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The Bullet Point: Ohio Commercial Law Bulletin

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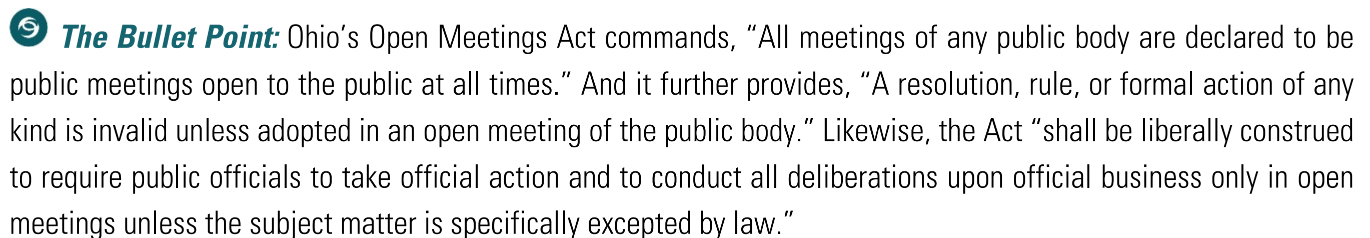
Jim Sandy and Richik Sarkar

Is my agreement enforceable under the Statute of Frauds?

Open Meeting Act

***State ex rel. More Bratenhal v. Village of Bratenahl*, Slip Op. No. 2019-Ohio-3233.**

This appeal involved a challenge to a village's compliance with Ohio's Open Meeting Act. Certain villagers challenged whether the village complied with the act when it elected a council officer by secret ballot. The Ohio Supreme Court ultimately held that this violated Ohio's Open Meeting Act.

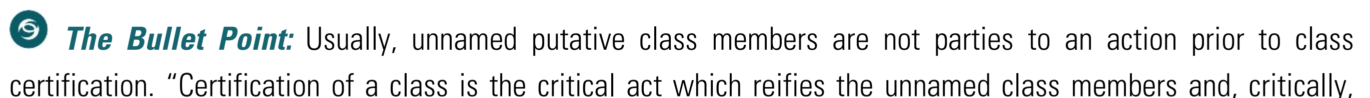


The Bullet Point: Ohio's Open Meetings Act commands, "All meetings of any public body are declared to be public meetings open to the public at all times." And it further provides, "A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." Likewise, the Act "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."

Arbitration as a Class Action Defense

***Gemarski v. PartsSource, Inc.*, Slip. Op. No. 2019-Ohio-3231.**

In this appeal, the Ohio Supreme Court found that in a putative class action, "when the case originates with a single named plaintiff and that plaintiff is not subject to an arbitration agreement that was entered into by unnamed putative class members, the defendant need not raise a specific argument referring or relating to arbitration in the answer—Defendant may raise an argument that relates to arbitration against putative class members at the class certification stage of proceedings."



The Bullet Point: Usually, unnamed putative class members are not parties to an action prior to class certification. "Certification of a class is the critical act which reifies the unnamed class members and, critically,

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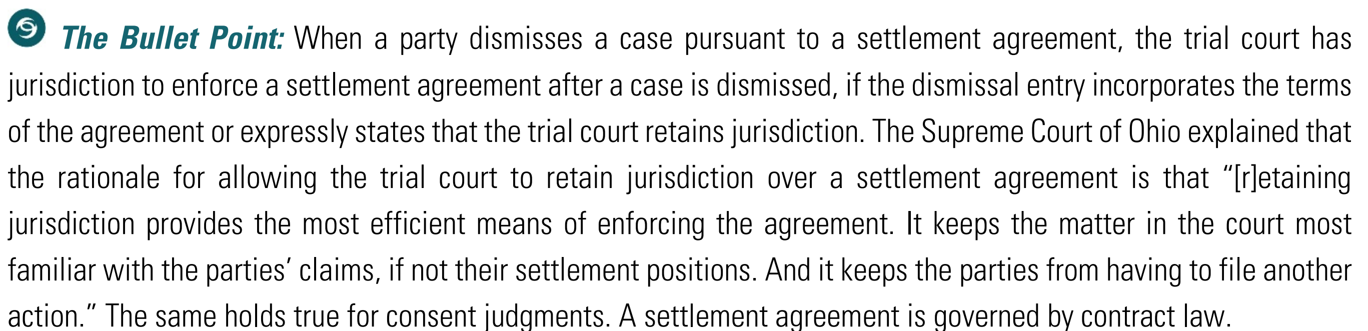
renders them subject to the court's power." Because of this, and as the Ohio Supreme Court held, "it follows that if unnamed putative class members are not parties to an action, then a defendant is under no duty to raise in its answer, or at any time prior to the class-certification stage, defenses that relate only to those unnamed class members."

Enforcing a Settlement Agreement

***Pollock v. Trustar Funding, LLC*, 8th Dist. Cuyahoga Nos. 107355 and 107679, 2019-Ohio-3272.**

After determining that the trial court retained jurisdiction post-dismissal to enforce the terms of the settlement, the Eighth Appellate District found the trial court did not err when it enforced the terms of the agreement.



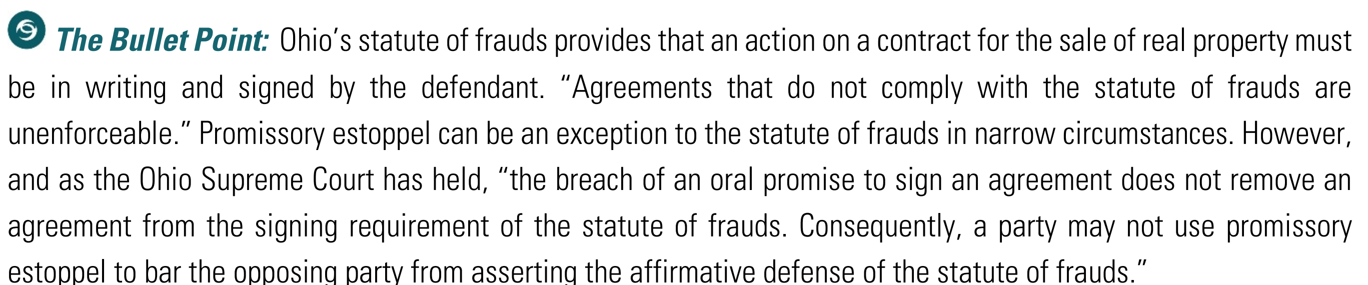
The Bullet Point: When a party dismisses a case pursuant to a settlement agreement, the trial court has jurisdiction to enforce a settlement agreement after a case is dismissed, if the dismissal entry incorporates the terms of the agreement or expressly states that the trial court retains jurisdiction. The Supreme Court of Ohio explained that the rationale for allowing the trial court to retain jurisdiction over a settlement agreement is that "[r]etaining jurisdiction provides the most efficient means of enforcing the agreement. It keeps the matter in the court most familiar with the parties' claims, if not their settlement positions. And it keeps the parties from having to file another action." The same holds true for consent judgments. A settlement agreement is governed by contract law.

"[T]o constitute a valid contract, there must be a meeting of the minds of the parties, and there must be an offer on the one side and an acceptance on the other." "'Meeting of the minds' refers to the manifestation of mutual assent by the parties of an agreement to the exchange and consideration, or to the offer and acceptance."

Statute of Frauds

***Duncan v. Fifth Third Bank,* 2d Dist. Greene No. 2018-CA-50, 2019-Ohio-3198.**

In this appeal, the Second Appellate District found that any agreement between the parties was unenforceable because it violated the statute of frauds, and the promissory estoppel exception did not apply.



The Bullet Point: Ohio's statute of frauds provides that an action on a contract for the sale of real property must be in writing and signed by the defendant. "Agreements that do not comply with the statute of frauds are unenforceable." Promissory estoppel can be an exception to the statute of frauds in narrow circumstances. However, and as the Ohio Supreme Court has held, "the breach of an oral promise to sign an agreement does not remove an agreement from the signing requirement of the statute of frauds. Consequently, a party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds."

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SLIP OPINION NO. 2019-OHIO-3233

THE STATE EX REL. MORE BRATENAHL; MEADE, APPELLANT, *v*. THE VILLAGE OF BRATENAHL ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. More Bratenahl v. Bratenahl,* Slip Opinion No. 2019-Ohio-3233.]

Civil law—Application of R.C. 121.22, Ohio's Open Meetings Act—The Open Meetings Act does not permit a governmental body to take official action by secret ballot—Maintaining secret-ballot slips as public records does not cure an R.C. 121.22 violation—Court of appeals' judgment reversed and cause remanded.

(No. 2018-0440—Submitted March 26, 2019—Decided August 14, 2019.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 105281, 2018-Ohio-497.

DEWINE, J.

{¶ 1} Ohio's Open Meetings Act commands, "All meetings of any public body are declared to be public meetings open to the public at all times." R.C. 121.22(C). The question before us is whether a village council complies with this directive when it elects a council officer by way of a secret ballot. We say no.

I. A secret ballot to elect a president pro tempore of council

{¶ 2} In January 2015, the Bratenahl Village Council gathered for its first meeting of the year. Among the council's business that day was the election of a president pro tempore—someone to serve as the acting mayor when the mayor is absent or unable to perform his or her duties. *See* R.C. 731.10. After two members were nominated for the position, the following exchange was had:

> MAYOR LICASTRO: Do you want to do a show of hands? Do you want to do a secret ballot?
>
> COUNCILMEMBER BECKENBACH: Let's do secret ballot. We've always done that.
>
> MAYOR LICASTRO: Secret Ballot. Mr. Matty?
>
> COUNCILMEMBER BACCI: Is that legal?
>
> SOLICITOR MATTY: Yes, it is legal.
>
> * * *
>
> COUNCILMEMBER BACCI: I thought I saw something in the Sunshine Law of the [Ohio Revised Code] that you can't have a secret ballot.

{¶ 3} No one replied to Councilmember Bacci's comment, and the council proceeded to vote by secret ballot. The village solicitor privately tallied the votes. Without revealing the results, he announced that the council would have to vote again because someone had voted for a person who had not been nominated. The

second vote was a tie, so the council voted by secret ballot a third time. Again, the village solicitor counted the votes and, without announcing the votes, declared Councilmember Jim Puffenberger the new president pro tempore.

{¶ 4} A year later, the community-news publication MORE Bratenahl and Patricia Meade, the operator of MORE Bratenahl, filed suit against the village of Bratenahl, five of the village's councilmembers, and its mayor (collectively, "Bratenahl"). MORE Bratenahl and Meade sought a declaratory judgment that Bratenahl had violated Ohio's Open Meetings Act, R.C. 121.22, by conducting public business by secret ballot, an injunction to prohibit future secret-ballot voting, reasonable attorney fees, and a civil forfeiture of $500.

{¶ 5} During discovery, Meade sought copies of the ballots. Bratenahl produced the ballot slips with sticky notes attached to them, purporting to identify the councilmember who cast each vote. Both sides filed motions for summary judgment. The trial court denied Meade's motion for summary judgment and awarded summary judgment to Bratenahl.

{¶ 6} On appeal, the Eighth District found that Meade was unable to establish that Bratenahl had violated the Open Meetings Act. It noted that, because the votes were cast in open session and were maintained as a public record, the votes were not "secret." 2018-Ohio-497, ¶ 20. Thus, there was "no evidence that Bratenahl attempted to conceal information from the public." *Id.*

{¶ 7} We accepted Meade's appeal on the question whether members of a public body violate the Open Meetings Act when they vote on matters of public business through the use of secret ballots. *See* 152 Ohio St.3d 1489, 2018-Ohio-2155, 99 N.E.3d 426.

II. The Open Meetings Act does not permit a governmental body to take official action by secret ballot

{¶ 8} The Open Meetings Act begins with a pronouncement: "This section shall be liberally construed to require public officials to take official action and to

conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." R.C. 121.22(A). It directs that "[a]ll meetings of any public body are declared to be public meetings open to the public at all times." R.C. 121.22(C). And it further provides, "A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." R.C. 121.22(H). (The act includes several exceptions to its requirements, none of which are applicable here.)

{¶ 9} Bratenahl does not dispute that its council is a public body, that the election of a president pro tempore was an "official action" on "public business," or that the council's January gathering was a meeting. (A meeting is defined as "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2).) The only question is whether the council acted in a meeting that was "open to the public" when it selected its president pro tempore by secret ballot.

{¶ 10} Taking a point from the introductory language of the act, Meade says that we must construe the act in favor of openness. To allow a secret ballot, she says, is inconsistent with the act's legislative purpose of allowing the public to ascertain the workings of their government.

{¶ 11} Bratenahl pushes back on such a reading. It says that the act does not prescribe a voting procedure, pointing to a municipal corporation's statutory authority "to determine its own rules." R.C. 731.45. In essence, Bratenahl contends that the act is satisfied as long as the doors to the meeting space are unlocked and the public is permitted to sit in the same room as the council.

{¶ 12} We begin our analysis with the text of the act, focusing on the ordinary meaning of its terms and its structure. Because the act does not define "open" or "open meeting," we afford the terms their plain, everyday meanings, looking to how such words are ordinarily used. *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803, ¶ 8-10. This work

includes reading words in their context and construing them "according to the rules of grammar and common usage." R.C. 1.42; *see also Great Lakes* at ¶ 9.

{¶ 13} "Open" is a word with a variety of usages. It is defined as "completely free from concealment : exposed to general or particular perception or knowledge," *Webster's Third New International Dictionary* 1579 (1966)—a definition that supports Meade's interpretation. But it can also mean more narrowly "free to be entered, visited, or used," *Webster's New International Dictionary* 1705 (1953), and "in a state which permits access, entrance, or exit," *Webster's New World Dictionary* 948 (3d College Ed.1988)—definitions more in line with Bratenahl's reading of the act.

{¶ 14} When we consider the full text of the act, its structure, and the legislative purpose as derived from the text of the act, we think it clear that the broader reading must carry the day. Significantly, the act does not just say that all meetings shall be open to the public. It also provides that "[a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." R.C. 121.22(H). Thus, the act ties the openness requirement to official action taken at the meeting. Not only must the meeting be open, but any official action (for example, the election of a president pro tempore) must take place in an open meeting. We read this to mean that that portion of the meeting in which the formal action is taken—here, the vote—must be open.

{¶ 15} Further, when the text of a statute makes its purpose clear, and we must choose between two permissible readings of the statutory text, an interpretation that advances the purpose of the statute is to be preferred over one that would thwart that purpose. *See Griffin v. Oceanic Contrs., Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 56-57 (2012). The text of the act makes clear its purpose: to require that public business be conducted in a manner that is

accessible to the public. Meade's reading advances that purpose; Bratenahl's reading does not.

{¶ 16} Bratenahl's reliance on the fact that the Open Meetings Act does not prescribe particular voting procedures does little to advance its cause. Just as the act does not prescribe a particular voting procedure, it does not prescribe how members are to communicate in such a meeting. But certainly, a meeting is not open if the members communicate in whispers, concealing their deliberations from the public. *See Manogg v. Stickle*, 5th Dist. Licking No. 97 CA 104, 1998 Ohio App. LEXIS 1961, *2, 4 (Apr. 8, 1998). Nor do we think it would be open if the members spoke only in Latin, or placed a screen between themselves and the audience, or took any of numerous other actions that would limit the public's ability to access their deliberations. The act may not prescribe any particular voting procedure—and a council may adopt its own rules—but none of this alters the fundamental requirement that the public have meaningful access to what takes place at the meeting.

{¶ 17} The reading that Bratenahl proposes—that a meeting is open as long as the doors of the meeting room are open to the public—is inconsistent with our precedent. In *State ex rel. Cincinnati Post v. Cincinnati*, we held that the act was violated when the city manager set up a series of back-to-back meetings (each attended by three of the city's councilmembers) to discuss public business prior to the regular session of the nine-member council. 76 Ohio St.3d 540, 542-543, 668 N.E.2d 903 (1996). In doing so, we looked to the legislative dictate that the statute be liberally construed and concluded that "Cincinnati's game of legislative musical chairs," *id.* at 544, was inconsistent with the statutory requirement that governmental bodies "conduct all deliberations upon official business only in open meetings." R.C. 121.22(A).

{¶ 18} Similarly, we have held that the act prohibited a majority of a school board from engaging in a private, prearranged discussion of public business by e-

mail that was later ratified by the board at a public meeting. *White v. King*, 147 Ohio St.3d 74, 2016-Ohio-2770, 60 N.E.3d 1234, ¶ 15, 24-25.

{¶ 19} Implicit in the *Cincinnati Post* and *White* decisions is a rejection of the view that Bratenahl advances. The act is not satisfied simply because the doors of a council meeting are open to the public. Rather, an open meeting requires that the public have meaningful access to the deliberations that take place among members of the public body, and that includes being able to determine how participants vote.

{¶ 20} Thus, we hold that the Open Meetings Act precludes a public body from taking official action by way of a secret ballot. Bratenahl violated the act when it elected its president pro tempore by secret ballot.

III. Maintaining secret-ballot slips as public records does not cure a R.C. 121.22 violation

{¶ 21} Bratenahl also argues that since the secret-ballot slips were maintained as public records, they were not actually secret. The court of appeals reached this same conclusion, finding that since the votes were cast in open session and later made public record, they were not "secret." 2018-Ohio-497, at ¶ 20. But the availability of concealed information through a public-records request does not retroactively make a meeting with secret votes "open to the public." Besides the practical problems attending Bratenahl's position—illustrated by the sticky notes haphazardly appended to the ballot slips, supposedly identifying the voters more than a year after they had cast their votes—it lacks any support in the text of R.C. 121.22. The statute's plain language requires that public meetings remain open throughout the proceedings themselves—the prospect of future access does not make a meeting "open to the public at *all* times." (Emphasis added.) R.C. 121.22(C). The statutory burden to maintain a meeting's openness is on the public officials, not the public. R.C. 121.22(A) and (C). Likewise, the consequence for failing to adopt a formal action in an open meeting—invalidation of that action—

falls on the public body. R.C. 121.22(H). Thus, the availability of secret-ballot slips as a public record does not retroactively make a meeting compliant with the act.

IV. The matter is not moot

{¶ 22} Bratenahl argues that since the president pro tempore's term has expired, the issue is moot. But again, the statute's plain terms refute this argument. R.C. 121.22(I)(1) provides:

> Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

{¶ 23} Thus, the act specifically allows a party to bring an action within two years of a violation—as Meade did. And when a violation or threatened violation is proven, it mandates the issuance of an injunction. Because the act, by its terms, anticipates exactly the type of action Meade pursued, we have little difficulty concluding that the matter is not moot.

V. Conclusion

{¶ 24} We hold that the use of secret ballots in a public meeting violates the Open Meetings Act. Accordingly, we remand this matter to the court of common pleas to issue an injunction under R.C. 121.22(I)(1), order the village council to pay a civil forfeiture under R.C. 121.22(I)(2)(a), and award any other relief consistent with R.C. 121.22.

Judgment reversed

and cause remanded.

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

Finney Law Firm, L.L.C., Brian C. Shrive, Christopher P. Finney, and Justin C. Walker, for appellant.

Matty, Henrikson & Greve, L.L.C., David J. Matty, Shana A. Samson, and Mark B. Marong, for appellees.

Frost Brown Todd, L.L.C., Ryan W. Goellner, and Monica L. Dias, urging reversal for amici curiae Ohio Coalition for Open Government, Reporters Committee for Freedom of the Press, and Ohio Association of Broadcasters.

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SLIP OPINION NO. 2019-OHIO-3231

GEMBARSKI, APPELLEE, *v.* PARTSSOURCE, INC., APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Gembarski v. PartsSource, Inc.,* Slip Opinion No. 2019-Ohio-3231.]

Civil law—Civ.R. 23(A)—In a class-certification case, when the case originates with a single named plaintiff and that plaintiff is not subject to an arbitration agreement that was entered into by unnamed putative class members, the defendant need not raise a specific argument referring or relating to arbitration in the answer—Defendant may raise an argument that relates to arbitration against putative class members at the class-certification stage of proceedings—Court of appeals' judgment reversed and cause remanded.

(No. 2018-0125—Submitted February 20, 2019—Decided August 14, 2019.)

APPEAL from the Court of Appeals for Portage County,

No. 2016-P-0077, 2017-Ohio-8940.

FISCHER, J.

{¶ 1} Appellant, PartsSource, Inc., appeals the judgment of the Eleventh District Court of Appeals affirming the trial court's judgment granting appellee Edward F. Gembarski's motion to certify a class action. We accepted jurisdiction over PartsSource's three propositions of law related to the trial court's decision to grant class certification. We will address only the second and third propositions of law, however, as they are dispositive in this case.

{¶ 2} We hold that in a class-certification case, when the case originates with a single named plaintiff and that plaintiff is not subject to an arbitration agreement that was entered into by unnamed putative class members, the defendant need not raise a specific argument referring or relating to arbitration in the defendant's answer. In such circumstances, the defendant may raise an argument that relates to arbitration against putative class members at the class-certification stage of the proceedings.

{¶ 3} As relevant to this case, PartsSource had no duty to assert arbitration as a defense in its answer because Gembarski, the only named class representative, was *not* subject to an arbitration agreement that had been entered into by unnamed putative class members. A defendant need not raise defenses that are related only to unnamed putative class members because those unnamed putative class members are not parties to the action prior to class certification. Thus, because arbitration was not available as a defense at the time PartsSource submitted its answer, PartsSource could not waive a right to assert arbitration at that time, as PartsSource had no such right to waive.

{¶ 4} Prior to Gembarski's motion to certify a class, PartsSource had no duty to raise an argument that, because unnamed putative class members were parties to arbitration agreements, Gembarski—as the representative of that class—failed to satisfy Civ.R. 23(A)'s typicality and adequacy requirements. Nor does any of Ohio's Rules of Civil Procedure require PartsSource to file a motion to strike

the class action. The burden to certify the class action or to maintain the class action is never on the defendant.

{¶ 5} Thus, because PartsSource denied Gembarski's averment that he met the requirements of Civ.R. 23(A) when it filed its answer, PartsSource properly preserved its arguments alleging that because unnamed putative class members were parties to arbitration agreements and Gembarski was not, Gembarski failed to satisfy Civ.R. 23(A)'s typicality and adequacy requirements. Accordingly, we reverse the judgment of the court of appeals and remand the cause to that court for consideration of PartsSource's assignments of error in light of this opinion.

I. BACKGROUND

{¶ 6} In October 2012, Gembarski filed a class-action complaint against his former employer, PartsSource, in the Summit County Court of Common Pleas. Gembarski asserted claims of breach of contract, unjust enrichment, conversion, equitable restitution, constructive trust, and "money had and received." Each claim was asserted on behalf of the putative class. Gembarski claimed that while he worked for PartsSource, PartsSource improperly withheld and deducted commissions earned by Gembarski and other account managers. Gembarski argued that his claims were typical of the putative class, which included current and former PartsSource account managers and employees, and that he would fairly and adequately protect the class as the named representative.

{¶ 7} PartsSource filed an answer to the complaint, denying the allegations as to each class-action requirement (including typicality and adequacy) and denying that the lawsuit could be maintained as a class action. Shortly thereafter, the parties agreed to transfer the case to the Portage County Court of Common Pleas.

{¶ 8} The parties agreed to participate in private mediation but came to no resolution. The case was removed to federal court but was then remanded to the Portage County Court of Common Pleas. In September 2015, Gembarski, for the first time, filed a motion asking that the trial court certify the case as a class action.

{¶ 9} PartsSource opposed Gembarski's motion to certify the class action. PartsSource argued that it had instituted an alternative-dispute-resolution program in January 2011 and that, under that program, employees who entered into an arbitration agreement waived their right to file a lawsuit in favor of a "three-step process culminating in mandatory and binding arbitration." Claims covered under the arbitration agreement included claims arising from or relating to the employees' employment. Gembarski, however, had refused to sign the arbitration agreement. So PartsSource alleged that Gembarski could not meet the typicality requirement necessary for his motion to certify the class to be granted because his claims or defenses were not typical of the claims or defenses of the putative class "where employees who signed arbitration agreements * * * would be precluded from participating in [the] case as absent class members." PartsSource also claimed that Gembarski failed to establish adequacy, as his interests diverged from those putative class members who were subject to the arbitration agreement with PartsSource.

{¶ 10} Gembarski argued that PartsSource had waived "the defense of arbitration." Gembarski claimed that PartsSource knew of "its alleged right to arbitrate" at the onset of the litigation. Gembarski maintained that because PartsSource participated in the litigation and had not asserted an "arbitration defense," PartsSource acted inconsistently with "its alleged right of arbitration." Gembarski concluded that because PartsSource waived an "arbitration defense," there was "nothing stopping, barring or otherwise prohibiting the absent class members from *participation* in the class action as a participating class member." (Emphasis sic.)

{¶ 11} PartsSource countered that it did not waive "the issue of arbitration." PartsSource argued that it never had a right to demand arbitration from Gembarski. PartsSource contended that it would have been premature to raise any argument related to arbitration prior to the class-certification phase of the litigation.

PartsSource added that it could not determine the defenses that may apply to unnamed putative class members given that Gembarski's proposed class definition was "a moving target" that remained a "little more than the shadow of an idea based in speculation about who might be in this class," particularly since Gembarski had proposed at least three class definitions over the course of the proceedings.

{¶ 12} After holding a hearing, the magistrate assigned by the common pleas court recommended that the court grant Gembarski's motion for class certification. The magistrate determined, in its findings of fact and conclusions of law, that PartsSource had waived "the defense of arbitration it ha[d] asserted in this matter." The magistrate found that PartsSource knew "of its alleged right to arbitrate since the onset of the filing of Plaintiff's Class Action Complaint" and yet, over the course of several years of litigation, PartsSource did not "raise the defense of arbitration" until it opposed Gembarski's motion for class certification. The magistrate further found that PartsSource "actively and vigorously" participated "in litigation in three (3) different Courts without once mentioning, let alone affirmatively seeking, arbitration." The magistrate determined that PartsSource's actions were "manifestly inconsistent with its alleged right of arbitration." Thus, the magistrate concluded that PartsSource "fully and expressly waived any right of arbitration in this matter."

{¶ 13} PartsSource filed numerous objections to the magistrate's decision. PartsSource objected to the magistrate's conclusions that PartsSource had waived any argument regarding arbitration and that even though Gembarski had refused to sign the arbitration agreement with PartsSource, and thus was not subject to that agreement, PartsSource should have raised the arbitration argument against Gembarski prior to his seeking to certify a class. The Portage County Court of Common Pleas reviewed the magistrate's findings of fact and conclusions of law, overruled PartsSource's objections as relevant to this appeal, and adopted the magistrate's decision.

{¶ 14} PartsSource appealed to the Eleventh District Court of Appeals and asserted three assignments of error relating to the trial court's judgment adopting the magistrate's decision, including the argument that the trial court "abused its discretion in summarily concluding that [Gembarski] satisfied Civil Rule 23's seven prerequisites."

{¶ 15} The appellate court affirmed the judgment of the trial court. The appellate court found that PartsSource "was aware of its right to assert the arbitration defense from the inception of the underlying class action." 2017-Ohio-8940, 101 N.E.3d 469, ¶ 66. That court determined that Gembarski "specified the details, including [PartsSource's] alleged misconduct and harm suffered by potential class members, that would be used to qualify the potential putative class members for certification." *Id.* The appellate court added that although Gembarski was not a party to the arbitration provision, PartsSource "had notice that other potential class members who suffered from the harm alleged in the complaint would be bound by the arbitration clause." *Id.*

{¶ 16} The appellate court also maintained that PartsSource's "failure to assert the arbitration defense in its answer, or a supplement thereto, or seek to enforce the right to arbitration at some point prior to its opposition to the certification was fundamentally inconsistent with its right to assert the defense." *Id.* Thus, that court concluded that the magistrate's conclusion that PartsSource "waived the arbitration defense to the typicality and adequacy requirements of class certification" was not unreasonable. *Id.* The appellate court further concluded that Civ.R. 23(A)'s requirements of typicality and adequacy were met. *Id.* at ¶ 66-67.

II. ANALYSIS

{¶ 17} PartsSource's second and third propositions of law are related to the lower courts' determinations that PartsSource had waived certain defenses and arguments:

> Proposition of Law II: A party to a class action cannot waive defenses against non-parties who are not yet under the court's jurisdiction—the proper time to raise defenses against non named, hypothetical putative class members who are not yet parties is at the class certification stage.
>
> Proposition of Law III: A party to a lawsuit does not waive the right to arbitrate by failing to assert arbitration as an affirmative defense; instead, waiver of the right to arbitrate is based upon the totality of the circumstances.

See 152 Ohio St.3d 1462, 2018-Ohio-1795, 97 N.E.3d 499. Because these two propositions of law are connected, we address them together.

{¶ 18} This case presents this court with one overarching question: in a class-action proceeding, at what point does a defendant waive the argument that the named class member does not satisfy the typicality or adequacy requirements under Civ.R. 23(A) when that named class member is not subject to an arbitration agreement that was entered into by most unnamed putative class members?

A. Arbitration as a defense and arbitration as an attack on a plaintiff's satisfaction of the requirements of Civ.R. 23(A)

{¶ 19} We must first recognize that PartsSource did not raise the defense of arbitration in its answer and did not argue arbitration as a defense to any of Gembarski's individual claims. PartsSource, in its opposition to Gembarski's motion to certify the class action, argued that Gembarski was not typical of the class or adequate to represent the class, *see* Civ.R. 23(A), because he was not subject to an arbitration agreement that had been entered into by most unnamed putative class members.

{¶ 20} Gembarski construed PartsSource's attack on his satisfaction of the requirements of Civ.R. 23(A) as PartsSource raising "the defense of arbitration"—the right to compel arbitration—and argued that PartsSource had waived the defense.

{¶ 21} In attempting to determine whether PartsSource waived the argument that Gembarski could not satisfy Civ.R. 23(A)'s typicality and adequacy requirements because he had not entered into the arbitration agreement that other unnamed putative class members had entered into with PartsSource, the lower courts merged the analyses of arbitration as a defense to the action and arbitration as an attack on a plaintiff's satisfaction of the requirements of Civ.R. 23(A).

{¶ 22} Arbitration as a defense to an action is a concept that is separate from arbitration as an attack on a plaintiff's satisfaction of the requirements of Civ.R. 23(A). While there is a relationship between these two concepts, in that the failure to assert one may perhaps waive or affect the defendant's ability to raise the other, each concept requires its own waiver analysis.

{¶ 23} For ease of analysis, we will refer to an attack on a plaintiff's satisfaction of the typicality and adequacy requirements of Civ.R. 23(A) based on the fact that the plaintiff was not subject to an arbitration agreement that was entered into by the unnamed putative class members as the "Civ.R. 23(A) argument." We will refer to a defendant's right to enforce an arbitration clause—i.e., arbitration as a defense to the action—as the "arbitration defense."

B. Waiver of the right to arbitrate or to assert a Civ.R. 23(A) argument

{¶ 24} " 'A waiver is a voluntary relinquishment of a known right.' " *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198, 2 N.E.2d 501 (1936), quoting *List & Son Co. v. Chase*, 80 Ohio St. 42, 49, 88 N.E. 120 (1909). A party may waive a right by express words or by conduct that is inconsistent with that right.

See id. However, "[m]ere silence will not amount to waiver where one is not bound to speak." *Id.*

{¶ 25} To establish waiver, the party seeking waiver must demonstrate (1) that the party knew of its right to assert an argument or defense and (2) that the totality of the circumstances establish that the party acted inconsistently with that right. *See, e.g.*, *Donnell v. Parkcliffe Alzheimer's Community*, 6th Dist. Wood No. WD-17-001, 2017-Ohio-7982, ¶ 21; *Atkinson v. Dick Masheter Leasing II, Inc.*, 10th Dist. Franklin No. 01AP-1016, 2002-Ohio-4299, ¶ 20.

{¶ 26} An assertion that a party waived an argument presents a mixed question of law and fact. *See, e.g.*, *Am. Express Co. v. Triumph Ins. Co.*, 1 W.L.B. 85, 1876 WL 6064, *1 (1st Dist.1876) (the question of waiver is a mixed one of law and fact, and it does not become a question of law except when the underlying facts are determined); *Ironton City Schools Bd. of Edn. v. Hayes, Donaldson, Wittenmyer & Partners*, 4th Dist. Lawrence No. 1734, 1985 WL 11150, *7 (June 17, 1985) (waiver is a mixed question of law and fact). This court reviews de novo the legal question whether PartsSource's conduct amounts to a waiver of the argument, but we review the factual findings underlying the trial court's determination only for clear error. *Nicholas v. KBR, Inc.,* 565 F.3d 904, 907 (5th Cir.2009); *see also State v. Keene,* 81 Ohio St.3d 646, 656, 693 N.E.2d 246 (1998) (a reviewing court evaluates legal questions independently but defers to a trial court's factual findings when those findings are supported by the record).

1. Waiver of arbitration as a "defense" to unnamed putative class members

{¶ 27} In determining whether PartsSource waived the Civ.R. 23(A) argument, the only argument that it raised related to arbitration, we must determine whether PartsSource was required to assert the arbitration defense in its answer under Civ.R. 8(B)—that is, whether PartsSource had a known right that it could waive.

{¶ 28} The parties do not dispute that PartsSource and Gembarski had *no* right to arbitrate, because they had not entered into an arbitration agreement. Therefore, PartsSource had no duty to assert an arbitration defense against Gembarski, who had not entered into an arbitration agreement. Rather, the question is, was PartsSource required to raise, in its answer, an arbitration defense to the unnamed putative class members who had entered into the arbitration agreement? We answer that question in the negative. Unnamed putative class members are *not parties* to the action prior to class certification; thus, PartsSource did not need to raise defenses that would be applicable against only those unnamed putative class members who were merely potential future parties.

{¶ 29} While this case presents an issue of first impression, persuasive authority supports our holding that unnamed putative class members are not parties to the class action prior to class certification. Federal courts are consistent in concluding that unnamed putative class members are not parties to an action prior to class certification. *See Barnes v. First Am. Title Ins. Co.*, 473 F.Supp.2d 798, 802 (N.D.Ohio 2007) ("proposed new plaintiffs are not current parties to the action prior to a ruling on certification"); *Taylor v. Pilot Corp.*, W.D.Tenn. No. 14-cv-2294-SHL-tmp, 2016 WL 4524310, *3 (Mar. 3, 2016) (putative class members are not parties to a case prior to class certification); *Currithers v. FedEx Ground Package Sys., Inc.*, E.D.Mich. No. 04-10055, 2012 WL 458466, *8 (Feb. 13, 2012) (putative class members are not considered parties prior to a class-certification ruling); *Zepeda v. United States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir.1983) (ruling that a court could not issue an injunction concerning putative class members before class certification, because those putative class members were not parties before the court); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir.1998), *abrogation on other grounds recognized*, *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir.2000) (until the putative class is certified, the action is between the individual plaintiffs and the defendants); *In re Checking*

Account Overdraft Litigation, 780 F.3d 1031, 1036-1037 (11th Cir.2015) (an unnamed class member is not a party to class-action litigation before the class is certified).

{¶ 30} The United States Supreme Court has recognized limited circumstances when an unnamed putative class member may be considered a party—generally, when unnamed putative class members' rights are at stake. *See Devlin v. Scardelletti*, 536 U.S. 1, 10-11, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002) (putative class members may appeal the approval of a settlement). But the Supreme Court has implied that a putative class member should not be treated as a party prior to class certification. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313, 131 S.Ct. 2368, 180 L.Ed.2d 341 (2011) (the argument that an unnamed class member is a party to the class action before the class is certified is a "novel and surely erroneous argument").

{¶ 31} We are persuaded by and agree with those federal courts that have concluded that unnamed putative class members are not parties to an action prior to class certification. "Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court's power." *In re Checking Account Overdraft Litigation* at 1037. Absent class certification, there is no justiciable controversy between a defendant and the unnamed putative class members. *See Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 17 (a controversy, to be justiciable, must be grounded on a present dispute, not a possible future dispute); *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 542, 660 N.E.2d 458 (1996) (justiciable matters are actual controversies between the parties); *see also Mallory v. Cincinnati*, 1st Dist. Hamilton No. C-110563, 2012-Ohio-2861, ¶ 10 (recognizing that this court has interpreted justiciable matters to mean an actual controversy, one with adverse legal interests, between the parties). It follows that if unnamed putative class members are not parties to an action, then a defendant is

under no duty to raise in its answer, or at any time prior to the class-certification stage, defenses that relate only to those unnamed class members.

{¶ 32} Therefore, because an arbitration defense to unnamed putative class members was not available to PartsSource prior to the class-certification stage, PartsSource did not waive any arbitration defense against those unnamed putative class members when it failed to raise that defense in its answer. The lower courts' determination that PartsSource waived the arbitration defense was error. PartsSource's decision not to include an arbitration defense in its answer did not foreclose its ability to raise a Civ.R. 23(A) argument at the class-certification stage.

2. Waiver of PartsSource's Civ.R. 23(A) argument

{¶ 33} We next consider whether PartsSource was required to do more than just deny the averments made in the complaint regarding Gembarski's satisfaction of Civ.R. 23(A)'s requirements to preserve the Civ.R. 23(A) argument until the class-certification phase. The answer is no.

a. PartsSource had no duty to raise with specificity the Civ.R. 23(A) argument in its answer

{¶ 34} As stated above, PartsSource had no right to an arbitration defense prior to the class-certification stage of the proceedings and therefore was not required to raise the defense of arbitration as a specific "defense" in its answer. PartsSource's failure to raise the arbitration defense in its answer as a defense to Gembarski's individual claims did not foreclose PartsSource from raising the Civ.R. 23(A) argument. We also conclude that PartsSource did not need to specifically raise the Civ.R. 23(A) argument beyond a denial in its answer to Gembarski's complaint.

{¶ 35} In an answer to a plaintiff's complaint, the defendant shall "state in short and plain terms the party's defenses to each claim asserted and *shall admit or deny the averments* upon which the adverse party relies." (Emphasis added.)

Civ.R. 8(B). The rule does not require a defendant to state the specific, detailed reasons *why* the defendant denies a plaintiff's averment.

{¶ 36} In his complaint, Gembarski averred that his "claims are typical of the Class" and that he would fairly and adequately protect the class "because his interests in the litigation are not antagonistic to the interests of the other members of the Class." PartsSource needed only to admit or deny Gembarski's averments to satisfy Civ.R. 8(B). And in its answer, PartsSource denied that "the captioned lawsuit may be maintained as a class action" and denied all the allegations related to the class action, including Gembarski's averments as to typicality and adequacy.

{¶ 37} PartsSource had no duty beyond denying the averments in Gembarski's complaint to raise the Civ.R. 23(A) argument. PartsSource's denials placed Gembarski on notice of PartsSource's intention to argue that he did not satisfy the Civ.R. 23(A) requirements. Thus, PartsSource did not waive the Civ.R. 23(A) argument by failing to assert the argument in its answer since there was no duty for it to do so.

b. PartsSource was not required to move to strike the class action to preserve the Civ.R. 23(A) argument

{¶ 38} Gembarski argues that PartsSource was required to raise the Civ.R. 23(A) argument prior to class certification in a motion to strike the class action. We disagree.

{¶ 39} Nothing in Civ.R. 12 nor in Civ.R. 23 imposed a duty on PartsSource to move to strike Gembarski's complaint or his motion to certify a class action. Gembarski—not PartsSource—undisputedly has the burden of establishing that the cause of action merits certification as a class action. *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978). Indeed, PartsSource is not at fault for waiting until Gembarski, the only named plaintiff, moved for class certification to assert, more exactly, its Civ.R. 23(A) argument that Gembarski's claims were not typical of unnamed putative class members and that he could not

adequately represent those unnamed putative class members. Until Gembarski filed his motion to certify the class, there was no basis in logic or reason for PartsSource to raise this Civ.R. 23(A) argument. Because PartsSource had no duty to move to strike Gembarski's class action, its failure to move to strike the class allegations is not a waiver of the Civ.R. 23(A) argument.

c. PartsSource raised its Civ.R. 23(A) argument
at the appropriate time—class-certification stage of the proceedings

{¶ 40} We agree that a defendant must assert a Civ.R. 23(A) argument in a timely manner to preserve the argument. *See generally In re Checking Account Overdraft Litigation*, 780 F.3d at 1037 (claims against unnamed putative class members exist only by hypothesis prior to class certification); *Taylor*, 2016 WL 4524310, at *3 (defendants did not waive right to arbitrate with unnamed putative members after class certification, because defendants would have been unable to compel arbitration prior to class certification); *Rimedio v. SummaCare, Inc.*, 9th Dist. Summit No. 21828, 2004-Ohio-4971, ¶ 14 (appellants could not have waived the right to assert an arbitration defense against unnamed class members prior to class certification). The appropriate time to raise a Civ.R. 23(A) argument is at the class-certification stage of the proceedings.

{¶ 41} "The party seeking to maintain a class action has the burden of demonstrating that all factual and legal prerequisites to class certification have been met." *Miranda v. Saratoga Diagnostics*, 2012-Ohio-2633, 972 N.E.2d 145, ¶ 14 (8th Dist.). It is at the class-certification stage of the proceedings that the plaintiff must attempt to prove that the requirements of Civ.R. 23(A) have been met, and it is at this same time in the proceedings that the defendant would have the opportunity to refute such claims.

{¶ 42} Here, Gembarski moved for class certification. In opposing certification, PartsSource immediately raised its Civ.R. 23(A) argument—that Gembarski, the only named class member, did not satisfy the typicality or adequacy

requirements under Civ.R. 23(A), because he was not subject to an arbitration agreement that was entered into by most putative class members.

{¶ 43} Because this stage in the litigation was the appropriate time to raise the Civ.R. 23(A) argument, PartsSource did not waive the argument by failing to assert it at any earlier stage of the proceedings. Therefore, the lower courts erred by determining that PartsSource waived its Civ.R. 23(A) argument.

III. CONCLUSION

{¶ 44} PartsSource did not waive the right to raise the arbitration defense, because prior to the class-certification stage of the proceedings, PartsSource did not have a right to arbitrate with Gembarski, who was the only named party. Further, because PartsSource did not have an obligation to raise the arbitration defense, its failure to do so has no impact on PartsSource's ability to raise the Civ.R. 23(A) argument.

{¶ 45} PartsSource did not waive the right to assert a Civ.R. 23(A) argument, because it had no duty to raise that argument at any time prior to the class-certification stage of the proceedings. PartsSource properly provided a general denial in its answer and raised the Civ.R. 23(A) argument at the class-certification stage of the proceedings. Thus, the lower courts erred in determining that PartsSource had waived any argument pertaining to Civ.R. 23(A) or the arbitration defense. Accordingly, we reverse the judgment of the court of appeals on the issue of waiver.

{¶ 46} Because we conclude that the appellate court erred as to the issue of waiver and we reverse on that basis, we need not reach PartsSource's first proposition of law addressing the merits of this case.

{¶ 47} We remand the cause to the appellate court to consider PartsSource's assignments of error in accord with this opinion.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and FRENCH, DEWINE, CELEBREZZE, and STEWART, JJ., concur.

KENNEDY, J., concurs in judgment only.

FRANK D. CELEBREZZE Jr., J., of the Eighth District Court of Appeals, sitting for DONNELLY, J.

Connick Law, L.L.C., and Thomas J. Connick, for appellee.

Zashin & Rich Co., L.P.A., Stephen S. Zashin, Jeffrey J. Wedel, and Helena Oroz, for appellant.

Baker & Hostetler, L.L.P., John B. Lewis, Dustin M. Dow, and Daniel R. Lemon, urging reversal for amicus curiae Ohio Management Lawyers Association.

[Cite as *Pollock v. Trustar Funding, L.L.C.*, 2019-Ohio-3272.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SUSAN POLLOCK, ET AL.,	:	
Plaintiffs-Appellants,	:	Nos. 107355 and 107679
v.	:	
TRUSTAR FUNDING, L.L.C., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 15, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CV-13-819529, CV-17-884945, and CV-18-894019

Appearances:

Zukerman, Daiker & Lear Co., L.P.A., Larry W. Zukerman, and S. Michael Lear, *for appellants*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Plaintiff-appellant Susan Pollock filed a lawsuit against Trustar Funding, L.L.C. ("Trustar" hereafter) and several individuals related to the company. The parties settled the lawsuit after reaching a settlement agreement, which set forth a five-year payment schedule, and the terms of the agreement were incorporated into a consent judgment journalized by the court. The defendants

subsequently failed to make the required payments and defaulted. The defendants then proffered a new settlement agreement. The dispute in this case was whether the trial court should enforce the original settlement agreement as incorporated in the consent judgment or the new proffered settlement agreement. After a review of the record and applicable law, we affirm the trial court's judgments enforcing the terms of the original settlement agreement.

Background

{¶ 2} This case has a convoluted and confusing procedural history due in part to the zealous advocacy by plaintiff's attorney, Harold Pollock, who is also a party in the underlying action. In the following, we summarize, to the best of our ability, the procedural history relevant to this appeal based upon the record.

{¶ 3} In 2010, Harold Pollock, Esq., and his wife Susan Pollock obtained a short-term loan of $170,000 from Brookview Financial, Inc. to finance the purchase of a property. Trustar was the servicer for the loan. Trustar was a family business: Brian Stark was the president of the company, and his now ex-wife Sharon Stark and his brother Paul Stark were employees of the company. In September 2011, the Pollocks made a $75,000 payment to Trustar as a partial payment for the loan. An employee of Trustar, allegedly Sharon Stark, misappropriated the funds and never forwarded the payment to Brookview Financial, Inc.

The Settlement Agreement and the Subsequent Default

{¶ 4} To recover the misappropriated funds, the Pollocks filed a complaint in 2013 (Cuyahoga C.P. No. CV-13-819529, "*Pollock 1*" hereafter) against Trustar,

Brian Stark, Sharon Stark, Paul Stark, and other related entities. As subsequently amended, the Pollocks' complaint alleged 16 counts, including a violation of the Ohio Predatory Lending Act, breach of contract, breach of duty of good faith, request for declaratory relief, respondeat superior, conversion, promissory estoppel, fraud and misrepresentation, piercing the corporate veils, fraudulent conveyances, breach of fiduciary duty, request for specific performance, request for preliminary and permanent injunction, and violations of the Ohio Consumer Sales Practices Act.

{¶ 5} Contentious litigation ensued soon after the Pollocks filed the amended complaint. Within weeks, the docket recorded almost 20 filings from attorney Harold Pollock, who represented himself and his wife at trial, and almost ten filings from attorney J. Norman Stark,[1] Brian and Paul's father, who acted as their counsel in this case.

{¶ 6} The parties then reached a global settlement agreement in late April 2014. Under the agreement, the Stark defendants were to pay Susan Pollock $100,000, with the payment amortized over five years (around $1,854 per month) beginning with June 2014. A promissory note of $100,000 was to be executed in her favor and secured by eight properties owned by various Stark defendants, and certain late payment interest and penalties were to be paid in the event of late payments under the note.

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[1] Attorney J. Norman Stark passed away during the pendency of this appeal. No appearance of counsel was filed by the appellee, and no appellee brief was filed in this appeal.

{¶ 7} A consent judgment entry was journalized in May 2014 by the trial court.[2] The consent judgment stated a judgment of $100,000 (amortized over five years) was entered in favor of Susan Pollock. It also referenced the purported note, but the note was not attached to the judgment and it is unclear whether such a note was ever executed by the defendants.[3]

{¶ 8} Following the settlement and the consent judgment, the Stark defendants began in July 2014 to pay Susan Pollock a monthly payment of $1,854.71, under the amortization rate provided in the settlement agreement. Three years later, after paying a total of $50,000, the Stark defendants defaulted in March 2017.[4]

Post-Default Litigation

{¶ 9} After the defendants defaulted in payment, the litigation in this matter resumed in earnest. Beginning in August 2017, attorney Pollock filed a flurry of motions in this case. He also filed two foreclosure actions, Cuyahoga C.P. Nos. CV117-883959 ("*Pollock 2*") and CV-17-883964 ("*Pollock 3*") (against Sharon Stark

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[2] The consent judgment was amended several months later. The amended judgment removed a provision regarding Brookview Financial. The amendment of the consent judgment is irrelevant for purposes of this appeal.

[3] The settlement agreement itself was also not attached to the consent judgment, although the consent judgment stated that it incorporated the settlement agreement.

[4] Soon after, Brian Stark, who apparently was the party making the payments, filed for personal bankruptcy. It is undisputed, however, that the money owed to Susan Pollock was not discharged by the bankruptcy filing.

and Paul Stark's personal residences, respectively, that were granted as security for the $100,000 judgment as a part of the parties' settlement agreement). In addition, he filed a creditor's bill action against Paul Stark, Cuyahoga C.P. No. CV-17-884762 ("*Pollock 4*") and two cases claiming fraudulent conveyance (Cuyahoga C.P. Nos. CV-17-884945/"*Pollock 5*" and CV-18-894019/"*Pollock 6*") in August 2017 and March 2018, respectively, the latter against attorney Stark and his wife.

{¶ 10} The court held a hearing in October 2017, one of the six hearings the court held in this post-judgment matter. The court and the parties discussed the possibility of consolidating the August 2017 fraudulent conveyance case with the instant case. After hearing, the court issued an entry stating, "[f]or purposes of consolidation, this case is hereby reinstated." Subsequently, both fraudulent conveyance cases were transferred to the trial court's docket for consolidation with the instant case (*Pollock 1*).

Attempt for a New Settlement

{¶ 11} On April 20, 2018, by way of email communication, attorney Stark proposed a new payment schedule to cure the defendants' default. The proffered settlement called for a payment of $62,000, to be paid by an initial lump sum payment of $11,000, followed by an accelerated payment schedule consisting of alternating monthly payments of $5,000 and $1,000, which would conclude in August 2019. As reflected by the response time on attorney Pollock's email reply to attorney Stark, the proffer was immediately rejected.

{¶ 12} Three days later, on April 23, 2018, attorney Pollock sent an email to the staff attorney for the trial court. In the email, he claimed that Stark defendants should be precluded from seeking to enforce the original settlement agreement because they were in default. He maintained that in order to allow the Stark defendants to resume payments under the 2014 settlement agreement, they would have to pay the "$27,000 + amount in which they are in arrears." He also informed the court that attorney Stark had proffered a new settlement but he and his wife "do not believe the Stark Defendants would or could make these payments."[5]

Dueling Motions to Enforce the Settlement Agreement, the Hearings, and Subsequent Judgment Entries

{¶ 13} On April 27, 2018, attorney Pollock filed a motion to enforce the 2014 settlement agreement. In conjunction, he filed a motion to show cause, asking the defendants to be held in contempt for violating the settlement agreement. Three days later, attorney Norman Stark filed the defendants' own motion to enforce the 2014 settlement agreement. The defendants acknowledged their default but asked the court to permit them to resume payments under the 2014 settlement agreement.

{¶ 14} On May 21, 2018, the trial court held a hearing on the dueling motions to enforce the settlement agreement. Brian Stark testified that his ex-wife Sharon and his brother Paul had left the company and he alone carried the burden of paying for the amount owed under the 2014 settlement agreement. Attorney Pollock asked

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[5] The April 20, 2018 and April 23, 2018 emails are attached as exhibits B and A, respectively, to the Stark defendants' motion to enforce settlement subsequently filed on April 30, 2018, and are therefore part of the appellate record.

that the defendants be required to make up for the missed payments now for the 14 months between the default in March 2017 and the present time, plus penalties for the late payments.

{¶ 15} The trial court inquired as to the circumstances surrounding the 2014 settlement and the new settlement proffered by attorney Stark in April 2017. At one point, the court stated "I'm going to enforce the settlement that they have offered," referring to the proffered settlement, to which attorney Pollock responded "okay." It is unclear what "okay" means in the context of the exchange.

{¶ 16} While the trial court appeared to show an intention to enforce the proffered settlement, which attorney Pollock had previously rejected, the court issued a judgment entry the next day, enforcing the 2014 settlement agreement instead. The May 22, 2018 entry stated:

> Defendants' motion to enforce settlement agreement is granted. All remaining claims are hereby dismissed as moot. Related foreclosure actions shall be held in abeyance until plaintiff is made whole. Plaintiff shall not engage in any further unnecessary litigation on this matter.

{¶ 17} A few weeks later, on June 12, 2018, the trial court journalized an "Order Enforcing Original Global Settlement Agreement." It clarified the previous order, adding that the 2014 settlement agreement was to be resumed as if the default had not occurred. The order stated:

> The Defendant[s] having moved to enforce the Global Settlement Agreement entered into between Trustar and Plaintiff on June 13, 2014, and the motion having come to be heard and granted May 21, 2018;

> Now, on considering the Motion to Enforce Settlement, and on the testimony and evidence introduced at the hearing had on May 21, 2018, it is hereby Ordered that the Global Settlement Agreement be resumed and enforced as though there were no default.

Plaintiff's Motion to Modify the May 22 and June 12, 2018 Orders

{¶ 18} On June 20, 2018, attorney Pollock filed a motion to modify the court's May 22 and June 12 orders, claiming the court should have enforced the proffered settlement. He pointed to exhibit B attached to the defendants' April 30, 2018 motion to enforce the settlement agreement as evidence that the proffered settlement remained open at the time of the May 21, 2018 hearing. (Exhibit B was the April 20, 2018 email from attorney Stark to attorney Pollock that contained the proffered payment schedule of an initial lump sum payment of $11,000 followed by alternating $5,000 and $1,000 monthly payments. Also showing on Exhibit B but not mentioned by attorney Pollock in his motion was attorney Pollock's rejection of the offer in his reply email.) Attorney Pollock claimed that the parties reached an agreement regarding the proffered settlement in open court at the May 21, 2018 hearing, and he argued the court should enforce the terms of that proffer.

{¶ 19} Simultaneous with the motion to modify the court's May 22 and June 12 orders, attorney Pollock filed a notice of appeal from these orders in 8th Dist. Cuyahoga No. 107355. This court remanded the matter to the trial court to rule on attorney Pollock's motion to modify. Upon remand, the trial court held a hearing on the motion to modify its orders. The court heard from attorney Pollock, Susan Pollock, attorney Stark, and Brian Stark. Attorney Stark reminded the court that the

proffered settlement was immediately rejected by attorney Pollock and maintained that the only settlement agreement the parties reached in this matter was the 2014 settlement agreement.

{¶ 20} The court inquired about the defendants' ability to pay pursuant to the accelerated payment schedule proffered by the defendants. Attorney Stark reported that the defendants were no longer in a financial position to pay under the proposed payment terms but would be able to make payments pursuant to the 2014 settlement agreement. He also reported the defendants have tendered two payments of $ 1,854.71 pursuant to the court's orders on May 22 and June 12, 2018. One check was accepted while the other refused. Attorney Pollock, on the other hand, maintained that if the payment was to be resumed under the original settlement agreement, plaintiff should be compensated in some manner for the lack of payments during the period between the defendants' default and the resumption of payments.

{¶ 21} The trial court expressed its dismay over attorney Pollock's engagement of multiple lawsuits and excessive motion practice for the collection of a debt. The court noted that an order for examination of a judgment debtor pursuant to R.C. 2333.09 was a remedy readily available to plaintiff as a creditor. The court remarked that the plaintiff's litigation tactic unnecessarily prolonged the resolution of this debt matter and necessitated the appointment of a receiver, noting that the receiver reported after an investigation that there was no substance to plaintiff's claims of fraudulent conveyances. The court, observing that attorney Pollock had

been disciplined by the Supreme Court of Ohio for harassing conduct, described his excessive filings in the instant matter as an abuse of process.

{¶ 22} After the hearing, the court issued a judgment on August 17, 2018, denying plaintiff's motion to modify the settlement order. In its judgment, the court recited the long litany of pleadings and motions filed by plaintiffs in this case and chided attorney Pollock over his over-zealous litigation tactics. The court stated:

> Despite a global settlement agreement reached by all parties in April of 2014, Plaintiffs still attempt to get a second, third, fourth, fifth, or sixth proverbial "bite at the apple" which has created thousands of dollars of litigation costs for Plaintiffs, Defendants, and for this Court. Plaintiffs['] zealous advocacy of the within claims goes beyond the bounds of practicality, with no less than 70 separate motions and briefs filed by Plaintiff in the within action alone. From August 2017 to the present, over 3 years after the parties entered into the global settlement agreement, Plaintiffs have submitted 53 separate pleadings and motions in this matter alone. Plaintiffs' deluge of motions and pleadings is an attempt to drown the defendants in paperwork and costs, [and expenses], money which could be spent going to paying the settlement agreement the parties entered into in 2014.

{¶ 23} The court found that at least one payment of $1,854 (the monthly amount due under the consent judgment) was delivered pursuant to the court's May 22 and June 12 orders and accepted by plaintiff, and another payment was delivered to attorney Pollock's office but was refused. The court also stated that "Plaintiffs' attempts to return this matter to the active docket amount to nothing more than an attempt for a glorified debtor's examination, are in direct contravention of this court's prior order, and accordingly denied any attempts at the same." Consistent with its prior judgment entries, the court ordered the defendants

to resume payments under the 2014 settlement agreement, and it dismissed the remaining pending cases (the two fraudulent conveyance cases).[6]

{¶ 24} On appeal, appellant Susan Pollock raises two assignments of error regarding the three judgment entries entered by the court:[7]

> 1. The trial court erred to the prejudice of appellant and/or exceeded its jurisdiction by denying appellant's motion to enforce settlement agreement and/or by granting appellees' motion to enforce settlement agreement and/or by dismissing appellant's remaining claims as moot and holding appellant's foreclosure cases in abeyance.
>
> 2. The trial court erred to the prejudice of appellant and/or exceeded its jurisdiction by denying appellant's motion to modify settlement order and/or by ratifying the trial court's granting of appellees' motion to enforce settlement agreement by dismissing appellant's remaining claims in *Pollock 1* and dismissing *Pollock 2*, *Pollock 5*, and *Pollock 6* without prejudice.

{¶ 25} We begin our review with the recognition that "[a] settlement agreement is a contract designed to terminate a claim by preventing or ending litigation." *Infinite Sec. Solutions, L.L.C. v. Karam Properties II*, 143 Ohio St.3d

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[6] Regarding the two fraudulent conveyance cases (*Pollock 5* and *Pollock 6*), the trial court noted the receiver's finding that the claims lacked merit at one of the hearings. On appeal, appellant does not challenge the receiver's finding. Regarding the two foreclosure cases, *Pollock 2* (Sharon Stark's personal residence) and *Pollock 3* (Paul Stark's personal residence), the court noted in the judgment that *Pollock 2* had been dismissed for plaintiffs' failure to timely file a Final Judicial Report as required under Loc.R. 24(B) of the Court of Common Pleas of Cuyahoga County, General Division. As to *Pollock 3*, attorney Pollock filed a motion to consolidate it with the instant case. The court denied the motion to consolidate, and that case apparently remains pending on the docket of a different trial judge.

[7] Eighth Dist. Cuyahoga No. 107679 concerns the court's August 17, 2018 judgment denying Susan Pollock's motion to modify the court's orders, and 8th Dist. Cuyahoga No. 107355 concerns the court's May 22, 2018 and June 12, 2018 judgment entries. The two appeals were consolidated by this court for briefing, hearing, and disposition.

346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 16. "The law highly favors settlement agreements * * * and a trial judge generally has discretion to promote and encourage settlements to prevent litigation." *Id.*

The Court Retains Jurisdiction to Enforce an Agreed Judgment

{¶ 26} As an initial matter, we address the trial court's jurisdiction to take further action in this case after the court journalized the parties' consent judgment, which incorporated the terms of the underlying settlement agreement.

{¶ 27} When a party dismisses a case pursuant to a settlement agreement, the trial court has jurisdiction to enforce a settlement agreement after a case is dismissed if the dismissal entry incorporates the terms of the agreement or expressly states that the trial court retains jurisdiction. *Infinite* at syllabus.

{¶ 28} The instant case, however, is procedurally different and therefore not directly governed by the *Infinite* holding. After the parties reached the settlement agreement, they did not submit a dismissal entry. Instead, a consent (agreed) judgment entry was journalized by the court. The consent judgment entry referenced the parties' settlement agreement and incorporated the terms of the agreement, which required the Stark defendants to pay Susan Pollock $100,000 (to be amortized over five years). The judgment did not specifically dismiss the case, but rather stated that "upon completion of the payments * * * the Stark Defendants shall be deemed fully and finally released from all claims * * *."

{¶ 29} "An agreed judgment entry is the court's acknowledgment that the parties have entered into a binding contract." *Hayes v. White*, 7th Dist. Columbiana

No. 01 CO 11, 2001-Ohio-3467, ¶ 29, citing *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 39, 285 N.E.2d 324 (1972). "[A]n agreed judgment or consent judgment is binding as if the merits had been litigated." *Id.*, citing *Gilbraith v. Hixson*, 32 Ohio St.3d 127, 129, 512 N.E.2d 956 (1987).

{¶ 30} While "[o]nce a trial court has entered a final judgment in a matter * * * a party's options for legal recourse become significantly limited," *Rocky River v. Garnek*, 8th Dist. Cuyahoga No. 97540, 2012-Ohio-3079, ¶ 7, quoting *Avon Lake Sheet Metal Co. v. Huntington Environmental Sys.*, 9th Dist. Lorain No. 03CA008393, 2004-Ohio-5957, the trial court, however, has authority to act post judgment when it enters a judgment by consent of the parties. As the Second District explained in *Grace v. Howell*, 2d Dist. Montgomery No. 20283, 2004-Ohio-4120, ¶ 9, citing 46 American Jurisprudence 2d, Judgments, Section 207:

> [c]ourts possess the general power to enter judgment by consent of the parties for the purpose of executing a compromise and settlement of the claims for relief in an action. In that judgment, which is stipulated by agreement, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as its judgment by signing and journalizing an entry reflecting the terms of the settlement agreement.

"Courts are authorized to enforce the terms of their judgments through post-judgment proceedings." *Id.* at ¶ 11. The Supreme Court also made this clear in *Infinite,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, at ¶ 27, summarizing the case law as follows:

> Courts have inherent authority to enforce their final judgments and decrees. *Rieser v. Rieser*, 191 Ohio App.3d 616, 2010-Ohio-6227, 947 N.E.2d 222, ¶ 5 (2d Dist.); *In re Whallon*, 6 Ohio App. 80, 83 (1st

> Dist.1915). Courts also have the authority "to enter judgment by consent of the parties for the purpose of executing a compromise and settlement of the claims for relief in an action." *Grace* at ¶ 9. In a consent decree, the litigants stipulate to the termination of a lawsuit by assenting to specified terms, which the court agrees to enforce as its judgment by journalizing an entry reflecting the terms of the settlement agreement. *Id.* When the court incorporates the terms of the parties' settlement agreement into a consent decree, the court can enforce those terms as its judgment. *Nippon Life Ins. Co. of Am. v. One Source Mgt., Ltd.*, 6th Dist. Lucas No. L-10-1247, 2011-Ohio-2175, ¶ 16.[8]

See also Cramer v. Petrie, 70 Ohio St.3d 131, 133, 637 N.E.2d 882 (1994) ("courts have inherent authority—authority that has existed since the very beginning of the common law—to compel obedience of their lawfully issued orders").

{¶ 31} The Supreme Court of Ohio explained that the rationale for allowing the trial court to retain jurisdiction over a settlement agreement is that "[r]etaining jurisdiction provides the most efficient means of enforcing the agreement. It keeps the matter in the court most familiar with the parties' claims, if not their settlement positions. And it keeps the parties from having to file another action." *Infinite* at

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[8] In addition, we note that Civ.R. 69 ("Execution") specifically authorizes the trial court to "direct the enforcement of the judgment." *State ex rel. Skyway Invest. Corp. v. Ashtabula Cty. Court of Common Pleas*, 130 Ohio St.3d 220, 2011-Ohio-5452, 957 N.E.2d 24, ¶ 13. Civ.R. 69 ("Execution"). Civ.R. 69 states:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be as provided by law. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may also obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

¶ 25. This rationale applies equally here, where the consent judgment incorporated the terms of the settlement agreement.

{¶ 32} Here, although the parties styled their motions as motions to enforce the settlement agreement, the court's authority to take further actions post judgment in this case should be more accurately characterized as an exercise of its inherent authority to enforce its final judgment, and not as jurisdiction pursuant to a motion to enforce a settlement agreement following a dismissal. Construed in this manner, the trial court's exercise of jurisdiction holding hearings entertaining various post-judgment motions and ultimately issuing several orders enforcing the parties' consent judgment is not improper. *See also Ohio Serv. Group, Inc. v. Integrated & Open Sys., L.L.C.*, 10th Dist. Franklin No. 06AP-433, 2006-Ohio-6738, ¶ 3 (the parties reached a settlement agreement, the terms of which were incorporated into an agreed judgment, and the court exercised jurisdiction when plaintiff later moved to enforce the agreed judgment). As the record reflects, the trial court did not permit the underlying disputes leading to the consent judgment to be revived but appropriately limited the post-judgment litigation to the default under the settlement terms set forth in the consent judgment and plaintiff's apparent attempts at executing on the judgment.

Standard of Review

{¶ 33} For our review here, because agreed judgments are typically treated as contracts, *Werr v. Moccabee*, 4th Dist. Ross No. 06CA2944, 2007-Ohio-3987, ¶ 12, just like a settlement agreement, we review this matter under the same

standard of review applied to a trial court's ruling on a motion to enforce a settlement agreement. That standard depends on the question presented. If the question is an evidentiary one, we will not overturn the trial court's finding if there is sufficient evidence to support such finding. *Chirchiglia v. Ohio Bur. of Workers' Comp.*, 138 Ohio App.3d 676, 679, 742 N.E.2d 180 (7th Dist.2000). If, on the other hand, the issue is a question of contract law, we determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. *Id.*

Issues on Appeal

{¶ 34} Under the two assignments of error, plaintiff-appellant Susan Pollock asks this court to reverse all three judgment entries issued by the trial court and remand the matter for further proceedings. In these orders, the trial court enforced the 2014 settlement agreement and allowed the defendants to resume payments under that agreement.

{¶ 35} We first note that although appellant maintains that the parties entered into a new and enforceable settlement agreement at the May 21, 2018 hearing and the trial court was obliged to enforce this new agreement, it is unclear from her brief whether she is seeking to enforce the 2014 settlement, which contains a penalty provision to be provided in a promissory note, or the new, proffered settlement. Regardless, we first address the question of whether there was a new and enforceable settlement agreement reached in court.

Whether a New Settlement Agreement Was Reached by the Parties

{¶ 36} A settlement agreement is governed by contract law. *Turoczy Bonding Co. v. Mitchell,* 2018-Ohio-3173, 118 N.E.3d 439, ¶ 16 (8th Dist.). "[T]o constitute a valid contract, there must be a meeting of the minds of the parties, and there must be an offer on the one side and an acceptance on the other." *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982). "'Meeting of the minds' refers to the manifestation of mutual assent by the parties of an agreement to the exchange and consideration, or to the offer and acceptance." *Tiffe v. Groenenstein*, 8th Dist. Cuyahoga No. 80668, 2003-Ohio-1335, ¶ 25, citing Restatement of the Law 2d, Contracts, Section 17, Comment c (1981). To have a meeting of the minds, "'there must be a definite offer on one side and an acceptance on the other.'" *Turoczy* at ¶ 18, quoting *Garrison v. Daytonian Hotel*, 105 Ohio App.3d 322, 325, 663 N.E.2d 1316 (2d Dist.1995). Furthermore, "[t]he relevant inquiry is the manifestation of intent of the parties as seen through the eyes of a reasonable observer, rather than the subjective intention of the parties. See 1 Corbin on Contracts (1963), Section 9; Restatement of the Law 2d, Contracts (1981), Sections 1 and 3." *Bennett v. Heidinger*, 30 Ohio App.3d 267, 268, 507 N.E.2d 1162 (8th Dist.1986).

{¶ 37} The record reflects that, after the defendants' default in 2017, the defendants' attorney, attorney Stark, proposed a new settlement that would have the defendants pay a lump sum of $11,000 to be followed by an accelerated payment schedule. This new payment schedule was proffered to the Pollocks through an

email dated April 20, 2018. However, the proffer was immediately rejected in a reply email from attorney Pollock.

{¶ 38} At the hearing held on May 21, 2018, attorney Stark reported to the court that he had proffered a new settlement with an accelerated payment schedule but it was immediately rejected by the Pollocks. Later at the hearing, the court expressed its exasperation over attorney Pollock's litigation tactics and, when attorney Pollock himself mentioned attorney Stark's proffer, the trial court responded: "I'm going to enforce the settlement that they have offered," to which attorney Pollock replied with a simple "okay."

{¶ 39} To form a binding agreement, there must be an offer and an acceptance. Here, however, the proposed settlement had already been rejected in an email reply and arguably no longer in existence at the time of the May 21, 2018 hearing — although attorney Stark's April 30, 2018 motion to enforce the 2014 settlement agreement attached an exhibit consisting of the April 20, 2018 email showing the new settlement proffered to attorney Pollock, it is unclear from attorney Stark's brief accompanying the motion whether that offer was still on the table.

{¶ 40} Furthermore, when the court appeared to express an intention to enforce the proffer, attorney Pollock's response of "okay," read in context, can hardly be construed as an unequivocal acceptance, even if the offer of the new payment terms had remained open. Pollock's response does not manifest a meeting of the minds required for a binding agreement.

{¶ 41} The Supreme Court of Ohio has observed that, while it is within the discretion of the trial judge to promote and encourage settlement, "[i]t is not within the province of the trial judge to enforce a purported settlement agreement when the substance or the existence of that agreement is legitimately disputed." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). Although the court here stated in passing at the hearing that it would enforce the proffered settlement, a trial judge speaks as the court only through the journal of the court. *State ex rel. Ruth v. Hoffman*, 82 Ohio App. 266, 268, 80 N.E.2d 235 (1st Dist.1947). "'A decision is not the oral pronouncement of the judge made from the bench, as distinguished from the more deliberate decision of the court speaking through its journal entry.' 11 Ohio Jurisprudence, 758." *Id.* at 268. *See also, e.g.*, *Thompson v. State*, 8th Dist. Cuyahoga No. 99265, 2013-Ohio-1907, ¶ 5 (a judge's oral pronouncements from the bench do not constitute a decision). While the trial court may have expressed an intention to enforce the proffered new settlement at the hearing, it did not err in enforcing the only settlement agreement the parties had reached in this case — the 2014 global settlement agreement — in its subsequent journal entries.

{¶ 42} Finally, appellant claims the trial court erred in not awarding the 5% late payment interest and 5 dollars per day penalty on late payments set forth in the consent judgment. Our review of the consent judgment shows the penalty terms are to be provided for in a purported promissory note to be executed by the

defendants in favor of Susan Pollock,[9] but the record before us does not contain such a note. Accordingly, the trial court did not err in not enforcing the provision.

{¶ 43} Under the terms of the consent judgment, the defendants will not be released from plaintiff's claims until the judgment is satisfied. This appeal is limited to the issues of whether the court properly enforced the 2014 settlement agreement incorporated in the consent judgment (as opposed to the purported new agreement) and whether the trial court erred in allowing defendants to resume payments under the consent judgment. For the foregoing reasons, we affirm the judgments of the trial court.

Appellant's Motion to Supplement the Record

{¶ 44} Finally, we address a motion filed by attorney Pollock to supplement the appellate record pursuant to App.R. 9(E).[10] He asked that the numerous emails he sent to the trial court and its staff attorney be made part of the record on appeal. He claims the email communications from him to the court should be made part of

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[9] The pertinent paragraph from the consent judgment states the following:

> [I]n order to pay the aforementioned judgment amount the Stark Defendants shall execute and deliver to Susan Pollock a Cognovit Promissory Note in her favor in the amount of $100,000.00, the payment of which will be amortized over five years beginning on June 15, 2014 at an interest rate of 4% per annum, with payments to be due on the fifteenth calendar day of each month, and providing for a late fee in the amount of five percent (5%) of the payment amount, or the unpaid balance thereof, plus 5.00 dollars for each day that the payment is late * * *.

[10] Attorney Pollock has since withdrawn from this appeal, and Susan Pollock is now represented by new counsel.

the appellate record because the trial court had directed the parties to submit discovery disputes in the electronic forum. A review of the email communications attached to appellant's motion to supplement the record shows the content of the emails goes beyond discovery (or scheduling) matters. In fact, attorney Pollock appeared to be litigating by way of electronic communication; some emails contain his argument regarding the merit of his claims, replete with citations to case law authority.

{¶ 45} We first observe that while the electronic forum may be an effective method of communication regarding scheduling or procedural matters, correspondence to the court, whether in electronic format or otherwise, are not proper forums for litigating the merit of substantive issues and email communications to the court cannot be substitutes for proper motion practice.

{¶ 46} This court is a court of record, and our review of the record is confined to the record as defined in App.R. 9. *Walton v. Dynamic Auto Body*, 7th Dist. Columbiana No. 12 CO 11, 2013-Ohio-758, ¶ 4. Pursuant to App.R. 9(A), the record on appeal consists of three matters: (1) the original papers and exhibits thereto filed in the trial court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket and journal entries prepared by the clerk of the trial court. *See Pailet v. Univ. of Cincinnati Hosp.*, 10th Dist. Franklin No. 82AP-952, 1983 Ohio App. LEXIS 16069, 5 (June 30, 1983). The email communications appellant sought to include as part of the appellate record do not fall within the three categories of matters comprising the appellate record.

{¶ 47} Furthermore, regarding a modification of the record, App.R. 9(E) states:

> (E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

{¶ 48} Although App.R. 9(E) permits supplementation of the record, it only permits addition of materials that have been "omitted from the record by error or accident." The email communications appellant seeks to supplement to the record do not meet the requirement of App.R. 9(E), and the motion is thus denied.[11]

{¶ 49} The trial court's judgments are affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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[11] We note that two emails *are* properly part of the appellate record: the email from attorney Pollock to attorney Stark dated April 20, 2018 (showing the new settlement proffered by attorney Stark but rejected by attorney Pollock) and an email from attorney Pollock to the court's staff attorney on April 23, 2018 (claiming the Stark defendants were precluded from seeking to enforce the 2014 settlement agreement). These emails were attached as exhibits to attorney Stark's motion to enforce the settlement agreement filed at the trial court on April 30, 2018.

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

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MICHELLE J. SHEEHAN, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR

[Cite as *Duncan v. Fifth Third Bank*, 2019-Ohio-3198.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

BRANDY DUNCAN	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 2018-CA-50
	:	
v.	:	Trial Court Case No. 2017-CV-575
	:	
FIFTH THIRD BANK	:	
	:	(Civil Appeal from
Defendant-Appellee	:	Common Pleas Court)
	:	

. . . .

O P I N I O N

Rendered on the 9th day of August, 2019.

. . . .

JAMIE L. ANDERSON, Atty. Reg. No. 0081218, 2190 Gateway Drive, Fairborn, Ohio 45324
Attorney for Plaintiff-Appellant

KARA A. SZANIK, Atty. Reg. No. 0075165, NATHAN BLASKE, Atty. Reg. No. 0076460, and BENJAMIN GREINER, Atty. Reg. No. 0096924, 1900 First Financial Center, 255 East Fifth Street, Cincinnati, Ohio 45202
Attorneys for Defendant-Appellee

. . . .

HALL, J.

{¶ 1} Brandy Duncan appeals the entry of summary judgment for Fifth Third Bank on her claims for breach of contract, breach of the duty of good faith and fair dealing, and misrepresentation. We hold that any agreement between the parties was unenforceable because it did not comply with the statute of frauds, R.C. 1335.05, as there was no written agreement signed by the bank, and that any agreement was not removed from the statute of frauds by promissory estoppel. We also hold that on this record neither of the other two claims can be brought alone. Therefore we affirm.

I. Facts and Procedural History

{¶ 2} In 2011, Fifth Third Bank filed a foreclosure action against real property owned by Duncan's parents, and judgment was entered for the bank. In June 2013, at a sheriff's sale, the bank purchased the property for $120,000. Afterward, the Duncan family tried to re-purchase[1] the property from the bank. According to Duncan, in 2014 her parents and the bank engaged in settlement discussions. Because they could not afford what the bank wanted, her parents asked if their daughter could purchase it. The bank agreed and engaged in discussions with Duncan. Duncan claims that the bank agreed to sell her the property for $117,000. Duncan sent the bank a "Contract to Purchase Real Estate" dated July 16, 2014, which she signed. But the bank never signed the agreement. Instead, on August 4, the bank sent Duncan a counter-offer of $195,000.

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[1] Duncan, incorrectly in our view, alternatively refers to this purchase as an attempt to "redeem" the property. Redemption under R.C. 2329.33 can be accomplished before confirmation by depositing with the clerk "the amount of the judgment * * *, with all costs, including poundage, and interest." An order confirming the sale was entered on January 28, 2014. Later, on March 27, 2014, the Duncan parents filed a Civ. R. 60(B) motion for relief from judgment asserting they had been denied notice and an opportunity to redeem the property. Nonetheless, a non-owner daughter could not "redeem" the property.

{¶ 3} In August 2015, Duncan and her parents filed an action against Fifth Third Bank claiming breach of contract, breach of the duty of good faith and fair dealing, and misrepresentation. They alleged that the bank had offered to sell them the property for $117,000. In November, the bank placed the property back on the market. According to the bank, on November 18, it offered to sell the property to the Duncans for $155,000 but no one responded to the offer. In January 2016, the bank sold the property to someone else. The original action against the bank was dismissed without prejudice.

{¶ 4} A year later, in September 2017, Brandy Duncan alone refiled the complaint against Fifth Third Bank. The complaint alleged the same three causes of action—breach of contract, breach of the duty of good faith and fair dealing, and misrepresentation. The bank moved for summary judgment on the grounds that any agreement did not comply with the statute of frauds, R.C. 1335.05, because there was no written agreement that it had signed, because there were no reliance damages, and because the second and third claims were not independent of the failed contractual claim. Duncan argued that promissory estoppel removed the agreement from the statute of frauds and that she was denied the purchase of a $200.000 property for the price of $117,000.

{¶ 5} The trial court, citing *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, held that promissory estoppel did not remove the agreement from the statute of frauds, so Duncan could not use promissory estoppel to bar the bank from asserting the statute of frauds as an affirmative defense to her breach-of-contract claim. The court granted summary judgment for the bank on the breach-of-contract claim, the breach-of-good-faith claim, and the misrepresentation claim. The court held that the latter two claims could not be brought as separate causes of action.

{¶ 6} Duncan appeals.

II. Analysis

{¶ 7} Duncan presents three assignments of error for our review. Each concerns one of her three causes of action.

{¶ 8} We review a trial court's grant of summary judgment de novo. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). By rule, Civ.R. 56(C), the moving party must show: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Breach-of-contract claim

{¶ 9} The first assignment of error alleges:

> THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF STATUTE OF FRAUDS.

{¶ 10} Ohio's statute of frauds provides that an action on a contract for the sale of real property must be in writing and signed by the defendant. R.C. 1335.05. "Agreements that do not comply with the statute of frauds are unenforceable." (Citation omitted.) *Olympic*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, at ¶ 32. Here, there was no dispute that no written document existed bearing the bank's signature that agreed to sell the property to Duncan for $117,000.

{¶ 11} Duncan argues that promissory estoppel removes the agreement from the statute of frauds and therefore an oral agreement between the parties was enforceable. In *Olympic*, the case relied on by the trial court, the Ohio Supreme Court held that promissory estoppel did not remove the parties' unwritten agreement from the statute of frauds. The Court held that "the breach of an oral promise to sign an agreement does not remove an agreement from the signing requirement of the statute of frauds. Consequently, a party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds * * *." *Id.* at ¶ 51. It is true that promissory estoppel may act as a narrow exception to the statute of frauds in certain circumstances. *See id.* at ¶ 29 ("We recognize that numerous jurisdictions have held that under various circumstances, promissory estoppel may be used to remove an agreement from having to comply with the statute of frauds."); *Mishler v. Hale*, 2014-Ohio-5805, 26 N.E.3d 1260, ¶ 26 (2d Dist.) (saying that promissory estoppel is an exception to the statute of frauds). But the Ohio Supreme Court has held that under circumstances like those in *Olympic*—an alleged oral promise to sign an agreement—the use of promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds does not apply. *See id.* ("However, we decline to adopt that exception under the circumstances of this case because it is both unnecessary and damaging to the protections afforded by the statute of frauds.").

{¶ 12} Here, Duncan alleges that the bank made an oral promise to sell her the property for $117,000, which she accepted. Because there were no written documents that complied with the statute of frauds, that alleged agreement, even if made, was legally unenforceable as a contract.

{¶ 13} In her brief, and in the trial court below, Duncan argued that promissory estoppel should apply to allow her to pursue a recovery. In *Olympic*, separate from the holding that under the circumstances promissory estoppel did not bar application of the statute of frauds, the court recognized that "*Promissory Estoppel* ***as an Action for Damages*** *Provides an Adequate Remedy for Detrimental Reliance on a Breached Promise*" (Emphasis added.) *Id.*, Heading of subsection III, B. However, we agree with the trial court that "a review of the complaint filed in this case reveals that [Duncan] did not plead a claim for promissory estoppel." (Decision and Entry, Doc. # 39, p. 4.)

{¶ 14} The complaint alleges three causes of action "COUNT 1: BREACH OF CONTRACT," "COUNT 2: BREACH OF GOOD FAITH AND FAIR DEALING," and "COUNT 3: MISREPRESENTATION." (Doc. # 1.) Count one unquestionably raises a contract claim when it indicated "[d]efendant breached its contractual obligations under this agreement." (*Id.* at ¶ 27.) Count two likewise raised a contract claim by alleging "[d]efendant breached its contractual obligations of good faith and fair dealing." (*Id.* at ¶ 37.) Count three, although it avers justified reliance on the bank's stated $117,000 purchase price, alleges "[d]efendant's statement that it would sell the property for $117,000.00 was made with conscious ignorance or a reckless disregard for the truth." (*Id.* at ¶ 44.) That count concludes with an allegation that Duncan was damaged as a result "of defendant's misrepresentation." (*Id.* at ¶ 45.) Even construing the complaint most favorably to Duncan, we conclude an action for promissory estoppel was not pled.

{¶ 15} In addition, had we concluded that a promissory estoppel claim was pled, that claim would fail by the absence of pled or demonstrated reliance damages. "[T]o establish a claim of promissory estoppel, the plaintiffs must prove '(1) a clear,

unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) *the person claiming reliance is injured as a result of the reliance on the promise.*' " (Emphasis added) *Shepard v. Griffin Servs., Inc.,* 2d Dist. Montgomery No. 19032, 2002 WL 940110, *14, quoting *Weiper v. W.A. Hill & Assoc.*, 104 Ohio App.3d 250, 260, 661 N.E.2d 796 (1st Dist. 1995). The evidence and arguments suggest two categories of damages. First, Duncan's affidavit filed November 15, 2018 in opposition to the motion for summary judgment stated that, due to the increased purchase price "my parents * * * were forced to leave said property, thus incurring thousands of dollars in moving expenses." (Doc. # 37.) Duncan could not recover damages personal to her parents who were not parties to this refiled case. Secondly, Duncan argues that the value of the home she was unable to buy for $117,000 was $200,000, and therefore she was "essentially out approximately $83,000.00 in equity in a home." (Appellant's Brief at 7.) But that formulation represents expectancy damages, not reliance damages caused by a detrimental change in position based on the alleged promise. Accordingly, a promissory estoppel claim would fail for lack of damages resulting from reliance.

{¶ 16} The first assignment of error is overruled.

B. Breach-of-good-faith claim

{¶ 17} The second assignment of error alleges:

APPELLEE VIOLATED ITS DUTY OF GOOD FAITH AND FAIR DEALING.

{¶ 18} In Ohio, every contract imposes on each party a duty of good faith and fair dealing in performance and enforcement. *Krukrubo v. Fifth Third Bank*, 10th Dist. Franklin No. 07AP-270, 2007-Ohio-7007, ¶ 18. Here, because the alleged agreement was not

enforceable, it imposed no duty of good faith and fair dealing on the parties.

{¶ 19} Moreover, a claim for breach of this duty cannot stand alone. Because the duty of good faith is integral to any contract, the breach of that duty is integral to a cause of action for breach of contract. *Id.* at ¶ 19. This means that, generally, a breach of the good-faith duty may not exist as a cause of action separate from a breach-of-contract claim. *Id.*; *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953, ¶ 52 (6th Dist.).

{¶ 20} The second assignment of error is overruled.

C. Misrepresentation claim

{¶ 21} The third assignment of error alleges:

THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT DUE TO OBVIOUS MISREPRESENTATION IN THIS CASE.

{¶ 22} On this record, Duncan's misrepresentation claim does not stand alone either. "[A] tort claim based upon the same actions as those upon which a breach-of-contract claim is based will exist independently of the contract action 'only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed.' " *425 Beecher, L.L.C. v. Unizan Bank, Natl. Assn.*, 186 Ohio App.3d 214, 2010-Ohio-412, 927 N.E.2d 46, ¶ 51 (10th Dist.), quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (9th Dist.1996). Here, Duncan's allegations in support of her misrepresentation claim were the same as those used to support her breach-of-contract claim. Her claim was that the bank represented that it would sell her parent's former home to her for $117,000 but then failed to honor that representation and made a " 'counter offer' of $195,000.00." (Duncan

affidavit ¶ 11.) "I, through my counsel, continued to negotiate the purchase price for said property but were unable to reach an agreement on the purchase price." (*Id.* at ¶ 14.) We have already determined that no enforceable contractual agreement was reached and therefore no enforceable contractual duty existed. Furthermore, we see no "duty owed separately" by the bank to the Duncan's daughter. Therefore, consistent with *425 Beecher,* the trial court did not err in granting summary judgment to the bank in regard to the misrepresentation claim.

{¶ 23} In addition, as we noted in paragraph 14 above, Duncan's claimed damages were 1) that she was denied the opportunity to buy a property for $117,000 that her brief argues was worth $200,000, and 2) that her parents "were forced to leave said property, thus incurring thousands of dollars in moving expenses." (Duncan affidavit ¶ 15.) Whether her third claim were construed as intentional misrepresentation (most commonly referred to as fraud), or the tort of negligent misrepresentation, justifiable reliance and damages proximately caused by such reliance were elements of both torts. *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 103-104, 742 N.E.2d 1198 (10th Dist.2000). The evidence and arguments did not support injury to Brandy Duncan for reliance damages resulting from a detrimental change in position on account of the misrepresentation alleged.

{¶ 24} The third assignment of error is overruled.

III. Conclusion

{¶ 25} We have overruled each of the assignments of error presented. The trial court's judgment is affirmed.

. . . .

FROELICH, J. and TUCKER, J., concur.

Copies sent to:

Jamie L. Anderson
Kara A. Czanik
Nathan Blaske
Benjamin Greiner
Hon. Michael A. Buckwalter