

IN THE SUPREME COURT OF OHIO

OLYMPIC HOLDING COMPANY LLC, et al.,
Plaintiffs/Appellees,
v.
ACE CAPITAL TITLE REINSURANCE COMPANY,
Defendant/Appellant.

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: Case No.: 08-0200
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: (On Appeal From The Tenth District Court
: of Appeals, Case No. 07-APE-2-0618)
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**APPELLEES' MOTION TO DISMISS APPEAL AS IMPROVIDENTLY GRANTED, OR
IN THE ALTERNATIVE, TO STRIKE PORTIONS OF APPELLANTS' MERITS BRIEF**

Defendant-appellant ACE Capital Title Reinsurance Company has filed a merits brief that exceeds the scope of issues identified in its jurisdictional memorandum. It thus raises issues over which the Court did not accept jurisdiction, which issues are not properly before the Court. Pursuant to S.Ct. Prac. R. XIV, Section 4, plaintiffs-appellees Olympic Holding LLC, Olympic Title Insurance Company, Title First Agency, Inc., Sutton Land Services, LLC, Sutton Alliance, LLC, and Title Midwest, Inc. respectfully move this Court for dismissal of this discretionary appeal as improvidently granted, or, in the alternative, for entry of an Order striking pages 36-39 (Proposition of Law I, Part G), and pages 42-50 ("Disposition of the Appeal") of the Merit Brief of Appellant ACE Capital Title Reinsurance Company. The reasons for this motion are set forth in the accompanying memorandum in support.

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Respectfully submitted,

Michael H. Carpenter per KML

Michael H. Carpenter (0015733)

Jeffrey A. Lipps (0005541)

Katheryn M. Lloyd (0075610)

CARPENTER LIPPS & LELAND LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, OH 43215

Telephone: (614) 365-4100

Facsimile: (614) 365-9145

Attorneys For Plaintiffs-Appellees

Olympic Holding LLC, Olympic Title

Insurance Company, Title First Agency,

Inc., Sutton Land Services, LLC, Sutton

Alliance, LLC, And Title Midwest, Inc.

MEMORANDUM

I. INTRODUCTION.

In the underlying appeal before the Tenth District Court of Appeals, the Court of Appeals considered twelve assignments of error in connection with the trial court's summary judgment and personal jurisdiction decisions. Defendant-appellant ACE Capital Title Reinsurance Company ("ACE Capital Title") filed a jurisdictional memorandum with this Court on January 25, 2008, that challenged the Court of Appeals' disposition of only two of those Assignments of Error—Nos. I and V—and did so through Propositions of Law I and II. This Court accepted jurisdiction over ACE Capital Title's two propositions of law on May 7, 2008.

ACE Capital Title now has filed a merits brief that makes arguments regarding three assignments of error that were never argued, mentioned, or alluded to in ACE Capital Title's jurisdictional briefing, and over which this Court never accepted jurisdiction. These three additional assignments of error are highly fact specific, would require a de novo review of extensive record evidence, and in two instances, would have to be decided first by the Tenth District Court of Appeals, which found them moot and has not yet ruled on them. The three additional assignments of error in no way raise issues of public or great general interest. It is improper for ACE Capital Title to have injected these three additional assignments of error into its merits brief, having concealed its intent to argue them in its jurisdictional brief. If, as ACE Capital Title now contends, the fact specific summary judgment questions implicated by the three additional assignments of errors are inextricably linked to the two narrow propositions of law over which this Court did accept jurisdiction, then this appeal should be dismissed as improvidently granted, for these are not questions of public or great general interest. In the alternative, and at a minimum, ACE Capital Title's discussion and arguments related to the three

additional assignments of error that were left out of its jurisdictional brief should be stricken from its merits brief, for this Court never accepted jurisdiction over the three additional assignments of error, and plaintiffs-appellees should not be required to brief them. In these difficult economic times, small businesses in Ohio like plaintiffs-appellees face enough economic hardship, without the compounded harm of out-of-state business partners reneging on agreements, and then using their comparative economic might to pursue litigation strategies that are not warranted under existing law or procedure.

In addition, this Court should decline ACE Capital Title's invitation to strip the Court of Appeals of its right to decide moot assignments of error.

II. BACKGROUND FACTS.

This appeal involves an attempt by a New York corporation, defendant-appellant ACE Capital Title, to escape liability to its admitted strategic partners and joint venturers by claiming that Ohio's Statute of Frauds permits it to lie to its partners and joint venturers with impunity. ACE Capital Title argues that it should be permitted to rely upon the Statute of Frauds as an absolute defense to a contract claim even though it undisputedly lied to plaintiffs-appellees about whether it would sign agreements that would have satisfied the Statute of Frauds.¹ ACE Capital Title argues this position despite the fact that every case in every state (including Ohio's appellate courts), and every treatise, ever to look at the question, agrees: a party that misrepresents its intent to sign a written agreement is estopped from subsequently relying on a Statute of Frauds defense.²

¹ See, e.g., COA Dec. at ¶47 ("ACE Capital Title does not dispute the appellants' evidence that it made express promises to produce signed written memoranda of the parties' agreements."). In its briefing to this Court, ACE Capital Title does not dispute that it made, and then reneged on, promises to sign the parties' agreements.

² The jurisdictional brief of plaintiffs-appellees set forth case law citations to the 22 states, including Ohio, that have ruled on this specific issue. See also 9 Williston on Contracts §21:7

The underlying facts are as follows. Plaintiffs-appellees (the “Olympic Group”) reached an agreement with ACE Capital Title to develop a new national system of title insurance and reinsurance, and to headquarter a new title insurance company of national scope on Front Street, in Columbus. ACE Capital Title was to provide capital, reinsurance in agreed amounts, and commercial referrals to the joint venture; the Olympic Group members were to provide bricks and mortar, personnel, and operational expertise. The Olympic Group was and is comprised of three successful, established title insurance agencies based in Columbus, Ohio; Valley Stream, New York; and Topeka, Kansas. ACE Capital Title was headquartered in Manhattan, drawing on capital and reinsurance provided by its Bermuda-based parent companies.

In 2003, the terms of the joint venture were mutually agreed to by the parties. The parties’ agreement and business plans were documented in numerous writings, including term sheets; formal business plans voted on and approved by ACE Capital Title’s parent companies; signed, verified applications by both the Olympic Group and ACE Capital Title to the Ohio Department of Insurance; and agreed-to written reinsurance and agency agreements that were awaiting only final, promised signature. The parties were mutually executing their joint venture when ACE Capital Title’s parent corporations decided to shut the company down in favor of pursuing a \$1 billion offshore initial public offering.

Unfortunately, ACE Capital Title did not apprise the Olympic Group that its fate was

(4th Ed. 1999) (“Agreement To Execute Written Memorandum”) (“[I]f the plaintiff has acted on the promise to reduce the contract to writing, and changed his position so that it would be unconscionable not to enforce the promise and the underlying contract, an estoppel will be erected to prevent the defendant from invoking the Statute.”); 4-12 Corbin on Contracts § 12.8 (2007) (“Promises to Execute a Sufficient Memorandum”) (“Equitable estoppel bars assertion of the statute as a defense” where there is “a promise...to execute a sufficient memorandum at a future time.”); Restatement of Contracts (1932), § 178, Comment f (“[A] promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.”).

doomed and its plans had changed. Instead, knowing full well of the IPO plans, ACE Capital Title specifically (and undisputedly) promised that it would sign the parties' agreements as soon as the Olympic Group closed on the acquisition of Olympic Title Insurance Company, which was to be part of the operating arm of the parties' joint venture. ACE Capital Title told the Olympic Group that the agreements could not be signed until the Olympic Group acquired the insurance company, but that the agreements would be signed immediately after the Olympic Group's acquisition of the insurance company closed. ACE Capital Title made its promises to sign after the parties' already had reached mutual agreement on all essential business terms of their joint venture, and had drafted written memoranda to memorialize the same.

In reliance on ACE Capital Title's promise to sign the written contracts memorializing the parties' agreed terms, the Olympic Group closed on the acquisition of Olympic Title Insurance Company on December 29, 2003. Just two business days later, on January 2, 2004, ACE Capital Title told the Olympic Group for the first time that it would not sign the promised agreements after all, and would not go forward with the parties' joint venture. This, it explained, was as a result of its parent companies' IPO, and the secret plans that had been made (but never conveyed to plaintiffs-appellees) regarding ACE Capital Title's future several weeks before. ACE Capital Title refused to sign or perform. The Olympic Group filed suit shortly thereafter.

The underlying case involves multiple, discrete causes of action, including, inter alia, breach of contract, breach of joint venture, breach of fiduciary duty, promissory estoppel, and fraud. The trial court granted summary judgment to ACE Capital Title on some of those causes of action, including the contract, joint venture, and fiduciary duty claims, giving rise to an appeal by plaintiffs-appellees to the Tenth District Court of Appeals. The trial court denied summary judgment as to the promissory estoppel and fraud claims, finding sufficient record evidence of

each.

Plaintiffs-appellees submitted twelve different assignments of error to the Tenth District. The Tenth District issued a unanimous decision on December 13, 2007, affirming the trial court in some respects, reversing the trial court in other important respects, and finding two assignments of error to be moot in light of its other holdings. The assignments of error considered by the Tenth District, and their disposition in the unanimous December 13, 2007 decision, are as follows:

<u>Assignment of Error</u>	<u>Disposition By Tenth District</u>
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.	Sustained (p. 17 of COA Decision)
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.	Held to be moot in light of AOE I and IV (p. 17 of COA Decision)
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.	Held to be moot in light of AOE I and IV (p. 17 of COA Decision)
IV. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Contract Claims Where There Was Ample Record Evidence Of Enforceable "Agreements To Agree."	Sustained (p. 16 of COA Decision)
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.	Sustained as to breach of fiduciary duty (p. 19 of COA Decision)
VI. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Negligent Misrepresentation Claim Given The Record Evidence Before It.	Overruled (p. 21 of COA Decision)

VII.	The Trial Court Erred In Sua Sponte Limiting Plaintiffs' Damages Regarding Promissory Estoppel And Fraud.	Held premature ; no jurisdiction to hear these arguments yet (p. 21 of COA Decision)
VIII.	The Trial Court Erred In Failing To Analyze The Long Arm Statute, Civil Rule 4.3(A), And The Principles Of Agency.	Overruled (p. 22 of COA Decision)
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.	Overruled (p. 24 of COA Decision)
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.	Overruled (p. 26 of COA Decision)
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.	Overruled (p. 33 of COA Decision)
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.	Overruled (p. 33 of COA Decision)

On January 25, 2008, ACE Capital Title filed a jurisdictional memorandum with this Court claiming that the Tenth District's disposition of two of the twelve assignments of error constituted an issue of public and great general interest. ACE Capital Title asserted only two propositions of law in its jurisdictional memorandum.

In Proposition of Law I of its jurisdictional brief, ACE Capital Title challenged the Tenth District's unanimous holding, pursuant to Assignment of Error No. I, that a party that lies about whether it will sign an agreement, in order to induce reliance by the other party, is estopped from relying upon a Statute of Frauds defense to excuse its misconduct. ACE Capital Title argued that

a party that misrepresents its intent to produce a signed writing should nonetheless be able to invoke the Statute of Frauds—contrary to what every state and learned treatise to look at the issue has decided. See supra fn. 2.

In Proposition of Law II of its jurisdictional memorandum, ACE Capital Title also challenged the Tenth District’s unanimous holding, pursuant to Assignment of Error No. V, that behaving “absolutely unethically” towards one’s admitted “strategic partner” may constitute a breach of fiduciary duty. In essence, ACE Capital Title argues that there can be no fiduciary duty among admitted strategic partners and joint venturers unless there is a signed joint venture agreement (even where one party has reneged on its promise to produce a signed writing).

Specifically, ACE Capital Title set forth the following propositions of law in its jurisdictional memorandum to this Court:

Proposition of Law No. 1: 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 .

Proposition of Law No. 2: 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.

The only Assignments of Error that ACE Capital Title addressed in its jurisdictional memorandum were Nos. I and V. Its only citations to the Court of Appeals’ decision in the jurisdictional memorandum are to the Court of Appeals’ discussion of Assignments of Error Nos. I and V.

In a 4-3 decision, this Court accepted ACE Capital Title’s arguments that the two foregoing Propositions of Law, concerning Assignments of Error Nos. I and V, constituted issues of public and great general interest.

Since this Court's jurisdictional decision, ACE Capital Title has now filed a merits brief that invites, for the first time, this Court to review not just Assignments of Error Nos. I and V, but also Assignments of Error Nos. II, III, and IV—never mentioned in its jurisdictional memorandum. ACE Capital Title's merits brief asks this Court:

- (i) to bypass the Tenth District in order to itself evaluate the many boxes of record evidence in order to make a summary judgment factual determination as to whether there are writings chargeable against ACE Capital Title that satisfy the Statute of Frauds (an issue that the Tenth District has not yet considered, because it found Assignment of Error No. III to be moot);
- (ii) to bypass the Tenth District and determine on its own whether the contracts in question were capable for performance in one year (an issue that the Tenth District has not yet considered, because it found Assignment of Error No. II to be moot); and
- (iii) to overrule the Tenth District's unanimous holding, pursuant to Assignment of Error IV, that the extensive factual record contains evidence of enforceable "agreements to agree" sufficient to withstand a motion for summary judgment.

None of these Assignments of Error—not II, not III, and not IV—were argued, mentioned, or even alluded to, in ACE Capital Title's jurisdictional brief. All of these Assignments of Error—II, III, and IV—are highly fact specific, factually disputed, and unsuitable for dismissal at the summary judgment phase.

ACE Capital Title knew full well that it could not take the position in its jurisdictional brief that fact-intensive, fact-specific summary judgment disputes in a single discrete case constitute the sort of generalized issue of public or great general interest that would justify invocation of this Court's discretionary jurisdiction. It did not even try to make that argument.³

³ Nor did its amici curiae, who filed jurisdictional briefs in support of Propositions of Law I and II, but have kept silent as to ACE Capital Title's merits brief and new request that this Court make summary judgment factual findings as to Assignments of Error Nos. II, III, and IV. The amici curiae no doubt recognize that the factual question of whether a particular negotiated writing, authored by ACE Capital Title pursuant to its deal with the Olympic Group, satisfies the Statute of Frauds, is not an issue that affects them, or constitutes an issue of public or great general interest.

Having failed to address Assignments of Error Nos. II, III, and IV in its jurisdictional brief, ACE Capital Title has waived the right to challenge the Tenth District's holdings as to those Assignments of Error now.

III. LAW AND ARGUMENT.

A. ACE Capital Title Is Not Entitled To Argue In Its Merits Brief Three Assignments Of Error That It Did Not Argue Or Reference In Its Memorandum In Support Of Jurisdiction.

ACE Capital Title's attempt to raise three assignments of error in its merits brief that it neglected to mention in its jurisdictional brief is improper.

Recently, this Court wrote the following with respect to an appellant's attempt to raise in its merits brief issues that were not raised in its memorandum in support of jurisdiction:

We note that Martin has also briefed a second proposition of law asserting that AMA's client list does not satisfy the definition of a trade secret because it contained information that is available to the public via the internet. However, because Martin never raised this issue in his memorandum in support of jurisdiction, we never agreed to consider it. Thus, we concern ourselves only with the proposition of law that we accepted for review[.]

Al Minor & Assocs., Inc. v. Martin (2008), 117 Ohio St.3d 58, 60, ¶9 (emphasis added). This result is in keeping with this Court's prior precedent regarding issues that were left out of jurisdictional briefing. See, e.g., Whitaker v. M.T. Automotive, Inc. (2006), 111 Ohio St.3d 177, 179, ¶9, fn. 2 ("The appellate court affirmed the propriety of the directed verdict on the fraud claim from which Whitaker has cross appealed. Although Whitaker offers this issue in his brief before this court, because he failed to raise it in his jurisdictional memorandum, it will not be addressed."); Corporex Dev. & Construction Mgmt., Inc. v. Shook, Inc. (2005), 106 Ohio St.3d 412, 414, fn. 1 ("Shook's brief in this case also raises the issue of whether the appellate court erred by reinstating DSI's implied-product-warranty claim. Shook, however, failed to raise that issue in its jurisdictional memorandum. As we did not accept jurisdiction based upon that issue, we refrain from addressing it."); Estate of Rodley v. Hamilton Cty. Bd. of MRDD (2004), 102

Ohio St.3d 230, 236 (because appellant failed to raise constitutionality argument in its jurisdictional briefing, “we decline to address this issue.”); In re Timken Mercy Medical Center (1991), 61 Ohio St.3d 81, 87 (“[A]ppellant argues that even if we find that the Board employed the proper level of scrutiny, we should reverse its decision as being in conflict with Ohio Adm. Code 3701-12-24. However, in its memorandum in support of jurisdiction, the appellant did not raise or even allude to this issue....Consequently, the question of whether the Board’s decision was based on a correct reading of Ohio Adm. Code 3701-12-24 is not properly before us and we decline to rule on it.”).

The rule from this Court’s precedent is quite clear: an appellant is not entitled to argue in its merits brief issues that were not raised in its jurisdictional memorandum. Despite this, ACE Capital Title has devoted many pages of its merits brief to three assignments of error that it never referenced, argued, or even alluded to in its jurisdictional briefing.

Indeed, ACE Capital Title’s jurisdictional memorandum makes reference and arguments related only to Assignments of Error Nos. I and V (recast as “Proposition of Law Nos. I and II” for purposes of its jurisdictional memorandum). Those two propositions concern Ohio law on whether a party that misrepresents its intent to sign a writing that would satisfy the Statute of Frauds is estopped from relying on the Statute, and Ohio law regarding fiduciary duty owed between and among joint venturers.

There is absolutely no mention in ACE Capital Title’s jurisdictional memorandum of Assignments of Error Nos. II and III (which the Tenth District Court of Appeals held to be moot), and No. IV (wherein the Tenth District unanimously held that there is record evidence of enforceable written agreements to agree chargeable against ACE Capital Title).

Thus, only now that this Court has accepted jurisdiction regarding the two propositions of law that relate to Assignments of Error Nos. I and V, ACE Capital Title is trying to slide before the Court three additional assignments of error that it knows never could have been described as issues of public or great general interest. That is improper.

On pages 36-39 of its merits brief, ACE Capital Title argues that the Tenth District Court of Appeals erred in sustaining Assignment of Error No. IV, regarding the existence of enforceable agreements to agree. Those issues and arguments are not contained in ACE Capital Title's jurisdictional memorandum.⁴ If ACE Capital Title wanted to argue Assignment of Error No. IV, it should have said as much in its jurisdictional memorandum, to give plaintiffs-appellees the opportunity to point out (and to give this Court the opportunity to decide) that this issue is not one of public or great general interest, but rather a highly specific factual question at summary judgment that implicates only the parties' own interests. There is no basis for ACE Capital Title to argue Assignment of Error No. IV now.

ACE Capital Title spends the final eight pages of its merits brief arguing Assignments of Error Nos. II and III under the curious heading "Disposition of the Appeal." ACE Merits Brief at 42-50. ~~Assignments of Error Nos. II and III were not part of ACE Capital Title's jurisdictional submission, either.~~ ACE Capital Title's jurisdictional memorandum made no reference to the

⁴ Moreover, ACE Capital Title misstates the summary judgment record in its discussion of Assignment of Error No. IV, in a misguided attempt to make that assignment of error seem like it involves a Statute of Frauds issue. In making its arguments, ACE Capital Title fails to mention that there is record evidence that the parties had mutually agreed on all essential terms of their joint venture, and that ACE Capital Title itself authored and disseminated written term sheets and signed business planning documents, which it admits reflected the parties' mutual understanding as to the terms of the parties' deal. Those writings are chargeable against ACE Capital Title, and eliminate any Statute of Frauds issue regarding Assignment of Error No. IV and the enforceability of preliminary agreements, or agreements to agree. If ACE Capital Title wants to dispute that record evidence (a tall task, given that the deposition testimony of its own witnesses confirms these facts), that would create nothing more than a fact dispute, the existence of which precludes summary judgment for ACE Capital Title, the moving party.

question of whether the parties' agreements were capable of performance in one year (Assignment of Error No. II), or whether the summary judgment record contains evidence of writings chargeable against ACE Capital Title that satisfy the Statute of Frauds (Assignment of Error III). These are not questions of public or great general interest. Whether, for example, the November 18, 2003 signed, written Board of Directors minutes--describing in explicit detail the business terms of the parties' joint venture, and ACE Capital Title's financial projections and hiring plans pursuant to the joint venture, and giving ACE Capital Title Board approval to proceed with the joint venture--constitute a writing chargeable against ACE Capital Title sufficient to satisfy the Statute of Frauds, is not a question of public or great general interest. These are summary judgment questions of disputed fact, particular to these parties.

If ACE Capital Title actually thought these Assignments of Error were linked to Assignment of Error and Proposition of Law No. I, regarding lying about producing a signed writing (the position that ACE Capital Title now takes in its merits brief), why did it not discuss or even allude to these issues in its jurisdictional brief? The answer is because it knew that Assignments of Error II and III raise separate issues, and ones that are highly specific to the particular facts of this case, which therefore do not present an issue of public or great general interest. Assignments of Error II and III should not be considered now for that reason.

In addition, and as set forth below, Assignments of Error Nos. II and III both were found to be moot by the Tenth District Court of Appeals. As such, they should be remanded to the Court of Appeals for decision in any event.

B. In The Event Of Remand, The Tenth District Court Of Appeals Is Entitled To Rule On Issues It Found To Be Moot.

A. The Court Of Appeals, Not This Court, Should Decide Assignments Of Error II And III, Previously Held Moot.

Under the heading “Disposition of the Appeal,” ACE Capital Title spends eight pages arguing that the Tenth District Court of Appeals should be stripped of its right to decide two assignments of error it held to be moot (Assignments of Error Nos. II and III). As discussed, those Assignments of Error were never mentioned in ACE Capital Title’s jurisdictional memorandum. That makes ACE Capital Title’s tactics doubly remiss: it is now launching a surprise attack on assignments of error that it never before argued should be in play before this Court, and at the same time, it is also inviting this Court to bypass the Court of Appeals’ authority to decide the two moot assignments of error in the event this Court does not affirm aspects of the Court of Appeals’ decision. Neither tactic is proper.

The case of Wagner v. Roche Laboratories (1996), 77 Ohio St.3d 116, 124, was also one in which the appellant requested the Court to address issues “which were found moot and were not addressed by the court of appeals.” Id. This Court declined to bypass the court of appeals in that fashion, holding:

We decline to consider this proposition of law, but remand this cause to allow the court of appeals to address appellant’s assignments of error raised in her cross-appeal below, which were found moot. Also remaining are the issues underlying appellees’ argument that a new trial is warranted, raised in the court of appeals but found moot and not addressed by that court. We remand this cause to the court of appeals to address these remaining assignments of error.

Id. (emphasis added). This approach is standard, of course. See, e.g., Texler v. D.O. Summers Cleaners & Shirt Laundry Co. (1998), 81 Ohio St.3d 677, 681 (“We remand this cause to the court of appeals for that court to review the remaining assignments of error raised by both parties below, which were found to be moot and not addressed.”); White v. Conrad (2003), 102 Ohio St.3d 125, 128 (with respect to issue court of appeals found to be moot, “[w]e remand this cause

to the court of appeals for consideration of that issue.”); Prouse, Dash & Crouch, LLP v. DiMarco (2007), 116 Ohio St.3d 167, 168 (“We remand the cause to the court of appeals to reexamine whether the trial court had jurisdiction over Yum and to address the other issues that were raised by DiMarco and Yum that the court declared moot.”); State of Ohio v. Wamley (2008), 117 Ohio St.3d 388, 389, ¶1 (“[W]e reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.”).

The principle that the Court of Appeals is entitled to decide moot assignments of error derives in part from the requirements of Appellate Rule 12(A)(1). That rule which provides, in relevant part, that the court of appeals shall:

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waiver, the oral argument under App. R. 21;

...

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

App. R. 12(A)(1) (emphasis added). This appellate rule has caused this Court to

reiterate that App. R. 12(A)(1)(c) requires an appellate court to decide each assignment of error and give written reasons for its decision unless the assignment of error is made moot by a ruling on another assignment of error.

State of Ohio v. Evans (2006), 113 Ohio St.3d 100, 105, ¶26 (emphasis added) (remanding cause to court of appeals to decide issue it previously found to be moot). Even ACE Capital Title admits that the Court of Appeals, in “typical practice,” is entitled to decide assignments of error previously held to be moot. See ACE Merits Brief at 43.

To argue that this Court should decide Assignments of Error Nos. II and III itself, and deny the Tenth District Court of Appeals the opportunity to rule on them, ACE Capital Title claims that Assignments of Error Nos. II and III “implicate” the Statute of Frauds. See ACE

Merits Brief at 42. But what ACE Capital Title is asking this Court to do as between Assignment of Error No. I, versus Nos. II and III, is very different.

In Assignment of Error No. I (i.e., Proposition of Law No. I in ACE Capital Title's jurisdictional brief), ACE Capital Title is asking this Court to decide the legal question of whether a party that knowingly misrepresents its intent to signed a written agreement can then rely upon the Statute of Frauds when it reneges on signing and performing the agreement. That is a legal question—one that has been decided consistently by Ohio's appellate courts, as well as the other 21 states and learned treatises that have considered the issue. See supra fn. 2. Those authorities all unanimously hold that a party that misrepresents its intent to sign a written agreement that would satisfy the Statute of Frauds is estopped from then relying upon the Statute of Frauds. See id. ACE Capital Title asks this Court to announce a contrary and completely unprecedented rule for Ohio alone. That rule would declare that a party in Ohio can lie with impunity regarding it intent to sign an agreement, because, under ACE Capital Title's proposed rule, the Statute of Frauds can be invoked to perpetrate and defend a fraud. However misguided its position, ACE Capital Title's Proposition of Law I, regarding Assignment of Error I, presents a question of law.

With respect to Assignments of Error Nos. II and III, however, ACE Capital Title does not ask this Court to announce or decide any issue of law. Instead—without ever having warned this Court in it jurisdictional memorandum that it was seeking to impose such a task—ACE Capital Title now, in its merits brief, asks this Court to determine the factual question of whether there are writings in this particular summary judgment record that satisfy the Statute of Frauds (Assignment of Error No. III), and to decide whether the specific agreements negotiated by the parties' are capable of performance in one year (Assignment of Error No. II). To render such a

decision, this Court would have to perform a de novo review (without the benefit of any prior review by the Court of Appeals, which found these issues moot) of all the summary judgment evidence in this case--multiple boxes of materials, culled from the 35 deposition transcripts and tens of thousands of pages of discovery documents in this case. Assignments of Error Nos. II and III are questions of disputed fact at summary judgment. They are not legal questions, and they are not questions of public or great general interest.

If ACE Capital Title intended to ask this Court to bypass the Court of Appeals with respect to assignments of error that Court found to be moot, and to sift through the voluminous summary judgment record evidence in this case, it should have said as much in its jurisdictional brief. Then the Court could have seen for itself that these are hotly contested questions of fact specific to the summary judgment record in this case, which fact questions do not constitute issues of public or great general interest.

ACE Capital Title knew better. It knew that for purposes of garnering this Court's discretionary review, it could not invoke assignments of error that the Court of Appeals is entitled to decide, nor invite this Court to delve through the voluminous summary judgment record to make factual determinations specific to this case alone. Now that this appeal has been accepted, ACE Capital Title should not be permitted to open the floodgates to raise assignments of error over which the Court of Appeals retains jurisdiction, and in which there are no issues of public or great general interest. A merits brief is not intended to operate as an open invitation to an appellant to raise and argue any and all issues related in anyway to the underlying case. A merits brief should be limited to those issues for which the Court accepted discretionary jurisdiction—i.e., only those issue which this Court found to represent issues of public or great general interest.

B. The Galmish Case Does Not Support ACE Capital Title's Position.

In this case, Assignments of Error Nos. II and III—which are highly particular questions of fact—require a fundamentally different analysis and review as compared to the legal question raised by Assignment of Error No. I. That distinguishes this case from Galmish v. Cicchini (2000), 90 Ohio St.3d 22, which ACE Capital Title relies upon for its argument that this Court should decide Assignments of Error Nos. II and III, even though the Tenth District Court of Appeals has not yet ruled upon them (having found them moot).

In the Galmish case, this Court determined that it could rule on Assignments of Error 2-6, even though the Stark County Court of Appeals had ruled only on Assignment of Error No. 1, finding the other five moot. Assignment of Error 1 in the Galmish case was: “The trial court erroneously denied the defendant’s motions for a directed verdict at the close of plaintiff’s case and at the close of all evidence.” Id. at 26, fn. 1. The Court of Appeals sustained that assignment of error, finding that the parol evidence rule barred all of the plaintiff’s claims, and any possibility of damages.

This Court overturned that determination by the Stark County Court of Appeals, restoring ~~the jury’s verdict.~~ This Court found that the parol evidence rule did not bar plaintiff’s claims, because of the Record evidence that the defendant made a promise and entered into a contract with no present intent to perform. As a result of this fraudulent conduct, the defendant was not entitled to rely on the parol evidence rule to defend plaintiff’s resulting tort and contract claims, and the sole basis for the Court of Appeals taking away plaintiff’s jury verdict was removed.

This Court’s determination as to Assignment of Error No. 1 in Galmish had a necessary ripple effect throughout the remaining five assignments of error. This Court’s threshold determination as to Assignment of Error No. 1—that the parol evidence rule was no bar to

plaintiff's claims—necessarily meant that the remaining assignments of error would have to be decided in favor of plaintiff, because of the way the assignments of error were structured.

Assignment of Error 2 expressly dealt with the parol evidence rule, as did Assignment of Error 3, and thus were nothing more than a reiteration of Assignment of Error 1. Id. at 26, fn. 1. As to Assignment of Error 4 regarding punitive damages, the defendant's sole basis for arguing against the jury's award of punitive damages was that the parol evidence rule should bar his liability (and any compensatory damages) in the first instance. With liability and the jury's compensatory damages restored by this Court's parol evidence ruling pursuant to Assignment of Error 1, defendant's sole argument against punitive damages was completely undercut. See id. at 31 ("These arguments fail because our determination that the parol evidence rule is inapplicable necessarily upholds the award of compensatory damages on Galmish's fraud claim.").

Likewise, Assignments of Error 5 and 6, dealing with the trial court's award of prejudgment interest and attorney fees, also turned on whether compensatory damages were proper as to plaintiff's liability claim. Restoring the jury's finding of liability and its award of compensatory damages necessarily resurrected the plaintiff's claims for prejudgment interest and attorney fees, when the defendant had cited his belief that there could be no liability under the parol evidence rule as his primary basis for opposing prejudgment interest and attorney fees.

Thus, Galmish is a case in which this Court's holding on a single, broadly stated Assignment of Error ("The trial court erroneously denied the defendant's motions for a directed verdict at the close of plaintiff's case and at the close of all evidence") had a necessary consequence for each of the remaining assignments of error. As this Court stated in the opening sentence of its decision, the single "pivotal issue in this appeal is whether Galmish's claims are barred by the parol evidence rule." Id. at 2. With that question answered in the negative, there

was a single, inevitable result for the remaining Assignments of Error, which had been structured by the defendant to all hinge on the threshold parol evidence determination. That is why in Galmish no remand was necessary to the Court of Appeals. Deciding Assignment of Error I against the defendant swept away all of his arguments as to the remaining assignments of error.⁵

Here, there is no necessary relationship between Assignments of Error Nos. I, II, III, and IV. Hypothetically, this Court could rule for ACE Capital Title and agree that in Ohio alone, a party can lie with impunity about whether it intends to sign written agreements that would satisfy the Statute of Frauds (although, ironically, such a result would fly in the face of Galmish, which recognizes tort liability where a party misrepresents its present intent to perform a promise or contract). Even under such a hypothetical, the agreements in question might still be capable of performance in one year, taking them out of the Statute of Frauds (Assignment of Error No. II); there might still be signed writings chargeable against ACE Capital Title that satisfy the Statute of Frauds (Assignment of Error No. III); and there might still be evidence of enforceable written agreements to agree, as the Court of Appeals already held (Assignment of Error No. IV).

Whether or not there is an exception to the Statute of Frauds pursuant to Assignment of Error No. I has no bearing on the question of whether the Statute applies in the first instance (Assignment of Error No. II), or applies but is satisfied by writings chargeable against ACE Capital Title (Assignment of Error III).

Unlike Galmish, then, finding for the appellant here as to the first Assignment of Error does not effectively determine the remaining assignments of error as well. That is why the Tenth

⁵ Similarly, this Court found that two assignments of error—one for unjust enrichment, and one for breach of contract—were sufficiently linked in M.J. DiCorpo, Inc. v. Sweeny (1994), 69 Ohio St.3d 497, also cited by ACE Capital Title. There, the Court found the presence of a contract necessarily negated the appellee's unjust enrichment claim, eliminating the need to remand the unjust enrichment claim to the Court of Appeals. Id. at 504. No such linkage exists here.

District Court of Appeals would remain entitled to decide Assignments of Error Nos. II and III, previously held moot, in the event that this Court were to rule for defendant-appellant as to Assignment of Error No. I in this case. The Assignments of Error in this case are not logically hinged as they were in Galmish.

The Galmish case is distinguishable in another key respect as well. In Galmish, the plaintiff expressly informed this Court in her jurisdictional memorandum of her intent to raise all of the issues then addressed in her merits brief. Her merits brief faithfully tracked her jurisdictional memorandum as to the arguments made and the Propositions of Law addressed. Cf. Ex. A hereto (“Memorandum In Support Of Jurisdiction Of Appellant Mary Ann Galmish”) and Ex. B hereto (“Amended Merit Brief Of Appellant Mary Ann Galmish”) (less attachments). Thus, Galmish does not stand for the proposition that a party can mislead the Court and its opponent as to the issues it intends to raise in its merits brief by filing a jurisdictional memorandum that conceals its true intent. Nor does it stand for the proposition that this Court, in this case, should divest the Tenth District Court of Appeals of its jurisdiction to decide the factual questions raised by Assignments of Error Nos. II and III in the hypothetical event that the Court of Appeals’ legal determination as to Assignment of Error No. I is overturned.

IV. CONCLUSION.

Accepting ACE Capital Title’s arguments at face value for the sake of argument, if ACE Capital Title believes Assignments of Error II, III, and IV--newly raised in its merits brief--are inextricably linked to Assignments of Error I and V, over which this Court accepted jurisdiction, then this appeal should be dismissed as improvidently granted. If one cannot consider Assignments of Error I and V without also considering Assignments of Error II, III, and IV, as ACE Capital Title contends, then the inevitable conclusion is that this appeal involves summary

judgment questions of disputed fact, which do not constitute questions of public or great general interest. This Court is without jurisdiction to entertain discretionary appeals that do not involve questions of public or great general interest. As such, this appeal should be dismissed as improvidently granted.

On the other hand, if it is possible to decide Assignments of Error I and V without reference to Assignments of Error II, III, and IV, then discussion of those latter Assignments of Error should be stricken from ACE Capital Title's merits brief, for they were never raised, argued, mentioned, or alluded to in the course of jurisdictional briefing, and consequently this Court did not accept jurisdiction over them. Accordingly, in the alternative, plaintiffs-appellees respectfully request entry of an Order striking pages 36-39 (Proposition of Law I, Part G), and pages 42-50 ("Disposition of the Appeal") of the Merit Brief of Appellant ACE Capital Title Reinsurance Company.

Respectfully submitted,

Michael H. Carpenter per KML

Michael H. Carpenter (0015733)

Jeffrey A. Lipps (0005541)

Katheryn M. Lloyd (0075610)

CARPENTER LIPPS & LELAND LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, OH 43215

Telephone: (614) 365-4100

Facsimile: (614) 365-9145

Attorneys For Plaintiffs-Appellees
Olympic Holding LLC, Olympic Title
Insurance Company, Title First Agency,
Inc., Sutton Land Services, LLC, Sutton
Alliance, LLC, And Title Midwest, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellees' Motion To Dismiss Appeal As Improvidently Granted, Or In The Alternative, To Strike Portions Of Appellants' Merits Brief was served this 24th day of July, 2008, upon the following via ordinary U.S. mail, postage prepaid:

Kathleen M. Trafford, Esq.
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215

Attorney for Defendant/Appellant
ACE Capital Title Reinsurance Company

Michael A. Carpenter per KML
One of the Attorneys for Plaintiffs-Appellees

687:001:205923

IN THE SUPREME COURT OF OHIO

99-1337

MARY ANN GALMISH,

Appellant,

vs.

GUY CICCHINI,

Appellee.

On Appeal from the Stark
County Court of Appeals,
Fifth Appellate District by
the Ninth Appellate District
sitting by Assignment

Court of Appeals
Case Nos. 97 CA 00326, 97 CA 00403

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MARY ANN GALMISH

A. William Zavarello (0014172)
(COUNSEL OF RECORD)
A. WILLIAM ZAVARELLO CO., L.P.A.
313 South High Street
Akron, OH 44308
(330) 762-9700
Fax No. (330) 762-1680

Ralph Streza (0017964)
Natalie Peterson (0068449)
PORTER, WRIGHT, MORRIS &
ARTHUR
925 Euclid Avenue
Cleveland, OH 44115
(216) 443-9000

and

Counsel for Appellee,
Guy Cicchini

Todd A. Harpst (0067309)
DAY, KETTERER, RALEY, WRIGHT & RYBOLT, LTD.
121 Cleveland Avenue, South
PO Box 24213
Canton, OH 44701-4213
(330) 455-0173
Fax No. (330) 455-2633

Counsel for Appellant,
Mary Ann Galmish

ON COMPUTER

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JUL 19 1999
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

EXHIBIT
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If a party enters a contract with no intention of performing it, fraud is committed.

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A. *Galmish v. Cicchini*, Case Nos. 97 CA 00326, 97 CA 00403
(9th App. Dist., Jun. 2, 1999).

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

This case presents four issues pivotal to the future of Ohio contracts in which one party has discretion over whether, and to what extent, the other party will receive benefits. These issues concern preserving parties' reasonable expectations in business transactions.

I. BRIEF SUMMARY OF FACTS

Appellant Mary Ann Galmish ["Galmish"] received a piece of commercial property after divorce from Appellee Guy Cicchini ["Cicchini"]. Galmish tried to sell the property to Developers Diversified Realty Corporation ["DDRC"] for \$765,000. She was unsuccessful. She went to her ex-husband, who was sophisticated in matters of business and real estate. They entered into a contract whereby Cicchini agreed to buy the Property from his ex-wife for \$765,000, and to split any proceeds over \$765,00 if Cicchini could sell it for more than that amount within a year. Approximately one month after the year expired, Cicchini sold the property for \$1,750,00.

II. FIRST PROPOSITION OF LAW

Galmish contends for her first proposition of law that where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion in good faith and in accordance with fair dealings.

In *Illinois Controls, Inc. v. Lanahan* (1994), 70 Ohio St. 3d 512, 639 N.E.2d 771, paragraph one of the syllabus, the Ohio Supreme Court, citing Justice Cardozo's decision in *Wood V. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917), recognized that a contractual provision which gives a party the exclusive right to market a product on behalf of another imposes upon that party a duty to employ reasonable efforts to make sales of the product. In doing so, this Court specifically adopted 1 Restatement of the Law 2d, Contracts [1981] 197, Section 77, Comment d, Illustration 9.

In its decision in the case at bar reversing the jury verdict in favor of appellant Mary Ann Galmish on her breach of contract claim, the Ninth District Court of Appeals noted that **the Supreme Court of Ohio has not extended this duty to all contractual situations.** The appellate court was not willing to find an implied duty on the part of Cicchini to use reasonable efforts to sell the property within one year. Galmish contends that it is a matter of great general and public interest to extend the duty established in *Illinois Controls* to those commercial contracts where one party to a contract has the discretionary power to affect the rights of the other party. Breach of the implied covenant of good faith and fair dealings is a breach of contract. It is an evasion of the spirit of the deal.

Ancillary to asking this Court to hold that where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion in good faith and fair dealings, Galmish asks the court specifically to adopt **Restatement of the Law 2d, Contracts , (1981) 99, § 205 which states that "Every contract imposes upon each party a duty of good faith and fair dealings in its performance and its enforcement."** This section of the Restatement is under the heading "Considerations of Fairness and the Public Interest", which has long been the public policy of this state. Comment (a) in particular notes that good faith performance of a contract emphasizes "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Galmish contends that this proposition of law is a logical extension of the holdings in *Illinois Controls*.

The notion of good faith and fair dealing is not inconsistent with or foreign to the law merchant, where the parties deal at arm's length in commercial contexts. To the contrary, the Uniform Commercial Code ["UCC"] imposes an obligation of good faith in the performance or

enforcement of every contract or duty covered under the Code. Ohio Rev. Code § 1301.09 (UCC 1-203). The contract between Galmish and Cicchini should be no different.

III. SECOND PROPOSITION OF LAW

In this case, the breach of contract, namely the violation of the implied covenant of good faith and fair dealing, was accompanied by the independent tort of fraud. While the contract and tort claims are mingled, they are separate and independent. Courts have long permitted a party to a contract to seek tort remedies if behavior constituting a contract breach also violates some recognized duty in tort.

Galmish contended at trial that at the time Cicchini entered into the Agreement, Cicchini never intended to sell the property within one year. For her second proposition of law, Galmish asks the Court to hold that, **if a party enters a contract with no intention of performing it, fraud is committed.** This principle is embodied in the Restatement (Second) of Torts § 530, which the Court is asked to adopt, and provides that misrepresentation of one's intent to perform a contract is fraudulent. Although this form of fraud has been recognized numerous times by Ohio's intermediate appellate courts, this Court has never ruled on the issue.

IV. THIRD PROPOSITION OF LAW

In evaluating the fraud claim in this case, in which the jury awarded Galmish one million dollars in punitive damages, the Court of Appeals erroneously concluded that parol evidence was improperly admitted to establish certain elements of fraud in an unambiguous contract. Galmish concedes that the contract was unambiguous and that it was drafted by her lawyer. Evidence extrinsic to the contract was properly admitted by the trial court, because it was not used to vary or to explain the terms of an unambiguous contract. It was used to establish the breach of the

covenant of good faith and fair dealings, and to establish the lack of any intent to carry out the terms of the contract at the time the contract was made.

In this appeal, this Court has the opportunity to clarify what is parol evidence and what is not. Uncertainty exists at the appellate level on this topic. For her third and final proposition of law, Galmish asks this Court to hold that **extrinsic evidence is admissible to prove both that a party fraudulently misrepresented a present intention to perform a contract and to prove that a party breached a contractual duty of good faith and fair dealings in the performance of the contract.**

V. FOURTH PROPOSITION OF LAW

For her fourth proposition of law, Galmish asks this Court to hold punitive damages are recoverable, upon proper proof, where a violation of the covenant of good faith and fair dealing is accompanied by the independent tort of fraud. Entering into a contract where the other party only benefits if the sale occurs within one year with no intention of selling the Property within one year is fraud and, while it "mingles" with the breach of an implied covenant of good faith and fair dealing, it is an independent tort. Galmish proved both to the jury and, in response, the jury properly awarded her punitive damages.

STATEMENT OF THE CASE AND FACTS

Galmish is Cicchini's ex-wife.¹ Galmish acquired valuable commercial property ["Property"] in North Canton, Ohio.

In 1993, DDRC² and Galmish negotiated for the Property's sale ["DDRC Sale"]. On September 20, 1993, Galmish and DDRC entered into a written option agreement ["Option

¹ Unless indicated, the herein facts are in the trial transcript. Transcript references to facts are included. Little background or informational facts are included.

² DDRC wanted the Property to develop commercial retail establishments.

Agreement”] to sell the Property to DDRC for \$765,000. On November 15, 1993, DDRC failed to purchase adjacent properties before the Option Agreement deadline. DDRC paid to extend the Option Agreement.

In late March 1994, DDRC contacted Cicchini to convince Galmish to extend the option time again. Cicchini told DDRC that, in order to hold the Property, he would purchase it.

In late Spring, 1994, Cicchini convinced Galmish to sell him the Property for DDRC Sale negotiations.³ Both agreed the Property was worth much more than \$765,000. Cicchini believed the DDRC Sale was worth \$1.7 million. Cicchini and Galmish agreed, if Galmish sold the Property to Cicchini for \$765,000 (Option Agreement price), they would split, *equally*, DDRC Sale proceeds **exceeding** \$765,000.

Thereafter, Cicchini promised, upon the Property’s acquisition from Galmish, to sell it to DDRC. After the discussion, DDRC told Galmish it would not exercise its option or extend the option deadline.

On May 24, 1994, Galmish and Cicchini signed an agreement [“Agreement”] (Plaintiff’s Trial Ex. 15). In addition to the terms for \$765,000 property sale, Cicchini agreed to pay Galmish one-half of DDRC Sale proceeds exceeding \$765,000 if Cicchini sold, transferred, or conveyed the property to DDRC **within one year of the execution of the agreement** (a new term).⁴ On May 31, 1994, Galmish transferred title to Cicchini.

In the Cicchini-DDRC negotiations, Cicchini’s attorney admitted Cicchini would not close the sale until the one year period ended.⁵ “No matter what happen[ed],” Galmish was to receive

³ Galmish is not sophisticated in business, while Cicchini is savvy and successful. He recognized Galmish’s lack of business savvy and opined she could not control money. Transcript at 497. Cicchini was part owner of a travel agency and owns a management company and seventeen successful McDonald’s franchises. Transcript at 183, 185.

⁴ Transcript at 195.

⁵ Transcript at 238.

no further monies.⁶ Although Cicchini rejected DDRC's offer of direct payment to Galmish for release of her rights in the Agreement, DDRC was ready to close the DDRC Sale before the Agreement's one year period.⁷ Cicchini-DDRC negotiations were replete with his delays in closing the sale.⁸

In the DDRC Sale Agreement, Cicchini negotiated two unusual provisions for confidentiality and escrow.⁹ First, Cicchini required DDRC's silence on all DDRC Sale negotiations; DDRC could not disclose the DDRC Sale status to Galmish (Plaintiff's Trial Ex. 19). Second, Cicchini was permitted to transfer the Property to DDRC *before* May 30, 1995, by depositing the deed in escrow. After the closing, Cicchini could remove the deed from escrow, "substituting" a deed with closing date (Plaintiff's Trial Ex. 19). With the substituted deed, Galmish would believe the DDRC Sale was concluded outside the one year period.

On May 26, 1995, Galmish sued Cicchini in the Stark County Court of Common Pleas. Her claims included breach of contract, breach of the duty of good faith, and fraud.

In early June, 1995, approximately one month after the one year period expired, Cicchini sold the Property to DDRC for \$1.75 million and closed on the DDRC Sale. Cicchini knowingly and willfully delayed execution of the DDRC Sale contract to avoid his contractual obligation to Galmish.

In July, 1997, after a five day trial the jury awarded Galmish \$1.5 million (\$492,000 compensatory damages and \$1 million punitive damages) and attorney fees. On August 26, 1997, the Court entered the Judgment Entry on the Verdict.

⁶ Transcript at 387.

⁷ Transcript at 648.

⁸ DDRC's general counsel testified he repeatedly changed the proposed agreement regarding insubstantial terms (Transcript at 235, 237), and, in December 1994, DDRC was ready to close the DDRC Sale (Transcript at 239). In her twenty years experience, she never had protracted negotiations where closing dates, but no other terms, change. Other DDRC representatives testified Cicchini requested all closing date extensions (Transcript at 394).

On October 15, 1997, the trial court awarded prejudgment interest from June 16, 1995 to the date of judgment. On October 20, 1997, it awarded attorney's fees equal to a contingent fee of one-third of the total jury verdict including compensatory and punitive damages and applicable interest.

On September 11, 1997 and November 10, 1997, Cicchini appealed the verdict and the rulings in favor of Galmish to the Fifth District Court of Appeals. Due to recusals, the Ninth Appellate District Court of Appeals heard the appeals.

On June 2, 1999, the appellate court reversed the verdict, finding error in denying Cicchini's motion for directed verdict.

On July 16, 1999, Galmish filed her Notice of Appeal and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. She appeals the Ninth District Court of Appeals decision.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1:

Where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion in good faith and in accordance with fair dealing.

This Court should adopt the Restatement (Second) of Contracts § 205 as the law of the State of Ohio: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

A. Restatement of Contracts §205

The Restatement of Contracts is a guide to courts and legislatures in developing contract law principles. See, e.g. *Illinois Controls, Inc. v. Langham*, 70 Ohio St. 3d 512 (1994). This

⁹ Transcript at 243-44.

Court is yet to adopt Section 205 or address the issue of the covenant of good faith and fair dealing.

B. Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is essential to every contract that grants one party discretionary power to avoid performance or defeat the vesting of another's rights in exchange for valuable consideration. The Supreme Court of Colorado captured the essence of contractual good faith, in holding:

Colorado, like the majority of jurisdictions, recognizes that every contract contains an implied duty of good faith and fair dealing. . . . The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations. . . . Good faith performance of a contract involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." . . . The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time. . . . The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party. . . . However, it will not contradict the terms or conditions for which the party has bargained. . . . Discretion occurs when the parties, at formation, defer a decision regarding performance terms of the contract. . . . [The] implied covenant of good faith and fair dealing is implied at law in every contract, [and a contract] provision precluding implied covenants [does] not prevent recovery . . . The merger and integration clauses do not [allow the defendant] to breach the implied covenant of good faith and fair dealing. The reasonable expectations of the parties remain vital considerations in every contract.

Amoco Oil Co. v. Ervin, 908 P.2d 493, 498-99 (Colo. 1995) (citations omitted).

Further, the Third Circuit Court of Appeals, applying Connecticut law, held: "In the majority of states, even though the express terms of a contract appear to permit unreasonable action, the duty of good faith limits the party's ability to act unreasonably in contravention of the other party's reasonable expectations." *Sterling National Mortgage Co. v. Mortgage Corner*, 97 F.3d 39, 42 (3rd Cir. 1996)(internal quotations omitted). See also, *Safeco Ins. Co. v. City of White House*,

Tenn., 36 F.3d 540, 548 (6th Cir. 1994) (recognizing implied covenant of good faith under Tennessee law); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989).

Good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. The good faith is **in the performance, not the formation**, of the contract. "When a court enforces the implied covenant it is in essence acting to protect the interest in having the services performed". Prosser, *Law of Torts* 613 (4th ed. 1989).

C. Ohio Law

In Ohio, contractual good faith is not a new concept. Ohio statutes and case law support the adoption of Section 205 and the doctrine of contractual good faith.

First, Ohio's version of the UCC requires good faith and fair dealing in contracts governed by the Code. Ohio Revised Code 1301.01 (S) defines "good faith" as "honesty in fact in the conduct or transaction concerned." *Id.* at §1301.01 (S). See also *id.* at §1302.01 (A)(2) ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade") The General Assembly unambiguously states "Every contract or duty... imposes an obligation of good faith in its performance or enforcement." *Id.* at §1301.09 (emphasis added). No logical reason exists for any distinction between a contract to sell realty and a contract to sell goods, insofar as the duty of good faith and fair dealing is concerned. Like the UCC, the Restatement Section 205 recognizes, in contracts, parties have an implied undertaking not to take opportunistic advantage. Section 205 goes beyond the UCC by imposing a duty of good faith and fair dealing which is both objective and subjective and, on all parties, not just merchants.

Second, several Ohio appellate courts recognize good faith is a consideration in some contractual transactions. *See, e.g., McCabe/Marra Company v. City of Dover*, 100 Ohio App.3d

139, 155 (1995) (promisor has burden of proving it made good faith efforts to satisfy contractual conditions, failure of which excuse his performance); *De Santis v. Soller*, 70 Ohio App.3d 226, 236 (1990) (party cannot take advantage of failure of a condition precedent to avoid performance when he made no effort to satisfy the condition); and *Kebe v. Nutro Machinery Corp.*, 30 Ohio App.3d 175, 178 (1985) (promisor must demonstrate good faith efforts to satisfy contractual conditions, failure of which excuse his performance). These courts often recognize considerations of fairness have long been the public policy in Ohio.

Finally, in *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 519 (1994), this Court laid the foundation for adoption of Section 205. In *Illinois Controls*, this Court relied on Justice Cardozo's opinion in *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917) and Restatement (Second) of Contracts § 77 to imply a contractual duty on behalf of one party to a preincorporation agreement to use reasonable efforts to market the products of the other party – even though the agreement contained no such express promise. This Court implied the duty to effect the parties' reasonable expectations under the preincorporation agreement.¹⁰ *Id.* at 520. In other words, this Court rejected a formalistic interpretation of the agreement to effect the parties' expectations, and prevent the other party from taking opportunistic advantage of his discretionary power.

D. Adoption of Section 205 and Covenant of Good Faith and Fair Dealing

In asking this Court to adopt Section 205 and the Covenant of Good Faith and Fair Dealing, Galmish cautions she is not seeking an extension of the holding in *Hoskins v. Aetna*, 6 Ohio St. 3d 272 (1983) or the establishment of a new tort. The issues concern breach of contract and the independent tort of fraud.

Cicchini's actions constitute a classic example of the violation of good faith and fair dealing. *See*, Burton, *supra* at 387. It was an evasion of the spirit of the deal. Here, the adoption of Section 205 is a logical extension of the case law and statutory interpretation.

This Court should reverse the appellate court's decision and reinstate the jury's verdict in Galmish's favor.

II. PROPOSITION OF LAW NO. 2:

If at the time a party enters a contract he has no intention of performing it, fraud is committed.

This Court should adopt the Restatement (Second) of Torts § 530 as the law of the State of Ohio: "A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."

A. Restatement (Second) of Torts §530

Like the Restatement of Contracts, Ohio courts regularly look to the Restatement of Torts (Second) for guidance.

The Restatement of Torts (Second) §530 applies to the case *sub judice*. Comment (c) to Section 530 addresses Cicchini's fraud.

Misrepresentation of intention to perform an agreement. The rule stated in this Section finds common application when the maker misrepresents his intention to perform an agreement made with the recipient. The intention to perform the agreement may be expressed but it is normally merely to be implied from the making of the agreement. Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit under the rule stated in § 525. This is true whether or not the promise is enforceable as a contract. If it is enforceable, the person misled by the representation has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.

Restatement (Second) of Torts § 530, Comment (c).

¹⁰ In the case *sub judice*, the appellate court strictly limited *Langham* to exclusive marketing contracts, and rejected its applicability to similar transactions. Court of Appeals Op. at 5.

The essence of this fraud is not the breach of the promise, but rather the promisor's intent, at contract execution, to not perform it. **Therefore, when a promisor enters a contract with the promisee and he has no intention of keeping his promise, he commits fraud.**¹¹

B. Ohio Law

To constitute fraud, the false representation must relate to a past or present fact upon which the defrauded party had a justifiable right to rely. Although, this Court has yet to adopt Section 530, Ohio's lower courts recognize fraud occurs when a contracting party misrepresents his present intent to perform an agreement. In other words, "a promise made with a present intention not to perform it is a misrepresentation of an existing fact – the speaker's present state of mind." *See, e.g., Link v. Leadworks, Corp.*, 79 Ohio App.3d 735, 742-743 (1992); *Dunn Appraisal Co. v. Honeywell Systems, Inc.*, 687 F.2d 877, 883 (6th Cir. 1987) (applying Ohio law); and *Snell v. Salem Ave. Ass'n*, 111 Ohio App.3d 23, 43 (1996) (following *Link*). Other state and federal courts also recognize this principle. *See, e.g., Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990); *Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F.Supp. 1201, 1208 (S.D.N.Y. 1986) (applying New York law).

C. Adoption of Section 530

Trial evidence revealed Cicchini never intended to comply with their Agreement. Cicchini *knew*, at the time of contracting, he would not complete the DDRC sale within the year because he would deprive Galmish of her share. His intention was contrary to his representation in the Agreement. Based upon Cicchini's false representations and other actions, the jury found fraud.

¹¹ The foregoing must be distinguished from the situation where the promisor has every intention of keeping his promise at the time he makes it, and then later decides to breach his promise. In that case, no actionable fraud pertains because any misrepresentation would be as to future performance, which constitutes promissory fraud. Promissory fraud is not actionable in Ohio, and this appeal does not argue that it should be.

The Ninth District Court of Appeals rejected this position in favor of one contrary to the Section 530's view that the law should be to allow victims of fraud in commercial transactions an adequate remedy. This Court must accept jurisdiction and reverse the Ninth District Court of Appeals decision.

III. PROPOSITION OF LAW NO. 3:

In an unambiguous contract, extrinsic evidence of a violation of the implied covenant of good faith and fair dealing and/or fraud is properly admissible.

It is axiomatic that evidence is admissible to prove or disprove a disputed fact if it meets the admissibility requirements of the Ohio Rules of Evidence and is not precluded by a substantive legal rule.

The Appellant concedes the Agreement is unambiguous. At trial, evidence extrinsic to the Agreement was used for two purposes: (1) to establish the breach of the implied covenant of good faith and fair dealings; and (2) to establish the independent tort of fraud. The trial judge correctly held this evidence admissible to prove Cicchini's fraud and covenant of good faith and fair dealing.

The appellate court erroneously misapplied the parol evidence rule and prior decisions from this Court to preclude both the fraud and breach of contract claims. Even more unfortunate is the growing trend among Ohio appellate courts to misuse the parol evidence rule, the Statute of Frauds, and *Ed Schory & Sons, Inc. v. Society National Bank*, 75 Ohio St.3d 433 (1996) to classify otherwise admissible evidence, as inadmissible, even though the evidence is not parol evidence, by definition. See, Morris G. Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds*, 23 AKRON L. REV. 1, 11-16 (1989).

The evidence offered in the case *sub judice* was not parol evidence, by definition. This Court must accept review to distinguish parol evidence, from extrinsic evidence used to prove the breach of the covenant of good faith and fair dealings and the independent tort of fraud.

IV. PROPOSITION OF LAW NO. 4:

Punitive damages are recoverable, upon proper proof, where a violation of the covenant of good faith and fair dealing is accompanied by the independent tort of fraud.

At trial, Galmish proved both claims, the violation of the covenant of good faith and fair dealing and the independent tort of fraud. The jury awarded her one million dollars.

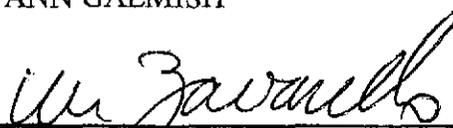
Courts have long permitted party to a contract to seek tort remedies if behavior constituting a contract breach also violates some recognized tort duty.

CONCLUSION

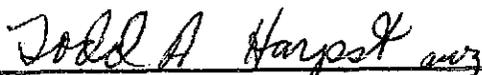
This Court should adopt the Restatement (Second) of Contracts §205. In so doing, Ohio will join the majority of jurisdictions recognizing the covenant of good faith and fair dealing. Second, this Court should adopt the Restatement (Second) of Torts §530. Parties will, then, be prohibited from misrepresenting their present intention to perform contracts. Ohio law will hold them accountable by providing a legal remedy for victims of the misrepresentation. Third, this Court should distinguish parol evidence which is improperly used to vary the terms of an unambiguous contract from properly used extrinsic evidence admissible to prove breach or intent. Finally, punitive damages are recoverable where a party proves a violation of the covenant of good faith and fair dealing, accompanied by the independent tort of fraud.

Appellant Mary Ann Galmish respectfully requests this Court to accept jurisdiction.

ATTORNEYS FOR THE APPELLANT,
MARY ANN GALMISH



A. William Zavarello, Esq. (0014172)
A. WILLIAM ZAVARELLO CO., L.P.A.
313 South High Street
Akron, OH 44308
(330) 762-9700; (330) 762-1680 Fax



Todd A. Harpst, Esq. (0067309)
DAY KETTERER RALEY WRIGHT RYBOLT, LTD.
121 Cleveland Avenue, South [P.O. Box 24213]
Canton, OH 44701-4213
(330) 455-0173; (330) 455-2633 Fax

PROOF OF SERVICE

A copy of the foregoing was served on Ralph Streza, Esq. and Natalie Peterson, Esq., Porter, Wright, Morris & Arthur, Attorneys for Appellee Guy Cicchini, at 925 Euclid Avenue, Cleveland, OH 44115 on July 15, 1999.



A. William Zavarello, Esq.

ORIGINAL

IN THE SUPREME COURT OF OHIO
ON COMPUTER - RAN

MARY ANN GALMISH,	:	Case No. 99-1337
	:	(On Appeal from the Stark
Appellant,	:	County Court of Appeals,
	:	Fifth Appellate District by
vs.	:	the Ninth Appellate District
	:	sitting by Assignment)
GUY CICCHINI,	:	
	:	Court of Appeals
Appellee.	:	Case Nos. 97 CA 00326, 97 CA 00403

**AMENDED MERIT BRIEF
OF APPELLANT MARY ANN GALMISH**

A. William Zavarello (0014172)
(COUNSEL OF RECORD)
Rhonda Gail Davis (0063029)
A. WILLIAM ZAVARELLO CO., L.P.A.
313 South High Street
Akron, OH 44308
(330) 762-9700
Fax No. (330) 762-1680

Ralph Streza (0017964)
(COUNSEL OF RECORD)
Natalie Peterson (0068449)
PORTER, WRIGHT, MORRIS &
ARTHUR
925 Euclid Avenue
Cleveland, OH 44115
(216) 443-9000

and
Counsel for Appellee,
Guy Cicchini

DAY, KETTERER, RALEY, WRIGHT & RYBOLT, LTD.
121 Cleveland Avenue, South
PO Box 24213
Canton, OH 44701-4213
(330) 455-0173
Fax No. (330) 455-2633

Counsel for Appellant,
Mary Ann Galmish

FILED
DEC 29 1999
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

Appellant, Mary Ann Galmish, is Appellee, Guy Cicchini's, ex-wife.¹ In their divorce, Galmish acquired valuable commercial property ["Property"] in North Canton, Ohio.

In 1993, DDRC² and Galmish negotiated for the Property's sale ["DDRC Sale"]. On September 20, 1993, Galmish and DDRC entered into a written option agreement ["Option Agreement"] to sell the Property to DDRC for \$765,000. On November 15, 1993, DDRC failed to purchase necessary adjacent properties before the Option Agreement deadline. DDRC paid to extend the Option Agreement.

In late March 1994, DDRC contacted Cicchini to convince Galmish to extend the option time again. Cicchini told DDRC that, in order to hold the Property, he would purchase it.

In late Spring, 1994, Cicchini convinced Galmish to sell him the Property for DDRC Sale negotiations.³ Both agreed the Property was worth much more than \$765,000.⁴ Cicchini said he could sell the Property to DDRC and get \$1.7 million.⁵ Cicchini and Galmish agreed, if Galmish sold the Property to Cicchini for \$765,000 (Option Agreement price), they would split, *equally*, DDRC Sale proceeds **exceeding** \$765,000.⁶

Thereafter, Cicchini promised, upon the Property's acquisition from Galmish, to sell it to DDRC. After *this* discussion, DDRC told Galmish it would not exercise its option or extend the option deadline.

¹ Unless indicated, the herein facts are in the trial transcript. Transcript references to facts are included. Little background or informational facts are included.

² DDRC wanted the Property to develop commercial retail establishments.

³ Galmish is not sophisticated in business, while Cicchini is savvy and successful. He recognized Galmish's lack of business savvy and opined she could not control money. Transcript at 497. Cicchini was part owner of a travel agency and owns a management company and seventeen successful McDonald's franchises. Transcript at 183, 185.

⁴ Transcript at 530.

⁵ *Id.*

⁶ *Id.*

On May 24, 1994, Galmish and Cicchini signed an agreement ["Agreement"] (Plaintiff's Trial Ex. 15). In addition to paying Galmish \$765,000 for the property, Cicchini agreed to pay Galmish one-half of the sale proceeds exceeding \$765,000 if Cicchini sold, transferred, or conveyed the property to DDRC **within one year of the execution of the agreement** (a new term added by Cicchini).⁷ On May 31, 1994, Galmish transferred title to Cicchini.

In the Cicchini-DDRC negotiations, Cicchini's attorney told relevant parties that Cicchini would not close the sale until the one year period ended.⁸ "No matter what happen[ed]," Galmish was to receive no further monies.⁹ Although Cicchini rejected DDRC's offer of direct payment to Galmish for release of her rights in the Agreement, DDRC was ready to close the DDRC Sale before the Agreement's one year period.¹⁰ Cicchini-DDRC negotiations were replete with his delays in closing the sale.¹¹

In the DDRC Sale Agreement, Cicchini negotiated two unusual provisions for confidentiality and escrow.¹² First, Cicchini required DDRC's silence on all DDRC Sale negotiations; DDRC could not disclose the DDRC Sale status to Galmish (Plaintiff's Trial Ex. 19). Second, Cicchini was permitted to transfer the Property to DDRC *before* May 30, 1995, by depositing the deed in escrow. After the closing, Cicchini could remove the deed from escrow, "substituting" a deed with a later closing date (Plaintiff's Trial Ex. 19). With the substituted deed, Galmish would believe the DDRC Sale was concluded outside the one year period.

⁷ Transcript at 195, 449, and 553.

⁸ Transcript at 238.

⁹ Transcript at 387.

¹⁰ Transcript at 648.

¹¹ DDRC's general counsel testified he repeatedly changed the proposed agreement regarding insubstantial terms (Transcript at 235, 237), and, in December 1994, DDRC was ready to close the DDRC Sale (Transcript at 239). In her twenty years experience, she never had protracted negotiations where closing dates, but no other terms, change. Other DDRC representatives testified Cicchini requested all closing date extensions (Transcript at 394).

¹² Transcript at 243-44.

STATEMENT OF CASE

On May 26, 1995, Galmish sued Cicchini in the Stark County Court of Common Pleas. Her claims included breach of contract, breach of the duty of good faith, and fraud.

In early June, 1995, less than one month after the one year period expired, Cicchini sold the Property to DDRC for \$1.75 million and closed on the DDRC Sale. Cicchini knowingly and willfully delayed execution of the DDRC Sale contract to avoid his contractual obligation to Galmish.

In July, 1997, after a five day trial the jury awarded Galmish One Million, Four Hundred Ninety Two Thousand Dollars (\$492,000 compensatory damages and \$1 million punitive damages) and attorney fees. On August 26, 1997, the Court entered the Judgment Entry on the Verdict.

On October 15, 1997, the trial court awarded prejudgment interest from June 16, 1995 to the date of judgment. On October 20, 1997, it awarded attorney's fees equal to a contingent fee of one-third of the total jury verdict including compensatory and punitive damages and applicable interest.

On September 11, 1997 and November 10, 1997, Cicchini appealed the verdict and the rulings in favor of Galmish to the Fifth District Court of Appeals. Due to recusals, the Ninth Appellate District Court of Appeals heard the appeals.

On June 2, 1999, the appellate court reversed the verdict, finding error in denying Cicchini's motion for directed verdict.

On July 16, 1999, Galmish filed her Notice of Appeal and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. She appealed the Fifth District Court of Appeals' decision.

On October 27, 1999, this Court granted jurisdiction.

On December 21, 1999, the Appellant filed her Merit Brief.

On December 27, 1999, the Appellant filed her Amended Merit Brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1:

Where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion in good faith and in accordance with fair dealing.

In this context, this Court should adopt the Restatement (Second) of Contracts Section 205 as the law of the State of Ohio: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

Galmish contends, for her first proposition of law, that where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion employing good faith and fair dealing.

A. Restatement of Contracts Section 205

The Restatement of Contracts is a guide to courts and legislatures in developing contract law principles. *See, e.g. Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St. 3d 512, 639 N.E.2d 771. Its provisions cover all aspects of contract law.

Of particular application in this case is Restatement (Second) of Contracts Section 205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Section 205 has been adopted or applied by many state and federal courts. *See, e.g., Marsu v. The Walt Disney Co.* (9th Cir. 1999), 185 F.3d 932; *Carma Developers v. Marathon Dev. Cal., Inc.* (1992), 2 Cal. 4th 342, 371, 826 P.2d 710; *Atlantic Richfield Co. v. Razumic* (Pa. 1978), 390 A.2d 736; *Wallace v. National Bank of Commerce* (Tenn. 1996), 938 S.W.2d 684; *Allis Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 216, 105 S. Ct. 1904, 1914, 85 L. Ed. 2d 206 (*applying* Wisconsin law); *Misco, Inc. v. United States Steel Corp.* (6th Cir. 1986), 184 F.2d 198. "The covenant of good faith finds particular application in situations where one

party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Marsu*, 185 F.3d at 937 (quoting *Carma*, 2 Cal. 4th at 372).

This Court has yet to adopt Section 205.¹³

B. Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is essential to every contract that grants one party discretionary power to avoid performance or defeat the vesting of another's rights in exchange for valuable consideration. *See Marsu*, 18 F.3d at 371 ("Such power must be exercised in good faith.") "The duty of good faith performance springs from the simple idea that certain expectations of fair and reasonable conduct are so fundamental that the parties rarely mention them in negotiation, and almost never distill them into express terms." M. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith* (April 1999), 40 Wm. & Mary L. Rev. 1123, 1128.

The Supreme Court of Colorado captured the essence of contractual good faith, in holding:

Colorado, like the majority of jurisdictions, recognizes that every contract contains an implied duty of good faith and fair dealing. . . . The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations. . . . Good faith performance of a contract involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." . . . The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time. . . . The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party. . . . However, it will not contradict the terms or conditions for which the party has bargained. . . . Discretion occurs when the parties, at formation, defer a decision regarding performance terms of

¹³ In *General Motors Corp. v. The Mahoning Valley Sanitary District* (6th Cir. Nov. 19, 1985), 780 F.2d 1021, 1985 WL 13944, unreported at *4-5, the Sixth Circuit Court of Appeals applied Section 205 in an Ohio case but the court discussed its difficulties due to the Supreme Court of Ohio's silence on this section's adoption.

Section 205 is a new section of the Restatement of Contracts, having been added in 1979. As far as our research reveals the Ohio courts have neither expressly accepted nor rejected this legal theory. In at least some contexts, the Ohio courts have recognized that covenants of good faith are implied in contracts. (citation omitted)...Whether the Ohio Supreme Court would adopt section 205 of the Restatement (Second) of Contracts is uncertain at best.

the contract. . . . [The] implied covenant of good faith and fair dealing is implied at law in every contract, [and a contract] provision precluding implied covenants [does] not prevent recovery . . . The merger and integration clauses do not [allow the defendant] to breach the implied covenant of good faith and fair dealing. . . . The reasonable expectations of the parties remain vital considerations in every contract.

Amoco Oil Co. v. Ervin (Colo. 1995), 908 P.2d 493, 498-99 (citations omitted).

Further, the Third Circuit Court of Appeals, applying Connecticut law, held: "In the majority of states, even though the express terms of a contract appear to permit unreasonable action, the duty of good faith limits the party's ability to act unreasonably in contravention of the other party's reasonable expectations." *Sterling National Mortgage Co. v. Mortgage Corner* (3d Cir. 1996), 97 F.3d 39, 42 (internal quotations omitted). See also *Safeco Ins. Co. v. City of White House, Tenn.* (6th Cir. 1994), 36 F.3d 540, 548 (recognizing implied covenant of good faith under Tennessee law); *Centronics Corp. v. Genicom Corp.* (N.H. 1989), 562 A.2d 187, 193.

Good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. The good faith is **in the performance, not the formation**, of the contract.¹⁴ "When a court enforces the implied covenant it is in essence acting to protect the interest in having the services performed". Prosser, *Law of Torts* 613 (4th ed. 1989). This Court has yet to address the issue of the covenant of good faith and fair-dealing.

C. Ohio Law

In Ohio, contractual good faith is not a new concept. Ohio statutes and case law support the adoption of Section 205 and the recognition of an implied covenant of good faith and fair dealing.

¹⁴ Galmish's fraud claim addressed the problem in contract formation. The fraud claim was separate from the claim for breach of the implied covenant of good faith and fair dealing; that claim went to the performance.

First, Ohio's version of the Uniform Commercial Code ["UCC"] requires good faith and fair dealing in contracts governed by the UCC. Ohio Revised Code §1301.01(S) defines "good faith" as "honesty in fact in the conduct or transaction concerned." *Id.* at §1301.01(S). *See also id.* at §1302.01 (A)(2) ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"). The General Assembly unambiguously states: "Every contract or duty... imposes an obligation of good faith in its performance or enforcement." *Id.* at §1301.09 (emphasis added). No logical reason exists for any distinction between a contract to sell realty and a contract to sell goods, insofar as the duty of good faith and fair dealing is concerned. Like the UCC, the Restatement Section 205 recognizes that, in contracts, parties have an implied undertaking not to take opportunistic advantage. Section 205 goes beyond the UCC by imposing a duty of good faith and fair dealing which is both objective and subjective and, on all parties, not just merchants.

Second, several Ohio appellate courts recognize good faith is a consideration in some contractual transactions. *See, e.g., McCabe/Marra Company v. City of Dover* (8th Dist. 1995), 100 Ohio App.3d 139, 155, 652 N.E.2d 236 (promisor has burden of proving it made good faith efforts to satisfy contractual conditions, failure of which excuse his performance); *De Santis v. Soller* (10th Dist. 1990), 70 Ohio App.3d 226, 236, 590 N.E.2d 886 (party cannot take advantage of failure of a condition precedent to avoid performance when he made no effort to satisfy the condition); and *Kebe v. Nutro Machinery Corp.* (8th Dist. 1985), 30 Ohio App.3d 175, 178, 507 N.E.2d 369 (promisor must demonstrate good faith efforts to satisfy contractual conditions, failure of which excuse his performance). These courts recognize that considerations of fairness have long been the public policy in Ohio.

Finally, in *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 519, 639 N.E.2d 456, this Court laid the foundation for adoption of Section 205. In *Illinois Controls*, this Court

relied on Justice Cardozo's opinion in *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917) and adopted 1 Restatement of the Law 2d, Contracts [1981] 197, §77, Comment d, Illustration 9, to imply a contractual duty on behalf of one party to a preincorporation agreement to use reasonable efforts to market the products of the other party – even though the agreement contained no such express promise. This Court implied the duty to effect the parties' reasonable expectations under the preincorporation agreement.¹⁵ *Id.* at 520. In other words, this Court rejected a formalistic interpretation of the agreement in order to effect the parties' expectations, and prevent the other party from taking opportunistic advantage of his discretionary power.

D. Adoption of Section 205 and Covenant of Good Faith and Fair Dealing

In asking this Court to adopt Section 205 and the Covenant of Good Faith and Fair Dealing, Galmish cautions she is not seeking an extension of the holding in *Hoskins v. Aetna* (1983), 6 Ohio St. 3d 272, 452 N.E.2d 1315, or the establishment of a new tort. This is a contract issue.

In its decision in the case at bar reversing the jury verdict in favor of Galmish on her breach of contract claim, the Fifth District Court of Appeals noted that the Supreme Court of Ohio has not extended this duty to all contractual situations. The appellate court was not willing to find an implied duty on the part of Cicchini to use reasonable efforts to sell the property within one year.

Galmish contends that this Court should extend the duty established in *Illinois Controls* to those commercial contracts where one party to a contract has the discretionary power to affect the rights of the other party. Breach of the implied covenant of good faith and fair dealings is a breach of contract. It is an evasion of the spirit of the deal.

¹⁵ In the case *sub judice*, the appellate court strictly limited *Langham* to exclusive marketing contracts, and rejected its applicability to similar transactions. Court of Appeals Op. at 5.

Ancillary to asking this Court to hold that where a contract gives one party a discretionary power to affect the rights of the other party, a duty is implied in law to exercise that discretion in good faith and in accordance with fair dealings, Galmish asks the court--*in this context*--specifically to adopt **Restatement of the Law 2d, Contracts (1981) 99, Section 205**. It states that **"Every contract imposes upon each party a duty of good faith and fair dealings in its performance and its enforcement."** This section of the Restatement is under the heading "Considerations of Fairness and the Public Interest", which has long been the public policy of this state. Comment (a) in particular notes that good faith performance of a contract emphasizes "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Galmish contends that this proposition of law is a logical extension of the holdings in *Illinois Controls*.

This Court should reverse the appellate court's decision on this issue and reinstate the jury's verdict in Galmish's favor.

II. PROPOSITION OF LAW NO. 2:

If, at the time a party enters a contract, he has no intention of performing it, fraud is committed.

This Court should adopt the Restatement (Second) of Torts Section 530 as the law of Ohio: "A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."

In this case, the breach of contract, namely the violation of the implied covenant of good faith and fair dealing, was accompanied by the *independent* tort of fraud. While the contract and tort claims are mingled, they are separate and independent. Courts have long permitted a party to a contract to seek tort remedies if behavior constituting a contract breach also violates some recognized duty in tort.

A. Restatement (Second) of Torts Section 530

Like the Restatement of Contracts, Ohio courts regularly look to the Restatement of Torts (Second) for guidance. Its Division 4, Chapter 22 addresses torts of misrepresentation. In particular, Sections 525 and 526 address liability for the tort of fraudulent misrepresentation (deceit) and the conditions under which misrepresentation is fraudulent. Courts refer to these sections to establish the basic claims for fraud.

~~The Restatement of Torts (Second) also contains Section 530 which addresses the intention of a promisor. Section 530 states:~~

§530. Misrepresentation of Intention

(1) A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention.

Rest. (2d) Torts Section 530, at 64.

Section 530 has been adopted or applied by state and federal courts. *See, e.g., Rutan v. Straehly* (1939), 289 Mich. 341, 286 N.W. 639; *Hanson v. American Nat'l Bank & Trust Co.* (Ky. 1993), 865 S.W.2d 302.

Comment (c) to Section 530 addresses Cicchini's fraud.

Misrepresentation of intention to perform an agreement. The rule stated in this Section finds common application when the maker misrepresents his intention to perform an agreement made with the recipient. The intention to perform the agreement may be expressed but it is normally merely to be implied from the making of the agreement. Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit under the rule stated in § 525. *This is true whether or not the promise is enforceable as a contract.* If it is enforceable, the person misled by the representation has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract. If the agreement [sic] is not enforceable as a contract, as when it is without consideration, the recipient still has, as his only remedy, the action in deceit under the rule stated in §525.

Restatement (Second) of Torts Section 530, Comment (c) (emphasis added).

The essence of this fraud is not the breach of the promise, but rather the promisor's intent, at contract execution, to not perform it. The fraud goes to the formation of the contract. **Therefore, when a promisor enters a contract with the promisee and he has no intention of keeping his promise, he commits the tort of fraud.**¹⁶ This particular type of fraud is sometimes referred to as the tort of deceit. *Prosser and Keeton on Torts* (5th Ed. 1984) §105, at 727.

B. Ohio Law

To constitute fraud, the false representation must relate to a past or present fact upon which the defrauded party had a justifiable right to rely. Although this Court has yet to adopt Section 530, Ohio's lower courts recognize fraud occurs when a contracting party misrepresents his present intent to perform an agreement. In other words, "a promise made with a present intention not to perform it is a misrepresentation of an existing fact – the speaker's present state of mind." *See, e.g., Link v. Leadworks, Corp.* (8th Dist. 1992), 79 Ohio App.3d 735, 742-43, 607

¹⁶ The foregoing must be distinguished from the situation where the promisor has every intention of keeping his promise at the time he makes it, and then later decides to breach his promise. In that case, no actionable fraud

N.E.2d 1140; *Dunn Appraisal Co. v. Honeywell Systems, Inc.* (6th Cir. 1987), 687 F.2d 877, 883 (applying Ohio law); and *Snell v. Salem Ave. Ass'n* (2d Dist. 1996), 111 Ohio App.3d 23, 43, 675 N.E.2d 555 (following *Link*). Other state and federal courts also recognize this principle. See, e.g., *Cohen v. Cowles Media Co.* (Minn. 1990), 457 N.W.2d 199, 202; *Brignoli v. Balch Hardy & Scheinman, Inc.* (S.D.N.Y. 1986), 645 F. Supp. 1201, 1208 (S.D.N.Y. 1986) (applying New York law).

C. Adoption of Section 530

Trial evidence revealed Cicchini never intended to comply with their Agreement. Cicchini *knew*, at the time of contracting, he would not complete the DDRC sale within the year because he could then deprive Galmish of her share of the proceeds. His intention was contrary to his representation in the Agreement. Based upon Cicchini's false representations and other actions, the jury properly found the tort of fraud.

Galmish asks the Court to hold that, **if a party enters a contract with no intention of performing it, the tort of fraud (deceit) is committed.** This principle is embodied in Section 530, which the Court is asked to adopt, and provides that misrepresentation of one's intent to perform a contract is fraudulent. Although this form of fraud has been recognized numerous times by Ohio's intermediate appellate courts, ~~this Court has not yet ruled on the issue.~~

The Fifth District Court of Appeals rejected this position in favor of one contrary to the Restatement view that the law should be to allow victims of the tort of fraud in commercial transactions an adequate remedy. This Court should reverse the Fifth District Court of Appeals' decision.

pertains because any misrepresentation would be as to future performance, which constitutes promissory fraud. Promissory fraud is not actionable in Ohio, and this appeal does not argue that it should be.

III. PROPOSITION OF LAW NO. 3:

In an unambiguous contract, extrinsic evidence of a violation of the implied covenant of good faith and fair dealing and/or fraud is properly admissible.

Galmish has conceded that the contract was unambiguous and that it was drafted by her lawyer. Galmish's claims (breach of duty of good faith and fair dealing and fraud) were proven. Of the three claims, the fraud claim received more evidentiary attention since it required *proof of* many elements and was the basis of the punitive damage claim. At trial, Galmish used evidence extrinsic to the Agreement for two purposes: (1) to establish the breach of the implied covenant of good faith and fair dealings; and (2) to establish the independent tort of fraud.¹⁷ The trial judge correctly held this evidence admissible to prove Galmish's tort claim of fraud and contract claim of breach of the covenant of good faith and fair dealing.

In evaluating the fraud claim in this case, in which the jury awarded Galmish one million dollars in punitive damages, the Court of Appeals erroneously concluded that parol evidence was improperly admitted to vary or add terms *to* an unambiguous contract.

Pursuant to *Burr v. Stark County Board of Commissioners* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, the tort of fraud¹⁸ has several elements:

- (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 such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,

¹⁷ She did not use the extrinsic evidence to *vary any contract term*

¹⁸ In *Prosser and Keeton on Torts*, the editors noted *Burr* involved the tort of deceit despite its unusual nature (involving pecuniary interests and personal anguish (but not personal injury)). 1998 Pocket Part at 103.

- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.

Id. at syllabus para. 2 (following *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407).

Galmish's fraud claim was deceit, due to Cicchini's intent not to perform it.

For the most part, the courts have limited deceit to those *cases where there is an intent to mislead*, and have left negligence and strict liability to be dealt with in some other type of action. There has been a good deal of overlapping of theories, and no little confusion, which has been increased by the indiscriminate use of the word "fraud", a term so vague that it requires definition in nearly every case.

Prosser & Keeton on Torts (5th ed. 1984) §105, at 727 (emphasis added).

"The claim for fraud [or deceit] must be premised on matters extrinsic to the written contract."

Edwards v. Thomas H. Lurie & Assoc. (10th Dist. Jan. 12, 1995), No. 9WE01-21, 1995 WL 12126, unreported.

Evidence extrinsic to the contract was properly admitted by the trial court. It was not used to vary or to explain the terms of an unambiguous contract. It was used to establish the breach of the covenant of good faith and fair dealings, and to establish the lack of any intent by Cicchini to carry out the terms of the contract at the time the contract was consummated (deceit).

~~It is axiomatic that evidence is admissible to prove or disprove a disputed fact if it meets~~
the admissibility requirements of the Ohio Rules of Evidence and is not precluded by a substantive legal rule.

Further, the Restatement (Second) of Torts Section 530 emphasizes the importance of using extrinsic evidence to prove fraud.

d. Proof of intention not to perform agreement. The intention that is necessary to make the rule stated in the Section applicable is the intention of the promisor when the agreement was entered into. The intention of the promisor not to perform an enforceable agreement **cannot be established**

solely by proof of its nonperformance, ... The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise.

Rest. (2d) Torts Section 530, Comment on Subsection (1), (d), at 65 (emphasis added).

In addition, Comment (c)(quoted earlier) also distinguished between the contract and tort action, indicating that both may relate to a contract.

The appellate court erroneously misapplied the parol evidence rule and prior decisions from this Court to preclude evidence necessary to prove both the fraud and breach of contract claims. Even more unfortunate is the growing trend among Ohio appellate courts to misuse the parol evidence rule, the Statute of Frauds, and *Ed Schory & Sons, Inc. v. Society National Bank* (1996), 75 Ohio St.3d 433, 662 N.E.2d 1074, to classify otherwise admissible evidence, as inadmissible, even though the evidence is not parol evidence, by definition. Morris G. Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds* (1989), 23 AKRON L. REV. 1, 11-16.

The evidence offered in the case *sub judice* was not parol evidence, by definition. In this appeal, this Court has the opportunity to clarify what is parol evidence and what is not. Uncertainty exists at the appellate level on this topic. This Court should clarify what is ~~permissible extrinsic evidence to prove the breach of the covenant of good faith and fair dealings~~ and the independent tort of fraud.

IV. PROPOSITION OF LAW NO. 4:

Punitive damages are recoverable, upon proper proof, where a violation of the covenant of good faith and fair dealing is accompanied by the independent tort of fraud.

Galmish asks this Court to hold punitive damages are recoverable, upon proper proof, where a violation of the covenant of good faith and fair dealing is accompanied by the independent tort of fraud. Entering into a contract where the other party only benefits if the sale occurs within one year with no intention of selling the Property within one year is fraud and, while it "mingles" with the breach of an implied covenant of good faith and fair dealing, it is an independent tort.

At trial, Galmish proved both claims, the violation of the covenant of good faith and fair dealing and the independent tort of fraud. In response, the jury properly awarded her one million dollars in punitive damages on the tort claim of fraud. (Cicchini did not object to the court's jury instructions regarding punitive damages.¹⁹ Further, the plain error doctrine does not apply.)

Cicchini's fraud and his egregious behavior were the basis of the punitive damages claim and award. This form of egregious misrepresentation is also known as the tort of deceit. The tort of deceit has a long history with contracts and involves the intent to mislead. In the Restatement (Second) of Torts, Division 4 (Misrepresentation) includes Topic 1 for fraudulent representation or deceit. Standard misrepresentation is not deceit. "In each case of alleged fraud the plaintiff, in order to be awarded punitive damages, must establish not only the elements of the tort itself but, in addition, must either show that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious."

¹⁹ See Tr. at 985. Cicchini was obligated to state a specific objection to direct the judge's attention to omissions and mistakes in the charge so the judge may correct them before the jury retires for deliberations. Ohio R. Civ. P. 51(A); *Singfield v. Thomas* (9th Dist. 1971), 28 Ohio App. 2d 185, 187.275 N.E.2d 644; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, syllabus para. 1, 436 N.E.2d 1001; *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St. 2d 41, 322 N.E.2d 629; *Yackel v. Kay* (8th Dist. 1994), 95 Ohio App. 3d 472, 479, 642 N.E.2d 1107; *Turner v. Bob Ross Buick, Inc.* (2d Dist. Nov. 22, 1993), No. 13809, 1993 WL485256, at *4-5, unreported.

Charles R. Combs Trucking, Inc. v. International Harvester (1984), 12 Ohio St.3d 241, 466 N.E.2d 883. Cicchini's type of intentional conduct is the reason why punitive damages are awarded.

Cicchini's type of fraud was premeditated and included ill will, hatred, and intentional conduct. Cicchini had a history of deception when it came to Galmish: their marriage, their divorce, and this profit split. He knew, when he executed the Agreement, that he had no intention of splitting the profit with her; he had a *plan* which would delay the transaction *beyond one year*. Even before he signed the Agreement, he contacted DDRC, informing them that he wanted Galmish to receive nothing. He repeated these ill-willed comments and became angry when pushed to expedite the deal so they could develop the Property. Many came forward to tell the jury of Cicchini's plan, including Bart Wolstein, other DDRC employees, and other witnesses. After all, it was Cicchini who asked for this extra clause (sale must occur within one year for Galmish to receive one-half of sale proceeds).²⁰ He even knew the amount of profit he would be able to get in negotiations. He knew that, at the time he entered the contract, he had no intention of splitting the share of the proceeds with his ex-wife.

At trial, the jury heard five days' testimony about his fraud and the depths to which he sank to accomplish his deceit.

Courts have long permitted a party to a contract to seek tort remedies if behavior constituting a contract breach also violates some recognized tort duty.

²⁰ Transcript at 195, 449, and 553.

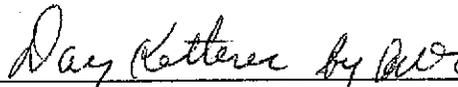
CONCLUSION

Appellant Mary Ann Galmish respectfully requests this Court reverse the decision of the Fifth District Court of Appeals and reinstate the trial court's judgment entered on the jury's verdict and its other rulings.

ATTORNEYS FOR THE APPELLANT,
MARY ANN GALMISH



A. William Zavarello, Esq. (0014172)
Rhonda Gail Davis, Esq. (0063029)
A. WILLIAM ZAVARELLO CO., L.P.A.
313 South High Street
Akron, OH 44308
(330) 762-9700; (330) 762-1680 Fax



DAY KETTERER RALEY WRIGHT RYBOLT, LTD.
121 Cleveland Avenue, South [P.O. Box 24213]
Canton, OH 44701-4213
(330) 455-0173; (330) 455-2633 Fax

CERTIFICATE OF SERVICE

A copy of the foregoing was served on Ralph Streza, Esq. and Natalie Peterson, Esq., Porter, Wright, Morris & Arthur, Attorneys for Appellee, at 925 Euclid Avenue, Cleveland, OH 44115 on December 28, 1999.



A. William Zavarello, Esq.