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INTRODUCTION

The appellees, like the Ninth District, believe that the application of the statute of frauds depends on the procedural mechanism a party employs to seek to enforce a non-compliant agreement. But the statute of frauds is not so limited, nor should it be, and the Court should reverse the judgment of the Ninth District.

The appellees first argue that because R.C. 1335.02(B) and 1335.05 bar “actions” founded on oral agreements, their effect is limited to civil lawsuits and counterclaims, and the appellees are free to assert an oral forbearance agreement as a defense. But what the appellees are attempting to do through their 60(B) motion is to reopen the underlying case to enforce an oral agreement—and, in point of fact, to assert a counterclaim—which is in the nature of an affirmative act. Indeed, this Court, more than 150 years ago, rejected the action/defense distinction that the appellees make here and upon which the Ninth District relied. In *Finch v. Finch*, 10 Ohio St. 501 (1860), this Court held that the statute of frauds applies to defenses just as to affirmative claims, and nothing in Ohio law since that time warrants radically altering the statute of frauds landscape by adopting a different interpretation today.

The appellees next contend that Civ.R. 60(B) motions are not “actions” within the statute of frauds because those sections must be read *in pari materia* with the definition of “action” found in R.C. 2307.01. But R.C. 2307.01 was passed nearly a century after the statute of frauds. Had the General Assembly wished to limit the scope of the statute of frauds, it would have done so through an amendment of the statute of frauds itself at some point in the last 150 years, not implicitly through R.C. 2307.01. Moreover, R.C. 2307.01 was enacted to distinguish then-existing common-law claims from “special proceedings,” which

has nothing to do with the statute of frauds, and unrelated statutes may not be read *in pari materia*. And if the appellees were correct, the upshot would be that Civ.R. 60(B) motions predicated upon oral agreements would be granted and judgments vacated, only to have the statute of frauds preclude the use of those very same oral agreements in the reopened cases. That would be both nonsensical and a profound waste of judicial resources.

Finally, the appellees argue that their alleged oral forbearance agreement was, in fact, a “settlement agreement” to which the statute of frauds does not apply. But while Ohio law does recognize a limited exception to the statute of frauds for “in-court” settlement agreements made on the record, in open court, no such exception has ever been recognized for “out-of-court” settlement agreements like the one alleged here. As this Court and others have held, out-of-court settlement agreements must still comply with the statute of frauds if they are to be enforced in this state.

In the end, the appellees ask the Court to up-end years of settled jurisprudence and undermine settled transactions by conditioning the statute of frauds’ applicability based on the procedural mechanism a party employs to enforce such an agreement. The Court should not so hold, but instead reverse the Ninth District’s decision and clarify that Ohio’s statute of frauds bars the enforcement of oral agreements within the statute’s scope, regardless of the mechanism by which a party seeks to enforce such an agreement.

ARGUMENT

Reply in Support of Proposition of Law No. 1: R.C. 1335.05 bars the enforcement of oral agreements concerning an interest in land regardless of the procedural mechanism a party employs to attempt to enforce such an oral agreement.

The appellees contend that the use of the term “action” in R.C. 1335.05 means that Ohio’s statute of frauds only bars the assertion of “civil lawsuits” based on oral agreements, but does not bar defenses. But such a limited definition of “action” was inconsistent with the definition of “action” in use around the time Ohio enacted the statute of fraud in 1810, and was rejected by the Court in 1860. The appellees have cited to no authority or changed circumstances requiring the Court to abrogate this traditional understanding and interpretation of the statute of frauds, and the Court should decline to do so.

A. The statute of frauds has historically been applied to defenses.

The statute of frauds has historically been understood to bar defenses, as well as civil lawsuits, that seek to enforce oral agreements within the statute’s reach. The Ninth District’s ruling stands in contrast to that historical understanding and cannot stand.

Ohio first enacted the statute of frauds on February 19, 1810. 19 Ohio Jurisprudence Statute of Frauds § 1, 557 (1931). The operative language of R.C. 1335.05, that “no action shall be brought whereby to charge the defendant...upon a contract or sale of lands, ... or interest in, or concerning them,” is the same now as it was then.¹ The same is true of the statute’s purpose, which is “for the prevention of frauds and perjuries.” *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, ¶ 33, quoting *Wilber v. Paine*, 1 Ohio 251, 255 (1824).

¹ The 1810 statute was re-codified as G.C. 8621, which was described as “substantially a copy” of the original statute. 4 Annotated General Code of the State of Ohio, 133 (Page’s 1912). G.C. 8621 was re-codified as R.C. 1335.05. See R.C. 1335.05 (historical notes).

At the time the statute was enacted, the word “action” was afforded a very broad construction that focused on a proceeding’s substance, not its form. Chief Justice Marshall defined “suit,” a synonym of “action,”² as follows: “the term . . . is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him.” *Weston v. City of Charleston*, 27 U.S. 464 (2 Pet.), 464 (1829). He went on: “[w]hile the modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.” *Id.*

Under this broad reading, it is logical that the statute of frauds would bar the judicial enforcement of an oral agreement, regardless of whether the party sought to do so as a claim, counterclaim, or defense. Whatever the “mode of proceeding,” the party was seeking to litigate and enforce rights under an oral agreement, and that act would be considered an “action.” And so this Court held in *Finch v. Finch*, 10 Ohio St. 501 (1860),³ when it rejected the very “action”/“defense” dichotomy the Ninth District created in this case.

In *Finch*, a widow filed a petition to enforce her dower interest in her late husband’s estate. His sons (and heirs) filed an answer alleging the widow had waived her dower interest in an oral antenuptial agreement that she made with her late husband. *Id.* at 502. The widow moved to strike the answer, arguing that because an antenuptial agreement is within the statute of frauds, it had to be in writing to be enforceable. *Id.* at 505.

² See, e.g., *Marsteller v. McClean*, 11 U.S. (7 Cranch) 156, 159 (1812) (“It seems, however, to be a settled rule that all the Plaintiffs *in a suit* must be competent to sue, otherwise the *action* cannot be supported”) (emphasis added); *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 381-382 (1851) (using “suit” and “action” interchangeably).

³ While FirstMerit argued this point in its opening brief, it was unaware that this Court had addressed and rejected the appellants’ argument 153 years ago in *Finch*. FirstMerit has no objection to permitting the appellees an opportunity to brief this authority.

In opposing her motion to strike, the sons raised precisely the same argument the appellees raise before this Court. They argued that “inasmuch as the statute of frauds does not make contracts within it void, but only provides that ‘no action shall be brought whereby to charge the defendant, upon any agreement upon consideration of marriage,’ such agreement may be available as a defense, though it could not be the foundation of an action upon it.” *Id.* at 507.

This Court rejected that argument, holding that “such a distinction, however, so far as we know, has never been recognized; but, on the contrary, it has been held that a statute, in language identical with ours, renders agreements within it equally available *whether in the defense or the prosecution of an action.*” *Id.* (emphasis added).

In 1877, this Court affirmed the statute’s applicability to defenses when it held that “where a defense to an action is founded on an agreement not to be performed within a year, the answer must show that such agreement was in writing.” *Reinheimer v. Carter*, 31 Ohio St. 579 (1877), paragraph two of the syllabus. In that case, the defendant asserted a defense to a suit to collect a note that was founded on an alleged agreement to extend the note’s maturity. *Id.* at 580. The Court affirmed a demurrer to the answer, holding that because the agreement was within the statute of frauds, the defendant was required to plead that it was in writing, and his failure to do so was fatal to his defense. *Id.* at 586-587.

These holdings are consistent with the broad definitions of “action” found elsewhere in Ohio law. *See, e.g.*, R.C. 1301.201(B)(1) (defining “action” as “any . . . proceeding in which rights are determined”); *Selvage v. Emmett*, 181 Ohio App.3d 371, 2009-Ohio-940, 909 N.E.2d 143, ¶ 13 (4th Dist.) (“The plain meaning of ‘action’ is ‘[a] civil or criminal judicial proceeding.’”); *see also Black’s Law Dictionary* 32, 1324 (9th Ed.2009) (defining “action” as

“a civil or criminal judicial proceeding,” and defining “proceeding” as “any procedural means for seeking redress from a tribunal or agency”).⁴

The common thread running through these definitions is the notion that “action” encompasses any proceeding where a party pursues a remedy, seeks to enforce a right, or otherwise seeks redress from a court of justice. By seeking to enforce an oral forbearance agreement against FirstMerit, whether by counterclaim, defense, or otherwise, the appellees sought relief from the trial court and a remedy against FirstMerit based on alleged rights under the alleged oral agreement.

Thus, the principle that the statute of frauds prohibits the enforcement of an oral agreement, even when a party seeks to enforce it as a “defense,” has been part of Ohio jurisprudence for at least 153 years. To FirstMerit’s knowledge, the Ninth District’s holding in this case is the only reported Ohio decision ever to hold to the contrary—an argument, it should be noted, that the Ninth District raised *sua sponte*, as the appellees never raised the argument below. That decision should be reversed.

B. R.C. 2307.01 does not limit the statute of frauds’ reach.

1. Had the General Assembly wished to limit the scope of the statute of frauds set forth in *Finch*, it would have done so through amendment to the statute of frauds.

The appellees argue that the definition of “action” in R.C. 2307.01—which was enacted a century after the statute of frauds—should be read to implicitly limit the statute of frauds. But the General Assembly is presumed to understand the scope of this Court’s

⁴ *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, cited by the appellees, does not compel a different result. The case turned on the legal effect of a Civ.R. 41(A) dismissal, not whether the word “action” encompasses something other than the filing of a suit, which is inapposite to the question before this Court.

reading of its statutes, and had it wished to limit the scope of the statute of frauds, it would have done so through an amendment of the statute of frauds *itself* at some point in the last 150 years, not implicitly through R.C. 2307.01. See *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, ¶ 11 (“[W]e presume that if the General Assembly disagreed with the rule set forth in *Cox*, it would have responded to it at some point in the past 30 years”), citing *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 22 (additional cites omitted). After all, as the Court noted, “the General Assembly has shown no hesitation in acting promptly when it disagrees with appellate rulings involving statutory construction and interpretation.” *Ferguson* at ¶ 23, citing *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591, ¶ 25.

2. The doctrine of *in pari materia* does not apply to statutes enacted a century apart for different purposes.

Moreover, as R.C. 2307.01 was enacted nearly 100 years after the statute of frauds to serve a different purpose, it does not inform the scope of the statute of frauds. Statutes are not *in pari materia* if they “do not relate to the same subject and . . . have no common purpose and scope.” *In re Friedman’s Estate*, 154 Ohio St. 1, 8, 93 N.E.2d 273 (1950), quoting 37 Ohio Jurisprudence Statutes 601, § 332 (1934). See also *Volan v. Keller*, 20 Ohio App.2d 204, 206, 253 N.E.2d 309 (7th Dist.1969) (“[S]tatutes which do not relate to the same subject, which have no common purpose and scope, and which from their historical development show they are distinct and separate, are not *in pari materia* and should not be construed together”).

In *Friedman’s Estate*, this Court reviewed a statute that provided estate tax exemptions to “lineal descendants” of a decedent—one that distinguished “lineal descendants” from adopted children—in light of a later enacted adoption statute that

conferred to adopted children all the inheritance rights of consanguineous children. *Id.* at 9. The Court held that because the two statutes governed different subject matters (taxation and inheritance rights), the adoption statute could not be read *in pari materia* with the exemption statute to confer a tax exemption for “lineal descendants” upon an adopted child. *Id.* at 9-10.

Other courts in Ohio have likewise refused to read statutes *in pari materia* that govern different subject matters. *See, e.g., In re Likes*, 406 B.R. 749, 755 (Bankr.N.D. Ohio 2009) (declining to read definition of “motor vehicle” in motor vehicle regulatory statute *in pari materia* with the term “motor vehicle” in R.C. 2329.66, as the two statutes served different purposes); *State v. Langman*, 105 N.E.2d 278, 281 (8th Dist.1951) (holding that two gambling statutes could not be read *in pari materia* because each statute dealt with a “specific subject entirely independent of the subject matter defined and prohibited in any of the other sections”).

So too with the statute of frauds and R.C. 2307.01. The statute of frauds is “for the prevention of frauds and perjuries.” *Wilber*, 1 Ohio at 251. To that end, this Court has consistently treated the statute of frauds as prohibiting the enforcement of certain types of agreements unless they are in writing. *See, e.g., Olympic Holding*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, at ¶ 32; *Heaton v. Eldridge*, 56 Ohio St. 87, 46 N.E. 638 (1897), paragraph three of the syllabus (“an agreement which ... is not to be performed within one year... will not be enforced in this state” unless it is in writing). And it has historically been applied to all proceedings, including defenses. *See Finch*, 10 Ohio St. at 507 (the statute “renders agreements within it equally available whether in the defense or the prosecution of an action”).

R.C. 2307.01, in contrast, codified a definition of “action” as part of judicial reforms following the adoption of the Ohio Constitution of 1851, when “actions at law” and “suits in equity” were merged for procedural purposes, and this Court decided to use the word “action” as a generic referent to both. *Barger v. Cochran*, 15 Ohio St. 460, 461 (1864). See also 1 Ohio Jurisprudence Historical Introduction, p. lxxi (1928), *citing* Ohio Const. 1851, Art. XIV, § 2.

The term “action” in this new judicial construct remained undefined until *Missionary Soc. of Methodist Episcopal Church v. Ely*, 56 Ohio St. 405, 47 N.E. 537 (1897). The issue in *Ely* was whether an application to a probate court to admit a will was an “action” or a “special proceeding” for purposes of determining the jurisdiction of the appellate court over orders issued in such a proceeding. To answer that question, the Court distinguished between “actions” and “special proceedings” as follows:

But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding.

Id. at 407. *Ely*’s definition of “action” was later codified as G.C. 11327. See 3 Annotated General Code of the State of Ohio, 4559 (Page’s 1921). G.C. 11327 was re-codified as R.C. 2307.01 in 1953. See R.C. 2307.01 (historical notes).

R.C. 2307.01 was thus not created with an eye toward distinguishing between a complaint, counterclaim or defense, nor toward limiting the reach of the statute of frauds. Rather, its purpose was to distinguish between ordinary litigation proceedings and “special

proceedings” for appellate jurisdiction purposes. It thus cannot be read *in pari materia* with the statute of frauds.

Moreover, the statute of frauds was enacted in 1810; R.C. 2307.01’s predecessor, G.C. 11327, was enacted in the early 1900s to codify the *Ely* court’s 1897 definition of “action.” Thus, the two statutes were enacted nearly 100 years apart. As the Court observed in *Friedman’s Estate*, “the fact that two statutes were enacted at different times is an element helpful to the conclusion that the statutes are not *in pari materia*.” 154 Ohio St. at 8. Timing of enactment is important given that “amendments and repeals [of statutes] by implication are not favored in the law,” and “the burden is upon him who claims such amendment or repeal by implication to establish such fact by clear and satisfactory evidence.” *Id.* at 10. *See also Lucas Cty. Bd. of Commrs. v. Toledo*, 28 Ohio St.2d 214, 217, 277 N.E.2d 193 (1971) (finding that “repeals by implication are not favored and will not be found unless the provisions of the purported repealing act are so totally inconsistent and irreconcilable with the existing enactment as to nullify it”).

The appellees’ argument, if accepted, would effectively amend the statute of frauds by substituting a more limited definition of “action” for the broader read this Court gave the word in *Finch*. *See Finch*, 10 Ohio St. at 507. Absent evidence that the General Assembly intended the enactment of R.C. 2307.01 to limit the statute of frauds, R.C. 2307.01 cannot be read to do so. *See Friedman*, 154 Ohio St. at 10; *Lucas Cty.*, 28 Ohio St.2d at 217; *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, 983 N.E.2d 350, at ¶ 11.

Reply in Support of Proposition of Law No. 2: A party cannot use Civ.R. 60(B) to enforce an alleged oral forbearance agreement when R.C. 1335.02 would prohibit that party from enforcing the same agreement through a complaint or counterclaim.

The appellees oppose FirstMerit's Proposition of Law No. 2 on two grounds. First, they contend, relying on R.C. 2307.01, that their Civ.R. 60(B) motion did not constitute an "action" within the meaning of R.C. 1335.02(B). Second, they contend that the alleged oral forbearance agreement was a "settlement agreement" to which the statute of frauds does not apply. Neither argument has merit. And the appellees' argument is ultimately beside the point, as the appellees filed their Civ.R. 60(B) motion to assert a counterclaim—a pleading to which they concede R.C. 1335.02(B) applies.

A. The appellees' Civ.R. 60(B) motion is in the nature of an action for purposes of R.C. 1335.02(B).

The appellees argue that the filing and prosecution of their Civ.R. 60(B) motion does not constitute an "action" within the meaning of R.C. 1335.02(B), again relying on the definition of "action" given in R.C. 2307.01. That statute defines "action" as "an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense." *Id.* Since a Civ.R. 60(B) motion is not a "pleading" and does not require service of "process," the appellees contend, it does not qualify as an "action" under R.C. 2307.01 and, therefore, R.C. 1335.02(B).

But it is more reasonable to construe the language of R.C. 1335.02(B) in light of the historical statute of frauds, R.C. 1335.05, than in light of R.C. 2307.01. As set forth in FirstMerit's opening brief, R.C. 1335.02 was enacted following the savings & loan crisis to reduce lender liability claims based on claims of oral agreements. (Appellant Br. 21-22). The two statutes use the word "action" in functionally the same way, despite being drafted

nearly 200 years apart. *Compare* R.C. 1335.02(B) (“no party to a loan agreement may bring an action on a loan agreement...”) *with* R.C. 1335.05 (“no action shall be brought whereby to charge the defendant...”). Both are components of the statute of frauds, and neither statute was enacted to address the scope of appellate jurisdiction, as was R.C. 2307.01.

As the drafting of R.C. 1335.02(B) was informed by the text and jurisprudence interpreting the statute’s ancient progenitor, R.C. 1335.05, the provisions should be read similarly. *See State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 25 (“all provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable”).

Moreover, the appellees’ prosecution of a Civ.R. 60(B) motion to vacate a judgment and assert a counterclaim, all to enforce rights under an alleged oral forbearance agreement, is in the nature of “bring[ing] an action” within the meaning of R.C. 1335.02(B). In substance, the appellees sought redress from the trial court and the judicial enforcement of an oral forbearance agreement against FirstMerit. The procedural vehicle they employed to obtain such redress is no more relevant to R.C. 1335.02(B)’s application than it is to R.C. 1335.05. After all, “[w]hile the modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is [an action].” *Weston*, 27 U.S. (2 Pet.) at 464 (Marshall, C.J.).

In any event, whether a Civ.R. 60(B) motion is an “action” or not, in order to prevail on such a motion to vacate a cognovit judgment, the appellees had to establish that they had a meritorious defense or claim. *See Fifth Third Bank v. Labate*, 5th Dist. No. 2005CA00180, 2006-Ohio-4239, ¶ 32 (to prevail on a Civ.R. 60(B) motion to vacate a cognovit judgment, the movants must establish they have a “meritorious defense or claim

to present if relief is granted”). As set forth above, they are barred from raising the statute of frauds as a defense. Moreover, the appellees’ Civ.R. 60(B) motion sought to vacate the *cognovit* judgment in order to allow them to bring a counterclaim to enforce the alleged oral forbearance agreement—and the appellees *concede* that the statute of frauds bars the assertion of counterclaims. (Civ.R. 60(B) Mot. 9, 11; Appellees Br. 11-12).

Because the appellees had neither a meritorious defense nor a meritorious counterclaim, the trial court appropriately denied their motion on statute of frauds grounds, and the Ninth District’s decision to the contrary should be reversed.

B. The appellees cannot escape the statute of frauds by characterizing their alleged oral forbearance agreement as a “settlement agreement.”

Finally, the appellees argue that their alleged oral forbearance agreement was not covered by the statute of frauds because it was a “settlement agreement of pending litigation.” (Appellee Br. 14-15). But this argument, which the trial court rejected (*see* Appx. 79-80) and the Ninth District never reached, is meritless.

It is true that Ohio courts recognize a narrow exception to the statute of frauds for settlement agreements that are made in open court and on the record. *See, e.g., Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 285 N.E.2d 324 (1972), paragraph one of the syllabus; *State Dept. of Natural Resources v. Hughes*, 6th Dist. No. E-00-002, 2000 WL 1752645, *3 (Nov. 30, 2000).

But this narrow exception does not apply where the alleged “settlement agreement” was negotiated out-of-court and off the record. In such cases, an agreement within the statute of frauds must be in writing to be enforceable, even though it may be a settlement agreement. *See, e.g., Sherman v. Haines*, 73 Ohio St.3d 125, 129, 652 N.E.2d 698 (1995) (holding that an alleged oral settlement agreement that violated the statute of frauds was

unenforceable as a matter of law); *Condominiums at Stonebridge Owners' Assn., Inc. v. Patton*, 8th Dist. No. 94139, 2010-Ohio-3616, ¶ 13 (indicating that the statute of frauds bars enforcement of an oral settlement agreement that involved the sale of real estate); *Thomas v. Thomas*, 5 Ohio App.3d 94, 99, 449 N.E.2d 478 (5th Dist.1982) (distinguishing between “in-court” and “out-of-court” settlement agreements and recognizing “out-of-court” agreements are subject to the statute of frauds).

The appellees did not contend that the alleged oral agreement was made on the record in open court or memorialized by a judgment entry entered by a court. As a result, the alleged oral forbearance agreement does not fall into the narrow statute of frauds exception for in-court settlements. *See Sherman*, 73 Ohio St.3d at 129.⁵

⁵ The appellees cite *Bankers Trust Co. v. Wright*, 6th Dist. No. F-09-009, 2010-Ohio-1697. But in *Wright*, the court did not consider the statute of frauds, which is waived if not raised. *See Houser v. Ohio Historical Socy.*, 62 Ohio St.2d 77, 79, 403 N.E.2d 965 (1980).

CONCLUSION

The judgment of the Ninth Appellate District in this case should be reversed.

Respectfully submitted,



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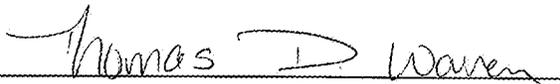
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CERTIFICATE OF SERVICE

I certify that on September 23, 2013, a true and accurate copy of this Merits Reply Brief of Appellant was served upon the following by regular U.S. mail, postage prepaid:

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