'* * *

{¶16} "'So we're not doing the jury, the answers are stricken. But we're still going to have a trial on the merits.'

{¶17} "(Tr. pp. 3-4). By striking Appellants' answers, the trial court invalidated the jury demand that Appellants had included in the body of their answer to the second amended complaint. Therefore, instead of a jury trial, the matter proceeded to a bench trial. Our review of the record reflects that there is no written order reflecting the trial court's decision to strike Appellants' answers as untimely and granting Appellees' request to withdraw their jury demand.

{¶18} "In the March 31, 2000, order from which this appeal was taken, the trial court found that Appellant Laura Stern failed to appear and was in default. The court also ruled that Appellant Louis Stern intentionally and maliciously interfered with services to Appellees' home. The trial court awarded Appellees damages in the amount of $29,826.00. In a subsequent hearing, the trial court awarded attorney's fees to Appellees in the amount of $23,845.00." Id.

{¶19} Appellants appealed these decisions. This court reversed the trial court's judgment and remanded the case for further proceedings. We concluded the court erred in removing this case from the jury docket when both parties had not properly waived a jury trial.

{¶20} We now continue with this case and the proceedings that occurred after remand. On December 18, 2001, the trial court scheduled the case for a jury trial. On December 26, 2001, appellants filed a motion requesting the court to order appellees to deposit the funds it received with the court, to require appellees to post an additional bond with the court, and asking for leave to file an amended second answer. The court held a hearing on the motions. In its January 7, 2002 judgment entry, the court granted appellants' motion in part stating that appellees were required to deposit the funds they received with the court. The court also stated appellants' motion requesting appellees to post a bond and asking for leave to file an amended second answer were premature because both parties had filed motions with this court for reconsideration and appellees had filed a motion to certify a conflict upon which we had not yet ruled. Therefore, the trial court stated that it would not determine those issues at that time.

{¶21} On February 4, 2002, appellants filed an "amended answer to second amended complaint." In response, appellees filed a motion to strike this answer alleging: (1) the answer was untimely since the complaint it answered was filed on July 9, 1997 (four years, six months previously); and (2) appellants' filed this untimely answer without leave of court. Appellants next filed an "answer to motion and motion for bond." In this "answer," appellants asserted that in its January 7, 2002 judgment entry, the trial court gave them permission to file the amended answer to second amended complaint, pending the outcome of the motions for reconsideration and to certify a conflict in this court.[2] In a February 25, 2002 judgment entry, the trial court

[2] In the meantime, on February 7, 2002, we denied the motions pending in this court in *Stern 3*.

ordered appellants' amended answer to second amended complaint stricken from the record. The court stated the answer was over four years late and was filed without leave of court and without a showing of excusable neglect as required by Civ.R. 6(B)(2). Additionally, the court stated that we found in *Stern 1* and *Stern 2* that the answer appellants sought to amend was itself untimely filed.

{¶22} Consequently, on March 4, 2002, Laura filed a "motion for continuance until Laura S. Stern can be served with second amended complaint." In this motion, Laura alleged she was never served with appellees' second amended complaint and requested that the court continue the trial until appellees served her with the complaint and she had a chance to answer it. Additionally, on March 7, 2002, Louis filed a motion for leave of court to file an amended answer. In its April 1, 2002 judgment entry, the trial court ruled that the jury trial would be limited to those issues raised in appellees' second amended complaint (filed July 9, 1997) and appellants' answer to the first complaint (filed August 8, 1995). The court ordered all other pleadings stricken from the record, in effect overruling appellants' motions.

{¶23} The case proceeded to trial and the jury returned a verdict in favor of appellees for $1,195.13 plus costs. The court journalized the verdict in its April 17, 2002 judgment entry. Appellants filed their timely notice of appeal on May 15, 2002. They proceed with this appeal pro se.

{¶24} At the outset, we should note that appellees have failed to file a brief in this matter. Therefore, we may accept appellants' statement of the facts and issues as correct and reverse the judgment if appellants' brief reasonably appears to sustain such action. App.R. 18(C).

{¶25} Appellants raise six assignments of error, the first of which states:

{¶26} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE DID NOT ALLOW THE SECOND AMENDED ANSWERS, FILED ON 2-4-02 TO STAND. HE ERRORED [sic.] WHEN HE ORDERED THEM STRICKEN FROM THE RECORDS ON 2-25-02 IN A JOURNAL ENTRY."

{¶27} Appellants contend the trial court stated it would allow them to file a second amended answer both at the January 7, 2002 hearing and in the judgment entry that followed. They contend the court erred in striking the second amended answer in its February 25, 2002 judgment entry. Appellants also argue the court failed to follow Civ.R. 13(F), which provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." Appellants assert the court violated Civ.R. 13(F) when it struck their answer after allowing them to file it.

{¶28} An examination of the January 7, 2002 transcript and the judgment entry that followed reveals that while the court initially stated it would allow appellants to file the second amended answer, it subsequently held the request was premature. Appellants filed the motion for leave to file an amended second answer on December 26, 2001 and the motion came for hearing on January 7, 2002. At that time, motions for reconsideration and to certify a conflict were pending in this court. At the hearing, the court first stated that it would allow appellants to file an amended answer. But, upon realizing motions were pending before this court, the trial court recanted its permission stating that after we decided the pending motions it would then probably allow appellants to file the amended answer. (January 7, 2002, Tr. 7-10).

{¶29} If any confusion remained about whether the court gave appellants permission to file another answer, the court clarified itself. In its judgment entry, the court stated that because of the pending motions in the court of appeals, appellants' motion was premature and therefore the court "makes no judgment on those issues." (January 7, 2002, judgment entry). A court speaks only through its journal entry and not by transcribed oral pronouncements. *Schenly v. Kauth* (1953), 160 Ohio St. 109, paragraph one of the syllabus. "A reviewing court is loath to address substantive or procedural content of a courtroom colloquy where it is then omitted from the written judgment." *Stern*, 00-JE-17.

{¶30} Thus, appellants did not have leave of court to file the February 4, 2002 "amended answer to second amended complaint." Accordingly, the court did not err in striking the "amended answer to second amended complaint" in its February 25, 2002 judgment entry, nor did it violate Civ.R. 13(F) by striking the answer after allowing appellants to file it, since it never allowed them to file it in the first place. Accordingly, appellants' first assignment of error is without merit.

{¶31} Appellants' second assignment of error states:

{¶32} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE DID NOT FOLLOW THE DECISION AND OPINION OF THE APPELLATE COURTS [sic.] FINDINGS OF DECEMBER 12, 2001, WHERE THE APPELLATE COURT ORDERED THE AMENDED ANSWERS OF THE APPELLANTS TO STAND."

{¶33} Appellants allege the trial court failed to follow this court's decision in *Stern 2*. They contend that we determined that their answers should stand; yet, the

trial court struck them from the record. They further allege the judge stated in court that he did not have to abide by our decision.

{¶34} First, it should be noted that after examining the partial transcripts filed with this court, we found no indication that the trial court stated it did not have to abide by our previous decision. With that said, the court's April 1, 2002 judgment suggests otherwise. The April 1, 2002 judgment entry states that the jury trial will be limited to the issues raised in appellees' second amended complaint (filed July 7, 1997) and appellants' answer (filed August 8, 1995). In *Stern* 2, we analyzed the law of the case doctrine and stated it provides that the decision of a reviewing court in a particular case remains the law of that particular case for all subsequent proceedings. We also noted that it binds a trial court to its own prior decisions. We determined that when the trial court struck appellants' answers (August 8, 1995 answer and August 7, 1997 answer) as untimely, it violated the law of the case. We reasoned that for nearly five years, the court and the parties treated the case as if it had been properly answered and no one questioned the timeliness of the answers. We stated that by striking the answers, the trial court violated the established law of this case. Therefore, as of our decision in *Stern 2*, appellants' August 8, 1995 answer and August 7, 1997 amended answer were properly on the record.

{¶35} For that reason, the court could not arbitrarily strike the August 7, 1997 amended answer as it did in its April 1, 2002 judgment entry. The amended answer is important because in it Louis asserts a counterclaim against appellees. Thus, appellants' second assignment of error has merit.

{¶36} Appellants' third assignment of error states:

{¶37} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE DID NOT PERMIT APPELLANT LAURA STERN TO FILE AN ANSWER TO THE AMENDED COMPLAINT OR THE SECOND AMENDED COMPLAINT AFTER A MOTION WAS ENTERED BY HER ON 3-4-02 IN WHICH LAURA STERN STATED THAT SHE HAD NOT BEEN SERVED."

{¶38} On March 4, 2002, appellant Laura Stern filed a "motion for continuance until Laura S. Stern can be served with second amended complaint." In the motion, Laura alleged she was never properly served with either complaint because appellees sent them to the wrong address. She requested that the court continue the trial until she could be properly served with the second amended complaint and file an answer.

{¶39} Appellants' brief states the court held a hearing on Laura's motion on March 11, 2002. They proceed to explain what the evidence at the hearing demonstrated. However, the only mention of this hearing in the record is a March 8, 2002 entry on the docket sheet stating a hearing on the motion is set for March 11, 2002. There is no judgment entry reflecting the outcome of the hearing. Appellants have not included a transcript of the hearing. Thus, we have nothing to review in regard to such hearing or judgment. The only indication on the record of the court's ruling on Laura's motion is found in the April 1, 2002 judgment entry. There the court stated the trial would be limited to the issues raised in the July 9, 1997 complaint and the August 8, 1995 answer and struck all other pleadings. Thus, in this entry, the court implicitly denied Laura's motion to file an amended answer.

{¶40} Appellants do not allege that the court is without personal jurisdiction over Laura. Instead, they argue that the court erred in not permitting Laura to file an amended answer.

{¶41} Civ.R. 15 governs amendments. Civ.R. 15(A) provides: "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Turner v. Cent. Local School Dist.* (1999), 85 Ohio St.3d 95, 99. Abuse of discretion connotes more than an error in law or judgment; it implies that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. While Civ.R. 15 provides for liberal amendment, the court should refuse such motions if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Turner*, 85 Ohio St.3d at 99; *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, paragraph two of the syllabus.

{¶42} Given the fact that this case has been pending since March of 1995, the trial court did not abuse its discretion in refusing to allow Laura to file an amended

answer. She did not file her motion until March 4, 2002 (almost five years after the filing of the second amended complaint). Apparently, the trial court did not want to incur any additional undue delay. This is reasonable given the extremely long, drawn-out litigation through which the parties have dragged this case.

{¶43} Accordingly, appellants' third assignment of error is without merit.

{¶44} Appellants' fourth assignment of error states:

{¶45} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE WOULD NOT ALLOW THE ADMISSION OF CRITICAL EVIDENCE THAT THE APPELLANTS WANTED ADMITTED TO NOT ONLY PROVE THAT THE APPELLEES HAD BOTH LIED UNDER OATH BUT HAD ALSO USED THE LAWSUIT FOR THE INTENTIONAL PURPOSE OF BLACKMAIL."

{¶46} Appellants contend the court erred in refusing to let them introduce certain evidence. It appears the evidence appellants wished to introduce was a letter from Lanson to appellants' attorney. Appellants contend their entire case was based on a claim that appellees used the lawsuit as leverage to force appellants to sell the farm to them. Appellants claim the evidence they wanted to introduce proved that appellees lied under oath and committed blackmail. Additionally, appellants assert that since appellees did not object to the introduction of the "evidence," the court could not exclude it. They insinuate the trial judge favored appellees since appellee Joyce Stern worked in the courthouse.

{¶47} Generally, all relevant evidence is admissible. Evid.R. 402. "Relevant evidence" is any evidence tending to make the existence of a fact at issue more probable or less probable than it would be without the evidence. Evid.R. 401. A trial

court has broad discretion in determining the admissibility of evidence. *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271. An appellate court will not reverse the trial court's decision to admit or exclude evidence absent an abuse of discretion. Id.

{¶48} The letter, which Louis referred to in his testimony, is not included with the partial trial transcript and he did not proffer on the record the content of the letter. Thus, it is impossible to determine whether it was relevant. "Error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the court by proffer." *Day, Ketterer, Raley, Wright & Rybolt, Ltd. v. Hamrick*, 5th Dist. No. 2002CA0043, 2002-Ohio-5433, at ¶29; Evid.R. 103(A). Accordingly, appellants' fourth assignment of error is without merit.

{¶49} Appellants' fifth assignment of error states:

{¶50} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE WOULD NOT ALLOW THE INTRODUCTION OF SEVERAL PIECES OF CRITICAL EVIDENCE TO PROVE THAT THE APPELLEES HAD LIED DURING THE TWO PREVIOUS TRIALS."

{¶51} Appellants assert that the trial court objected to evidence they wished to admit when Louis was under oath. Appellants contend that the evidence would have shown the jury that the testimony at the first two trials did not match the testimony at the April 17, 2002 trial.

{¶52} After examining the partial transcript, it appears appellants are referring to a point in the trial where Louis, while testifying on direct examination, wanted to enter certain transcripts into evidence. (April 17, 2002, Tr. 15-17). Louis attempted to enter transcripts of his brother Steve's testimony and Lanson's testimony at a previous trial. The court stated that since Steve was unavailable as a witness, it would admit

the transcript of Steve's testimony. However, it did not allow Louis to introduce the transcript of Lanson's previous testimony because Lanson was available as a witness. The court explained to Louis that since Lanson was present at the trial, he had to put Lanson on the stand and ask him about his testimony at the prior trial. (Tr. 16).

{¶53} The court's ruling on the transcripts' admissibility is consistent with the Rules of Evidence. Louis could not introduce a transcript of Lanson's prior testimony while he, Louis, testified on direct examination. As the court explained, the proper way for Louis to introduce the transcript of Lanson's testimony was to call Lanson to the stand, ask him the same questions as he previously testified to, and, if Lanson answered differently from the transcript, use the transcript as impeachment evidence. See, Evid.R. 613; Evid.R. 801(D); Evid.R. 802. Thus, the trial court did not abuse its discretion in refusing to allow Louis to introduce the transcript of Lanson's previous testimony. Accordingly, appellants' fifth assignment of error is without merit.

{¶54} Appellants' sixth assignment of error states:

{¶55} "THE TRIAL JUDGE ERRORED [sic.] WHEN HE ALLOWED THE APPELLEES TO ENTER A PICTURE USED AT A PREVIOUS PROBATE HEARING BUT WOULD NOT ALLOW THE APPELLANTS TO ENTER EVIDENCE OF HOW THE PROBATE JUDGE DECIDED THAT APPELLEE LANSON STERN WAS LIEING [sic.] AND THAT THE PICTURES WERE FALSE."

{¶56} Appellants argue the court erred in not allowing them to present evidence of an alleged finding by the probate court that Lanson lied. It is not clear what evidence appellants argue the court should have admitted. They discuss pictures they wanted to introduce. The admission or exclusion of pictures as evidence

in the partial transcript only occurs once. At page 17, the court, over appellees' objection, allows appellants to introduce a picture of a corncrib's location on the farm.

{¶57} It is appellants' responsibility to provide this court with a record of the facts, testimony, and evidence in support of their assignments of error. *Collier v. Harrison County Auditor*, 7th Dist. No. 00-523-CA, 2001-Ohio-3384. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶58} Since appellants have not provided this court with the portion of the transcript in which they allege the court erred in excluding evidence they wished to admit, we have no choice but to presume the validity of the trial court's decision on this matter. Accordingly, appellants' sixth assignment of error is without merit.

{¶59} Based on the merit of appellants' second assignment of error, the trial court's decision is hereby reversed and remanded for further proceedings according to law and consistent with this opinion.

Vukovich and DeGenaro, JJ., concur.