

IN THE SUPREME COURT OF OHIO

13-1282

CHRISTINE L. FOOR,

Appellee,

v.

COLUMBUS REAL ESTATE
PROS.COM, et al.,

Appellants,

On Appeal from the
Fifth District Court of Appeals

Court of Appeals
Case No. 12 CAE 08 0063

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS, COLUMBUS REAL ESTATE PROS.COM, ET AL.

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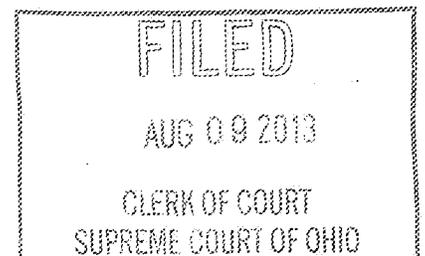


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This is a case of public and great general interest because it involves the very definition of what constitutes a binding settlement agreement. Unfortunately, the court of appeals appears to have misunderstood the facts and misapply the law so as to undo an agreement that everyone involved intended to be a settlement.

The majority of civil cases are settled and do not go to trial. When parties and their counsel settle cases, it is imperative that they can be certain the case will stay settled and that Ohio courts will enforce that settlement. By undoing the settlement agreement in this case, the Fifth District Court of Appeals has cast doubt on the enforceability of settlements. This doubt will discourage the settlement of future cases.

STATEMENT OF THE CASE AND FACTS

On November 15, 2009, Plaintiff-Appellee entered into a contract with Defendant-Appellants for Defendant-Appellants to manage a parcel of investment real property, Pl. Complaint, Exhibit D. The contract contained both attorney fee and indemnification provisions, Id. In accordance with the contract, Defendant-Appellants located a tenant to lease the property and otherwise managed the property as agreed. Subsequently, Plaintiff-Appellee became dissatisfied with Defendant-Appellant due to some alleged damage to the property, unknown to Defendant-Appellants, caused by the tenant, Def. Motion for Summary Judgment at 2. Plaintiff-Appellee demanded that the tenant be immediately evicted. Defendants-Appellants could not summarily evict the tenant because he was current on his rent. This failure to immediately evict the tenant angered Plaintiff-Appellee who proceeded to file the instant lawsuit against Defendant-

Appellants on April 8, 2011, Complaint. Defendant-Appellants filed counterclaims for breach of contract, indemnification and payment of attorney fees, Answer, Crossclaim and Counterclaim of Defs.

On October 24, 2011, Defendant-Appellants' attorney at the time, Benjamin Segal, and Plaintiff-Appellee's attorney, Christopher Trolinger, began settlement negotiations, Hrg. Trans. at 65. Plaintiff-Appellee's counsel first sent a letter to opposing counsel proposing settlement terms of a \$15,000 payment, which was refused, Id. at 65-66; Pl.'s Ex. A. Defendant-Appellants' counsel counter offered, on November 4, 2011, with a proposal of a dismissal and Plaintiff-Appellee's payment of the Defendant-Appellants' attorney fees, Hrg. Trans. at 66; Pl.'s Ex. B. Plaintiff-Appellee's counsel rejected this counteroffer and stated that he had been able to have his client hold off on filing complaints with administrative agencies, Hrg. Trans. at 47-50; Pl.'s Ex. C.

On November 8, 2011, Plaintiff-Appellee's counsel emailed Defendants-Appellants' counsel, told him he may have authority to settle and invited Defendants-Appellants' counsel to call him, Hrg. Trans. at 38-40. During that telephone call, on November 9, 2011, Plaintiff-Appellee's counsel and Defendants-Appellants' counsel settled the case for a mutual "walk away," Hrg. Trans. at 38-40. The agreement did not depend on working out details. Rather, the agreement was for all parties to simply walk away from the dispute, each to pay their own counsel fees and court costs, Id.

On November 14, 2012, just five days after settling the case, Plaintiff-Appellee filed an administrative complaint with the Department of Commerce alleging the same grievances she alleged in the settled civil case, Pl.'s Notice of Filing of Copy of Dept. of Commerce Complaint, Exhibit A. Importantly, that complaint references Plaintiff-

Appellee's initial oral complaint to the Department on Commerce on the previous Wednesday, Id. That date would have been November 9, 2012, the same day the case was settled.

Defendants-Appellants filed a motion to enforce the settlement. At the July 13, 2012, hearing on Defendants-Appellants' motion to enforce the settlement, Plaintiff-Appellee testified that she had filed the administrative complaint out of civic concern for other potential clients of Defendants-Appellants, Hrg. Trans. at 20. Defendants-Appellants' counsel demonstrated by use of an email from Plaintiff-Appellee to the Department of Commerce that Plaintiff-Appellee was, in fact, demanding that Defendants-Appellants pay her \$25,000.00 in damages, Hrg. Trans. at 21-22. Plaintiff-Appellee then admitted that she was demanding \$25,000.00 in damages in the administrative complaint, Id.

Plaintiff-Appellee's counsel and Defendant-Appellants' former counsel, Benjamin Segal, both testified at the July 13, 2012, hearing regarding the settlement agreement reached on November 9, 2011, Hrg. Trans. At that hearing, Plaintiff-Appellee's counsel agreed the settlement agreement he had reached with Defendant-Appellants' counsel was for a mutual "walk away," Hrg. Trans at 72. However, he also claimed that that the walk away did not include his client's ability to pursue administrative complaints against Defendant-Appellants, Hrg. Trans. at 73-74. Defendant-Appellants' former counsel staunchly denied that the settlement had excluded Plaintiff-Appellee's right to pursue administrative complaints and testified the settlement had been a complete walk away and end to all litigation of any kind, Hrg. Trans. at 39-40.

Strangely, Plaintiff-Appellee's Counsel agreed that no competent attorney would ever agree to a settlement, which would leave the Plaintiff free to recover her all of her damages through an administrative action while leaving all of the Defendants' counterclaims dismissed with prejudice, Hrg. Trans. at 73-75. Nonetheless, he maintained that this was the deal he had reached with Defendant-Appellants' former counsel, Id. These concessions leave only two possibilities; Plaintiff-Appellee and her Counsel intentionally deceived Defendants-Appellants' former counsel into making a deal that no competent attorney would ever make or Plaintiff-Appellee and her counsel were not truthful in their testimony regarding the scope of the settlement.

The trial court found that Plaintiff-Appellee "lacked credibility in her testimony regarding the settlement agreement" and granted Defendant-Appellants' motion to enforce the settlement agreement, J.E. Granting Motion to Enforce Settlement at 2. Plaintiff-Appellee appealed to the Fifth District Court of Appeals. Subsequently, the Appellate Court held that because the parties could not agree on whether or not the "walk away" had included Plaintiff-Appellee's right to re-file the case as a an administrative action, the settlement was not enforceable.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No I: The term "walk away" is sufficiently clear to form a binding settlement agreement.

The parties in this case agreed to a full settlement and "walk away." This agreement could not possibly have been any clearer. Both sides were to fully end the litigation and completely walk away from the dispute, Hrg. Trans. at 39-40, 72. This agreement to "walk away" was a legally binding contract which encompassed the totality of the dispute and fully settled all issues arising from the material facts of this case.

Settlement agreements are favored in the law, *Witt v. Watson*, 2005 Ohio 3290 (Fifth Dist.). A settlement constitutes a binding contract which may not be repudiated by either party, *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1; *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36; *Witt*, 2006 Ohio 3290. While it is preferable that a settlement be memorialized in writing, this is not a requirement for enforceability, *Kostelnik*, 96 Ohio St.3d at 3. Even an oral settlement may be enforceable if there is sufficient particularity to form a binding contract, *Id.* The terms of a contract can be determined from the “words, deeds, acts, and silence of the parties,” *Id.* What is essential is that the parties come to a meeting of the minds as to the essential terms of the contract, *Id.* at 3-4, citing *Espiscopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations* (1991) Ohio St.3d 366, 369.

The Fifth District Court of Appeals found that there was no meeting of the minds as to certain details of the settlement agreement, specifically whether or not the agreement precluded the filing of the administrative complaint, and that the settlement agreement is therefore unenforceable. Nothing could be further from the truth. Defendants-Appellants’ former Counsel who negotiated the settlement testified that the agreement was for a “walk away” and that he understood that to mean a total end to the dispute, *Hrg, Trans.* at 39-40. Plaintiff-Appellee’s Counsel testified that he had used the phrase “take my ball and go home” to describe the settlement agreement and agreed that he had in fact consented to the walk away, *Id.* at 72. The meaning of these phrases was clear and all encompassing. There was to be a total end to the dispute between the parties. There were no details to work out because the parties had agreed to completely end their dispute in its entirety.

Proposition of Law No. II: An appellate court may not review the enforceability of a settlement agreement de novo.

Questions of law are reviewed on a de novo basis, *Arnott v. Arnott* (2012), 132 Ohio St. 3d 401, 405. A trial judge's findings of fact should not be overturned on appeal if some competent and credible evidence supports that judgment, meaning the findings do not go against the manifest weight of the evidence, *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. This standard of review is highly deferential, and the role of the reviewing court is not to determine if it would have arrived at the same conclusion as the trial court, *Amsbary v. Brumfield* (2008), 177 Ohio App.3d 121. The reviewing court must uphold the judgment as long as the record contains "some evidence from which the trier of fact could have reached its ultimate factual conclusions," *Brugg v. Fancher*, 2007 Ohio 2019, at ¶ 9. Reviewing courts must keep in mind that the trier of fact's findings are presumed to be correct, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80.

"The issue of whether an enforceable agreement exists raises a mixed question of law and fact." *McSweeny v. Jackson* (1996), 117 Ohio App.3d 623. Thus, "a reviewing court's application of the law to the facts is de novo, but a reviewing court will not reverse a trial court's findings of fact so long as they are supported by some competent, credible evidence." *Id.*; *Continental W. Condo Unit Owners Assn. v. Howard E. Ferguson, Inc.*(1996), 74 Ohio St.3d 501, 502.

The suggestion that Plaintiff-Appellee and her Counsel truly believed they retained the right to file an administrative complaint against Defendants-Appellants and attempt to recover \$25,000.00 in damages on the same facts is beyond belief. Even

Plaintiff-Appellee's own Counsel testified that no rational attorney would ever make such a deal, Id. at 73-75. Yet, he maintained that this had been the settlement, Id. The Court, as the finder of fact, did not believe this testimony and found that the agreement the parties had reached was for a complete walk away and end to all litigation, including administrative complaints, J.E. Granting Motion to Enforce Settlement. This finding was supported by ample competent, credible evidence including the testimony of both attorneys who had made the agreement, Hrg. Trans. at 39-40, 72.

The Court's decision to enforce a complete settlement between the parties as embodied in the written settlement agreement was correct and should have been upheld on appeal. Instead, the Fifth District Court of Appeals reexamined the facts de novo and found the settlement agreement to be too ambiguous to enforce. This decision completely ignored that fact that the Trial Court, who was in the best position to examine the evidence and witnesses, explicitly declined to believe Plaintiff-Appellee's testimony regarding this alleged ambiguity and found that Plaintiff-Appellee "lacked credibility in her testimony regarding the settlement agreement". Unless it appeared that this finding was completely without support, the appellate court should not have reexamined it.

CONCLUSION

Attorneys throughout Ohio settle cases every day. Sometimes, these settlement agreements are contained in extensive, carefully drafted documents. Other times, cases are settled on a handshake outside a municipal court. Regardless of the complexity of a case, when adversaries agree to end their dispute and walk away from the controversy they must certain in their knowledge that the matter is really over.

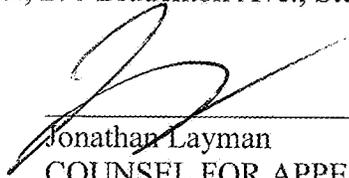
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Christopher Trolinger, 270 Bradenton Ave., Ste 100, Dublin, OH 43017 on August 9, 2013.



Jonathan Layman
COUNSEL FOR APPELLANTS

APPENDIX 1

A

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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CHRISTINE L. FOOR

Plaintiff -Appellant /Cross-Appellee

-vs-

COLUMBUS REAL ESTATE PROS. COM, ET AL.

Defendants - Appellees/ Cross-Appellants

JUDGMENT ENTRY

CASE NO. 12 CAE 08 0063

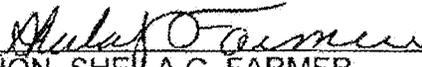
For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is reversed. The complaint and counterclaim are reinstated, and this cause is remanded to that court for further proceedings. Costs assessed to appellees.



HON. CRAIG R. BALDWIN



HON. W. SCOTT GWIN



HON. SHEILA G. FARMER

COURT OF APPEALS
DELAWARE COUNTY OHIO
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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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CHRISTINE L. FOOR

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Plaintiff - Appellant/Cross-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Craig R. Baldwin, J.

-vs-

COLUMBUS REAL ESTATE PROS. COM, ET AL.

Case No. 12 CAE 08 0063

Defendant - Appellees/Cross-Appellants

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware
County Court of Common Pleas,
Case No. 11 CV H 04 0448

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT:

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2013 JUN 25 AM 9:47
JAN ANTONOPLOS
CLERK

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Baldwin, J.

{¶1} Appellant Christine L. Foor appeals a judgment of the Delaware County Common Pleas Court enforcing a settlement agreement and dismissing her complaint against appellees Columbus Real Estate Pros.com, Gregory R. Babbitt and Your Estate Pros LLC. Appellees have filed a cross-appeal assigning error to the judgment of the court granting appellant partial summary judgment on their counterclaims.

STATEMENT OF FACTS AND CASE

{¶2} On April 8, 2011, appellant filed a complaint against appellees for failing to properly manage a parcel of rental property owned by appellant. The complaint contained ten causes of action, including negligent infliction of emotional distress, fraud, breach of contract and multiple violations of consumer statutes. Appellees filed a counterclaim for breach of contract, indemnification and payment of attorney fees.

{¶3} Both sides filed motions for summary judgment on the counterclaims for indemnification and failure to purchase insurance on the property. The trial court denied appellees' motion for summary judgment and partially granted appellant's motion for summary judgment.

{¶4} On October 24, 2011, counsel for appellant sent a letter to counsel for appellees offering to settle the case for \$15,000.00. Counsel for appellees responded by email on November 4, 2011, that appellees would settle the case in exchange for appellant paying all of their attorney fees plus costs.

{¶5} Counsel for appellant emailed appellees' attorney on November 8, 2011, stating that he may have authority to settle the case. During a telephone conversation

the next day, counsel agreed that the parties would mutually "walk away." Counsel for appellees was to draft a written settlement agreement.

{¶16} On November 14, 2011, appellant filed a complaint against appellees with the Department of Commerce. At this time, counsel for appellees discovered that he had not sent his draft of the settlement agreement to appellant's attorney. Counsel for appellees sent appellant a draft of the agreement on December 2, 2011.

{¶17} Appellees filed a motion to enforce the settlement agreement on February 23, 2012. The court held an evidentiary hearing on July 13, 2012. At the hearing, counsel for appellees testified that he believed there were no further details to work out in the settlement agreement and the parties would walk away with no further judicial or administrative proceedings being filed. Appellant testified that she understood the settlement to be "possible" and that it would not be final until it was in writing and she had an opportunity to review the language. She also testified that she did not understand the settlement included any possible administrative proceedings, and believed the settlement only covered the case in Delaware County. Counsel for appellant testified that the settlement was for the parties to "walk away," and there were no discussions about mutual releases or about appellant not proceeding with an administrative complaint.

{¶18} The trial court found appellant's testimony was not credible and granted the motion to enforce the settlement agreement. The court dismissed both the complaint and the counterclaims based on the settlement agreement.

{¶19} Appellant assigns nine errors:

{¶10} "I. THE COURT ERRED AS A MATTER OF LAW IN CONSIDERING CONFIDENTIAL COMMUNICATIONS FROM A PRIVILEGED MEDIATION PROCESS WHEN MAKING A RULING, AS NO EXCEPTIONS TO THE PRIVILEGE APPLY.

{¶11} "II. THE COURT ERRED AS A MATTER OF LAW IN DENYING PLAINTIFF-APPELLANT'S MOTION TO STRIKE AS THE RECORD CONTAINED TESTIMONY AND REFERENCES TO PRIVILEGED MEDIATION COMMUNICATIONS.

{¶12} "III. THE COURT ERRED IN FINDING THAT NO VAGUENESS OR UNCERTAINTY EXISTED IN THE TERMS OF THE 'WALK AWAY' AGREEMENT MADE BETWEEN PARTIES' COUNSEL.

{¶13} "IV. THE COURT ERRED IN FINDING THAT NO WRITING WAS NECESSARY TO FINALIZE THE NEGOTIATIONS BETWEEN THE PARTIES AND THAT AN ENFORCEABLE AGREEMENT EXISTED.

{¶14} "V. THE COURT ERRED AS A MATTER OF LAW AND FACT IN ENFORCING SETTLEMENT AS CLIENT REVIEW OF A FORMALIZED WRITTEN DOCUMENT WAS NECESSARY BEFORE ANY SETTLEMENT AGREEMENT WOULD BE FINAL.

{¶15} "VI. THE COURT ERRED AS A MATTER OF LAW AND FACT IN CLASSIFYING PLAINTIFF-APPELLANT'S ADMINISTRATIVE COMPLAINT AS AN 'ADMINISTRATIVE CLAIM.'

{¶16} "VII. THE COURT ERRED AS A MATTER OF LAW AND FACT IN DETERMINING THE CREDIBILITY OF PLAINTIFF-APPELLANT'S TESTIMONY

THROUGH OVER-THE-PHONE COMMUNICATIONS AND CONFIDENTIAL MEDIATION COMMUNICATIONS.

{¶17} "VIII. THE COURT ERRED AS A MATTER OF LAW IN FAILING TO GRANT PLAINTIFF-APPELLANT'S MOTION FOR PROTECTIVE ORDER, QUASH AND EXCLUDE DOCUMENTS, AS THE MOTION WAS UNOPPOSED AND SUPPORTED BY SUFFICIENT SPECIFICITY AND RELEVANT CASE LAW.

{¶18} "IX. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THE DRAFTED AGREEMENT EX. 1 ENCOMPASSED THE TOTALITY OF THE PARTIES' AGREEMENT."

{¶19} *Appellees assign three errors on cross-appeal.*

{¶20} "I. THE COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE CONTRACT DID NOT REQUIRE PLAINTIFF TO INDEMNIFY DEFENDANTS.

{¶21} "II. THE COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF HAD NOT BREACHED THE INSURANCE PROVISION OF THE CONTRACT.

{¶22} "III. THE COURT ERRED IN NOT ENJOINING THE ADMINISTRATIVE ACTION FILED WITH THE DEPARTMENT OF COMMERCE DIVISION OF REAL ESTATE."

III., IV., V.

{¶23} We address appellant's third, fourth, and fifth assignments of error together, as appellant does in her brief. Further, we address these assignments of error first as they are dispositive of the appeal.

{¶24} Settlement agreements are considered contracts and, therefore, their interpretation is governed by the law of contracts. *State v. Butts*, 112 Ohio App.3d 683, 686, 679 N.E.2d 1170 (1996). The burden of establishing the existence and terms of a settlement agreement rests on the party asserting its existence. *Nilavar v. Osborn*, 127 Ohio App.3d 1, 11, 711 N.E.2d 726 (1998). In addition to consideration, enforceable contracts also require certainty and clarity, as well as a meeting of the minds. *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). A "meeting of the minds" occurs when there is an offer and an acceptance of the offer. *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982). Generally, conduct sufficient to show agreement, including performance, constitutes acceptance of an offer. *Nagle Heating & Air Conditioning Co. v. Heskett*, 66 Ohio App.3d 547, 550, 585 N.E.2d 866 (1990).

{¶25} Further, when the alleged settlement agreement is verbal and not written, the existence and the terms of such agreement must be established by clear and convincing evidence. *Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 799, 615 N.E.2d 1071 (1992). In determining whether an oral agreement has been established, the trial court may consider the words, deeds, acts, and silence of the parties. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3, 770 N.E.2d 58 (2002). Vagueness, indefiniteness or uncertainty as to any essential term of an agreement prevents the creation of an enforceable contract. *Rulli* at 376, 683 N.E.2d 337. However, if the parties proceed to act as if the contract was in effect, the contract is enforceable. *Nagle* at 550, 585 N.E.2d 866.

{¶26} In the instant case, we find that the court erred in finding the existence of a completed settlement agreement was proven by clear and convincing evidence. The

fact that counsel for appellees was to prepare a draft of the agreement demonstrates that the parties intended to enter into a written agreement, and that the oral agreement was not necessarily the final agreement of the parties. Neither party made any attempt to dismiss their claims after the alleged settlement agreement was reached on November 9, 2011. Further, from the testimony presented at the hearing, the parties did not have a mutual understanding as to what the terms "walk away" meant in the context of the instant case, with appellees believing appellant would not pursue an administrative action and appellant and her attorney believing the settlement applied solely to the Delaware County case. The written draft of an agreement which the trial court enforced is not signed by any of the parties or counsel, including the attorney who drafted the agreement, indicating that this was not necessarily the final agreement of the parties. The trial court erred in enforcing this draft of a settlement agreement.

{¶27} The third, fourth and fifth assignments of error are sustained.

{¶28} Appellant's first, second, sixth, seventh, eighth, and ninth assignments of error are rendered moot by our disposition of assignments of error three, four and five.

{¶29} We next turn to the assignments of error on cross-appeal.

I., II.

{¶30} Appellees' first two assignments allege error in the court granting summary judgment to appellant on the first two counts of the counterclaim.

{¶31} The trial court's summary judgment did not dismiss these two counts of the counterclaim and the judgment is clearly an interlocutory order. The court did not dismiss the counterclaim pursuant to summary judgment, but rather dismissed the counterclaim pursuant to enforcement of the settlement agreement. Because we have

reversed the trial court's judgment dismissing the case pursuant to enforcement of the settlement agreement, the complaint and counterclaim are reinstated and the summary judgment entry is an interlocutory order, not a final judgment over which we have jurisdiction. Pursuant to Civ. R. 54(B), this order is subject to revision by the trial court at any time prior to entry of final judgment in the case. Accordingly, appellant's first two assignments of error are premature and are overruled.

III.

{¶32} Appellees argue that the court erred in not enjoining the administrative action filed by appellant with the Department of Commerce. This argument is based on the settlement agreement, which we have found the court erred in enforcing. The assignment of error is therefore moot.

{¶33} The judgment of the Delaware County Common Pleas Court enforcing a settlement agreement between the parties is reversed. The complaint and counterclaim are reinstated, and this cause is remanded to that court for further proceedings. Costs assessed to appellees.

By: Baldwin, J.

Gwin, P. J. and

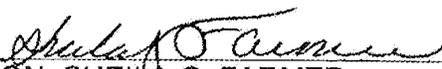
Farmer, J. concur.



HON. CRAIG R. BALDWIN



HON. W. SCOTT GWIN



HON. SHEILA G. FARMER

CRB/rad