

IN THE SUPREME COURT OF OHIO

SHELLY SHOR GERSON, et al.,

Plaintiffs-Appellees,

-vs-

CHARLES SHOR,

Defendant-Appellant.

Supreme Court Case No. 12-1696

**On Appeal from the Hamilton County
Court of Appeals**

First Appellate Judicial District

Appeal No. C110832

**PLAINTIFFS-APPELLEES SHELLY SHOR GERSON, TOBY SHOR, AND
SYLVIA SHOR'S MEMORANDUM IN OPPOSITION TO JURISDICTION**

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I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

It is difficult to imagine a case involving less public or general interest than a private family dispute settled pursuant to a written Memorandum of Understanding (“MOU”) which the parties expressly identified as “binding and enforceable.” Nevertheless, Appellant Charles Shor (“Mr. Shor”) argues that the decision below “eviscerates” this Court’s precedent and “violate[s] a fundamental public policy.” (Memorandum, p. 3). In particular, Mr. Shor contends that the trial court should have held a hearing before it ruled, and that the Court of Appeals “brushed aside the intent of the parties – ignoring numerous omissions and ambiguities.” (Memorandum, p. 2). Nothing could be further from the truth.

First, the trial court allowed for extensive discovery regarding the intent of the parties, considered multiple briefs which cited to the evidentiary record, and held a hearing before granting summary judgment. This was not a case where Appellees moved to quickly enforce an informal settlement agreement during the pendency of a litigation. On the contrary, after five months of intense mediation resulted in the MOU, Appellees filed an entirely new lawsuit and engaged in the full discovery process before moving for summary judgment to enforce the settlement. Thus, even if *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 683 N.E.2d 332 (1997) requires a hearing every time a party disputes the validity of a settlement agreement (no matter how trivial and disingenuous the dispute) the lower courts followed that directive. Indeed, the trial court allowed for discovery of more evidence than is contemplated by *Rulli*. Consequently, Mr. Shor cannot create a reviewable issue out of the process used by the lower courts.

Moreover, the substance of the decision below is unassailable. The decision followed this Court’s past rulings and common sense by finding that the detailed MOU signed by the parties means what it says – it is “binding and enforceable.” In reaching this conclusion, the

lower courts did not need to advance beyond the first paragraph of the MOU, which states in part:

Desiring to settle and resolve all disputes among them, the undersigned enter into this Memorandum of Understanding of Settlement (“MOU”), **intending it to be binding and enforceable.**

(Ex. 1 to Mr. Shor’s Memorandum, p. 1) (emphasis added). Moreover, the First District considered the precise ambiguities raised by Mr. Shor’s Memorandum but found “that nothing demonstrates that the parties had not reached an agreement to settle their disputes.” (Ex. 1, p. 3).

In response to these facts, Mr. Shor offers shrill rhetoric, not substantive analysis. In fact, the strident tone of Mr. Shor’s Memorandum is designed to distract the Court from the straightforward and unremarkable nature of the lower courts’ rulings. But try as he might, Mr. Shor cannot change the fact that the parties entered into an expressly-binding settlement agreement which the First District appropriately enforced. Mr. Shor cannot unilaterally repudiate the MOU, and his buyer’s remorse is no basis for jurisdiction with this Court. Accordingly, the Court should uphold Ohio’s strong policy in favor of settlement, and decline jurisdiction of this matter.

II. ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITION OF LAW

Appellant’s Proposition of Law No. 1: When the meaning or existence of a settlement agreement are disputed, a trial court should at a minimum consider (1) the competing drafts of the proposed final agreement, and (2) the subsequent conduct of the parties, before entering judgment based on an earlier oral or written agreement.

Contrary to Mr. Shor’s suggestion that courts should view settlement agreements warily, Ohio law “favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation.” *Spercel dba Sperco Tool Co. v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972). *See also Continental W. Condominium Unit*

Owners Ass'n v. Howard E. Ferguson, Inc., 74 Ohio St. 3d 501, 502, 660 N.E.2d 431, 432 (1996) (“settlement agreements are highly favored in the law”). “In the event that an agreement is reached through mediation, it is as enforceable as any contractual agreement.” *Allied Erecting and Dismantling Co., Inc. v. Qwest Communications Int’l, Inc.*, 7th Dist. No. 08 MA 212, 2010-Ohio-5939, 2010 Ohio App. LEXIS 4995, ¶ 17 (applying terms of MOU to decide settlement dispute). To be enforceable as a binding contract, a settlement agreement requires no more formality than any other type of contract. It need not necessarily be signed, as even oral settlement agreements may be enforceable. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 15. That is, a settlement agreement is valid as long as it is the product of a meeting of the minds. *Rulli*, 79 Ohio St.3d at 376.

As the *Spercel* Court stated, “a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the court.” 31 Ohio St.2d at 39 (*quoting Cummins Diesel Michigan, Inc., v. The Falcon*, 305 F. 2d 721, 723 (7th Cir. 1962)). “To permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though ... the agreement is of binding force.” *Id.* This court has previously refused to allow the unilateral rescission of a settlement agreement solely on the basis that the party seeking rescission had changed his mind and become dissatisfied with the agreement. *Mack v. Polson Rubber Co.*, 14 Ohio St. 3d 34, 36, 470 N.E.2d 902 (1984). *See also Hite v. Leonard*, 9th Dist. No. 19838, 2000 Ohio App. LEXIS 3799, *7-11 (Aug. 23, 2000) (rejecting argument that there was no meeting of the minds for a settlement, and enforcing it).

In this case, there was unquestionably a meeting of the minds. The MOU arose out of five months of mediation designed to resolve a long and complex history of disputes between the

parties. Prior to the filing of this action, the parties were embroiled in three lawsuits which they agreed to attempt to resolve through mediation. Two of the cases were pending in Hamilton County Probate Court, but were later transferred to the Court of Common Pleas. One of the probate lawsuits involved Trust A under the S. David Shor Trust (“Marital Trust”), in which Appellant Shelly Shor Gerson (“Shelly”) is the co-trustee along with her mother, Appellee Sylvia Shor (“Sylvia”). Sylvia is the lifetime beneficiary and Mr. Shor, Shelly, and Appellee Toby Shor (“Toby”) are contingent beneficiaries. The other probate lawsuit involved the Kenton County Farm Trust (“KFTC”), in which Shelly is the trustee and Mr. Shor, Shelly, and Toby are lifetime beneficiaries. In both lawsuits Mr. Shor was seeking an accounting of the trusts. The third case, a shareholder derivative action for breach of fiduciary duty brought by Shelly and Toby against Mr. Shor and the family business, Duro Bag Manufacturing Co. (“Duro Bag”), was voluntarily dismissed without prejudice pending the results of mediation.

At the outset of the mediation, the parties executed an Interim Mediation Agreement whereby they agreed, among other things, to negotiate two general goals: “A. An equitable and fair division and segregation of all assets currently held in Trust A an Trust B and the Kenton County Farm Trust, and to do so in such a way that will not prejudice nor diminish the rights currently held and owned by Sylvia Shor; and B. A change in corporate governance to insure adequate and fair participation by all shareholders.”

Over a five-month period, the parties met, negotiated, and agreed to settle all outstanding disputes. On September 16, 2010, the parties finally reached an agreement, which was memorialized in the MOU, jointly drafted by counsel for Mr. Shor (Vorys, Sater, Seymour &

Pease)¹ and counsel for Shelly, Toby and Sylvia (Dinsmore & Shohl). Mr. Shor does not dispute that he signed the MOU on September 17, 2010. Shelly signed the MOU on her own behalf and, with express authority on behalf of Toby and Sylvia.

Apart from being expressly “binding and enforceable, the MOU contains the following detailed terms:

- Shelly resigns as trustee of the Marital Trust;
- If Mr. Shor predeceases his mother, \$4 million in assets of the Marital Trust will be set aside for her benefit with the remaining proceeds to be liquidated and divided to Mr. Shor, Shelly, and Toby by thirds;
- The Farm Trust shall be divided 1/3 each within the terms of the Trust with Mr. Shor receiving the property closest to the adjacent parcel owned by him. If the parties cannot agree to the division line, it will be determined through arbitration;
- Duro Bag’s shareholders and directors shall satisfy their fiduciary duties pursuant to Kentucky law, Duro Bag’s articles of incorporation and by-laws and the 1997 Shareholder Agreement;
- The 1997 Shareholder Agreement shall remain intact except as modified by the MOU;
- Dividends shall be paid from 85% of the net profits of the Company unless all shareholders agree that such dividend be canceled;
- No bonus shall be paid to Mr. Shor unless it is objectively reasonable;
- The Board shall schedule four meetings per year;
- The Company’s chief financial officer shall attend board meetings and update the Board on the Company’s financial condition;
- Each of the Company’s divisions chief operating officers shall attend at least one Board meeting per year;
- All shareholders shall receive monthly financials and budgets;

¹ Mr. Shor is currently represented by his fifth set of attorneys since 2009. The counsel who represented Mr. Shor during the mediation withdrew before this case was filed.

- All shareholders shall have the right to annual meetings with division chief operating officers to discuss all aspects of the Company;
- All shareholders, at her or his expense, shall have the right once a year to examine or have examined the financial records of the Company;
- Shelly and Toby shall be retained as full-time employees of the Company until they reach age 65;
- The Company will provide all directors with relevant information to the agenda one week and advance of board meetings;
- Between quarterly Board meetings, the Company and directors will use their reasonable efforts to promptly update each director as to material developments (as defined in the MOU) relating to the Company;
- All matters required to be approved by the Board must be discussed by the Board before taking action on such matter;
- The signatories shall release and discharge one another with respect to any and all claims now existing of any nature whatsoever, including the pending Farm and Marital Trust cases; and
- The Company shall pay the legal expenses of all parties.

Given the terms set forth above, the MOU cannot be considered incomplete or unclear. It is a three-page type-written agreement prepared with the assistance of counsel and expressly intended to be “binding and enforceable.” It spells out detailed reforms to Duro Bag’s corporate governance and the operation of the two trusts, mutual releases, and agreements for the payment of legal fees. In short, it has all the hallmarks of a valid, enforceable contract.

Mr. Shor identifies three areas where the MOU is supposedly vague, but a review of these sections reveals Mr. Shor’s arguments to be mere pretexts for refusing to honor the MOU he voluntarily signed. Mr. Shor claims that ambiguities exist as to: (1) the modification and/or termination of the Farm and Marital Trusts; (2) the identity of the parties to the agreement; and (3) the governance of Duro; confidentiality.

Mr. Shor's first argument relating to modification or termination of the Farm and Marital Trusts in Section A.1.-3. of the MOU, is that "the MOU does not specify one way or the other whether the division and conveyance of the real estate is to be based on area, value or both." (Memorandum, p. 10). Actually, the MOU is very clear: the KCFT "will be divided 1/3 each within the terms of the Trust and transferring to Charles Shor, all pursuant to survey that such property closest to the parcel/home owned by him. If the parties cannot agree on the division line, it shall be determined by binding arbitration." This provision, which is unambiguous, makes no mention of dividing the property by value. It only references a survey, which necessarily involves a division based on area. To the extent Mr. Shor is complaining about the status of the real property before partition is accomplished, he can only blame himself. If he had complied with his obligations under the MOU from the start, there would be no lingering uncertainty as to the property.

Mr. Shor also claims that "there was not even a meeting of the minds as to who the necessary parties to the settlement were." (Memorandum, p. 11). It is undisputed that the directors were not formally listed as parties to the MOU and did not sign it. However, whether the directors, Tim Needham and Ivan Hughes, are formal parties to the MOU is immaterial. As an initial matter, the directors did not appeal the trial court's judgment and Appellees did not dispute the finding that the directors are not signatories. Furthermore, Section B. of the MOU delineates the corporate duties and obligations of Duro Bag, its Board of Directors, *each director individually*, and each shareholder to adhere to mandatory changes in the corporate governance and operation of Duro Bag. The MOU was signed by *all* the shareholders of Duro Bag. Accordingly, as the trial court found, all individual directors of Duro Bag are to be subject to the corporate mandates contained therein and must abide by it. The fact that Needham and Hughes

are not identified by name in the MOU or did not sign it does not render the MOU ambiguous or unenforceable under any circumstance.

Finally, Mr. Shor claims that the MOU is ambiguous because the draft settlement agreement had different terms than the MOU relating to Mr. Shor's bonus. But irrespective of Mr. Shor's attempt to obfuscate the facts, the MOU is clear on the issue of Mr. Shor's bonus. Specifically, pursuant to Section B.3., "The calculation of 'net profits' shall be made prior to consideration of any bonus payable to Charles Shor. No bonus shall be paid unless it is objectively reasonable, considering the nature of Duro as a Subchapter S Corporation owned by members of the same family." The fact that Shelly could not immediately identify a family-owned corporation substantially similar to Duro Bag does not create an ambiguity in the MOU.

Nor does the parties' inability to reduce the MOU to a final, comprehensive settlement agreement render the MOU unenforceable, as Mr. Shor argues. (Memorandum, p. 8). While it is true that Appellees' counsel engaged in correspondence for this purpose with Mr. Shor's fifth and current counsel, further expression of the agreement proved to be impossible under the circumstances.

However, the lack of a further expression of agreement is immaterial. It is well-settled law in Ohio that an agreement can be enforced even if a further expression of the agreement was intended, so long as the parties intended to be bound and the intentions are sufficiently definite to be enforced. *Normandy Place Assocs. v. Beyer*, 2 Ohio St.3d 102, 105-106, 443 N.E.2d 161 (1982). *See also Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 556 N.E.2d 515 (1990) (affirming the trial court's enforcement of an "agreements to agree" where the parties manifested an intent to be bound by the terms and these intentions are sufficiently definite to be specifically enforced); *Alpert v. Kodee Technologies*, 117 Ohio App.3d 796, 691 N.E.2d 732 (7th Dist. 1999)

(enforcing a preliminary agreement which specified that a “more detailed agreement” would be prepared under *Normandy*).

In fact, *Normandy* addressed this precise issue in the context of letters of intent, to which Mr. Shor repeatedly compared the MOU in his deposition. In *Normandy*, the Supreme Court of Ohio recognized the general validity of preliminary agreements, and rejected the position that an agreement to make an agreement is *per se* unenforceable. In that case, the defendant was a prospective tenant in a shopping center and signed an “Agreement to Lease” with the developer. The defendant later signed a “Letter of Intent,” again indicating that he would lease the space. When the lease was eventually presented, the defendant claimed that he no longer wished to rent the space and cited 29 alleged discrepancies between the lease and the preliminary agreement. The trial court held that the preliminary agreement was unenforceable. The Supreme Court of Ohio reversed and remanded, setting forth the standard above.

On remand, the trial court found that the parties intended to be bound by the preliminary agreement to lease and the court of appeals affirmed the trial court’s decision. *Normandy Place Associates v. Beyer*, 2nd Dist. No. CA 10498, 1988 Ohio App. LEXIS 964 (March 16, 1988). The appellate court noted that the agreement to lease contained all of the essential terms of a typical lease and a provision making it a final agreement upon acceptance.

In the instant case, Mr. Shor cannot credibly argue that the parties have not manifested a definite intention to be bound by the terms of the MOU – the MOU itself reflects the parties’ intent that it be “*binding and enforceable*.” Here, there was clearly a “meeting of the minds.” The parties negotiated the MOU in detail, and signed it after careful consideration. Its terms are certain, complete, and unambiguous. The trial court was correct when it concluded that “the fact

that the second agreement could not be reached is unfortunate but does not mean the MOU is unenforceable.”

Mr. Shor’s contention that the trial court should have conducted an evidentiary hearing is no more availing. First, *Rulli* does not stand for the proposition that a hearing is required in every case where a party manufactures a dispute about the validity of a settlement agreement. *Rulli* itself addressed a situation where the “substance or existence of agreement is *legitimately* disputed.” 79 Ohio St. 3d at 376 (emphasis added). Courts of Appeal have interpreted *Rulli* to require hearings only where a legitimate dispute exists. See *LEH Props. v. Pheasant Run Ass’n*, 9th Dist. No. 10CA009780, 2011-Ohio-516, 2011 Ohio App. LEXIS 451, ¶ 11 (dispute as to settlement agreement must be “legitimate”); *Kohler v. Kohler*, 2nd Dist. No. 2009 CA 3, 2009-Ohio-3434, 2009 Ohio App. LEXIS 2948, ¶ 22 (finding that *Rulli* does not require a hearing where the “fundamental elements of the agreement” are not in dispute); *Agarwal v. Bansal*, 2001 Ohio App. LEXIS 1505 (Mar. 30, 2001) (finding no hearing necessary because “unlike the agreement at issue in *Rulli*, the written, signed, and initialed memorandum at issue here is unambiguous as to the terms disputed by defendant and thus cannot be ‘legitimately disputed’”).

Other Ohio courts have distinguished *Rulli* on procedural grounds, especially where the validity of a settlement agreement is presented on a summary judgment motion. See *Johannsen v. Ward*, 6th Dist. No. H-09-028, 2010-Ohio-4203, 2010 Ohio App. LEXIS 3574, ¶ 80 (no need for hearing on summary judgment motion enforcing settlement because agreement was not uncertain and issues were fully briefed); *W.O.M., Ltd. v. Willys-Overland Motors, Inc.*, 6th Dist. No. L-05-1201, 2006-Ohio-6997, 2006 Ohio App. LEXIS 6907, ¶ 20 (distinguishing *Rulli* because *Rulli* did not deal with summary judgment motion; where summary judgment is entered, there is no genuine issue of material fact and therefore no need for an evidentiary hearing).

However, even if *Rulli* did require a hearing in every case of a disputed settlement agreement, the trial court acted in accordance with such a rule. The trial court had available to it discovery responses, depositions, and extensive briefs and arguments of the parties. It then held a hearing on the cross-motions for summary judgment before issuing judgment.

Finally, Mr. Shor's argument regarding the parol evidence rule is a red herring. The First District repeated the exact language of *Hite*, a post-*Rulli* case, for the proposition that "when the language in a settlement agreement is clear and unambiguous, neither party can advance parol evidence to show a 'meeting of the minds' or a lack thereof." (Ex. 1, p. 3). *See Hite*, 2000 Ohio App. LEXIS at *11 (*citing Yaroma v. Griffiths*, 104 Ohio App. 3d 545, 555, 662 N.E.2d 867 (8th Dist. 1995)). The First District did not create any new law, and merely confirmed that the MOU was clear and unambiguous on its face. Mr. Shor's attempt to characterize this language as "a new and erroneous expansion" of the parol evidence rule is just another attempt to avoid his responsibilities under the binding MOU.

III. CONCLUSION

As Mr. Shor himself acknowledged, the MOU was "binding and enforceable." Mr. Shor's arguments to the contrary have no merit whatsoever. Therefore, Appellees Shelly Shor Gerson, Toby Shor, and Sylvia Shor request that this Court decline jurisdiction of this matter, and let stand the First District's well-reasoned and uncontroversial ruling.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon the following by

U.S. Mail this ~~5th~~ day of November, 2012:

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