Is my oral agreement enforceable?

July 14, 2021

Promissory Estoppel

Faith Lawley, LLC v. McKay, 12th Dist. Warren No. CA2020-08-052, 2021-Ohio-2156

In this appeal, the Twelfth Appellate District affirmed the trial court's decision, agreeing that there was no evidence the plaintiffs ever made a clear and unambiguous promise on which the defendant could have reasonably relied to support a promissory estoppel claim.

The Bullet Point: Under the equitable doctrine of promissory estoppel, Ohio courts allow parties to rely on promises made even in the absence of a formal agreement. In order to succeed on a claim for promissory estoppel, a party must prove that: "(1) a clear and unambiguous promise was made; (2) upon which it would be reasonable and foreseeable for the party to rely; (3) actual reliance on the promise; and (4) the party was injured as a result of the reliance." The first element serves as a gatekeeping issue that can be particularly difficult for parties to overcome.

In this case, the defendant asserted a counterclaim of promissory estoppel, arguing that the plaintiffs represented that they would waive a deadline under the contract while the parties attempted to negotiate a new agreement. However, the defendant failed to point to any specific statement that clearly and unambiguously indicated that the plaintiffs promised to waive the contractual deadline. Rather, even in the defendant's own affidavit, the statements purported to be promises only vaguely implied that the plaintiffs were aware the defendant intended to negotiate a new agreement. As there was no evidence that the plaintiffs ever made a clear and unambiguous promise, the court determined that there was nothing on which the defendant could have reasonably relied.

Waiver of Right to Arbitrate

Paradie v. Turning Point Builders, Inc., 11th Dist. Lake No. 2020-L-046, 2021-Ohio-2178

In this appeal, the Eleventh Appellate District reversed and remanded the trial court's decision, holding that the filing of an answer and counterclaim did not waive the defendants' right to compel arbitration as they filed a motion to stay pending arbitration on the same day.

The Bullet Point: Ohio public policy favors arbitration, and the courts utilize a strong presumption in its favor. Nevertheless, the right to arbitration can be waived if 1) the party waiving the right to arbitration knew of the existing right, and 2) said party acted inconsistently with its right to arbitration. That being said, waiver should not be "lightly inferred." Rather, Ohio courts apply a totality of the circumstances test to determine whether a party acted inconsistently with its right to arbitration. Under said test, courts

may consider the following circumstances: "(1) any delay in the requesting party's demand to arbitrate by filing a motion to stay the proceedings pending arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the proceeding, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings pending arbitration; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts."

In this case, the defendants filed a motion to stay pending arbitration on the same day as filing an answer, which set forth the affirmative defense of an arbitration clause. Although the motion to stay was stricken from the record as being procedurally deficient, the defendants subsequently refiled their motion and filed counterclaims on the same day, stating that they needed to "prepare for the possibility that the arbitration provision may not be enforced or that the case will not be stayed." The trial court denied the motion to stay, finding that the defendants waived their right to arbitration due to filing an answer and counterclaims, as this recognized the trial court's authority to determine the outcome of the claims. The appellate court disagreed, holding that under the totality of the circumstances, waiver did not apply. In making such a determination, the court emphasized that there was no delay between the defendants filing their initial motion to stay pending arbitration and filing their answer, which contained the affirmative defense of the arbitration clause. Further, although the defendants filed counterclaims, they provided a justifiable basis for doing so. The court noted that although the defendants might have been preparing an alternate plan if the stay was not granted, this did not, alone, mean they waived the right to arbitrate. Moreover, the plaintiff was not prejudiced in any way, as he was immediately put on notice that the defendants intended to pursue arbitration and he failed to file a dispositive motion on the issue. Lastly, the parties had not yet conducted discovery or held depositions. Consequently, the defendants did not act inconsistently with their right to compel arbitration and waiver did not apply.

Oral Agreement

Erie Capital, LLC v. Barber, 6th Dist. Erie No. E-20-010, 2021-Ohio-2258

In this appeal, the Sixth Appellate District affirmed the trial court's decision, finding that the oral settlement agreement was unenforceable as the parties did not have a meeting of the minds as to the essential terms of the settlement.

The Bullet Point: An agreement does not have to be in writing to be enforceable. Rather, whether written or oral, an agreement is sufficiently certain for a court to enforce if it provides a basis for determining the existence of a breach and for giving an appropriate remedy. Further, a meeting of the minds as to the essential terms of the contract is a requirement to enforcing said agreement.

At issue in this matter was a contested partition action between brothers who owned multiple parcels of land as tenants in common. The parties engaged in a recorded settlement hearing to resolve their disputes over the division of the various parcels and ownership of access roads. At the conclusion of the hearing, the magistrate outlined the terms of the parties' agreement, specifying that "the deeds and documents would be filed as promptly as possible." The parties then verified that the magistrate's synopsis accurately reflected the terms of their agreement, that no changes needed to be made, and

that “this is the agreement that [they] wanted to resolve the case.” No written agreement was provided to the court, and, believing the case was settled, the court dismissed the litigation with prejudice. Subsequently, the defendants jointly moved to enforce the agreement reached at the settlement hearing. Specifically, the defendants argued that the material terms of the agreement were clear and that they had obtained an access road easement over the plaintiff’s parcel. Both the trial and appellate courts disagreed, finding that the agreement was not enforceable as the essential terms were not sufficiently clear. As the appellate court explained, “an oral settlement agreement may be enforceable so long as 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.’” Here, the agreement stated that the parties would file deeds as promptly as possible, but it did not specify what type of deeds would be filed. The appellate court noted that the type of deeds to be filed was an essential term of partitioning the parcels. Likewise, whether the plaintiff enjoyed exclusive access to his parcel or whether the defendants had a right to traverse over his parcel was fundamental to the partition action. Despite being an essential term, the settlement hearing record was devoid of any discussion whatsoever about an access road easement existing or being created over the plaintiff’s parcel. As the parties did not reach mutual assent as to the essential terms of the agreement; namely, the type of deeds to be filed and the existence of an access road easement, the parties did not reach an enforceable oral settlement agreement.

Vicarious Liability

Weiler v. Knox Community Hosp., 5th Dist. Knox No. 20CA000018, 2021-Ohio-2098

In this appeal, the Fifth Appellate District affirmed the trial court’s decision, agreeing that because the plaintiff’s partial settlement of its medical malpractice claim included a release of the employee, the plaintiff’s vicarious liability claim against the employer was extinguished.

The Bullet Point: Under the doctrine of respondeat superior, an employer or principal is vicariously liable for the torts of its employees or agents. Vicarious liability depends upon the existence of control by a principal (or master) over an agent (or servant). As the Ohio Supreme Court has explained, “for the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied.” Stated differently, until the injured party receives full satisfaction of his claim, a judgment against either the principal or the agent does not bar pursuing an action or obtaining a judgment against the other. Fundamental to the doctrine of respondeat superior is that the principal is vicariously liable only when the agent can be held directly liable. This is because the liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability of the agent, there can be no liability of the principal. Simply stated, once the primary liability is extinguished, either by settlement and release or by a favorable judgment, the secondary liability is necessarily extinguished. Accordingly, when there is a release of the agent, even a partial settlement with the agent bars a claim against the principal. This is because the principal’s right to indemnity from the agent, by way of subrogation to the plaintiff’s claims, is the crucial factor in releasing the principal when the agent is released.

Related people

Stephanie Hand-Cannane
James W. Sandy

[Cite as *Faith Lawley, L.L.C. v. McKay*, 2021-Ohio-2156.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

FAITH LAWLEY, LLC, et al.,	:	
Appellees,	:	CASE NO. CA2020-08-052
	:	
- vs -	:	O P I N I O N
		6/28/2021
JOHN MCKAY,	:	
Appellant.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 18CV91051

Robbins, Kelly, Patterson & Tucker, LPA, Richard O. Hamilton, Jr., Robert M. Ernst, 7 West Seventh Street, Suite 1400, Cincinnati, Ohio 45202, for appellees

Gottesman & Associates, LLC, Zachary Gottesman, 404 East 12th Street, First Floor, Cincinnati, Ohio 45202 and Crehan & Thumann, LLC, Lynne M. Longtin, 404 East 12th Street, Second Floor, Cincinnati, Ohio 45202, for appellant

BYRNE, J.

{¶1} Defendant-appellant, John McKay, appeals from the summary judgment decision of the Warren County Court of Common Pleas. The trial court dismissed McKay's counterclaims against plaintiffs-appellees, Eric Novicki, Christopher Lawley, and Faith Lawley, LLC ("the plaintiffs"), and granted the plaintiffs' requested declaratory judgment. For the reasons set forth below, we agree that McKay failed to identify any disputed issues

of material fact precluding summary judgment. Accordingly, we affirm the trial court's decision.[1]

I. Factual Background

{¶2} McKay purchased an investment unit of Granite Creek Flexcap I, L.P. ("Granite Creek"), a small business investment hedge fund. McKay's funding commitment for the unit was $1.5 million. From June 2006 through the first quarter of 2010, McKay funded the unit with $900,000. McKay also paid $165,000 in taxes related to the unit.

{¶3} In early 2010, Granite Creek issued McKay a capital call for $75,000. McKay, however, was in the midst of a divorce and facing liquidity issues. He could not afford the cash call.

{¶4} McKay was acquaintances with Novicki and Lawley and had done business deals with them in the past. According to McKay, he approached Novicki and Lawley with a proposal that would allow him to avoid losing or diluting his investment. He would sell them the Granite Creek unit but retain an option to repurchase the unit at a later date.

{¶5} Novicki and Lawley agreed to this transaction and together they formed Faith Lawley, LLC – of which they would be the sole members – to hold the investment. To memorialize the transfer and option to repurchase, McKay had his attorney prepare a transfer agreement ("Transfer Agreement").

{¶6} Under the Transfer Agreement, Faith Lawley, LLC agreed to pay McKay $125,000 for the Granite Creek unit. Faith Lawley, LLC further agreed to pay the $75,000 capital call. According to McKay, the price for the unit was set "well below" his investment because the deal was intended to provide him with a quick cash infusion until he could repurchase the unit.

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar and placed it on the regular calendar for purposes of issuing this opinion.

{¶7} The Transfer Agreement provided McKay with an option to repurchase the Granite Creek unit at any time through and including December 31, 2012. Thus, McKay had slightly less than two years to exercise the option. To exercise the option, the Transfer Agreement required McKay to give Faith Lawley, LLC written notice of his intent to exercise the option and to pay the option price prior to the expiration of the option period.

{¶8} The option price was the original purchase price of $125,0000 plus the $75,000 capital call payment, plus any other capital calls incurred by Faith Lawley, LLC, plus interest at 25% per annum on the total.[2] McKay characterized this 25% interest as Novicki and Lawley's "additional incentive," to enter the deal.

{¶9} The Transfer Agreement contained an integration clause. The clause provided that no provision of the agreement could be modified, amended, or waived except by a written agreement, executed by all the parties.

{¶10} On February 26, 2010, the parties executed the Transfer Agreement. Faith Lawley, LLC paid McKay the purchase price and further paid Granite Creek's capital call. The transfer of the investment unit required Granite Creek's approval, and Faith Lawley, LLC subsequently entered into a separate subscription agreement with Granite Creek. Consequently, the transfer was completed.

{¶11} In September 2012, approximately three months before the expiration of the option, McKay approached Lawley and Novicki to discuss what he called a "tail" agreement. According to McKay, this would be an alternative to exercising the option and would permit him to instead buy back an interest in the Granite Creek unit. On December 17, 2012, McKay emailed Novicki a detailed proposal containing his terms for this proposed "tail" agreement. Novicki responded, said he would call Lawley the following week, and told

2. The option price also included a payment to account for certain taxes, and a minimum interest payback of $20,000.

McKay to contact Lawley about setting up a meeting. In a follow-up e-mail, Novicki told McKay to forward the proposal to Lawley. No agreement was reached concerning the "tail" agreement proposal prior to the expiration of the option.

{¶12} It is undisputed that McKay never sent Faith Lawley, LLC written notice of his intent to exercise the option prior to the December 31, 2012 option deadline, or at any other time. Nor did McKay tender the option price to Faith Lawley, LLC at any time. McKay never obtained any written extension of the option deadline from the plaintiffs.

{¶13} Following the expiration of the option deadline, McKay continued to communicate with Novicki and Lawley concerning the proposed "tail" agreement. The parties met for an in-person meeting on January 7, 2013. This meeting became "heated" and the parties left with no agreement in place. According to Lawley, McKay had refused to consider a proposal by the plaintiffs that would require McKay to "back stop" what the plaintiffs had paid into the Granite Creek unit with McKay's stock in a separate company.

{¶14} Over the next three years, McKay continued communicating with Novicki and Lawley concerning potential agreements to buy back into the Granite Creek unit. Many of these discussions were memorialized in e-mails. However, none of McKay's efforts to broker a new deal concerning the Granite Creek unit resulted in any agreement.

{¶15} On May 4, 2016, McKay e-mailed Novicki and Lawley purporting to accept a proposal that they had made to him during the in-person meeting on January 7, 2013 – more than three years earlier. Both Novicki and Lawley quickly responded, repudiating that any offer was available to accept. In Lawley's response, he reminded McKay that in 2013, the Granite Creek unit was not producing any investment return. For that reason, the plaintiffs were only willing to allow McKay to join with them in the investment if he agreed to take on some of the risk. They had asked him to share that risk by putting up his separate company stock, and he had refused. Lawley indicated that Granite Creek had since hit a

"home run" with one of its investments and the unit was starting to produce a return. Therefore, the risk that was present in 2013 was no longer present, and, thus, the deal that the plaintiffs would have potentially considered then was not a possibility in 2016.

II. Procedural Background

{¶16} McKay, an Illinois resident, filed suit against the plaintiffs in Illinois to "enforce his rights regarding the [Granite Creek] unit * * *." The outcome of the Illinois lawsuit is not apparent from the record.

{¶17} The plaintiffs then filed this lawsuit in Warren County. The plaintiffs' complaint contained a single count for declaratory judgment. The plaintiffs asked the court to declare that McKay was not entitled to any share of the funds he invested in the Granite Creek unit prior to selling it to Faith Lawley, LLC, that McKay was not entitled to any distributions or proceeds from Granite Creek payable to Faith Lawley, LLC, and that McKay was not entitled to any additional compensation from Faith Lawley, LLC.

{¶18} In his amended answer, McKay asserted six counterclaims. Only Count Four and Count Five are relevant to this appeal.[3] Count Four was labeled "estoppel and waiver of limitation of time to execute repurchase option." In it, McKay asserted that the plaintiffs had represented to him that they would pay him "additional consideration" if he were to forbear on exercising his option to repurchase the Granite Creek unit. McKay alleged that the plaintiffs made these representations before and after the option deadline of December 31, 2012. McKay additionally claimed that the plaintiffs represented, before and after December 31, 2012, that they would allow McKay to exercise the option after its expiration

3. In Counts One through Three, McKay asserted claims of breach of contract, fraud, and "estoppel barring contract enforcement." These claims relate to McKay's argument that Faith Lawley, LLC was contractually required to obtain Granite Creek's consent to the transfer of the investment unit, and that it had failed to do so. In the summary judgment proceedings, the plaintiffs submitted proof that Granite Creek had approved the transfer. The trial court found likewise. This issue has not been appealed. Count Six was a claim for prejudgment interest, which was dismissed and also has not been appealed.

if the parties did not enter into this "forbearance agreement." McKay asserted that he reasonably relied on these representations and therefore the plaintiffs should be equitably estopped from enforcing the contractual limitation of time to exercise the option.

{¶19} In Count Five, McKay alleged fraud. McKay pled that the plaintiffs falsely represented that they would negotiate with him in good faith regarding paying him to forbear exercising the option and that they misrepresented that they would extend the option deadline in conjunction with ongoing negotiations.

{¶20} The parties filed cross-motions for summary judgment. A magistrate subsequently issued a decision recommending that summary judgment be granted to the plaintiffs. Following McKay's objections, the magistrate's decision was later adopted in full by the trial court.

{¶21} With respects to Counts Four and Five, the decision noted that McKay's amended counterclaim failed to identify any particular statements or communications by the plaintiffs wherein they had made representations concerning paying additional consideration to McKay for forbearing on the option or where they had agreed to extend the option period. The court noted that the only summary judgment evidence that McKay had presented that would indicate that the plaintiffs made any such promises was his "naked" and "self serving" affidavit, which was insufficient to create a genuine issue of material fact. The court determined that no reasonable finder of fact could find that the plaintiffs "sought or desired any forbearance from McKay in exercising his Option, or that they represented the Option Period would be extended if no alternative agreement was reached for McKay to buy in once the Option Period had expired."

{¶22} The court issued a final judgment entry granting the plaintiffs judgment as a matter of law on their request for declaratory judgment. The court dismissed all of McKay's counterclaims.

III. Law and Analysis

{¶23} McKay raises the following sole assignment of error:

{¶24} THE TRIAL COURT ERRED IN HOLDING THAT MCKAY FAILED TO OFFER EVIDENCE OF MATERIAL FACTS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT OF HIS COUNTERCLAIMS OF ESTOPPEL, WAIVER AND FRAUD.

{¶25} McKay argues that the court erred in granting summary judgment in favor of the plaintiffs on Count Four, promissory estoppel/waiver, and Count Five, fraud. Within his discussion of this assignment of error, McKay presents three "issues" for review.

A. Standard of Review

{¶26} This court reviews a trial court's summary judgment decision under a de novo standard. *Deutsche Bank Natl. Trust Co. v. Sexton*, 12th Dist. Butler No. CA2009-11-288, 2010-Ohio-4802, ¶ 7. Summary judgment is appropriate under Civ.R. 56 when (1) there is no genuine issue of material fact remaining to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. *BAC Home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.), citing *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998).

{¶27} The party requesting summary judgment bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a party moving for summary judgment has satisfied its initial burden, the nonmoving party "must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings." *Sexton* at ¶ 7; Civ.R. 56(E).

B. Promissory Estoppel/Waiver

i. Whether McKay's Affidavit Creates a Genuine Issue of Material Fact

{¶28} In his first issue presented, and with reference to Count Four, promissory estoppel, McKay contends that an averment in his affidavit created a disputed issue of material fact as to whether the plaintiffs promised to extend or waive the Transfer Agreement option deadline.

{¶29} Promissory estoppel is an equitable doctrine for enforcing the right to rely on promises. *A N Bros. Corp. v. Total Quality Logistics, L.L.C.*, 12th Dist. Clermont No. CA2015-02-021, 2016-Ohio-549, ¶ 32. In order to establish a claim for promissory estoppel, a party must establish (1) a clear and unambiguous promise was made, (2) upon which it would be reasonable and foreseeable for the party to rely, (3) actual reliance on the promise, and (4) the party was injured as a result of the reliance. *Id.*

{¶30} McKay's promissory estoppel claim was premised on his allegation that the plaintiffs represented that they would waive the December 31, 2012 option deadline while attempting to negotiate the "tail" agreement. McKay points to the following averment in McKay's own affidavit as establishing a genuine issue of fact on this issue:

> Plaintiffs knew the negotiations were in lieu of McKay exercising the repurchase option. [Excerpt from Eric Novicki Deposition], page 52. Plaintiffs told Defendant both before and after the deadline that Defendant still had the right to repurchase his interest in Granite Creek while the parties negotiated." [*Id.*], page 52, line 1-9 and page 54, line 12-15.

{¶31} Even if we accept these two statements as true, neither statement clearly and unambiguously indicates that the plaintiffs made any promise concerning extending or waiving the option deadline.[4] The first sentence vaguely implies that the plaintiffs were

4. We note that any verbal modification to the Transfer Agreement was specifically excluded by the agreement's integration clause. This calls into question whether McKay could *reasonably* rely on a verbal promise to extend the deadline.

aware that McKay intended to negotiate a new agreement instead of exercising the option. The second sentence could be true without the plaintiffs ever having waived or extended the option deadline. The plaintiffs could have independently decided to grant McKay the right to repurchase an interest in the investment, outside of the transfer agreement.

{¶32} The two sentences of the averment cite separate portions of Novicki's deposition testimony. However, upon review, neither cited portion of Novicki's deposition involves any discussion of extending the option deadline. The testimony on page 52 involves Novicki discussing his understanding of a remark Lawley made to him about letting McKay "buy in for cash." Lawley's "buy in for cash" remark was referenced in an e-mail Novicki sent to McKay on January 8, 2013, the day following the unsuccessful meeting between the parties. The e-mail provided in relevant part:

> [McKay],
>
> I think it is better if you and [Lawley] work this out. I worked really hard to even get [Lawley] to the table. His questions and comments to me were "why are we doing anything" and "I will let him buy in for cash[.]"

{¶33} It is not clear from the e-mail when Lawley made the remark to Novicki about being willing to let McKay buy in for cash. In an uncontroverted affidavit submitted in the summary judgment proceedings, Novicki clarified that Lawley made this statement to him *prior* to the Transfer Agreement option deadline.

{¶34} However, McKay argues that because this e-mail was sent *after* the option deadline, the statement implies that Lawley was waiving the deadline. McKay further notes that during Novicki's deposition, Novicki explained that by "buy in for cash," he believed Lawley was referring to the Transfer Agreement's option provision. Thus, according to McKay, Lawley must have extended the option deadline if he was going to let him "buy in for cash" after the option expired.

{¶35} The "buy in for cash" comment does not support McKay's claim that there was a promise of an option extension or waiver. If it is accepted that Lawley stated that McKay could "buy in for cash" prior to December 31, 2012, then this is merely a statement of fact. It was McKay's right under the Transfer Agreement. If Lawley told Novicki that he would allow McKay to "buy in for cash," and meant after December 31, 2012, then this merely reflects ongoing negotiations regarding McKay's continued interest in obtaining an interest in the Granite Creek unit. Moreover, any statement or conduct occurring after the option deadline would be irrelevant to McKay's promissory estoppel claim.

{¶36} We next turn to McKay's citation to testimony on page 54 of Novicki's deposition. The cited testimony consists of McKay's attorney asking Novicki if he agreed with Lawley's statement about allowing McKay to buy in for cash. Novicki explained that it did not matter if he agreed or not, because (as was just discussed), this was McKay's right under the Transfer Agreement.

{¶37} Consequently, to the extent McKay's affidavit averment vaguely suggests the extension or waiver of the Transfer Agreement option, it appears unsupported by the very testimony that McKay cited. A party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. *Hillstreet Fund III, L.P. v. Bloom*, 12th Dist. Butler No. CA2009-07-178, 2010-Ohio-2961, ¶ 10.

{¶38} Other evidence in the record supports the conclusion that the plaintiffs made no promises to extend the option deadline and instead merely agreed to listen to McKay's alternative proposal. According to Novicki, the reason that McKay approached the plaintiffs about the "tail" agreement was that McKay could not afford to exercise the option. Novicki testified:

> McKay came to me [some time before September 24, 2012] and

> said, I can't perform on the contract. I don't have the money to do it. I can't perform on the contract. Is there a way that we can modify or change the agreement or a way for me to get back in the interest? And I said, well, I don't know. Let me talk to [Lawley].
>
> I talked to [Lawley] and his response was, why would I give him our money? And I said, I agree, it doesn't make any sense. And I said, but [McKay] thinks he has some proposals that will make sense and maybe we should listen to him and see what he's got to propose. So [Lawley] agreed to that and that's where we were at.

{¶39} Shortly before the option would expire, McKay e-mailed Novicki on December 17, 2012. This e-mail appeared to memorialize the terms of McKay's proposed "tail" agreement and included a very detailed summary of the proposal. However, McKay never mentioned the option. He did not discuss extending the option period. He never mentioned any proposal to "forbear" exercising the option. Nor was there any explanation of how the plaintiffs paying McKay to forbear would provide the plaintiffs with any benefit. McKay did not state he was prepared to exercise the option if the plaintiffs did not agree to this "tail" agreement. And there was no reference in the e-mail to any promises made by Novicki or the plaintiffs towards McKay. The e-mail was simply McKay's proposal to the plaintiffs.

{¶40} Perhaps most notably, the record contains an e-mail McKay sent to Novicki in February 2013, again indicating his desire to make some deal with regard to the Granite Creek unit. In it, he referred back regretfully to the January 7, 2013 meeting and indicated he would like to "resolve something we could both live with and move forward with our friendship." He mentioned his desire to "claw back for a little bit before you take the rest" and indicated he thought it was fair to ask for "a bone, only after you make a good return." McKay then stated, "Propose whatever you want – *I know my contract rights are gone*." (Emphasis added.) This statement flatly contradicts McKay's affidavit averments made nearly seven years later.

{¶41} The evidence submitted in this case reflects that prior to the option deadline, McKay was not in a financial position to exercise the option. Or, for reasons that are not clear from the record, McKay did not want to exercise the option but wanted to partner with the plaintiffs on the investment. Regardless, it is clear that McKay was still seeking some way to "get back in the interest." While the plaintiffs were dubious that McKay could propose anything that they would be interested in, they were willing to listen to his proposal. Otherwise, as stated by Lawley, McKay could "buy in for cash." We agree that the averment in McKay's affidavit is unsupported by the summary judgment evidence and insufficient to create a genuine issue of material fact.

{¶42} In support of the contention that his affidavit was not "self-serving" and was sufficient to preclude summary judgment, McKay cites Judge Ringland's concurring opinion in *Hillstreet Fund*, 2010-Ohio-2961. There, Judge Ringland distinguished cases where defendants submitted affidavits generally denying liability or contesting their involvement in an event from those cases where a party describes the statement against interest of an opposing party. *Id*. at ¶ 17-18. *Hillstreet* is distinguishable and does not support McKay's argument. In *Hillstreet*, the affidavit describing the admission against interest specifically identified the person who made the statement and described the person's statement. *Id*. at ¶ 18. McKay's affidavit is far less detailed. It failed to specifically identify who made the promises regarding the option deadline and only vaguely described what statements were made. Moreover, McKay's affidavit is uncorroborated and contradicted by other evidence in the record.

{¶43} We agree with the plaintiffs' suggestion that this case is more similar to *Citibank v. Eckmeyer*, 11th Dist. Portage No. 2008-P-0069, 2009-Ohio-2435. There, Citibank sued the appellant for approximately $20,000 as a result of a default on a credit card agreement. *Id*. at ¶ 2. The appellant submitted his affidavit in which he averred that

he contacted Citibank to negotiate a settlement and that Citibank had agreed to settle the account for $7,000. *Id.* at ¶ 59. The court of appeals concluded that the affidavit was self-serving, failed to identify the individual whom the appellant claimed to have contacted, and failed to establish whether that person had any authority to settle the debt. In addition, the court noted that the appellant had conceded receiving a letter rejecting his offer to settle the account. *Id*. Like the present case, the affidavit in *Citibank* set forth an alleged admission by a party opponent, but was unsupported by any other evidence, and failed to identify the individual alleged to have made the statement.

{¶44} In sum, McKay has failed to point to specific facts in the summary judgment record evidencing a clear and unambiguous promise made by the plaintiffs to McKay concerning the option. There are no disputed issues of material fact precluding summary judgment. Consequently, we find no merit in McKay's first issue presented for review.

ii. Evidence of Waiver

{¶45} In McKay's second issue presented, he argues that "a party's affidavit testifying to statements of a party opponent and accompanying evidence of the opposing party's conduct are admissible evidence of a claim of waiver." Initially, we observe that waiver is not a claim; it is an affirmative defense. *Miller v. Wikel Mfg. Co.*, 46 Ohio St.3d 76, 78 (1989). Waiver is a "voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform." *List & Son Co. v. Chase*, 80 Ohio St. 42, 49 (1909). Waiver must be "intentional, with knowledge of the facts and of the party's rights." *Id*. at 51.

{¶46} As set forth above, there was no evidence presented of any intentional waiver of the option deadline by the plaintiffs. The plaintiffs' agreement to listen to McKay's proposal or negotiate an alternative agreement does not constitute a waiver of any right

under the Transfer Agreement. And as explained above, the evidence regarding allowing McKay to "buy in for cash" also does not set forth any grounds for waiver. McKay argues that the trial court ignored evidence of waiver, but in each instance cited by McKay, the evidence was discussed and sufficiently addressed by the court. McKay's arguments concerning waiver lack merit.

C. Fraud

{¶47} In his third issue presented for review, McKay argues that his affidavit created a genuine issue of material fact as to his fraud claim. McKay incorporates the same arguments he presented with respect to his promissory estoppel claim. For the same reasons described previously, McKay failed to present evidence of any representation by the plaintiffs concerning extending the option period. Accordingly, he has failed to identify a genuine disputed issue of fact for trial as to any misrepresentation in conjunction with the fraud claim.

{¶48} For the foregoing reasons, we overrule McKay's sole assignment of error and affirm the trial court's decision dismissing McKay's counterclaims and granting the declaratory judgment requested by the plaintiffs.

{¶49} Judgment affirmed.

M. POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *Paradie v. Turning Point Builders, Inc.*, 2021-Ohio-2178.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

TERRANCE PARADIE, Plaintiff-Appellee, - v - TURNING POINT BUILDERS, INC., et al., Defendants-Appellants.	**CASE NO. 2020-L-046** Civil Appeal from the Court of Common Pleas Trial Court No. 2019 CV 001868

O P I N I O N

Decided: June 28, 2021
Judgment: Reversed and remanded

Rochelle M. Hellier, Axelrod Law Office, 7976 Tyler Boulevard, Mentor, OH 44060 (For Plaintiff-Appellee).

Patrick D. Quinn and *Ronald A. Annotico*, Quinn Legal Associates, Inc., 2802 Som Center Road, Suite 102, Willoughby Hills, OH 44094 (Defendants-Appellants).

MATT LYNCH, J.

{¶1} Defendants-appellants, Turning Point Builders, Inc., Turning Point Insurance Restoration, and Ryan Brown, appeal from the judgment of the Lake County Court of Common Pleas, denying their motion to stay proceedings pending arbitration. For the following reasons, we reverse the decision of the lower court and remand for further proceedings consistent with this opinion.

{¶2} On November 15, 2019, plaintiff-appellee, Terrance Paradie, filed a Complaint against appellants. The Complaint raised claims for Breach of Contract, Bad

Faith, Conversion, Fraud, and Unjust Enrichment. The claims related to a dispute over a contract for the appellants to build Paradie a home.

{¶3} On January 2, 2020, appellants filed a Joint Motion for Leave to File Answer and Counterclaims, which was granted. Appellants filed their Joint Answer on January 21, 2020. As an affirmative defense, they alleged that the claims were "subject to a contractually agreed upon binding arbitration clause." On the same date, appellants filed a motion to stay the case pending arbitration, which was subsequently stricken from the record as "unsigned and not in compliance with Civ.R. 11." Paradie filed a motion in opposition on January 27, 2020, contending that the provision for arbitration did not apply since appellants' actions were fraudulent and they were withholding a refund for money owed despite not performing under the contract. The arbitration clause, contained in the parties' "Contract to Purchase" provides: "Any dispute, claim, or controversy arising from this agreement will be settled by a third party arbitrator in accordance with the Rules and Procedures of the Federal Arbitration Act. The decision of the arbitration will be binding on both parties. No arbitration arising out of or relating to the work shall include, by consolidation or join[d]er, any additional persons not party to this contract unless by written consent of both parties."

{¶4} On February 18, 2020, appellants filed counterclaims against Paradie. In a February 21, 2020 Judgment Entry, the court found that the counterclaims should be stricken from the record as they were filed over a month past the time granted for leave to file the answer and counterclaims.

{¶5} Also on February 18, appellants filed a second motion to stay case. They alleged that the matter should be stayed pending arbitration since there was a mandatory

arbitration clause in the parties' contract.

{¶6} On March 2, 2020, appellants filed a motion requesting leave to file counterclaims instanter, asserting that since Paradie had objected and opposed the motion to stay, they needed to "prepare for the possibility that the arbitration provision may not be enforced or that the case will not be stayed." Attached were counterclaims for Promissory Estoppel, Unjust Enrichment, Breach of Contract, and Fraud.

{¶7} The court issued a Judgment Entry on March 5, 2020, denying the motion to stay. It found, "without reviewing the issue of whether fraud in the inducement precludes arbitration in this case," appellants had waived their right to have the matter submitted to arbitration. This finding was based on the fact that they filed an answer and counterclaims and sought leave to do so, as well as sought extra time for discovery due to the counterclaims, which the court found demonstrated recognition of its authority to determine the outcome.

{¶8} Appellants timely appeal and raise the following assignment of error:

{¶9} "The Trial Court abused its discretion and otherwise committed prejudicial error when it denied Appellants' Motion to Stay the Case Pending Arbitration."

{¶10} "Generally, the standard of review for a decision granting or denying a motion to stay proceedings pending arbitration is abuse of discretion," including the issue of waiver of arbitration. *Naylor Family Partnership v. Home S. & L. Co. of Youngstown*, 11th Dist. Lake No. 2013-L-096, 2014-Ohio-2704, ¶ 13. "However, a de novo standard of review is used when a trial court's grant or denial of a stay is based solely upon questions of law." *Id.*

{¶11} Appellants raise several issues, both procedural and substantive, relating

to the finding of waiver. We will initially address whether, under the facts of this case, the record supported the determination that appellants waived their right to arbitrate.

{¶12} "Ohio public policy favors arbitration and, therefore, such provisions are ordinarily considered valid and enforceable." *Alkenbrack v. Green Tree Servicing, L.L.C.*, 11th Dist. Geauga No. 2009-G-2889, 2009-Ohio-6512, ¶ 14. "As a result, a court must indulge a strong presumption in favor of arbitration and resolve any doubts in favor of arbitrability." *Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App.3d 619, 2010-Ohio-4563, 943 N.E.2d 1030, ¶ 24 (11th Dist.).

{¶13} However, "[i]t is well-established that the right to arbitration can be waived." *Naylor,* 2014-Ohio-2704, at ¶ 18, citing *Hogan v. Cincinnati Fin. Corp.,* 11th Dist. Trumbull No. 2003-T-0034, 2004-Ohio-3331, ¶ 22. To prove waiver, the opposing party is required to demonstrate "(1) that the party waiving the right knew of the existing right of arbitration and (2) that the party acted inconsistently with that right." *Id.*, citing *Hogan* at ¶ 23. It has been held waiver should not be "lightly inferred." *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 415, 701 N.E.2d 1040 (3d Dist.1997).

{¶14} In determining whether a party acted inconsistently with the right to arbitrate, this court has applied the totality of the circumstances test set forth in *Harsco*. *Alkenbrack* at ¶ 26; *Glenmoore Builders, Inc. v. Kennedy*, 11th Dist. Portage No. 2001-P-0007, 2001 WL 1561742, *4 (Dec. 7, 2001). "Such circumstances that *may* be considered by the trial court to determine whether a party acted inconsistently with his right to arbitrate include: (1) any delay in the requesting party's demand to arbitrate by filing a motion to stay the proceedings pending arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the proceeding,

including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings pending arbitration; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts." *Glenmoore* at *4, citing *Harsco* at 414; *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 10th Dist. Franklin No. 10AP-353, et al., 2011-Ohio-80, ¶ 21.

{¶15} In considering the totality of the circumstances, we note that this court held the trial court abused its discretion in finding waiver under a strikingly similar set of facts in *Glenmoore*. In *Glenmoore*, the appellant filed an answer to the complaint, in which he asserted the complaint should be dismissed pursuant to the binding arbitration clause. On the same day, appellant also filed a motion to stay the proceedings pending arbitration. Appellant filed a counterclaim and cross-claims, making a demand for a jury trial. *Id.* at *4. This court found that appellant did not act inconsistently with his right to arbitrate. *Id.* In reaching this holding, we emphasized that there was no delay between filing the answer and the motion to stay, filed on the same date. Appellant did not take part in any pre-litigation discovery or motion practice prior to filing the motion to stay. Although a counterclaim was filed, it was filed on the same day as the motion to stay and this court noted that counterclaims must be timely asserted, providing a justifiable basis for the filing of the counterclaim although appellant intended to pursue arbitration. Thus, there was no prejudice to the plaintiff. Under the totality of the circumstances, waiver did not apply. *Id.*

{¶16} In the present matter, appellants also filed their initial motion to stay pending

arbitration on the same day as the answer, which set forth the affirmative defense of the arbitration clause. While the court found this motion procedurally deficient, it was refiled less than a month later. Appellants did not file other motions or otherwise appear to participate in any discovery either before the filing of the initial motion or the refiled motion. The status conference held on February 18, which resulted in an order setting deadlines for discovery and dispositive motions, was held on the same date the motion to stay was refiled. While appellants did file counterclaims, which were stricken by the trial court as untimely, they were initially filed the same date as the refiled motion to stay pending arbitration. A subsequent attempt to refile the counterclaims included a statement by appellants that the counterclaims were being pursued in the instance that arbitration was denied. We fail to see any prejudice to Paradie as he was essentially immediately on notice that appellants intended to pursue arbitration and he filed no dispositive motions such as a motion for summary judgment and no depositions or other significant discovery appear to have been completed. *See Fries v. Greg G. Wright & Sons, LLC*, 2018-Ohio-3785, 120 N.E.3d 426, ¶ 33 (1st Dist.). Consistent with *Glenmoore*, we hold that appellants did not act inconsistently with their right to arbitrate. *See Milling Away, L.L.C. v. Infinity Retail Environments, Inc.*, 9th Dist. Summit No. 24168, 2008-Ohio-4691, ¶ 12-14 (where the defendant filed a counterclaim but also filed the motion to stay prior to a trial date being set and only minimal discovery had been conducted, thereby failing to cause delay or prejudice, the lower court did not err in finding that the "heavy burden" to establish waiver had not been overcome).

{¶17} Paradie argues that a finding of waiver was proper because appellants sought to pursue arbitration and litigation simultaneously, emphasizing the filing of the

counterclaims. Similarly, the trial court based its ruling primarily on the conclusion that the appellants had demonstrated their recognition of the court's authority to determine the suit by submitting an answer and counterclaims. To fully evaluate the circumstances, this factor should be viewed in conjunction with the totality of the circumstances. *See Milling Away* at ¶ 12 (while the filing of a counterclaim creates a presumption of waiver, "[t]o determine whether a party has actually waived its right to arbitrate, this Court also must look to other factors such as when the invocation of the arbitration clause occurred"). As discussed above, in *Glenmoore* this court found that the filing of a counterclaim alone, when considered with other facts, does not warrant a finding of waiver. 2001 WL 1561742 at *4. While the trial court also took issue with appellants arguing at the case management conference that additional time would be needed for discovery on the counterclaims, we again emphasize that the appellants consistently and swiftly raised their argument that the matter should be referred to arbitration. The motion to stay pending arbitration was ruled upon within less than two months after the deadline for appellants' answer. It is not the case that extensive discovery was conducted or any delay was caused by appellants' actions, which consistently demonstrated they wanted to exercise arbitration, even when filing the counterclaims as they noted a desire to preserve them in case the request to stay was denied. *See id*. (noting that counterclaims must be timely asserted). That appellants may have been preparing an alternate plan if the stay was not granted does not, alone, mean they waived the right to arbitrate.

{¶18} Further, Paradie's citation to this court's decision in *Hogan v. Cincinnati Fin. Corp., supra*, to support his contention that the filing of counterclaims constituted waiver is also unavailing as *Hogan* is distinguishable. In *Hogan*, the party found to have waived

arbitration was the plaintiff, who chose to file a lawsuit rather than seek arbitration initially. Significantly, while this court noted the inconsistency of filing a complaint requesting damages and arbitration, we emphasized that the complaint was "especially problematic in light of [plaintiff's] motion for summary judgment." 2004-Ohio-3331, at ¶ 31. Unlike in the present matter, no separate motion to stay was filed and both parties went through the time and expense of preparing summary judgment filings before the issue of arbitration was addressed by the court. In *Hogan*, this court specifically noted that the filing of a motion for summary judgment supports a finding that arbitration was waived. *Id.* at ¶ 25. In the present matter, the issue of arbitration was brought up immediately and handled relatively expeditiously, evidencing an intent to arbitrate and a lack of prejudice.

{¶19} Paradie also cites *Discover Bank v. Bennington*, 2018-Ohio-3246, 118 N.E.3d 283 (11th Dist.), in which waiver was not found, presumably to demonstrate its inapplicability to the present case. We do not find *Discover Bank* to be relevant in the present matter as it ultimately dealt with the issue of whether a defendant may obtain a stay of proceedings pending arbitration without having initiated arbitration proceedings, a question answered in the affirmative but not directly relevant here. *Id.* at ¶ 21. The lower court did not find that arbitration was waived because arbitration proceedings had not been initiated, nor do we reverse its finding on that ground.

{¶20} As to the other Eleventh District cases cited by Paradie, we find each of these to have various distinguishing factors which led to an outcome wherein a finding of waiver was proper. Like *Hogan*, *GMS Mgt. Co., Inc. v. Coultier*, 11th Dist. Lake No. 2005-L-071, 2006-Ohio-1263, involved a plaintiff bringing a complaint which necessitates the defendant responding and further proceedings to be conducted, which more directly

submits the party to the authority of the court and results in prejudice to the defendant.

{¶21} *EMCC Invest. Ventures, LLC v. Rowe,* 11th Dist. Portage No. 2011-P-0053, 2012-Ohio-4462, involved entirely different circumstances where the parties engaged in both discovery and mediation, filed motions including one for summary judgment, and 28 months passed from the filing of the complaint until the motion to arbitrate. *Id.* at ¶ 49-56. Similarly, in *Naylor*, the defendant requested arbitration 11 months after the complaint had been filed, and three months after the parties had agreed to conduct discovery, thereby causing delay and prejudice. 2014-Ohio-2704 at ¶ 24. Finally, *Garvin v. Independence Place Condominium Assn.*, 11th Dist. Lake No. 2001-L-055, 2002 WL 479992 (Mar. 29, 2002) and *Marks v. Swartz*, 174 Ohio App.3d 450, 2007-Ohio-6009, 882 N.E.2d 924 (11th Dist.) involved defendants who either failed to plead arbitration in the answer or file a motion to stay pending arbitration, neither of which were the case here.

{¶22} Since we hold that the court erred in determining appellants waived the right to seek a stay pending arbitration, appellants' arguments regarding whether the court properly raised this issue sua sponte and whether they should have been permitted to brief the issue are moot.

{¶23} We next consider whether, since waiver was not proper grounds to deny arbitration, the proceedings should otherwise be stayed pending arbitration. Appellants assert that we should order the trial court to stay proceedings pending arbitration, although they present no argument regarding the applicability or validity of the arbitration clause. Paradie, on the other hand, asserts that, regardless of waiver, the arbitration clause is not enforceable.

{¶24} Paradie contends that the arbitration clause is unenforceable due to its unconscionability. However, this argument was not raised below in Paradie's motion in opposition to the stay. Paradie asserted below only that the motion should be denied due to defendants' actions being fraudulent, withholding a refund for money owed despite not performing.

{¶25} It has been held that, where the plaintiff objected to the motion to compel arbitration on multiple grounds of unenforceability, including fraud, but did not argue that the arbitration clause was unconscionable, and the court made no factual findings on this issue, the appellate court "will not consider whether the arbitration provision was unconscionable for the first time on appeal." *Paulozzi v. Parkview Custom Homes*, *L.L.C.*, 2018-Ohio-4425, 122 N.E.3d 643, ¶ 14, fn. 2 (8th Dist.). The same circumstances are present here.

{¶26} A conclusion that consideration of this issue on appeal is precluded is buttressed by the fact that it is impossible to properly and fairly consider unconscionability based on the record before this court. To find procedural unconscionability required to invalidate an arbitration clause, courts consider "the relative bargaining positions of the parties, whether the terms of the provision were explained to the weaker party, and whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed." (Citation omitted.) *Jamison v. LDA Builders, Inc.*, 11th Dist. Portage No. 2011-P-0072, 2013-Ohio-2037, ¶ 55 ("[p]rocedural unconscionability is * * * a fact-sensitive question that looks at the surrounding circumstances of each individual case"). Factors relating to the relative bargaining position include education, age, intelligence, business acumen of the parties, the drafter

of the contract, whether alterations in printed terms were possible, and whether alternative sources to supply the goods are available. *Id.*

{¶27} In an attempt to demonstrate procedural unconscionability, Paradie sets forth various facts relating to whether the parties discussed the arbitration clause, availability of alternative sources for building the home, and whether the parties had been represented by counsel. These are not facts that are present in the limited record before this court. We do not know the experience or business acumen of Paradie, nor the circumstances surrounding the execution of the agreement and whether the arbitration provision was discussed. We cannot consider factual statements made by Paradie in his appellee's brief that are unsupported by the record. It has been held that, particularly in relation to the fact-sensitive nature of unconscionability determinations, where there was insufficient evidence in the record to evaluate the procedural unconscionability factors, the appellate court cannot conduct a proper de novo review as to unconscionability. *Reynolds v. Crockett Homes, Inc.*, 7th Dist. Columbiana No. 08 CO 8, 2009-Ohio-1020, ¶ 18-20; *see also Jamison* at ¶ 55. Thus, even if this issue were properly before us and not waived, we are not in a position to make a finding that the agreement was unconscionable such that arbitration should be denied. For these reasons, we decline to consider unconscionability as a ground to affirm denial of the motion to stay arbitration.

{¶28} Finally, Paradie contends that the arbitration clause is unenforceable as the contract and arbitration clause were fraudulently induced and appellants did not intend to be bound by the terms of the contract or allow for cancellation of such contract. Within this discussion, he also argues that the dispute is not for an arbitrable issue since it does not relate to work performed under the contract.

{¶29} As to the issue of fraudulent inducement, for this to preclude arbitration, the law requires that the party must demonstrate the arbitration provision itself was fraudulently induced. *Smith v. Nationwide Mut. Ins. Co.*, 2018-Ohio-3758, 120 N.E.3d 72, ¶ 30 (10th Dist.). The lower court, in determining waiver applied, specifically declined to address the issue of whether fraud precluded application of the arbitration clause.

{¶30} While the issue of fraud, as well as, to a very limited extent, whether entitlement to a refund without work performed was subject to arbitration, was raised in the lower court, it is evident this issue was not developed in any manner. This argument was alleged in Paradie's brief reply to the motion to stay, affidavits or other evidence were not submitted in support of the argument, and no evidentiary hearing was conducted. We are left with a record devoid of evidence which would help us determine whether the arbitration clause was fraudulently induced.

{¶31} It has been held that an appellate court cannot determine the enforceability of an arbitration provision when there is a lack of a record to support such a holding. In the instance where a court fails to make factual findings to support a determination that the arbitration clause is invalid and "the circumstances surrounding the arbitration agreement have not been sufficiently developed," the matter has been remanded to conduct an evidentiary hearing or further proceedings on that issue. *Brownell v. Van Wyk*, 2d Dist. Montgomery No. 24042, 2010-Ohio-6338, ¶ 31; *Taylor-Winfield Corp. v. Winner Steel, Inc.*, 7th Dist. Mahoning No. 06-MA-176, 2007-Ohio-6623, ¶ 39 ("[s]ince the issue of whether [appellant's] claim was referable to arbitration was not fully developed in the proceedings below, this Court should not consider it for the first time on appeal").

{¶32} We acknowledge appellants' argument that, since Paradie failed to provide evidence in support of his claim that fraud precluded arbitrability, this court should find proceedings should be stayed pending arbitration. It is evident, as discussed above, that Paradie did not provide any evidence or case law in his reply to the motion to stay arbitration, and provided very little argumentation. However, it has been held that, where the trial court did not fully consider arguments when having denied a stay pending arbitration on other grounds, the proper outcome is to remand for further proceedings since the matter was not ripe for review, particularly where the determination was fact-dependent. In *U.S. Bank, N.A. v. Wilkens*, 8th Dist. Cuyahoga No. 93088, 2010-Ohio-262, the appellate court held that alternative arguments to affirm the trial court's denial of the motion to stay which attack the enforceability of the arbitration clause "are not yet ripe for review" where the court found the right to arbitrate was waived and the enforceability of the arbitration clause may require factual findings "more appropriate for the trial court." *Id.* at ¶ 45. *See also Murray v. David Moore Builders, Inc.*, 177 Ohio App.3d 62, 2008-Ohio-2960, 893 N.E.2d 897, ¶ 14 (9th Dist.) (finding a remand was required when the trial court "having denied the stay based on the scope of the provision, rather than the enforceability of the clause" had not ruled on the issue raised on appeal and "some of the arguments may require findings of fact").

{¶33} As such, we do not find alternate grounds to affirm the trial court's decision denying the motion to stay proceedings pending arbitration and thus reverse its judgment. Upon remand, the court should consider whether the arbitration clause is enforceable based upon the grounds raised by Paradie in the trial court.

{¶34} The sole assignment of error is with merit.

{¶35} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.

[Cite as *Erie Capital, L.L.C. v. Barber*, 2021-Ohio-2258.]

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

Erie Capital, LLC, et al.	Court of Appeals No. E-20-010
Appellees	Trial Court No. 2016-CV-0455
v.	
Phillip F. Barber, etc., et al.	**DECISION AND JUDGMENT**
Appellants	Decided: June 30, 2021

* * * * *

Charles M. Murray, Joseph A. Galea, and Daniel McGookey, for appellees.

D. Jeffrey Rengel, Thomas R. Lucas, and Kevin J. Zeiher, for appellants.

* * * * *

MAYLE, J.

Introduction

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas that denied the appellants' joint motion to enforce an oral settlement agreement.

Following an evidentiary hearing on the matter, the trial court found that the purported agreement was unenforceable because it lacked definite terms and because there was no "meeting of the minds" as to material terms. Finding no error, we affirm.

Procedural History

{¶ 2} This case began with the filing of a complaint to partition land commonly owned by three brothers. The property at issue is situated on the northwest corner of Kelleys Island in Erie County, Ohio. Before 2014, the "Minshall Estate" had been owned by four principals: Frances Minshall, who owned a 3/6 interest, and her three sons: William, Peter and Werner Minshall, who each owned a 1/6 interest. Mother and sons owned the property jointly, as tenants in common.[1] When Frances Minshall died on March 2, 2014, each son inherited a one-third undivided interest in her share, again as tenants in common.

{¶ 3} According to William, "[b]y 2016, [the co-tenancy] was no longer workable. [William] wanted complete separation from his brothers [and] no longer wanted to share any access to the property with them." William, the plaintiff-appellee herein, filed this partition action on July 6, 2016 against Werner and Peter, the defendant-appellants. Werner answered the complaint and filed a cross complaint for monetary damages and

[1] The brothers own their respective interest in the property through legal entities, which are the named parties in this case. That is, William owns his interest through Erie Capital, LLC., the plaintiff-appellee herein. Werner owns his interest through the W.E. and J.M. Minshall 1997 Childrens' Trust, and Peter owns his interest through the Kelleys Island Revocable Trust. The trusts are the defendant-appellants in this action. For ease, we refer to the parties by their individual first names.

declaratory judgment alleging that William had breached his fiduciary duty as trustee of their mother's trust. Peter also filed a counterclaim and third party complaint against William, raising the same claims as Werner.

{¶ 4} A recorded settlement hearing (hereinafter "the settlement hearing") was held before a magistrate on August 31, 2017. At the conclusion of the hearing, the magistrate outlined the terms of the parties' agreement. According to the magistrate, the parties agreed that:

1. Parcels 3 through 15 would be divided as follows:

Werner would get parcels 4, 9, 10, and half of 13

Peter would get parcels 5, 6, 7, 8, and half of 13

William would get parcels 3, 11, 12, 14, and 15;

2. Two separate tracts of land would be sold to the Trust for Public Land and how to apportion the proceeds from those sales;

3. William would give a first right of refusal with regard to Parcel 3 to Peter and Werner, jointly;

4. "The deeds and documents [would] be filed as promptly as possible. The plat would * * * would also be recorded, which indicates that Minshall Road is to go in at some point in time or that's the desire of the plat."

5. The $45,000 of "start-up costs" paid by Werner would be "dealt with privately between Peter and Werner."

6. William would not petition the court for attorneys' fees;

7. Two "small" access roads would remain and that one of them (below parcel #14) would belong to William and the other (below parcel #13) would belong to Peter and Werner. (Sept. 6, 2019 Tr. at 10-22).

{¶ 5} The magistrate then asked the parties to verify that the above synopsis "accurately" reflected the terms of the agreement, that there were no "corrections or changes" that needed to be made, that "this is the agreement [that] you want [to] resolve this case," that the parties were not being forced or intimidated into the agreement and that each party was satisfied with his lawyer's representation. William and Peter, in his individual capacity and as proxy to Werner, verified that each assertion was true. William's counsel stated that the agreement would be memorialized in writing, identified as the "Kelleys Island Agreement," and submitted to the court for inclusion in a judgment entry.

{¶ 6} No written agreement was provided to the court. Therefore, as described by the trial court, "[b]elieving the matter was settled, after waiting approximately five (5) months for a signed entry, and when no signed agreement was filed with this Court even after numerous attempts to get one from the parties, this Court dismissed this case as 'settled.' (Judgment Entry filed on or about May 2, 2018). The dismissal was with prejudice." (April 6, 2020 Journal Entry). The trial court retained jurisdiction for purposes of enforcing the settlement agreement.

{¶ 7} A flurry of filings followed. Of relevance to this appeal was Defendants' "[Joint] Motion to Enforce Settlement Reached on August 31, 2017." An evidentiary hearing (hereinafter "the evidentiary hearing") on the motion was held on September 6, 2019. To begin, the court played a segment from the recorded settlement hearing that outlined the terms of parties' agreement and confirmation thereof (described above). That audio recording was transcribed and made a part of the evidentiary hearing transcript. (Tr. at 10-22). Next, the trial court described the "break down [that] occurred" after the settlement hearing and then set about to determine whether the oral agreement, as described by the magistrate, was enforceable. The trial court received evidence and heard testimony from William, Peter and Werner Minshall.

{¶ 8} By judgment entry dated April 6, 2020, the trial court found that no valid settlement agreement had been entered into and denied Peter and Werner's joint motion to enforce settlement agreement. Peter and Werner (referred to jointly as "appellants") appealed and raise two assignments of error for our review:

> I. The trial court erred in finding that an identified private easement on an agreed and properly recorded plat was unenforceable.
>
> II. The trial court erred in failing to enforce the settlement agreement of the parties.

Law and Analysis

{¶ 9} In their first assignment of error, the appellants argue that the trial court erred in finding that "no easement * * * existed." They claim that a plat, executed by the

brothers in 2001, created a "private driveway easement [that] traversed parcels 7, 8, 9, 10, and 11." (Appellants' brief at 6). Of particular relevance here is appellants' claim that the easement gave them access to their parcels "over [Williams'] parcel #11."

{¶ 10} In its decision, the trial court specified that the issue of "whether an access * * * exist[ed] via an easement or right of way" was "not" an issue presented by appellants' Joint Motion to Enforce. The court added that it had reviewed the settlement hearing record "numerous times," and "[n]owhere in the record [was] there any discussion about an 'easement' existing or being created over parcel #11." (J.E. at 6). Indeed, in a footnote, the trial court stated that "this court *would have found* that no easement or right of access existed. The basis for this would include [identifying reasons]"—which further demonstrates that the trial court did not make any ruling on that issue. (J.E. at 10, n.8; emphasis added.).

{¶ 11} We find that the trial court expressly stated that the "only" issue before it was whether the parties entered into an enforceable agreement at the settlement hearing, and it carefully tailored its decision to that limited issue. (Sept. 6, 2019 Tr. at 9-10). Contrary to the appellants' claim, the trial court made no finding with regard to the existence, or enforceability, of an easement. The legal arguments presented by appellants in their first assignment of error are simply outside the scope of the proceeding that is currently on appeal, i.e. the joint motion to enforce the August 31, 2017 settlement agreement. Accordingly, we find appellants' first assignment of error not well-taken.

{¶ 12} Appellants repackage that same argument in their second assignment of error in claiming that the trial court "incorrectly believed" that there was "no signed agreement," (i.e. the 2001 plat) that recognized their right to access "upland parcels over parcel #11." (Appellants' Brief at 13-15). For the same reasons expressed above, we find that the trial court did not make any finding regarding the enforceability of the alleged easement that may or may not be reflected in the 2001 plat. Appellants' argument is therefore not well-taken.

{¶ 13} The appellants also argue in their second assignment of error that the trial court erred in failing to enforce the settlement agreement because its "material terms * * * were clear."

{¶ 14} "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 Cont'l W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.,* 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996) ("The standard of review [to be applied to rulings on a motion to enforce a settlement agreement] is whether or not the trial court erred. Accordingly, the question before us is whether the trial court erred as a matter of law in dismissing the motion to enforce the settlement agreement.").

{¶ 15} "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.*

{¶ 16} "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997) (Holding that a trial court must conduct an evidentiary hearing "[w]here the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement").

{¶ 17} "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* at ¶ 15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85, 75 N.E.2d 608 (1st Dist.1947).

{¶ 18} We begin our review of the purported settlement agreement with the term that "[t]he deeds and documents [would] be filed as promptly as possible."

{¶ 19} Following the settlement hearing and in furtherance of partitioning the property, appellants presented William with a deed for each of his parcels—described by appellants as "a deed in fee simple warranting title in William except for easements and

restrictions of record." (Appellants' brief at 17). But, William would not accept the deeds, insisting instead on general warranty deeds, i.e. deeds without limitation. He claims that he "did not bargain for imperfect title when he participated in the Settlement Hearing to partition their joint property." (Appellee's brief at 22; emphasis omitted). In its decision, the trial court concluded that the settlement agreement failed, in part, due to a "lack of definiteness" with respect to the "[t]ypes of deeds (General Warranty, Quit Claim, etc.,) to be given for the parcels." (J.E. at 15-16).

{¶ 20} To be binding, a contract must be definite and certain. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations,* 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). While the parties need not agree on every conceivable circumstance that might arise in order for a contract to exist, they must agree on the contract's "essential terms." (Citations omitted.) *In re Est. of Bohl,* 12th Dist. Brown Nos. Nos. CA2015–01–005, CA2015–01–006, 2016-Ohio-637, ¶ 33. "Thus, a valid contract must be specific as to its essential terms." *Id.* In a contract that is not for goods, the essential terms are, generally, the parties to the contract and its subject matter. *Id.*, citing *Mantia v. House,* 178 Ohio App.3d 763, 2008-Ohio-5374, 900 N.E.2d 641, ¶ 9 (2d Dist.2008). An agreement is sufficiently certain for enforcement if it provides a basis for determining the existence of a breach and for giving an appropriate remedy. *Id.*

{¶ 21} Here, the purported settlement agreement states that the parties would file "deeds"; it does not specify what type of "deeds" would be filed. And yet, whether William enjoyed exclusive access to his parcels, including Parcel 11, or conversely,

whether his brothers had a right to traverse over his parcels, including Parcel 11, is fundamental to the partition action. Indeed, as stated in their brief, appellants *agree* with the trial court that "accessibility to other upland parcels over parcel #11 * * * was a material or essential element of the parties' agreement." Appellants are hard-pressed to show that this essential term of the settlement agreement—i.e., the type of deeds to be recorded—was clear in the absence of any evidence in the record that the parties reached a meeting of the minds on that issue.

{¶ 22} In order to find the existence of a valid contract, both parties to the contract must consent to its terms, there must be a meeting of the minds of both parties, and the contract must be definite and certain. Here, even if we assume that the parties had agreed on all other essential terms, the record supports the trial court's determination that the parties did not reach mutual assent as to the type of deed to grant one another in the partition of parcels and, more fundamentally, to the "crucial" issue of access. Upon review of the record, Werner and Peter have not demonstrated that the trial court erred in finding a lack of meeting of the minds as to a settlement agreement. Therefore, we find that the trial court did not err in denying their motion to enforce settlement. Accordingly, appellants' second assignment of error is found not well-taken.

Conclusion

{¶ 23} Based upon the foregoing, we find the trial court correctly concluded that the parties did not reach an enforceable settlement agreement. Accordingly, appellants' first and second assignments of error are found not well-taken, and the trial court's April

6, 2020 judgment entry is affirmed. The appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
JUDGE

Myron C. Duhart, J. _____
CONCUR.
JUDGE

[Cite as *Weiler v. Knox Community Hosp.*, 2021-Ohio-2098.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD WEILER, ET AL.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 20CA000018
	:	
KNOX COMMUNITY HOSPITAL, ET AL.	:	
	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas, Case No. 18PM01-0014
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 22, 2021

APPEARANCES:

For Plaintiffs-Appellants:	For Defendant-Appellant:
GERALD S. LEESEBERG CRAIG S. TUTTLE Leesburg & Valentine 175 South Third St., Penthouse One Columbus, OH 43215	FREDERICK A. SEWARDS Poling Law 300 E. Broad St., Suite 350 Columbus, OH 43215

Delaney, J.

{¶1} Plaintiffs-Appellants Richard and Sherre Weiler appeal the October 23, 2020, judgment entry of the Knox County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee Knox Community Hospital.

FACTS AND PROCEDURAL HISTORY

{¶2} Edward Blackburn, M.D. was the primary care physician for Plaintiff-Appellant Richard Weiler. At the time Weiler was a patient, Dr. Blackburn was an employee, agent, and/or member of Fredericktown Family Practice, Inc., and Defendant-Appellee Knox Community Hospital. In 2011, Dr. Blackburn ordered Weiler a Prostate-Specific Antigen (PSA) Test to measure the amount of PSA in Weiler's blood. The result of that PSA test was normal. After 2011, Dr. Blackburn did not order any further prostate cancer screening for Weiler, but Weiler thought he was receiving the PSA test in his bloodwork ordered by Dr. Blackburn. In 2016, Weiler was diagnosed with prostate cancer. The cancer has progressed to a stage that it is no longer responding to treatment.

{¶3} On May 22, 2017, Plaintiffs-Appellants Richard and Sherre Weiler filed a complaint in the Richland County Court of Common Pleas against Knox Community Hospital; Fredericktown Family Practice, Inc.; Christopher V. Blackburn as the Executor of the Estate of Edward Blackburn, M.D.[1]; Sarah Jackson, CNP; and Holly Mast, CNP. The complaint brought claims for medical negligence and failure to obtain informed consent for the defendants' alleged failure to conduct prostate cancer screening and timely diagnose Weiler's prostate cancer. The complaint alleged Dr. Blackburn was an

[1] Dr. Blackburn passed away before the complaint was filed.

employee, agent, and/or member of Fredericktown Family Practice and Knox Community Hospital.

{¶4} Weiler voluntarily dismissed Fredericktown Family Practice, Inc. as a defendant. Defendant Sarah Jackson, CNP filed a motion for summary judgment, which the Richland County Court of Common Pleas granted, and Jackson was dismissed as a party.

{¶5} The defendants also filed a motion to change venue to Knox County. The trial court granted the motion to change venue on January 10, 2018. The complaint was transferred to the Knox County Court of Common Pleas on January 19, 2018.

{¶6} After the transfer of the case to Knox County, Weiler dismissed Holly Mast, CNP as a defendant. Weiler also voluntarily dismissed his claim for informed consent.

{¶7} The only claim pending was medical malpractice against the remaining defendants, Christopher V. Blackburn as the Executor of the Estate of Edward Blackburn, M.D. ("Estate of Dr. Blackburn"), and Defendant-Appellee Knox Community Hospital ("KCH").

{¶8} Weiler entered into settlement negotiations with the Estate of Dr. Blackburn and KCH. Dr. Blackburn was the named insured on an individual insurance policy issued by The Doctors Company. KCH was the named insured on an insurance policy issued by Coverys Insurance Company. Dr. Blackburn and KCH were initially represented by the same trial counsel; as the settlement negotiations progressed, however, The Doctors Company retained separate counsel to represent it and the Estate of Dr. Blackburn during the negotiations.

{¶9} Weiler and the Estate of Dr. Blackburn entered into a Release and Settlement Agreement. On April 24, 2020, Weiler voluntarily dismissed the Estate of Dr. Blackburn as a defendant, with prejudice.

{¶10} On May 12, 2020, KCH filed a motion to compel Weiler to produce the full and complete copy of the Release and Settlement Agreement between Weiler and the Estate of Dr. Blackburn. KCH became aware there was allegedly language in the Release and Settlement Agreement that would preserve the right of Weiler to continue the negligence claim against KCH. Weiler opposed the motion and argued the parties to the Release and Settlement Agreement agreed it was confidential. The trial court ordered Weiler to provide only excerpted provisions of the Release and Settlement Agreement, which were pertinent to Weiler's reservation of rights. Weiler could make any redactions necessary to preserve the confidentiality of the Release and Settlement Agreement.

{¶11} KCH filed a motion for summary judgment on August 31, 2020. It contended that while Weiler brought a claim for medical negligence against both the Estate of Dr. Blackburn and KCH, liability attached to KCH via vicarious liability through the actions of its former employee, Dr. Blackburn. Via the Release and Settlement Agreement, Weiler settled with and released the Estate of Dr. Blackburn from his claim of medical negligence. Weiler voluntarily dismissed the Estate of Dr. Blackburn from the action, with prejudice. KCH argued it was black-letter law that the settlement with and the release of the employee who was primarily liable extinguishes the secondary liability of the employer, KCH. Based on the Release and Settlement Agreement, there was no genuine issue of material fact that KCH was entitled to judgment as a matter of law on the claim for medical negligence. The redacted Release and Settlement Agreement was filed under seal.

{¶12} Weiler filed a response to the motion for summary judgment. The Release and Settlement Agreement defined the term "RELEASEE" to exclude Dr. Blackburn's employer, KCH. Weiler described the settlement with the Estate of Dr. Blackburn as a partial settlement. Weiler argued Ohio law permitted a plaintiff to settle with a primarily liable employee and continue to pursue vicarious liability claims against the secondarily liable employer when the consideration paid by the employee was only a partial satisfaction of the plaintiff's damages.

{¶13} On October 23, 2020, the trial court granted KCH's motion for summary judgment. It is from this judgment that Weiler now appeals.

ASSIGNMENTS OF ERROR

{¶14} Weiler raises one Assignment of Error:

{¶15} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE, WRONGLY HOLDING THAT AN EMPLOYER HOSPITAL CAN ONLY BE HELD LIABLE WHEN THE EMPLOYEE PHYSICIAN REMAINS SUBJECT TO LIABILITY."

ANALYSIS

{¶16} The issue before this Court is whether the trial court erred when it granted summary judgment in favor of KCH in finding that a settlement with the employee, as the primarily liable party, extinguishes the claim of liability against the employer, the secondarily liable party. Based upon our interpretation of current Ohio case law on this issue, we find the trial court did not err.

Standard of Review

{¶17} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment. The moving party bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶18} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶19} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*., 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

Respondeat Superior

{¶20} The Ohio Supreme Court explained in *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994), that "[g]enerally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior." *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio

St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 20. The Court adopted a theory of vicarious liability in *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990). It held that "[i]t was a fundamental maxim of law that a person cannot be held liable, other than derivatively, for another's negligence. * * * [T]he most common form of derivative or vicarious liability is that imposed by the law of agency, through the doctrine of *respondeat superior*." *Wuerth*, ¶ 20 quoting *Albain* at 255, overruled on other grounds by *Clark*, 68 Ohio St.3d at 444-445. Vicarious liability "depends on the existence of control by a principal (or master) over an agent (or servant), terms that [the Court] have used interchangeably." *Wuerth* at ¶ 20 citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, 494 N.E.2d 1091 (1986).

{¶21} In the instant case, the employment relationship between of KCH and Dr. Blackburn is not before this Court. The parties agree that Dr. Blackburn was an employee of KCH and acting within the scope of his employment at the time of the alleged medical negligence.

{¶22} The Ohio Supreme Court analyzed the issue of respondeat superior in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939. *Wuerth* involved a claim for legal malpractice against the attorney and law firm filed in federal court. The district court dismissed the attorney from the suit because the statute of limitations for legal malpractice had expired before the complaint was filed. *Moore v. Mount Carmel Health System*, 2020-Ohio-6695, 164 N.E.3d 104, ¶ 26 (10th Dist.), citing *Wuerth* at ¶ 7-8. The district court next dismissed the vicarious liability claim against the law firm because there was no legally cognizable claim against the attorney, and the law firm did not directly practice law. *Id*. citing *Wuerth* at ¶ 8. On appeal

to the Sixth Circuit Court of Appeals, the court certified a question to the Ohio Supreme Court whether Ohio law permits a legal malpractice claim to "'be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance.'" *Moore* at ¶ 27 citing ¶ 9.

{¶23} In *Wuerth*, the Ohio Supreme Court examined its prior holdings as to the respective liabilities of a principal and agent:

> "For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." [*Losito v. Kruse*, 136 Ohio St. 183, 187, 24 N.E.2d 705 (1940)], citing *Maple v. Cincinnati, Hamilton & Dayton RR. Co*. (1883), 40 Ohio St. 313. See also *State ex rel. Flagg v. Bedford* (1966), 7 Ohio St.2d 45, 47–48, 36 O.O.2d 41, 218 N.E.2d 601 ("This court follows the rule that until the injured party receives full satisfaction, he may sue either the servant, who is primarily liable, or the master, who is secondarily liable, and a mere judgment obtained against the former is not a bar to an action or judgment against the latter"). "The plaintiff, in any event, can have but one satisfaction of his claim." *Losito*, 136 Ohio St. at 187–188, 16 O.O. 185, 24 N.E.2d 705.
>
> Although a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable. As we held in *Losito*, for example, "[a] settlement with and

> release of the servant will exonerate the master. Otherwise, the master would be deprived of his right of reimbursement from the servant, if the claim after settlement with the servant could be enforced against the master." *Id*. at 188, 16 O.O. 185, 24 N.E.2d 705, citing *Herron v. Youngstown* (1940), 136 Ohio St. 190, 16 O.O. 188, 24 N.E.2d 708; *Bello v. Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526; *Brown v. Louisburg* (1900), 126 N.C. 701, 36 S.E. 166. Similarly, in *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, we recognized that "[t]he liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. *If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions.*" (Emphasis added.) *Id*. at ¶ 20, citing *Losito* and *Herron*. See also *Munson v. United States* (C.A.6, 1967), 380 F.2d 976, 979 (applying Ohio law and stating that "the master's sole liability depends upon a finding of liability on the part of the servant, so he cannot be held accountable where there is no such finding").

Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶¶ 21-22. The Court did not decide whether the judgment dismissing the law firm should be affirmed but answered the certified question by holding, "[a] law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice." *Wuerth* at ¶ 18. The Sixth District Court of Appels then affirmed the dismissal of the law firm based on the dismissal of the attorney. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 349 Fed.Appx. 983, 984 (6th Cir.2009).

Plaintiff's Settlement and Release of the Employee

{¶24} There is no factual dispute that Weiler entered into a Release and Settlement Agreement with the Estate of Dr. Blackburn. The terms of the Release and Settlement Agreement were confidential, and the majority of the agreement filed under seal with the trial court was redacted. The unredacted portion of the Release and Settlement Agreement defined the "Releasees" as "CHRISTOPHER V. BLACKBURN, Individually and as Executor of the Estate of Edward D. Blackburn, Edward D. Blackburn (Deceased) and THE DOCTORS COMPANY." The redacted agreement stated, "[t]he definition of RELEASEES shall not include Knox Community Hospital." Weiler characterized the Release and Settlement Agreement as a partial settlement of his claim for medical negligence. Due to the redactions, we are unable to recite the terms of the agreement as to compensation for Weiler's injuries.

{¶25} The issue before this Court is whether Weiler's settlement and release of his claims with the Estate of Blackburn extinguished his claims of vicarious liability against KCH. We look to *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, where the Ohio Supreme Court favorably cited to three decisions from the First District and Eighth District that found settlement with the employee, the primarily liable party, extinguishes the liability of the employer, the secondarily liable party:

> An example is *Radcliffe v. Mercy Hosp. Anderson* (May 14, 1997), Hamilton App. Nos. C–960424 and 960425, 1997 WL 249436, a wrongful-death case filed against Mercy Hospital and two physicians, both independent contractors who had treated the plaintiff at Mercy. The plaintiff settled her claim against the first physician, and the court granted summary

judgment in favor of the second physician. The court, in turn, granted summary judgment to the hospital on the issue of its liability for the alleged negligence of the independent-contractor physicians. The court concluded that once the primary liability was extinguished, either by settlement and release or by a favorable judgment, the secondary liability was necessarily extinguished also. *Id*., citing *Losito v. Kruse*. "[T]here can be no vicarious liability imputed to a principal, if there is no liability on the part of the agent." *Id*.

In *Wells v. Spirit Fabricating, Ltd*. (1996), 113 Ohio App.3d 282, 680 N.E.2d 1046, [appeal not allowed, 77 Ohio St.3d 1514, 674 N.E.2d 369 (1997),] the appellate court concluded that the plaintiff's settlement with and release of the employee/defendant also released the employer. An "employer cannot be found to be liable for negligence he did not commit. The employer's liability is dependent on the negligence of the employee. Since the plaintiff released [the employee] for his negligence, there is no basis to support plaintiff's claim against Spirit [the employer]." *Id*. at 294, 680 N.E.2d 1046.

Likewise, in *Dickerson v. Yetsko* (Nov. 22, 2000), Cuyahoga App. No. 77636, 2000 WL 1739298, [appeal not allowed, 91 Ohio St.3d 1464, 743 N.E.2d 403 (2001)], the plaintiff settled with and executed a release to Dr. Yetsko. The court held that the release extinguished the secondary liability of Meridia Hospital because the hospital's liability, if any, was secondary to and derived solely from the primary liability of its agent. If the liability of the

> primarily liable party was extinguished, the liability of the secondarily liable party was likewise extinguished. *Id*.

Comer v. Risko, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶¶ 21-23.

{¶26} The rationale of the rule espoused in *Losito* is "to protect the employer's indemnification rights against the employee, who bears primary liability." *Wells v. Spirit Fabricating, Ltd.*, 113 Ohio App.3d 282, 291, 680 N.E.2d 1046 (8th Dist. 1996). "'[W]here a person is chargeable with another's wrongful act and pays damages to the injured party as a result thereof, he has a right of indemnity from the person committing the wrongful act, the party paying the damages being only secondarily liable; whereas, the person committing the wrongful act is primarily liable.' quoting *Travelers Indemn. Co. v. Trowbridge* (1975), 41 Ohio St.2d 11, 14, 70 O.O.2d 6, 321 N.E.2d 787. It logically follows that release of the employee from liability would thwart the employer's ability to seek reimbursement from the employee for payments made to the plaintiff by destroying the employer's subrogation rights. *Wells*, 113 Ohio App.3d at 293, 680 N.E.2d 1046." *Comer*, 2005-Ohio-4559, ¶ 24.

{¶27} The *Wells* case further held that a partial satisfaction and a reservation of right to pursue a claim against the secondarily liable party would bar the claim:

> Also, although there is only a partial satisfaction and plaintiff reserved her right to pursue a claim against defendant, the plaintiff cannot do so. The Ohio Supreme Court in *Krasny–Kaplan v. Flo–Tork, Inc*. (1993), 66 Ohio St.3d 75, 78, 609 N.E.2d 152, 154, held:
>
> "The concept of indemnity embraces aspects of primary and secondary liability. Indemnification occurs when one who is primarily liable is required

to reimburse another who has discharged a liability for which that other is only secondarily liable. See Prosser & Keeton on Torts (5 Ed.1984) 341, Section 51. In the present case, no *liability* of either defendant to the plaintiff was found. Therefore, the traditional understanding of indemnity cannot apply, because appellee was never determined to be primarily liable." (Emphasis sic.)

The court in *Munson v. United States* (C.A.6, 1967), 380 F.2d at 979, also applied the above principle as follows:

"It should be clear that the primary-secondary characterization of the relationship between master-servant is a definition of their rights between themselves and has no bearing on their liability to the third party who has been injured. Thus, the master's right to indemnity from his servant, by way of subrogation to plaintiff's claims, is the crucial factor in releasing the master when the servant is released. It is not, as the Government contends, based on some abstract dissolution of the underlying liability to the plaintiff which occurs when the servant releases him for less than full compensation and plaintiff reserves his rights against the master. That view would seem to be an erroneous application of the rule that where master and servant are joined by plaintiff in one suit, a verdict against the master will not be allowed when the servant is simultaneously exonerated. In that situation, the master's sole liability depends upon a finding of liability on the part of the servant, so he cannot be held accountable where there is no such finding."

Wells v. Spirit Fabricating, Ltd., 113 Ohio App.3d 282, 293, 680 N.E.2d 1046, 1053 (8th Dist.1996).

{¶28} When it answered the certified question as to the liability of a law firm based on the alleged malpractice of a non-party attorney, the Ohio Supreme Court in *Wuerth* acknowledged the similarities in legal and medical malpractice claims and utilized precedent in the medical malpractice arena. *Moore* at ¶ 28. In *Moore v. Mount Carmel Health System*, 2020-Ohio-6695, 164 N.E.3d 1041 (10th Dist.), the Tenth District Court of Appeals examined the conflict in the districts whether *Wuerth* should be applied to medical malpractice claims:

> Several districts in Ohio have applied *Wuerth* to bar malpractice claims against a medical or dental group where the allegedly negligent doctor or dentist was either not included or was not timely sued. *See Hignite v. Glick, Layman & Assocs., Inc.*, 8th Dist. Cuyahoga No. 95782, 2011-Ohio-1698, 2011 WL 1327433, ¶ 13 (dental malpractice claim against dental office barred because statute of limitations against dentist had expired); *Whitcomb v. Allcare Dental & Dentures*, 8th Dist. Cuyahoga No. 97141, 2012-Ohio-219, 2012 WL 1755861, ¶ 9-10 (same); *Rush v. Univ. of Cincinnati Physicians, Inc.*, 2016-Ohio-947, 62 N.E.3d 583, ¶ 23 (1st Dist.) (allegedly negligent doctor was not named in suit); *Wilson v. Durrani,* 1st Dist. Hamilton No. C-130234, 2014-Ohio-1023, 2014 WL 1337583, ¶ 15 (release of another party included claims against doctor; therefore, doctor's practice could not be vicariously liable); *Henry v. Mandell-Brown*, 1st Dist. Hamilton No. C-090752, 2010-Ohio-3832, 2010 WL 3239118, ¶ 14 (claims

against doctor were not filed within the limitations period); *Smith v. Wyandot Mem. Hosp.*, 3d Dist. Wyandot No. 16-14-07, 2015-Ohio-1080, 2015 WL 1289500, ¶ 17, fn. 4 (same); *Brittingham v. Gen. Motors Corp.*, 2d Dist. Montgomery No. 24517, 2011-Ohio-6488, 2011 WL 6352294, ¶ 50-51 (malpractice claim against General Motors, which hired company doctor, was not allowed where doctor was not timely sued).

In contrast, a number of districts have distinguished *Wuerth* or found it inapplicable where claims against hospitals and their employees are concerned. *See Stanley v. Community Hosp.*, 2d Dist. Clark No. 2010-CA-53, 2011-Ohio-1290, 2011 WL 941527, ¶ 22; *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034, ¶ 21 (2d Dist.); *Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986, 2010 WL 3328650, ¶ 30-34; *Henik v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25701, 2012-Ohio-1169, 2012 WL 953138, ¶ 19; *Cobbin v. Cleveland Clinic Found.*, 2019-Ohio-3659, 143 N.E.3d 1155, ¶ 30 (8th Dist.).

Moore v. Mt. Carmel Health Sys., 10th Dist. No. 2017APE-10-754, 2020-Ohio-6695, 164 N.E.3d 1041, 2020 WL 7352652, ¶¶ 32-33.

{¶29} We acknowledge the conflicts in the appellate districts as to the issue of vicarious liability and medical malpractice claims against hospitals and their employees. Our review of the law, however, shows that *Losito* and its progeny, which includes *Wuerth,* are currently valid precedent to resolve this appeal. “We * * * take this opportunity to remind the lower courts in this state that they are required to follow our precedent. *State*

v. Fips, 160 Ohio St.3d 348, 2020-Ohio-1449, 157 N.E.3d 680, ¶ 10 citing *Smith v. Klem*, 6 Ohio St.3d 16, 18, 450 N.E.2d 1171 (1983), citing *Merrick v. Ditzler*, 91 Ohio St. 256, 264, 110 N.E. 493 (1915).

{¶30} We note that as of the date of this opinion, the Ohio Supreme Court has accepted for review the appeal of *Clawson v. Heights Chiropractic Physicians*, LLC., 2nd Dist. Montgomery No. 28632, 2020-Ohio-5351, appeal accepted for review, 161 Ohio St.3d 1474, 2021-Ohio-717, 164 N.E.3d 477, where the issue before the Supreme Court is whether, "once an physician/employee's liability has been extinguished for alleged acts of malpractice the claimant can no longer pursue vicarious liability claims sounding in respondeat superior against the corporate employer of the physician."

Covenant Not to Sue vs. General Release

{¶31} Weiler also contends this case is distinguishable because the Release and Settlement Agreement only provided for a partial settlement, and he reserved his right to pursue a claim against KCH. He cites this Court to *Riley v. City of Cincinnati*, 46 Ohio St.2d 287, 348 N.E.2d 135 (1976). In *Riley*, the plaintiff suffered an injury after she stepped in a hole in a sidewalk. She sued the abutting property owners and the City of Cincinnati for her injuries. After the abutting property owners were dismissed from the action pursuant to a covenant not to sue executed by the plaintiff, the matter went to trial against the city and the jury returned a verdict for the plaintiff. On appeal, the Supreme Court held the covenant not to sue was not a bar to further proceedings against the city. It held:

> When an injured plaintiff brings a tort action against two tortfeasors, the liability of one being primary and the liability of the other being secondary,

> and, prior to the trial of the action, plaintiff executes for a valuable consideration a covenant not to sue in favor of the defendant primarily liable, the consideration therefor being only for partial satisfaction of plaintiffs damages, such covenant is not a bar to further proceedings in the pending cause. (*Diamond v. Davis Bakery*, 8 Ohio St.2d 38, 222 N.E.2d 430, approved and followed.)

Riley v. City of Cincinnati, 46 Ohio St.2d 287, 348 N.E.2d 135, 136 (1976), paragraph one of syllabus. In resolving the matter, the Court examined the language of the covenant not to sue. It held that a covenant not to sue was "nothing more or less than a contract and should be so construed." *Id*. at 291. The Court found the terms of the contract (1) clearly stated that the consideration to be paid was only a partial compensation for the injury received, acknowledging she had suffered injuries in excess thereof; (2) it did not "release" any party but promised only to "cease and desist from prosecution" of the present action against the abutting property owners only; and (3) it expressly excepted and reserved all rights the plaintiff had against the city. *Id*. at 295.

{¶32} The Eighth District Court of Appeals examined a covenant not to sue in *Leon v. Parma Community Gen. Hosp*., 140 Ohio App.3d 95, 746 N.E.2d 689 (8th Dist. 2000). The administrator of the patient's estate sued the hospital, alleging vicarious liability and negligent credentialing of the physician. The hospital impleaded the physician and radiology group in a third-party complaint for indemnity. The administrator executed a covenant not to sue with the physician and radiology group in exchange for $700,000. The covenant not to sue constituted a "full and final consideration of any and all claims or rights or cause of action" against the physician and radiology group. *Id*. at 97. The

covenant not to sue expressly reserved the right to bring claims against the hospital. *Id*. The administrator then settled his claim with the hospital. The only claim remaining was the third-party indemnification claim of the hospital against the physician and radiology group. *Id*. at 99.

{¶33} Counsel for the physician and radiology group filed a motion for summary judgment pursuant to *Radcliffe* and *Wells* arguing the administrator's settlement with the primarily liable parties extinguished the hospital's secondary liability. *Id*. The issue was whether the covenant not to sue had the effect of a release to extinguish the secondary liability of the hospital and preclude the indemnification claim. *Id*. The Eighth District found there was a difference between a covenant not to sue and a release:

> A covenant not to sue is nothing more than a contract and should be construed as such. *Diamond v. Davis Bakery, Inc*. (1966), 8 Ohio St.2d 38, 42, 37 O.O.2d 383, 385, 222 N.E.2d 430, 432. Limited by the language of the contract and the intent of the parties, a covenant not to sue will be upheld as such if it clearly states that (1) the consideration paid was only a partial compensation for the injury sustained; (2) the plaintiff was not "releasing" the other party from any claim, but promised only to "cease and desist" from further prosecution of the present action; and (3) the plaintiff is reserving its rights to pursue other claims. *See Riley*, 46 Ohio St.2d at 295, 75 O.O.2d at 336, 348 N.E.2d at 141. A release, on the other hand, is unqualified and absolute in its terms and gives rise to a rebuttable presumption that the injury has been fully satisfied. *Whitt v. Hutchison* (1975), 43 Ohio St.2d 53, 60, 72 O.O.2d 30, 34–35, 330 N.E.2d 678, 683.

> It is well established that a plaintiff may settle a claim for partial satisfaction with one tortfeasor and execute a covenant not to sue. The covenant will not, however, act as a bar to further litigation against another tortfeasor who is also liable even where the suit is brought against a party who is only secondarily liable and who may have a right of indemnity against the party in favor of whom the covenant not to sue was executed. *Whitt*, 43 Ohio St.2d at 60–61, 72 O.O.2d at 34–35, 330 N.E.2d at 683. A covenant not to sue that does not purport to release a cause of action and does not expressly recognize that the consideration paid thereunder as full satisfaction for the injury will not bar actions against others for causing the injury where the injury has not been fully compensated. *Id*.; see, also, *Mason v. Labig* (June 29, 1989), Greene App. No. 87–CA–91, unreported, at 40–43, 1989 WL 72234.

Id. at 99-100. The court examined the language of the document executed by the administrator, the physician, and radiology group and concluded it was a covenant not to sue as opposed to a general release. *Id*. Because it was a covenant not to sue, the court found *Radcliffe* and *Wells* did not apply to bar the hospital's indemnification claim against the physician and radiology group.

{¶34} In this case, we do not have access to the full terms of the Release and Settlement Agreement as the courts did in *Riley* and *Leon*. The filed copy of the Release and Settlement Agreement was redacted so that only the terms relating to the reservation of rights were available for court's review. In his appellate brief, Weiler contends that KCH did not object to the redactions to preserve its claim against liability. We find this argument

disingenuous because Weiler is relying on the terms of the Release and Settlement Agreement that are redacted and unknown to the other parties or the court to argue for judgment in his favor. Weiler contends the Release and Settlement Agreement was a partial settlement. In his appellate brief he states it was a partial settlement because Weiler "will eventually suffer a premature death as a result of his cancer, giving rise to an entirely new and yet-to-accrue wrongful death claim." (Appellant's Brief, p. 20). Weiler may amend his complaint for medical malpractice to include a claim of wrongful death at some point in the unfortunate future, but there is no dispute that a wrongful death claim was not pending before the trial court when Weiler and the Estate of Dr. Blackburn entered into the Release and Settlement Agreement.

{¶35} After the moving party files its motion for summary judgment, the nonmoving party has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988). Weiler has not met his burden under Civ.R. 56 for this Court to follow the holdings of *Riley* and *Leon* to find there is a genuine issue of material fact the Release and Settlement Agreement was not a general release, barring the application of *Losito* and *Wells*.

Vicarious Liability Was Extinguished

{¶36} Dr. Blackburn was an employee of KCH and was acting within the scope of his employment when he provided the allegedly negligent care to Weiler. Weiler and the Estate of Dr. Blackburn entered into a Release and Settlement Agreement where he settled the claim against the Estate of Blackburn but reserved his right to pursue a claim

against KCH. Even if Weiler met his burden under Civ.R. 56 to establish there was a genuine issue of material fact as to the terms of the Release and Settlement Agreement regarding a partial settlement demonstrating the agreement was not a general release, the law is clear that when there is a release of the agent, even a partial settlement with the agent bars a claim against the principal. *See Wells, supra*. Pursuant to *Losito* and its progeny, we hold that that because Weiler released the Estate of Dr. Blackburn from his claim of medical negligence, there is no basis to support Weiler's claim of vicarious liability against KCH.

{¶37} Weiler's sole Assignment of Error is overruled.

CONCLUSION

{¶38} The judgment of the Knox County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Wise, John, J., concur.