IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLANT ACE CAPITAL TITLE REINSURANCE COMPANY

Kathleen M. Trafford (0021753)
(COUNSEL OF RECORD)
James D. Curphey (0015832)
L. Bradfield Hughes (0070997)
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215-6194
Phone: (614) 227-1915
Facsimile: (614) 227-2100
ktrafford@porterwright.com

Frederick R. Kessler
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue
New York, New York 10110
Phone: (212) 382-3300
Facsimile: (212) 382-0050

Attorneys for Appellant ACE Capital Title Reinsurance Co.

Michael H. Carpenter (0015733)
(COUNSEL OF RECORD)
Jeffrey A. Lipps (0005541)
Kathryn M. Lloyd (0075610)
Carpenter & Lipps, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Phone: (614) 365-4100
Facsimile: (614) 365-9145

Attorneys for Appellees Olympic Holding Co. LLC, et al.

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STATEMENT OF THE CASE

The Statute of Frauds requires certain agreements or undertakings to be memorialized in a signed writing. It has been part of the statutory law of this State for 200 years. During this period it has been expanded by the General Assembly, but never constricted. In particular, since its inception the requirement that an agreement not to be performed within a year must be in writing and signed by the party sought to be bound has been in the Statute, and the General Assembly has never enacted any exceptions to this unambiguous requirement.

The Statute of Frauds continues to be good public policy. Indeed it is even more important now because of the great number, magnitude and importance of complex, multiyear agreements upon which Ohio's sophisticated economy depends. It is especially important in the context of substantial business deals, where the rule of law must be clear and predictable. Companies doing business in Ohio need a predictable standard that lets them know with certainty when and how they form a contract. The Statute provides that necessary certainty. It protects businesses from having long-term contractual obligations foisted upon them by alleged oral statements made during the course of negotiations if those negotiations end without closure. It allows lawyers to advise their clients with confidence as to the consequences of their statements and actions. And it enables parties to negotiate complex deals without being forced into multiyear agreements they neither agreed to or signed.

This case illustrates precisely what the General Assembly intends to avoid by the Statute of Frauds. Three title agencies sought to put together a multifaceted deal with ACE Capital that would "revolutionize" title insurance. Indisputably it was to be a five-year deal involving great complexity and requiring various written contracts to be prepared, agreed to and signed. Also beyond dispute is that throughout the negotiating process, both sides were represented by seasoned business lawyers. The preliminary discussions and due diligence – the smiles, handshakes and term sheets – took about six months. The contract negotiations – the lawyering and scrivenering – continued five more months. But the deal never closed. Before any draft agreement was ever signed, before one of the two major components had even been reduced to a draft writing, and while significant disagreements still existed between the parties over other agreements upon which the deal was unquestionably predicated, ACE Capital decided to terminate the negotiations and not pursue the arrangement.

There is no question that throughout this period ACE Capital and its chief operating officer, Richard Reese, expected the deal to close by late 2003 or early 2004. But there also is no question that all participants on both sides knew that the deal would not be consummated – would not close – until written agreements were *signed* by all the parties. ACE Capital's lawyers went to great lengths to make sure this was understood by prominently placing on the draft agreements a disclaimer that no agreement would exist unless and until a final, written agreement was signed by the parties. They also put a provision in all the drafts stating that no agreement was effective until signed, and the title agencies also included this provision in every draft they sent to ACE Capital. Moreover, the title agencies obviously recognized that a signed writing was required to consummate the deal because the first thing they did upon learning that ACE Capital had decided *not to consummate* the deal was to sign a version of the latest draft (their version) and send it to ACE Capital, demanding that it be signed by ACE Capital as well. When ACE Capital refused, the title agencies hatched a plan to attempt to force ACE Capital to sign and ultimately brought this action in an effort to do so. But ACE Capital never signed the proffered agreement.

Thus, this is a quintessential case for the Statute of Frauds, and the trial court properly granted summary judgment on all the contract and breach of fiduciary duty claims for the simple reason that there never was a finalized and signed reinsurance agreement and there never was a signed joint venture agreement, or, indeed, even a draft of such an agreement. (Decision at 13 - 15; Appx. A52-54.) The trial court correctly recognized that a meaningful and important distinction exists between invoking a judge-made exception to the Statute of Frauds, thereby allowing contractual claims for expectancy damages to proceed on the basis of alleged oral statements or unsigned drafts that do not satisfy the Statute of Frauds, and invoking the equitable doctrine of promissory estoppel, thereby permitting a party to seek damages to the extent of its reasonable reliance upon alleged oral statements or unsigned writings. (*Id.* at 15-16; Appx. A54-55.) The trial court accordingly denied summary judgment as to the title agencies' non-contractual promissory estoppel claim (and a related fraud claim), and those claims are set for trial.

The central issue before this Court is whether the court of appeals erred in reinstating the contract and joint-venture claims against ACE Capital on the basis of a judge-made exception to the Statute of Frauds. Specifically, the court of appeals held that a judicially-created exception to Ohio's Statute of Frauds estops a party from asserting the Statute of Frauds as an affirmative defense – even though the parties clearly manifested an intention not to be bound until there was a signed written agreement – where it is alleged that the party's agent orally misrepresented that a draft agreement would be signed in the future. (Opinion at ¶ 48; Appx. A22.) It also held that the Statute of Frauds did not bar suit on a breach of fiduciary duty claim based upon an alleged five-year joint venture agreement that was never reduced to writing at all, let alone signed. (Opinion at ¶¶50-55; Appx. A22-24.)

The court of appeals clearly erred by rejecting the Statute of Frauds as a defense and allowing the title agencies' contract and breach of fiduciary duty claims to proceed against ACE Capital in the absence of a signed writing. If the public policy codified in the Statute of Frauds is no longer good public policy, the Statute should be rewritten by the General Assembly – not by the courts. If there are to be exceptions to the Statute of Frauds, the General Assembly should study and debate the wisdom of such exceptions and should legislate the circumstances under which they should be applied. Any such exceptions should not be allowed to creep into the law by judicial reactions to the facts in individual cases, especially where an existing and well-established doctrine already lets a court "do justice" when it believes one party has misled another to its detriment, but no enforceable contract exists. A party disappointed by the failure of a complex, multiyear deal to close already has a remedy under the equitable doctrine of promissory estoppel to recover damages to the extent of its reasonable reliance on the representations of the other party's agents. The court of appeals' holding essentially allows parties in failed commercial negotiations to bootstrap claims for expectancy damages onto claims for reliance damages, thereby doing violence to the letter and spirit of the Statute of Frauds. It matters not whether such an exception functions by estopping a party from asserting an affirmative defense, or simply by a court declining to follow duly enacted legislation. Even if this Court is willing to entertain a judge-made "exception" to the Statute, any such exception surely should not extend to a situation, such as this one, where the parties were sophisticated businesses, represented by experienced counsel; where they were engaged in arms-length negotiations to conclude a complex five-year business deal; and where they repeatedly stated, confirmed and reconfirmed in their written exchanges that there would be no deal unless and until there was a formal, signed writing.

Applying a judicially-created exception to the Statute of Frauds in this context is particularly mischievous judicial activism because it makes it difficult, if not impossible, for business to be transacted and for lawyers to properly advise their clients of the consequences of their words or actions. Complex commercial transactions often take months to negotiate and close. The parties must be free to talk about the terms and conditions that they envision will govern their relationship and to exchange written proposals, term summaries and draft agreements. Business deals cannot be effectively negotiated and closed if the parties and their lawyers must worry constantly about the possible implications of an oral comment, or about the calculated misuse of an unsigned draft or other summary should the deal fail to close. Additionally, parties negotiating at arms' length should never be transformed into fiduciaries with special duties, absent their express written consent. The court of appeals' ruling should therefore be reversed.

STATEMENT OF FACTS

Appellant ACE Capital Title Reinsurance Co. ("ACE Capital") is a title reinsurance company. Appellees Sutton Land Services, LLC, Title First Agency Inc. and Title Midwest, Inc. (collectively the "Title Agencies") are title insurance agencies. In early 2003, ACE Capital, mainly through its Chief Operating Officer Richard Reese, had discussions with principals of the Title Agencies (including witnesses Howard Kopel, George Henry and William Mosimann) about a potential multiyear reinsurance relationship, facilitated by the Title Agencies' acquisition of Olympic Title Insurance

Company ("OTIC"). The goal was to create a new title underwriting business, ultimately of national scope, that would compete with existing underwriters and "revolutionize" the title business. (Reese Tr. 222; Supp. 648.)[1] The Title Agencies hoped to skip the "middle-man" by owning and operating their own title insurer, OTIC, backed by ACE Capital's reinsurance.

In broad terms, the proposed reinsurance relationship was to have a "residential" component (for policies with coverage up to $1,000,000) and also a "commercial" component (for policies with coverage over $1,000,000). For the residential component, under a proposed five-year arrangement, OTIC would underwrite the title policies, retaining the first $10,000 of liability and reinsuring the remainder with ACE Capital (the "Residential Reinsurance Agreement"). For the commercial component, again under another proposed five-year arrangement, ACE Capital would underwrite the policies and reinsure the lowest layer of risk (liabilities up to $100,000) with OTIC, and ACE Capital would retain the remainder up to $200 million (the "Commercial Reinsurance Agreement.") Regardless of whether this proposed reinsurance relationship is referred to as a "joint venture," a "strategic alliance," a "partnership" or otherwise, there is no dispute in the record that what was being proposed – and all that was being proposed – was a five-year contractual relationship. Like Reese, principals of each Title Agency testified to this fact. (*See, e.g.,* Kopel Tr. 148-152; Supp. 630-34 ("the period *** in the most basic sense was five years"); Mossimann Tr. 43-44; Supp. 641 ("term to run five years from inception"); Henry Tr. 235; Supp. 621 ("ACE would not

[1] The record references are to the deposition testimony (Tr.) and exhibits (Ex.) submitted to the trial court in support of ACE Capital's Motion for Summary Judgment and included in the Appendix filed with the Court of Appeals. Pursuant to S. Ct. Prac. R. VII, these portions of the record are included in ACE Capital's Supplement, which ACE Capital filed under seal in accordance with an agreed Protective Order between the parties.

terminate their reinsurance agreement for five years after the first anniversary"); Reese Tr. 165; Supp. 647 (proposed term increased from three to five years).)

From the beginning of the negotiations to the end, the parties understood and expected that the ultimate deal would be consummated only if and when the parties signed a written contract memorializing all terms and conditions mutually agreed upon to govern their relationship going forward, but nothing of the sort ever occurred. No such contract was ever signed. Before the parties concluded their negotiations and drafting, ACE Capital decided not to close on the deal.

The manifest intent from the beginning of the negotiations to the end was that there would be no deal until there was a signed agreement, and there never was a signed agreement for any component of the deal.

In early 2003, ACE Capital and the Title Agencies exchanged term sheets broadly outlining the proposed reinsurance relationship as the basis for beginning to work toward final, formal agreements. ACE Capital never signed these term sheets, which stated on each page the following disclaimer in bold capital letters: "**NOT AN OFFER OF INSURANCE.**" (Ex. D137, 138; Supp. 378, 381.) Principals of the Title Agencies admitted that no contract was formed by the term sheets. (*See, e.g.,* Henry Tr. 135; Supp. 620 ("no, I don't believe they constitute an agreement by themselves."); Kopel Tr. 16-17; Supp. 623-24 ("A term sheet does not constitute an agreement.")

In August 2003, ACE Capital and the Title Agencies began negotiating and drafting the actual written agreements that would, they then hoped, eventually consummate 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. Although the parties expected that these negotiations would result in a signed agreement, they were also aware from the very beginning that no deal would exist unless and until both parties signed a written agreement. That never happened.

From August 4, 2003 through November 5, 2003, the parties exchanged at least nine different versions of a proposed Residential Reinsurance Agreement. (Ex. D24/24A-D33/33A; Supp. 128-321.) Each draft had the following "No Contract Disclaimer" on the first page:

> *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.*

(*See e.g.*, Ex. 24A; Supp. 129.) (emphasis added.) Each draft version also expressly stated: "*This Agreement may be executed in any number of counterparts, and by the parties on separate counterparts, but will not be effective until each party has executed at least one counterpart.*" (*Id.*; Supp. 139.) (emphasis added.) None of the drafts, each of which concluded with blocks for signatures to be witnessed (*e.g.*, Supp. 199), was ever signed by ACE Capital.

These drafts of the Residential Reinsurance Agreement required and incorporated by reference an ancillary contract, a "Capital Support Agreement," by which the Title Agencies would backstop OTIC. The Capital Support Agreement was critical to ACE Capital's willingness to go forward with the deal. Reese described the Capital Support Agreement as a "fill or kill provision" – meaning that if it was not satisfied, there could be no Residential Reinsurance Agreement. (Reese Tr. 691-92; Supp. 670.) Although principals of the Title Agencies acknowledged that the Capital Support Agreement was "absolutely" necessary to induce ACE Capital to conclude the

Residential Reinsurance Agreement, (Kopel Tr. 71-72; Supp. 637; Berliner Tr. 75; Supp. 617), the Title Agencies resisted this provision (Reese Tr. 691-92; Supp. 670). On October 8, 2003, ACE Capital circulated an initial draft Capital Support Agreement. (Ex. D74-74A; Supp. 343-47.) The draft Capital Support Agreement contained an unlimited obligation for the Title Agencies to maintain the capital of their vehicle for the deal, OTIC, at a set minimum. (Ex. D74A; Supp. 345.) The Title Agencies did not accept that draft. The parties exchanged no further drafts of the Capital Support Agreement for the proposed five-year Residential Reinsurance Agreement, and no party ever signed the Capital Support Agreement.

All drafts of the proposed Residential Insurance Agreement also required OTIC to enter into agreements, each satisfactory to ACE Capital in its sole discretion, with any agency that would write title insurance policies (the "Approved Agency Agreement"). On November 13, 2003, ACE Capital sent an initial 21-page, single-spaced draft of a form agency agreement to the Title Agencies. (Ex. 79-79A; Supp. 349-70.) A week later, the Title Agencies responded that they had reviewed the draft and "will be back to you with comments." (Ex. D78; Supp. 348.) Despite expressing reservations about the draft, they never followed through with comments prior to ACE Capital's decision to stop negotiations. The Title Agencies also never even identified which entities would serve as approved agencies, which individuals would serve as authorized employees, or what rates would serve as agreed commissions. More than a month later, the Title Agencies forwarded a "draft model 'commercial' agency agreement" to ACE even though no draft commercial reinsurance agreement had yet been written. The transmittal note represented that the draft commercial agency agreement was based on the "proposed form 'residential' agency agreement," but "contains too many modification[s] to make it, in our view, worthwhile to blackline" and cautioned that "[n]ot everyone on our side has weighed in with their comments on this draft." (Ex. D34; Supp. 322.) No Approved Agency Agreement, for either the residential or commercial component of the proposed deal, was ever close to finalized or signed by either side.

Neither side ever prepared any other type of draft agreement during the course of the negotiations. Most significantly, the parties never even began to draft a reinsurance agreement for the commercial component of the contemplated arrangement. According to ACE Capital COO Reese, the commercial title insurance program was the "driver" of the deal from ACE Capital's perspective, such that without it there would be no deal at all between ACE Capital and the Title Agencies. (Reese Tr. 508; Supp. 663.) The Title Agencies' principal negotiator agreed, testifying that the residential side of the deal was "not a big deal" for ACE Capital, and that "[i]t made no sense for them to do it without the [commercial] one." (Kopel Tr. 169; Supp. 635.) Also significant is the fact that there never was any written joint-venture agreement, or even a draft letter of intent to enter into a joint venture. (Kopel Tr. 147; Supp. 629A; Henry Tr. 132-33; Supp. 619.) The reason is simple – there never was a joint venture contemplated, proposed or even discussed by the parties, separate and distinct from the proposed reinsurance deal.

The parties negotiated with the expectation that a deal would be consummated, if at all, by a signed written agreement, but that never happened.

ACE Capital, like the Title Agencies, negotiated with the expectation that a deal ultimately would be consummated and concluded with a signed agreement. That is what Reese expected would happen. (Reese Tr. 456-57; Supp. 660-61.) 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 in broad terms generally describing the transaction. (Reese Tr. 257-58, 337-338; Supp. 649-50, 652-53.) Just as the Title Agencies hoped that the contracts would come to fruition, ACE Capital took steps in anticipation of the deal closing. It hired a new employee, told some customers about the prospect of its relationship with the Title Agencies, and submitted its own application to the Ohio Department of Insurance ("ODI") to become a direct title insurer for the commercial component of the proposed deal. (Reese Tr. 364-65; Supp. 657-58.) When ACE Capital submitted that application in early November, Reese fully expected to be doing business with OTIC, pursuant to a signed agreement, sometime in the first quarter of 2004. (Reese Tr. 525; Supp. 664.)

Throughout the second half of 2003, and right up to the end of the year, Reese worked hard to close the deal. The Title Agencies claim to have relied heavily on his statement that there was a "handshake deal," and other optimistic comments regarding his expectation that the deal would be consummated by ACE Capital. (Reese Tr. 559; Supp. 665.) Those comments, however, simply confirm that Reese and ACE Capital expected that the deal ultimately would close. Reese also testified that he understood all along that the consummation of the deal would require a signed contract. (Reese Tr. 41-44, 345-46; Supp. 644-45, 654-55.) He testified that he had made this clear in his discussions with the Title Agencies. He told them that the agreements had to be approved by ACE Capital's Credit Committee and that, while he was optimistic, any agreements "needed to be written out and executed." (Reese Tr. 342-43, 346; Supp. 654-55.)

Reese himself was disappointed when the deal did not close. He had worked hard on making it happen, and because it did not close, his position with ACE Capital terminated. That understandable disappointment gives some context to his testimony questioning the company's business ethics. (Reese Tr. 684; Supp. 669) (declining to state that ACE Capital "breached" an agreement, but also stating that ACE Capital acted "unethically" by pulling out of the negotiations.) Nonetheless, Reese still acknowledges that no deal was made because there was no final, approved, written agreement. There was no contract. (Reese Tr. 343-346, 456-462; Supp. 654-55, 660-62.)

The Title Agencies committed to acquiring OTIC long before the contract negotiations with ACE Capital got underway and closed on their acquisition of OTIC knowing there was no signed agreement with ACE Capital.

It is true that the Title Agencies' acquisition of OTIC was a necessary component of the proposed reinsurance relationship with ACE Capital. The Title Agencies were insurance agents; they needed to acquire a title insurance company to issue policies. The Title Agencies committed to acquiring OTIC well in advance of the contract negotiations with ACE Capital. Sutton Land Title Services and its principal, Kopel, took the lead on this issue for the Title Agencies. In March 2003, Kopel sent a letter of intent to acquire OTIC. (Ex. D219; Supp. 385.) The Title Agencies then formed Appellee Olympic Holding Company, LLC for the purpose of acquiring OTIC. On May 13, 2003, while the parties were still negotiating over the terms of a draft stock purchase agreement, Kopel sent a letter to the owner of OTIC chastising him for not executing the agreement and threatening to seek to enforce the signed letter of intent to close the deal. (Ex. D228; Supp. 387.) When OTIC took issue with that threat, by pointing that there were no mutually agreeable terms and conditions for this transaction as yet, Olympic Holding executed a draft of the stock purchase agreement and demanded that OTIC sign it. (Ex. D230; Supp. 388.) With OTIC continuing to resist a forced acquisition on unacceptable terms, the Title Agencies, *dba* Olympic Holding, sued OTIC and its owners to force them to sign their latest version of the stock purchase agreement. (Ex. D233; Supp. 450.) Two weeks later OTIC capitulated; the parties settled and executed a stock purchase agreement at that time, some three months before even the *first draft* of the Residential Reinsurance Agreement was sent to the Title Agencies by ACE Capital.

On November 12, 2003, while the Title Agencies and ACE Capital were still negotiating the essential terms of the various agreements that would govern the proposed reinsurance relationship, the Title Agencies submitted their own application to ODI, seeking approval for Olympic Holding to acquire OTIC. (Ex. D8; Supp. 92.) The Title Agencies attached to their application a version of the Residential Reinsurance Agreement from which they had unilaterally deleted the "No Contract Disclaimer" and all references to the Capital Support Agreement. (*Id.;* Ex. D8-10; Supp. 109-27.) They did keep in, however, the provision requiring that the agreement be *signed* to be operative. (*Id.*; Supp. 120.) The person responsible for submitting the application to ODI admits that he removed the "No Contract Disclaimer" from that draft Residential Reinsurance Agreement without ACE Capital's authorization:

> Q: Did anyone from ACE Capital Title represent to you orally or in writing that it was okay to remove the footer reflected on the November 5th, 2003 draft Residential Reinsurance Agreement in what was subsequently submitted to [ODI]?
> A: No.

(Martyn Tr. 214; Supp. 639.) After obtaining ODI approval, Olympic Holding completed the acquisition of OTIC on December 29, 2003.

After ACE Capital decided against continuing negotiations, the Title Agencies, knowing that a signed agreement was intended and required, plotted to force ACE Capital to sign one of the Title Agencies' draft agreements.

Just days before the Title Agencies closed their acquisition of OTIC, ACE Capital and its parent companies decided that, due to market factors and priority changes, ACE Capital should not proceed with any new initiatives. (Reese Tr. 652-53; Supp. 667-68.) ACE Capital informed the Title Agencies of its decision to stop the negotiations on January 2, 2004. (Reese Tr. 607-08; Supp. 666.) Only then did the Title Agencies inform ACE Capital that they had obtained ODI approval to acquire OTIC and had closed on its acquisition. (*Id.*) At that time, there still were no final agreements signed by the parties nor any other signed writing containing the terms of the residential or commercial components of the deal. Recognizing that ACE Capital was not going to conclude the negotiations, the Title Agencies then tried to force an agreement on ACE Capital, taking a page from the same playbook they used to force the stock purchase agreement on OTIC.

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 a draft of the Residential Reinsurance Agreement – prepared by them – to ACE Capital for signature. (Ex. D35-35B; Supp. 323-42.) 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 Title. (*Id.*) Nor was it accompanied by the essential Capital Support Agreement or any Approved Agency Agreements. (*Id.*) The forwarded draft, however, still stated that *"[t]his agreement may be executed in any number of counterparts, and by the parties on separate counterparts, but will not be effective until each party has* *executed at least one counterpart*" and still concluded with blocks for signatures to be witnessed. (*Id.*; Supp. 335, 341.) (emphasis added.) ACE Capital did not sign.

On January 16, 2004, OTIC's Board of Directors met. The key agenda item was: "*Discussion about* *un-executed* *ACE reinsurance agreement and* *legal strategy to force signature*." (Ex. D103, D109; Supp. 371-72, 377) (emphasis added.) The next day, Kopel circulated an email describing a "cram down" strategy 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. That document contains provisions making Ohio law applicable and, perhaps more importantly, requires a speedy arbitration of disputes. We need to consider whether to try to enforce this, or if we actually must do so, based on our position that we have a subsisting contract [.] For the rest of the dispute, we have said that we have agreed on "economic terms" but don't have a contract draft to look to. In either case (or, rather both cases) we should probably ask for emergency injunctive relief, including a prohibition against Ace moving to implement any shut down of its title subsidiary, spin off, merger or movement of cash resources out of the company etc. in any way that might negatively affect our agreements. This would, if successful, be a significant problem for them.*

(Ex. D106; Supp. 373-74.)

Ten days later, the Title Agencies and their affiliates filed suit in Franklin County against ACE Capital and four foreign affiliates (none of whom had participated in the discussions or were parties to the proposed deal), seeking, among other things, specific performance and/or contractual expectancy damages based on the unsigned draft of the Residential Reinsurance Agreement (with references to the Capital Support Agreement deleted) and an allegedly implied joint-venture agreement (unwritten and unsigned).

After the Title Agencies' eve-of-trial dismissal and re-filing of the suit in 2006, the trial court granted ACE Capital summary judgment on all of the Title Agencies' contract-based claims, and correctly limited the Title Agencies' potential recovery on their promissory estoppel and fraud claims to their alleged reliance damages. (Decision at 22-34; Appx. A61-62.) 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 expectancy damages under a purported breach of contract theory. (*Id.*)

The court of appeals reversed the trial court's decision in part and remanded the Title Agencies' breach of contract and fiduciary duty claims for trial, holding that a promissory estoppel exception to Ohio's Statute of Frauds applies even to complex commercial transactions between sophisticated parties represented by counsel. (Opinion, ¶ 48; Appx. A22.) ACE Capital thus now faces trial not only on a promissory estoppel claim, but also on breach of contract and fiduciary duty claims — all based on purported "agreements" that were never finalized or signed and were, in turn, predicated on other agreements that had never been reached and over which significant disagreements existed between the parties. This Court accepted ACE Capital's discretionary appeal on May 7, 2008.

LAW AND ARGUMENT

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.

A. This Court Consistently Rejects The Insertion Of Judge-Made Exceptions Into The Enactments Of The General Assembly.

The court of appeals wrote a promissory estoppel exception into Ohio's Statute of Frauds as the basis for permitting the Title Agencies to sue ACE Capital for breach of *unsigned* five-year agreements, some of which had not even been reduced to writing in draft form. (Opinion, ¶¶ 36-40; Appx. A19-20.) By doing so, the court violated this

Court's consistent admonishment that judge-made exceptions to statutes are not appropriate.

In April 2008, for example, in *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St. 3d 81, 2008-Ohio-1770, this Court refused to insert a "good sense" exception to the Public Records Act:

> [T]he General Assembly is the ultimate arbiter of policy considerations relevant to public-records laws *** and it is for the legislature to 'weigh[] and balance the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.' *** A judicially created "good sense" rule cannot override this precedent.

Id. at ¶¶ 35, 44 (internal citations omitted.) Not a single member of this Court voted to recognize a judicially-created exception to the disclosure requirements of the Public Records Act. Instead, the Court appropriately noted that "it does not make 'good sense' for courts to judicially legislate exceptions *** [.]" *Id.* at ¶ 50, n.2.

Similarly, in *State ex rel. Stoll v. Logan County Bd. of Elections*, 117 Ohio St. 3d 76, 2008-Ohio-333, this Court held that it would be inappropriate for it to add an exemption to a statutory referendum procedure:

> The elections board and its members claim that there is an exception to the filing requirement of R.C. 519.12(H) for rural townships in which the township building "is not regularly manned and documents are not 'filed' as that term is commonly understood." But the statute contains no exception, and we cannot add one to its express language. *** "'In construing a statute, we may not add or delete words.'"

Stoll, 2008-Ohio-333, at ¶ 39 (internal citations omitted.)

In like fashion, this Court again refused to engraft a judge-made exception onto the procedures prescribed by the General Assembly in a 2007 case challenging the appointment of a conservator over a credit union:

> The plain statutory language of R.C. 1733.15 and 1733.17 requires action by the board of directors before the credit union acts, unless the action is otherwise permitted by law or the articles or regulations of the credit union. *** We will not read into a statute any further exceptions to the general rule not expressly provided for by the General Assembly.

United Tel. Credit Union, Inc. v. Roberts, 115 Ohio St. 3d 464, 2007-Ohio-5247, ¶¶ 7-9.

The Court also rejected a judicially-created exception to the Public Records Act in *State ex rel. WBNS TV, Inc. v. Dues,* 101 Ohio St. 3d 406, 2004-Ohio-1497. In that case, the Court disapproved of an exception recognized by the lower court even though it acknowledged that strong public policy reasons may have supported it:

> [W]e have not authorized courts or other records custodians to create new exceptions to R.C. 149.43 based on a balancing of interests or generalized privacy concerns. *** "It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43[B], found in both the statute itself and in other parts of the Revised Code." *** *"Although there may be good policy reasons to exempt settlement [figures], these policy considerations cannot override R.C. 149.43, because the General Assembly is the ultimate arbiter of public policy."*

WBNS, 2004-Ohio-1497, ¶¶ 31-37 (internal quotations omitted) (emphasis added).

This Court has not merely refused to engraft new judicially-created exceptions to statutes in scenarios like those described above. The Court also has refused to apply common-law rules or "doctrines" – *even doctrines previously recognized by this Court* – when doing so would conflict with statutes. In *Wallace v. Ohio Dept. of Commerce,* 96 Ohio St. 3d 266, 2002-Ohio-4210, for example, the State invited the Court to adopt the "public duty rule" as a bar to liability in the Court of Claims. Before *Wallace,* this Court had recognized the doctrine in a case regarding a *municipality's* liability. *Id.,* citing *Sawicki v. Ottawa Hills* (1988), 37 Ohio St. 3d 222, 525 N.E. 2d 468. Even so, in

Wallace, this Court declined to engraft the public-duty rule into R.C. Chapter 2743, which determines the scope of the *State's* liability in the Court of Claims:

> [N]o matter what considerations of policy support the *judicial* application of the public-duty rule, we must remember that R.C. Chapter 2743 has *legislatively* set forth the public policy of this state. *** It is inappropriate for the court to engraft the public-duty rule as an additional limitation on liability that the General Assembly has not provided. *** <u>It is not this court's role to apply a judicially created doctrine when faced with statutory language that cuts *against* its applicability</u>.")

Wallace, 2002-Ohio-4210, ¶ 33 (italics in original; underscoring added).

In each of the opinions just described this Court refused to recognize judge-made exceptions to statutes. These opinions are worthy of particular note here as the Court considers whether the court of appeals erred when it reversed summary judgment on the basis of a judge-made "promissory estoppel exception" to Ohio's Statute of Frauds.

B. The Statute Of Frauds Contains No "Promissory Estoppel Exception."

1. R. C. 1335.05 expressly precludes any action to enforce an unsigned multiyear agreement.

The Title Agencies sued based on two alleged agreements – a Residential Reinsurance Agreement and a joint venture agreement. (Compl.; Supp. 1-91.) The trial court correctly held that their contract claims were barred by R.C. 1335.05 based on the evidence that both purported agreements were to be performed over a period longer than one year, that the former was in "un-finalized form" and "not signed," and that the latter was never even "put into formal writing." (Decision, at 5; Appx. A44.)

R.C. 1335.05 is the current iteration of a two-centuries old Statute of Frauds that has never in its long history contained any promissory estoppel exception. The General Assembly first enacted the Statute of Frauds in 1810. *Fleming v. Donahue* (1831), 5 Ohio 255, 258. The Statute has been amended several times since, but the General

Assembly has never seen fit to add any "promissory estoppel exception" to its unambiguous requirement that certain agreements, including multiyear agreements, must be memorialized in a signed writing in order for "any action" to be taken to enforce them. *See, e.g.,* H.B. No. 349 (1925) (86th General Assembly); H.B. No. 58 (1931) (89th General Assembly); *see also* Am. Sub. H. B. No. 682, Sec. 1335.05 (1975) (H.B. 682 added to the scenarios under which Ohio law requires a signed writing before any action at law will be recognized.)

2. The Statute of Frauds serves significant public interests.

Why does Ohio require long-term agreements to be both in writing and signed by the party to be charged? Because the legislature decided that the harm of foisting an unexecuted or bogus oral agreement upon a bargaining party becomes too great to sustain under law when the agreement lasts more than a year, unless a signed document memorializes its terms and solemnizes its making. This policy judgment is intended to avoid disputes just like this one, where disappointed plaintiffs try to obtain the aspirational benefits of long-term agreements neither reduced to writing nor signed. Indeed, the whole point of the Statute of Frauds is to prevent "he-said, she-said" litigation over the terms of unwritten or unsigned long-term agreements – especially when material terms and essential ancillary agreements are not finalized. The Statute, properly applied, "prevent[s] plaintiffs from foisting certain kinds of obligations upon those who had never assented to assume them." 4 Corbin on Contracts (1997), § 12.1.

The compelling policy considerations underlying the Statute have been recognized over and over again. *See, e.g., Purcell v. Miner* (1867), 71 U.S. 513, 517, 18 L. Ed. 435 ("Every day's experience more fully demonstrates that this statute was founded in wisdom, and absolutely necessary to preserve the title to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony."); *Newman v. Newman* (1921), 103 Ohio St. 230, 245, 130 N.E. 70 ("The statute of frauds is founded in wisdom and has been justified by long experience.") This Court's opinions citing R.C. 1335.05 reveal a consistent pattern, requiring that the kinds of agreements enumerated in the Statute be in writing and signed before the Court will recognize any action at law to enforce them.

In *Wolf v. Friedman* (1969), 20 Ohio St. 2d 49, 253 N.E. 2d 761, for example, a lawyer sued to recover monetary damages for unpaid services he had rendered to the defendant's wife. The plaintiff claimed that the defendant had made an express oral promise to pay. Because R.C. 1335.05 provides that no action may be brought upon a promise to answer for the debt of another unless the agreement is in writing and signed, this Court concluded that the Statute precluded the plaintiff's cause of action. *Wolf,* 20 Ohio St. 2d at 52. In lieu of a breach of contract action at law, the lawyer was left with a claim under R.C. 3103.03 for the reasonable value of his services. *Id.* at 53.

Two decades later, in *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St. 3d 265, 533 N.E. 2d 325, this Court needed to determine whether a counterclaim was barred by the Statute of Frauds. In the counterclaim, a couple alleged that the plaintiff, a credit association, had induced them into executing two promissory notes and a mortgage agreement by falsely representing that they would be released from their obligations once they sold 50,000 bushels of corn. The corn was sold, but the credit association still sued the couple on the instruments. The court of appeals found that the counterclaim asserted a claim which avoided the Statute of Frauds. This Court, however, reversed because the couple did not present "any such writing which sets forth those terms which they allege were agreed to *** ." *Marion,* 40 Ohio St. 3d at 273. The

Court not only applied the Statute to bar the couple's counterclaim, but also expressly rejected their attempts, in reliance on some older cases, to invoke fraud as a means to bypass the Statute:

> [I]n all these cases, plaintiffs alleged some sort of fraud which they claimed vitiated the statute. Even though there was an unperformed promise to convey an interest in land in these cases, *this court consistently upheld the application of the Statute of Frauds and refused to enforce the oral promise.* Consequently, the Cochrans may not premise fraud upon the [credit association]'s mere refusal to honor the alleged parol agreement. *This is especially so when what is sought is either direct enforcement of the alleged oral agreement or an indirect enforcement by such an award of damages as would discharge the Cochrans' obligations on the notes and on the mortgage.*

Id. at 274 (emphasis added.)

Likewise, in 1996 this Court issued its seminal decision in *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St. 3d 433, 1996-Ohio-194. In *Ed Schory,* a developer approached a bank to obtain financing for a proposed multiphase development that was to consist of multiple buildings constructed over a period of years. With respect to the first phase of the development, the developer executed a loan application, and the bank sent the developer a commitment letter, which he signed, agreeing to the terms set forth therein. When the project fell through and litigation ensued, the developer alleged that the bank had agreed to finance not just the first phase, but rather the entire project. The developer submitted an affidavit in which he averred that the bank's loan officer, Michael Crowl,

> confirmed the available interest rates, that financing would be available for the whole project at 75 percent of appraised value *** [.] I have been [led] to believe by Mike Crowl that regional officials in Cleveland knew of the local policies, based upon which Canton had committed to finance the Sherbrook project, but that the officials in Cleveland refused to honor the commitments made to me.

Ed Schory, 75 Ohio St. 3d at 441, quoting the developer's Affidavit.

This Court, relying again on R.C. 1335.05, rejected the developer's attempts to circumvent the Statute of Frauds based on the loan officer's alleged oral promises:

> [T]he record belies [the developer]'s contention that [the bank] agreed to finance the entire project. Instead, it is evident that the parties intended to divide the project into phases for purposes of completion and financing. The parties entered into a series of written agreements. In this regard, [the bank] could not have breached a contract to finance the entire development because such a contract simply did not exist. Even if it did exist as alleged by [the developer], it was not in writing and signed by [the bank]. Thus, [the developer]'s breach of contract action is barred by the Statute of Frauds.

Ed Schory, 75 Ohio St. 3d at 439. Thus, the Court affirmed summary judgment in the bank's favor on the developer's breach of contract claim. *Id.*

Ed Schory is noteworthy for several reasons. Just as the proposed arrangement at issue here was to be comprised of multiple agreements (*e.g.*, Residential, Commercial, Capital Support, Agency), the bank's financing agreement with the developer in *Ed Schory* was multiphased and entailed multiple subagreements, some of which — unlike the case here — had actually *been signed and performed.* And, just as the Title Agencies here attempt to circumvent the Statute of Frauds by relying on parol statements of ACE Capital's former COO Reese (ignoring the many times that Reese testified that no final agreement existed between the parties), the developer in *Ed Schory* tried to convince the Court that the bank's loan officer, Crowl, had orally promised him a deal on which the bank later reneged. Finally, *Ed Schory* rejected the developer's claim that a fiduciary duty had arisen between himself and the bank as they negotiated financing for the multiphase development project — a point addressed in more detail in ACE Capital's Second Proposition of Law, *infra.*

C. A Century Ago, This Court Cautioned Against Recognizing Equitable Exceptions To Ohio's Statute Of Frauds.

When considering whether to approve the equitable exception to the Statute of Frauds that the court of appeals relied on here, it is worthwhile to turn the clock back even further than *Wolf, Marion,* and *Ed Schory,* which were decided in the modern era under the Revised Code. A century ago, in 1908, when the Statute of Frauds was codified in the former General Code, this Court expressly noted that equitable exceptions to the Statute are "*regretted by the wisest judges.*" *Yeager v. Tuning* (1908), 79 Ohio St. 121, 126, 86 N.E. 657 (emphasis added).

In *Yeager,* the plaintiffs alleged that they and the defendants had mutually agreed, orally, to construct a telephone line across their properties, with everyone contributing equally to the project. The line was constructed as agreed, and, according to the plaintiffs, was intended to be permanent. The defendants allegedly cut the line three years later, and the plaintiffs sought an order requiring the defendants to restore the line. This Court, relying on the Statute of Frauds, affirmed the circuit court's decision in favor of the defendants, holding that "[a] parol agreement by several adjoining landowners to erect and maintain telephone poles *** does not create an easement but is merely a parol license and is revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed." *Yeager,* 79 Ohio St. 121, paragraph 3 of the syllabus. As the Court explained in *Yeager*:

> 'The statute [of frauds],' says Lord Redesdale, 'was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud. *If the statute had been vigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements, from the necessity of the case, would have been reduced to writing.*

Yeager, 79 Ohio St. at 126-27 (emphasis added.)

In the time since *Yeager*, Professor Williston has described 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. A hundred years after *Yeager*, however, disappointed plaintiffs fishing for the full benefits of unfinished, unsigned long-term agreements continue to try to cast away the Statute by asking Ohio's courts to recognize new equitable exceptions to its straightforward requirements, including on the basis of precisely the sort of alleged oral representations, unsuccessful negotiations and unsigned drafts from which contractual remedies do not themselves flow. Unfortunately, some appellate courts — including the court below — have taken the bait. *See, e.g., McCarthy, Lebit, Crystal, & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App. 3d 613, 622 N.E. 2d 1093; *see also* Opinion, ¶ 40, citing *McCarthy* (Appx. A20.) Professor Corbin aptly describes the result: "new and disturbing elements continually appear, turning old rules that once were a sound basis of prediction into empty and lifeless formulae or worse." Corbin, *supra*, § 12.1.

D. There Is No Reason To Create A Judicial Exception To The Statute Of Frauds.

Ohio's Statute of Frauds sets forth a certain rule of law that prevents fraudulent claims of contract and prevents disappointed plaintiffs like the Title Agencies from foisting obligations upon defendants who never assented to assume them. There is simply no reason for this Court to sanction a "promissory estoppel exception" to the Statute. Ohio already has a mechanism that allows a court to give relief to a party who reasonably relies to his detriment on the promises of another. That relief is the common law equitable remedy of promissory estoppel. This Court has recognized the equitable doctrine of promissory estoppel set forth in Section 90 of the Restatement of the Law 2d, Contracts. *Shampton v. City of Springboro,* 98 Ohio St. 3d 457, 2003 Ohio 1913, ¶ 32; *Talley v. Teamsters* (1976), 48 Ohio St. 2d 142, 145, 357 N.E.2d 44.

ACE Capital is not suggesting that the equitable doctrine of promissory estoppel be abrogated or overruled. Nor is ACE Capital suggesting that this Court overrule any of its prior decisions applying Section 90 of the Restatement. Judge Cain expressly permitted the Title Agencies' promissory estoppel claim against ACE Capital to go forward, and ACE Capital is not here challenging that decision. What ACE Capital seeks is relief from the Title Agencies' breach of contract claim — relief that Judge Cain granted, but that the court of appeals took away by erroneously applying and expanding *McCarthy*'s promissory estoppel exception to the Statute of Frauds.

Judge Cain explained carefully the distinction between the Title Agencies' equitable claim for promissory estoppel and their legal claim for breach of contract, as well as the remedies associated with these claims:

> [Title Agencies' promissory estoppel claim] is distinct from [their] promissory estoppel defense to the application of the Ohio Statute of Frauds. In [the promissory estoppel] claim, [Title Agencies] allege that they relied upon the promises made by ACE Capital to their detriment. *** In ¶376 of [Title Agencies'] 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. [Title Agencies], however, go on to ask for expectancy damages, including lost profits. *** *The Court will not allow [Title Agencies] to subvert the Statute of Frauds with a promissory estoppel claim. Therefore, the only amounts that [Title Agencies] can recover under their promissory claim is their actual out of pocket expenses associated with [ACE Capital]'s promises ***[.] *** [Title Agencies] cannot use their [equitable] claim[s] as a vehicle to subject ACE Capital to two unexecuted agreements and to recover alleged lost profits under those agreements.*

(Decision at 15-17, 22, Appx. A54-56, A61) (emphasis added.) By erroneously applying and extending a promissory estoppel exception to the Statute of Frauds, the court of appeals undid this reasoned distinction, subjecting ACE Capital to trial not merely on the Title Agencies' equitable claim for reliance damages, but also on their claim at law for allegedly breaching five-year contracts that were never finalized or signed.

E. The Promissory Estoppel Exception To The Statute Of Frauds Recognized In Certain Ohio Appellate Decisions Results In Confusion And Judicial Nullification Of The Statute.

The development of the promissory estoppel exception to Ohio's Statute of Frauds, culminating in its erroneous extension by the court of appeals here, is a study in confusion and contradiction.

1. Twenty years ago, the Sixth Circuit predicted that this Court would <u>not</u> adopt a promissory estoppel exception.

In *Seale v. Citizens Savings & Loan Assn.* (C.A.6, 1986), 806 F. 2d 99, the United States Court of Appeals for the Sixth Circuit decided that although Ohio had adopted the doctrine of promissory estoppel set forth in Section 90 of the Restatement, this Court was *not* likely to allow promissory estoppel to defeat the Statute of Frauds.

In *Seale,* the plaintiff purchased buildings from Citizens Savings & Loan ("Citizens") in a sale-leaseback transaction. One of Citizens' directors allegedly assured the buyer that Citizens would repurchase the buildings five years later for nearly $1 million. The buyer noted that there was no repurchase agreement in the documents, but Citizens' director assured him not to worry about it. After the director committed suicide, the buyer sued Citizens on its obligation to repurchase. The district court held that Citizens was liable under a promissory estoppel theory and ordered specific performance of the unwritten repurchase agreement.

The Sixth Circuit reversed. "The agreement to repurchase the buildings was not in writing and required performance five years after the date of the agreement; thus it did not satisfy the requirements of the statute of frauds." *Seale*, 806 F.2d at 102.

> A number of courts have permitted promissory estoppel in statute of frauds cases while an apparently equal number of courts have rejected it. *** [An] Ohio Court of Appeals has held that the defense of the statute of frauds to an action to seek enforcement of an oral contract of employment for two years may be overcome by the doctrine of promissory estoppel. *See Gathagan v. Firestone Tire & Rubber Co.*, 23 Ohio App. 3d 16, 490 N.E. 2d 923 (1985). *** We do not find this Court of Appeals decision to be persuasive authority for the proposition that the Supreme Court of Ohio would allow promissory estoppel to defeat the statute of frauds in a real estate context, however.

Id. at 103. As the basis for rejecting *Gathagan* and predicting that this Court would not apply a promissory estoppel exception to the Statute of Frauds to permit suit on an unwritten real-estate agreement, the *Seale* court noted that:

> real estate transactions are usually formal undertakings involving significant sums of money. *** The statute of frauds is thus necessary "to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests.

Id. at 104, quoting *North Coast Cookies, Inc. v. Sweet Temptations, Inc.* (1984), 16 Ohio App. 3d 342, 348, 476 N.E. 2d 388. As the Sixth Circuit wrote in *Seale*, echoing this Court's statements in *Yeager* and *Newman, supra:*

> The absence of a writing makes the existence and the terms of the agreement to repurchase uncertain. Indeed, the statute of frauds was designed precisely to avoid 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.

Seale, 806 F. 2d at 104. After predicting that this Court would *not* recognize any promissory estoppel exception to the Statute of Frauds, the Sixth Circuit determined that the oral agreement to repurchase was not enforceable. *Id.* Consistent with Judge Cain's ruling here, the Sixth Circuit remanded the case for resolution of the buyer's fraud claim. *Id.* at 105-06.

2. The promissory estoppel exception to the Statute of Frauds has crept into Ohio law via confusing and contradictory appellate opinions.

In *McCarthy, Lebit, Crystal & Haiman Co.* (1983), 87 Ohio App.3d 613, the Eighth District did precisely what the Sixth Circuit predicted this Court would *not* do. *McCarthy* held that "the 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." *Id.* at 627 (citing cases from Arizona, Texas, and the 5th Circuit.) The *McCarthy* court, however, was divided on this issue. In dissent, Presiding Judge Corrigan argued 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, citing *Seale* and *Leesburg Fed. S. & L. v. Dunlap* (Mar. 28, 1988), Highland App. No. 658, unreported, 1988 WL 35791.

Disagreement about promissory estoppel as an exception to the Statute has extended well beyond Judge Corrigan's dissent in *McCarthy*. In *Connolly v. Malkamaki,* 11th Dist. No. 2001-L-124, 2002 Ohio 6933, ¶¶ 23-24, Ohio's Eleventh District acknowledged *McCarthy* but disagreed with its application in an employment dispute. A year later, Ohio's Second District noted that "the law on the subject [is] mixed." *Eske Properties, Inc. v. Sucher*, 2d Dist. No. 19840, 2003-Ohio-6520, ¶ 64, citing *Assn. for Responsible Devel. v. Fieldstone Ltd. Partnership* (Nov. 13, 1998), Montgomery App. No. 16994, 1998 WL 785330, at *7. The Second District later declined to apply *McCarthy* in *Miami Valley United Methodist Mission Society v. White-Dawson* (March 3, 2000), Montgomery App. No. 17873, 2000 Ohio App. LEXIS 740, at *10-11. In March 2007, District Judge Carr noted that this 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.* (S.D. Ohio March 23, 2007), No. 3:03CV7512, 2007 WL 915134, at *3-4. Earlier this year, Ohio's Third District declined to apply *McCarthy*'s exception to an alleged oral promise to provide documentation for an alleged oral promise to sell property. *Heffner Investments, Ltd. v. Piper*, 3d Dist. Nos. 10-07-09/10-07-10, 2008-Ohio-2495, at ¶¶ 16-23.

Likewise, of course, after careful consideration in this case, Judge Cain rejected the Title Agencies' plea for *McCarthy*'s promissory estoppel exception because he realized its application here would nullify the Statute:

> [B]y 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 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. *** 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.

(Decision at 11; Appx. A50-51.) As Judge Cain further explained, the first prong of the *McCarthy* test ("a misrepresentation that the requirements of the Statute have been complied with") simply does not apply here. "[T]here is no allegation by Plaintiffs that

ACE Capital misrepresented that the Statute of Frauds requirements have 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." (Decision at 9; Appx. A48.) As for that second prong, Judge Cain correctly determined that this prong is geared to situations where the parties have come to oral agreement on all terms and one side has promised to put that contract in writing. (*Id.*) This prong could not logically apply to the Residential Reinsurance Agreement, *which had already been reduced to memorandum form* in multiple drafts exchanged by the parties, but never signed. (Decision at 9-10; Appx. A48-49.) As Judge Cain put it:

> 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.

(Decision at 10; Appx. A49.)

The court of appeals, nevertheless, reinstated the Title Agencies contract and fiduciary duty claims, ostensibly under the second prong of the *McCarthy* test. Even though that prong of *McCarthy*'s test expressly requires "a promise to make a memorandum of the agreement," the court of appeals concluded that ACE Capital should be estopped from asserting the Statute of Frauds as a defense on a different basis, not contained in either prong of *McCarthy*'s test; that is, due to a "misrepresentation to supply signed memoranda of the parties' agreements." (Opinion at ¶ 48; Appx. A22.) If this ruling is affirmed, there will now be yet a third prong to the *McCarthy* test that will, precisely as Judge Cain predicted, render the Statute a nullity.

The promissory estoppel exception to the Statute of Frauds has also spawned contradictory appellate decisions regarding *reasonable reliance,* a concept central to any promissory estoppel theory. Here, for example, the Tenth District found that a material issue of fact remains for trial regarding whether ACE Capital, pursuant to a further expansion of *McCarthy,* promised to *sign* an agreement. (Opinion ¶ 48; Appx. A22.) Even if ACE Capital *had* made such a promise, any dispute about that is irrelevant, for as the Tenth District itself recently (and correctly) held, it is *unreasonable as a matter of law* for sophisticated parties to rely on such statements of future intent:

> 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 cannot be reconciled. In this case involving complex negotiations between sophisticated entities, who exchanged drafts but never signed final agreements, the Tenth District allows contract claims to proceed to trial based upon an alleged promise to "supply a signed memoranda of the parties' agreement." In *Carcorp,* by contrast, another case where sophisticated parties represented by counsel exchanged drafts but never signed a contract, another Tenth District panel declared the plaintiff's reliance on a promise to deliver a signed writing to be unreasonable as a matter of law.

This case well illustrates why the Court must foreclose judge-made promissory estoppel exceptions to the Statute of Frauds. The Tenth District has expanded the notion of a promissory estoppel exception to a situation where application of the Statute of Frauds should be most obvious and expected. No writing was signed memorializing the deal, but now the Title Agencies seek to declare a proposed five-year relationship to be both fully formed and enforceable without signature. The Court should reverse the decision below and disavow this judicially-created subversion of a statutory enactment. *See, e.g., Cincinnati Enquirer, Stoll, United Telephone, WBNS,* and *Wallace, supra.*

F. Even If The Court Recognizes a Judge-Made Promissory Estoppel Exception To The Statute Of Frauds, Such Exception Should Be Narrow And Should Not Apply Here.

The Court should hold that there is no promissory estoppel exception to the Statute Frauds for the reasons already noted. Alternatively, if the Court is inclined to authorize a judicially-created exception to the Statute of Frauds, the exception should be narrowly tailored and applied only in instances where a grave injustice might otherwise be done. This case, however, does not present the Court with a proper occasion to adopt and invoke any "injustice" exception to the Statute of Frauds because the undisputed facts here do not warrant any such exception.

1. No exception should be recognized where, as here, the draft transactional documents evince the parties' mutual intent not to be bound until the deal closes and the contract documents are signed.

As this Court has noted, "it is well-established that 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 by the terms of an agreement until formalized in a written document and signed by both." *Berjian v. Ohio Bell Tel. Co.* (1978), 54 Ohio St. 2d 147, 151, 375 N.E. 2d 410; 1 Williston on Contracts (Rev. Ed. 1936), 59, Section 28. Here, the very *text* of the *draft* agreements that the Title Agencies seek to enforce make it clear that no binding agreement between the parties had been reached.

Each term sheet stated on each page the following disclaimer in bold capital letters: "**NOT AN OFFER OF INSURANCE.**" (Ex. D137-38; Supp. 378, 381.) Each version of the Residential Reinsurance Agreement from ACE Capital to the Title Agencies had the following "No Contract Disclaimer" on the first page:

> *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.*

(*See, e.g.*, Ex. 24A; Supp. 129.) (Emphasis added.) All versions, including the one the Title Agencies tried to force ACE Capital to sign, also contained an express provision requiring full execution for effectiveness:

> *This Agreement may be executed in any number of counterparts, and by the parties on separate counterparts, but will not be effective until each party has executed at least one counterpart.*

(*Id.*; Supp. 139.) (Emphasis added.) Indeed, all the drafts noted that the agreement would conclude with signature pages. (*Id.*) Furthermore, the ancillary agreements likewise were never in final form. ACE Capital's draft Capital Support Agreement sent to the Title Agencies contained a conspicuous "**DRAFT**" header, and was sent under cover of an e-mail describing it as an "initial draft." (Ex. D74-74A; Supp. 343-47.) The Approved Agency Agreement never got past the initial draft. (Ex. D78, D79-79A; Supp. 348-70.) It would be the height of injustice to permit enforcement as contracts what are so clearly and conspicuously identified as incomplete, unsigned draft agreements.

2. The exception simply does not fit where, as here, the transaction at issue is a complex, multiyear proposal negotiated in a commercial setting.

As the Sixth Circuit noted in *Seale,* some transactions by their very nature are simply more complex and solemn than others. *Seale,* 806 F. 3d at 104. Complex, "formal undertakings involving significant sums of money" are generally regarded as "more deserving of protection" by the Statute of Frauds' requirement of a signed writing. *Id.* When it is undisputed that the transaction at issue is a complex, multiyear proposal negotiated in a commercial setting, the policy interests protected by the Statute of Frauds are at their highest. Justice and the realities of modern complex business transactions demand that those interests be vindicated by the formality required by the Statute, not undermined by a nebulous, *ad hoc* promissory estoppel exception to the Statute's simple and unambiguous requirement of a signed writing. *See McCarthy,* 87 Ohio App. 3d at 635-637 (Corrigan, J., dissenting); *see also Leesburg Fed. S. & L. v. Dunlap* (Mar. 28, 1988), Highland App. No. 658, unreported, 1988 WL 35791.

3. There is no need for an equitable exception to an unambiguous statute where, as here, the parties to the transaction were at all times represented by counsel.

As this Court has previously noted in an equitable promissory estoppel case, "state and local laws are readily available for public review," and "it is a simple matter for a party to educate itself as to the procedural formalities" required to bind another to a contract. *Shampton v. City of Springboro,* 98 Ohio St. 3d 457, 2003-Ohio-1913, 786 N.E.2d 883, ¶ 34. In *Shampton,* this Court concluded that a food service company and its owner could not reasonably rely on a city manager's professed authority to enter into a long-term lease because the city's charter and resolutions did not grant that authority. *Id.* Obviously, *Shampton*'s principle is even more compelling where, as here, those negotiating a transaction are at all times *represented by counsel* fully aware of Ohio's Statute of Frauds and its requirement for a signed writing before any long-term agreement will be enforceable. Those same lawyers, of course, should be attuned to the legal import of disclaimers on *draft* transactional documents and provisions in those draft documents requiring signature to be effective. A clear rule will allow counsel to provide definite advice to negotiating parties. All concerned will know that a long-term contract is not created until it is written, agreed to and signed.

4. The notion of a judge-made exception should never extend where, as here, sophisticated parties negotiate the terms of the proposal at arm's length.

The justice of an estoppel depends on the parties and the context within which they negotiate. When sophisticated parties negotiate at arm's length, courts rightly take a dim view of alleged promises made among them along the way. *See, e.g., Ed Schory,* 75 Ohio St. 3d at 442-43 ("'While the advice was given in a congenial atmosphere and in a sincere effort to help the Scotts prosper, nevertheless, the advice was given by an institutional lender in a commercial context in which the parties dealt at arms length, each protecting his own interest.'") (quoting *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St. 2d 282, 287, 390 N.E. 2d 320). As the Tenth District itself noted, "when two sophisticated business entities are involved in negotiations *** [u]ntil 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,* 2007-Ohio-380, at ¶ 20.

Thus, even if the Court were inclined to consider a promissory estoppel exception, no such exception is warranted in this case for any one of several different reasons evident from the undisputed facts in the record.

G. The Title Agencies' Contention That There Was An Enforceable "Agreement to Agree" Here Is Simply Another Attempted End-Run Around The Statute Of Frauds.

The court of appeals injected still more confusion into the Statute of Frauds with its treatment of the Title Agencies' Fourth Assignment of Error. In that Assignment, which the court of appeals addressed together with the Title Agencies' other Assignments regarding the Statute of Frauds (Opinion, ¶ 33; Appx. A18), the Title Agencies claimed that Judge Cain erred in granting summary judgment on their contract claims "where there was ample record evidence of enforceable 'agreements to agree.'" (*Id.*, ¶ 28; Appx. A16.) In just three very brief paragraphs, the court of appeals agreed with the Title Agencies, relying on dicta from this Court's decision in *Normandy Place Assocs. v. Beyer* (1982), 2 Ohio St. 3d 102, 443 N.E. 2d 161 – a case that nowhere mentions the Statute of Frauds. (Opinion, ¶¶ 43-45; Appx. A21.)

Normandy is completely distinguishable from the case at bar, and the court of appeals should not have relied on dicta from that case to approve the Title Agencies' "agreement to agree" theory. In *Normandy*, a landlord and a prospective tenant *executed* an "Agreement to Lease," and the tenant also *executed* a Letter of Intent confirming his intention to lease the property, only to back out after noticing certain discrepancies between these preliminary, *signed* agreements and the formal written lease that was later presented to him. This Court remanded the case to determine whether the parties manifested an intention to be bound by the terms of the *signed* "Agreement to Lease" and the *signed* Letter of Intent. *Normandy*, 2 Ohio St. 3d at 105-06. *Normandy* thus differs markedly from the case at bar, in that the alleged "agreements to agree" on a lease were themselves *signed* (unlike the draft agreements here) and also insofar as the Statute of Frauds was not even implicated (as it is here).

Moreover, since *Normandy* was decided, this Court has clarified that letters of intent or "agreements to principles" that are "subject to further negotiation and a detailed and definitive *** agreement" most certainly do *not* constitute enforceable "agreements to agree." *M.J. DiCorpo, Inc. v. Sweeney* (1994), 69 Ohio St. 3d 497, 503, 634 N.E. 2d 203. *M.J. DiCorpo* pertained to a proposed law firm merger. Basic terms and conditions of the proposed merger were set forth in a *signed* letter of intent. Within fifteen days of signing the letter of intent, a "definitive agreement" to combine the firms was submitted from one firm to another – yet the "definitive agreement" differed from the letter of intent. One firm refused to sign the "definitive agreement," the merger was never consummated, and this Court was asked whether an enforceable "agreement to agree" had been reached due to the signed letter of intent. This Court said no:

> [A]ppellees claim a right to a two-percent commission on a merger that never occurred based upon the assumption that the *** letter of intent constituted a binding "Merger Contract" that was breached by appellants. *** However, we find that the letter of intent does not constitute a binding merger agreement. Nor does it amount to a specific agreement to agree to a merger in the future. *** Here, the express terms of the letter of intent clearly indicate that that document was nothing more than an agreement to principles which were subject to further negotiation and a detailed and definitive merger agreement. While the letter may have provided the basic framework for future negotiations, the letter itself did not address all the essential terms of the merger. Thus, the letter of intent is not a legally enforceable contract.

M.J. DiCorpo, 69 Ohio St. 3d at 503.

Professor Corbin agrees with *M.J. DiCorpo*'s caution regarding recognizing the validity and enforceability of preliminary "agreements to agree" before all essential terms of a deal have been agreed to:

> Further illustrations are to be found in the cases of a so-called contract to make a contract, or agreement to agree. It is quite possible for parties to make an enforceable contract binding them to prepare and execute a final agreement. *In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document.* That document is understood to be a mere memorial of the agreement already reached. *If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called "contract to make a contract" is not a contract at all.*

Corbin, *supra,* § 2.8. Here, of course, unlike *Normandy* and *M.J. DiCorpo,* there is not even a letter of intent to look to (signed or unsigned) reflecting any so-called "agreement to agree." The parties merely exchanged *unsigned* drafts of a residential reinsurance agreement, failed to agree on all essential terms of that agreement (including the key capital support provisions), did not reduce any alleged joint venture agreement to writing, and never came to terms on the commercial or agency components of the deal.

If the Court recognizes an enforceable "agreement to agree" here on a multiyear deal that itself would otherwise be subject to the formalities of R.C. 1335.05, the Statute would be rendered meaningless. Such a result would conflict with black-letter Ohio law:

> Neither an oral promise to make a memorandum of a contract or an oral promise to perform the contract itself is enforceable unless the Statute of Frauds is satisfied by the making of a memorandum in compliance therewith. *An oral agreement to execute a written contract in compliance with the Statute of Frauds stands on no firmer footing than a direct oral agreement within the statute and is just as ineffective and unenforceable.* To recognize an oral agreement to sign a written agreement within the statute would be to countenance an evasion of the statute and defeat its object; it would permit a thing to be done by indirection which the statute is designed to prevent.

51 *Ohio Jurisprudence 3d* (2002), Statute of Frauds, § 2 (citing *Gillespie v. Citizens Bldg. of Cleveland* (C.P. 1945), 16 Ohio Op. 229; *Ossage v. Foley* (Hamilton 1923), 20 Ohio App. 16; *Phillip W. Frieder Co. v. Smith Bros. Iron & Steel Co.* (Mahoning 1938), 27 Ohio L. Abs. 44). This Court should thus reject the Title Agencies' "agreement to agree" theory for what it really is: simply another attempted end-run around the Statute of Frauds.

<u>PROPOSITION OF LAW NO. II</u>: 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.

Although it is undisputed that the parties never prepared or signed a written joint venture agreement, 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. Judge Cain 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. (Decision at 14-15; Appx. A53.) Reversing, the Tenth District relied on its decision in *Doctors Hosp. v. Hazelbaker* (1995), 106 Ohio App. 3d 305, 309-310, 665 N.E. 2d 1175, 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, ¶ 4; Appx. A8.)

The Tenth District's analysis is incomplete and, if left intact, will further erode the Statute of Frauds. *Hazelbaker* nowhere addresses the Statute of Frauds. While some joint ventures may indeed be "implied" and unwritten, 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. The consequences of the Tenth District's decision allowing the Title Agencies to proceed with their breach of fiduciary duty claim are enormous. The court of appeals' decision, if allowed to stand, would establish 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 arms' length negotiations to conclude a long-term deal are ongoing. The decision below makes still-negotiating parties both fiduciaries and arm's-length competitors — even adversaries — at the same time.

Courts 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, 561 N.E. 2d 1005, jurisdiction denied (1989), 41 Ohio St. 3d 717. In *Garg,* a former CEO complained that an alleged joint-venture agreement had guaranteed his position for ten years. As the Ninth District Court of Appeals noted, "[w]hile 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." *Garg,* 54 Ohio App. 3d at 172; *see also Mill Creek Builders, Inc. v. Waltz Custom Builders,* Lucas App. No. L-90-316, 1991 Ohio App. LEXIS 6113, at *17 (same). Because the joint-venture agreement itself was unenforceable pursuant to the Statute of Frauds, the court in *Garg* determined that the defendant "cannot be held to have breached any fiduciary duty." *Id.* at 173. The same result applies here, as the parties were not in a fiduciary or special relationship that would give rise to a duty that might support a claim for breach of fiduciary duty.

This Court's seminal *Ed Schory* decision emphasized that fiduciary duties do not arise even during the most "congenial" arm's-length negotiations by parties protecting their own interests. *Ed Schory,* 75 Ohio St. 3d at 442-43. On the contrary, this Court has defined a fiduciary relationship 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, 485, 2003-Ohio-5077, ¶ 32 (quoting *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St. 3d 98, 101, 519 N.E. 2d 363).

The court of appeals' decision here turns this Court's precedent on its head, declaring that actionable fiduciary duties — among the highest duties imposed by law — can arise between parties still negotiating at arm's length across the table. The decision must be reversed. Parties in Ohio working toward the culmination of complex, multimillion-dollar, multiyear deals cannot be exposed to the risk that something they say or do during their negotiations may be exploited as a breach of fiduciary duty by the other party after negotiations break down.

DISPOSITION OF THE APPEAL

Upon the Court's adoption of the foregoing Propositions of Law, ACE Capital respectfully submits that this Court should remand this case to the trial court for further proceedings not inconsistent with its Opinion. In doing so, the Court also should address two of the Title Agencies' Assignments of Error that the court of appeals previously deemed to be moot. Both of these Assignments of Error, like ACE Capital's Propositions of Law, implicate the Statute of Frauds. The court of appeals found the Title Agencies' Assignments of Error II and III to be moot given its disposition of other Assignments of Error and its decision to remand the cause back to Judge Cain. (Opinion, ¶ 103; Appx. A38.) In Assignment of Error II, the Title Agencies claimed that the parties' agreements were capable of performance within one year and thus outside the Statute of Frauds. (Title Agencies' Appellate Brief at 26-28.) In Assignment of Error III, the Title Agencies claimed that there were signed writings chargeable against ACE Capital that satisfy the Statute of Frauds. (*Id.* at 28-30.)

ACE Capital recognizes that this Court's typical practice is to remand cases to the court of appeals to consider assignments of error that the court of appeals previously deemed to be moot. *See State ex rel. OCSEA v. SERB*, 104 Ohio St. 3d 122, 129, 2004-Ohio-6363, 818 N.E. 2d 688. However, on several other occasions, for reasons of judicial economy also present here, the Court has resolved assignments of error that courts of appeal had not addressed on mootness grounds. *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St. 3d 30, 33-35, 2001-Ohio-59; *Apel v. Katz*, 83 Ohio St. 3d 11, 18, 1998-Ohio-420; *see also M.J. DiCorpo, supra*, 69 Ohio St. 3d at 504 (resolving assignments of error deemed moot by the court of appeals in an "agreement to agree" case.) ACE Capital submits that this Court should do so in this case as well.

In *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 2000-Ohio-7, 734 N.E.2d 782, for example, the court of appeals reversed a jury award, concluding that the defendant should have prevailed on the basis of the parol evidence rule. The court of appeals found just one of the defendant's six assignments of error dispositive and did not address the remaining five assignments on the basis of mootness. This Court reversed the court of appeals' decision and reinstated the trial court's judgment. The Court did so even though the defendant urged this Court to remand the cause back to the court of appeals for resolution of his remaining five assignments of error:

> Cicchini points out *** that the court of appeals chose not to address his remaining assignments of error, *** and argues that "if this Court disturbs the appellate court ruling, it should surely remand the case for further proceedings on these unaddressed issues." We disagree. Assignments of Error Nos. One, Two, and Three have all been resolved by this opinion, as they all concern the applicability of the parol evidence rule to bar Galmish's claims. Assignments of Error Nos. Four, Five, and Six can be resolved presently without any further delay.

Galmish, 90 Ohio St. 3d at 19-20. Here, as in *Galmish,* the two assignments of error that the court of appeals deemed to be moot are tied to the issues already present and "can be resolved presently without any further delay." As *Galmish, Kroh, Apel,* and *M.J. DiCorpo* all demonstrate, there is no bar to this Court's resolution of the assignments of error that the court of appeals deemed to be moot. The interests of judicial economy warrant that the Court do so in this case – which the Title Agencies first brought four years ago, then dismissed on the eve of trial, and then re-filed – instead of sending the parties back to the court of appeals to resolve assignments of error inextricably linked to the Statute of Frauds. ACE Capital addresses the merits of those two Assignments now.

A. The Contracts At Issue Were Not Entirely Performable As Intended Within One Year, As Judge Cain Concluded.

The Title Agencies' Second Assignment of Error below is easily resolved. Under black-letter Ohio law, the Statute of Frauds bars enforcement of an unsigned contract unless "it can be *entirely performed as the parties intended* within a year." *Weiper v. J.A. Hill & Assocs.* (1995), 104 Ohio App. 3d 250, 264, 661 N.E. 2d 796 (emphasis added). The mere theoretical possibility that a contract may be *terminated* before one year is irrelevant; the issue is whether the parties intended to complete performance within one year. *See id.,* 104 Ohio App. 3d at 264; *see also Soteriades v. Wendy's of Fort Wayne, Inc.* (1986), 34 Ohio App. 3d 222, 517 N.E. 2d 1011; 51 O. Jur. 3d Frauds, Statute of §§ 59, 61, 62. The Title Agencies admitted in their own Complaint that the parties fully anticipated the Reinsurance Agreement would exceed one year. (Compl. ¶ 297; Supp. 50.) ("the parties reasonably expected the joint venture to last much longer than that.")

Judge Cain correctly determined that the contracts at issue in this case clearly were not performable as intended within one year. As Judge Cain noted, the Title Agencies failed to 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*." (Decision at 6; Appx. A45.) (emphasis added). Instead, the Title Agencies pointed to certain termination provisions in the draft Residential Reinsurance Agreement attached to their Complaint. Specifically, the Title Agencies referred to sections 1.1, 2.2, and 3.1 of the Residential Reinsurance Agreement as the basis for their contention that the parties' agreement was performable within one year and thus outside the Statute of Frauds. (Title Agencies' Appellate Brief, at 27.)

The Title Agencies' reliance on these sections of the Residential Reinsurance Agreement is fundamentally flawed. The relied-upon sections only provide for early termination of the Residential Reinsurance Agreement upon the happening of certain identified contingencies. (Compl., Ex. A; Supp. 76-77.) Early termination of the Agreement pursuant to these provisions would not constitute "perform[ance] *as the parties intended* within a year." *See Weiper* and *Soteriades, supra,* (emphasis added.) In fact, the Title Agencies' principal negotiator himself testified that the residential and commercial components of the proposed deal were "coextensive" and would not terminate until five years after notice. (Kopel Tr. 169; Supp. 635; Mosimann Tr. 44; Supp. 641 ("term to run five years from inception"); Henry Tr. 235; Supp. 621 ("ACE would not terminate their reinsurance agreement for five years after the first anniversary *** we actually thought it would last forever.") Moreover, these early-termination provisions *only* apply to the alleged Residential Reinsurance Agreement, not to any alleged joint venture agreement. (Decision at 6, Appx. A45.)

B. Judge Cain Determined Correctly That There Were No Signed Writings Satisfying The Statute Of Frauds.

The Title Agencies brought this lawsuit, in their own words, to "force signature" by ACE Capital on a deal that ACE Capital never signed. (Ex. D103; Supp. 372.) They clearly recognize that ACE Capital's <u>*signature*</u> was necessary to consummate an agreement. As addressed earlier (at 15), an agenda item for the Title Agencies' Board of Directors meeting in January 2004, just days before they sued ACE Capital, was a "[d]iscussion about *un-executed* ACE reinsurance agreement and legal strategy to *force signature*." (Ex. D103; Supp. 371-72.) (emphasis added.) Thus, it is not surprising that — as Judge Cain correctly concluded on summary judgment — no *signed writings* between the parties existed to satisfy the Statute of Frauds:

> 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 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.

(Decision at 5, Appx. A44.)

Even after suing ACE Capital to "force signature" on admittedly unsigned agreements, however, the Title Agencies, in their third Assignment of Error below, still try to point to other writings from earlier points in the negotiations, arguing they are sufficient to "satisfy the Statute of Frauds." (Title Agencies' Appellate Brief at 30.)

First, the Title Agencies rely on the unsigned term sheets authored by ACE Capital in early 2003. (Ex. 190; Supp. 536-40.) For obvious reasons, preliminary negotiating documents such as term sheets do not satisfy the Statute of Frauds. *See Human Services Plaza Partnership v. The Huntington National Bank* (C.A.6, 1996), Nos. 94-3362/94-3365, 1996 U.S. App. LEXIS 8115, *16-19 ("a preliminary summary of the terms to be contained in the Letter of Credit *** does not contain the essential terms of the agreement expressed with 'clearness and certainty'"); *see also Platte Valley Wyo-Braska Beet Growers Assn. v. Imperial Sugar Co.* (C.A.10, 2004), 100 Fed. Appx. 717, 2004 U.S. App. LEXIS 10839, at *8-11 (unsigned term sheet for sale of real property not enforceable); *cf. 26901 Cannon Road v. King & Assocs.,* Cuyahoga App. No. 80906, 2002-Ohio-6050, 2002 Ohio App. LEXIS 5876, at ¶ 20) (reversing summary judgment on the basis of a *signed* letter of intent that referred to terms previously submitted, not merely on the basis of an unsigned term sheet.) Parties circulate term sheets during negotiations to memorialize what they believe to be incremental progress on proposed terms; not to create legally enforceable obligations. Indeed, the Title Agencies admitted that term sheets do not constitute binding agreements. (Henry Tr. 135; Supp. 620 ("no, I don't believe they constitute an agreement by themselves."); Kopel Tr. 16-17; Supp. 623-24("A term sheet does not constitute an agreement").)

Second, the Title Agencies point to "business plans" approved by ACE Capital's indirect parent. (Title Agencies' Appellate Brief, at 30.) The Title Agencies rely on a Franklin County decision standing for the proposition that "'the minutes of the board of directors' meetings of [a] corporation can constitute a sufficient memorandum in writing to meet the requirement of the Statute of Frauds.'" (Title Agencies' Appellate Brief at 29, quoting *Soteriades v. Wendy's of Fort Wayne, Inc.,* 34 Ohio App. 3d 222, 225.) But they omit the fact that a *signed* stock purchase agreement existed in *Soteriades* that led the court to deem the Statute to be satisfied. *Soteriades,* 34 Ohio App. 3d at 224 ("it is unnecessary for us to determine whether the unsigned minutes *** are sufficient to meet the requirement of the Statute *** since there is a signed writing pertaining to the issues *** . The signed writing is the stock purchase agreement, which is signed by the then president of defendant corporation as well as by plaintiff ***[.]")

Third, the Title Agencies rely on the application submitted to ODI by ACE Capital as allegedly "setting forth in writing the commercial component of the parties' joint venture agreement *** [.]" (Title Agencies' Appellate Brief at 30.) This application is the only writing the Title Agencies rely on that was actually signed by ACE Capital Title, and it relates only to the proposed commercial reinsurance business. (Ex. 165; Supp. 524-35.) The application merely references ACE Capital's *proposed* future insurance strategy; it does not purport to memorialize the terms of the alleged joint venture or the Residential Reinsurance Agreement, establish that those agreements had actually been made, or for that matter even refer to them. (*Id.*) *See Beggin v. Ft. Worth Mtge. Corp.* (1994), 93 Ohio App. 3d 333, 337, 638 N.E. 2d 604 ("separate signed and unsigned writings may be integrated to satisfy the Statute of Frauds only when the signed writing 'specifically' makes 'reference' to the unsigned writing.") (internal quotation omitted).

Fourth, the Title Agencies claimed below that ACE Capital "negotiated and agreed to written forms of the reinsurance agreement and agency agreement, which it promised to sign." (Title Agencies' Appellate Brief, at 30.) This contention is absurd, as even the Title Agencies concede that ACE Capital did not sign either of these documents. And the record evidence leaves no dispute that material terms were still be negotiated on both of these agreements and the other ancillary agreements to the Residential Reinsurance Agreement. (*See* pp. 8-10, *supra.*)

As to the fifth category of writings allegedly chargeable against ACE Capital, the Title Agencies claim that ACE Capital gave them "[three] detailed writings it authored explicitly setting forth all of the elements of the joint venture agreement, as well as the financial projections related to the joint venture." (Title Agencies' Appellate Brief at 30.) The Title Agencies' reliance on these documents is equally misplaced.

The first of these "detailed writings" is a December 5, 2003 e-mail that Reese sent to a supervisor attaching four presentations about ACE Capital's business plans and strategies. (Ex. 203; Supp. 541.) Notably, one presentation states that "Suggested Steps" – including "*Finalize* agents' agreement with Olympic Group ***" and "*Execute* reinsurance agreement ***" – remain "to Effect the Business Development *Goals*." (Supp. 543, emphasis added.) Another makes similar statements. (Supp. 552.)

The second is a January 2, 2004 e-mail that Reese sent to Kopel, just *after* informing him that ACE Capital would not enter into the proposed five-year joint venture or sign the draft reinsurance agreement. (Ex. 214; Supp. 589.) Reese sent the email to Kopel as part of the parties' efforts to find a buyer for ACE Capital because the proposed deal was *not* going to close. This e-mail contains the same references to *non-final* and *unexecuted* agreements as the December e-mail addressed above. (Supp. 595.)

The third is a January 19, 2004 "ACE Capital Title Business Plan," which Reese prepared to assist in finding a buyer for ACE Capital and e-mailed to the Title Agencies that day for their review in anticipation of a later meeting. (Ex. 204; Supp. 561.) This plan lists completion of an agency agreement with the Olympic Group as a "goal" for the first quarter of 2004. (Supp. 572, 577.)

How the Title Agencies can assert that the foregoing internal business plans or presentations expressly noting the *non-final* and *unexecuted* nature of the proposed venture between themselves and ACE Capital can amount to writings chargeable against ACE Capital is beyond the realm of comprehension.

For the foregoing reasons, the Title Agencies' Second and Third Assignments of Error are easily resolved. The agreements that ACE Capital is alleged to have breached were long-term agreements never memorialized in any writings that would satisfy the Statute of Frauds. For reasons of judicial economy, and pursuant to its authority to review assignments of error that the court of appeals previously deemed to be moot, this Court should overrule the Title Agencies' Second and Third Assignments of Error.

CONCLUSION

For the foregoing reasons, ACE Capital respectfully asks this Court to reverse the decision of the Franklin County Court of Appeals in this case in part, reinstate the trial court's January 26, 2007 Decision, and remand this cause to the trial court for further proceedings not inconsistent with its Opinion.

Respectfully submitted,

Kathleen M. Trafford

Kathleen M. Trafford (0021753)
(COUNSEL OF RECORD)
James D. Curphey (0015832)
L. Bradfield Hughes (0070997)
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215-6194

Frederick R. Kessler
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue
New York, New York 10110

Attorneys for Appellant
ACE Capital Title Reinsurance Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 15, 2008, a copy of the foregoing *Merit Brief of Appellant ACE Capital Title Reinsurance Company* was served via hand-delivery upon the following counsel of record:

Michael H. Carpenter (0015733)
Jeffrey A. Lipps (0005541)
Kathryn M. Lloyd (0075610)
Carpenter & Lipps, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215

Attorneys for Appellees Olympic Holding Co. LLC, et al.

Kathleen M. Trafford
Counsel for Appellant

COLUMBUS/1440084 v.04

IN THE SUPREME COURT OF OHIO

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

APPENDIX

IN THE SUPREME COURT OF OHIO

Olympic Holding Co. LLC, *et al.*,	:	Case No. 08-0200
Plaintiffs-Appellees	:	
v.	:	ON APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS, TENTH APPELLATE DISTRICT
ACE Capital Title Reinsurance Co.	:	
Defendant-Appellant.	:	Court of Appeals Case No. 07 APE-2-0168

NOTICE OF APPEAL
OF APPELLANT ACE CAPITAL TITLE REINSURANCE CO.

Kathleen M. Trafford (0021753)
(COUNSEL OF RECORD)
James D. Curphey (0015832)
Jay A. Yurkiw (0068143)
L. Bradfield Hughes (0070997)
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215-6194
Phone: (614) 227-1915
Facsimile: (614) 227-2100
ktrafford@porterwright.com

Attorneys for Appellant ACE Capital Title Reinsurance Co.

Of Counsel:
Frederick R. Kessler
William A. Maher
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue
New York, New York 10110
Phone: (212) 382-3300
Facsimile: (212) 382-0050

Michael H. Carpenter (0015733)
Jeffrey A. Lipps (0005541)
Kathryn M. Lloyd (0075610)
Carpenter & Lipps, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Phone: (614) 365-4100
Facsimile: (614) 365-9145

Attorneys for Appellees Olympic Holding Co. LLC, et al.

Notice of Appeal of Appellant ACE Capital Title Reinsurance Company

Appellant ACE Capital Title Reinsurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 07 APE-2-0168 on December 13, 2007.

This case raises questions of public and great general interest.

Respectfully submitted,

Kathleen M. Trafford

Kathleen M. Trafford (0021753)
(COUNSEL OF RECORD)
James D. Curphey (0015832)
Jay A. Yurkiw (0068143)
L. Bradfield Hughes (0070997)
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215-6194
Phone: (614) 227-1915
Facsimile: (614) 227-2100
ktrafford@porterwright.com

Attorneys for Appellant
ACE Capital Title Reinsurance Co.

Of counsel:

Frederick R. Kessler
William A. Maher
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue
New York, New York 10110
Phone: (212) 382-3300
Facsimile: (212) 382-0050

CERTIFICATE OF SERVICE

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

Michael H. Carpenter (0015733)
Jeffrey A. Lipps (0005541)
Kathryn M. Lloyd (0075610)
Carpenter & Lipps, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Phone: (614) 365-4100
Facsimile: (614) 365-9145

Attorneys for Appellees Olympic Holding Co. LLC, et al.

Kathleen M. Trafford

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Olympic Holding Company,
LLC et al ,

Plaintiffs-Appellants,

v

ACE Limited et al ,

Defendants-Appellees

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

(REGULAR CALENDAR)

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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No 07AP-168

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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 G Gary Tyack

Judge G Gary Tyack

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.

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	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2007 JAN 26 AM 9: 21
CLERK OF COURTS

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.

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

[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.

<u>**Breach of Fiduciary Duty**</u>

Ace Capital next moves the Court for Summary Judgment as to Plaintiffs' fifth claim for breach of fiduciary duty. *See* <u>Plaintiffs' Complaint</u> 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

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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.

<u>Negligent Misrepresentation</u>

Ace Capital next moves the Court for Summary Judgment as to Plaintiffs' seventh claim for negligent misrepresentation. *See* <u>Plaintiffs' Complaint</u> 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.

<u>Delman v. Cleveland Heights</u> (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

1335.05 Certain agreements to be in writing.

No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or 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.

No action shall be brought to charge a person licensed by Chapter 4731. of the Revised Code to practice medicine or surgery, osteopathic medicine or surgery, or podiatric medicine and surgery in this state, upon any promise or agreement relating to a medical prognosis unless the promise or agreement is in writing and signed by the party to be charged therewith.

Effective Date: 07-01-1976