The Bullet Point: Ohio Commercial Law Bulletin

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Can an email create a binding contract?

Email Satisfies Statute of Frauds

Battle Axe Construction, LLC v. Hafner & Sons, Inc., 1st Dist. Hamilton No. C-180640, 2019-Ohio-4191.

In this appeal, the First Appellate District found that the statute of frauds was satisfied through an email exchange between the parties.

The Bullet Point: The statute of frauds, R.C. 1302.04(A), bars the enforcement of contracts for the sale of goods over $500 unless there is a writing indicating a contract between the parties and signed by the party against whom enforcement is sought. There are exceptions to this rule. For instance, R.C. 1302.04(C)(3) provides that even when a contract fails to satisfy the writing requirement of the statute of frauds, it is still enforceable where the goods have been accepted and paid for.

Attorneys' Fees

Bales v. Forest River, Inc., 8th Dist. Cuyahoga No. 107896, 2019-Ohio-4160.

In this appeal, the Eighth Appellate District affirmed the trial court's decision on the amount of attorney's fees to the plaintiff related to various consumer protection violations.

The Bullet Point: Ohio courts apply a two-part test to the reasonableness of attorney's fees. First, the trial court multiplies the number of hours reasonably expended by the attorney by a reasonable hourly rate. This calculation provides "an initial estimate of the value of the lawyers' services." Second, the court can then adjust the fee upward or downward based on a variety of factors including the time and labor required, novelty and difficulty of the questions involved, fee customarily charged in the locality for similar services, amount involved and results obtained, and the experience, reputation, and ability of the lawyer performing the services. These two steps often overlap.

Settlement Agreements

***Santomauro v. SUMSS Property Management, LLC,* 9th Dist. Summit No. 29032, 2019-Ohio-4335.**

Here, the Ninth Appellate District affirmed in part and reversed in part the trial court's decision enforcing a settlement agreement between the parties.

The Bullet Point: Settlement agreements are contacts and are susceptible to the same defenses a party might have to a contract. Thus, lack of capacity can be a valid defense to the enforcement of a settlement agreement. However, a party who enters into a settlement agreement and later claims to have been incompetent to enter into that settlement must demonstrate by clear and convincing evidence that the agreement was executed while he was mentally incompetent. To demonstrate a lack of competency, a party must show that his mind was so affected at the time he entered the agreement that he did not possess the ability to comprehend the nature or scope of his act, or to appreciate its effect or consequences. A settlement can also be avoided by "duress." "To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." "Three common elements of duress include (1) the involuntary acceptance of terms by one party, (2) no alternative to acceptance under the circumstances, and (3) coercive acts by the other party gave rise to those circumstances."

[Cite as *Battle Axe Constr., L.L.C. v. H. Hafner & Sons, Inc.*, 2019-Ohio-4191.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BATTLE AXE CONSTRUCTION L.L.C., Plaintiff-Appellee,	:	APPEAL NO. C-180640 TRIAL NO. 17CV-03439
vs.	:	*O P I N I O N.*
H. HAFNER & SONS, INC., Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 11, 2019

Yocum & Neuroth, L.L.C., and *Thomas R. Yocum*, for Plaintiff-Appellee,

William Flax, for Defendant-Appellant.

CROUSE, Judge.

{¶1} Defendant-appellant H. Hafner & Sons, Inc., ("Hafner") failed to fulfill its contractual obligation to furnish compactible soil to plaintiff-appellee Battle Axe Construction L.L.C. ("Battle Axe"), and then ignored repeated requests from Battle Axe to remedy the situation. Hafner now appeals the trial court's award of $15,000 in damages to Battle Axe for breach of contract and breach of implied warranty for a particular purpose.

{¶2} In two assignments of error, Hafner argues that the trial court erred in its statute-of-frauds analysis, and in failing to consider Battle Axe's conduct in frustrating Hafner's ability to perform and failure to mitigate damages. Finding both assignments of error to be without merit, we affirm the judgment of the trial court.

Factual Background

{¶3} On April 18, 2016, Joseph Jackson, Battle Axe's CEO, called Justin Cooper, vice president of Hafner, about ordering compactible soil from Hafner. Battle Axe and Hafner had a three-year history of doing business together, and Battle Axe had ordered soil from Hafner before. Jackson testified that "compactible soil" has a standard meaning in the construction industry—that it meets a minimum compaction percentage of 95 percent. Jackson stated that when he called Cooper, Cooper told him that Hafner could supply compactible soil. Per the parties' usual course of doing business, Jackson told Cooper over the phone what he needed, rather than providing him with any sort of specifications sheet. The same day Jackson ordered the soil, he sent trucks to pick it up.

{¶4} Over the course of the entire day, the trucks picked up 23 loads of soil from Hafner and took them to two separate construction projects. Each time a truck took a load, Hafner charged Battle Axe's credit card. Once Battle Axe offloaded and leveled the dirt at the project site, it was tested in multiple areas for compaction. The tests failed at both project sites.

{¶5} Upon discovering that the soil was unfit, Jackson called Cooper and informed him of the problem. Cooper told Jackson that they would "come up with a solution," but then failed to respond to follow-up communications from Jackson. Jackson sent Cooper an email detailing the problem, and requesting that Hafner refund $3,200 for the soil and $2,880 for the trucking costs. Cooper emailed Jackson back and told him that a proctor test had not yet been performed to determine if the soil was compactible. Jackson testified that a proctor test is a method that can be used to determine the compaction of soil. Jackson stated that the email was the first time Cooper mentioned anything about Hafner's need to test the soil. Jackson emailed Cooper back, but did not receive any further responses from Cooper.

{¶6} On April 20, Cooper would not answer the phone or any emails. Jackson did not have time to wait to figure out what to do with the unfit soil. Rather than attempting to haul it back to Hafner, Jackson testified that the most efficient way to dispose of the soil was to transport it to a farm only 15 minutes from the project site. Returning the soil to Hafner would have required Battle Axe's trucks to drive roughly an hour from the project site. Therefore, Battle Axe began to offload the unfit soil at the farm.

{¶7} Jackson stated that he would have waited to load his trucks if he knew Hafner needed to perform a proctor test on the soil prior to pick-up. There was an

inspector (hired by the property owner) on site as they unloaded the soil at the project site, but absent obvious contamination, compaction problems cannot be determined by simple observation of the soil. Jackson testified that the soil must be a certain height before it can be tested with a proctor. The soil wasn't tested until Battle Axe spread the soil out and "lifted" it, which was a day or two after the soil was offloaded.

{¶8} Cooper testified that he never represented to Jackson that the soil was compactible. Cooper stated that he told Jackson in their initial phone call that the soil would require a proctor test before Battle Axe could pick it up. He stated that after his phone call with Jackson, he directed that soil samples be sent to Terracon, an engineering company, for testing to determine if the soil was compactible. Cooper was notified by Jackson that the soil was not compactible before Terracon could perform the tests.

{¶9} Cooper testified that the transaction tickets, which the truck drivers signed for each of the 23 loads, merely described the soil as "fill soil." However, when Battle Axe's trucks showed up to pick up the soil, Hafner did not contact anyone at Battle Axe to tell them the test had not yet been performed, nor did it stop the trucks from loading and hauling the soil away.

{¶10} Hafner advances three main arguments with regard to the first assignment of error: (1) the transaction was actually 23 different sales, none of which were over $500, and so the statute of frauds does not apply, and even if the statute of frauds did apply, the email communications referenced as satisfying the statute of frauds were sent three days after the sales were completed, and so do not satisfy the statute of frauds; (2) there was no meeting of the minds so as to create an implied warranty of fitness for a particular purpose; and (3) Hafner was prevented

from satisfying its obligations under the duty of implied warranty due to Battle Axe's actions in removing the soil and transporting it away.

Standard of Review

{¶11} When reviewing a trial court's judgment to determine if it is against the manifest weight of the evidence, an appellate court

> weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

Eastley v. Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

{¶12} Under a manifest-weight-of-the-evidence review, "every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts." *Id.* at ¶ 21. "If the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment." *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988).

Contract Formation

{¶13} In order for a contract to exist, there must be a meeting of the minds as to the essential terms of the contract. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16.

{¶14} Hafner claims that there was no meeting of the minds as to what the parties meant when they contracted for compactible soil. It argues that Jackson understood the soil as already compactible and ready for pick-up, while Cooper

meant that Hafner would perform a proctor test to determine *if* the soil was compactible. Hafner argues that this disconnect means the trial court erred when it found the existence of a contract and an implied warranty of fitness for a particular purpose.

{¶15} The court was presented with conflicting testimony, and did not err in relying on Jackson's testimony, the phone calls, and the emails in finding that there was a meeting of the minds, and thus, a contract formed. The evidence showed that Cooper told Jackson that Hafner could provide compactible soil. Therefore, he must be held to his promise to perform.

Statute of Frauds

{¶16} R.C. 1302.04(A) bars the enforcement of contracts for the sale of goods over $500 unless there is a writing indicating a contract between the parties and signed by the party against whom enforcement is sought.

{¶17} The trial court found that the emails exchanged between Hafner and Battle Axe on April 21, 2016, were sufficient to satisfy the statute of frauds. The finding is supported by the record. The emails show an agreement between Battle Axe and Hafner in which Battle Axe agreed to pay Hafner $3,200 for engineered soil.

{¶18} Even if the emails were not sufficient, the statute of frauds is satisfied as a matter of law by payment and acceptance. R.C. 1302.04(C)(3) provides that even when a contract fails to satisfy the writing requirement of the statute of frauds, it is still enforceable where the goods have been accepted and paid for. *See Royal Doors, Inc. v. Hamilton-Parker Co.,* 10th Dist. Franklin No. 92AP-938, 1993 WL 141233, *6 (Apr. 29, 1993); *see also Frank Adams & Co. v. Baker*, 1 Ohio App.3d 137, 138, 439 N.E.2d 953 (1st Dist.1981).

{¶19} It is undisputed that Battle Axe accepted the soil and paid Hafner. Therefore, the statute of frauds is satisfied by payment and acceptance, and the contract is enforceable.

{¶20} The trial court's holding that the statue of frauds was satisfied by the writings was not against the manifest weight of the evidence. Also, the statute of frauds was satisfied by the acceptance of the soil by Battle Axe and payment to Hafner.

Implied Warranty of Fitness for a Particular Purpose

{¶21} The elements of an implied warranty of fitness for a particular purpose are (1) the seller knows of the buyer's particular purpose, (2) the seller knows that the buyer is relying on the seller's skill or judgment to furnish suitable goods, and (3) the buyer actually relies on the seller's skill or judgment. R.C. 1302.28; *Hollingsworth v. The Software House, Inc.*, 32 Ohio App.3d 61, 65, 513 N.E.2d 1372 (2d Dist.1986). As Official Comment One to R.C. 1302.28 notes,

> whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.

{¶22} The trial court found that there was an implied warranty of fitness for a particular purpose because the elements of R.C. 1302.28 were met. The trial court found that (1) Cooper knew Jackson requested and purchased compactible soil, (2) Cooper knew Jackson was relying on his skill and judgment to provide the requested

compactible soil, and (3) Jackson relied on Cooper's skill and judgment when he purchased the soil.

{¶23} Battle Axe was not required to tell Hafner exactly what functions the soil was being used for, rather the circumstances of the sale indicate that Battle Axe was relying on Hafner's expertise to provide it with compactible soil.

{¶24} Hafner claims that even if there was an implied warranty of fitness for a particular purpose, Battle Axe's actions in removing the truckloads of soil before any testing could be done made it impossible for Hafner to satisfy its obligations to deliver the soil "fit" for its particular purpose. Hafner appears to confuse an implied warranty of fitness for a particular purpose with a condition precedent. Its argument that it was Battle Axe's actions which prevented it from fulfilling its obligations under the contract might be persuasive if the proctor test was a condition precedent to the formation of a contract. But, that is not the case.

{¶25} A condition precedent must occur before obligations in a contract become effective. *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 22. If the condition is not fulfilled, the parties are excused from performance. *Id.* Whether a provision of a contract is a condition precedent is a question of the parties' intent, which is determined by the language of the provision, the language of the entire agreement, and the subject matter of the contract. *M3 Producing, Inc. v. Tuggle*, 2017-Ohio-9123, 91 N.E.3d 805, ¶ 14 (5th Dist.).

{¶26} Cooper testified that during his initial phone conversation with Jackson, they agreed on what was essentially a condition precedent—that the soil be tested for compaction prior to either party performing. He also testified that he sent the soil to Terracon to be tested, but cancelled the test once Battle Axe discovered the

problem. Jackson testified that Cooper told him the soil was compactible. Then, when Battle Axe's trucks picked up the soil, no one from Hafner told them the soil still needed to be tested.

{¶27} The trial court was presented with conflicting testimony, and chose to believe Battle Axe's witnesses and evidence, which showed that Jackson requested compactible soil, Cooper knew Jackson was relying on his knowledge and judgment to provide the requested compactible soil, and Jackson actually relied on Cooper's knowledge and judgment when he purchased the soil. Its decision is supported by evidence of prior dealings between the parties, Jackson's testimony, Cooper's testimony that Hafner released the soil to the trucks despite claiming to have sent the soil off to be tested, and the emails between Jackson and Cooper.

{¶28} Hafner's argument also fails under an impossibility-of-performance theory. Impossibility of performance is a defense to a claim for breach of contract, but the act which renders performance impossible must be unforeseeable. *Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 2016-Ohio-4611, 66 N.E.3d 1226, ¶ 16 (1st Dist.). Hafner could have prevented or halted pick-up of the soil at any time, but it did not do so. Battle Axe's removal of the soil was not only foreseeable by Hafner, it was authorized by Hafner. Hafner's first assignment of error is overruled.

Mitigation

{¶29} In Hafner's second assignment of error, it advances two arguments. First, it once again raises Battle Axe's conduct as an excuse for its own nonperformance. As discussed above, Battle Axe's conduct did not frustrate Hafner's ability to perform. Second, Hafner argues that Battle Axe failed to properly mitigate damages.

{¶30} The injured party in a breach-of-contract action cannot recover damages that it could have prevented by "reasonable affirmative action." *First Fin. Bank, N.A. v. Cooper*, 2016-Ohio-3523, 67 N.E.3d 140, ¶ 23 (1st Dist.). The injured party need only use "reasonable, practical care and diligence, not extraordinary measures." *Id.* Whether a party uses reasonable care to avoid damages is a question of fact. *Id.*

{¶31} Battle Axe took reasonable steps to mitigate its damages. Upon discovering that the soil was unfit on April 18, Jackson called Cooper and told him that there was a problem with the soil. Cooper told Jackson that they would "come up with a solution." When Jackson tried to follow up with Cooper, he did not receive any response. So, he emailed Cooper. Cooper initially responded, but again failed to respond to follow-up communications.

{¶32} On April 20, Battle Axe began to transport the unfit soil to a farm near the project site and offload it there. Jackson stated that this was the most efficient way to dispose of the unfit soil because the farm was only 15 minutes from the job site, whereas Hafner was roughly an hour from the job site. Although Battle Axe was not paid by the farm for the soil, Battle Axe purchased "good" soil from the farm to use on its projects, and then left the "bad" soil at the farm. Jackson testified that Hafner could not have resold the soil to someone else because it was "bad dirt," and would not achieve compaction.

{¶33} Hafner claims that Battle Axe did not mitigate damages according to "standard procedures," but fails to articulate what those standard procedures are. Battle Axe's decision to mitigate damages by hauling the soil to the farm was reasonable, and the trial court's award of damages was not against the manifest weight of the evidence.

Conclusion

{¶34} The trial court did not err in finding a contract between Hafner and Battle Axe and an implied warranty of fitness for a particular purpose for Hafner to deliver compactible soil to Battle Axe. Battle Axe's conduct did not frustrate Hafner's ability to perform under the contract. Battle Axe used reasonable care in transporting the unfit soil to a local farm in order to mitigate its damages. Therefore, Hafner's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

ZAYAS, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

[Cite as *Bales v. Forest River, Inc.*, 2019-Ohio-4160.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ROGER BALES,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 107896
v.	:	
FOREST RIVER, INC.,	:	
Defendant-Appellant/ Cross-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 10, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-875918

Appearances:

Burdge Law Office Co., L.P.A. and Elizabeth Ahern Wells, Ronald L. Burdge, and Scarlett M. Steuart, *for appellee/cross-appellant*.

Bruns, Connell, Vollmar & Armstrong, L.L.C. and Kevin C. Connell, Adam C. Armstrong, and Tara F. Taylor, *for appellant/cross-appellee*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant/cross-appellee Forest River, Inc. ("Forest River") and plaintiff-appellee/cross-appellant Roger Bales appeal from a decision of

the trial court awarding Bales $47,637.02 in attorney fees and litigation costs, in connection with the parties' settlement of claims Bales had brought against Forest River for alleged violations of the Ohio Consumer Sales Practices Act and the Magnuson Moss Warranty Act. Forest River contends the trial court failed to provide a sufficient explanation of its attorney fee award and abused its discretion by awarding Bales too much in attorney fees and litigation costs. Bales contends that the trial court abused its discretion by awarding him too little in attorney fees and litigation costs. Finding no merit to the parties' arguments, we affirm the decision of the trial court.

Factual Background and Procedural History

{¶ 2} In January 2016, Bales purchased a 2014 Wildwood travel trailer manufactured by Forest River (the "RV") from Ruff's RV Center in Euclid, Ohio. After he purchased it, Bales had a number of problems with the RV that he attempted to have repaired. On February 14, 2017, Bales filed suit against Forest River, asserting claims of breach of express and implied warranties, violations of the Ohio Consumer Sales Practices Act, R.C. 1345.01 et seq., ("CSPA") and violations of the Magnuson Moss Warranty Act, 15 U.S.C. 2301 et seq., ("MMWA") (collectively, the "RV warranty claims") based on various alleged "malfunctions, defects and problems" he had experienced with the RV, including:

> electrical issues, frame and axle defects, trailer does not sit level, abnormal and excessive tire wear, defective entertainment center, cook top vent flap replaced, finish cracking under power panel to fridge, finish flaking off of silverware drawer, finish cracking under bedroom sliding doors, bedroom door keeps falling off track, stove front burner

> not igniting, foam under sofa seat collapsed, large bow in bathroom wall, tongue jack malfunctions, clips broken on bathroom vent, dinette skirt falling off, outside door won't stay latched, bumper panel had to be repaired, and more.

{¶ 3} Bales alleged that Forest River had breached its warranties because the RV was "out of service for reason of repair" for "more than 100 days in the first year." He sought rescission of the contract and/or damages or other statutory remedies, plus "expenses of suit and litigation," interest from the date of the sales contract and reasonable attorney fees and costs. Forest River filed an answer denying the material allegations of the complaint and asserting numerous defenses. Forest River denied that the RV was defective and claimed Bales had damaged the RV. After the parties completed fact and expert discovery, the case was set for trial.

{¶ 4} On June 27, 2018, the day trial was scheduled to begin, the parties reached a settlement. Forest River agreed to buy back the RV and to pay Bales' "reasonable attorney fees and litigation costs." As stated in the "agreed entry resolving the case" (the "agreed entry"):

> The parties have resolved this matter in that Defendant Forest River, Inc. has agreed to buy back the RV, and to pay Plaintiff's reasonable attorney fees and litigation costs, to be determined by [the] Court in a subsequent Motion for Attorney Fees and Litigation Costs. Plaintiff Roger Bales and Defendant Forest River, Inc. further stipulate and agree that Roger Bales is the prevailing party under all claims in this case for the purpose of seeking attorney fees and litigation costs under R.C. 1345.09(F) and 15 U.S.C. 2310(d).

{¶ 5} On July 13, 2018, Bales filed a motion for attorney fees and ligation costs. Bales requested that the trial court award him $44,417.25 in attorney fees and

$10,499.74 in litigation costs incurred in litigating the RV warranty claims. The $44,417.25 in requested attorney fees were broken down as follows:

Timekeeper	Total Hours	Hourly Rate	Total
Attorney Burdge	0.9 hours	$350.00	$ 360.00[1]
Attorney Wells	125.99 hours	$275.00	$34,647.25
Attorney Steuart	50.20 hours	$175.00	$ 8,785.00
Paralegal	5.0 hours	$125.00	$ 625.00
			$44,417.25

{¶ 6} The $10,499.74 in requested litigation costs consisted of $6,000 in expert costs ($4,500 for an expert inspection and $1,500 for expert testimony), $258.95 in filing fees, $31.00 in facsimile transmission costs, $24.10 for delivery service fees, $550.24 for trial-related hotel and meal expenses, $1165.90 in mileage and parking costs, $49.87 in printing costs, $671.23 for photographs, $21.00 in subpoena fees and $1,727.45 in transcript costs.

{¶ 7} In support of his motion, Bales attached: (1) a copy of the agreed entry; (2) affidavits from Attorneys Ronald Burdge, Elizabeth Ahern Wells and Scarlett Steuart — the three attorneys from Burdge Law Office Co., L.P.A. (the "Burdge law firm") who worked on the case — along with their curriculum vitaes, information regarding their education and experience and itemized billing records; copies of documents related to other cases involving the Burdge law firm in which

[1] This breakdown is set out in the "fee and cost summary" attached to Burdge's affidavit in support of Bales' motion for attorney fees and litigation costs. We note that 0.9 x $350 is not $360 as stated in the summary, but $315. Because no one has mentioned this error, we do not further address it here.

their clients received significant attorney fee awards; (3) a copy of an affidavit from Attorney Krista Ray, dated October 14, 2010, in which she opined $350 was a reasonable hourly rate for Attorney Burdge;[2] (4) copies of Forest River's pretrial statement and responses to Bales' third set of requests for admissions and (5) a copy of a "United States Consumer Law Attorney Fee Survey Report 2015-2016" edited by Attorney Burdge.

{¶ 8} In his affidavit, Attorney Ronald Burdge averred that Bales had paid a $2,500 retainer and that the Burdge law firm had thereafter agreed to represent Bales in this matter on "a contingent hourly rate fee shifting basis," i.e., if Bales did not prevail, the Burdge law firm had no right to recover attorney fees from Bales beyond the retainer, and that Bales was obligated to pay all litigation expenses.

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[2] In her affidavit, Attorney Ray indicates that she is an attorney licensed to practice law in Ohio since November 2009, that she is familiar with Attorney Burdge and his education, training and experience, that she is "familiar with attorney fee hourly rates in southwestern Ohio," having "practiced law in various counties in southwestern Ohio on a regular basis since being licensed" and that a reasonable hourly rate for Attorney Burdge in his consumer law cases "would currently be $350." Although no one has raised the issue, we question the extent to which Attorney Ray's affidavit, executed more than eight years before the fee request here, by an attorney who had been practicing in Ohio for less than a year, regarding hourly rates charged in southwest Ohio in 2010, would be probative of the reasonableness of the fees requested in this case.

Nevertheless, while the presentation of testimony from a "disinterested person" or expert may be the "better practice" when establishing the reasonableness of attorney fees, *Grove v. Gamma Ctr.*, 3d Dist. Marion No. 9-12-41, 2013-Ohio-1734, ¶ 31, such testimony is not required to support a finding that attorney fees are reasonable. *See, e.g.*, *Cleveland v. CapitalSource Bank*, 8th Dist. Cuyahoga No. 103231, 2016-Ohio-3172, ¶ 13 ("[I]n Ohio there is no steadfast rule that the 'reasonableness' of attorney fees must be proved by expert testimony. * * * [E]vidence of reasonableness 'may take the form of testimony, affidavits, answers or other forms of sworn evidence. As long as sufficient evidence is presented to allow the trial court to arrive at a reasonable attorney fee award, the amount of the award will not be disturbed absent an abuse of discretion.'"), quoting *R.C.H. Co. v. 3-J Machining Serv.*, 8th Dist. Cuyahoga No. 82671, 2004-Ohio-57, ¶ 25.

Attorney Burdge further averred that the billing statements attached to his affidavit were "[t]rue and accurate itemized details" of his firm's billing records for the case, that "[b]ased on [his] education, training and experience," the hourly rates charged for the legal services he and the other attorneys and paralegal rendered in the case were reasonable and that the time and expenses billed on the case were reasonable and necessary. Attorneys Wells and Steuart included similar averments in their affidavits. In her affidavits, Attorney Wells further detailed the history of the case, including her efforts to resolve the parties' dispute and the fact that her attorney trial time had been previously awarded in other cases.

{¶ 9} Forest River opposed Bales' motion, asserting that the amount of the recovery — i.e., a loan payoff of $14,672.04 in exchange for title to the RV plus a payment of $2,372.32 to Bales — "did not justify fees and expenses of over $50,000" and that the trial court should award Bales only $7,500 in attorney fees because that amount was "more in line" with the '"amount involved and results obtained'" under *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991).

{¶ 10} Specifically, Forest River argued that plaintiff's counsel's hourly rates should be adjusted downward because the issues in the case "were not novel or difficult" for the Burdge law firm, "which specializes in consumer law," and that plaintiff's counsel presented no "objective" or "other corroborating evidence" beyond their self-serving affidavits that their hourly rates were "reasonable and customary for similar legal services in the locality." Forest River also argued that it should not be charged (1) for $12,480.25 in attorney travel time billed by Bales'

counsel to travel to Cleveland from their offices in Dayton or (2) for $831.25 in allegedly "duplicative work" billed by Attorneys Wells and Steuart "for their time to appear on the morning of trial and participate in negotiations that resulted in the settlement of the case."

{¶ 11} With respect to the $10,499.74 in requested litigation costs, Forest River argued that Bales' expert witness expenses and attorney travel expenses were excessive and not recoverable under the CSPA or the MMWA. Forest River requested that the trial court award Bales only $2,783.60 in litigation costs to cover the "ordinary expenses of litigation such as subpoena fees, deposition transcripts, postage and copying costs." In support of its opposition, Forest River submitted a copy of a powerpoint presentation showing damage Bales allegedly caused to the RV and copies of journal entries from two Franklin County Common Pleas cases in which the trial court awarded plaintiffs represented by the Burdge law firm significantly lower attorney fee awards than had been requested.

{¶ 12} In response, Bales filed a reply in which he requested a 15 percent enhancement of his attorney fees under *Bittner*, 58 Ohio St.3d 143, 569 N.E.2d 464. In its surreply, Forest River asserted that any enhancement of Bales' attorney fees would be "improper."

{¶ 13} The trial court scheduled a hearing on the motion for attorney fees and litigation costs for September 26, 2018. The hearing did not proceed as scheduled. Instead, the parties agreed that the trial court could rule on Bales'

motion for attorney fees and litigation costs based on the parties' briefs, without a hearing.

{¶ 14} On September 27, 2018, Bales filed a "notice of submission of fee records re prosecution of fee petition," requesting an additional $6,187.50 in attorney fees (22.5 hours at an hourly rate of $275) and $280.19 in litigation costs ($111.25 in mileage and $168.94 in online research costs) for a total of $6,467.69 related to the prosecution of his motion for attorney fees and litigation costs. Forest River opposed the request. It argued that preparation of the motion and reply was "mundane and uncomplicated" and that the additional amounts requested, which included $1,237.50 in attorney travel time, $112.50 in attorney travel expenses and $660.00 in attorney time to oppose Forest River's motion for leave to file a surreply to address the enhancement argument Bales raised for the first time in his reply, were "excessive and unreasonable."

{¶ 15} On October 10, 2018, the trial court issued its decision. It awarded Bales (1) $37,761.51 in attorney fees and in $6,641.67 in litigation costs in connection with the litigation of the RV claims and (2) $3,233.84 in attorney fees and litigation costs "directly relating to the briefing" on Bales' motion for attorney fees and litigation costs. The trial court entered judgment in favor of Bales and against Forest River for "total attorney fees and litigation costs of $47,637.02" plus postjudgment interest and court costs.

{¶ 16} Forest River appealed, raising the following two assignments of error for review:

FIRST ASSIGNMENT OF ERROR:
The trial court erred when it failed to state the basis for its determination on the attorney fees and costs awarded to Mr. Bales as required by *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991).

SECOND ASSIGNMENT OF ERROR:
The trial court erred in its award of attorney fees and litigation costs to Mr. Bales in the amount of $47,637.02.

{¶ 17} Bales cross-appealed, raising the following sole cross-assignment of error for review:

The trial court abused its discretion by reducing the amount of attorney fees and litigation costs sought by Plaintiff.

Law and Analysis

Standard for Determining Attorney Fee Award

{¶ 18} In *Bittner*, the Ohio Supreme Court set forth a two-part test for determining a "reasonable" attorney fee award.[3] First, the trial court multiplies the number of hours reasonably expended by the attorney by a reasonable hourly rate. *Bittner*, 58 Ohio St.3d at 145, 569 N.E.2d 464. This calculation provides "an initial estimate of the value of the lawyers' services." *State ex rel. Harris v. Rubino*, 156 Ohio St.3d 296, 2018-Ohio-5109, 126 N.E.3d 106, ¶ 3. The trial court may then

[3] Although *Bittner* involved an attorney fee award under CSPA, courts have applied it to attorney fee awards in other contexts as well. *See, e.g., State ex rel. Harris v. Rubino*, 156 Ohio St.3d 296, 2018-Ohio-5109, 126 N.E.3d 106, ¶ 3 (applying *Bittner* in determining a reasonable attorney fee award under R.C. 733.61 in connection with a successful petition for a writ of mandamus).

adjust the fee upward or downward based on the factors listed in Prof.Cond.R. 1.5(a).[4] *Harris* at ¶ 3, citing *Bittner* at syllabus. These factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

Prof.Cond.R. 1.5(a).

{¶ 19} The party seeking an award of attorney fees bears the burden of demonstrating the reasonableness of the requested fees. *See, e.g., Nordquist v. Schwartz*, 7th Dist. Columbiana No. 11 CO 21, 2012-Ohio-4571, ¶ 22 ("The requesting party bears the burden of proving evidence of any hours worked that would be properly billed to the client, proving the attorney's hourly rate, and

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[4] *Bittner* identified the factors set forth in former DR 2-106(B). After *Bittner* was decided, the Rules of Professional Conduct replaced the Code of Professional Responsibility in Ohio. Accordingly, the factors set out in Prof.Cond.R. 1.5(a) now apply. The factors set forth in former DR 2-106(B) and Prof.Cond.R. 1.5(a) are, however, essentially the same.

demonstrating that the rate is reasonable."), citing *Unick v. Pro-Cision, Inc.*, 7th Dist. Mahoning No. 09MA171, 2011-Ohio-1342, ¶ 28-29.

{¶ 20} Although consideration of the Prof.Cond.R. 1.5(a) factors is commonly described as the "second part" of the *Bittner* attorney-fee-calculation process, the two steps "may overlap * * * because several of the reasonableness factors are often subsumed within the initial lodestar calculation and normally will not provide an independent basis for adjusting the fee award." *Miller v. Grimsley*, 197 Ohio App.3d 167, 2011-Ohio-6049, 966 N.E.2d 932, ¶ 14 (10th Dist.); *see also Harris* at ¶ 12 (where the relevant Prof.Cond.R. 1.5(a) factors were "subsumed within [the court's] initial calculation," the court declined to "further adjust the award based on those factors"). This is because when calculating the initial "lodestar" amount, the trial court should exclude any time the attorney "unreasonably expended," i.e., attorney time that is duplicative, unnecessary or excessive given the tasks performed. *See, e.g., Pack v. Hilock Auto Sales*, 10th Dist. Franklin No. 12AP-48, 2012-Ohio-4076, ¶ 17-18 ("[I]n determining whether hours are unreasonably expended, a trial court inevitably considers the first three reasonableness factors listed above."). "The trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation." *Bittner*, 58 Ohio St.3d at 146, 569 N.E.2d 464.

{¶ 21} We review a trial court's decision regarding an award of attorney fees for abuse of discretion. *Id.* A trial court abuses its discretion where its decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d

217, 219, 450 N.E.2d 1140 (1983). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents. Inc. v. River Place Community Urban Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *see also Ockunzzi v. Smith*, 8th Dist. Cuyahoga No. 102347, 2015-Ohio-2708, ¶ 9 ("'Abuse of discretion' is a term of art, describing a judgment neither comporting with the record, nor reason."). A trial court also acts unreasonably and abuses its discretion when "the amount of fees determined is so high or so low as to shock the conscience." *Bittner* at 146.

{¶ 22} When making an attorney fee award, the trial court must "state the basis for the fee determination" to allow for meaningful appellate review of the attorney fee award. *Id.* If a trial court's decision awarding attorney fees lacks sufficient explanation, an appellate court will reverse the award and remand the matter for the trial court "to further elucidate its analysis." *Calypso Asset Mgmt., LLC v. 180 Indus., LLC*, 2019-Ohio-2, 127 N.E.3d 507, ¶ 29 (10th Dist.).

Trial Court's Statement of Basis for Attorney Fee Award

{¶ 23} In its first assignment of error, Forest River contends that the trial court failed to provide a sufficient statement of the basis for its fee determination under *Bittner* because the trial court did not make specific findings of fact (1) that "the hours submitted through the affidavits of Mr. Bales' attorneys were a reasonable amount of time under the circumstances" and that "the hourly rates submitted by the Burdge firm were reasonable," (2) calculating the number of hours reasonably expended on the case times a reasonable hourly fee and (3) applying and

analyzing each of the relevant Prof.Cond.R. 1.5(a) factors, including specifically identifying which Prof.Cond.R. 1.5(a) factor(s) supported its attorney fee award.

{¶ 24} In this case, the trial court explained the basis for its award of attorney fees and litigation costs, including its calculations and reasoning, as follows:

> To determine reasonable fees to be awarded, the trial court should calculate the number of hours reasonably expended on the case times the hourly fee. This calculation may be modified by those factors listed in DR 2-106(B). The trial court must state the basis for its fee determination. *See Bittner v. Tri-County Toyota*, 58 Ohio St.3d 143 (1991).
>
> Upon reviewing both parties' briefs and plaintiff's breakdown of costs, the court finds:
>
> Plaintiff's requested $44,417.25 for attorney fees is reduced to $37,761.51 as follows:
>
> 1) Duplicative charges for the multiple attorneys' court appearance 06/27/20018 by 50% * * * to $415.62; and
>
> 2) For all travel time incurred, as the court will not order defendant to pay the full plaintiff attorneys' rates for travel, by 50% to $6,240.12.
>
> Plaintiff's requested $10,499.74 for litigation expenses is reduced to $6,641.67 as follows:
>
> 1) By 50% to $3,000.00 for plaintiff's expert report; and
>
> 2) By 50% to $858.07 for travel-related expenses.
>
> Plaintiff's requested attorney fees and litigation costs directly related to the briefing for this decision of $6,467.69 is reduced by 50% to $3,233.84.

{¶ 25} Based on the record before us and the arguments and evidence presented, we believe under the particular facts and circumstances here, the trial court's explanation of its fee award as set forth in its October 16, 2018 journal entry

was a sufficient statement of the basis for the trial court's fee determination to enable us to conduct a meaningful review of the trial court's decision.

{¶ 26} Bales' requested attorney fees and litigation costs were itemized in the affidavits and billing statements submitted in support of Bales' motion. Of those fees and expenses, Forest River specifically challenged only: (1) charges for attorney travel time and travel expenses; (2) $831.25 in charges for alleged "duplicative work" by Attorneys Wells and Steuart; (3) charges for expert witness expenses and (4) charges for prosecuting the motion for attorney fees and litigation costs. Forest River also challenged the fees requested generally, arguing that the trial court should reduce the fees awarded "due to the routine nature of the issues presented in this case" and because the attorney fees and expenses requested were "more than double the amount received by the Plaintiff."

{¶ 27} As an initial matter, we note that the amount of attorney fees awarded in a consumer case "need not bear a direct relationship to the dollar amount of the damages." *Williams v. Sharon Woods Collision Ctr., Inc.*, 2018-Ohio-2733, 117 N.E.3d 57, ¶ 21 (1st Dist.), citing *Bittner*, 58 Ohio St.3d at 144, 569 N.E.2d 464. "'A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious * * * claims but relatively small potential damages to obtain redress from the courts.'" *Bittner* at 144, quoting *Riverside v. Rivera*, 477 U.S. 561, 578, 196 S.Ct. 2686, 91 L.Ed.2d 466 (1986).

{¶ 28} Although Forest River complains that the trial court failed to specifically address and analyze the Prof.Cond.R. 1.5(a) factors in its decision, the

only Prof.Cond.R. 1.5(a) factors Forest River contended warranted a reduction of fees below were Prof.Cond.R. 1.5(a)(1), specifically, "the novelty and difficulty of the questions involved" and Prof.Cond.R. 1.5(a)(4), "the amount involved and the results obtained." As Forest River states in its brief, it "asked the trial court to reduce the fees requested by the Burdge firm due to the routine nature of the issues presented in the case." Forest River did not dispute that the other Prof.Cond.R. 1.5(a) factors supported the hourly rate and fees charged by plaintiff's counsel.[5]

{¶ 29} The cases cited by Forest River are inapposite. This is not a case in which the trial court failed to set out specific reasons for its attorney fee award and the only thing we are able to determine with certainty is the amount awarded. *Compare Santoscoy v. Ganley Nissan, Inc.*, 8th Dist. Cuyahoga No. 75957, 1999 Ohio App. LEXIS 4095, 3, 10-11 (Sept. 2, 1999); *Fine v. U.S. Erie Islands Co.*, 6th Dist. Ottawa No. OT-07-048, 2009-Ohio-1531, ¶ 56-59. This is not a case in which it cannot be reasonably determined from the trial court's decision how it calculated

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[5] As Forest River states in its rely brief:

> Forest River didn't dispute that attorney fees are authorized by the MMWA and the CSPA, that it agreed to pay reasonable fees and litigation costs, or that calculation of the lodestar amount results in a presumptively reasonable fee. Forest River didn't question the burden of proof owed by each party. Forest River didn't challenge the reasonableness of the hourly rate charged by members of the Burdge firm on grounds they were disproportionate to fee charged by other attorneys or claim that the Burdge firm isn't entitled to reasonable compensation for the substantive work they performed in this case.
>
> Instead, Forest River asked the trial court to reduce the fees requested by the Burdge firm due to the routine nature of the issues presented in this case. * * *

the amount of fees awarded. *Compare Ferrari v. Howard*, 8th Dist. Cuyahoga No. 77654, 2002-Ohio-3539, ¶ 74-93. And this is not a case in which the trial court, without explanation, omitted an entire category of requested fees or litigation expenses from its attorney fee award. *See, e.g., Jarmon v. Friendship Auto Sales Co.*, 8th Dist. Cuyahoga No. 86589, 2006-Ohio-1587, ¶ 9.

{¶ 30} In determining the amount of attorney fees to award a party, there is no requirement that the trial court make specific findings regarding factors or issues that are not in dispute. The trial court's decision in this case referenced the *Bittner* test, addressed each of the specific objections raised by Forest River to the amounts requested by Bales and clearly identified each of the reductions made from the amounts requested by Bales (and the reductions it declined to make) in response to Forest River's objections. The trial court clearly explained how it arrived at the amounts it awarded for attorney fees and litigation expenses, including each of the specific adjustments made to the amounts requested in "plaintiff's breakdown of costs," and why. Although Forest River contends that the trial court's decision fails to address Forest River's argument that the requested attorney fees should have been reduced because the "type and extent of work was mundane and uncomplicated," the only specific task Forest River claimed was "mundane and uncomplicated" was the preparation of the "routine" motion and reply in prosecuting Bales' request for attorney fees and litigation costs. The trial court's decision clearly addresses that claim, reducing the requested attorney fees and litigation costs "directly related to the briefing for this decision" by 50 percent.

Forest River did not otherwise explain why it believed the "mundane and uncomplicated" nature of the case warranted a reduction in attorney fees under *Bittner* and presented no evidence in support of such a claim.[6] Accordingly, the trial court did not abuse its discretion in failing to otherwise address this argument in its decision. We overrule Forest River's first assignment of error.

Award of Attorney Fees and Litigation Expenses

{¶ 31} Forest River's second assignment of error and Bales' cross-assignment of error are interrelated. Accordingly, we address them together.

{¶ 32} In its second assignment of error, Forest River contends that the trial court erred by ordering Forest River to pay for: (1) Attorney Steuart's "duplicative and redundant" attorney time; (2) attorney travel time and travel expenses; (3) Bales' expert witness expenses and (4) the fees and expenses incurred in prosecuting Bales' motion for attorney fees and litigation costs. Forest River contends that these fees and expenses were excessive, unreasonable and not recoverable under CSPA or MMWA.

{¶ 33} In his cross-assignment of error, Bales argues that the trial court abused its discretion in failing to award him the full amount of attorney fees and

[6] The sum and substance of Forest River's argument regarding this issue below was as follows: "Forest River asks the Court to adjust these hourly rates downward because the issues presented by this case were not novel or difficult for the Burdge law firm which specializes in consumer law."

litigation costs requested — $61,384.68[7] — because Forest River agreed to pay "Plaintiff's reasonable attorney fees and litigation costs" as set forth in the agreed entry and failed to present any evidence that any of Bales' requested attorney fees or litigation expenses was unreasonable.

{¶ 34} In this case, the parties stipulated, as part of their settlement agreement, that (1) Forest River would pay Bales "reasonable attorney fees and litigation costs" and (2) Bales was "the prevailing party under all claims in this case for the purpose of seeking attorney fees and litigation costs under R.C. 1345.09(F) and 15 U.S.C. 2310(d)." The parties did not define "litigation costs" in their agreement aside from the references to R.C. 1345.09(F) and 15 U.S.C. 2310(d). R.C. 1345.09(F)(2) provides that "[t]he court may award to the prevailing party a reasonable attorney fee limited to the work reasonably performed if * * * [t]he supplier has knowingly committed an act or practice that violates this chapter." 15 U.S.C. 2310(d)(2) states:

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

The MMWA does not define "cost and expenses" as used in this provision.

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[7] Bales does not contend that the trial court abused its discretion in failing to award an enhancement of his attorney fees as requested in his reply in support of his motion for attorney fees and litigation costs.

{¶ 35} *Black's Law Dictionary* defines "litigation costs" as "[t]he expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against another." *Black's Law Dictionary* 423, 1075 (10th Ed.2014). It defines "expense," in relevant part, as "[a]n expenditure of money, time, labor, or resources to accomplish a result." *Id.* at 698.

{¶ 36} Applying these provisions and definitions, we cannot say that the trial court abused its discretion in determining that, pursuant to the parties' stipulation and settlement agreement, Bales was entitled to recover from Forest River the reasonable attorney fees and litigation expenses (including reasonable expert fees and attorney travel expenses) that Bales incurred both (1) in litigating his claims against Forest River and (2) in recovering those attorney fees and litigation costs from Forest River. Likewise, we cannot say, based on the record before us, that the trial court abused its discretion in determining that $37,761.51 in attorney fees and $6,641.67 in litigation expenses related to the litigation of Bales' claims and $3,233.84 in attorney fees and litigation costs "directly relating to the briefing" on Bales' motion for attorney fees and litigation costs were "reasonable" under the parties' stipulation and settlement agreement.[8]

{¶ 37} Bales submitted itemized billing statements detailing each of the expenses and tasks for which compensation was sought, the time spent on each task

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[8] Given that this dispute arises out of a stipulation and settlement agreement, we note that had the parties wished to exclude (or include) certain items as recoverable "litigation costs" or place a cap (or floor) on the amount of attorney fees that could reasonably be awarded to Bales, they could have addressed this in their stipulation and agreement.

and the applicable hourly rate assessed. The record reflects that this case was pending for more than a year before settlement during which time the parties engaged in fact and expert discovery, participated in settlement negotiations and prepared for trial. The attorneys who worked on Bales' case submitted affidavits in which they averred that the hourly rates charged, the time expended and the litigation expenses incurred were both reasonable and necessary to defend the case and obtain the outcome obtained.

{¶ 38} Forest River challenged only two categories of expenses (1) expert witness fees and (2) attorney travel expenses. Forest River challenged only three aspects of attorney time (1) "duplicative time" resulting from Attorneys Wells and Steuart both appearing for trial and participating in the trial-day settlement negotiations, (2) the fees incurred prosecuting the motion for attorney fees and litigation costs and (3) attorney travel time. Those were the expenses and attorney time the trial court reduced in its fee award.

{¶ 39} With respect to the challenged expert witness fees, Forest River acknowledges that, given the nature of the allegations and the matters at issue, Bales could not have proven its claims against Forest River without expert testimony. Accordingly, a reasonable expert fee was properly compensable as "litigation costs." However, considering the claims and matters at issue in this case, we cannot say that the trial court acted unreasonably, arbitrarily or unconscionably in concluding that $6,000 in pretrial expert witness fees was excessive and limiting the amount of recoverable expert witness expenses to $3,000.

{¶ 40} Likewise, we cannot say, based on the record before us, that the trial court acted unreasonably, arbitrarily or unconscionably in (1) concluding that it was unreasonable for plaintiff's counsel to bill the same hourly rate for their travel time as they billed for providing substantive legal services and (2) awarding 50 percent — and only 50 percent — of Bales' attorneys' "duplicative time," attorney time prosecuting the motion for attorney fees and litigation expenses and attorney travel time and travel expenses. To the extent that the litigation expenses incurred by Bales or the time charged by his attorneys was excessive or unreasonable, Bales was not entitled to recover those sums from Forest River.

{¶ 41} Although it may have perhaps been reasonable for two attorneys to provide legal services at trial if the case had been tried, here, there was no trial because the case settled the morning of trial. Bales' counsel did not establish that full billing for the services of two attorneys was reasonable and necessary given that no trial occurred.

{¶ 42} Counsel for Bales, like counsel for Forest River, was from the Dayton area. As such, handling this case that was pending in Cleveland necessarily involved attorney travel time and travel expense and was, therefore, a "litigation cost" incurred in litigating the RV claims. However, no evidence was presented that counsel with the requisite skill and experience to handle this case could not have been found locally. Accordingly, the trial court did not abuse its discretion in concluding that that the recoverable amount of this attorney time and expense should be reduced by 50 percent.

{¶ 43} Finally, we cannot say, based on the record before us, that the trial court acted unreasonably, arbitrarily or unconscionably in awarding Bales 50 percent — and only 50 percent — of the $6,467.69 in attorney fees and expenses he requested "directly related to the briefing" of his motion for attorney fees and litigation costs. Briefing the motion for attorney fees and litigation costs was a necessary step in the recovery of those fees and costs. As such, it was not unreasonable for the trial court to include, as part of the fee award, a sum for attorney time and costs related to briefing that motion. However, the record reflects that the briefing the Burdge law firm submitted in support of Bales' motion for attorney fees and litigation costs was quite similar to briefing the Burdge law firm had submitted in prosecuting attorney fee requests in other cases. Further, the attorney fees Bales requested for prosecuting the motion included attorney time spent drafting a reply brief seeking an enhancement of fees, which the trial court did not award. Accordingly, the trial court did not abuse its discretion in concluding that that the recoverable amount of attorney time and expense "directly related to the briefing" of Bales' motion for attorney fees and litigation costs should be reduced by 50 percent.

{¶ 44} We overrule Forest River's second assignment of error and Bales' cross-assignment of error.

{¶ 45} Judgment affirmed.

It is ordered that appellee 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, JUDGE

MARY J. BOYLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

[Cite as *Santomauro v. SUMSS Property Mgt., L.L.C.*, 2019-Ohio-4335.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
MARSHA SANTOMAURO, et al. Appellees v. SUMSS PROPERTY MANAGEMENT, LLC Appellant	C.A. Nos. 29032 29217 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2014-04-1498

DECISION AND JOURNAL ENTRY

Dated: October 23, 2019

SCHAFER, Judge.

{¶1} Appellant-Defendant, SUMSS Property Management, LLC ("SUMSS"), appeals from the March 28, 2018 journal entry and April 18, 2018 order of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms in part and reverses in part.

I.

{¶2} This matter stems from a dispute among six siblings regarding the management of a family real estate and property management business, SUMSS, formed by their father, Anthony Santomauro, in 2004. Following their father's passing in 2014, each of the following siblings was a member with a one-sixth interests in the business: Marsha Santomauro, Lisa Madden, Brenda Elaine Loss, Andrea Renee Cowan, Craig Santomauro, and Christopher Santomauro. Appellees-Plaintiffs, Marsha and Lisa, commenced this action on April 4, 2014, as members of SUMSS seeking judicial dissolution of the company. Marsha and Lisa alleged, inter alia, that Christopher, as manager of SUMSS, had mismanaged the company and breached his fiduciary

duties, and alleged that such conduct made it impracticable to carry on the business of SUMSS. Marsha and Lisa's one-count complaint named SUMSS as the only defendant, and they did not assert any causes of actions against the other siblings individually.

{¶3} SUMSS answered the complaint and litigation ensued. On September 7, 2016, SUMSS filed a counterclaim against Lisa. In the counterclaim, SUMSS alleged that "Lisa, either directly or indirectly through her son, Blake Madden," formed a limited liability company under the name Urban Imperial Building and Rental, LLC ("Urban Imperial"). SUMSS alleged that Lisa, as chief operating officer and general manager of Urban Imperial, engaged in direct and unfair competition with SUMSS, breached fiduciary duties to SUMSS, and unlawfully used SUMSS's trade name "Urban Rental" in operating Urban Imperial to confuse the public and usurp SUMSS's good will.

{¶4} The litigation carried on to the trial date of December 4, 2017. Rather than proceed to trial, the parties engaged in settlement discussions spanning over the course of three days. The settlement discussions culminated with the parties' announcement on December 6, 2017, that they reached an agreement to resolve the case. On December 6, 2017, SUMSS's attorney, Mr. Soles, entered the terms of the settlement agreement on the record in open court in the presence of the judge assigned to hear this matter. The parties—all present and represented by counsel—confirmed their acquiescence to the stated terms of the settlement agreement and represented to the court that the matter was settled. The parties indicated that Mr. Soles would draft "something" regarding the mutual releases and present the trial judge with a proposed judgment entry to mark the case settled and dismissed pursuant to the terms of the agreement read into the record.

{¶5} Then, on December 22, 2017, SUMSS filed a motion to return the matter to the active docket, which was, essentially, a motion to set aside the settlement agreement. In the motion, SUMSS disputed the existence of an enforceable settlement agreement, contending that there was no meeting of the minds as to all relevant terms and asserting defenses to the enforceability of the agreement. Marsha and Lisa each filed a brief in opposition to SUMSS's motion, to which SUMSS filed a reply. The trial court issued a journal entry on January 16, 2018, ruling on SUMSS's motion; the court concluded that SUMSS was not entitled to an evidentiary hearing on its motion, denied the request to return the matter to the active docket, and found that parties entered into an enforceable settlement agreement. The trial court also ordered Marsha and Lisa to submit "a draft of a final judgment entry incorporating the terms of the settlement agreement as entered into at the hearing of December 6, 2017[.]"

{¶6} SUMSS filed objections to plaintiffs' proposed final order on January 26, 2018, and filed renewed objections on February 6, 2018. However, on February 13, 2018, the trial court issued an order reconsidering its prior decision and setting an evidentiary hearing to determine whether the parties had reached a settlement agreement. One day prior to the March 13, 2018 evidentiary hearing, SUMSS filed a supplemental motion to return the matter to the active docket.

{¶7} At the evidentiary hearing, SUMSS presented the testimony of its managing member, Christopher, and the testimony of a physician who had treated Christopher for bronchitis in December of 2017. Following the hearing, the trial court took the matter under advisement and then issued a journal entry on March 28, 2018, ruling on SUMSS's motion to return the matter to the active docket. In its entry, the trial court found "that there was an enforceable settlement agreement entered by the parties to this lawsuit on December 6, 2017[,]"

and further found that "[Mr.] Soles, on behalf of his client, [SUMSS] had apparent authority to enter into the settlement agreement." The trial court also found "that the settlement agreement was certain in its terms and that there was a meeting of the minds on all essential elements to the settlement agreement." Following the trial court's discussion of the terms of the settlement agreement, and the trial court's decision as to which of those terms were essential to the settlement agreement, the court again ordered counsel for Marsha and Lisa to submit "a draft of a final judgment entry incorporating the essential terms of the settlement agreement as set forth above * * *" noting that the "judgment entry should also retain jurisdiction by [the trial court] for the sole purpose of enforcing the settlement as agreed to by the parties on December 6, 2017."

{¶8} On April 10, 2018, SUMSS filed an objection and opposition to a proposed final order submitted by Lisa's attorney. Over SUMSS's objection, the trial court entered an order on April 18, 2018, reiterating its denial of SUMSS's motion to return the matter to the active docket and finding that the parties entered into a valid and enforceable settlement agreement on December 6, 2017. The April 18, 2018 entry purported to memorialize the terms of the settlement agreement as follows:

> 1) Titles to the 17 real estate properties, all of which are accurately identified in the Transcript made on December 6, 2017, to-wit, 307 Broad, 310/316 Broad, 330 Broad, 1940 3rd Street, 1941 4th Street, 1937 4th Street, 1523 Broad Street, 2032 3rd Street, 2035 Bird, 528 Stow, 2250 4th Street, 2026 3rd Street, 2431 Northland, 542 Sackett, 346/348 Broad, 1868 2nd Street, and 1880 2nd Street, **shall all be transferred by [SUMSS] by quit claim deed, "as-is"** [as of December 6, 2017] **to [Marsha and Lisa] or to [their] designee(s) forthwith**.
>
> 2) Leases incident to each of the 17 properties described above and in the December 6, 2017 transcript shall be transferred to [Marsha and Lisa], or to their designated LLC, by [SUMSS] forthwith and [SUMSS] shall further provide to [Marsha and Lisa] or their designee(s), all records reflecting lease payments made from January 1, 2018 for each of the 17 properties described above through April 1, 2018, including all amounts actually paid for each unit, the identity (identities) of the tenant/tenants making the payments and the dates on which the payments

> were made. These documents shall be provided by [SUMSS] to [Marsha and Lisa], or their designee(s) **forthwith**.
>
> 3) All security deposits pertaining to the 17 properties described by street addresses above and in the December 6, 2017 transcript shall be transferred by [SUMSS] to [Marsha and Lisa] or their designee(s) no later than April 5, 2018.
>
> 4) All January, February, March and April, 2018 rental payments made incident to the 17 properties described herein and in the December 6, 2017 transcript shall be transferred by [SUMSS] to [Marsha and Lisa] or their designee(s) **forthwith**.
>
> 5) [Marsha and Lisa] shall transfer their membership units in [SUMSS] to [SUMSS] **forthwith**;

(Emphasis sic.) SUMSS timely appealed from the April 18, 2018 order, presenting four assignments of error for our review.

{¶9} On May 16, 2018, Lisa filed a motion in the trial court seeking attorney fees from SUMSS pursuant to R.C. 2323.51. The motion was filed while SUMSS's appeal from the trial court's April 18, 2018 order was pending in this Court. This Court granted Lisa's motion for limited remand and remanded the matter to the trial court for the limited purpose of ruling on Lisa's motion for attorney fees. The trial court issued its ruling on July 23, 2018, denying the motion for attorney fees without a hearing. Lisa moved to consolidate the appeals. Initially, we denied the motion. However, upon further consideration we now consolidate the appeals for the purpose of this decision.

{¶10} For ease of analysis, we reorder and consolidate certain assignments of error.

II.

SUMSS's Assignment of Error II

> **The trial court erred in holding that the settlement agreement was enforceable when SUMSS's managing member lacked the authority or capacity to enter into the agreement and was operating under duress.**

{¶11} In its second assignment of error, SUMSS contends that the settlement agreement was unenforceable because Christopher lacked the authority to transfer SUMSS's properties. SUMSS also argues that Christopher lacked the capacity to enter into the settlement agreement due to illness, and that the settlement agreement is unenforceable due to duress.

{¶12} The standard of review applicable to a trial court's decision as to the enforceability of a settlement agreement depends on the question presented on appeal. *Technical Constr. Specialties, Inc. v. New Era Builders, Inc.*, 9th Dist. Summit No. 25776, 2012-Ohio-1328, ¶ 18. This Court will not overturn a trial court's findings on an evidentiary question if there was sufficient evidence to support such a finding. *Id.* citing *Chirchiglia v. Bur. of Workers' Comp.*, 138 Ohio App.3d 676, 679 (7th Dist.2000). However, if the dispute is a question of law, this Court "must review the decision de novo to determine whether the trial court's decision to enforce the settlement agreement is based upon an erroneous standard or a misconstruction of the law." *New Era Builders* at ¶ 18, citing *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1995).

A. <u>Authority to Transfer SUMSS's Properties</u>

{¶13} While maintaining that a settlement agreement does not exist, SUMSS first argues in its second assignment of error that Christopher lacked the authority to enter into the "purported settlement agreement" that would require SUMSS to transfer seventeen "rental properties along with the leases and security deposits for those properties."

{¶14} During the evidentiary hearing, counsel for SUMSS argued that Christopher lacked authority under R.C. 1705.25. In its ruling, the trial court found that Attorney Soles advised the court that the parties had reached a settlement and proceeded to place the terms of the settlement on the record in the presence of both Christopher and Craig, neither of whom

raised any objections to counsel's authority to agree to the stated terms. Regardless of any issues as to Christopher's authority, the trial court concluded that SUMSS had been represented by counsel and that counsel possessed apparent authority to enter into the settlement agreement. Having found that SUMSS's attorney had authority to agree to the terms of the settlement, the trial court rejected SUMSS's claim that Christopher lacked authority to enter the settlement agreement.

{¶15} On appeal, SUMSS does not directly address the trial court's finding that trial counsel for SUMSS exercised apparent authority to enter the settlement agreement on behalf of his client. Rather, SUMSS contends that R.C. 1705.25 limits the authority of a manager of a limited liability company and prevents the manager from making any agreement that would make it impossible to carry out the ordinary business of the company. SUMSS argues that Christopher, as manager, was statutorily prohibited from entering the agreement because the transfer of seventeen properties would contravene this statute. SUMSS maintains that Christopher lacked authority to transfer the seventeen properties without agreement of SUMSS's other members because doing so would prevent SUMSS from carrying on its ordinary business.

{¶16} Even if SUMSS were to successfully argue that R.C. 1705.25 could, as a matter of law, extinguish counsel's authority under these circumstances, SUMSS has not demonstrated the factual basis upon which it seeks to invoke R.C. 1705.25 as grounds for constraining SUMSS's authority to enter the settlement agreement. SUMSS has not cited to any evidence in the record to establish that the transfer of the seventeen properties or any other term of the agreement would "make it impossible to carry on the ordinary business of the company" as stated in R.C. 1705.25(A)(3)(c). Indeed, a review of the record shows that aside from eliciting testimony from Christopher regarding this issue, SUMSS did not present evidence in support of this argument.

Therefore, we conclude that the trial court did not err by overruling the request to set aside the settlement agreement on this basis.

B. Christopher's Illness

{¶17} SUMSS next argues that Christopher was too ill to understand the settlement agreement. Specifically, SUMSS argues that because Christopher was suffering from an illness—bronchitis and/or pneumonia—and because he was "heavily medicated[,]" Christopher did not understand the terms of the purported agreement and did not have the mental capacity to understand the complex settlement agreement. On this basis, SUMSS's argues the settlement is unenforceable because Christopher, as manager, lacked the capacity to enter the agreement.

{¶18} Contractual capacity is an essential element of a contract. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. A party who enters into a settlement agreement and later claims to have been incompetent to enter into that settlement must demonstrate by clear and convincing evidence that the agreement was executed while he was mentally incompetent. *Bretzfelder v. Bretzfelder*, 9th Dist. Summit No. 23674, 2008-Ohio-2669, ¶ 6, citing *DiPietro v. DiPietro*, 10 Ohio App.3d 44, 46, (10th Dist.1983). To demonstrate a lack of competency, a party must show that his mind was so affected at the time he entered the agreement that he did not possess the ability to comprehend the nature or scope of his act, or to appreciate its effect or consequences. *Miller v. Miller*, 9th Dist. Summit No. 21770, 2004-Ohio-1989, ¶ 16, quoting *Kaltenbach v. Kaltenbach*, 4th Dist. Ross No. 1313, 1987 WL 15494, *2 (Aug. 11, 1987).

{¶19} In its ruling, the trial court found it significant that Christopher participated in the negotiations prior to entering the settlement agreement, but at no time during the proceedings did he raise the issue that he was suffering from any medical condition that might render him incapacitated to make decisions. In fact, as the trial court noted, Christopher did not raise this

issue until sixteen days after the settlement. Considering the evidence SUMSS presented at the hearing, the trial court found that the physician SUMSS called to testify regarding Christopher's condition did not offer any opinion as to Christopher's mental capacity as of December 6, 2017. The trial court concluded that there was no evidence upon which the court could find that the effects of the medicine rendered Christopher incompetent as of that date.

{¶20} On appeal, SUMSS reiterated the arguments raised in the trial court, but failed to point to evidence in the record to substantiate its claim that Christopher's illness or medication affected his mind so severely that he was unable to comprehend the terms of the settlement to which SUMSS agreed. Additionally, our review of the record shows that, aside from Christopher's own testimony that he did not feel well, lacked oxygen, and experienced confusion, SUMSS did not present sufficient evidence to demonstrate that he lacked the mental capacity to authorize SUMSS's attorneys to settle the matter pursuant to those terms. Therefore, we cannot conclude that the trial court erred by rejecting the argument that Christopher's alleged illness prevented him from authorizing SUMSS's attorneys to enter into the settlement agreement on December 6, 2017.

C. Duress

{¶21} In the final argument of this assignment of error, SUMSS contends that the agreement was unenforceable because it was the product of duress. SUMSS argues that, prior to the three-day negotiation period leading up to the December 6, 2017 settlement agreement, Marsha's attorney sent "inappropriate texts" to Andrea Renee, "threatening her with criminal prosecution for her support of SUMSS during the litigation." It is SUMSS's theory that Marsha's attorney did this to "gain an unfair advantage and procure a better settlement position" because he "knew" that Andrea Renee would relay this threat to Christopher. SUMSS asserts

that this caused Christopher to worry about Andrea Renee, and placed him in a state of duress which "motivated him to attend the court dates while ill and attempt to settle the lawsuit." The trial court found that any alleged overreaching or duress directed at Andrea Renee—a non-managing member of SUMSS—rather than Christopher as the managing member would not be relevant as to whether SUMSS had entered into a settlement agreement.

{¶22} "'To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.'" *Feathers v. Tasker*, 9th Dist. Summit No. 26318, 2012-Ohio-4917, ¶ 8, quoting *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990), syllabus. "Three common elements of duress include (1) the involuntary acceptance of terms by one party, (2) no alternative to acceptance under the circumstances, and (3) coercive acts by the other party gave rise to those circumstances." *Id*. citing *Blodgett* at 246.

{¶23} On appeal, SUMSS has not pointed to any evidence in the record to demonstrate coercive acts that left SUMSS with no alternative under the circumstances but to involuntarily accept Marsha and Lisa's settlement terms. *See Feathers* at ¶ 8. SUMSS's subsequent dissatisfaction with the terms of the settlement agreement does not constitute grounds to set aside the agreement in the absence of evidence that coercion forced SUMSS to accept the terms of the agreement. *See Feathers* ¶ 11-12. The allegedly "inappropriate texts" sent by Marsha's attorney were directed to Andrea Renee; she was neither a party to this litigation in her individual capacity nor a managing member of SUMSS. Even assuming that the substance of these text messages caused concern, personally, for Andrea Renee or Christopher, the record does not support the contention that the messages somehow forced SUMSS to accept the terms of the settlement agreement reached as a result of three days of counseled negotiations between the

parties. In fact, SUMSS contends on appeal that the alleged duress compelled Christopher to participate in negotiations while ill, but does not explain how the text messages actually caused SUMSS to involuntarily accept any settlement terms presented by Marsha. At best, this amounts to a claim that SUMSS entered the agreement under difficult circumstances, which is insufficient to establish duress. *Feathers* at ¶ 8.

{¶24} Based on the foregoing, we cannot say that the trial court erred by concluding that there was no apparent nexus between the text messages to Andrea Renee and SUMSS's decision to enter the settlement agreement. Therefore, we conclude that the trial court did not err by denying SUMSS's request to set aside the agreement on the basis of duress.

{¶25} We conclude that SUMSS has not shown that the trial court's decision—rejecting SUMSS's arguments that the settlement agreement was unenforceable due to a lack of authority, capacity to enter the agreement, or as a result of duress—was not supported by sufficient evidence. SUMSS's second assignment of error is overruled.

SUMSS's Assignment of Error I

> **The trial court erred in holding that there was an enforceable settlement agreement between [SUMSS] and [Marsha] and [Lisa] as of December 6, 2017.**

{¶26} In its first assignment of error, SUMSS argues that the trial court erred by finding that the terms placed on the record on December 6, 2017, resulted in an enforceable settlement agreement. Within this single assignment of error, SUMSS asserts numerous issues with regard to two distinct contentions: (1) that the settlement agreement was unenforceable because there was no meeting of the minds as to essential terms, and (2) that the settlement agreement is unenforceable under the statute of frauds.

A. Statute of Frauds

{¶27} Initially, we must address an issue with SUMSS's contention that the settlement agreement is unenforceable under the statute of frauds. SUMSS challenges that, because the "purported oral" settlement agreement involves the transfer of real property, the enforcement of the agreement would violate the statute of frauds. SUMSS asserts that "the trial court erred in determining that the oral settlement agreement was valid when it involved the transfer of real property." Although SUMSS ignores the fact that the trial court's subsequent journal entry would eliminate any issue related to the statute of frauds, *see Michaels v. Michaels*, 9th Dist. Medina No. 09CA0047-M, 2010-Ohio-963, ¶ 15, our review of the record reveals that SUMSS never raised the issue to the trial court. "Arguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank, Natl. Assn. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 12. Generally, a reviewing court does "not consider questions not presented to the court whose judgment is sought to be reversed.'" *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 9th Dist. Summit No. 25622, 2012-Ohio-1324, ¶ 8, quoting *Goldberg v. Indus. Com'n of Ohio*, 131 Ohio St. 399 (1936), paragraph four of the syllabus. Because SUMSS raised this statute of frauds argument for the first time on appeal, this Court declines to consider it. *See Klever v. City of Stow*, 13 Ohio App.3d 1, 5 (9th Dist.1983).

B. Meeting of the Minds as to Essential Terms

{¶28} On appeal, SUMSS contends that the trial court erred by determining that a settlement agreement exists, because there was not a sufficient meeting of the minds as to the settlement terms read into the record to create an enforceable settlement agreement. SUMSS raises numerous issues on this point—some of which were presented to the trial court through

SUMSS's motion to return the case to the active docket and objections to proposed orders, and some of which appear to be raised for the first time on appeal.

{¶29} Generally, where parties voluntarily enter into an oral settlement agreement in the presence of the court, the agreement constitutes a binding contract and a trial court may sign an entry reflecting the settlement agreement in the absence of a motion to set the agreement aside. *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36 (1972), paragraphs one and two of the syllabus. In a case such as this, where "the terms of a settlement agreement were read into the record, but the settlement agreement was not reduced to judgment by the trial court and a dispute subsequently arises as to the terms of the agreement, 'the trial judge should [ ] conduct [ ] an evidentiary hearing to resolve the parties' dispute about the existence of an agreement or the meaning of its terms as read into the record at the hearing, before reducing the matter to judgment.'" *City of Cuyahoga Falls v. Wells*, 9th Dist. Summit No. 19959, 2001 WL 81260, *2, quoting *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 377 (1997). When a party disputes "whether the evidence shows that a settlement agreement exists, this Court will not reverse the trial court's decision so long as its finding is supported by sufficient evidence in the record." *Brown v. Dillinger*, 9th Dist. Medina No. 05CA0040-M, 2006-Ohio-1307, ¶ 7.

{¶30} Although a settlement agreement memorialized in writing is preferable, "an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." *Kostelnik*, 2002-Ohio-2985 at ¶ 15. "[T]he terms of the agreement must be reasonably certain and clear[,]" because

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

> expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.

Rulli at 376 , quoting 1 Corbin on Contracts (Rev. Ed.1993) 525, Section 4.1. However, it is axiomatic that "[a]ll agreements have some degree of indefiniteness and some degree of uncertainty." *Kostelnik* at ¶ 17.

{¶31} SUMSS lists a variety of issues in support of its contention that there was no meeting of the minds. Specifically, SUMSS contends that the settlement lacked sufficient details and that the agreement was "complicated and several terms were undecided" because: (1) it was unclear whether the seventeen properties would be transferred to plaintiffs personally or to their designee; (2) the parties did not confirm whether it was possible to transfer all seventeen properties in the manner indicated in the agreement; (3) the parties did not specify details as to when, and to whom, the security deposit and rents would be paid or who would bear responsibility for the properties prior to transfer; (4) the agreement lacked details regarding the description of the estate claims Marsha and Lisa agreed to waive, and did not specify "which claims were to be assigned to which party[;]" (5) the parties included "additional terms" at the last minute by including a provision for mutual releases, altering the identity of the transferee of the properties from Marsha and Lisa to an unnamed entity, and raising an issue regarding family cemetery plots; and (6) counsel for Marsha and Lisa subsequently inquired as to whether the property transfer would include an adjacent lot. Additionally, SUMSS argues that the "parties never reached an enforceable agreement because there was an intent to reduce the agreement to writing" and because "there was no meeting of the minds to bind non-parties."

Complicated and Undecided Terms

{¶32} While arguing that certain terms are complicated, undecided, or unclear, SUMSS does not point to any terms of the settlement agreement that are actually disputed by the parties. Instead, SUMSS claims that the settlement agreement was "anything but [] simple" and that it failed to include sufficient detail.

{¶33} "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Kostelnik*, 2002-Ohio-2985 at ¶ 16. "A dispute over the meaning of a term does not constitute an absence of a material term that could defeat the enforceability of the contract." *Allen v. Bennett*, 9th Dist. Summit Nos. 23570, 23573, and 23576, 2007-Ohio-5411, ¶ 14. In the event that incidental terms or details are not concluded in the agreement, they can be resolved later—judicially or by agreement—but their omission does not render the agreement unenforceable. *See Murra v. Farrauto*, 10th Dist. Franklin No. 16AP-347, 2017-Ohio-842, ¶ 16. Whether a meeting of the minds has occurred as to the essential terms of a contract is a question of fact to be determined from all the relevant facts and circumstances. *Aber v. Vilamoura*, 184 Ohio App.3d 658, 2009-Ohio-3364, ¶ 10 (9th Dist).

{¶34} SUMSS has not identified any details of the parties' agreement, the omission of which might render the settlement agreement unenforceable. Otherwise put, the issues raised by SUMSS involve terms and details that, conceivably, could have been included in the settlement. However, SUMSS has not demonstrated that these additional details constitute essential or material terms, as opposed to being incidental or collateral matters that would not defeat the formation or enforceability of a contract. *See Mr. Mark Corp. v. Rush, Inc.*, 11 Ohio App.3d 167, 169 (8th Dist.1983), quoting Restatement of the Law 2d, Contracts, Section 33, Comment a

(1981) ("Where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract.")

{¶35} SUMSS asserts that certain terms were added or discussed during "the last minute" of settlement negotiations. The mere fact that these issues were discussed or included near the end of the settlement hearing does not substantiate SUMSS's contention that there was no meeting of the minds as to the material terms of the settlement agreement. Likewise, the fact that Marsha's attorney subsequently inquired as to whether an adjacent parcel would be included in the term of the agreement describing the transfer of real property does not mean that the term was unclear or disputed, let alone establish that there was no meeting of the minds.

Written Agreement

{¶36} SUMSS next argues that the settlement terms read into the record cannot constitute an enforceable agreement because "the parties intended to formalize the agreement in writing," "did not intend to be bound by the oral agreement[,]" and instead "contemplated the future action of drafting an agreed order for the judge to sign." In support of this contention SUMSS notes the parties' stated intention to execute mutual releases, mentions a term of the agreement that anticipated the transfer of the properties would occur after the signing of the settlement agreement, and again references the statute of frauds.

{¶37} Once the parties have assented to the terms of a settlement, the settlement agreement exists such that it 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.'" *Feathers*, 2012-Ohio-4917 at ¶ 7, quoting *Haas v. Bauer*, 156 Ohio App.3d 26, 2004-Ohio-437, ¶ 16 (9th Dist.). "'The mere fact that parties who have reached a verbal agreement also have agreed to reduce their contract to writing does not prevent the agreement from being a contract if

the writing is not made.'" *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15, quoting *Union Sav. Bank v. White Family Cos., Inc.*, 183 Ohio App.3d 174, 2009-Ohio-2075, ¶ 26 (2d Dist.). "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." *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel*, 8th Dist. Cuyahoga No. 106714, 2019-Ohio-3756, ¶ 69, citing *Guenther*.

{¶38} Even assuming that the record supports SUMSS's claim that the parties intended to execute a written settlement agreement, the fact that the settlement was not reduced to a writing would not negate the validity of the settlement or divest the trial court of the authority to sign a journal entry reflecting the parties' agreement. Regardless of any intent the parties may have had to reduce their settlement agreement to writing or to execute documents pursuant to their agreement, SUMSS did not present any evidence to establish that the parties did not intend for the settlement agreement to exist until it was reduced to a writing signed by all parties. Whether the parties intended to be bound by the settlement agreement is a question to be resolved by the trier of fact. *Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 235 (1990). The record contains sufficient evidence to support the trial court's conclusion that the parties intended to be bound by the agreement. *See id*.

Binding Non-parties

{¶39} Finally, SUMSS argues that there was no meeting of the minds to bind numerous non-parties. SUMSS argues that "the settlement agreement purported to bind numerous non-parties who did not participate in the settlement negotiations" or give consent to be bound by the agreement. First, SUMSS asserts an issue as to a term regarding waiver of estate claims that

SUMSS believes "likely referred to Chris, Craig, and [Andrea] Renee." Second, SUMSS argues that the agreement required Blake Madden, as a non-party to the litigation, to take certain actions regarding his company's website.

{¶40} The transcript of the December 6, 2017 settlement agreement indicates that Marsha and Lisa would agree to waive "any entitlement to any distribution in [their late father's] estate," and to assign their interests to "SUMSS and/or to Chris, [Andrea] Renee, and Craig." Ostensibly, this term places an obligation on Marsha and Lisa, but it does not purport to bind a non-party as SUMSS contends. Additionally, counsel for SUMSS stated on the record that "Tim Madden, Blake Madden, and Trisha Madden" would agree to release all claims related to the probate case. SUMSS did not argue or point to any evidence to support the claim that these non-parties did not consent to be bound by the agreement. Even assuming these non-parties did not consent to be bound by the agreement, the import of this particular term is unclear in the context of the settlement agreement. Accordingly, we conclude that SUMSS's arguments regarding these non-parties lack merit.

{¶41} SUMSS also raised an issue as to the terms of the settlement requiring the removal of certain language from the website of Urban Imperial. Urban Imperial is the subject of SUMSS's counterclaim against Lisa, wherein SUMSS alleges that Lisa, along with her son, Blake, formed Urban Imperial by unlawfully using a trade name and unfairly competing with SUMSS. The transcript of the settlement agreement does reflect that the parties agreed to terms involving Urban Imperial. However, the transcript merely references Blake using the name Urban Imperial for the company, and reflects that Urban Imperial would be permitted to keep its name but would refrain from using a slogan and remove untruthful statements and information on the website. The record does not support SUMSS's claim that the settlement agreement binds

Blake, as non-party to the litigation, to take any action in furtherance of the settlement agreement. Therefore, we conclude that SUMSS has not demonstrated how references to non-parties indicate a lack of meeting of the minds as to a material term of the settlement agreement.

{¶42} SUMSS's first assignment of error is overruled.

SUMSS's Assignment of Error III

The trial court erred in altering the terms of the settlement agreement.

SUMSS's Assignment of Error IV

The trial court abused its discretion by adopting an additional disputed settlement term proposed by [Marsha and Lisa] without first holding a hearing.

{¶43} In SUMSS's third and fourth assignments of error, SUMSS argues that the trial court erred when it altered terms and adopted a disputed term in its entry reflecting the settlement agreement. We agree.

{¶44} SUMSS asserts that, following the March 13, 2018 evidentiary hearing, "the trial court reduced the agreement to only a few 'essential' terms," and improperly deemed other terms of the settlement agreement to be nonessential terms and omitted them from the journal entry. Additionally, SUMSS argues, the trial court added a provision requiring SUMSS to transfer certain rent payments to Marsha and Lisa despite the fact that the parties never negotiated or agreed to include such a term in their settlement. In essence, SUMSS contends, "the trial court amended the settlement agreement to omit terms favoring SUMSS and unilaterally added significant terms favoring [Marsha and Lisa], in order to reach what it thought was an equitable result."

{¶45} When parties reach a settlement agreement in open court and preserve it by reading it into the record, the trial court may approve a journal entry that *accurately reflects* the

terms of the agreement and adopt the agreement as the court's judgment. *Bolen v. Young*, 8 Ohio App.3d 36, 37 (10th Dist.1982); *see Spercel*, 31 Ohio St.2d 36, at paragraph two of the syllabus. In resolving any disputes as to the terms of the agreement, "the trial judge may not adopt the terms of the agreement as he recalls and understands them in the form of a judgment entry." *Bolen* at ¶ 37. If the terms of an agreement are "clear and unambiguous, the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations; instead, the court must give effect to the agreement's express terms." *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, ¶ 34. It is reversible error for a trial court to adopt a judgment entry that fails to accurately reflect the entire settlement agreement. *Schmid v. Rutter*, 9th Dist. Wayne No. 2505, 1989 WL 157218, *2.

{¶46} In its March 28, 2018 journal entry, the trial court found that an enforceable agreement existed and set forth its findings regarding the essential terms of the agreement. Having overruled SUMSS's motion requesting to set aside the agreement and return the case to the active docket, the trial court proceeded to act on its authority to approve an entry adopting the terms of the settlement. The trial court's April 18, 2018 order incorporated the settlement terms into the court's order dismissing the case Those terms included (1) the transfer of the seventeen properties from SUMSS to Marsha and Lisa, (2) the transfer of the leases for those properties along with all records related to lease payments, (3) security deposits related to the leased properties, (4) all January, February, March, and April rental payments made incident to the seventeen properties, (5) the transfer of Marsha and Lisa's membership interests in SUMSS to SUMSS. SUMSS contends that the trial court erred when it omitted from the entry reflecting settlement several agreed terms, including "probate matters, the release of claims, and the removal of advertising statements[.]"

{¶47} We summarize below the terms of the settlement agreement placed into the record on December 6, 2017:

> SUMSS will transfer seventeen properties, each identified in the record by address, to Marsha and Lisa, or to a newly created entity they designate.
>
> SUMSS will transfer the seventeen properties by quitclaim deeds, in an as-is condition.
>
> The anticipated date for the transfer of the properties is on or before January 1, 2018.
>
> SUMSS will sign any and all leases, including any security deposits, to Marsha and Lisa within 120 days of the signing of the settlement agreement.
>
> Marsha and Lisa will transfer all membership units to SUMSS and execute any and all documents necessary to effectuate that transfer.
>
> The case pending before the trial court will be dismissed with prejudice.
>
> Regarding the probate of the estate of their late father, Lisa and Marsha agree to execute any forms necessary to waive entitlement to any distribution in the estate and assign their interest to SUMSS and/or Chris, Andrea Renee, and Craig. This "would include" Tim Madden, Blake Madden, and Trisha Madden,
>
> Urban Imperial may continue to use its current name, but agrees to stop using their current slogan and to remove any reference on their website inaccurately claiming that they have been in business since 1954 and any other untrue information.
>
> Marsha would receive certain personal items, including a grandfather clock, glass windows, porcelain vases, and videos of Marsha with her father in Italy.
>
> Lisa would receive some photos of her father.
>
> Each party would pay its own attorney fees, and the court costs would be split between the parties.
>
> Anyone signing a mutual release would get a release from all other parties.
>
> The parties agreed to divide family cemetery plots in a manner permitted by the cemetery's rules and regulations.

Our review of the record reveals that several terms stated on the record are not reflected in the trial court's April 18, 2018 order memorializing the terms of the agreement.

{¶48} SUMSS claims that the reason the trial court amended the settlement agreement is because, in the trial court's view, this was a case of judicial dissolution and SUMSS benefited merely by avoiding dissolution. Indeed, in the transcript of the evidentiary hearing the trial court stated the following:

> Well, here is the situation: What is easily lost sight of in this issue is that this settlement or - - alleged settlement on December 6th was to settle the case in front of this [c]ourt involving the dissolution of the corporation. Anything else, such as probate matters, burial plots, photographs, they may have been talked about, but I don't know why those would be material terms.

{¶49} SUMSS argued that if the trial court deemed certain terms of the agreement immaterial and excluded them as "unenforceable provisions," there may not be a meeting of the minds or a mutual benefit to both sides. In other words, eliminating terms from the agreement would remove some of the bargained-for benefit to SUMSS. In response, the trial court went on to say:

> But here is what [SUMSS] get[s]. If the settlement would go through, 17 lots go to the Plaintiffs and they get out of [SUMSS]. [SUMSS] never has to run the risk of being dissolved.

{¶50} In its March 28, 2019 journal entry holding that the parties entered an enforceable settlement agreement on December 6, 2017, the trial court stated:

> The [c]ourt would note that the main purpose of the settlement was to settle the litigation in front of it which concerned the petition by the Plaintiffs to dissolve [SUMSS] pursuant to provisions of R.C. Chapter 1705. Other matters discussed on December 6, 2017 were, while perhaps subjectively important to the parties, were not essential to that settlement from a legal analysis.
>
> This is important because [SUMSS] argues that there were persons who would be affected by the settlement that were not parties to this litigation. Likewise, [SUMSS] also argues that there were certain issues discussed at the December 6, 2017 hearing that were under the exclusive jurisdiction of the Summit County

> Probate Court. Both of those may be true but, in this [c]ourt's view, they were not essential to the settlement agreement. Therefore, this [c]ourt can adopt the settlement agreement as to the transfer of the properties whose addresses were read into the record, the transfer of any security deposits to the Plaintiffs and the transfer of the Plaintiffs' membership units back to [SUMSS].

{¶51} Thus, the trial court determined—despite the parties' negotiations and agreement on the record to include specific terms of the settlement—that certain terms were not "material" or "essential" in that they were related only to settlement, but not directly related to the issues underlying the case. Aside from the trial judge indicating his own interpretation and understanding of the core or essence of the agreement, the precise basis for the trial court's conclusion is unclear. Although the trial court hints at a legal analysis regarding the essential terms of the settlement, there is no legal basis for including or disregarding terms placed on the record as terms of the parties' settlement solely because the court did not consider them to be "essential" terms of the settlement agreement.

{¶52} SUMSS also argues that the trial court erred when it adopted a term—over SUMSS's objection—that Lisa's attorney included in a proposed judgment entry. SUMSS contends that the trial court's April 18, 2019 order altered the parties' settlement agreement by including an additional settlement term requiring SUMSS to transfer rent payments for the seventeen properties.

{¶53} The trial court's April 18, 2018 order stated:

> 2) Leases incident to each of the 17 properties described above and in the December 6, 2017 transcript shall be transferred to Plaintiffs, or to their designated LLC, by [SUMSS] **forthwith** and [SUMSS] shall further provide to Plaintiffs or their designee(s), all records reflecting lease payments made from January 1, 2018 for each of the 17 properties described above through April 1, 2018, including all amounts actually paid for each unit, the identity (identities) of the tenant/tenants making the payments and the dates on which the payments were made. These documents shall be provided by [SUMSS] to Plaintiffs, or their designee(s) **forthwith**.

> 3) All security deposits pertaining to the 17 properties described by street addresses above and in the December 6, 2017 transcript shall be transferred by [SUMSS] to [Marsha and Lisa] or their designee(s) **no later than April 5, 2018**.
>
> 4) All January, February, March and April, 2018 **rental payments made incident to the 17 properties** described herein and in the December 6, 2017 transcript shall be transferred by [SUMSS] to [Marsha and Lisa] or their designee(s) **forthwith**.

(Emphasis sic.) SUMSS maintains that the parties never considered, much less agreed, to include this as a term of the settlement.

{¶54} The record reflects that the parties anticipated that the date for transfer of the properties would be on or before January 1, 2018. The parties agreed that SUMSS would assign leases to Marsha and Lisa within 120 days of the signing of the settlement agreement. The record does not indicate any agreement for SUMSS to remit four months of rental payments to Marsha and Lisa as of January 2018.

{¶55} We conclude that the trial court erred by adopting a journal entry that improperly added terms, and omitted others, contrary to the stated intentions of the parties in reaching an agreement to settle their claims. At a minimum, a settlement agreement must include a meeting of the minds as to all essential terms. *Kostelnik*, 2002-Ohio-2985 at ¶ 16. However, if arguably "less essential" terms are included in the agreement, the trial court cannot disregard the parties' expressed intent to include such terms and remove them from the settlement agreement. "Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the parties' contract. *Rulli*, 79 Ohio St.3d at 380. If the record clearly reflects that the parties intended to include a term in their settlement agreement, the trial court does not have the discretion to adopt a judgment entry that unilaterally excludes or adds terms in a manner that would result in a settlement agreement that is inconsistent with the parties' agreement. *See City of Cuyahoga Falls v. Wells*, 9th Dist. Summit No. 19959, 2001 WL 81260, *3.

{¶56} The trial court's basis for adding and omitting terms of the agreement is not supported by law, and the evidence in the record does not support the trial court's decision. Therefore, this matter is reversed and remanded for the trial court to adopt a journal entry that accurately reflects the parties' settlement agreement as stated on the record on December 6, 2016. We caution, however, that our directive on remand should not be construed so as to limit the trial court's ability to consider any previously unresolved issues stemming from the terms disputed in this assignment of error.

{¶57} SUMSS's third and fourth assignments of error are sustained.

Lisa's Assignment of Error

The trial court abused its discretion in denying [Lisa]'s motion for an evidentiary hearing made pursuant to R.C. 2323.51 and thereafter denying [Lisa]'s motion for attorney fees for SUMSS'[s] frivolous misconduct.

{¶58} In her merit brief on appeal, Lisa argues that the trial court erred when it declined to hold a hearing on her motion for attorney fees and denied the motion. Specifically, Lisa argues that the trial court abused its discretion by refusing to grant a hearing where she incurred unnecessary legal fees because SUMSS moved to vacate the settlement agreement on contrived bases. Lisa asserts that SUMSS made this motion after participating in negotiations—in court and represented by three lawyers—over the course of December 4-6, 2017, and after the terms of the agreement were read into the record in the presence of the trial judge and SUMSS's managing member. We disagree.

{¶59} A court's decision on whether to award sanctions under R.C. 2323.51 will not be reversed on appeal absent an abuse of discretion. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, ¶ 11. An abuse of discretion involves something more than an error of law or judgment; it requires the appealing party to show that the trial court's decision was

unreasonable, arbitrary, or unconscionable. *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this Court may not simply substitute its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶60} R.C. 2323.51(B)(1) permits a "party adversely affected by frivolous conduct [to] file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." A court may make an award pursuant to R.C. 2323.51(B)(1) only after the court conducts a hearing "to determine whether particular conduct was frivolous * * * [and] whether any party was adversely affected by it * * *." R.C. 2323.51(B)(2)(a)-(c). However, it is well-settled that "R.C. 2323.51(B)(2) does not mandate a hearing whenever a motion for fees is made, but only that an evidentiary hearing is a necessary precondition to awarding fees." *Avon Poured Wall, Inc. v. Boarman*, 9th Dist. Lorain No. 04CA008448, 2004-Ohio-4588, ¶ 24.

{¶61} While acknowledging the overwhelming precedent holding to the contrary, Lisa contends "that the language of R.C. 2323.51 does not seem to leave the decision whether to grant a hearing to the discretion of the [t]rial [c]ourt." Lisa urges that her motion to dismiss presented a "triable issue" and "arguable basis" for awarding attorney fees and claims, therefore, "an evidentiary hearing should have been permitted * * *."

{¶62} We conclude that Lisa has not presented any authority to support her claim that the trial court was required to hold an evidentiary hearing prior to denying her motion. This Court has consistently held "that R.C. 2323.51 requires the trial court to hold a hearing before it can award attorney fees as a sanction for frivolous conduct, *but the same is not required when the trial court declines to award attorney fees*." (Emphasis added.) *Sunrise Coop., Inc. v.*

Joppeck, 9th Dist. Lorain No. 16CA010984, 2017-Ohio-7654, ¶ 25. Lisa has not established that the trial court abused its discretion when it denied her motion for attorney fees without hearing.

{¶63} Lisa's assignment of error is overruled.

III.

{¶64} SUMSS's assignments of error one and two are overruled. SUMSS's third and fourth assignments of error are sustained. Lisa's single assignment of error is overruled. The trial court's April 18, 2019 order is reversed, and this matter is remanded for proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, P. J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

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