Do I have an enforceable contract?

March 12, 2021

Contract Interpretation

***McCruter v. Travelers Home & Marine Ins. Co.*, 11th Dist. Lake No. 2019-L-167, 2021-Ohio-472**

In this appeal, the Eleventh Appellate District affirmed in part and reversed in part the lower court's decision, and remanded the matter after determining the trial court's interpretation of the contract was contrary to the express language of the policy.

The Bullet Point: When interpreting a contract, Ohio courts examine the contract as a whole instead of analyzing each section separately on its own. Further, when a contract's language is clear, "a court may look no further than the writing itself to find the intent of the parties." Stated differently, Ohio courts look to the plain and ordinary meaning of the language and presume that the intent of the parties is reflected in the language used by the contracting parties. In this matter, the insurer argued it was not liable to pay the monetary judgment granted to the injured plaintiff because its insured allegedly failed to perform her contractual duties under the insurance policy. As this court noted, the relevant section of the insurance policy did not impose duties upon the insured. Rather, the express language of the policy described the duties that the insurer owed to the insured, not duties owed by the insured. The court explained that an insured cannot violate a policy requirement that imposes no duties upon her. As such, the trial court erred when it interpreted the policy contrary to its express language by finding the insured violated a policy under which she had no duties to fulfill.

Enforceable Contract

***Lakeside Produce Distrib. v. Wirtz,* 8th Dist. Cuyahoga No. 109460, 2021-Ohio-505**

In this appeal, the Eighth Appellate District affirmed the trial court's decision, finding that the language in the agreement was too aspirational to constitute an enforceable contract.

The Bullet Point: Under long-standing law, a plaintiff must allege four elements to state a claim for breach of contract: "(1) the existence of a binding contract, (2) the nonbreaching party performed his or her contractual obligations, (3) the other party failed to fulfill its contractual obligations without legal excuse, and (4) the nonbreaching party suffered damages as a result of the breach." As a preliminary matter, there must be an enforceable contract before a party can succeed on a breach of contract claim. An enforceable contract is one which contains an offer, acceptance, consideration, and a manifestation of mutual assent. Stated differently, a plaintiff satisfies the first element by demonstrating

that “both parties consented to the terms of the contract, that there was a ‘meeting of the minds’ of both parties, and that the terms of the contract are definite and certain.” As the court explained, contract terms are definite and certain if they allow the court to determine the existence of a breach and the appropriate remedy. The court explained that indefinite and aspirational language does not constitute an enforceable promise under Ohio law. As the agreement contained merely general, aspirational statements, it did not constitute an enforceable confidentiality contract.

Right to Set-Off

***Mockensturm v. McIlwain*, 6th Dist. Lucas No. L-20-1035, 2021-Ohio-532**

In this appeal, the Sixth Appellate District affirmed in part and reversed in part the trial court’s decision, agreeing that since there was a mutuality of obligation between the parties, the defendant was entitled to set-off.

The Bullet Point: In Ohio, setoff is “that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to set off their respective debts by way of a mutual deduction.” Simply stated, the claim of setoff exists when the plaintiff brings a suit against the defendant for money damages, and the defendant responds by asserting a claim of setoff against the plaintiff for money owed on a separate agreement between the parties. The necessary prerequisite to setoff is mutuality of obligation between the parties. That is to say, the defendant cannot assert a claim of setoff unless both the plaintiff and the defendant are also parties to the other contract.

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[Cite as *McCruter v. Travelers Home & Marine Ins. Co.*, 2021-Ohio-472.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SHONDA MCCRUTER, AS MOTHER OF L.J.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2019-L-167**
- vs -	:	
THE TRAVELERS HOME AND MARINE INSURANCE COMPANY,	:	
Defendant/Third Party Plaintiff-Appellee,	:	
- vs -	:	
VERONICA MALDONADO ARIAS,	:	
Third Party Defendant.		

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2018 CV 001834.

Judgment: Affirmed in part, reversed in part, and remanded.

George R. Oryshkewych, 6100 Oak Tree Boulevard, Suite 200, Independence, Ohio 44131 (For Plaintiff-Appellant).

Steven D. Strang and *Gary L. Nicholson*, Gallagher Sharp LLP, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115 (For Defendant/Third Party Plaintiff-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Shonda McCruter ("Ms. McCruter"), as mother of L.J., appeals the judgment of the Lake County Court of Common Pleas granting summary judgment to

appellee, The Travelers Home and Marine Insurance Company ("Travelers"), and denying her motion for summary judgment.

{¶2} This matter involves a supplemental complaint Ms. McCruter filed on behalf of L.J. against Travelers seeking to recover a judgment in the amount of $16,780.68 entered against Veronica Maldonado Arias ("Ms. Arias") for injuries that L.J. incurred from Ms. Arias' dog.

{¶3} Travelers insured Ms. Arias under a homeowners' policy. However, Travelers and Ms. Arias entered into letter agreement in which Ms. Arias purportedly declined coverage for the occurrence and Travelers purportedly disclaimed its duties of defense and indemnification.

{¶4} Ms. McCruter argues that the trial court erred by granting Travelers' motion for summary judgment, where the trial court found there are no genuine issues of material fact that Ms. Arias violated terms of the policy and that such violations prejudiced Travelers and relieved it of its duty to pay Ms. McCruter's judgment against Ms. Arias. Ms. McCruter also argues that the trial erred by denying her motion for summary judgment.

{¶5} After a careful review of the record and pertinent law, we find that neither party is entitled to summary judgment. We find the trial court erred as a matter of law to the extent it found Ms. Arias violated a policy provision that imposes no duties upon her. We also find that genuine issues of material facts exist regarding whether Travelers waived the policy's notice requirement and whether Travelers was prejudiced by late notice. With respect to Ms. Arias' alleged violations of the policy's cooperation requirements, we find there are genuine issues of material fact as to whether (1) the

parties colluded to impair Ms. McCruter's rights under the policy, (2) the letter agreement constitutes an improper cancellation of the policy under Ohio law, (3) Ms. Arias violated the cooperation requirements, and (4) Travelers waived these requirements.

{¶6} Thus, we affirm in part, reverse in part, and remand this matter for further proceedings consistent with this opinion. Upon remand, Ms. McCruter's claims against Travelers, as well as the determination of Travelers' damages with respect to its default judgment against Ms. Arias, remain pending.

Substantive and Procedural History

{¶7} In August 2017, Ms. McCruter, as the mother of L.J., a minor, filed a complaint in the Lake County Court of Common Pleas against Ms. Arias, a resident of Georgia. Ms. McCruter alleged that in July 2017, L.J. was walking in Fairport Beach Park with her mother and other family members. Ms. Arias was walking her pit bull in the same general vicinity, when the dog lunged at L.J. and "bit and/or clawed" her face, causing an approximately one-inch laceration beneath L.J.'s left eye.

{¶8} At the time of the incident, Ms. Arias and her husband were insured through a homeowners' policy issued by Travelers. Ms. Arias apparently did not want to involve Travelers in the matter. Instead, she retained an Ohio attorney, Jason L. Carter ("Attorney Carter"), to defend her in the lawsuit. She did not notify Travelers regarding the incident or Ms. McCruter's lawsuit.

Initial Communications with Travelers

{¶9} On May 14, 2018, Ms. McCruter's counsel, George R. Oryshkewych ("Attorney Oryshkewych"), sent a letter to Travelers at its home office in Connecticut, notifying Travelers of the incident and his client's pending lawsuit against Ms. Arias,

enclosing a copy of the complaint, and requesting that the matter be assigned to a claims adjuster. Travelers received the letter on May 18. On May 22, Travelers opened a claim and assigned it to Anthony Shell ("Mr. Shell"), an adjuster in Traveler's Indiana office. Travelers also communicated with the insurance agent regarding the underlying facts of the incident and the status of the lawsuit.

{¶10} On May 23, Ms. Arias spoke to a colleague of Mr. Shell by telephone and indicated she did not want Travelers involved in the lawsuit.

{¶11} On May 24, Mr. Shell and Ms. Arias exchanged email correspondence. Ms. Arias confirmed that she was not filing a claim with Travelers and was handling the matter herself. Mr. Shell responded that he would need to review to determine whether Travelers could avoid involvement. Internally, Travelers engaged in coverage analysis.

{¶12} On May 25, Mr. Shell and Ms. Arias exchanged further email correspondence. Mr. Shell requested information about the dogs Ms. Arias owns, stating that he "must have at least this information" since Travelers cannot "unknow" that which it became aware. He wrote that he would move forward with closing the claim and that Travelers may require her to sign a document in the presence of a notary public. Ms. Arias responded with the requested information. She also provided information regarding the circumstances of the incident.

{¶13} During June 2018, Travelers general counsel conducted a legal review of Ms. Arias' request to waive coverage and handle the matter herself.

{¶14} On July 3, 2018, Attorney Oryshkewych sent a follow up letter to Travelers' home office in Connecticut. He advised Travelers that after Ms. McCruter obtained a judgment against Ms. Arias, she intended to file a supplemental complaint against

Travelers pursuant to R.C. 3929.06(A)(2) unless Travelers paid the judgment in full within 30 days.

The Letter Agreement

{¶15} On July 9, Mr. Shell sent an email to Ms. Arias in which he stated that for Travelers to withdraw, she must acknowledge that Travelers will not be able to assist her with the claim any longer at any point, including if an award was made against her. He attached a letter from himself on Travelers letterhead for Ms. Arias' review. He requested that she and any other policy holder sign the acknowledgment contained on the last page in the presence of a notary public and return it to him.

{¶16} In the letter, Mr. Shell acknowledged receipt of Ms. McCruter's lawsuit and the presentment of a claim under the policy. He also memorialized Travelers' understanding that Ms. Arias wished to proceed with defending the lawsuit on her own without Travelers' assistance. He wrote that before Travelers could agree, it must discuss her rights and what she would be giving up if she decided to proceed as she had requested. Mr. Shell then set forth duplicated portions of Ms. Arias' policy regarding Travelers' contractual duties.

{¶17} A section of the letter entitled, "Your Request," states as follows:

{¶18} "Your Travelers Homeowners Policy was written to cover certain general liability expousres [sic] associated with home ownership, including dog bite(s). In your policy, coverage for defense is included, as is indemnity and medical payments. However, both are under the sole discretion of Travelers when they are involved in the defense of our insured. You have made a specific request for Travelers not to be involved in this case * * *. To date, you have retained your own counsel, when [sic] you have paid

at your sole expense, and have been defending this case per your direction. Travelers was only put on notice by the Plaintiff's counsel directly, something that you did not want to occur. Even though your application for insurance lacked acknowledgment of dogs on your premises or that you owned [sic], that in itself would not preclude coverage based on our review as pitt [sic] bulls are not presently an excluded breed of dogs on a Georgia homeowner's application with Travelers.

{¶19} "If you wish to continue this case at your sole expense, you must understand that Travelers, nor its affiliates, will defend nor indemnify, or reimbursement [sic] you in any way in regards to this case or any verdict that may be assessed. Your insurance coverage will continue for any other covered losses, but you will not be able re-request [sic] assistance from Travelers in regards [sic] to this lawsuit. By signed [sic] the attached page, you are stating that you understand and agree that you are not going to cooperate or allow us to investigate or defend you in this matter any longer, and that may result in an irrevocable prejudice with Travelers would [sic] potentially void coverage under this policy for this loss."

{¶20} Mr. Shell requested that Ms. Arias sign the last page of the letter in the presence of a notary public. This page states as follows:

{¶21} "By signing below, I agree that I have read and understand the attached letter in regards [sic] to the lawsuit titled *Shonda McCrutter [sic], As Mother of [L.J.], A Minor v. Veronica Maldonado Arias* and it is my decision to not use my Homeowner's coverage with Travelers or any of their affiliates. I will not now or ever request Travelers to defend, indemnify, or reimburse me for any amount in regards [sic] to this lawsuit. I

understand that my coverage will not otherwise be effected [sic] as it relates to any other claim that may arise while I have coverage with Travelers or any of their affiliates."

{¶22} Two days later, Mr. Shell and Ms. Arias engaged in further email communication. Ms. Arias acknowledged Mr. Shell's prior email and stated she would have the letter agreement completed as soon as possible. They also discussed Attorney Oryshkewych's attempts to involve Travelers in the claim. Mr. Shell noted his receipt of two letters from Attorney Oryshkewych and stated he would not respond until Ms. Arias signed the letter agreement. On July 18, Ms. Arias and her husband signed the letter agreement in the presence of a notary public, and Ms. Arias emailed it to Mr. Shell.

{¶23} On July 20, Mr. Shell sent an email to Attorney Oryshkewych in which he acknowledged Attorney Oryshkewych's previous requests to involve Travelers in the lawsuit against Ms. Arias. He further wrote that (1) the reason Travelers had not responded was because Ms. Arias did not wish to have Travelers involved, which he characterized as "well within her rights," (2) Attorney Oryshkewych was not, nor had he ever been, a party to the policy and therefore had no right or authority to make a claim that Ms. Arias did not wish to tender, (3) Travelers would be closing its files, (4) Ms. Arias had "signed off" and would not have Travelers represent her in the lawsuit, and (5) Ms. Arias would continue to participate through her own counsel.

{¶24} Attorney Oryshkewych responded by reiterating his client's intention to file a supplemental complaint against Travelers pursuant to R.C. 3929.06 and stating nothing in the statute relieves the insurer of liability if the insured does not want the insurer involved.

Post-Judgment Communications

{¶25} In defending Ms. Arias against Ms. McCruter's lawsuit, Attorney Carter did not take any depositions or conduct formal discovery. Ms. Arias authorized him to make a settlement offer of $5,000 on her behalf, which was not accepted. The matter eventually proceeded to a bench trial. With Ms. Arias' approval, Attorney Carter stipulated to her liability. Ms. McCruter was the only witness to testify.

{¶26} On September 26, 2018, the trial court entered judgment in favor of Ms. McCruter and awarded damages of $16,780.68. Ms. Arias did not authorize Attorney Carter to file an appeal.

{¶27} On the same date, Attorney Oryshkewych sent an email to Mr. Shell informing him of the judgment and indicating he would file a supplement complaint against Travelers on his client's behalf if Travelers did not satisfy the judgment in full within 30 days. Mr. Shell responded by stating Travelers had a "policy-holder's release in place." When Attorney Oryshkewych contended that such a release would not preclude Travelers' statutory liability, Mr. Shell told him to "handle how you wish."

{¶28} On October 30, 2018, Mr. Shell sent an email to Ms. Arias inquiring about her plans regarding the judgment against her, suggesting that she may be responsible for Travelers' costs in defending a lawsuit against Ms. McCruter. Ms. Arias responded that she would not appeal the judgment and would force Ms. McCruter to pursue collection efforts against her in Georgia.

The Supplemental Complaint

{¶29} On November 1, 2018, Ms. McCruter filed a supplemental complaint against Travelers pursuant to R.C. 3929.06 in the Lake County Court of Common Pleas.

Travelers appeared through counsel and filed an answer. Travelers alleged that Ms. Arias breached conditions in the policy by failing to provide prompt notice of the alleged incident and by failing to cooperate with Travelers in the investigation, defense, and settlement of Ms. McCruter's lawsuit. Travelers attached the letter agreement as an exhibit.

{¶30} Travelers also filed a third-party complaint against Ms. Arias seeking a declaratory judgment that Travelers does not owe payment of Ms. McCruter's judgment because Ms. Arias breached conditions in the policy, and, alternatively, seeking reimbursement from Ms. Arias in the event it is required to pay Ms. McCruter's judgment.

{¶31} The record indicates that Ms. McCruter's counsel took the deposition of Mr. Shell.

{¶32} Travelers perfected service of its third-party complaint on Ms. Arias and subsequently moved for default judgment against her. The trial court issued a journal entry granting Travelers' motion for default judgment against Ms. Arias and ordering that a damages hearing be conducted in conjunction with the trial on the merits.

{¶33} Both parties filed motions for summary judgment. Travelers argued that it was not required to pay the judgment against Ms. Arias because Ms. Arias failed to comply with certain provisions set forth in the policy, which prejudiced Travelers. In support, Travelers submitted affidavits from Attorney Carter and Mr. Shell. Attorney Carter's and Mr. Shell's affidavits authenticated and referenced Ms. McCruter's complaint against Ms. Arias and the letter agreement. Mr. Shell's affidavit also authenticated and referenced email correspondence between himself and Ms. Arias as well as the policy.

{¶34} In her motion, Ms. McCruter argued that (1) she has established a prima facie case pursuant to R.C. 3929.06, (2) the plain language of the policy does not allow Ms. Arias to unilaterally thwart coverage, (3) Ms. Arias' defenses do not constitute "coverage defenses" under R.C. 3929.06(C)(1), (4) Ms. Arias cooperated with Travelers, and (5) public policy weighs against permitted an insured to choose to exclude coverage at the expense of injured persons. In support, Ms. McCruter submitted and referenced the deposition transcript of Mr. Shell and its accompanying exhibits. These exhibits include Attorney Oryshkewych's letters to Travelers, email correspondence between Mr. Shell and Ms. Arias and between Mr. Shell and Attorney Oryshkewych, the letter agreement, and the claim notes.

{¶35} Both parties also filed briefs in opposition and reply briefs.

The Trial Court's Judgment Entry

{¶36} The trial court issued a judgment entry granting Travelers' motion for summary judgment and denying Ms. McCruter's motion for summary judgment.

{¶37} First, the trial court found that an insured's lack of cooperation constitutes a "coverage defense" under R.C. 3929.06(C)(1). Second, the trial court found that the "unrefuted" facts demonstrate Ms. Arias violated her duties under the policy by (a) failing to notify Travelers of the occurrence; (b) refusing to permit Travelers to defend the lawsuit, provide counsel of its choice, investigate, provide a defense, conduct pre-trial discovery, settle before trial, and appeal the judgment; and (c) refusing to assist Travelers' litigation of the case. Third, the trial court found that by refusing such actions and voluntarily electing to waive coverage, Ms. Arias relinquished any right to have Travelers defend,

indemnify, or reimburse her for the judgment. Finally, the trial court found that Ms. Arias' violations prejudiced Travelers' ability to resolve the matter as it saw fit.

{¶38} Since it found that Travelers was not liable to pay Ms. McCruter's judgment, the trial court found there could be no third-party complaint by Travelers against Ms. Arias. Therefore, the trial court dismissed Travelers' third-party complaint against Ms. Arias.

{¶39} Ms. McCruter timely appealed and presents the following assignment of error for our review:

{¶40} "The trial court erred, as a matter of law, by granting summary judgment against plaintiff/appellant and by denying plaintiff/appellant's motion for summary judgment."

Grant of Summary Judgment to Travelers

{¶41} Within her first assignment of error, Ms. McCruter argues that the trial court erred by granting summary to Travelers.

Standard of Review

{¶42} We review de novo a trial court's order granting summary judgment. *Sabo v. Zimmerman*, 11th Dist. Ashtabula No. 2012-A-0005, 2012-Ohio-4763, ¶ 9.

{¶43} Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Welch v. Ziccarelli*, 11th Dist. Lake No. 2006-L-229, 2007-Ohio-4374, ¶ 36. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. *Id*.

{¶44} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial'. The jurisprudence of summary

judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [75 Ohio St.3d 280 (1996)], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Id.* at ¶ 40.

{¶45} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Id*.

{¶46} Further, in considering a motion for summary judgment, a court must determine only whether reasonable minds can reach more than one conclusion on the facts. The court must not weigh the evidence or determine the merits of the case or the credibility of the witnesses. *Kreais v. Chemi-trol Chem. Co*., 52 Ohio App.3d 74, 78 (6th Dist.1989); *Turner v. Turner*, 67 Ohio St.3d 337, 341-342 (1993). The purpose of

summary judgment is not to try issues of fact, but to determine whether triable issues of fact exist. *McGee v. Goodyear Atomic Corp*., 103 Ohio App.3d 236, 242-243 (4th Dist.1995). Not only is it the duty of the court to closely scrutinize the evidence in favor of the movant, but it must view it, as well as any inferences which may be made from that evidence, in the most favorable light to the opposing party. *Allstate Ins. Co. v. Baileys*, 192 F.Supp. 595, 596 (N.D.Ohio 1958). Summary judgment should not be granted where the facts, although not in dispute, are subject to conflicting inferences. *Cottrell v. Mayfield*, 11th Dist. Portage No. 1730, 1987 WL 10758, *1 (May 1, 1987).

Choice of Law

{¶47} The record indicates that Travelers issued the policy in Georgia to Ms. McCruter, who is a Georgia resident. The policy does not contain a choice of law provision. In cases involving a contract, the law of the state where the contract is made governs interpretation of the contract. *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St.3d 43, 44 (1986). Resort to the principles of conflict of laws is necessary only if there is an actual conflict between local law and the law of another jurisdiction. *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 224 (11th Dist.1996). Since this court's research has disclosed that Ohio and Georgia would apply like principles of insurance law, and since the outcome of this case would be the same regardless of which state's law is applied, Ohio law will be applied in this opinion. *See Elkins v. Am. Intern. Special Lines Ins. Co*., 611 F.Supp.2d 752, 761 (S.D.Ohio 2009).

Principles of Liability Insurance

{¶48} To properly address Ms. McCruter's assignment of error, it is necessary to discuss the nature of her lawsuit against Travelers.

{¶49} R.C. 3929.05 and 3929.06 address liability insurance for bodily injury or death. These statutes are to be construed together. *Steinbach v. Maryland Cas. Co*., 15 Ohio App. 392, 394 (2d Dist.1921).

Benefitted Parties

{¶50} R.C. 3929.05 provides that "[w]henever a loss or damage occurs on account of a casualty covered by a contract of insurance made between an insurance company and any person * * * by which contract such person * * * is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person * * * is responsible, the liability of the insurance company is absolute, and the payment of said loss does not depend upon the satisfaction by the assured of a final judgment against him for loss, damage, or death occasioned by such casualty."

{¶51} According to the Supreme Court of Ohio, a policy of liability insurance is primarily for the insured's own benefit but also for the benefit of third parties who might be injured by the insured's actions. *See Conold v. Stern*, 138 Ohio St. 352, 364 (1941); *see Evans v. Grange Mut. Cas. Co*., 12 Ohio Misc. 108, 110 (C.P.1964) ("Truly the contract of insurance * * * is actually a contract for the benefit of a third party who has been aggrieved as well as for the protection of the negligent party"). Thus, the court has held that an injured person has a potential interest and a substantial right in an insurance policy from the very moment of his or her injury, although it does not develop into a vested right until a judgment is secured against the insured. *Hartford Acc. & Indem. Co. v. Randall*, 125 Ohio St. 581, 585-586 (1932).

{¶52} The insurance company's interest in the case also precedes judgment against the insured, since the insurer investigates, defends, and even settles claims.

Evans at 112. The only reason the insurance company is not made a party defendant by law is that such would apprise the jury that the negligent defendant is covered by insurance. *Id*.

{¶53} The liability of an insurance company becomes "absolute" under R.C. 3929.05 only in the sense that the payment of loss shall not depend upon the satisfaction by the insured of a final judgment against him or her. *Luntz v. Stern*, 135 Ohio St. 225 (1939), paragraph one of the syllabus.

No Cancellation

{¶54} R.C. 3929.05 further provides that "[n]o such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after said assured has become responsible for such loss, damage, or death, and any such cancellation or annulment is void." The purpose of this provision is to secure the right of the injured person against the insurance company free from the right of the insurance company to settle with the insured and cancel the policy after the responsibility against the insured attached. *Steinbach* at 394.

Supplemental Complaint

{¶55} Under R.C. 3929.06, plaintiffs who are awarded damages at trial may file a posttrial, supplemental complaint against the judgment debtor's insurer to recover damages covered under the judgment debtor's insurance policy. *Estate of Heintzelman v. Air Experts, Inc*., 126 Ohio St.3d 138, 2010-Ohio-3264, ¶ 11. Specifically, R.C. 3929.06(A)(1) provides that the plaintiff "is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor's policy of liability insurance applied to the satisfaction of the final judgment." If the

judgment debtor's insurer has not paid the judgment creditor within 30 days of the entry of final judgment, "the judgment creditor may file in the court that entered the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount." R.C. 3929.06(A)(2). The Supreme Court of Ohio has stated that the purpose of R.C. 3926.06 is to afford the injured person direct and prompt benefit of the insured's policy. *Luntz* at 229.

Affirmative Defenses

{¶56} In a judgment creditors' action against the insurer under R.C. 3929.06, "the insurer has and may assert as an affirmative defense against the judgment creditor any coverage defenses that the insurer possesses and could assert against the holder of the policy in a declaratory judgment action or proceeding under R.C. Chapter 2721. of the Revised Code between the holder and the insurer." R.C. 3929.06(C)(1).

{¶57} According to the Supreme Court of Ohio, the judgment creditor's right "against the insurer, if any, is a derivative right implied in law by way of subrogation to the rights of the insured against the insurer." *Conold* at 365. As a result, "the right of a judgment creditor against the insurer can rise no higher than the rights of the insured judgment debtor against such insurer." *Id*. Thus, if there is no coverage under the terms of the policy for the judgment debtor's liability, the insurer can raise those defenses against the judgment creditor. *Estate of Heintzelman* at ¶ 11.

{¶58} The court has recognized that an insured's breach of the policy through nonperformance may void the policy before a judgment creditor is able to enforce his claim against the insured. *Conold* at 360-361 ("[I]f the policy * * * becomes void by

nonperformance of the insured, it is void as to all parties who may thereafter claim under it"). Thus, the court has held "the failure on the part of the insured * * *, without collusion or fraudulent conduct with the insurer, to perform conditions subsequent * * * must affect all such claims thereafter asserted * * *." *Id*. at 361.

{¶59} The court has also held that a judgment creditor has standing in a supplemental proceeding to assert that the insurer waived policy conditions by failing to defend its insured in the underlying action, even in the absence of a written assignment or other contractual right. *Sanderson v. Ohio Edison Co*., 69 Ohio St.3d 582, 587 (1994).

Principles of Contract Interpretation

{¶60} Travelers argues there is no genuine dispute that Ms. Arias failed to fully comply with the terms of the policy and that her failure to comply prejudiced Travelers. Therefore, Travelers argues that it has no duty to provide coverage or to pay Ms. McCruter's judgment against Ms. Arias.

{¶61} Travelers' asserted defense involves the interpretation of its insurance policy with Ms. Arias. A decision granting summary judgment based on interpretation of an insurance contract is a question of law. *Doe v. Sherwin*, 11th Dist. Portage No. 2013-P-0058, 2015-Ohio-2451, ¶ 11.

{¶62} When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. The court examines the insurance contract as a whole and presumes that the intent of the parties is reflected in the language used in the policy. *Id*. The court looks to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the

policy. *Id*. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id*. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Id*. When interpreting an insurance contract, any ambiguities will be construed strictly against the insurer and liberally in favor of the insured. *Id*. at ¶13.

{¶63} With the above principles in mind, we address the merits of Ms. McCruter's appeal.

Refusal to Permit Travelers' Performance

{¶64} Travelers argues that Ms. Arias breached several policy provisions. Therefore, it contends that Ms. Arias did not comply with the policy's "Suit Against Us" provision, which states, in relevant part, that "[n]o action can be brought against [Travelers] unless there has been full compliance with all the terms under this Section II."

{¶65} First, Travelers argues that Ms. Arias breached the policy's "Coverage E – Personal Liability" provision, which states as follows:

{¶66} "If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence' to which this coverage applies, we will:

{¶67} "1. Pay up to our limit of liability for the damages for which an 'insured' is legally liable. Damages include prejudgment interest awarded against an 'insured'; and

{¶68} "2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the 'occurrence' is exhausted by the payment of a judgment or settlement."

{¶69} Travelers argues that Ms. Arias refused to *permit* Travelers to defend and indemnify her and to investigate and settle Ms. McCruter's lawsuit.

{¶70} Travelers' interpretation is not consistent with the express language of the policy. The "Suit Against Us" provision requires Ms. Arias' "full compliance with all the terms under *this Section II*." (Emphasis added.) Section II contains multiple parts. The "Duties After 'Occurrence'" provision is set forth in "Section II – Conditions," and it describes the duties the *insured* must perform for Travelers to provide coverage. By contrast, "Coverage E – Personal Liability" is set forth in "Section II - Liability Coverages," and it describes contractual duties that *Travelers* owes to its insured. Ms. Arias cannot violate a policy provision that imposes no duties upon her.

{¶71} None of the cases cited by Travelers support the proposition that an insured violates an insurance policy by refusing to allow an insurer to perform its contractual duties. Rather, the cited cases recognize that under a nonperformance defense, an insured's failure to comply with policy conditions potentially *relieves* the insurer of its contractual obligations. *Johnson v. Allstate Ins. Co*., 11th Dist. Trumbull No. 2001-T-0127, 2002-Ohio-7165, ¶ 30, quoting *Gabor v. State Farm Mut. Auto. Ins. Co*., 66 Ohio App.3d 141, 143 (8th Dist.1990) ("When cooperation is a policy condition and the insured fails to comply, in the absence of waiver or estoppel, 'the insurer may be relieved of further obligation with respect to a claim with which the insured did not cooperate'").

{¶72} Therefore, Ms. Arias' violations of the policy, if any, must involve the "Duties After 'Occurrence'" provision, which we will address below.

{¶73} The trial court found that Ms. Arias violated the policy by refusing to "*let* Travelers defend the action, "*let* Travelers provide counsel of its choice, "*allow* Travelers

to investigate and provide a defense of Travelers' choosing," "*let* Travelers conduct pre-trial discovery," "*allow* Travelers to settle the matter prior to trial," and "*let* Travelers appeal the judgment thereafter." (Emphasis added.) Thus, it appears the trial court found that Ms. Arias violated "Coverage E – Personal Liability," which constitutes an error of law because, as previously noted, the insured cannot violate a policy requirement that imposes no duties upon the insured.

Notice Requirement

{¶74} Second, Travelers argues that Ms. Arias breached the notice requirement set forth in the "Duties After 'Occurrence'" provision, which states, in relevant part, as follows:

{¶75} "In case of an 'occurrence', you or another 'insured' will perform the following duties that apply. We have no duty to provide coverage under this policy if your failure to comply with the following duties is prejudicial to us. You will help us by seeing that these duties are performed:

{¶76} "a. Give us written notice as soon as is practical, which sets forth:

{¶77} "(1) The identity of the policy and the named 'insured' shown in the Declarations;

{¶78} "(2) Reasonably available information on the time, place and circumstances of the 'occurrence'; and

{¶79} "(3) Names and addresses of any claimants and witnesses;

{¶80} Notice provisions allow the insurer (1) to become aware of occurrences early enough that it can have a meaningful opportunity to investigate, (2) the ability to determine whether the allegations state a claim that is covered by the policy, (3) to step

in and control the potential litigation, protect its own interests, maintain the proper reserves in its accounts, and pursue possible subrogation claims, and (4) to make timely investigations of occurrences in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St.3d 292, 302-303 (2000).

{¶81} Travelers argues that Ms. Arias failed to give Travelers "written notice" of the incident "as soon as practical."

{¶82} The Supreme Court of Ohio has created a two-step analysis to be applied in determining whether coverage may be avoided based upon late notice. *Ferrando v. Auto-Owners Mut. Ins. Co*., 98 Ohio St.3d 186, 2002-Ohio-7217, ¶ 90. First, the court must determine whether the insured's notice was timely. *Id*. This determination is based on asking whether the insurer received notice "within a reasonable time in light of all the surrounding facts and circumstances." *Id*. If the insurer did not receive reasonable notice, the next step is to inquire whether the insurer was prejudiced. *Id*. Unreasonable notice creates a presumption of prejudice to the insurer, which the insured bears the burden of evidence to rebut. *Id*. The question of whether the insured met the notice condition is usually a question for the jury. *Ormet Primary* at 300.

{¶83} It is undisputed that Ms. Arias did not notify Travelers about the incident or the lawsuit. Instead, Travelers first became aware of the matter after Attorney Oryshkewych sent a letter to Travelers enclosing a copy of the complaint. According to the Supreme Court of Ohio, however, because of an injured person's "potential interest and a substantial right in the policy from the very moment of his injury," his or her

performance of policy conditions is effective against the insurer. *See Hartford*, *supra*, at 585-86.

{¶84} It is also undisputed that Travelers did not receive Attorney Oryshkewych's letter until May 18, 2018, which was over ten months after the incident (July 2, 2017) and approximately four months prior to the bench trial (September 24, 2018). However, we find there are genuine issues of material fact as to whether Travelers waived strict compliance with the policy's notice requirement.

Waiver

{¶85} It is a basic principle of contract law that a party to a contract who would benefit from a condition precedent to its performance may waive that condition. *Thomas v. Nationwide Mut. Ins. Co*., 177 Ohio App.3d 502, 2008-Ohio-3662, ¶ 93 (8th Dist.). An insurer may waive a policy's requirements through the words, acts, or conduct of its authorized agent. *See id.* at ¶ 99; *Lind v. State Auto. Mut. Ins. Assn*., 128 Ohio St. 1, 7 (1934). When a condition is excused, its nonperformance is no bar to recovery on the contract. *Thomas* at ¶ 93. Whether such waiver has taken place is generally a question of fact for the jury. *Jokic v. State Auto. Mut. Ins. Co.*, 11th Dist. Lake No. 2004-L-135, 2005-Ohio-7044, ¶ 35.

{¶86} Courts have long held that an insurance company waives a policy's notice provisions when it disclaims all liability under the policy. In *Hartford*, *supra*, the Supreme Court of Ohio held that "[w]here a policy of indemnity casualty insurance obligates the insurance company to defend, in the name and on behalf of the assured, any suit against the assured within the terms of the policy, and as a condition thereto requires that immediate notice of such be given to the company, such notice is waived if, prior to such

suit, the company by its authorized agent disclaims liability to indemnify and declares its intention not to defend the suit for that reason." *Id*. at paragraph three of the syllabus.

{¶87} In *Costa v. Cox*, 84 Ohio Law Abs. 338, 171 N.E.2d 529 (9th Dist.1958), *aff'd*, 168 Ohio St. 379 (1958), the Ninth District found waiver on the part of the insurance company where, following its receipt of notice from the injured person's counsel, it conducted only a "casual" investigation and disclaimed all liability for damages and any duty to defend the insured. *Id*. at 534; *see also Patterson v. Tice*, 91 Ohio App.3d 414, 419 (5th Dist.1993) (waiver found where, following its receipt of notice from the injured person's counsel, the insurance company made a "casual determination" that it had no duty to defend and did not intervene in the underlying action or "otherwise judicially ascertain its duty to defend its interests or those of its insured"); *Jones v. Sailer*, 12th Dist. Fayette No. CA89-06-012, 1990 WL 14808, *3 (Feb. 20, 1990) (waiver found where, subsequent to learning of the accident, the insurance company denied liability and retroactively cancelled coverage).

{¶88} Here, Travelers first received notice of the incident and the lawsuit from Ms. McCruter's counsel. Subsequently, Travelers communicated with Ms. Arias, conducted a brief investigation of the incident, and determined whether it could accommodate her request to waive coverage for the incident and handle the matter on her own. Shortly thereafter, the parties entered into the letter agreement, whereby Travelers consented to Ms. Arias' request and purported to disclaim its duties to defend or indemnify Ms. Arias. Thus, there is a genuine issue of material fact as to whether Travelers waived the policy's notice requirement by virtue of the letter agreement.

Prejudice

{¶89} Even if Travelers did not waive the notice requirement, genuine issues of material fact exist as to whether Travelers was materially prejudiced by late notice.

{¶90} Prejudice has been described as "seriously impairing the insurer's ability to investigate a claim." *Johnson*, *supra*, at ¶ 31. Mr. Shell's affidavit states that Travelers was prejudiced because "an opportunity to investigate fully the alleged * * * injury, and the subject occurrence and claim, *was not seized*." (Emphasis added.) Mr. Shell's affidavit does not assert that late notice impaired Travelers' ability to "seize" such an opportunity. In fact, Mr. Shell's affidavit recounts information Ms. Arias provided to him regarding the circumstances of the injury, and the record reflects that Travelers engaged in some investigation.

{¶91} In addition, Mr. Shell's affidavit states that after receiving notice, Travelers "fully advised" Ms. Arias that it was "prepared to defend and indemnify" her in the lawsuit. Mr. Shell's affidavit does not state that Travelers was only prepared to defend Ms. Arias under a reservation of rights. Thus, Mr. Shell's assertion is not consistent with a claim of prejudicial late notice.

{¶92} The trial court found that Ms. Arias violated the policy by not placing Travelers on notice of the occurrence, which prejudiced Travelers. Since there are genuine issues of material fact regarding waiver and prejudice, we find the trial court erred by granting summary judgment to Travelers.

Cooperation Requirements

{¶93} Third, Travelers argues that Ms. Arias violated the cooperation requirements set forth in the "Duties After 'Occurrence'" provision, which obligated Ms.

Arias to "[c]ooperate with [Travelers] in the investigation, settlement or defense or any claim or suit," and to "[p]romptly forward [Travelers] every notice, demand, summons or other process relating to the 'occurrence.'"

{¶94} In order to protect themselves from false claims, insurers frequently include clauses in their policies which mandate cooperation by the insured in investigating a claim. *Johnson* at ¶ 29. To constitute a defense to liability, an insured's lack of cooperation must result in material and substantial prejudice to the insurance company. *Id.* at ¶ 30.

{¶95} The issue of whether an insured has violated the cooperation clause of a policy is a question to be determined in view of the facts and circumstances in each case. *Id.* at ¶ 32. Generally, the issue of whether there has been a violation of an insurance policy is for the factfinder. *Id*.

Availability of Noncooperation Defense

{¶96} We find that evidence in the record raises genuine issues of material fact as to whether the noncooperation defense is available to Travelers as a result of collusion and/or improper cancellation of the policy.

{¶97} As previously indicated, an injured person has a *potential* interest and a substantial right in an insurance policy from the very moment of his or her injury. *Hartford*, *supra*, at 585. The Supreme Court of Ohio held that for the insurer to assert a nonperformance defense against a judgment creditor's supplemental complaint, the insured's failure to perform must have been "without collusion or fraudulent conduct with the insurer." *Conold*, *supra*, at 361; *see* 7A Plitt, Maldono, Rogers & Plitt, *Couch on Insurance*, Section 106:30 (3d Ed.2019) ("[T]he rule subjecting the injured person to

defenses good against the insured does not apply in case of collusion between the insurer and the insured"). This is because the injured person is in no position to avoid the collusion or protect himself or herself from it. *Couch on Insurance* at Section 106:30.

{¶98} The definition of "collusion" includes "'where two persons, apparently in a hostile position and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court.'" *Valley Paint v. Natl. Union Fire Ins. Co. of Pittsburgh*, 12th Dist. Clermont No. CA2010-08-060, 2011-Ohio-1308, ¶ 15, quoting *Scofield v. Excelsior Oil Co.*, 31 Ohio C.D. 416 (1905).

{¶99} Further, R.C. 3929.05 expressly voids any "cancellation or annulment" of an insurance policy covering bodily injury or death by "any agreement between" the insured and insurer after the insured "has become responsible" for such loss. Courts have consistently held that an insured "has become responsible" for purposes of R.C. 3929.05 when an injury occurs. *See*, *e.g.*, *Conold* at 364-365 (holding that the statute prohibits cancellation "after an injury occurs"); *Loxley v. Motorists Mut. Ins. Co*., 2d Dist. Montgomery No. 20156, 2004-Ohio-3771, ¶ 59 (holding that the occurrence of an accident when the policy was in effect precluded cancellation of the policy retroactive to a date prior to the accident); *McGuire v. Mills*, 4th Dist. Ross No. 98CA2462, 1999 WL 685873, *5 (Aug. 30, 1999) (holding that the statute prevented retroactive cancellation after an accident); *Commercial Union Ins. Co. v. The Travelers Ins. Co*., 10th Dist. Franklin No. 80AP-354, 1980 WL 353760, *2 (Oct. 23, 1980) (finding cancellation ineffective where the procedures were completed after the date of the accident); *Jones*, *supra*, at *3 (holding that insurer's cancellation of coverage subsequent to an accident directly violated the statute).

{¶100} In this case, both Ms. Arias' and Travelers' interests in avoiding liability conflicted with Ms. McCruter's interest in obtaining money damages. After the incident but before trial, Ms. Arias and Mr. Shell exchanged several email communications. Although Attorney Oryshkewych had sent two letters to Travelers asserting Ms. McCruter's potential rights under the policy, he was excluded from these communications. Ultimately, Travelers and Ms. Arias entered into a letter agreement whereby Ms. Arias purported to waive insurance coverage for the incident and Travelers purported to disclaim its duties to defend and indemnify Ms. Arias.

{¶101} While Travelers characterizes the letter agreement as merely confirmation of Ms. Arias' unilateral decision to reject coverage, the agreement itself contradicts this statement. The letter agreement explicitly states that "[b]y sign[ing] the attached page, you are stating that you understand and agree that you are not *going to* cooperate or allow us to investigate or defend you in this matter *any longer*." (Emphasis added.) Further, the parties expressly acknowledged that Ms. Arias' actions "may result in an irrevocable prejudice with Travelers [that] would potentially void coverage under this policy for this loss."

{¶102} This language may be reasonably construed as a directive to Ms. Arias to not perform her duties under the policy on a going forward basis despite potential prejudice to Travelers. Ms. Arias' noncompliance would also have the potential effect of prejudicing Ms. McCruter's derivative rights as a judgment creditor operating under R.C. 3929.06.

{¶103} The trial court found that by signing the letter agreement, Ms. Arias "voluntarily elected to waive her right to coverage," and thus "relinquished any right to

have Travers defend, indemnify or reimburse her." Since evidence in the record supports inferences regarding collusion and/or improper cancellation of the policy under R.C. 3929.05, we find the trial court erred by granting summary judgment to Travelers.

Violation of Cooperation Requirements

{¶104} Even if Travelers is not barred from asserting a noncooperation defense, we also find that genuine issues of material fact exist as to whether Ms. Arias violated the policy's cooperation requirements.

{¶105} The word "cooperate" means "to act or to operate jointly with another or others." *Cox*, *supra*, at 535. Metaphorically, it may be described as "'a two-way street' - an effort on the part of the insurance company to fulfill its contract, coupled with the help and assistance of the insured." *Id*. In essence, a cooperation provision gives the insurance company a right to the assistance and help of the insured. *Id*. Before this right can be demanded, however, the insurance company must fulfill its contractual obligations. *Id*.

Investigation

{¶106} Travelers argues that Ms. Arias did not cooperate in the investigation of the lawsuit. However, the record suggests that Ms. Arias cooperated with Travelers to the extent Travelers requested her cooperation. For instance, Mr. Shell sent an email to Ms. Arias posing a series of questions regarding the dogs she owns. Approximately two and half hours later, Ms. Arias responded with the requested information as well as a description of the incident. At his deposition, Mr. Shell acknowledged that Ms. Arias provided him with everything he had asked for and cooperated with him.

Duty to Defend

{¶107} Travelers also argues that Ms. Arias did not cooperate in the defense of the lawsuit.

{¶108} In his affidavit, Mr. Shell's states that after receiving notice of the lawsuit from Attorney Oryshkewych, Travelers "made a good faith effort to defend and indemnify" Ms. Arias and "fully advised" her "that it was prepared to defend and indemnify" her.

{¶109} We note that there is a difference between an insurance company's duty to defend and its duty to indemnify. A duty to defend arises if the allegations in the pleadings state a claim "potentially or arguably" within the policy's coverage. *Wedge Prods., Inc. v. Hartford Equity Sales Co*., 31 Ohio St.3d 65, 67 (1987). By contrast, the duty to indemnify arises from the conclusive facts and resulting judgment. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, ¶ 33. Since Travelers received notice of the lawsuit prior to trial, it could not have tried to indemnify Ms. Arias.

{¶110} Further, evidence in the record conflicts with Mr. Shell's unequivocal claim that Travelers attempted to defend Ms. Arias.

{¶111} In her first email to Mr. Shell, Ms. Arias states that she is not filing a claim and has hired her own attorney. Mr. Shell wrote back that Travelers "normally" has a contractual duty to defend but that he "understood her position," that it was a "tricky situation," and that he would determine Travelers' options. In his second email, Mr. Shell requested information from Ms. Arias so he could "push this to be closed." In his deposition, Mr. Shell testified that Travelers felt Ms. Arias had a right to decline coverage under the policy and that they were attempting to "appease" her.

{¶112} In the letter agreement, Travelers references Ms. Arias' "request" to proceed on her own and states it must "discuss her rights" before it "can agree to" her "decision." While the letter agreement contains some policy analysis, there is no express statement that Ms. Arias is entitled to a defense even under a reservation of rights.

{¶113} In fact, the letter agreement states: "In your policy, coverage for defense is included, as is indemnity and medical payments. However, both [sic] are under the sole discretion of Travelers when they are involved in the defense of our insured." Further, in his deposition, Mr. Shell testified that if Ms. Arias had changed her mind regarding coverage, he does not know if Travelers would have covered the claim or even defended her with a reservation of rights.

{¶114} Ms. Arias' stated desire to defend the lawsuit on her own did not necessarily relieve Travelers of its obligation under the policy. The record does not reflect that Ms. Arias expressly refused to cooperate with Travelers. *See*, *e.g.*, *Consol. Stores Internatl. Corp. v. London Ins. & Reins. Market Assn*., S.D.Ohio No. C2-96-1047, 2001 WL 1681139, *6 (Oct. 24, 2001) (breach of cooperation provision found where insured foreign entity "unequivocally stated" to its insurer that it would not appear in the action filed against it in the United States). As previously indicated, the letter agreement informs Ms. Arias that "you are not *going to* cooperate or allow us to investigate or defend you in this matter *any longer*." (Emphasis added.)

{¶115} Further, the policy provides that Travelers "will * * * [p]rovide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent." The Supreme Court of Ohio has held that this language "imposes an *absolute duty* upon the insurer to assume the defense of the action where the complaint states a claim which

is partially or arguably within policy coverage." (Emphasis added.) *Sanderson*, *supra*, at paragraph one of the syllabus. The insurer's failure to honor that obligation constitutes a material breach of the contract, and the insurer cannot be immunized from payment by its own breach of contract. *Id*. at 586-587.

{¶116} In addition, when an insurance company declines liability and refuses to defend, it waives the insured's further performance of policy conditions. *Suver v. Murphy*, 10th Dist. Franklin No. 79AP-669, 1980 WL 353350, *4 (Mar. 25, 1980). Neither the insured nor the injured party is required to perform conditions in a policy made vain and useless by reason of the insurer's prior breach. *Sanderson* at 587.

{¶117} To protect its rights, an insurer may intervene in the injured person's lawsuit and/or judicially ascertain its duties via a declaratory judgment action under R.C. 2721.02(A). *See Patterson*, *supra*, at 419 (holding that upon receipt of notice from the injured person's counsel, the insurer was required to "intervene in the underlying action or otherwise judicially ascertain its duty to defend its interests or those of its insured"). *Weller v. Farris*, 125 Ohio App.3d 270, 272-273 (2d Dist.1998) (involving an insurer that intervened in the personal injury action against its insured and sought declaratory judgment that it did not have a duty to defend because of the insured's failure to cooperate in the investigation of the accident).

{¶118} The letter agreement states that Travelers will not defend Ms. Arias or indemnify or reimburse her for any verdict and that Ms. Arias will not request that Travelers do so. Further, Travelers did not intervene in Ms. McCruter's lawsuit, and it did not file a declaratory judgment action against Ms. Arias until after her liability was

established. Thus, one could reasonably conclude that Travelers declined liability and refused to defend.

Settlement

{¶119} Travelers further argues that Ms. Arias did not cooperate in the settlement of the lawsuit by promptly forwarding to Travelers every "notice, demand, summons or other process" regarding Ms. McCruter's pretrial settlement demands or position.

{¶120} Notably, Travelers does not assert that it opted to settle Ms. McCruter's lawsuit, nor does the record reflect an attempt to exercise that option. Rather, in Mr. Shell's first email to Attorney Oryshkewych, he asserted that Ms. McCruter had no right or authority to make a claim under the policy and that Travelers would be closing its files. After Attorney Oryshkewych informed Mr. Shell that Ms. McCruter had obtained judgment against Ms. Arias, Mr. Shell told Attorney Oryshkewych to "handle how you wish."

{¶121} Ms. Arias' stated desire to handle the lawsuit on her own did not impair Travelers' absolute right to settle a claim or lawsuit against its insured within policy limits. The policy states that Travelers "will * * * [p]rovide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit *that we decide is appropriate*." (Emphasis added.) The Supreme Court of Ohio has held that this language "expressly and unambiguously" grants the insurance company "the option of settling any claims made against the [insured], regardless of whether such claims are groundless, frivolous or fraudulent if it determined that settlement [was] appropriate." *Marginian v. Allstate Ins. Co*., 18 Ohio St.3d 345, 347 (1985). As long as the insurance company settles within the monetary limits of the policy, the insured has no claim against it for a breach of its duty of good faith. *Id*. at syllabus.

{¶122} The court has further held that an insurer's failure to defend relieves the insured of the duty to seek the insurer's assent to and participation in a proposed settlement. *Sanderson* at 586. "By abandoning the insureds to their own devices in resolving the suit, the insurer voluntarily forgoes the right to control the litigation and, consequently, will not be heard to complain concerning the resolution of the action in the absence of a showing of fraud, even if liability is conceded by the insureds as a part of settlement negotiations." *Id*.

{¶123} Since genuine issues of material fact exist as to whether Ms. Arias violated the cooperation requirements, there are necessarily genuine issues of material fact as to whether Ms. Arias' violations were the cause of material and substantial prejudice to Travelers.

{¶124} Accordingly, we find the trial court erred in granting summary judgment to Travelers as to Ms. Arias' alleged violations of the policy's cooperation requirements.

The Help Requirements

{¶125} Finally, Travelers argues that Ms. Arias violated the "help" requirements set forth in the "Duties After 'Occurrence'" provision, which obligated Ms. Arias to "help" Travelers "at [its] request * * * (1) [t]o make a settlement; (2) [t]o enforce any right of contribution or indemnity against any person or organization who may be liable to an 'insured'; (3) [w]ith the conduct of suits and attend hearings and trials; and (4) [t]o secure and give evidence and obtain the attendance of witnesses."

{¶126} Travelers argues that Ms. Arias did not "help" it (1) to make a settlement (2) with the conduct of Ms. McCruter's lawsuit, (3) or to secure and give evidence and obtain the attendance of witnesses. As indicated, however, the express language of the

provision only requires Ms. Arias to "help" Travelers with such activities at Travelers' "request." Travelers does not allege that it made any requests for help with such activities, nor does the record reflect that it did. In fact, the record does not reflect that Travelers attempted to engage in any of these activities. Rather, Travelers entered into the letter agreement to avoid involvement in Ms. McCruter's lawsuit, and Ms. Arias' counsel handled her defense.

{¶127} The trial court found that Ms. Arias violated the policy by "refusing to assist Travelers' litigation of the case." Since Travelers did not meet its burden to establish that it requested Ms. Arias' assistance in litigation activities or that it even engaged in litigation activities, we find the trial court erred in granting summary judgment to Travelers.

{¶128} Ms. McCruter's sole assignment of error has merit in part.

Denial of Summary Judgment to Ms. McCruter

{¶129} Within her sole assignment of error, Ms. McCruter also argues that the trial court erred by denying her motion for summary judgment.

{¶130} We also review de novo a trial court's denial of a motion for summary judgment. *Meeker R & D, Inc. v. Evenflo Co. Inc.*, 2016-Ohio-2688, 52 N.E.3d 1207, ¶ 24 (11th Dist.).

{¶131} The basis of Ms. McCruter's motion for summary judgment is that Travelers did not establish its nonperformance defense. Since we have determined above that there are numerous genuine issues of material fact surrounding this defense, Ms. McCruter is also not entitled to summary judgment. Therefore, the trial court did not err by denying Ms. McCruter's motion for summary judgment.

{¶132} The remainder of Ms. McCruter's sole assignment of error is without merit.

{¶133} According to the Supreme Court of Ohio, "'[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred.'" *State ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, ¶ 11, quoting *State ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113 (1982).

{¶134} In this case, error occurred when the trial court granted Travelers' motion for summary judgment. Upon remand, Ms. McCruter's claims against Travelers, as well as the determination of Travelers' damages with respect to its default judgment against Ms. Arias, remain pending.

{¶135} Based on the foregoing, the judgment of the Lake County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

MATT LYNCH, J., concurs,

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

THOMAS R. WRIGHT, J., concurs with a Concurring Opinion.

{¶136} I agree that questions of fact remain that preclude summary judgment, but I disagree with the majority's conclusion that Ohio and Georgia law are synonymous.

{¶137} "It is well-settled in Ohio that in cases involving a contract, the law of the state where the contract is made governs interpretation of the contract. *Garlick v. McFarland* (1953), 159 Ohio St. 539, 545, 113 N.E.2d 92 [50 O.O. 445]; *Switzer v. Carroll* (C.A. 6, 1966), 358 F.2d 424, 426." *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St.3d 43,

44, 487 N.E.2d 568 (1986); *accord Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 747 N.E.2d 206; *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822 (6th Cir.1996).

{¶138} Here, it is undisputed that the contract of insurance was entered into in Georgia and that the insureds are residents of Georgia. Thus, absent a choice of law provision, the determination necessary, whether under R.C. 3929.06(C)(1) Travelers has an affirmative defense, is governed via Georgia law. *Ferrin* at 44-45. And upon applying Georgia law to the mostly undisputed facts, the determinative issues are readily apparent.

{¶139} "The interpretation of an insurance policy is subject to the relevant general rules of contract construction, the cardinal rule being to determine and carry out the intent of the parties. * * * In making the determination of intent, a court is to consider the insurance policy as a whole, and a preferred construction will give effect to each provision, attempt to harmonize the provisions with each other, and not render any of the policy provisions meaningless or mere surplusage. *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 273 Ga. 710, 712 (1), 544 S.E.2d 156 (2001). Furthermore, '[t]he policy should be read as a layman would read it. Additionally, exclusions will be strictly construed against the insurer and in favor of coverage.' *Id*. Finally, Georgia law provides that 'insurance companies are generally free to set the terms of their policies as they see fit so long as they do not violate the law or judicially cognizable public policy.' *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 287 (2), 667 S.E.2d 90 (2008)." *Natl. Cas. Co. v. Georgia School Bds. Assn.-Risk Mgt. Fund*, 304 Ga. 224, 228-29, 818 S.E.2d 250 (2018).

{¶140} In addressing a comparable dispute, the Georgia Supreme Court held:

{¶141} "To justify the denial of coverage for an insured's non-cooperation under Georgia law, the *insurer* must establish: * * * (a) that it *reasonably requested* the insured's

cooperation in defending against the plaintiff's claim, (b) that its insured *willfully and intentionally* failed to cooperate, and (c) that the insured's failure to cooperate prejudiced the insurer's defense of the claim. * * * *Vaughan v. ACCC Ins. Co.*, 314 Ga.App. 741, 742–743(2), 725 S.E.2d 855 (2012); *see also Cotton States Mut. Ins. Co. v. Proudfoot*, 123 Ga.App. 397(3), 181 S.E.2d 305 (1971); *H.Y. Akers & Sons, Inc. v. St. Louis Fire & Marine Ins. Co.*, 120 Ga.App. 800(3), 172 S.E.2d 355 (1969)." (Emphasis added.) *Travelers Home & Marine Ins. Co. v. Castellanos*, 297 Ga. 174, 177, 773 S.E.2d 184 (2015).

{¶142} "Once the insurer presents evidence that it was entitled to withdraw coverage, the burden shifts to the plaintiff to establish that the insured's failure to cooperate was justified." *Vaughan* at 743, citing *Wolverine Ins. Co. v. Sorrough*, 122 Ga.App. 556, 557(1)(a), 177 S.E.2d 819 (1970).

{¶143} One of the cases relied on, *H.Y. Akers & Sons, Inc.,* centrally addresses an insured's breach of the cooperation clause and held:

{¶144} "Usually, whether there has been a breach of the co-operation clause is a fact question. The insurer has the burden of showing, prima facie, a violation of the agreement by the insured and that *it has been diligent and acted in good faith in seeking to obtain the insured's co-operation*. The breach, once prima facie shown, shifts the burden to [the party] who seeks to enforce a claim under the policy to show justification or excuse therefor. The insurer is not required to anticipate or negate all excuses or reasons that might justify it." (Emphasis added.) *Id.* at paragraph three of the syllabus.

{¶145} And in *H.Y Akers & Sons, Inc*., a Georgia court of appeals found:

{¶146} "A breach of the [cooperation] clause is prima facie shown when it appears that counsel employed to defend on behalf of the insured made reasonable effort to obtain the insured's co-operation. If the asserted breach is the insured's failure to attend the trial of a case, a showing of reasonable effort to notify him of the time and place of the trial, as scheduled by the court, and a request for his attendance is sufficient." *Id*. at paragraph four of the syllabus.

{¶147} Thus, under Georgia law, the insurer has the burden to show not only that it diligently sought its insured's cooperation, but also that the insured willfully and intentionally refused to cooperate. Absent this showing, the burden does not shift to the insured to show justification for the failure to cooperate. *Wolverine*, *supra*, at 557.

{¶148} Georgia law is closely aligned with leading legal treatises on this subject. *See* 14 Plitt, Maldono, Rogers & Plitt, *Couch on Insurance*, Section 199:21 (3d Ed.) (insurer must employ methods that are reasonably calculated to secure the insured's cooperation).

{¶149} "To effectively deny insurance coverage based upon lack of cooperation, an insurer must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, (3) that the attitude of the insured, after cooperation was sought, was one of willful and avowed obstruction, and (4) the insured's failure to cooperate prejudiced the insurer. While an insurer who alleges a violation of a policy's cooperation clause need not show that the insured openly avowed an intent to obstruct the insurer, it is a heavy burden to show circumstances that support the inference

that the insured's failure to cooperate was deliberate." (Footnotes omitted.) 16 *Williston on Contracts*, Section 49:108 (4th Ed.).

{¶150} Ohio cases, on the other hand, are more focused on the extent of the insured's compliance and cooperation as well as the resulting prejudice to the insurer. *Bolton v. State Farm Fire & Cas. Co.*, N.D.Ohio No. 3:16 CV 220, 2017 WL 5132732, *15 (Nov. 6, 2017) ("Plaintiffs' refusal to produce the requested records was a breach of their duty to cooperate and materially prejudiced Defendant's investigation"); *Weller v. Farris*, 125 Ohio App.3d 270, 274, 708 N.E.2d 271 (2d Dist.1998) ("To avoid liability to the injured party, the insurer must establish that the insured's failure to cooperate prejudiced its rights and that the failure to cooperate was material and substantial"); *Johnson v. Allstate Ins. Co.*, 11th Dist. Trumbull No. 2001-T-0127, 2002-Ohio-7165, ¶ 30, quoting *Gabor v. State Farm Mut. Auto Ins. Co.*, 66 Ohio App.3d 141, 143-144, 583 N.E.2d 1041 (8th Dis.1990) ("'To constitute a defense to liability, an insured's lack of cooperation must result in material and substantial prejudice to the insurance company'").

{¶151} In light of the different focus, it is paramount we employ Georgia law.

{¶152} The facts in evidence here via Tony Shell's deposition testimony and the emails between Shell and Arias reveal that Arias told Maurice Brown, another Travelers agent, that she did not want Travelers to handle this in any way.

{¶153} Shell says Arias was adamant that she did not want Travelers to provide her with a defense, so he did what he could to comply with her request and even drafted a waiver of her coverage and closed the claim file after consulting Travelers' claims counsel.

{¶154} Yet before this occurred, Shell said that Arias was cooperative and answered his questions. Shell recalls that Arias was worried about increased insurance premiums.

{¶155} And while there is nothing evidencing that she withdrew her request not to file a claim, there is nothing evidencing that she was asked to take Traveler's defense counsel.

{¶156} Based on these limited facts, genuine issues of fact remain, and summary judgment was not warranted.

{¶157} On remand, the trier of fact must first determine if Travelers met its burden of proof establishing that it employed reasonably diligent efforts to secure Arias' cooperation and provide her with a defense. Second, it must decide whether Arias' request to Travelers not to file a claim constitutes a willful and intentional refusal to cooperate. Finally, it must determine whether Travelers was prejudiced as a result. These are questions of fact for the jury. Accordingly, summary judgment in either party's favor was improper.

{¶158} Thus, for the reasons stated, I agree with the ultimate holding reached by the majority, i.e., affirm in part, and reverse in part and remand, albeit for different reasons.

{¶159} Additionally, although I agree with the majority's conclusion that Travelers *could* have sought to intervene in the lawsuit in an effort to have the court determine its rights and responsibilities under the policy, I disagree that Travelers' decision not to do so amounts to "declined liability and [a] refus[al] to defend." Instead, intervening to secure declaratory judgment is but one way for an insurance company to ascertain its rights and

responsibilities under a policy of insurance. *See* Young, Bekeny & Mesko, *Ohio Insurance Coverage*, Section 11:2 (2020) (explaining that when "the insurer's sole concern appear[s] to be its potential obligation to indemnify the insured in the event of a judgment against it, the insurer ha[s] a number of options available to it, none of which require * * * intervention. For instance, it could deny coverage immediately; it could await a judgment against the insured and either deny coverage at that time (in which case the claimant could file a supplemental petition under R.C. 2929.06), or deny coverage and concurrently file a declaratory judgment action").

{¶160} Last, I write to point out that McCruter does not raise an argument regarding the validity of the written waiver in her motion for summary judgment or on appeal under R.C. 3929.05, and Travelers likewise does not raise it as a defense in support of summary judgment, and as such, this issue was not before the trial court for consideration, and we likewise should not address it. *U.S. Bank Natl. Assn., as Trustee under Pooling & Servicing Agreement dated as of September 1, 2006 MASTR Asset-Backed Securities Tr. 2006-NC2 Mtge. Pass-Through Certificates, Series 2006-NC2 v. Harper*, 9th Dist. Lorain No. 19CA011499, 2020-Ohio-4674, ¶ 17 (procedural due process in summary judgment requires the nonmoving party have an opportunity to respond); *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, 795 N.E.2d 648, ¶ 34 ("Civ.R. 56's procedural fairness requirements place significant responsibilities on all parties and judges to ensure that summary judgment should be granted only after all parties have had a fair opportunity to be heard"). Moreover, collusion was not an argument raised by the parties, decided by the trial court, or raised on appeal, and as such, we should not address it either. *Id.*

[Cite as *Lakeside Produce Distrib. v. Wirtz*, 2021-Ohio-505.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

LAKESIDE PRODUCE DISTRIBUTION, INC., ET AL., :

Plaintiffs-Appellants, :

No. 109460

v. :

AMY WIRTZ, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 25, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-919970

Appearances:

Thrasher Dinsmore & Dolan, L.L.P., and Leo M. Spellacy, Jr., *for appellants*.

Gallagher Sharp L.L.P., Timothy T. Brick, and Lori E. Brown, *for appellees*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Plaintiffs-appellants, Terrence Granzier and Lakeside Produce Distribution, Inc. (collectively "plaintiffs"), appeal the dismissal of their refiled

complaint against defendants-appellees, Amy Wirtz and Wirtz Legal Solutions L.L.C. (collectively "Wirtz"). Lakeside claims the following error:

> The trial court erred in finding that the collaborative law agreement was not an enforceable contract and dismissing the complaint under Civ.R. 12(B)(6).

{¶ 2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} This breach-of-contract case arose as a result of divorce proceedings between Terrence Granzier ("Mr. Granzier") and his ex-wife ("Mrs. Granzier"). In an effort to terminate their marriage without litigation, Mr. and Mrs. Granzier opted to use the collaborative family law process set forth in R.C. 3105.41 et seq. The collaborative law process requires that both parties be represented by counsel, who are retained solely for purposes of settlement negotiations and not for purposes of litigation. Wirtz represented Mrs. Granzier.

{¶ 4} In October 2015, the Granziers entered into a "Collaborative Law Agreement" ("the Agreement") to negotiate a settlement of their divorce. The Agreement contains the following clause: "We will work to protect the privacy, respect and dignity of all involved, including parties, attorneys and consultants." The final provision of the Agreement promises that "both parties and lawyers hereby pledge to comply with and to promote the spirit and written word of this document." (Collaborative Law Agreement attached to complaint p. 4.)

{¶ 5} The Granziers and their attorneys signed the Agreement. The Granziers also signed a separate addendum to the Agreement, which was not signed by counsel. The addendum states that one of the "possible benefits" of the Agreement is that "[a]ll information is shared fully in a private forum, on request of either party, and all negotiations take place directly, face-to-face." (Addendum to Collaborative Law Agreement attached to the complaint, p. 2.) Based on these agreements, Mr. Granzier believed that any information provided during the collaborative law process would remain confidential. (Complaint ¶ 17-19.)

{¶ 6} Mr. Granzier is the sole shareholder of Lakeside Produce Distribution, Inc. ("Lakeside"). Lakeside provides salad manufacturers with a year-round supply of bulk cabbage. Mr. Granzier was concerned that if news of his divorce became public, his competitors, particularly Cabbage, Inc., would use the information for their own advantage and "place doubts in the minds of Lakeside's growers and customers as to the Lakeside's liquidity." (Complaint ¶ 16.)

{¶ 7} Mr. Granzier discovered during the collaborative law process that Wirtz had shared information about the Granziers' divorce and Lakeside to members of Cabbage, Inc., with whom Wirtz shared office space. Consequently, in June 2018, plaintiffs filed a complaint against Wirtz, asserting claims of breach of contract, misappropriation of trade secrets, and intentional interference with business relationships. The complaint alleged, among other things, that Wirtz breached the Agreement by disclosing confidential information regarding Mr. Granzier's divorce

to Cabbage Inc. Wirtz filed a motion to dismiss. The trial court granted the motion to dismiss, in part, and dismissed the breach-of-contract claim.

{¶ 8} In order to immediately appeal the decision, plaintiffs voluntarily dismissed the complaint (i.e., the remaining claims for misappropriation of trade secrets and intentional inference with business relationships). Thereafter, plaintiffs refiled the complaint, alleging only the breach-of-contract claim. The refiled complaint alleged that Mr. Granzier informed Wirtz of the need for keeping his divorce confidential, particularly with regard to Lakeside's competitors, and that Wirtz confirmed that the communications would be kept secret. (Complaint ¶ 15.) The complaint further alleged that Wirtz disclosed confidential information concerning the Granzier's divorce to members of Cabbage, Inc. and that, based on information provided by Wirtz, Cabbage, Inc. told growers and customers that it was considering purchasing Lakeside. (Complaint ¶ 29, 33, 35.) Lakeside alleges that it lost business and profits as a result of these statements. (Complaint ¶ 47.)

{¶ 9} Wirtz again moved to dismiss the complaint, pursuant to Civ.R. 12(B)(6), claiming plaintiffs failed to state claim on which relief could be granted. Wirtz argued that (1) there was no enforceable confidentiality provision in the Agreement, and that (2) because Lakeside was not a party to the Agreement, it lacked standing to assert a breach-of-contract claim. The trial court agreed and dismissed the complaint. Plaintiffs now appeal the trial court's judgment.

II. Law and Analysis

A. Standard of Review

{¶ 10} The trial court dismissed the complaint pursuant to Civ.R. 12(B)(6). A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief can be granted "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

{¶ 11} A trial court's review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to, or incorporated within, the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. An appellate court reviews de novo a trial court's decision granting a motion to dismiss under Civ.R. 12(B)(6). *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 12} In our review of a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Jenkins v. Cleveland*, 8th Dist. Cuyahoga No. 104768, 2017-Ohio-1054, ¶ 8, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. For a party to ultimately prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that

would justify a trial court granting relief. *Id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

B. Breach of Contract

{¶ 13} In the sole assignment of error, plaintiffs argue the trial court erred in dismissing the complaint for failure to state a claim on which relief could be granted. They contend the court erroneously concluded there was no enforceable confidentiality provision in the parties' agreement.

{¶ 14} To state a claim for breach of contract, the plaintiff must allege (1) the existence of a binding contract, (2) the nonbreaching party performed his or her contractual obligations, (3) the other party failed to fulfill its contractual obligations without legal excuse, and (4) the nonbreaching party suffered damages as a result of the breach. *Cynergies Consulting, Inc. v. Wheeler*, 8th Dist. Cuyahoga No. 90225, 2008-Ohio-3362, ¶ 15, citing *All Star Land Title Agency, Inc. v. Surewin Invest., Inc.*, 8th Dist. Cuyahoga No. 87569, 2006-Ohio-5729.

{¶ 15} The parties' Agreement and addendum were attached to the refiled complaint and incorporated therein. After reviewing the Agreement, the trial court concluded that the first element of a contract claim was not met because there was no binding confidentiality agreement. The trial court found that the language in the Agreement was too aspirational to constitute an enforceable agreement.

{¶ 16} To be enforceable, a contract must have an offer, acceptance, consideration, and a manifestation of mutual assent. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-298, 770 N.E.2d 58, ¶ 16. A valid offer, the acceptance of which

would create an enforceable contract, must contain terms that are "reasonably certain." Restatement of the Law 2d, Contracts, Section 33(1) (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."); *Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 311, 594 N.E.2d 668 (1st Dist.1991) (A valid contract must be specific as to its essential terms.).

{¶ 17} To prove the existence of a contract, the proponent of the contract must show that "both parties consented to the terms of the contract, that there was a 'meeting of the minds' of both parties, and that the terms of the contract are definite and certain." *Nilavar v. Osborn*, 137 Ohio App.3d 469, 484, 738 N.E.2d 1271 (2d Dist.2000), quoting *McSweeney v. Jackson*, 117 Ohio App.3d 623, 631, 691 N.E.2d 303 (4th Dist.1996).

{¶ 18} The terms of a contract are sufficiently certain if they "'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" *Mr. Mark Corp. v. Rush, Inc.*, 11 Ohio App.3d 167, 169, 464 N.E.2d 586 (8th Dist.1983), quoting Restatement of the Law 2d, Contracts, Section 33, at 92 (1981). *See also In re Estate of Bohl*, 2016-Ohio-637, 60 N.E.3d 511 (12th Dist.) ("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.").

{¶ 19} As previously stated, the Agreement provided that the parties and their attorneys "will work to protect the privacy, respect and dignity of all involved, including parties, attorneys and consultants." The last provision of the Agreement

states that "[b]oth parties and lawyers hereby pledge to comply with and to promote the spirit and written word of this document."

{¶ 20} The trial court concluded that the privacy language in the Agreement was too general and aspirational to constitute an enforceable confidentiality provision. In reaching its conclusion, the trial court relied on *Ullmo v. Gilmour Academy*, 273 F.3d 671, 677 (6th Cir.2001).

{¶ 21} In *Ullmo*, the Sixth Circuit affirmed an order granting summary judgment in favor of a defendant-school on contract and fraud claims based on statements contained in the school's student/parent handbook. The school stated in the handbook that its mission was to "search for excellence in each person." It also stated that its teaching tradition involved "respecting pupils' differing abilities and styles of learning." *Id*. at 675. Parents of a student sued the school for breach of contract, alleging that it failed to effectively teach their child within his disabilities, as evidenced by his poor grades.

{¶ 22} In affirming the award of summary judgment in favor of the school, the Sixth Circuit noted that the handbook lacked any "description of the faculty's teaching methods or any promise as to the manner in which the faculty will accommodate a student's learning disabilities." *Id*. at 676. The court also found that "[n]o standards [we]re set forth to determine whether [the school] has worked for the full development of its students or respected its students' differing abilities." *Id*. The court concluded, therefore, that the language in the handbook promising to accommodate a student's learning disabilities was "aspirational in nature" and not

specific enough to create enforceable terms of a contract. *Id*. at 677. The court explained:

> Indefinite and aspirational language does not constitute an enforceable promise under Ohio law. The Ohio Supreme Court has made clear that vague language will not warrant judicial enforcement, stating that "[a] court cannot enforce a contract unless it can determine what it is."

Id., quoting *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 683 N.E.2d 337 (1997). *See also Clayton v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 101854, 2015-Ohio-1547, ¶ 11 (holding that antidiscrimination and antiharassment provisions in an employee handbook did not create any contractual obligations or rights); *Pierce v. Bishop*, 4th Dist. Meigs No. 10CA6, 2011-Ohio-371, ¶ 13, 22 (noting that even though the existence of a duty for purposes of a negligence action could be found in the express or implied terms of a contract, such "general and aspirational" policies regarding employee safety were not sufficient to create a binding contract to establish a duty); *Sagonowski v. Andersons, Inc.*, 6th Dist. Lucas No. L-03-1168, 2005-Ohio-326, ¶ 51-55 (holding that an "Employee Bill of Rights" reflected "aspirational statements" and did not create specific contractual terms between the employer and employee); *Olive v. Columbia/HCA Healthcare Corp.*, 8th Dist. Cuyahoga Nos. 75249 and 76349, 2000 Ohio App. LEXIS 914 (Mar. 9, 2000) (concluding a hospital's "aspirational statement of policy that it would take corrective action in a uniform, consistent, and nondiscriminatory manner" was not sufficient to create a binding contract).

{¶ 23} Plaintiffs argue their Agreement provides a binding confidentiality agreement because it uses language such as "will" and "pledge," and contains specific and measurable commitments, such as "to protect the privacy, respect and dignity of all involved." Plaintiffs contend the words "will" and "pledge" are akin to the word "shall" and, therefore, implies an enforceable contractual duty. Plaintiffs cite *Smith v. Smith*, 2d Dist. Drake No. 09CA06, 2010-Ohio-31, and *Pike-Delta-York Edn. Assn. v. Howell*, Fulton C.P. No. 20182, 1980 WL 102275 (Dec. 4, 1980), to support their argument.

{¶ 24} In *Smith*, a former husband requested that his former wife be held in contempt of court for failing to comply with an obligation in the parties' separation agreement, which required her to pay an equal share of their child's college expenses. The wife testified that it was her intention to pay an equal share when she signed the separation agreement, but asserted that her intention was conditioned on her ability to pay her share of the expenses. Thus, the issue in the case was whether the separation agreement created an enforceable contractual obligation or whether it merely stated an aspirational goal.

{¶ 25} In finding that the wife's duty to pay an equal share of the child's college expenses was an enforceable contract provision, the court observed that the parties' agreement used the word "shall," and that the word "'[s]hall' is a word of obligation, not aspiration." *Id.* at ¶ 19. The wife's obligation under the agreement was also specific; her failure to pay half of the child's college expenses constituted a breach.

{¶ 26} In *Pike-Delta-York*, a teacher's union sought to enforce a provision of a collective bargaining agreement against a nonunion teacher to collect membership dues. The collective bargaining agreement stated, in relevant part, that "all certified non-administrative personnel are expected to join the (plaintiff) association * * * or pay a representation fee equal to such membership dues." The court compared this language with another provision that used the words "shall" and "will" and concluded that while the words "shall" and "will" established the existence of a mandatory contractual duty in the other provision, the word "expect" in the disputed provision did not create a contractual obligation. *Id*. The term "expect" anticipates some possible action sometime in the future, is not specific, and is, therefore, aspirational rather than a mandatory obligation.

{¶ 27} The Agreement in this case provides that the parties and their lawyers "will work to protect the privacy, respect and dignity of all involved." The Agreement does not specify how the parties' privacy will be protected. Nor does it say that the parties' privacy "shall" be protected. The Agreement does not specifically require that all communications shared in the collaborative process be kept confidential. Instead, the Agreement sets forth general ideals without any express confidentiality language. We, therefore, agree with the trial court that this language is aspirational in nature and does not create any specific contractual terms regarding confidentiality.

{¶ 28} Plaintiffs nevertheless contend the agreement is ambiguous and that parol evidence should have been considered to clarify the Agreement. They contend

the court should have considered Amy Wirtz's oral promises that the collaborative law process would be confidential.

{¶ 29} "The parol evidence rule is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting the terms of the contract with evidence of alleged or actual agreements." *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 440, 662 N.E.2d 1074 (1996). Under the parol evidence rule, "'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.'" *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000), quoting 11 Williston on Contracts, Section 33:4, at 569-70 (4th Ed.1999).

{¶ 30} Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning, will extrinsic evidence be considered to give effect to the parties' intentions. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987). But, when the terms in a contract are unambiguous, courts will not create a new contract by finding an intent not expressed in the clear language employed by the parties. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246, 406, 374 N.E.2d 146 (1978). A court may not put words into a contract that the parties themselves failed to include. *Porterfield v. Bruner Land Co.*, 7th Dist. Harrison No. 16 HA 0019, 2017-Ohio-9045, ¶ 16.

{¶ 31} Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.).

{¶ 32} The parties' Agreement is not ambiguous; it simply lacks a specific confidentiality provision. Furthermore, there are no special circumstances warranting the consideration of parol evidence since the plain language of the Agreement is clear and unambiguous. Therefore, the trial court properly concluded that the parol evidence rule prohibited it from considering contemporaneous oral agreements that may vary or contradict the terms of the written agreement.

{¶ 33} Still, plaintiffs argue the collaborative law process outlined in R.C. Chapter 3105, establishes the existence of a confidentiality provision in the parties' agreement. They contend the collaborative law process is another special circumstance warranting consideration of parol evidence.

{¶ 34} R.C. 3105.48 provides that collaborative family-law communications are confidential "to the extent agreed by the parties in a signed record or as provided by the law of this state." R.C. 3105.43 further provides a list of mandatory provisions to be included in collaborative law agreements, but a confidentiality provision is not required. Therefore, the collaborative law process was not a special circumstance warranting the consideration of parol evidence for purposes of construing the parties' agreement.

{¶ 35} We sympathize with the plaintiffs' grievances against Wirtz. However, after construing the reasonable inferences in plaintiffs' favor and reviewing the plain and unambiguous language of the parties' agreement, we find no set of facts entitling them to relief. Therefore, the sole assignment of error is overruled.

{¶ 36} The trial court's judgment is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

_____

EILEEN T. GALLAGHER, JUDGE

MICHELLE J. SHEEHAN, P.J., and
MARY EILEEN KILBANE, J., CONCUR

[Cite as *Mockensturm v. McIlwain*, 2021-Ohio-532.]

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

Carl B. Mockensturm	Court of Appeals No. L-20-1035
Appellant	Trial Court No. 19CVF00203
v.	
Craig McIlwain	**DECISION AND JUDGMENT**
Appellee	Decided: February 26, 2021

* * * * *

Mark M. Mockensturm and Kevin C. Urtz, for appellant.

Alan Kirshner, for appellee.

* * * * *

MAYLE, J.

{¶ 1} In this case, plaintiff-appellant, Carl B. Mockensturm, appeals the January 9, 2020 judgment of the Maumee Municipal Court that awarded him $58.80 plus interest against the defendant-appellee, Craig McIlwain. For the following reasons, we affirm, in part, and reverse, in part.

{¶ 2} On March 4, 2019, Mockensturm sued McIlwain in the Maumee Municipal Court, alleging that McIlwain owed $4,596.22 on an outstanding promissory note. On March 28, 2019, McIlwain answered the complaint, denying that he owed anything on the note. He also filed a counterclaim against Mockensturm, alleging that he failed to pay $15,000 for custom furniture that McIlwain built for him. The court held a bench trial on January 8, 2020, at which time the following testimony and evidence was heard.

{¶ 3} McIlwain was previously married to Mockensturm's stepdaughter. In 2012, while that marriage was still intact, Mockensturm loaned $20,000 to McIlwain. The loan is memorialized in a promissory note dated December 17, 2012, signed by McIlwain, which states that McIlwain must repay the $20,000 loan, with interest at an annual rate of 0.22 percent. Under the note, the "Due Date" for repayment is "any future date on which the Lender demands repayment," and after the Due Date, interest would accrue at an annual rate of 0.50 percent. The note further provides that "[i]f any payment obligation under this Note is not paid when due, the Borrower shall be obligated to pay all costs of collection, including reasonable attorney fees* * *."

{¶ 4} Mockensturm's daughter and bookkeeper, Michele Topar, managed the loan for her father through her business, Advanced Bookkeeping Concepts. Topar recorded McIlwain's payments on a spreadsheet, and calculated the outstanding principle and interest on a running basis.

{¶ 5} McIlwain did not make any payments on the loan until 2014. McIlwain made an initial payment of $5,000 on July 11, 2014, and a second payment of $1,500 on August 11, 2014. Thereafter, the parties amended their agreement.

{¶ 6} On August 12, 2014, McIlwain emailed Mockensturm a "memo of understanding" which, he said, memorialized a discussion they had the day before. The memo states:

> I, Craig Mcilwain, owing Carl Mockensturm the remaining sum of $13,500 in principle of a total sum of $20,000, agree to make a monthly payment of $1500.00 due by the 15th of each month. The next payment due September 15, 2014. The final payment will be due March 15, 2015. This will require that in certain months more than the minimum payment will be paid. Likely months being October, November, and February. The February 2015 payment will be made approximately 1 week later than usual based on expected cash flow and show schedule.

Mockensturm acknowledged his agreement at the bottom of this document, where he added:

> Carl B. Mockensturm 8-13-14
>
> I agree to the above and add to this memo a [sic] understanding on a more fair interest rate than what is stated in the original note.
>
> A more fair rate due to the length of the time should be 5% from this date forward until Paid in Full.

{¶ 7} According to Topar's records and testimony, McIlwain issued only four checks to Mockensturm after this amendment: a check for $1,500 on October 20, 2014; a check for $750 on March 4, 2015; a check for $1,500 on April 3, 2015, and a check for $1,500 on May 8, 2015. At trial, McIlwain claimed that he made additional payments by check, but he did not have any records to prove it. He explained that he lost all of his records after his divorce, when his ex-wife took over the house and all its contents. McIlwain also claimed that he made several cash payments that are not reflected on Topar's ledger, but he did not say how much cash he paid or when he paid it. He also did not have any records of these cash payments. McIlwain explained that he did not think to get a receipt for any of his cash payments because "it's family."

{¶ 8} The bulk of the parties' dispute concerns whether McIlwain received appropriate credits to his outstanding debt in exchange for various pieces of furniture that McIlwain handcrafted for Mockensturm's family. Mockensturm testified that he did not owe any compensation for this furniture, claiming that he was not involved in these transactions and that the furniture was "never mine." When McIlwain's attorney questioned Mockensturm regarding his reply to counterclaim—in which he admitted that McIlwain built various pieces of furniture "[a]t plaintiff's request"—Mockensturm responded "I don't know what that's about." Mockensturm explained that Topar ordered furniture from McIlwain directly. Instead of paying McIlwain for the furniture she ordered, Topar made loan payments to Mockensturm on McIlwain's behalf and then recorded these payments on her spreadsheet. Mockensturm did acknowledge, however,

that he agreed to apply a credit to McIlwain's loan as payment for a fireplace mantle that, he said, his son had purchased from McIlwain. Mockensturm testified that he does not recall any conversations with McIlwain regarding *how much* credit should be given to McIlwain in exchange for any of the furniture, and there is very little documentation in that regard.

{¶ 9} Topar confirmed that she bought various pieces of furniture from McIlwain. She claims that she paid McIlwain directly for some of the furniture, while in other instances he told her to make a loan payment to Mockensturm on his behalf. While Topar acknowledged that McIlwain did not provide invoices for most of the furniture she purchased, she did not explain how she determined the value of any items that lacked an invoice. Topar did, however, testify that McIlwain "has had copies of [the spreadsheet] in the past"—i.e., the spreadsheet that tracked McIlwain's payments and documented the various credits that she gave him in exchange for his furniture—but Topar did not say *when* McIlwain received those copies or *what* was reflected on the copies that he received. And there is no documentation in the record to show which versions of the spreadsheet McIlwain received. McIlwain did admit that he had received copies of the ledger in the past, but he "had a hard time figuring them out" because "they always seemed to be different and * * * give something and then take it away * * *. I never knew what was going on with those sheets."

{¶ 10} McIlwain testified that he never agreed to accept the values that Topar assigned to his furniture in her ledger, and he denied that he received any direct payments

from Topar for any furniture. He also testified that he made all of the furniture at Mockensturm's request. He said "I never felt like it was coming from Michele, it always felt like it was coming from Carl, I mean that's the way it always looked. I was pretty much doing the work for Carl." McIlwain testified that he tried to make payments on the loan, but "the financial pressures got harder and harder" for him. And, because McIlwain was not able to make many payments, he "felt like there was a lot of pressure on [him] to do this stuff [i.e., make furniture] because [he] owed the money." He said that he did not send many invoices to the Mockensturms because "it was mostly fairly loose."

{¶ 11} Although he does not have anything in writing, McIlwain thought that the loan "was done" after he finished his last piece of furniture for the Mockensturms in November 2015. He did not hear anything else on the loan until after he and his wife—Mockensturm's stepdaughter—divorced in 2018.

{¶ 12} At trial, McIlwain presented the expert testimony of Scott Midgley, a custom woodworker. Mockensturm objected to Midgley's testimony on the grounds of relevancy, and the trial court overruled the objection. Midgley explained the time, effort, and skill that is required to make custom furniture pieces like the ones that McIlwain crafted for the Mockensturms. He then provided estimated values for each of McIlwain's furniture pieces. Before he did, Mockensturm's counsel confirmed to the trial court that, although he maintained that the value of the furniture was established by the parties' own dealings (and, therefore, Midgley's testimony was irrelevant), he did not have any

objection to the content of Midgley's testimony "as far as his estimates go." In other words, Mockensturm did not object to Midgley's valuations as fair estimates.

{¶ 13} In total, McIlwain built six different collections of furniture for the Mockensturms: (1) a TV cabinet with television mount, (2) an oak shelf, computer cabinet, and desk, (3) a large conference room table, (4) a small conference room table, (5) a chair rail, and (6) a fireplace mantle. The relevant testimony regarding this furniture can be summarized as follows:

{¶ 14} ***1. TV cabinet with television mount.*** McIlwain installed a custom television platform and wall mount in Mockensturm's house. Topar did not give McIlwain any credit for this piece of furniture on her ledger. According to Mockensturm, this "never had anything to do with * * * the note" and he was "pretty sure" that McIlwain built this piece before the 2012 loan. Mockensturm said it was a "family project" and they both worked on it together. McIlwain, on the other hand, stated that he was "pretty sure" and "almost certain" that he did this work for Mockensturm after the note. He testified that he expected to be compensated for this piece, he was never compensated for it, and it was not a "gift." Midgley testified that a fair price for this piece of furniture, based on the time and work involved, was $1,471.

{¶ 15} ***2. Oak shelf, computer cabinet, and desk.*** In 2015, McIlwain made a custom oak shelf along with a computer cabinet and desk for Topar's business, ABC. McIlwain issued a handwritten invoice for $935, which he discounted to $750 for both pieces. McIlwain testified that he discounted the price because "Carl was pushing me

pretty hard to do this stuff for her so I made it easy by throwing a little discount in there." Topar made a $750 loan payment to her father, on McIlwain's behalf, as compensation for this furniture. Topar's ledger for McIlwain's outstanding loan includes a credit for $750 on March 4, 2015, with the notation "ABC Paid." McIlwain testified regarding the time and effort that it took to create these items. Midgley said that a fair price for this furniture, based on the time and work involved, was $2,100.

{¶ 16} ***3. Large conference room table.*** In 2015, McIlwain made a white oak and mahogany conference room table for Topar's office. Topar claims that she paid $1,200—to McIlwain directly—for this table, and that this transaction had nothing to do with the note. Topar did not, however, produce an invoice, canceled check, or any other documentation regarding this purchase, stating that she did not think she needed such documents for court "since it was my own personal side deal." At trial, McIlwain presented a copy of an email that Mockensturm sent to McIlwain on July 22, 2015, regarding this table, which stated:

> Hi Craig. Confirming my order for Michele.
>
> Table to be approx. 8' long by 36" wide. Wood from existing stock.
>
> Call me when you have a plan for the style and color of finish.
>
> Any idea on the timing?

When asked about this email at trial, Mockensturm stated that he "just provided measurements." Topar did not give McIlwain any credit for this table on her ledger, but she did make a note at the bottom of the ledger that states "Conference table in

D-2 – Michele's Conference Table – paid Ck for $1,200 – No bonus since hasn't made payments." She testified that her dad was considering giving him a bonus because the table "looked really nice" but decided against it because "he hadn't made any payments and hadn't tried to." McIlwain testified regarding the time and effort that it took to create the table, and McIlwain claimed that he never received any payment for it. Midgley testified that a fair price for this conference room table, based on the time and work involved, was $4,860.

{¶ 17} ***4. Small conference room table.*** In 2015, McIlwain made a small conference room table—also referred to by the parties as a "round" or "triangular" conference room table—for Topar's business. Topar testified her conference room tables were ordered by "me and my dad." She said, "I needed a conference room table and we thought hey, let's ask Craig." Topar's internal business records regarding her purchase of this table includes a handwritten note stating "NEVER got invoice from Craig. He wanted me to pay dad as a loan payment on his behalf." On January 23, 2015, Topar transferred $1,800 to her father's trust as payment for the table. Topar's ledger for McIlwain's outstanding loan includes a credit for $1,800 on January 23, 2015, with the notation "ABC Paid." McIlwain testified regarding the time and effort that it took to create the table, and he claimed that he never agreed to accept the amount of credit that is reflected on Topar's register. Midgley testified that a fair price for this conference room table, based on the time and work involved, was $3,980.

{¶ 18} ***5. Chair rail.*** Topar testified that she paid $604 to McIlwain for a chair rail for her office in a transaction "that had nothing to do with the loan at all." She did not, however, produce any records of payment at trial. Topar's ledger for McIlwain's outstanding loan does not include a credit for the chair rail, and Mockensturm stated that he had "nothing" to do with this purchase. McIlwain testified regarding the time and effort that it took to create the chair rail, and he claimed that he never received any payment for it. Midgley testified that a fair price for the chair rail, based on the time and work involved, was $2,010.

{¶ 19} ***6. Mantle.*** In 2015, McIlwain created a custom mantle for Mockensturm's son. As Topar testified, McIlwain made a mantle for her brother's fireplace, and "dad paid for that" and "instead of giving Craig a check Craig said just apply it to the loan so, again, that's what we did." Topar's ledger includes a credit dated July 1, 2015, for $600, with the following notation: "Trade work for Mantel at Mike's House." McIlwain testified regarding the time and effort that it took to create the mantle, and he stated that he never agreed to accept the amount of credit that is reflected on the register. Midgley did not estimate a value for the mantle, but McIlwain testified that a fair value would represent 40 hours of work at $45 an hour—i.e., $1,800.

{¶ 20} The final credit on Topar's payment ledger is a "bonus" credit for $600 on November 3, 2015—there is no record of any additional payments on the loan after this date. Topar testified that Mockensturm "decided to try and help Craig out and give him a

bonus for $600 for all of the work that he did just because he was trying to help him out." According to McIlwain, he thought that the loan was "done."

{¶ 21} McIlwain, however, received a letter from Mockensturm's attorneys on January 18, 2019, stating that there was still money owed on his loan and threatening collection proceedings if McIlwain did not pay the full amount outstanding—which, the letter stated, was $4,596.22 as of that date. McIlwain did not pay, and Mockensturm filed this case a few weeks later.

{¶ 22} After considering all of this testimony and evidence, the trial court issued a ruling from the bench. First, the trial court rejected McIlwain's argument that laches precluded Mockensturm from enforcing the note, and found that McIlwain owed a total of $4,628.80 on the note.

{¶ 23} Regarding the furniture purchases and payments, the trial court noted that although there was "little or no testimony on who ordered the pieces, what they were supposed to look like, how fancy they were supposed to be," there were "some things * * * which were able to be garnered by the testimony and the evidence presented." The court noted that "[t]he relationship of the parties" was a factor in the "ordering patterns and * * * what was ordered." It then considered some of the items of furniture. It rejected Midgley's valuation for the printer cabinet, saying "I don't believe that printer cabinet cost $2,100 to fabricate, I just don't believe it." The trial court also noted that there was not enough evidence for him to determine the value of the TV stand. But the court went on to state:

> The table on the other hand, the round table I believe every bit that that could have cost $3,980, not the $1,800 that was given credit. I believe the mantel would have cost $1,800 as opposed to the 600. And I believe the, those seem to be, there was evidence on Exhibit M, evidence there's uncontested that the conference table was, appeared to be an agreed price of $1,200, therefore the set off is at $4,570.

{¶ 24} The court then stated that "judgment for the plaintiff" in the amount of $58.80, "judgment for plaintiff on the Counterclaim," and "cost to defendant." Court was then adjourned.

{¶ 25} The next day, January 9, 2020, the trial court issued a written decision and judgment entry. In its two-paragraph written decision, the court noted that a bench trial was held on January 8, 2020 and, "[u]pon consideration of the testimony and evidence presented," the court granted judgment to Mockensturm on his complaint and awarded damages in the amount of $58.80 with interest at the rate of 5 percent per annum from the date of judgment, granted judgment to Mockensturm on the counterclaim, and ordered McIlwain to pay costs. The trial court did not provide any reasoning for its judgment, and neither party requested findings of fact and conclusions of law under Civ.R. 52.

{¶ 26} Mockensturm filed a notice of appeal on February 4, 2020. McIlwain filed a notice of cross-appeal on February 14, 2020, but never filed a brief within the time prescribed by the appellate rules. For the sake of clarifying the record, we hereby dismiss McIlwain's cross-appeal under App.R. 18(C) for failing to file a brief.

{¶ 27} Mockensturm timely filed an appellant's brief, in which he asserts the following assignments of error:

> **No. 1:** The Trial Court's decision to setoff the amount Appellee owed to Appellant under the promissory note was against the manifest weight of the evidence.
>
> **No. 2:** The Trial Court abused its discretion when it failed to award Appellant his reasonable attorney fees as described in the promissory note.

II. The trial court's decision to setoff the amount that McIlwain owed to Mockensturm under the promissory note was not against the manifest weight of the evidence.

{¶ 28} In his first assignment of error, Mockensturm argues that the trial court's decision to setoff the amount that McIlwain owed to Mockensturm under the note was against the manifest weight of the evidence because (1) McIlwain did not assert setoff as an affirmative defense, (2) there was no mutuality of obligation between Mockensturm and McIlwain, (3) McIlwain was already compensated for the furniture that he built for Topar and Mockensturm's son, and (4) the trial court "arbitrarily" assigned value to the furniture.

{¶ 29} An appellate court reviews judgments from the trial court following a bench trial under the manifest weight of the evidence standard. *Terry v. Kellstone, Inc.*, 6th Dist. Erie No. E-12-061, 2013-Ohio-4419, ¶ 12. The manifest weight standard is the same in a civil case as in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-23. "When weighing the evidence, the court of appeals

must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if 'the jury clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Quest Workforce Solutions, LLC v. Job1USA, Inc.*, 2016-Ohio-8380, 75 N.E.3d 1020, ¶ 41 (6th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts." *Eastley* at ¶ 21.

{¶ 30} Here, in the trial court's judgment entry following bench trial, it awarded $58.80 to Mockensturm on his complaint, and found in Mockensturm's favor on McIlwain's counterclaim. The trial court's judgment entry did not include any factual findings, and the trial court was not required to provide any further explanation of its ruling. Under Civ.R. 52, "[w]hen questions of fact are tried by the court without a jury, judgment may be general for the prevailing party" unless one of the parties requests findings of facts and conclusions of law within the time prescribed by the rule. Neither Mockensturm nor McIlwain requested findings of fact and conclusions of law. Where an appellant did not request findings of fact and conclusions of law under Civ.R. 52, it is improper for an appellate court to speculate on the mental process of the trial court. *Howell v. Vance*, 12th District Clermont No. CA85-09-069, 1986 WL 8910, *2 (Aug. 18,

1996) ("[w]hile it would be error of reversible magnitude for a court to simply arbitrarily select a damage figure not sustained by the evidence, we will not presume this is what the trial court did when appellant has not utilized a Civil Rule, Civ.R. 52, which is designed to allow us to make such a determination" because it would be "improper" for the appellate court to "speculate" on the trial court's "mental process" in that situation.).

{¶ 31} Moreover, the court did provide insight into its mental process here. After testimony concluded, it found that the "relationship of the parties" was a factor in their "ordering patterns" for the furniture, and the court accepted certain furniture valuations as fair and accurate. The trial court then stated that McIlwain owed $4,628.80 to Mockensturm on the note, Mockensturm owed $4,570 to McIlwain for the custom furniture, and these mutual debts should be setoff—resulting in an award of $58.80 to Mockensturm.

{¶ 32} A setoff is defined as "that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to set off their respective debts by way of a mutual deduction." *Witham v. South Side Bldg. & Loan Ass'n of Lima, Ohio*, 133 Ohio St. 560, 562, 15 N.E.2d 149 (1938); *Tejeda v. Toledo Heart Surgeons, Inc.*, 186 Ohio App.3d 465, 2009-Ohio-3495, 928 N.E.2d 1138, ¶ 53 (6th Dist.). A central element of a right to setoff is the existence of mutuality of obligation. *Witham* at 562. Mutuality is lacking where both parties to the transaction on which suit was brought are not also parties to the independent contract on which a right of setoff is claimed. *Id.*

{¶ 33} As this court has recognized, a right of setoff can be asserted "as an affirmative defense in [the] answer or by way of counterclaim." *Beck v. Mar Distribs. of Toledo, Inc.*, 6th Dist. Lucas No. L-11-1219, 2012-Ohio, 5321, ¶ 16. Although McIlwain did not assert setoff as an affirmative defense, he asserted a counterclaim against Mockensturm in which he alleged that he built various items of furniture "[a]t plaintiff's request" and plaintiff "failed to pay defendant for said labor work and materials" and "failed to credit defendant for [the furniture] on the note." Under Civ.R. 13(C), a counterclaim "may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." In other words, pursuant to Civ.R. 13(C), "a counterclaim is now any claim, *including setoff* or recoupment, which a defendant may have against a plaintiff." (Emphasis added). *Murphy v. Hall*, 11th Dist. Trumbull No. 2019-T-0022, 2020-Ohio-163, ¶ 24, quoting *Indus. Fabricators, Inc. v. Natl. Cash Register Corp.*, 10th Dist. Franklin No. 83AP-13, 1984 WL 4669, *5 (Mar. 8, 1984) (finding that the trial court did not err by construing defendant's affirmative defense for setoff as a counterclaim under Civ.R. 8(C), which allows a court to treat a defense as a counterclaim "if justice so requires."). We therefore reject Mockensturm's argument that McIlwain was not entitled to any setoff because he did not assert a right of setoff as an affirmative defense.

{¶ 34} Turning to the substantive issue of setoff, we reject Mockensturm's arguments that the trial court's judgment is against the manifest weight of the evidence.

{¶ 35} First, regarding mutuality of obligation, although Mockensturm testified that he was not involved in the furniture transactions, there was evidence in the record to the contrary. For example, in Mockensturm's reply to McIlwain's counterclaim, he admitted that McIlwain built various pieces of furniture "[a]t plaintiff's request." McIlwain introduced an email in which Mockensturm stated he was confirming "my order for Michele" for the large conference room table. Topar testified that some of the orders came from "me and my dad." Most importantly, McIlwain testified that he always felt that the furniture orders were "coming from Carl" and that he was "pretty much doing the work for Carl." He further testified that he felt like there was "a lot of pressure" on him to make the furniture because he "owed the money" on the note to Mockensturm.

{¶ 36} Notably, with the exception of Mockensturm's email regarding the large conference room table, there was no documentation to prove who ordered what furniture. Thus, the trial court was left to determine—as a necessary prerequisite to setoff—whether there was mutuality of obligation between Mockensturm and McIlwain by assessing the relative credibility of the witnesses on that issue. Although under a manifest-weight standard we consider credibility of witnesses, we must nonetheless extend special deference to the trial court's credibility determinations given that the trial court had "the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor." *State v. Wright*, 6th Dist. Lucas No. L-16-1053,

2017-Ohio-616, ¶ 47, citing *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14. Here, we cannot say that the trial court lost its way simply because it believed McIlwain instead of Mockensturm on that issue.

{¶ 37} For this same reason, we also reject Mockensturm's claim that McIlwain is not entitled to a setoff because he was already compensated for the furniture that he built. There was little documentation and testimony regarding any agreed-upon prices for the furniture. Indeed, while Topar acknowledged that McIlwain did not provide invoices for most of the furniture that was purchased, she did not explain how she assigned values to furniture that lacked an invoice. In addition, McIlwain clearly testified that he did not agree to accept the credits that are reflected on Topar's ledger, and he claimed that he did not receive any payment from anyone for various items of furniture. Again, this issue required the trial court to consider the respective credibility of the witnesses, and we cannot say that the trial court lost its way when it parsed the evidence and determined that Mockensturm owed McIlwain for the custom furniture.

{¶ 38} Finally, we reject Mockensturm's claim that the trial court "arbitrarily" assigned value to the furniture. Both McIlwain and Midgley testified that it was time consuming to build the various pieces of custom furniture, and provided their opinions regarding the fair value of the furniture given the time, effort, and materials involved. Moreover, Mockensturm's counsel explicitly stated that he had no objection to Midgley's estimated values for the furniture. The trial court apparently accepted some of this testimony, and we cannot say that it lost its way in doing so—especially since there was

evidence to support the trial court's valuations, and we must make every reasonable presumption in favor of the trial court's judgment.

{¶ 39} In sum, after reviewing the record, we cannot say that the trial court lost its way and thereby created a manifest miscarriage of justice when it set off the parties' respective debts and awarded judgment to Mockensturm for $58.80. Mockensturm's first assignment of error is found not well-taken.

II. The trial court erred by failing to award reasonable attorney fees to Mockensturm.

{¶ 40} In his second assignment of error, Mockensturm argues that the trial court abused its discretion when it failed to award Mockensturm reasonable attorney fees under the note, which provides that "[i]f any payment obligation under this Note is not paid when due, the Borrower shall be obligated to pay all costs of collection, including reasonable attorney fees * * *." Although Mockensturm did not bring a separate claim against McIlwain for attorney fees, his prayer for relief requested judgment "in the amount of $4,596.22, plus interest, costs and attorneys' fees." The trial court did not address the issue of attorney fees, thereby overruling the request sub silento. *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶ 10.[1]

[1] In cases, such as this, where the plaintiff does not invoke a specific statutory or rule authority as a basis for its request for attorney fees and, instead, simply includes an unspecified request for attorney fees in the prayer for relief, appellate courts do not view the general request for fees as a separate and distinct claim for purposes of Civ.R. 54(B). *Jones* at ¶ 12. *See also PC Surveillance.net, LLC v. Rika Group Corp.*, 7th Dist. Mahoning No. 11 MA 165, 2012-Ohio-4569, ¶ 16-17; *Scott v. Lyons*, 11th Dist.

{¶ 41} To begin, Mockensturm cites an incorrect standard of review. If a contract is clear and unambiguous, then its interpretation is a matter of law because there is no issue of fact to be determined, and the trial court's interpretation is reviewed de novo on appeal. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). "If the terms of the contract are unambiguous, the court must enforce the intent of the parties as expressed by the contract." *Harris v. Reiff*, 6th Dist. Wood No. WD-03-056, 2003-Ohio-7264, ¶ 9. Moreover, although a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation under the "American rule" that has been adopted by Ohio courts, there are certain exceptions to that rule. *Wilborn v. Bank One Cor.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. Relevant here, the American rule does not apply where "an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees." *Id.*

{¶ 42} Here, the contract unambiguously states, "[i]f any payment obligation under this Note is not paid when due, the Borrower shall be obligated to pay all costs of collection, including reasonable attorney fees * * *." Mockensturm sued McIlwain claiming that he had not paid the balance due on the note, and the trial court concluded that McIlwain did, in fact, have an outstanding payment obligation under the note that was not paid when due. Accordingly, under the note, McIlwain is "obligated to pay all costs of collection, including reasonable attorney fees."

Ashtabula No. 2008-A-0032, 2009-Ohio-1141, ¶ 30; *Knight v. Colazzo*, 9th Dist. Summit No. 24110, 2008-Ohio-6613, ¶ 9.

{¶ 43} We find Mockensturm's second assignment of error well-taken. Under the unambiguous terms of the note, Mockensturm is entitled to recover reasonable attorney fees. We therefore reverse and remand this matter to the trial court for a determination of Mockensturm's reasonable attorney fees.

III. Conclusion

{¶ 44} We find that the trial court's judgment awarding a total of $58.80 to Mockensturm was not against the manifest weight of the evidence. Accordingly, we find Mockensturm's first assignment of error not well-taken.

{¶ 45} We also find that Mockensturm is entitled to recover reasonable attorney fees from McIlwain under the unambiguous language of the promissory note. Accordingly, we find Mockensturm's second assignment of error well-taken. We reverse and remand this matter to the trial court for a determination of Mockensturm's reasonable attorney fees. The trial court's judgment is affirmed in all other respects.

{¶ 46} We therefore affirm, in part, and reverse, in part, the January 9, 2020 judgment of the Maumee Municipal Court. The parties are ordered to split the costs of this appeal under App.R. 24(A)(4).

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCUR.
JUDGE