

ORIGINAL

IN THE SUPREME COURT OF OHIO

AMBER WILLIAMS

Appellee

Vs.

FREDERICK ORMSBY

Appellant

CASE NO. 2010-1946

On Appeal From The
Ninth Appellate District,
Medina County, Ohio

MERIT BRIEF OF APPELLEE, AMBER WILLIAMS

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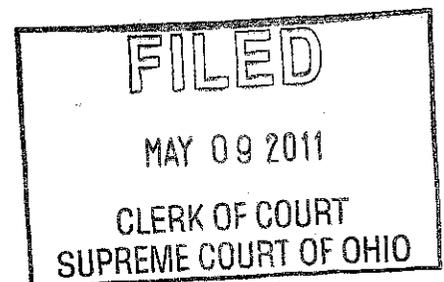


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STATEMENT OF THE CASE AND FACTS

The Appellant's statement of facts is incorrect in regards to the first paragraph on page 1 of Appellant's Merit Brief, "unemployed at the time she received it, the property was encumbered by a mortgage of approximately \$310,000.00 that she had no means of paying." Actual facts are "in some of your responses to interrogatories, there was a \$310,000.00 mortgage – approximately \$310,000.00 mortgage on the property. Are we talking about the same mortgage? Answer Yes." (Supp. p. 29 and 44: Williams depo. at p. (10), 1, 4, and p. (25), 1, 25) There is nothing in the record cited by Appellant about Appellee being unemployed or no means of paying the mortgage.

Appellant's Statement of facts is somewhat solitary in the view point that Appellant began making mortgage payments "in light of their intention to marry" found at Appellant's Statement of Facts page 1, paragraph 3. From Appellee's view point she states, "—that Mr. Ormsby voluntarily took it upon himself to pay. Question so to be clear, he paid the mortgage payment for the house from – what is it August through December of 2004?" Appellant's Supp. 75 at Williams's deposition p. (56), 1, 11-15.

In response to the contention in the Statement of Facts by Appellant, that Appellee was bereft of funds, please see Appellant's Supp. p. 34, p. (15) of the Williams's deposition 1, 6-9, where she received around \$100,000.00 from the prior divorce. Appellee in her deposition, Appellant's Supp. 43 at page (24), 1, 9-17 of Williams's deposition, indicates she signed a deed to Mr. Ormsby because of financial considerations from the divorce that weren't finalized. Their assets would be joint after they were married, Appellant's Supp. 43, Williams's deposition p. (24) 1, 9-23. A deed was to be placed back in her name when these issues were resolved,

Appellant's Supp. p. 45, Williams's deposition p (26), 1, 6-10. It was her understanding that he was going to put her name back on the deed and that they were equal partners in the house Appellant's Supp. p. 45, p. (26) Williams's deposition 1, 23-25. There was no specific date when Mr. Ormsby was to transfer the property back into both names, Appellant's Supp p. 46 p. (27) Williams's deposition, 1, 1-3.

The March, 2005 agreement was novated by the June 2, 2005 Agreement signed by both parties and recorded for public record with the Medina County Recorder's Office at 2007 ORO 30007. Appellee's Supp. p. 1, 2, and 3. It was declared by Appellant that the Appellee had in the real property a present property interest, not future. The June 2, 2005 agreement was put together by Mr. Ormsby not the Appellee, Appellant Supp. 54, Williams's deposition p. (35), 1, 7. The March 2005 agreement was declared null and void by Mr. Ormsby, Appellant's Supp. 61, page (42) Williams's deposition 1, 22-24. It was stated specifically per the June 2005 contract, "all other agreements concerning the items stated below to be null and void" Appellee's Supp. p. 2. There was mutual consideration by both parties, they both put money into the house after the June 2005 agreement, Appellant's Supp. p. 63, Williams's deposition p.(44), 1, 20. The Appellee voluntarily novated the March 2005 agreement, he wrote a letter to Appellee indicating it to be null and void and that he had put together the June 2005 agreement, Appellant's Supp. p. 66, Williams's deposition, p. (47), 1 1-3. The agreement was not conditioned on marriage as Appellant could not get married, he was not divorced, and it was Mr. Ormsby's idea to put the home into a 50/50 split, Appellant's Supp. 68, Williams's deposition, p. (49), 1, 4-9. If the parties' relationship deteriorated, the agreement provided for the eventualities of divisions of property, Appellant's Supp. p. 70, Williams's deposition, p.(51), 1, 1-13 and see Appellee's

Supp. pg. 2 and 3. The parties agreed that they would both have insurable interests in the property and sharing of replacement costs of the contents and Appellee indicated that she would share her assets with him and she acknowledges both having an insurable interest in the assets that were in the home, Supp. p. 70, Williams's deposition p. (51), 1, 17-21 and Appellee's Supp. page 2 section 3.

The June 2, 2005 contract indicates "FOR VALUABLE CONSIDERATION..." Appellee's Supp. p. 2. The contract of June 2, 2005 is in writing and indicates in the present tense that the parties are equal in the same (ownership of the property), Appellee's Supp. p. 2, numbered section 1.

The contract further indicates to protect Appellee's interest in the property she will file a lien which she did on November 6, 2007, Appellee's Supp. p. 1. Both parties are granted a present tense insurable interest in the home and the contents, Appellee's Supp., p 2, Sec 3. Parties agree that in the event of decease, the survivor of the two would own the real estate, Appellee's Supp, p. 2, 3, Sec No. 5. They will divide the income from the home if it is sold, Appellee's Supp. p. 3, Sec No. 6. Parties agree, "in the event that the relationship ..." (not marriage or failure to enter into marriage) to the disposition of the real estate. They relieve their oral agreements from failure under the Statutes of Frauds, ORC Ann. 1335.04, by Appellant creating a writing concerning real property, Appellee's Supp. p. 1-5. Appellee's Supp. p. 5 shows by the last writing thereon it was prepared by, grantor.

The Statement of the Case by Appellant concerning dates and times of filing of various pleadings and entries of the Court is adopted by Appellee.

ARGUMENTS IN SUPPORT OF COURT OF APPEALS' DECISION

Appellate review of an award of summary judgment is De Novo, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio State 3d 102, therefore this is a De Novo review by this Court. The Supreme Court of Ohio should apply facts and evidence in the case in the light most favorable to the non-moving party casting any doubt in favor of the non-moving party, here Appellee, *Viac v. Stow Woodward Co.* (1983), 13 Ohio Appellate 3d 7, 12, and *Temple v. Wien United, Inc.* (1977), 50 Ohio St. 2d 317, 327. In *Williams v. Ormsby*, Ninth District Court of Appeals Case No. 08 CIV 0869 The Court of Appeals' findings are correct and not in the least specifically as follows:

Page 5, Paragraph 16... a manifestation of mutual assent and legality of object and consideration.... Consideration consists of either a benefit to the promisor or a detriment to the promisee...".

Page 6, Paragraph 17 "He has- **I shared my assets with him, too. We were living together as a couple.**"(Emphasis added)

Page 6, Paragraph 18 Rather, "she refused to move back into the house unless I gave her, you know- unless she were [sic] given equity in the house. So that was her condition."

Page 7, Paragraph 19 Whether the bargained-for detriment is equivalent to the benefit received is not determinative of the existence of consideration; it need only be something regarded by the promisor as beneficial enough to induce his promise... Moreover "companionship" has been recognized in case law as valid consideration.

Page 9, Paragraph 22... the June 2005 contract does not contain any language that can be construed as a condition...Additionally, the contract has a provision addressing the possibility "that the relationship between [WILLIAMS] and [ORMSBY] would end.

Page 10, Paragraph 22... the parties could have used the term "marriage" rather than "relationship".

Upon the above law and findings this court should base its' decision and affirm the Appellate Court's decision. There is consideration existing between the parties.

This is a straight contract case. The parties have a contract in writing. The contract involves real estate and therefore subject to the Statute of Frauds, ORC Ann. 1335.04. The

parties in this case freely entered into a contract, under no coercion, to equally divide the real property proceeds of sale or ½ the appraised value if one or the other bought the other out. They agreed to share in the insurance policy benefits, if there was a loss occasioned to the real estate or contents, such in fact shows mutual consideration back and forth, for there is a sharing of loss of assets between the parties. It is quite clear that Appellant was receiving something, because what Appellee was offering was "... beneficial enough to induce his promise", *Carlisle, et al v. T & R Excavating*, 23 Ohio App. 3rd 277. The parties by their bargaining back and forth novated the contract of March, 2005.

Appellee in this case obviously felt that she was being swindled when she signed over the deed to her house and received no benefit back, Appellant Supp. p. 54, p. (35) Williams's deposition, 1, 2-4. The June 2, 2005 contract indicates that all interests of the parties concerning real estate are present tense interests, such were not conditioned upon marriage. The terms of the June 2, 2005 contract should be strictly construed against the drafter, to wit: the Appellant. The terms are clear. The terms are unambiguous. They are in writing and they concern real estate. Appellant is not defensed if marriage does not happen. The parties' agreement of June 2, 2005 is recorded in the public record, Appellee's Supp. p. 1-5. The parties freely and completely determined what was to happen to the property in case of the decease of one of the parties, i.e. the property goes to the survivor. At no point of time is the June 2, 2005 contract "conditioned". The rights and interests of the parties are completely set forth. Their rights and obligations in the real property sprang into being June 2, 2005.

We have two competent adult individuals who enter into an enforceable June 2, 2005 agreement with their eyes open see, *Nilavar v. Osborne*, 127 Ohio Appellate 3rd 1, which

reversed granting of motion for summary judgment. Where the parties are competent and there is a meeting of minds, proffers and promises made, action and rendering of performance on those promises has occurred under the June 2, 2005 contract, in support see *Ford v. Tandy*, 86 Ohio Appellate 3rd 364.

Appellant had knowledge that the March 2005 contract was novated, accepted the terms of the June 2, 2005 contract, and his conduct subsequent to June 2, 2005 by moving in with the Appellee and living with her as man and wife, (multiple civil protection order filings) for years thereafter was within the terms of the June 2, 2005 contract, see *Union Central Life Insurance Co. v. Hoyer*, 66 Ohio St. 344. The parties in essence completely acquiesced to the June 2, 2005 contract and the March, 2005 contract was novated, *Global Insurance Co. v. Wayne*, 75 Ohio St 3rd 451. When all of the evidence in the record is considered by this Court, in the light most favorable to the Appellee, the summary judgment should be viewed as having been properly reversed by the Court of Appeals. In support see Appellee's admission 5, Appellee's Supp. 6 the parties are sharing expenses and working on the house. Admission 7, Appellee's Supp. 8 indicates that the March, 2005 contract is coerced. Admission 8, Appellee's Supp. 8 sharing all household duties including a bed. Admission 12, Appellee's Supp. 9 sharing 50/50 including her assets, caring for him and caring for his health. Admission 14, Appellee's Supp. 10 he was the one who prepared the June 2, 2005 contract. Admission 16, Appellee's Supp. 11 Appellee and Appellant had arranged for distribution of their property if the relationship terminated. Admission 17, Appellee's Supp. 11 these issues were resolved. Appellant Supp. p. 45, Williams's deposition p. (26), l. 6-10. It was her understanding that he was going to put her back

on the deed and that they were equal partners in the house, Appellant's Supp. p. 45, p. (26) of Williams's deposition, 1, 23-25 . There was no specific date when Mr. Ormsby was supposed to transfer the property back into both names, Appellant's Supp. 46, page (27), Williams's deposition 1, 1-3.

All matters were clear under the June 2, 2005 agreement signed by both parties, notarized, and recorded at the Medina County Recorder's Office at 2007 ORO 30007, Appellee's Supp. p. 1-5.

After the property was transferred into Mr. Ormsby's name, the wedding had to be cancelled because he was still married, Appellant's Supp. p. 49, p. 30 of Williams's deposition 1, 17-21. The June 2, 2005 agreement eventually was put together by Mr. Ormsby not the Appellee, Appellant Supp. 54, pg (35) of Williams's deposition, 1, 7. The March, 2005 agreement was declared null and void by Mr. Ormsby, Appellant Supp. p. 61, p. (42), Williams's deposition, 1, 22-24 and specifically by the June, 2005 contract clearly states "all other agreements concerning the items stated below considered to be null and void", Appellee's Supp. p. 2.

There was mutual consideration by both parties. They both put money into the house after the June, 2005 agreement, Appellant's Supp. p. 63, Williams's deposition p. (44), 1, 20. The Appellant voluntarily abrogated the March 2005 agreement, as he wrote a letter to Appellee indicating it to be null and void, when he put together the June 2005 agreement, Appellant's Supp. p. 66, Williams's deposition p. (47), 1, 1-3. The June 2005 agreement is not in contemplation of marriage because he could not get married, who knows when he could marry because he was not divorced. It was Mr. Ormsby's idea to put the home back into a 50/50 split,

Appellant's Supp. p. 68, Williams's deposition p. (49), 1, 4-9. If the parties' relationship deteriorated it provided for the eventualities of division of property, Appellant's Supp. p. 70, Williams's deposition p. (51), 1, 1-13 and Appellee's Supp. p. 2- 3. The parties agreed that they would both have insurable interests in the property and replacement costs of the contents; Appellee indicated that she would share her assets with Appellant, Appellant's Supp. p. 70, Williams's deposition p. (51), 1, 17-21 and Appellee's Supplement p. 2, section 3.

Appellant wrongly argues that the Court of Appeals view point concerning *Snyder v. Ward*, (1949), 151 Ohio St. 426 is incorrect. The petitioner in *Snyder, supra* failed, because of the Statute of Frauds ORC Ann. 1335.04. An entire reading of *Snyder, supra*. leads to a conclusion that the decision would have been entirely different, if the contract between the parties had been reduced to writing. Here the contract was reduced to writing. It is also interesting to note that the *Snyder, supra*, cited *Galadville v. Mc Dowell*, 247 Ill. 34, 93 Northeast 86, that Court found, even though the agreement between the two parties was oral, that the contract was taken out of the Statutes of Fraud because Eva accepted the offer from her uncle, when she was 18, to stay with her aunt and conform with their views about social life until she married, which she did, and because Eva was in constructive possession of the property, the Court found refusing to enforce the contract, would be a fraud upon Eva.

It would be a fraud upon Appellee who was in actual possession of the property in this case to not enforce the June 2, 2005 contract, which is within the Statute of Frauds. Eva only being in constructive possession, had the contract enforced, Appellant was in actual possession. Another interesting case which contradicts the viewpoint of the Appellant concerning *Snyder, supra*., is *Emery v. Darling*, 50 Oh. St. 160, one sister convinced her other sister to live with her,

and if in fact she did so, the real property would go to her. The sister, promissor, reduced this promise to writing, the Court stated that the value and society of the sister was incapable of being measured in money found that even though such was incapable of monetary measurement it was sufficient consideration to enforce the contract, which had been reduced to writing, i.e. the Statute of Frauds had no application. The results in *Emery*, supra, may well have been different if the contract was not in writing.

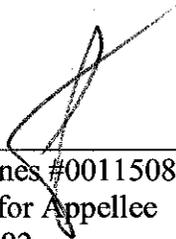
Here the contract is in writing. The value of the society of Appellee to Appellant was of sufficient consideration for him to put it in writing. Lawyers should always say, GET IT IN WRITING. Well, in this case, it is in writing, the Appellant's writing and he is bound by it.

CONCLUSION

This Court should affirm the Court of Appeals' decision.

This Court should based upon de novo review of the materials in the record, grant Appellee's request for summary judgment.

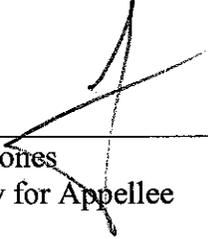
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by ordinary US Mail, postage prepaid, to counsel for Appellant, Michael L. Laribee, 325 North Broadway Street, Medina, Ohio 44256 this 6 day of May, 2011.



L. Ray Jones
Attorney for Appellee