The Bullet Point: Ohio Commercial Law Bulletin

Is my Agreement Ambiguous?

Volume 4, Issue 20
November 10, 2020
Jim Sandy and Stephanie Hand-Cannane

Challenges to Arbitration Award

***Hughes v. Hughes,* 10th Dist. Franklin No. 19AP-865, 2020-Ohio-5026**

In this appeal, the Tenth Appellate District affirmed the trial court's decision and confirmed an arbitration award.

- **The Bullet Point:** As Ohio law strongly encourages the resolution of disputes through arbitration, it strictly limits judicial review of arbitration awards. Under R.C. 2711.13, a party has only three months after an arbitration award is issued to: 1) file a motion in the court of common pleas for an order vacating, modifying, or correcting the award, and 2) serve the opposing party. On the other hand, a party has up to one year after an arbitration award is issued to apply to the court for an order confirming the award. R.C. 2711.09. This statutory language is mandatory, and the court must confirm an arbitration award unless there is a pending motion to vacate, modify, or correct the award. Moreover, the court isn't required to conduct a hearing before confirming an arbitration award.

Parol Evidence

***Patel v. Strategic Group, L.L.C.,* 8th Dist. Cuyahoga No. 109043, 2020-Ohio-4990**

In this appeal, the Eighth Appellate District affirmed in part and vacated in part the trial court's decision, finding that because the terms of the purchase agreement were ambiguous, the court properly considered parol evidence to establish the parties' mutual understanding and agreement.

- **The Bullet Point:** When interpreting a contract, Ohio courts review the contract as a whole and presume the language accurately reflects the parties' intent. When the language is plain and unambiguous, the contract terms are enforced as written and courts do not look beyond the four corners of the document to interpret its meaning. Conversely, Ohio courts do look to outside evidence to interpret the parties' intentions when the contract terms are unclear or ambiguous. Contract terms are ambiguous where their meanings are "reasonably susceptible to multiple interpretations" or explanations. In such cases, courts allow parol evidence to be introduced solely to explain or interpret the intentions of the parties, not to contradict the contract terms. As the court found the purchase agreement terms to be ambiguous, parol evidence was properly introduced to clarify the parties' mutual understanding.

Interpreting Cognovit Notes

***Sutton Bank v. Progressive Polymers, L.L.C.*, 2020-Ohio-5101**

In this appeal, the Supreme Court of Ohio reversed the lower court's decision and reinstated the trial court's cognovit judgment, determining that the literal interpretation of the cognovit note terms was contrary to the intent of the parties.

- **The Bullet Point:** Under Ohio law, a cognovit note enables a creditor to obtain an immediate judgment against a defaulting debtor without providing prior notice or an opportunity to be heard. Instead, the cognovit note's warrant of attorney authorizes an attorney to act on behalf of the debtor to confess judgment against the debtor. Because a warrant of attorney has such extraordinary authority to confess judgment, Ohio courts require a specific warning to appear on the cognovit note to clearly notify debtors of the warrant of attorney. R.C. 2323.13(D). Moreover, Ohio courts strictly construe cognovit note terms against those seeking to enforce them and "court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject." That being said, while the traditional rules of contract interpretation apply to cognovit notes, courts still must give effect to the clear intent of the parties when interpreting cognovit notes. As explained by the Supreme Court, traditional interpretation rules must yield to the intent of the parties, and "a contract will not be interpreted literally if doing so would produce absurd results in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek". In this case, as the literal interpretation of the disputed warrant of attorney terms would have exchanged the parties waiving their rights, the Court refused to apply the terms as written and instead construed the warrant of attorney according to the parties' intent.

Enforceable Agreements

***Aceste v. Stryker Corp.,* 6th Dist. Lucas No. L-19-1166, 2020-Ohio-4938**

In this appeal, the Sixth Appellate District reversed the trial court's decision, holding that by making a counteroffer, the plaintiffs rejected the defendants' offer and no settlement agreement was reached.

- **The Bullet Point:** To succeed on a motion to enforce a settlement agreement, the moving party must demonstrate that a valid settlement agreement exists with reasonably certain and clear terms. There is no requirement that the settlement agreement be in writing, but there must be evidence establishing enforceable terms of an oral agreement. As the court succinctly noted, it "cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract." Regardless of whether the settlement agreement was oral or in writing, the moving party must prove the existence of an offer and an acceptance of that same offer. Stated differently, once negotiating parties reject an offer or make a counteroffer, the original offer is "off the table" and no settlement agreement has been reached for the court to enforce. As the court determined the plaintiffs responded to the defendants' offer with a counteroffer, the parties failed to enter into a binding settlement agreement and the motion to enforce was denied.

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[Cite as *Hughes v. Hughes*, 2020-Ohio-5026.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carl F. Hughes,	:	
Plaintiff-Appellee,	:	No. 19AP-865 (C.P.C. No. 19CV-7615)
v.	:	(REGULAR CALENDAR)
Martin J. Hughes, III,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 22, 2020

On brief: *Zeiger, Tigges & Little LLP, Marion H. Little, Jr.*, and *Christopher J. Hogan*, for appellee. **Argued:** *Christopher J. Hogan.*

On brief: *Taft Stettinius & Hollister LLP, Julia B. Meister, Russell S. Sayre*, and *Aaron M. Herzig*, for appellant. **Argued:** *Russell S. Sayre.*

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Martin J. Hughes, III, appeals from a judgment of the Franklin County Court of Common Pleas granting the application to confirm arbitration award filed by plaintiff-appellee, Carl F. Hughes. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} This case arises from the arbitration award in *Martin J. Hughes, III v. Carl F. Hughes*, JAMS Ref. No. 1345000131.[1] At 11:03 a.m., on September 20, 2019, appellant filed

[1] On September 29, 2020, this court issued a decision concerning an appeal arising from a separate arbitration award also involving appellant and appellee. *See Hughes v. Hughes*, 10th Dist. No. 19AP-329, 2020-Ohio-4653. The dispositive issues in that appeal are unrelated to the dispositive issues in this appeal.

in the Marion County Court of Common Pleas a motion to vacate the award. He accomplished service on appellee's counsel at 4:05 p.m. that afternoon. Three minutes later, appellee filed an application to confirm the same arbitration award in the Franklin County Court of Common Pleas. At 5:33 p.m. that day, appellee notified appellant's counsel of the filing of his application to confirm.

{¶ 3} In October 2019, appellant moved to dismiss appellee's application to confirm the arbitration award in the Franklin County trial court based on the jurisdictional priority rule. Appellant argued that because he invoked the jurisdiction of the Marion County trial court before appellee invoked the jurisdiction of the Franklin County trial court, the Franklin County trial court lacked jurisdiction over appellee's application. On December 9, 2019, and before the Franklin County trial court ruled on appellant's motion to dismiss, the Marion County trial court held a hearing on appellant's motion to vacate the arbitration award. At the hearing, the Marion County trial court rejected appellant's assertion that the arbitrator had exceeded his authority and consequently orally denied his motion to vacate the arbitration award. It filed a judgment entry the next day dismissing the matter with prejudice for the reasons stated at the hearing. On December 18, 2019, appellant appealed from this judgment to the Third District Court of Appeals.

{¶ 4} On December 17, 2019, the day before appellant appealed from the Marion County trial court judgment to the Third District, the Franklin County trial court granted appellee's application to confirm the arbitration award. In granting the application, the Franklin County trial court took notice of the Marion County trial court's final judgment dismissing with prejudice appellant's request to vacate the arbitration award pursuant to R.C. 2711.10. The Franklin County trial court reasoned that because the Marion County trial court had rejected appellant's motion to vacate pursuant to R.C. 2711.10 and no application to modify had been filed under R.C. 2711.11, the court could rule on appellee's application to confirm pursuant to R.C. 2711.09. After stating it was granting appellee's application to confirm, the trial court added: "This Court reaches the same conclusion as the Marion County Court and incorporates Judge Finnegan's opinion as if rewritten herein (See Exhibits A and B)." (Dec. 17, 2019 Order at 2.)

{¶ 5} Appellant timely appeals.[2]

II. Assignments of Error

{¶ 6} Appellant assigns the following errors for our review:

> [1.] The trial court erred in ruling on Carl's application to confirm the JAMS Award when it lacked subject-matter jurisdiction to do so.
>
> [2.] The trial court erred in ruling on Carl's application to confirm the JAMS Award before Martin exhausted his appeals regarding his corresponding application to vacate.
>
> [3.] The trial court below erred in adopting the Marion County court's decision denying Martin's application to vacate the JAMS Award.

III. Discussion

{¶ 7} Because they involve interrelated issues, we address together appellant's first, second, and third assignments of error. In his first assignment of error, appellant contends the trial court erred in ruling on appellee's application to confirm the arbitration award because it lacked jurisdiction. Appellant's second assignment of error alleges the trial court erred in ruling on the application to confirm because he had not exhausted the appeals process in the case involving his request to vacate filed in Marion County. And appellant's third assignment of error asserts the trial court erred in adopting the Marion County trial court's decision denying appellant's application to vacate. These assignments of error lack merit.

A. Judicial Review of Arbitration Award

{¶ 8} All three assignments of error generally raise the issue of whether the trial court erred in granting appellee's application to confirm the arbitration award. "Arbitration occurs when disputing parties contractually agree to resolve their conflict by submitting it to a neutral third party for resolution. It provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening

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[2] Subsequent to the filing of the merit briefs in this appeal, appellant filed a motion to stay until the resolution of his appeal that was then pending in the Third District. On October 13, 2020, the Third District affirmed the judgment of the Marion County trial court dismissing appellant's motion to vacate. *Hughes v. Hughes*, 3d Dist. No. 9-19-88, 2020-Ohio-4882. Thus, appellant's motion to stay is moot.

crowded court dockets." *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83 (1986). Consequently, Ohio has a well-established public policy that favors arbitration. *State v. Ohio Civ. Serv. Emps. Assn., Local 11 AFSCME AFL-CIO*, 10th Dist. No. 14AP-906, 2016-Ohio-5899, ¶ 12.

{¶ 9} To encourage the resolution of disputes in arbitration, judicial review of arbitration awards is limited. *Franklin Cty. Sheriff v. Teamsters Local No. 413*, 10th Dist. No. 17AP-717, 2018-Ohio-3684, ¶ 17. "R.C. Chapter 2711 provides the exclusive statutory remedy which parties must use in appealing arbitration awards to the courts of common pleas." *Galion v. Am. Fedn. of State, Cty. & Mun. Emps., Ohio Council 8, AFL-CIO, Local No. 2243*, 71 Ohio St.3d 620 (1995), paragraph two of the syllabus. Pursuant to R.C. 2711.13, "[a]fter an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code." "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action." R.C. 2711.13.

{¶ 10} Alternatively, a party may seek judicial confirmation of an arbitration award. Within "one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code." R.C. 2711.09. "The language of R.C. 2711.09 is mandatory. If no motion to vacate or modify an award is filed, the court must confirm an arbitration award given a timely motion under R.C. 2711.09." *MBNA Am. Bank, N.A. v. Jones*, 10th Dist. No. 05AP-665, 2005-Ohio-6760, ¶ 14. "Trial courts are not required to conduct hearings before confirming arbitration awards." *Strnad v. Orthohelix Surgical Designs*, 8th Dist. No. 94396, 2010-Ohio-6161, ¶ 37.

{¶ 11} An appellate court's role when reviewing a trial court's determination regarding arbitration is even more limited. "An appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award." R.C. 2711.15. But "when a court of appeals

reviews a trial court's judgment concerning an arbitration award, the appellate court must confine its review to evaluating the order issued by the trial court pursuant to R.C. Chapter 2711." *Ohio Civ. Serv. Emps. Assn., Local 11 AFSCME AFL-CIO* at ¶ 13. "When reviewing a trial court's decision to confirm, modify, vacate, or correct an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but should review questions of law de novo." *Portage Cty. Bd. of Dev. Disabilities v. Portage Cty. Educators' Assn. for Dev. Disabilities*, 153 Ohio St.3d 219, 2018-Ohio-1590, ¶ 2.

B. Jurisdictional Priority Rule

{¶ 12} Our determination of whether the trial court erred in confirming the arbitration award in this case centers on the applicability of the jurisdictional priority rule. "The jurisdictional priority rule prevents the prosecution of two actions involving the same controversy in two courts of concurrent jurisdiction at the same time." *Davis v. Cowan Sys.*, 8th Dist. No. 83155, 2004-Ohio-515, ¶ 11. Under the jurisdictional priority rule, "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279 (1977), syllabus. *See John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga Cty.*, 150 Ohio St. 349 (1948), paragraph three of the syllabus ("When a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of, and no court of co-ordinate jurisdiction is at liberty to interfere with its proceedings.").

{¶ 13} "Generally, it is a condition of the operation of the state jurisdictional priority rule that the claims or causes of action be the same in both cases, and if the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." (Internal quotations and citations omitted.) *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393 (1997). The jurisdictional priority rule also applies "when the causes of action, relief requested, and the parties are not exactly the same so long as the actions are part of the same 'whole issue.' " *Triton Servs., Inc. v. Reed*, 12th Dist. No. CA2016-04-028, 2016-Ohio-7838, ¶ 8. "Actions comprise part of the 'whole issue' when: (1) there are cases pending in two different courts of concurrent jurisdiction involving

substantially the same parties; and (2) the 'ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where the suit originally commenced.' " *Instant Win, Ltd. v. Summit Cty. Sheriff*, 9th Dist. No. 20762, 2002-Ohio-1633, ¶ 6, quoting *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank*, 54 Ohio App.3d 180, 183 (8th Dist.1988).

C. Analysis

{¶ 14} Appellant argues the jurisdictional priority rule required the Franklin County trial court to dismiss and thereby effectively deny appellee's application to confirm the arbitration award. We disagree. Under the circumstances of this case, the jurisdictional priority rule did not preclude the trial court from granting appellee's request to confirm the arbitration award.

{¶ 15} In resolving the ultimate issue before us, we first address the threshold issue of whether the jurisdictional priority rule can apply to concurrent judicial review of an arbitration award. Citing *Licking Hts. Local School Dist. Bd. of Edn. v. Reynoldsburg City School Dist. Bd. of Edn.*, 10th Dist. No. 12AP-579, 2013-Ohio-3211, appellee argues the jurisdictional priority rule cannot apply to statutory arbitration proceedings initiated pursuant to R.C. Chapter 2711. In *Licking Heights*, this court addressed whether, under the Ohio Rules of Civil Procedure, a motion to confirm an arbitration award pursuant to R.C. 2711.09 was a compulsory counterclaim to another party's motion to vacate the arbitration award pursuant to R.C. 2711.10. This designation was significant because res judicata bars a party from asserting a compulsory counterclaim in a subsequent proceeding. *See Fender v. Miles*, 185 Ohio App.3d 136, 2009-Ohio-6043, ¶ 12 (12th Dist.). As to the compulsory counterclaim issue, this court determined that the civil rules that apply to special proceedings brought pursuant to R.C. 2711.05 et seq. are those pertaining to motions, not pleadings. *Licking Hts.* at ¶ 21. Consequently, this court held that Civ.R. 13(A), which concerns compulsory counterclaims, "does not apply to proceedings on a motion to vacate, modify or correct an arbitration award brought pursuant to R.C. 2711.10," and therefore was not barred by res judicata. *Id.* at ¶ 22, 24.

{¶ 16} Pursuant to *Licking Heights*, the denial of a motion to vacate an arbitration award in one proceeding does not preclude, based on compulsory counterclaim procedural rule requirements, the subsequent filing of an application to confirm the same arbitration

award in a separate proceeding. Appellee deduces from this principle that the jurisdictional priority rule, which would preclude independent proceedings in separate courts, does not apply to these special proceedings. But *Licking Heights* did not involve an application to confirm that was filed in a different county than the request to vacate. Because the requests at issue were filed in the same court, *Licking Heights* did not involve the possible application of the jurisdictional priority rule. Thus, we disagree with appellee's assertion that the reasoning in *Licking Heights* leads to the conclusion that the jurisdictional priority rule cannot apply to arbitration proceedings. Further, our research reveals no case finding the jurisdictional priority rule cannot apply to arbitration proceedings. To the contrary, the jurisdictional priority rule has been applied in the arbitration proceeding context. *See Primesolutions Securities, Inc. v. Winter*, 8th Dist. No. 103961, 2016-Ohio-4708 (finding court whose power was first legally invoked had exclusive jurisdiction to determine "whole issue" of dispute over an arbitration award). *See also State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426 (2001) (based on the uncertainty of whether the proceedings at issue involved the same "whole issue," the court rejected the argument that the jurisdictional priority rule "patently and unambiguously divested" the respondent trial court judge of jurisdiction over an order confirming an arbitration award despite his "basic statutory jurisdiction over" the request pursuant to R.C. 2711.16.). Therefore, we disagree with appellee's contention that the jurisdictional priority rule cannot apply to arbitration proceedings.

{¶ 17} Even though the jurisdictional priority rule can apply in the arbitration proceedings context, in this case, the rule did not preclude the trial court's confirmation of the arbitration award. Analytically, a request to vacate an arbitration award and a request to confirm that award are opposite sides of the same coin. Both requests emanate from the same award but seek opposite relief in relation to that award. Appellee's application to confirm the arbitration award was filed in Franklin County and served on appellant's counsel after appellant's application to vacate was filed in Marion County and served on appellee's counsel. Thus, the Marion County trial court acquired exclusive jurisdiction over the "whole issue," which did not cease until that court entered final judgment. *See John Weenink & Sons Co.*; *Primesolutions Securities, Inc.*, *supra*.

{¶ 18} On December 10, 2019, the Marion County trial court entered final judgment dismissing the matter based on its decision to deny appellant's request for an order vacating the arbitration award. That court's jurisdiction over the matter ended with that entry. *See Geiger v. Morgan Stanley DW, Inc.*, 10th Dist. No. 09AP-608, 2010-Ohio-2850, ¶ 13 (finding that "a trial court's denial of an R.C. 2711.11 motion to modify constitutes a final, appealable order even in the absence of a confirmation of an award rendered by the trial court under R.C. 2711.09"). With the termination of the case in Marion County, there were no longer two proceedings pending in courts of concurrent jurisdiction. A week later, and a day before appellant appealed from the Marion County trial court decision, the Franklin County trial court acknowledged the Marion County trial court proceeding had completed on December 10, 2019. Thus, the Franklin County trial court did not grant appellee's application to confirm the arbitration award until after the Marion County trial court had denied appellant's motion to vacate.

{¶ 19} According to appellant, even though the Marion County trial court's jurisdiction over the case had ended, the Franklin County trial court still could not rule on the application to confirm because he had not exhausted his appeals as to the disposition of the motion to vacate. This argument is unpersuasive. When the Franklin County trial court entered judgment confirming the arbitration award, no case relating to the arbitration award was pending in Marion County or the Third District Court of Appeals. Appellant filed his notice of appeal in Marion County the day after the Franklin County trial court entered judgment. And, even if appellant had appealed from the Marion County trial court judgment before the Franklin County trial court had entered judgment, the Franklin County trial court and the Third District Court of Appeals are not courts of concurrent jurisdiction. *See Wellman v. Salt Creek Valley Bank*, 10th Dist. No. 06AP-177, 2006-Ohio-4718, ¶ 9 ("Franklin County Common Pleas Court and the Fourth District Court of Appeals are not courts of concurrent jurisdiction.").

{¶ 20} Further, our review of whether the Franklin County trial court erred in confirming the arbitration award is confined to the record at the time it rendered judgment. *See Leiby v. Univ. of Akron*, 10th Dist. No. 05AP-1281, 2006-Ohio-2831, ¶ 7 ("appellate review is limited to the record as it existed at the time the trial court rendered judgment"); *State v. Ishmail*, 54 Ohio St.2d 402, 405 (1978), quoting *Bennett v. Dayton Mem. Park &*

Cemetery Assn., 88 Ohio App. 98 (2d Dist.1950), paragraph one of the syllabus (" 'in an appeal on questions of law the reviewing court may consider only that which was considered by the trial court and nothing more' "). Thus, subsequent proceedings do not affect our review in this appeal of whether the Franklin County trial court erred based on the record before it.[3]

{¶ 21} Lastly, appellant contends the Franklin County trial court erroneously adopted the Marion County trial court's decision denying his application to vacate the arbitration award based on its statement that it "reache[d] the same conclusion as the Marion County Court and incorporates Judge Finnegan's opinion as if rewritten herein (See Exhibits A and B)." (Dec. 17, 2019 Order at 2.) This statement indicated the Franklin County trial court's agreement with the Marion County trial court's conclusion that appellant failed to demonstrate the arbitration award must be vacated for a reason set forth in R.C. 2711.10. But this concurrence had no bearing on the Franklin County trial court's disposition of the application to confirm. Even though the filing and disposition of the motion to vacate in the Marion County trial court was relevant for the purpose of the Franklin County trial court's disposition of appellee's application to confirm, the substantive merits of a motion to vacate was not before the Franklin County trial court. No motion to vacate was filed in Franklin County. Because the Franklin County trial court's opinion as to the Marion County trial court's resolution of appellant's motion to vacate was inconsequential as to its disposition of appellee's motion to confirm, we construe it as dictum.

{¶ 22} In the final analysis, once there were no longer two actions on the same whole issue pending in courts of concurrent jurisdiction, the Franklin County trial court could exercise its jurisdiction over appellee's application to confirm. At that time, it was required to grant the application to confirm because the arbitration award had not been vacated, modified, or corrected, and no challenge to the arbitration award was pending in any court of common pleas. *See* R.C. 2711.09; *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18

[3] Appellant would not have been without recourse if the Third District had reversed the Marion County trial court's judgment and the arbitration award at issue was vacated. Appellant could have pursued relief under Civ.R. 60(B)(4), which permits a trial court to grant relief from judgment if "a prior judgment upon which it is based has been reversed or otherwise vacated."

Ohio St.3d 170, 174 (1985) ("when a motion is made pursuant to R.C. 2711.09 to confirm an arbitration award, the court must grant this motion if it is timely, unless a timely motion for modification or vacation has been made and cause to modify or vacate is shown"). Thus, we conclude the trial court properly confirmed the arbitration award.

{¶ 23} For these reasons, we overrule appellant's first, second, and third assignments of error.

IV. Disposition

{¶ 24} Having overruled all three of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and BEATTY BLUNT, JJ., concur.

[Cite as *Patel v. Strategic Group, L.L.C.*, 2020-Ohio-4990.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BIPIN PATEL,	:	
Plaintiff-Appellee,	:	No. 109043
v.	:	
STRATEGIC GROUP, L.L.C.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART AND VACATED IN PART
RELEASED AND JOURNALIZED: October 22, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-897461

Appearances:

Kenneth J. Fisher, Co., L.P.A., Kenneth J. Fisher, and Dennis A. Nevar, *for appellee.*

The Law Office of Jaye M. Schlachet, Eric M. Levy, and Jaye M. Schlachet, *for appellant.*

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant Strategic Group, L.L.C. ("Strategic Group") appeals the trial court's order entering judgment in favor of plaintiff-appellee Bipin

Patel ("Patel") and against Strategic Group on Patel's claims of breach of contract and conversion, with an award of damages in the amount of $50,000. For the reasons that follow, we affirm in part and vacate in part.

I. Factual and Procedural History

{¶ 2} On February 13, 2018, Strategic Group purchased the commercial real estate located at 1877 Triplett Boulevard, Akron, Ohio for $95,000 ("real property"). Strategic Group then advertised the real property for sale through the online website BizBuySell.

{¶ 3} Patel, a resident of Alabama, communicated several times with Shadi Taha ("Taha"), a co-manager of Strategic Group, to discuss the real property. On March 5, 2018, Taha indicated via text message that the convenience store located on the real property had been subject to a lease agreement. According to Patel, Taha advised him that the underlying lease agreement was expiring, and Patel could either renew the lease or opt to run the convenience store on his own. Taha's text message read "renew the lease or take over!!!" Patel's intent was to purchase the real property and to personally operate the convenience store — he did not want the convenience store subject to an underlying lease agreement.

{¶ 4} Taha provided differing testimony. Taha claimed he informed Patel the lease agreement was in place with a few years remaining on the underlying lease. Per Taha, Patel asked if Strategic Group would negotiate with the current tenant and attempt to terminate the lease agreement. Taha notified Patel that Strategic Group

would not attempt such negotiations, but Patel could pursue those options once he owned the real property.

{¶ 5} Patel, along with three other individuals, traveled to Ohio to inspect the real property in early March 2018. On March 10, 2018 ("the March meeting"), Patel and his associates met Taha at a local Starbucks. Patel had not retained an attorney at that point in time.

{¶ 6} The parties provided contrary testimony regarding the documents exchanged at the March meeting. Patel denied that Taha provided him with a purchase agreement or lease agreement at that time. Patel claimed he first received copies of the purchase agreement and lease agreement, by email, following the March meeting. Conversely, Taha stated he presented the proposed purchase agreement — that represented the sale of the real property from Strategic Group to Patel for the sum of $550,000 — as well as a copy of the underlying lease at the March meeting. Taha testified that Patel and his associates examined the documents for approximately one hour.

{¶ 7} All parties agree that the purchase agreement noted Patel's remittance of $50,000 earnest money. Patel paid the earnest money at the March meeting with three personal checks. Patel's father and two of Patel's friends each provided a check; the checks were made payable to Strategic Group. Strategic Group did not place the earnest money in escrow, as required under the purchase agreement, but deposited the funds in its personal bank account.

{¶ 8} Patel provided conflicting testimony as to why he submitted the earnest money at the March meeting, prior to execution of the purchase agreement. Patel first testified that Taha required payment of the earnest money before he executed the purchase agreement. Patel later conceded he was anxious to purchase the real property and informed Taha that he would pay the earnest money and subsequently have the documents reviewed by his attorney.

{¶ 9} Patel and Taha did not meet again following the March meeting, but exchanged copies of the relevant documents by email. While Taha asserted he provided the purchase agreement and lease agreement at the March meeting, Patel claimed receipt of the purchase agreement on March 11, 2018, and a partial lease on March 12, 2018. The partial lease agreement did not contain the pages that would have shown the lessee agreed to the available options, thereby committing to a lease extension until November 2020.

{¶ 10} According to Taha, he provided Patel with duplicate copies of the lease on March 13, 2018, and March 20, 2018, and Patel should have known the real property was subject to the underlying lease. The entire lease agreement was over 70 pages and Taha admitted he never read the document in full. Patel maintained he did not receive the entire lease agreement until after his receipt of the title commitment.

{¶ 11} The parties negotiated the purchase agreement by adding to the existing, printed paragraphs with hand-written language that was initialed by both buyer and seller. The document was executed on March 13, 2018. Taha then

contacted Barristers Title of Ohio ("Barristers") on March 14, 2018, to complete the title work associated with the purchase agreement.

{¶ 12} Patel received a copy of the title commitment from Barristers on March 19, 2018. The title commitment included a handwritten notation that the buyer and seller — Patel and Strategic Group — would handle the assignment of the lease outside of escrow. This was Patel's first notice that the underlying lease agreement was not expired.

{¶ 13} Upon receipt of the title commitment, Patel provided his attorney, Christian Pereyda ("Pereyda"), with the documents relative to the purchase agreement. Pereyda penned a letter to Strategic Group, on Patel's behalf, stating Patel would not go forward with the contract because the property was not satisfactory for its intended purpose. The letter requested the return of Patel's earnest money. Patel may also have contacted Strategic Group directly and indicated that because the lease was not expired, he was terminating the agreement and requested the return of his earnest money.

{¶ 14} Taha asserted that he was contacted by Patel after March 19, 2018, and asked to renegotiate the purchase agreement for a lower selling price. Patel conceded he attempted to negotiate a lower price after Taha refused to return the earnest money, but the parties did not agree upon alternate terms.

{¶ 15} Patel insisted he terminated the purchase agreement as permitted by the document's express terms and demanded repayment of his $50,000 earnest money. Strategic Group refused to accept Patel's termination notice and, instead,

argued it was entitled to the earnest money because Patel breached the contract when he failed to complete the purchase of the real property.

{¶ 16} Due to Strategic Group's refusal to return the earnest money, Patel filed suit against Strategic Group on May 5, 2018, claiming breach of contract, conversion, fraudulent misrepresentation, negligent misrepresentation, and fraudulent inducement. Strategic Group filed an answer on June 7, 2018. Strategic Group and Patel filed motions for summary judgment on January 23, 2019, and March 21, 2019, respectively. The trial court denied both summary judgment motions on June 4, 2019.

{¶ 17} On June 26, 2019, the trial judge conducted a bench trial. In interpreting the purchase agreement, the trial judge found rider A, when read in conjunction with paragraph 6, was subject to multiple interpretations. The judge allowed the introduction of parol evidence to determine the parties' intent when they entered the agreement. Both parties presented evidence at trial, and the trial court rendered a verdict in favor of Patel on his breach of contract and conversion claims, with an award of $50,000. An opinion and order were journalized by the trial court on September 6, 2019.

{¶ 18} Strategic Group filed a timely notice of appeal on September 24, 2019, and raised, verbatim, the following assignments of error:

> Assignment of Error No. 1: The trial court erred in considering parol evidence in awarding judgment to appellee.

Assignment of Error No. 2: The trial court erred in finding appellant liable to appellee for breach of contract which was not supported by the evidence.

Assignment of Error No. 3: The trial court erred by awarding judgment on appellee's conversion claim where it also awarded judgment on the claim of breach of contract.

Assignment of Error No.4: The trial court erred in awarding appellee judgment against appellant on its claim for conversion.

II. Law and Analysis

A. Standard of Review

{¶ 19} Strategic Group's arguments that the purchase agreement language was not ambiguous, parol evidence was erroneously considered, and the trial court erred when it found Strategic Group breached the contract present mixed questions of fact and law:

> While the interpretation of a contract is generally a matter of law subject to de novo review, the same standard does not apply when the agreement is ambiguous, as the trial court found in this case. *See Dzina v. Dzina*, 8th Dist. Cuyahoga No. 83148, 2004-Ohio-4497, ¶ 11-13 (whenever contractual language is deemed to be ambiguous, it is the responsibility of the trial court to interpret it, and the trial court has broad discretion in clarifying ambiguous language). The interpretation of an ambiguous term used in a contract is a question of fact and will not be reversed on appeal absent an abuse of discretion. *Maines Paper & Food Serv., Inc. v. Eanes*, 8th Dist. Cuyahoga No. 77301, 2000 Ohio App. LEXIS 4480, 2 (Sept. 28, 2000). A trial court's decision does not constitute an abuse of discretion unless it is unreasonable, arbitrary, or unconscionable. *Castlebrook Ltd. v. Dayton Properties Ltd.*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992), citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985). Accordingly, when applying this standard of review, an appellate court is not free to substitute its judgment for that of the trial court. *Nofzinger v. Blood*, 6th Dist. Huron No. H-02-014, 2003-Ohio-1406, ¶ 42.

MRI Software, L.L.C. v. W. Oaks Mall FL, L.L.C., 2018-Ohio-2190, 116 N.E.3d 694, ¶ 11 (8th Dist.).

{¶ 20} As to the trial court's factual findings that Strategic Group breached the purchase agreement, the weight given to the evidence and the credibility of the witnesses are primarily issues assessed by the trier of fact. *Id.* at ¶ 12. The reviewing court views the trial court's credibility determinations with due deference. *Id.* And "[b]ecause the trial court is best able to view the witnesses and observe their demeanor when it weighs the credibility of the offered testimony, there is a presumption that the findings of the trier of fact are correct." *Id.*, citing *Nofzinger* at ¶ 41, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The standard of appellate review of the trial court's decision that Strategic Group breached the contract is manifest weight of the evidence. *See Schaste Metals v. Tech Heating & Air Conditioning*, 8th Dist. Cuyahoga No. 71589, 1997 Ohio App. LEXIS 3543, 3 (Aug. 7, 1997) (a breach of contract claim is reviewed under a manifest weight of the evidence standard). "Accordingly, following a bench trial, a reviewing court will generally uphold a trial court's judgment as long as the manifest weight of the evidence supports it — that is, as long as 'some' competent and credible evidence supports it." *MRI Software* at ¶ 12, citing *Hamilton v. Ball*, 2014-Ohio-1118, 7 N.E.3d 1241, ¶ 15 (4th Dist.).

B. Breach of Contract

{¶ 21} For ease of analysis, we will review the assignments of error out of order and first discuss the second assignment of error. In its second assignment of

error, Strategic Group argues that the trial court erred when it found in favor of Patel on his breach of contract claim. Specifically, the trial court found that Patel, pursuant to the terms of the purchase agreement, terminated the contract and, therefore, Strategic Group was required to return Patel's earnest money. Strategic Group's failure to remit the earnest money resulted in a breach of contract.

{¶ 22} We first look at the trial court's assessment of the contract — the purchase agreement. The trial court found that when read together paragraph 6 and rider A of the purchase agreement were ambiguous. Paragraph 6 reads:

> 6. **CLOSING**: The closing of the sale of the Property (the "Closing Date") shall be 30 days after removal/satisfaction or waiver of all contingencies, but no later than 20 March 2018.

Additionally, rider A of the purchase agreement reads in its entirety:

RIDER A

ADDITIONAL CONTINGENCIES

TO

PURCHASE AGREEMENT

ADDITIONS TO PRINTED PARAGRAPHS

SOLD AS IS NO CONTINGENCIES

{¶ 23} Paragraph 6 required the removal, satisfaction, or waiver of all contingencies by March 20, 2018; contingencies were defined in rider A. The terms of rider A were subject to two interpretations: (1) the parties' handwritten additions to the printed paragraphs — that were initialed by both parties — constituted

contingencies, or (2) the language "additions to printed paragraphs" was a heading and there were no contingencies under the purchase agreement.

{¶ 24} Patel argued the "additions to printed paragraphs" language identified contingencies whereas Strategic Group argued this verbiage was simply a heading and no contingencies applied under the purchase agreement. The contract terms of rider A were susceptible to multiple interpretations thereby creating ambiguity. *See Michael A. Gerard, Inc. v. Haffke*, 8th Dist. Cuyahoga No. 98488, 2013-Ohio-168, ¶ 11, citing *Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 52 Ohio St.3d 174, 177, 556 N.E.2d 1186 (1990) (contract terms reasonably susceptible to more than one explanation are ambiguous).

{¶ 25} The interpretation of paragraph 6 and rider A was not problematic until Barristers distributed the title commitment. The purchase agreement required Strategic Group to deliver a title commitment to Patel by March 18, 2018. (Purchase agreement at paragraph 12.) After the parties executed the purchase agreement, Strategic Group secured Barristers for completion of the necessary title work. On March 19, 2018, one day later than required by the terms of the contract, Barristers delivered a copy of the title commitment to Patel. The title commitment excluded coverage for the underlying lease and the document included a handwritten note that read: "Buyer and Seller to get assignment [of lease] outside of escrow." (Patel's trial exhibit No. 3.) The title work indicated the underlying lease would expire on November 16, 2020. Patel alleged this was his first notice that the lessee had

exercised its options to renew the underlying lease until November 2020. Patel subsequently requested and obtained a complete copy of the lease agreement.

{¶ 26} Paragraphs 11 and 12 of the purchase agreement addressed title and read as follows:

> **11. TITLE**: At the closing Seller shall deliver to Buyer a good and sufficient general warranty deed (the "Deed") conveying good and marketable fee simple title in and to the Property to Buyer, free and clear of all liens, claims and encumbrances whatsoever, except (a) any mortgage financing assumed by Buyer (b) covenants, easements, reservations, conditions and restrictions of record, if any, *reviewed and approved by Buyer, pursuant to paragraph 12*, (c) zoning changes and (d) real estate taxes and assessments, both general and special, which are a lien but not yet due and payable as of the Closing Date (as hereinafter defined).
>
> 12**. TITLE POLICY**: Seller shall furnish to Buyer at Seller's expense an Owner's Policy of Title Insurance (the "Title Policy"), issued by ____ in the amount of the Sales Price and dates at or after the Closing Date, insuring record title to the Property to Buyer subject only to the exceptions described in paragraph 11, provided that Buyer shall have the right to review *and approve* any easements, covenants, conditions, reservations or restrictions of record disclosed in the preliminary title commitment to be provided to Buyer by Seller within five (5) days after the execution of this agreement. If for any reason the title company is unable to issue a Title Policy as aforesaid of if Seller is otherwise unable to convey title as set forth in paragraph 11 and if within fifteen (15) days after the receipt of notice by certified mail from Buyer to Seller to remove or satisfy the defect or defects in title, said defects are not cured, then at the expiration of said fifteen (15) day period, Buyer may at his option, to be exercised by notice by certified mail to Seller within five (5) days after the expiration of said fifteen (15) day period, (i) accept such title as Seller is able to furnish, or (ii) terminate this Agreement and receive all funds or documents, if any, previously paid or deposited by Buyer. Upon such termination neither party hereto shall thereafter be under any further liability to the other party hereto.

(Emphasis added.) We note that the emphasized language in paragraph 11 — reviewed and approved by Buyer, pursuant to paragraph 12 — was a handwritten

addition to the paragraph and, depending upon how rider A was interpreted, could have qualified as an "addition to printed paragraphs" or a contingency under rider A. The wording "and approve" in paragraph 12 was crossed out by the parties.

{¶ 27} The question before the court was whether the parties intended the handwritten additions to the printed paragraphs to be contingencies that had to be waived, removed, or satisfied before closing. (Purchase agreement at paragraph 6.) If so, Patel's approval of the assignment of the lease — divulged for the first time in the title commitment — was a contingency that had to be waived, removed, or satisfied before closing. Parol evidence was introduced to interpret the parties' intended meaning of paragraph 6 and rider A.

{¶ 28} Patel testified that he did not intend to execute the purchase agreement if an underlying lease was attached to the real property because Patel wanted to personally operate the convenience store. Taha was aware of Patel's intention to purchase the real property and operate the convenience store himself. To do so, there could be no underlying lease agreement attached to the real property. Patel testified about Taha's March 5, 2018 text that led Patel to believe he could either renew the underlying lease agreement or choose to terminate the lease and operate the convenience store personally. The parol evidence clarified for the trial court that the parties intended the contingencies to include the handwritten additions to the printed paragraphs, including Patel's approval of the title work.

{¶ 29} After establishing the intentions of the parties and determining the language added to the printed purchase agreement served as contingencies, the trial

court further analyzed and interpreted the terms of the purchase agreement. Barristers' title work showed the real property was encumbered by the underlying lease and the lease had to be assigned from Strategic Group to Patel. The purchase agreement did not specifically address the assignment of the lease from Strategic Group to Patel or the current renewal status of the lease agreement. However, Patel's approval of the title work, as required under paragraphs 11 and 12, allowed him to assess these issues presented in the title commitment. Patel testified that upon receiving the title commitment, he terminated the purchase agreement.

{¶ 30} The purchase agreement provided for termination under paragraphs 4, 5, and 12. Paragraph 5, specifically, allowed Patel to terminate the purchase agreement and receive a full refund of the earnest money should Patel's investigation of the property disclose any state of facts objectionable, in Patel's sole judgment, per the contingencies contained in rider A. Patel found the title commitment objectionable and, therefore, notified Strategic Group of his intentions to terminate. Patel sent his termination notice, through his attorney, in writing and by mail as required by the terms of the purchase agreement.

{¶ 31} Strategic Group argues that because Patel testified at trial that the physical land was not objectionable — only the presence of the lease — Patel could not terminate under paragraph 5. We do not interpret paragraph 5 as imposing such a limitation. Further, the trial court found the terms of paragraph 5 permitted Patel's objections to the purchase agreement and title commitment and we do not find this was against the manifest weight of the evidence.

{¶ 32} Paragraph 5 also stated Patel would receive a refund of the earnest money upon his termination of the purchase agreement. Strategic Group's failure to return the earnest money constituted a breach of contract.

{¶ 33} Based upon the foregoing, the trial court found that the purchase agreement contained ambiguous terms that led to more than one interpretation of rider A and paragraph 6. The trial court's introduction of parol evidence helped to explain the parties' intentions when they executed the purchase agreement. The trial court found Patel was entitled to terminate the purchase agreement, which he did with the requisite notice required under the agreement. Upon receipt of Patel's notice of termination, Strategic Group was obligated to return Patel's earnest money and Strategic Group's failure to do so constituted a breach. The trial court's findings were supported by competent, credible evidence and were not unreasonable, arbitrary, or unconscionable. Therefore, the trial court correctly found in favor of Patel on his breach of contract claim and Strategic Group's second assignment of error is overruled.

C. Parol Evidence

{¶ 34} In its first assignment of error, Strategic Group contends that the trial court erred when it considered parol evidence. Specifically, Strategic Group argues that the terms of the purchase contract were not ambiguous and, therefore, parol evidence should not have been introduced.

{¶ 35} Interpretation of a contract requires the court to ascertain and give effect to the parties' intent. *MRI Software*, 2018-Ohio-2190, 116 N.E.3d 694, at ¶ 27,

citing *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). In so doing, the court reviews the contract as a whole and presumes the parties' intent is reflected in the contract's language. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. As a result, if the contract's language is plain and unambiguous, the terms are enforced as written, and courts may not turn to evidence outside the four corners of the contract to alter its meaning. *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 159 Ohio St.3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 13.

{¶ 36} Conversely, courts will consider extrinsic evidence to give effect to the parties' intentions where the language of the contract is unclear or ambiguous. *Alliant Food Servs. v. Powers*, 8th Dist. Cuyahoga No. 82189, 2003-Ohio-4193, ¶ 36. Contract terms are considered ambiguous where their meanings are reasonably susceptible to multiple interpretations. *Porterfield v. Bruner Land Co.*, 2017-Ohio-9045, 103 N.E.3d 152, ¶ 18 (7th Dist.), citing *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.). Once a clause is found ambiguous, "parol evidence can be introduced to explain the intention of the parties." *Schleicher v. Alliance Corporate Res.*, 10th Dist. Franklin No. 95APE03-311, 1995 Ohio App. LEXIS 5405, 9 (Dec. 7, 1995). "Parol evidence is used only to interpret the terms, and not to contradict the terms." *First Natl. Bank of Pennsylvania* at ¶ 25.

{¶ 37} Courts apply a de novo standard when reviewing the application of parol evidence. *Rice v. Rice*, 7th Dist. Columbiana No. 2001-CO-28, 2002-Ohio-

3459, ¶ 38, citing *Charles A. Burton, Inc. v. Durkee*, 158 Ohio St. 313, 324, 109 N.E.2d 265 (1952).

{¶ 38} The trial court determined that a reading of paragraph 6 and rider A together created an ambiguity since multiple interpretations were possible. Rider A could have meant the additions to the printed paragraphs were contingencies or, alternatively, the wording "additions to printed paragraphs" was a heading and no contingencies applied under the contract.

{¶ 39} The parol evidence provided the trial court clarity as to the parties' mutual intentions when they entered the purchase agreement. The trial court considered Taha's representations to Patel, relative to the status of the underlying lease agreement and Patel's right to operate the convenience store as his own business. Taha's March 5, 2018 text communicated to Patel that the underlying lease agreement was expired and did not need to be renewed. Patel reasonably relied on those representations. It was Patel's intention to enter the purchase agreement with the expectation that he would operate the convenience store independently and that the real property would not be subject to an underlying lease agreement. The trial court found the parties intended and mutually agreed at drafting that the language "additions to printed paragraphs" demonstrated the additional handwritten terms included in the purchase agreement were contingencies thereby allowing Patel to approve the title commitment. The record reflects that the trial court did not err when it found the terms of the purchase

agreement ambiguous and considered parol evidence to establish what the parties mutually agreed to and understood to be the meaning of rider A.

{¶ 40} Thus, Strategic Group's first assignment of error lacks merit and is overruled.

D. Conversion

{¶ 41} Strategic Group's third and fourth assignments of error both address conversion and will be discussed collectively. Strategic Group argues that the trial court erred when it found it liable for conversion and awarded Patel judgment on his conversion claim.

{¶ 42} Conversion and breach of contract are alternate causes of action. *Boston v. Sealmaster Industries*, 6th Dist. Erie No. E-03-040, 2004-Ohio-4278, ¶ 36, citing *Richardson v. Shaw*, 209 U.S. 365, 382-383, 28 S.Ct. 512, 52 L.Ed. 835 (1908). A litigant may not recover for both a breach of contract and conversion. *Boston* at ¶ 37. An award on both claims would amount to double recovery. *Kindle Rd. Co., L.L.C. v. Trickle*, 5th Dist. Licking No. 03CA99, 2004-Ohio-4668, ¶ 61.

{¶ 43} Patel filed suit against Strategic Group and identified five causes of action; only his claims of breach of contract and conversion are relevant to this inquiry. Through his breach of contract and conversion claims, Patel sought repayment of the $50,000 earnest money he deposited with Strategic Group at the inception of the parties' dealings.

{¶ 44} The trial court determined Strategic Group breached the purchase agreement when it failed to refund the earnest money to Patel after Patel exercised

his right to terminate the agreement. Additionally, the trial court found Strategic Group wrongfully withheld, and continued to wrongfully withhold, the earnest money in contravention to Patel's property rights and, therefore, converted Patel's property. The trial court entered judgment in favor of Patel, and against Strategic Group, on the claims of breach of contract and conversion and awarded damages to Patel totaling $50,000.

{¶ 45} The trial court correctly found in favor of Patel on his breach of contract claim, as described above in response to Strategic Group's second assignment of error. Once the trial court returned the full value of the alleged converted property to Patel — as occurred when the trial court awarded Patel $50,000 on his breach of contract claim — Patel suffered no damages pursuant to his conversion action. *See Silverman v. Am. Income Life Ins. Co. of Indianapolis*, 10th Dist. Franklin Nos. 01AP-338 and 01AP-339, 2001 Ohio App. LEXIS 5683, 32 (Dec. 18, 2001) (where the owner received full value of the converted property, he suffered no damages under a conversion cause of action). Breach of contract and conversion are alternate causes of action, and once the trial court found Strategic Group breached the purchase agreement, there was no basis for the trial court to consider Patel's claim of conversion. *See Dream Makers v. Marshek*, 8th Dist. Cuyahoga No. 81249, 2002-Ohio-7069, ¶ 20 (based upon plaintiff's conversion and breach of contract causes of action that sought identical damages from the defendant, the trial court correctly granted defendant's motion for summary

judgment on the conversion claim because the facts presented a clear and simple contract action under which the plaintiff had recovered the alleged damages).

{¶ 46} We find that once the trial court found Strategic Group liable for breach of contract, the conversion claim could not be considered and any arguments regarding conversion were moot. We vacate the order that found Strategic Group liable for conversion and vacate the portion of the judgment that found Strategic Group liable for $50,000 due to conversion. We affirm the judgment to the extent it awarded Patel $50,000 for damages under his breach of contract claim. In light of this conclusion, Strategic Group's third and fourth assignments of error are moot.

{¶ 47} Judgment affirmed in part and vacated in part.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

RAYMOND C. HEADEN, JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR

SLIP OPINION NO. 2020-OHIO-5101

SUTTON BANK, APPELLANT, *v.* PROGRESSIVE POLYMERS, L.L.C., ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Sutton Bank v. Progressive Polymers, L.L.C.*, Slip Opinion No. 2020-Ohio-5101.]

Cognovit promissory notes—Courts must give effect to the clear intent of the parties when interpreting cognovit notes—Judgment reversed.

(No. 2019-1314—Submitted July 21, 2020—Decided November 3, 2020)

APPEAL from the Court of Appeals for Portage County,
Nos. 2018-P-0079 and 2019-P-0001, 2019-Ohio-3239.

STEWART, J.

{¶ 1} This case concerns whether certain inconsistencies in a cognovit promissory note signed by the debtors prevent its enforcement. Because the contract, viewed as a whole, put the debtors on notice of the rights that they were relinquishing by signing the note, the court of appeals erred in holding that the note

was defective. We therefore reverse the judgment of the Eleventh District Court of Appeals and reinstate the trial court's cognovit judgment entered in favor of the creditor.

I. Background

{¶ 2} On July 22, 2016, appellees, Progressive Polymers, L.L.C., and Darin A. Bay, borrowed $500,000 from appellant, Sutton Bank. To secure the loan, Bay signed a cognovit promissory note as a member of Progressive Polymers and in his own behalf. Pursuant to the note, Progressive Polymers and Bay promised to repay Sutton Bank the principal amount of the loan, with interest, in 72 monthly installments. The note included a confession-of-judgment clause that contained a warrant of attorney by which Progressive Polymers and Bay agreed that should they default on the note, an attorney could confess judgment against them.

{¶ 3} The note begins with a section of definitions: " 'I', 'me,' and 'my,' refer to each Borrower signing this Note," Progressive Polymers and Bay, and " 'You' and 'Your' refer to the Lender," Sutton Bank. The pronouns retain this usage through the 30 paragraphs of the note, including in the boxed confession-of-judgment clause between paragraphs 29 and 30. The only portion of the document that does not clearly retain the construction of "you" and "your" as defined and quoted above, is the R.C. 2323.13(D)-required warning. This warning, which recites the language in R.C. 2323.13(D), is located immediately following paragraph 30 and directly above Bay's two signatures. Bold and in capital letters, it states:

> WARNING: BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT

> FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

{¶ 4} On September 13, 2018, Sutton Bank filed a complaint for a cognovit judgment against Progressive Polymers and Bay in the Portage County Court of Common Pleas alleging default. The complaint sought the remaining balance owed on the principal, plus late fees, accrued interest, pre- and postjudgment interest, court costs, and attorney fees. Pursuant to the warrants of attorney in the note, an attorney chosen by Sutton Bank filed an answer confessing judgment against Progressive Polymers and Bay and in Sutton Bank's favor. The trial court ruled in favor of Sutton Bank and issued the cognovit judgment.

{¶ 5} Progressive Polymers and Bay appealed from the trial court's judgment to the Eleventh District Court of Appeals and also filed a Civ.R. 60(B) motion for relief from judgment in the trial court. The Eleventh District remanded the matter to the trial court to rule on the motion.

{¶ 6} In their motion, Progressive Polymers and Bay argued that the promissory note was not a valid cognovit note and that therefore the trial court lacked jurisdiction to enter a cognovit judgment in favor of Sutton Bank. The cognovit note was invalid, they argued, because the statutory warning had to be read as being directed to Sutton Bank as the lender, and not to them as the borrowers, since the note specifically defines "you" and "your" as the lender, Sutton Bank. Bay and Progressive Polymers asserted that this interpretation of the warning language was the only legitimate one inasmuch as a cognovit note must be strictly construed against the party seeking its enforcement. Accordingly, Progressive Polymers and Bay maintained that the warning was defective because

it failed to put *them* on notice of the rights that they were waiving by signing the note.

{¶ 7} Sutton Bank countered that while the definition section identified "you" and "your" with the lender, those definitions do not apply in the warning. Instead, the bank argued that courts must give words in a promissory note their defined meaning unless some other meaning is apparent on the face of the document. Sutton Bank maintained that it is was clear from the overall context of the document and the language used in the warning that the word "you," as contained in the warning, referred to Progressive Polymers and Bay as the signers of the note, notwithstanding the relevant provisions of the definition section.

{¶ 8} The trial court denied the motion to vacate, and Progressive Polymers and Bay appealed from that judgment also. In a split decision, the Eleventh District reversed the judgment of the trial court, vacated the cognovit judgment in favor of Sutton Bank, and remanded the cause to the trial court for further proceedings on the bank's complaint. 2019-Ohio-3239, ¶ 19.

{¶ 9} The court of appeals began by acknowledging that because cognovit notes allow judgment to be entered against a party without notice or hearing, they are strictly construed against the party seeking enforcement. The majority further reasoned that the parties' intent is revealed in their language. Unambiguous and clear terms need no interpretation, and courts must give effect to all contract provisions. After applying these rules, the court concluded:

> Interpreting the contract as a whole and avoiding interpretations that have the effect of annulling parts of it, the definition section of the Note unambiguously grants [Progressive Polymers and Bay] the right to confess judgment against Sutton Bank in the event of a breach. This is the language chosen by the parties to the contract—namely, Sutton Bank as the drafter of the

> Note—despite the default language inserted from the Ohio statute using the pronoun "you" instead of "I" to describe the signer(s). Sutton Bank acknowledges the borrower must be given the warning set forth in the statute. However, a plain reading of the definitions chosen by Sutton Bank establishes that there is no statutory warning directed to the borrower[s], [Progressive Polymers and Bay].

Id. at ¶ 15. Accordingly, the majority held that the note did not meet the strict requirements of R.C. 2323.13(D) and was therefore not a valid cognovit note upon which judgment could be entered.

{¶ 10} The dissent reached the opposite conclusion. It noted that Progressive Polymers and Bay's argument, while "creative," was unreasonable in light of the following facts: the note used the precise warning language required by R.C. 2323.13(D); the language clearly and naturally applied to Progressive Polymers and Bay and if read to apply to Sutton Bank, it would be meaningless and absurd; and the note, signed by Progressive Polymers and Bay, included a warrant of attorney, placing them at least constructively on notice that the warning provision applied to them and not Sutton Bank. *Id.* at ¶ 32-39 (Trapp, J., dissenting). The dissent admonished the majority for failing to apply the rule of contractual interpretation that defined terms within a contract should be interpreted as retaining their meaning throughout the contract unless evidence shows that the parties intended the term to have a different meaning. *Id*. at ¶ 22 (Trapp, J., dissenting). Finding that the overall context of the note, and the language employed by the warning provision itself, expressed a clear intent that "you" in the warning applied to Progressive Polymers and Bay, the dissent concluded that the note met the strict statutory requirements for cognovit notes and consequently that the cognovit judgment should be enforced. *Id.* at ¶ 39 (Trapp, J., dissenting).

{¶ 11} Sutton Bank appealed to this court, and we accepted jurisdiction over the following proposition of law: "Although cognovit clauses are construed strictly against those enforcing them, courts must still follow traditional rules of contractual interpretation when analyzing those clauses." *See* 157 Ohio St.3d 1510, 2019-Ohio-5193, 136 N.E.3d 495.

II. Analysis

A. Cognovit Promissory Notes

{¶ 12} A cognovit promissory note is a special type of commercial paper by which a debtor[1] authorizes a creditor, in the event of the debtor's default on his payment obligation, to obtain an immediate judgment against him without prior notice or an opportunity to be heard. *See D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 176, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). A note takes the form of a cognovit note if it includes a warrant of attorney. *Huntington Natl. Bank v. Burda*, 10th Dist. Franklin No. 08AP-658, 2009-Ohio-1752, ¶ 8. The warrant of attorney authorizes an attorney of the creditor's choosing to act on behalf of the debtor to confess judgment against the debtor in a court of law. *See Overmyer* at 176, fn. 2; *Cleveland Bar Assn. v. Greenberg*, 112 Ohio St. 3d 138, 2006-Ohio-6519, 858 N.E.2d 400, ¶ 5, fn. 1. At bottom, "the purpose of a cognovit note is to allow the holder of the note to quickly obtain judgment, without the possibility of a trial." *Sky Bank v. Colley*, 10th Dist. No. 07AP-751, 2008-Ohio-1217, ¶ 7.

{¶ 13} R.C. 2323.12 and 2323.13 govern cognovit notes. For the warrant of attorney to be valid so that the court has authority to enter a cognovit judgment on the note, a specific warning must appear on it. R.C. 2323.13(D) states:

1. A debtor will also be referred to as a "maker." A "maker" is "[s]omeone who signs a promissory note." *Black's Law Dictionary* 1145 (11th Ed.2019).

> A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1974, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the space or spaces provided for the signatures of the makers, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:
>
> "Warning — By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

{¶ 14} In the past, this court has stated that a warrant of attorney is to be strictly construed against the person in whose favor the judgment is given. *See Lathrem v. Foreman*, 168 Ohio St. 176, 188, 151 N.E.2d 905 (1958), citing *Haggard v. Shick*, 151 Ohio St. 535, 86 N. E.2d 785 (1949); *Peoples Banking Co. v. Brumfield Hay & Grain Co.*, 172 Ohio St. 545, 548, 179 N.E.2d 53 (1961); *Cushman v. Welsh*, 19 Ohio St. 536, 539 (1869); *Spence v. Emerine*, 46 Ohio St. 433, 439, 21 N. E. 866 (1889). We have also said that "court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject." *Lathrem* at paragraph one of the syllabus.

B. Traditional Rules of Interpretation Apply to Cognovit Provisions

{¶ 15} Rules of contract interpretation are tools that we use to give meaning to disputed terms or provisions so that the contract as a whole will reflect the parties' intent. *See Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. These rules can be broken down into two basic categories: primary interpretive rules and secondary interpretive rules. In all cases involving contract interpretation, we start with the primary interpretive rule that courts should give effect to the intentions of the parties as expressed in the language of their written agreement. *See Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37. Other primary interpretive rules assist the court in doing this by giving guidance on how to interpret the meaning of certain words. For example, one rule is that "[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. Another more specific, but also at times very helpful, rule is that technical terms are to be given their technical meaning "unless a different intention is clearly expressed." *See Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 361, 678 N.E.2d 519 (1997). Other rules are secondary, rather than primary, interpretive tools and do not operate unless the primary rules of interpretation fail to resolve the contract's meaning. The rule that a contract provision should be strictly construed against one party and liberally construed in favor of the other—either due to the type of contract or contractual provision at issue, inequality in bargaining power, or the fact that one party is the drafter and the other is not—is a secondary rule. *See Malcuit v. Equity Oil & Gas Funds, Inc.*, 81 Ohio App.3d 236, 239-240, 610 N.E.2d 1044 (9th Dist.1992). Accordingly, it does not come into play unless the intent of the parties cannot be

deciphered because the contract language is reasonably susceptible of two different interpretations. *See id.*

{¶ 16} We conclude that traditional rules of contract interpretation do apply to cognovit provisions, just as they would to any other provision in any other contract. Rules of interpretation have one purpose—to give meaning to the language of the contract in a way that reflects the intent of the parties. If courts did not use rules of interpretation when interpreting cognovit provisions, those provisions could be open to all manner of interpretations, some of which would naturally be incongruous with the parties' actual intent.

{¶ 17} The majority and dissenting opinions of the court of appeals did, to some extent, apply traditional rules of contract interpretation in their respective analyses. We agree with Sutton Bank, however, that the majority's analysis stopped short of where it should have when it applied the note's definition of "you" (referring to the lender, Sutton Bank) to the statutory warning language without considering, as it should have considered, whether the parties intended this reading.

C. The Note's Definition Section Does Not Apply to the Statutory Warning

{¶ 18} Because this case involves an issue of contract interpretation, the outcome depends on whether the parties intended the note's definition of "you" to apply to the statutory warning. *Sunoco*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, at ¶ 37 (A court's primary concern when confronted with an issue of contract interpretation is to give effect to the parties' intentions). Although words and terms within a contract will be given their ordinary meaning, *see Alexander* at paragraph two of the syllabus, where parties to a contract have given a word a specific meaning by expressly defining it in the contract, that definition will generally override whatever definition might otherwise be established by an examination of the word's ordinary meaning or common usage. *In re Payne*, 450 B.R. 711, 719 (Bankr.S.D.Ohio 2011). Furthermore, when a word is expressly defined, then that word should be given its expressed meaning whenever it is used

in the contract. *Id.* at 719-720. Both rules regarding defined terms stem from the broader principle that where terms in a contract are clear and unambiguous, they should be applied as written. It is clear from the appellate court's opinion that the court used these rules to conclude that the definition section of the note must apply to the warning provision. However, what the appellate court failed to understand is that these rules—helpful though they are—are not unbreakable or inviolable. They must yield to the intent of the parties, and when the parties clearly did not intend an express definition to apply, a court cannot force that construction upon them. *See In re Adelphia Communications Corp.*, 368 B.R. 348, 354 (Bankr.S.D.N.Y.2007) (defined terms must still be interpreted in the context of the entire agreement); *Beanstalk Group, Inc. v. AM Gen. Corp.,* 283 F.3d 856, 860 (7th Cir.2002) ("a contract will not be interpreted literally if doing so would produce absurd results in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek").

{¶ 19} Focusing on what the parties would have intended, we are unpersuaded by Progressive Polymers and Bay's argument that the note's defined terms had the effect of modifying the warning provision such that the warning no longer applied to them. To begin, the very first sentence of the warning says: "BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL." (Capitalization sic.) The "you" clearly refers to the signers of the note. And because Bay's signatures, on behalf of himself and Progressive Polymers, are the only ones on the note and appear directly below the warning, the "you" must necessarily refer to Progressive Polymers and Bay, regardless of how "you" is defined elsewhere in the document. If someone had signed the document on behalf of Sutton Bank, there would be ambiguity as to whether "you" referred to Sutton Bank as the lender instead of Progressive Polymers and Bay as the borrowers. But since Sutton Bank did not sign, no ambiguity exists. Likewise, the second sentence of the warning provision also makes clear that "you" refers to

Progressive Polymers and Bay. It states: IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR * * *." (Capitalization sic.) Bay and Progressive Polymers do not dispute that they are the only parties to the note that have an obligation to make timely payments. Sutton Bank, as the lender and creditor, has no such obligation. Furthermore, according to the warning's plain language, "you" in the second sentence must at least be viewed as referring to a party that is not the creditor because that individual or entity might have claims against the creditor. Again here, Sutton Bank is the creditor. If we adopt the construction that Progressive Polymers and Bay urge us to adopt, this second sentence would be read to mean: "If [Sutton Bank] does not pay on time a court judgment may be taken against [Sutton Bank] without [Sutton Bank's] prior knowledge and the powers of the court may be used to collect from [Sutton Bank] regardless of any claims [Sutton Bank] may have against [itself] * * *. This reading obviously makes no sense.

{¶ 20} Accordingly, we find that the statutorily-required language of the warning provision, coupled with the placement of the signature line, can leave no doubt that the notice was directed to the makers of the note: Progressive Polymers and Bay. Indeed, it is telling that neither Bay nor Progressive Polymers argues, or has ever argued, ignorance as to the type of document that they were signing. Nor have they claimed ignorance about waiving their due process rights by signing it. Instead, their arguments against upholding the cognovit judgment rest on the fact that technically, if the definition of "you" in the note is applied to the "you" in the warning provision, the warning provision put Sutton Bank, and not them, on notice of rights that Sutton Bank was waiving even though Progressive Polymers and Bay,

not Sutton Bank, were the signatories. This is an unnatural and strained reading of the warning provision, and the parties did not intend such a result.

III. Conclusion

{¶ 21} For the foregoing reasons, we hold that although cognovit clauses are construed strictly against those seeking to enforce them, courts must still give effect to the clear intent of the parties when interpreting them. We therefore reverse the judgment of the Eleventh District Court of Appeals and reinstate the trial court's cognovit judgment in favor of Sutton Bank.

Judgment reversed.

O'CONNOR, C.J., and KENNEDY, FRENCH, FISCHER, DEWINE, and DONNELLY, JJ., concur.

Meyer Kerschner, Ltd., Michael D. Stultz, and Douglas A. Stephan, for appellant.

Buckingham, Doolittle & Burroughs, L.L.C., Patrick J. Keating, and Daniel J. Glass, for appellee.

Ice Miller, L.L.P., and Steven D. Forry, urging reversal for amicus curiae Ohio Credit Union League.

Vorys, Sater, Seymour and Pease, L.L.P., John J. Kulewicz, Jeffrey E. Smith, and Scott A. Herkamp; and Jeffrey D. Quayle, urging reversal for amicus curiae Ohio Bankers League.

Porter, Wright, Morris & Arthur, L.L.P., H. Grant Stephenson, and L. Bradfield Hughes, urging reversal for amicus curiae Community Bankers Association of Ohio.

[Cite as *Aceste v. Stryker Corp.*, 2020-Ohio-4938.]

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

Frank Aceste, et al.	Court of Appeals No. L-19-1166
Appellants	Trial Court No. CI0201504798
v.	
Stryker Corporation, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: October 16, 2020

* * * * *

Karin L. Coble, for appellants.

Susan M. Audey and Tariq M. Naeem, for appellees, Stryker Corporation and Howmedica Osteonics Corp.

Paul C. Cosgrove and Joshua A. Klarfeld, and Georgia Hatzis, for appellee, Hammill Manufacturing Company.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Frank and Rhonda Aceste, appeal the judgment of the Lucas County Court of Common Pleas, dismissing with prejudice appellants' claims against

appellees, Stryker Corporation, Howmedica Osteonics Corporation, and Hammill Manufacturing Company. For the reasons that follow, we reverse.

I. Facts and Procedural Background

{¶ 2} The present matter was initiated on December 11, 2015, when appellants filed a complaint against appellees for compensatory damages related to medical problems and loss of consortium. The case was subsequently consolidated with another pending case involving a separate plaintiff. Relevant here, the claims were mediated over numerous sessions beginning in June 2016.

A. Trial Court Grants Appellees' Motion to Enforce Settlement Agreement

{¶ 3} On April 10, 2017, appellees moved to enforce a settlement agreement that was purportedly reached during the mediation sessions. In their motion, appellees asserted that on September 30, 2016, counsel for appellants, Zoll & Kranz, LLC, sent correspondence to appellees confirming that appellants, among others, agreed to the settlement terms, including appellees' payment of a sum of money to appellants, dismissal of the lawsuit with prejudice, release of all present and future claims against appellees, appellants' responsibility for Medicare liens, and strict confidentiality and non-disparagement. Appellees also asserted that Zoll & Kranz indicated, in the September 30, 2016 correspondence, that as part of the informed consent process, appellants were provided with an explanatory form to review the terms of the settlement.

{¶ 4} The September 30, 2016 correspondence was not so specific regarding the settlement terms, however. The correspondence stated, in its entirety,

We have reached at least some conclusion with all remaining [redacted] clients.

As you know, we allocated the offer with the assistance of Special Master Judge Richard B. McQuade. Their responses can be broken into 3 categories:

Group A

[Redacted] people have accepted the allocated offer. [Redacted] of those have returned a signed form and we are still waiting on the remaining [redacted]. The total amount allocated to these [redacted] was [redacted].

Group B

[Redacted] people, [redacted] and [redacted] have accepted the allocated offer contingent on resolution of their liens such that they do not have to pay any subrogation. Both live in "made-whole" states where subrogation is not due until the client has been made whole and we have sent letters to both subrogation carriers demanding that they waive their liens. The total amount allocated to these [redacted] is [redacted].

Group C

[Redacted] people, [redacted] and [redacted], have rejected the allocated offer. The total amount allocated to these [redacted] was [redacted].

> If you feel it would be helpful, we could provide Judge Welsh a copy of the Special Master's letter to the clients with the spreadsheet showing each allocation and the bases for it. While the material is confidential and privileged, we hope that she will determine that Judge McQuade's allocation was done fairly.
>
> While we are still working to secure final signed acceptance as well as aggressively pursuing the lien resolution issue on behalf of [redacted] clients, we have essentially reached what we feel is fairly (sic) optimistic point. We recognize there are a few contingent issues on behalf of our clients and we are mindful that is not precisely what Stryker was seeking. I welcome input on direction or next steps from this point.

{¶ 5} The next email, chronologically, that appellees attached to their motion to enforce the settlement agreement was a November 23, 2016 email wherein Zoll & Kranz sent to appellees their proposed Qualified Settlement Fund agreement ("QSF") and proposed Medicare and Non-Medicare releases. On November 28, 2016, appellees replied with their proposed changes to the QSF and to the releases, and stated that if the documents were acceptable, then appellees would need a list of the individuals categorized into Medicare and Non-Medicare. On November 29, 2016, Zoll & Kranz approved the documents and sent to appellees a list of the Medicare status for all settled individuals for purposes of determining the correct release language. Appellants were included on this list. Appellees then requested a list of the actual settlement proceeds

allocated to each person. In response, a second list identifying the settled individuals with their settlement allocations was sent to appellees on November 30, 2016. Again, appellants were included on the list.

{¶ 6} Based on the representations of Zoll & Kranz, appellees prepared the individualized "Confidential Settlement Agreement and Full Release," which appellees claim memorialized the basic settlement terms to which the parties had already agreed. This release was sent to Zoll & Kranz on December 5, 2016, and was attached to appellees' motion to enforce the settlement agreement as Exhibit D. The December 5, 2016 "Confidential Settlement Agreement and Full Release" is the first document that details any of the terms of the settlement agreement. Appellants did not sign the December 5, 2016 "Confidential Settlement Agreement and Full Release."

{¶ 7} Also attached to appellees' motion to enforce the settlement agreement were several email chains discussing appellants' unwillingness to sign the "Confidential Settlement Agreement and Full Release." On January 12, 2017, Zoll & Kranz advised appellees that appellants had raised an issue with the portion of the "Confidential Settlement Agreement and Full Release" language pertaining to Medicare. On January 27, 2017, Zoll & Kranz provided appellees with proposed edits to the release which removed the Medicare provisions, but specifically noted "We do not have client consent but we at least wanted to give you a draft to consider." A further email from Zoll & Kranz on that date reiterated "But please bear in mind I have not yet been able to get the client on board. Very difficult situation, even though he previously had agreed in

writing." On January 30, 2017, Zoll & Kranz contacted appellees to inquire on their response to the proposed changes to the Medicare provisions, but again noted, "We do not yet have client consent yet * * * * We hope that if the client accepts, we can quickly get the final agreement to him for signature." Appellees responded that they agreed to the proposed edits, but to "keep [them] posted." On February 3, 2017, Zoll and Kranz advised appellees that they were sending the finalized release to appellants. The February 3, 2017 "Confidential Settlement Agreement and Full Release" was attached to appellees' motion to enforce the settlement agreement as Exhibit H. Appellants have at all times refused to sign either the December 5, 2016, or the February 3, 2017 "Confidential Settlement Agreement and Full Release." On March 2, 2017, Zoll & Kranz moved to withdraw as counsel.

{¶ 8} In their motion to enforce the settlement agreement, appellees argued that appellants' "words, deeds, and acts establish that the parties had a meeting of the minds as to the essential terms of a settlement agreement," which were acceptance of a settlement in an agreed-upon amount in exchange for a dismissal of appellants' lawsuit with prejudice and a release of their claims. Appellees further argued that appellants' agreement to the terms of the settlement was corroborated by the fact that appellants only contested the Medicare release language in the December 5, 2016 "Confidential Settlement Agreement and Full Release." Thus, appellees concluded that a valid settlement agreement existed that should be enforced by the trial court.

{¶ 9} Appellants responded by filing a pro se motion to vacate the motion to enforce the settlement agreement. In their motion, appellants first argued that Rhonda Aceste never agreed to the settlement, was not aware of any explanatory form regarding the terms of the settlement agreement, never spoke with anyone from Zoll & Kranz's office, and never signed an informed consent letter.

{¶ 10} Additionally, appellants argued that while Frank Aceste signed an "Informed Consent Acknowledgment and Consent to Settle" form on November 2, 2016, he only did so after much pressure from counsel, and while he was mentally incapacitated by pain. Furthermore, appellants contended that Frank was told by counsel that signing the informed consent form was the only way that he could learn the terms of the settlement, and that he would still have a right to decline the settlement once the full terms were disclosed.

{¶ 11} The informed consent form, which was attached as an exhibit to appellants' motion to vacate, stated, in pertinent part:

> I have read and understand the terms of the foregoing letter regarding the aggregate settlement offer being made to 22 clients of Zoll & Kranz, LLC, including myself as well as the allocation of the funds among the clients. I have also spoken to my attorneys and their staff on numerous occasions leading up to this settlement and have been well-informed during these communications.

> I accept the terms outlined in the letter, the *Gross Individual Settlement Amount*, and my settlement allocation of * * *.[1] I understand that this is an estimate and my *Net Individual Settlement Amount* will be the final settlement amount that will be distributed to me after confirmation of the Settlement Criteria listed below, deductions for contingency attorney's fees, litigation costs, as well as any healthcare liens that are deducted from the "*Gross Individual Settlement Amount*."
>
> * * *
>
> I agree to the appointment of Judge Richard B. McQuade to resolve any disputes that may arise in connection with this Settlement, including the allocation of settlement proceeds.

Notably, the "foregoing letter" that was referred to in the informed consent form, and that contained the terms of the settlement agreement, was not included in the documents presented to the trial court in the litigation on the motion to enforce the settlement agreement.

{¶ 12} Finally, appellants argued in their motion to vacate that the final December 5, 2016 "Confidential Settlement Agreement and Full Release" that Frank refused to sign was drastically different from the original informed consent form that he signed on November 2, 2016.

[1] The specific dollar amount of appellant's settlement allocation was included in the informed consent letter, but is omitted here for purposes of confidentiality.

{¶ 13} For all of the above reasons, appellants requested that the court vacate the motion to enforce the settlement agreement, require appellees to provide all medical records and study results relating to Frank, and allow appellants additional time to find suitable counsel.

{¶ 14} Attached to appellants' motion to vacate was, inter alia, an email exchange between Frank Aceste and Zoll & Kranz. The email exchange evidences that counsel was communicating to appellants that appellants could still opt out of the settlement agreement as of late December 2016, well after Zoll & Kranz informed appellees that appellants had agreed to the terms of the settlement. On December 28, 2016, counsel emailed Frank and updated him on the need for an "MSA" (Medicare Medical Savings Account), and suggested hiring a third-party expert to conduct an MSA analysis. If an MSA was needed, it would reduce the amount of the settlement offer that Frank would receive. At the end of the email, counsel posed the following conundrum: "we cannot push forward with an MSA analysis until we know if you are going to accept the offer…and I imagine you don't know if you're accepting the offer until you know how the analysis will turn out." On January 5, 2017, Frank replied, and indicated that he could not make a decision without more information, or without certain assurances. Zoll & Kranz replied on January 6, 2017, that, to clarify, the choice was:

> [W]e either opt in to the current settlement program, or opt out. * * * If you opt out, then our task is to return to fighting your case in court. If Stryker decides to settle the other 19 people without you (their option), then

> they may approach you about settling on other terms (maybe we could ask them to pay the MSA). Then again, when we only have 2 cases left (I have one other person who opted-out months ago), then they may refuse any more settlement talks and we'll prepare for trial over the next 18-24 months.

On January 11, 2017, Frank emailed counsel to inform them that "I have decided to opt out of the settlement agreement and to continue litigation." After a further email from Zoll & Kranz attempting to salvage the settlement agreement, Frank replied on January 12, 2017,

> The MSA, which was brought to light with the final settlement docs, has raised some issues I had not thought of earlier.
>
> This settlement is unacceptable regardless of MSA and I will take my chances.
>
> [Appellees] should have disclosed the full settlement details from the start.

{¶ 15} Also attached to appellants' motion to vacate was a December 13, 2016 email from Zoll & Kranz to Frank's sister, Claire Aceste. The email explained,

> Regarding the original offer including 22 people, but now only 20: Stryker did make their original offer contingent on all 22 people accepting. Back then, first one person said "no" and we called Stryker and asked if we should even continue our work. They said "please continue," which we

took to mean that they would proceed without one person. Then, when I asked for final answers from the last 4 people (Frank was one of those last 4, as I recall), one more person said "no." Everyone else said "yes." Then, Stryker considered whether they wanted to go forward for the 2 months that followed…and very recently came back and said they would go forward with the 20 of 22.

{¶ 16} On June 27, 2017, appellees filed their reply in support of their motion to enforce the settlement. In their reply, appellees reiterated that appellants' words, deeds, and acts as conveyed through their counsel established a meeting of the minds as to the essential terms of the settlement agreement. Appellees argued that this reality is conclusively supported by the signed informed consent letter, in which Frank acknowledged that he understood the terms of the agreement, that he was aware that the gross settlement amount was subject to a series of deductions, and that he accepted the settlement.

{¶ 17} On August 21, 2017, the trial court entered its judgment granting appellees' motion to enforce the settlement agreement. The trial court reasoned that the informed consent form signed by Frank on November 2, 2016, evidenced the satisfaction of the essential terms of contract formation, namely offer, acceptance, consideration, and manifestation of mutual assent. The court further found that there was no evidence in the record to support appellants' claim that Frank's signature on the informed consent form

was the product of mental incapacity or undue influence. Thus, the court held that a binding settlement agreement existed.

{¶ 18} As to Rhonda's claim for loss of consortium, the trial court found that such a claim is a derivative claim that cannot survive if the main claim at issue is dismissed. Thus, the court held that Rhonda's claim was no longer enforceable, and that it was subject to the settlement agreement.

{¶ 19} Finally, the court held that even if the informed consent form did not establish that a settlement agreement existed, an agreement nonetheless materialized when appellants presented a counter-offer to appellees—that included changes to the Medicare language—which appellees accepted when they agreed to the modified language.

B. Appellants Initiate Repeated Challenges to the Trial Court's Judgment Granting the Motion to Enforce the Settlement Agreement

{¶ 20} On September 26, 2017, appellants appealed the trial court's judgment granting the motion to enforce the settlement agreement. On December 6, 2017, this court dismissed appellants' appeal for lack of a final appealable order.

{¶ 21} In the meantime, appellants filed a pro se motion to stay the trial court's August 21, 2017 judgment. In their motion, appellants argued that Frank suffered from diminished mental capacity, as evidenced by an attached listing of the prescription drugs he takes, as well as notes from his psychiatrist relating the treatments and effects Frank has experienced. Appellants further argued that extreme pressure from counsel was placed upon Frank to induce him to sign the informed consent form. Finally, appellants

argued that their prior counsel failed to look into Frank's medical situation, and that appellants have requested, but have not obtained, all of Frank's records held by appellees.

{¶ 22} Notably, attached to appellants' motion to stay was a December 6, 2016 letter from counsel to appellants that accompanied the December 5, 2016 "Confidential Settlement Agreement and Full Release."[2] In the letter, counsel stated that they had been waiting to hear if appellees would go forward with the settlement with only 20 of the 22 claimants agreeing to the settlement, and that counsel was now happy to report that appellees had "agreed to go forward with the settlement." Further, the letter stated that "Stryker has made its revised offer contingent on all 20 people accepting the final terms. If any of the 20 clients does not finalize the settlement, then the offer is withdrawn as to all clients."

{¶ 23} Appellees filed their opposition to appellant's motion to stay, and included a motion to amend the trial court's August 21, 2017 judgment to set forth the parties' respective obligations in light of the court's decision to grant the motion to enforce the settlement agreement. Appellees requested that the court amend its entry to order appellants to execute the "Confidential Settlement Agreement and Full Release" setting forth the terms of the settlement agreement and dismissing the claims with prejudice. While not explicit, appellees referred to the December 5, 2016 "Confidential Settlement Agreement and Full Release" in their motion to amend.

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[2] Later, the record reveals that the December 6, 2016 correspondence also included a "Revised Informed Consent" form, although that form was not attached to appellants' motion to stay.

{¶ 24} Appellants then filed their reply in support of their motion to stay. In the reply, appellants argued that the September 30, 2016 email chain relied upon by appellees in their motion to enforce the settlement agreement did not support the existence of a settlement agreement. Additionally, appellants asserted that there was never oral or written discussion on the issue of dismissal with prejudice, and thus that term was not part of the original settlement offer. Lastly, appellants stated that there was never acceptance of the settlement offer, that they had the understanding that they still had the choice to opt out of the settlement agreement, that the purported counter-offer from appellants was not accepted by appellees because they only agreed to three of the seven proposed changes, and that Frank's mental illness precluded him from being able to enter into the settlement agreement.

{¶ 25} Following our mandate dismissing appellants' appeal for lack of a final appealable order, appellants filed a pro se motion for a temporary restraining order and preliminary injunction. Although not entirely clear, in their motion for a temporary restraining order, appellants appeared to request that the court prohibit any further litigation on appellees' motion to enforce the settlement agreement because the settlement agreement was negotiated on behalf of appellees by an attorney who is not licensed to practice law in Ohio.

{¶ 26} Appellees responded, arguing that appellants' motion was frivolous, and that any litigation appellees participated in, including the motion to enforce the settlement agreement, was properly brought by Ohio-licensed counsel.

{¶ 27} Appellants replied in support of their motion for a temporary restraining order, and also filed an opposition to appellees' October 23, 2017 motion to amend the trial court's August 21, 2017 judgment entry. As to the opposition to the motion to amend, appellants argued that the motion was untimely pursuant to Lucas County Court of Common Pleas Local Rule 5.05(C) and (D).

{¶ 28} On May 16, 2018, the trial court entered its judgment denying appellants' pro se motion to stay the judgment and pro se motion for a temporary restraining order, and granting appellees' motion to amend the August 21, 2017 judgment. The trial court reasoned that appellants' motion to stay was moot by virtue of the fact that the August 21, 2017 judgment was determined not to be a final appealable order. Further, to the extent that appellants argued that the trial court's judgment on the motion to enforce the settlement agreement was erroneous, the trial court found that appellants' arguments were the same as in its opposition to the motion to enforce and the court found them to be unpersuasive. As to appellants' motion for a temporary restraining order, the trial court found the motion to be without merit because all of the litigation in the case had been conducted on behalf of appellees by an attorney licensed in Ohio. Finally, as to appellees' motion to amend the August 21, 2017 judgment entry, the trial court agreed, and in an effort to enter a final appealable order, the trial court ordered:

> Both Plaintiffs and Defendants herein are hereby ordered to execute the Confidential Settlement Agreement and Full Release and Joint Dismissal and undertake their respective obligations contained within such

document(s). Furthermore, the parties are ordered to provide this Court with a stipulated dismissal of all Plaintiffs' claims, with prejudice, by Friday, June 1, 2018, at 4:30 p.m.

The trial court did not specify whether the parties were to execute the December 5, 2016, or the February 3, 2017 "Confidential Settlement Agreement and Full Release."

{¶ 29} Shortly before the deadline, on May 31, 2018, appellants filed a "Proposed Settlement Agreement and Dismissal" with the trial court. In their filing, appellants asserted that they submitted a "General Release and Confidential Settlement Agreement" to appellees, but that appellees have not executed the submitted agreement. Strikingly, in the copy of the agreement that appellants submitted with their motion, appellants included a provision that appellees pay an amount approximately 75 times more than the settlement amount contained in the original proposed settlement agreement.

{¶ 30} On June 1, 2018, appellees filed a motion to dismiss appellants' complaint with prejudice, arguing that appellants have failed to comply with the terms of the trial court's May 16, 2018 judgment, and have attempted to extort appellees to settle their claims.

{¶ 31} Before the trial court could rule on appellees' motion to dismiss, appellants appealed the court's May 16, 2018 judgment entry ordering them to execute the "Confidential Settlement Agreement and Full Release."

{¶ 32} Thereafter, appellants filed their opposition to appellees' motion to dismiss, and a pro se motion for reconsideration of the trial court's August 21, 2017 judgment

granting the motion to enforce the settlement agreement. In their filing, appellants attached, for the first time, the "Revised Informed Consent" form sent to appellants by Zoll & Kranz as part of the December 6, 2016 correspondence. Appellants alleged that the "Revised Informed Consent" form—which they refused to sign—contains fraudulent statements by appellees as well as by Zoll & Kranz. Thus, appellants requested the court to reconsider its granting of appellees' motion to enforce the settlement agreement, and deny appellees' motion to dismiss.

{¶ 33} On July 19, 2018, this court dismissed appellants' appeal of the trial court's May 16, 2018 judgment entry for lack of a final appealable order.

{¶ 34} Subsequently, on November 8, 2018, the trial court entered an order reaffirming that appellants' complaint against appellees has been settled pursuant to the terms of the settlement agreement that was attached to appellees' motion to enforce the settlement agreement. This time the trial court ordered appellants to execute the February 3, 2017 "Confidential Settlement Agreement and Full Release," and warned them that if they failed to do so within 21 days, then the court would grant appellees' motion to dismiss, and would dismiss the complaint with prejudice.

{¶ 35} Appellants appealed the trial court's November 8, 2018 judgment entry, which this court again dismissed for lack of a final appealable order.

{¶ 36} On January 4, 2019, following our dismissal of the most recent appeal, the trial court again ordered appellants to execute the "Confidential Settlement Agreement and Full Release," but did not specify whether they should execute the December 5,

2016, or the February 3, 2017 version. The court notified appellants that if they failed to do so within ten days, appellees' motion to dismiss would be granted, and appellants' complaint would be dismissed with prejudice.

{¶ 37} Ten days later, on January 14, 2019, appellants filed a pro se Civ.R. 60(B) motion for relief from judgment, arguing that Frank underwent a surgery on December 7, 2018, that uncovered new evidence in support of appellants' claims against appellees.

{¶ 38} Appellees opposed the motion, arguing that relief from judgment under Civ.R. 60(B) is inappropriate because no final judgment had been entered. To that end, appellees again requested that the trial court dismiss the complaint with prejudice, noting appellants' flagrant refusal to comply with the trial court's order to execute the "Confidential Settlement Agreement and Full Release."

{¶ 39} Appellants then filed their reply in support of their motion for relief from judgment, in which they argued that they did not give "informed" consent to settle because Zoll & Kranz and appellees allegedly failed to disclose pertinent facts and documents at the time of the original settlement negotiations. Appellants further alleged that the original informed consent form that was executed on November 2, 2016, was materially different than the version of the "Revised Informed Consent" form and "Confidential Settlement Agreement and Full Release" that was presented to them on December 6, 2016.

{¶ 40} On May 1, 2019, the trial court entered its judgment denying appellants' motion for relief from judgment. Moreover, the court advised appellants "for the final

time" that if they do not execute the settlement agreement within 20 days, the court will dismiss the complaint with prejudice upon a proper motion by appellees.

{¶ 41} On May 23, 2019, because appellants continued to refuse to sign the "Confidential Settlement Agreement and Full Release," appellees moved to dismiss the complaint with prejudice.

{¶ 42} On June 5, 2019, appellants filed their opposition, in which they raised a number of issues: (1) Rhonda's claim for loss of consortium is still enforceable; (2) appellees' counsel committed the unauthorized practice of law; (3) appellee Hammill Manufacturing was not a party to the motion to enforce the settlement agreement; (4) appellees are in default for failing to file an answer to appellants' complaint; (5) the September 2, 2016 informed consent letter did not contain the material terms of the settlement agreement, including the dismissal of claims with prejudice; (6) the September 2, 2016 informed consent letter and the revised December 6, 2016 informed consent letter state that if any client rejects the offer, then the offer is withdrawn as to all clients; (7) appellants submitted a proposed settlement and dismissal to appellees on May 30, 2018, which received no response; and (8) Frank's mental illnesses and prescription medications impacted his ability to enter into a settlement agreement.

{¶ 43} Attached to the opposition, for the first time, was the full September 2, 2016 letter from Zoll & Kranz to appellants describing the proposed settlement agreement, and requesting appellants' informed consent to the agreement. The letter conveyed that appellees insisted that the settlement offer be accepted by all 22 clients,

and if any client rejects the offer, then it is withdrawn as to all clients. Also included, for the first time, was a portion of the December 6, 2016 letter from Zoll & Kranz to appellants reporting that two people opted out of the original settlement offer, but counsel continued to negotiate and appellees agreed to settle with the remaining 20 clients. Zoll & Kranz again conveyed that "Stryker has made its revised offer contingent on all 20 people accepting the final terms. If any of the 20 clients does not finalize the settlement, then the offer is withdrawn as to all clients."

{¶ 44} Because appellants did not execute the "Confidential Settlement Agreement and Full Release," the trial court, on July 25, 2019, entered its judgment dismissing appellants' complaints with prejudice.

II. Assignments of Error

{¶ 45} Appellants timely appealed the trial court's July 25, 2019 judgment entry, and filed a pro se appellate brief setting forth 16 assignments of error. Thereafter, appellants were able to retain counsel, and this court permitted counsel to submit a supplemental brief, but this court ordered that counsel was "bound by the assignments of error raised in [appellants'] pro se briefs and may not assert new, additional assignments of error." The 16 assignments of error set forth by appellants are:

> 1. Hundreds of pages of sealed Documents and Exhibits A-M were not provided after the withdrawal of former appellants' attorney's Zoll & Kranz on 3/6/2017.

2. The contents of these Exhibits and Documents, which were in the possession of Zoll & Kranz and were essential to making an informed consent and were not disclosed to appellants before the delayed signing of the informed consent on November 2, 2016.

3. These Exhibits and Documents were belatedly released to Appellants by former Attorney Jim O'Brien, Zoll & Kranz on 6/29/2018.

4. Appellees Stryker et al refused to provide these Exhibits and Documents.

5. The trial court issued a judgment based on untrue allegations presented by Appellees' attorneys without the full understanding of the Appellant Frank A. Aceste mental condition (Exhibit 5 Page 3 of 6 of Plaintiffs' Pro Se Motion to Vacate Stryker's Motion to Enforce Settlement filed 6/16/2017) and (Exhibit A of Appellants' Pro Se Motion for Stay on Judgment filed 10/10/2017) due to an oversight of the trial court's non recognition of proof of Frank's mental incapacity to enter into an agreement due to MDD (Major Depressive Disorder), Anxiety, and the prescription medications' (Effexor, Klonopin, Neurontin, Ambien) side effects on decision making.

6. Frank A. Aceste was coerced into signing the first informed consent, 32 days after the close of the informed consent process, without the presence of his sister (Claire Aceste), acting as advisor due to his

diminished mental capacity. Frank is not capable of making a decision of this magnitude without an advisor as stated by his psychologist and neurologist, Dr. Una Choday MD, PA, records from 2009 through present.

7. The informed consent did not contain a non negotiable offer, acceptance, contractual capacity, or a consideration and was verbally declined and not signed at the Sept. 30, 2016 end of the informed consent process as claimed by Appellee Stryker.

8. Dismissal With Prejudice was never discussed.

9. Frank's wife Appellant Mrs. Rhonda A. Aceste was never even spoken to once by former counsel and did not sign the 1st Informed Consent which Appellee Stryker claims binds Mrs. Rhonda A. Aceste to the supposed settlement agreement.

10. All of Appellants' edits were not agreed to by Appellees and were not just limited to Medicare as Appellees claimed. (only 3 of 7 edits were accepted).

11. In accordance with the Judgment Entry dated 5/17/2018 by Judge Cook, being appealed here, there is included an order to Appellants and Defendants to execute a confidential settlement agreement, full release and joint dismissal and undertake their respective obligations contained within such document(s), however, this did not state which settlement document. Appellants Frank A. Aceste and Rhonda A. Aceste in

compliance with the 5/16/2018 court order, submitted a proposed settlement and dismissal to defendants and the court, filed 5/30/2018, which received no response.

12. Appellant Frank A. Aceste entered into supposed Mediation discussions with Appellee's Stryker (not neutral) Mediator Honorable Diane Welsh, a mediator at JAMS, Inc. arranged by Appellee's attorney Kim Catullo on 2/15/2017. She verbally admitted that not all the edits were accepted as stated by Appellees. In this almost 2 hr. phone call former counsel Jim O'Brien admitted to Mediator Diane Welsh that he told Mr. Frank A. Aceste and his sister Mrs. Claire Aceste (acting as advisor) that the Informed Consent was not final and that we still had the right of refusal to continue litigation. The fact that Appellee Stryker scheduled this mediation is proof that the first informed consent did not contain all the elements necessary for settlement. The contents of the materially different supposed settlement agreement were never disclosed to either Appellants or their former attorney Jim O'Brien before receipt 12/6/2016.

13. Second Revised Informed Consent and First Settlement Agreement and Full Release of 12/6/2016 was not signed and orally rejected and contained fraudulent statements.

14. Second and Third Settlement Agreement and Full Release was not signed and orally rejected and led to mediation phone call with the

Honorable Diane Welsh, Stryker's Appellees Mediator (sic), on 2/15/2017, which resulted in no resolution.

15. Rhonda A. Aceste loss of Consortium is an independent claim that is still enforceable.

16. Unlawful practice of law by Stryker Attorneys Paul Asfendis and Kim Catullo of Gibbons P.C.

III. Analysis

{¶ 46} At the outset, we note that appellants have not separately argued their assignments of error in their appellate brief, but it is clear that the central issue at dispute is whether a settlement agreement existed between the parties as articulated in appellants' seventh and thirteenth assignments of error.

> The standard of review to be applied to a ruling on a motion to enforce a settlement agreement depends primarily on the question presented. If the question is an evidentiary one, this court will not overturn the trial court's finding if there was sufficient evidence to support such finding. However, in a case such as this one where the issue is a question of contract law, reviewing courts must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law.

(Internal citations omitted.) *Turoczy Bonding Co. v. Mitchell*, 2018-Ohio-3173, 118 N.E.3d 439, ¶ 15 (8th Dist.); *see also Continental W. Condominium Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996) ("[B]ecause

the issue is a question of contract law, Ohio appellate courts must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. The standard of review is whether or not the trial court erred.").

{¶ 47} Here, the dispute is not whether the parties breached the terms of the settlement agreement, but rather whether a settlement agreement exists in the first instance. "We review de novo as a question of law a trial court's decision on a motion to enforce settlement of whether a settlement agreement exists as a contract between the parties to terminate a claim by preventing or ending litigation." *Zimmerman v. Bowe*, 6th Dist. Lucas No. L-18-1200, 2019-Ohio-2656, ¶ 11, citing *Marine Max of Ohio, Inc. v. Moore*, 6th Dist. Ottawa No. OT-15-033, 2016-Ohio-3202, ¶ 14; *see also North Side Bank & Trust Co. v. Trinity Aviation, LLC*, 2020-Ohio-1470, --- N.E.3d ---, ¶ 17 (1st Dist.) ("[W]e determine the existence of a contract as a question of law, and our standard of review on questions of law is de novo."); *Alexander Local Sch. Dist. v. Village of Albany*, 2017-Ohio-8704, 101 N.E.3d 21, ¶ 31 (4th Dist.) ("[T]he existence of a contract is a question of law. Therefore, the existence of a contract is a legal conclusion and not a factual allegation."); *Union Sav. Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, 946 N.E.2d 835, ¶ 20 (10th Dist.) ("Courts generally determine the existence of a contract as a matter of law. This court reviews questions of law regarding the existence of a contract de novo."); *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.) ("The existence of a contract is a question of law.").

{¶ 48} Initially, we note that this case would have benefited greatly from a hearing on the motion to enforce the settlement agreement, as is actually required by *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 377, 683 N.E.2d 337 (1997) ("Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment."). However, because neither appellants nor appellees ever requested a hearing in the trial court, and because appellants did not raise the issue as an assignment of error, the issue is waived. *Wilson v. Wilson*, 2018-Ohio-3820, 111 N.E.3d 110, ¶ 21 (6th Dist.) ("If a trial court does not hold the required hearing, an appellant nonetheless waives this error for purposes of appellate review where '[t]he record shows no indication that appellant requested an evidentiary hearing or objected to the nature of the proceedings.'"). Thus, our review will be limited to whether the evidence presented to the trial court on the motion to enforce the settlement agreement establishes that a settlement agreement did in fact exist.

{¶ 49} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.* "The burden of proof for each element is by a preponderance of the evidence on the party

seeking to enforce the settlement agreement." *Zimmerman* at ¶ 9, citing *Savoy Hosp., LLC v. 5839 Monroe St. Assocs. LLC*, 6th Dist. Lucas No. L-14-1144, 2015-Ohio-4879, ¶ 26.

{¶ 50} In this case, we find that the evidence does not support the existence of an offer and acceptance forming an oral settlement agreement.

> "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." 1 Restatement of the Law 2d, Contracts (1981), Section 24. An offer is binding on the offeror when accepted by the offeree. An offer remains open for acceptance by the offeree until it is revoked by the offeror, rejected by the offeree, or until the time for its acceptance has expired. *Id.*, Section 36.
>
> When an offer is rejected, it ceases to exist, and a subsequent attempted acceptance is inoperative to bind the offeror. A rejection is implied in a counteroffer, which is "interpreted as being in effect a statement by the offeree not only that he will enter into the transaction on the terms stated in his counteroffer, but by implication that he will not assent to the terms of the original offer." 1 Williston On Contracts (4 Ed. Lord Ed.1990) 631, Section 5:3. An offeree's power to conclude the bargain through his acceptance of the offer is, therefore, terminated by his making of a counteroffer. Restatement, *supra*, Section 39(2).

Garrison v. Daytonian Hotel, 105 Ohio App.3d 322, 325, 663 N.E.2d 1316 (2d Dist.1995).

{¶ 51} Here, in a December 13, 2016 email to Frank's sister, Zoll & Kranz described the original offer:

> Regarding the original offer including 22 people, but now only 20: Stryker did make their original offer contingent on all 22 people accepting. Back then, first one person said "no" and we called Stryker and asked if we should even continue our work. They said "please continue," which we took to mean that they would proceed without the one person. Then, when I asked for final answers from the last 4 people (Frank was one of those last 4, as I recall), one more person said "no." Everyone else said "yes." Then, Stryker considered whether they wanted to go forward for the 2 months that followed...and very recently came back and said they would go forward with the 20 of 22.

Thus, the original offer required all 22 clients to accept it. This is supported by the September 30, 2016 email, in which Zoll & Kranz relayed that Group A accepted the offer, Group B accepted the offer contingent on the resolution of liens, and Group C rejected the offer. At the end of the email, Zoll & Kranz stated, "We recognize there are a few contingent issues on behalf of our clients and we are mindful *that is not precisely what Stryker was seeking*. I welcome input on direction or next steps from this point." (Emphasis added.) In effect then, the September 30, 2016 email was not an acceptance of

the offer, but rather a counteroffer to settle with less than 22 clients. The counteroffer constituted a rejection of the original offer, and therefore appellants' purported acceptance of the original offer as evidenced by Frank's November 2, 2016 signing of the informed consent form was ineffective to create a binding settlement agreement.[3]

{¶ 52} Furthermore, appellees December 5, 2016 "Confidential Settlement Agreement and Full Release," cannot be construed to be an acceptance of the counteroffer because in the intervening months, the parties engaged in negotiations resulting in changed language reflected in the December 5, 2016 "Confidential Settlement Agreement and Full Release." "A reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer." *Foster v. Ohio State Univ.*, 41 Ohio App.3d 86, 88, 534 N.E.2d 1220 (10th Dist.1987), citing 1 Restatement of the Law 2d, Contracts (1981) 144, Section 59. Therefore, appellees' December 5, 2016 "Confidential Settlement Agreement and Full Release" constituted a further counteroffer, which

[3] The dissent asserts that we err by concluding that appellants' acceptance must have occurred on November 2, 2016, or not at all. The dissent then points to the September 30, 2016 email as evidence that appellants accepted the offer. First, we note that we do not conclude that appellants must have accepted the offer on November 2, 2016, or not at all. Rather, we conclude that the November 2, 2016 signing of the informed consent form is evidence of appellants' purported acceptance of the offer. That purported acceptance, however, was ineffective because the original offer had already been rejected by the September 30, 2016 email. Second, as discussed above, the September 30, 2016 email was not an acceptance of the offer because the offer was contingent on all 22 plaintiffs accepting, and at least two of the plaintiffs did not accept. The fact that Frank, individually, was one of the people that initially indicated acceptance of the offer does not create a binding settlement agreement where contingencies related to the offer were not met.

appellants clearly rejected.[4] Accordingly, we hold that the record does not establish an offer and acceptance forming a binding settlement agreement between the parties.[5]

{¶ 53} Nonetheless, even if we were to find that an offer and acceptance existed, we find that the settlement agreement is unenforceable because the record contains no evidence as to the terms of that agreement.

{¶ 54} "It is preferable that a settlement be memorialized in writing. However, an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract. Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" (Internal citations omitted.) *Kostelnik*, 96 Ohio St.3d 1,

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[4] The dissent argues that the December 5, 2016 "Confidential Settlement Agreement and Full Release" was an acceptance of appellants' counteroffer, but does not address the fact that the release contained additional or different terms.

[5] In reaching the opposite conclusion, the dissent places great emphasis on its characterization that appellants did not contest the existence of a settlement agreement in their response to the motion to enforce the settlement agreement. This characterization, though, does not reflect appellants' arguments, wherein Frank asserted, "In fact, it was my understanding, after numerous discussions and e-mails with my counsel that even if I signed this original [November 2, 2016] informed consent, I would indeed have the choice of accepting the final settlement, if and when, it was offered." From this statement, Frank was clearly indicating that he did not believe there was a settlement agreement, only preliminary negotiations. Furthermore, Frank's understanding that the settlement agreement was not final is supported by the emails from his counsel as of December 2016 informing him that he still had the option "to decline the settlement once the full terms were disclosed." The dissent argues that poor advice or inadequate legal representation is not sufficient to repudiate a settlement agreement, but this argument misses the point that Frank's belief that he could still decline the settlement goes to whether there was a true meeting of the minds.

2002-Ohio-2985, 770 N.E.2d 58, at ¶ 15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E.2d 608 (1st Dist.1947).

{¶ 55} "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Rulli*, 79 Ohio St.3d at 376, 683 N.E.2d 337.

> "A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are."

Id., quoting 1 Corbin on Contracts (Rev. Ed.1993) 525, Section 4.1. While "it is generally within the discretion of the trial judge to promote and encourage settlements to prevent litigation * * * * [a] trial judge cannot, however, force parties into a settlement." *Id.*

{¶ 56} Appellees sought to enforce the settlement agreement under the terms of the December 5, 2016 "Confidential Settlement Agreement and Full Release." It is indisputable that appellants refused to sign the December 5, 2016 "Confidential Settlement Agreement and Full Release." Thus, to have those terms enforced, it was incumbent upon appellees to demonstrate that those terms accurately reflected the oral settlement agreement that was purportedly reached following the mediation sessions.

However, appellees presented no evidence to establish the terms of the oral settlement agreement.

{¶ 57} As evidence of the oral agreement, appellees cited the September 30, 2016 email, wherein Zoll & Kranz relayed,

> Group A
>
> [Redacted] people have accepted the allocated offer. [Redacted] of those have returned a signed form and we are still waiting on the remaining [redacted]. The total amount allocated to these [redacted] was [redacted].
>
> Group B
>
> [Redacted] people, [redacted] and [redacted] have accepted the allocated offer contingent on resolution of their liens such that they do not have to pay any subrogation. Both live in "made-whole" states where subrogation is not due until the client has been made whole and we have sent letters to both subrogation carriers demanding that they waive their liens. The total amount allocated to these [redacted] is [redacted].

On appeal, appellees also point to the "Informed Consent Acknowledgment and Consent to Settle" that appellant signed on November 2, 2016, as evidence that a settlement agreement was reached. Yet, neither the September 30, 2016 email, nor the November 2, 2016 informed consent form set forth any terms of the settlement agreement other than

the amount.[6] Those two documents do not set forth any terms regarding Medicare releases, confidentiality and non-disparagement, appellants' release of any future claims against appellees, or the dismissal of appellants' present claims with prejudice.

{¶ 58} Appellees also cite, as evidence that a settlement agreement existed, the inclusion of Frank Aceste on two lists sent by Zoll & Kranz on November 29 and 30, 2016. While those emails could potentially support the existence of an earlier agreement to settle, they too—like the September 30, 2016 email and the November 2, 2016 informed consent form—do not provide any details on the terms of the settlement agreement. Likewise, the entire email chain that began on November 23, 2016, does not describe any of the terms of the settlement agreement.

{¶ 59} The first, and only, evidence of the specific terms of a settlement agreement is found in the December 5, 2016 "Confidential Settlement Agreement and Full Release." But there is nothing in the record tying those terms to the oral settlement agreement that was allegedly reached following the mediation sessions; there is no separate evidence of the terms of the oral settlement agreement for comparison, there is no affidavit attesting that those were the terms of the oral settlement agreement, and there is no testimony to that effect either. Simply put, appellees cannot rely solely on a rejected written proposal to establish the terms of a prior oral agreement. *See Apple v.*

[6] While the November 2, 2016 informed consent form did reference the terms of the settlement offer as set forth in an attached letter, that letter was not provided to the trial court before it entered its decision on appellees' motion to enforce the settlement agreement.

Hyundai Motor Am., 2d Dist. Montgomery No. 23218, 2010-Ohio-949, ¶ 10 ("Hyundai could not use the written settlement document to impose additional duties on the Apples to which they had not agreed.").

{¶ 60} Because of the lack of any evidence of the terms of the oral settlement agreement, the present case is distinguishable from the cases relied upon by appellees. Illustratively, appellees cite three cases as examples of settlement agreements that were enforced even though they were made outside of the presence of the court and were not reduced to a signed writing.

{¶ 61} In *Turoczy Bonding Co. v. Mitchell*, 2018-Ohio-3173, 118 N.E.3d 439, ¶ 10 (8th Dist.), the plaintiff moved to enforce a settlement agreement, arguing that the parties had agreed to mutually dismiss their claims at their own costs. Attached to the plaintiff's motion was an email exchange in which counsel for the plaintiff stated, "I wanted to confirm what we talked about earlier today. Your client will agree to a mutual dismissal of all claims, with prejudice. Each party to bear their own costs with a broad release. You can draft the release." Counsel for the defendant replied, "Yes * * * provided it's happening ASAP and not after I do a bunch more work." *Id.* at ¶ 7. Several days later, counsel for the plaintiff inquired how the release was coming along, and counsel for the defendant responded that he "was working on it * * * no worries." *Id.* at ¶ 8. However, several days after that, the defendant changed his mind and no longer wished to enter into a settlement agreement. *Id.* The defendant argued that there was no enforceable settlement agreement because he never signed a written agreement, and because the email

communications did not contain any clear and definite terms. *Id.* at ¶ 11. On appeal, the Eighth District affirmed the trial court's decision to enforce the settlement agreement, rejecting the defendant's contention that the terms of the settlement agreement were vague and indefinite. The Eighth District reasoned that the emails "clearly reflect a definite offer and acceptance concerning the parties' agreement to mutually dismiss their claims with prejudice at their own cost. Given the implications of a dismissal of all claims at the parties' own cost, no further action or discussion of additional terms was contemplated or required. In short, no unresolved contingencies remained." *Id.* at ¶ 21.

{¶ 62} In *Cugini & Capoccia Builders, Inc. v. Tolani*, 5th Dist. Delaware No. 15 CAE 10 0086, 2016-Ohio-418, ¶ 11, the plaintiffs filed a motion to enforce a settlement agreement, which the trial court granted. The court ordered, "In accordance with the parties' settlement agreement, judgment is granted in favor of the Plaintiff against the Defendants for $35,000, and the Plaintiff is ordered to complete the designated list of work items." *Id.* at 25. On appeal, the Fifth District affirmed. The Fifth District found that the trial court had reviewed the correspondence between the parties, and that the correspondence showed that the parties agreed that (1) the defendants would pay the plaintiff $35,000, (2) the plaintiff would complete a defined list of work items; and (3) the defendants would deposit the funds into their attorney's trust account, and the funds would be released upon completion of the work. *Id.* at ¶ 19. Thus, the Fifth District concluded that the trial court's order finding the existence of a completed settlement agreement was proven by clear and convincing evidence. *Id.* at ¶ 21.

{¶ 63} Finally, in *Apple v. Hyundai Motor Am.*, 2d Dist. Montgomery No. 23218, 2010-Ohio-949, ¶ 10, the Tenth District affirmed the trial court's decision to grant the defendant's motion to enforce a settlement agreement. In that case, the plaintiffs sued the defendant for breach of Ohio's Lemon Law. The plaintiffs orally proposed to settle the lawsuit in return for a $7,000 payment from the defendant. The defendant accepted the offer, and confirmed acceptance by sending a letter to counsel for the plaintiffs. The defendant then sent the plaintiffs a copy of a standard form of release that it used when settling litigation. *Id.* at ¶ 3. The next day, counsel for the plaintiffs sent the standard release back to the defendant with two of the paragraphs crossed out. Notations in the margin explained that the paragraphs had not been agreed to by the plaintiffs. The paragraphs provided for non-disclosure, and that the plaintiffs would indemnify the defendant for future losses arising from claims by third parties. Counsel for the plaintiffs explained that the settlement would remain intact if those two paragraphs were removed from the release. *Id.* at ¶ 4. Before the defendant responded, the plaintiffs contacted their counsel and explained that they no longer wished to settle because they were continuing to have problems with their car. *Id.* at ¶ 5. Counsel then relayed that the plaintiffs would not abide by the settlement agreement, and the defendant responded by filing a motion to enforce the settlement agreement, while agreeing in the process to delete the two objectionable paragraphs. *Id.* On appeal, the Tenth District reasoned that while the defendant could not use the written settlement document to impose additional duties, the

plaintiffs could not repudiate their performance promised in the oral agreement. *Id.* at ¶ 10.

{¶ 64} *Turoczy*, *Cugini*, and *Apple*, are all distinguishable from the present case, because in each of them, although the settlement agreements were not reduced to a signed writing, evidence was presented establishing enforceable terms of an oral agreement. For the same reasons, appellees reliance on *Santomauro v. Sumss Property Mgmt., LLC*, 2019-Ohio-4335, 134 N.E.3d 1250, ¶ 4 (9th Dist.) (settlement agreement read into the record in open court); *Mathews v. E. Pike Local School Dist. Bd. Of Edn.*, 4th Dist. Pike No. 12CA831, 2013-Ohio-4437, ¶ 11 (the trial court held a hearing and received testimony that Mathews' attorney was authorized to accept the settlement agreement); *Aber v. Vilamoura, Inc.*, 184 Ohio App.3d 658, 2009-Ohio-3364, 922 N.E.2d 236 (9th Dist.) (testimony taken at a hearing on the motion to enforce the settlement agreement from the parties' lawyers); *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58 (examined the evidence surrounding the settlement agreement—which included a letter from one of the defendants confirming the settlement agreement, the releases separately provided by the two defendants, Kostelnik's conduct of not objecting to the terms of the releases and seeking approval of the settlement and distribution of the proceeds from the probate court, and Kostelnik's later action of seeking relief from judgment against only one of the defendants—and concluded that joint and several liability was not one of the terms of the settlement agreement); and *Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972) (hearing was held on the motion to vacate, at which the trial

judge in the original action testified that the parties had come to a firm agreement), is likewise misplaced.

{¶ 65} In contrast, here, the only term of the oral settlement agreement that appellees have established is the amount. There is no evidence that the remainder of the terms contained in the December 5, 2016 "Confidential Settlement Agreement and Full Release" were part of the oral settlement agreement.[7] Thus, even if we held that there was an offer and acceptance of the oral settlement agreement, that agreement is not enforceable because the terms have not been defined. *See Rulli*, 79 Ohio St.3d at 376, 683 N.E.2d 337 ("A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract."). Therefore, we hold that the record does not demonstrate an enforceable oral settlement agreement.

{¶ 66} Finally, we find that Zoll & Kranz's conduct following appellants' rejection of the December 5, 2016 "Confidential Settlement Agreement and Full Release" cannot establish a settlement agreement between the parties. In its decision granting the motion to enforce the settlement agreement, the trial court alternatively found that Zoll & Kranz's raising of an issue regarding the Medicare language of the December 5, 2016 "Confidential Settlement Agreement and Full Release" constituted a counteroffer, which appellees accepted. The trial court's alternative reasoning, however, ignores that in all of its correspondence on this issue, Zoll & Kranz expressly notified appellees that it did not

[7] Notably, despite concluding that the terms of the rejected "Confidential Settlement Agreement and Full Release" should be enforced, the dissent does not point to any evidence linking those terms to the terms of any purported oral settlement agreement.

have client consent: on January 27, 2017, "We do not have client consent but we at least wanted to give you a draft to consider;" also on January 27, 2017, "I have not yet been able to get the client on board;" and on January 30, 2017, "We do not yet have client consent yet." "An attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action." *Morr v. Crouch*, 19 Ohio St.2d 24, 249 N.E.2d 780 (1969), paragraph two of the syllabus. Thus, because appellants never gave consent to settle, Zoll & Kranz's actions following the December 5, 2016 "Confidential Settlement Agreement and Full Release" could not create a binding settlement agreement.[8]

{¶ 67} Therefore, for the above reasons, we hold that the trial court erred when it granted appellees' motion to enforce the December 5, 2016 "Confidential Settlement Agreement and Full Release."

[8] In concluding otherwise, the dissent asserts that although counsel acknowledged that it did not have client consent, it nonetheless was acting at appellants' behest because it presented the Medicare changes requested by appellants. We find two faults with this logic. First, and primarily, the dissent's conclusion reaches the curious result that counsel's actions, openly done without the clients' consent, can nonetheless bind the clients to a settlement agreement. Second, the dissent's conclusion is based on a faulty premise, which is that appellees agreed to all of the changes proposed by appellants. The dissent infers from appellants' opposition to the motion to enforce the settlement agreement that appellants only proposed changes to the Medicare release language. In so doing, the dissent expresses confusion as to why appellants would state that appellees "did not agree to all the changes." In fact, appellants proposed multiple changes to the "Confidential Settlement Agreement and Full Release," including a change to the amount of the settlement, but appellants' counsel only presented the Medicare release language proposals to appellees. (See markups to "Confidential Settlement Agreement and Full Release" attached to appellants' October 10, 2017 pro se motion for stay on judgment.)

{¶ 68} Accordingly, appellant's seventh and thirteenth assignments of error are well-taken.

{¶ 69} Because we hold that the record does not demonstrate an enforceable settlement agreement between the parties, appellants' remaining assignments of error are denied as moot.

IV. Conclusion

{¶ 70} For the foregoing reasons, we find that substantial justice has not been done the party complaining. The August 21, 2017 judgment entry granting appellees' motion to enforce settlement agreement, and the July 25, 2019, judgment entry dismissing the case with prejudice, are hereby reversed and vacated, and this matter 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.
CONCUR. _____
JUDGE

Christine E. Mayle, J.,
DISSENTS AND WRITES
SEPARATELY.

MAYLE, J.

{¶ 71} Respectfully, I dissent. In my view, the record clearly demonstrates that the parties reached a binding settlement agreement. Indeed, Frank Aceste filed a pro se response to appellees' motion in which *he did not contest the existence of a settlement agreement*. Instead, he argued that "the settlement agreement should be voided" because his attorneys supposedly pressured him into it while he was in pain and lacked the capacity to contract, and because his attorneys allegedly provided inadequate advice and poor legal representation during the pendency of his case. The record, however, is devoid of any evidence to support such claims—which, in any event, are not a valid basis to void a binding contract. I would therefore affirm the trial court's August 21, 2017 order to the extent that it enforced the parties' settlement agreement.

{¶ 72} But, I believe that the trial court erred on May 16, 2018, when it amended its August 21, 2017 decision by adding an ambiguous statement of relief. That is—as appellants argue in their eleventh assignment of error—the May 16, 2018 order is ambiguous because the statement of relief does not specify *which version* of the Confidential Settlement Agreement and Full Release and Joint Dismissal must be signed. This ambiguity is problematic because "a court order cannot be enforced in contempt unless the order was 'clear and definite, unambiguous, and not subject to dual interpretations.'" *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 23.

{¶ 73} Because the trial court dismissed the action as a sanction for appellants' contempt of court—i.e., their failure to follow an ambiguous court order— I would find appellants' eleventh assignment of error well taken. I would reverse and remand this matter to the trial court so that it could enter judgment pursuant to the terms of the settlement agreement and dismiss the case with prejudice. That way, both parties—not just appellees—would receive the benefit of the contract they agreed upon.

1. The parties agreed upon the essential elements of a contract.

{¶ 74} The "[e]ssential elements" of any contract, including settlement agreements, include "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual asset and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D. Ohio 1976). Oral settlement agreements are enforceable in Ohio, and the terms of such agreements "may be determined from 'words, deeds, acts, and silence of the parties.'" *Id.* at ¶15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E.2d 698 (1st Dist.1947), paragraph one of the syllabus. As this court has recognized, "[c]omplete clarity in every term of the agreement is unnecessary because all agreements have some degree of indefiniteness and uncertainty." *Advantage Renovations, Inc. v. Maui Sands Resort, Co., LLC,* 6th Dist. Erie No. E-11-040, 2012-Ohio-1866, ¶ 18, citing *Kostelnik* at ¶ 17. Indeed, "seldom, if ever, does the evidence in proof of an oral contract present its

terms in the exact words of offer and acceptance found in formal written contracts. And no such precision is required." *Id.*, quoting *Rutledge* at 86. Courts enforce oral contracts for one simple reason: people must be held to the promises they make. *Id.*

{¶ 75} Acccording to the record, on or about August 11, 2016, a private mediation session between appellees and Zoll & Kranz, legal counsel for 22 different CerviCore and FlexiCore recipients, including Frank Aceste, resulted in a global settlement offer from appellees for a set amount, to be allocated between the 22 claimants, in exchange for their dismissal of claims against the appellees. The mediation was conducted by former federal Magistrate Judge Diane M. Welch. In addition, Zoll & Kranz retained former federal district court Judge Richard B. McQuade as a special master to determine the allocation of the settlement monies amongst the settling claimants.

{¶ 76} On September 30, 2016, Zoll & Kranz sent an email to appellees' counsel—with a copy to Judge Welch—indicating that appellants (among other claimants) "have accepted the allocated offer," and that Zoll & Kranz had received signed forms back from some—but not all—of the claimants that had accepted. This email also states that two of the 22 claimants rejected the offer.

{¶ 77} On November 2, 2016, Frank Aceste signed a form for his attorneys titled "Informed Consent Acknowledgment and Consent to Settle" in which he confirms that he agreed to settle his claim in exchange for his allocation of the settlement proceeds (which is specified by dollar amount in the document). Although this document was intended to be a confidential attorney-client communication (indeed, it is specifically marked as

such), Frank Aceste attached the Informed Consent document to his pro se response to appellees' motion to enforce settlement. He did not, however, attach the accompanying letter from his attorneys (that is referenced in the document) that outlines the terms of the parties' settlement agreement beyond the essential terms that are summarized in the Informed Consent.[9]

{¶ 78} From there, the parties anticipated that there would be two different versions of the written settlement agreement and release—one form would be used for Medicare recipients, and another form would be used for non-Medicare recipients. To that end, on November 29, 2016, Zoll & Kranz emailed appellees' counsel with an attached document that listed all settled individuals and their Medicare status. Frank Aceste is on the list of settled individuals, and he is identified as a Medicare recipient. In response to this email, appellees' counsel asked for another list that includes "the actual allocations to each person."

{¶ 79} The next day, November 30, 2016, Zoll & Kranz sent appellees' counsel another spreadsheet, this one identifying all of the settling claimants and their allocated

[9] Frank did, eventually, submit the accompanying letter from Zoll & Kranz to the trial court, and the letter does, in fact, outline additional details of the parties' settlement agreement. But, as the majority recognizes, that letter was not before the trial court when it ruled on appellees' motion. Although that letter would have made it even easier for the trial court to have found an enforceable settlement agreement, I agree that we should not consider it because it was not before the trial court when it ruled on the motion. Regardless, for reasons discussed, the record before the trial court at the time of appellees' motion fully supports its decision to enforce the parties' settlement agreement.

settlement amount. Once again, the spreadsheet that Zoll & Kranz sent to appellees' counsel identified Frank Aceste as a settled individual.

{¶ 80} On December 5, 2016, appellees' counsel emailed a written "Confidential Settlement Agreement and Full Release" to plaintiffs' counsel. The written agreement identifies Frank and Rhonda Aceste as the "RELEASORS," and the appellees as the "RELEASEES." Most relevant to the current dispute, the written settlement agreement contains four separate paragraphs addressing various implications that Medicare may have on the parties' settlement as a matter of law, including the following:

> 2.12 RELEASORS understand that should the Center for Medicare and Medicaid Services ("CMS") find that a Medicare Set-Aside Allocation should have been established and/or that Medicare's interests were not adequately protected, CMS (Medicare) may require RELEASORS to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. * * *

{¶ 81} As demonstrated through the confidential attorney-client communications that Frank Aceste attached to his pro se response to appellees' motion, this provision regarding a potential Medicare Set-Aside ("MSA") prompted Frank to raise some issues with his attorneys that were, apparently, never discussed before. Specifically, it appears that Frank asked Zoll & Kranz whether he would need an MSA, and for how much, given that two doctors in New York had told him that he will need explant surgery to remove

the medical device. On December 28, 2016, Zoll & Kranz advised him that he "may" need an MSA if he has future medical costs, but that they would have to do an MSA analysis after the settlement was finalized. In response, on January 5, 2017, Frank sent Zoll & Kranz an email that included the following:

> I would think that this should have been done initially before determining the share amount of the settlement. The people who had the device removed are getting more money to cover the medicare payback but I have to set aside money for future medical costs without any monetary consideration to offset the set aside. I cannot make a decision without knowing what the MSA will be. If you are confident that there will be no MSA as previously stated and are willing to move ahead with the settlement on that statement I might be able to reach a decision. I might also consider settling if the amount was adjusted to cover an MSA in your point system.

{¶ 82} On January 6, 2017, Zoll & Kranz responded via email, telling him that the allocation was done by a neutral third party (retired Judge McQuade) and that they could not change his settlement allocation. His attorney also stated:

> [Y]ou are right that I didn't know of the need for the MSA until you brought up that 2 doctors in NY told you that you needed the explant surgery. I had reviewed all your medical records before talking to you and did not see any indication that a neurosurgeon was recommending the

surgery, so I saw no need for the MSA. Once you told me that, though, I realized we do need the independent analysis. Normally I would have seen this situation coming much sooner, but, please remember that we didn't order the medical records from these doctors based on your request that we do not order them.

{¶ 83} Zoll & Kranz went on to explain that if he decides to "opt out" of the settlement, then the defendants could possibly approach him about settling on other terms, but they could also "refuse any more settlement talks and we'll prepare for trial over the next 18-24 months."

{¶ 84} In response, Frank told his attorneys on January 11, 2017, that "I have decided to opt out of the settlement agreement and to continue litigation." His attorney at Zoll & Kranz responded that day, stating that "you had said 'yes' to the settlement when our estimated proceeds were [x].[10] That hasn't changed, right? I mean, if the MSA was zero, you would be signing everything, right?" In that same email, his attorney suggested that they get the MSA done at a certain percentage that he could live with, and that he is "still pushing for zero, and if not zero, then 5% or 8% or 10%...etc." The next day—January 12, 2017—Frank responded by stating:

> The MSA, which was brought to light with the final settlement docs, has raised some issues I had not thought of earlier.

[10] The specific dollar amount of appellants' settlement proceeds has been omitted for confidentiality purposes.

This settlement is unacceptable regardless of MSA and I will take my chances.

Stryker should have disclosed the full settlement details from the start.

Notably, Frank Aceste did not submit any correspondence that he may have had with his attorneys after January 12, 2017.

{¶ 85} Appellees, however, submitted an email from Zoll & Kranz to appellees' counsel that was sent 15 days later—on January 27, 2017—that attached a revised version of the written settlement agreement and release between the parties. The proposed revisions from Zoll & Kranz deleted the four paragraphs that had addressed potential Medicare-related issues, including the possibility of an MSA. In addition, Zoll & Kranz provided a letter stating that they had "provided Frank with an opinion letter that a Medicare Set Aside ("MSA") is not required in his case" and explaining why, in their opinion, an MSA would not be required for Frank Aceste. The letter further advises appellees that Zoll & Kranz would directly hold harmless and indemnify appellees from any potential Medicare-related liability in connection with Frank Aceste.

{¶ 86} On January 30, 2017, appellees' counsel accepted the opinion letter, along with the proposed edits to the written agreement, and proposed the addition of one "clarifying edit" to specify that the Release releases future claims as well as present claims. On February 3, 2017, Zoll & Kranz e-mailed appellees' counsel "a copy of the

final release" that incorporated the proposed edits of January 27, as well as the additional edit that appellees' counsel had sent on January 30.

{¶ 87} Although the Zoll & Kranz email dated January 27, 2017, stated that "[w]e do not have client consent but we at least wanted to give you a draft to consider," and the Zoll & Kranz email dated February 3, 2017, stated "[w]e still have not heard from the client but we are going to overnight this document to him along with a copy of the opinion letter," the record suggests that counsel's negotiations regarding the language of the written settlement agreement and release was, in fact, done at Frank Aceste's behest. That is, Frank Aceste states in his pro se response to appellees' motion:

> I relayed my concerns with respect to the final settlement agreement. The agreement contained language prohibiting the use of Medicare which is my only source of medical coverage. I told them I would be committing fraud if I signed the statement as it was. There were also issues regarding the potential need for a Medicare set aside, which also, were never disclosed or discussed until this point. (Exhibit 3). ***After much back and forth, the partner, requested my edits and finally agreed to present them to Stryker***. The partner relayed that Stryker agreed to the changes, but when the final settlement agreement was sent, it did not reflect all the changes. I was then told that Stryker did not agree to all the changes.

It is unclear why Frank Aceste argued that appellees "did not agree to all the changes" because, from the record before the court, appellees accepted all of the proposed edits that they received from plaintiffs' counsel.[11]

{¶ 88} Regardless, it is abundantly clear from the record that the essential elements of a settlement agreement existed—i.e., the parties had expressed their mutual assent to settle the litigation for an agreed-upon sum of money—thereby forming a valid settlement agreement. That is, the record demonstrates that, at the mediation session before Judge Welch, the appellees made an offer to settle with all 22 claimants for a global sum, which was to be allocated between those 22 claimants by special master Judge McQuade. This offer was accepted by Frank Aceste, as communicated to

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[11] The majority maintains that appellees did not agree to all of Frank's changes, and references a handwritten markup of the Confidential Settlement Agreement and Full Release that Frank sent to his attorneys on January 19, 2017. That communication, however, was not before the trial court when it decided the appellees' motion and, therefore, that document should not be considered by this court. And, we do not know what attorney-client communications transpired between January 19, the date of that document, and January 27, when Zoll & Kranz emailed appellees with proposed edits on the written contract. Regardless, as the majority points out, the major edit that Frank proposed in that January 19 document—other than the deletion of the Medicare-related provisions—was an upward adjustment of his settlement allocation (by more than 75%) because, as he writes in the margin, "I have been told by a physician that device needs to be removed." But, as I discuss further below, Frank had already agreed to accept his settlement allocation—which was an essential element of the parties' agreement—and, as evidenced by the attorney-client communications that Frank *did* attach to his response to appellee's motion, Zoll & Kranz had already properly advised him that "[w]e cannot change the allocation; that's set now."

appellees through his attorneys' emails dated September 30, 2016, November 29, 2016, and November 30, 2016, and as he confirmed in writing to his attorneys on November 2, 2016.

{¶ 89} Moreover, in my view, the back-and-forth communications between Frank Aceste and Zoll & Kranz also confirm that Frank agreed to settle his claims for his allocated share of settlement funds. That is, once the possibility of an MSA was brought to light through the language of the proposed settlement agreement and release, Frank Aceste wanted to undo the settlement because he feared that an MSA would eviscerate his ultimate recovery of settlement proceeds. Indeed, Frank did not correct his attorney when he stated "you had said 'yes' to the settlement when our estimated proceeds were [x]." Instead, Frank responded by stating that "[t]he MSA, which was brought to light with the final settlement docs, has raised some issues I had not thought of earlier." The settlement agreement is not any less enforceable just because Frank Aceste may have believed, in hindsight, that he made a bad deal.

{¶ 90} In fact, Frank Aceste's own representations to the trial court are perhaps the strongest evidence of a binding contract. In his pro se response to appellees' motion, Frank *did not dispute that he accepted the offer* and *did not dispute the existence of a settlement agreement*. Rather, he argued that "the settlement agreement should be voided" and "relay[ed] the reasons [he] believe[d] the settlement should not be enforced." He claimed that he agreed to the settlement "under extreme pressure, while in a depressive state, without my full and complete knowledge of both what I was agreeing to

and the ramifications of the agreement." That is, he argued that the parties' settlement agreement should be voided because (1) he lacked capacity to contract, (2) he was under undue influence from his attorneys to settle, and (3) his attorneys had advised him that he could change his mind after reviewing the written settlement agreement.[12] The trial court properly rejected these arguments.

{¶ 91} First, the record is devoid of any evidence—let alone clear and convincing evidence—that Frank Aceste lacked the capacity to contract. *In re Estate of Flowers*, 2017-Ohio-1310, 88 N.E.3d 539, ¶ 84 (6th Dist.) (lack of mental capacity must be established by clear and convincing evidence). Although Frank claimed that he did not understand that he was entering a binding contract, there is no evidence that any mental illness affected his mind to such a degree that he was *incapable* of understanding that he was entering a binding contract. *Miller v. Miller*, 9th Dist. Summit No. 21770, 2004-Ohio-1989, ¶ 16 (a party lacks capacity to contract where his mind was so affected "as to destroy [his] ability to understand the nature of the act in which he [wa]s engaged, its scope and effect or its nature and consequences.").

[12] Frank also argued in his pro se response that his wife and co-plaintiff, Rhonda Aceste, "was never involved in any of the discussions nor agreed to any part of the settlement." Rhonda, however, did not sign the pro se filing, and Frank could not make any arguments on Rhonda's behalf because he is not a licensed attorney. Regardless, Rhonda's claim is derivative of Frank's claims and, accordingly, could not stand on its own after Frank settled his claims with appellees. *Wagner v. Westfield Cos.*, 6th Dist. Fulton No. F-02-013, 2002-Ohio-6367, ¶ 21 (if the main claim is dismissed, "the derivative claim fails as well.") It is notable, however, that while Frank argued that *Rhonda* did not agree to the settlement, he never argued that *he* did not agree to the settlement.

{¶ 92} Second, regarding Frank's claims of undue influence, "[t]o avoid a contract on the basis of duress, a party must prove coercion *by the other party to the contract*. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." (Emphasis added.) *Patton v. Wood Cty Humane Soc.*, 157 Ohio App.3d 670, 2003-Ohio-5200, 798 N.E.3d 676, ¶ 27 (6th Dist.), quoting *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 551 N.E.2d 1249 (1990), syllabus. Frank did not allege any undue influence by appellees.

{¶ 93} Finally, Frank argued that his attorneys advised him that "[he] would still have a right to decline the settlement once the full terms were disclosed." That, however, is not a valid basis to unravel an otherwise valid settlement agreement. "In spite of the ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make." *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 17. The majority maintains that "Frank's belief that he could still decline the settlement goes to whether there was a true meeting of the minds." To the contrary,

> [i]f one person does not intend to be bound by an agreement he has made, and the other person is not aware of that lack of intention, there is no 'meeting of the minds' as a layman might understand the phrase. Nevertheless, unless there is a mutual mistake or some like occurrence, the law is only interested in objective manifestations of intent. * * * Expressions of assent are generally sufficient to show a meeting of the

minds. Thus, one person's unexpressed reservation does not prevent there being a meeting of the minds as that term is recognized in law.

Rudd v. Online Res., Inc., 2d Dist. Montgomery No. 17500, 1999 WL 397351, *5 (June 18, 1999), citing *Nilavar v. Osborn*, 127 Ohio App.3d 1, 711 N.E.2d 726 (2d Dist.1998). Indeed, as this court has recognized, "a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real, secret intention differs therefrom, it is entirely immaterial." *Bulger v. Bulkowski*, 6th Dist. Sandusky No. S-83-3, 1983 WL 6799, *2 (May 20, 1983), quoting *Perlmuter Printing Co.* 436 F.Supp. at 415. Here, because Frank's outward manifestations are sufficient to show a meeting of the minds, there is a binding agreement even though Frank may have believed—for whatever reason—that he could change his mind later.

{¶ 94} Moreover, even if it is assumed—for purposes of argument only—that Frank received poor advice or inadequate legal representation from his attorneys, "[a] party cannot attempt to repudiate a settlement agreement by simply asserting a change of heart or an assertion of poor legal advice." *Kerwin v. Kerwin*, 6th Dist. Lucas No. L-04-1002, 2004-Ohio-4676, ¶ 7. Indeed, much of Frank Aceste's pro se response to appellees' motion is devoted to complaints about his attorneys. For example, he argues the settlement agreement should be undone because "[n]o discovery was ever requested," "[c]ounsel did not research my case at all," and because his attorneys failed to solicit "all of [his] doctors * * * for information and records about my condition." Any such issues

between Frank and his attorneys have no bearing on the enforceability of the parties' settlement agreement.

{¶ 95} For all these reasons, I believe that the essential elements of a settlement agreement exists between the parties.

2. The majority's view of offer and acceptance is too narrow.

{¶ 96} The majority, however, finds that the evidence does not support the existence of an offer and acceptance because (1) the original offer required all 22 claimants to accept and two claimants rejected the offer, which means that the Zoll & Kranz email on September 30, 2016, was actually a counteroffer to settle with less than all claimants, which rejected the initial offer, and (2) the December 5, 2016 email from appellees' counsel, attaching the initial draft of the Confidential Settlement Agreement and Full Release, constituted yet another counteroffer that the appellants rejected. I disagree.

{¶ 97} First, it is true that appellees' initial settlement offer required all 22 claimants to accept, and the September 30, 2016 email from plaintiffs' counsel stated that 20 claimants (including appellants) accepted the offer but two claimants had rejected. The majority reasons that the September 30 email was actually a counteroffer that "constituted a rejection of the original offer, and therefore appellants' purported acceptance of the original offer as evidenced by Frank's November 2, 2016 signing of the informed consent form was ineffective to create a binding settlement agreement."

{¶ 98} But even if the September 30, 2016 email from plaintiffs' counsel was a counteroffer that rejected appellees' original offer, it was necessarily a counteroffer from the 20 claimants that wished to dismiss their claims for their allocated share of the settlement funds—*including Frank Aceste*. And appellees accepted that counteroffer from Frank, as demonstrated by their counsel's December 5, 2016 email that forwarded a draft agreement and release to memorialize the parties' settlement. *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 16 (a contract may be determined from the "words, deeds, acts, and silence of the parties"). Indeed, as plaintiffs' counsel confirmed in an email to Frank's sister on December 13, 2016, appellees "said they would go forward with the 20 of 22"—i.e., they accepted Frank's counteroffer.

{¶ 99} In my view, the majority errs by focusing on the date that Frank signed the Informed Consent document as if that document is the only evidence that Frank accepted appellees' settlement offer—which, in turn, leads the majority to conclude that Frank's acceptance must have occurred on November 2, 2016, or not at all. While that document is certainly the clearest indication of Frank's acceptance—it states "I accept," specifies the amount of his settlement allocation, and includes his signature at the bottom—it is not the only evidence that Frank agreed to accept his allocated share to dismiss his case.[13] As

[13] For these same reasons, appellants' reliance upon an unexecuted "Revised" Informed Consent document, dated December 6, 2016, is misplaced. It is unclear when, or why, Zoll & Kranz sent that document to appellants for their signature, and that document was not before the trial court when it ruled on the motion to enforce settlement agreement. Regardless, as explained above, there is still a great deal of evidence in the record that

this court has recognized, such formal precision in terms of "I offer" and "I accept" is not required when dealing with oral contracts because "seldom, if ever, does the evidence in proof of an oral contract present its terms in the exact words of offer and acceptance found in formal written contracts." *Advantage Renovations,* 6th Dist. Erie No. E-11-040, 2012-Ohio-1866, at ¶ 18, quoting *Rutledge,* 81 Ohio App. at 86, 75 N.E.2d 608.

{¶ 100} Here, the September 30, 2016 email from plaintiffs' counsel indicated that 20 claimants "*have accepted* the allocated offer," but they were still waiting for signed forms from a few of the claimants—which demonstrates that Frank Aceste had already accepted the offer as of September 30, and then subsequently confirmed his acceptance by signing the Informed Consent for his attorneys.[14] Frank's acceptance is further confirmed through his back-and-forth discussions with his attorneys—which, in my view, show that he did, in fact, accept the allocated offer but had a change of heart after realizing that his case could require an MSA. Indeed, the Medicare-related provisions of the written agreement were the only terms of the written settlement agreement that he disputed in those privileged communications with his attorneys—further demonstrating his prior acceptance of the essential elements of the contract. Finally—and most crucially, in my opinion—Frank Aceste recognizes the existence of a settlement

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demonstrates Frank's acceptance of appellees' offer to settle—including but not limited to Frank Aceste's own statements to the trial court.

[14] If the September 30 email is more properly viewed as a counteroffer, then Frank Aceste confirmed his *counteroffer* to settle for his allocated share when he signed the Informed Consent on November 2.

agreement, repeatedly, and in his own words, throughout his pro se response to appellees' motion. The majority ignores those admissions, but in my view, those admissions demonstrate that the essential elements of the settlement agreement were undisputed.

{¶ 101} I also disagree with the majority's view that the December 5, 2016 email from appellees' counsel, attaching the initial draft of the Confidential Settlement Agreement and Full Release, "constituted yet another counteroffer that the appellants rejected." To the contrary, "[t]he mere fact that parties who have reached a verbal agreement have agreed to reduce their contract to writing does not prevent the agreement from being a contract if the writing is not made." *Santomauro v. Sumss Prop. Mgmt.*, 2019-Ohio-4335, 134 N.E.3d 1250, ¶ 37 (9th Dist.), quoting *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15. "It is only where the parties intend that there will be no contract until the agreement is fully reduced to writing and executed that no settlement exists unless the final, written settlement agreement is signed by all of the parties." *Id.*, quoting *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel*, 2019-Ohio-3756, 142 N.E.3d 1267, ¶ 69 (8th Dist.), *appeal allowed by*, 157 Ohio St.3d 1535, 2020-Ohio-122, 137 N.E.3d 1207 (2020). Here, there is no evidence in the record to suggest that the parties intended that there would be no contract until the anticipated written document was formally executed. And, as discussed further below, the record demonstrates that the parties agreed to all of the terms of that written contract other than the Medicare-related provisions.

3. The parties agreed to the terms of the Confidential Settlement Agreement and Full Release, minus the Medicare-related provisions.

{¶ 102} I disagree with the majority's position that appellants "rejected" the Confidential Settlement Agreement and Full Release. In my view, the back-and-forth correspondence in the record—including the correspondence between Frank Aceste and his attorneys at Zoll & Kranz, as well as the correspondence between Zoll & Kranz and appellees—shows that the parties agreed upon all of the terms of the Confidential Settlement Agreement and Full Release except the Medicare-related provisions.

{¶ 103} This case is similar to *Apple v. Hyundai Motor America*, 2d Dist. Montgomery No. 23218, 2010-Ohio-949. In that case, the Apples sued Hyundai for violations of the Ohio Lemon Law, R.C. 1345.72, after experiencing numerous problems with their vehicle. The Apples orally agreed to settle their lawsuit in return for a $7,021.19 payment from Hyundai. Counsel for Hyundai then sent counsel for the Apples "a copy of a standard form of release that Hyundai has used when settling litigation." *Id.* at ¶ 3.

{¶ 104} Regarding the terms of parties' agreement, the Apples took issue with only two provisions—one that provided for non-disclosure, and one that provided for indemnification of third-party claims. *Id.* at ¶ 4. Counsel for the Apples relayed these concerns to Hyundai. Before Hyundai responded, the Apples had a change of heart and decided they no longer wished to settle. Hyundai filed a motion to enforce settlement agreement, seeking to enforce the written contract minus the two provisions to which the

Apples had objected. The trial court enforced the settlement, and that decision was affirmed on appeal, wherein the appellate court stated:

> Hyundai could not use the written settlement document to impose additional duties on the Apples to which they had not agreed. However, neither could the Apples repudiate their performance promised in the oral agreement when Hyundai agreed to remove the offending two paragraphs from the written settlement document, restoring the status quo ante. Absent the two paragraphs to which the Apples did not agree, the oral settlement agreement remains enforceable. *Id.* at ¶ 10.

{¶ 105} Similarly here, Frank never disputed any provision of the written contract other than the Medicare-related provisions. Ultimately, appellees agreed to delete those provisions, including the provision regarding an MSA. Like the agreement at issue in *Apple*, the written settlement agreement remains enforceable—minus those Medicare-related provisions. As the trial court properly concluded, Frank signaled his acceptance of the remainder of the written provisions through his "words, deeds, acts, and silence." *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 15.

{¶ 106} The majority, however, wholly discards the trial court's interpretation because Zoll & Kranz stated that they "do not have client consent" when they proposed edits to the settlement agreement that deleted the Medicare-related provisions but left the rest of the agreement untouched. But despite counsel's statements in those emails, there is still sufficient evidence in the record to support the trial court's conclusion that Zoll &

Kranz *did* act with Frank Aceste's authority when it sent those edits. Most importantly, Frank Aceste makes an express representation in his pro se response to appellees' motion that he relayed his "concerns" with the language in the written agreement—which was limited to the Medicare provisions—to his attorneys, and "[a]fter much back and forth, the partner, requested my edits and finally agreed to present them to Stryker." Notably, Frank made those representations after reading appellees' motion—which attaches and relies upon those edits that Zoll & Kranz actually presented to Stryker—and Frank did not claim that his attorneys lacked the authority to present those edits to Stryker on his behalf.

{¶ 107} Moreover, this statement is largely consistent with the back-and-forth attorney-client communications that Frank attached to his pro se filing. Although Frank did not attach any attorney-client communications after January 12, 2017—when he told his attorneys that the "settlement is unacceptable"—the record contains sufficient evidence that subsequent attorney-client communications occurred (although not submitted for review) and likely culminated in the Zoll & Kranz opinion letter regarding an MSA and corresponding revisions to the settlement agreement that deleted the Medicare provisions. Again, *Frank's own words* are the strongest evidence of this.

{¶ 108} It is true that the trial court should have held a hearing on the appellees' motion. Not only was a hearing required under *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 683 N.E.2d 337 (1997), a hearing would have placed the trial court in a much better position to make the required credibility determinations regarding what Frank authorized (or

didn't authorize) Zoll & Kranz to do on his behalf. Unfortunately, neither appellants nor appellees requested a hearing, and appellants did not raise the trial court's failure to hold a hearing as an assignment of error on appeal. In these situations, appellate courts review the evidentiary record that was before the trial court when it ruled on the motion to enforce settlement agreement. *See, e.g.*, *Turoczy Bonding Co. v. Mitchell*, 2018-Ohio-3173, 118 N.E.3d 439 (8th Dist.) (where there was no hearing and no assignment of error relating to the lack of a hearing, the appellate court reviewed the record before the trial court—consisting of various correspondence between the parties—to determine whether the trial court erred by granting motion to enforce settlement); *Cugini & Capoccia Builders, Inc. v. Tolani*, 5th Dist. Delaware No. 15 CAE 10 0086, 2016-Ohio-418 (same).

{¶ 109} In this case, although no hearing was held, the record nonetheless contains express representations from Frank Aceste to the trial court—in which he expressly recognizes the existence of a settlement agreement, and states that his attorney presented "his edits" on the written document to appellees. In my view, although there are some inconsistencies in the evidence before the trial court (which should have been addressed at a hearing), Frank's own admissions to the trial court are more than sufficient to support the trial court's conclusion that counsel's actions were done with Frank Aceste's consent and, consequently, there is a binding settlement agreement between the parties. Indeed, all of Frank's objective and outward manifestations of assent—i.e., his words, acts, deeds, and silence (as I discuss at length above)—demonstrate that the parties had reached a settlement agreement, which Frank wished to "void" because he wanted more

money given the possibility of an MSA. In other words, this is nothing more than a case of "buyer's remorse." Because the record before the trial court firmly demonstrates the existence of a binding settlement agreement, I would affirm the trial court's enforcement of that agreement.

4. The May 16, 2018 order is ambiguous and cannot be enforced in contempt.

{¶ 110} Although the trial court enforced the parties' settlement agreement on August 21, 2017, its order did not include a statement of relief or dismiss the appellants' claims. For those reasons, this court dismissed the appellants' initial appeal on December 6, 2017, so that the trial court could add a statement of relief that "set forth the parties' rights and obligations under the agreement" and dismiss the appellants' claims with prejudice.

{¶ 111} The trial court, however, did not do that. Instead, on May 16, 2018, the trial court amended its August 21, 2017 order by adding a statement of relief that ordered the parties to execute the "Confidential Settlement Agreement and Full Release and Joint Dismissal," to undertake their respective obligations in that document, and provide the court with a stipulated dismissal with prejudice by June 1, 2018. The order did not clearly and unambiguously state which version of the settlement agreement should be executed.

{¶ 112} The appellants then filed a second appeal, which we dismissed on July 19, 2018, for lack of a final, appealable order. Thereafter, on November 8, 2018, the trial

court ordered the parties to "execute the Confidential Settlement Agreement and Full Release and Joint Dismissal" within 21 days.

{¶ 113} The appellants filed a third appeal instead. The third appeal was dismissed on December 20, 2018, for lack of a final, appealable order.

{¶ 114} Thereafter, on January 4, 2019, the trial court ordered the parties to execute the Confidential Settlement Agreement and Full Release and Joint Dismissal within ten days. When appellants did not sign, the trial court issued an order on May 1, 2019, stating "this is Plaintiffs [sic] final advisement: If they do not execute the settlement agreement with Defendants within twenty days of the filing of this judgment entry with the clerk of courts, the Court *will* dismiss this case upon a proper motion by Defendants." The appellants did not sign, appellees filed a motion to dismiss, and the trial court dismissed appellants' claims, with prejudice, on July 25, 2019.

{¶ 115} In my view, this chain of events is problematic for several reasons. First and foremost, as appellants argue in their eleventh assignment of error, the May 16, 2018 order—which amended the August 21, 2017 order that enforced the parties' settlement agreement—is ambiguous because the statement of relief does not specify which version of the Confidential Settlement Agreement and Full Release and Joint Dismissal must be signed. "[A] court order cannot be enforced in contempt unless the order was 'clear and definite, unambiguous, and not subject to dual interpretations.'" *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 23. Because the trial court's order was ambiguous, it could not be enforced in contempt.

{¶ 116} Moreover, even if the trial court had specified which version of the Confidential Settlement Agreement and Full Release and Joint Dismissal must be signed, I would still have serious concerns regarding an order that merely compels the parties to sign the settlement agreement. In that situation, a party that disputes the existence or terms of the settlement agreement is forced to either (1) obey the order by signing the settlement agreement, thereby waiving its right to appeal the existence or terms of that agreement, or (2) disobey the order, thereby suffering the imposition of sanctions (here, dismissal with prejudice) or an order of contempt.

{¶ 117} In my view, trial courts should enforce settlement agreements by entering judgment that incorporates the terms of the settlement agreement. Not only does such an order preserve the parties' appellate rights, it also avoids any guesswork on appeal regarding what, exactly, the trial court found the parties had agreed upon. *See Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 39, 285 N.E.2d 324 (1972), quoting *Herndon v. Herndon*, 183 S.E.2d 386, 388 (Ga.1971) (when enforcing a settlement agreement between the parties, "it is the duty of the court to make the agreement the judgment of the court and thereby terminate the litigation.").

{¶ 118} For example, in *Campbell v. Buzzelli*, 9th Dist. Medina No. 07CA0048-M, 2008-Ohio-425, years after the parties' divorce, Buzzelli filed a motion to modify parental rights and responsibilities, child support, and tax exemptions. The parties settled their dispute at a hearing before the court, and agreed to draft an entry representing the parties' agreement. When Campbell refused to sign the entry, Buzzelli filed a motion to

enforce settlement agreement. The trial court ordered the parties to submit an agreed entry by January 19, 2017, or all pending motions would be dismissed. The parties never filed an agreed entry, and the trial court dismissed all pending motions, including the motion to enforce settlement agreement.

{¶ 119} The appellate court found this was error. It concluded that the trial court should have incorporated the parties' settlement agreement into a judgment of the court. The court stated "[w]hile we understand the trial court's frustration with the parties' inability to file an agreed upon entry, such inaction by the parties does not grant the trial court authority to ignore their settlement agreement." *Id.* at ¶ 11.

{¶ 120} Similarly here, I certainly understand the trial court's frustration with appellants. By all accounts, the trial court was very accommodating and bent over backwards to give appellants enough time and leeway to resolve this dispute themselves. But in doing so, the trial court never issued a final, appealable order that actually enforced the parties' settlement agreement and preserved the rights and obligations of both parties under that agreement.

{¶ 121} For all of these reasons, I respectfully dissent. I would affirm the trial court's August 21, 2017 order to the extent that it concluded that the parties have a binding settlement agreement. I would, however, find appellants' eleventh assignment of error well taken, and reverse and remand this matter to the trial court to issue a final judgment pursuant to the parties' settlement agreement that includes dismissal with prejudice.