[Cite as *Mariano v. Morella*, 2009-Ohio-4103.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PATRICK M. MARIANO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0020**
- vs -	:	
ROBERT M. WALLS, et al.,	:	
Defendants,	:	
JOSEPH J. MORELLA, et al.,	:	
Defendants-Appellants,	:	
(TONY NAPOLET, d.b.a. NAPOLET BONDING CO., Appellee).	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2002 CV 2693.

Judgment: Affirmed.

James M. Brutz, 410 Mahoning Avenue, N.W., Warren, OH 44483 (For Plaintiff-Appellee).

Robert L. York, 138 East Market Street, Warren, OH 44481 (For Defendants-Appellants).

Anthony G. Rossi, III, and *John M. Rossi*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Joseph J. and Roxanne Morella, appeal from the February 6, 2008 judgment entry of the Trumbull County Court of Common Pleas, overruling their objections and adopting the magistrate's September 21, 2007 decision.

{¶2} In September of 2002, appellants acquired title to vacant land known as Lot 5 in the Gulch Estates Plat in Howland Township, Trumbull County, Ohio. The following month, appellants began construction of a residence on Lot 5. As of November 18, 2002, appellants had completed excavation of the basement and pouring of the concrete footers to support the basement walls, but had not begun construction of the basement walls upon the concrete footers.

{¶3} On November 18, 2002, appellee, Patrick M. Mariano ("Mariano"), filed a complaint against appellants and Robert M. and Randi B. Walls ("the Walls"), alleging three counts: count one, declaratory judgment; count two, permanent injunction; and count three, money damages.[1] Mariano claimed that as "Developer" of the Gulch Estates Plat and owner of Lot 1, he was vested with authority to enforce the right of prior "design approval" as to appellants' residence and sought a temporary restraining order ("TRO") and preliminary injunction enjoining further construction.

{¶4} Mariano filed an amended complaint that same day, adding defendants Tom and Darlene Jones ("the Joneses"), owners of Lot 4.[2] Mariano also filed an amended motion for a preliminary injunction.

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1. The Walls conveyed Lot 5 to appellants. They are not named parties to the instant appeal.

2. The Joneses are not named parties to this appeal.

{¶5} Mariano was granted a TRO and ordered to provide a $10,000 bond. On November 26, 2002, appellee Tony Napolet ("Napolet"), d.b.a. Napolet Bonding Company, filed a "Temporary Restraining Order Bond Civil Rule 65(C)," indicating that Napolet Bonding Company as surety on behalf of Mariano is held and firmly bound unto appellants for the payment of such costs and damages as may be incurred by them up to a maximum amount of $10,000. The TRO was later extended to December 24, 2002.

{¶6} On January 2, 2003, appellants filed an answer to the amended complaint as well as counterclaims against Mariano and cross-claims against Napolet, seeking judgment declaring that the TRO should not have been granted; judgment against Mariano for all damages resulting from the TRO; and judgment against Napolet upon the bond in the amount of $10,000.

{¶7} On January 23, 2003, appellants filed a memorandum opposing Mariano's amended motion for a preliminary injunction. The matter was heard before the magistrate on January 24, 2003.

{¶8} On April 11, 2003, Mariano filed a reply to appellants' counterclaims, asserting that they failed to mitigate their damages. Napolet did not file an answer or reply to appellants' cross-claims against him.

{¶9} Pursuant to his May 2, 2003 decision, the magistrate recommended that Mariano's motion for a preliminary injunction be overruled, and that there is no actual "developer." Appellants filed objections to the magistrate's decision on May 8, 2003. Mariano filed objections on May 14, 2003. The trial court ultimately adopted the magistrate's decision on March 24, 2006.

{¶10} On May 12, 2006, appellants filed a motion to execute on the bond provided by Napolet and for trial upon their claims against Mariano and Napolet for damages resulting from the issuance of the TRO.

{¶11} A trial was held before the magistrate on September 15, 2006.

{¶12} At the trial, appellant Roxanne Morella ("Roxanne") testified that she and her husband, appellant Joseph J. Morella ("Joseph"), purchased a vacant lot in June of 2002, and entered into a construction agreement with Robert Miller ("Miller") to construct a house in September of 2002. Appellants entered into a construction loan agreement with First Place Bank in September of 2002, in which construction was to be completed by March 31, 2003. Construction began in early October of 2002. On November 26, 2002, appellants were served with the TRO, restraining construction of the residence. At that time, the excavation of the basement was complete and the footers were in place. In December of 2002, the trial court extended the TRO to expire around the end of the year.

{¶13} According to Roxanne, during the period the TRO was in effect, she visited the site several times; there was heavy snowfall and freezing temperatures; and the excavation looked like a skating pond with the hole filled in with snow and completely frozen over, level to the surface. In February of 2003, Roxanne indicated the hole was filled with snow, completely covering all the footers, which lasted through April. She stated that in May of 2003, the excavation was still filled with water, which was drained by Miller. At that time, Roxanne said that the footers were weakened and not usable. She testified that Miller had to remove the footers and pour new ones, expanding the square footage of the original foundation, at a cost of $13,922. Also,

Roxanne stated that she and Joseph had to extend their loan with First Place Bank for one year, at a cost of $250. Appellants had to reside in an apartment, paying rent at the rate of $700 per month. As a result of the TRO and weather conditions, appellants were delayed for a total of six months with respect to completion of their residence.

{¶14} Roxanne fired Miller in April of 2004, due to his failure to perform any work on the house for three weeks. According to Roxanne, she and Joseph completed the work that Miller agreed to do, but failed to do, at a cost of $26,000; at the time Miller was fired, the balance due him under the contract was $12,000 to $15,000; and to complete the residence, appellants paid $12,000 to $14,000 in addition to the balance on the contract.

{¶15} Miller testified for Mariano that he was the contractor for appellants' house and installed footers on November 25 or 26, 2002. Just before Thanksgiving, Miller quit working on appellants' residence after receiving a document restraining him from working on the job. After receiving the TRO, Miller indicated that appellants never asked him nor did he ever talk with them about things that he could have done to protect the footers. In the spring of 2003, Miller drained water out of the basement by digging a ditch with an excavator. Miller stated he was never compensated to take out the old footers and re-do them, nor was he paid the full amount pursuant to the construction agreement. Specifically, he said that he received the total amount stated in the construction contract, except for $12,000 to $15,000. Based on his knowledge and experience, Miller believed that water, snow, and ice in the hole damaged the footers. He was fired before he completed the house.

{¶16} According to Mariano, he has been a general contractor for about forty years. During the time period that the TRO was in force, Mariano viewed the site about five to eight times. He prepared a list of the high and low temperatures and total amount of precipitation during the period the TRO was in force, which was 1.75 inches. Mariano opined that 1.75 inches of precipitation could not fill the entire basement during the period the TRO was in force. He stated that it is possible to lay concrete footers in near-freezing weather, provided proper preparation is made. Mariano indicated that pursuant to the construction contract, Miller agreed to use rebar and Formadrain in constructing footers. However, no rebar or Formadrain was observed by Mariano. He believed the footers could have been saved by digging a ditch at the time the footers were poured to drain water coming into the excavation, or by periodically pumping water out of the excavation.

{¶17} On September 18, 2006, Mariano and Napolet filed an agreed judgment entry, indicating that Mariano would indemnify Napolet and that judgment should be rendered against Mariano and in favor of Napolet in an amount equal to any judgment rendered against Napolet up to a maximum of $10,000.

{¶18} On September 21, 2007, the magistrate filed his decision, stating that the TRO should not have been granted; that appellants were not entitled to judgment against Mariano and Napolet for damage to the footers; appellants were entitled to judgment against Mariano and Napolet for $700 for apartment rent for one month and for the $250 fee extending their loan for one year, for a total judgment in the amount of $950.

{¶19} On October 5, 2007, appellants filed objections to the magistrate's decision, as well as supplemental objections, with leave, on January 18, 2008. On January 22, 2008, Mariano filed a memorandum in opposition to appellants' objections.

{¶20} Pursuant to its February 6, 2008 judgment entry, the trial court overruled appellants' objections and adopted the magistrate's September 21, 2007 decision. It is from that judgment that appellants filed a timely notice of appeal and make the following assignment of error for our review:

{¶21} "The court below erred in limiting judgment to the cost of one month of apartment rental upon [appellants'] claim for additional rent and in denying judgment on [appellants'] claim for the cost of replacement of the footers."

{¶22} In their sole assignment of error, appellants argue that the trial court erred in limiting judgment to the cost of one month of apartment rental upon their claim for additional rent and in denying judgment on their claim for the cost of replacement of the footers.

{¶23} Appellants assert thirteen issues:

{¶24} "[1.] A decision and judgment adopting a magistrate's decision which is an abuse of discretion by the trial court must be reversed on appeal.

{¶25} "[2.] Where, in an appeal of a judgment by a trial court following a bench trial, the court finds the judgment is against the manifest weight of the evidence, the court shall reverse such judgment and may, either remand the case, or weigh the evidence and enter the judgment the trial court should have made.

{¶26} "[3.] Adjudication of a claim for damages resulting from wrongful issuance of a temporary restraining order is governed by the law of negligence.

{¶27} "[4.] If any injury is the natural and probable consequence of a negligent act and is such as should have been foreseen in the light of all attending circumstances, the negligent act is the proximate cause of the injury.

{¶28} "[5.] Circumstantial evidence is competent to prove a fact by evidence of another fact that, according to common experience of mankind, is rationally connected to its existence.

{¶29} "[6.] In deciding a case without a jury, in assessing the credibility of a witness, the court must consider the financial interest and bias of the witness, if any.

{¶30} "[7.] Assumption of risk requires that a plaintiff knows that a risk is present and understands the nature of the risk.

{¶31} "[8.] A party has no duty to 'minimize' damages where there is no possible means or method of minimization of the damages.

{¶32} "[9.] The law does not require that a person use extreme care to avoid injury; only that care which a reasonable, prudent person would exercise for his protection under the same circumstances.

{¶33} "[10.] The affirmative defense of contributory fault is waived unless it is presented by motion or in a responsive pleading or by amendment.

{¶34} "[11.] Where defendant fails to plead an affirmative defense, evidence tending to prove that defense is irrelevant and consideration of such evidence by the trier of fact is improper.

{¶35} "[12.] Upon finding mutual negligence, the trier of fact must consider the effect of comparative fault.

{¶36} "[13.] For injury to real property having no market value, the measure of damages is the cost of restoration or repairs, giving regard to the circumstances and the separate items of damage."

{¶37} For ease of discussion, we will consider appellants' thirteen issues under their sole assignment of error together.[3]

{¶38} "We review the adoption of a magistrate's decision by a trial court for abuse of discretion." *Montecalvo v. Am. Family Ins. Co*., 11th Dist. No. 2006-T-0074, 2006-Ohio-6881, at ¶5, citing *Singer Steel Co. v. H&J Tool & Die Co., Inc.*, 11th Dist. No. 2002-P-0135, 2004-Ohio-5007, at ¶22. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶39} Civ.R. 53(D)(4)(d) provides in part: "[i]f one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. ***"

{¶40} Error, if any, committed by the trial court focuses not on the magistrate's

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3. In their June 11, 2008 brief, appellants detail thirteen points of law or issues, but fail to apply any of those points or issues to the facts of this case with an analysis. In their July 11, 2008 reply brief, however, appellants provide a separate analysis under their first two issues.

findings or proposed decision, but rather on the trial court's actions. *W.R. Martin, Inc. v. Zukowski*, 11th Dist. Nos. 2006-L-028 and 2006-L-120, 2006-Ohio-6866, at ¶32, citing *In re Woodburn* (Jan. 2, 2002), 9th Dist. No. 20715, 2002 Ohio App. LEXIS 1, at 5.

{¶41} In the case at bar, the trial court indicated the following in its February 6, 2008 judgment entry:

{¶42} "This action came on for hearing before the General Division Magistrate pursuant to Civil Rule 53, and the Court finds that the issues have been duly heard, findings of fact and conclusions of law have been duly rendered, and the Magistrate's Decision duly filed. The Court finds that objections to the Magistrate's Decision have been filed. Upon careful and independent examination and analysis of the Magistrate's Decision and Recommendations, and a hearing on objections held by this Court, the Court finds that said objections are not well taken and all of them are hereby overruled.

{¶43} "Therefore, the Court adopts the Magistrate's Decision and Recommendations (which are incorporated herein by reference and made a part hereof), enters the same as a matter of record, and includes the same as the Court's findings and judgment herein. The Court further finds that there is no error of law or other defect on the face of the Magistrate's Decision.

{¶44} "Therefore, in conformity with the Magistrate's Decision and Recommendations, it is hereby ORDERED, ADJUDGED and DECREED as follows:

{¶45} "The Court hereby enters judgment declaring the Defendants, Joseph and Roxanne Morella, were wrongfully enjoined from proceeding with the construction of their home; and further, ordering that Defendants, Joseph and Roxanne Morella, be awarded $950.00 from the bond issued by Tony Napolet, dba Napolet Bonding Co., in

connection with the Court's November 26, 2002 Temporary Restraining Order; and further ordering that Plaintiff Patrick Mariano indemnify Napolet for said amount in accordance with the stipulation submitted to this effect. Plaintiff to bear the costs of this action.

{¶46} "IT IS SO ORDERED."

{¶47} The record before this court establishes that the trial court did not abuse its discretion by adopting the magistrate's decision. Again, at the trial before the magistrate, Roxanne testified that she and Joseph entered into a construction agreement with Miller to construct a residence in September of 2002. Appellants' construction loan agreement with First Place Bank indicated that construction was to be completed by March 31, 2003. In early October of 2002, construction of the home began. However, appellants were served with the TRO on November 26, 2002, restraining construction of the residence. During the period the TRO was in effect, Roxanne visited the site several times. She indicated that as a result of the TRO and weather conditions, appellants were delayed for a total of six months and incurred additional expenses with respect to completion of their home. She fired Miller in April of 2004.

{¶48} According to Miller, after installing footers, he received the TRO, restraining him from working on appellants' residence. Miller indicated that appellants never asked him nor did he ever talk with them about things that he could have done to protect the footers. In the spring of 2003, Miller drained water out of the basement. Miller stated he was never compensated to take out the old footers and re-do them, nor was he paid the full amount pursuant to the construction agreement. Based on his

knowledge and experience, Miller believed that water, snow, and ice in the hole damaged the footers.

{¶49} Mariano testified that he viewed the site about five to eight times. Again, he prepared a list of the high and low temperatures and total amount of precipitation during the period the TRO was in force, which was 1.75 inches. Mariano opined that 1.75 inches of precipitation could not fill the entire basement during the period the TRO was in force. He stated that it is possible to lay concrete footers in near-freezing weather, provided proper preparation is made. Mariano indicated that pursuant to the construction contract, Miller agreed to use rebar and Formadrain in constructing footers. However, no rebar or Formadrain was observed by Mariano. He believed the footers could have been saved by digging a ditch at the time the footers were poured to drain water coming into the excavation, or by periodically pumping water out of the excavation.

{¶50} The magistrate witnessed the credibility of the witnesses and evidence as well as any conflicting testimony before rendering his decision. We determine that the magistrate's decision was supported by competent, credible evidence and therefore, by implication, is supported by the manifest weight of the evidence. *In re Memic*, 11th Dist. Nos. 2006-L-049, 2006-L-050, and 2006-L-051, 2006-Ohio-6346, at ¶21, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at syllabus.

{¶51} Pursuant to its February 6, 2008 judgment entry, the trial court independently reviewed the magistrate's findings and decisions before overruling appellants' objection. See, e.g., *Homestead Real Estate LLC v. Shampay*, 11th Dist. No. 2007-L-006, 2007-Ohio-3202.

{¶52} Appellants' issues are without merit.

{¶53} For the foregoing reasons, appellants' sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed. It is ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.