ORIGINAL

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS, LLC, et al.	)	Cases Nos. 2013-1671 and 2013-1795
Appellee	)	
vs.	)	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
KARAM PROPERTIES I, LTD., et al.	)	
Appellant	)	Court of Appeals Case No. L-12-1313

MERIT BRIEF OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

ARGUMENT 8

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 8

Certified Conflict 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 14

CONCLUSION 20

CERTIFICATE OF SERVICE 21

APPENDIX

Appx. Page

Notice of Appeal to the Supreme Court of Ohio 1

Notice of Certified Conflict 4

Decision and Judgment of the Lucas County Court of Appeals (October 4, 2013) 39

Opinion and Judgment Entry of the Lucas County Court of Common Pleas (October 12, 2012) 53

Judgment Entry of the Lucas County Court of Common Pleas (May 26, 2011) 66

Consolidation Order of the Lucas County Court of Common Pleas (February 18, 2010) 67

Order to Seal Document of the Lucas County Court of Common Pleas (June 3, 2013) 68

Ohio Constitution, Article IV, Section 4(B) 69

R.C. 2305.01 70

Loc.R. 5.05(F) of the Court of Common Pleas of Lucas County, General Division 72

TABLE OF AUTHORITIES

CASES **PAGE**

A. B. Jac, Inc. v. Liquor Control Comm,
29 Ohio St.2d 139, 280 N.E.2d 371 13

Bugeja v. Luzik,
7th Dist. No. 06 MA 50, 2007-Ohio-733 16

Davis v. Jackson,
159 Ohio App.3d 346, 2004-Ohio-6735, 823 N.E.2d 941 (9th Dist.) 16

Estate of Berger v. Riddle,
8th Dist. Nos. 66195, 66200, 1994 WL 449397 (August 18, 1994) 7, 8, 14, 15, 16

Grace v. Howell,
2nd Dist. No. 20283, 2004-Ohio-4120 16

Hendrie v. Lowmaster,
152 F.2d 83 (6th Cir.1945) 13

Hill v. Briggs,
111 Ohio App.3d 405, 676 N.E.2d 547 (10th Dist.1996) 10, 11

Hines v. Zofko,
11th Dist. No. 93-T-4928, 1994 WL 117110 (March 28, 1994) 8, 15

Hofer v. Hofer,
35 Ohio Law. Abs. 486, 42 N.E.2d 165 (9th Dist.1940) 12, 13

In re Grimsley,
449 B.R. 602 (Bankr.S.D.Ohio 2011) 13

Joyce v. General Motors Corp.,
49 Ohio St.3d 93, 551 N.E.2d 172 (1990) 13

Lurz v. Lurz,
8th Dist. No. 93175, 2010-Ohio-910 12

Mack v. Polson Rubber Co.,
14 Ohio St.3d 34, 470 N.E.2d 902 (1984) 8

Marshall v. Beach,
143 Ohio App.3d 432, 758 N.E.2d 247 (11th Dist.2001) 9, 15

Nova Information Sys., Inc. v. Current Directions, Inc.,
11th Dist. No. 2006-L-214, 2007-Ohio-4373 ..... 9, 15

Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.,
137 F.2d 871 (6th Cir.1943) 13

Schwarz v. Bd. of Trustees of Ohio State Univ.,
31 Ohio St.3d 267, 510 N.E.2d 808 (1987) 19

Showcase Homes, Inc. v. Ravenna Savings Bank,
126 Ohio App.3d 328, 710 N.E.2d 347 (3rd Dist.1998) 9, 16

Spercel v. Sterling Indus.,Inc.
31 Ohio St.2d 36, 285 N.E.2d 324 (1972) 8, 17

State ex rel. Bd. Of Cty. Commrs. Of Athens Cty. v. Bd. Of Directors of Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgmt. Dist.,
75 Ohio St.3d 611, 665 N.E.2d 202 (1996) 17

State ex. rel. Rice v. McGrath,
62 Ohio St.3d 70, 577 N.E.2d 1100 (1991) 8, 19

State ex rel. Spies v. Lent,
5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844 ..... 9, 15, 16

Tepper v. Heck,
8th Dist. No. 61061, 1992 WL 369283 (December 10, 1992) 8

Tracy-Collins Bank & Trust Co. v. Travelstead,
592 P.2d 605 (Utah 1979) 19

CONSTITUTIONAL PROVISIONS/STATUTES/RULES

Ohio Constitution, Article IV, Section 4(B) 19

R.C. 2305.01 19

Loc.R. 5.05(F) of the Court of Common Pleas of Lucas County, General Division 11

OTHER

Black's Law Dictionary,
335 (9th Ed.2009) 10

34 Corpus Juris, Judgments, Section 794 13

STATEMENT OF FACTS

On July 4, 2008, a fire broke out at an apartment complex located in Toledo, Ohio. (R. 1 [*Travelers* Litigation] at ¶¶12, 16).[1] Toledo Properties, LLC owned the complex. (R. 1 [*Travelers* Litigation] at ¶6). The fire caused millions of dollars in property damage to the complex. (R. 1 [*Travelers* Litigation] at ¶17). The fire was caused by fireworks that were launched by a tenant of the complex. (R. 1 [*Travelers* Litigation] at ¶12). Infinite Security Solutions, LLC ("Infinite"), provider of security services at the complex, failed to stop the use of fireworks despite the fact that it knew or should have known that the fireworks were on site and were being launched. (R. 1 [*Travelers* Litigation] at ¶¶7, 13-14).

At the time of the fire, the complex was insured for property damage under a policy issued by Appellant The Travelers Indemnity Company ("Travelers"). (R. 1 [*Travelers* Litigation] at ¶3). Travelers, in exchange for a policyholder's release, paid Karam Managed Properties, LLC approximately $8.9 million for the fire loss. (R. 166 [Motion to Set Aside Judgment] at Exhibit 2). Appellees herein claim to have sustained damages in excess of the insurance payment.

In April of 2009, Infinite filed suit against Karam Properties I, Ltd. and Karam Properties II, Ltd., affiliates of Toledo Properties, LLC, in the *Infinite* Litigation, seeking to recover approximately $99,000 for unpaid services Infinite had performed at the complex. (R.1 [Complaint]). Karam Properties I, Ltd. and Karam Properties II, Ltd. filed a Counterclaim against Infinite, seeking to recover their claimed uninsured portion of the fire loss. (R. 7 [Answer and Counterclaim]). Karam

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[1]References to the record are from the trial court record in *Infinite Security Solutions, LLC v. Karam Properties II, Ltd., et al.*, Lucas County Court of Common Pleas Case No. CI-09-3781 ("*Infinite* Litigation") and *Travelers Indemnity Company v. Infinite Security Solutions, LLC*, Lucas County Court of Common Pleas Case No. CI-09-4627 ("*Travelers* Litigation"). Unless otherwise indicated, all references to "R." are to the *Infinite* Litigation. References to "R. [Court of Appeals]" are to the court of appeals record.

Managed Properties, LLC and Toledo Properties LLC subsequently were added to the *Infinite* Litigation as real parties in interest. (R. 99 [Supplement to Motion for Leave to File Second Amended Complaint]); R. 151 [Order granting Motion for Leave to File Second Amended Complaint]).[2]

In June of 2009, Travelers filed a subrogation suit against Infinite in the *Travelers* Litigation, seeking to recover the $8.9 million it had paid to Karam.[3] (R. 1 [*Travelers* Litigation]).

On February 18, 2010, the *Infinite* Litigation and the *Travelers* Litigation were consolidated. (R. 21 [*Infinite* Litigation]; R. 30 [*Travelers* Litigation]).

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.

The next day, 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 whereby Infinite agreed to make a monetary payment to settle Karam's and Travelers' claims against it.[4] The settlement included an agreement on the part of Travelers and Karam that they would attempt to resolve their competing claims to the stipulated settlement amount, and that if they were unable to do so, they would submit the dispute to the trial court. (R. 220 [Transcript] at pp. 7-8, 12-13, 16-17, 21-23; Supp. 7-8, 12-13, 16-17, 21-23). The trial court was advised of the settlement at the conference. (R. 220 [Transcript] at pp. 7-8, 17-18; Supp. 7-8, 17-18).

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[2]Karam Properties I, Ltd., Karam Properties II, Ltd., Karam Managed Properties, LLC, and Toledo Properties, LLC are hereafter referred to collectively as "Karam."

[3]Infinite's policy provided liability limits of only $1,000,000. (R. 220 [Transcript of September 6, 2011 Hearing ("Transcript")] at p. 10; Supp. 10).

[4]The amount of the settlement is under seal. (R. 234 [Order to Seal Document]; Appx. 68).

In an Order journalized on May 26, 2011, the trial court directed: "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." (R. 165; Appx. 66).

Shortly after the trial court issued its May 26, 2011 Order (hereafter "Dismissal Entry"), it became apparent that Travelers and Karam could not resolve their competing claims to the settlement proceeds. Accordingly, on June 20, 2011, and prior to expiration of the 30-day time period referenced in the Dismissal Entry, Travelers filed a Motion to Set Aside Judgment Entry. (R. 166). In its Motion, Travelers advised the court that pursuant to previous discussions that had taken place between the court and the parties, 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. At the hearing, counsel for Travelers recounted the events as follows:

> . . . As the Court may recall, this is two consolidated cases arising out of a fire at Hunter's Ridge Complex. Travelers had a subrogation claim against Infinite, and Infinite had a collection action against Karam to which it counterclaimed.
>
> The case was pending for, I don't know, over a year, lots of discovery and so forth, and in April the Court ordered a mediation take place, which we did conduct actually two days with Judge McQuade. The parties made some progress, but a settlement wasn't reached, and so, the – pursuant to the Court's order, there was a May 19th court ordered pretrial settlement conference that occurred in this courthouse. At that Court ordered event, the parties resolved most of the issues relative to the various issues in the two consolidated cases, but not all of them. Namely, Infinite agreed to fund an [$XXX][5] settlement pot of which, as we discussed just a moment ago, [$XXX] was to be cut out to pay Infinite on the collection action. The remaining [$XXX] was available to Travelers and Karam. And at the conclusion of the Court ordered settlement conference on the 19th, as the

[5]References to monetary amounts have been redacted.

> Court may recall, we notified the Court that there was a remaining issue that existed between Travelers and Karam and that is how the [$XXX] would be distributed if at all given that Travelers believes that it has priority to those proceeds.
>
> During that settlement conference, we indicated that the Travelers and Karam would attempt to resolve the remaining distribution issue, but if that wasn't possible we'd request that the Court set a briefing schedule so that we could deal with this, what I believe to be is a primarily legal issue on that.
>
> * * *
>
> . . . [T]his was a settlement that was reached pursuant to this Court ordered settlement conference. We were here in your court. We were in the courthouse under a Court ordered event, and this Court had jurisdiction over the case at that time. This is a straggling issue related to the settlement of the case, and it's something that is appropriate for this Court to finish out the settlement by resolving this remaining issue.
>
> As I've outlined in my affidavit, co[-]counsel was with me when we both indicated that this remaining issue existed, and that we were seeking the Court's assistance should we not be able to resolve it amicably. . . .

(R. 220 at pp. 6-8, 13-14; Supp. 6-8, 13-14). The following colloquy then transpired between the trial court and counsel for Karam:

THE COURT:	Mr. Reagan, were you here in May when the matter was resolved?
MR. REAGAN:	I was here, yes, when the settlement was reached, May 19th.
THE COURT:	And was Mr. Nestico [co-counsel for Karam] here?
MR. REAGAN:	Yes.
THE COURT:	Okay. Your memorandum opposing Travelers' motion is devoid of any reference to what she has argued here, which is that you advised this Court, me, that all matters had been resolved. There is one lingering issue, as Ms. Chapnick [counsel for Travelers] has articulated, and that is how do you split up the balance of the [$XXX] between the two of you. There's nothing, nothing in this memorandum addressing that. Do you agree with that?

MR. REGAN: I can address that, Your Honor.

THE COURT: Do you agree you didn't address it at all in your memorandum?

MR. REAGAN: I did not address the issue of the settlement conference. There was a settlement. I think –

THE COURT: Well, the extent is – the question is what's the extent of that. She's saying there's a settlement with one caveat, and that caveat has to do with this very issue. You don't deny that. You just say everything is settled, there's a federal case which is now handling that priority issue.[6]

MR. REAGAN: Well –

THE COURT: That's an excellent job of wordsmithing without confronting the issue head-on, and that is do you agree or not that you came before this Court and you agreed with Ms. Chapnick that everything had been resolved save how to split the [$XXX]?

MR. REAGAN: We did, your Honor.

THE COURT: You made that representation to me?

MR. REAGAN: Yes.

THE COURT: Okay. So, at least that part of the record is clear. Now, the only issue is how do you deal with my judgment entry and what consequence, if any, does that judgment entry have on this lingering priority issue.

* * *

[6]On June 14, 2011, just 19 days after the trial court had issued its Dismissal Entry, Karam filed a Complaint against Travelers in *Karam Managed Properties, LLC, et al. v. Travelers Indemnity Co.*, United States District Court, Northern District of Ohio, Case No. 5:11-CV-01222. Karam seeks to litigate the apportionment/priority issue in the federal court litigation. It has been stayed, pending resolution of the state court proceedings.

MR. REAGAN: . . . We left here that day considering that we might approach the Court, and I don't recall agreeing that we would approach the Court on that issue, but that we may approach the Court if we were unsuccessful in resolving that issue. We left here that day, had numerous conversations, had lengthy correspondence back and forth between Travelers, and we were, unfortunately, not able to resolve that issue. . . .

* * *

THE COURT: . . . So you don't believe you could have come to this court – I think you – actually, I think you implied that you could. You could have come back to this Court and said, Judge, we can't work it out, can we use your assistance, can we file a brief to help establish the priority and how to split up the [$XXX].

MR. REAGAN: We were confronted with that issue that afternoon, Your Honor, and we agreed that we may do that. Okay.

(R. 220 at pp. 15-18, 21-22; Supp. 15-18, 21-22). The trial court concluded the hearing by stating:

> . . . I'm going to defer until I make sure my recollection of the case law relative to this issue is accurate and to give fair weight to the arguments presented both in the memorandum submitted with this motion, as well as the oral arguments of counsel this date. Accordingly, this matter will be taken under advisement and decision will be rendered forthwith. . . .

(R. 220 at pp. 33-34; Supp. 33-34).

Thereafter, 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. (R. 174). Travelers then filed a Cross-Motion Seeking Priority to Settlement Proceeds, detailing the reasons why Travelers, and not Karam, had priority to the settlement proceeds. (R. 176). Karam responded to both Motions. (R. 183; R. 185).

On October 12, 2012, the trial court granted Travelers' Cross-Motion Seeking Priority to Settlement Proceeds and denied as moot Travelers' Motion to Set Aside Judgment Entry and Infinite's Motion to Enforce Settlement. (R. 192 at pp. 3-4, 12; Appx. 55-56, 64). Having resolved the apportionment/priority issue in favor of Travelers, the trial court ordered payment of the agreed-upon amounts to enforce the parties' settlement. As the trial court opined:

> 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.

(R. 192 at pp. 3-4; Appx. 55-56).

Karam appealed the trial court's final judgment. (R. 201). In a Decision and Judgment entered on October 4, 2013, the Sixth Appellate District concluded that the trial court had unconditionally dismissed the case, and that the trial court therefore lacked subject matter jurisdiction to issue its October 12, 2012 Judgment Entry. (R. [Court of Appeals] 23; Appx. 39-52). The Sixth Appellate District declared the October 12, 2012 Judgment Entry to be void, thus dismissing the appeal for lack of a final, appealable order.

In its Decision and Judgment, the Sixth Appellate District also determined that a conflict existed between its decision and the decisions in *Estate of Berger v. Riddle*, 8th Dist. Nos. 66195,

66200, 1994 WL 449397 (August 18, 1994), and *Hines v. Zofko*, 11th Dist. No. 93-T-4928, 1994 WL 117110 (March 28, 1994).

Travelers filed a Notice of Certified Conflict, as well as a Memorandum in Support of Jurisdiction. Karam filed a Memorandum Opposing Jurisdiction. On January 22, 2014, this Court accepted the certified conflict appeal in Case No. 2013-1671 and the jurisdictional appeal of Travelers in Case No. 2013-1795. The two appeals have been consolidated.

ARGUMENT

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. *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36, 470 N.E.2d 902 (1984), citing *Spercel v. Sterling Indus., Inc.* 31 Ohio St.2d 36, 285 N.E.2d 324 (1972). Only when a case has been ***unconditionally*** dismissed does a trial court lose authority to proceed in the case. *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991). Thus, "[w]hen an action has been dismissed pursuant to a stated ***condition***, such as the existence of a settlement agreement, the court ***retains*** authority to enforce such an agreement in the event the condition does not occur." (Emphasis added.) *Estate of Berger v. Riddle*, 8th Dist. Nos. 66195, 66200, 1994 WL 449397, *2 (August 18, 1994), citing *Tepper v. Heck*, 8th Dist. No. 61061, 1992 WL 369283 (December 10, 1992).

The determination of whether a dismissal is conditional or unconditional depends upon the language used in the dismissal entry. *See Showcase Homes, Inc. v. Ravenna Savings Bank*, 126 Ohio App.3d 328, 331, 710 N.E.2d 347 (3rd Dist.1998)("Whether a dismissal is unconditional depends on the terms of the order."). The Dismissal Entry herein was a conditional dismissal because the Dismissal Entry (1) stated the parties had resolved their differences; (2) stated the dismissal was without prejudice; (3) reserved to the parties the right to file a final entry of dismissal; and (4) provided a time frame for the filing of the final entry of dismissal. Since the Dismissal Entry was conditional, the trial court had authority to consider and enforce the terms of the settlement agreement, and the court of appeals below erred in concluding otherwise.

The Dismissal Entry began by stating: "Parties having represented to the court that their differences have been resolved[.]" The Dismissal Entry thus acknowledged that a settlement agreement had been reached. Language reserving jurisdiction to enforce a settlement "need ***not*** be highly detailed or precise." (Emphasis added.) *State ex rel. Spies v. Lent*, 5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844, ¶47, citing *Nova Information Sys., Inc. v. Current Directions, Inc.*, 11th Dist. 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.* (Emphasis added.) Moreover, even if a dismissal entry does not ***explicitly*** state that the dismissal is conditioned on a 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." (Emphasis added.) *Marshall v. Beach*, 143 Ohio App.3d 432, 436, 758 N.E.2d 247 (11th Dist.2001). The statement in the Dismissal Entry that "[p]arties having represented to the court that their differences have been resolved" directed that the case had been dismissed pursuant to a stated condition -- the settlement.

The Dismissal Entry further stated: "[T]his case is dismissed, without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order." In dismissing the case without prejudice and in reserving to the parties the right to file a final entry of dismissal, the Dismissal Entry contemplated ***future*** action – the quintessential feature of a condition. *See Black's Law Dictionary* 335 (9th Ed.2009)(defining "condition" as "[a] ***future*** and uncertain event on which the existence or extent of an obligation or liability depends"). (Emphasis added.)

The procedure contemplated by the trial court involved a two-step process: (1) the issuance of a ***conditional*** dismissal without prejudice, followed by (2) an ***unconditional*** and final dismissal with prejudice. The procedure is a common one, and one that 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 trial court was advised. The trial 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. When the plaintiff subsequently refused to execute the settlement documents, the defendant filed a motion to set aside the dismissal entry and to enforce the settlement. The trial court granted the motion to set aside and then conducted a hearing on whether a settlement had been reached. The trial court ultimately granted the motion to enforce the settlement.

The defendant appealed, arguing the trial court had no jurisdiction to consider the motion to set aside the judgment entry and to enforce the settlement because the case had been unconditionally dismissed. The Tenth Appellate District disagreed, stating:

> 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. 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.[7] 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 Loc.R. 25.03 dismissal.

Id. at 409.

Hill instructs that part one of the two-step procedure used by the trial court herein – the entry of a dismissal without prejudice – effected a ***conditional*** dismissal of the case. *Hill* further instructs that if the case herein had progressed to part two of the procedure – the filing by the parties of a final entry of dismissal – that such filing would have effected a ***final*** and ***unconditional*** dismissal of the case. Since the case herein did ***not*** progress to step two, the case was ***not*** unconditionally dismissed.

Not only did the plain language of the Dismissal Entry direct that it was conditional, the trial court also orally communicated to the parties that the Dismissal Entry was intended to operate as a conditional dismissal. As the trial court explained during the hearing on Travelers' Motion to Set Aside Judgment Entry:

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[7]Loc.R. 5.05(F) of the Court of Common Pleas of Lucas County, General Division, 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." (Appx. 79).

> . . . 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. So that's why it's without prejudice. . . .

(R. 220 at p. 33; Supp. 33). In its final Opinion and Judgment Entry, the trial court reaffirmed that the Dismissal Entry was intended to serve as a conditional dismissal:

> 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. . . .

(R. 192 at p. 3; Appx. 55). While it acknowledged this stated intention of the trial court, the court of appeals did not give it effect. As the court of appeals stated in its Decision and Judgment:

> 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. . . . However, "a court speaks exclusively through its journal entries." *In re Guardianship of Hollins*, 114 Ohio St.3 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶30. Here, the entry unequivocally dismissed the action.

(R. [Court of Appeals] 23 at pp. 10-11; Appx. 48-49).

A court does speak through its judgment entries. However, if there is some ambiguity or doubt as to the meaning of a judgment entry, a reviewing court is obligated to discern such meaning from the record. *See Lurz v. Lurz*, 8th Dist. No. 93175, 2010-Ohio-910, ¶17 ("The appellate court should examine the entire record to discern the meaning of the judgment entry when the judgment is unclear or ambiguous."); *Hofer v. Hofer*, 35 Ohio Law. Abs. 486, 42 N.E.2d 165, 167 (9th Dist.1940)

quoting 34 Corpus Juris, Judgments, Section 794 ("In cases of ambiguity or doubt, the entire record may be examined and considered" in determining the legal effect of a judgment entry); *In re Grimsley*, 449 B.R. 602, 615 (Bankr.S.D.Ohio 2011)("[T]here is nothing in the principle [that a court speaks only through its judgment entries and orders] that prohibits a court from reviewing the entire record of a case . . . when deciding the grounds for, or the meaning of, a court's judgment or order. To the contrary, a court clearly may do so."). *See also Hendrie v. Lowmaster*, 152 F.2d 83, 85 (6th Cir.1945), quoting *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F.2d 871 (6th Cir.1943)("Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt that one which renders it more reasonable, effective and conclusive in light of the facts and the law of the case.").

This Court expressed a similar opinion in *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 551 N.E.2d 172 (1990), paragraph one of the syllabus, citing *A. B. Jac, Inc. v. Liquor Control Comm.*, 29 Ohio St.2d 139, 280 N.E.2d 371, (1972), paragraph two of the syllabus, when it held: "Where, in the interest of justice, it is essential for a reviewing court to ascertain the grounds upon which a judgment of a lower court is founded, the reviewing court must examine the entire journal entry and the proceedings."

The court of appeals was faced with conflicting case law concerning whether the language contained in the Dismissal Entry rendered it a conditional or an unconditional dismissal. This conflicting case law is discussed in detail in a subsequent portion of Travelers' Merit Brief. The essence of the conflict is that some appellate districts hold that language in a dismissal entry must be meticulous and exacting in order for a trial court to retain jurisdiction, whereas other appellate districts hold that such language need only mention a settlement and need not be detailed or precise in order for a trial court to retain jurisdiction. Considering this conflict, and considering that in light

of this conflict the Dismissal Entry was subject to two interpretations (because the Sixth District had not decided the issue before this case), the stated intent of the trial court was critical. The interests of justice required that the court of appeals give credence to the trial court's intent.

Based upon the foregoing, Travelers respectfully requests that its Proposition of Law be adopted and that this Court hold that an 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 a settlement agreement.

Certified Conflict 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.

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 varied.

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 (August 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. at *3.

Similarly, in *Hines v. Zofko*, 11th Dist. No. 93-T-4928, 1994 WL 117110, *1 (March 28, 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. As *Hines* explained:

> The judgment entry which dismissed the instant case stated: "Case settled and dismissed." It did not merely state that the case was dismissed. Thus, the dismissal was conditioned upon the settlement of the case. When the settlement was not performed, the condition upon which the action was dismissed failed, and the trial court retained authority to proceed in the action.

Id. *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 Sys., 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 in *State ex rel. Spies v. Lent*, 5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844, ¶¶46, 47, held:

> . . . 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. Koglman*, 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 to the trial court continuing jurisdiction over disputes arising out of the settlement. *See Grace v. Howell*, 2nd Dist. No. 20283, 2004-Ohio-4120, ¶13 (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 the trial court of jurisdiction to take further action); *Davis v. Jackson*, 159 Ohio App.3d 346, 2004-Ohio-6735, 823 N.E.2d 941, ¶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 the trial court of jurisdiction).

In its decision below, 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,[8] 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.

(R. [Court of Appeals] 23 at p. 10; Appx. 48).

The rule of law espoused by the Fifth, Eighth, and Eleventh Appellate Districts is the better-reasoned one and the one that furthers the public policy of this state. Settlements are favored in the law. As this Court explained more than 40 years ago in *Spercel v. Sterling Indus., Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972):

> As noted in 15 American Jurisprudence 2d 938, Compromise and Settlement, Section 4: "The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. * * * The resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole." To this we might add that courts today could not successfully cope with the volume of their dockets in the absence of settlement agreements.

Accord State ex rel. Bd. of Cty. Commrs. of Athens Cty. v. Bd. of Directors of Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgmt. Dist., 75 Ohio St.3d 611, 617, 665 N.E.2d 202 (1996)("settlement agreements . . . are valid, enforceable, and highly favored in the law"). The rule of law announced by the court of appeals below undercuts this policy.

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[8]The view adopted by the court of appeals below is not a majority view. The view has been adopted by the Second, Seventh, and Ninth Appellate Districts.

The first alternative in the Sixth District's holding – that for a dismissal entry to be conditional it must embody the terms of a settlement agreement – prevents the parties and the litigants from giving due consideration to the detail necessary to finalizing a settlement agreement. In the typical case, parties agree in principle on the essential terms of a settlement in a mediation, pretrial or settlement conference with a court, but then engage in additional discussions before an agreement is reduced to writing and executed. Requiring that a dismissal entry, filed to meet the exigencies imposed upon the parties in a mediation or in a conference with the court, actually embody the terms of a settlement agreement will discourage or impede the drafting of a final agreement that is the result of mindful deliberation and that reflects the parties' actual intent.

Moreover, requiring that a dismissal entry actually embody the terms of a settlement will dissuade parties from entering into settlement agreements. Many, if not most, parties to a settlement agreement do not want the terms of the agreement to be made a matter of public record. The settlement that underlies the present dispute is one such agreement.[9] Requiring that a dismissal entry actually embody the terms of a settlement agreement thus will hinder, not promote, settlements.

The Sixth District's second alternative – that for a dismissal entry to be conditional it must expressly reserve jurisdiction to the trial court – will discourage efficiency in the management of litigation. The rule will result in the expense of new litigation to enforce settlement agreements and thus will result in delays in the resolution of disputes due to the involvement of new judges and the setting of new case management schedules and deadlines. Judicial economy would be better served if the original trial judge, who is often familiar with the facts of the case and the intent of the parties in entering into settlements, is permitted to resolve any controversies arising out of such settlement

[9]Infinite was so adamant that the terms not be disclosed that it prevailed upon the trial court to seal the settlement agreement when it was made part of the record of this case.

agreements. "Otherwise the compromise, instead of being an aid to litigation, would be only ***productive*** of litigation as a separate and additional impetus." (Emphasis added.) *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979).

Finally, the second alternative imposes an unnecessary and improper burden on the trial court. Ohio's courts of common pleas are courts of general jurisdiction and are ***presumed*** to have jurisdiction over a particular controversy unless a contrary showing is made. *See Schwarz vs. Bd. of Trustees of Ohio State Univ.*, 31 Ohio St.3d 267, 272, 510 N.E.2d 808 (1987)(courts of common pleas are courts of "original and general jurisdiction"); Ohio Constitution, Article IV, Section 4(B)("The courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters[.]"); R.C. 2305.01 ("Except as otherwise provided by this section or section 2305.03 of the Revised Code, the court of common pleas has original jurisdiction in all civil cases in which the matter in dispute exceeds the exclusive original jurisdiction of county courts[.]"). *Accord State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991)(only when a court "patently and unambiguously ***lacks*** jurisdiction to consider a matter" will the court be deemed to have acted outside its authority)(Emphasis added.) The rule of law announced by the court of appeals requires that a trial court affirmatively ***reserve*** jurisdiction, when the law presumes that jurisdiction already ***exists***. Such rule of law imposes an unnecessary and improper burden on the trial court.

Based upon the foregoing, this Court should answer the certified question in the negative and hold that a dismissal entry need not embody the terms of a settlement agreement and need not expressly reserve jurisdiction to the trial court to enforce the terms of a settlement agreement in order to render the dismissal a conditional one.

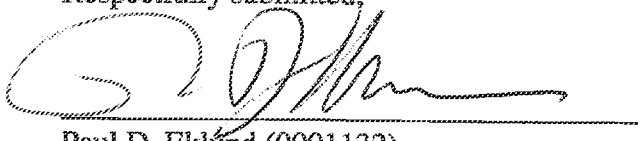
CONCLUSION

The plain language of the Dismissal Entry directs that it was a conditional dismissal, and the record makes clear that the trial court intended the Dismissal Entry to be conditional. The court of appeals acknowledged the stated intention of the trial court, but did not give it effect. The decision of the court of appeals is wrong.

Moreover, the decision of the court of appeals undermines the twin policies of encouraging settlement agreements and promoting judicial efficiency. The requirement that a dismissal entry actually embody the terms of a settlement agreement will result in settlements that are negotiated in haste and will deter out-of-court settlements by parties who do not want the terms of such agreements to be made public. The requirement that a dismissal entry expressly reserve jurisdiction to the trial court will discourage judicial economy and will prevent the court with the most knowledge of the case from enforcing a settlement agreement in line with its presumed jurisdiction.

Accordingly, Travelers respectfully requests that this Court accept Travelers' Proposition of Law, answer the certified conflict question in the negative, and reverse the October 4, 2013 Decision and Judgment of the Sixth Appellate District.

Respectfully submitted,



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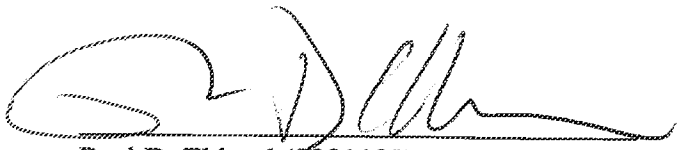

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APPENDIX

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS, LLC, et al. Appellee vs. KARAM PROPERTIES I, LTD., et al. Appellants	))))))))))	Case No. 13-1795 On Appeal from the Lucas County Court of Appeals, Sixth Appellate District Court of Appeals Case No. L-12-1313

NOTICE OF APPEAL OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

Appellant The Travelers Indemnity Company ("Appellant") hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-12-1313 on October 4, 2013 ("Judgment"). This case is one of public and great general interest.

Appellant also gives notice that in its Judgment, the Sixth Appellate District certified a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. On October 23, 2013, Appellant filed a Notice of Certified Conflict concerning the Judgment. The Supreme Court Case Number assigned to the certified conflict case is 13-1671.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Notice of Appeal 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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ORIGINAL

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS, LLC, et al. Appellee vs. KARAM PROPERTIES I, LTD., et al. Appellants	))))))))))	Case No.: 13-1671 On Appeal from the Lucas County Court of Appeals, Sixth Appellate District Court of Appeals Case No. L-12-1313

NOTICE OF CERTIFIED CONFLICT OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

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FILED
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SUPREME COURT OF OHIO

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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT OF APPELLANT THE TRAVELERS INDEMNITY COMPANY

Pursuant to S.Ct.Prac.R. 8.01, Appellant, The Travelers Indemnity Company, hereby gives notice that on October 4, 2013, the Sixth Appellate District, Lucas County, issued a Decision and Judgment Entry in *Infinite Security Solutions, LLC, et al. v. Karam Properties I, Ltd., et al.*, No. L-12-1313, finding such 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), and certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution.

A copy of the Sixth District's order certifying a conflict and opinion are attached hereto as Exhibit A. A copy of the conflicting opinion of the Eighth Appellate District in *Estate of Berger v. Riddle* is attached hereto as Exhibit B, and a copy of the conflicting opinion of the Eleventh Appellate District in *Hines v. Zofko* is attached hereto as Exhibit C.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Notice of Certified Conflict of Appellant The Travelers Indemnity Company was served by regular U.S. Mail this 22nd day of October 2013 upon the following:

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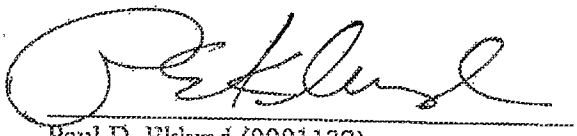

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Exhibit A

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COMMON PLEAS COURT
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 L12-1313
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
SEAL
By _____ Deputy

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

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:

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

Dist.1982), for the proposition that "[t]he entering into the settlement agreement constitutes a waiver of the defense of lack of juriadiction 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

(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. Lusik*, 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. Zafko*, 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,

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[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." *Whitelock 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. JUDGE

Arlene Singer, P.J. JUDGE

Stephen A. Yarbrough, J. JUDGE
CONCUR.

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.

14.

Exhibit B

8-29

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 66195 and 66200

ESTATE OF SAM BERGER, ET AL.	:	
PLAINTIFFS-APPELLANTS	:	JOURNAL ENTRY
v.	:	AND
LINDELL RIDDLE, ET AL.	:	OPINION
DEFENDANTS-APPELLEES	:	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 18, 1994

CHARACTER OF PROCEEDING: Civil appeals from Common Pleas Court, Nos. CV-129085 and CV-167640.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION: AUG 29 1994

APPEARANCES:

For Plaintiffs-Appellants:

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Berger & Fertel
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For Defendants-Appellees:

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Cleveland, OH 44115

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POSTED 2

DAVID T. MATIA, J.:

Plaintiff-appellant, Sanford Berger, appeals from the judgment of the Cuyahoga County Court of Common Pleas, Case Nos. CP-129085 and CP-167640, dated August 24, 1993, in which the trial court granted in part and denied in part defendants-appellees Lindell and Deborah Riddle's motion to enforce settlement agreement. Plaintiff-appellant also appeals the trial court's denial of his motion for partial vacation of judgment. Plaintiff-appellant assigns two errors for this court's review.

Plaintiff-appellant's appeal is not well taken.

I. THE FACTS

This action arises out of a boundary dispute between adjoining property owners, plaintiff-appellant, Sanford Berger, and defendants-appellees, Lindell and Deborah Riddle. This dispute resulted in the filing of two lawsuits in the Cuyahoga Court of Common Pleas, Case Nos. CP-129085 and 167640. These cases were consolidated and set for trial on September 14, 1992. On the day of trial, a settlement was reached between the parties. On September 15, 1992, the trial court journalized the following entry:

> All claims and counterclaims in the above numbered cases settled and dismissed with prejudice at defendants' costs.

The terms of this settlement were soon disputed.

On March 3, 1993, defendants-appellees, the Riddles, filed a motion to enforce settlement agreement. Defendants-appellees contend that the settlement provided as follows:

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(1) plaintiff-appellant to receive $14,000.00;

(2) plaintiff-appellant to execute a full and final release;

(3) plaintiff-appellant to execute a consent agreement;

(4) plaintiff-appellant and defendants-appellees to execute a mutual release;

(5) defendants-appellees to receive $2,500.00.

The consent agreement in question apparently gave defendant-appellee, Lindell Riddle, access to plaintiff-appellant Berger's property for the limited purpose of pruning trees located along the property line. Berger denies that the consent agreement was ever part of the overall settlement agreement.

On June 7, 1993, the trial court held a hearing on defendants-appellees' motion to enforce the settlement agreement. On June 8, 1993, the trial court journalized the following entry:

> Counsel present, hearing had. Defendants' motion to enforce settlement granted in part. Mr. Riddle is not to enter onto Berger's property. All parties agreed to same.

On August 24, 1993, a second judgment entry was journalized by the trial court pertaining to defendants-appellees' motion to enforce settlement agreement. This entry provided that defendants-appellees' motion was granted in part and denied in part. The entry went on to state that Berger was "deemed" to have executed a full and final release and the consent agreement. In addition, Berger and defendants-appellees were "deemed" to have executed a mutual release and Berger was ordered to pay defendants-appellees $2,750.00 as consideration for the mutual release. Lastly,

VOL 0364 PG 0091

defendants-appellees were ordered to stay off Berger's property and Berger was ordered to stay off defendants-appellees' property.

Attached to the court's judgment entry were the full and final release executed by Berger. The consent agreement signed by the attorneys for the parties and the mutual release signed by Berger, his attorney and defendants-appellees' attorney. The consent agreement allows defendants-appellees to "continue to prune, maintain and care for the existing pine trees, ornamental trees and plants, the centerline of which are on Riddles' property, but which plantings are also along the common property line. Berger agrees not to interfere with these plants or their root systems."

On September 16, 1993, plaintiff-appellant Berger filed a motion for partial vacation of judgment. In the motion, Berger sought to vacate the section of the consent agreement allowing Riddle on the property to prune and maintain pine trees, ornamental trees and plants. Berger also sought to vacate the section of the entry ordering Berger to pay defendants-appellees $2,750.00 as consideration for the mutual release.

On November 30, 1993, the trial court denied plaintiff-appellant's motion for partial vacation of judgment.

Plaintiff-appellant timely brought the instant appeal.

II. FIRST ASSIGNMENT OF ERROR

Plaintiff-appellant's first assignment of error states:

> THE AUGUST 24, 1993 ORDER, WHICH MATERIALLY CHANGED THE TERMS OF THE SEPTEMBER 15, 1992 SETTLED AND DISMISSED WITH PREJUDICE ORDER, WAS VOID FOR LACK OF JURISDICTION.

000092

A. THE ISSUE RAISED: DID THE TRIAL COURT HAVE JURISDICTION

Plaintiff-appellant Berger argues, through his first assignment of error, that the trial court's judgment entry dated August 24, 1992 was void for lack of jurisdiction. Specifically, Berger argues that, once the trial court journalized its order settling and dismissing the underlying cases, it lost all jurisdiction absent the filing of a Civ.R. 60(B) motion to vacate.

Plaintiff-appellant's first assignment of error is not well taken.

B. THE STANDARD OF REVIEW

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. *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36. 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.

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.

In the event that a factual dispute arises concerning the existence or the terms of a settlement agreement, as in this instance, Ohio courts have held that an evidentiary hearing is

required in order to determine the nature of the purported settlement. *Palmer v. Kaiser Found. Health* (1991), 64 Ohio App.3d 140.

C. THE TRIAL COURT POSSESSED JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT

In the case *sub judice*, the trial court's entry dated September 15, 1992 states clearly that all the claims and counterclaims between the parties were settled and dismissed. On March 3, 1993, the trial court was made aware of a dispute concerning the terms of the purported settlement.

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. *Palmer, supra*.

At the evidentiary hearing, the court determined that the parties had, in fact, reached a settlement and ordered that the settlment agreement be enforced. Plaintiff-appellant's actions also indicated that a settlement was reached. Plaintiff-appellant not only negotiated the settlement check for $14,000.00 but also executed the full and final release and the mutual release. In addition, plaintiff-appellant's attorney also signed the consent agreement on behalf of plaintiff-appellant. It is plaintiff-appellant's contention that his attorney was not authorized to sign

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the consent agreement; however, the authorization for an attorney to settle a client's claim need not be express, but may be ascertained from the surrounding circumstances. *Elliott v. General Motors Corp.* (1991), 72 Ohio App.3d 486. Given the facts surrounding the instant action, it can be said that plaintiff-appellant's attorney was authorized to sign the consent agreement and settle the overall claim.

Accordingly, plaintiff-appellant's first assignment of error is not well taken.

III. SECOND ASSIGNMENT OF ERROR

Plaintiff-appellant's second assignment of error states:

> THE TRIAL COURT'S NOVEMBER 30, 1993 ORDER, DISMISSING THE APPELLANT'S CIV.R. 60(B) MOTION FOR PARTIAL VACATION OF THE AUGUST 24, 1993 JUDGMENT, CONSTITUTED PREJUDICIAL ERROR.

A. THE ISSUE RAISED: WHETHER THE TRIAL COURT ERRED TO PLAINTIFF-APPELLANT'S PREJUDICE

Plaintiff-appellant Berger agues, through his second assignment of error, that the trial court's dismissal of his motion for partial vacation of judgment constituted prejudicial error. For the reasons that follow, plaintiff-appellant's second assignment of error is not well taken.

B. STANDARD OF REVIEW

To prevail on a motion brought under Civ.R. 60(B), a movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and,

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where the grounds of relief are Civ.R. 60(B)(1) to Civ.R. 60(B)(3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146.

Civ.R. 60(B) states:

> (B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.
>
> The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

C. THE TRIAL COURT DID NOT ERR TO PLAINTIFF-APPELLANT'S PREJUDICE

In the case *sub judice*, plaintiff-appellant has failed to meet the three part test set forth in *GTE, supra*, in order to prevail on a Civ.R. 60(B) motion to vacate judgment. Although the motion for partial vacation of judgment was timely filed, plaintiff-

WD-94 00096

appellant has failed to set forth either a meritorious claim or defense to present if relief is granted or that he is entitled to relief under the grounds enumerated in Civ.R. 60(B)(1) through (5). Plaintiff-appellant's second assignment of error is not well taken.

Judgment of the trial court is affirmed.

00097

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON, P.J. and

DYKE, J., CONCUR.

RECEIVED FOR FILING

AUG 18 1994

GERALD E. FUERST, CLERK

By _____ Dep.

DAVID T. MATIA
JUDGE

JOURNALIZED AUG 29 1994

GERALD E. FUERST, Clerk of Courts

By _____ Deputy

COPIES MAILED TO COUNSEL FOR ALL PARTIES. — COSTS TAXED.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Exhibit C

COURT OF APPEALS

ELEVENTH DISTRICT

TRUMBULL COUNTY, OHIO

JUDGES

DAVID A. HINES,

Plaintiff-Appellee,

- vs -

DAVID H. ZOFKO,

Defendant-Appellant.

HON. JUDITH A. CHRISTLEY, P.J.,
HON. JOSEPH E. MAHONEY, J.,
HON. ROBERT A. NADER, J.

ACCELERATED
CASE NO. 93-T-4928

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 92 CV 1435

JUDGMENT: Affirmed.

FILED
COURT OF APPEALS
MAR 28 1994
TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

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VOL 30-650

10/22/2013 11:03 3306752701 TRUMBULL CLERK CRT PAGE 02/04

NADER, J.

This is an accelerated calendar appeal, which has been submitted for consideration upon the brief of appellant. Appellee, David A. Hines, has not participated in this appeal.

On August 17, 1992, appellee, David A. Hines, filed a complaint requesting an injunction and money damages against appellant, David E. Zofko. Appellant and appellee subsequently entered into a settlement agreement, which is not included in the record.

The trial court, on February 21, 1993, filed a judgment entry stating: "Case settled and dismissed." On April 20, 1993, appellee filed a "Motion to Enforce Settlement Agreement." An order was then entered on June 25, 1993, by the trial court, after a hearing on the motion was held. The record does not contain a transcript of this hearing or an appropriate substitute. The order granted appellee's motion to enforce the settlement agreement and entered judgment for appellee in the amount of $1,500 plus interest. Appellant timely appealed, assigning the following as error:

> "To appellant's prejudice, the trial court erred in entering a money judgment against him."

Appellant asserts that once the trial court had entered an order dismissing the action, it retained no jurisdiction to enforce the settlement agreement which precipitated its dismissal. Appellant does not challenge the existence or validity of the

VOL. 30-651
COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT
10/22/2013 11:03 3306752701 TRUMBULL CLERK CRT PAGE 03/03

settlement agreement, but asserts that appellee was obligated to proceed through a Civ.R. 60(B) motion to vacate the dismissal, prior to requesting enforcement of the settlement agreement, or to file a separate action on the settlement contract.

Although proceeding through a Civ.R. 60(B) motion to vacate the dismissal or in a separate action to enforce the settlement agreement are permissible avenues, they are not required under the facts in this case. When an action is unconditionally dismissed, the trial court loses authority to proceed in that matter. *State ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70. It therefore follows that when a matter is conditionally dismissed, the trial court retains authority to proceed in the matter if the condition upon which the case was dismissed does not occur. Cf. *Tepper v. Beck* (Dec. 10, 1992), Cuyahoga App. No. 61061, unreported, fn. 1.

The judgment entry which dismissed the instant case stated: "Case settled and dismissed." It did not merely state that the case was dismissed. Thus, the dismissal was conditioned upon the settlement of the case. When the settlement was not performed, the condition upon which the action was dismissed failed, and the trial court retained authority to proceed in the action.

VOL. 30-652

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT
10/22/2013 11:03 3306752761 TRUMBULL CLERK CRT PAGE 04/040

Thus, we hold that the trial court proceeded properly by conducting a hearing and entering judgment upon appellee's motion to enforce the settlement agreement.

The judgment of the trial court is hereby affirmed.

Robert A. Nader

JUDGE ROBERT A. NADER

CHRISTLEY, P.J., dissents,

MAHONEY, J., concurs.

VOL. 30-653

10/22/2013 11:03 3306752701 TRUMBULL CLERK CRT PAGE 05/05

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL.)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

DAVID A. HINES,

Plaintiff-Appellee,

- vs -

DAVID E. ZOFKO,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 93-T-4928

For the reasons stated in the Opinion of this court, the assignment of error is without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

Robert A. Nader

JUDGE ROBERT A. NADER
FOR THE COURT

CHRISTLEY, P.J., dissents.

FILED
COURT OF APPEALS
MAR 28 1994
TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

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COMMON PLEAS COURT
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THE STATE OF OHIO, LUCAS COUNTY, ss
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 L12-1313.
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 AD 2013
BERNIE QUILTER, Clerk
SEAL
By _____ Deputy

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

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:

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 Tile & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 240, 456 N.E.2d 1309 (10th

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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 Sav. 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

(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. Zofka*, 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,

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[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." *Whitelock 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. JUDGE

Arlene Singer, P.J. JUDGE

Stephen A. Yarbrough, J. JUDGE
CONCUR.

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
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IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

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

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[1] A 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.

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'

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[2]In 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 the 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

[3]However, 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).

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 Company[4] 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 organiz ation 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).

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

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.
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> * * *
>
> 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

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.

10/12/12
Date

Judge Gene A. Zmuda

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FILED
LUCAS COUNTY

2011 MAY 26 A 9 58

COMMON PLEAS COURT
BERNIE OUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

INFINITE SECURITY SOLUTIONS LLC,	*	CASE NO: G-4801-CI-200903781-000
Plaintiff.	*	
	*	JUDGE GENE A. ZMUDA
v.	*	
KARAM PROPERTIES I LTD,	*	JUDGMENT ENTRY
Defendant.	*	

* * * * *

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
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

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

E-JOURNALIZED
FEB 18 2010

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

FILED
LUCAS COUNTY

INFINITE SECURITY SOLUTIONS LLC, CASE NO: G-4801-CI-200903781-000

Plaintiff.

2013 JUN -3 P 12:00

v.

ORDER TO SEAL A DOCUMENT

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

KARAM PROPERTIES I LTD,
Defendant.

JUDGE GENE A. ZMUDA

* * * * * * * *

The Court finds by clear and convicing evidence that the presumption of allowing public access to Order granting the parties Joint Motion to Authorize Payment of Settlement Funds is outweighed by the higher interests and determines public policy is served by restricting public access as the document is not exempt from public access through any state, federal or common law.

The Court further finds that the least restrictive means available to restrict the use of the document is:

_____ a) redacting certain information to wit:

_____ b) by restricting remote access to the information or document.

_____ c) by using a generic term or title to describe the information:

_____ d) by using initials or other identifiers for parties names:

Xx e) that the entire document must be sealed to protect the risk of injury to:

- _____ 1. persons
- _____ 2. individual privacy rights & interests
- Xx 3. proprietary business information
- _____ 4. public safety
- _____ 5. the fairness of the adjudicatory process

The Court ORDERS the Clerk of Courts to place the Order granting the parties Joint Motion to Authorize Payment of Settlement Funds under seal and that the file not be opened without further order of the Court.

Dated: 6/3/13

JUDGE GENE A. ZMUDA

E-JOURNALIZED
JUN 05 2013

§ 4. Common pleas court.

Ohio Constitution

Article IV. Judicial

Current through the November, 2011 General Election

§ 4. Common pleas court

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

Ohio Statutes

Title 23. COURTS - COMMON PLEAS

Chapter 2305. JURISDICTION; LIMITATION OF ACTIONS

Current with Legislation effective as of 1/1/2014

§ 2305.01. Jurisdiction in civil cases - trial transfer

Except as otherwise provided by this section or section 2305.03 of the Revised Code, the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. The court of common pleas shall not have jurisdiction, in any tort action to which the amounts apply, to award punitive or exemplary damages that exceed the amounts set forth in section 2315.21 of the Revised Code. The court of common pleas shall not have jurisdiction in any tort action to which the limits apply to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in section 2315.18 of the Revised Code.

The court of common pleas may on its own motion transfer for trial any action in the court to any municipal court in the county having concurrent jurisdiction of the subject matter of, and the parties to, the action, if the amount sought by the plaintiff does not exceed one thousand dollars and if the judge or presiding judge of the municipal court concurs in the proposed transfer. Upon the issuance of an order of transfer, the clerk of courts shall remove to the designated municipal court the entire case file. Any untaxed portion of the common pleas deposit for court costs shall be remitted to the municipal court by the clerk of courts to be applied in accordance with section 1901.26 of the Revised Code, and the costs taxed by the municipal court shall be added to any costs taxed in the common pleas court.

The court of common pleas has jurisdiction in any action brought pursuant to division (I) of section 4781.40 of the Revised Code if the residential premises that are the subject of the action are located within the territorial jurisdiction of the court.

The courts of common pleas of Adams, Athens, Belmont, Brown, Clermont, Columbiana, Gallia, Hamilton, Jefferson, Lawrence, Meigs, Monroe, Scioto, and Washington counties have jurisdiction beyond the north or northwest shore of the Ohio river extending to the opposite shore line, between the extended boundary lines of any adjacent counties or adjacent state. Each of those courts of common pleas has concurrent jurisdiction on the Ohio river with any adjacent court of

common pleas that borders on that river and with any court of Kentucky or of West Virginia that borders on the Ohio river and that has jurisdiction on the Ohio river under the law of Kentucky or the law of West Virginia, whichever is applicable, or under federal law.

Cite as R.C. § 2305.01

History. Amended by 129th General AssemblyFile No.127, HB 487, §101.01, eff. 9/10/2012.

Effective Date: 07-06-2001; 04-07-2005

GENERAL DIVISION RULES
FOR THE
LUCAS COUNTY COMMON PLEAS COURT
AS OF 3/01/2014

--TABLE OF CONTENTS--

RULE 1 -- GENERAL PRACTICE

1.01 COURT TERMS & SESSIONS
- A. TERMS
- B. SESSIONS

1.02 OFFICIAL LAW JOURNAL
- A. OFFICIAL JOURNAL
- B. ATTORNEY NOTIFICATION

1.03 ATTORNEYS
- A. COUNSEL
- B. TRIAL COUNSEL
- C. LIMITATIONS
- D. APPEARANCE OF COUNSEL
- E. INFORMATION FOR COURT

1.04 FILING REQUIREMENTS
- A. COURT RECORDS
- B. FILINGS
- C. ATTORNEY IDENTIFICATION
- D. CASE DESIGNATION
- E. JUDGES' NAMES ON FILINGS

1.05 FAX FILING
- A. AUTHORIZATION
- B. FAX COPIES
- C. REQUIREMENTS
- D. FAX DOCUMENTS AS ORIGINALS
- E. CHARGES

1.06 COURT COSTS AND FEES
- A. SECURITY FEES
- B. COMPUTER RESEARCH FEES
- C. MICROFILM FEES
- D. AUTOMATION FEES
- E. JURY TRIAL FEES
- F. FORECLOSURE FEE

1.07 RETENTION OF RECORD EVIDENCE
- A. DUTY
- B. TIME LIMITS
- C. CRIMINAL EXHIBITS
- D. PROFFERED EXHIBITS

RULE 2 -- COURT SECURITY & DECORUM

2.01 SECURITY
A. SECURITY PLAN
B. SEARCH
C. WEAPONS
2.02 DECORUM
A. DECORUM
B. SANCTIONS

2.03 USE OF ELECTRONIC AND OTHER DEVICES

RULE 3 -- CASE MANAGEMENT

3.01 GENERAL
A. AUTHORITY
B. PURPOSE
3.02 COURT ACTION
A. ASSIGNED JUDGE
B. UNAVAILABILITY OF ASSIGNED JUDGE
C. VISITING JUDGE
D. COURT MAGISTRATES

RULE 4 -- CRIMINAL CASES

4.01 GRAND JURY PROCEEDINGS
A. TAPE RECORDING
B. RECORD KEEPING
4.02 ASSIGNMENT OF CRIMINAL CASES
A. RANDOM ASSIGNMENT
B. MULTIPLE CASES
C. SCHEDULING
D. INVENTORY
4.03 BAIL & BONDS
A. MUNICIPAL BAIL
B. BOND SETTING & MODIFICATION
C. PERSONAL RECOGNIZANCE BONDS
D. SURETY & PROPERTY BONDS
4.04 COUNSEL
A. APPOINTED COUNSEL
B. INDIGENT DEFENDANTS

C. APPLICATION FOR FEES
D. PRIVATE CASES
E. ATTENDANCE
F. EXPERTS FOR INDIGENT DEFENDANTS

4.05 CRIMINAL MOTIONS

A. WRITTEN MOTIONS
B. MOTIONS TO SUPPRESS
C. PROOF OF SERVICE
D. DEADLINES
E. PAGE LIMITATION

4.06 CRIMINAL TRIALS

A. PRECEDENCE
B. RETENTION OF RECORD EVIDENCE

4.07 VICTIMS & WITNESSES

A. NOTIFICATION
B. PRESENTENCE STATEMENTS

RULE 5 -- CIVIL CASES

5.01 CASEFLOW

A. CASE DESIGNATION SHEET
B. SERVICE
C. INVENTORY AND REVIEW OF CASES

5.02 ASSIGNMENT PROCEDURES

A. ASSIGNMENT AND REASSIGNMENT OF CASES
B. CONSOLIDATION
C. DISQUALIFICATION
D. REASSIGNMENTS

5.03 TIME LIMITS

A. GENERAL TIME LIMITS
B. ADMINISTRATIVE APPEALS
C. FORCIBLE ENTRY AND DETAINER ACTIONS

5.04 PLEADINGS, MOTIONS& OTHER PAPERS

A. PLEADING EXTENSIONS
B. AMENDMENTS
C. MOTION REQUIREMENTS
D. OPPOSITION
E. REPLY
F. SUBMISSION DATE
G. HEARINGS
H. EMERGENCY MATTERS
I. PAGE LIMITATION

5.05 ORDERS & JUDGMENTS

A. ROUTINE ORDERS
B. INTERLOCUTORY ORDERS

C. JUDGMENTS
D. DEADLINES
E. JOURNALIZATION
F. SETTLEMENT
G. COURT-PREPARED ORDERS

5.06 PRETRIAL CONFERENCES

A. SCHEDULING AND ATTENDANCE
B. INITIAL PRETRIAL STATEMENT
C. ISSUES TO BE CONSIDERED
D. INITIAL PRETRIAL ORDER
E. FINAL PRETRIAL CONFERENCE
F. SANCTIONS

5.07 CIVIL TRIALS

A. SCHEDULING
B. CONTINUANCES
C. TRIAL DEPOSITIONS
D. RETENTION OF EVIDENCE
E. JURY COSTS
F. JURY FEE

5.08 COMMERCIAL DOCKET

A. DESIGNATION AND ORGANIZATION
B. SCOPE OF THE COMMERCIAL DOCKET
C. TRANSFER OF CASES TO THE COMMERCIAL DOCKET
D. RE-FILED CASES
E. ADJUSTMENT TO OTHER CASE ASSIGNMENTS
F. REVIEW OF FILED CIVIL CASES

5.09 LIENS

A. APPLICABILITY
B. NOTICE TO BUNDLE LIENS
C. JUDGE ASSIGNMENT
D. DOCKETING
E. RELEASE OF LIENS

RULE 6--- ALTERNATE DISPUTE RESOLUTION

6.01 CIVIL CASE MEDIATION PROGRAM

A. PURPOSE
B. SCOPE
C. CIVIL CASE MEDIATOR
D. ATTENDANCE
E. MEDIATION PROCESS
F. CONFIDENTIALITY
G. SANCTIONS

6.02 OTHER ADR PROGRAMS

RULE 7 -- JURY MANAGEMENT & ADMINISTRATION

7.01 JURY MANAGEMENT
A. JURY ADMINISTRATION
B. MONITORING JURY SYSTEM
C. JURY FACILITIES
D. JUROR COMPENSATION
7.02 JUROR ELIGIBILITY
A. GENERAL ELIGIBILITY
B. THOSE INELIGIBLE
C. TERM
7.03 JURY SELECTION
A. SOURCE LIST
B. PANEL SELECTION
C. EXEMPTIONS, EXCUSES & DEFERRALS
7.04 JURY TRIALS
A. ORIENTATION
B. VOIR DIRE
C. JURY INSTRUCTIONS
D. DELIBERATION

RULE 8 -- SPECIAL PROCEDURES

8.01 BANKRUPTCY & APPROPRIATION CASES
A. BANKRUPTCY
B. APPROPRIATION CASES
C. TAXES
8.02 FORECLOSURE PROCEDURES
A. FILING OF FORECLOSURE COMPLAINT
B. CASE DESIGNATION SHEET
C. COUNTY TREASURER
D. SHERIFF'S SALE

8.03 CERTIFICATE OF QUALIFICATION FOR EMPLOYMENT
A. FILING OF CERTIIFCATE OF QUALIFICATION FOR EMPLOYEMENT

RULE 9 -- MISCELLANEOUS

9.01 MEDIA
A. APPLICATION
B. PERMISSION
C. LIMITATIONS
D. POOLING
E. SANCTIONS
9.02 COMMITTEE ON NOTARIES PUBLIC
A. MEMBERS
B. DUTIES
C. FEES
D. APPOINTMENTS
E. TERMS
F. OFFICERS
G. ACCOUNTING
9.03 WORK RELEASE
A. AUTHORITY FOR PROGRAM
B. RESIDENT VIOLATIONS

APPENDICES

APPENDIX A FILING FEES
APPENDIX B ASSIGNED COUNSEL FEE SCHEDULE
APPENDIX C CIVIL CASE DESIGNATION SHEET

-TEXT OF RULES--

The Court of Common Pleas of Lucas County, Ohio, General Division, adopts the following rules effective July 1, 1996, as revised effective March 1, 2014. The Court may amend these rules as needed, making proposed amendments available for public comment where appropriate. Counsel are advised to verify the current version with the Office of the Court Administrator, where copies may be obtained for a nominal charge of $ 2.00 per copy.

The rules shall be known as the General Division Rules for the Lucas County Common Pleas Court of Ohio and may be cited as Gen. R. ___.

G. HEARINGS Written motions shall generally be submitted and determined by the court upon briefs served and filed. No oral argument will be allowed except by leave of, and upon the time limits set by, the assigned judge.
H. EMERGENCY MATTERS Motions pertaining to urgent matters, including motions for temporary restraining orders, temporary injunctions, to dissolve injunctions or attachments, to request warrants for arrest or other process of restraint of personal liberty of a party to a civil case shall be submitted to the assigned judge for disposition. Notice of the time and place of hearing shall be served upon the adverse party or the party's counsel. No testimony shall be permitted unless ordered by the assigned judge.
I. PAGE LIMITATIONS All memoranda attached to motions, as well as briefs filed in administrative appeals, whether supporting or opposing a motion or brief, shall not exceed twenty (20) pages, exclusive of any supporting exhibits. For good cause shown, the Court may grant a party leave to file a memorandum or brief in excess of the page limitation. Application for such leave shall be by motion specifying the number of pages requested and specifying reasons extra pages are needed. (Effective 1/1/2004)

5.05 ORDERS & JUDGMENTS

A. ROUTINE ORDERS For routine matters where no opposition is expected by the adversary or from the court (i.e. motions to allow telephone conferences, scheduling continuances for good cause, etc.) the court may sign the accompanying order before the submission date specified in 5.04(F).
B. INTERLOCUTORY ORDERS Upon a decision on an interlocutory matter or motion which does not constitute a judgment as defined by the Civil Rules, an order in conformity to the decision or finding of the court shall be prepared by designated trial counsel for the prevailing party. The proposed order shall be submitted to the civil bailiff in the assigned judge's courtroom for court approval, journalization, and transmittal to the parties by the clerk of courts.
C. JUDGMENTS Upon either the court's rendering of a decision which constitutes a judgment as defined by the Civil Rules or the jury's rendering of a verdict, designated trial counsel for the prevailing party shall prepare a judgment in conformity with the decision or verdict. The proposed order shall be submitted to opposing counsel and to the civil bailiff in the assigned judge's courtroom for the judge's approval, and also to the clerk of courts for journalization and then for transmittal to the parties.
D. DEADLINES Within 7 days after the return of a verdict or after a decision or finding of the court which constitutes a judgment, or after the filing of a docket entry in an

interlocutory matter statingçSee Order, unless further time is given by the court, designated trial counsel for the prevailing party shall prepare and submit an appropriate judgment or order to opposing counsel who shall approve or reject within 7 days after receipt. If counsel are unable to agree upon the language in the judgment or order, the various proposals shall be submitted to the trial judge within 14 days after the judgment or order was rendered and the judge will direct the contents of the judgment or order.

E. JOURNALIZATION The judgment specified in Civil Rule 58 shall be journalized within 30 days of the verdict, decree or decision. If such judgment is not prepared and presented for journalization by counsel, it shall be prepared and journalized by the court. The date of journalization by the Clerk of Court of a final appealable order shall begin the 30 day period of appeal.

F. SETTLEMENT 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.

G. COURT-PREPARED ORDERS The provisions of this rule shall not be deemed to preclude the court from *sua sponte* preparing and filing with the clerk for journalization its own judgment or order. The clerk of court shall immediately serve a copy of the order or judgment upon journalization to each counsel of record through any means available in accordance with Civil Rule 5 including handing it to the person, leaving it at a location prescribed by the rule, mail service, commercial carrier, or delivery via electronic means to a facsimile number or an e-mail address provided in accordance with Civil Rule 11 by the attorney or party to be served.

H. SERVICE BY CLERK'S OFFICE Once journalized, the Clerk of courts Office will transmit the entries to the email address submitted by the parties. Counsel for a party, or a Pro Se litigants representing themselves who do not have an email address may, by motion, request ordinary mail service of entries by the Clerk of Courts Office.

5.06 PRETRIAL CONFERENCES

A. SCHEDULING AND ATTENDANCE Each judge shall periodically schedule initial pretrial or early case management conferences in the following categories of cases:

A Professional Torts
B Product Liability
C Other Torts