No. 05-CV-998

DISTRICT OF COLUMBIA COURT OF APPEALS

NATHANIEL LANDRY,

Appellant,

v.

ANTHEA COOPER-ALLEN,

Appellee.

Appeal from the Superior Court
of the District of Columbia,
Civil Division, Landlord and Tenant Branch

BRIEF OF APPELLEE ANTHEA COOPER-ALLEN

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*** Presenting oral argument**

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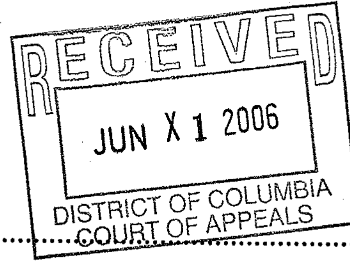

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RULE 28(A)(2)(A) STATEMENT

The parties to this case are Nathaniel Landry, the plaintiff-appellant, and Anthea Cooper-Allen, the defendant-appellee. Mr. Landry was represented in the trial court and is represented in this Court by Bernard A. Gray, Sr. Ms. Cooper-Allen was not represented by counsel below. She is represented in this Court by Barbara McDowell of the Legal Aid Society of the District of Columbia and Danielle M. Hohos of Jones Day. John Doe, the original named defendant, is a fictitious party.

STATEMENT OF THE CASE

This appeal challenges a denial by the Superior Court (Kravitz, J.) of a motion under Rule 59(e) to reopen a final judgment entered in the Landlord and Tenant Branch. The motion was predicated on the belated recognition by the plaintiff landlord's counsel that certain concessions he made at trial may have been unwise. In light of all of the facts and circumstances, including that the plaintiff was represented by "one of the most experienced landlord-and-tenant lawyers in this city," the court held that the defendant's interest in finality outweighed the plaintiff's interest in relitigating the case.

1. *The Complaint and Answer.* On December 30, 2004, Nathaniel Landry, Sr., filed a Complaint for Possession of Real Estate with respect to the premises at 3447 17th Street, N.W. The complaint named "John Doe" as defendant. The complaint asserted that Mr. Landry was seeking possession because the defendant or defendants were "[s]quatters" with "[n]o rights of tenancy." Appellant's Appendix (Appellant's App.) at 6.

On January 26, 2005, the initial return date, Anthea Cooper-Allen appeared *pro se* in the Landlord and Tenant Branch and filed an answer to the complaint in which she identified herself as the defendant. In the answer, Ms. Cooper-Allen "den[ied] that the landlord is entitled to possession," "den[ied] that there is no tenancy," asserted that she did not receive a valid notice to quit, and questioned whether Mr. Landry was the true owner of the property. Appellee's Appendix (Appellee's App.) at A1 (Answer of Defendant).[1]

2. *The Trial.* On April 7, 2005, Judge Kravitz conducted the bench trial in the case. On the morning of trial, Bernard A. Gray, Sr., entered his appearance as counsel for the landlord,

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[1] Because the Appellant's Appendix did not contain the Answer of Defendant or the Defendant's Opposition to Plaintiff's Motion To [sic] For Reconsideration, we are submitting an Appellee's Appendix containing these filings.

who had previously represented himself in the case. Ms. Cooper-Allen continued to proceed *pro se*. Appellant's App. 3, 14.

In his opening statement, Mr. Gray articulated the landlord's theory of the case: that "there are squatters in this property and we want possession of it basically." Appellant's App. 15. Mr. Gray asserted that anyone who was in the house was there without the landlord's permission. *Id.* at 16. Mr. Gray further maintained that the landlord therefore "ha[s] a right to possession without a notice to quit." *Id.* at 15.

In her opening statement, Ms. Cooper-Allen countered that she did "have permission to be in the house." Appellant's App. 16. Ms. Cooper-Allen stated that Mr. Landry allowed her to live in the house in return for her services in "secur[ing] the building materials that were being used by his contractors" and performing other chores, such as "keep[ing] the back and front of the house free of debris and leaves." *Id.* at 16.

Mr. Landry was the first -- and, as it turned out, the only -- witness at the trial. On direct examination, Mr. Landry testified that, in the fall of 2003, he had entered into "a verbal agreement" with William "Too Tall" Davis concerning the occupancy of the house. Appellant's App. 18, 20. According to Mr. Landry, Mr. Davis "was authorized" to live on the property as a "trade off" for performing various tasks enumerated on a handwritten list created by Mr. Landry. *Id.* at 20-22. In other words, said Mr. Landry, Mr. Davis "was there legally." *Id.* at 21. Mr. Landry stated that he neither paid wages to Mr. Davis nor received rent payments from Mr. Davis. *Id.* at 22.

On cross examination, Mr. Landry acknowledged that he "had several conversations" with Ms. Cooper-Allen, including one in which he agreed that she and her son could stay in the house after Mr. Davis's departure "until the contractors had completed work." Appellant's App.

23. In response to Judge Kravitz's question as to "what kind of an arrangement did you have then with Ms. [Cooper-]Allen," Mr. Landry replied that "she could stay until the contractor was finished and she would do those things that were on that list." *Id.* at 24. And, when Judge Kravitz then inquired whether Ms. Cooper-Allen "was to do this work in lieu of paying rent," Mr. Landry responded that "[a]t no time was rent ever discussed." *Id.* at 24.

After Mr. Landry's testimony, Mr. Gray announced that the landlord rested his case. Appellant's App. 25.

At that point, Judge Kravitz asked Mr. Gray whether he had "proffered in [his] opening statement that the evidence would show there was no landlord tenant relationship," and Mr. Gray responded, "That's correct." Appellant's App. 25. Judge Kravitz then asked Mr. Gray what the evidence actually showed, and Mr. Gray responded, "[T]here is a landlord and tenant relationship." *Id.* at 25. Judge Kravitz further asked Mr. Gray whether it was thus the case "that [at] a minimum a notice to quit would have had to have been served and probably there would have had to be some kind of a breach of the agreement to prove as well," and Mr. Gray responded, "Yes, Your Honor." *Id.* at 26. Judge Kravitz finally asked Mr. Gray whether, "in light of that, you would concede that your lawsuit failed as a matter of law," and Mr. Gray responded, "Yes, Your Honor." *Id.* at 26.

In light of those concessions by the landlord, Judge Kravitz entered judgment in favor of Ms. Cooper-Allen. In so doing, Judge Kravitz expressed his view that "there was a landlord and tenant relationship established by Mr. Landry." Appellant's App. 26.

3. ***The Reconsideration Motion.*** On April 19, 2005, the landlord filed a Motion for Reconsideration. Appellant's App. 7. The supporting memorandum stated that, because Mr. Gray had been taken by "surprise" by his client's admission of an agreement to allow Ms.

Cooper-Allen to live in the house in exchange from performing tasks there, Mr. Gray had conceded the existence of a landlord-tenant relationship between the parties. *Id.* at 8. The memorandum stated that Mr. Gray, "[i]n hind sight," believed that concession to be incorrect in light of *Anderson v. William J. Davis, Inc.*, 553 A.2d 648 (D.C. 1989). *Id.* at 8. The memorandum further stated that Mr. Gray had failed at trial to "consider the definition of a rental unit" -- a definition that he believed the property would not satisfy because it was "under construction." *Id.* at 8.

Ms. Cooper-Allen filed a *pro se* opposition to the motion. She argued that the statutory definition of "rent" -- "the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit," D.C. Code § 42-3501.03(28) -- was broad enough to cover her provision of services at the house. Appellee's App. A2 (Defendant's Opposition To Plaintiff's Motion To [*sic*] For Reconsideration 1-2.) Ms. Cooper-Allen further argued that the house was a "rental unit," because it was offered to her in exchange for such rent. *Id.* at A3.

Judge Kravitz denied the Motion for Reconsideration. Appellant's App. 11-12. Judge Kravitz noted that "[t]he plaintiff, represented by one of the most experienced landlord-and-tenant lawyers in this city, conceded at trial that his sole theory of the case had been definitively contradicted by his own testimony." *Id.* at 12. Judge Kravitz added that, if the plaintiff had wanted to advance an alternative theory based on the *Anderson* case, the time to do so "was during trial, before a judgment was entered in this summary proceeding." *Id.* at 12. "At this point," Judge Kravitz concluded, "the defendant's interest in the finality of the judgment entered on April 7, 2005 outweighs the plaintiff's interest in making an argument that easily could have been made during trial." *Id.* at 12.

ARGUMENT

The trial court acted well within its broad discretion in denying the landlord's Motion for Reconsideration of the judgment in this landlord-tenant case. After his counsel conceded at trial not only that a landlord-tenant relationship existed between the parties, but also that his "lawsuit failed as a matter of law," the landlord attempted to retract his concessions through a motion under Rule of Civil Procedure 59(e). In denying that motion, Judge Kravitz reasonably concluded that the defendant's and the judicial system's interests in finality should prevail over the landlord's interest in raising an argument that he had neglected to raise at trial despite having been represented by counsel experienced in landlord-tenant law. That ruling is consistent with the decisions of this Court and other courts recognizing that a party ordinarily may not obtain relief under Rule 59(e) from the legal errors of his own lawyer.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO VACATE THE JUDGMENT BASED ON AN ASSERTED MISTAKE OF LAW BY EXPERIENCED LANDLORD-TENANT COUNSEL

Rule 59(e) states simply that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Super. Ct. Civ. R. 59(e). This Court has held that Rule 59(e), as distinguished from Rule 60(b), is the appropriate mechanism for seeking reconsideration of a judgment based on "a mistake of law by [the movant's] counsel." *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 804 (D.C. 1984).[2] That is the basis for the landlord's Motion for Reconsideration in this case. The landlord argued that "[i]n hind sight

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[2] Other courts have considered such requests for relief based on an error of counsel under Rule 60(b)(1), which authorizes relief on grounds of "mistake, inadvertence, surprise, or excusable neglect." This Court has not suggested any difference in the legal standard depending on whether such relief is sought under Rule 59(e) or Rule 60(b)(1). *See generally* 11 Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* [hereinafter Wright & Miller] § 2817, at 181 (2d ed. 1986) ("There is a considerable overlap between Rule 59(e) and Rule 60.").

Counsel was incorrect" in conceding the existence of a landlord-tenant relationship arising out of the parties' agreement that Ms. Cooper-Allen could live in the house owned by Mr. Landry in exchange for her performance of services there. Appellant's App. 8.

Rule 59(e) motions are "committed to the broad discretion of the trial judge." *District No. 1 -- Pacific Coast District, Marine Eng'rs' Beneficial Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278 (D.C. 2001). This Court's review of a trial judge's denial of a motion under Rule 59(e), as under Rule 60(b), "is limited to determining whether the judge abused his discretion." *Oxendine v. Merrell Dow Pharms., Inc.*, 563 A.2d 330, 333 (D.C. 1989) (discussing standard or review of motions under Rule 60(b)); *see also* 11 Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* [hereinafter Wright & Miller] § 2810.1 (2d ed. 1986) (recognizing that reconsideration of a judgment is an extraordinary remedy that should be used sparingly). The landlord does not dispute the deferential standard of review applicable here. *See* Appellant's Brief (Appellant's Br.) 3.

A. Relief From A Final Judgment Is Rarely Available Based On Errors Of Counsel

An error of law by a party's counsel "will rarely warrant relief" on a motion under either Rule 59(e) or Rule 60(b), as this Court made clear in one of the very cases on which the landlord relies. *Wallace, supra,* 482 A.2d at 804-05 (cited in Appellant's Brief at 2 and 3); *see Household Fin. Corp. v. Frye*, 445 A.2d 991, 993 (D.C. 1982) (questioning whether "ignorance of the law would be a ground for granting relief under any part of Rule 60(b)"); *Graves v. Nationwide Mut. Ins. Co.*, 151 A.2d 258, 261 (D.C. 1959) (observing that Rule 60(b) would not provide relief for counsel's ignorance of the trial court's rules). Other courts are in accord. *See, e.g., Clarke v. Burkle*, 570 F.2d 824, 831 (8th Cir. 1978) ("[R]elief from a judgment is not to be granted under Rule 60(b) simply because its entry may have resulted from incompetence or ignorance on the part of an attorney employed by the party seeking relief."); *Federal's Inc. v. Edmonton Inv. Co.*,

555 F.2d 577, 583 (6th Cir. 1977) ("Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise."); *Dal Int'l Trading Co. v. Sword Line, Inc.*, 286 F.2d 523, 525 (2d Cir. 1961) ("[G]enerally a party who makes an informed choice will not be relieved of the consequences when it subsequently develops that choice was unfortunate.").

More particularly, this Court has recognized that Rule 59(e) is not intended to "enable a party to complete presenting its case after the court has ruled against it." *District No. 1, supra*, 782 A.2d at 278. Much less does Rule 59(e) serve to allow a party to reopen a judgment to present a new theory of the case after having concluded, "[i]n hind sight," that it should not have conceded at trial that its previous theory was unavailing. *See FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (stating that Rule 59(e) motions cannot be used to argue a new legal theory); 11 Wright & Miller § 2810.1, at 127-28 ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."); *see also Paddington Partners v. Bouchard*, 34 F.3d 1132, 1147 (2d Cir. 1994) ("An argument based on hindsight regarding how the movant would have preferred to have argued its case does not provide grounds for Rule 60(b) relief, nor does the failure to interpose a defense that could have been presented earlier, nor does the failure to marshal all known facts in opposition to a summary judgment motion.") (internal citations omitted). This understanding of the Rules is vital to promoting "the important need for finality in litigation." *Tennille v. Tennille*, 791 A.2d 79, 83 (D.C. 2002).

B. The Landlord Has Not Offered Any Compelling Reason To Vacate The Judgment Based On His Counsel's Error

The landlord did not offer to the trial court, and does not offer here, any reason that would compel a departure from the general unavailability of Rule 59(e) relief in this context.

The landlord offered only a single cursory excuse for his concession, through counsel, that the parties stood in a landlord-tenant relationship: that counsel was "totally surprised" by his client's admission at trial that he entered into an agreement with Ms. Cooper-Allen whereby she could live in the house in return for doing work there. Appellant's Br. 3. (The landlord and his counsel had theretofore been proceeding on the theory that Ms. Cooper-Allen was a "squatter" who was in the house without *any* lawful authority.)

The most plausible explanation for counsel's surprise about so central a fact -- a fact to which his client immediately admitted on cross examination by his *pro se* adversary -- is that the client either concealed the fact from his counsel or that his counsel did not make an adequate pre-trial inquiry into the facts of the case. *Cf.* Appellant's Br. 3 (noting that counsel did not enter an appearance in the case until the day of trial and proceeded "based upon his client's rendition of the facts"). That Ms. Cooper-Allen's answer specifically averred the existence of a tenancy should have put both the landlord and his counsel on notice of the need to discuss the matter thoroughly before trial. In any event, the landlord gave the court no reason in the Rule 59(e) motion to doubt that any "surprise" was the result of the landlord' concealment, the counsel's inadequate preparation, or both.

Whether the blame for the surprise would be more accurately placed on the landlord or on his counsel, the trial court was equally justified in denying Rule 59(e) relief. As the Court observed in the Rule 60(b) context, "[o]rdinarily the acts and omissions of counsel are imputed to the client even though detrimental to the client's cause." *Ry. Express Agency, Inc. v. Hill*, 250 A.2d 923, 926 (D.C. 1969). The Court added that "[t]his rule is necessary for the orderly conduct of litigation." *Id.*; *see also In re E.T.A.*, 880 A.2d 264, 266 (D.C. 2005) ("Although, there is an 'outrageous conduct' exception to this general rule, and although we recognize the

importance in principle of the parental rights being asserted by the mother, we conclude that on the record before us, counsel's failure to prepare a statement of proceedings and evidence must be imputed to his client.") (internal citations omitted); *Newsome v. District of Columbia*, 859 A.2d 630, 631 (D.C. 2004) (applying rule in case involving job termination). This is a particularly appropriate case in which to apply that rule given the trial court's observation, which the landlord does not dispute, that his counsel is "one of the most experienced landlord and tenant lawyers in this city." Appellant's App. 12.

C. Vacatur Of The Judgment Was Not Necessary To Prevent "Manifest Injustice" To The Landlord

Although, as the landlord notes (Appellant's Br. 3), a trial court may grant a Rule 59(e) motion in cases in which reopening the judgment is necessary to avoid "manifest injustice," this is not such a case. As an initial matter, the mere fact that a movant has suffered an adverse judgment, which might not have been entered had the case been tried differently, is insufficient in itself to establish manifest injustice. Otherwise, it would be the rule, rather than the exception, for Rule 59(e) relief to be granted to enable a party to relitigate its case. In this case, moreover, several considerations justify the trial court's failure to find any manifest injustice to the landlord from the preservation of the judgment against him.

First, the landlord, through counsel, conceded the existence of a landlord-tenant relationship and acquiesced in the very judgment from which he now seeks relief under Rule 59(e). Because "[i]t is well settled that generally parties are bound by their stipulations," *Waltemeyer v. Autocar Sales & Serv. Co.*, 103 A.2d 921, 922 (D.C. 1954), counsel would have been aware of the potentially fatal consequence of making those concessions, even if counsel was not aware of the particular case law that would permit him to argue against the entry of the judgment absent the concessions. *See Tennille*, *supra*, 791 A.2d at 85 (recognizing that a party

ordinarily is not entitled to relief from judgment for his own or his counsel's "free, calculated and deliberate choice") (quoting *Blacker v. Rod*, 87 A.2d 634, 636 (D.C. 1952)). In an analogous context, this Court has been "especially reluctant" to consider a claimed error that was "invited" by the appellant in the trial court. *Cowan v. United States*, 629 A.2d 496, 503 (D.C. 1993); *see District of Columbia v. Wical Ltd. Ptship.*, 630 A.2d 174, 183 (D.C. 1992) (explaining that ordinarily "[a] party cannot be heard to complain in an appellate court of that which he has co-operated in doing in lower court").

Second, even if the landlord had argued against the existence of a landlord-tenant relationship at trial, or after vacatur of the judgment, on the ground that Ms. Cooper-Allen was an employee rather than a tenant, the landlord would not necessarily have prevailed on that argument. As Judge Kravitz recognized, a tenant may pay "rent" in the form of services, rather than money. *See* 52A Corpus Juris Secundum, Landlord & Tenant § 982 (2005) (defining rent as "[t]he return, whether of money, *service* or specific property, which the tenant makes to the landlord as compensation for the use of the demised premises") (emphasis added); D.C. Code § 42-3501.03(28) (defining rent as "the entire amount of money, *money's worth, benefit,* bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit") (emphasis added). Thus, in *Revithes v. District of Columbia Rental Housing Commission*, 536 A.2d 1007 (D.C. 1987), this Court observed that, although a unit occupied by an owner is not "rented or offered for rent" for purposes of determining the applicability of the "small landlord" exemption to the District's rent control laws, "[a] relative, on the other hand, who pays 'rent' of some form -- money, goods, *or services* -- would appear to occupy a unit that is 'offered for rent.'" *Id.* at 1017 (emphasis added).

Contrary to the landlord's suggestion, *Anderson v. William J. Davis, Inc.*, 553 A.2d 648 (D.C. 1989), is not dispositive of this case. In *Anderson,* the defendants, who were employed by the property owner as maintenance workers, were allowed to occupy an apartment in the plaintiff's building rent-free "as partial compensation for their services." *Id.* at 648. On those facts, this Court deemed it "inescapable that they were servants, not tenants, and thus were not entitled as tenants to thirty days' notice to quit under [then] D.C. Code § 45-1404." *Id.* at 649. The Court nonetheless recognized that "whether a master-servant or landlord-tenant relationship exists depends on the circumstances of each case." *Id.* The circumstances of this case are unlike those in *Anderson.* It was undisputed in *Anderson* that the defendants were employees of the property owner. Here, however, the landlord offered no evidence that his relationship with Ms. Cooper-Allen was that of an employer to employee rather than of a landlord to a tenant. For example, the landlord did not attempt to show that he treated Ms. Cooper-Allen as an employee for purposes of the tax laws, the health and safety laws, or other laws governing an employer's obligations with respect to an employee. Nor did the landlord show the degree of supervision of Ms. Cooper-Allen's work that generally is required for an employer-employee relationship. *See Spirdes v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979) (explaining that the "extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review [in deciding whether an employer-employee relationship existed], as it is at common law and in the context of several other federal statutes").

In circumstances more similar to this case than to *Anderson*, other courts have found a landlord-tenant relationship, rather than an employer-employee relationship. *See, e.g., Grant v. Detroit Ass'n of Women's Clubs*, 505 N.W.2d 254 (Mich. 1993) (holding that a caretaker who rendered services solely in exchange for use of an apartment was a tenant entitled to the

protections of the landlord-tenant laws); *State Auto Ins. Co. v. Knuttila*, 645 N.W.2d 475 (Minn. App. 2002) (individual who lived in house in property owner's absence in return for performing maintenance was a tenant).

Finally, there is no substance for the landlord's assertion that the trial court's ruling "force[s] the Plaintiff to give up his property to another" and "amounts to a taking of Plaintiff's property without fair compensation." Appellant's Br. 4. Nothing in the trial court's ruling prevents the landlord from suing to evict Ms. Cooper-Allen based on a violation of their agreement or on any other applicable ground enumerated in the Rental Housing Act. The landlord's assertion rings particularly hollow because, at some point after the denial of the Rule 59(e) motion in this case, the landlord unilaterally imposed a rental charge of $2200 per month for the house and, when Ms. Cooper-Allen was unable to pay it, sued her again in the Landlord and Tenant Branch. That case is currently awaiting trial. *See Landry v. Cooper-Allen*, No. L&T 044334-05 (filed Jan. 13, 2006).

II. THE LANDLORD OFFERS NO BASIS FOR REVERSING THE UNDERLYING JUDGMENT

It is unclear whether the landlord is attempting to seek review of the underlying judgment of April 7, 2005, as well as from the denial of the motion for relief from that judgment. Although the landlord's legal arguments are addressed solely to whether the trial court abused its discretion in denying the Rule 59(e) motion (*see* Appellant's Br. 3-4), the landlord also argues, in conclusory fashion, that "the evidence does not support the judgment." *Id.* at 4; *see also id.* at 1 (identifying the second issue presented as "Is there substantial evidence in the record to support a judgment for the Defendant?"). In these circumstances, the Court should deem any challenge to the underlying judgment to have been waived. *See, e.g., Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) ("When a party includes no developed argumentation on a point . . . we

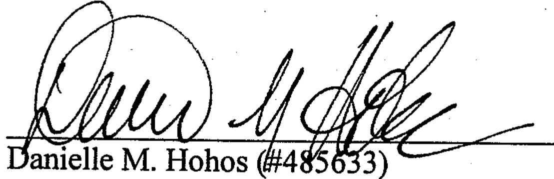
treat the argument as waived."); *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks omitted); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs.")

Even if one assumes *arguendo* that the landlord has adequately preserved a challenge to the underlying judgment, the relevant question is not whether that judgment is supported by the evidence alone, but rather whether the judgment is supported by the landlord's concessions of law. The answer is an unequivocal "yes." The landlord acknowledged, on the record, that "[t]here is a landlord and tenant relationship" between the parties, that at "a minimum a notice to quit would have had to have been served" in such circumstances, and consequently that his "lawsuit failed as a matter of law." Appellant's App. 25-26. In light of those concessions, the trial court had an adequate basis to enter judgment against the landlord.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Appellee Anthea Cooper-Allen and Appendix of Appellee to be delivered by first class mail, postage prepaid, this 1st day of June 2006, to:

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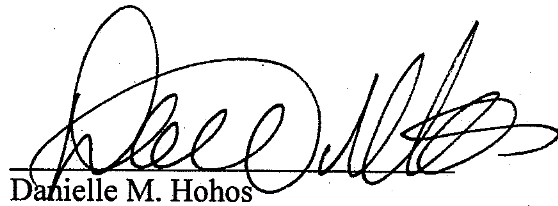

Danielle M. Hohos