The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

Am I a party entitled to enforce a lost promissory note?

Unconscionability Challenges to Arbitration

***Zubek v. Dearborn*, 8th Dist. Cuyahoga No. 107883, 2019-Ohio-3765.**

In this appeal the Eighth Appellate District reversed the trial court's finding that an arbitration agreement was unconcionsable and ordered the parties to arbitrate their disputes.

The Bullet Point: The notion of unconscionability embodies two concepts: procedural unconscionability and substantive unconscionability: the former concerns "circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible"; the latter refers to "unfair and unreasonable contract terms." Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, business acumen and experience, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods at issue. Conversely, substantive unconscionability goes to the terms of the contract. "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable."

Recovery of attorney's fees seeking to enforce settlement

***Rayco Manufacturing, Inc. v. Murphy, Rogers, Sloss & Gambel*, 8th Dist. Cuyahoga No. 106714, 2019-Ohio-3756.**

In this appeal, the Eighth Appellate District resolved an intra-district split as to whether attorney's fees spent in enforcing the terms of a settlement agreement are recoverable as compensatory damages. The court ultimately found that attorney's fees spent in enforcing an agreement can in fact be recovered as compensatory damages.

The Bullet Point: Ohio follows the "American Rule," which provides that a prevailing party in a civil action may not generally recover its attorney fees as part of the "costs of litigation" unless attorney fees are provided for by statute, the nonprevailing party acts in bad faith, or there is an enforceable contract that "specifically provides for the losing party to pay the prevailing party's attorney fees." However, attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement. The rationale behind the exception for allowing attorney fees expended as a result of enforcing a settlement agreement is that "any fees incurred after the breach of the settlement agreement were relevant to the determination of compensatory damages, including those fees [a party was] 'forced' to incur by filing the action."

Ability to enforce a lost note

***Beneficial Financial Inc. v. Saunders*, 4th Dist. Gallia No. 18CA5, 2019-Ohio-3577.**

In this appeal, the Fourth Appellate District found that the trial court did not err when it found that the plaintiff was a party entitled to enforce a promissory note that had been lost.

The Bullet Point: R.C. 1303.31(A) identifies three entities entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument under R.C. 1303.38 or 1303.58(D). To be entitled to enforce a lost note, the party seeking judgment must establish: (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (2) The loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of a person who is unknown, who cannot be found, or who is not amenable to service of process. Ohio recently amended its lost note statute, which now permits an assignee to enforce a lost instrument acquired from a party who was in possession and entitled to enforce the instrument at the time the loss occurred.

[Cite as *Zubek v. Dearborn*, 2019-Ohio-3765.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ROBERT ZUBEK, :

Plaintiff-Appellee, :

No. 107833

v. :

AARON DEARBORN, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: September 19, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-883188

Appearances:

Carlozzi & Associates Co., L.P.A., and Louis J. Carlozzi, *for appellee*.

Gallagher & Sharp, L.L.P., P. Kohl Schneider, and Richard C.O. Rezie, *for appellants*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Defendants-appellants USA Enterprises, Inc. d.b.a. USA Insulation Company, Inc., Aaron Dearborn, and Donald Depasquale appeal from the trial court's judgment denying the defendants' motion to stay proceedings pending

arbitration in connection with a complaint filed by plaintiff-appellee Robert Zubek against the defendants for the insulation work done at his home. The trial court held the arbitration agreement contained in the parties' contract is both procedurally and substantively unconscionable. After a careful review of the record and applicable law, we determine that the arbitration agreement is neither procedurally nor substantively unconscionable and therefore reverse the trial court's judgment.

Substantive Facts and Procedural History

{¶ 2} Zubek contracted with USA Insulation to insulate his house. He had found USA Insulation's webpage and contacted the company via email. A representative from the company, Donald Depasquale, came to Zubek's house and they discussed how to improve the insulation of the house. Depasquale prepared a contract for the project for $5,400. Zubek signed the contract, which included an arbitration agreement.

{¶ 3} Subsequently, disputes arose regarding the quality of the insulation work. USA Insulation tried to remedy the problem but to no avail. Zubek filed a complaint against the defendants, alleging breach of contract, fraud, negligence, and violations of the Ohio Consumer Sales Practices Act ("CSPA"). He alleged the insulation work caused structural damage to his house and sought $150,000 in damages. The defendants filed a motion to stay the proceedings pending arbitration pursuant to the arbitration agreement. Zubek opposed the motion, claiming the arbitration agreement was both procedurally and substantively unconscionable.

The trial court agreed and denied the motion. This appeal follows. On appeal, USA Insulation raises the following assignment of error for our review:

1. The trial court erred by denying defendant' motion to stay proceedings pending arbitration.

Arbitration

{¶ 4} Arbitration is a favored mechanism to settle disputes. Both the Ohio General Assembly and the courts have expressed a strong public policy favoring arbitration. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. *See also ABM Farms v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574 ("Ohio and federal courts encourage arbitration to settle disputes"). Arbitration provides the parties "'with a relatively expeditious and economical means of resolving a dispute.'" *Hayes* at ¶ 15, quoting *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992). Accordingly, there is a presumption favoring arbitration in Ohio courts when the claim falls within the scope of an arbitration provision. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27.

{¶ 5} Arbitration is a matter of contract. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). A determination of whether a written agreement is unconscionable is an issue of law, and we review de novo. *Taylor Bldg.* at ¶ 35. Under the de novo standard of review, we afford no deference to a trial court's decision granting or denying a motion to stay pending arbitration. *Brownlee v. Cleveland Clinic Found.*,

8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 9. The trial court's factual findings regarding the circumstances surrounding the making of the contract, however, are reviewed with deference. *Taylor Bldg.* at ¶ 38.

Procedural and Substantive Unconscionability

{¶ 6} The notion of unconscionability embodies two concepts: procedural unconscionability and substantive unconscionability: the former concerns "circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible"; the latter refers to "unfair and unreasonable contract terms." *Collins v. Click Camera & Video,* 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993). The party claiming unconscionability of an arbitration agreement bears the burden of proving that the agreement is both substantively and procedurally unconscionable. *Taylor Bldg.* at ¶ 34.

a. Whether the Arbitration Agreement is Procedurally Unconscionable

{¶ 7} Zubek claims the arbitration agreement is procedurally unconscionable because there was no meeting of the minds despite his signing the contract. Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, business acumen and experience, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods at issue. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 2. The key inquiry here concerns whether a party, considering his

education or lack of it, had a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993).

{¶ 8} These factors weigh in favor of enforcing the arbitration agreement in this case. We consider first whether the arbitration terms are hidden. The insulation contract consists of only two pages rather than a voluminous collection of papers. The first page describes the work to be performed and the contract price of $5,400. The second page of the contract is headed "USA INSULATION'S TERMS AND CONDITIONS OF SALE." It begins with a paragraph headed "CONSUMER'S RIGHT TO CANCEL," which states that the consumer has three days to cancel the contract. Below the right-to-cancel provision is the heading "TERMS AND CONDITIONS." The first paragraph of the terms and conditions is the arbitration provision. The arbitration provision was printed in the same font as the remaining terms and conditions. The word "arbitration" is set off in bold, capital letters and it is the first word under the Terms and Conditions. The key language in the arbitration agreement is underlined and also in bold letters:

> **Customer understands and agrees that, in the absence of this provision, Customer would have a right to litigate Disputes through a court and Customer has knowingly expressly waived that right and agreed to resolve any Disputes through binding arbitration in accordance with the provisions of this paragraph**.

{¶ 9} Thus, a review of the contract shows that the arbitration agreement is prominently presented rather than concealed or buried in fine print. *Taylor Bldg.*

at ¶ 46 (the arbitration clause was not unconscionable as it appeared in standard, rather than fine print and it was not hidden). *See also McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 26 (finding an arbitration agreement not procedurally unconscionable where its print was "not exceedingly small" and it contained a sentence in all capital letters stating "this contract contains a binding arbitration provision which may be enforceable by the parties").

{¶ 10} Furthermore, the circumstances surrounding the signing of the contract reflect Zubek had a reasonable opportunity to understand the terms of the contract. *Lake Ridge Academy*, 66 Ohio St.3d 376, 613 N.E.2d 183. Zubek is a Cleveland police officer. As he testified at his deposition, he had been previously involved in an arbitration proceeding with the city of Cleveland on a contract issue and he was familiar with arbitration provisions.[1] Zubek acknowledged that USA Insulation's representative asked him to read the contract before signing and he had

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[1] At his deposition, Zubek testified as follows:

Q. Have you ever been involved in an arbitration proceeding?
A. I have.
Q. You have?
A. Yes.
Q. When was that?
A. I couldn't tell you exactly what year. It was involving police work.
Q. Was it before or after you entered into the agreement with USA Insulation?
A. Before.
Q. Okay. So before entering into the agreement with USA Insulation you were familiar with arbitration?
A. Yes.
Q. Arbitration provisions?
A. Yes.

the opportunity to review the contract and asked questions. When asked at the deposition whether he *did* read the contract before signing it, Zubek stated he did not read it, but only "perused" and "scanned over" it. He knew that he had three days to further review the contract and to cancel the contract. He also acknowledged that if he did not like the contract, there were many other insulation contractors available in the area. When asked to read the arbitration agreement in the contract at his deposition, he agreed the language was clear. He also acknowledged that by signing the contract, he agreed to all of the terms and conditions of the contract. Furthermore, USA Insulation representative Depasquale testified that, before any contract was signed, he would go over the customer's right to cancel and the arbitration provision with every customer, and the customer would be expected to read the remaining terms and conditions on his or her own.

{¶ 11} Therefore, Zubek's own testimony shows that he was not hurried through the signing process. He was specifically asked by USA Insulation's representative to read the contract before signing it. "One must read what one signs." *ABM Farms*, 81 Ohio St.3d at 503, 692 N.E.2d 574. "'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.'" *Id.*, quoting *Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L.Ed. 203 (1875).

{¶ 12} Zubek argues there was no meeting of the minds because the arbitration agreement did not provide the fees associated with arbitration or the applicable arbitration rules governing the costs. The courts have rejected this claim.

Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (an arbitration provision is not unenforceable simply because the provision is silent as to costs). *See also Khaledi v. Nickris Properties*, 6th Dist. Huron No. H-17-015, 2018-Ohio-3087, ¶ 20; and *Sikes v. Ganley Pontiac Honda, Inc.*, 8th Dist. Cuyahoga No. 82889, 2004-Ohio-155, ¶ 18.

{¶ 13} Our review of the record shows the requirement of arbitration in the instant contract was not hidden and Zubek had a reasonable opportunity to understand it. *Lake Ridge Academy*, 66 Ohio St.3d 376, 613 N.E.2d 183. In addition, although USA Insulation was the drafter of the contract, Zubek had many other insulation contractors in the area to choose from and he was free to cancel the contract within three days. Therefore, we cannot say there was an unequal bargaining power between these two parties. Even if there were some degree of inequality of bargaining power, that factor alone is not sufficient to invalidate an otherwise enforceable arbitration agreement. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 45.

{¶ 14} This court has consistently rejected a claim of procedural unconscionability under similar circumstances. *See e.g., Neel v. A. Perrino Constr., Inc.*, 2018-Ohio-1826, 113 N.E.3d 70, ¶ 26 (8th Dist.) (plaintiffs were not pressured to sign the contract and they had the opportunity to ask questions before signing; the defendant builder was not the only builder available; and plaintiffs' status as consumers did not free them of their duty to read their contract before signing); *Robinson v. Mayfield Auto Group, L.L.C.*, 2017-Ohio-8739, 100 N.E.3d 978, ¶ 40

(8th Dist.) (the arbitration agreement was not procedurally unconscionable even though the defendant drafted the contract and arbitration was not specifically explained to plaintiff; plaintiff was free to walk away from the contract if he did not like its terms); and *Conte v. Blossom Homes L.L.C.*, 2016-Ohio-7480, 63 N.E.3d 1245, ¶ 23 (8th Dist.) (plaintiff failed to establish he was unable to understand the terms of the arbitration agreement or that he was pressured to sign the contract). The trial court concluded in error that there was no meeting of the minds regarding the arbitration agreement contained in the parties' contract.

b. Whether the Arbitration Agreement is Substantively Unconscionable

{¶ 15} Substantive unconscionability goes to the terms of the contract. *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 7 (9th Dist.). "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable." *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294.

{¶ 16} Zubek alleges that the instant arbitration is to be governed by the American Arbitration Association's ("AAA") Construction Industry Arbitration Rules rather than by its Consumer Arbitration Rules. He also alleges that, under the construction arbitration sliding-scale cost schedule, his filing fee alone would be $7,500, based on the amount of damages he sought ($150,000) and a request for three instead of one arbitrator. He argues that the arbitration fees are cost prohibitive and create a chilling effect.

{¶ 17} Zubek is correct that "[t]here is a point at which the costs of arbitration could render a clause unconscionable as a matter of law." *Neel*, 2018-Ohio-1826, 113 N.E.3d 70, at ¶ 18. However, the party claiming substantive unconscionability on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. *Green Tree Fin.*, 531 U.S. 79, at 92, 121 S.Ct. 513, 148 L.Ed.2d 373. A mere *risk* that a party will be saddled with prohibitive costs is too speculative to invalidate an arbitration agreement. *Id*.

{¶ 18} In its judgment, the trial court found the arbitration agreement to be substantively unconscionable on the ground that the amount of arbitration fees of $7,500 under the Construction Industry Arbitration Rules (based on a request of three arbitrators and damages exceeding $150,000) would exceed the total amount of USA Insulation's total liability ($5,400).

{¶ 19} The trial court's estimation does not appear to be supported by the record. Although Zubek claims he could only file under the Construction Industry Arbitration rules, which requires a much higher filing fee, AAA's Consumer Rules

R-1 does not seem to preclude him from filing under the Consumer Rules.[2] Under the Consumer Arbitration Rules, the consumer's filing fee is capped at $200 regardless of damages sought.

{¶ 20} Zubek would incur the $7,500 filing fee *only if* he chooses to file under the Construction Industry Arbitration Rules rather than the Consumer Arbitration Rules, requests three arbitrators instead of one, and seeks damages in excess of $150,000. Furthermore, if he does file under the Construction Industry Arbitration rules, the arbitration fees will be subject to allocation by the arbitrator in the eventual award. In addition, the arbitrator may find the liability limitation of $5,400 to be unenforceable and invalid.

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[2] R-1 of AAA's Consumer Arbitration Rules states:

R-1. Applicability (When the AAA Applies These Rules)

(a) The parties shall have made these Consumer Arbitration Rules ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and
1) have specified that these Consumer Arbitration Rules shall apply;
2) have specified that the Supplementary Procedures for Consumer-Related Disputes shall apply, which have been amended and renamed the Consumer Arbitration Rules;
3) the arbitration agreement is contained within a consumer agreement, as defined below, *that does not specify a particular set of rules*; or
4) the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the Consumer Arbitration Rules.

(Emphasis added.)

While R-1 (a) states that examples of contracts that typically do not meet the criteria for application of consumer rules include "home instruction and remodeling contracts," the instant insulation contract is one for household service, not "home construction and remodeling."

{¶ 21} In other words, the scenario on which the trial court based its finding of substantive unconscionability is speculative only. As the party complaining of the costs of arbitration, Zubek bears the burden of showing the likelihood they will incur oppressive costs. *Green Tree Fin. Corp.-Alabama*, 531 U.S at 92, 121 S.Ct. 513, 148 L.Ed.2d 373. "[T]he mere risk that a plaintiff would be forced to pay exorbitant costs is too speculative to justify invalidation of the arbitration agreement." *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 58.

{¶ 22} In addition, this court has interpreted *Taylor Bldg.* to require "specific and individualized evidence that arbitration costs were unduly burdensome to the party opposing it." *McCaskey*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, at ¶ 32. While "the cost of arbitration may be high, so too is the cost of litigating a claim. Indeed, it is quite possible that litigation could result in substantial legal fees and costs that, in the end, exceed the cost of arbitration." *Handler v. Southerland Custom Builders, Inc.*, 8th Dist. Cuyahoga No. 86956, 2006-Ohio-4371, citing *English v. Cornwall Quality Tools Co., Inc.*, 9th Dist. Summit No. 22578, 2005-Ohio-6983, ¶ 17. While Zubek submitted AAA's fee schedules to the trial court, he failed to provide specific evidence to show the arbitration fees exceeded the cost of ligation and were unduly burdensome to him given his financial situation. "Without some evidence that a party would be precluded from bringing a claim, the cost of arbitration, standing alone, is not a justifiable reason to find unconscionability." *McCaskey* at ¶ 34. Given the case law

authority, we are unable to find the arbitration agreement substantively unconscionable on the grounds of arbitration costs.

{¶ 23} Zubek also argues the arbitration agreement is substantively unconscionable because it "eliminates important consumer rights" under the CSPA. In particular, he argues that, should he prevail in his claims, he would be entitled to treble damages and attorney fees, but his rights to these damages would be affected by the limitation of liability contained in the instant contract.[3]

{¶ 24} The courts in Ohio have consistently held that claims under the CSPA do not preclude arbitration. *See, e.g., Khaledi*, 6th Dist. Huron No. H-17-015, 2018-Ohio-3087, at ¶ 13; *Lavelle v. Henderson*, 9th Dist. Summit No. 27921, 2016-Ohio-5313, ¶ 11; *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 10 (9th Dist.); and *Stinger v. Ultimate Warranty Corp.*, 161 Ohio App.3d 122, 2005-Ohio-2595, 829 N.E.2d 735, ¶ 23 (5th Dist.).

{¶ 25} Furthermore, Ohio law does not prohibit an arbitrator from awarding treble damages and attorney fees under the CSPA. *Stehli v. Action Custom Homes*, 11th Dist. Geauga No. 98-G-2189, 1999 Ohio App. LEXIS 4464, 12 (Sep. 24, 1999); and *Zalecki v. Terminix Internatl.*, 6th Dist. Lucas No. L-95-156, 1996 Ohio App. LEXIS 593, 11 (Feb. 23, 1996). Should the arbitrator find USA Insulation acted deceptively or unconscionably in violation of the CSPA and award treble damages,

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[3] The CSPA permits an award of treble damages under certain circumstances, such as when the defendant's violation of the CSPA involves a deceptive or unconscionable act. R.C. 1345.09(B).

the arbitrator will decide whether the $5,400 limitation of liability is unenforceable and to be severed from the contract — a severability clause in the instant contract allows any provision found invalid to be severed while the remainder of the contract continues in full force and effect. Therefore, contrary to Zubek's allegation, the arbitration agreement does not eliminate Zubek's rights under the CSPA and the arbitration agreement is not substantively unconscionable on this ground.

Public Policy

{¶ 26} Zubek also contends that the arbitration agreement violates public policy as applied to his CSPA claims because arbitrations are not open to the public and the arbitrator's findings are not published, which he argues undermines the CSPA's goal of alerting consumers to unfair business practices. Zubek cites no case law authority for his contention.

{¶ 27} As the Ninth District noted in *Tomovich v. USA Waterproofing & Found. Servs.*, 9th Dist. Lorain No. 07CA009150, 2007-Ohio-6214, when there is no confidentiality provision in the arbitration agreement, the results of the arbitration would be readily available to the Attorney General and there would be no bar to the results of the arbitration becoming public information. Here, the arbitration agreement does not contains a confidentiality provision, therefore, Zubek's concerns are not well founded.[4]

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[4] Zubek also claims the arbitration agreement violates the public policy because the AAA Construction Industry Arbitration Rules R-48(d)(ii)(allowing the arbitrator to award attorney fees to the prevailing party) — so-called "loser-pays" provision — is in conflict with R.C. 1345.09(F) (allowing an award of attorney fees when the consumer files

{¶ 28} Finally, Zubek claims the arbitration agreement violates public policy because it is "inherently unfair to the consumer." Again, he cites no case law authority for this proposition. As we have noted above, the courts in Ohio have consistently held that claims under the CSPA can be submitted to arbitration. Zubek's public policy arguments fail.

{¶ 29} The trial court's judgment denying the defendants' motion to stay proceedings pending arbitration is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellants recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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a complaint in bad faith or if the defendant knowingly violated the statute). Zubek cites this court's decision in *Neel* (finding similar language in R.C. 4722.08(D) at odds with R-48(d)(ii)). *Neel,* 2018-Ohio-1826, 113 N.E.3d 70, at ¶ 41-43. The inclusion of "loser-pays" provision in an arbitration agreement has been found to be against public policy. *DeVito v. Autos Direct Online, Inc.*, 2015-Ohio-3336, 37 N.E.3d 194 (8th Dist.). However, *DeVito* held that the arbitration agreement would be enforceable by severing the offending "loser-pays" provision. Similarly here, the offending fee-shifting provision can be excised from the arbitration agreement without affecting the validity of the parties' agreement to arbitrate.

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MICHELLE J. SHEEHAN, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Rayco Mfg., Inc. v Murphy, Rogers, Sloss & Gambel,* 2019-Ohio-3756.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

RAYCO MANUFACTURING, INC.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	No. 106714
v.	:	
MURPHY, ROGERS, SLOSS & GAMBEL, A PROFESSIONAL LAW CORPORATION, ET AL.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

EN BANC DECISION AND JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; REMANDED
RELEASED AND JOURNALIZED: September 19, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-13-815844

Appearances:

Kehoe & Associates, L.L.C., Robert D. Kehoe, and Kevin P. Shannon; Critchfield, Critchfield & Johnston, Ltd., J. Douglas Drushal, Steven J. Shrock, and Andrew P. Lycans, *for appellant/cross-appellee.*

Baker Hostetler, Ernest E. Vargo, and Michael E. Mumford, *for appellees/cross-appellants* Murphy, Rogers, Sloss & Gambel, a Professional Law Corporation, Peter B. Sloss, Gary J. Gambel, Robert H. Murphy, and

Donald R. Wing.

Gallagher Sharp L.L.P., Timothy T. Brick and Steven D. Strang, *for appellees/cross-appellants* Cavitch, Familo & Durkin Co., L.P.A., Douglas A. DiPalma, Michael C. Cohan, and Eric J. Weiss.

EILEEN A. GALLAGHER, J.:

{¶ 1} Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, the en banc court determined that a conflict existed between (1) the panel decision in this case, which followed our prior decision in *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318 (8th Dist.), and (2) our prior decisions in *R.C.H. Co. v. Classic Car Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 83697, 2004-Ohio-6852, and *Mayfran Internatl. v. May Conveyor, Inc.*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511 (July 15, 1993), regarding whether attorney fees incurred as a result of a motion to enforce a settlement agreement are recoverable as compensatory damages.

{¶ 2} In this case, plaintiff-appellant/cross-appellee Rayco Manufacturing, Inc. ("Rayco") appeals from the trial court's decision granting defendants-appellees/cross-appellants' (collectively, "appellees")[1] motion to enforce a settlement agreement that resolved legal malpractice claims Rayco had filed against

[1] Appellees consist of Murphy, Rogers, Sloss & Gambel, a Professional Law Corporation, Peter B. Sloss, Gary J. Gambel, Robert H. Murphy, and Donald R. Wing (collectively, "Murphy") and Cavitch, Familo & Durkin Co., L.P.A., Douglas A. DiPalma, Michael C. Cohan and Eric J. Weiss (collectively, "Cavitch").

appellees. Rayco contends that the trial court erred in finding that there was an enforceable settlement agreement. Appellees cross-appeal and contend that the trial court erred in denying their request to recover the attorney fees they incurred to enforce the settlement agreement. To secure and maintain uniformity of decisions within the district, we vacate the panel decision issued on November 29, 2018, *Rayco Mfg. Inc. v. Murphy, Rogers, Sloss & Gambel*, 8th Dist. Cuyahoga No. 106714, 2018-Ohio-4782, consider appellees' cross-assignment of error en banc and issue this decision as the final decision in this appeal.

{¶ 3} This opinion is divided into two parts: (1) the decision of the en banc court and (2) the decision of the merit panel. The decision of the en banc court is limited to analysis and resolution of the issue raised in appellees' cross-assignment of error regarding whether attorney fees incurred as a result of a motion to enforce a settlement agreement are recoverable as compensatory damages. The merit panel reissues the original panel decision with respect to Rayco's three assignments of error, which is unaffected by this en banc review, and addresses appellees' cross-assignment of error in light of the en banc court's decision.

DECISION OF THE EN BANC COURT:

{¶ 4} The issue to be considered by the en banc court has been framed as follows: "Are attorney fees incurred as a result of a motion to enforce a settlement agreement recoverable as compensatory damages?" Upon en banc review, we hold that attorney fees can be awarded as compensatory damages to the prevailing party

on a motion to enforce a settlement agreement when the attorney fees are incurred as a direct result of a breach of the settlement agreement.

{¶ 5} Ohio follows the "American Rule," which provides that a prevailing party in a civil action may not generally recover its attorney fees as part of the "costs of litigation" unless attorney fees are provided for by statute, the nonprevailing party acts in bad faith or there is an enforceable contract that "specifically provides for the losing party to pay the prevailing party's attorney fees." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7.

{¶ 6} In *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, this court held that, notwithstanding the American Rule, a party was entitled to recover its attorney fees as compensatory damages when the fees were incurred as a direct result of the breach of a settlement agreement. In that case, Berry filed suit against his supervisor and employer, Wachovia Securities ("Wachovia"), alleging that Wachovia breached an agreement to pay the full amount of Berry's share of an arbitration award that had been entered against Berry in an arbitration between Berry and his former employer, Merrill Lynch. *Id.* at ¶ 1. The arbitration panel awarded Merrill Lynch $250,000 on its claims against Berry and awarded Berry $125,000 on his claim against Merrill Lynch. *Id.* at ¶ 2. Wachovia paid the $250,000 judgment against Berry. *Id.* at ¶ 3. Berry endorsed the $125,000 check he received from Merrill Lynch and gave it to his Wachovia branch manager with a note requesting that the check be placed on deposit "to offset the interest due on our contract" and indicating that "[t]he $125,000 is to be returned on demand."

Id. at ¶ 3-4. The check was deposited into a Wachovia account dedicated to legal settlements. Berry later asked to have the check returned to him, but Wachovia refused to return it. *Id.* at ¶ 5. Berry filed suit, alleging that Wachovia had breached an agreement to hold Berry's Merrill Lynch proceeds and produce them on demand; Wachovia filed a counterclaim, alleging that Berry had breached a settlement agreement that he would reimburse Wachovia for certain of the amounts it had paid to Merrill Lynch in satisfaction of the arbitration award. *Id.* at ¶ 1, 6. Wachovia sought to recover as damages the attorney fees it expended or would be required to expend to enforce the settlement agreement. *Id.* at ¶ 6.

{¶ 7} The jury found against Berry on all of his claims and in favor of Wachovia on its counterclaim; it awarded Wachovia $432,000 in damages for the attorney fees Wachovia expended in enforcing the settlement agreement. *Id.* at ¶ 8.

{¶ 8} Berry appealed to this court, asserting, among other arguments, that the award of attorney fees to Wachovia violated the American Rule. *Id.* at ¶ 18-19. This court disagreed. The court held that Berry had breached the settlement agreement when he filed suit against Wachovia, seeking the return of the $125,000. *Id.* at ¶ 15. The court further held that the attorney fees Wachovia incurred to enforce the settlement agreement were recoverable as compensatory damages resulting from Berry's breach of their agreement. *Id.* at ¶ 19-20. As the court explained:

> Ohio adheres to the rule that "a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396,

> at ¶ 7. However, attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement. *See Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. Ottawa No. OT-09-026, 2010-Ohio-4714, ¶ 34; *Tejada-Hercules v. State Auto. Ins. Co.*, 10th Dist. Franklin No. 08AP-150, 2008-Ohio-5066, ¶ 10. The rationale behind the exception for allowing attorney fees expended as a result of enforcing a settlement agreement is that "any fees incurred after the breach of the settlement agreement were relevant to the determination of compensatory damages, including those fees [a party was] 'forced' to incur by filing the action." *Tejada-Hercules* at ¶ 10.
>
> The legal fees awarded in this case were the measure of compensatory damages directly related to Wachovia's need to enforce the settlement agreement. The court did not err by awarding Wachovia its attorney fees as compensatory damages.

Id. at ¶ 19-20;[2] *see also Shelly Co. v. Karas Properties, Inc.*, 8th Dist. Cuyahoga No. 98039, 2012-Ohio-5416, ¶ 41 (citing *Berry* and observing that "[c]ourts often award attorney fees incurred after the breach of a settlement agreement because 'when a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim,'" but ultimately concluding that *Berry* did not apply because the breach of contract claim at issue did not involve a settlement agreement), quoting *Shanker v. Columbus Warehouse Ltd. Partnership*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391 (June 6, 2000).

[2] Because it found the jury's damages award to be "plainly excessive," the court gave Wachovia the option of accepting a remittitur of the damages award to $133,691 — the amount that Wachovia requested and proved at trial — or a new trial. *Id.* at ¶ 44, 46.

{¶ 9} In *Mayfran Internatl. v. May Conveyor, Inc.*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511, this court held that a party who prevailed on a motion to enforce a settlement agreement was not entitled to recover the attorney fees it incurred to enforce the agreement as compensatory damages because there had been no finding that the other party had acted in bad faith. In that case, Mayfran International, Inc. ("Mayfran") sued May Conveyor, Inc. and several related defendants (collectively, "May Conveyor"), asserting various claims relating to the alleged misappropriation of trade secrets. *Id.* at 2-3. Prior to trial, the parties reached an alleged settlement. *Id.* at 2-4. After execution of a handwritten settlement agreement, but before execution of a final "definitive agreement," a dispute arose as to the meaning of one of the terms of the alleged settlement, and Mayfran filed a motion to enforce the settlement agreement. *Id.* at 3-8. After a series of hearings, the trial court determined that the parties had entered into an enforceable settlement agreement and that May Conveyor had breached that agreement. It awarded Mayfran lost profits and its attorney fees as compensatory damages for breach of the settlement agreement. *Id.* at 8-9. May Conveyor appealed. On appeal, this court reversed the attorney fee award, concluding that the attorney fee award was "not proper" because there had been no finding that May Conveyor acted in bad faith and, "[a]bsent a statutory provision, a prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith." *Id.* at 15, citing *State ex rel. Kabatek v. Stackhouse*, 6 Ohio St.3d 55, 451 N.E.2d 248 (1983).

{¶ 10} In *R.C.H. Co. v. Classic Car Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 83697, 2004-Ohio-6852, the parties reached a settlement agreement in a lease dispute. *Id.* at ¶ 2-5. The plaintiffs thereafter filed an "amended second cause of action," alleging that the defendants had breached the settlement agreement. *Id.* at ¶ 7. The trial court entered judgment for the plaintiffs for rent due, utilities and attorney fees. *Id.* at ¶ 8. On appeal, this court reversed the attorney fee award based on the American Rule, noting that there was no contractual or statutory basis for an award of attorney fees and no finding that the defendants had acted in bad faith. *Id.* at ¶ 10-11.

{¶ 11} We follow *Berry* and hold that attorney fees can be awarded as compensatory damages to the prevailing party on a motion to enforce a settlement agreement when the fees are incurred as a direct result of a breach of the settlement agreement.

{¶ 12} Compensatory damages are awarded to a party to compensate it for damages, injury or other loss caused by another party. The object of compensatory damages is to make the aggrieved party whole, i.e., to put the party in as good a position as the party would have been had the agreement at issue been fully performed or the harm not occurred. *See, e.g., Kovach v. Lazzano,* 11th Dist. Geauga No. 1082, 1983 Ohio App. LEXIS 12491, 7 (Aug. 5, 1983) ("Compensatory damages in Ohio have been traditionally defined as the measure of actual loss suffered by the aggrieved party[.] * * * [T]he object of compensatory damages is to make the damaged party whole for the wrong done to him. * * * General compensatory

damages are those which result from the wrongful act and which are traceable to and the necessary result of the act."); *Johnson v. Weiss Furs*, 8th Dist. Cuyahoga No. 76680, 2000 Ohio App. LEXIS 676, 4 (Feb. 24, 2000) ("[T]he purpose of monetary compensatory damages is to put the injured party in the position that he or she would have been in, had the wrong complained of not occurred.").

{¶ 13} When parties settle a case, the end of litigation is an essential component of the consideration exchanged as part of the settlement. A party may pay more (or accept less) to resolve a case by settlement than the party believes it would have to pay (or would recover) if the dispute were to be fully litigated in exchange for (1) the certainty of result and (2) peace, i.e., an end to the time and expense associated with litigating the parties' dispute. Where a party breaches a settlement agreement and the breach causes the nonbreaching party to incur attorney fees through continued litigation to enforce the settlement agreement, the nonbreaching party has lost an essential benefit of its bargain. As such, the nonbreaching party is entitled to recover the reasonable attorney fees it incurred in enforcing the settlement agreement — not as part of the "costs of litigation" — but rather, as compensatory damages for the other party's breach of the settlement agreement.

{¶ 14} Courts have long recognized that, notwithstanding the American Rule, a plaintiff may recover attorney fees expended in an action brought by a third party as compensatory damages where the defendant's breach of contract caused the plaintiff to engage in the litigation with the third party. *See, e.g., S & D*

Mechanical Contrs., Inc. v. Enting Water Conditioning Sys., Inc., 71 Ohio App.3d 228, 241, 593 N.E.2d 354 (2d Dist.1991); *see also* Annotation, *Attorneys' Fees Incurred in Litigation with Third Person as Damages in Action for Breach of Contract*, 4 A.L.R.3d 270.

{¶ 15} Because the attorney fees recoverable on a successful motion to enforce a settlement agreement are compensatory damages — rather than "costs of litigation" — the American Rule does not preclude their recovery even where none of the other exceptions to the American Rule applies.

{¶ 16} A number of other Ohio appellate districts have reached the same conclusion. *See, e.g., Brown v. Spitzer Chevrolet Co.*, 5th Dist. Stark No. 2012 CA 00105, 2012-Ohio-5623, ¶ 19-21 ("attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement"); *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. Ottawa No. OT-09-026, 2010-Ohio-4714, ¶ 33-34 (appellee entitled to an award of attorney fees as compensatory damages "because those fees were incurred as a direct result of appellants' breach of the settlement agreement"); *Myron C. Wehr Properties, L.L.C. v. Petraglia*, 2016-Ohio-3126, 65 N.E.3d 242, ¶ 36, 38 (7th Dist.) ("[A]ttorney fees may be awarded where it can be established they were the result of the offending party's breach of the settlement agreement and sought as compensatory damages and not merely as costs of the action."); *Tejada-Hercules v. State Auto. Ins. Co.*, 10th Dist. Franklin No. 08AP-150, 2008-Ohio-5066, ¶ 9-11 (recognizing "a distinction between cases in which attorney fees are awarded as costs and those in which the

fees are awarded as part of the aggrieved party's damages" and that "a party may receive attorney fees resulting from the other party's breach of the settlement agreement as a form of compensatory damages"); *Shanker*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391, at 11-15 ("Because defendant's attorney fees are attributable to and were incurred as the result of plaintiffs' breach of the settlement agreement, defendant is entitled to recover those fees in order to make whole and compensate him for losses caused by plaintiffs' breach."); *see also Rohrer Corp. v. Dane Elec Corp. USA*, 482 Fed.Appx. 113, 115-117 (6th Cir.2012) ("Ohio law allows a court to award attorney's fees as compensatory damages when a party's breach of a settlement agreement makes litigation necessary, even where none of the exceptions to the American Rule have been shown."); *Wilson v. Prime Source Healthcare of Ohio*, N.D.Ohio No. 1:16-cv-1298, 2018 U.S. Dist. LEXIS 34445, 8-9 (Mar. 2, 2018) (where a settling party forces the other party to litigate a motion to enforce the settlement, the party forced to enforce the settlement agreement is "entitled to attorney's fees stemming from this additional litigation as compensatory damages").

{¶ 17} Allowing the recovery of attorney fees as compensatory damages on a motion to enforce a settlement agreement is consistent with the strong public policy that exists in encouraging settlements and enforcing settlement agreements. *See, e.g., Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972) ("'The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. * * * The resolution of

controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole."'), quoting 15 American Jurisprudence 2d, Compromise and Settlement, Section 4 at 938; *Turoczy Bonding Co. v. Mitchell*, 8th Dist. Cuyahoga No. 106494, 2018-Ohio-3173, ¶ 16 ("Settlement agreements are generally favored in the law."); *Ortiz v. United States Fid. & Guar. Co.*, 8th Dist. Cuyahoga No. 85966, 2005-Ohio-5982, ¶ 21 ("[P]ublic policy favors settlements. Without such, it would be difficult for parties to attempt the amicable adjustment or compromise of disputes. Moreover, when parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket. Perhaps the most salubrious aspect of settlement is its finality; the conflict is resolved and the appellate process is avoided.").

{¶ 18} Were it otherwise, a party who had a "change of heart" regarding a settlement agreement would have nothing to lose by refusing to comply with the settlement agreement, challenging the existence or enforceability of the settlement agreement, and continuing to litigate the matter, notwithstanding the harm to the nonbreaching party.[3] At worst, i.e., if the court were to rule against the breaching

[3] Although an exception exists under the American Rule, permitting the recovery of attorney fees as litigation costs where the nonprevailing party acts in "bad faith," this is a high bar for the recovery of attorney fees. *See, e.g., Covenant Dove Holding Co., L.L.C. v. Mariner Health Care, Inc.*, 1st Dist. Hamilton No. C-120878, 2013-Ohio-3824, ¶ 7 ("'Bad faith' is more than bad judgment or negligence. * * * It implies a dishonest

party and enforce the settlement agreement, the breaching party would simply be required to comply with the settlement agreement as originally agreed. Allowing parties to recover attorney fees incurred to enforce a settlement agreement as compensatory damages "encourages parties to comply with the terms of their settlement agreements, lest they put themselves at risk of paying the nonbreaching parties' attorney fees" incurred in enforcing the settlement agreement. *Tejada-Hercules*, 10th Dist. Franklin No. 08AP-150, 2008-Ohio-5066, at ¶ 22.

{¶ 19} Although in *Berry*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, the nonbreaching party sought enforcement of a settlement agreement in a separate action rather than by filing a motion to enforce the settlement agreement, we see no reason that a different rule should apply depending on how a party seeks to enforce a settlement agreement. *See, e.g., Wilson*, N.D., Ohio No.1:16-CV-1298, 2018 U.S. Dist. LEXIS 34445, at 8-9 ("Attorney's fees as compensatory damages are available whether a party files a separate breach of contract suit or a motion to enforce settlement before the original trial court."). In both instances, a party seeking to enforce a settlement agreement is subjected to additional or continued litigation as a result of the other party's attempted repudiation of a settlement agreement. A nonbreaching party should not be compelled to initiate a

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purpose, moral obliquity, conscious wrongdoing, breach of a known duty due to ulterior motive, ill will comparable to fraud, or an actual intent to mislead or deceive another."); *see also LEH Properties v. Pheasant Run Assn.*, 9th Dist. Lorain No. 1-CA009780, 2011-Ohio-516, ¶ 23. Thus, a party could not recover attorney fees under the bad faith exception to the American Rule merely because a party had a "change of heart" regarding a settlement or in the ordinary case where a party simply fails to comply with the terms of a settlement agreement.

separate action and file and serve a new complaint (or seek leave to amend a previously filed complaint), incurring even greater expense and further wasting limited judicial resources, in order to recover its compensatory damages incurred in enforcing a settlement agreement.

{¶ 20} Accordingly, we hold that attorney fees can be awarded as compensatory damages on a motion to enforce a settlement agreement when the fees are incurred as a direct result of the breach of a settlement agreement.

{¶ 21} To the extent *R.C.H. Co. v. Classic Car Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 83697, 2004-Ohio-6852, and *Mayfran Internatl. v. May Conveyor, Inc.*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511 (July 15, 1993), are inconsistent with this decision of the en banc court, we overrule them.

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EILEEN A. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J.; MARY J. BOYLE, FRANK D. CELEBREZZE, JR., RAYMOND C. HEADEN, LARRY A. JONES, SR., and KATHLEEN ANN KEOUGH, JJ., CONCUR;

MICHELLE J. SHEEHAN, J., DISSENTS WITH SEPARATE OPINION, with PATRICIA ANN BLACKMON, EILEEN T. GALLAGHER, SEAN C. GALLAGHER, and ANITA LASTER MAYS, JJ.

MICHELLE J. SHEEHAN, J., DISSENTING:

{¶ 22} Respectfully, I dissent. "Ohio has long adhered to the 'American [R]ule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation." *Wilborn v. Bank*

One Corp., 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7, citing *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 33-34, 514 N.E.2d 702 (1987), and *State ex rel. Beebe v. Cowley*, 116 Ohio St. 377, 156 N.E. 214 (1927).

{¶ 23} The United States Supreme Court has repeatedly recognized this bedrock principle and recently affirmed that "the American Rule has roots in our common law reaching back to at least the 18th Century * * *." *Baker Botts L.L.P. v. ASARCO, L.L.C.*, 576 U.S. __, 135 S.Ct. 2158, 192 L.Ed.2d 208 (2015) (refusing to create a "judicial exception" to the American Rule to allow recovery of attorney fees for work performed in defending a fee application in Bankruptcy Court per Section 330(a)(1) of the Bankruptcy Code).

{¶ 24} There are three well-established exceptions to the rule in Ohio. Attorney fees may be awarded if (1) a statute creates a duty to pay fees,[4] (2) the losing party has acted in bad faith, or (3) the parties contract to shift fees. *Wilborn* at ¶ 7. *See also Pegan v. Crawmer*, 79 Ohio St.3d 155, 156, 679 N.E.2d 1129 (1997); *Krasny-Kaplan Corp. v. Flo-Tork, Inc.*, 66 Ohio St.3d 75, 77, 609 N.E.2d 152 (1993); *State ex rel. Kabatek v. Stackhouse*, 6 Ohio St.3d 55, 451 N.E.2d 248 (1983); *Nottingdale*; *State ex rel. Crockett v. Robinson*, 67 Ohio St.2d 363, 369, 423 N.E.2d

[4] For example, R.C. 2335.39 authorizes an award of attorney fees to a prevailing party where an action by the state agency is not substantially justified. *Collyer v. Broadview Dev. Ctr.*, 81 Ohio App.3d 445, 611 N.E.2d 390 (10th Dist.1992). R.C. 2323.51 authorizes an award of attorney fees to a party to a civil action who is adversely affected by another party's frivolous conduct. *See Moore v. Cleveland*, 8th Dist. Cuyahoga No. 83070, 2004-Ohio-360.

1099 (1981); *Sorin v. Bd. of Edn.*, 46 Ohio St.2d 177, 347 N.E.2d 527 (1976); and *State ex rel. Grosser v. Boy*, 46 Ohio St.2d 184, 347 N.E.2d 539 (1976).

{¶ 25} The fourth exception endorsed by the court today appears to have originated in 2000 when a sister appellate court deviated from the American Rule to allow the recovery of attorney fees as compensatory damages in *Shanker v. Columbus Warehouse Ltd. Partnership*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391 (June 6, 2000). In *Shanker*, the parties reached an oral settlement agreement in court. Plaintiff, however, subsequently submitted a draft settlement agreement with a new term not in the original settlement agreement. Defendant filed a motion to enforce the settlement agreement the parties had reached in court. The trial court enforced the in-court settlement, and plaintiff appealed the trial court's decision, which was affirmed on appeal. After the appeal, defendant refused to pay the settlement proceeds because plaintiff had continued to litigate after the parties had settled, causing defendant to incur additional attorney fees to defend the settlement. Plaintiff then filed a new lawsuit to enforce the settlement agreement. Defendant counterclaimed, claiming plaintiff breached the settlement by continuing to litigate and therefore defendant should be awarded attorney fees defending the settlement agreement in the first litigation.

{¶ 26} The trial court concluded both parties breached the settlement agreement and awarded defendant attorney fees incurred defending the settlement agreement. On appeal, the Tenth District affirmed the trial court's decision, reasoning that the attorney fees were sought as compensatory damages flowing from

plaintiff's breach of the settlement agreement. The court of appeals also held plaintiff was entitled to attorney fees for defendant's own breach of the settlement and remanded the case.

{¶ 27} Unfortunately, our sister districts and now this court applied the broad proposition in *Shanker* that attorney fees are recoverable for breach of a settlement agreement without any authorization or guidance from the Ohio Supreme Court or the legislature. In other words, appellate courts have now carved out a narrow exception and placed settlement agreements on a pedestal, above all other types of contracts. With a stroke of a pen, appellate courts now allow any party that disputes a settlement agreement and succeeds to gain a windfall in attorney fees and in effect encourages pursuit of further litigation over any minor breach or discrepancy involving a settlement agreement.

{¶ 28} A settlement agreement is a contract — one designed to terminate a claim by preventing or ending litigation. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 28. As a contract, a settlement agreement is governed by principles of contract law. *Rulli v. Fan Company*, 79 Ohio St.3d 374, 683 N.E.2d 337 (1997).

{¶ 29} In Ohio, attorney fees are generally not recoverable as costs of litigation in a contract action. *Walton Commercial Ent. v. Assns., Conventions, Tradeshows, Inc.*, 71 Ohio App.3d 109, 115, 593 N.E.2d 64 (10th Dist.1990), citing *Allen v. Std. Oil Co.*, 2 Ohio St.3d 122, 443 N.E.2d 497 (1982). However, the parties to a contract may provide for attorney fees to be awarded to the prevailing party.

The American Rule allows for the shifting of attorney fees in this situation as one of the three well-settled exceptions. *See Nottingdale*, 33 Ohio St.3d at 36, 514 N.E.2d 702 (when the right to recover attorney fees arises from a contractual term, the rationale permitting recovery is the parties' fundamental right to contract freely).

{¶ 30} Although public policy and the law favor the resolution of controversies and uncertainties through settlement agreements rather than litigation, *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 285 N.E.2d 324 (1972), there is no compelling reason to elevate a settlement agreement above all other contracts for purposes of recovery of attorney fees as damages. As in any contract, it is entirely foreseeable that a settlement agreement may be breached or its terms may be disputed. The parties are free — as they often do — to negotiate and provide for an award of attorney fees in the settlement agreement itself in the event of a breach. In other words, the parties themselves could easily contract for an award of attorney fees to the prevailing party in the event of further litigation necessitated by an allegation of a breach of the settlement agreement. The parties' failure to negotiate and incorporate such a term in their agreement does not warrant the courts to impose such a rule or deviate from the American Rule. As this court stated in *R.C.H. Co. v. Classic Car Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 83697, 2004-Ohio-6852, ¶ 11, attorney fees are allowable as damages "where the parties have bargained for this result."

{¶ 31} The Tenth District reasoned that the attorney fees incurred as a result of enforcing a settlement agreement are recoverable because they constitute

compensatory damages flowing from a party's breach of the settlement agreement. *Shanker*, 10th Dist. Franklin No. 99AP-772, 2000 Ohio App. LEXIS 2391, at 12, and *Tejada-Hercules v. State Auto Ins. Co.*, 10th Dist. Franklin No. 08AP-150, 2008-Ohio-5066, ¶ 9. This, however, can be said of attorney fees in all breach of contract actions. In every breach of contract litigation, the expenditure of attorney fees by the nonbreaching party to enforce the contract is a direct result of the other party's breach; the nonbreaching party is forced to incur attorney fees to enforce the contract. Whether attorney fees are labeled compensatory damages or costs is a distinction without a difference. Attorney fees are attorney fees. Calling them compensatory damages does not change the nature of the fees.

{¶ 32} The majority here notes that compensatory damages are awarded to make the aggrieved party whole — to put the party in the position where the party would have been in had the agreement been fully performed. Again, this can be said of attorney fees in all breach of contract actions. The nonbreaching party can truly be made whole only by recovering the attorney fees incurred as the result of the other party's breach, yet attorney fees are generally not recoverable unless expressly contracted for.

{¶ 33} The trial court in this case recognized the same issue when it held:

> Despite its lengthy exegesis on the subject, the *Shanker* court's affirmance of the award of attorney[] fees to a party enforcing a settlement agreement was based only on the fact that the fees were incurred because the agreement was breached. Yet that can be said for any successful plaintiff on a breach of contract claim. Adopting the *Shanker* rationale throughout Ohio would nullify the American rule that each party to a lawsuit is responsible for its own attorney[] fees

> unless they agreed otherwise, had a statutory entitlement to fees, or the other side acted in bad faith. Perhaps the abrogation of that rule would be salutary, but that is hardly a policy decision for a discrete three-judge appellate panel — much less a single common pleas judge — to make.

Journal Entry, Dec. 14, 2017.

{¶ 34} Within the parameters of the American Rule, it is traditionally within the sound discretion of the trial court to determine whether attorney fees are warranted under the facts of each case. *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007-Ohio-6833, 879 N.E.2d 765, ¶ 27. *See also Lima Pub. Library Bd. of Trustees v. State Emp. Rels. Bd.*, 3d Dist. Allen No. 1-10-51, 2011-Ohio-1730, ¶ 39. An award of attorney fees should be "fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." *Wilborn*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶ 19, fn. 3, citing *Nottingdale*, 33 Ohio St.3d 32, 33-34, 514 N.E.2d 702, at syllabus. A bright-line rule holding that attorney fees are recoverable as compensatory damages in litigation involving an alleged breach of settlement agreement unnecessarily interferes with the trial court's discretionary power in matters of attorney fees and it has procedural consequences. "If the fees are damages, then the availability and amount of such fees have to be determined by the jury." *Christe v. GMS Mgmt. Co.*, 88 Ohio St.3d 376, 378, 726 N.E.2d 497 (2000). However, calculating attorney fee awards requires consideration of the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the results

obtained, and consideration of all of these issues is best undertaken by courts rather than juries. *Id*. at 378-379.

{¶ 35} One of the important public policy considerations underlying the American Rule is that requiring the parties to pay for their own legal fees encourages and promotes settlement. Awarding attorney fees to the prevailing party in litigation involving disputes over a settlement agreement, however, encourages more litigation, rather than resolution. If a party knows they can collect their attorney fees from the other side for a breach of a settlement agreement in an already contentious matter, any alleged breach will be litigated and result with an award of attorney fees likely greater than the original amount in dispute.

{¶ 36} As for a party who merely "had a change of heart" regarding a settlement, this scenario would likely fall under the bad faith exception if the court finds the "change of heart" to be "conscious wrongdoing or a breach of known duty due to ulterior motive." *See State v. Powell,* 132 Ohio St.3d 233, 2017-Ohio-2577, 71 N.E.2d 865, ¶ 81 (bad faith "imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud"). In any event, the parties can always contract for an award of attorney fees to preclude a "change of heart."

{¶ 37} Ohio is an "American Rule" jurisdiction. Under the rule, the parties involved in litigation bear their own litigation costs and they are free to alter the effect of the rule contractually. Absent an express contractual provision, the court can award attorney fees within its discretion if a party breaches a settlement

agreement in bad faith. *Shanker* and its progeny disturb Ohio's long tradition of adhering to the American Rule. I believe this court should continue to apply the American Rule with its well-established exceptions until the Supreme Court of Ohio or the legislature provides otherwise. Respectfully, I dissent.

DECISION OF THE MERIT PANEL:

EILEEN A. GALLAGHER, P.J.:

{¶ 38} Rayco appeals from the trial court's decision granting appellees' motion to enforce a settlement agreement that resolved legal malpractice claims Rayco had filed against appellees. Rayco contends that the trial court erred in finding that there was an enforceable settlement agreement. Appellees cross-appeal and contend that the trial court erred in denying their request to recover the attorney fees they incurred to enforce the settlement agreement. For the reasons that follow, we affirm the trial court's decision to the extent that it grants appellees' motion to enforce the settlement agreement, reverse the trial court's decision to the extent that it denies appellees' motion for attorney fees and remand the case for further proceedings.

Factual Background and Procedural History

{¶ 39} In October 2013, Rayco filed a complaint against appellees for legal malpractice arising out of appellees' handling of a prior lawsuit Rayco had filed against Deutz Corporation and Deutz AG (collectively, "Deutz") for breach of warranty and other claims arising out of Deutz's sale of engines to Rayco. In that case, summary judgment was granted in favor of Deutz and affirmed by the United States Court of Appeals for the Sixth Circuit.

{¶ 40} In February 2015 and June 2016, the parties attempted to mediate their dispute with the assistance of a retired judge as the mediator. At the second mediation, Rayco authorized the mediator to convey a settlement demand of $3,050,000, in the aggregate, to appellees. At the conclusion of the second mediation, no agreement had been reached but efforts to settle the case continued.

{¶ 41} In July 2016, the mediator issued a written recommendation to the parties, recommending that they settle the case for $2,650,000 in the aggregate. Rayco's counsel advised the mediator that Rayco did not agree with the recommendation and that appellees would have to pay the full $3,050,000 it had demanded to settle the case. In September 2016, with the consent of all parties, the mediator met with Rayco's chief executive, John Bowling, to further discuss the possibility of resolving the case. After the meeting, the mediator continued to have settlement discussions with Rayco and its counsel by telephone.

{¶ 42} In the fall of 2016, several pretrial conferences were cancelled at the parties' request due to ongoing settlement negotiations. During this time period,

one of Rayco's attorneys, Robert Kehoe, had discussions with appellees' counsel in which he reiterated that the only way to settle the case would be to pay Rayco's full settlement demand of $3,050,000. Given the amount of the demand, appellees needed to request additional authority from their insurance carriers to settle the case. To that end, in late 2016, Murphy's counsel and Cavitch's counsel separately requested written settlement demands from Rayco that Murphy and Cavitch could submit to their insurance carriers. In January 2017, Cavitch's counsel emailed Attorney Kehoe inquiring about the status of the "demand letter" from Rayco. Attorney Kehoe replied that he was "working on it."

{¶ 43} On January 26, 2017, Attorney Kehoe sent letters to Murphy's counsel and Cavitch's counsel. He indicated that he was writing "to follow up on the June 23, 2016 mediation and subsequent settlement discussions with [appellees' counsel] and the mediator." He stated that Rayco had authorized the mediator to convey a "firm demand" of $3,050,000 to settle the case and had "made it clear" that "$3,050,000 was an absolute aggregate amount necessary to settle the case." He further indicated that "[w]e have not explored the possibility of resolving Rayco's claims against [the Murphy and Cavitch appellees] independent[ly]" but that there was "enough insurance coverage" for appellees "[i]n combination" to "meet Rayco's demand."

{¶ 44} At a pretrial conference on January 30, 2017, the parties advised the trial court that settlement negotiations were ongoing. A month later, on February

23, 2017, one of Murphy's attorneys, Ernie Vargo, sent an email to Rayco's counsel, with the consent of Cavitch's counsel, stating as follows:

> This is in response to Rayco's offer of settlement as set forth in your letter of January 26, 2017 to me. Counsel for Cavitch indicates that he has received a substantively similar letter on behalf of the Cavitch firm and named attorneys.
>
> The Murphy firm, Cavitch firm, and named lawyers from each firm accept the collective settlement demand of $3,050,000 in the aggregate. This acceptance is conditioned upon a full release and dismissal and other customary provisions to be negotiated and memorialized in a formal settlement agreement. Defendants agree to provide the initial draft of the written agreement to you for comments. Please expect the draft within 14 days of this email.
>
> Thank you for your efforts in negotiating this resolution with us.

{¶ 45} Later that day, Attorney Kehoe responded to the email. He left a voicemail message for Attorney Vargo, thanking him and requesting that he return his call, indicating, "I'd like to talk to you briefly about the logistics and I note that you'll take the first cut at the settlement documents and have them in about 14 days, which is fine." The following day, another of Rayco's attorneys, J. Douglas Drushal, emailed Attorney Vargo. He thanked Attorney Vargo for his February 23, 2017 email and stated that "[i]f he has not done so yet, [Attorney Kehoe] will be in touch shortly with how we would like to proceed to finalize things."

{¶ 46} On March 2, 2017, Attorney Drushal emailed appellees' counsel, stating, "I believe we are waiting for the final versions of what your side wants signed in the way of releases, etc. before presenting the package to Rayco. We need to know every detail before we can finalize. Anything you could do to expedite that would be helpful. Thanks."

{¶ 47} On March 7, 2017, Murphy's counsel emailed "defendants' draft settlement agreement and release" to Rayco's counsel. Murphy's counsel also inquired whether the parties should notify the court that they had "an agreement in principle" given that a pretrial conference was scheduled with the trial court for the following day. Attorney Drushal responded: "Agree that we should contact [the] court and say we don't need the conference. I will defer to the rest of you to coordinate that, assuming all others concur." The trial court cancelled the March 8, 2017 pretrial conference at the parties' request.

{¶ 48} On March 10, 2017, Attorney Kehoe forwarded a red-lined version of the settlement agreement "with suggested changes from Plaintiff's counsel" along with a proposed dismissal entry. The suggested changes included a mutual release provision, i.e., in addition to Rayco's release of its claims against Murphy and Cavitch, Murphy and Cavitch would release any claims they had against Rayco, and a provision that the trial court would retain jurisdiction over any disputes related to the settlement agreement. Attorney Kehoe stated: "Kindly review and let us know if [the suggested changes] are acceptable. If so, we will proceed to obtain our client's signature."

{¶ 49} Appellees' counsel made additional changes to the revised settlement agreement circulated by Rayco's counsel and sent a red-lined version of the document to Rayco's counsel on March 16, 2017.[5] On April 4, 2017, Attorney Kehoe

[5] All drafts of the settlement agreement exchanged between the parties, including the "final" version of the settlement agreement, included a "costs" provision that stated, "[t]he Parties shall bear their own costs, expenses, and attorney fees in connection with

left a voicemail message for Attorney Vargo. He indicated that "[t]he settlement document itself is fine" and that "[w]e had John [Bowling's] commitment to settle with the number that we agreed upon, but he's being a little bit difficult in getting the document signed."

{¶ 50} Rayco never signed the settlement agreement.

{¶ 51} On June 16, 2017, appellees filed a motion to enforce the settlement agreement. Appellees asserted that the parties had agreed to settle the case on February 23, 2017 but that Rayco refused to sign the settlement agreement. Appellees requested that the court enforce the settlement agreement and award them the attorney fees they incurred to enforce the settlement agreement.

{¶ 52} Rayco opposed the motion. It argued that there was no settlement agreement because, by the time appellees "accepted" the $3,050,000 settlement offer Rayco made at the June 2016 mediation, it had lapsed. Rayco further argued that its counsel's January 26, 2017 letters simply summarized the parties' past settlement positions and indicated Rayco's "willingness to re-open negotiations" and were not settlement offers.

{¶ 53} The trial court held an evidentiary hearing on the motion to enforce the settlement. The hearing was held before an advisory jury, which the trial court

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this agreement," and a "specific performance" provision that stated, "[t]he Parties agree that, in the event of a breach of the terms of this Agreement, there will be no adequate remedy at law to remedy such breach and, accordingly, the Parties agree that specific performance may be awarded to enforce the terms of this Agreement."

empaneled, sua sponte, to address the issue of "whether the parties entered into a contract to settle the lawsuit."

{¶ 54} Attorney Vargo (one of Murphy's attorneys), Attorney Timothy Brick (one of Cavitch's attorneys), and two of Rayco's attorneys, Attorneys Kehoe and Drushal, testified at the hearing. The parties also submitted a joint stipulation of undisputed facts. The 38 facts to which the parties stipulated detailed the history of the parties' settlement negotiations and included 15 documents created or exchanged by the parties during the course of their settlement negotiations.[6]

{¶ 55} During their testimony, Attorneys Vargo and Brick "walked through" the parties' stipulations and incorporated exhibits. Appellees argued there were at least three potential "offers" and three potential "acceptances" that gave rise to an enforceable settlement agreement. Appellees argued that Rayco's counsel's January 26, 2017 letters to appellees' counsel constituted offers that appellees accepted by means of Attorney Vargo's February 23, 2017 email to Rayco's counsel. They argued that the subsequent conduct of counsel, i.e., exchanging drafts of the settlement agreement, constituted further evidence of the parties' agreement to settle the case. Alternatively, appellees argued that (1) Murphy's counsel's February 23, 2017 email constituted a counteroffer to settle the case for $3,050,000 that Rayco accepted (a)

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[6] Prior to the hearing, the parties filed a joint motion for leave to file a stipulation of undisputed facts regarding appellees' motion to enforce the settlement agreement. In their joint motion, the parties asserted that there were no disputed questions of material fact relevant to the motion to enforce the settlement agreement, that an advisory jury was no longer necessary and that "[t]he sole remaining question is whether the undisputed facts give rise to a binding settlement agreement as a matter of law." The trial court denied the motion.

by means of Attorney Kehoe's voicemail message to Attorney Vargo later that day or (b) by means of the email Attorney Drushal sent to Attorney Vargo the following day or (2) Rayco's counsel submission of the revised settlement agreement (which included mutual releases and other changes) to appellees' counsel on March 10, 2017 constituted an offer to settle the case for $3,050,000 that appellees accepted on March 16, 2017 when they made additional changes to the revised settlement agreement and returned the document to Rayco's counsel.

{¶ 56} Attorney Kehoe testified upon cross-examination. He acknowledged the "tru[th] and accura[cy]" of the facts set forth in the parties' joint stipulation and confirmed that he was authorized to enter into the stipulation on behalf of Rayco. He indicated that he sent the January 26, 2017 letters to appellees' counsel in response to their request for a written settlement demand and that Rayco had authorized him to send the letters. He further acknowledged receipt of Attorney Vargo's February 23, 2017 email, indicating that appellees agreed to pay the amount Rayco had demanded ($3,050,000 in the aggregate), that he understood the email was sent on behalf of both Murphy and Cavitch and that he and appellees' counsel thereafter exchanged various emails congratulating and thanking one another for "working so hard to get this done." Attorney Kehoe testified that after he received Attorney Vargo's February 23, 2017 email, he reported the settlement to Bowling. He indicated that Bowling accepted his congratulations on the settlement and did not dispute that the case had been settled or object to the settlement at that time. He further testified, however, that when Bowling was presented with the settlement

documents, he was "unwilling to sign" them. According to Attorney Kehoe, Bowling told him that he believed the settlement of the lawsuit was like a real estate transaction, i.e., that the deal was not finalized and there was no settlement until he signed the written settlement agreement. Attorney Kehoe further testified, however, that he had fully intended to consummate a settlement through his communications with appellees' counsel.

{¶ 57} Attorney Drushal testified that he interpreted his co-counsel's January 26, 2017 letters not as a "renewed demand" or "offer that could be accepted" but rather, as a "recitation of the history of what had happened" and "as seeking an offer from the lawyers, law firms, and their insurance company which would be presented to Mr. Bowling to see if he would accept it at that point." He further testified that, as he communicated in his March 2, 2017 email, in his view, "everybody needed to sign off on" the final version of the agreement before the parties had a settlement.

{¶ 58} After the parties concluded their presentation of evidence and gave closing arguments, the advisory jury deliberated. Six interrogatories were submitted to the advisory jury. The advisory jury answered interrogatories indicating that the parties had entered into a settlement agreement and signed a verdict form in favor of appellees and against Rayco on the motion to enforce the settlement agreement.[7]

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[7] One of the trial court's November 9, 2017 journal entries states: "The jury answered interrogatories to the effect that the parties did enter into an enforceable settlement agreement and signed a verdict form in favor of the defendants." The

{¶ 59} After dismissing the jury, the trial court stated that "[b]ased upon the evidence hearing and having taken into consideration or under consideration the jury's verdict in this case, I find that the motion to enforce the settlement is well taken."

{¶ 60} On December 14, 2017, the trial court issued a written decision granting appellees' motion to enforce the settlement agreement. The trial court determined, "[b]ased upon all the evidence," that the parties had "a contract to settle with terms clear and enforceable" as a result of Rayco's "acceptance" of appellees' February 23, 2017 "offer" to settle the case for $3,050,000. As the trial court explained:

> In this case, on February 23 the defendants unambiguously offered the plaintiff a settlement of $3,050,000 in exchange for a dismissal of all claims against all defendants. The plaintiff — through counsel but with the authority of Rayco's chief executive — accepted that offer as shown by trial counsel's February 23 voicemail and as further evidenced by: 1) plaintiff's co-counsel's email that same day, 2) the plaintiff's March 10 proposed release of all claims leaving the figure of $3,050,000 undisturbed and 3) the plaintiff's confirmation on April 4 that "the settlement document (release dated March 16 and drafted by the defendants) is fine" and that Bowling had previously accepted the proffered settlement.

{¶ 61} The trial court ordered the parties to "conclude the settlement under the terms outlined in the March 16, 2017, written settlement agreement." The trial court, however, denied appellees' request to recover the attorney fees they had

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interrogatories submitted to the advisory jury, the advisory jury's answers to those interrogatories and the jury's signed verdict form were not included in the record this court received on appeal. The jury's answers to the interrogatories were not read into the record. Accordingly, we do not know what specific findings were made by the advisory jury.

incurred to enforce the settlement agreement based on the American Rule. Because the parties did not agree to shift fees, because there was no applicable statute providing for the recovery of attorney fees and because there was "insufficient evidence of the reasons for, and nature of, Bowling's resistance to finalizing the settlement" to support a finding that Rayco acted in bad faith by refusing to finalize the settlement, the trial court held that appellees were not entitled to recover the attorney fees they incurred in enforcing the settlement agreement.

{¶ 62} Rayco appealed, raising the following three assignments of error for review:

> I. The trial court erred in finding that there was an enforceable settlement agreement entered into by the parties.
>
> II. The trial court erred by permitting appellees' counsel to testify in violation of the witness advocate rule.
>
> III. The trial court erred in applying a preponderance of the evidence standard to determine whether there was an enforceable settlement agreement.

{¶ 63} Murphy and Cavitch cross-appealed, raising the following single assignment of error for review:

> Whether the trial court erred as a matter of law when it failed to award appellees reasonable attorney fees incurred to enforce the settlement agreement.

{¶ 64} For ease of discussion, we address Rayco's assignments of error out of order.

Law and Analysis

Motion to Enforce Settlement Agreement

Standard of Review

{¶ 65} The standard of review applied when reviewing a ruling on a motion to enforce a settlement agreement depends on the question presented. If the question is a factual or evidentiary one, the reviewing court will not overturn the trial court's finding if there was sufficient evidence to support the finding. *Turoczy Bonding Co. v. Mitchell*, 8th Dist. Cuyahoga No. 106494, 2018-Ohio-3173, ¶ 15, citing *Chirchiglia v. Ohio Bur. of Workers' Comp.*, 138 Ohio App.3d 676, 679, 742 N.E.2d 180 (7th Dist.2000). If the issue is a question of contract law, the reviewing court must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. *Turoczy* at ¶ 15. Rayco raises both factual and legal issues in its appeal.

Requirements for an Enforceable Settlement Agreement

{¶ 66} A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). Like any other contract, it requires an offer, acceptance, consideration and mutual assent between two or more parties with the legal capacity to act. *See, e.g., Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16; *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). For a contract to be enforceable, there must be a "meeting of the minds" as to the essential terms of the agreement.

Kostelnik at ¶ 16-17. The essential terms of the agreement must be "'reasonably certain and clear'" and mutually understood by the parties. *Id.*, quoting *Rulli* at 376. As the Ohio Supreme Court explained in *Rulli*:

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

Rulli, at 376, quoting 1 *Corbin on Contracts*, Section 4.1, at 525 (Rev.Ed.1993).

{¶ 67} The burden of establishing the existence and terms of a settlement agreement lies with the party who claims the agreement exists. *Turoczy* at ¶ 19, citing *Nilavar v. Osborn*, 127 Ohio App.3d 1, 11, 711 N.E.2d 726 (2d Dist.1998).

{¶ 68} Once a settlement offer has been accepted, the settlement agreement is mutually binding; the settlement agreement cannot be set aside simply because one of the parties later changes its mind. *See, e.g., Turoczy* at ¶ 18 ("Once there is * * * a meeting of the minds, one cannot refuse to proceed with settlement due to a mere change of mind."), citing *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36-37, 470 N.E.2d 902 (1984); *Clark v. Corwin*, 9th Dist. Summit No. 28455, 2018-Ohio-1169, ¶ 13 ("'[W]hen the parties agree to a settlement offer, [the] agreement cannot be repudiated by either party, and the court has the authority to sign a journal entry reflecting the agreement and to enforce the settlement.'"), quoting *Shetler v. Shetler*, 9th Dist. Wayne No. 00CA0070, 2001 Ohio App. LEXIS 2289, 4-5 (May 23, 2001); *Kostelnik* at ¶ 17 ("'[A]ll agreements have some degree of indefiniteness and some

degree of uncertainty'"; however, "'people must be held to the promises they make.'"), quoting 1 *Corbin on Contracts*, Section 4.1 at 530 (Perillo Rev.Ed.1993).

{¶ 69} It is only where the parties intend that there will be no contract until the agreement is fully reduced to writing and executed that no settlement exists unless the final, written settlement agreement is signed by all of the parties. *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15. If a client authorizes its attorney to negotiate a settlement and the attorney negotiates a settlement within the scope of that authority, the client is bound by it. *See, e.g., Bromley v. Seme*, 2013-Ohio-4751, 3 N.E.3d 1254, ¶ 25 (11th Dist.) ("'It is well-recognized that a party may be bound by the conduct of his or her attorney in reaching a settlement.'"), quoting *Saylor v. Wilde*, 11th Dist. Portage No. 2006-P-0114, 2007-Ohio-4631, ¶ 12. A party cannot avoid a settlement that was negotiated through counsel by claiming that his attorney lacked actual authority to enter into the settlement. *See, e.g., Fugo v. White Oak Condominium Assn.*, 8th Dist. Cuyahoga No. 69469, 1996 Ohio App. LEXIS 2725, 8-12 (June 27, 1996); *Klever v. Stow*, 13 Ohio App.3d 1, 4-5, 468 N.E.2d 58 (9th Dist.1983); *see also Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 392-393, 474 N.E.2d 328 (1984).

The Existence of an Enforceable Settlement Agreement

{¶ 70} In its first assignment of error, Rayco contends that the trial court erred in finding that the parties entered into an enforceable settlement agreement because (1) the $3,050,000 settlement offer Rayco made at the June 2016 mediation had lapsed by the time appellees purported to accept it and (2) its counsel's January

26, 2017 letters simply indicated Rayco's "willingness to re-open negotiations" and were not sufficiently "certain and clear regarding the settlement terms" to constitute a valid settlement offer. Rayco asserts that these letters simply summarized the parties' past settlement positions and made it clear that Rayco was still willing to consider settlement rather than specifying the terms upon which Rayco would settle the case. Rayco further contends that the letters could not be deemed settlement offers because they did not specifically allocate settlement amounts between Murphy and Cavitch and because they lacked "other essential settlement terms required to execute a proper settlement agreement."

{¶ 71} The trial court, however, did not find an enforceable settlement agreement based on the settlement demand Rayco made at the mediation or its counsel's January 26, 2017 letters to appellees' counsel. Rather, the trial court found that Murphy's counsel's February 23, 2017 email constituted an "unambiguous offer" to Rayco to settle the case for $3,050,000, which Rayco accepted when its counsel, Attorney Kehoe, left a voicemail message for Murphy's counsel later that day. The trial court found that the parties' agreement was "further evidenced" by (1) Attorney Drushal's February 24, 2017 email, (2) Rayco's counsel's circulation of its proposed revisions to the settlement agreement on March 10, 2017 leaving the figure of $3,050,000 undisturbed and (3) Attorney Kehoe's statement on April 4, 2017 that "the settlement document is fine" and that Bowling had previously agreed to the settlement.

{¶ 72} Accordingly, Rayco's first assignment of error is meritless.

Standard of Proof

{¶ 73} In its third assignment of error, Rayco contends that the trial court instructed the jury regarding, and itself applied, the wrong standard of proof. Rayco argues that if the trial court had properly instructed the jury that appellees needed to prove the existence of a settlement agreement by clear and convincing evidence rather than a preponderance of the evidence, "the jury may well have ruled in Rayco's favor." Rayco further argues that "[t]o the extent the trial court acted independently of the advisory jury," the trial court erred in applying a preponderance of the evidence standard rather than a clear and convincing evidence standard in determining whether a settlement agreement existed.

{¶ 74} This was a bench trial with an advisory jury pursuant to Civ.R. 39(C)(1). The advisory jury was not the factfinder in this case. After receiving answers to interrogatories and the verdict from the advisory jury, the trial court made its own findings of fact and conclusions of law. As the trial court stated in its journal entry: "Based upon all the evidence, I find that there is a contract to settle with terms that are clear and enforceable." As such, any error in the trial court's instructions to the advisory jury was harmless.

{¶ 75} There is no indication in either the trial transcript or the trial court's decision what standard of proof the trial court applied in determining that a settlement agreement existed. As a general matter, "[a] presumption of regularity attaches to all judicial proceedings." *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. This presumption of regularity extends to the trial

court's application of the correct burden of proof. Thus, we presume that the trial court applied the correct legal standard absent an affirmative demonstration otherwise. *See, e.g., In re Adoption of K.N.W.*, 4th Dist. Athens Nos. 15CA36 and 15CA37, 2016-Ohio-5863, ¶ 44; *Wilson v. Jones*, 3d Dist. Seneca No. 13-13-06, 2013-Ohio-4638, ¶ 28.

{¶ 76} Citing *Brilla v. Mulhearn*, 168 Ohio App.3d 223, 2006-Ohio-3816, 859 N.E.2d 578, ¶ 21 (9th Dist.), *Foor v. Columbus Real Estate Pros.com*, 5th Dist. Delaware No. 12 CAE 08 0063, 2013-Ohio-2848, ¶ 26, and *Ivanicky v. Pickus*, 8th Dist. Cuyahoga No. 91690, 2009-Ohio-37, ¶ 8, 13, Rayco contends that "[w]hen asked to enforce a settlement agreement," the "correct legal standard" is whether the record contains clear and convincing evidence of both the terms of the settlement agreement and the parties' assent to those terms. Rayco further contends that since the trial court instructed the advisory jury that appellees needed to prove the existence of a settlement agreement by a preponderance of the evidence, we must assume that the trial court applied a preponderance of the evidence standard in determining that the parties had agreed to settle the case for $3,050,000.

{¶ 77} Following a thorough review of the record and the relevant case law, we cannot say that the trial court applied the wrong standard of proof in determining that a settlement agreement existed in this case. In the cases cited by Rayco, the evidence the court relied upon when referencing the clear and convincing evidence standard was evidence of an oral settlement agreement. *See Brilla* at ¶ 20-21 (observing that "a settlement agreement may be enforced regardless of whether it

has been reduced to writing, as long as the terms of the agreement can be established by clear and convincing evidence" and concluding that an enforceable settlement agreement existed where, "even disregarding the magistrate's documentation of [the parties' settlement] agreement," it was clear to the court that the terms of the agreement and appellant's assent to those terms "may be established by clear and convincing evidence"), citing *Shetler*, 9th Dist. Wayne No. 00CA0070, 2001 Ohio App. LEXIS 2289, at 3 ("An oral settlement agreement 'can be enforced by the court in those circumstances where the terms of the agreement can be established by clear and convincing evidence.'"), quoting *Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 799, 615 N.E.2d 1071 (10th Dist.1992); *Foor* at ¶ 5, 26 (where during a telephone conversation, counsel agreed that the parties would each "walk away" but the parties did not mutually understand what that meant, trial court erred in finding that a "completed settlement agreement" was proven by clear and convincing evidence); *see also Cugini & Capoccia Builders, Inc. v. Tolani*, 5th Dist. Delaware No. 15 CAE 10 0086, 2016-Ohio-418, ¶ 18 ("when the alleged settlement agreement is verbal and not written, the existence and the terms of such agreement must be established by clear and convincing evidence"); *Stanton v. Holler*, 7th Dist. Belmont No. 07 BE 29, 2008-Ohio-6208, ¶ 14 ("A settlement agreement that has not been reduced to writing may be enforced if its terms can be established by clear and convincing evidence.").

{¶ 78} In this case, by contrast, the purported settlement agreement is evidenced by writings on all sides, including the mutual exchange of drafts of the written settlement agreement that set forth the essential terms of the settlement.

{¶ 79} Further, in *Ivanicky*, although the appellant argued on appeal that the trial court had erred in enforcing appellee's motion to enforce a settlement agreement because appellee did not offer clear and convincing evidence that an oral settlement agreement had been reached, this court held only that the trial court had erred in failing to hold an evidentiary hearing prior to confirming the settlement; it did not indicate what standard should be applied in determining whether an enforceable settlement agreement existed. *Ivanicky* at ¶ 8, 13.

{¶ 80} Particularly where, as here, there is written evidence of a settlement agreement, other courts — including this court — have indicated that a preponderance of the evidence standard applies in determining whether a settlement agreement exists. *See, e.g., Hillbrook Bldg. Co. v. Corporate Wings*, 8th Dist. Cuyahoga No. 68619, 1996 Ohio App. LEXIS 3854, 9-13 (Sept. 5, 1996) ("'Reduced to its simplest terms, a settlement agreement is a contract. The party asserting the contract (settlement agreement) must prove by a preponderance of the evidence the existence of the elements of the contract, including an offer, acceptance and consideration as to the existence of the contract and as to its terms.'"), quoting *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 456 N.E.2d 1309 (10th Dist.1982); *Sutter v. Henkle*, 3d Dist. Mercer No. 10-15-14, 2016-Ohio-1143, ¶ 9; *Savoy Hospitality, L.L.C. v. 5839 Monroe St. Assocs. L.L.C.*, 6th Dist.

Lucas No. L-14-1144, 2015-Ohio-4879, ¶ 26; *Burrell Industries, Inc. v. Cent. Allied Ents.*, 7th Dist. Belmont Nos. 96 BA 18 and 96 BA 25, 1998 Ohio App. LEXIS 6176, 12-13 (Dec. 15, 1998); *Rondy, Inc. v. Goodyear Tire Rubber Co.*, 9th Dist. Summit No. 21608, 2004-Ohio-835, ¶ 7; *State v. Lomaz,* 11th Dist. Portage Nos. 2002-P-0118 and 2003-P-0062, 2006-Ohio-3886, ¶ 48; *see also DSW, Inc. v. Zina Eva, Inc.*, S.D.Ohio No. 2:11-cv-0036, 2011 U.S. Dist. LEXIS 143377, 5 (Dec. 13, 2011) ("Although there is some suggestion that if the agreement is oral only, the burden of proof is by clear and convincing evidence, * * * where there is a written agreement, the burden (under Ohio law) appears to be the same as in any other case based on breach of contract, and that is to 'prove by a preponderance of the evidence the existence of the elements of the contract, including offer, acceptance and consideration both as to the existence of the contract and as to its terms.'"), quoting *Ohio State Tie & Timber* at 240.

{¶ 81} In this case, however, regardless of whether a preponderance of the evidence or a clear and convincing evidence standard applies, a review of the record shows that the trial court's finding that the parties entered into an enforceable settlement agreement is supported by sufficient competent, credible evidence. Here, the material facts relating to the parties' settlement negotiations were undisputed. Based on the facts set forth in the parties' joint stipulation of undisputed facts, not only was there a clear offer and acceptance showing a mutual understanding of the essential terms, the parties thereafter confirmed their settlement agreement in various follow-up communications. The only evidence

Rayco offered to refute the existence of a settlement agreement was Attorney Drushal's testimony that he believed "everybody needed to sign off" on the final version of the agreement before the parties had a settlement. However, that testimony was contradicted by (1) his co-counsel's April 4, 2017 voicemail message to Attorney Vargo (in which Attorney Kehoe stated indicated that "[t]he settlement document itself is fine" and that "[w]e had John [Bowling's] commitment to settle with the number that we agreed upon, but he's being a little bit difficult in getting the document signed") and (2) Attorney Kehoe's testimony at the hearing that he had intended, by his words and actions, to consummate a settlement with appellees' counsel. Thus, the uncontroverted evidence in this case was not only sufficient to prove the existence of a settlement agreement by the greater weight of the evidence under a preponderance of the evidence standard but was also sufficient to produce a firm belief or conviction in the mind of the trier of fact as to the existence of a settlement agreement, so as to establish the existence of a settlement agreement under a clear and convincing evidence standard. *See In re Phillips*, 3d Dist. Marion Nos. 9-96-44, 9-96-45, and 9-96-46, 1997 Ohio App. LEXIS 1152, 4-8 (Mar. 13, 1997) (trial court's improper use of a lower standard of proof was harmless error where the evidence plainly demonstrated that the movant had proven its case by the requisite clear and convincing evidence).

{¶ 82} Accordingly, we overrule Rayco's third assignment of error.

The Witness-Advocate Rule

{¶ 83} In its second assignment of error, Rayco argues that the trial court erred by permitting appellees' counsel to testify at the hearing in violation of the "witness-advocate rule." The "witness-advocate rule" is based on Prof.Cond.R. 3.7(a). That rule provides:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) the disqualification of the lawyer would work substantial hardship on the client.

{¶ 84} Prof.Cond.R. 3.7(a), however "does not render a lawyer incompetent to testify as a witness on behalf of his client. Rather, * * * the [r]ule functions to allow the court to exercise its inherent power of disqualification to prevent a potential violation of [the ethics rules]." *Damron v. CSX Transp., Inc.*, 184 Ohio App.3d 183, 2009-Ohio-3638, 920 N.E.2d 169, ¶ 39 (2d Dist.); *see also Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 258-259, 510 N.E.2d 379 (1987) (noting that the "Code of Professional Responsibility 'does not delineate rules of evidence but only sets forth strictures on attorney conduct'" and that "[w]hen an attorney seeks to testify, his employment as counsel goes to the weight, not the competency, of his testimony"), quoting *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 539 (3d Cir. 1976). In *Mentor Lagoons*, the

Ohio Supreme Court, applying the disciplinary rules then in place, set forth a procedure for courts to follow in determining whether a lawyer can serve as both an advocate and a witness. *Mentor Lagoons* at paragraph two of the syllabus; *see also 155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 427-428, 650 N.E.2d 869 (1995). As the Second District explained in *Damron*, when applying that procedure in the context of the subsequently adopted Ohio Rules of Professional Conduct:

> In determining whether a lawyer can serve as both an advocate and a witness, a court must first determine the admissibility of his testimony without reference to the Disciplinary Rules. If the court finds the testimony admissible, and a party or the court moves for the attorney to withdraw or be disqualified, the court must then consider whether any exceptions to Prof.Cond.R. 3.7(a) apply to permit the attorney to both testify and continue representation.

Id. at ¶ 39. Where a party moves for disqualification, the moving party bears the burden of proving that disqualification is necessary. *McCormick v. Maiden*, 6th Dist. Erie No. E-12-072, 2014-Ohio-1896, ¶ 11, citing *Baldonado v. Tackett*, 6th Dist. Wood No. WD-08-079, 2009-Ohio-4411, ¶ 20. The burden of proving that one of the exceptions in Prof.Cond.R. 3.7(a)(1)-(3) applies falls upon the attorney seeking to claim the exception. *McCormick* at ¶ 11.

{¶ 85} In this case, the trial court was not asked to exercise its "inherent power of disqualification" to prevent a potential violation of the Rules of Professional Conduct. Instead, after appellees' counsel conducted voir dire, gave their opening statements and called their first witness — Attorney Vargo — Rayco's counsel objected to his testimony based on the witness-advocate rule.

{¶ 86} It should have come as no surprise that counsel for appellees would testify at the evidentiary hearing. This is not a case in which the testimony presented could have been elicited by other means. Aside from the mediator and the clients themselves, who were not directly involved in the settlement negotiations after the parties stopped working with the mediator, the only persons with personal knowledge regarding the parties' settlement negotiations were the parties' attorneys. Although the parties had attempted to avoid having their attorneys testify by submitting a joint motion for leave to file a stipulation of undisputed facts regarding appellees' motion to enforce settlement agreement, the trial court denied their request to have appellees' motion decided based on the stipulation.

{¶ 87} As explained in the comments to Prof.Cond.R. 3.7, the rationale for the advocate-witness rule is as follows:

> The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Comment 2, Prof.Cond.R. 3.7.

{¶ 88} Rayco argues that it was prejudiced by appellees' counsel serving as both witnesses and advocates at the hearing because it enabled appellees' counsel to refer to their own testimony during closing arguments and urge the jury to accept

their recitation of the facts — in essence vouching for "the truthfulness of their own testimony."

{¶ 89} However, in this case, the jury had only an advisory role. The advisory jury gave its "advice," based on its view of the evidence, to the trial court, but its decision was not binding on the trial court. The trial court was required to make its own independent findings of fact and conclusions of law as if there had been no verdict from the advisory jury. The trial court was well aware of the different roles assumed by appellees' counsel at the hearing and was not likely to be confused or misled by the lawyers' dual capacities. *See Michael P. Harvey Co., L.P.A. v. Ravida*, 2012-Ohio-2776, 972 N.E.2d 1087, ¶ 5 (8th Dist.) (noting that "[t]he concerns expressed in the comments to Prof.Cond.R. 3.7(a)(2)" had "no applicability" where the case was tried to the court, the court "fully understood" that lawyer was acting pro se and "should have been able to distinguish between his role as advocate and his role as a witness without the same risk of confusion that might have been present had the case been tried to a jury").

{¶ 90} Further, the matters as to which appellees' counsel testified were not in dispute. *See* Prof.Cond.R. 3.7(a)(1). Appellees' counsel's testimony tracked the stipulation of undisputed facts the parties had jointly submitted and admitted into evidence at the hearing. When testifying on cross-examination, Attorney Kehoe acknowledged that 95 percent of appellees' counsel's testimony was "substantively accurate" and that the "few details around the edges that [he] might * * * state differently" were not material.

{¶ 91} Accordingly, Rayco was not prejudiced by appellees' attorneys' testimony and the trial court did not abuse its discretion or otherwise err in permitting appellees' attorneys to testify at the hearing. *See Erie Air Conditioning & Heating, Inc. v. S.C. Co.*, 8th Dist. Cuyahoga No. 63216, 1993 Ohio App. LEXIS 3652, 19-22 (July 22, 1993) (trial court did not abuse its discretion in failing disqualify plaintiff's counsel or in allowing plaintiff's counsel to testify in defense of counterclaim and in rebuttal of defendants' case-in-chief where motion to disqualify counsel was filed on the eve of trial and to have prevented counsel from testifying would have worked a substantial hardship on the client given counsel's unique role in the contested dealings). Rayco's second assignment of error is overruled.

Request for Attorney Fees Incurred to Enforce the Settlement Agreement

{¶ 92} In their cross-assignment of error, appellees argue that the trial court erred in denying their request for an award of the reasonable attorney fees they incurred to enforce the parties' settlement agreement. Rayco argues that the American Rule "applies to actions seeking to enforce a settlement agreement" and that the trial court properly denied appellees' request for attorney fees because "in the absence of a finding of bad faith, a trial court commits reversible error in awarding attorney fees on a motion to enforce a settlement agreement." Applying the decision of the en banc court above, we find that the trial court erred in refusing to award appellees their reasonable attorney fees incurred in enforcing the

settlement agreement as compensatory damages for Rayco's breach of the settlement agreement.

{¶ 93} Rayco also argues that we should affirm the trial court's decision to deny appellees' request for attorney fees because appellees presented no evidence at the hearing regarding the amount of attorney fees they incurred in enforcing the settlement agreement or the reasonableness of those fees. However, as stated in the trial court's journal entry, the issue to be decided at the hearing was "whether the parties entered into a contract to settle the lawsuit."[8] After that issue was decided, the trial court inquired whether it had "enough law [and] evidence" to decide "whether to award fees or not." The trial court granted the parties leave to submit "legal briefs" on the "legal question of what circumstances give rise to an award of attorneys' fees in favor of [a] prevailing movant to enforce [a] settlement agreement" and whether "a motion to enforce in and of itself gives rise to a potential entitlement for fees." There was no opportunity for appellees to present evidence as to the amount of attorney fees they contended should have been awarded.

{¶ 94} Accordingly, appellees' cross-assignment of error is sustained.

{¶ 95} The trial court's judgment is affirmed to the extent that it grants appellees' motion to enforce the settlement agreement and reversed to the extent that it denies appellees' motion for attorney fees. Case remanded for a

[8] Appellees also filed a motion in limine to limit testimony and evidence at the hearing to the issue of the "settlement between the parties," which the trial court granted.

determination of the amount of reasonable attorney fees appellees incurred to enforce the settlement agreement.

{¶ 96} Judgment affirmed in part; reversed in part; case remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

_____
EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
RAYMOND C. HEADEN, J., CONCUR

[Cite as *Beneficial Fin. I., Inc. v. Saunders*, 2019-Ohio-3577.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

BENEFICIAL FINANCIAL I INC.,	:	
Plaintiff-Appellee,	:	Case No. 18CA5
vs.	:	
DOYLE J. SAUNDERS, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Marc E. Dann and Emily White, Cleveland, Ohio, for appellants.

Matthew J. Richardson, Columbus, Ohio, for appellee.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-28-19
ABELE, J.

{¶ 1} Doyle J. Saunders and Sharon A. Saunders, defendants below and appellants herein, appeal a Gallia County Common Pleas Court summary judgment in favor of Beneficial Financial I Inc., successor in interest to HFTA Corporation, successor by merger to HFTA First Financial Corporation, formerly known as Transamerica, on its foreclosure action.

{¶ 2} Appellants assign one error for review:

FIRST ASSIGNMENT OF ERROR:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE WHERE APPELLEE WAS BARRED AS A MATTER OF LAW FROM ENFORCING A LOST NOTE IT ACQUIRED FROM AN UNIDENTIFIED ASSIGNOR, AND WHERE IT FAILED TO PRESENT ADMISSIBLE EVIDENCE DEMONSTRATING THE TERMS OF THE PROMISSORY NOTE,

DEFAULT IN PAYMENTS, OR AMOUNT OWED."

{¶ 3} In January 1997, Sharon and Doyle Saunders (appellants) executed a $64,513.19 promissory note payable to Transamerica Financial Services. The note was secured by a mortgage on their property at 178 Church Street in Bidwell, Ohio. On October 5, 2015, Beneficial Financial I Inc., plaintiff below and appellee herein, filed a foreclosure action and sought (1) relief on the note and the mortgage, (2) reformation of the legal description of property included in the mortgage, and (3) a declaratory judgment that appellee is entitled to enforce the note, which had been lost, over against HSBC Finance Corporation.[1]

{¶ 4} Appellee's complaint alleged that they are entitled to enforce the promissory note, with an unpaid balance of $46,226.01 plus interest from April 3, 2011. Appellee further alleged that appellants were in default in payment and declared the debt to be immediately due and payable. Appellee stated that on September 10, 2014, the mortgage was assigned from HSBC Finance Corporation, Successor by Merger to HFTA Corporation, Successor by Merger to HFTA First Financial Corporation f/k/a Transamerica Financial Services to Beneficial Financial I Inc. Appellee further stated that Holzer Hospital Foundation, State of Ohio Department of Taxation and the Treasurer of Gallia County, have or claim to have an interest in the premises.

{¶ 5} As part of the complaint, appellee also asserted that, although the appellants are the owners of the property, through inadvertence or error, the legal description, as contained in the mortgage deed, does not conform to the legal description set forth in the warranty deed book. However, the parties' intention at the time of the execution of the mortgage deed was to transfer to

[1] At the time appellee filed the complaint, HSBC Finance Corporation had not been made a party to the complaint.

the appellee all interest that the appellants had in the property. Thus, through a scrivener's error the legal description was not entirely and properly placed in the mortgage deed and deed of conveyance. Accordingly, appellee stated that it was entitled to a declaratory judgment that it is the party entitled to enforce the promissory note and demanded that the mortgage deed be reformed to provide for the proper legal description. Appellee further demanded judgment against the appellants, jointly and severally, for $46,226.01 plus interest from April 3, 2011, plus late charges, any deferred non interest/interest bearing amounts, advances for taxes and insurance, and all other expenditures recoverable under the note, the mortgage and Ohio law.

{¶ 6} Appellee also attached to the complaint a lost-note affidavit from Lori Washington, Vice President and Assistant Secretary of Administrative Services Division of Beneficial, executed April 22, 2014, that states in part:

> 3. I am making this Lost Note Affidavit in connection with a promissory note and/or loan agreement ("Note"), in which Doyle J. Saunders and Sharon A. Saunders, promised to pay the Lender the sum of $64,513.19 (the "Loan"). The Loan is identified as Account Number ***.
>
> 4. On or about the date on which this Affidavit was executed, a diligent search for the original Note was conducted. The search included looking in the physical files and secure storage facilities where the original Note and other documents related to Account * * * are maintained.
>
> 5. After conducting the search described in paragraph 4 above, Lender was not able to locate either the original or a copy of the Note. Therefore, the Lender cannot reasonably obtain possession of the original Note because the whereabouts of the original Note cannot be determined although the Lender was in possession of the original Note prior to its whereabouts becoming undeterminable.
>
> 6. The records maintained by the Lender, including the mortgage associated with 178 Church St. Bidwell, OH, 45614 as well as a payment history are attached as composite Exhibit 1, and were used to establish the terms of the Note and also established that the Note was not paid, satisfied, pledged, transferred or lawfully seized.

> 7. The terms of the Note were input into the servicing system, and include among other things the principal balance, property address, the names of the obligors and mortgagers, interest rate, payment dates, term, and account number. The information detailed above was then used to service the loan, including the recording of payments, as well as fees and costs relating to the Loan.
>
> 8. The interest rate set forth in the Note, as detailed by the Lender's records attached as composite Exhibit 1, was 14.499%, the date of the first payment was due on March 3, 1997 and the final payment was to be made on or before February 03, 2027.
>
> 9. The amount of the monthly principal and interest payments due under the terms of the Note, as detailed by the Lender's records attached as composite Exhibit 1 are $790.00.
>
> 10. Lender hereby agrees to hold the Borrowers harmless and agrees to indemnify them from any loss they may incur by reason of a claim by another person or entity to enforce the note.

{¶ 7} Appellee also attached to the complaint: (1) a copy of the appellants' mortgage with Transamerica Financial Services in the amount of $64,513.19, dated January 29, 1997, (2) a copy of the mortgage assignment to it from HSBC, successor by merger to HFTA Corporation, successor by merger to HFTA First Financial Corporation f/k/a Transamerica, and (3) a copy of Beneficial's Preliminary Judicial Report according to which the property was encumbered with six Ohio tax liens and one judgment lien.

{¶ 8} On March 17, 2016, appellee filed an amended complaint for foreclosure, declaratory judgment and other equitable relief. Also, appellee added a new party defendant, HSBC Finance Corporation. On April 22, 2016, appellee filed a motion for default judgment. Appellants filed a motion to strike Exhibit A (lost-note affidavit of Lori Washington) of the appellee's amended complaint for foreclosure and alleged that the lost-note affidavit failed to satisfy the R.C. 1303.38(A)(1) requirements.

{¶ 9} On October 4, 2016, appellee filed an amended Exhibit A to its October 5, 2015

complaint. The amended Exhibit A is a Lost Note Affidavit from Jeffrey W. Kordecki, Vice President and Assistant Secretary of the Administrative Services Division of Beneficial. This affidavit averred: "The Lender acquired ownership of the Note from a person who was entitled to enforce the Note when its whereabouts became undeterminable." On October 12, 2016, the appellants filed a renewed motion to strike Exhibit A.

{¶ 10} On February 1, 2017, appellee filed a Civ.R. 55 motion for default judgment and a Civ.R. 56 motion for summary judgment, accompanied by an affidavit in support from Heather R. Tibbetts, Vice President and Assistant Secretary of the Administrative Services Division of Beneficial, dated January 30, 2017. Tibbetts attested to the assignment of mortgage, the payment history, the terms of the mortgage, and the amount due. In addition, Tibbetts' affidavit stated in part:

> 5. I attest that the original note has been lost, destroyed, or cannot otherwise be located despite reasonable diligence; that Plaintiff was in possession and entitled to enforce said note when the loss of possession occurred or acquired ownership of the instrument from a person entitled to enforce the instrument when the loss of possession occurred; that the loss of possession was not a result of a transfer by the Plaintiff or a lawful seizure.

{¶ 11} On February 13, 2018, the trial court issued its decision and determined that:

> Plaintiff has set forth sufficient evidence to show it is the proper party to enforce the note and mortgage herein, that the mortgage was assigned, and that the note, although lost, was transferred to plaintiff and that the mortgage refers to the note. As held in *Bank of New York v. Dobbs*, 2004-Ohio-4742, citing the Restatement III, Property, Section 5.4(b) 'Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.' The Court then stated 'Thus, the obligation follows the mortgage if the record indicates the parties so intended.'
>
> Plaintiff has presented evidence by way of affidavits that the note was transferred with the mortgage. Defendants have failed to set forth any evidence that

> would indicate otherwise. * * *
>
> The Court hereby rules that plaintiff is entitled to foreclose upon the note and mortgage and that plaintiff is entitled to reformation of the legal description contained in the mortgage.

{¶ 12} Thus, on March 19, 2018 the trial court granted summary judgment and concluded that (1) Beneficial is entitled to a declaratory judgment that it is the party entitled to enforce the promissory note, and (2) defendants HSBC Finance Corporation, Successor by Merger to HFTA Corporation, Successor by Merger to HFTA First Financial Corporation f/k/a Transamerica Financial Services are barred from claiming any interest in the note. The court also reformed the mortgage deed. This appeal followed.

I.

{¶ 13} In their sole assignment of error, appellants contend that the trial court erred in granting summary judgment because Beneficial should be barred as a matter of law from enforcing a lost note that it acquired from an unidentified assignor, and when it failed to present admissible evidence to demonstrate the terms of the promissory note, default in payments, or the amount owed.

{¶ 14} Generally, summary judgment proceedings present an appellate court with the unique opportunity to review the evidence in the same manner as the trial court. *Smiddy v. Wedding Party, Inc.*, 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). Civ.R. 56 provides that summary judgment may be granted only after the trial court determines:

> 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). It is also well

established that a party seeking summary judgment bears the burden to demonstrate that no issues of material fact exist for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A dispute of fact is "material" if it affects the outcome of the litigation, and is "genuine" if demonstrated by substantial evidence going beyond the allegations of the complaint. *Burkes v. Stidham,* 107 Ohio App.3d 363, 371, 668 N.E.2d 982 (8th Dist.1995), *Myers v. Jamar Enterprises,* 12th Dist. Clermont No. CA2001-06-056, 2001 WL 1567352, *2 (Dec. 10, 2001). The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ,* 37 Ohio St.2d 150, 151-152, 309 N.E.2d 924 (1974).

{¶ 15} "'To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due.'" *HSBC Mtge. Servs., Inc. v. Watson,* 3d Dist. Paulding No. 11-14-03, 2015-Ohio-221, ¶ 24, quoting *Wright-Patt Credit Union, Inc. v. Byington,* 6th Dist. Erie No. E-12-002, 2013-Ohio-3963, ¶ 10; *Deutsche Bank Natnl. Trust Co. v. Najar,* 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Bank of Am., N.A. v. Sweeney,* 8th Dist. Cuyahoga No. 100154, 2014-Ohio-1241, ¶ 8.

{¶ 16} Appellants first assert that Beneficial failed to adequately demonstrate that it is a party entitled to enforce the note. R.C. 1303.31(A) identifies three entities entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce

the instrument pursuant to R.C. 1303.38 or 1303.58(D).

{¶ 17} At the time Beneficial filed this action, R.C. 1303.38, Ohio's version of Section 3-309 of the Uniform Commercial Code (U.C.C.), provided for the enforcement of lost, destroyed, or stolen instruments and stated:

> (A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:
>
> (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
>
> (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
>
> (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Further, under R.C. 1303.38(B), a party who seeks to enforce a lost note must prove the terms of the instrument.

{¶ 18} Before Beneficial filed its February 1, 2017 summary judgment motion, the General Assembly amended R.C. 1303.38(A)(1) to be less restrictive (effective September 28, 2016). Appellants argue that although the legislature amended the statute, to permit an assignee to enforce a lost instrument acquired from a party who was in possession and entitled to enforce the instrument at the time the loss occurred, statutory amendments are presumed to be prospective in operation unless expressly made retroactive. See R.C. 1.48; *Hyle v. Porter*, 117 Ohio St.3d 165, 167, 882 N.E.2d 899 (2008). Thus, appellants argue that the prior version of the statute must apply in this case because it was in effect when the note was lost and the action commenced.

{¶ 19} Appellees, however, contend that the prior version of an amendment should apply only if the amendment is substantive. "The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively." *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000), citing R.C. 1.48; *State v. Cook*, 83 Ohio St.3d 404, 410, 700 N.E.2d 570 (1998), citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), paragraph one of the syllabus. "*If so*, the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial." (Emphasis added.) *Bielat, supra*.

{¶ 20} Consequently, our first step must be to determine whether the General Assembly expressly made the statute retrospective. We point out that the statutes in *Van Fossen* and *Bielat* included language such as "notwithstanding any provision of any prior statute or rule of law" (*Van Fossen*) or "prior to, on, or after the effective date of the Act" (*Bielat*), which indicates that the General Assembly "expressly made [the respective statutes] retrospective" as per R.C. 1.48. However, the statute in question in this case, R.C. 1303.38, contains no such language to indicate retroactivity. Thus, we need not reach the issue of substantive versus remedial and conclude that the former version of R.C. 1303.38 applies to the case at bar.

{¶ 21} Turning to the application of the former version of R.C. 1303.38, we must consider whether "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." To determine whether these statutory requirements are satisfied, we apply a preponderance of the evidence standard. *Bank of New York Mellon Corp. v. Erickson*, 5th Dist. Stark No. 2016CA00155, 2017-Ohio-599, ¶ 27, citing *Fifth Third Mtge. Co. v. Fillmore*, 5th Dist. Delaware No. 12CAE 040030, 2013-Ohio-311, ¶ 36-42.

{¶ 22} Appellants urge us to follow the Third District's analysis in *U.S. Bank, N.A. v. Jones*, 2016-Ohio-7168, 71 N.E.3d 1233 (3d Dist.). In *Jones*, the court concluded that the lost-note affidavit, executed by Wells Fargo after it allegedly had assigned the note and mortgage to U.S. Bank, stated that Wells Fargo "is the lawful owner of the Note" and that Wells Fargo "has not cancelled, altered, assigned, or hypothecated the Note." The court, however, emphasized that R.C. 1303.38 requires that the person in possession of the instrument and entitled to enforce it when the loss of possession occurred must set forth in the lost-note affidavit when the note was lost or that Wells Fargo was the servicing agent for U.S. Bank when the note was lost. Further, the court noted that the additional affidavit of judgment, executed by Wells Fargo several years after it allegedly had assigned the note and mortgage to U.S. Bank, stated that Wells Fargo is the servicing agent for U.S. Bank, but the affidavit did not state when the note was lost or that Wells Fargo was the servicing agent for U.S. Bank when the note was lost. Instead, the affidavit simply referenced the earlier lost-note affidavit. Thus, after its review, the Third District concluded that "no evidence in the record to establish that U.S. Bank was in possession of the note, *and* entitled to enforce the note *when loss of possession occurred.* At best, the evidence only establishes that U.S. Bank *may* have been entitled to enforce the note when loss of possession occurred, and this is insufficient to establish that U.S. Bank was entitled to enforce the lost note under R.C. 1303.38(A)(1)." *Jones* at ¶ 22-23. We observe, however, that in *Jones,* unlike the facts in the case sub judice, the foreclosure plaintiff did not provide testimony that it was in possession of the note when it was lost. Rather, the plaintiff's servicer, who was also the original lender under the note, testified that it, instead of the plaintiff, was the lawful owner of the note. *Jones* at ¶ 22. In addition, the servicer did not state whether the note was lost before or after the note and mortgage were transferred to the plaintiff,

creating a question as to which party was in possession of the note when it was lost.

{¶ 23} Beneficial contends that we should follow the Fifth District's analysis in *Bank of New York Mellon Corp. v. Erickson,* 5th Dist. Stark No. 2016CA00155, 2017-Ohio-599, *supra,* where the court considered a lost-note affidavit and concluded that a foreclosure plaintiff satisfies the R.C. 1303.38(A) requirements by producing testimony to indicate that (1) the servicer or its predecessor (as servicer or by merger) or the custodian, acquired possession of the note, (2) possession of the note cannot be reasonably determined because the note was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person, and (3) the loss of possession of the note is not the result of a rightful transfer or a lawful seizure of the note. *Erickson* at ¶ 28.

{¶ 24} The Fifth District, in applying the former version of R.C. 1303.38, concluded that the plaintiff sufficiently established that, although the original note could not be located, the summary judgment burden must shift to the defendant to demonstrate a genuine issue of material fact for trial. While the *Erickson* defendant argued that the lost-note affidavit failed to establish, by a preponderance of the evidence, that the bank was in possession of the note and entitled to enforce the note when the loss of possession occurred, the Fifth District concluded that the defendant did not supply any Civ.R. 56 evidence to contradict the information supplied in the lost-note affidavit or to show any issue of material fact in dispute. *Erickson* at ¶ 29. Many other courts have also found lost-note affidavits, similar to the ones in the case at bar, to be sufficient. For example, in *Huntington Natnl. Bank v. Cade*, 8th Dist. Cuyahoga No. 103674, 2016-Ohio-4705, the Eighth District considered a lost-note case in which a bank employee's affidavit averred that the original note was lost and she could not locate it despite a diligent search of the records, but that Huntington was in possession of the note and entitled to enforce it when loss of possession occurred and that the

loss of possession was not the result of a transfer by Huntington or a lawful seizure. The affiant employee also affirmatively stated that she possessed personal knowledge of the facts and matters recited in the affidavit due to her job functions. *Cade* at ¶ 12. The Eighth District noted that Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. *See Bush v. Dictaphone Corp.,* 10th Dist. Franklin No. 00AP-1117, 2003-Ohio-883, ¶ 73. Also, no requirement exists that an affiant explain the basis for his or her personal knowledge when personal knowledge can be reasonably inferred based on the affiant's position and other facts contained in the affidavit. *Nationstar Mtge., L.L.C. v. Wagener,* 8th Dist. Cuyahoga No. 101280, 2015-Ohio-1289, ¶ 26. An affiant's specific averment that an affidavit is made on personal knowledge is sufficient to satisfy the requirement of Civ.R. 56(E) unless controverted by other evidence. *Charter One Mtge. Corp. v. Keselica,* 9th Dist. Lorain No. 04CA008426, 2004-Ohio-4333.

{¶ 25} The *Cade* court also concluded that Huntington produced sufficient evidence of its right to enforce the note under R.C. 1303.38, which shifted the burden to Cade to set forth sufficient facts to demonstrate that a genuine issue of material fact exists for trial. Cade, however, supplied no rebuttal evidence to contradict the information in the lost-note affidavit or to show any disputed issue of material fact. Thus, because Huntington's evidence was not rebutted, the magistrate found that the note was lost prior to the foreclosure filing, that Huntington had possession of the note and was entitled to enforce the note when it lost possession, and the loss was neither a result of a transfer of the note by Huntington nor a lawful seizure of the note by another entity. *Cade, supra,* at ¶ 14,

{¶ 26} Similarly, in the case at bar the lost-note affidavits state that they are based upon personal knowledge obtained through the review of, and in reliance upon, business records concerning the loan. Moreover, Tibbetts' affidavit satisfied the elements of appellee's prima facie

case for foreclosure. In her affidavit, Tibbetts (1) authenticated the mortgage and the mortgage assignment from HSBC to Beneficial, (2) testified that the appellants are in default with the loan currently due for the May 3, 2011 monthly installment, (3) testified that the appellants were both sent notice of their default and given an opportunity to cure it, (4) further authenticated the letter that provided such notice, and satisfied all conditions precedent, (5) testified to the amount of principal and interest due, and (6) authenticated a payoff statement reflecting the same.

{¶ 27} In addition to challenging the lost note, appellants argue that the trial court erred in admitting the business records that Beneficial produced from a prior servicer over their hearsay objection. Specifically, appellants claim that Tibbetts did not testify as to her familiarity with the prior servicer's record keeping system and did not lay a foundation for the admissibility of Beneficial's business records. However, Tibbetts expressly stated that she was "comprehensively trained on how {appellee] monitors and tracks loan transactions, and specifically, the way that [appellee] receives, inputs, and maintains critical loan information." As Beneficial asserts, under the adoptive business records exception to the rule against admitting hearsay evidence, "[r]ecords need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business and incorporated into the business records of the testifying entity." *Green Tree Servicing, LLC v. Roberts,* 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 30. Tibbetts' affidavit states: "To the extent such records related to the loan that is the subject of this proceeding ("Loan"), come from another entity, those records were received by [appellee] in the ordinary course of its business, have been incorporated into and maintained as part of [appellee]'s business records and have been relied on by [appellee]." Thus, we find appellants' arguments in this vein to be without merit.

{¶ 28} Finally, appellants assert that appellee "should" have produced "records of merger" regarding the predecessors in interest of HSBC, the party that assigned the appellants' mortgage to Beneficial. However, as appellee notes, Ohio courts have held that borrowers lack standing to challenge the validity of mortgage assignments when they are not a party to such assignments. *See Bank of New York Mellon v. Froimson*, 8th Dist. Cuyahoga No. 99443, 2013-Ohio-5574, ¶ 17 ("It is settled in this appellate district that a mortgagor lacks standing to challenge the assignment of his mortgage directly if the mortgagor is neither a party to, nor a third-party beneficiary of, the assignment contract.") *See also, Chase Home Fin. v. Heft*, 3d Dist. Logan Nos. 8–10–14, 8–11–16, 2012–Ohio–876; *Bridge v. Aames Capital Corp*., N.D.Ohio No. 1:09 CV 2947, 2010 WL 3834059 (Sept. 29, 2010).

{¶ 29} Accordingly, based upon the foregoing reasons, we agree with the trial court's conclusion that Beneficial produced sufficient evidentiary materials to establish its right to enforce the note under R.C. 1303.38. Thus, Beneficial satisfied its initial burden for summary judgment. Consequently, the appellants had a reciprocal burden to produce evidentiary materials to establish a triable issue of fact. We also agree with the trial court's conclusion that appellants failed to produce such evidence. Thus, because Beneficial's evidence was not rebutted, the trial court properly granted summary judgment in favor of Beneficial and appellants' assignment of error is without merit.

{¶ 30} Accordingly, based upon the foregoing reasons, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

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

McFarland, J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.