IN THE SUPREME COURT OF OHIO

Olympic Holding Co. LLC, *et al.*,	:	
Plaintiffs-Appellees	:	Case No. 08-0200
	:	ON APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS, TENTH APPELLATE DISTRICT
v.	:	
ACE Capital Title Reinsurance Co.	:	
Defendant-Appellant.	:	Court of Appeals Case No. 07-AP-168

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ACE CAPITAL TITLE REINSURANCE COMPANY

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The issues presented for review in this appeal are of great interest to all Ohio businesses and, ultimately, to the customers they serve. The decision below expands what had been a narrow, judicially-created "promissory estoppel exception" to Ohio's Statute of Frauds—an exception recognized by some lower courts, but not this Court. It extends this judge-made exception to complex, multi-year commercial transactions in which sophisticated parties, represented by skilled lawyers, negotiate over several months and exchange various term sheets and draft agreements, but never actually consummate a deal by signing a contract as expressly intended by the parties.

The decision below also effectively creates a wholly-new "joint venture exception" to the Statute of Frauds. The Court of Appeals found that fiduciary duties may be imposed on parties who seek to establish a joint venture to be conducted over five years, and who are engaging in arms-length negotiations about the terms of the venture, even though there is no written document to memorialize terms and no writing signed by either party. It establishes for the first time as a matter of Ohio law that the party and lawyer on one side of the negotiating table owe a heightened fiduciary duty—usually reserved for special advisors—to the party and lawyer across the table, even while negotiations to conclude a long-term deal are yet ongoing. The decision below makes still-negotiating parties both fiduciaries and adversaries at the same time.

The consequence of the Court of Appeals' decision is that businesses conducting complex commercial deals in Ohio have lost the ability to predict the legal consequences of their actions with any certainty. Parties working toward the culmination of complex, multi-year, multi-million dollar deals are now exposed to the risk that something they say or do during their arms-length negotiations may be exploited by the other party after negotiations break down and the deal dies to create a contract claim or fiduciary obligations.

This Court has adopted the doctrine of promissory estoppel set forth in the Restatement (Second) of Contracts, Section 90, as a separate equitable remedy that may be used when justice so requires to compensate a disappointed party who has reasonably relied to his detriment on the other party's conduct when a deal fails to close. See, *e.g., Talley v. Teamsters* (1976), 48 Ohio St.2d 142, 146. It is not suggested here that the Court eliminate promissory estoppel as an equitable remedy. It is quite another matter, however, to allow a contract claim—plainly barred by the Statute of Frauds—to survive through a promissory estoppel exception to the Statute, as the Court of Appeals did here. Because promissory estoppel already exists as an equitable remedy to avoid unjust results, there is no need for a promissory estoppel exception to the Statute of Frauds.

This Court has never spoken to the issue of whether there should be a promissory estoppel exception to the Statute of Frauds. The exception has crept into Ohio law through a handful of lower-court decisions, but Ohio courts do not agree as to its scope or application. Compare *McCarthy, Lebit, Crystal & Hamilton Co. v. First Union Mgmt., Inc.* (1993), 87 Ohio App. 3d 613, 627 (exception applies only when a party misrepresents that the Statute of Frauds has been met or promises to make a memorandum of the agreement); and *Daup v. Tower Cellular* (2000), 136 Ohio App.3d 555, 566 (in employment contexts, promissory estoppel exception may bar Statute of Frauds defense more broadly); with *Connolly v. Malkamaki*, 2002-Ohio-6933, ¶¶ 23-24 (declining to apply *McCarthy*'s test for the exception); and *Royal Doors Inc. v. Hamilton Parker Co.* (1993), Franklin App. No. 92AP-938, 1993 Ohio App. LEXIS 2310, *12 (declaring promissory estoppel exception "inappropriate" because "[t]he alleged contract was an arms-length transaction between two parties with considerable background in the … field."). Ohio's bench and bar, and those doing business in Ohio, would benefit from this Court's acceptance of this appeal to determine whether there should be any promissory estoppel exception to the Statute of Frauds at all and, only if so, in what contexts such an exception should apply.

It is not an overstatement to say that the decision below nullifies the Statute of Frauds, a statute that this Court recognized long ago to be "founded in wisdom" and "justified by long experience." *Newman v. Newman* (1921), 103 Ohio St. 230, 245. The General Assembly enacted the Statute of Frauds precisely to prevent litigation such as this, where parties are entangled in a "he-said, she-said" dispute over whether an enforceable contract was ever made and, if so, what its terms are. The General Assembly long ago determined that it would be unwise to allow such disputes to be tried in the courts, and that the surest way to avoid such litigation was to require long-term contracts of this type to be in writing and signed by the party against whom the agreement is sought to be enforced. Because the Statute of Frauds is a statutory rule of law, the province of the lower courts to create an exception to it should not be assumed. Typically, it is not the role of the courts to make exceptions to statutes. If public policy calls for such an exception then the General Assembly—not the courts—should create and define that exception.

The second issue presented for review is of great interest for similar reasons. The decision below creates out of whole cloth a new exception to the Statute of Frauds for joint ventures. Contract law governs whether parties have created a joint venture with enforceable rights and obligations, and thus joint ventures are subject to the Statute of Frauds and rendered unenforceable if they do not satisfy the Statute. The Court of Appeals, however, held that even though the parties were involved in ongoing arms-length negotiations about the terms of a multi-year transaction, and had not yet drafted a five-year joint venture agreement, much less signed one, the defendant may have said or done something that inadvertently created a long-term joint venture and thereby assumed fiduciary duties toward the plaintiffs.

The summary-judgment context of this appeal is no reason for this Court not to accept it. The Court reviews "doubtful reversals" of summary judgment as presenting questions of great general interest. *North v. Pennsylvania R. Co.* (1967), 9 Ohio St.2d 169, 171. Review is particularly appropriate in this case and at this stage because the very purpose of the Statute of Frauds is to prevent "he-said, she-said" disputes about agreements, not in writing or not signed, from going to trial—which is precisely what is happening here. It is undisputed that the parties in this case did not sign a written contract. The Court of Appeals, nonetheless, is sending a contract claim to trial based on disputed testimony over whether there was a five-year agreement. The Court of Appeals placed particular weight on testimony by a former employee that there was a "handshake deal," and that, in his opinion, the company acted "unethically" when it did not close the deal. Opinion, at ¶¶ 6, 15, 46, 48. It also relied on testimony that this former employee promised that a contract would be signed if certain conditions were met and that the agreement had "gone upstairs for signature." Id. at ¶¶ 11-12, 46. This type of testimony, however, should not create a triable issue on a contract claim where the purported contract cannot be performed in a year. The whole point of the Statute of Frauds is to require a signed writing precisely to avoid litigating disputes about whether an enforceable multi-year agreement exists.

STATEMENT OF FACTS

ACE Capital Title Reinsurance Co. ("ACE Capital") is a title reinsurance company. In early 2003, ACE Capital had discussions with three regional title insurance agencies about a potential five-year reinsurance relationship. The proposed transaction consisted of a "residential" component and a "commercial" component. The goal was to create a new title underwriter business, ultimately of national scope, that would compete with existing underwriters and revolutionize the title insurance business.

The parties exchanged three term sheets broadly outlining the proposed transaction, but ACE Capital never signed them, and each sheet stated in bold capital letters that it was "NOT AN OFFER OF INSURANCE." In August 2003, ACE Capital and the title agencies began negotiating the interrelated written agreements that would govern the proposed deal. These negotiations extended over a five-month period during which the parties were at all times represented by skilled legal counsel experienced in commercial transactions. The parties expected that these negotiations would result in a signed agreement, but that never happened.

ACE Capital sent the title agencies eight different versions of a "Residential Reinsurance Agreement," the last of which was nineteen single-spaced pages in length and included forty-four different sections. Each of these drafts had a "No Contract Disclaimer" on the first page clarifying that the drafts were "for discussion purposes only" and that neither the drafts nor any other statement made at any time was an "offer, invitation or recommendation" to enter into the transaction. None of these drafts was ever signed by ACE Capital.

These drafts of the Residential Reinsurance Agreement required and incorporated by reference two ancillary written contracts, a Capital Support Agreement and an Approved Agency Agreement. ACE Capital circulated a draft four-page, single-spaced Capital Support Agreement (including seven defined terms and eleven other sections) and a twenty-one page, single-spaced draft Approved Agency Agreement (including twenty-six sections and three incomplete schedules). The title agencies rejected those draft ancillary agreements, and neither one was finalized or signed. The parties never drafted a reinsurance agreement for the commercial component of the transaction. Nor did they draft a joint venture agreement or any other written contract setting forth the terms of the purported five-year joint venture.

ACE Capital negotiated with the title agencies with the hope that the transaction would ultimately be consummated. ACE Capital's 2003 business plan anticipated the completion and execution of the required contracts, and ACE Capital's parent corporation approved a business plan generally describing the transaction. Also in anticipation that the contracts would come to fruition, ACE Capital hired a new employee, told some customers about the prospect of its relationship with the title agencies, and submitted an application to the Ohio Department of Insurance ("ODI") to become a direct title insurer.

The title agencies also applied to the ODI, seeking ODI's approval to acquire an existing Ohio title insurance company, Olympic Title Insurance Company ("OTIC"). The title agencies planned all along to use OTIC to write residential title insurance policies and commercial title reinsurance policies, and had started the process for acquiring OTIC back in early 2003—after the parties exchanged term sheets but before contract negotiations even started. In late December 2003, knowing full well that the Residential Reinsurance Agreement and ancillary agreements had not yet been executed, the title agencies closed on the acquisition of OTIC.

Just days before the title agencies acquired OTIC, ACE Capital's parent companies decided that, due to market factors and priority changes, ACE Capital should not proceed with any new initiatives. ACE Capital informed the title agencies of its decision to stop the negotiations on January 2, 2004. At that time, there still was no final agreement signed by the parties nor any other signed writing containing the terms of the residential or commercial components of the transaction. Only then did the title agencies inform ACE Capital that they had already closed on their acquisition of OTIC. Recognizing that ACE Capital was not going to conclude the negotiations, the title agencies then tried to force an agreement upon ACE Capital.

The first business day after learning of ACE Capital's decision not to proceed with the deal, the title agencies unilaterally re-dated, signed, and sent the most recent draft of the Residential Reinsurance Agreement (a draft prepared by them) to ACE Capital for signature. Notably absent from this draft were any references to the Capital Support Agreement, which had been included in all eight drafts circulated by ACE Capital. Nor was it accompanied by the essential Capital Support and Approved Agency Agreements. The forwarded Residential Reinsurance Agreement stated: "This agreement may be executed in any number of counterparts, and by the parties on separate counterparts, <u>but will not be effective until each party has executed at least one counterpart</u>." (Emphasis added). ACE Capital did not sign.

On January 16, 2004, OTIC's Board of Directors met. The key item on the agenda was: "Discussion about <u>un-executed</u> Ace reinsurance agreement and legal strategy to <u>force signature</u>." (Emphasis added). The next day, the principal of one of the title agencies circulated an email describing a strategy to cram-down the deal against ACE Capital:

> We have taken the position that the Parties have agreed to all aspects of the deal. In the case of the Reinsurance contract, there is a final draft contract . . . . For the rest of the dispute, we have said that we have agreed to the "economic terms" but don't have a draft to look to.

Ten days later, the title agencies and their affiliates filed suit in Franklin County against ACE Capital and four foreign insurance affiliates (none of whom had participated in the discussions or were parties to the proposed deal). The title agencies claimed that certain alleged oral statements made by an ACE Capital employee rendered the Statute of Frauds inoperative and required enforcement of the draft five-year Residential Reinsurance Agreement and the purported five-year joint venture. After the title agencies' eve-of-trial dismissal and re-filing of the suit in mid-2006, the trial court granted ACE Capital summary judgment on all of the title agencies' contract-based claims, and limited the title agencies' potential recovery on their promissory estoppel and fraud claims to their alleged reliance damages. The trial court rejected the title agencies' theory that a promissory estoppel exception barred ACE Capital's Statute of Frauds defense, and thus precluded the title agencies from pursuing their claims for specific performance and expectation damages (estimated to be around $65 million).

The Tenth District Court of Appeals reversed the trial court's decision in part and remanded the title agencies' breach-of-contract claims for trial, holding that there is a promissory estoppel exception to Ohio's Statute of Frauds that applies even to complex commercial transactions between sophisticated parties represented by counsel. ACE Capital now faces a trial not only on a promissory estoppel claim for alleged reliance damages, but also on breach-of-contract and fiduciary duty claims for specific performance and benefit-of-the-bargain damages—all based on purported "agreements" that ACE Capital never signed or never saw.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Ohio recognizes no promissory estoppel exception to the Statute of Frauds that would permit an action upon an unwritten or unsigned agreement that is not to be performed in one year.

This Court should accept jurisdiction over this appeal to decide whether Ohio law should recognize any so-called promissory estoppel exception to the Statute of Frauds. The state of Ohio law on this issue is far from clear, and this Court has not yet spoken on the appropriateness, let alone the scope, of this judge-made exception to the Statute of Frauds.

A. The Promissory Estoppel Exception to the Statute of Frauds Is a Recent, Judge-Made Exception to a Venerable and Unambiguous Statute.

The General Assembly first enacted the Statute of Frauds in 1810. *Fleming v. Donahue* (1831), 5 Ohio 255, 258. For nearly 200 years, it has been well established that no action shall be brought to enforce certain agreements "unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith ...[.]" R.C. 1335.05. Professor Williston describes Ohio as among the states that "have noted the beneficial aspects of the Statute, and have restricted rather than enlarged and multiplied the exceptions to the Statute." 10 Williston on Contracts (4th Ed. 1999, Supp. 2007), § 21:2, n.16.

The so-called promissory estoppel exception to the Statute of Frauds, in stark contrast to the Statute itself, is new and controversial. Surveying the development of this judge-made exception, Professor Corbin notes that cases adopting promissory estoppel as an exception to the Statute are "very recent." 4 Corbin on Contracts (Rev. Ed. 1997, Supp. 2007) at § 12.8, n.13. Corbin traces the origin of the exception to California and elsewhere within the Ninth Circuit. *Id.* at § 12.8. Professor Williston notes that some states "have exercised admirable caution in refusing to adopt what they perhaps correctly perceive as too loose a doctrine of promissory estoppel or equitable estoppel; a doctrine that would swallow the Statute of Frauds and defeat its evidentiary function, if not its cautionary function." Williston, *supra,* § 27.13.

Chief among the cautious jurisdictions to reject the promissory estoppel exception is Florida, where the Supreme Court noted that the legislature had declined to incorporate the exception into the Statute of Frauds—and therefore declined to do so itself. *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.* (Fla. 1966), 190 S.2d 777, 779. A more recent Florida Court of Appeals decision reiterated this point:

> If Florida is to move toward enforcing oral promises intended to be performed beyond one year, or towards compensating those who enter into such agreements, <u>it is the proper function of the Florida Legislature to announce that public policy change, not the function of a district court of appeal</u>.

Collier v. Bolling Brooks, 632 So. 2d 149, 156 (Fla. Ct. App. 1994) (emphasis added); see also *Topp, Inc. v. Uniden Am. Corp.* (S.D. Fla. 2007), 483 F.Supp.2d 1187, 1219; *Lynkus Comms., Inc. v. WebMD Corp.* (Fla. Ct. App. 2007), 965 So. 2d 1161, 1167.

A leading Illinois case has similarly refused to create a promissory estoppel exception to the statute. *Sinclair v. Sullivan Chevrolet Co.* (Ill. Ct. App. 1964), 45 Ill. App.2d 10, 17, 20, 195 N.E.2d 250, *aff'd*, 31 Ill. 2d 507 ("Where * * * a case is clearly within the Statute of Frauds, promissory estoppel is inapplicable, for the net effect would be to repeal the Statute completely."). Likewise, Pennsylvania federal courts have anticipated that Pennsylvania's high court would reject the exception. *See Int'l Poultry Processors, Inc. v. Wampler Foods, Inc.* (E.D. Pa. Apr. 29, 1999), 1999 U.S. Dist. LEXIS 7025, *16 n.11. And Washington state courts have expressed great reluctance to adopt any such exception. *See Reilly v. Brunner* (Wash. Ct. App. 2003), 2003 Wash. App. LEXIS 662, *5 (collecting cases).

B. <u>Confusion Reigns Regarding the Exception and Its Application in Ohio</u>.

Given this history, it is no surprise that there has been a great deal of confusion here in Ohio about whether and to what extent a promissory estoppel exception to the Statute of Frauds exists; and, if so, what that may mean in a given case. Twenty years ago, the United States Court of Appeals for the Sixth Circuit analyzed Ohio law and concluded that this Court would <u>not</u> allow the exception to override the Statute:

> The Ohio Supreme Court has never explicitly ruled on whether promissory estoppel can apply in instances where the statute of frauds would bar enforcement of an alleged oral agreement involving real estate. However, Ohio courts have long recognized the important function that the statute of frauds plays.
> ***

> The statute of frauds was designed precisely to prevent litigation such as this, where the parties are entangled in a dispute over what was or was not promised ...[.] The conflicting evidence and arguments presented to this Court illustrate well the dangers posed by permitting oral real estate transactions. If a court allows parol evidence of an unwritten contract, it can never be certain that it is not perpetuating rather than preventing a fraud. Had the agreement been reduced to writing, however, there would be little opportunity for fraud or mistake to arise.
> ***
> The Ohio Supreme Court has had no occasion to consider the ramifications of allowing the doctrine of promissory estoppel to override the statute of frauds in a real estate context. In the absence of a strong indication of its position on this issue, we decline to abrogate the clear and explicit intent of Ohio's two statutory provisions for writing requirements in real estate transactions.

Seale v. Citizens Savings & Loan Assn. (6th Cir. 1986), 806 F.2d 99, 102-104.

In *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Management* (1993), 87 Ohio App.3d 613, however, the Eighth District undertook precisely the analysis that the Sixth Circuit predicted this Court would not undertake by applying the promissory estoppel exception to a law firm's negotiations with its landlord about the renewal of a form lease for office space. In dissent, Judge Corrigan cited *Seale* and a later decision from the Fourth District for the proposition that real estate transactions and other formal undertakings involving significant sums of money are ill-suited for any promissory estoppel exception to the Statute of Frauds. *Id.* at 637. In March 2007, Judge Carr noted that the Ohio Supreme Court had "yet to adopt a firm rule" regarding whether and to what extent *McCarthy* or some other test controlled "whether a claim for promissory estoppel may avoid the effect of the statute of frauds...[.]" *Niemi v. NHK Spring Co., Ltd.* (March 23, 2007), S.D. Ohio No. 3:03CV7512, 2007 WL 915134, at *3-4.

Now, in this case, the Tenth District has applied and expanded *McCarthy* to allow the promissory estoppel exception to defeat summary judgment in a context even less deserving of the doctrine. Here, it is undisputed that experienced businesspersons represented by sophisticated counsel negotiated at arms-length for many months concerning a multi-layer, multi-year relationship. No writing was signed memorializing the transaction, but now the title agencies seek to declare a five-year contract to be both fully formed and enforceable in advance of signature. The decision below remanding the title agencies' breach-of-contract claims lets them proceed to trial not merely on a promissory estoppel theory for reliance damages, but also on a contract theory, in contravention of the plain language of the Statute of Frauds. If this Court does not restrain Ohio courts' application (and expansion) of *McCarthy* and the promissory estoppel exception, Ohio will lose its status as an "admirably cautious" jurisdiction still mindful of the centuries-old requirement in the Statute of Frauds of a signed writing. This legislating from the bench should be restrained.

C. No Such Exception Should Apply as a Matter of Law to Complex Transactions Like the One at Bar.

Even *McCarthy* limits the circumstances under which a promissory estoppel exception may bar the Statute of Frauds to where there has been "(1) a misrepresentation that the statute's requirements have been complied with or (2) a promise to make a memorandum of the agreement." *McCarthy,* 87 Ohio App.3d at 626-27. Apparently relying on the second prong, the Tenth District found a material issue of fact whether ACE Capital made a "misrepresentation to supply signed written memoranda of the parties' agreements." Opinion, at ¶ 48. Even if ACE Capital had made such a "promise"—which it did not—any dispute about that is irrelevant, for as the Tenth District recently (and correctly) held, it is unreasonable as a matter of law for sophisticated parties to rely on statements of future intent to supply a signed writing:

> Reliance on a statement of future intent made prior to the conclusion of negotiations in a complex business transaction is unreasonable as a matter of law. *** Such a rule is particularly appropriate when two sophisticated business entities are involved in negotiations. Until the documents are signed and delivered the game is not over. Businessmen would be undesirably inhibited in their dealings if expressions of intent and the exchange of drafts were taken as legally binding agreements.

Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc., Franklin App. No. 06AP-329, 2007-Ohio-380, ¶ 20 (citation omitted).

The Tenth District's rulings here and in *Carcorp* cannot be reconciled. In this case involving complex negotiations between sophisticated parties represented by counsel, who exchanged drafts but never signed a contract, the Tenth District finds a material issue of fact regarding an alleged promise to "supply signed memoranda of the parties' agreement" and thereby applies *McCarthy*'s promissory estoppel exception to the Statute of Frauds. By contrast, in *Carcorp*, another case where sophisticated parties represented by counsel exchanged drafts but never signed a contract, another Tenth District panel declares the plaintiff's reliance on a promise to deliver a signed writing to be unreasonable as a matter of law given the sophistication of the parties involved. The latter approach to reliance comports with that of those Ohio courts that decline to apply a promissory estoppel exception to the Statute of Frauds when sophisticated parties, solemn undertakings, and significant sums of money are involved. See, *e.g.*, *Seale*; *Royal Doors* (promissory estoppel exception "inappropriate" where alleged contract was arms-length transaction between sophisticated parties); *Columbus Trade Exchange, Inc. v. AMCA Intl. Corp.* (S.D. Ohio 1991), 763 F.Supp. 946, 955 (same; "[t]o find otherwise does irreparable harm to the statute of fraud and renders it nugatory...[.]"). This Court's guidance is sorely needed to determine whether sophisticated parties engaged in arms-length negotiations may sue on a contract, otherwise barred by the Statute of Frauds, based on an alleged oral "agreement to agree" and/or an alleged promise to deliver a signed writing. Opinion at ¶¶ 43-45, 48-49.

Proposition of Law No. II: A joint venture agreement that cannot be performed in one year is subject to Ohio's Statute of Frauds, and where that Statute bars the agreement, a joint venturer's claim for breach of fiduciary duty against a co-venturer is also barred as a matter of law.

After erroneously applying *McCarthy*'s promissory-estoppel exception to the Statute of Frauds and remanding the title agencies' contract claims on that basis, the Court of Appeals injected still more confusion into the Statute of Frauds with its treatment of the title agencies' claim for breach of fiduciary duty. The title agencies allege that they and ACE Capital were co-venturers in a purported five-year venture and that, as such, the parties owed fiduciary duties to one another, which ACE Capital allegedly breached. The trial court correctly granted ACE Capital summary judgment on this claim, deciding that there was no enforceable contract or joint venture and thus no special relationship between the parties sufficient to create a fiduciary duty.

Reversing, the Tenth District relied on its decision in *Doctors Hosp. v. Hazelbaker* (1995), 106 Ohio App.3d 305, 309-310, for the proposition that "joint venturers may incur fiduciary obligations to each other regardless of whether any written agreement is then in force, since such a writing is not necessary for the creation of such a venture." Opinion, at ¶ 54. This analysis is incomplete and further erodes the Statute of Frauds. *Hazelbaker* nowhere addresses the Statute of Frauds. While some joint ventures may indeed be "implied" and unwritten, *Al Johnson Construction Co. v. Kosydar* (1975), 42 Ohio St. 2d 29, 32, the Statute of Frauds provides that "no action" can be taken on such an agreement if it is to last more than one year and has not been signed by the party to be charged. R.C. 1335.05. Courts in Ohio and elsewhere agree that unwritten/unsigned joint ventures subject to the Statute of Frauds cannot generate fiduciary duties between co-venturers. See, *e.g., Garg v. Venkataraman* (1988), 54 Ohio App.3d 171, 173 (joint venture agreements may be oral, but are still contracts subject to the Statute of Frauds; where joint venture agreement is unenforceable under Statute, there can be no breach of fiduciary duty between co-venturers); *Advanced Protection Technologies, Inc. v. Square D Co.* (M.D. Fla. 2005), 390 F.Supp.2d 1155, 1161-62 (same). Moreover, this Court has previously emphasized that fiduciary duties do not arise even during the most "congenial" arms-length negotiations by parties protecting their own interests. *Ed Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St.3d 433, 442-43.

This Court should accept jurisdiction over ACE Capital's Second Proposition of Law to determine, as a matter of first impression, whether fiduciary duties may arise between parties negotiating a proposed multi-year joint venture at arms-length. Businesses negotiating arms-length transactions in this state need to know whether they are somehow the fiduciaries of the parties across the table from them.

CONCLUSION

For the foregoing reasons, ACE Capital respectfully asks the Court to accept jurisdiction of this appeal in order to (1) preserve the integrity of Ohio's Statute of Frauds; (2) clarify the state of Ohio law regarding the putative promissory estoppel exception thereto; (3) hold that to the extent there is such an exception, it is inapplicable in complex business transactions; and (4) clarify that where an alleged joint venture is barred by the Statute of Frauds, no fiduciary duty exists between co-venturers still negotiating at arms length the terms of the venture.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby affirms that she caused the foregoing Memorandum in Support of Jurisdiction to be served via hand-delivery, this 25th day of January, 2007 upon the following:

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COLUMBUS/1412391 v.02

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

OLYMPIC HOLDING COMPANY, LLC, et al.,	:	
Plaintiffs,	:	
vs.	:	Case No. 06CVH06-7238
ACE LIMITED, et al.,	:	Judge Cain
Defendants	:	

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DECISION GRANTING IN PART AND DENYING IN PART DEFENDANT'S, ACE CAPITAL TITLE REINSURANCE COMPANY, MOTION FOR SUMMARY JUDGMENT, FILED SEPTEMBER 20, 2006

Rendered this 25th day of January 2007.

CAIN, J.

This matter is before this Court in Defendant's, Ace Capital Title Reinsurance Company (hereinafter "Ace Capital"), Motion for Summary Judgment, filed September 20, 2006. Plaintiffs filed their Memorandum in Opposition on October 18, 2006. Ace Capital filed its Reply Memorandum on November 9, 2006. This motion is now ripe for decision.

The basic facts of this case are long and complicated.[1] These facts, however, are well known to the Court and the parties involved, and for the sake of brevity, the Court will not restate them here. Furthermore, while there are some slight discrepancies, the facts presented in both sides' current briefings accurately portray the events leading up to the present lawsuit. All that really needs to be emphasized by the Court is that the present dispute centers on the validity of two

[1] Plaintiffs' Complaint alone contains seventy pages and over 422 paragraphs. The evidence submitted by the parties in regards to the present motion accounts for over three boxes worth of material.

EXHIBIT
A

alleged agreements. A Joint Venture Agreement and a Residential Reinsurance Agreement. All ten claims presented in Plaintiffs' Complaint generally revolve around the existence of these two agreements. Ace Capital now moves the Court for Summary Judgment as to all but two of Plaintiffs' claims. Ace Capital primarily moves for judgment on the grounds that the Ohio Statute of Frauds bars any action based upon either of the two alleged agreements. The Court has now conducted a de novo review of the facts and arguments presented by the parties, and has come to the following decision.

Summary judgment was established through Civ. R. 56 as a procedural device to terminate litigation when there is no need for a formal trial. Norris v. Ohio Std. Co. (1982), 70 Ohio St.2d 1. The rule mandates that the following be established: (1) that there is no genuine issue of any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. Bostic v. Connor (1988), 37 Ohio St.3d 144.

Summary judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. A "party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. Civ. R. 56(C) sets forth an exclusive list of documentary evidence that a court may consider when reviewing a motion for summary judgment.

In accordance with Civ. R. 56(E), when a properly supported motion for summary judgment is made, the nonmoving party may not rest upon the mere allegations or denials contained in the pleadings but must come forward with specific facts demonstrating a genuine issue of fact for trial. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against him.

Statute of Frauds

Ace Capital first moves the Court for Summary Judgment as to Plaintiffs' four core claims based upon the alleged Joint Venture Agreement and Residential Reinsurance Agreement (hereinafter the "Residential Agreement"). These four claims consist of a claim for specific performance of the Joint Venture Agreement, Plaintiffs' Complaint at ¶¶285-310; a claim for breach of the Joint Venture Agreement, Id. at ¶¶311-333; a claim for specific performance of the Residential Agreement, Id. at ¶¶334-352; and a claim for breach of the Residential Agreement, Id. at ¶¶353-365. Due to the similar nature of all four of these claims, and the arguments made against them, the Court will deal with them together.

The bulk of this case, *i.e.* the claims listed above, can be disposed of with the answer to one question: Is an action brought pursuant to the alleged Joint Venture Agreement and the alleged Residential Agreement barred by the Ohio Statute of Frauds? The Ohio Statute of Frauds can be found in R.C. 1335.05, which states:

> No action shall be brought whereby to charge the defendant ... upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

In a nutshell, this statute contains two requirements that an agreement must meet if it has a term longer than one year. These requirements are that the agreement be in writing and that the agreement be signed.

In order to make a proper analysis of whether the Ohio Statute of Frauds applies to the Joint Venture Agreement and the Residential Agreement, the Court must first determine whether these two agreements were for a term longer than one year. In the present case, it is certain that they were. From reading a copy of the proposed Residential Agreement, it is clear that it was intended to be for a term longer then one-year. *See* Plaintiffs' Complaint at Ex. A. In fact, it is evident that the Residential Agreement was to last at least five-years. Furthermore, the testimony of Howard Kopel, on the behalf of Plaintiffs, shows that the Joint Venture Agreement and the Residential Agreement were to have terms of at least five-years. Mr. Kopel testified that the Joint Venture Agreement and the Residential Agreement had to have durations that were co-extensive in order to make them work. Kopel Depo. at p. 148. He further testified that these two agreements were to last for a duration of at least five-years. Id. at 148-150. The Court can come to no other conclusion except that the Joint Venture Agreement and the Residential Agreement were to last for a term longer than a year.

With this determination made, it becomes evident that the Ohio Statute of Frauds bars any action based upon the Joint Venture Agreement or the

Residential Agreement. First, both agreements are considered contracts and are subject to R.C. 1335.05. *See* Greg v. Venkataraman (Wayne, 1988), 54 Ohio App. 3d 171, 172 ("While joint venture agreements may be oral, they are, nonetheless, still contracts, and thus subject to all of the applicable requirements of contract law, including the Statute of Frauds."). Second, it is undisputed that both of these agreements were never formally signed or executed. Third, at least as it pertains to the Joint Venture Agreement, there was never a formal writing of the agreement between the parties.[2] The Joint Venture Agreement allegedly consists of term sheets exchanged by the parties along with certain oral promises. Therefore, the Joint Venture Agreement not only fails to satisfy the signature requirement of R.C. 1335.05, it also fails to satisfy the writing requirement.

Collectively the evidence in this case shows that the Joint Venture Agreement was not put into formal writing, was not signed, and was to be performed over a period longer than one-year. The evidence also shows that the Residential Agreement was in writing, at least in an un-finalized form, but was not signed and was to be performed over a period longer than one-year. R.C. 1335.05 bars any action pursuant to either of these agreements.

With this analysis in tow, the Court can now look at the various arguments made by Plaintiffs in an attempt to bring the Joint Venture Agreement and the Residential Agreement out from under R.C. 1335.05. Plaintiffs' first argument is that both agreements could have theoretically been performed in one-year and

[2] On the other hand, the Residential Agreement was substantially memorialized in the form of draft copies. None of these copies, however, were ever executed.

as such, they are not subject to R.C. 1335.05. In support of this argument Plaintiffs cite to Weiper v. W.A. Hill & Assoc. (Hamilton, 1995), 104 Ohio App. 3d 250, which states:

> A promise unlikely to be performed within a year which is, in fact, not performed within a year, is still not within the Statute of Frauds if at the time of making there is a possibility that it can be **entirely performed as the parties intended** within a year. *Bryan v. Looker* (1994), 94 Ohio App. 3d 228, 234, 640 N.E.2d 590, 594; *Ford v. Tandy Transp., Inc.* (1993), 86 Ohio App. 3d 364, 382, 620 N.E.2d 996, 1007; 3 Jaeger, *Williston on Contracts* (3 Ed.1960) 576-578, Section 495. Courts have construed this principle liberally to render contracts enforceable. Restatement of the Law 2d, Contracts, Section 130, Comment a.

Id. at 264 (Emphasis added).

Plaintiffs argue that the Residential Agreement could have been theoretically performed within one-year. The only evidence that they bring forth to support this argument is references to sections 1.1, 2.2 and 3.1 of the Residential Agreement. *See* Plaintiff's Complaint at Ex. A. Sections 1.1 and 3.1 set forth aggregate limits on the amount of coverage and losses, while section 2.1 of the Residential Agreement provides for immediate termination of the agreement upon a certain set of enumerated occurrences. Unfortunately for Plaintiffs, these sections of the Residential Agreement do not help them.

In order to show how this is so, the Court must first note that Plaintiffs do not come forward with any affirmative evidence to rebut the conclusion that the Joint Venture Agreement and the Residential Agreement were to last for a duration of at least five-years. Furthermore, Plaintiffs' arguments concerning sections 1.1, 2.2 and 3.1 only apply to the Residential Agreement and not to the Joint Venture Agreement. Therefore, it appears that there is no real argument by

Plaintiffs that the Joint Venture Agreement could have been performed in a year.[3] Regardless of this point, the Court's decision applies to both agreements.

Plaintiffs' only real basis for arguing that the two agreements could have been performed in less than a year is via section 2.2 of the Residential Agreement, concerning early termination.[4] This section, however, does not fit into the Weiper holding cited above. The Weiper case states that a contract will not fall within the Statute of Frauds if it "can be entirely **performed** as the parties **intended** within a year" Weiper at 264 (Emphasis added). The key words to focus on here are the words "performed" and "intended". Section 2.2, relied upon by Plaintiffs, has nothing to do with the intended performance of the agreement, but only has to do with possible early termination of the agreement. Early termination would not be performance of the agreement as the parties intended. It would be non-performance of the agreement. As shown by the agreements themselves, along with the testimony of the parties, both the Joint Venture Agreement and the Residential Agreement were intended to last for a period of at least five years. This intention was regardless off the language found in section

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[3] In fact, the only argument that Plaintiffs make in support of the contention that the Joint Venture Agreement could have been performed in less than a year can be found in one sentence on page 20 of their Memorandum in Opposition. Plaintiffs state: "Here, it is possible that the parties' joint venture-to create a new title insurance and reinsurance program-could have been achieved in one year." Stating it is not enough; you have to prove it, which Plaintiffs have not done in this case.

[4] Plaintiffs also argue that the limits proposed in sections 1.1 and 3.1, while unlikely, could theoretically be reached in less than a year. While this may be so, the Court cannot rule that it prevents the application of the Statute of Frauds. Theoretically, both Ace Capital and Plaintiffs can cease to exist the day after the agreement was signed, which would cause the agreement to be performed in less than a year and not barred by the Statute of Frauds. Theoretically, the world may end in less then a year after the agreement was signed. While some courts may take the theoretical argument to its limits, this Court will not. Even though in the present case the Residential Agreement's loss limits could theoretically be reached in less than a year, common sense, and Plaintiffs' own admissions, make this event so improbabable as to bring it out of the realm of theoretical. Sections 1.1 and 3.1 cannot save Plaintiffs.

2.2. Therefore, section 2.2 of the Residential Agreement cannot serve to bring either agreement out from under the Ohio Statute of Frauds. *See* Soteriades v. Wendy's of Ft. Wayne, Inc. (Franklin, 1986), 34 Ohio App. 3d 222, 226 (Holding that the possibility that the contract could have been terminated in the first year due to the sale of the business was not enough to "find that such provision is sufficient to render the agreement one not to be performed within one year within the meaning of R.C. 1335.05".).

Plaintiffs' second argument as to why an action pursuant to the Joint Venture Agreement and the Residential Agreement is not barred by R.C. 1335.05 is that Ace Capital is estopped from relying on R.C. 1335.05.[5] Plaintiffs essentially argue that Ace Capital is estopped from relying on the Statute of Frauds because it, via its employees and officers, promised to sign the Residential Agreement and the Joint Venture Agreement, as well as promised to reduce the Joint Venture Agreement to writing. This is a defense that needs to be examined very closely in order to see its flaws.

Promissory estoppel, in the contexts of R.C. 1335.05, is not an absolute and can only be used in a limited number of circumstances. In fact, there are only two such circumstances. "[T]he doctrine of promissory estoppel may be used to preclude a defense of statute of frauds, but only when there has been (1) a misrepresentation that the statute's requirements have been complied with or (2) a promise to make a memorandum of the agreement." McCarthy, Lebit, Crystal,

[5] This defense to the Statute of Frauds needs to be distinguished from Plaintiffs' claim for promissory estoppel, which will be dealt with later in this decision.

& Haiman Co., L.P.A. v. First Union Mgt., Inc. (Cuyahoga, 1993) 87 Ohio App. 3d 613, 627.

Before the Court can make its determination as to this matter, it should first be noted that there is no allegation by Plaintiffs that Ace Capital misrepresented that the Statute of Frauds' requirements had been complied with. Plaintiffs solely rely upon the second grounds for promissory estoppel cited above, that Ace Capital allegedly promised to make a memorandum of the agreements. Plaintiffs argue that throughout their dealings with Ace Capital, they were assured on many occasions that if certain things occurred, Ace Capital would sign the agreements. Plaintiffs cite to deposition testimony to support this argument. Plaintiffs also argue that there is extensive evidence before the Court that Ace Capital promised to reduce the rest of the parties' agreements, including the Agency Agreement and the Capital Support Agreement, down to writing. Plaintiffs once again cite to deposition testimony to support this argument.

Plaintiffs have failed to establish that they are entitled to promissory estoppel. Even accepting the testimony cited by Plaintiffs as true, it does not satisfy the second basis for promissory estoppel found in the McCarthy case. The present situation is not a situation that was envisioned in that ruling. The McCarthy ruling is more geared towards a situation where the parties, through negotiations, have come to a final agreement on all the terms of a contract. It assumes that the parties have orally executed that contract and one side has promised to put that contract in writing. This is just not the situation found in the present case.

The facts of McCarthy illustrate this point. In McCarthy, a law firm was renegotiating its lease with its landlord. The two sides entered into extensive negotiations and ultimately came to a final agreement on the terms of the renewed lease. The parties orally agreed to those terms and orally executed the lease. The landlord then made a promise to put the agreed upon lease terms in writing and present that writing to the law firm for a formal signature. The landlord never did this and later claimed that the Statute of Frauds barred any action on the new lease. The court in McCarthy ultimately ruled that the law firm had raised an issue of fact concerning whether promissory estoppel precluded the application of the Statute of Frauds. The lower court's initial grant of Summary Judgment in favor of the landlord was reversed.

The present case is distinguishable from McCarthy in a couple of ways. First, this is not a case where the parties agreed upon all the terms of a contract, and all that remained was to reduce it to writing. There is ample evidence before the Court that many of the terms of both the Joint Venture Agreement and the Residential Agreement were in flux and still open to negotiation. Second, the Residential Agreement was already in writing, so Ace Capital could not reduce to writing what already was.[6] Third, there was never any oral execution of the agreements. As seen by the very evidence presented by Plaintiffs, Ace Capital only promised to sign the agreements if certain events occurred. Therefore, the agreements were not yet executed. This is unlike McCarthy were the parties had

[6] While there may have been a promise to reduce the Agency Agreement and the Capital Support Agreement down to writing, there has not been any evidence presented by the parties that these agreements were either explicitly or implicitly executed or signed. Also, these agreements are just portions of the larger agreements at play in this case.

a completed executed contract and all that remained was to memorialize its terms.

The final distinguishing factor between McCarthy and the present case is that there is a distinct difference between a promise to "make a memorandum of the agreement" and a promise to sign an agreement. The first promise assumes that there is a complete executed agreement. The second promise assumes that there will be an executed agreement in the future. To say that an agreement is formed because there is a promise to sign it in the future defies common logic. If the Court were to accept Plaintiffs' arguments concerning this issue, it would create unfounded results.

One of these unfounded results can be demonstrated through the simple example: Party A gets a promise from party B that when the terms of the agreement are right and certain events occur, B will sign it. A then insists on negotiating for terms unfavorable to B, preventing B from fulfilling his/her promise to sign the agreement. A then sues B arguing that B promised to sign and as such, the parties have a binding contract. This allows one party to have a superior and undeserved bargaining position over the other. It creates a situation where one party can force its will onto another. This is a result that the Court cannot endorse.[7]

Furthermore, by ruling in Plaintiffs' favor on this issue, the Court would be rendering the Statute of Frauds null and void in its entirety. In almost every contract negotiation the parties agree to sign the contract if all their respective

[7] The Court is not suggesting that this is what happened in the present case. The Court only uses this as an example of what could happen.

conditions are met and they reach terms that are mutually satisfactory. To say that this promise to sign creates the contract itself makes no sense. If that were so, the entire negotiations process would be illusionary. A party would not be able to back out of negotiations if they were not getting what they wanted. This is because their promise to sign would have already sealed the deal. This would render all contract negotiations null and void and would put a severe impediment on peoples' willingness to enter into contracts with others. The unwitting promise to sign in the future would automatically bring the contract out from under the Statute of Frauds, thus leaving it an empty statute. Based upon the facts as presented in this case, as well as the logic of the law, the Court does not feel that promissory estoppel serves to bring the Joint Venture Agreement and the Residential Agreement out from under R.C. 1335.05.

Plaintiffs' third argument as to why an action based upon the Joint Venture Agreement and the Residential Agreement is not barred by R.C. 1335.05 is that Ace Capital's writings are sufficient to satisfy R.C. 1335.05. In support of this argument, Plaintiffs cite to Busler v. D & H Mfg. (Franklin, 1992), 81 Ohio App. 3d 385, which states:

> Any signed memorandum is sufficient to satisfy the Statute of Frauds so long as it (1) identifies the subject matter of the agreement, (2) establishes that a contract has been made, and (3) states the essential terms with reasonable certainty. *N. Coast Cookies, Inc., supra*, 16 Ohio App.3d at 349, 16 OBR at 398, 476 N.E.2d at 396, citing 1 Restatement of the Law 2d, Contracts (1981) 336, Section 131. The memorandum may be written after the alleged oral promise occurred. See *McGilvery v. Shadel* (1949), 87 Ohio App. 345, 43 O.O. 74, 95 N.E.2d 1. It does not have to be a formal memorial of the agreement. Rather, a signed acknowledgement of an oral promise can qualify as a memorandum which satisfies the statute, even if the

> acknowledgement repudiates the oral promise. Restatement, *supra*, at 347, Section 133, Illustration 4.

Busler at 389-390.

The Busler case, and the law embodied in it, does not provide an exception to the Statute of Frauds, it instead provides a way of satisfying it. The Busler case speaks to satisfying the writing requirement found in R.C. 1335.05. It has been previously stated that the terms of the Residential Agreement have for the most part already been put into writing and satisfy the writing requirement of R.C. 1335.05. As for the Joint Venture Agreement, the Court has stated that its terms have largely not been put into formal writing. Therefore, the Busler case can only serve Plaintiffs in establishing the writing requirement for the Joint Venture Agreement.

Unfortunately for Plaintiffs, the Busler case does not help them. The Busler case clearly indicates that the writing must be a signed writing. There has been no evidence presented in this case that there is a signed writing memorializing the terms of either the Residential Agreement or the Joint Venture Agreement. Without a signed writing, the holding in the Busler case, as well as the holdings in the other cases cited by Plaintiffs, do not help them[8].

It has been affirmatively established that R.C. 1335.05 bars any action brought by Plaintiffs pursuant to the Joint Venture Agreement and the Residential Agreement. It has been established that these two agreements were both for

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[8] Plaintiffs cite to Soteriades v. Wendy's of Ft. Wayne, Inc. (Franklin, 1986), 34 Ohio App. 3d 222 at p 225, which states

> The memorandum in writing satisfying the requirement of the Statute of Frauds may consist of several related writings, even though only one such writing is signed, if the

terms longer then one-year and were both not signed or executed. The Court has disposed of all the various defenses raised by Plaintiffs. Therefore, there is no genuine issue of material fact as to the issue of whether the Ohio Statute of Frauds bars an action pursuant to the Joint Venture Agreement or the Residential Agreement, and Summary Judgment must be awarded in Ace Capital's favor.

This determination disposes of the major claims found in Plaintiffs' Complaint. It disposes of Plaintiffs' first claim for specific performance of the Joint Venture Agreement; Plaintiffs' second claim for breach of the Joint Venture Agreement; Plaintiffs' third claim for specific performance of the Residential Agreement; and Plaintiffs' fourth claim for breach of the Residential Agreement. The Court will now move on to Ace Capital's arguments as to the other claims made in Plaintiffs' Complaint.

Breach of Fiduciary Duty

Ace Capital next moves the Court for Summary Judgment as to Plaintiffs' fifth claim for breach of fiduciary duty. *See* Plaintiffs' Complaint at ¶¶366-373. In this claim, Plaintiffs essentially allege that Ace Capital breached certain fiduciary duties in relation to the parties' proposed joint venture. In order for Ace Capital to have breached a fiduciary duty owed to Plaintiffs, they must first be in a fiduciary relationship. "The term 'fiduciary relationship' has been defined as a relationship in which special confidence and trust is reposed in the integrity and fidelity of another, and there is a resulting position of superiority or influence acquired by

signed writing refers to the unsigned writing or if it appears by inspection and comparison of the writings that they logically relate to or form part of the same transaction.

virtue of this special trust." McConnell v. Hunt Sports Enters. (Franklin, 1999), 132 Ohio App. 3d 657, 687.

Ace Capital's alleged breach of a fiduciary duty is based upon the existence of the Joint Venture Agreement between the parties. First, as determined above, the Statute of Frauds bars any action based upon the Joint Venture Agreement. Second, all of the evidence in this case shows that the parties to this action were sophisticated business entities that were dealing at arms length. Until the Joint Venture Agreement was formalized and executed, Ace Capital and Plaintiffs were not yet in a fiduciary relationship. As shown above, the Joint Venture Agreement was never formalized or executed. Therefore, the parties did not have the requisite "fiduciary relationship" and there can be no breach of any fiduciary duty on the part of Ace Capital. Summary Judgment must be awarded in favor of Ace Capital as to Plaintiffs' fifth claim for breach of fiduciary duty.

Promissory Estoppel

Ace Capital next asks the Court for Summary Judgment as to Plaintiffs' sixth claim for promissory estoppel. *See* Plaintiffs' Complaint at ¶¶374-380. This claim is distinct from Plaintiffs' promissory estoppel defense to the application of the Ohio Statute of Frauds. In this claim, Plaintiffs allege that they relied upon the promises made by Ace Capital to their detriment. This claim does not directly ask the Court to determine the existence or the validity of the Joint Venture Agreement or the Residential Agreement. Plaintiffs are primarily asking for a determination that they detrimentally relied upon the promises of Ace Capital.

This case, like the Busler case, clearly calls for some sort of signed writing.

Under Ohio law, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Cuthbert v. Trucklease Corp., Franklin App. No. 03AP-662, 2004 Ohio 4417, ¶29, *quoting* Talley v. Teamsters Local No. 377 (1976), 48 Ohio St.2d 142, 146. The elements of a promissory estoppel claim are: "(1) a clear, unambiguous promise; (2) reasonable and foreseeable reliance upon the promise by the person to whom the promise is made; and (3) resulting injury to the party who relied on the promise." Id., citing Stickler v. Keycorp, Cuyahoga App. No. 80727, 2003 Ohio 283, ¶20

In its motion, Ace Capital makes three arguments as to why the Court should grant it Summary Judgment on Plaintiffs' promissory estoppel claim. The first is that the Ohio Statute of Frauds bars it. This argument fails. This is primarily due to the fact that Plaintiffs' promissory estoppel claim does not directly seek to enforce the terms of either the Joint Venture Agreement or the Residential Agreement. Plaintiffs' promissory estoppel claim speaks more of the actions they took in reliance on Ace Capital's alleged promises. Actions that Plaintiffs allege were to their detriment. While two of the alleged promises made by Ace Capital were to enter into the Joint Venture Agreement and the Residential Agreement, these two promises alone do not serve to bar Plaintiffs' claim.

In order to show this determination as valid, the Court must look a little closer at Plaintiffs' promissory estoppel claim. In ¶376 of Plaintiffs' Complaint, they list specific things that they did in anticipation of the close of the Joint Venture Agreement and the Residential Agreement. It appears from this list that there is only a very specific and small set of damages associated with this claim. Plaintiffs, however, go on to ask for expectancy damages, including lost profits. *See* Plaintiffs' Complaint at ¶¶379, 380. In order to award expectancy damages, the Court would have to infer the existence of the Joint Venture Agreement and the Residential Agreement. The Court has already ruled that any actions pursuant to these agreements are bared by the Ohio Statute of Frauds. The Court will not allow Plaintiffs' to subvert the Statute of Frauds with a promissory estoppel claim. Therefore, the only amounts that Plaintiffs can recover under their promissory claim is their actual out of pocket expenses associated with Ace Capital's alleged promises, those expenses specifically laid out in ¶376 of their Complaint.[9] This brings this claim out of the grips of the Ohio Statute of Frauds and allows it to proceed to trial.

Ace Capital's second and third arguments in favor of Summary Judgment on Plaintiffs' promissory estoppel claim are that Plaintiffs cannot show the existence of an unambiguous promise nor can they show reasonable or foreseeable reliance. The Court has reviewed the evidence and arguments as to these matters, and it feels that there are genuine issues of material fact as to

[9] The Court makes no opinion as to what damages Plaintiffs are actually entitled to recover. All the Court is saying is that Plaintiffs cannot use their promissory estoppel claim as a vehicle to subject Ace Capital to two unexecuted agreements and to recover alleged lost profits under those

these two points. The Court cannot rule as a matter of law that Ace Capital made no unambiguous promises to Plaintiffs or that Plaintiffs did not reasonably rely on them. As such, the Court cannot grant Ace Capital Summary Judgment as to Plaintiffs' entire promissory estoppel claim.

The Court would like to re-iterate that this determination is not an open invitation to reargue the Statute of Frauds issue or to try to get damages for lost profits. This decision only preserves the limited scope of Plaintiffs' alleged detrimental reliance damages. As stated earlier, these alleged damages can be found in Plaintiffs' Complaint at ¶376. Ace Capital can be responsible for no other damages pursuant to Plaintiffs' promissory estoppel claim and Summary Judgment is hereby awarded to Ace Capital in regards to any claim made by Plaintiffs for expectancy damages or lost profits.

Negligent Misrepresentation

Ace Capital next moves the Court for Summary Judgment as to Plaintiffs' seventh claim for negligent misrepresentation. *See* Plaintiffs' Complaint at ¶¶381-388. The elements of negligent misrepresentation are as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Delman v. Cleveland Heights (1989), 41 Ohio St.3d 1, 9, *citing* 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1).

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agreements. Furthermore, the two cases cited by Plaintiffs in ¶379 of their Complaint do not do much to support their claim for expectancy damages and lost profits.

> A core requirement is a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transactions. This relationship occurs only in "special" circumstances. Usually the defendant is a professional (e.g., an accountant) who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a *limited* class. *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St. 2d 154, 157, 436 N.E.2d 212 (1982); *Gutter v. Dow Jones, Inc.*, 22 Ohio St. 3d 286, 288-89, 490 N.E.2d 898 (1986). This "special" relationship does not exist in ordinary business transactions. *Id.*

Picker Int'l, Inc. v. Mayo Foundation (N.D. Ohio, 1998), 6 F. Supp. 2d 685, 689.

In the present case there is no special relationship between the parties. Plaintiffs and Ace Capital are all separate entities from each other. They are all sophisticated business entities that negotiated with each other at arms length. At no time was Ace Capital put in the position of rendering opinions to Plaintiffs for the purpose of guiding their business. While there were negotiations between the parties, there was never a special relationship between the parties as contemplated by the law. Ace Capital's Motion for Summary Judgment must be granted as to Plaintiffs' claim for negligent misrepresentation.

Fraud

Finally, Ace Capital moves the Court for Summary Judgment as to Plaintiffs' tenth claim for fraud. *See* Plaintiffs' Complaint at ¶¶402-422. In this claim, Plaintiffs essentially claim that Ace Capital made numerous false representations and omissions that Plaintiffs relied on to their detriment. In Williams v. Aetna (1998), 83 Ohio St. 3d 464, the Supreme Court set out the elements for proving fraud as:

> (a) a representation or, where there is a duty to disclose, concealment of a fact,

(b) which is material to the transaction at hand,

(c) made falsely, with knowledge of its falsity, or with utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

(d) with intent of misleading another into relying upon it,

(e) justifiable reliance upon the representation or concealment, and

(f) resulting injury proximately caused by the reliance.

Id. at 475.

Ace Capital's first argument in favor of Summary Judgment is that Plaintiffs cannot show that Ace Capital's alleged fraudulent actions are distinct from those alleged by Plaintiffs in their breach of contract claims. Further, Ace Capital argues that Plaintiffs cannot show damages independent of those alleged in their breach of contract claims. The Court agrees with these arguments. Through its fraud claim, Plaintiffs are once again attempting to recover damages pursuant to the Joint Venture Agreement and the Residential Agreement. As stated earlier, any action based upon these two agreements, including an action of fraud, is bared by the Ohio Statute of Frauds. As such, any attempt by Plaintiffs to enforce the terms of the Residential Agreement or the Joint Venture Agreement through a fraud claim fails. To this extent, Ace Capital's Motion for Summary Judgment as to Plaintiffs' fraud claim must be granted.

This decision, however, does not end the Court's inquiry into Plaintiffs' fraud claim. It appears to the Court that Plaintiffs' fraud claim is very similar to their promissory estoppel claim in that it alleges that Plaintiffs detrimentally relied on the misrepresentations and/or omissions of Ace Capital. For this purpose, Plaintiffs' fraud claim remains viable as a partner to their promissory estoppel claim. But, the Court must trim Plaintiffs' fraud claim down a little.

In ¶403 of Plaintiffs' Complaint, they list numerous misrepresentations allegedly made by Ace Capital. In its motion, Ace Capital argues that Plaintiffs cannot prove that these were in fact misrepresentations or that Plaintiffs justifiably relied on them. The Court has reviewed the arguments and evidence submitted by the parties as to this issue, and is of the opinion that an issue of fact remains. The Court cannot rule as a matter of law that Ace Capital did not make misrepresentations to Plaintiffs or that Plaintiffs did not justifiably rely on those misrepresentations. As such, in regards to Ace Capital's alleged misrepresentations to Plaintiffs, Ace Capital's Motion for Summary Judgment must be denied.

In ¶406 of Plaintiffs' Complaint, they allege that Ace Capital made numerous omissions to Plaintiffs. These allegations bring up a different situation then the one above. Any fraud claim made by Plaintiffs pursuant to any alleged omissions on the part of Ace Capital must fail. As stated numerous times in this decision, the parties in this case are sophisticated business entities. They are entities that dealt with each other in arms length negotiations. In order for Ace Capital to be liable to Plaintiffs for damages associated with any alleged omissions, Ace Capital must first have had a duty to disclose. Since the parties were unrelated and in arms length negotiations, Ace Capital never had an affirmative duty to disclose any specific information to Plaintiffs. As such, any fraud claim by Plaintiffs based upon alleged omissions by Ace Capital cannot proceed. Ace Capital's Motion for Summary Judgment as to this aspect of Plaintiffs' fraud claim must be granted.

The Court would again like to re-iterate that Plaintiffs' fraud claim only remains viable for a very limited subset of damages. Plaintiffs cannot use it as a vehicle to enforce the provisions of the Joint Venture Agreement or the Residential Agreement against Ace Capital. Any damages that could be awarded to Plaintiffs via their fraud claim must be limited to any out of pocket detrimental reliance damages that they may have or damages that are wholly unrelated to the Joint Venture Agreement or the Residential Agreement.[10]

Conclusion

In summary, the issues that remain for trial are as follows. Plaintiffs' promissory estoppel claim survives to the extent that the potential damages they can recover are limited to Plaintiffs' detrimental reliance damages. Plaintiffs cannot recover expectancy damages or lost profits via this claim. Similarly, Plaintiffs' fraud claim survives to the extent that the potential damages that Plaintiffs can recover are limited to their detrimental reliance damages or those wholly unrelated to either the Joint Venture Agreement or the Residential Agreement. Again, Plaintiffs cannot seek expectancy damages or lost profit pursuant this claim. Due to the fact that no arguments were made as to them, Plaintiffs' eighth claim for tortious interference with contractual relationship and ninth claim for tortious interference with business relationship shall also proceed to trial.

After a de novo review and thorough consideration, the Court finds portions of Defendant's, Ace Capital Title Reinsurance Company, motion to be well-taken and portions to be not well-taken. The Court rules as follows.

[10] Plaintiffs still must prove the elements of fraud before they are even entitled to any damages.

Defendant's, Ace Capital Title Reinsurance Company, Motion for Summary Judgment as to claims one, two, three, four, five, and seven of Plaintiffs' Complaint is herby GRANTED.

Defendant's, Ace Capital Title Reinsurance Company, Motion for Summary Judgment as to claims six and ten of Plaintiffs' Complaint for promissory estoppel and fraud is hereby GRANTED IN PART and DENIED IN PART in accordance with the above decision.

Counsel for Defendant, Ace Capital Title Reinsurance Company, shall prepare, circulate and submit a judgment entry reflecting this decision to the Court within five days of the filing of this decision in accordance with Loc. R. 25.01.

IT IS SO ORDERED.

David E. Cain, Judge

Copies to:

Michael H. Carpenter
Daniel D. Mordarski
Katheryn M. Lloyd
Counsel for Plaintiffs

James D. Curphey
Jay A. Yurkiw
William A. Maher
Randall R. Rainer
Counsel for ACE Defendants

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Olympic Holding Company, LLC et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 07AP-168 (C.P.C. No. 06CVH-06-7238)
ACE Limited et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on December 13, 2007

Carpenter & Lipps LLP, Michael H. Carpenter, Jeffrey A. Lipps and *Katheryn M. Lloyd,* for appellants.

Porter, Wright, Morris & Arthur LLP, James D. Curphey and *Jay A. Yurkiw; Wollmuth, Maher & Deutsch LLP, William A. Maher* and *Frederick R. Kessler,* for appellees.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Plaintiffs-appellants, Olympic Holding Company, LLC, Olympic Title Insurance Company, Title First Agency, Inc., Sutton Land Services, LLC, Sutton Alliance, LLC, and Title Midwest, Inc., appeal from the January 26, 2007 judgment entry of the Franklin County Court of Common Pleas dismissing certain foreign defendants, ACE Limited, Assured Guaranty Re Overseas Ltd., f/k/a ACE Capital Re Overseas Ltd.

("ACRO"), Assured Guaranty Re Ltd., f/k/a Assured Guaranty Re International Ltd., f/k/a ACE Capital Re International Ltd. ("ACRI"), and ACE Bermuda Insurance Ltd. ("ACE Bermuda") ("collectively offshore defendants") for lack of personal jurisdiction pursuant to Civ.R. 12(B)(2). Plaintiffs-appellants also appeal from the February 21, 2007 judgment entry granting in part and denying in part summary judgment in favor of the remaining defendant-appellee, ACE Capital Title Reinsurance Company (ACE Capital Title). For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court, and grant in part and deny in part appellees' motion to dismiss portions of this appeal for lack of jurisdiction.

{¶2} Appellants are title insurance agencies, and appellee ACE Capital Title is a reinsurance company that, during the relevant time period, was a wholly owned subsidiary of ACRO, and an indirect subsidiary of ACRI, ACE Bermuda, and ACE Limited, the offshore defendants. The offshore defendants are closely related legal entities domiciled outside of the United States.

{¶3} This case arose as a result of ACE Capital Title's refusal to go forward with a complex business transaction after many months of planning, negotiation, and part performance. In August 2000, ACE Capital Title proposed to combine its capital resources (including the backing of the offshore defendants) with appellants' expertise in residential and commercial title operations. The goal was to create a new title underwriter business, ultimately of national scope, that would compete with existing underwriters and revolutionize the title insurance business.

{¶4} As part of the overall plan, appellants were to acquire Olympic Title Insurance Company ("OTIC"), a small Ohio based title insurance company. Appellants would use OTIC as their underwriter on all of their title insurance real estate transactions of less than $1 million ("residential transactions"). In addition, ACE Capital Title would become licensed as a direct title insurer in Ohio and elsewhere in addition to its already existing status as a reinsurer. ACE Capital Title would act as a direct insurer on transactions in excess of $1 million ("commercial transactions"). OTIC would act as reinsurer on those transactions, but it would only reinsure the first $100,000 of each policy. ACE Capital Title and certain offshore defendants would reinsure the rest up to $200 million per policy. The overall impact of the plan was to allow appellants to offer reinsurance rates that were "astonishingly better" than what was available in the market.

{¶5} In the first half of 2003, the parties exchanged "term sheets" laying out the essential terms of the deal. The term sheets were authored by Richard Reese, the Chief Operating Officer of ACE Capital Title. Reese testified that "we had come to a pretty comfortable feeling that the term sheet represented a business deal we were both happy with, yes." (Appendix, Exhibit - Reese II, at 293.) The term sheets contained language at the bottom of the page stating: "NOT AN OFFER OF INSURANCE."

{¶6} By mid-2003, Reese stated that ACE Capital Title had a "handshake deal" with appellants with respect to the "strategic alliance" between ACE Capital Title and appellants. Reese testified at his deposition that he used the terms "strategic alliance," "joint venture," "partnership," and "strategic partnership" in the same way.

{¶7} By summer 2003, ACE Capital Title was making the deal its top priority. Around that time, appellants entered into a key element of the strategic alliance, a stock purchase agreement to acquire OTIC. Another key element was a "Capital Support Agreement" that required appellants to provide a financial guaranty to OTIC. The parties dispute whether they ever reached agreement on this element.

{¶8} Reese began drafting a formal title business plan reflecting the Olympic-ACE strategic alliance. In September 2003, Reese traveled to Bermuda to present the business plan to the offshore parent corporations. In mid-November 2003, the offshore Board of Directors voted on and approved the written business plan. ACE Capital Title began informing its customers about the deal.

{¶9} Also in November 2003, appellants applied to the Ohio Department of Insurance ("ODI") for approval to acquire OTIC. Attached to the application was a draft of the Residential Reinsurance Agreement (without the Capital Support Agreement) in which the defendants agreed to reinsure OTIC. Prior drafts of this agreement contained a disclaimer stating:

> This document is intended for discussion purposes only. Neither this document nor any other statement (oral or otherwise) made at any time in connection herewith is an offer, invitation or recommendation to enter into any transaction. Any offer would be made at a later date and subject to contract, satisfactory documentation and market conditions.

The parties dispute whether appellants had permission to remove the disclaimer language or whether this was done without the knowledge of ACE Capital Title.

{¶10} ACE Capital Title submitted its own application to ODI in November 2003 to become a direct title insurer, as opposed to a reinsurer. The application disclosed the offshore defendants' ownership and involvement with ACE Capital Title, and described ACE Capital Title as the "dedicated vehicle" for title insurance and reinsurance for the offshore defendants. Reese testified that ACE Capital Title's application was part of the parties' strategic alliance/joint venture. Additionally, ACE Capital Title hired new personnel to work on the strategic alliance, and ACRO had allocated hours for its personnel to work on the alliance.

{¶11} Through Reese, Ace Capital Title promised to sign the various agreements with appellants after appellants obtained ODI approval and acquired OTIC. On December 5, 2003, Reese represented to appellants that the parties would be writing business early in the first quarter of 2004.

{¶12} At about the same time, on December 2, 2003, the ACE family of companies announced a $1 billion initial public offering ("IPO"). Appellants inquired as to what effect the IPO would have on the deal. They were reassured by Reese that the IPO would help, not hurt, the parties' deal, the deal was still on, the agreement was completed and had "just gone upstairs for signature." (Mossman Deposition, at 132.)

{¶13} On December 22, 2003, the offshore defendants informed ACE Capital Title that they were to cease writing new business immediately. The offshore executives who made the decision to "pull the plug" on the deal knew of the business plan, but made a determination that the title business was only a small part of the overall business of ACE Capital Title, and continuation of the business was a distraction to the IPO activities.

Reese did not inform appellants of this development, and appellants closed on the acquisition of OTIC on December 29, 2003.

{¶14} On January 2, 2004, Howard Kopel, on behalf of the appellants, telephoned Reese to announce the good news of the OTIC closing. Reese then dropped a "bombshell," as he termed it. The ACE family of companies was not going forward with the strategic alliance and would not sign the agreements. The next day, appellants sent ACE Capital Title signed copies of the Residential Reinsurance Agreement dated January 5, 2004, expressly seeking counter-signature by ACE Capital Title. ACE Capital Title refused to sign. On January 6, 2004, ACE Capital Title withdrew its application to ODI and asked that all copies be returned.

{¶15} Reese testified that ACE Capital Title acted absolutely unethically in the entire transaction and to a series of people who had relied upon them for a very long time. (Appendix Exhibit – Reese III at 684.)

{¶16} Shortly thereafter, on January 27, 2004, appellants filed suit. (C.P.C. No. 04-CV-939.) The trial court dismissed the offshore defendants after holding an evidentiary hearing, and the plaintiffs voluntarily dismissed the action without prejudice on May 19, 2006, pursuant to Civ.R. 41(A)(1).

{¶17} The instant case was filed on June 2, 2006, and designated a refiled action. Appellants alleged claims for breach of the strategic alliance joint venture agreement, breach of the reinsurance agreement, specific performance of both the strategic alliance joint venture agreement and the reinsurance agreement, breach of fiduciary duty, promissory estoppel, negligent misrepresentation, tortious interference with a contractual relationship, tortious interference with a business relationship, and fraud.

{¶18} As they had done in the first action, the offshore defendants moved to dismiss for lack of personal jurisdiction. The parties agreed that the discovery in the first action would be used in the refiled action. On September 20, 2006, ACE Capital Title moved for summary judgment. On December 18, 2006, the trial court issued a decision granting the offshore defendants' motion to dismiss for lack of personal jurisdiction. The trial court relied upon its personal jurisdiction decision in the prior action stating that, "[n]othing has changed since the Court issued that ruling, and the Court sees no reason why it should come to a different result." Decision at 6. On January 26, 2007, the trial court entered a judgment entry dismissing the offshore defendants.

{¶19} On the same day, the trial court issued a decision granting in part ACE Capital Title's motion for summary judgment. The trial court ruled that the contract claims were barred by the Statute of Frauds. The trial court granted summary judgment to ACE Capital Title on all of appellants' contract claims, and the breach of fiduciary duty and negligent misrepresentation claims, reasoning that, without the underlying contract claims, those claims must fail also. The trial court limited the kinds of damages appellants could seek on the fraud and promissory estoppel claims, and ruled that the tortious interference claims could proceed to trial even though the claims were only asserted against the offshore defendants who had already been dismissed from the action. The court included Civ.R. 54(B) language that there was no just cause for delay. This appeal followed.

{¶20} On March 23, 2007, the offshore defendants and ACE Capital Title filed a motion to dismiss, in part, appellants' appeal. The first basis of the motion is the claim that this court lacks subject matter jurisdiction over appellants' still pending fraud and promissory estoppel claims because the trial court did not completely and finally dispose of those claims under R.C. 2505.02 and Civ.R. 54(B).

{¶21} Appellants respond by arguing that the trial court extended its flawed contract claim analysis to the fraud and promissory estoppel claims, and improperly disallowed expectancy damages or lost profits on those claims. Appellants contend that the trial court's erroneous contract conclusions infected its analysis of the promissory estoppel and fraud claims. Since the contract claims are properly before this court, appellants argue that this court should address the promissory estoppel and fraud claims as well. Appellants also claim that appellees did not move for summary judgment as to damages on those claims, and therefore it was improper for the trial court to sua sponte address the issue of damages without briefing or argument by the parties.

{¶22} Appellants' "infection" theory is not the appropriate method of analysis to determine whether there is a final appealable order. To be final and appealable, an order that adjudicates one or more but fewer than all the claims or fewer than all the parties and contains a certification pursuant to Civ.R. 54(B) must meet the two-step test articulated by the Supreme Court of Ohio in *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352. First, the appellate court should focus on whether the order is final as defined in R.C. 2505.02. The question is whether the order sought to be appealed affects a substantial right and whether, in effect, it determines an action and prevents a judgment.

Second, the appellate court should review the trial court's determination under Civ.R. 54(B), that there is no just reason for delay.

{¶23} Despite the presence of Civ.R. 54(B) language, the trial court's summary judgment order does not determine the action and prevent a judgment with respect to those claims. For example, in *R & H Trucking, Inc. v. Occidental Fire & Cas. Co. of North Carolina* (1981), 2 Ohio App.3d 269, 271, this court indicated that if the trial court decided one of the legal issues in the case, but does not finally adjudicate the claim for relief, the trial court's decision does not become a final appealable order merely by the inclusion of "no just reason for delay" language in the trial court's order. If we delay any review of the promissory estoppel and fraud claims until the action is fully adjudicated, appellants would still have relief available to them in the future in the form of another appeal. *DeAscentis v. Margello*, Franklin App. No. 04AP-4, 2005-Ohio-1520, at ¶19. Therefore, no final appealable order exists with respect to those claims, and this court lacks jurisdiction to consider them on appeal.

{¶24} The second basis of the motion to dismiss in part relates to the dismissal of the offshore defendants. The offshore defendants and ACE Capital Title contend that the trial court's January 26, 2007 judgment entry granting the offshore defendants' motion to dismiss for lack of personal jurisdiction is not a final appealable order.

{¶25} Appellants, on the other hand, argue the judgment entry dismissing them is a final appealable order despite the lack of Civ.R. 54(B) language. Appellants rely upon the recent Supreme Court of Ohio case of *Natl. City Commercial Capital Corp. v. AAAA at Your Service, Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942. In *National City*, the Supreme

Court of Ohio resolved a conflict between appellate districts concerning whether a dismissal other than on the merits which prevents refiling in the trial court is a final appealable order. As in this case, appellants in *National City* were appealing a motion to dismiss for lack of personal jurisdiction pursuant to Civ.R. 12(B)(2). The Supreme Court of Ohio held that the dismissal, pursuant to Civ.R. 12(B)(2), which prevented refiling in the trial court, was a final appealable order.

{¶26} Here, appellants cannot refile and, in essence, a final judgment has been rendered against them because the issue of personal jurisdiction has been disposed of, and there is nothing left for determination by the trial court. The motion to dismiss the portion of the appeal concerning jurisdiction over the offshore defendants is, therefore, not well-taken and denied.

{¶27} In conclusion, the motion to dismiss a portion of this appeal is granted with respect to the promissory estoppel and fraud claims, and denied with respect to the dismissal of the offshore defendants.

{¶28} Turning to the merits of the appeal, appellants have asserted the following assignments of error:

> I. The trial court erred in granting summary judgment on plaintiffs' contract claims where there were fact disputes regarding whether defendants are estopped from relying upon a statute of frauds defense.
>
> II. The trial court erred in granting summary judgment on plaintiffs' contract claims where the parties' agreements were capable of performance in one year and thus fall outside the statute of frauds.
>
> III. The trial court erred in granting summary judgment on plaintiffs' contract claims where there were signed writings

> chargeable against the ACE defendants that satisfy the statute of frauds.
>
> IV. The trial court erred in granting summary judgment on plaintiffs' contract claims where there was ample record evidence of enforceable "agreements to agree."
>
> V. The trial court erred in granting summary judgment on plaintiffs' breach of fiduciary duty and fraudulent concealment claims where there was a disputed factual record.
>
> VI. The trial court erred in granting summary judgment on plaintiffs' negligent misrepresentation claim given the record evidence before it.
>
> VII. The trial court erred in sua sponte limiting plaintiffs' damages regarding promissory estoppel and fraud.
>
> VIII. The trial court erred in failing to analyze the long arm statute, Civil Rule 4.3(A), and the principles of agency.
>
> IX. The trial court erred in improperly relying upon a dissolved interlocutory decision in a voluntarily dismissed case to decide personal jurisdiction, contrary to its obligation of de novo review.
>
> X. The trial court erred in failing to decide personal jurisdiction on a prima facie standard, given that no evidentiary hearing occurred in this case.
>
> XI. The trial court erred in failing to consider the preponderance of the record evidence supporting personal jurisdiction, as set forth in plaintiffs' appendix of personal jurisdiction evidence, which the trial court ignored.
>
> XII. The trial court erred when it wrongly dismissed the offshore ACE defendants while properly recognizing that tortious interference claims asserted against them are entitled to proceed to trial, because such claims satisfy the long arm statute.

{¶29} The law governing motions for summary judgment is clearly set forth in Civ.R. 56. In *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, the Supreme

Court of Ohio clarified the burdens of both parties with respect to a motion for summary judgment:

> [A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

(Emphasis sic.)

{¶30} In Ohio, these principles are embodied in a three-prong test taken directly out of Civ.R. 56: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶31} Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc.* (2000), 530 U.S. 133, 120 S.Ct.

2097, 2110. This court follows these well-settled principles. See, e.g., *Baeer v. Scotts Co.*, Franklin App. No. 01AP-323, 2001-Ohio-3978.

{¶32} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. When reviewing a trial court's decision granting summary judgment, we conduct an independent review of the record, and the appellate court "stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100,103.

{¶33} Assignments of error one through four concern appellants' contract claims and specifically, the applicability of the statute of frauds. As noted above, the trial court disposed of these claims on the basis of the affirmative defense of the statute of frauds.

{¶34} Appellants argue that the statute of frauds does not bar the claims in this case because ACE Capital Title is estopped from using the statute of frauds as a defense because it misrepresented its intent to sign the agreements at issue. Appellants also claim that the statute of frauds does not apply to their claims because the contracts at issue are capable of performance within a year. Appellants further argue that even if the statute of frauds does apply to their contract claims, there are signed writings that fulfill the statute of frauds. And finally, appellants argue that the parties had created a joint venture, they had reached mutual agreement on the essential terms of the deal and, under Ohio law, there existed an enforceable "agreement to agree."

{¶35} ACE Capital Title argues that the deal was never consummated, that sophisticated and experienced business people negotiated at arms length, but failed to conclude their negotiations with final, executed documentation. Therefore, according to

ACE Capital Title, the statute of frauds bars the contract claims, and none of the exceptions—sufficient writings, capability of performance within one year, or promissory estoppel apply. Additionally, ACE Capital Title argues that the documents themselves manifest a clear intent not to be bound absent a signature.

{¶36} Ohio's statute of frauds, R.C. 1335.05, states in pertinent part:

> No action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

{¶37} Appellants assert that, under the circumstances of this case, the doctrine of promissory estoppel bars ACE Capital Title from using the statute of frauds defense. Appellants rely upon the case of *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, to support their claim.

{¶38} *McCarthy* involved negotiations between a law firm and its landlord for a lease of office space. The Eighth District Court of Appeals applied the doctrine of promissory estoppel and reversed summary judgment. The court found genuine issues of material fact existed as to whether the parties had agreed to an oral lease, and whether the defendant landlord falsely represented to the law firm that it would deliver a written lease.

{¶39} The Eighth District Court of Appeals adopted the approach taken by other states that the doctrine of promissory estoppel may be used to preclude a defense of the statute of frauds when there has been: (1) a misrepresentation that the statute's requirements have been complied with; or (2) a promise to make a memorandum of the agreement. In *Moore Burger, Inc. v. Phillips Petroleum Co.* (Tex.1973), 492 S.W.2d 934, a case cited with approval in *McCarthy,* the Supreme Court of Texas examined similar circumstances and held that the determinative promise in that case was the promise to sign a written agreement which itself complied with the statute of frauds.

{¶40} In this case, as in *McCarthy*, there are factual disputes as to whether the parties reached agreement on all the essential terms of the strategic alliance. Appellants argue that they presented sufficient evidence from which a jury could conclude that the parties reached definite and mutual agreement on all essential business terms.

{¶41} Appellants presented evidence by way of deposition that the term sheets set forth the terms that had been spelled out and agreed upon. However, the parties dispute whether they ever reached agreement on the capital support issue. The parties also dispute whether appellants were given permission to remove disclaimer language from the residential reinsurance agreement, and whether they agreed as to the terms of the residential reinsurance agreement. In addition, the parties dispute whether they had agreed to the terms of the agency agreement, and whether they had reached a mutual agreement to share profits, losses, risk, and operating responsibility.

{¶42} ACE Capital Title urges this court to find that the record supports the legal conclusion that no binding agreement existed because the parties manifested an unambiguous intent not to be bound. ACE Capital Title argues that disclaimer language in the residential reinsurance agreement supports their argument as well as the efforts of appellants to obtain signatures after they acquired OTIC. However, as noted above, the parties dispute whether ACE Capital Title gave them permission to remove the disclaimer in their application to ODI, and what can be inferred if it is shown that permission was given.

{¶43} In Ohio, an agreement to agree is not per se unenforceable. In *Normandy Place Assocs. v. Beyer* (1982), 2 Ohio St.3d 102, 105, the Supreme Court of Ohio stated:

> * * * It is thus not the law that an agreement to make an agreement is per se unenforceable. The enforceability of such an agreement depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced.

{¶44} However, courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound until the terms of the agreement are formalized in a signed written document. See *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 151.

{¶45} After reviewing the evidence and bearing in mind the relative burdens of the parties on a motion for summary judgment, we find genuine issues of material fact exist on the question of whether the parties reached mutual agreement on all essential terms of the agreements. The fourth assignment of error is well-taken.

{¶46} In addition, appellants have presented evidence that Reese promised that ACE Capital Title would sign the agreements once appellants acquired OTIC. Reese also testified that the parties *had* reached agreement and were implementing and memorializing the terms of the joint venture. Appellants were told that the agreement was completed and had just gone upstairs for signature.

{¶47} ACE Capital Title does not dispute the appellants' evidence that it made express promises to produce signed written memoranda of the parties' agreements. Rather, ACE Capital Title argues that the parties were sophisticated parties represented by skilled counsel, and thus a higher standard applies when appellants attempt to evade the bar of the statute of frauds through promissory estoppel.

{¶48} The doctrine of promissory estoppel arises in equity, and is intended to prevent fraudulent oral promises upon which another party relies to its detriment. ACE Capital Title's own chief operating officer stated that his company acted absolutely unethically in the entire transaction and to a series of people who had relied upon them for a very long time. Under these circumstances, it is appropriate to allow appellants to assert the equitable doctrine of promissory estoppel. Appellants have met their burden to present evidence that ACE Capital Title should be equitably estopped from using the affirmative defense of the statute of frauds because of a misrepresentation to supply signed written memoranda of the parties' agreements. The first assignment of error is well-taken.

{¶49} In conclusion, genuine issues of material fact preclude summary judgment on appellants' contract claims. The claims must be remanded for trial, and therefore we sustain assignments of error one and four. Given our disposition of these assignments of error, we decline to address assignments of error two and three, as we believe the issues to be moot.

{¶50} Assignment of error five concerns appellants' claims for breach of fiduciary duty and fraudulent concealment. The trial court granted summary judgment in favor of

ACE Capital Title on these claims because in its view there was no enforceable joint venture agreement, and therefore there could be no special relationship between the parties sufficient to create a fiduciary relationship or to impose a duty on ACE Capital Title to disclose material information. ACE Capital Title asserts the same position on appeal.

{¶51} The elements of an action for breach of fiduciary duty are similar to those for ordinary negligence, with the difference being a need to establish that the duty arose out of a fiduciary relationship. A fiduciary relationship is defined as one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Landskroner v. Landskroner,* 154 Ohio App.3d 471, 2003-Ohio-4945, at ¶32, quoting *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 442.

{¶52} Appellants assert that the existence of the joint venture itself creates the requisite fiduciary duty of full disclosure and a duty against self dealing or secret advantage. Also, appellants claim that their role as partners or "strategic partners" with ACE Capital Title created a special duty for both parties to maintain the highest operating and ethical standards with each other.

{¶53} Appellees argue that the parties were acting to protect their own interests and negotiating at arms length in a commercial transaction. A fiduciary relationship does not exist under those circumstances. *Landskroner*, at 486, citing *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 101.

{¶54} In *Doctors Hosp. v. Hazelbaker* (1995), 106 Ohio App.3d 305, 309-310, this court held that "joint venturers may incur fiduciary obligations to each other regardless of whether any written agreement is then in force, since such a writing is not necessary for the creation of such a venture." The court went on to quote *Al Johnson Constr. Co. v. Kosydar* (1975), 42 Ohio St.2d 29, paragraph one of the syllabus: "A joint venture is '* * * an association of persons with intent, by way of contract, *express or implied*, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, to each of the other coadventurers * * *.' " (Emphasis sic.)

{¶55} Appellants have presented evidence that the parties embarked upon a complex joint venture to revolutionize the title insurance business by combining ACE Capital Title's and the offshore defendants' financial resources with appellants' expertise in residential and commercial title insurance. ACE Capital Title considered appellants to be their strategic partners, and there is deposition testimony that ACE Capital Title sought to maintain the highest operating and ethical standards with their partners. In this case, just as in *Doctors Hosp.*, there is at the very least a material issue of fact whether appellants and ACE Capital Title were joint venturers and, by extension, owed a fiduciary duty to each other. The trial court erred in determining there was no possibility of a joint venture between the parties in this case. Given ACE Capital Title's admission of unethical behavior, the claim for breach of fiduciary duty should proceed to trial.

{¶56} After reviewing the complaint, we are unable to locate a claim for "fraudulent concealment," apart from the fraud claim to be addressed in connection with assignment of error seven. Accordingly, appellants' fifth assignment of error is sustained in part with respect to the claim for breach of fiduciary duty, and as discussed in connection with the motion to dismiss this appeal, in part, we are without jurisdiction to consider appellants' fraud claims.

{¶57} In their sixth assignment of error appellants argue that the disputed factual record creates triable issues on their claim for negligent misrepresentation. In Ohio, the elements of negligent misrepresentation have been set out as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Marasco v. Hopewell, Franklin App. No. 03AP-1081, 2004-Ohio-6715, at ¶52 (emphasis sic), quoting *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 9. "The question of whether or not the actor used reasonable care in obtaining or communicating information is one for the jury." *Marasco,* at ¶53.

{¶58} Appellees cite *Ziegler v. Findlay Industries, Inc.* (N.D.Ohio 2006), 464 F.Supp.2d 733, 738, for the proposition that an additional requirement in a claim for negligent misrepresentation is a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in a business transaction.

{¶59} In *Ziegler*, the federal district court for the Northern District of Ohio, interpreting Ohio law, declined to extend the tort of negligent misrepresentation to a claim arising in the employee-employer relationship. Citing an unreported federal case, the court went on to state: "A core requirement in a claim for negligent misrepresentation is a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transaction." *Hayes v. Computer Assoc. Intern., Inc.*, (N.D.Ohio 2003) No. 3:02CV7452. " 'This relationship occurs only in "special" circumstances. Usually the defendant is a professional (e.g., an accountant) who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a limited class. This 'special' relationship does not exist in ordinary business transactions.' *Id.* Those 'who are in the business of supplying information for the guidance of others typically include attorneys, surveyors, abstractors of title and banks dealing with non-depositors' checks.' " *Nichols v. Ryder Truck Rentals, Inc.* (June 23, 1994), Cuyahoga App. No. 65376, citing *McCarthy.*

{¶60} Here, appellants have not set forth evidence of specific facts sufficient to create a genuine issue of material fact as to whether the parties were in a "special relationship" with each other.

{¶61} Appellants' sixth assignment of error is not well-taken and is overruled.

{¶62} Appellants' seventh assignment of error relates to appellants' promissory estoppel and fraud claims. As discussed in connection with the offshore defendants' and ACE Capital Title's motion to dismiss, in part, appellants' appeal, the trial court's resolution of those claims did not result in a final appealable order. As such, we are without jurisdiction to consider the merits of this assignment of error.

{¶63} In assignments of error eight through eleven, appellants challenge the decision of the trial court that the offshore defendants must be dismissed for lack of personal jurisdiction.

{¶64} In their eighth assignment of error, appellants assert that the trial court failed to analyze the jurisdiction issue in terms of appellants' agency theory of personal jurisdiction. Appellants alleged personal jurisdiction over the offshore defendants based upon the activity of their alleged agent, ACE Capital Title. Appellants claim that the failure of the trial court to discuss the concepts of agency or apparent agency under Ohio law means that it erred by failing to consider the applicable law. We disagree.

{¶65} Admittedly, the trial court's decision did not include analysis of the relevant factors to be considered in determining personal jurisdiction. Instead, the trial court stated that it had reached the same conclusion (based on the same evidence) that it had in the previously dismissed case. The court held that appellants "still have not satisfied the elements needed for this Court to exercise proper jurisdiction over the Ace Foreign Defendants." (Decision Granting the ACE Foreign Defendants' Motion to Dismiss the Complaint for Lack of Personal Jurisdiction, Dec. 18, 2006, at 7.) It is clear from a review of the record that the agency issue was foremost in the trial court's consideration of the issue. The eighth assignment of error is not well-taken and is overruled.

{¶66} In assignment of error nine, appellants argue that the trial court erred in failing to conduct a de novo review of the issue and, instead, simply repeated its decision in the previously dismissed case to decide personal jurisdiction.

{¶67} In its judgment entry of January 26, 2007 dismissing the foreign defendants, the trial court stated that it had conducted a de novo review of the evidentiary record. Also, in its November 20, 2006 Recusal Decision and Entry, the trial court explicitly indicated it would consider the evidence and arguments de novo, stating:

> The Court understands Plaintiffs fears concerning the bias that the previous case may cause it. Plaintiffs, however, should rest assured that the Court will look at all the arguments and evidence presented by both Plaintiffs and Defendants *de novo*. * * * It will look at Plaintiffs' new claims and old claims as if they were newly before the Court. The Court has no interest in preventing Plaintiffs or Defendants from getting a fair shake. It is only interested in treating all parties before it fairly.

{¶68} Appellants contrast that statement of the trial court with (1) the court's decision to incorporate the evidentiary hearing that occurred in the voluntarily dismissed action into the present action; (2) its statement in the present action that "[n]othing has changed since the Court issued that ruling, and the Court sees no reason why it should come to a different result" (Personal Jurisdiction Decision of December 18, 2006, at 6); and (3) its statement that it would be "completely unfair to the Ace Foreign Defendants" to reach any different conclusion than it had in the initial action. Id. at 7.

{¶69} A general principle of appellate review is the presumption of regularity; that is, a trial court is presumed to have followed the law unless the contrary is made to appear in the record. *Werts v. Werts*, Summit App. No. 23610, 2007-Ohio-4279. Here, the trial court clearly stated that it would conduct a de novo review of the jurisdictional evidence. The court's review included the evidence from the dismissed action because the parties stipulated to the use of all discovery materials from the original action. The trial court's decision to use the prior discovery and hearing transcript was not a refusal to conduct a de novo review. Instead, the trial court indicated that it had reached the same conclusion based on the same record evidence. The trial court's conclusion that "[n]othing has changed" from the findings and conclusions of the original action is insufficient to overcome the presumption that the trial court conducted a de novo review of the evidence. The ninth assignment of error is not well-taken and is overruled.

{¶70} In their tenth assignment of error, appellants contend that the trial court erroneously evaluated the jurisdictional evidence on a preponderance of the evidence standard which is appropriate when an evidentiary hearing is held as opposed to the lesser prima facie standard which courts apply when there has been no evidentiary hearing.

{¶71} When a party moves for dismissal for lack of personal jurisdiction, the nonmoving party bears the burden of establishing the court's jurisdiction. *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79, 86. If the court does not hold an evidentiary hearing, the nonmoving party need only make a prima facie showing of jurisdiction to withstand the motion to dismiss. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306. If the court conducts an evidentiary hearing, the nonmoving party must establish the trial court's jurisdiction by a preponderance of the evidence. *Levengood v. Levengood* (June 7, 2000), Tuscarawas App. No. 1998AP100114.

{¶72} In this case, the trial court considered the stipulated discovery from the dismissed action as well as the transcript of the evidentiary hearing that was held before a magistrate in the original case. The trial court indicated that the testimony from the prior action aided the court in making its previous decision to grant the motion to dismiss. Any such reliance on this testimony was indirect in that the magistrate conducted the hearing, and the trial court overruled the objections to the magistrate's decision. Thus, although the trial court did not have the benefit of a transcript of the evidentiary hearing when it made its initial decision, it can be said that it relied on the testimony in making its decision.

{¶73} The trial court went on to determine that the evidentiary transcript was properly before the court as part of the stipulated discovery, and therefore it could rely on that transcript in making its determination in the refiled case. Since a hearing was held, and the trial court was relying on the transcript of that earlier hearing, the trial court concluded that it must apply the preponderance standard of proof to appellants' assertion of personal jurisdiction.

{¶74} We find no error in the trial court's decision to use the prior evidentiary hearing transcript and to apply the preponderance standard of proof. Civ.R. 41 does not, read in its entirety, completely erase the memory of a previously filed action. *Indus. Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 579. In *Industrial Risk Insurers*, the Supreme Court of Ohio held that "[i]n an action that has once been voluntarily dismissed pursuant to Civ.R. 41(A)(1)(a), a trial court, when ruling on a Civ.R. 41(B)(1) motion to dismiss for failure to prosecute, may consider the conduct of the plaintiff in the prior action." Id. at syllabus.

{¶75} Here, to ignore the prior hearing would force the trial court to go through the needlessly repetitive step of ordering a second evidentiary hearing to present the same evidence that was already before the court in the form of a transcript. In addition, we agree with the reasoning of the trial court that applying a prima facie standard in this case would work an injustice to the parties. As the trial court stated:

> * * * All a party would have to do is file the original action, go through an evidentiary hearing, have a determination that the Court lacks personal jurisdiction, and then dismiss the case pursuant to Civ. R. 41 (A)(1)(a). Then that party could refile the case, take all the positive evidence from the previous hearing and stick it in his/her complaint, and then argue that the Court must apply the "prima facie" standard. This system would allow the party seeking to assert personal jurisdiction over another the benefit of the evidentiary hearing, without providing the other party the same benefit. * * *

(Personal Jurisdiction Decision, at 7.)

{¶76} Just as the plaintiff's conduct in *Industrial Risk Insurers* could be considered by the trial court in the subsequent action, the stipulation to all the prior discovery implicates the evidentiary hearing in the prior action. The trial court was within its discretion to deem the hearing transcript part of the discovery before the court. Appellants cannot avoid all the consequences of the previously filed action when they stipulate to the use of the prior discovery. The tenth assignment of error is not well-taken and is overruled.

{¶77} In their eleventh assignment of error, appellants contend that the trial court erred in deciding that it lacked jurisdiction over the foreign defendants under their agency theory. In essence, appellants are arguing that the decision of the trial court is against the manifest weight of the evidence.

{¶78} To recap, the offshore defendants filed a Civ.R. 12(B)(2) motion to dismiss for lack of personal jurisdiction. Appellants responded by asserting that the foreign defendants, as principals, were subject to personal jurisdiction in Ohio by virtue of the actions of its agent, ACE Capital Title. See Civ.R. 4.3 and Ohio's long-arm statute R.C. 2307.382(A)(1) and (2). Appellants also claim the trial court ignored the factors considered by courts when they determine personal jurisdiction under an agency theory.

{¶79} ACE Capital Title and the foreign defendants argue that the absence of an agency relationship precludes personal jurisdiction over the foreign defendants. Primarily, appellees argue that appellants failed to prove undue control by the parent corporation over the subsidiary sufficient to subject the foreign defendants to the personal jurisdiction of the trial court.

{¶80} At the outset, we note that there is no dispute regarding personal jurisdiction over ACE Capital Title. Therefore, appellants need only prove by a preponderance of the evidence that ACE Capital Title was acting as the agent for the offshore defendants for personal jurisdiction over the offshore defendants to be appropriate.

{¶81} Appellate review of a motion to dismiss under Civ.R. 12(B)(2) is de novo if no evidentiary hearing is held. *Info. Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 550, 2003-Ohio-566, at ¶9. Here, we have a situation in which the trial court is presumed to have reviewed discovery including a transcript of an earlier proceeding involving the same issue. The trial court had volumes of evidence before it and, as discussed in connection with the previous assignment of error, applied the preponderance of the evidence standard. However, the trial court's decision does not contain credibility determinations, analysis, or discussion of the evidence it reviewed. On review, we have the same evidence before us, and therefore we review the decision of the trial court under our normal deferential standard of review in civil cases, to wit: Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶82} We begin our review by focusing on the factors courts consider in deciding whether to impute the subsidiary's contacts with Ohio to the foreign parent company for purposes of personal jurisdiction.

{¶83} In *Rucker v. Personal Finance Co. of Columbus* (1948), 86 Ohio App. 110, the court considered the question of whether the subsidiary was doing the business of the parent or whether there were distinct businesses of the parent and subsidiary.

{¶84} "The fact that the stock of a subsidiary is held by a foreign corporation and that the foreign corporation exercises control over the subsidiary through the ownership of the stock, the corporate identity being formally preserved, is not sufficient to subject such foreign corporation to the jurisdiction of a court of this state." Id. at paragraph four of the syllabus.

{¶85} In *MacDonald v. Navistar Intern. Transp. Corp.* (S.D.Ohio 2001), 143 F.Supp.2d 918, 923-924, the United States District Court for the Southern District of Ohio identified fictitious corporate separation, holding the subsidiary out as its agent, and undue control of the parent over the subsidiary as factors to be considered. In order to impute jurisdiction of a subsidiary to a parent company, the plaintiffs must show that the parent exercised the type of control necessary to ascribe to it the activities of the subsidiary. See, e.g., *Escude Cruz v. Ortho Pharmaceutical Corp.* (C.A.Puerto Rico, 1980), 619 F.2d 902, 905.

{¶86} In *In re Lupron Marketing and Sales Practices Litigation* (D.Mass. 2003), 245 F.Supp.2d 280, 292, the court indicated that a parent's oversight of a subsidiary's business plan is not ordinarily sufficient to tip the jurisdictional scale. Id. Nor is approval of a marketing scheme or authority to approve the plans of the subsidiary sufficient to subject the parent to personal jurisdiction. Id.

{¶87} The foreign defendants have directed our attention to *United States v. Bestfoods* (1998), 524 U.S. 51, 72, 118 S.Ct. 1876, a veil piercing case, in which the United States Supreme Court stated that the fact that directors of a parent serve as directors of its subsidiary is not sufficient *standing alone* to expose the parent to liability for the subsidiary's acts.

{¶88} In *Hitt v. Nissan Motor Co., Ltd.* (D.C.Fla. 1975), 399 F.Supp. 838, 850, the court looked at the following factors in determining whether a foreign corporation is transacting business in a forum through its subsidiary for purposes of state long-arm statutes: withdrawal of foreign company from jurisdiction where it had been transacting business while establishing local subsidiary to continue the business and dominating its board of directors; local subsidiary performs all business which parent itself could perform by its own officials were it present, i.e., subsidiary a mere conduit for products of the parent; overlap in boards of directors, officers and significant interchange of personnel between parent and subsidiary; exchange between parent and subsidiary of records and documents; listing of subsidiary as branch or agent of parent or that parent and subsidiary are part of one entity; sending of technical personnel to subsidiary by parent at its expense to assist the latter with its operations; advertising activities by subsidiary to benefit parent and vice versa; and inconvenience to parent in defending in forum balanced with benefits and advantages from their activities within the forum. Id. at 850.

{¶89} Here, ACE Capital Title is wholly owned by the offshore defendants. However, as discussed above, mere stock ownership is insufficient to establish personal jurisdiction. Appellants then point to the overlap of officers and directors, and shared employees as evidence that there is little separation between the parent and subsidiary. ACE Capital Title does not have its own employees or office space. It has a services agreement with ACRI for those things, as well as office supplies, office equipment, accounting department and legal department.

{¶90} ACE Capital Title's business was that of reinsuring title policies from primary title insurers. In its sales and marketing literature, ACE Capital Title is referred to as the "dedicated vehicle" for the ACE family of companies because it was the only ACE entity that was involved in title insurance and reinsurance throughout the ACE group of companies.

{¶91} Through internal reinsurance layering, provided by the offshore defendants, ACE Capital Title, with $45 million in its own assets, was able to reinsure risk that amounted to $200 million per policy and $30 billion in total exposure. Moreover, the offshore defendants always provided an unconditional guaranty of every financial obligation incurred by ACE Capital Title by means of a "keepwell agreement."

{¶92} The offshore defendants shared the name "ACE" with ACE Capital Title as well as a common logo, a common website, joint publications, marketing and branding. ACE Limited controlled the marketing of ACE Capital Title and its use of the "ACE" name. Marketing materials needed to be approved. There is an ACE newsletter authored by an attorney in Columbus, Ohio that is disseminated to clients and potential clients.

{¶93} ACE Capital Title did not have the authority to bind the offshore defendants. Rather, the offshore defendant ACRI reviewed the joint venture/strategic alliance business plan and voted to approve the plan, to authorize ACE Capital Title to apply to the ODI for a license in Ohio, and to authorize ACRO to hire additional personnel to work with appellants to implement the plan.

{¶94} ACE Capital Title represented to appellants that final documents would be and were being signed after appellants acquired OTIC.

{¶95} The offshore defendants made the decision as to whether ACE Capital Title would be allowed to participate in the IPO. ACE Capital Title played no part in that decision.

{¶96} Very little, if any, of the evidence presented by appellants is contested as factually inaccurate. The foreign defendants, of course, disagree with the inferences appellants draw from this evidence. The foreign defendants argue that ACE Capital Title did not conduct any of its parents' business because it was the dedicated vehicle for title reinsurance and the foreign defendants were not in that business. The foreign defendants also argue that they did not control the day-to-day operation of ACE Capital Title. The arrangement to carry ACE Capital Title employees as a subsidiary of one of the foreign defendants was merely a payroll employer, but it did not grant the foreign defendant any authority to control ACE Capital Title's employees. ACE Capital Title observed corporate formalities, and acting through its management, had the authority to write policies. They note that ACE Capital Title had paid in capital surplus of over $25 million from which it could pay claims.

{¶97} The foreign defendants argue that the overlapping officers and directors and the co-branding efforts are makeweight factors that do not substantively affect the lack of an agency relationship between the parents and the subsidiary.

{¶98} After review of all the assertions and the evidence underlying them, we conclude that there is some competent, credible evidence to affirm the judgment of the trial court with respect to personal jurisdiction over the foreign defendants. Our conclusion is based primarily on the following factors. The evidence showed that ACE Capital Title was not distributing a product of the parent corporation. There was a separate nature of the business of ACE Capital Title from that of the foreign defendants. ACE Capital Title was the only ACE entity writing title reinsurance policies. ACE Capital Title observed corporate formalities. The degree of control exercised by the foreign defendants over day-to-day operations is negligible. Granted there were some shared officers and directors who were involved in approving the business plan of the strategic alliance and the ultimate decision to pull the plug on the parties' deal, but these were major decisions affecting the future of ACE Capital Title and not the typical day-to-day type of control that would lead to the conclusion of *undue* control. Finally, there is an absence of evidence that ACE Capital Title had the authority to bind the foreign defendants.

{¶99} The eleventh assignment of error is not well-taken and is overruled.

{¶100} In their twelfth assignment of error, appellants contend that the trial court erred in dismissing the offshore defendants while indicating that the tortious interference claims could proceed to trial.

{¶101} Based on our consideration of the personal jurisdiction issue with respect to the offshore defendants, it is our conclusion that such claims cannot survive as they were asserted only against the foreign defendants. Appellants have not demonstrated that the offshore defendants were doing or soliciting business in Ohio or engaging in a persistent course of conduct with respect to Ohio. The twelfth assignment of error is not well-taken and is overruled.

{¶102} Based on the foregoing, we grant in part and deny in part appellees' motion to dismiss part of this appeal for lack of jurisdiction. No final appealable order exists with respect to the promissory estoppel and fraud claims, and this court lacks jurisdiction to consider them on appeal. Therefore, that portion of the motion to dismiss in part is granted. The motion to dismiss the portion of the appeal concerning jurisdiction over the offshore defendants is not well-taken and denied.

{¶103} We affirm in part and reverse in part the judgment of the trial court. Specifically, we sustain assignments of error one and four, and overrule assignments of error two and three as moot. Appellants' fifth assignment of error is sustained in part with respect to the claim for breach of fiduciary duty, and, as discussed in connection with the motion to dismiss in part this appeal, we are without jurisdiction to consider appellants' fraud claims. Appellants' sixth assignment of error is overruled. Appellants' seventh assignment of error relates to appellants' promissory estoppel and fraud claims, and we are without jurisdiction to consider the merits of this assignment of error. Assignments of error eight, nine, ten, eleven, and twelve are overruled.

{¶104} The judgment of the Franklin County Court of Common Pleas to dismiss the offshore defendants for lack of personal jurisdiction is sustained, and the judgment of the trial court granting in part and denying in part summary judgment in favor of ACE Capital Title is affirmed in part and reversed in part and this matter is remanded for further proceedings in accordance with this opinion.

Motion of appellees to dismiss the appeal in part is granted in part and denied in part. Judgment affirmed in part and reversed in part and remanded for further proceedings.

BROWN and FRENCH, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Olympic Holding Company, LLC et al ,

Plaintiffs-Appellants,

v

No 07AP-168
(C P C No 06CVH-06-7238)

ACE Limited et al ,

(REGULAR CALENDAR)

Defendants-Appellees

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 13, 2007, we grant in part and deny in part appellees' motion to dismiss part of this appeal for lack of jurisdiction No final appealable order exists with respect to the promissory estoppel and fraud claims, and this court lacks jurisdiction to consider them on appeal Therefore, that portion of the motion to dismiss in part is *granted* *The motion to dismiss the portion of the appeal concerning jurisdiction over* the offshore defendants is not well-taken and denied

We affirm in part and reverse in part the judgment of the trial court Specifically, we sustain assignments of error one and four, and overrule assignments of error two and three as moot Appellants' fifth assignment of error is sustained in part with respect to the claim for breach of fiduciary duty, and, as discussed in connection with the motion to dismiss in part this appeal, we are without jurisdiction to consider appellants' *fraud claims* Appellants' *sixth assignment of error is overruled*

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Appellants' seventh assignment of error relates to appellants' promissory estoppel and fraud claims, and we are without jurisdiction to consider the merits of this assignment of error Assignments of error eight, nine, ten, eleven, and twelve are overruled

Accordingly, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas to dismiss the offshore defendants for lack of personal jurisdiction is sustained, and the judgment of the trial court granting in part and denying in part summary judgment in favor of ACE Capital Title is affirmed in part and reversed in part and this matter is remanded for further proceedings in accordance with this opinion Costs are assessed against appellees

TYACK, BROWN & FRENCH, JJ

By ______________________
Judge G Gary Tyack