ORIGINAL

IN THE SUPREME COURT OF OHIO

ARTISAN MECHANICAL, INC. Appellant, v. JAMES MICHAEL BEISER and CHRIS LAY, Appellees.	11-0052 On Certification Of Conflict From Butler County Court of Appeals, Twelfth Appellate District Court of Appeals Case No. CA2010-02-039

APPELLANT ARTISAN MECHANICAL, INC.'S NOTICE OF CERTIFIED CONFLICT

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CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JAN 10 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Pursuant to Ohio Supreme Court Rule 4.1, Appellant Artisan Mechanical, Inc. ("Artisan") hereby gives notice of an Order from the Butler County Court of Appeals certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. A copy of the court of appeals' order certifying a conflict is attached as Exhibit A. A copy of the court of appeals' order appealed from is attached as Exhibit B.

The issue certified as a conflict is:

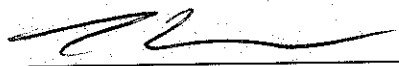
> When there is a factual dispute between the parties over the existence of a valid settlement agreement, is the trial court required to conduct an evidentiary hearing regardless of whether it enforces or denies enforcement of the agreement and enters judgment pursuant to the Ohio Supreme Court decision in *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380?

(Exhibit A, Entry Granting In Part And Denying In Part Motion To Certify Conflict at 2) The court of appeals held that the trial court was not required to conduct an evidentiary hearing pursuant to *Rulli* because the trial court refused to enforce, rather than enforced, the settlement agreement between the parties. (Exhibit B, Judgment Entry and Opinion at ¶ 41)

Other courts of appeals, including the Sixth District and Tenth District Courts of Appeals have held that an evidentiary hearing is required by *Rulli* where the court declines to enforce a settlement agreement. *See Michelle M.S. v. Eduardo H.T.*, Erie App No. E-05053, 2006-Ohio-2119 (attached as Exhibit C); *Moore v. Johnson* (Dec. 11, 1997), Franklin App. No. 96APE11-1579 (attached as Exhibit D).

Pursuant to Ohio Supreme Court Rule 4.2(D), Artisan respectfully requests that the Supreme Court determine that a conflict exists and set a briefing and argument schedule to resolve the conflict.

Respectfully submitted,



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Attorney for Appellant
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 7th day of January 2011, via regular U.S. mail, postage prepaid upon the following:

Anthony G. Covatta, Esq.
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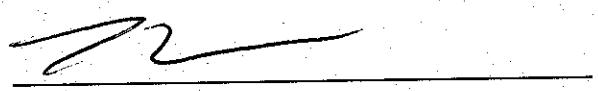

Timothy G. Pepper

IN THE COURT OF APPEAL FOR BUTLER COUNTY, OHIO

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CINDY CARPENTER
BUTLER CO. CLERK OF COURTS

ARTISAN MECHANICAL, INC.,	:	CASE NO. CA2010-02-039
Appellant,	:	
vs.		ENTRY GRANTING IN PART AND DENYING IN PART MOTION TO CERTIFY CONFLICT
JAMES MICHAEL BEISER, et al.,	:	
Appellees.	:	

FILED BUTLER CO.
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CINDY CARPENTER
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellant, Artisan Mechanical, Inc., on November 17, 2010.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which provides that when the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

In *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, the Ohio Supreme Court held that a trial court erred by enforcing a proposed settlement agreement without first conducting an evidentiary hearing where there was a legitimate dispute between the parties as to the existence of the settlement agreement.

In present case, appellant contends that when overruling its second assignment of error, this court held that the trial court was not required to hold an evidentiary hearing with respect to a disputed settlement agreement because the trial court refused to enforce the alleged oral settlement agreement. This court found that, unlike

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EXHIBIT
A

the situation in *Rulli*, the trial court refused to enforce the purposed settlement agreement, and therefore nothing in *Rulli* required the trial court to hold an evidentiary hearing before entering summary judgment against appellant.

Appellant asserts that other courts of appeal have not limited *Rulli* to circumstances where a trial court has enforced a settlement agreement, but have also applied it in circumstances where the court refused to enforce an alleged settlement agreement. Specifically, appellant contends that this court's decision is in conflict with decisions by the Sixth District Court of Appeals and the Tenth District Court of Appeals. See *Michelle M.S. v. Eduardo H.T.*, Erie App. No. E-05053, 2006-Ohio-2119; *Moore v. Johnson* (Dec. 11, 1997), Franklin App. No. 96APE11-1579.

Upon consideration of the foregoing, the court finds that the motion for certification is well-taken, and the same is hereby GRANTED with respect to this issue. The question for certification is as follows:

> When there is a factual dispute between the parties over the existence of a valid settlement agreement, is the trial court required to conduct an evidentiary hearing regardless of whether it enforces or denies enforcement of the agreement and enters judgment pursuant to the Ohio Supreme Court decision in *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380?

The second issue appellant raises for certification involves disposition of the first assignment of error, in which this court found that "clear evidence" existed that the parties did not intend to be bound by the terms of their settlement agreement until it was formalized in a written document executed by the parties. Appellant argues that other appellate courts have enforced settlement agreements under similar factual circumstances, including the First District Court of Appeals in *Cembrex Care Solutions, LLC v. Gockerman/Hematology Care, Inc.*, Hamilton App. No. C-050623, 2006-Ohio-3137, and the Tenth District Court of Appeals in *Charvat v. Credit Foundation of*

America, Franklin App. No. 08AP-477, 2008-Ohio-6820. However, appellant has failed to cite any language in the above cases which addresses the issue of whether "clear evidence" existed with respect to whether the parties did or did not intend to be bound by the terms of a settlement agreement until the agreement was formalized in a written document. Appellant merely repeats arguments already considered and rejected by this court. Accordingly, appellant has failed to show that a conflict exists. The motion for certification with regard to the second issue is therefore DENIED.

IT IS SO ORDERED.

H.J. Bressler, Presiding Judge

Stephen W. Powell, Judge

Robert P. Ringland, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

ARTISAN MECHANICAL, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-02-039
	:	OPINION
- vs -		11/8/2010
	:	
JAMES MICHAEL BEISER, et al.	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2832

Taft Stettinius & Hollister LLP, Timothy G. Pepper, 110 North Main Street, Suite 900, Dayton, Ohio 45402-1786, for plaintiff-appellant

The Drew Law Firm Co., LPA, Anthony G. Covatta, One West Fourth Street, Suite 2400, Cincinnati, Ohio 45202, for defendants-appellees

POWELL, J.

{¶1} Plaintiff-appellant, Artisan Mechanical, Inc., appeals a summary judgment granted by the Butler County Common Pleas Court in favor of defendants-appellees, James Michael Beiser and Chris Lay, on Artisan's claim that Beiser and Lay breached an enforceable, oral settlement agreement between the parties regarding a prior lawsuit between them. We affirm.

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EXHIBIT
B

{¶2} Artisan is a mechanical contractor. Beiser and Lay are mechanical engineers who were employed by Artisan through approximately the third quarter of 2008. Beiser and Lay left Artisan to start their own mechanical engineering firm, Accurate Mechanical Solutions. On November 10, 2008, Artisan filed a lawsuit against Beiser and Lay in the Butler County Common Pleas Court to prevent them from misappropriating Artisan's trade secrets and business opportunities.

{¶3} On the morning of February 4, 2009, Artisan's counsel made a settlement proposal to Beiser and Lay's counsel, in which both parties were to agree not to compete with one another with respect to certain "key customers" for a period of six months. Specifically, Beiser and Lay were to agree not to submit any new bids to work on projects for two of Artisan's key customers, Fuji and Veritus Technology Group, and Artisan, in turn, was to agree not to submit any bids to work on projects for two of its other key customers, Flavor Systems and Lyons Magnus, whom Beiser and Lay wished to have as customers for AMS. That same morning at 9:44 a.m., Beiser and Lay's counsel accepted Artisan's settlement proposal on the following terms and conditions:

{¶4} "1. Both sides 'walk away' from the litigation.

{¶5} "2. Six month non-compete, commencing today, February 4, 2009, ending August 3, 2009.

{¶6} "3. Beiser, Lay and their company will initiate no new bids to Fuji or Verdis [sic].

{¶7} "4. Artisan will initiate no new bids to Flavor Systems or Lyons Magnus."

{¶8} Beiser and Lay's counsel "suggest[ed]" that the parties prepare a "Mutual Release and Settlement Agreement" and offered to prepare the agreement if Artisan's counsel would "likewise prepare an Entry of Dismissal of all claims and counterclaims."

{¶9} Artisan's counsel responded by e-mail as follows:

{¶10} "[A]s we discussed, the offer is that your clients basically stand still and submit nothing to Fuji and Verdis [sic] in furtherance of any bid. I don't know if that's what you mean by 'initiate,' but as we discussed, that is an important point. We do not have an agreement just on the wording below [referring to the 9:44 a.m. e-mail message]; please explain what 'initiate' means and whether your clients will agree to stand still and not submit anything further to Fuji or Verdis [sic], for today forward for six months, in furtherance of any bid."

{¶11} Beiser and Lay's counsel responded:

{¶12} "I am informed that the bid to Fuji is complete. Nothing further will be submitted, or needs to be submitted. We have a deal."

{¶13} The parties cancelled depositions that were scheduled for February 5-6, 2009. On February 6, 2009, Beiser and Lay's counsel sent Artisan's counsel a draft of a settlement agreement. When he had not received a response by February 16, 2009, Beiser and Lay's counsel e-mailed Artisan's counsel, asking him when he would be "ready to exchange signature pages," and Artisan's counsel replied, "I'll get back to you as quickly as I can."

{¶14} On February 19, 2009, Artisan's counsel informed the trial court that "the case had settled." The next day, the trial court issued an entry that noted that the parties had advised it that the case "has been settled" and ordered that the action be "dismissed with prejudice provided that any of the Parties may, upon good cause shown, within sixty days, request further court action if settlement is not consummated." The entry further stated that "[u]pon agreement and within sixty days, the Parties may submit a supplementary entry outlining details of the settlement."

{¶15} On March 10, 2009, Beiser and Lay's counsel sent Artisan's counsel a "Settlement Agreement and Mutual Release" that had been executed by Beiser and Lay

and contained a space for Artisan's signature.[1] On March 17, 2009, Artisan's counsel e-mailed Beiser and Lay's counsel, suggesting that the "confidentiality" and "non-disparagement" provisions in the proposed settlement agreement be deleted and that the "applicable law" provision be modified to make state court in Butler County, Ohio the proper venue for any future action that might arise from the agreement.

{¶16} On April 16, 2009, Artisan's counsel e-mailed Beiser and Lay's counsel and requested an update as to where matters stood regarding the lawsuit, and Beiser and Lay's counsel indicated in response that the parties had agreed to drop the "confidentiality" and "non-disparagement" provisions and modify the venue provision in the proposed settlement agreement. He then encouraged Artisan's counsel to "get your clients to sign [the proposed agreement] and then [he] would get his boys [Beiser and Lay] to sign as well."

{¶17} The parties did not send any further messages to each other. On April 21, 2009, the 60-day period set forth in the trial court's February 20, 2009 conditional dismissal order lapsed, without either party having ever requested the trial court to take further action in the lawsuit or without the parties submitting a supplemental entry outlining the details of any settlement agreement they reached.

{¶18} In June 2009, Artisan learned that Beiser and Lay were performing work for Fuji. When Artisan's counsel requested an explanation, Beiser and Lay's counsel acknowledged that his clients had submitted a new bid to perform work for Fuji, but rejected any claim that their actions constituted a breach of a settlement agreement, because Artisan had failed to execute the proposed settlement agreement that Beiser and Lay had tendered and thus there was no settlement agreement between the parties that

1. The March 10, 2009 draft of the proposed Settlement Agreement and Mutual Release that Beiser and Lay's counsel sent to Artisan's counsel is appended to this opinion.

Beiser and Lay could have breached.

{¶19} On June 29, 2009, Artisan filed another lawsuit against Beiser and Lay in the Butler County Common Pleas Court, which forms the basis of the current appeal. Artisan alleged in its complaint that, even though the parties failed to execute a formal written contract, they reached an enforceable, oral settlement agreement on February 4, 2009 and that Beiser and Lay breached that agreement by making a bid to Fuji. On January 29, 2010, the trial court granted summary judgment to Beiser and Lay on the ground that the parties never reached a "meeting of the minds" on the "essential terms and details of the settlement agreement."

{¶20} Artisan now appeals, assigning the following as error:

{¶21} Assignment of Error No. 1:

{¶22} "THE TRIAL COURT ERRED IN GRANTING BEISER AND LAY'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT THERE WAS NO ENFORCEABLE SETTLEMENT AGREEMENT BETWEEN THE PARTIES."

{¶23} Artisan argues the trial court erred in finding that there was no enforceable settlement agreement between the parties, and consequently granting summary judgment to Beiser and Lay because they accepted all the essential terms of the settlement agreement on February 4, 2009 and the parties' counsel agreed on all remaining terms of the agreement by April 16, 2009. Artisan also contends that even though the parties intended to but did not reduce their agreement to a formal written document, their February 4, 2009 oral settlement agreement was still enforceable since its terms can be determined with "sufficient particularity" and "the parties' deal was not contingent on it being reduced to writing." We disagree with these arguments.

{¶24} Summary judgment is appropriate under Civ.R. 56 when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of

law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id.

{¶25} "[A] settlement agreement is a contract designed to terminate a claim by preventing or ending litigation[.]" *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158. While "[i]t is preferable that a settlement agreement be memorialized in writing[,] an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3-4, 2002-Ohio-2985, ¶15. "Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" Id., quoting *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, paragraph one of the syllabus.

{¶26} "'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' [Citation omitted.] A meeting of the minds as to the essential terms of the contract is a requirement

to enforcing the contract. [Citation omitted.]" *Kostelnik*, 2002-Ohio-2985 at ¶16.

{¶27} "Mutual assent" or "a meeting of the minds" means that both parties have reached agreement on the contract's essential terms. *Fenix Enterprises, Inc. v. M & M Mortg. Corp., Inc.* (S.D.Ohio 2009), 624 F. Supp. 2d 834, 841. A meeting of the minds occurs if "a reasonable person would find that the parties manifested a present intention to be bound to an agreement." *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, ¶12. "The parties must have a distinct and common intention that is communicated by each party to the other." *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 744, 2008-Ohio-5642, ¶12. Moreover, for a contract to be valid and enforceable, the contract must be specific as to its essential terms, such as the identity of the parties to be bound by the contract and the subject matter of the contract. See *Mantia v. House*, 178 Ohio App.3d 763, 2008-Ohio-5374, ¶9.

{¶28} In support of its claim that the parties reached an enforceable, oral settlement agreement on February 4, 2009, Artisan points out that, when it asked Beiser and Lay's counsel to "explain what 'initiate' means," Beiser and Lay's counsel responded by stating that he had been "informed that the bid to Fuji is complete[,]" that "[n]othing further will be submitted, or needs to be submitted[,]" and that "we have a deal." Artisan asserts that once Beiser and Lay's counsel declared, "we have a deal," an enforceable, oral settlement agreement was created between the parties. We disagree.

{¶29} In his February 4, 2009, 9:44 a.m. e-mail to Artisan's counsel, in which he accepted the terms of Artisan's initial settlement proposal, Beiser and Lay's counsel suggested that the parties "prepare a Mutual Release and Settlement Agreement" and offered to prepare the agreement in exchange for Artisan's counsel preparing a dismissal entry. Two days after their February 4, 2009 negotiations, Beiser and Lay's counsel sent Artisan a draft of a settlement agreement. On February 16, 2009, Artisan's counsel told

Beiser and Lay's counsel that he would get back to him as quickly as he could. However, Artisan did not indicate that the parties would not have to place their agreement in a formal written document.

{¶30} On February 19, 2009, Artisan advised the trial court that the case "had settled." However, the trial court's February 20, 2009 conditional dismissal entry did not dismiss the case with prejudice. Instead, it allowed either party, upon a showing of good cause, to ask the trial court to take further action in the case, which, presumably, meant to reactivate the case, within 60 days of the entry. The fact that the trial court did not simply dismiss the case with prejudice at this point shows that the parties had not yet reached a final settlement agreement.

{¶31} Artisan's counsel finally got back to Beiser and Lay's counsel on March 17, 2009 and then again on April 16, 2009, at which time the parties agreed to delete the confidentiality and non-disparagement provisions and modify the venue provision in the contract. However, at no time during the parties' negotiations that took place between February 4, 2009 until April 16, 2009 did Artisan ever indicate that it would be unnecessary for the parties to place their agreement in a formal written contract.

{¶32} A review of the evidence submitted by the parties in the summary judgment proceedings, even when looked at in the light most favorable to Artisan as the nonmoving party, shows that, while the parties engaged in negotiations between February 4, 2009 and April 16, 2009, they never reached a meeting of the minds on the essential terms of the proposed settlement agreement regarding Artisan's 2008 action against Beiser and Lay. This conclusion is confirmed by Artisan's refusal to sign the proposed Settlement Agreement and Mutual Release sent to it by Beiser and Lay.

{¶33} In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 151-152, the Ohio Supreme Court stated "that courts will give effect to the manifest

intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both[.]"

{¶34} In this case, there was clear evidence demonstrating that the parties did not intend to be bound by the terms of the parties' proposed settlement agreement until both parties executed a formal written document. In the parties' final e-mail communication during their settlement negotiations, Beiser and Lay's counsel indicated that the parties had reached agreement on the confidentiality, non-disparagement and venue provisions of the proposed settlement agreement, and encouraged Artisan's counsel to have his clients sign the proposed agreement, as amended, and stated that he would have his clients do the same. Again, Artisan's counsel did not indicate that a formal written contract would not be necessary in order for the parties to have an enforceable agreement.

{¶35} Artisan engaged in negotiations with Beiser and Lay over the terms of the settlement agreement from February 4, 2009 until April 16, 2009. Artisan's actions during this period demonstrates that Artisan agreed with Beiser and Lay that the parties' agreement had to be placed in a formal written contract in order for the agreement to be enforceable. However, Artisan refused to sign the agreement before the conditional dismissal entry became final on April 21, 2009 and failed to ask the trial court to take further action in the matter on the basis of good cause. Therefore, we agree with the trial court's finding that there was never a meeting of the minds between the parties on the essential terms of the settlement agreement, and we conclude that the trial court properly granted summary judgment to Beiser and Lay on Artisan's complaint.

{¶36} Consequently, Artisan's first assignment of error is overruled.

{¶37} Assignment of Error No. 2:

{¶38} "THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR BEISER AND LAY WITHOUT HOLDING AN EVIDENTIARY HEARING ON THE EXISTENCE OF AN ENFORCEABLE SETTLEMENT AGREEMENT."

{¶39} Artisan argues the trial court erred by not holding an evidentiary hearing before granting summary judgment to Beiser and Lay because there was a factual dispute between the parties over the existence of a valid settlement agreement, and therefore, under *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, the trial court was required to conduct an evidentiary hearing prior to entering judgment. However, *Rulli* is clearly distinguishable from this case.

{¶40} In *Rulli*, the Ohio Supreme Court held that a trial court erred by *enforcing* a purported settlement agreement between the parties without first conducting an evidentiary hearing where there was a legitimate dispute between the parties as to the existence of the settlement agreement. In support of its decision, the *Rulli* court noted that, "[s]ince a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that the parties agree on the meaning of those terms." Id. at 376.

{¶41} Unlike the situation in *Rulli*, the trial court in this case *refused to enforce* what Artisan purported to be an enforceable, oral settlement agreement between the parties, after finding that the parties had never actually reached a settlement agreement — a determination that this court has upheld in response to Artisan's first assignment of error. Therefore, nothing in *Rulli* required the trial court to hold an evidentiary hearing before entering summary judgment in Beiser and Lay's favor. Cf. *Union Sav. Bank v. White Family Cos., Inc.*, 183 Ohio App.3d 174, 2009-Ohio-2075; *Ivanicky v. Pickus*, Cuyahoga App. No. 91690, 2009-Ohio-37, ¶13; and *Myatt v. Myatt*, Summit App. No. 24606, 2009-Ohio-5796, ¶8, 12-13.

{¶42} Artisan also argues the trial court committed reversible error by relying "on suspect evidence in granting Beiser and Lay's motion for summary judgment." In support, Artisan points out that when Beiser and Lay attached to their summary judgment motion the parties' counsels' e-mail correspondence from February 4, 2009, March 17, 2009, and April 16, 2009, Beiser and Lay failed to properly authenticate these documents by attaching an affidavit, and thus argues the documents had no evidentiary value. Artisan acknowledges that Beiser and Lay attached to their reply brief an affidavit purportedly authenticating the documents, but notes that when it moved to strike the affidavit and to file a surreply brief, the trial court failed to rule on those motions. We find this argument unpersuasive.

{¶43} Evid.R. 901(A) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

{¶44} The record in this case shows that Artisan itself attached to its memorandum in opposition to Beiser and Lay's motion for summary judgment several of the e-mail messages whose authenticity Artisan is now challenging on appeal. Thus, any error the trial court may have committed in considering the e-mail messages attached to both parties' memoranda was induced by Artisan, and thus Artisan cannot be allowed to take advantage of it. See *Poneris v. A & L Painting, LLC,* Butler App. Nos. CA2008-05-133, CA2008-06-139, 2009-Ohio-4128, ¶41.

{¶45} Furthermore, Beiser and Lay filed an affidavit with the trial court averring that the materials attached to their motions are "accurate" and Artisan presented no evidence to the contrary. While Beiser and Lay did not file their affidavit authenticating the e-mail messages attached to their summary judgment motion until they filed their reply brief in the summary judgment proceedings, Artisan has failed to explain how it was

materially prejudiced because of this. In particular, Artisan has never claimed that the e-mail messages attached to Beiser and Lay's memoranda have been fabricated or are *not* what Beiser and Lay purport them to be. Therefore, the affidavit was sufficient under Evid.R. 901 to show that the documents were, in fact, what Beiser and Lay's counsel purported them to be, namely, copies of the e-mail messages the parties exchanged on the dates in question.

{¶46} Artisan also alleges that the trial court committed reversible error when it failed to rule on its request to compel discovery from Beiser and Lay. However, Artisan suffered no prejudice as a result of the trial court's failure to rule on its discovery requests since those requests were mooted as a result of the trial court's decision to grant summary judgment to Beiser and Lay. Additionally, if Artisan needed more time to respond to Beiser and Lay's summary judgment motion, Artisan could have requested it under Civ.R. 56(F), but failed to do so.

{¶47} In light of the foregoing, Artisan's second assignment of error is overruled.

{¶48} Judgment affirmed.

BRESSLER, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting:

{¶49} I respectfully dissent from the majority's opinion because when the evidence is looked at in the light most favorable to Artisan as the nonmoving party, it is apparent that genuine issues of material fact remain in dispute, and thus the trial court erred by granting summary judgment to Beiser and Lay.

{¶50} While a trial court has a duty to interpret the terms of a contract as a matter

of law, the existence of a contract itself is generally regarded as a question of fact to be resolved by the trier of fact, i.e., a jury or the trial court acting in its role as the trier of fact. See, e.g., *Terrell v. Uniscribe Professional Services, Inc.* (N.D.Ohio 2004), 348 F. Supp. 2d 890, 893; *Snyder v. Snyder,* 170 Ohio App. 3d 26, 2007-Ohio-122; and *In re Estate of Ivanchak,* 169 Ohio App.3d 140, 2006-Ohio-5175. But, see, *Zelina v. Hillyer,* 165 Ohio App.3d 255, 2005-Ohio-5803 (holding that the existence of a contract is a question of law).

{¶51} In this case, sufficient evidence was presented in the summary judgment proceedings to create genuine issues of material fact regarding whether the parties' negotiations reached a point at which mutual assent to the essential terms of the settlement agreement had been expressed before the 60-day time limit set forth in the trial court's conditional dismissal order lapsed, and whether the parties intended for their settlement agreement to be binding even without a formal written contract.

{¶52} Specifically, the parties' exchange of e-mails on February 4, 2009 establishes the material elements of the parties' oral settlement agreement, including (1) the parties to be bound by the agreement: Artisan and Beiser and Lay and their company, AMS, and (2) the agreement's subject matter: a six-month non-compete agreement, in which both sides "walk away" from the litigation, with Beiser and Lay and AMS agreeing not to initiate any new bids to Fuji or Veritus Technology Group, and Artisan, in turn, agreeing not to initiate any new bids to Flavor Systems or Lyons Magnus.

{¶53} This court has held that it is not necessary for the parties to work out every specific detail of their agreement in order for them to have had a meeting of the minds, as the trial court opined at one point in its opinion. See, generally, *Schrock v. Schrock,* Madison App. No. CA2005-04-015, 2006-Ohio-748; and *Carnahan v. London,* Madison App. No. CA2005-02-005, 2005-Ohio-6684. In this case, the subsequent e-mails

exchanged between the parties' counsel on March 17, 2009 and April 16, 2009 established that the parties agreed not to include "confidentiality" and "non-disparagement" provisions in their agreement and that the proper venue for any action arising from any future dispute involving the agreement was to be in state court in Butler County, Ohio. Specifically, the April 16, 2009 e-mail that Beiser and Lay's counsel sent to Artisan's counsel in which Beiser and Lay's counsel stated that the parties had reached agreement on the remaining issues of confidentiality, non-disparagement and venue establishes that there was a meeting of the minds between the parties as to all essential and non-essential terms of the parties' agreement, or, at the very least, provided sufficient evidence to create a genuine issue of material fact on this question.

{¶54} Beiser and Lay assert that "it would be contrary to justice and law to impose terms of counsel's negotiations upon the parties" since "[c]ounsel for the parties, not the parties themselves, were negotiating and attempting to agree to terms that would then be presented to their respective clients." However, Beiser and Lay offered no evidence to show that their counsel did not have the specific authority to negotiate on their behalf, and it appears from the evidence presented by the parties in the summary judgment proceedings, which has to be examined in the light most favorable to Artisan as the nonmoving party, that Beiser and Lay's counsel *did* have such specific authority to negotiate on Beiser and Lay's behalf. See, generally, *Judd v. Queen City Metro* (1986), 31 Ohio App.3d 88, 91-92.

{¶55} The majority asserts that a signed, formal written agreement was necessary in order to bind the parties. However, when the evidence is looked at in a light most favorable to Artisan as the nonmoving party, it is apparent that a genuine issue of material fact exists as to whether the parties intended that their agreement not become binding until they both signed a formal written contract.

{¶56} In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co* (1978), 54 Ohio St.2d 147, 151-152, the court stated:

{¶57} "[I]t is well-established that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both (see *Smith v. Onyx Oil and Chemical Co.* (C.A.3, 1955), 218 F.2d 104, 108; 1 Williston on Contracts (Rev.Ed.1936), 59, Section 28)[.]"

{¶58} Here, there was evidence on both sides of the question as to whether the parties *intended* to make their agreement contingent on a formal written contract. In his February 4, 2009, 9:44 a.m. e-mail to Artisan's counsel in which he accepted the terms of the settlement agreement proposed by Artisan's counsel, Beiser and Lay's counsel stated, "I would *suggest* that we prepare a Mutual Release and Settlement Agreement." (Emphasis added.) However, Beiser and Lay's counsel did not make the parties' agreement "subject to" or contingent upon the parties' signing a formal, written contract. Cf. *Union Sav. Bank v. White Family Cos., Inc.*, 183 Ohio App.3d 174, 2009-Ohio-2075, ¶27. Therefore, viewing the evidence in a light most favorable to Artisan as the non-moving party, a genuine issue of material fact exists as to whether or not the parties intended that their agreement would not become effective until a formal written contract was signed.

{¶59} In light of the foregoing, the question of whether or not an enforceable, oral settlement agreement was created by the parties prior to April 21, 2009 should not have been decided by summary judgment. Therefore, I respectfully dissent from the court's decision upholding the trial court's grant of summary judgment to Beiser and Lay.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp

[Cite as *Michelle S. v. Eduardo T.*, 2006-Ohio-2119.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michelle M. S.

Appellee

v.

Eduardo H. T., Jr.

Appellant

Court of Appeals No. E-05-053

Trial Court No. 99-SU-0030

DECISION AND JUDGMENT ENTRY

Decided: April 28, 2006

* * * * *

Daniel J. Brady, for appellee.

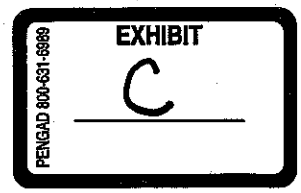
Sam R. Bradely and Wayne R. Nicol, for appellant

* * * * *

PIETRYKOWSKI, J.

{¶1} This case is before the court following the judgment of the Erie County Court of Common Pleas, Juvenile Division, amending the parties' shared parenting plan. For the reasons set forth herein, we reverse and remand.

{¶2} The relevant facts are as follows. The allocation of the parties' parental rights relative to their minor child was subject to an October 8, 1999 shared parenting decree entered by the trial court. On May 22, 2003, appellee Michelle S. filed a motion to modify shared parenting plan. On August 28, 2003, appellant Eduardo T. filed his



own motion to modify the existing shared parenting plan. While these competing motions were pending, on March 3, 2004, the trial court entered a judgment entry designating appellant as emergency temporary residential parent for school enrollment purposes. A March 23, 2004 consent entry continued this order. On June 24, 2004, appellee dismissed her motion to modify the shared parenting plan.

{¶3} On November 29, 2004, the parties notified the trial court that they had reached a settlement on the matters pending from appellant's motion to modify the existing shared parenting plan, including issues related to child support. A January 26, 2005, notice by the trial court to the parties seems to confirm this by stating:

{¶4} "Pursuant to previous notice by the Court, you were to have submitted a JUDGMENT ENTRY. Unless said JUDGMENT ENTRY is submitted within ten (10) days of the date hereof, the Court will on its own motion, dismiss the motion/case."

{¶5} However, subsequent to the November 29, 2004 alleged settlement, the parties realized that two child support calculation issues had not been addressed and a dispute arose out of them. Based on this dispute, appellee refused to sign the judgment entry of settlement that appellant's counsel had drafted.

{¶6} On March 25, 2005, appellant filed a motion to enforce the settlement agreement. Attached to the motion was a copy of the judgment entry drafted by appellant's attorney. On April 6, 2005, the trial court scheduled a hearing on appellant's motion to enforce the settlement agreement for May 23, 2005.

{¶7} There is no record of any proceeding taking place on May 23, 2005. There is no entry for this date on the docket sheet.

{¶8} On June 16, 2005, the trial court entered an amended shared parenting decree essentially adopting a plan drafted by appellee's attorney. The decree stated, "[t]his matter came before the court upon the agreement of the Mother and Father * * *."

{¶9} In his single assignment of error, appellant asserts:

{¶10} "The trial court erred and committed reversible error when it failed to hold an evidentiary hearing on the Appellant's Motion to Enforce Settlement Agreement."

{¶11} Appellant argues that the trial court failed to conduct an evidentiary hearing on the disputed settlement terms as required by *Rulli v. Fan Company* (1997), 79 Ohio St.3d 374. It is true, "[w]here the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli* at 377; See also *Watson v. Watson* (May 14, 1999), 6th Dist. No. OT-98-029 citing *Zigmont v. Toto* (1988), 47 Ohio App.3d 181, 185. Citing *State v. Williams* (1977), 51 Ohio St.2d 112, appellee asserts that appellant waived his right to appeal any claimed procedural error by failing to raise an objection with the trial court during the 24 days between the scheduled May 23, 2005 hearing date and the June 16, 2005 adoption of appellee's shared parenting plan by the trial court. Further, appellee asserts that since no transcript of any May 23, 2005 proceeding exists, appellant was required to provide a statement of the proceedings pursuant to App.R. 9(C) from which to review the trial court's conduct.

Finally, appellee asserts that the failure of either party to object to the trial court concerning any May 23, 2005 proceedings suggests that in fact, there was an evidentiary hearing on that day.

{¶12} The record reveals that there is a dispute either as to the terms of the parties' settlement agreement or that contests the very existence of a settlement agreement which required an evidentiary hearing. Appellant asserts that at the time of the November 29, 2004 alleged oral settlement agreement, the terms were incomplete, having failed to address a particular child support guideline worksheet adjustment and the date for commencement of appellee's child support order. Essentially, appellant contends that the parties had a settlement agreement with regard to all terms except for these two narrow child support issues. We find that the trial court should have held an evidentiary hearing on these issues.

{¶13} Nevertheless, appellee argues that appellant's assignment of error fails because there was no App.R. 9(C) statement filed in this case. In *Watson*, after the parties entered into an in-court settlement agreement in a divorce case, a dispute arose as to the agreement. A hearing was held regarding the parties' dispute as to which judgment entry correctly reflected the parties' settlement agreement. No transcript of this hearing was submitted to this court, nor apparently, was a statement of the proceedings pursuant to App.R. 9(C). The appellant appealed alleging abuse of discretion after the trial court entered a judgment entry that the appellant alleged did not accurately reflect the parties' settlement agreement. We held that when parties enter into an in-court settlement

agreement, and one party later disputes the terms of the agreement, the trial court should hold an evidentiary hearing to resolve any dispute about the existence of an agreement or its terms. Id. citing *Zigmont v. Toto* (1988), 47 Ohio App.3d 181, 185. However, we also found that pursuant to *Knapp v. Edward Laboratories* (1980), 61 Ohio St.2d 197, 199, a transcript of the hearing regarding the dispute or in the alternative, a statement pursuant to App.R. 9(C) was necessary for the resolution of the assigned errors. Therefore, because the appellant failed to submit either of these, this court presumed the validity of the trial court's actions and found the appellant's assignments of error not well-taken.

{¶14} In contrast to *Watson*, there is absolutely no evidence in the record that there was a hearing at all. An entry in the docket sheet for this day does not even exist. Under these circumstances, we do not fault appellant for failing to file an App.R. 9(C) statement for a hearing that never occurred.

{¶15} Appellee also contends that appellant waived his right to raise the procedural error of the trial court. In *Monea v. Campisi*, 5th Dist. No. 2004CA00381, 2005-Ohio-5215, a magistrate's order indicated that the parties allegedly had entered into a settlement agreement arising out of a dispute over the ownership of a business. Subsequently, the appellee filed a motion to enforce settlement. A week later, a hearing was held on the motion to enforce settlement. That same day, the trial court issued a magistrate's recommendations/judgment entry enforcing the alleged settlement agreement between the parties. The appellant appealed from this order, alleging that the trial court erred by failing to hold an evidentiary hearing to resolve the parties' disputes regarding

the existence of a settlement agreement. The court found that the record showed no indication that the appellant requested an evidentiary hearing or objected to the nature of the proceedings. Therefore, the appellant waived his right to an evidentiary hearing by failing to request such a hearing or to object to the lack of an evidentiary hearing. Id. at ¶ 11.

{¶16} In the present case, in contrast to *Monea*, the record indicates that appellant requested a hearing to resolve the two disputed child support issues. In his motion to enforce settlement, appellant specifically requested that the court schedule a hearing. Further, *Monea* was based on a Civ.R. 53(E)(3)(a) requirement for objections to a magistrate's decision. In the present case, we cannot discern from the record that there was any proceeding on the scheduled date of May 23, 2005, much less that a magistrate presided. Therefore, we find that appellant did not waive his right to an evidentiary hearing by failing to file objections in the trial court. Appellant's assignment of error is well-taken.

{¶17} The judgment of the Erie County Court of Common Pleas, Juvenile Division, is reversed. This case is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J. _____ JUDGE

Arlene Singer, P.J. _____ JUDGE

Dennis M. Parish, J. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Gregory L. MOORE, Plaintiff-Appellee,
v.
Charles F. JOHNSON, Defendant-Appellant, Johnson Industries Corporation, J.I. Investors Co., Thomas B. Johnson, Q3 JMC, Inc., Q3 Industries, Inc., and The Huntington National Bank, Defendants-Appellees.
Gregory L. MOORE, Plaintiff-Appellant/Cross-Appellee,
v.
Thomas B. JOHNSON and Johnson Industries Corporation, Defendants-Appellees/Cross-Appellants, J.I. Investors Co., Charles F. Johnson, Q3 JMC, Inc., Q3 Industries, Inc. and The Huntington National Bank, Defendants-Appellees.

Nos. 96APE11-1579, 96APE12-1638, 96APE12-1703.
Dec. 11, 1997.

APPEAL from the Franklin County Court of Common Pleas.
Mazer & Company, Bernard D. Mazer and Kerry M. Donahue, for Gregory L. Moore.

Bradley & Farris Co., L.P.A., and Phillip R. Bradley, for Charles F. Johnson.

Thompson Hine & Flory, Leslie W. Jacobs and Kenneth G. Cole, for Thomas B. Johnson and Johnson Industries Corporation.

Emens, Kegler, Brown, Hill & Ritter, and Stephen E. Chappelear; Barnes & Thornburg, and Howard Kochell, for Q3 JMC, Inc. and Q3 Industries.

Schottenstein, Zox & Dunn, David R. Eberhart and John P. Gilligan; Jody Oster, for The Huntington National Bank.

OPINION

BRYANT, J.

*1 A consolidation of three separate appeals, this case arises from litigation plaintiff-appellant, Gregory L. Moore, initiated against defendants-appellees, Thomas B. Johnson ("T. Johnson"), Johnson Industries Corp. ("Johnson Industries"), and The Huntington National Bank ("Huntington"), defendant-appellant, Charles F. Johnson ("C. Johnson"), and defendants, JI Investors Co. ("JI Investors"), Q3 JMC, Inc., and Q3 Industries, Inc. (collectively, "Q3").

Specifically, Moore appeals from a judgment of the Franklin County Court of Common Pleas directing a verdict on his wrongful termination claim against Johnson Industries, directing verdicts on his $10,000 loan and indemnification claims against T. Johnson, and dismissing his remaining claims against those two defendants. Moore also appeals the trial court's refusal to conduct an evidentiary hearing prior to ruling on a motion to enforce an alleged settlement agreement among the parties. T. Johnson and Johnson Industries filed cross-appeals conditioned on the disposition of Moore's appeal. C. Johnson filed three separate appeals, the first, Franklin App. No. 96APE10-1388, was dismissed as premature; the second, Franklin App. No. 96APE11-1579, contests the trial court's refusal to impose Civ.R. 11 sanctions on Moore and his counsel; and the third, Franklin App. No. 96APE12-1638, contests the trial court's refusal to conduct an evidentiary hearing concerning the alleged settlement agreement. Huntington has filed two separate motions contesting the standing of Moore and C. Johnson to appeal the settlement agreement issue.

I. FACTUAL HISTORY

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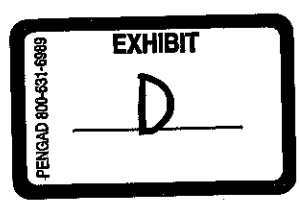

In 1986, Moore became an employee of Johnson Industries, a family-owned manufacturing company formerly located in Urbana, Ohio. T. Johnson and C. Johnson are brothers, and both were shareholders of the company, as well as members of the board of directors. T. Johnson also served as president of the company. Moore eventually became an officer of the corporation and a member of its board of directors.

In 1991, Moore, T. Johnson and three other high level employees of Johnson Industries, Daniel J. Velikan, Robert L. Hilgendorf, and Kenneth A. Cashman, formed JI Investors, an Ohio general partnership. The partnership was formed, in part, to address management's concern that C. Johnson was disrupting the operation of Johnson Industries. JI Investors addressed the concern by entering into an assumption and loan agreement with C. Johnson under which it agreed to assume his substantial debt owed to Huntington, to loan him money so he could make payments to his other creditors, and to pay him $112,000 per year for a period of five years. In exchange, he agreed to withdraw from the management of Johnson Industries and to pay the partnership $550,000 on or before September 11, 1996, plus interest, origination costs, and ten percent of the increase in the book value of his four hundred forty-four shares of stock in Johnson Industries. He also pledged his stock as collateral in the event of his default.

*2 In addition to the partnership agreement, each partner of JI Investors entered into a five-year employment contract with Johnson Industries. Moore's contract specified a term of employment from October 1, 1991 to September 30, 1996. Moore's "compensation" was divided into two components: (1) an $80,000 salary, plus (2) amounts sufficient to equal the payments JI Investors was required to make to Huntington. The second component of his salary was never paid to Moore, but instead was paid directly to Huntington as payment for the debts JI Investors assumed.

Within a few years after the formation of JI Investors, Johnson Industries encountered severe financial difficulties. Ultimately, the board of directors voted to sell virtually all of Johnson Industries' assets to Q3. The closing for the asset sale occurred on March 8, 1995 (the "Asset Sale"). After the Asset Sale, Johnson Industries ceased making payments to Huntington. Consequently, JI Investors defaulted on its payment obligation to Huntington.

Prior to the board's decision to sell Johnson Industries' assets to Q3, Johnson Industries needed, but lacked the funds to purchase, a piece of machinery for its manufacturing processes. Moore enabled Johnson Industries to purchase the machinery by issuing a $10,000 personal check to T. Johnson, who deposited the check in his personal checking account. T. Johnson then issued a personal check to Johnson Industries for $10,000.

Although Moore accepted employment with Q3 prior to the Asset Sale, Moore and Johnson Industries dispute whether Moore left Johnson Industries voluntarily. Moore did not have a written employment contract with Q3, but he was told his salary would be between $40,000 and $45,000 and, if he worked hard, he would earn commissions sufficient to make his total compensation equal the $80,000 salary he had earned at Johnson Industries. Moore worked for Q3 for approximately two weeks and then he was terminated on approximately March 13, 1995, after announcing that he was taking an unapproved three-week vacation, having received permission only for a three-day vacation. In September 1995, Moore accepted a position with another company.

II. LITIGATION HISTORY

In July 1995, Moore filed a complaint initiating this litigation. Against T. Johnson, Moore sought indemnification in the event he incurred any liability for his participation in the JI Investors' partnership.

Against Johnson Industries, Moore sought indemnification, $10,000 in damages for Johnson Industries' alleged default on Moore's loan for the

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machinery, and $133,334 in damages for Johnson Industries' alleged breach of its written employment contract with Moore.

Against C. Johnson, Moore sought indemnification and a declaration that C. Johnson's financial obligation to JI Investors was immediately due and payable. On September 17, 1996, C. Johnson responded with a motion for Civ.R. 11 sanctions and attorney fees against Moore and his counsel. The trial court denied the motion on October 8, 1996, concluding that Moore had not filed a frivolous lawsuit against C. Johnson. On October 28, 1996, before trial began, Moore voluntarily dismissed C. Johnson from the lawsuit pursuant to Civ.R. 41(A).

***3** Against Q3, Moore asserted claims for wrongful termination of his employment, for unjust enrichment based on its using the machine for which Moore had loaned $10,000 to Johnson Industries, and for violations of the Employee Retirement Income Security Act. Moore subsequently settled his claims against Q3.

Against Huntington, Moore sought a declaration that he had no obligation to Huntington for JI Investors' debt. Huntington filed a counterclaim against Moore seeking to recover JI Investors' debt, and the trial court subsequently granted summary judgment in Huntington's favor for an amount in excess of $480,000. (Decision June 17, 1996; Entry July 24, 1996.)

After Huntington secured its judgment against Moore, the parties allegedly participated in a settlement mediation in the presence of a magistrate. As a result of the mediation, Moore contends that he, along with T. Johnson, C. Johnson, Hilgendorf, Velikan, and Q3, entered into a settlement agreement ("global agreement") with Huntington. The alleged global agreement limited Moore's obligation to Huntington to $6,250. However, the parties ended the mediation without reducing the global agreement to writing. Shortly after the mediation, Huntington asserted no settlement agreement had been reached among the parties.

On October 4, 1996, the trial court conducted a nonevidentiary hearing regarding the global agreement. The trial court concluded there had been no meeting of the minds, but even if there had been, the oral agreement would have been unenforceable under Loc.R. 29.01. Subsequently, Moore allegedly paid Huntington $100,000 in satisfaction of Huntington's judgment against him so that he could proceed with the sale of his personal residence on which Huntington had filed a lien.

On October 28, 1996, this case came to trial. Moore asserted only three claims during the trial, two against T. Johnson and one against Johnson Industries. All other claims were dismissed by the trial court pursuant to Civ.R. 41(B). Moore's first claim against T. Johnson was a contract claim to recover on the alleged personal loan of $10,000 from Moore to T. Johnson for the purchase of the machinery Johnson Industries used. Over T. Johnson's objection, Moore's claim was pursued for the first time at trial, as Moore had not previously asserted it in his pleadings. Moore's second claim against T. Johnson related to their obligations as partners in JI Investors. Moore claimed that T. Johnson was obligated by paragraph 11.2 of the JI Investors General Partnership Agreement ("Partnership Agreement") to indemnify Moore for the $100,000 he paid to Huntington and for the costs and attorney fees he incurred in defending himself against Huntington. Moore's final claim sought damages from Johnson Industries for its alleged wrongful termination of Moore's employment contract.

At the close of Moore's case-in-chief, the trial court granted the directed verdict motions of T. Johnson and Johnson Industries on Moore's $10,000 loan claim and wrongful termination claim, respectively. At the close of all the evidence, the trial court granted T. Johnson's directed verdict motion on Moore's remaining indemnification claim. Moore timely appeals in Franklin App. No. 96APE12-1703, assigning the following errors:

***4** "I. THE TRIAL COURT ERRED, AT THE CLOSE OF APPELLANT, GREGORY L.

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MOORE'S, CASE, IN DIRECTING A VERDICT IN FAVOR OF APPELLEE, JOHNSON INDUSTRIES COMPANY (HEREINAFTER REFERRED TO AS 'APPELLEE JOHNSON INDUSTRIES'), THAT IT WAS NOT REQUIRED TO INDEMNIFY APPELLANT, GREGORY L. MOORE (HEREINAFTER REFERRED TO AS 'APPELLANT MOORE'), FROM ANY LIABILITIES ASSOCIATED WITH THE J.I. INVESTORS PARTNERSHIP, AS REQUIRED BY PARAGRAPH 3.2 OF THE EMPLOYMENT AGREEMENT.

"II. THE TRIAL COURT ERRED, AT THE CLOSE OF APPELLANT MOORE'S CASE, IN DIRECTING A VERDICT IN FAVOR OF APPELLEE JOHNSON INDUSTRIES THAT IT WAS NOT REQUIRED TO COMPLY WITH PARAGRAPH 3.1 OF THE EMPLOYMENT AGREEMENT.

"III. THE TRIAL COURT ERRED, AT THE CLOSE OF APPELLANT MOORE'S CASE, IN DIRECTING A VERDICT IN FAVOR OF APPELLEE JOHNSON INDUSTRIES THAT IT WAS NOT REQUIRED TO REPAY A LOAN TO APPELLANT MOORE IN THE SUM OF TEN THOUSAND AND NO/100 DOLLARS ($10,000.00).

"IV. THE TRIAL COURT ERRED, AT THE CLOSE OF APPELLANT MOORE'S CASE, IN DIRECTING A VERDICT IN FAVOR OF APPELLEE, THOMAS B. JOHNSON (HEREINAFTER REFERRED TO AS 'APPELLEE JOHNSON'), THAT HE PERSONALLY WAS NOT REQUIRED TO REPAY A LOAN TO APPELLANT MOORE IN THE SUM OF TEN THOUSAND AND NO/100 DOLLARS ($10,000.00).

"V. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING, ON OR ABOUT OCTOBER 4, 1996, TO ASCERTAIN WHETHER OR NOT A SETTLEMENT HAD BEEN REACHED BY AND AMONG APPELLANT MOORE, APPELLEE JOHNSON, APPELLEE JOHNSON INDUSTRIES, ROBERT L. HILGENDORF, KENNETH A. CASHMAN, DANIEL J. VELIKAN, AND APPELLEE, HUNTINGTON NATIONAL BANK (HEREINAFTER REFERRED TO AS 'APPELLEE HUNTINGTON').

"VI. THE TRIAL COURT ERRED, AT THE CLOSE OF THE SUBMISSION OF THE EVIDENCE OF THIS CASE, BY DIRECTING A VERDICT IN FAVOR OF APPELLEE JOHNSON THAT HE WAS NOT REQUIRED TO INDEMNIFY APPELLANT MOORE FROM THE JUDGMENT SECURED BY APPELLEE HUNTINGTON AGAINST APPELLANT MOORE.

"VII. THE TRIAL COURT ERRED, AT THE CLOSE OF THE SUBMISSION OF THE EVIDENCE OF THIS CASE, BY DIRECTING A VERDICT IN FAVOR OF APPELLEE JOHNSON THAT HE WAS NOT REQUIRED TO REIMBURSE APPELLANT MOORE FOR ALL COSTS, INCLUDING ATTORNEY FEES, INCURRED BY APPELLANT MOORE INCURRED IN DEFENDING THE ACTION OF APPELLEE HUNTINGTON TO SECURE A JUDGMENT AGAINST APPELLANT MOORE AND BY NOT ADMITTING INTO EVIDENCE EXHIBIT FIVE (5), THE ITEMIZED FEE STATEMENT REFLECTING THE ATTORNEY FEES INCURRED BY APPELLANT MOORE."

T. Johnson and Johnson Industries timely cross-appeal, assigning the following errors:

"I. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT SUSTAINED AN OBJECTION BY GREGORY MOORE TO THE INTRODUCTION OF EVIDENCE BY THOMAS JOHNSON AND JOHNSON INDUSTRIES CORP. SHOWING THAT MOORE HAD REACHED AN EXPRESS AGREEMENT WITH HUNTINGTON NATIONAL BANK THAT LIMITED HIS OBLIGATION TO THE BANK AS A PARTNER IN J.I. INVESTORS CO. TO $6,250.

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"II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT OVERRULED AN OBJECTION BY THOMAS JOHNSON TO MOORE ASSERTING AND INTRODUCING EVIDENCE ON A CLAIM TO RECOVER ON AN ALLEGED PERSONAL LOAN OF $10,000, WHICH MOORE ASSERTED FOR THE FIRST TIME IN HIS TRIAL BRIEF."

***5** C. Johnson timely appeals in Franklin App. No. 96APE11-1579 the trial court's denial of his motion for sanctions against Moore and his counsel, assigning the following error:

"I. THE COURT ERRED IN DENYING SANCTIONS AGAINST GREGORY L. MOORE AND HIS COUNSEL."

C. Johnson also timely appeals in Franklin App. No. 96APE12-1638 the trial court's ruling regarding the global agreement between the parties, assigning the following errors:

"I. THE COURT ERRED IN RULING UPON MOTIONS OF PARTIES WITHOUT REVIEW OF SAID MOTIONS AND/OR WITHOUT EVIDENTIARY HEARINGS ON THE ISSUES.

"II. THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING ON THE ISSUES."

III. INDEMNIFICATION

Because Moore's first, sixth, and seventh assignments of error all concern his indemnification claims and interrelate with the first assignment of error asserted in the cross-appeal of T. Johnson and Johnson Industries, we address them together. In assessing the validity of the verdicts directed against Moore, we must determine whether reasonable minds could come to but one conclusion upon the evidence submitted and whether that conclusion is adverse to Moore. Civ.R. 50(A)(4). In so doing, we must construe the evidence in Moore's favor; we may not weigh the evidence or assess the credibility of the witnesses. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119-120, 671 N.E.2d 252.

A. Indemnification from Johnson Industries

Moore contends in his first assignment of error that the trial court erred by granting a directed verdict against him on his claim for indemnification from Johnson Industries. Moore's first assignment of error misconstrues the trial court's disposition of his indemnification claim against Johnson Industries. The trial court did not grant a motion for directed verdict, but dismissed Moore's claim pursuant to Civ. R. 41(B), which authorizes a court, upon motion or *sua sponte,* to dismiss a claim for failure to prosecute.

Moore's complaint sought indemnification against Johnson Industries under paragraph 3.2 of his employment agreement, but he elected not to pursue the claim at trial. Moore's trial brief, as well as his proposed jury instructions and interrogatories, omitted any reference to an indemnification claim against Johnson Industries. More significantly, however, at a conference held on the morning of trial, Moore's counsel identified only one claim against Johnson Industries, and it related to wrongful termination. Specifically, after listing Moore's causes of action to be tried, and in the process pointing out the two claims against T. Johnson, Moore's counsel stated: "I left on the claim that Gregory Moore had against Johnson Industries * * * and that is for a wrongful termination on a written employment contract." (Tr. 14.) Moore's counsel did not object or otherwise correct the trial court when it later identified the wrongful termination claim as the only claim remaining against Johnson Industries.

***6** In accordance with his representations to the court, Moore throughout the trial failed to pursue an indemnification claim against Johnson Industries. Even though the trial court admitted Moore's employment agreement with Johnson Industries into evidence, the trial transcript is devoid of Moore's

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attempt to establish a claim for indemnification against Johnson Industries during his case-in-chief. While Moore argues that pages 435 to 450 of the transcript demonstrate that he discussed the claim for indemnification against Johnson Industries in his case-in-chief, those pages contain discussions between the parties and the judge outside the presence of the jury; the discussions are not evidence. Moreover, the discussions focused on the first sentence of paragraph 3.2 relating to Moore's wrongful termination claim against Johnson Industries, not the second sentence of paragraph 3.2, which addresses Johnson Industries' obligation to indemnify Moore for his participation in the JI Investors' partnership.

Accordingly, Moore's first assignment of error is overruled.

B. Indemnification from Johnson

Moore contends in his sixth assignment of error that the trial court erred by directing a verdict against him on his claim for indemnification from T. Johnson. Paragraph 11.2 of the Partnership Agreement, however, ultimately disposes of Moore's claim.

Paragraph 11.2 provides two methods of withdrawal from the partnership: (1) a partner may voluntarily withdraw, and (2) a partner is deemed to have withdrawn if his employment with Johnson Industries involuntarily terminates. In each case, a withdrawing partner will "no longer be responsible for the debts and liabilities of the partnership and the remaining partners agree to indemnify and save such partner harmless from any such debts or liabilities." Nonetheless, paragraph 11.2 specifies that only *remaining* partners are obligated to indemnify withdrawing partners.

Moore seeks indemnification from T. Johnson under paragraph 11.2, contending T. Johnson was the "last man out" of JI Investors, and thus liable to Moore under the provisions of paragraph 11.2. The record, however, does not support Moore's contention that T. Johnson was the "last man out." Moreover, even if he was, the facts in the record do not support Moore's indemnification claim.

According to the undisputed evidence, when Johnson Industries' Asset Sale to Q3 was due to be completed, the employees of Johnson Industries were sent a letter notifying them that their employment with Johnson Industries was terminated. Moore received the letter, as did T. Johnson. Although the parties dispute whether Moore was involuntarily terminated or voluntarily quit his employment with Johnson Industries, even if we assume, as Moore contends, that he was involuntarily terminated, his withdrawal from JI Investors would have occurred around the same time as T. Johnson's, as both would have been terminated from employment when the letters of termination were issued to the employees of Johnson Industries.

*7 Moore nonetheless argues that T. Johnson remained an employee because he retained his title of president and some duties associated with it. However, one may be an officer without being an employee of the corporation. *Kuehnl v. Indus. Comm.* (1940), 136 Ohio St. 313, 25 N.E.2d 682; *Gibson v. Beacon Ins. Co. of America* (Dec. 21, 1987), Franklin App. No. 87AP-546, unreported (1987 Opinions 3139). The uncontested evidence reflects that T. Johnson's employment was terminated by the same letter Moore received, and T. Johnson received no further compensation as an employee of Johnson Industries after that point. Indeed, the record suggests Velikan was the only Johnson Industries' employee who continued to be employed by Johnson Industries after the Asset Sale. Velikan, not T. Johnson, would have been the "last man out" on this record.

Even if, despite the lack of supporting evidence, we adopt Moore's argument that T. Johnson was the "last man out," Moore nonetheless is not entitled to indemnification under paragraph 11.2 against T. Johnson because his right to indemnification, if any, accrued at a time when T. Johnson was no longer a partner.

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"The nature of an indemnity relationship is determined by the intent of the parties as expressed by the language used." *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, 240, 513 N.E.2d 253. Moreover, if a contract "provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises." *Firemen's Ins. Co. v. Antol* (1984), 14 Ohio App.3d 428, 429, 471 N.E.2d 831. An indemnitee incurs liability when a court finds the indemnitee to be liable. *Enterprise Group Planning, Inc. v. Savin* (Feb. 10, 1994), Cuyahoga App. No. 65693, unreported.

Huntington obtained summary judgment against Moore for the partnership debt on June 18, 1996, a judgment journalized on July 24, 1996. Moore testified he settled his liability for the partnership debt with Huntington for $100,000 in September 1996. T. Johnson testified, however, he sent a letter to all partners in May 1996 stating: (1) he had been involuntarily terminated as an employee of Johnson Industries in March of 1995, and (2) to the extent that fact was disputed, he was voluntarily withdrawing from the partnership effective immediately. Moore acknowledged he received a letter from T. Johnson announcing his resignation as a partner. Although Moore could not recall whether the letter stated T. Johnson was voluntarily withdrawing effective immediately, Moore did not challenge T. Johnson's testimony concerning the content of the letter, nor did he raise an evidentiary objection on the basis that T. Johnson did not introduce the letter into evidence.

Paragraph 11.2 clearly indicates the partners' intent that only remaining partners would be bound as indemnitors. As a result, even if (1) Moore became liable for the partnership debt on July 24, 1996, and (2) T. Johnson did not withdraw until May, making him the "last man out," paragraph 11.2 provides Moore with no indemnity rights against T. Johnson because he was not a "remaining partner" in the partnership when Moore's right to indemnification accrued.

***8** Accordingly, Moore's sixth assignment of error is overruled.

C. Indemnification for Attorney Fees

Moore's seventh assignment of error relating to indemnification for costs and attorney fees is premised on a determination that T. Johnson must indemnify Moore pursuant to paragraph 11.2 of the Partnership Agreement. Because T. Johnson has no obligation to indemnify Moore under paragraph 11.2, Moore's seventh assignment of error is overruled.

The first assignment of error asserted in the cross-appeal of T. Johnson and Johnson Industries contests an evidentiary ruling during the trial concerning the global agreement and its impact on their duty to indemnify Moore. Because neither T. Johnson nor Johnson Industries is obligated to indemnify Moore, the first assignment of error on cross-appeal is moot.

IV. WRONGFUL TERMINATION CLAIM AGAINST JOHNSON INDUSTRIES

Moore contends in his second assignment of error that the trial court erred by directing a verdict against him on his wrongful termination claim against Johnson Industries. The assignment of error is not well-taken: even if Johnson Industries breached its contract of employment with Moore, the trial court's disposition of Moore's claim was proper because Moore failed to mitigate his damages.

Mitigation of damages incurred from a wrongful termination is an affirmative defense with the burden of proof resting on the employer. *State ex rel. Martin v. Columbus* (1979), 58 Ohio St.2d 261, 389 N.E.2d 1123, paragraph three of the syllabus. To establish the defense, an employer must offer evidence proving the amount the wrongfully terminated employee earned, or in the exercise of due diligence, could have earned in appropriate employment during the period of exclusion. *Id.* at paragraph two of the syllabus. However, a wrongfully terminated employee need only accept "similar"

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employment in mitigation. *Id.* at 264, 389 N.E.2d 1123.

Moore testified that his position with Q3 was similar to his position with Johnson Industries. Moore also testified that Q3 told him he would not suffer any diminution in his $80,000 yearly salary from Johnson Industries because his base salary of $40,000 to $45,000 at Q3 would be supplemented with commissions if he worked very hard in his new position. According to the evidence, Q3 terminated Moore because he unilaterally announced he was taking an unauthorized three-week vacation in March 1995, Q3 having approved only a three-day vacation. Moore remained unemployed until September 1995, when he accepted employment with another company.

Even though the commissions, which would have constituted approximately fifty percent of Moore's total compensation at Q3 were not guaranteed, the undisputed evidence was that Q3 offered Moore similar employment which as a package would cause him no diminution in income. With that evidence, Johnson Industries met its burden of establishing Moore could have earned as much with Q3 as he did with Johnson Industries, and Moore offered no evidence to contest the issue. While Moore's termination from Q3 deprived him of that income, the evidence in this record demonstrates that Moore caused his termination from employment at Q3 by his decision to take three weeks unapproved vacation. Because his lack of earnings was the result of his own actions, the lost income cannot undermine the mitigation evidence otherwise supporting the trial court's directed verdict for Johnson Industries on Moore's wrongful termination claim. See *Burnside v. Bloxham* (1923), 121 Misc. 672, 201 N.Y.S. 672.

***9** Moore did not assert in the trial court or on appeal that the second component of his compensation at Johnson Industries is a factor in mitigation. Indeed, the second component is not compensation, given the facts of the record.

However Moore's employment contract with Johnson Industries may have labeled that money sent to Huntington, on this record it cannot be considered compensation for mitigation purposes. In effect, each partner of JI Investors was given a "salary increase" to cover the payment to Huntington on the partnership's debt. Not only did Moore not have access to the additional "compensation," but it was used to pay a partnership debt, not a personal debt. Indeed, Moore himself asserted in the trial court that the entire scheme was tax fraud because Johnson Industries reported the additional payment as compensation. Accordingly, on this record the additional payment is not part of Moore's compensation to be met for mitigation purpose in subsequent employment.

Moore's second assignment of error is overruled.

V. BREACH OF $10,000 LOAN CONTRACT

Because Moore's third and fourth assignments of error interrelate with the second assignment of error asserted in the cross-appeal of T. Johnson and Johnson Industries, we address them together.

A. Loan Claim Against Johnson Industries

Moore's third assignment of error asserts the trial court erred in directing a verdict against him on his $10,000 loan claim against Johnson Industries. Moore misconstrues the trial court's disposition of his loan claim against Johnson Industries. The trial court dismissed his claim pursuant to Civ.R. 41(B) because Moore abandoned the claim prior to trial, electing instead to pursue the claim against T. Johnson.

Not only did Moore's trial brief, his proposed jury instructions, and interrogatories omit any reference to a loan claim against Johnson Industries, but during the pretrial conference, Moore's counsel responded to the trial court's request for a listing of Moore's remaining claims by asserting the loan claim only against T. Johnson personally, not against Johnson Industries.

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Moreover, Moore never attempted to establish Johnson Industries' liability for the loan during his case-in-chief. While some of the testimony solicited during Moore's case-in-chief arguably related to a claim against Johnson Industries for the $10,000 loan, the testimony was given in response to questions framed to establish liability against T. Johnson, and in answers negating that liability. The trial court properly invoked Civ.R. 41(B) to dismiss Moore's claim against Johnson Industries.

Moore's third assignment of error is overruled.

B. Loan Claim Against T. Johnson

Moore's fourth assignment of error asserts the trial court erred in granting a directed verdict on his claim against T. Johnson for repayment of $10,000 loaned to purchase equipment for Johnson Industries. Although T. Johnson responds with both procedural and substantive arguments, we address T. Johnson's substantive argument, as it disposes of the assigned error.

***10** The trial court concluded that Moore failed to introduce evidence sufficient to demonstrate that reasonable minds could conclude that T. Johnson had promised to personally repay the $10,000 loan. Essential to the formation of an enforceable contract are a meeting of the minds, an offer, and acceptance. *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 442 N.E.2d 1302. The parties must have a distinct and common intention which is communicated by each party to the other. *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 .

Even when the evidence is construed in Moore's favor, he has failed to demonstrate that T. Johnson promised to repay him for the $10,000 Johnson Industries used to purchase machinery. Moore never asked T. Johnson to be personally obligated for the loan. In response to questioning from his own counsel, Moore stated "I can't remember any exact words on [*sic*] Tom Johnson that I was going to hold him personally liable, or whatever." (Tr. 327.) Moreover, T. Johnson never promised to personally repay the loan. Responding to questioning from Moore's counsel, T. Johnson stated "I never made that statement to Greg Moore, that I was personally obligated." (Tr. 243.) Moore confirmed Johnson's testimony by testifying that he did not have any indication from T. Johnson about who would repay him for the $10,000 loan.

In an effort to circumvent that testimony, Moore argues three points to establish T. Johnson's personal liability for the loan. Moore first relies on testimony from T. Johnson's deposition which was read into the trial transcript during discussions between the parties and the trial court:

" * * * I [Johnson] told him that I would be responsible. I would pay Greg Moore the ten thousand dollars in some kind of settlement of the case. I would take that as my responsibility." (Tr. 109.) (See, also, Tr. 110.)

Moore's reliance on the deposition testimony is misplaced. In deciding a motion for directed verdict, a court must frame its analysis and base its decision on the evidence submitted. See, *e.g.*, Civ.R. 50(A)(4); *Wagner, supra.* The deposition testimony Moore relies on was not submitted into evidence, and Moore did not elicit any such testimony from T. Johnson during trial. Instead, those passages were quoted out of the presence of the jury in response to Johnson's directed verdict motion. Moreover, the deposition testimony was never read into evidence once the trial resumed, nor is it likely that it could have been, as Johnson's comments were made in the context of settlement negotiations and would have been inadmissible under Evid.R. 408.

Moore next argues that the structure of the loan transaction demonstrates Johnson's personal obligation to repay the $10,000 loan. The testimony at trial indicated that Moore issued a $10,000 check payable to T. Johnson, who deposited the check into his personal account. Thereafter, T. Johnson issued a $10,000 check payable to Johnson Industries, en-

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abling it to purchase the machinery. T. Johnson's decision not to endorse Moore's check directly over to Johnson Industries does not take Moore's argument out of the realm of speculation, absent some evidence indicating that Moore asked, or that T. Johnson agreed, that T. Johnson would personally repay the $10,000.

***11** Lastly, Moore asserts a course of dealing argument to overcome the lack of evidence of an express agreement between himself and T. Johnson. His argument is unavailing because Moore presented no evidence establishing that he had previously made loans to T. Johnson. To the contrary, Moore admitted he had never loaned any money to T. Johnson prior to the time he gave T. Johnson the $10,000 to enable Johnson Industries to purchase the machinery.

Moore's failure to introduce evidence essential to the elements of his loan claim against T. Johnson warranted a directed verdict against him on that claim. Accordingly, his fourth assignment of error is overruled. The court's disposition of Moore's fourth assignment of error renders moot the second assignment of error set forth in the cross-appeal of T. Johnson and Johnson Industries.

VI. GLOBAL AGREEMENT AND EVIDENTIARY HEARING

Because Moore's fifth assignment of error, C. Johnson's two assignments of error in appeal 96APE12-1638, and the motions to dismiss filed by Huntington interrelate, we address them jointly. Both Moore and C. Johnson contend the trial court erred by refusing to conduct an evidentiary hearing prior to ruling on the motion to enforce the global agreement. Preliminarily, however, we must address Huntington's separate motions contesting the standing of Moore and C. Johnson to appeal the issue.

A. Moore's Standing to Pursue his Fifth Assignment of Error

"Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." *Ohio Contract Carriers Assn. v. Public Utilities Comm.* (1942), 140 Ohio St. 160, 42 N.E.2d 758, syllabus.

Huntington contends that Moore lacks standing regarding the global agreement because subsequent to the trial court's ruling on the enforcement motion, Moore entered into a written agreement with Huntington whereby he agreed to pay Huntington $100,000 in satisfaction of the judgment obtained against him, and he released any and all claims he had against Huntington. The settlement agreement between Moore and Huntington, however, is not set forth in the record; thus no evidence properly before this court indicates that Moore lacks standing to appeal the trial court's ruling concerning the global agreement. See App.R. 9(A).

While a court of appeals may order an addition to the record on appeal pursuant to App.R. 9(E) when the accuracy of the proposed changes are undisputed, the document allegedly omitted from the record must actually have been before the trial court. *Stadler v. Rankin* (Apr. 29, 1993), Franklin App. No. 92AP-1269, unreported (1993 Opinions 1590). Huntington has not shown that the settlement agreement between it and Moore was actually before the trial court, nor is it apparent to this court that it was. Accordingly, the purported settlement agreement attached to Huntington's motion to dismiss Moore's fifth assignment of error may not be considered in deciding Huntington's motion. Rather, the trial court may determine Moore's standing to pursue an evidentiary hearing, per our disposition of Moore's fifth assignment of error.

***12** Given the absence of the settlement agreement between Moore and Huntington from the record, as well as the reduction in Moore's liability to Huntington had the global agreement been enforced, Moore is an aggrieved party who possesses standing to pursue his fifth assignment of error. Accordingly, Huntington's motion to dismiss Moore's fifth assignment of error is denied.

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B. C. Johnson's Standing to Pursue His Assignments of Error in Appeal 96APE12-1638

Huntington argues that C. Johnson lacks standing to appeal the trial court's ruling concerning the global agreement because (1) Moore voluntarily dismissed C. Johnson from the lawsuit, and (2) C. Johnson has asserted claims to enforce the global agreement in two additional actions.

C. Johnson is not an aggrieved party for purposes of this lawsuit. C. Johnson was dismissed from this lawsuit before any liability could be imposed on him. As a result, regardless of the global agreement, he sustained no liability. To the extent he is a party to other litigation, he may assert the global agreement there as a defense to any claims asserted against him, and in that litigation seek a determination whether a global agreement occurred which insulates him from further liability. Similarly, should Moore refile his claims against C. Johnson, C. Johnson may assert the global agreement as a defense, if appropriate, and litigate any surrounding issues at that time. In neither instance will C. Johnson be bound by any determination reached in this litigation, as his lack of standing precludes application of *res judicata* or collateral estoppel principles.

Accordingly, Huntington's motion to dismiss C. Johnson's appeal in case 96APE12-1638 is granted.

C. Review of the Trial Court's Refusal to Conduct an Evidentiary Hearing

Generally, if a motion to enforce a settlement agreement surrounds an agreement of undisputed terms, the issue is one of contract law; thus the standard of review is whether the trial court erred as a matter of law. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502, 660 N.E.2d 431. However, if the agreement's terms are in dispute, the issue of whether the trial judge should enforce the alleged settlement agreement is reviewed under an abuse of discretion standard. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 683 N.E.2d 337. The abuse of discretion standard focuses on more than whether an error of law has occurred; it also addresses whether the trial court's attitude is unreasonable, arbitrary or unconscionable. See, *e.g., State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs.* (1994), 70 Ohio St.3d 94, 97, 637 N.E.2d 311. Under *Rulli,* decided after the trial court's decision here, the trial court should have conducted an evidentiary hearing prior to ruling on the motion to enforce the global agreement.

***13** Highly favored in the law, a valid settlement agreement "is a contract between the parties, requiring a meeting of the minds as well as an offer and acceptance thereof." *Rulli, supra; Continental W. Condominium Unit Owners Assn., supra.* Oral settlement agreements require no more formality or particularity than does the formation of any other binding contract. *Noroski, supra,* at 79, 442 N.E.2d 1302.

While courts may often encourage settlement, the parties may not be forced into a settlement agreement. Thus, when the parties dispute the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment. *Rulli, supra,* at syllabus. Similarly, a party should not be deprived of a settlement agreement merely because the opposing party defends against a settlement enforcement motion by denying that the agreement existed. *North Hampton Day Care and Learning Center, Inc. v. Ohio Dept. of Human Services* (Apr. 4, 1997), Clark App. No. 96-CA-20, unreported. In such cases, the moving party is entitled to an evidentiary hearing. *Id.*

Here, the trial court denied the motion to enforce the global agreement without first conducting an evidentiary hearing. Instead, the court conducted a nonevidentiary oral hearing, after which it concluded (1) no meeting of the minds occurred, and no one prepared or executed a settlement agreement, (2) it was unable to enforce an oral agreement when there was no record to support it, (3) it was unable to enforce a settlement agreement which was never prepared, let alone executed, and

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(4) any such settlement agreement would have been unenforceable pursuant to Loc.R. 29.01, which provides that "[n]o oral agreement of counsel with each other, or with a party or an officer of the Court, will be regarded unless made in open court."

Under *Rulli,* however, the trial court should have conducted an evidentiary hearing prior to ruling on the motion to enforce the global agreement. Without evidence in the form of sworn testimony from the parties and the magistrate, the court lacked a proper factual basis to conclude that no meeting of the minds occurred among the parties. As this court stated in *Bolen v. Young* (1982), 8 Ohio App.3d 36, 455 N.E.2d 1316:

" * * * Where an agreement is purportedly arrived at in the presence of the trial judge and approved by the parties, but its terms are not memorialized on the record and one of the parties later disputes the terms of the agreement by refusing to approve an entry journalizing the agreement, the trial judge many not adopt the terms of the agreement as he recalls and understands them in the form of a judgment entry. Instead, the party disputing the agreement is entitled to an evidentiary hearing before another judge * * * in which the trial judge may be called as a witness to testify as to his recollection and understanding of the terms of the agreement * * *." *Id.* at 37, 455 N.E.2d 1316.

***14** Although the facts here are slightly different since the parties allegedly entered into the global agreement in the presence of a magistrate, the procedure identified in *Bolen* provides a workable procedure for this case. The trial court should have given the parties an opportunity to present sworn witnesses, including the magistrate, and to testify regarding the existence and terms of the alleged global agreement.

Arguably, Loc.R. 29.01 does not contradict the dictates of *Rulli* or *Bolen.* Loc.R. 29.01 prevents a trial court from enforcing an oral, extra-judicial settlement agreement that is not subsequently reduced to a writing or memorialized in open court. It does not preclude a trial court, as a preliminary matter, from ascertaining the existence and terms of an oral, extra-judicial settlement agreement. If the trial court concludes that the parties entered into the global agreement, the parties arguably may then obtain enforcement of the agreement by formalizing it in accord with Loc.R. 29.01.

Moreover, even if Loc.R. 29.01 conflicts with *Rulli,* Loc.R. 29.01 cannot supersede law the Supreme Court pronounces. See *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 597 N.E.2d 153 (local rules may not be inconsistent with any rule governing procedure or practice promulgated by the Supreme Court including the Rules of Civil Procedure). *Rulli* announced that oral settlement agreements are subject to no greater requirements than any other contract. Despite the attempts of Loc.R. 29.01 to impose greater requirements, *Rulli* controls. Because *Rulli* requires an evidentiary hearing in these circumstances, Loc.R. 29.01, to the extent it does not, conflicts here with *Rulli* and is unenforceable in this instance. Accordingly, Moore's fifth assignment of error is sustained.

VII. C. JOHNSON'S MOTION FOR CIV.R. 11 SANCTIONS

C. Johnson has separately appealed the trial court's October 8, 1996 decision denying his September 17, 1996 motion for sanctions and attorney fees against Moore and his counsel. The trial court concluded that Moore did not file a frivolous lawsuit against C. Johnson. The trial court's ruling is reviewed to determine whether the trial court abused its discretion. *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65, 505 N.E.2d 966.

Civ.R. 11 provides:

" * * * The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule an at-

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torney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. * * * "

***15** To recover sanctions or attorney fees pursuant to Civ.R. 11, a party must produce evidence of a willful violation. Civ.R. 11; *Kemp, Schaeffer & Rowe Co., L.P.A. v. Frecker* (1990), 70 Ohio App.3d 493, 497, 591 N.E.2d 402. C. Johnson's sole argument for sanctions and attorney fees focuses on Moore's not knowing why C. Johnson was made a party to this case.

A review of the amended complaint indicates that C. Johnson was a proper party to Moore's declaratory judgment action. R.C. 2721.12 states:

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceeding. * * * "

C. Johnson was a proper party in the litigation because Moore sought to ascertain the rights and obligations of the parties under the assumption and loan agreement between C. Johnson, JI Investors, and Johnson Industries. Moore's attorneys did not willfully violate Civ.R. 11 by including C. Johnson in the lawsuit. C. Johnson's sole assignment of error in appeal 96APE11-1579 is overruled.

Having overruled all the assignments of error except for Moore's fifth assignment of error, the judgment of the trial court in Franklin App. No. 96APE12-1703 is affirmed regarding the verdicts directed against Moore, but reversed concerning the issue of an evidentiary hearing. C. Johnson's appeal in Franklin App. No. 96APE12-1638 is dismissed for lack of standing. The judgment of the trial court is affirmed in Franklin App. No. 96APE11-1579. Accordingly, this case is remanded to the trial court with instructions to conduct an evidentiary hearing pursuant to part VI of this opinion.

Judgment affirmed in Franklin App. No. 96APE11-1579; judgment affirmed in part and reversed in part, and case remanded in Franklin App. No. 96APE12-1703; case dismissed in Franklin App. No. 96APE12-1638.

LAZARUS and BOWMAN, JJ., concur.

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Not Reported in N.E.2d, 1997 WL 771015 (Ohio App. 10 Dist.)

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