

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GENE BAILEY	:	APPEAL NO. C-090098
	:	TRIAL NO. 2007CV-04564
and	:	
NARVELL BAILEY,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
DAVID SEGENREICH,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiffs-appellants, Gene and Narvell Bailey, sued defendant-appellee, David Segenreich, for breach of contract. Segenreich filed a counterclaim for breach of contract and for unjust enrichment. When the Baileys failed to appear in court on the scheduled trial date, a magistrate of the municipal court entered judgment in favor of Segenreich on his counterclaim. The trial court adopted the magistrate's decision.

The Baileys filed a motion for a new trial. A magistrate denied the motion, and the trial court adopted the magistrate's decision. The Baileys now appeal.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In their first assignment of error, the Baileys argue that the trial court erred by adopting the magistrate’s decision in favor of Segenreich on his counterclaim. However, the record contains no transcript of the ex parte trial. The appellant bears the burden to provide a transcript for appellate review. Because the Baileys have failed to provide a transcript of the proceedings for our review, we have no choice but to presume the validity of the lower court’s proceedings.² Consequently, we overrule the first assignment of error.

In their second assignment of error, the Baileys argue that the trial court erred by denying their motion for a new trial. We review the denial of a motion for a new trial for an abuse of discretion.³ Unless the trial court’s decision was unreasonable, arbitrary, or unconscionable, we will not disturb it on appeal.⁴

In their motion for a new trial, the Baileys sought a new trial pursuant to Civ.R. 59(A)(3), on the grounds of “accident or surprise which ordinary prudence could not have guarded against.” Specifically, they asserted that they had missed the trial date due to unforeseen circumstances that had arisen on the eve of trial. They contended that these extraordinary circumstances had prevented them from remembering the trial date.

“To warrant a new trial on Civ.R. 59(A)(3) ‘surprise’ grounds, the complaining party must show unfair surprise. [Citations omitted.] A court may grant a motion for a mistrial when a party is confronted by surprising new facts or conditions which were unknown despite reasonable trial preparation. [Citations omitted.]”⁵ In this

² *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; see, also, *In re Crabtree*, 1st Dist. No. C-010290, 2002-Ohio-1135.

³ *Joiner v. Simon*, 1st Dist. No. C-050718, 2007-Ohio-425, ¶6.

⁴ See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

⁵ *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA2, 03CA3, and 03CA4, 2005-Ohio-3494, ¶121.

OHIO FIRST DISTRICT COURT OF APPEALS

case, the Baileys did not allege, let alone demonstrate, that they had been unfairly surprised.

Following our review of the record, we cannot say that the trial court abused its discretion in denying the Baileys' motion for a new trial. We overrule the second assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 23, 2009
per order of the Court _____.
Presiding Judge