

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS,)
LLC, et al.)

Case No.

Appellee)

13-1795

vs.)

On Appeal from the Lucas County Court
of Appeals, Sixth Appellate District

KARAM PROPERTIES I, LTD., et al.)

Court of Appeals Case No. L-12-1313

Appellants)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

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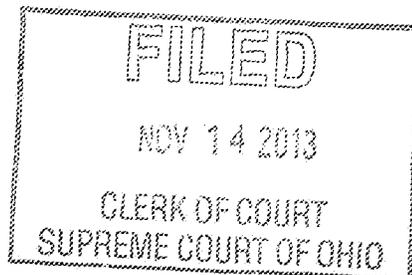
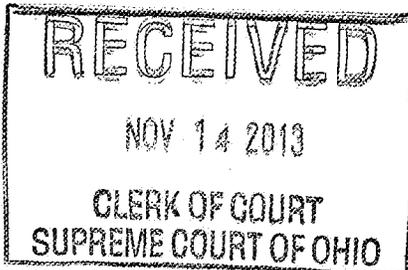


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
AND GREAT GENERAL INTEREST**

This case presents the following question: What language must a trial court include in an entry of dismissal in order to ensure that the trial court retains limited jurisdiction over the case while the parties finalize a settlement agreement? In Ohio, the answer presently depends upon the appellate district in which the trial court is located.

Some appellate districts have held that language in such a dismissal entry need not be detailed or precise. This view encourages the finality of settlements and makes them easier to enforce. Other appellate districts, employing a more restrictive view, require meticulous and exacting language in a dismissal entry. This view, adopted by the Sixth Appellate District in its decision in this case, discourages the finality of settlements and encourages significant new litigation. This does not serve the interests of the litigants and results in a drain on judicial resources.

The trial court below, upon being informed by the parties that they had reached a settlement, issued a dismissal entry that stated: "Parties having represented to the court that their differences have been resolved, this case is dismissed, without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order." Prior to expiration of the 30-day time period referenced in the trial court's dismissal entry, Appellant The Travelers Indemnity Company ("Travelers"), a party to the settlement agreement, sought the court's assistance in enforcing the settlement agreement. The trial court, believing it had issued a conditional dismissal that permitted it to retain limited jurisdiction to consider issues related to the settlement, enforced the settlement agreement in a manner favorable to Travelers.

Upon entry of a final judgment, Appellees Karam Properties, I, Ltd., Karam Properties II, Ltd., Karam Managed Properties, LLC, and Toledo Properties, LLC (collectively “Karam”), also parties to the settlement agreement, appealed the trial court’s judgment. The Sixth Appellate District concluded that the trial court’s entry of dismissal was an unconditional dismissal that divested the trial court of jurisdiction to consider issues related to the settlement. The Sixth Appellate District thus declared the trial court’s final judgment to be void.

Travelers asks the Court to accept jurisdiction in this case because settlements are a matter of public and great general interest. Settlements affect not only the litigants personally, but the judicial system and society generally. As this Court has often said, public policy favors settlements. Settlements unclog dockets, thereby conserving judicial resources. They save time and money, thus conserving economic resources. Settlements provide certainty to outcomes and enable the parties to negotiate more satisfying outcomes.

Although statistical data on the subject does differ, it is fair to state that “most” cases settle.¹ Often, though, parties who believe they have reached a settlement find themselves unable to effectuate it. This can happen for a number of reasons. The parties may disagree about unanticipated detail necessary to or implied by an agreement, or a dispute may arise as to whether a party is holding up its end of the agreement. Sometimes a party simply changes its mind about an agreement. Whatever the reason, trial courts are often confronted with the question of whether they have continuing jurisdiction to consider a matter involving the enforcement of a settlement agreement once a case has been dismissed.

¹See Barkai, John; Kent, Elizabeth; and Martin, Pamela, “Court Review: Volume 42, Issue 3-4 – A Profile of Settlement” (2006). *Court Review: The Journal of the American Judges Association*. Paper 22. <http://digitalcommons.unl.edu/ajacourtreview/22>.

Travelers asks the Court to accept jurisdiction in this case for the further reason that doing so will enable the Court to resolve the conflict among Ohio's appellate districts on the question of what language must be included in an entry of dismissal in order for a trial court to retain limited jurisdiction to effectuate and enforce a settlement. As indicated, some appellate districts have held that the language need not be detailed or precise, while other appellate districts have held that the language must be meticulous and exacting. Geography should not dictate the rule of law, especially when it involves a matter of public policy.

STATEMENT OF THE CASE AND FACTS

This matter stems from a fire that occurred on or about July 4, 2008, at an apartment complex in Toledo, Ohio. The fire caused millions of dollars in property damage to the complex. The fire was caused by fireworks that were launched by a tenant of the complex. Infinite Security Solutions, LLC ("Infinite"), who provided security services at the complex, knew or should have known that the fireworks were on site and were being launched.

At the time of the fire, the complex was insured for property damage under a policy issued by Travelers. Travelers, in exchange for a policyholder's release, paid Karam approximately \$8.9 million for the fire loss. Karam claims to have sustained damages in excess of the insurance payment.

In April of 2009, Infinite filed suit against Karam, seeking to recover approximately \$99,000 for unpaid services Infinite had performed at the complex. *See Infinite Security Solutions, LLC v. Karam Properties II, Ltd. et al.*, Lucas County Court of Common Pleas, Case No. CI-09-3781 ("Infinite Litigation"). Karam filed a Counterclaim against Infinite, seeking to recover its claimed uninsured portion of the fire loss.

In June of 2009, Travelers filed a subrogation suit against Infinite, seeking to recover the \$8.9 million it had paid to Karam.² See *Travelers Indemnity Company v. Infinite Security Solutions, LLC*, Lucas County Court of Common Pleas, Case No. CI-09-4627 (“*Travelers Litigation*”).

The *Infinite Litigation* and the *Travelers Litigation* were consolidated. (Appendix at A29).

On May 18, 2011, the parties engaged in a mediation with Judge Richard McQuade. Although progress was made, the parties were not able to reach a settlement.

On May 19, 2011, the trial court held a final settlement conference. Judge McQuade appeared at the settlement conference and continued the mediation. The parties ultimately entered into an oral settlement agreement in which Infinite agreed to make a monetary payment to settle Karam’s and Travelers’ claims against it.³

During the settlement discussions, the issue of the apportionment of/priority to the settlement proceeds as between Travelers and Karam arose, but was not resolved. Travelers and Karam agreed that they would attempt to resolve the apportionment/priority issue, but that if they were unable to do so, they would notify the court and seek its assistance in deciding the issue. The trial court advised the parties at the final settlement conference that upon being notified that the apportionment/priority issue could not be amicably resolved, a court conference would be scheduled to outline a procedure to address the issue.

Thereafter, the trial court entered an Order that stated: “Parties having represented to the court that their differences have been resolved, this case is dismissed, without prejudice, with the

²Infinite’s policy provided liability limits of only \$1,000,000.

³The amount of the settlement is under seal.

parties reserving the right to file an entry of dismissal within thirty (30) days of this order.” The Order was journalized on May 26, 2011. (Appendix at A28).

It soon became apparent that Travelers and Karam could not resolve their competing claims to the settlement proceeds. Accordingly, on June 20, 2011, prior to expiration of the 30-day time frame referenced in the trial court’s May 26, 2011 Order, Travelers filed a Motion to Set Aside Judgment Entry. In its Motion, Travelers advised the trial court that pursuant to the parties’ and the court’s previous discussions, the court was being called upon to decide the apportionment/priority issue.

On September 6, 2011, the trial court held a hearing on Travelers’ Motion to Set Aside Judgment Entry, taking same under advisement.

On February 13, 2012, Infinite filed a Motion to Enforce Settlement, asking the court to enter an order setting forth the terms of the settlement agreement and permitting Infinite to pay into court the settlement proceeds. Travelers then filed a Cross-Motion Seeking Priority to Settlement Proceeds, which detailed the reasons why Travelers, and not Karam, had priority to the settlement proceeds. Karam responded.

On October 12, 2012, the trial court resolved the apportionment/priority issue in favor of Travelers and ordered payment of the agreed-upon amounts to enforce the parties’ settlement. As the trial court explained in its October 12, 2012 Opinion and Judgment Entry:

In this case, the parties represented to this Court, at a settlement pretrial conference, that a settlement had been reached and that the appropriate documentation would be prepared and executed by the parties. The Judgment Entry issued by this Court was not an unconditional dismissal . . . as the language used in the Judgment Entry was equivalent to the fact that a settlement had been reached between the parties. The Judgment Entry dismissed this matter without prejudice and allowed the parties to file their own dismissal order within 30 days. Therefore, this Court’s May 26, 2011

Judgment Entry was not an unconditional dismissal but was a dismissal with a stated condition that allows this Court to retain the authority to enforce the settlement agreement. Thus, Travelers' Motion to Set Aside Judgment Entry is deemed moot and DENIED as this Court retains jurisdiction to enforce the settlement agreement in this matter without the need to vacate this Court's May 26, 2011 Judgment Entry.

(Appendix at A17-A18).

Karam appealed the trial court's final judgment. In a Decision and Judgment entered on October 4, 2013, the Sixth Appellate District concluded that the trial court had unconditionally dismissed the case without prejudice, and that the trial court therefore lacked subject matter jurisdiction to issue the October 12, 2012 Judgment Entry. The Sixth Appellate District held that the October 12, 2012 Judgment Entry was void, and the court of appeals thus dismissed the appeal for lack of a final, appealable order.

In its Decision and Judgment Entry, the Sixth Appellate District also certified a conflict, finding its decision to be in conflict with the decisions of the Eighth Appellate District, Cuyahoga County, in *Estate of Berger v. Riddle*, Nos. 66195, 66200, 1994 WL 449397, (August 18, 1994), and the Eleventh Appellate District, Trumbull County, in *Hines v. Zofko*, No. 93-T-4928, 1994 WL 117110 (March 28, 1994).

On October 23, 2013, Travelers filed a Notice of Certified Conflict with this Court. The certified conflict case has been assigned Case No. 13-1671 and is pending before the Court. This appeal follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A trial court's entry of dismissal that (1) states the parties have resolved their differences or have arrived at a settlement agreement, (2) states that the dismissal is without prejudice, (3) permits the submission by the parties of a final entry of dismissal, and that (4) provides a time-frame for the filing of any final entry of dismissal, is a conditional dismissal that does not divest the trial court of jurisdiction to consider and enforce the terms of the settlement agreement.

This Court has long recognized that a trial court has authority to enforce a settlement agreement reached by the parties during the pendency of a civil case. *See Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 470 N.E.2d 902 (1984). This Court also has stated that a trial court loses the authority to proceed in a case when it has been *unconditionally* dismissed. *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 577 N.E.2d 1100 (1991). Implicit in the Court's holding in *McGrath* is that a dismissal may be *other* than unconditional. This Court has never considered the question of what language must be included in an entry of dismissal in order for the dismissal to be considered conditional. Ohio's appellate districts have considered the question, but their answers have not been uniform. Indeed, they conflict.

At one end of the spectrum are courts of appeals decisions holding that a dismissal entry need not be highly detailed or precise, but rather need merely allude or make reference to a settlement in order to render the dismissal conditional. Illustrative of this view is the decision of the Eighth Appellate District in *Estate of Berger v. Riddle*, 8th Dist. Nos. 66195, 66200, 1994 WL 449397, *3 (Aug. 18, 1994), wherein the court held that a dismissal entry that stated "[a]ll claims and counterclaims in the above numbered cases settled and dismissed with prejudice at defendants' costs" was a conditional dismissal that did not divest the trial court of jurisdiction to hear a motion to enforce the settlement. As *Berger* explained:

The trial court's dismissal was clearly a conditional dismissal based on a settlement agreement and, as such, the trial court retained jurisdiction to hear a motion to enforce the settlement agreement. Faced with a factual dispute concerning the nature and terms of the settlement the trial court properly set the matter for an oral hearing to determine the extent of the disputed terms. . .

Id.

Similarly, in *Hines v. Zofko*, 11th Dist. No. 93-T-4928, 1994 WL 117110, *1 (Mar. 22, 1994), the Eleventh Appellate District held that a dismissal entry that merely stated “[c]ase settled and dismissed” was a conditional dismissal that did not divest the trial court of jurisdiction to consider a motion to enforce a settlement. *See also Marshall v. Beach*, 143 Ohio App.3d 432, 436, 758 N.E.2d 247 (11th Dist. 2001)(although dismissal entry did not explicitly state that dismissal was conditioned on settlement, it was “implicit within its mandate that if the parties did not reach an ultimate resolution, the trial court retained the authority to proceed”); *Nova Information Systems, Inc. v. Current Directions, Inc.*, 11th Dist. No. 2006-L-214, 2007-Ohio-4373, ¶15 (“Where a court wishes to reserve limited jurisdiction, the language of the reservation need not be highly detailed or precise. Rather, the entry of dismissal need merely allude to the existence of a settlement upon which the dismissal is premised.”).

Following the lead of the Eighth and Eleventh Appellate Districts, the Fifth Appellate District held in *State ex rel. Spies v. Lent*, 5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844, ¶¶46, 47:

. . . When an action is dismissed pursuant to an expressed condition, such as the existence of a settlement agreement, the court retains jurisdiction to enforce said agreement. [*Tabbaa v. Kogelman*, 149 Ohio App.3d 373, 2002-Ohio-5328], citing *Berger v. Riddle* (August 18, [1994]), Cuyahoga App. Nos. 66195, 66200. The determination of whether a dismissal is unconditional and the court is thus deprived of jurisdiction to entertain a motion to enforce a settlement agreement is dependent on the terms of the dismissal order. *Id.*, citing *L-air Molded Plastics, Inc. v. Goforth* (February 24, 2000), Cuyahoga App. No. 74543; *Showcase Homes, Inc. v. The Ravenna Savings Bank* (1998), 126 Ohio App.3d 328, 710 N.E.2d 347.

The language reserving limited jurisdiction need not be highly detailed or precise. *Nova Info Sys., Inc. v. Current Directions, Inc.*, Lake App. No. 2006-L-214, 2007-Ohio-4373, ¶15. Rather, the entry of dismissal need merely allude to the existence of a settlement upon which the dismissal is premised. *Id.*

At the other end of the spectrum are courts of appeals decisions holding that in order for a dismissal entry to be conditional, it must either expressly embody the terms of the settlement or explicitly reserve the trial court's continuing jurisdiction over disputes arising out of the settlement. *See Grace v. Howell*, 2nd Dist. No. 20283, 2004-Ohio-4120, ¶14 (since dismissal entry "neither expressly embodied the terms of the settlement agreement nor expressly reserved jurisdiction to enforce duties the settlement agreement imposed[.]" trial court lacked jurisdiction to entertain motion to enforce settlement); *Bugeja v. Luzik*, 7th Dist. No. 06 MA 50, 2007-Ohio-733, ¶8 (dismissal entry that "neither incorporated the settlement agreement into its judgment entry nor indicated that it retained the jurisdiction to enforce the terms of the settlement" was unconditional dismissal that deprived trial court of jurisdiction to take further action); *Davis v. Jackson*, 159 Ohio App.3d 346, 2004-Ohio-6735, ¶15 (9th Dist.)(dismissal entry that "neither incorporated the settlement agreement into its judgment entry nor indicated that it retained jurisdiction to enforce the terms of the settlement" was an unconditional dismissal that deprived trial court of jurisdiction).

In the middle of the spectrum is the Tenth Appellate District, whose decisions reflect an intra-district conflict on the issue. *Compare Hill v. Briggs*, 111 Ohio App.3d 405, 676 N.E.2d 547 (10th Dist 1996)(trial court *retained* jurisdiction to consider motion to enforce settlement after trial court dismissed case by way of entry that contained no mention of terms of settlement and no mention of retention of jurisdiction) with *Reitter Stucco, Inc. v. Ducharme*, 10th Dist. No. 11AP-488, 2011-Ohio-6831, ¶16 (trial court was *divested* of jurisdiction to consider motion to enforce

settlement because dismissal entry did not “recite or incorporate the specific terms of [the agreement”).

In its decision in this case, the Sixth Appellate District adopted the more restrictive view espoused by the Second, Seventh, and Ninth Appellate Districts:

Upon due consideration, we agree with the majority view of our sister courts, and hold that for a dismissal entry to be conditioned upon a settlement agreement, the entry must either embody the terms of the settlement agreement or expressly reserve jurisdiction to enforce the settlement agreement. Therefore, because the dismissal entry in this case did neither, it constituted an unconditional dismissal. Accordingly, the trial court did not have jurisdiction to entertain Infinite’s motion to enforce the settlement agreement or Travelers’ cross-motion for priority in the settlement proceeds.

(Appendix at A10).

Travelers submits that the rule of law announced by the Sixth Appellate District in this case violates the public policy that favors the prompt resolution of disputes in that it casts an unnecessary and restrictive obstacle into the settlement process. Moreover, the rule of law announced by the Sixth Appellate District in this case runs afoul of the mandate of this Court in *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991), that *only* when a court “patently and unambiguously” lacks jurisdiction is a dismissal entry unconditional.

Travelers submits that its proposition of law strikes a proper balance between the public policy of encouraging the prompt resolution of disputes and ensuring the finality of judgments. Moreover, the proposition of law asserted by Travelers will promote the efficient use of judicial resources by permitting parties to conclude their disputes before trial judges who are familiar with their cases, rather than forcing parties to institute new lawsuits whose only aim is to enforce an agreement previously reached in a preceding lawsuit.

The proposition of law submitted by Travelers defines a conditional dismissal as one that (1) states the parties have resolved their differences or have arrived at a settlement agreement; (2) states that the dismissal is without prejudice; (3) permits the submission by the parties of a final entry of dismissal; and that (4) provides a time-frame for the filing of any final entry of dismissal.

With regard to the first criteria, in order to qualify as a conditional dismissal, an entry need only allude to the existence of a resolution or settlement. In the typical case, parties agree in principle on the essential terms of a settlement, but engage in additional discussions before an agreement is reduced to writing and executed. Requiring that a dismissal entry merely mention a resolution or settlement will encourage the drafting of a final agreement that is the result of mindful deliberation, that reflects the parties' actual intent, and that minimizes the possibility of subsequent disputes.

The second, third, and fourth criteria go hand-in-hand and collectively reflect a trial court's intention to retain jurisdiction pending submission of a final entry of dismissal. By stating the dismissal is without prejudice, the trial court anticipates that a final entry will be forthcoming. That entry may be submitted by the parties within a designated time frame or be entered by the court if one is not forthcoming by the parties. A similar procedure was sanctioned by the Tenth Appellate District in *Hill v. Briggs*, 111 Ohio App.3d 405, 676 N.E.2d 547 (10th Dist. 1996).

In *Hill*, the parties entered into a settlement agreement of which the court was advised. The court issued an entry noting the settlement and directing the parties to put on a final entry of dismissal. When a final entry of dismissal was not forthcoming, the trial court issued its own dismissal entry pursuant to a local rule that required prompt submission of an entry of dismissal following settlement. In concluding that the trial court's entry was a conditional dismissal that

permitted the trial court to retain jurisdiction to entertain a motion to enforce the settlement, the court of appeals stated:

The parties in this case advised the court that the matter had been settled and the court put on an entry on September 22, 1994 directing them to submit a final entry by October 11, 1994. No entry was submitted, so the court put on its own entry under [Franklin County Court of Common Pleas (General Division)] Loc.R. 25.03.⁴ Loc.R. 25.03 says that counsel shall promptly submit an entry of dismissal following settlement, but if they don't the court may order the case dismissed for want of prosecution. The purpose of the rule is clear. Too often a case will be settled, checks sent, releases executed, and the files closed without anyone bothering to dismiss the case which is still open on the court's docket. In such a case, a routine Loc.R. 25.03 entry of dismissal would constitute a final and unconditional dismissal in the case.

In the case before us, however, there was a question on whether the matter was actually settled and, thus, we find that the court had jurisdiction to consider a motion to vacate its . . . dismissal.

Id. at 409.

Similar to *Hill*, the dismissal entry issued by the trial court herein contemplated the issuance of a final entry. Similar to *Hill*, there was a question herein as to whether the priority/apportionment issue had been resolved. Similar to *Hill*, the trial court herein properly reserved continuing jurisdiction to consider the priority/apportionment issue.

Plainly, the trial court in this case considered its dismissal to have been conditional and one that permitted it to retain continuing limited jurisdiction. As the trial court stated to counsel at a hearing on Travelers' Motion to Set Aside Judgment Entry:

⁴Lucas County Court of Common Pleas (General Division) Loc.R. 5.05(f) provides similarly: "Counsel shall promptly submit an order of dismissal following settlement of any case. If counsel fail to present such an order to the trial judge within 30 days or within such time as the court directs, the judge may order the case dismissed for want of prosecution or file an order of settlement and dismissal and assess costs."

[Y]ou've made more out of the entry than the Court placed on the record. That is, I call them a placeholder entry, pending submission of whatever the final entry is once you've finalized everything, and this is why the language reads the way it is and why the case was dismissed without prejudice to allow you time to complete the terms of the preparation of the full and final release, and then submit your replacement dismissal order which is the effective one with prejudice once all the release language and all the releases are signed and executed and processed.

Travelers, in a timely fashion and in accordance with the conditional dismissal entry, properly invoked the jurisdiction of the trial court to enforce the settlement agreement by resolving the priority issue.

CONCLUSION

This case presents the Court with an opportunity to resolve a conflict among Ohio's appellate districts and provide direction on an issue that impacts the public policy of the State of Ohio. Travelers submits that this case is one of public and great general interest and one that is worthy of the Court's consideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant The Travelers Indemnity Company was served by regular U.S. Mail this 13 day of November 2013 upon the following:

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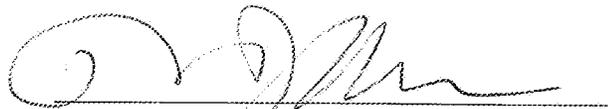
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BERNIE QUILTER
CLERK OF COURTS

THE STATE OF OHIO, LUCAS COUNTY, as
I, BERNIE QUILTER, Clerk of Common Pleas Court
and Court of Appeals, hereby certify this document to be a true
and accurate copy of entry from the Journal of the proceedings
of said Court filed 10-04-13 on case number
L-12-1313

IN TESTIMONY WHEREOF, I have hereunto
subscribed my name officially and affixed the seal of said court
at the Courthouse in Toledo, Ohio, in said County, this 17th
day of October, A.D. 2013
BERNIE QUILTER, Clerk
By [Signature]
Deputy

SEAL

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

Infinite Security Solutions, LLC, et al.

Court of Appeals No. L-12-1313

Appellee

Trial Court No. CI0200903781

v.

Karam Properties I, Ltd., et al.

DECISION AND JUDGMENT

Appellants

Decided: OCT 04 2013

Paul D. Eklund, for appellee The Travelers Indemnity Company.

John J. Reagan, Alberto R. Nestico and Christopher J. VanBlargan,
for appellants.

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from a judgment granting appellee's, The Travelers
Indemnity Co. ("Travelers"), motion seeking priority to settlement proceeds. Because the

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trial court lacked jurisdiction to entertain Travelers' motion, we dismiss this appeal for lack of a final appealable order.

A. Facts and Procedural Background

{¶ 2} On or around July 4, 2008, a fire caused over \$13 million of damage to an apartment complex owned by appellants, Karam Properties I, Ltd., Karam Properties II, Ltd., Karam Managed Properties, LLC, and Toledo Properties, LLC (collectively "Karam"). Karam insured the property through Travelers, who paid Karam approximately \$8.9 million for the loss in exchange for a policyholder's release.

{¶ 3} Subsequently, Infinite Security Solutions, LLC ("Infinite"), which provided security services to the apartment complex, brought a claim against Karam for breach of contract for Karam's failure to pay for several months of services. Karam answered and filed a counterclaim, alleging that Infinite negligently failed to stop residents from setting off the fireworks that started the fire. Around the same time, Travelers initiated a separate lawsuit against Infinite, seeking to recover the amount it paid to Karam for losses sustained by the fire. The trial court consolidated these two cases. Despite the consolidation, neither Travelers nor Karam filed cross-claims to determine who had priority to any recovery against Infinite.

{¶ 4} After extensive discovery, the parties purportedly reached a settlement agreement on May 19, 2011. Unfortunately, although the settlement agreement was discussed in open court, no record was made of those proceedings. Furthermore, the settlement agreement was not reduced to writing and signed by the parties. The parties

2.

admit that pursuant to the agreement, Infinite will pay a fixed sum to settle the tort claims against it, less an amount to settle its breach of contract claim against Karam.¹ However, the parties disagree on the extent of the agreement relative to who has priority to the funds paid by Infinite. Notably, both Travelers and Karam concede that priority was not determined during the settlement discussions. Notwithstanding that the priority issue had not yet been resolved, on May 26, 2011, the trial court sua sponte entered a judgment dismissing the action.

{¶ 5} Shortly after this judgment was entered, Karam filed an action in federal court, seeking, in part, a judgment that it is entitled to all of the proceeds from Infinite because the policyholder's release that it signed was not effective to overcome the "make-whole" doctrine. Thereafter, Travelers moved the trial court, pursuant to Civ.R. 60(B), to set aside the May 26, 2011 judgment entry dismissing the case, so that the trial court could decide the priority issue. The parties briefed Travelers' motion, and the trial court held an oral hearing on the motion on September 6, 2011. The trial court then took the matter under advisement.

{¶ 6} On February 13, 2012, Infinite moved the trial court to enforce the settlement agreement. Essentially, because the trial court had not yet ruled on Travelers' Civ.R. 60(B) motion, and because the priority issue had still not been resolved, Infinite sought an order requiring the parties to execute a release so that Infinite could pay the agreed sum to the court, thereby concluding its role in the litigation, and allowing Karam

¹ Infinite has moved to seal several filings in this case so that the amount of the settlement is not disclosed.

and Travelers to continue to quarrel over the distribution of those funds. Travelers responded to Infinite's motion, and filed a cross-motion seeking priority to the settlement proceeds. Karam opposed Travelers cross-motion, arguing that the trial court did not have jurisdiction over the priority issue because the case had been unconditionally dismissed, and, because priority was never an issue that was presented to the court in the pleadings, it was not necessary to the settlement. Travelers replied that the May 26, 2011 judgment was conditioned on the settlement; consequently, the trial court retained jurisdiction to enforce the settlement. Furthermore, Travelers argued that the settlement included the parties' agreement that if they could not resolve the priority issue, they would return to the trial court for its determination.

{¶ 7} On October 12, 2012, the trial court entered its judgment on the respective motions. The trial court determined that its May 26, 2011 judgment was a conditional dismissal, and therefore it retained jurisdiction to enforce the settlement agreement between the parties. Accordingly, it denied Travelers' Civ.R. 60(B) motion for relief from judgment as moot. The trial court then decided the priority issue, determining that Travelers was entitled to the full amount of the settlement proceeds. As a result, the trial court granted Travelers' cross-motion for priority in the settlement proceeds, and in light of that decision, denied Infinite's motion to enforce the settlement agreement as moot.

B. Assignments of Error

{¶ 8} Karam has timely appealed the October 12, 2012 judgment, asserting three assignments of error:

4.

1. The trial court erred in declaring that Travelers has priority to the Infinite settlement proceeds because the court had previously dismissed the case unconditionally, and thus, lacked subject matter jurisdiction to decide this issue.

2. The trial court erred in reopening the case to decide the issue of priority where the settlement agreement did not address the issue, determination of the issue was not necessary to enforce the agreement, and the issue had not been raised in any pleading.

3. The trial court erred in holding that the policy's subrogation clause superceded (sic) the equitable "make-whole" doctrine where the clause did not expressly state that Travelers would have priority to funds recovered by Karam regardless of whether Karam obtained a full or partial recovery.

II. Analysis

{¶ 9} In Karam's first assignment of error, it argues that the trial court lacked jurisdiction to enforce the settlement agreement because the action had already been unconditionally dismissed.

{¶ 10} As an initial matter, Travelers argues that Karam has waived any argument that the trial court lacked jurisdiction. Travelers relies on *Figueroa v. Showtime Builders, Inc.*, 8th Dist. Cuyahoga No. 95246, 2011-Ohio-2912, ¶ 10, which quotes *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 240, 456 N.E.2d 1309 (10th

5.

Dist.1982), for the proposition that “[t]he entering into the settlement agreement constitutes a waiver of the defense of lack of jurisdiction and [is] a consent to jurisdiction solely for the purpose of enforcement of the settlement agreement in the absence of some provision in the agreement itself to the contrary.” However, *Ohio State Tie & Timber* dealt with *personal* jurisdiction over a party to a contract, whereas here the trial court’s ability to enforce the settlement agreement is a question of *subject-matter* jurisdiction. It is well-settled that “[t]he lack of subject-matter jurisdiction may be raised for the first time on appeal,” and “[t]he parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking.” *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 238, 358 N.E.2d 536 (1976), *overruled on other grounds*, *Manning v. Ohio State Library Bd.*, 62 Ohio St.3d 24, 29, 577 N.E.2d 650 (1991). Therefore, Karam has not waived, and could not waive, the issue of subject-matter jurisdiction.

{¶ 11} Turning to the merits of the assignment of error, we note that a trial court possesses authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit because such an agreement constitutes a binding contract. *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36, 470 N.E.2d 902 (1984). Further, “[w]hen an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur.” *Estate of Berger v. Riddle*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397, *2 (Aug. 18, 1994). However, we also note that a trial court

loses jurisdiction to proceed in a matter when the court has unconditionally dismissed the action. *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991). Therefore, the threshold issue in this case is whether the trial court's May 26, 2011 judgment constituted a conditional or unconditional dismissal of the action.

{¶ 12} “The determination of whether a dismissal is unconditional, thus depriving a court of jurisdiction to entertain a motion to enforce a settlement agreement, is dependent upon the terms of the dismissal order.” *Le-Air Molded Plastics, Inc. v. Goforth*, 8th Dist. Cuyahoga No. 74543, 2000 WL 218385, *3 (Feb. 24, 2000), citing *Showcase Homes, Inc. v. Ravenna Savs. Bank*, 126 Ohio App.3d 328, 331, 710 N.E.2d 347 (3d Dist.1998). Here, the dismissal entry stated: “Parties having represented to the court that their differences have been resolved, this case is dismissed without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order.”

{¶ 13} In *Huntington Natl. Bank v. Molinari*, 6th Dist. Lucas No. L-11-1223, 2012-Ohio-4993, ¶ 15-17, we recognized that Ohio courts have taken different views on whether similar language constitutes a conditional or unconditional dismissal. Karam urges us to adopt the view of a number of districts that this language is an unconditional dismissal because it does not expressly embody the terms of the settlement agreement nor expressly reserve jurisdiction to enforce the settlement agreement. *Davis v. Jackson*, 159 Ohio App.3d 346, 2004-Ohio-6735, 823 N.E.2d 941, ¶ 15 (9th Dist.), citing *Cinnamon Woods Condominium Assn., Inc. v. DiVito*, 8th Dist. No. 76903, 2000 WL 126758, *2

7.

(Feb. 3, 2000). See *Grace v. Howell*, 2d Dist. Montgomery No. 20283, 2004-Ohio-4120, ¶ 4, 13 (dismissal entry stating the matter has “been settled and compromised to the satisfaction of all parties as shown by the endorsement of counsel below” held to be an unconditional dismissal); see also *Showcase Homes, Inc.* at 329, 331 (“This day came the parties and advised the Court that the within cause has been settled. IT IS THEREFORE ORDERED that the complaint and parties’ respective counterclaims be and hereby are dismissed with prejudice”); *McDougal v. Ditmore*, 5th Dist. Stark No. 2008 CA 00043, 2009-Ohio-2019, ¶ 16 (“Upon agreement of Counsel for Plaintiffs and Counsel for Defendant, this matter is dismissed with prejudice to refiling”); *Bugeja v. Luzik*, 7th Dist. Mahoning No. 06 MA 50, 2007-Ohio-733, ¶ 8 (“case settled and dismissed with prejudice at defendant’s cost”); *Smith v. Nagel*, 9th Dist. Summit No. 22664, 2005-Ohio-6222, ¶ 6 (“The court, having been advised that the parties have reached an agreement in this case, orders this matter to be marked ‘SETTLED and DISMISSED’”); *Baybutt v. Tice*, 10th Dist. Franklin Nos. 95APE06-829, 95APE08-1106, 1995 WL 723688, *1-2 (Dec. 5, 1995) (“The within action is hereby settled and dismissed with prejudice. Costs paid.”); *Nova Info. Sys., Inc. v. Current Directions, Inc.*, 11th Dist. Lake No. 2006-L-214, 2007-Ohio-4373, ¶ 3-6, 16 (“by agreement of the parties, * * *The Complaint * * * is hereby dismissed with prejudice. The Counterclaim * * * and * * * Third Party Complaint * * * are hereby dismissed with prejudice”).

{¶ 14} Travelers, on the other hand, argues that we should adopt the view of the Eighth District that merely referring to a settlement agreement is sufficient to form a

conditional dismissal. See *Berger*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397 at *1, 3 (“All claims and counterclaims in the above numbered cases settled and dismissed with prejudice” was “clearly a conditional dismissal based on a settlement agreement”); *Fisco v. H.A.M. Landscaping, Inc.*, 8th Dist. Cuyahoga No. 80538, 2002-Ohio-6481, ¶ 10 (“instant matter is settled and dismissed” held to be a conditional dismissal). Travelers also points out that the Eighth District is not alone in reaching this conclusion, citing *Hines v. Zofko*, 11th Dist. Trumbull No. 93-T-4928, 1994 WL 117110 (Mar. 22, 1994), in which the Eleventh District held that a dismissal entry which stated, “Case settled and dismissed,” was a conditional dismissal.

{¶ 15} Further, Travelers relies on *Marshall v. Beach*, 143 Ohio App.3d 432, 436, 758 N.E.2d 247 (11th Dist.2001), in which the Eleventh District again held that the trial court retained jurisdiction to consider a motion to enforce a settlement agreement. In that case, the entry stated, “Case settled and dismissed with prejudice, each party to bear their own costs. Judgment entry to follow. Case concluded.” *Id.* at 434. However, the parties never filed a separate entry, nor completed a formal settlement agreement. *Id.* at 435. One of the parties subsequently filed a motion to enforce the settlement agreement. The trial court then held a hearing, determined what the terms of the settlement agreement were, and granted the motion to enforce the agreement. On appeal, in addressing whether the trial court had jurisdiction to consider the motion to enforce the settlement agreement, the Eleventh District reasoned,

Although the [dismissal] order does not explicitly state that the dismissal was conditioned on the settlement of the case, it is implicit within its mandate that if the parties did not reach an ultimate resolution, the trial court retained the authority to proceed accordingly. This conclusion is further buttressed by the trial court's statement that a second judgment entry was to follow. *Id.* at 436.

Travelers argues that a similar result should be reached here, where the dismissal order referenced that the parties had resolved their differences and contemplated that a second judgment entry would be forthcoming.

{¶ 16} Upon due consideration, we agree with the majority view of our sister courts, and hold that for a dismissal entry to be conditioned upon a settlement agreement, the entry must either embody the terms of the settlement agreement or expressly reserve jurisdiction to enforce the settlement agreement. Therefore, because the dismissal entry in this case did neither, it constituted an unconditional dismissal. Accordingly, the trial court did not have jurisdiction to entertain Infinite's motion to enforce the settlement agreement or Travelers' cross-motion for priority in the settlement proceeds.

{¶ 17} Admittedly, entering an unconditional dismissal of the action was not the result contemplated by the trial court when it issued its May 26, 2011 judgment entry. As the court stated at the hearing on Travelers' Civ.R. 60(B) motion,

[Y]ou've made more out of the entry than the Court placed on the record. That is, I call them a placeholder entry, pending submission of

whatever the final entry is once you've finalized everything, and this is why the language reads the way it is and why the case was dismissed without prejudice to allow you time to complete the terms of the preparation of the full and final release, and then submit your replacement dismissal order which is the effective one with prejudice once all the release language and all the releases are signed and executed and processed.

However, "a court speaks exclusively through its journal entries." *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶ 30. Here, the entry unequivocally dismissed the action. Unlike *Marshall*, the provision that the parties "reserv[ed] the right to file an entry of dismissal" did not qualify the initial dismissal on the entry of a second. Instead, it merely provided the parties an option that they may or may not have exercised. Because the parties did not file a replacement entry of dismissal, the May 26, 2011 judgment remains in effect.²

{¶ 18} Furthermore, the fact that the dismissal was without prejudice actually supports our conclusion that the trial court lacks jurisdiction over the settlement agreement. Dismissal without prejudice does not mean that the dismissal is a placeholder having no effect; rather,

² Notably, Lucas County Court of Common Pleas Loc.R. 5.05(F) provides a procedure for settlements in civil cases that may have avoided this result: "Counsel shall promptly submit an order of dismissal following settlement of any case. If counsel fail to present such an order to the trial judge within 30 days or within such time as the court directs, the judge may order the case dismissed for want of prosecution or file an order of settlement and dismissal and assess costs."

[it] means that the plaintiff's claim is not to be unfavorably affected thereby; all rights are to remain as they then stand, leaving him or her free to institute a similar suit. The parties are put back in their original positions, and the plaintiff may institute a second action upon the same subject matter. In a typical civil action, a claim that is dismissed "without prejudice" may be refiled at a later date.

Dismissal without prejudice relieves the trial court of all jurisdiction over the matter, and the action is treated as though it had never been commenced. (Emphasis added.) 1 Ohio Jurisprudence 3d, Actions, Section 170 (2013).

{¶ 19} Therefore, because the trial court lacked jurisdiction to enforce the settlement agreement, its October 12, 2012 judgment is void. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 8 ("If a court acts without jurisdiction, then any proclamation by that court is void."). Accordingly, Karam's first assignment of error is well-taken, rendering Karam's second and third assignments of error moot.

III. Certification of Conflict

{¶ 20} Article IV, Section 3(B)(4) of the Ohio Constitution states, "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any court of appeals of

the state, the judges shall certify the record of the case to the supreme court for review and final determination.”

{¶ 21} In order to qualify for a certification of conflict to the Supreme Court of Ohio, a case must meet the following three conditions:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be “upon the same question.” Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.” *Whitlock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

{¶ 22} We find that our holding today is in conflict with the Eighth District Court of Appeals’ decision in *Estate of Berger v. Riddle*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397 (Aug. 18, 1994), and the Eleventh District Court of Appeals’ decision in *Hines v. Zofko*, 11th Dist. Trumbull No. 93-T-4928, 1994 WL 117110 (Mar. 22, 1994). Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: Whether a dismissal entry that does not either embody the terms of a settlement agreement or expressly reserve jurisdiction to the trial court to enforce the terms of a settlement agreement is an unconditional dismissal.

{¶ 23} The parties are directed to S.Ct.Prac.R. 8.01, et seq., for guidance.

IV. Conclusion

{¶ 24} Based on the foregoing, the October 12, 2012 judgment of the Lucas County Court of Common Pleas is void, and this appeal is dismissed for lack of a final appealable order. *See State v. Gilmer*, 160 Ohio App.3d 75, 2005-Ohio-1387, 825 N.E.2d 1180, ¶ 6 (6th Dist.) (a void judgment is not a final appealable order). Costs are assessed to Travelers pursuant to our discretion under App.R. 24(A).

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

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

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Infinite Security Solutions, LLC, et al.,	*	Case No.: CI 09-3781
Plaintiffs,	*	Honorable Gene A. Zmuda
vs.	*	
Karam Properties I, Ltd., et al.,	*	OPINION AND JUDGMENT ENTRY
Defendants.	*	

This matter comes before the Court on Plaintiff The Travelers Indemnity Company's ("Travelers") Motion to Set Aside Judgment Entry and Memorandum of Law, Plaintiff/Counterclaim Defendant Infinite Security Solutions, LLCs' ("Infinite") Motion to Enforce Settlement by Order of Entry of Release, and Travelers' Cross-Motion Seeking Priority to Settlement Proceeds.

Karam Properties II, Ltd., Karam Managed Properties, LLC, and Toledo Properties, LLC (collectively referred to as "Karam") filed a brief in opposition to Travelers' motion to set aside judgment entry and Travelers filed a reply brief in support and supplemental submission.

Travelers and Karam filed responses to Infinite's motion to enforce settlement and Karam filed a memorandum in opposition to Travelers' cross-motion seeking priority to settlement proceeds. Finally, Travelers filed a reply to Karam's response.

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On May 19, 2011, a settlement conference was held with this Court where the parties verbally agreed upon a settlement of this matter.¹ On May 26, 2011, this Court issued its own Judgment Entry which stated in its entirety: "Parties having represented to the court that their differences have been resolved, this case is dismissed without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order." (Judgment Entry of this Court file-stamped May 26, 2011). The parties never filed their own entry of dismissal.

On June 20, 2011, Travelers filed its Motion to Set Aside Judgment Entry in an effort to reopen the case to address issues involving the priority/apportionment of the settlement proceeds between Travelers and Karam. This matter was fully briefed by the parties.

On September 6, 2011, this Court held a hearing on Travelers' Motion to Set Aside Judgment Entry. The Court heard oral arguments of counsel that were in addition to the parties' written briefs. Upon conclusion of the hearing, the Court took Travelers' motion under advisement. Subsequently, on February 13, 2012, Infinite filed its Motion to Enforce Settlement by Order of Entry of Release as to the terms of settlement reached by the parties at the May 19, 2011 settlement pretrial conference. The motions identified above have been fully briefed and are now decisional.

I. Motion to Set Aside Judgment Entry:

In its motion to set aside judgment entry, Travelers argues that this Court retains the authority to enforce an agreement of settlement between the parties and that the distribution/priority to the proceeds is a term of the settlement. Karam argues that the settlement reached resolved all pending claims and that the issue of distribution/priority of the proceeds of the settlement is a new matter

¹A formal settlement agreement and release was not executed on that date by the parties and the terms of the settlement were not placed upon the record.

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which has now become the subject of a Federal Court action.² Thus, Karam argues that this Court was divested of jurisdiction to handle this matter.

The Eighth District Court of Appeals of Ohio in *Estate of Berger v. Riddle*, 1994 Ohio App. LEXIS 3623 (Ohio Ct. App., Cuyahoga County Aug. 18, 1994), stated that:

"A trial court possesses the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit. *Mack v. Polson* (1984), 14 Ohio St.3d 34, 470 N.E.2d 902; *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36, 285 N.E.2d 324. A trial court loses the authority to proceed in a matter when the court unconditionally dismisses an action as the court no longer retains jurisdiction to act. *State, ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70, 577 N.E.2d 1100.

When an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur. *Tepper v. Heck* (Dec. 10, 1992), Cuyahoga App. No. 61061, unreported; *Hines v. Zafko* (March 22, 1994), Trumbull County App. No. 93-T-4928, unreported." *Id.* at 5-6.

In this case, the parties represented to this Court, at a settlement pretrial conference, that a settlement had been reached and that the appropriate documentation would be prepared and executed by the parties. The Judgment Entry issued by this Court was not an unconditional dismissal as noted in *Berger* as the language used in the Judgment Entry was equivalent to the fact that a settlement had been reached between the parties. The Judgment Entry dismissed this matter without prejudice and allowed the parties to file their own dismissal order within 30 days. Therefore, this Court's May 26, 2011 Judgment Entry was not an unconditional dismissal but was a dismissal with a stated condition that allows this Court to retain the authority to enforce the settlement agreement. Thus, Travelers'

²In March of 2012, the Federal District Court stayed its matter pending this action being resolved.

Motion to Set Aside Judgment Entry is deemed moot and DENIED as this Court retains jurisdiction to enforce the settlement agreement in this matter without the need to vacate this Court's May 26, 2011 Judgment Entry.

II. Motion to Enforce Settlement & Cross-Motion Seeking Priority to Settlement Proceeds:

Travelers sets forth the terms of the settlement in its motion to set aside judgment entry as:

- 1) Travelers and Karam agreed to settle their claims against Infinite for a total sum of \$850,000.00;
- 2) Infinite agreed to settle its \$97,000.00 claim against Karam for \$25,000.00 which Travelers agreed would be made from the \$850,000.00; and
- 3) Karam agreed that the \$25,000.00 paid to Infinite from the total settlement of \$850,000.00 was a credit to Travelers against any eventual division of the remaining \$850,000.00 in proceeds between Travelers and Karam.

In its motion to enforce settlement, Infinite moves this Court to enforce the settlement reached by the parties on May 19, 2011 by entering an Order setting forth the terms of the settlement and release. Infinite asserts that after months of waiting for a settlement agreement and release to be circulated between the parties, Infinite circulated a proposed settlement agreement and release to both Karam and Travelers. Infinite was never provided feedback or objection to the proposed settlement agreement and release by Karam or Travelers. Infinite states that no party disputes that a settlement was reached and thus, Infinite asks this Court to enter an Order setting forth the terms of the settlement agreement and release and permitting Infinite to pay the settlement funds into the Court.

In response, Travelers files a Cross-Motion Seeking Priority to Settlement Proceeds which sets forth the reasons why Travelers has priority to the \$825,000.00 settlement proceeds. Karam files a memorandum in opposition to Travelers' cross-motion arguing that it is entitled to a portion of the

\$825,000.00. Thus, the only issue remaining to be resolved to complete the settlement in this matter is the issue between Travelers and Karam as to the apportionment/priority to the \$825,000.00 settlement proceeds.

Prior to examining the arguments made by the parties on the issue of apportionment, a brief summary of the facts of this case are in order.

The instant matter consists of two consolidated matters arising out of a July 5, 2008 fire at the Hunter's Ridge Apartment Complex in Toledo, Ohio. (Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds, p.3). The first action, captioned *Infinite Security Solutions v. Karam Properties II, Ltd.* with case no. CI09-3781, was commenced by Infinite as a collection action against Karam for some unpaid bills. (Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds, p.3). The second action, captioned *The Travelers Indemnity Company v. Infinite Security Solutions, LLC* with case no. CI09-4627, was commenced as a subrogation action by Travelers, as property insurer for Karam, for the \$8,879,824.20 fire related damage claim paid by Travelers to Karam.³ (Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds, p.3).

In support of its position for priority of settlement proceeds, Travelers argues that Karam released all claims arising from the fire at Hunter's Ridge and that release precludes Karam from recovery of any of the settlement proceeds and entitles Travelers to indemnification. Travelers

³However, Infinite's liability policy only had limits of \$1,000,000.00. (Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds, p.4).

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further argues that the language of its policy gives Travelers priority to the settlement proceeds paid by Infinite and the "make-whole" doctrine does not apply in this case where the policy language is clear and unambiguous.

Karam asserts that the release is silent with respect to its right to prosecute a claim against Infinite for its approximately \$3 million dollars in uninsured loss. Karam argues that the policy's subrogation clause does not give Travelers priority to the Infinite settlement proceeds because the clause fails to include language necessary to render the "make-whole" doctrine inapplicable.

Resolution of this issue requires consideration of provisions contained in two separate documents: the insurance policy between Travelers and Karam; and the full, final and complete release of claims for Hunter's Ridge Apartments.

In the insurance policy between Travelers and Karam at Section X, Subsection 2 of the General Provisions, there is a provision titled Subrogation - All Other Coverages. Section X, Subsection 2, states, in pertinent part, that:

"If any person or organization to or for whom the Company⁴ makes payment under this policy has rights to recover damages from another; those rights are transferred to the Company to the extent of such payment. That person or organization must do everything necessary to secure the Company's rights and must do nothing after the loss to impair them. The Company will be entitled to priority of recovery against any such third party (including interest) to the extent payment has been made by the Company, plus attorney's fees, expenses or costs, incurred by the Company." (Exhibit 6 attached to Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds).

⁴Under the policy of insurance, "Company" is defined as The Travelers Indemnity Company.

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The Full, Final, and Complete Release of Claim for Hunter Ridge's Apartments between

Travelers and Karam states, in pertinent part, that:

"NOW THEREFORE, for and in consideration of an additional payment at this time to Karam by Travelers of Eight Hundred and Seventy Eight Thousand Four Hundred and Fourteen and 72/100 Dollars (\$878,414.72), for a total of Eight Million Eight Hundred and Seventy Nine Thousand Eight Hundred Twenty Four Dollars and 20/100 (\$8,879,824.20), Karam does jointly and severally, for itself and for any and all persons, firms, corporations and entities claiming by or through them, and for its successors and assigns, hereby release, acquit, and forever discharge Travelers and its parent companies, successors, assigns, directors, agents, investigators, employees, and all other persons, firms, corporations and legal entities whomsoever which are associated with Travelers from any and every claim, demand, right or cause of action, of whatsoever kind or nature, arising from this claim.

* * *

Karam agrees to indemnify and save harmless Travelers, its parent companies, successors and assigns, and all of its officers, directors, agents, investigators, and employees, of and from any and every claim or demand or every kind or character which might be asserted under or by virtue of Travelers' making of the above-referenced payment against the claimed damages arising from this event and through the insured." (Exhibit 5 attached to Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds).

A settlement agreement is a binding contract between parties which requires a meeting of the minds as well as an offer and acceptance and a settlement agreement is subject to enforcement under standard contract law. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 1997 Ohio 380. Under Ohio law, it is generally presumed that "[t]he intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. "If the language of [a written agreement] is clear and

unambiguous, this Court must enforce the instrument as written." *Hite v. Leonard Ins. Servs. Agency, Inc.* (Aug. 23, 2000), 9th Dist. No. 19838, 2000 Ohio App. LEXIS 3799.

Courts generally presume that the intent of the parties can be found in the written terms of their contract. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 1992 Ohio 28. If a contract is unambiguous, the language of the contract controls and "[i]ntentions not expressed in the writing are deemed to have no existence and may not be shown by parole evidence." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 53. If, however, "a contract is ambiguous, parol evidence may be employed to resolve the ambiguity and ascertain the intention of the parties." *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 521, 1994 Ohio 99. Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *Butler v. Joshi* (May 9, 2001), 9th Dist. No. 00CA0058, 2001 Ohio App. LEXIS 2062. "The decision as to whether a contract is ambiguous and thus requires extrinsic evidence to ascertain its meaning is one of law." *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.* (1989), 65 Ohio App.3d 139, 146.

Travelers argues that the interpretation of subrogation provisions by the Supreme Court in *Peterson v. Ohio Farmers Ins. Co.* 175 Ohio St. 34 (Ohio 1963) and *Ervin v. Garner*, 25 Ohio St.2d 231 (Ohio 1971) are relevant here and remain good law. While Karam argues that the decisions in *Peterson* and *Ervin* are no longer relevant and that the more recent decision by the Supreme Court of Ohio in *North Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, establishes that certain contractual provisions must be included in a policy to override the make-whole doctrine.

Peterson, supra, involved the recovery of a judgment against a third-party tortfeasor after a loss by an insured and the right of an insurer to priority for reimbursement under a subrogation provision in the insurance policy. The Supreme Court in *Peterson* held that:

"Where the policy subrogation provisions and the subrogation assignment to the insurer convey all right of recovery against any third-party wrongdoer to the extent of the payment by the insurer to the insured, the insurer, who has cooperated and assisted in proceedings against the wrongdoer, is entitled to be indemnified first out of the proceeds of any recovery against the wrongdoer." *Id.* at 38.

In *Ervin*, the Court was faced with a similar issue as in *Peterson* where the tortfeasor's insurer made payment to the insured for fire loss to the insured's barn and pursuant to a subrogation agreement, the insurer was entitled to the payment by tortfeasor up to the amount it paid in satisfaction of the insured's claim. The Supreme Court held in *Ervin* that:

"Where an insured sustains a loss which is partially covered by a policy of insurance, and assigns to the insurer all right of recovery against a third-party wrongdoer to the extent of the payment by the insurer to the insured; and where prior to the filing of the insured's lawsuit against the tort-feasor the insurer communicated to insured's counsel its wish to enter the lawsuit as a co-plaintiff, and asked insured's counsel to represent it, which request was never answered; and although no cooperation and assistance was given thereafter by the insurer, equity does not require that the insured be first indemnified out of proceeds of such recovery." *Id.* at paragraphs 1 and 2 of the syllabus by the Court.

The Supreme Court in *Ervin* also found that:

"Cases of contractual interpretation should not be decided on the basis of what is 'just' or equitable. This concept is applicable even where a party has made a bad bargain, contracted away all his rights, and has been left in the position of doing the work while another may benefit from the work. Where various written documents exist, it is the court's duty to interpret their meaning, and reach a decision by using the usual tools of contractual

interpretation (e. g., the written documents, the intent of the parties, and the acts of the parties) and not by a determination of what is fair, equitable, or just." *Id.* at 239-240.

Karam argues that the Supreme Court in *North Buckeye* attempts to simplify the process for evaluating subrogation provisions by adopting standards developed by the United States Court of Appeals for the Sixth Circuit in *Hiney Printing Co. v. Brantner*, 243 F.3d 956 (2001) and *Copeland Oaks v. Haupt*, 209 F.3d 811 (2000). Karam asserts that the language of the subrogation provision in its insurance policy does not meet the two prongs established by the Sixth Circuit in *Hiney* and *Copeland Oaks* and adopted in *North Buckeye* that the language is 1) clear in establishing both a priority to the funds recovered and 2) a right to any full or partial recovery.

However, the Supreme Court in *North Buckeye* discusses subrogation provisions in the context of reimbursement between an insured and a health-benefits provider. The Supreme Court in *North Buckeye* held in that context that:

"A reimbursement agreement between an insured and a health-benefits provider clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both (1) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured's behalf and (2) that the insurer will be accorded priority over the insured as to any funds recovered." *Id.* at paragraph 2 of the syllabus by the Court.

Relevant to our case, the Supreme Court held in *North Buckeye* that:

"The 'general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.' In addition, the trial court recognized that this court has held that this equitable limit on subrogation, commonly denominated the 'made whole' or 'make whole' doctrine, may be overridden by a clear and unambiguous

agreement between an insured and an insurer that the insurer shall have priority to any recovery from the tortfeasor. *Ervin v. Garner* (1971), 25 Ohio St.2d 231." *Id.* at 190-191.

The Supreme Court went on to hold that:

"Consistent with our holding in *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, 388, we therefore recognize that the make-whole doctrine applies by default where a reimbursement or subrogation contract does not contain language providing otherwise." *Id.* at 194.

In this case, the subrogation provision in the policy of insurance between Travelers and Karam is clear and unambiguous and provides that "if any person or organization to or for whom the Company makes payment under this policy has rights to recover damages from another; those rights are transferred to the Company to the extent of such payment" and most importantly, "the Company will be entitled to priority of recovery against any such third party (including interest) to the extent payment has been made by the Company, plus attorney's fees, expenses or costs, incurred by the Company." (Exhibit 6 attached to Travelers' Response to Infinite's Motion to Enforce Settlement by Order of Entry of Release and Cross-Motion Seeking Priority to Settlement Proceeds). Further, the Full, Final, and Complete Release of Claim for Hunter's Ridge Apartments provides that Travelers paid Karam the amount of \$8,879,824.20 for the Hunter's Ridge Apartments claim. The amount of the settlement in this case is only \$825,000.00 which is clearly far less than what Travelers paid Karam for its insurance claim.

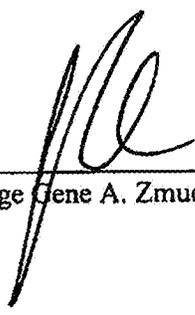
Consequently, based upon the arguments of counsel, Section X, Subsection 2 of the policy of insurance, the Full, Final and Complete Release of Claim for the Hunter's Ridge Apartments, and all relevant case law, the Court finds that there was a clear and unambiguous subrogation provision between Travelers and Karam in this matter. Pursuant to the subrogation

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provision, the Court finds that Travelers has a priority of recovery to any monies paid by a third party. Therefore, the Court finds that Travelers is entitled to priority and reimbursement from Infinite of the full amount of settlement proceeds available totaling \$825,000.00 in this matter. Thus, this Court finds Travelers' Cross-Motion Seeking Priority to Settlement Proceeds well-taken and GRANTED. Further, in light of this Court's ruling, Infinite's Motion to Enforce Settlement is deemed moot and DENIED. Infinite is hereby Ordered to forward payment to Travelers in the amount of \$825,000.00 forthwith. The Court instructs the parties to this action to complete and execute any settlement agreement and release consistent with this Court's Opinion and Judgment Entry within 30 days which shall conclude any and all outstanding issues relative to the settlement reached by the parties on May 19, 2011 in this consolidated action.

The ruling herein is a full and complete adjudication of all claims incipient in plaintiffs' complaint as they relate to defendants and a complete adjudication of all genuine issues, merits and matters in controversy between the parties with respect to any duties owed by defendants to the plaintiffs. It appears there is no just cause for further delay, and that, pursuant to Civ. R. 54, Final Judgment should be entered.

10/12/11
Date



Judge Gene A. Zmuda

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FILED
LUCAS COUNTY

2011 MAY 26 A 9:58

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURT
IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

INFINITE SECURITY SOLUTIONS LLC,

Plaintiff.

v.

KARAM PROPERTIES I LTD,

Defendant.

* CASE NO: G-4801-CI-200903781-000
*
*
* JUDGE GENE A. ZMUDA
*
*
* JUDGMENT ENTRY
*
*

* * * * *

Parties having represented to the court that their differences have been resolved, this case is dismissed without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order.

Date: May 23, 2011



JUDGE GENE A. ZMUDA

Distribution: MARTIN HOLMES JR
STEVEN JANIK
PATRICK THOMAS
MICHELE CHAPNICK
ALBERTO NESTICO
JOHN REAGAN

FILED
LUCAS COUNTY

2010 FEB 18 A 9:05

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

COMMON PLEAS COURT
BERNIE OUILTER
CLERK OF COURTS
THE TRAVELERS INDEMNITY
Plaintiff,

* Consolidated Into Case No. CI 200903781
* Judge Gene A. Zmuda

vs.

* CONSOLIDATION ORDER

INFINITE SECURITY SOLUTIONS
LLC
Defendant.

* Consolidated From Case No. CI 200904627
* Judge James Jensen

This matter came on to be heard upon the Motion of Plaintiff, The Travelers Indemnity Co. The Court finds said Motion to Consolidate well taken and grants the same.

It is therefore ORDERED that case number CI 200904627 is ORDERED transferred from the docket of Judge James Jensen to the docket of Judge Gene A. Zmuda and consolidated with case number CI 200903781.

It is further ORDERED that case number CI 200904627 having been consolidated into case number CI 200903781, case number CI 200904627 should no longer be used and therefore all subsequent pleadings are to be filed under case number CI 200903781.

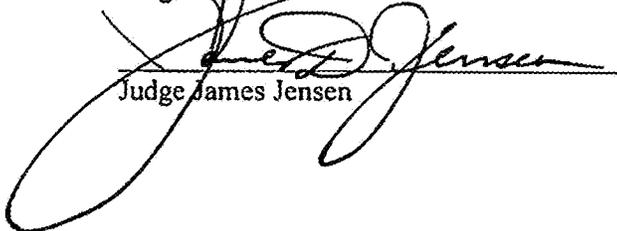
It is further ORDERED that case number CI 200904627 is dismissed and costs transferred to CI 200903781.

Date: 2-16-10



Judge Gene A. Zmuda

Date: 2-11-10



Judge James Jensen

cc: STEVEN G. JANIK
MARTIN HOLMES JR.
ALBERTO R. NESTICO
PAUL W. STEELE III
MICHELE A. CHAPNICK

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