

IN THE SUPREME COURT OF OHIO

OLYMPIC HOLDING COMPANY LLC, et al.,

Plaintiffs/Appellees,

v.

ACE LIMITED, et al.,

Defendants/Appellants.

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: Case No.: 08-0200
:
: (On Appeal From The Tenth District Court
: of Appeals, Case No. 07-APE-2-0618)
:
:
:
:

APPELLEES' STATEMENT IN OPPOSITION TO JURISDICTION

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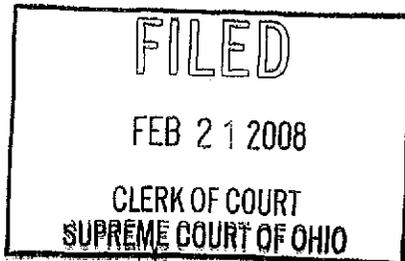


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I. STATEMENT OF APPELLEES' POSITION REGARDING WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

This is a factually complex summary judgment case that is based on well-settled law.

The 34-page Tenth District Court of Appeals' opinion was thoughtful and unanimous. This is not a certified conflict case. This is not a case where Ohio law diverges from that of other jurisdictions. This is not a case in which the applicable law is "confusing," as appellant ACE Capital Title Reinsurance Company ("ACE Capital Title," or "defendant") claims.

The underlying Tenth District Court of Appeals decision deals with a single, narrow, discrete, and completely uncontroversial issue in contract law: is a defendant entitled to summary judgment based on the Statute of Frauds, where there is voluminous Record evidence and judicial admissions that defendant affirmatively misrepresented to the plaintiffs that it would produce a signed writing? Ohio courts, including the unanimous Tenth District Court of Appeals here, have always said "no." In this regard, Ohio is in line with every other jurisdiction that has faced the question of whether a party that misrepresents its promised intent to produce a signed writing can nonetheless rely on a Statute of Frauds defense (it cannot). The Statute of Frauds is not intended to help a party perpetrate a fraud, and allowing a party to lie about whether it would sign an agreement has never been part of the public policy of any business-friendly jurisdiction.

Indeed, the assignment of error that was before the Tenth District Court of Appeals, which assignment of error appellant now challenges, was as follows:

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.

The Court of Appeals agreed—unanimously—in a 34-page opinion, holding:

[Plaintiffs] 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.

COA at ¶48.

The Court of Appeals performed a de novo review of the voluminous summary judgment record in reaching its holding. In that regard, it found evidence that the parties had reached mutual agreement on the essential terms of their joint venture and reinsurance agreements. It found evidence the parties were performing in accordance with those agreements. It found evidence the parties had reduced their agreements to writings that ACE Capital Title promised to sign as soon as plaintiffs acquired the Olympic Title Insurance Company (“OTIC”), an Ohio-based insurance company. In great part, that evidence came from defendant’s own officers:

[Plaintiffs] have presented evidence that Reese [the Chief Operating Officer of defendant ACE Capital Title] 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. [Plaintiffs] were told that the agreement was completed and had just gone upstairs for signature.

COA at ¶46 (emphasis in the original).¹

Plaintiffs acquired OTIC, to be based in Columbus, in accordance with the parties’ agreements and in reliance on defendant’s promise to sign. Thereafter, ACE Capital Title refused to sign the parties’ agreements after all, as a result of its parent companies’ decision to pursue a \$1 billion initial public offering (“IPO”) instead. The fact that ACE Capital Title backed out after agreements had been reached, promises had been made, and the parties were performing caused its Chief Operating Officer (“COO”), Richard Reese, to testify “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.” COA at ¶15 (emphasis added).

¹ Id. at ¶11 (“Through Reese, ACE Capital Title promised to sign the various agreements with appellants after appellants obtained ODI approval and acquired OTIC.”).

Notably, ACE Capital Title never disputed whether it had promised plaintiffs it would sign the parties' agreements. The Court of Appeals observed:

ACE Capital Title does not dispute the [plaintiffs'] 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[.]

COA at ¶47. Id. at ¶11.

That is the same approach that ACE Capital Title takes here, as appellant. It does not and cannot argue that evidence is lacking as to whether the parties reached agreement, and whether its representatives promised to sign the agreements. Each of plaintiffs' principals, as well as ACE Capital Title's COO, Mr. Reese, as well as multiple documents, all confirmed that the parties had reached agreement, and that ACE Capital Title promised to execute written memoranda of the parties' agreements as soon as the OTIC acquisition occurred. Of course, had ACE Capital Title attempted to refute this evidence, that would create nothing more than a fact dispute, which would preclude summary judgment in ACE Capital Title's favor in any event. ACE Capital Title was not entitled to summary judgment on the factual Record presented.

Instead, in order to try to escape the overwhelming factual Record at summary judgment, ACE Capital Title asks this Court to turn its back to the facts and create a whole new "rule" out of whole cloth: that "sophisticated parties represented by skilled counsel" are entitled to lie about their intent to sign memoranda, and then rely upon a Statute of Frauds defense to claim "Gotcha—you don't have a signed writing after all, despite what I promised you."

Remarkably, defendant ACE Capital Title and its amici curiae try to tell this Court that that is the "pro-business" result: that businesses should be able to lie to each other with impunity in their dealings with one another, and that behavior its own COO calls "absolutely unethical" is the order of the day when out-of-state mega companies like New York-based ACE Capital Title

(with its Bermuda-based parent companies) come to do business in Ohio. The “rule” that ACE Capital Title advocates is not the prevailing law in any jurisdiction. Not surprisingly, no jurisdiction allows a party that has lied about its intent to produce a signed writing to rely upon a Statute of Frauds defense to the resulting breach of contract claim.

In short, this is a fact intensive case for which the Court of Appeals found—correctly, and unanimously—that summary judgment is inappropriate. ACE Capital Title identifies no issue of public or great general concern that would justify an interlocutory discretionary appeal.

II. APPELLEES’ STATEMENT OF THE CASE.

After conducting a de novo review of the exhaustive Record evidence in this case, including plaintiffs’ seven-volume appendix of deposition and exhibit excerpts, the Tenth District Court of Appeals set forth a detailed six-page recitation of the pertinent facts in its 34-page unanimous written decision. ACE Capital Title has chosen to misstate those facts here.

For example, ACE Capital Title asserts “there is no written document to memorialize terms and no writing signed by either party.” ACE Stmt. at 1. In actuality, the Court of Appeals found there were written term sheets, written business plans, written applications to the Ohio Department of Insurance (“ODI”), and agreements lacking only their promised signature.²

ACE Capital Title also suggests to this Court that at the time it reneged on its agreements and announced it would not go forward with the parties’ deal as a result of its parents’ decision to pursue a \$1 billion IPO instead, the parties were “still negotiating,” and had not reached agreement on the terms of their business deal. The Court of Appeals found otherwise, citing the testimony of ACE Capital Title’s COO, Mr. Reese: “Reese also testified that the parties *had*

² See, e.g., COA at ¶5 and ¶41 (term sheets authored by ACE); ¶8 (ACE’s business plan); ¶9-10 (ACE’s ODI application); ¶11 (ACE’s promised signature); ¶14 (ACE’s refusal to sign). Because the Court of Appeals determined that there was factual evidence to support plaintiffs’ claim that ACE Capital Title is estopped from relying on the Statute of Frauds, it did not need to reach plaintiffs’ Assignment of Error No. 3—that these writings satisfy the Statute of Frauds.

reached agreement and were implementing and memorializing the terms of the joint venture.” COA at ¶46 (emphasis in original).³ ACE Capital Title is not entitled to misstate the facts.

What ACE Capital Title is trying to do, of course, is make it seem as though this case is about some unsubstantiated, naked oral promise to engage in what it concedes is a \$65 million business deal. In actuality, as the Court of Appeals noted, “[t]his 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.” COA at ¶3. There are tens of thousands of pages of documents reflecting the parties’ agreements. Dozens of witnesses from Ohio, Kansas, New York, and the Bermuda base of ACE Capital Title’s parent companies gave hundreds of hours of deposition testimony regarding the parties’ dealings. ACE Capital Title’s witnesses agreed that terms had been reached, and its documents show signature was promised.

At the end of the day, ACE Capital Title’s “refusal to go forward” had nothing to do with plaintiffs, or any inability to reach terms. Rather, even ACE Capital Title admits that “[j]ust 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 Stmt. at 6. “Market factors and priority changes” are just a euphemism for the ACE companies’ decision to dump the parties’ joint venture in favor of a \$1 billion IPO. Unfortunately, ACE Capital Title did not tell plaintiffs this until after they acquired OTIC.⁴ And unfortunately, this was contrary to everything that ACE Capital Title expressly promised and represented to plaintiffs. That is why ACE Capital Title’s own COO testified that plaintiffs were treated “absolutely unethically” by his company.

³ At a minimum, “there are factual disputes as to whether the parties reached agreement on all the essential terms of the strategic alliance.” COA at ¶40. See also *id.* at ¶45.

⁴ See COA at ¶14. *Cf.* ACE Stmt. at 6-7 (misstating facts as to chain of events).

This is not a case about whether promissory estoppel is available as a default alternative to a breach of oral contract claim as a general proposition (even if defendant's misleading citations attempt to cast it as such). This case is about ACE Capital Title renegeing on promises to sign agreed-upon writings that would satisfy the Statute of Frauds, where plaintiffs relied on its promises. No court allows a party to invoke the Statute of Frauds in such a circumstance. Ample Record evidence supports the Court of Appeals' conclusion 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." COA at ¶48. Defendant's misleading legal cites, copied by its amici curiae, require no different result.

III. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW.

A. Response To Proposition of Law No. 1: Ohio Law Does *Not* Permit A Party To Rely On A Statute Of Frauds Defense After Misrepresenting Its Intent To Produce A Signed Writing That Would Satisfy The Statute Of Frauds.

There is not a single appellate district anywhere in Ohio at any time that has ever held, or even suggested, that a party can promise to produce a signed writing, induce reliance on the promise, only to renege on the promise and rely upon the Statute of Frauds as a defense:

- McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc., 87 Ohio App.3d 613, 627 (Cuyahoga 1993) ("[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.");
- Gnomes Knoll Farm, Inc. v. Aurora Inn Operating Partnership, Case No. 93-G-1772, 1994 Ohio App. LEXIS 2904, *18-19 (Geauga June 30, 1994) (trial court erred in granting summary judgment on contract claim where defendant reneged on promise "that a lease agreement would be sent to appellants within thirty days," and was estopped from relying upon Statute of Frauds), discretionary app. not allowed, (1994) 71 Ohio St.3d 1423;
- Saydell v. Geppetto's Pizza and Ribs Franchise Sys., 100 Ohio App.3d 111, 121-22 (Cuyahoga 1994) (Ohio law recognizes that promise to reduce agreement to writing can estop a party from relying upon the Statute of Frauds) (citing McCarthy), app. not allowed, (1995) 72 Ohio St.3d 1415;
- Beaverpark Assoc. v. Larry Stein Realty Co., Case No. 14950, 1995 Ohio App. LEXIS, *13 (Montgomery Aug. 30, 1995) (same, citing McCarthy);

- Jones v. R/P Int'l. Technologies, Inc., Case No. C-940567, 1995 Ohio App. LEXIS 4187, *8 (Hamilton Sept. 27, 1995) (adopting McCarthy and Beaverpark), app. not allowed, (1996) Ohio St.3d 1411;
- Assoc. For Responsible Dev. v. Fieldstone Ltd. P'ship, Case No. 16994, 1998 Ohio App. LEXIS 5388, *20 (Montgomery Nov. 13, 1998) (same, citing McCarthy);
- Alford v. Moore, Case No. CA98-04-026, 1998 Ohio App. LEXIS 5613, *13 (Clermont Nov. 30, 1998) (same, citing McCarthy);
- Miami Valley United Meth. Mission Society v. White-Dawson, Case No. 17873, 2000 Ohio App. LEXIS 740, *10-11 (Montgomery Mar. 3, 2000) (citing McCarthy regarding “breach of a promise to make a memorandum of the agreement.”);
- Landskroner v. Landskroner, 154 Ohio App.3d 471, 489 (Cuyahoga 2003) (parties have been barred from invoking Statute of Frauds in “cases where there has been... a promise to make a memorandum out of the agreement.”) (citing McCarthy), app. not allowed, (2004) 101 Ohio St.3d 1423;
- Eske Prop., Inc. v. Sucher, 2003-Ohio-6520, ¶ 24 (Montgomery) (defendant estopped from relying on Statute of Frauds “where one party promises to formalize an agreement in writing, but does not.”) (citing McCarthy at ¶¶56-57), app. not allowed, 102 Ohio St.3d 1423;
- Lowe v. Phillips, 2005-Ohio-2514, ¶29 (Montgomery) (“As to the...requirement that a promise to make a memorandum of the agreement in writing must occur in order to rely on the promissory estoppel exception to the Statute of Frauds, the evidence supports that such a promise occurred....Thus, we agree with the trial court that Lowe established the exception of promissory estoppel.”);
- Martin v. Friedberg, 2007-Ohio-3932, ¶20 (Morgan) (finding “appellant is estopped from raising the defense of the statutes of fraud.”) (citing McCarthy), discretionary app. not allowed, 2007-Ohio-6803;
- Spectrum Benefit Options, Inc. v. Medical Mut. of Ohio, 2007-Ohio-5562, ¶40 (Athens) (“[F]or the promissory estoppel exception to apply, there must be ‘either a misrepresentation that the statute of fraud’s requirements have been complied with or a promise to make a memorandum of the agreement.’”) (citing McCarthy) (citations omitted).

ACE Capital Title, for its part, does not cite to a single contrary Ohio case. It does, however, cite to a handful of Ohio cases—none of which say what it claims.

The cases of Royal Doors, Inc. v. Hamilton-Parker Co., No. 92AP-938, 1993 Ohio App. LEXIS 2310 (Franklin April 29, 1993), and Columbus Trade Exchange, Inc. v. AMCA Int'l. Corp., 763 F.Supp. 946 (S.D. Ohio 1991), cited by ACE Capital Title, did not involve any promise to sign a memorandum of the parties’ agreement. Those cases therefore do not deal with the issue presented to the Court of Appeals. Cases dealing generally with whether

promissory estoppel is available as an alternative to a breach of contract claim are not probative of the narrow issue presented here: whether a party that falsely promises to produce a signed writing is estopped from relying on the Statute of Frauds. It is.

The case of Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc., 2007-Ohio-380 (Franklin), is cited by ACE Capital Title as supposedly creating an irreconcilable conflict within the Tenth District itself. It does not. In fact, in Carcorp, the trial court's grant of summary judgment was reversed because the defendant had not even moved for summary judgment on the breach of contract claim. The words "Statute of Frauds" are not even mentioned in the decision. The Carcorp decision does not present the same legal issues, and it presents completely different facts.⁵ That is no doubt why the Court of Appeals here rejected ACE Capital Title's identical, vaporous Carcorp arguments when they were made to it below.

ACE Capital Title also cites to Seale v. Citizens Savings & Loan Ass'n, 806 F.2d 99 (6th Cir. 1986), but neglects to mention that the Seale case acknowledged the fact that a party that misrepresents its intent to produce a signed writing is estopped from relying on the Statute of Frauds. Id. at 103 (citing cases). The Seale court did not apply the promissory estoppel exception to the Statute of Frauds, because "Plaintiff here has not proceeded on the theory of a separate promise" to produce a signed writing. Id. Thus, Seale does not address these facts.

Curiously, ACE Capital Title then cites to several cases that actually suggest the two limiting conditions of McCarthy, supra, should only apply to sophisticated business parties, and not apply at all to private individuals who might benefit from a broader estoppel exception to the Statute of Frauds. Why would ACE Capital Title cite cases that hurt them? Well, ACE Capital

⁵ Cf. COA at ¶45 ("[W]e find genuine issues of material fact exist on the question of whether the parties reached mutual agreement on all essential terms of the agreements.") and Carcorp Dec. at ¶20 ("It is undisputed that the parties did not discuss, let alone agree upon, most of the contract terms that would be necessary to complete this complex business transaction.").

Title claims that because some courts have ruled that McCarthy is too restrictive when applied to individuals, it should not be available at all when sophisticated parties are at issue. This is a disingenuous attempt to turn these cases on their head. “Sophisticated parties” are indeed allowed to point out that a defendant is estopped from relying on the Statute of Frauds because it misrepresented its intent to produce a signed writing. The McCarthy case itself involved “sophisticated parties:” a law firm suing its Cleveland landlord over high-rise office space.

In fact, Ohio courts have held in many instances that McCarthy applies only and specifically to business transactions, and not to private persons entering into an employment contract, for example.⁶ ACE Capital Title’s cited case of Connolly v. Malkamaki, 2002-Ohio-6933 (Lake), agrees that McCarthy applies specifically to sophisticated business entities, and not ordinary employees. Id. at ¶24. ACE Capital Title erroneously suggests that Connolly rejected the notion that estoppel can preclude a Statute of Frauds defense. On the contrary, Connolly actually expanded the circumstances in which estoppel will bar the Statute of Frauds.

In the same vein, ACE Capital Title also cites to Niemi v. NHK Spring Co., Ltd., 481 F.Supp.2d 869 (N.D. Ohio 2007). The case clearly acknowledged that a party that misrepresents its intent to produce a signed writing may not rely on a Statute of Frauds defense.⁷ ACE Capital Title, however, claims that Niemi states there is no “firm rule” regarding whether a party may ever be estopped from relying on the Statute of Frauds. That is an active mischaracterization of the case’s holding. The case creates no confusion as to the baseline rule; the only question it

⁶ See Poskocil v. The Cleveland Institute of Music, Case No. 71425, 1997 Ohio App. LEXIS 1644, *10 (Cuyahoga April 24, 1997) (“The limitation on the doctrine of promissory estoppel [to the Statute of Frauds] does not apply to employer-employee relationships. McCarthy, Lebit is applicable to business relationships in which the parties are more of an equal in bargaining position and knowledge than in a typical employment agreement situation.”).

⁷ Id. at 874 (Statute does not apply “if there was a misrepresentation that the statute had been complied with, or if there was a promise to reduce the oral agreement to writing later.”).

raised is whether estoppel should be limited to the two circumstances in McCarthy, or whether a broader estoppel exception should apply to less sophisticated individual plaintiffs. See id.

Here, of course, where the plaintiff business entities have adduced evidence that meets even the stringent requirements of McCarthy, there is no opportunity for the Court to ever reach the question of whether those stricter McCarthy requirements (which plainly apply to sophisticated parties claiming an estoppel exception to the Statute of Frauds) should equally apply to private individuals. Whether a private individual should have to meet the same strict standards as sophisticated parties to invoke estoppel is not before the Court. This much, however, is clear: where, as here, a party misrepresents its intent to produce a signed writing, it is estopped from relying on the Statute of Frauds. “Sophistication” is no defense, and “absolutely unethical” business practices are not a public policy result this Court should embrace.

B. Ohio Law Is In Accordance With Every Other State To Review This Issue.

ACE Capital Title then cites decisions from foreign jurisdictions in an attempt to make Ohio look out-of-step on the issue of whether a party that misrepresents its promised intent to produce a signed writing may rely on the Statute of Frauds. In actuality, every jurisdiction to look at the issue agrees: a party cannot lie about whether it intends to sign a written agreement, induce reliance, and then rely upon the Statute of Frauds as a defense. One need only consider the few states cited by ACE Capital Title as supposedly rejecting the McCarthy approach:

- Washington: Klink v. Famous Recipe Fried Chicken, Inc. (1980) 94 Wn.2d 255, 259-62 (Washington Supreme Court holding “[b]ecause on motion for summary judgment, facts have been asserted which show Famous' agent, Skinner, promised to make and execute a written franchise agreement... Klink may bring this action notwithstanding the statute of frauds.”); In re Estate of Nelson, 85 Wn.2d 602, 610-11 (Wash. 1975) (“A party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the Statute of Frauds, and then breaks that promise, is estopped to interpose the Statute as a defense to the enforcement of the contract by another who relied on it to his detriment”) (citing cases and treatises);

- Pennsylvania: Du Seso v. United Refining Co., 549 F. Supp. 1289, 1296-97 (W.D. Pa. 1982) (“[P]revailing authority indicates that the bar of the statute will be removed only when a party has misrepresented his intention to reduce an agreement to writing.”);
- Illinois: Roti v. Roti, 364 Ill. App. 3d 191, 199 (2006) (“In order to trump the Statute of Frauds, a party must invoke the doctrine of equitable estoppel [in which] the party asserting it must additionally allege words or conduct amounting to a misrepresentation or concealment of material facts.”) (citation omitted).

Other jurisdictions dealing with broken promises to produce a signed writing have reached the same conclusion.⁸

⁸ Alaska: Alaska Airlines v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954) (analyzing Restatement of Contracts 2d, Section 178, Comment f, and Williston on Contracts (1936), Sec. 533A, to “conclude that there was an intention to carry promissory estoppel (or call it what you will) into the statute of frauds if the additional factor of a promise to reduce the contract to writing is present.”); Arizona: Mullins v. S. Pac. Transp. Co., 174 Ariz. 540, 542-43 (Ariz. Ct. App. 1992) (“In Arizona, the doctrine of promissory estoppel applies to a contract otherwise barred by the Statute of Frauds only [...] where the party asserting the Statute of Frauds defense has misrepresented that the statute’s requirements have been met or promises to put the agreement in writing.”); California: Wilk v. Vencill, 30 Cal. 2d 104, 108 (Cal. 1947) (applying estoppel to defeat a Statute of Frauds where the defendant represented that she “consented to the sale and that she would sign the agreement in the near future[.]”); District of Columbia: Rafferty v. NYNEX Corp., 744 F. Supp. 324, 330 (D.D.C. 1990) (“[Party’s] alleged promise to reduce the contract to writing ‘as soon as possible’ and his subsequent failure to do so, brings the contract within the [estoppel] doctrine for purposes of a motion for summary judgment.”), aff’d in part & rev’d in part, 314 U.S. App. D.C. 1 (D.C. Cir. 1995); Kansas: Hazen v. Garey, 168 Kan. 349, 351, 359 (Kan. 1949) (defendant estopped from asserting Statute of Frauds where he falsely “promised to plaintiffs that he would cause the oral agreement to be reduced to writing, [and] execute the same”); Maine: Chapman v. Boman, 381 A.2d 1123, 1129 (Me. 1978) (defendant’s promise to make a memorandum gave rise to a genuine issue of material fact as to whether defendant was estopped from using Statute of Frauds); Massachusetts: Cellucci v. Sun Oil Co., 2 Mass. App. Ct. 722, 729-30 (Mass. Ct. App. 1974) (defendant estopped from asserting Statute of Frauds given the “repeated assurances that the deal was... ‘all set,’ ...and that the signature by a vice president at the home office was a purely formal or perfunctory matter.”); Michigan: Jim-Bob, Inc. v. Mehling, 178 Mich. App. 71, 88-89 (Mich. Ct. App. 1989) (holding “the trial court properly submitted the estoppel question to the jury” where commercial lessors misrepresented their intent to sign a new lease with plaintiff lessee); Minnesota: Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 283-84 (Minn. 1975) (estoppel bars Statute of Frauds “when the promise relied upon is a promise to reduce the contract to writing.”); Missouri: Davis v. Nelson, 880 S.W.2d 658, 666-67 (Mo. Ct. App. 1994) (Statute of Frauds barred where defendant falsely promised that “[h]e was going to sign”); Montana: Northwest Potato Sales v. Beck, 208 Mont. 310, 316-17 (Mont. 1984) (Statute of Frauds barred where defendant refused to sign contract); New Jersey: Pop’s Cones, Inc. v. Resorts Intern. Hotel, Inc., 307 N.J. Super. 461, 465 (N.J. Super. Ct. App. Div. 1998) (Statute of Frauds barred where defendant misrepresented that

Not every state has been presented with a case in which a party misrepresented its intent to produce a signed writing. Florida is among the states that has not had a case raising the facts and issues presented here (and none of ACE Capital Title's cited Florida cases involve a broken promise to produce a signed writing). Even Florida, however, recognizes that where parties have negotiated the terms of an agreement and all that is missing is the signature, principles of equity allow the Court to supply the missing signature.⁹ In short, Ohio law is not out-of-step on these issues. Ohio is squarely in the mainstream—indeed, the only stream. No court allows a party to misrepresent its intent to produce a signed writing, and then interpose the Statute of Frauds.¹⁰

agreement was “95% there, we just need [the COO's] signature on the deal” and COO would “approve the deal”); Nevada: Harmon v. Tanner Motor Tours, 79 Nev. 4, 16 (Nev. 1963) (party estopped from relying on Statute of Frauds where it made false assurances “a formal written agreement would be prepared for signature.”); Oklahoma: Gibson v. Arnold, 288 F.3d 1242, 1245 (10th Cir. 2002) (“Under Oklahoma law, a defendant must make false representations or conceal facts before he will be estopped from asserting the statute of frauds as a defense to an oral agreement, and the Oklahoma Supreme Court has interchangeably referred to this form of estoppel as both equitable and promissory estoppel.”); Tennessee: Interstate Co. v. Bry-Block Mercantile Co., 30 F.2d 172, 176 (W.D. Tenn. 1928) (“The statute of frauds has no application to a case where the agreement ... was intended by the parties to be reduced to writing, but has been prevented from being done by the fraud or breach of promise of one of the parties.”); Texas: Moore Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972); Frost Crushed Stone Co. v. Odell Geer Constr. Co., 110 S.W.3d 41, 46 (Tex. App. 2002) (“To avoid the statute of frauds defense to a contract, the promissory estoppel exception set forth in ‘Moore’ Burger applies when the party promises to sign a written agreement which itself complies with the statute of frauds.”); Wisconsin: Klein v. Kelly, 95 Wis. 2d 733, 733 (Wis. Ct. App. 1980) (party estopped to rely on Statute of Frauds where he misrepresented intent to sign); Wyoming: Vogel v. Shaw, 42 Wyo. 333, 341 (Wyo. 1930).

⁹ See Smith v. Royal Automotive Group, Inc., 675 So.2d 144, 153-54 (Fl. Dist. Ct. App. 1996). See also W.R. Grace & Co. v. Geodata Services, Inc., 547 So.2d 919, 925 (Fl. 1989) (Florida Supreme Court recognizing promissory estoppel).

¹⁰ ACE Capital Title's treatise citations are as misleading as its case law. It failed to include the relevant portions. Cf. 9 Williston on Contracts §21:7 (4th Ed. 1999) (“Agreement To Execute Written Memorandum”) (“[I]f the plaintiff has acted on the promise to reduce the contract to writing, and changed his position so that it would be unconscionable not to enforce the promise and the underlying contract, an estoppel will be erected to prevent the defendant from invoking the Statute.”); 4-12 Corbin on Contracts § 12.8 (2007) (“Promises to Execute a Sufficient Memorandum”) (“Equitable estoppel bars assertion of the statute as a defense” where there is “a promise...to execute a sufficient memorandum at a future time.”); Restatement of

C. Response To Proposition of Law No. 2: Whether ACE Capital Title Owed And Breached A Fiduciary Duty Is A Fact-Intensive Inquiry That Does Not Represent An Issue Of Public And Great General Interest.

Whether the parties, by virtue of their agreements, dealings, and representations to one another, created fiduciary obligations to each other under the specific facts of this case is hardly the kind of important issue of public and great general interest that would justify this Court accepting discretionary interlocutory review of the Court of Appeals' decision regarding summary judgment. The nature of the relationship between given parties is necessarily fact-specific. The Court of Appeals made a fact-based determination based on its de novo review of the Record summary judgment evidence. See COA at ¶55. There is nothing about its exercise or its outcome that calls for this Court's discretionary interlocutory review. Indeed, the factual Record shows that ACE Capital Title itself recognized plaintiffs as joint venturers.¹¹

ACE Capital Title argues that because it believes the Statute of Frauds should bar plaintiffs' joint venture agreement, plaintiffs' breach of fiduciary duty claim should fall as a necessary result. This Court has long held there are multiple means through which a fiduciary duty can be created,¹² not the least of which is ACE Capital Title's own fact-specific admissions.

Even if an enforceable joint venture agreement were a prerequisite to a breach of fiduciary duty claim (it is not, see supra n. 12), ACE Capital Title's argument overlooks

Contracts (1932), § 178, Comment f (“[A] promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.”).

¹¹ See, e.g., COA at ¶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.”).

¹² Umbaugh Pole Bldg. Co. v. Scott (1979), 58 Ohio St.2d 282, syllabus (“A fiduciary relationship may be created out of an informal relationship...when both parties understand that a special trust or confidence has been reposed.”); Groob v. Keybank (2006), 108 Ohio St.3d 348, 351 (“When both parties understand that a special trust or confidence has been reposed,...a fiduciary relationship may be established.”).

important aspects of the Court of Appeals' decision. Assignment of Error ("AOE") No. 1 is not the beginning and the end of the joint venture analysis. First, the Court of Appeals held that there are enforceable agreements to agree as to the joint venture that may proceed to trial (AOE No. 4; COA at ¶43). ACE Capital Title has not appealed that holding. Second, even if ACE Capital Title were to receive all that it requests through the instant appeal, this case would still have to be remanded to the Court of Appeals to decide two assignments of error that it found to be moot because of its decision on AOE No. 1. See COA at ¶49. Those two remaining assignments of error involve, AOE No. 2, whether the underlying agreements are capable of being performed in one year such that the Statute of Frauds does not apply, and AOE No. 3, whether there are writings chargeable against ACE Capital Title that satisfy the Statute of Frauds. Resolution of those assignments of error in plaintiffs' favor would leave the joint venture claim intact, thereby confirming the existence of a fiduciary duty between the parties.¹³

Thus, there are multiple, independent means through which plaintiffs may prevail on their joint venture claims. And there are multiple, independent means through which a fiduciary duty can be and was created. Breach of fiduciary duty will turn on facts in this case, and not ACE Capital Title's arguments that this Court should create new law immunizing "sophisticated parties" from lying about their intent to produce signed writings.

D. Acceptance Of Discretionary Appeal At This Juncture Will Not Assist The Efficient, Orderly Resolution Of This Case.

Acceptance of this discretionary appeal would not clarify or streamline anything with respect to the underlying case. After all, fraud and promissory estoppel claims remain for trial, and were not the subject of the Court of Appeals' opinion. In addition, ACE Capital Title has made no challenge to the Court of Appeals' finding (AOE No. 4) that there are enforceable

¹³ Nilavar v. Osborn, 127 Ohio App.3d 1, 20 (Clark 1998) (holding "parties to a joint venture, like those in a partnership, owe each other the duties of fiduciaries.").

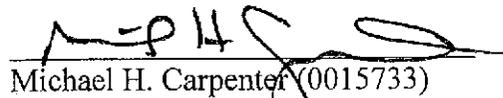
agreements to agree that may proceed to trial. At best, granting ACE Capital Title everything it seeks would only result in the matter being remanded to the Court of Appeals for determination of AOE Nos. 2 and 3, which were declared moot before, while the rest of the remaining claims proceeded to trial. ACE Capital Title's approach would leave the case a procedural mess, fractured between the issues that are now before the trial court, those remanded to the Court of Appeals, and this Court.

As for ACE Capital Title's claim that this Court regularly invites interlocutory review of summary judgment cases, that again, of course, is not the case. The North v. Pennsylvania R. Co. (1967), 9 Ohio St. 2d 169, case, cited by ACE Capital Title for this supposed proposition, simply noted that the "Courts of Appeals when reversing orders granting summary judgment [sh]ould state in the entry of reversal the specific material facts concerning which a dispute exists requiring reversal." Id. at 171. The Court of Appeals has done that here, laying out the facts in a detailed 34-page unanimous decision that leaves no doubt as to its holdings, or the facts it relied upon in reaching them. Faced with an extensive factual Record and twelve assignments of error, the Court of Appeals moved systematically through the issues, decided some in favor of plaintiffs, some in favor of the various ACE defendants, and declined to rule on certain issues at this juncture. Its well-reasoned and thoughtful analysis of the trial court's actions at summary judgment hardly cries out for this Court's discretionary interlocutory review.

IV. CONCLUSION.

For all of the reasons stated here, plaintiffs-appellees respectfully submit that this Court should decline to accept discretionary jurisdiction over this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

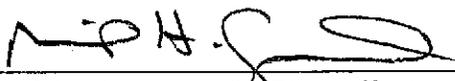
I hereby certify that a true copy of the foregoing Appellees' Statement In Opposition To Jurisdiction was served this 21st day of February, 2008, upon the following via ordinary U.S. mail, postage prepaid:

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