[Cite as *Runge v. Brown*, 2013-Ohio-3064.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Richard Runge, et al.	Court of Appeals No. OT-12-033
Appellants	Trial Court No. 08CV702H
v.	
Robert A. Brown, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: July 12, 2013

* * * * *

Gregg A. Peppel, for appellants.

John A. Coppeler, for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, Richard and Amy Runge, appeal from the judgment of the Ottawa County Court of Common Pleas, following a bench trial, which found in favor of

appellees, Robert and Patricia Brown, on appellants' claims for fraudulent misrepresentation, fraudulent inducement, and breach of contract. Because we hold that the trial court erred in striking appellants' jury demand, we reverse.

{¶ 2} The present matter began on December 15, 2008, when appellants filed their complaint, with a jury demand, against appellees. Appellants' claims stemmed from their purchase of appellees' condominium in February 2005. The gravamen of appellants' complaint was that appellees allegedly knew that the condominium roof leaked and that the condominium had never been issued a certificate of occupancy, but failed to disclose those facts to appellants prior to the purchase.

{¶ 3} On June 8, 2010, appellants moved for summary judgment on all of their claims. Appellees subsequently moved for summary judgment as to one of the counts on August 23, 2010. Briefing on the motions for summary judgment continued until January 3, 2011. In the interim, the parties had a discovery dispute regarding appellees' opportunity to inspect the condominium. On September 3, 2010, the trial court resolved the dispute, and simultaneously entered an order that scheduled a telephone case management conference for December 2, 2010.

{¶ 4} On March 1, 2011, appellants submitted their jury deposit. On March 8, 2011, however, the trial court sua sponte struck the jury demand for failure to deposit the required costs within ten days after the first pretrial as set forth in Loc.R. 11.09 of the

Court of Common Pleas of Ottawa County, General Division.[1] Thus, the trial court set the matter for a bench trial to occur on June 6-7, 2011. Later, on April 28, 2011, the trial court denied the parties' motions for summary judgment. The trial date was then continued several times. On August 18, 2011, a pretrial was held pursuant to Loc.R. 31 of the Court of Common Pleas of Ottawa County, General Division. In accordance with the rule, the parties submitted their pretrial statements and a settlement pretrial report was entered. The report stated only that the matter was to proceed to a bench trial on August 29, 2011. Ultimately, the trial date was continued again, and the trial eventually took place on December 12-14, 2011, and March 26-28, 2012.

{¶ 5} Following the trial, the court entered judgment on October 31, 2012, finding in favor of appellees on all of appellants' claims. Appellants have timely appealed, and now raise three assignments of error:

1. The trial court erred in striking Richard and Amy Runges' jury demand.

2. The trial court erred by finding that Robert and Patricia Brown did not misrepresent or conceal the fact that there was no building permit or certificate of occupancy. These findings and resulting judgment in favor of

[1] That rule provided,

> In all civil cases, the party demanding a jury trial shall deposit an additional $250.00 as security for costs of calling the jury not later than ten (10) days after the first pretrial. Failure to advance this deposit shall constitute a waiver of the right to trial by jury.

Robert and Patricia Brown on Richard and Amy Runges' claims for fraudulent misrepresentation, fraudulent inducement and breach of contract are erroneous and against the manifest weight of the evidence.

3. The trial court erred by finding that there was no evidence of fraud or mistake, thus avoiding rescission as an available remedy to Plaintiffs Richard and Amy Runge. This finding and resulting judgment in favor of defendants Robert and Patricia Brown are erroneous and against the manifest weight of the evidence.

II. Analysis

{¶ 6} We find appellants' first assignment of error to be determinative of this appeal.

{¶ 7} As an initial matter, appellees contend that the issue of whether the court erred when it struck appellants' jury demand is not subject to review for two reasons: (1) appellants' appeal is limited solely to the trial court's judgment on the merits of the case, and (2) appellants waived the issue by failing to raise it in the trial court. Both contentions are without merit.

{¶ 8} As it relates to the scope of appellants' appeal, it is well-settled that "[w]hile App.R. 3(D) provides that appellant must include in the notice of appeal reference to the order from which the appeal is taken, appellant need not refer to every interlocutory order he wishes to challenge. Interlocutory orders are merged into the final judgment and can be appealed as part of the final judgment." *Siemaszko v. FirstEnergy Nuclear Operating*

Co., 187 Ohio App.3d 437, 2010-Ohio-2121, 932 N.E.2d 414, ¶ 9 (6th Dist.). Here, the order striking appellants' jury demand was an interlocutory order that merged into the final judgment from which appellants appealed, and is thus properly subject to review.

{¶ 9} Under their second contention, appellees argue that appellants had nine months from the time their jury demand was stricken to when the trial started in which they could have moved the trial court to correct the claimed error. Because appellants took no action during this time, appellees contend that appellants waived the issue on appeal, or induced the trial court to commit the alleged error. We disagree. Contrary to appellees' assertions otherwise, appellants are not raising a new issue on appeal. Rather, the issue involving the jury demand was raised when the trial court sua sponte entered its interlocutory order striking the jury demand. Moreover, we can identify no requirement under the law that a litigant must move the trial court for reconsideration of an interlocutory order as a condition of contesting that order on appeal. Therefore, appellants' first assignment of error is properly before this court, and we will now turn our attention to whether it has merit.

{¶ 10} "The right of trial by jury shall be inviolate." Ohio Constitution, Article I, Section 5; Civ.R. 38(A).

> The right to trial by jury is one of the most fundamentally democratic institutions in the history of the human race. Throughout history, the right to trial by jury has been considered the crown jewel of our liberty. "For 500 years, trial by jury has been praised as the most cherished

> institution of free and intelligent government that the world has ever seen and as the best institution for the administration of justice ever devised by the mind of man." 1 Few, In Defense of Trial By Jury (1993) 74. The founders of this great nation held the right to trial by jury in very high esteem. They were willing to sacrifice their very lives to preserve for the people of the United States of America the inestimable right to trial by jury. In the words of United States Supreme Court Justice * * * William J. Rehnquist, "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. * * * Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense * * * and thus keep the administration of law in accord with the wishes and feelings of the community." *Parklane Hosiery Co., Inc. v. Shore* (1979), 439 U.S. 322, 343-344, 99 S.Ct. 645, 657-658, 58 L.Ed.2d 552, 570 (Rehnquist, J., dissenting). *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 331, 662 N.E.2d 287 (1996) (Douglas, J., dissenting).

{¶ 11} Nevertheless, "[l]ocal court rules, requiring an advance deposit as security for the costs of a jury trial and providing that the failure of a party to advance such deposit constitutes a waiver of the right to a trial by jury, are moderate and reasonable

regulations of the right of trial by jury, and are constitutional and valid." *Walters v. Griffith*, 38 Ohio St.2d 132, 311 N.E.2d 14 (1974), syllabus.

{¶ 12} We review a trial court's denial of a jury trial based on the litigant's failure to pay the jury deposit for an abuse of discretion. *See Skiadas v. Finkbeiner*, 6th Dist. No. L-05-1094, 2007-Ohio-3956, ¶ 30; *Wade v. Oglesby*, 74 Ohio App.3d 560, 563, 599 N.E.2d 748 (6th Dist.1991). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In the present case, we hold that the trial court abused its discretion in sua sponte striking appellants' jury demand.

{¶ 13} This is not the first time this issue has appeared before our court. In *Wade v. Oglesby, supra*, we reversed a trial court's decision to strike a jury demand in a parentage action for failing to pay the deposit on time. In that case, the local rule provided that failure to make the deposit within ten days of filing the jury demand "will be considered to be a waiver of the right to trial by jury." There, Oglesby filed his jury demand on February 8, 1990, thus, by rule, the jury deposit was due on February 18, 1990. On February 21, 1990, without the deposit having been paid, the trial court entered a judgment scheduling a jury trial for May 31, 1990. Oglesby eventually paid the deposit on May 1, 1990 – one day after Wade moved to strike the jury demand for failure to comply with the local rule. However, on May 3, 1990, the trial court granted Wade's motion to strike. Notably, the trial court did not return the jury deposit. Instead, it applied the money as a deposit on court costs. The case was ultimately tried to the bench

on May 31, 1990, resulting in a finding that Oglesby was the father of the minor child. After the trial, the court assessed court costs against the deposit and returned the unused portion. *Oglesby* at 561.

{¶ 14} On appeal, Oglesby argued that although he did not strictly comply with the local rule, he substantially complied by making the deposit thirty days before the trial was scheduled. We agreed. *Id.* at 562. In our analysis, we recognized that Oglesby had fully paid the jury deposit, albeit beyond the ten-day time limit. We also recognized that the trial court granted the right to a jury trial after the ten-day time limit and before the deposit was made. Finally, we noted that the trial court used the money as advanced court costs instead of returning it. Under those circumstances, we held that the trial court abused its discretion when it struck Oglesby's jury demand. *Id.* at 563.

{¶ 15} In contrast, in *Pasco v. McCoy*, 6th Dist. No. OT-94-046, 1995 WL 386441 (June 30, 1995), we held that the trial court did not abuse its discretion in sua sponte striking the jury demand for failing to comply with the same rule that is at issue sub judice. There, Pasco initially filed the complaint, with a jury demand, in Stark County. The case was subsequently transferred to Ottawa County, and the clerk sent Pasco's attorney a letter advising him that, pursuant to local rule 3.03, $86.50 must be deposited as security for costs within 14 days. The costs were paid twice, once by appellant, and once by appellant's attorney. The matter was then stayed because the defendants filed for bankruptcy. Once the case was reactivated, on March 10, 1993, the trial court set the

matter for trial. On November 9, 1993, the trial court sua sponte struck the jury demand for failing to deposit additional costs as required by local rule 11.09. Pasco subsequently moved to reinstate the jury demand, which the trial court denied. *Id.* at *2-3, 5.

{¶ 16} On appeal, Pasco argued that she substantially complied with the local rule, citing *Oglesby*. However, we distinguished her case from the facts in *Oglesby*. In particular, we found that in *Oglesby*, the full amount of the deposit was paid before the jury demand was struck, whereas Pasco had paid less than half of the required amount. *Id.* at *6. Further, in *Oglesby*, thirty days remained before the scheduled jury trial date. In contrast, in *Pasco*, only eight days remained, which was an insufficient amount of time to complete all of the steps necessary to call a jury. Moreover, Pasco did not express interest in accepting the alternate trial date that was several months away. *Id.* Thus, we held that Pasco did not substantially comply with the local rule, and the trial court did not abuse its discretion in denying her motion to reinstate her jury demand. *Id.*

{¶ 17} Similarly, in *Skiadas v. Finkbeiner, supra*, we upheld the trial court's denial of a jury trial. In *Skiadas*, the local rule required the jury deposit to be made by noon on the Friday before the scheduled trial date. *Skiadas*, 6th Dist. No. L-05-1094, 2007-Ohio-3956 at ¶ 21. The attorney for Skiadas, however, did not make the deposit until 3:40 p.m. on that Friday. *Id.* at ¶ 22. Notably, the trial court judge had personally warned all of the parties that failure to timely deposit the jury fee would constitute a waiver of a trial by jury. At the hearing to determine whether the case should be tried to a jury or to the bench, counsel for Skiadas admitted that he knew the rule, but was too

busy to make the jury deposit on time. The trial court did not accept the explanation, though, in light of the advance notice that the parties had, and in light of the fact that the trial court's criminal bailiff saw counsel getting his shoes shined at the courthouse at noon on that Friday. The trial court stated that counsel's conduct was a "flagrant neglect of following what's required by attorneys who practice in this court." *Id.* at ¶ 30. Based on these circumstances, we held that the trial court did not abuse its discretion in denying Skiadas a jury trial. *Id.*

{¶ 18} Here, assuming that the first pretrial occurred on December 2, 2010 – a determination the parties dispute – we conclude, based on our previous decisions, that appellants substantially complied with local rule 11.09. Like the plaintiff in *Oglesby*, appellants deposited the full amount before the trial court struck the jury demand. In addition, appellants made the deposit while the motions for summary judgment were still pending, and well before the date of trial, which the trial court set for three months later in the order striking the jury demand. Thus, unlike *Pasco*, there was still more than sufficient time to complete all of the steps necessary to call a jury. Furthermore, contrary to *Skiadas*, there is no indication in the record that appellants flagrantly neglected to follow the rules. Therefore, we hold that the trial court abused its discretion when it sua sponte struck appellants' jury demand.

{¶ 19} Accordingly, appellants' first assignment of error is well-taken. Further, our disposition of appellants' first assignment of error renders their second and third assignments moot. *See* App.R. 12(A)(1)(c).

III. Conclusion

{¶ 20} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is reversed. The cause is remanded to the trial court for further proceedings consistent with this decision. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE