

IN THE SUPREME COURT OF OHIO

KIM C. BRECHBUHLER

Appellant,

vs.

09-0048

On Appeal from the Stark County
Court of Appeals Fifth Appellate
District

Court of Appeals Case No.
2007CA00281

**CLYDE B. BRECHBUHLER; AND,
BRECHBUHLER TRUCK SALES, LLC.**

Appellees.

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT KIM C.
BRECHBUHLER**

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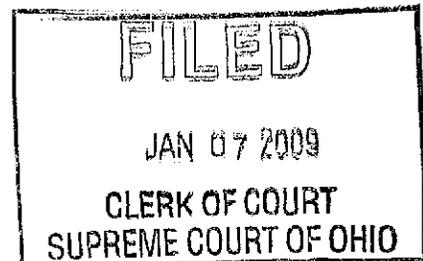


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STATEMENT OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

With the recent advent of increasing mortgage fraud claims, this case brings to the Court's attention the barring of the vast majority of fraudulent inducement claims by the parol evidence rule as it is being applied by lower courts pursuant to this Court's ruling in *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22. Therein, this Court held that the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement, however, "an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms." Id. at 29, quoting *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265. Because of the imprecise language employed in crafting the ruling in *Galmish* essentially all fraudulent inducement claims may be avoided by the parol evidence rule. The essential elements of fraudulent inducement, by definition, require a false representation material to the transaction. *Burr v. Stark Cty. Bd. Of Commrs.* (1986), 23 Ohio St.3d 69. It is simply difficult to conceive of a false representation **material to a transaction** that would not concern, at least to some extent, the same **subject matter as the transaction**, and therefore, Ohio's lower courts have followed and barred the majority of fraudulent inducement claims. Particularly, in this case, the trial court and the Court of Appeals held Appellant's fraudulent inducement claim barred, but neither court pointed to specific consistencies in the subject matter of the prior oral agreement with that of the subsequent writing.

To make matters more confusing for Appellant, the Fifth District Court of Appeals, where this appeal arises, previously announced in *Clemente v. Gardner*, that "the parole evidence rule cannot prevent a party from introducing extrinsic evidence for the purpose of proving fraudulent inducement." 5th Dist. No. 04LW1891, 2004-Ohio-2254, at ¶ 37. Furthermore, it "was

never intended that the parol evidence rule could be used as a shield to prevent the proof of fraud . . .” Id.¹ Now, however, the Court of Appeals is barring fraudulent inducement claims without even attempting an analysis of the consistency between prior agreements before excluding extrinsic parol evidence. Therefore, in order for more meaningful appellate review of fraudulent inducement cases, Appellant raises to this Court the question of whether a trial court must first determine consistencies in the subject matter between oral misrepresentations and subsequent written agreements prior to applying the parol evidence rule to bar a fraudulent inducement claim.

Second, this case is of great importance in that it presents the misapplication of the parol evidence rule in barring evidence of subsequent oral modifications or agreements. Specifically, while evidence of subsequent modifications or agreements should not be barred by the parol evidence rule, the Court of Appeals failed to address Appellant’s evidence of subsequent oral modifications, promises, and agreements before finding that the parol evidence rule barred his claims.

Finally, and of equally great importance, this case raises the question of whether an unjust enrichment or breach of contract claim is barred against an investor or creditor of a limited liability company solely by virtue of a determination that funds received by a Limited Liability Company were an investment and thus subject to risk.

STATEMENT OF THE CASE

This case involves various misrepresentations and promises made to Appellant Kim C. Brechbuhler (Son) by Appellee Clyde B. Brechbuhler (Father) that induced Son to gratuitously assign his membership interest in Brechbuhler Truck Sales, LLC., (BTS) over to Father.

¹ The Seventh District Court of Appeals Heard Appellant’s Appeal as of Right Upon the Recusal of the Judges of the Fifth District Court of Appeals.

Importantly, Father and Son executed a second assignment agreement that transferred certain real estate rights away from Son and BTS over to another entity owned solely by Father, and at the time of the execution of the second agreement Father reiterated his misrepresentations and promises. Specifically, Father falsely represented to Son that the sole reason for the assignment was to obtain a better interest rate on a commercial loan, and that Son's interests would be protected and would be returned to him at the earlier of the paying off of BTS's real estate loan, or Father's death, whichever occurred first. Not long after the ink dried on the paper, Father terminated Son's employ, and Son lost his business and his livelihood.

Relying on this Court's ruling in *Galmish v. Cicchini*, the trial court concluded that Son's fraudulent inducement claims were barred by the application of the parol evidence rule without making any determination whatsoever whether the proffered evidence of fraud concerned the same subject matter or directly contradicted the terms of the parties subsequent written assignment. The Court of Appeals, likewise, held that Appellant's claims of fraudulent inducement and unjust enrichment were barred by the application of the parol evidence rule, ignoring evidence of fraudulent inducement, and evidence of subsequent oral promises and modifications, and without conducting any analysis of the consistency or inconsistency between the subject matter of the oral promises and misrepresentations with the subsequent writings.

Lastly, this case involves a sum of \$120,000.00 that Son loaned to BTS. The trial court held that the money loaned by Son to the business was an investment and not a loan, and reasoned that since an investment is subject to risk, Son could not maintain an unjust enrichment claim or a breach of contract claim against BTS for failing to repay him. The Court of Appeals, without citing any authority for the proposition that an action cannot be maintained against a limited liability company by an investor for unjust enrichment affirmed the trial court's decision

of September 14, 2007, and upheld the trial court's grant of summary judgment in favor of Appellee on all of Appellant's claims.

STATEMENT OF FACTS

In the Fall of 2002, Appellant, Kim C. Brechbuhler (Son) formed Brechbuhler Truck Sales, L.L.C. (BTS) as sole member and purchased the assets of an existing truck sales company. Both Son and appellee Clyde Brechbuhler (Father) guaranteed one promissory note with First Merit Bank, a promissory note to the seller of the acquired truck sales business, and a lease guarantee.

Son operated BTS as sole member and manager and generated gross sales in excess of thirty four million dollars through November of 2005. Meanwhile, Son's company BTS made all of the payments on the financial obligations of BTS. As the company became profitable in 2005, Father, whose only role prior to that time was as a guarantor, and without Son's knowledge, contacted Son's attorney, and falsely stated to him that First Merit Bank was requiring that Son transfer his membership interest in BTS over to Father. Father then directed that paperwork be prepared (the first assignment) transferring Son's interest in BTS over to Father.

After obtaining the paperwork from Son's attorney, **both prior to and after executing the first assignment**, Father falsely stated to Son that his interest in the company would be protected and that it would be returned to him after the earlier of his death or when the real estate that BTS operated the business on was paid off, and falsely stated that the assignment was being required by First Merit Bank.² Son, induced by Father's false statements, then executed an

² Deposition of Kim C. Brechbuhler at 198-200; The Condition of Paying off the Real Estate occurred.

assignment (the first assignment) of his membership interest on or about November 7th, 2005.³

Son did not receive any remuneration for executing the assignment.

After obtaining the assignment of Son's membership interest in BTS, Father (whose net worth exceeded \$10,000,000) transferred BTS's rights under a lease with an option to purchase agreement which Son had negotiated, over to another Limited Liability Company owned solely by Father (the second assignment). Importantly, Father reiterated at that time that appellant would be returned to his interest when the real estate was paid off. Meanwhile, Son, through BTS had made all of the payments on the real estate and had reduced the amount owed on it to \$464,000.00. An appraisal of the property done shortly before the transfer of the real property from BTS to Father valued the property at \$900,000.00. Father, in deposition testimony, testified that he had to gain control of BTS because he wanted to give more money to charity.

Thereafter, instead of returning Son's interest in BTS when the real estate was paid off, Father terminated Son's employ as President of BTS on December 9, 2006. Thereafter, Son filed suit on January 26, 2007, and the trial court granted Appellees summary judgment as to all of Son's claims, and the Court of Appeals Affirmed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Prior to Applying the Parol Evidence Rule to a Fraudulent Inducement Claim, A Trial Court Must First Make a Determination that False Representations That Induce the Making of a Contract Pertain to the same Subject Matter or are Directly Contradicted by a Subsequent Written Agreement.

In this Proposition of Law, Appellant urges this Court to recognize that the lower court's are barring the majority of fraudulent inducement claims without making an express determination of the consistency of prior oral negotiations and subsequent written agreements.

³ A membership interest in an Ohio Limited Liability Company is personal property (O.R.C. §1705.17) and therefore is not subject to the statute of frauds.

In this case, Appellant (Son) sought damages in tort for fraudulent misrepresentation caused by three misrepresentations made by Appellee (Father) that induced Son to gratuitously assign his membership interest in Brechbuhler Truck Sales, LLC., (BTS) over to Father. Father made the following three misrepresentations to Son: (1) that Father and Son's bank (First Merit) was requiring a transfer of Son's membership interest; (2) that Son's membership interest would be returned to him upon the earlier of the paying off of the real estate where Son conducted his business or upon Father's death, whichever occurred first; and, (3) that Son's interest would be protected and returned to him, none of which were true.

Son, induced by Father's false statements executed an assignment (the first assignment) of his membership interest on November 7th, 2005. Father, realizing the need for Son's consent to the transfer of Real Property upon which Son's business was located, reiterated his falsehoods after the first assignment and prior to a second assignment which transferred real estate rights over to another business owned solely by Father. Son, gave the following deposition testimony regarding these events:

A. Oh, he [Father] made a promise to me right before we closed. He also made a promise to me when I was sitting here upstairs with Fred Haupt [Father's Attorney] when I signed over the 100 percent ownership of the company.⁴

At the occasion of the execution of the second assignment which induced Son to consent to the transfer of the real estate assets of BTS over to Father, Father again promised to Son that:

A. I knew the situation. The situation was like I have told you several times: "Sign those documents for the interest rate." My interests were protected. The company was to return to me when the building was paid off—and he [Father] said, "Let's pay it off as soon as we can."

Q. All right.

⁴ Deposition of Appellant Kim C. Brechbuhler at p. 60-61.

A. And he said – the third thing was his death. But it was represented to me time and time again that it was just to get a better interest rate. That was the only reason this whole thing was ever done, the only reason.⁵

Next, with respect to Father's false statement to Son that the sole reason for the assignment of Son's membership interest was to obtain re-financing with First Merit, Son produced the affidavit of Son's attorney who deposed that Father telephoned him asking him to prepare an assignment because First Merit bank was requiring that Clyde Brechbuhler [Father] gain control of the company in order to make a refinancing loan. Documents produced in discovery demonstrated that Father's statement to Son that their bank was requiring an assignment of Son's membership interest was false, as, unbeknownst to Son, First Merit had closed the loan ten days prior to Father gaining control of Son's Company through fraud. The trial court, despite Appellant's pleas, refused to consider that evidence.

In the trial court's only reference to the barring of Son's fraudulent inducement claim the trial court stated "[d]efendants also argue Plaintiff's claims are barred by the parol evidence rule, which, simply put, prohibits parties from introducing evidence of antecedent understandings and negotiations when the parties have expressed their complete agreement in a writing. Plaintiff responds that Clyde [Father] promised to return his interest in B.T.S. before and after the assignment. The Court finds that there is simply no evidence of multiple promises, including any second or subsequent promise by Clyde [Father] to return Plaintiff's interest in BTS once the real estate was paid off."

Likewise, the Court of Appeals never pointed to any language in the simple assignment agreement which would contradict Father's misrepresentation as to the bank financing or the paying off of the business real estate. In other words, neither court made an express

⁵ Deposition of Appellant Kim C. Brechbuhler at p. 198-200.

determination that any of the three misrepresentations that induced Son to consent to either of the assignment agreements he executed directly contradicted with the written assignment, and therefore erred in finding his claims barred by the parol evidence rule. Simply stated, this Court's ruling in *Galmish* desperately needs clarification in order that our courts do not continue to interpret the parol evidence rule as a rule prohibiting the introduction of evidence of subsequent oral promises or modifications, or bar all fraudulent inducement claims without first making a determination of the consistency between oral misrepresentations and subsequent written agreements. Since this Court's decision in *Galmish*, the vast majority of fraudulent inducement claims have been barred by Ohio courts. Thus, this Court should exercise its discretionary jurisdiction and offer additional guidance to Ohio's courts concerning this important question.

Proposition of Law No. 2: The Parol Evidence Rule Does not Bar Evidence of Subsequent Oral Agreements or Modifications.

In this Proposition of Law, Appellant asks this Court to send a clear message to the Ohio's lower court's regarding the timing of the application of the parol evidence rule. In this case, Father made promises to Son both before and after an assignment agreement. Nothing in the parol evidence rule permits the barring of evidence of subsequent agreements or modifications. *Uebelacker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268 at 273. "[A] gratuitous oral agreement to modify a prior contract is binding if it is acted upon by the parties and if a refusal to enforce the modification would result in a fraud or injury to the promisee." *Eske Properties, Inc. v. Sucher*, 2nd Dist. No. 19840, 2003-Ohio-6520 at ¶37. Appropriately, subsequent oral agreements could be enforced. *Id.* Even though Son presented deposition testimony that Father made several misrepresentations and oral promises to him both before and after both of the assignments, the trial court summarily disregarded his deposition testimony, and

the Court of Appeals never even addressed it. Therefore, this Court should exercise its discretionary jurisdiction and should clearly set forth the proposition of law that evidence of subsequent modifications, negotiation, and agreements are never barred by the application of the parol evidence rule.

Proposition of Law No. 3: The Determination That Funds Received by a Limited Liability Company are an Investment Instead of a Loan Does Not Preclude an Investor or a Creditor from maintaining an Unjust Enrichment Claim.

In this Proposition of Law, Appellant asks for this Court to recognize that both lower courts' determinations that funds Appellant gave BTS were an investment instead of a loan barred his unjust enrichment claim were erroneous and that summary judgment was inappropriately granted to Appellee. Appellant's unjust enrichment claim concerns the sum of \$120,000.00 that he loaned Appellee BTS. Ignoring evidence to the contrary, both lower courts concluded that no genuine issue of material fact existed as to Son's unjust enrichment claim holding that the money son handed over to BTS was an investment and that precluded his ability to bring an unjust enrichment claim. Son produced his deposition testimony and that of the bookkeeper/controller of BTS as follows:

Q. How have you arrived at the sum of \$120,000 if you don't know any of the details?

A. Oh, that's what Kathy Mann told me the company owes me, between Kathy Mann—yeah. [Kathy Mann is the bookkeeper/controller for BTS]

Deposition of Kim Brechbuhler, p. 92. Furthermore, Appellant introduced the deposition testimony of Kathy Mann, the financial controller and bookkeeper for BTS who testified that:

Q. As the person doing the books for Brechbuhler Truck Sales do you recall that there was a note payable to Kim Brechbuhler for 120,000?

A. There was a note payable officer.

Q. And who was that officer?

A. I couldn't - - it was my understanding that it was Kim [Son].

Q. And at some point in 2007 that \$120,000 comes off the balance sheet, do you recall that?

A. Yes.

Q. Okay. Who directed you to remove that note payable from the -- from the books of the company?

A. I did not remove it.

Q. Do you know who did remove it?

A. Yes.

Q. And could you tell me who that is?

A. Kevin Kirkland [an independent accountant for BTS].

Q. And did Mr. Kirkland say why he was taking it off the books?

A. It was a - - per Clyde [Father].

Deposition of Kathy Mann, p. 28-29.

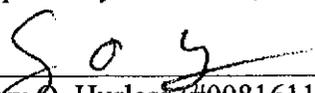
Despite the fact that both lower courts inexplicably did not take the facts as most favorable to Appellant, both courts reasoned that Son's \$120,000 was an investment, and he could not recover under a theory of unjust enrichment. There is no such law of the case in Ohio, as is evidenced by the Court of Appeals lack of a citation for that proposition of law. The elements of unjust enrichment are simply "(1) a benefit conferred by the plaintiff upon a defendant; (2) knowledge by the defendant of such benefit; and (3) retention of the benefit by the

defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179 at 183. In the instant case, Appellant benefitted Appellees Father and BTS by loaning \$120,000.00 to BTS. Appellee Father knew of the amount due Son as evidenced by his direction to the accountant to remove the record of it from the books of BTS in 2007. Under the circumstances, where Appellant's membership interest was obtained through fraud, Appellant submits that it would be unjust for Appellees to retain the benefit of Appellant's money, and that the question of whether Appellant's \$120,000.00 is considered an investment or a loan is immaterial to Appellant's unjust enrichment action. Therefore, Appellant respectfully requests that this Court exercise its discretionary jurisdiction in order to address whether Appellant's unjust enrichment claim was properly barred.

CONCLUSION

For the reasons outlined above, this case presents the Court with three important propositions of law. First, a reviewing court should determine whether or not misrepresentations are consistent with a subsequent writing prior to applying the parol evidence rule and barring a fraudulent inducement claim. Second, reviewing courts should never apply the parol evidence rule to bar evidence of subsequent negotiations, modifications, or agreements. Finally, an unjust enrichment claim should not be barred simply because of a determination that funds received by a limited liability company are an investment instead of a loan. Therefore, Appellant respectfully requests that this Court grant jurisdiction to review this case in order that the important issues presented herein can be decided on the merits.

Respectfully Submitted,

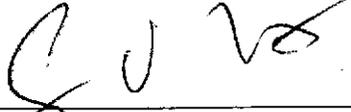


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PROOF OF SERVICE

A copy of the foregoing was served by regular U.S. mail this 6th day of January, 2009 to David E. Butz, and Nathan D. Vaughan, P.O. Box 36963, Canton, Ohio, 44735-6963, attorneys for Appellees Clyde B. Brechbuhler, and Brechbuhler Truck Sales, LLC.



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STATE OF OHIO)
)ss:
COUNTY OF STARK)

IN THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT

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KIM C. BRECHBUHLER

C.A. No. 2007CA00281

Appellant

v.

CLYDE B. BRECHBUHLER, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF STARK, OHIO
CASE No. 2007CV00449

1/8/09

DECISION AND JOURNAL ENTRY

(R)

Dated: November 24, 2008

CARR, Presiding Judge.

{¶1} Appellant, Kim Brechbuhler (“Son”), appeals the judgment of the Stark County Court of Common Pleas which entered summary judgment in favor of Appellees, Clyde Brechbuhler (“Father”), Brechbuhler Truck Sales LLC (“BTS”), C-Wand Properties LLC (“C-Wand”), Alex Clarke (“Clarke”), and Nathan Hutton (“Hutton”). This Court affirms.

I.

{¶2} On September 18, 2002, Son entered into an asset purchase agreement, on behalf of BTS, with Allied Truck Sales Co., Inc., to purchase Allied’s Mack Truck franchise. In October of 2002, the acquisition by BTS was completed with Father providing or guaranteeing all of the compensation obligations as set forth in the final agreement.

{¶3} On November 7, 2005, Son assigned his membership interest to Father. As a part of the assignment, Son designated Father “as his successor to occupy the office of Manager[,]” and provided that the membership interest was “free and clear of any liens or encumbrances.”

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On December 14, 2005, Father, on behalf of BTS, assigned the lease and underlying obligation to C-Wand. On December 9, 2006, Father terminated Son's employment at BTS.

{¶4} On January 26, 2007, Son filed a complaint against Father, BTS, Clarke, C-Wand, and Hutton. On July 27, 2007, Son filed a "motion for partial summary judgment of defendant's counterclaims[.]" On the same day Father, C-Wand and BTS filed two separate motions for summary judgment which collectively moved the trial court for summary judgment on all of Son's counts; Hutton and Clarke filed a motion for summary judgment; and Father filed a third motion for summary judgment "on defendant's counterclaims, count IX and X."

{¶5} On September 14, 2007, through three separate journal entries, the trial court denied Son's motion for partial summary judgment, denied Father's motion for summary judgment on counterclaim counts nine and ten, but granted Father, BTS, and C-Wand's first and second motion for summary judgment, as well as Clarke and Hutton's motion for summary judgment as to the counts against them. On October 4, 2007, Son filed a timely notice of appeal.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN GRANTING [] APPELLEES' MOTION[S] FOR SUMMARY JUDGMENT ON [SON'S] FRAUDULENT INDUCEMENT CLAIM BY ERRONEOUSLY DETERMINING THAT OHIO'S STATUTE OF FRAUDS BARRED [SON'S] CLAIM."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN GRANTING [] APPELLEES' MOTION[S] FOR SUMMARY JUDGMENT ON [SON'S] FRAUDULENT INDUCEMENT CLAIMS BY ERRONEOUSLY DETERMINING THAT THE PAROL EVIDENCE RULE BARRED [SON'S] FRAUDULENT INDUCEMENT CLAIM."

{¶6} Son argues that his claim that Father fraudulently induced him into assigning all of the rights to BTS is not barred by Ohio's statute of frauds or the parol evidence rule. This

Court disagrees as to Son's parol evidence claim, therefore rendering moot his claim regarding the statute of frauds.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶10} In order to set forth a case for fraudulent inducement, the following elements must be established: (1) that the representation in question was “a representation material to the

transaction;” (2) that was “made falsely, with knowledge of its falsity, or with utter disregard and recklessness regarding its truth or falsity; (3) with the intent to mislead another into reliance; (4) justifiable reliance on the representation or concealment; (5) and injury proximately resulting from such reliance.” *Brownstone Developers II, LLC v. Jivan Properties, LLC*, 5th Dist. No. 2007-CA-00160, 2008-Ohio-883, at ¶26, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus.

{¶11} In the case before the court, Son argues that the trial court erred in granting summary judgment as to his fraudulent inducement claims because he did not seek to enforce any oral contracts or promises made between him and father. Rather, Son argues that he was induced into assigning his interest in BTS by the allegedly fraudulent promises made by Father. However, this Court finds the trial court correctly found that Son’s fraudulent inducement claims were barred by the parol evidence rule.

{¶12} It is important to recognize, as pointed out by Son, that the Supreme Court of Ohio has noted that “the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement.” *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 28. However, the high court went on to hold in the same case that “the parol evidence rule may not be avoided ‘by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by a signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.’” *Id.* at 29, quoting *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, paragraph three of the syllabus. The Supreme Court further explained its holding and provided:

“In other words, ‘[t]he Parol Evidence Rule will not exclude evidence of fraud which induced the written contract. But, a fraudulent inducement case is not

made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit.” *Galmish*, 90 Ohio St.3d at 29.

{¶13} In the case at hand, Son is attempting to avoid the parol evidence rule and have the terms of an alleged prior verbal agreement with his Father substituted for the terms of an unambiguous written agreement which was signed by Son. More specifically, Son wishes to enforce the unsubstantiated oral agreement which would cause the membership interest and property to revert back to him upon the death of Father, or upon the satisfaction of the debts on the property; however, this directly contradicts the terms of the written assignment which transferred all interest to Father, and which dealt with the exact same subject matter as the alleged oral agreement. As pointed out by the Supreme Court, such “contradictory assertions [are] exactly what the Parol Evidence Rule was designed to prohibit.” *Id.* Therefore, Son’s fraudulent inducement claims fail as excluded by the parol evidence rule.

*Did Not Address
Subs. Agmt*

{¶14} Son also claims that the trial court erred in finding that his fraudulent inducement claims were prohibited by the statute of frauds. However, this claim is moot as it has already been determined that the fraudulent inducement claims fail under the parol evidence rule.

{¶15} Son’s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN FINDING NO GENUINE ISSUE OF MATERIAL FACT EXISTED ON [SON’S] UNJUST ENRICHMENT CLAIM.”

{¶16} Son argues that the trial court erred in finding that there was no genuine issue of material fact “as to whether the \$120,000.00 that appellant loaned BTS was an investment or a

loan” that was subject to repayment, and granting summary judgment as to his breach of contract/unjust enrichment claim. This Court disagrees.

{¶17} The standard of review for a trial court’s grant of summary judgment is de novo and is set forth above.

{¶18} This Court has found that “[i]n order to recover under a theory of unjust enrichment, a plaintiff must prove by a preponderance of the evidence: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant was retaining that benefit under circumstances where it would be unjust for him to retain that benefit without payment.” *Davis v. Estate of Hyden*, 5th Dist. No. 07AP060034, 2008-Ohio-2644, at ¶18, citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶19} In order to set forth a viable claim for breach of contract, one must successfully set forth the following: “the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach.” (Internal citations omitted). *Phillips v. Spitzer Chevrolet Co.*, 5th Dist. No. 2006CA00002, 2006-Ohio-4701, at ¶17.

{¶20} In his complaint, Son alleged that “Defendant [BTS] has breached its obligation to repay Plaintiff the sum of One Hundred Twenty Thousand Dollars (\$120,000), loaned by Plaintiff to Defendant [BTS][,]” and “therefore have been unjustly enriched by retaining Plaintiff’s loan of One Hundred Twenty Thousand Dollars (\$120,000).” However, in granting summary judgment in favor of Appellees on this cause of action, the trial court addressed it solely in terms of breach of contract. On appeal, Son alleges that the court erred in granting summary judgment as to his unjust enrichment claim. In any event, the ultimate issue on appeal

is whether there was a “genuine issue [] of material fact [] as to whether the \$120,000.00 was an investment or a loan subject to repayment to [Son][.]”

{¶21} As support for his argument, Son points only to the testimony of Kathy Mann, who Son characterized as “the financial controller and bookkeeper for BTS[.]” In her deposition, Kathy Mann testified that she recalled a note payable in the amount of \$120,000, that she believed it was payable to Son, and that the note payable was eventually removed from the books of BTS.

{¶22} However, in Son’s own testimony he recognized that the disputed \$120,000 was in fact an investment, and also that it was in part a payment for money he had taken from BTS and not yet repaid. When asked if he invested any personal funds into BTS, Son replied “I’ve got about 120,000 in it.” Later in the deposition, Son reiterated the point stating “I’ve got 120- invested in it[.]” and that the investment was made by the issuance of various checks.

{¶23} While Son provided evidence that there potentially was a note payable to him in the amount of \$120,000 in the records of BTS, he completely fails to recognize his own admission that the amount he now disputes was actually an investment in BTS, and not a loan. Accordingly, Son has failed to set forth specific facts that refute his own testimony that the grant of \$120,000 was an investment, and has not demonstrated that a genuine triable issue remains.

{¶24} Son’s third assignment of error is overruled.

*whether investment or loan should be
subject to
repayment.*

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED IN GRANTING [] APPELLEES’ MOTION FOR SUMMARY JUDGMENT ON [SON’S] TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CLAIM BECAUSE [SON] PRESENTED GENUINE ISSUES OF MATERIAL FACT.”

{¶25} Son argues that the trial court erred in granting summary judgment on his tortious interference with a business relationship claim in regard to the actions of Clarke and Hutton, and C-Wand. This Court disagrees.

{¶26} This Court reviews a trial court's granting of summary judgment as to tortious interference with a business relationship de novo as set forth above.

{¶27} In order to prevail on a claim of tortious interference with a business relationship, a plaintiff must demonstrate: "(1) a business relationship or contract; (2) the wrongdoer's knowledge of the relationship or contract; (3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages." *Davis v. Johnson*, 5th Dist. No. 07CA40, 2007-Ohio-6567, at ¶70, quoting *Brookside Ambulance, Inc. d.b.a. Rumpf Ambulance Serv. v. Walker Ambulance Serv.* (1996), 112 Ohio App.3d 150, 155-56. In order for there to be recovery, there must be malicious action on the part of the wrongdoer. *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Nos. 22098 & 22099, 2005-Ohio-4931, at ¶88, citing *A&B-Abell Elevator Co., Inc., v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 15. Furthermore, "even if an actor's interference with another's contract causes damages to be suffered, that interference does not constitute a tort if the interference is justified." *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 176.

{¶28} In regard to Clarke and Hutton, Son fails to establish any "intentional and improper action" that rose to the level of malice. Furthermore, Son fails to make any connection between the actions he alleges as improper and his eventual termination from BTS. In support for his argument, Son provides only that Clarke signed documents before he was officially hired; that Father, Clarke and Hutton contemplated eventually selling BTS after Father gained control;

and that Clarke had called BTS and spoke with employees prior to the official beginning of his employment. However, Son failed altogether to offer any argument as to how these actions were malicious in nature and were carried out in order to terminate his business relationship with BTS. Accordingly, Son has failed to establish a claim for tortious interference with a business relationship against Clarke and Hutton.

{¶29} In regard to C-Wand, Son again fails to establish any behavior that could be deemed improper or malicious. The only identifiable argument offered by Son that C-Wand behaved improperly was that C-Wand “intentionally t[ook] title away from BTS[,]” and that Father, acting as owner of C-Wand, failed to return Son’s membership interest in BTS. First, title was not taken from BTS, but voluntarily assigned to C-Wand by BTS; and second, Son has failed to offer any evidence establishing that he was entitled to the return of any membership interest in BTS.

{¶30} Not only has Son failed to show any malicious action on the part of C-Wand, but he has also failed to argue how the actions he alleges to be improper prevented a contract formation, procured a breach of contract, or terminated a business relationship. Accordingly, Son has failed to establish a claim for tortious interference with a business relationship against C-Wand.

{¶31} Son’s fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

“THE TRIAL COURT ERRED UNDER CIV. R. 56(C) BY NOT TAKING THE FACTS MOST FAVORABLE TO [SON] AND INSTEAD ADOPTING THE FACTS AS PRESENTED BY [] APPELLEES.”

{¶32} Son argues that the trial court erred in not construing the facts before it in a light most favorable to Son, and because the trial court “invented facts that were never presented as part of the record.” This Court disagrees.

{¶33} As mentioned above, a trial court must view the facts and evidence in the light most favorable to the non-moving party when determining whether summary judgment is appropriate. See *Viock*, supra. However, the non-moving party still has a burden to set forth specific facts that demonstrate that a genuine triable issue exists. See *Tompkins*, supra. “The mere fact that there is a factual dispute is not necessarily sufficient to defeat a motion for summary judgment. The dispute must be over a material fact.” *Mount v. Columbus & S. Ohio Elec. Co.* (1987), 39 Ohio App.3d 1, 2. See, also, *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248 (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”). “Irrelevant and unnecessary factual disputes will not preclude summary judgment.” *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d. 313, 322, citing *Anderson*, 477 U.S. at 247-48. Furthermore, “[a] fact is material when it affects the outcome of the case under the applicable substantive law.” *Campbell v. Chris’s Cafe, Inc.*, 5th Dist. No. 2005-CA-108, 2006-Ohio-4063, at ¶12.

{¶34} In support of his argument, Son provides three examples of how the trial court failed to view the evidence in a light most favorable to him, as the non-moving party. Son argues that the trial court incorrectly stated that Father had provided Son with “a lifetime of financial assistance,” that the trial court cited a portion of Father’s deposition that did not support the proposition for which it was cited, and that the trial court’s judgment entry showed that genuine issues of material fact existed. However, these examples do not show that the trial court

failed to view the evidence in the light most favorable to Son, but rather are instances where the trial court summarized the evidence before it, and the summations just happened to be adverse to Son. That the trial court is to view the evidence in a light most favorable to Son, does not mean that it must find that all evidence supports Son's claims.

{¶35} As noted above, notwithstanding the fact that the evidence is to be viewed in a light most favorable to the non-moving party, the non-moving party still has the burden to show genuine triable issues remain once the moving party points to evidentiary material that shows no genuine issues as to material fact exist. Here, Father, BTS, C-Wand, Clarke, and Hutton pointed to the written agreement between Father and Son, as well as deposition and affidavit testimony, that show there are no genuine issues as to any material facts; however, Son failed to set forth the required evidence needed to meet his reciprocal burden and, in turn, defeat summary judgment.

{¶36} Son's fifth assignment of error is overruled.

III.

{¶37} Son's five assignments of error are overruled. The judgment of the Stark County Court of Common Pleas is affirmed.

Judgment affirmed.

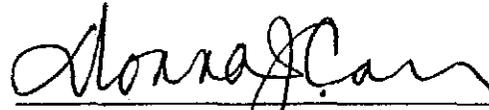
The Court finds that there were reasonable grounds for this appeal.

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

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.


DONNA J. CARR
FOR THE COURT

SLABY, J.
MOORE, J.
CONCUR

APPEARANCES:

GARY O. HURLESS and KEN A. FICKEY, Attorneys at Law, for Appellant.

DAVID E. BUTZ and NATHAN D. VAUGHAN, Attorneys at Law, for Appellees.

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