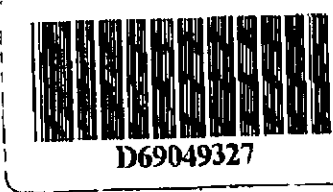


~~ISSUED to Attorney~~

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER : CASE NO. DR0500131
Plaintiff, :
vs. : JUDGE PANIOTO
JON H. ENTINE : SUBPOENA DUCES TECUM
Defendant. : FOR DOCUMENT PRODUCTION

TO: AOL, LLC
Attn: Custodian of Records
22000 AOL Way
Dulles, VA 20166



GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

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FILED
STATE OF OHIO, COUNTY OF HAMILTON SS

You are required to appear before a notary public in and for the County and State on Thursday, July 20, 2006 at 9 00 A M at the offices of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, to produce records hereinafter referred to

You are required to bring with you and produce the documents listed on the attached Exhibit "A "

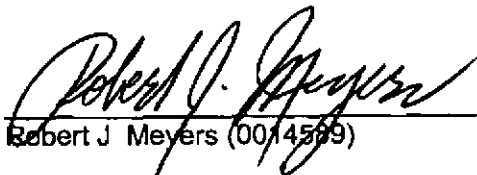
This is a Records Subpoena Only, and in lieu of your personal delivery of these records on the date noted, you may send certified copies of all such records that are in your possession, custody and/or control to Robert J Meyers, Esq , of Buechner, Haffer, O'Connell, Meyers & Koenig Co , L P A , located at 105 East Fourth Street, Suite 300, Cincinnati, Ohio 45202, prior to Thursday, July 20, 2006 A proposed certificate is attached

This Subpoena is issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure by Robert J Meyers, attorney of record in the within cause pursuant to division (A)(2) of said rule

BUECHNER, HAFFER,
MEYERS & KOENIG
CO , L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500


Fail not under penalty of Law

WITNESS my hand this 5th day of July,
2006 at Cincinnati, Hamilton County, Ohio


Robert J Meyers (0014589)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena Duces Tecum for Document Production to Google, Inc has been served by ordinary U S Mail this 5th day of July, 2006 upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206


Robert J Meyers #0014589
Attorney for Defendant

2

CERTIFICATION

STATE OF VIRGINIA)
) SS
COUNTY OF _____)

Under penalty of perjury, I hereby verify that I am the authorized Custodian of Records of AOL, LLC, and am duly authorized to certify that the attached copies are copies of the complete records relating to AOL, LLC

I further verify that the originals of these documents were made at or near the time of the occurrence of the matters set forth therein, by (or from information transmitted by) a person with knowledge of those matters

The documents were kept under my control and in the usual manner and course of business of AOL, LLC

Each document was made in the usual manner and course of business of AOL, LLC, according to the customary standards of this office

Records Custodian

Sworn to and subscribed before me this _____ day of _____, 2006

Notary Public

**BUECHNER, HAFFER,
MEYERS & KOENIG
CO, LPA**
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579 1500

2

**Ohio Rules of Civil Procedure
Rule 45. Subpoena**

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena

(2)(a) A person commanded to produce under divisions (A)(1)(b) (ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

- (a) fails to allow reasonable time to comply,
- (b) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies,
- (c) requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party,
- (d) subjects a person to undue burden.

(4) Before filing a motion pursuant to a division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated

(D) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ R 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

2

EXHIBIT "A"

1 Copies of all incoming and outgoing emails associated with the email address of runerun@aol.com, held in the name of Ellen Turner, for the period of January 1, 2000 through date of receipt of this Subpoena

107535

**BUECHNER, HAFFER,
MEYERS & KOENIG
CO, L P A**
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

Ellen L Turner

Plaintiff

-vs-

Jon H Entine

Defendant

Case No DR0500131
File No E233969
CSEA 7053135062

MAGISTRATE'S ORDER

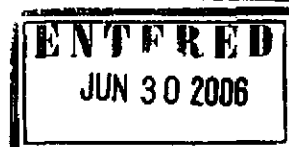
Judge Panioto
Magistrate Theile

The previous stay of discovery ordered June 22, 2006 is rescinded. Discovery may proceed on the issues of the validity and enforceability of the parties' prenuptial agreement. All discovery on these issues shall be completed by September 1, 2006.

Copies of this order have been mailed to the parties or their counsel. This Order is effective immediately. Either party may appeal this order by filing a Motion to Set the Order Aside within ten days of the date this order is entered. The pendency of a Motion to Set the Order Aside does not stay the effectiveness of this order unless the Magistrate or Judge grants a stay.


Magistrate Gregory R. Theile 06/30/2006

Copies sent by Clerk of Courts to
Randal S Bloch Esq, Attorney For Plaintiff
Gloria S Haffer Esq, Attorney For Defendant



Sender

GREGORY HARTMANN
CLERK OF COURTS
1000 MAIN STREET RM 115
CINCINNATI OH 45202-1298

PS Form 3800, 6/02

COMPLETE THIS SECTION ON DELIVERY

A. Signature (or Address or Agent)

B. Received By: (Please Print Name)

C. Date of Delivery

D. Addressee's Address (if Different From Address Listed by Sender)

E. Secondary Address / Suite / No. / Floor (Please Print Clearly)

Delivery Address

City State ZIP + 4 Code

CERTIFIED MAIL



7194 5194 6310 0272 2475

RETURN RECEIPT REQUESTED

Addressed to:
 DR0500131 P1 WAIVER
 ELLEN TURNER
 7719 SHAWNEE RUN ROAD
 CINCINNATI OH 45243



3-UP Laser Form / USA CMF-075 11/05

45202

Handwritten notes:
L.H. 90
DR0500131

A INSUFFICIENT ADDRESS
 ATTEMPTED NOT KNOWN
 NO SUCH NUMBER/STREET
 NOT DELIVERABLE AS ADDRESSED
 UNABLE TO FORWARD

OTHER

RTS
RETURN TO SENDER

Cart Mail Nbr: 7194 5194 6310 0272 2475
 DR0500131 P1
 ELLEN TURNER
 7719 SHAWNEE RUN ROAD
 CINCINNATI OH 45243

REGULAR MAIL SENT

JUN 29 2006



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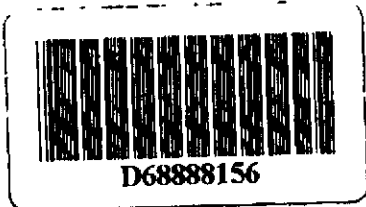
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RTS
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COURT OF COMMON PLEAS
 DIVISION OF DOMESTIC RELATIONS
 HAMILTON COUNTY, OHIO



Ellen Turner
 Plaintiff / Petitioner

Date 6-14-06

-vs/and-

Case No DR0500131

File No 6233969

John Entine
 Defendant / Petitioner

CSEA No _____

Judge Panico
 Judge / Magistrate's

ORDER FOR CONTINUANCE

Whereas, Plaintiff / Defendant / Other _____, has(have) requested a continuance of the hearing set for _____, 20 _____ for the following reason(s)

- conflict of trial assignment
- for the presence of a necessary witness
- for the presence of a party
- to obtain additional information/discovery
- continued in progress
- failure of service
- other set after scheduling on per mutual agreement to counsel to apply

Whereas, the complaint / petition / motion was filed on _____ and there have been _____ previous continuances,

Whereas, no other party / counsel objects to this continuance OR _____ objects to the continuance

THEREFORE, IT IS HEREBY ORDERED:

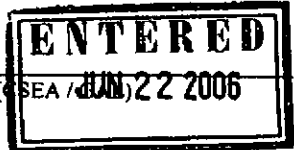
This case is hereby continued to 9-13 9-15-9-19 9-21 at 9:00 am/pm for 5 1/2 days hour(s), Court of Common Pleas, Division of Domestic Relations, 800 Broadway in Courtroom 2-C02 before Judge/Magistrate Thiele
 For (type of hearing) _____

The motion for a continuance is denied
 Further Orders are as follows: stay discovery schedule pending further order

This Order is effective immediately. If a Magistrate has issued this Order, either party may appeal the Order by filing a Motion to Set Aside the Order within ten (10) days of the date this Order is filed. The pendency of a Motion to Set Aside the Order does not stay the effectiveness of this Order unless the Magistrate or Judge grants a stay.

[Signature]
 Judge / Magistrate

By signature below, both parties / counsel acknowledge receipt of this Order.



Plaintiff
[Signature]
 Attorney for Plaintiff

Defendant
[Signature]
 Attorney for Defendant

Other (CSEA / GAL)
[Signature]
 Other (CSEA / GAL)

| COURT | FILE | CSEA | 0014589 | PARTY 1 | 0014333 | PARTY 2

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

Ellen L. Turner

Plaintiff

-vs-

Jon H. Entine

Defendant

Case No DR0500131
File No E233969
CSEA 7053135062

MAGISTRATE'S DECISION
WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Judge Pamoto
Magistrate Theile

An Entry, captioned "General Order of Reference" which is a matter of record in this Court, provides " that all matters be and are hereby referred to a Magistrate in accordance with Rule 53 of Ohio Rules of Civil Procedure"

This cause came on for hearing on June 16, 2006 on the parties' memoranda filed June 15, 2006 on issues of law

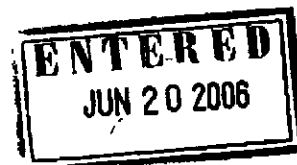
The Plaintiff/Wife is represented by Randal S Bloch, Esquire and Sallee M Fry, Esquire
The Defendant/Husband is represented by Gloria S Haffer, Esquire and Robert J Meyers, Esquire

FINDINGS OF FACT

For the purposes of this Decision, the operative facts are not in dispute The parties married on May 15, 1994 in Tarrytown, New York On May 11, 1994, the parties both signed a Pre-Nuptial Agreement

The purpose of this Decision is to determine what applicable law will be applied in the determination of the enforceability of the parties' pre-nuptial agreement

The pre-nuptial agreement is replete with language indicating that the parties fully understood this agreement, that each party had consulted with counsel prior to the execution of this agreement and that they had voluntarily entered into it Each party's counsel signed a certification that each party had been fully informed as to the effect of this pre-nuptial agreement



The agreement provided, in part,

Both parties hereto recognize that this agreement is a pre-marital agreement as defined in California Family Code Sections 1610, et seq Both parties understand and intend that the provisions of this Agreement shall prevail over the provisions of law applicable in the absence of this Agreement

This agreement is executed in the State of California and shall be subject to and interpreted under the laws of the State of California, even though the parties intend to be married in the State of New York this agreement contains the entire understanding and agreement of the parties. ..

Although one primary purpose for entering into this pre-nuptial agreement was to protect the parties in the event of possible litigation and liability resulting from Husband's investigative reporting activities at about the time of the agreement, the pre-nuptial agreement provides that, "Such ultimate determination (of the potential claims against Husband) shall in no way effect the efficacy of this agreement or any of its provisions"

Wife now seeks an enforcement of the provisions of the pre-nuptial agreement under California law Husband is requesting that the pre-nuptial agreement not be enforced and have Ohio law apply to the issues in this case

CONCLUSIONS OF LAW

A Pre-Nuptial Agreement is a contract between parties contemplating marriage which allows them to set forth their property rights and economic interests


Contracts should be interpreted in accord with the parties intent as set forth by clear and unambiguous language in their agreement.

The agreement of the parties to enter into a pre-nuptial agreement and to be bound by California law does not violate a fundamental policy of this state

DECISION

The parties, by their agreement, have determined the applicable law to be applied in the interpretation of their pre-nuptial agreement California law will be applied in determining application, enforcement and interpretation of the parties' pre-nuptial agreement

Copies of this Decision have been mailed to the parties or their counsel. Objections to this Magistrate's Decision must be filed within seventeen (17) days of the filing date of the Magistrate's Decision and a copy served on the opposing side.


Magistrate Gregory R. Theile 06/16/2006

Copies sent by Clerk of Courts to

Randal S. Bloch, Esquire, Attorney For Plaintiff

Sallee M. Fry, Esquire, Attorney for Plaintiff

Gloria S. Haffer, Esquire, Attorney For Defendant

Robert J. Meyers, Esquire, Attorney For Defendant

ENTRY ADOPTING MAGISTRATE'S DECISION

Pursuant to Civil Rule 53, the Court hereby adopts the Magistrate's Decision. The timely filing and serving of written objections to the decision, or of any civil post-judgment motions pursuant to Appellate Rule 4, shall operate as an automatic stay of execution of this judgment until the Court disposes of such objections or motions by vacating, modifying, or affirming same.

If the Magistrate's Decision addressed a post-decree motion for relief, and, if no written objections to same, or no civil post-judgment motions pursuant to Appellate Rule 4, are timely filed and served, this judgment constitutes a final appealable order, as defined in ORC Section 2505.02, and, accordingly, pursuant to Civil Rule 58(B), the Hamilton County Clerk of Courts is hereby directed to serve upon all parties not in default for failure to appear, notice of this judgment and its date of entry upon the Court's journal. **A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIVIL RULE 53(E)(3)**



Judge, Court of Common Pleas
Division of Domestic Relations

COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

ELLEN L. TURNER : CASE NO. DR0500131
Plaintiff, : JUDGE PANIOTO
v. : MAGISTRATE THEILE
JON H. ENTINE : DEFENDANT'S BRIEF ON
Defendant. : APPLICABLE STATE LAW

I. INTRODUCTION

Pursuant to the Court's directive on June 7, 2006, Defendant Jon H Entine ("Husband"), by and through counsel, respectfully submits his Brief on the legal issue of whether the Court should apply Ohio law or California law to determine whether the parties' Premarital Agreement is valid and enforceable

II. STATEMENT OF THE RELEVANT FACTS

The parties were married in May 1994 in Tarrytown, New York. Four days before their marriage, the parties signed a premarital agreement in California (the "Premarital Agreement"), where they had recently relocated. Both parties were represented by California legal counsel. The Premarital Agreement states in Section 19 on page 17 that it shall be subject to and interpreted under the laws of the State of California.¹

At the time the Premarital Agreement was signed, Husband was writing an explosive investigatory article for a magazine and had been threatened with defamation lawsuits in the United States and the United Kingdom and was concerned about possible physical violence. The impetus for the Premarital Agreement was fear and a concern about protecting the parties and preserving their assets, which would be immediately considered joint under California law,

¹ A copy of the Premarital Agreement is attached as Exhibit A



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GRACEORY HASTMANN
CLERK OF COURTS
HAMILTON COUNTY, OHIO

from the looming lawsuits. The eventual publication of the investigatory article sent the stock price of the subject company plummeting more than \$500 million.

Prior to the marriage, Husband had been a news producer and executive for ABC News and NBC News in New York City, and Wife was a manager at Cadbury Schweppes in Connecticut. Husband sacrificed his lucrative career in network television news to pursue a new, less predictable, and less lucrative career in writing so that Wife could pursue her climb up the corporate ladder as a highly-paid business executive. From the time they began dating in 1992 and during their marriage, she worked for numerous companies including, in order, Cadbury Schweppes in Connecticut, Taco Bell in Orange County, California, The Weather Channel in Atlanta, Limited Brands in Columbus, Kinko's in Ventura County, California, Nike in Portland, Turner & Associates in Agoura Hills, California, and Sara Lee in Cincinnati. These positions required the parties to relocate to seven different cities between 1993 and 2002. Husband became involved in consulting, public speaking and teaching in addition to writing.

One child was born of the marriage, namely, Madeleine ("Maddie") Rose Entine, born May 22, 1998. Husband was the primary caregiver of Maddie during the marriage while Wife focused her career and climbed the corporate ladder.

In the summer of 2002, the parties moved to Cincinnati when Wife accepted an executive position with Sara Lee Corporation. They have continuously resided in Cincinnati since 2002. All of their tangible assets are located in Cincinnati.

In October 2004, Wife announced that she wanted a divorce. From October 2004 until January 19, 2005, the parties lived together as a family in the marital residence while determining an appropriate way to end the marriage and arranging a mutually agreeable parenting schedule.

The parties' living situation abruptly changed on January 20, 2005, while Husband was in New York for a speaking engagement. Wife began secretly packing up the house and moved

out of the marital residence while Husband was out of town. While Wife had the parties' daughter watch, she stripped most of the marital residence bare, including almost all of their daughter's furniture and clothes, and took a majority of the parties' financial and other important legal documents to her new residence.

On January 21, 2005, Wife filed her Complaint for Divorce, which was served the same day on Husband. Approximately one year after the Complaint was filed, in January 2006, Wife advised Husband for the first time that she intended to seek the enforcement of the Premarital Agreement.

III. LAW AND ARGUMENT

A. INTRODUCTION

The issue before the Court is whether Ohio law or California law should govern the parties' Premarital Agreement. While the 1994 Premarital Agreement states that California law applies, Husband submits that this Court should apply Ohio law, and not California law.

B. OHIO LAW

The general rule in Ohio is that the law of the state where the contract is to be performed controls.² When the parties to a contract expressly select a forum other than the place of performance, then the trial court will apply the test adopted by the Ohio Supreme Court in the landmark case of *Schulke Radio Productions, Ltd v. Midwestern Broadcasting Co.*³ to determine the controlling state law. The *Schulke* test provides as follows:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied **unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the**

² *Montana Coal & Coke Co v. Cincinnati Coal & Coke Co* (1904), 69 Ohio St 351, paragraph one of the syllabus.

³ (1983), 6 Ohio St 3d 436, 453 N.E. 2d 683.

parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties⁴

Schulke enumerates two requirements for applying the chosen state law. The first requirement is that the chosen state must have a substantial relationship to the parties or the transaction, or there must be some reasonable basis for the parties' choice.

Here, California, the chosen state, does not have a substantial relationship to the parties or the transaction. The parties do not have any relationship with California. They moved to Cincinnati, Ohio in the summer of 2002 and have continuously lived in Ohio since 2002. They purchased a home in Cincinnati that served as the marital residence. Husband continues to reside in the home as his primary and only residence. Wife leased a home in Cincinnati that serves as her primary and only residence. The parties vote in Ohio. They have Ohio driver's licenses. They pay taxes in Ohio. All of their tangible assets are located in Ohio.

Husband is affiliated with the Ohio office of Northlich Public Relations, a full-service public relations agency, as an independent contractor. He is also a writer, among other things, and operates out of his Cincinnati home.

Wife has established her own business in Ohio known as Turner & Humbert, LLC, an Ohio limited liability company. She maintains an office and place of business for Turner & Humbert, LLC in Cincinnati.

The parties' minor daughter resides with the parties in Ohio, attends school in Ohio, and enjoys a number of extracurricular activities in Ohio. All of her medical providers are located in Ohio. This Court has approved a Shared Parenting Plan governing the parties' rights and responsibilities regarding the minor child. They have both expressed a commitment to live in

⁴ *Id.* at syllabus (emphasis added)

Ohio indefinitely and are so tied by their Shared Parenting agreement. The parties do not have any relationship with California.

There is no reasonable basis for the parties' choice of California. The parties were married in New York where they had been residing and working until shortly before their marriage when they moved to California for Wife's career opportunity. After they decided to get married (and even before they were formally engaged), the parties agreed that after they married they would jointly focus on Wife's career as a business executive and Husband would discontinue his career in network television news and start a new career in writing to allow maximum flexibility for Wife. Their plan was for Wife to climb the corporate ladder by seeking the best opportunities at the best companies regardless of location. Even before the parties married in 1994, Wife had committed herself to a career track that involved frequent relocations. She had worked at Frito Lay in Texas from 1984 to 1988 and at Cadbury Schweppes in Connecticut from 1988 to 1993 before her position was terminated.

Over the course of the next six years, from the fall of 1994 to the spring of 2000, Wife held six jobs in six different cities. Approximately nine months before the parties were married, Wife accepted a position at Taco Bell Corporation located in California, and the parties relocated to California. After less than two years, in 1995, Wife left her employment at Taco Bell to join The Weather Channel in Atlanta, Georgia, and the parties moved to Atlanta. After about a year in Atlanta, Wife left The Weather Channel. Wife's next job was at Limited Brands, Inc. in Columbus, Ohio, and the parties moved to Columbus in the summer of 1996. Approximately a year and half later, in 1998, Wife left the Limited for a position at Kinko's Inc., and the parties returned to California.

Wife's employment at Kinko's Inc. ended in 1999, and she was hired by Nike, Inc. in December 1999. The parties purchased a house in Portland, Oregon but Wife was abruptly fired after only four months at Nike and before they moved into the Oregon home. In the

summer of 2002, Wife was hired by Sara Lee Corporation, and the parties left the west coast for Cincinnati. Sara Lee was Wife's seventh job in seven different cities since 1993. Wife was terminated from her job in April 2004, three months before the executive jobs at Sara Lee were relocated to Chicago.

Based upon the foregoing, it is apparent that the parties never intended to remain in California or in any one particular state for any substantial period of time. They decided before they were married that they would relocate whenever and wherever a better employment opportunity came along for Wife. And they did relocate for seven different jobs. California happened to be the location of Wife's next job at the time the parties were to be married. That position at Taco Bell was merely a stepping stone for Wife to the next rung. Under these circumstances, it was unreasonable for the parties to select California law, or any one particular state law, to govern the Premarital Agreement.

The facts of this case as applied to the first prong of *Schulke* demonstrate that the parties did not make an effective choice and that the chosen state law should not govern their premarital agreement. According to the plain language of *Schulke*, Husband having satisfied the first requirement need not proceed to the second requirement.

However, for the sake of argument, Husband can show that California law should not be applied based upon *Schulke's* second requirement. The second requirement is that the application of the law of the chosen state must not violate the fundamental policy of the state which (1) has a greater material interest in the determination of the issue, and (2) is the state whose law would be applied in the absence of a choice by the parties. This means that if Ohio has a materially greater interest than California in this matter, and Ohio law would have governed the agreement if the parties had not specified otherwise, then California law cannot be applied if it violates Ohio public policy.

Ohio law clearly would have applied in this case had the parties not specified California law in the Premarital Agreement. Ohio is the place of performance of the Premarital Agreement. And Ohio has a materially greater interest than California in the outcome of this action. As stated above, the parties live and work in Ohio. They own real property in Ohio. Their tangible assets are located in Ohio. The parties' minor daughter resides with the parties and attends school in Ohio. California has no interest in the outcome of this divorce action between two Ohio citizens.

California law must not be applied here because it is repugnant to Ohio's fundamental policy of equitable distribution of property. In particular, Section 6 D of the parties' Premarital Agreement is offensive to the basic principles underlying the equitable distribution policy.

Section 6 D of the Premarital Agreement states as follows:

In the event the parties desire to acquire property jointly as community property, they shall do so by a separate written agreement so stating their intent to acquire community property, and identify the same with specificity. There shall be no community property acquired by the parties other than as expressly stated. In the event either party contributes any money to improve or maintain an asset of the other party, the contributing party shall have no community property interest or separate property interest in the maintained or improved asset and shall not be entitled to any reimbursement from the other except as otherwise expressly agreed to in writing signed by both parties.⁵

The highlighted portion of Section 6 D is significant in that a literal application of this language to the facts of this case, including Wife's trickery and deception, could cause Husband to forfeit his share of all the family assets accumulated during the marriage and the substantial inheritance (in excess of \$550,000.00) he received from his father during the marriage.

Husband used almost all of his inheritance to improve the parties' marital residence in Cincinnati. Husband has produced documentation tracing virtually every penny of his

⁵ See page 8 of the parties' Premarital Agreement (emphasis added), copy attached as Exhibit A.

inheritance that he put into the marital residence. At all times during the marriage, Husband reasonably believed and never doubted that the marital residence was jointly titled in both parties' names. During this divorce proceeding, Husband discovered to his surprise that Wife had defrauded him by causing the residence to be titled solely in her name. Wife never told Husband that the marital residence was not jointly titled. Husband believes Wife has committed fraud and breached her fiduciary duty. A literal interpretation of the Premarital Agreement (if found to be valid and enforceable) could transform the marital residence into Wife's separate property and Husband's inheritance into Wife's separate property. This result is untenable in Ohio.

Ohio statutory law defines separate property in R.C. §3105.171(B)(6). Specifically, R.C. §3105.171(B)(6)(a)(i) provides that an inheritance by one spouse by bequest, devise or descent during the marriage constitutes separate property of the recipient. R.C. §3105.171(D) states that the court shall disburse a spouse's separate property to that spouse. Only in very limited circumstances where equity dictates will a court make a distributive award consisting of one spouse's separate property to another.

Additionally, according to R.C. §3105.171(H), "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." Under the plain language of Ohio statutory law, Wife's misconduct in secretly causing the marital residence to be titled solely in her name would not diminish or eliminate Husband's marital interest in the property. The language of the California premarital agreement, if interpreted literally, could provide otherwise.

By seeking the enforcement of the Premarital Agreement, Wife has improperly attempted to circumvent Ohio law in an effort to have the marital residence designated as her separate property and to have Husband's inheritance deemed her separate property. In so

doing, Wife has also attempted to defy the basic concept that no one should be permitted to profit from her wrongful conduct⁶

Section 9 of the Premarital Agreement also offends Ohio public policy That section provides

The parties agree that any earnings, profits, perquisites, residuals, income or benefits, no matter their nature, kind, or source, from and after the marriage, including but not limited to, salary, residuals, bonuses, stock options, deferred compensation, and retirement benefits, shall be the separate property of the party earning or acquiring such earnings, income or benefits as though the contemplated marriage had never occurred There shall be no allocation made of any such earnings, income or benefits between community property and separate property, and such earnings, income or benefits shall be entirely the separate property of the party earning or acquiring the same The parties acknowledge their understanding that in the absence of this Agreement any earnings, residuals, income or benefits resulting from the personal services, skills, celebrity goodwill, industry, and efforts of either party during the contemplated marriage would be community property

Under this section, all of the income of any kind earned by Wife during the marriage, as well as all money earned by Husband that was used to pay family expenses, including home improvements, could possibly be characterized as Wife's separate property despite the fact that the parties never separated their lives financially and had agreed to sacrifice Husband's career in television to allow Wife to pursue her career This result is also contrary to R C § 3105 171(A)(3)(iii), which expressly states that all income due to the labor, monetary, or in-kind contribution of either or both spouses that occurred during the marriage is marital property Husband loyally supported Wife and moved from state to state every other year or so to permit Wife to improve her resume and earning power Husband assumed the basic household responsibilities so that Wife could focus on her career It is inconceivable under Ohio law that Husband would be denied all interest in the assets they accumulated jointly during the marriage

⁶ *Schrader v Equitable Life Assurance Soc* (1985), 20 Ohio St 3d 41, 485 N E 2d 1031

Likewise, Section 8 of the Premarital Agreement, entitled Community Efforts in Managing the Other Party's Separate Property Interests, contravenes Ohio's policy of compensating a party for his or her non-monetary contributions to the marriage. During the marriage, while Wife was vigorously pursuing her career, Husband devoted his time and effort to managing the parties' investments as well as the mundane details of the parties' daily lives. He later served as the primary caretaker of the parties' minor child. Husband's non-monetary contributions are highly valued in Ohio law but are not give much, if any, credit in California.

Section 13 of the Premarital Agreement, entitled Debt Obligations on Separate Property Interests, and Section 14 of the Premarital Agreement, entitled Unsecured Debt Responsibility, are repugnant in that they deny the right of reimbursement to a party who uses separate property to pay the debts of the other party. Husband poured all of his assets into the parties' daily living. He paid for improvements to the parties' various houses and routine living expenses. The Premarital Agreement denies Husband the ability to obtain reimbursement.

Under the facts and circumstances of this case, Sections 6, 8, 9, 13, and 14 of the Premarital Agreement are particularly onerous and unconscionable. Ohio domestic relations courts as courts of equity have the unique ability to remedy onerous and unconscionable premarital agreements. It does not appear that California courts have statutory authority to correct repugnant and unconscionable property division.

Considering the facts and circumstances of this action in connection with the second prong of the *Schulke* test, this Court should not apply California law to the Premarital Agreement. This Court should apply Ohio law.

There is a dearth of case law in Ohio on point with this action. It appears that only the Eleventh District Court of Appeals has faced a choice of law issue in connection with a premarital agreement in *In re Estate of Davis* (Dec 3, 1999), Ashtabula App No 98-A-0085, 1999 Ohio App LEXIS 5751, unreported. There, the parties signed a prenuptial agreement that

contained a choice of law provision stating that Texas law would control the agreement. The parties were married in Ohio. During their twelve-year marriage, the parties spent part of each year living in Ohio and Texas. The wife had an interest in 3,460 acres of land in Texas.

The wife died in Ohio, and the husband sought to set aside the prenuptial agreement. He argued that Ohio law should govern the agreement because (1) Ohio was the place of performance, (2) the parties were married in Ohio, (3) the parties resided for part of the year in Ohio, and (4) the wife's will was executed and probated in Ohio. The husband further claimed that Texas had no significant relationship to the agreement.

The Eleventh District applying *Schulke* disagreed with the husband. It found that the facts demonstrated that Texas had a substantial relationship to the agreement. Specifically, the *Davis* court pointed to the wife's large land interest in Texas, the wife's bank account located in Texas, the agreement was signed in Texas, and the parties resided in Texas for part of each year for eleven years of their marriage. The *Davis* court concluded that the standards of *Schulke* had been met, and the trial court properly held that Texas law controlled.

Davis turned on the specific facts of that case. The operative facts in *Davis* indicated that the parties had a substantial connection with the chosen state and that the parties made an effective choice of law.

On the contrary, the parties in this case do not have a substantial (or any) connection with the chosen state. Neither party has retained any interest in land located in California. The home they once owned in California was sold years ago after they decided to move to Cincinnati for the Sara Lee position. The parties do not have any bank or financial accounts in California. All of their tangible property is located in Ohio. Since relocating to Ohio in 2002, the parties have resided in Ohio all year round. They do not reside in California or any other state for part of the year. Wife filed her Complaint for Divorce in Ohio.

The facts do not supply a reasonable basis to find that California has a substantial relationship to the agreement or the parties. The parties have a substantial relationship to Ohio and only to Ohio.

Based upon the rationale of *Davis*, California law should not govern the parties' agreement. Ohio has a greater interest in this case. Ohio is the place of performance. California law is repugnant to Ohio public policy regarding the equitable distribution of property. Under the circumstances, Ohio law should apply.

Beyond the context of divorce proceedings, Ohio courts routinely deny the application of the state law designated by the parties to a contract based upon the factors of *Schulke*. For example, in *J&L Specialty Steel v Hammond Constr.*,⁷ the Fifth District affirmed the trial court's decision not to apply the choice of law provision in a purchase order agreement designating Pennsylvania law as the controlling state law even though Pennsylvania had a substantial relationship to the parties and transaction because Pennsylvania law was contrary to Ohio's fundamental policy concerning indemnification.

Likewise, in *Telmark, Inc. v P J T, Inc.*,⁸ the Fourth District affirmed the trial court's refusal to apply the New York choice of law clause in the parties' lease contract, which would allow the lessor to receive attorney fees. The *Telmark* court found that Ohio had a substantially greater relationship with the parties and transaction than New York and that the lessor included the New York choice of law provision to circumvent Ohio's rule against awards of attorney's fees.⁹

Here, the Court should follow the line of Ohio cases refusing to apply the choice of law provision. The particular facts of this case as applied to the requirements of *Schulke* militate

⁷ (Aug 11, 1997), Stark App No 1996CA00370, 1997 Ohio App LEXIS 3900, unreported, copy attached as Exhibit B

⁸ Mar 2, 1993, Gallia App No 92 CA 17, 1993 Ohio App LEXIS 1344, unreported, copy attached as Exhibit C

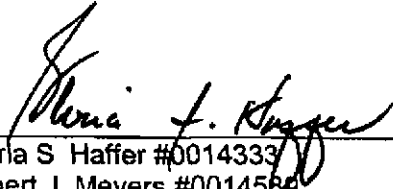
⁹ *Id.*

against the application of California law to govern the parties' Premarital Agreement. Ohio has a materially greater interest in the parties and the distribution of their property than California. The parties lived in Cincinnati longer than they lived in any other city since they were married. The total time the parties lived in Ohio (Columbus and Cincinnati combined) is greater than the time they lived in any other state, including California. They are committed to the Shared Parenting Plan approved by the Court and to making Cincinnati their permanent home indefinitely, or at least until their minor child goes to college ten years from now. The parties were merely passing through California when they signed the Premarital Agreement. The Premarital Agreement is at odds with Ohio's equitable distribution policy. Accordingly, Ohio law should control.

IV. CONCLUSION

For all of the foregoing reasons, this Court should disregard the California choice of law provision in the Premarital Agreement and apply Ohio law.

Respectfully submitted,

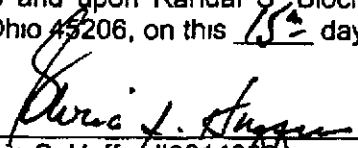


Gloria S. Haffer #0014333
Robert J. Meyers #0014589
Trial Attorneys for Defendant Jon H. Entine
Buechner, Haffer, O'Connell,
Meyers, Healey & Koenig, Co., L.P.A.
300 Fourth & Walnut Centre
105 East Fourth Street
Cincinnati, Ohio 45202
Telephone 513-579-1500
Facsimile 513-977-4361
E-mail ghaffer@bhomhk.com
E-mail rmeyers@bhomhk.com

BUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO., L.P.A.
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Defendant's Brief on Applicable State Law has been served upon Sallee M Fry, Esq , Law Office of Sallee M Fry, 2345 Ashland Avenue, Cincinnati, Ohio 45206 and upon Randal S Bloch, Esq , Wagner & Bloch, LLC, 2345 Ashland Avenue, Cincinnati, Ohio 45206, on this 15th day of June, 2006



Gloria S Haffer #0014388
Robert J Meyers #0014589
Attorneys for Defendant

105437

BUECHNER, HAFFER,
O'CONNELL, MEYERS,
HEALEY & KOENIG
CO, L P A
Suite 300
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 579-1500

PREMARITAL AGREEMENT

THIS AGREEMENT is made and entered into by and between JON H ENTINE hereinafter "JON" and ELLEN TURNER hereinafter "ELLEN" with reference to the following facts and purposes:

A. JON and ELLEN plan to be married to each other on May 15, 1994.

B. JON is a writer/producer and ELLEN is a business person, presently a Senior Director of Taco Bell. Both parties are in good health and financially self-supporting.

C. JON and ELLEN were formerly married to other people, but such former marriages have been terminated by a Judgment of Dissolution of Marriage. Neither JON nor ELLEN has any children.

D. Neither JON nor ELLEN now has any right, title, claim or interest in or to the property, income, or estate of the other by reason of their non-marital relationship, or otherwise, and neither party is indebted to the other.

E. JON and ELLEN desire to make a fair, reasonable, and full disclosure of their respective property and financial obligations, one to the other.

F. The parties intend and desire by this Agreement to (1) define their respective rights in the property they now hold and (2) to avoid certain interests which, except for this Agreement, each might acquire after their marriage in the income and property of the other as incidents of their contemplated marriage.

G. Both parties hereto recognize that this Agreement is a premarital agreement as defined in California Family Code Sections 1610, et seq. Both parties understand and intend that the provisions of this Agreement shall prevail over the provisions of law applicable in the absence of this Agreement

THEREFORE, for good and valuable consideration, including, without limitation, the mutual promises, conditions, and agreements set forth herein and the contemplated marriage of the parties, the parties agree as follows.

1. Effective Date:

This Agreement shall be and become effective as of the date of the contemplated marriage between the parties, and its effectiveness is expressly conditioned upon such marriage. If, for any reason and irrespective of fault, the contemplated marriage does not take place, this Agreement will be of no force or effect.

2. Independent Counsel:

The parties acknowledge and agree that they each have been represented by separate and independent legal counsel and have relied on counsel of their own choosing in negotiations for and in preparation of this Agreement. JON warrants and represents that he is and has been represented by Joan S. Bauman, Attorney at Law, of Phillips & Bauman and a member in good standing of the Bar of the State of California. ELLEN warrants and represents that she is and has been represented by Henry Friedman, Attorney at Law, a member in good standing of the Bar of the State of California. The parties acknowledge and agree that they have carefully read this Agreement, and that the provisions of the Agreement have been explained fully to them by their respective counsel.

3 Voluntary and Informed Consent:

The parties further acknowledge and agree that they are fully aware of and understand the contents, legal effect, and consequences of this Agreement, and that they enter into this Agreement voluntarily, free from duress, fraud, undue influence, coercion, or misrepresentation of any kind.

4 Property and Financial Disclosures:

A A fair and reasonable disclosure of all of JON's property and financial obligations has been made by him to

ELLEN, and a list of such property and financial obligations is set forth in Exhibit "A" attached hereto and incorporated herein by reference. It is understood that the property and financial obligations set forth in Exhibit "A" are approximate and not necessarily exact, but they are intended to be reasonably accurate and are warranted to be the best estimates of such property and financial obligations. ELLEN hereby expressly and voluntarily waives any right to disclosure of JON's property and financial obligations beyond the disclosure provided

B. A fair and reasonable disclosure of all of ELLEN's property and financial obligations has been made by her to JON, and a list of such property and financial obligations is set forth in Exhibit "B" attached hereto and incorporated herein by reference. It is understood that the property and financial obligations set forth in Exhibit "B" are approximate and not necessarily exact, but they are intended to be reasonably accurate and are warranted to be the best estimates of such property and financial obligations. JON hereby expressly and voluntarily waives any right to disclosure of ELLEN's property and financial obligations beyond the disclosure provided.

C The parties agree that the foregoing disclosures are not an inducement to enter into this Agreement, and neither is relying upon any or all of the disclosures in any manner whatsoever JON and ELLEN agree that each is willing to enter into this Agreement regardless of the nature or extent of the

present or future assets, liabilities, income, or expenses of the other, and regardless of any financial arrangements made for his or her benefit by the other.

5. Rights Incident to Parties' Non-Marital Relationship:

JON and ELLEN acknowledge and agree that they have not previously entered into any other contract, understanding, or agreement, whether express, implied in fact, or implied in law with respect to each other's property or earnings, wherever or however acquired or with respect to the support or maintenance of each other. Neither party now has, possesses, or claims any right or interest whatsoever, in law or equity, under the laws of any state, in the present or future property, income or estate of the other, or a right to support, maintenance, or rehabilitation payments of any kind whatsoever from the other by reason of the parties' non-marital relationship. The parties acknowledge that they each have been advised by their respective counsel on California law respecting non-marital relationship, and they each agree that neither has any rights and/or obligations arising out of their non-marital relationship with each other. In the event it is subsequently determined, notwithstanding the advice of their respective counsel, that either party maintained any of the above-described rights, such rights are expressly waived.

6. Separate Property Interests in Premarital and Post Marital Assets and Acquisitions:

A. JON and ELLEN agree that all property, including the property set forth in Exhibit "A" belonging to JON at the commencement of their contemplated marriage, and any property acquired by JON subsequently from any source whatsoever shall be and remain his separate property. The parties further acknowledge and agree that all rents, issues, profits, increases, appreciation, income, residuals, deferred payments, and liabilities from the separate property of JON, and any other assets purchased or otherwise acquired with the foregoing proceeds, shall be and remain JON's separate property. The parties agree that a change in the form of JON's assets as a result of the sale, exchange, hypothecation, or other disposition of such assets, or a change in the form of doing business, shall not constitute any change of property characterization, and such assets shall remain JON's separate property regardless of any change in form. ELLEN shall have no right, title, interest, lien, or claim under the laws of any state in or to any of JON's separate property assets

B JON and ELLEN agree that all property, including the property set forth in Exhibit "B" belonging to ELLEN at the commencement of their contemplated marriage, and any property acquired by ELLEN subsequently from any source whatsoever, shall be and remain her separate property The parties further

acknowledge and agree that all rents, issues, profits, increases, appreciation, and income from the separate property of ELLEN, and any other assets purchased or otherwise acquired with the foregoing proceeds, shall be and remain ELLEN's separate property. The parties agree that a change in the form of ELLEN's assets as a result of the sale, exchange, hypothecation, or other disposition of such assets, or a change in form of doing business, shall not constitute a change of property characterization, and such assets shall remain ELLEN's separate property regardless of any change in form. JON shall have no right, title, interest, lien, or claim under the laws of any state in or to any of ELLEN's separate property assets.

C. ELLEN has been informed, and both parties acknowledge, that JON is pursuing his career as an independent producer and writer. JON is writing a controversial article for ~~Vanity Fair Magazine~~, for which he anticipates that he will be sued for defamation. JON and ELLEN agree that a large part of the consideration for entering into this Premarital Agreement is ELLEN's forbearance of any of the financial benefits of JON's written materials in exchange for the promise that JON's liabilities are his sole and separate property, that JON will hold ELLEN harmless therefrom and completely and thoroughly indemnify her from any liabilities flowing therefrom. In the event that any of the foregoing assumptions or expectations of the parties prove

to be misplaced, such ultimate determination shall in no way affect the efficacy of this Agreement or any of its provisions.

D In the event the parties desire to acquire property jointly as community property, they shall do so by a separate written agreement so stating their intent to acquire community property, and identify the same with specificity There shall be no community property acquired by the parties other than as expressly stated In the event either party contributes any money to improve or maintain an asset of the other party, the contributing party shall have no community property interest or separate property interest in the maintained or improved asset and shall not be entitled to any reimbursement from the other except as otherwise expressly agreed to in a writing signed by both parties.



7. Community Efforts in Managing Each Party's Own Separate Property Interests:

A. The parties acknowledge and agree that JON may devote considerable personal time, skill, service, industry and effort during their marriage to the investment and management of his separate property and the income generated thereof. The parties acknowledge and agree that even though the expenditure of JON's personal time, skill, service, industry and effort might constitute or create a community property interest, community property income, or community property asset in the absence of

this Agreement, no such community property interest, income, or asset shall be created thereby, and any income, profits, accumulations, appreciation, residuals, and increase in value of the separate property of JON during marriage shall be and remain entirely JON's separate property, including any celebrity goodwill.

B. The parties acknowledge and agree that ELLEN may devote considerable personal time, skill, service, industry and effort during their marriage to the investment and management of her separate property and income thereof. The parties acknowledge and agree that even though the expenditure of ELLEN's personal time, skill, service, industry and effort might constitute or create a community property interest, community property income, or community property asset in the absence of this Agreement, no such community property interest, income or asset shall be created thereby, and any income, profits, accumulations, appreciation and increase in value of the separate property of ELLEN during marriage shall be and remain entirely ELLEN's separate property.

8 Community Efforts in Managing the Other Party's
Separate Property Interests:

The parties acknowledge and agree that during their marriage, one party may choose to contribute considerable personal time, skill, service, industry and effort to the investment and management of the other party's separate property and the income

thereof The parties acknowledge and agree that even though any such contribution might constitute or create a community property interest, community property income, or a community property asset in the absence of this Agreement, no such community property interest, income, or asset shall be created thereby. The parties further agree that any such contribution shall not create any other claim, right, lien, or interest whatsoever, in favor of the party contributing the personal time, skill, service, industry and effort, in or to the other party's separate property and any income, residuals, profits, accumulations, appreciation and increase in value thereof during the parties' marriage.

9. Separate Property Earnings, Deferred

Compensation and Employee Benefits:

The parties agree that any earnings, profits, perquisites, residuals, income or benefits, no matter their nature, kind, or source, from and after the marriage, including, but not limited to, salary, residuals, bonuses, stock options, deferred compensation, and retirement benefits, shall be the separate property of the party earning or acquiring such earnings, income or benefits as though the contemplated marriage had never occurred There shall be no allocation made of any such earnings, income or benefits between community property and separate property, and such earnings, income or benefits shall be entirely

*

the separate property of the party earning or acquiring the same. The parties acknowledge their understanding that in the absence of this Agreement any earnings, residuals, income or benefits resulting from the personal services, skills, celebrity goodwill, industry and efforts of either party during the contemplated marriage would be community property.

10. Separate Property Interests in Preexisting Retirement and Employee Benefit Plans:

A. JON presently owns interest in various I.R A accounts, 401(k) accounts, and Keogh accounts. ELLEN acknowledges and agrees that pursuant to the terms of this Agreement, all retirement benefits owned by or held for the benefit of JON as of the date of the contemplated marriage shall be and remain JON's separate property, and ELLEN shall have no right, title, claim or interest therein. Any contributions made by JON or held for the benefit of JON before and after the date of marriage shall be JON's separate property, including interest and accumulations thereon.

B. ELLEN presently owns an interest in a retirement plan. ELLEN acknowledges and agrees that pursuant to the terms of this Agreement, all retirement benefits owned by or held for the benefit of ELLEN as of the date of the contemplated marriage shall be and remain ELLEN's separate property, and JON shall have no

right, title, claim or interest therein. Any contributions made by ELLEN or held for the benefit of ELLEN before and after the date of marriage shall be ELLEN's separate property, including interest and accumulations thereon.

C. JON has been informed by his counsel and understands that pursuant to Federal law, or the terms of ELLEN's retirement benefit plan documentation, he may become entitled to survivor rights and/or benefits in, to, or from ELLEN's retirement benefits. JON hereby (a) waives of his rights to all such survivor benefits under any of ELLEN's retirement benefits; (b) consents to the designation by ELLEN of any person or entity as the beneficiary entitled to any such survivor benefits without further waiver by JON, and (c) agrees to execute all necessary documents within thirty (30) days after marriage in order to effectuate such waiver and consent.

D ELLEN has been informed by her counsel and understands that pursuant to Federal law, or the terms of JON's retirement plan documentation, she may become entitled to survivor rights and/or benefits in, to, or from JON's retirement benefits. ELLEN hereby (a) waives her rights to all such survivor benefits under any of JON's retirement benefits; (b) consents to the designation by JON of any person or entity as the beneficiary entitled to any such survivor benefits without further wavier

by ELLEN; and (c) agrees to execute all necessary documents within thirty (30) days after marriage in order to effectuate such waiver and consent.

11. Property Transfers Between Parties:

The parties agree that nothing contained in this Agreement shall be construed as a bar to either party's transferring, conveying, devising, or bequeathing any property to the other. Neither party intends by this Agreement to limit or restrict in any way the right to receive any such transfer, conveyance, devise, or bequest from the other made after the parties' marriage. However, the parties specifically agree that no promises of any kind have been made by either of them about any such gift, bequest, devise, conveyance, or transfer from one to the other

12. Management and Control of Separate Property Interests:

The parties agree that each party shall retain and enjoy sole and exclusive management and control of his or her separate property, both during lifetime, and upon death, as though unmarried. In order to accomplish the intent of this Agreement, each of the parties agrees to execute, acknowledge and deliver, at the request of the other, his or her heirs, executors, administrators, grantees, devisees, or assigns, any and all

*Done this
Unmarried
Page
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such deeds, releases, assignments, or other instruments as required to effect the terms of this Paragraph 12. These instruments shall include, but not be limited to, the retirement plan survivor benefits waiver and consent form referred to in Paragraph 10 of this Agreement, and such further assurances as may be reasonably required or requested to effect or evidence the release, waiver, relinquishment, or extinguishment of the rights of either party in the property, income or estate of the other under the provisions of this Agreement, and to assure that each party shall have sole and exclusive management and control of his or her separate property.

13. Debt Obligations on Separate Property Interests:

All debt obligations (including principal and interest) incurred due to or as a consequence of the ownership, purchase, encumbrance or hypothecation of the separate property of either party, whether real, personal or mixed, and all taxes, insurance premiums, and maintenance costs of said separate property, shall be paid from such party's separate property there being no community property by the terms of this Agreement. To the extent that either party uses his or her separate property to pay the foregoing obligations of the other party, there shall be no right to reimbursement for such expenditures, absent a writing signed by both parties to the contrary

14. Unsecured Debt Responsibility:

All unsecured obligations of each party, no matter when incurred, shall remain the sole and separate obligation of each such party, and each party shall indemnify and hold the other harmless from liability therefor. Each party's unsecured obligations shall be paid from each respective party's separate property income or separate property funds, at such party's election, there being no community property by the terms of this Agreement. To the extent that either party uses his or her separate property to pay the unsecured obligations of the other party, there shall be no right to reimbursement for such expenditures, absent a writing signed by both parties to the contrary.

15. Support Liability:

A The parties recognize that under California law, it may not be permissible for either party to waive spousal support and such waiver is presently legally impermissible. However, to the extent such waiver may ultimately be permissible, each of the parties does waive the right to claim support from the other in the event they separate within five (5) years from the date of marriage.

B Each acknowledges that prior to the date of the parties' marriage, he or she was providing for all of his or her own support needs based upon a standard of living with which each

party was comfortable; neither party was relying upon, nor had any reason to rely upon, the support of any other party whatsoever. Each of the parties expects he or she will be fully capable of providing for all of his or her own support needs subsequent to their marriage, with no need for a support contribution from the other in the event they separate within five (5) years from the date of their marriage. The within agreement is designed to help accomplish such result.

C. In the event the parties separate within five (5) years of the date of their marriage, to the extent either party's standard of living may be enhanced during said period and to the extent allowable by law, each of the parties waives any right to have a Court of competent jurisdiction consider the enhanced standard of living, should one party make application for support.

D. After five (5) years from the date of their marriage, in the event of a separation or marriage dissolution proceeding, each party's obligation to support the other shall be determined and governed under the laws of the State of California, without regard to the balance of this Paragraph 15.

16 Parties and Persons Bound:

This Agreement shall bind the parties to the Agreement, and their respective heirs, executors, administrators, assigns and any other successors in interest

17. Voluntary Arms' Length Negotiations:

The parties acknowledge and agree that this document is voluntarily entered into by and between them and that, as of the date of execution of this Agreement, there is no confidential or fiduciary relationship existing between them as defined under the laws of the State of California.

18 Execution Formalities:

The parties specifically agree that forthwith upon their execution of the Agreement, their respective signatures shall be acknowledged by a notary public in their presence. The parties further acknowledge that the date which is set forth on the signature page of this Agreement next to their names is the actual date on which they and each of them are signing this Agreement. This Agreement, or a memorandum of this Agreement, may be recorded at any time from time-to-time by either party in any place or office authorized by law for the recording of documents affecting title to or ownership status of property, real or personal, specifically including, but not limited to, any county in which either party resides during the marriage and any county in which either party owns or may own real or personal property.

19. Applicable Law:

This Agreement is executed in the State of California and shall be subject to and interpreted under the laws of the State of

California, even though the parties intend to be married in the State of New York.

20 Entire Agreement:

This Agreement contains the entire understanding and agreement of the parties. There have been no promises, representations, warranties, or undertakings by either party to the other, oral or written, of any character or nature, except as set forth herein.

21. Modification, Revocation:

This Agreement may be altered, amended, modified or revoked only by an instrument in writing expressly referring to this Agreement, executed, signed and acknowledged by the parties hereto, and by no other means. Each of the parties waives the right to claim, contend, or assert in the future that this Agreement was modified, canceled, superseded or changed by an oral agreement, course of conduct, or estoppel.

22 Invalidity and Severability:

This Agreement has been jointly prepared and negotiated by the parties and their counsel. It shall not be construed against either party. If any term, provision, or condition of this Agreement is held by a Court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions

shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

IN WITNESS WHEREOF, the parties have executed this Premarital Agreement on the dates set forth below.



JON H. ENTINE

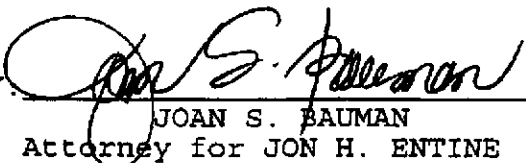
Dated 5/11/94



ELLEN TURNER

Dated: 5/11/94


PHILLIPS & BAUMAN

BY: 

JOAN S. BAUMAN
Attorney for JON H. ENTINE

Dated: 5/2/94

LAW OFFICES OF HENRY FRIEDMAN

BY: 

HENRY FRIEDMAN
Attorney for ELLEN TURNER

Dated: 5/9/94

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

On _____ before me, _____
a Notary Public, personally appeared JON H. ENTINE, personally
known to me (or proved to me on the basis of satisfactory
evidence) to be the person whose name is subscribed to the within
instrument and acknowledged to me that he executed the same in his
authorized capacity, and that by his signature on the instrument
the person, or the entity upon behalf of which the person acted,
executed this instrument.

WITNESS my hand and official seal.

(SEAL)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On _____ before me, _____,
a Notary Public, personally appeared ELLEN TURNER, personally
known to me (or proved to me on the basis of satisfactory
evidence) to be the person whose name is subscribed to the within
instrument and acknowledged to me that she executed the same in
her authorized capacity, and that by her signature on the
instrument the person, or the entity upon behalf of which the
person acted, executed this instrument.

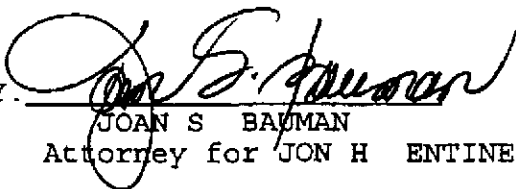
WITNESS my hand and official seal.

(SEAL)

ATTORNEY'S CERTIFICATION

The undersigned hereby certifies that she is an attorney at law, duly licensed and admitted to practice in the State of California; that she has been employed by and compensated by JON H ENTINE, one of the parties to the foregoing Agreement, that this attorney has advised and consulted with JON H ENTIRE in connection with his property rights and has fully explained to JON H ENTINE the legal effect of the foregoing Agreement and the effect which it has upon his rights otherwise obtaining as a matter of law; that said party after being fully advised by the undersigned, acknowledged to the undersigned that JON H ENTINE understood the legal effect of the foregoing Agreement and executed the same freely and voluntarily.

PHILLIPS & BAUMAN

BY. 
JOAN S BAUMAN
Attorney for JON H ENTINE

ATTORNEY'S CERTIFICATION

The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of California; that he has been employed by and compensated by ELLEN TURNER, one of the parties to the foregoing Agreement; that this attorney has advised and consulted with ELLEN TURNER in connection with her property rights and has fully explained to ELLEN TURNER the legal effect of the foregoing Agreement and the effect which it has upon her rights otherwise obtaining as a matter of law; that said party after being fully advised by the undersigned, acknowledged to the undersigned that ELLEN TURNER understood the legal effect of the foregoing Agreement and executed the same freely and voluntarily.

LAW OFFICES OF HENRY FRIEDMAN


BY: 
HENRY FRIEDMAN
Attorney for ELLEN TURNER

EXHIBIT "A"

JON'S SEPARATE PROPERTY

1. RETIREMENT ACCOUNTS:

A. ABC Int 401K fixed interest mutual fund, with an estimated balance of \$22,531.00, being

B. ABC Stock 401K, pre-tax mutual fund, with an estimated balance of \$7,818.99, being

C. IRA-Vanguard Gold and Precious Metals Portfolio, pre-tax IRA, mutual fund, with an estimated balance of \$23,500.00, being

D. IRA-Vanguard Health Care Portfolio, with an estimated balance of \$11,780.00, being

E. IRA-Vanguard Energy Portfolio, IRA rollover, mutual fund, with an estimated balance of \$39,780.00, being

F. Keogh-Vanguard Trustees Equity Fund/International Portfolio, money purchase, mutual fund, with an estimated balance of \$2,211.90, being

G. Keogh-Vanguard Explorer Fund, profit sharing, mutual fund, with an estimated balance of \$5,299.00, being

2. CASH ACCOUNTS:

A. Checking account at Wells Fargo Bank in the amount of \$515.00.

B. Savings account at Wells Fargo Bank in the amount of \$50.29

3. REAL PROPERTY INTERESTS:

A. Co-op, located at 320 Riverside Drive, 8G, New York, New York 10025, valued at approximately \$375,000.00.

B. Co-op Mortgage at 320 Riverside Drive, 8G, New York, New York 10025, with an approximate mortgage balance of \$268,000.00

4. **STOCK INTERESTS:**

A. Robertson Contrarian Portfolio, with an estimated balance of \$8,120.00.

5 **Frequent Flyer** mileage estimated to be approximately 320,000 miles as of March 30, 1994.

6 **ARTICLES ON THE BODY SHOP:**

A. All present and future rights, title and interests in and flowing from any articles written by JON about The Body Shop, including but not limited to books, book contracts, cash advances, movie and television rights, residuals and profits which may be based upon or flow from said article.

B Any and all liabilities incident to or flowing from said articles, including, but not limited to, Court judgments based upon future liabilities or settlements agreed to by JON, attorney's fees, accounting fees, penalties, and interest thereon.

Paragraph 5 , Schedule "A" of this Agreement is not intended to convey, nor shall it be construed as, an admission of guilt or liability in any way whatsoever by Jon It is intended to define the rights of the parties during their intended marriage to certain assets and liabilities that but for this Agreement, would affect the characterization of the property rights of the parties, with particular reference to the Vanity Fair article.

JON intends to hold ELLEN harmless from any liabilities he may incur with respect to the property rights set forth in this Schedule "A" during the intended marriage in consideration of ELLEN waiving all right, title, and interest to the monetary benefits of JON's writings.

7 **OTHER MISCELLANEOUS PROPERTY:**

A. Coin Collection, estimated value \$6,000.00.

B National Property Analysis Master limited partnership interest valued at approximately \$6,637.00.

C. A 1987 Acura Integra 4-Door automobile valued at approximately \$4,500.00, being California License Number 3 EVV 578.

D Various pictures and furniture valued at approximately \$3,500 00

E. Computer equipment valued at approximately \$11,000.00.

EXHIBIT "B"

ELLEN'S SEPARATE PROPERTY

1. PROPERTY:

A Residence located at 30932 Colonial Place, Laguna Niguel, California 92677, valued at approximately \$500,000.00, with equity of approximately \$120,000.00.

B. A one-half (1/2) interest in North Carolina beach house located at 5313A Virginia Dare Trail, Nags Head, North Carolina, appraised at \$300,000.00 with a mortgage of approximately \$200,000.00.

Approximate value of ELLEN's equity in property is \$50,000.00

2. CASH ACCOUNTS:

Checking account and savings account with an aggregate approximate balance of \$44,000 00.

3 RETIREMENT ACCOUNT:

401K Plan with an approximate value of \$47,000.00.

4 MUTUAL FUNDS:

A Fidelity Emerging Markets, with an estimated balance of \$25,000 00.

B. Monetta, with an estimated balance of \$7,800.00.

C IAI Regional, with an estimated balance of \$5,900.00.

D. Janus Fund, with an estimated balance of \$10,000.00.

E. Janus Twenty, with an estimated balance of \$8,500.00

F. Vanguard U S Growth, with an estimated balance of \$5,300 00.

Total of approximately \$62,500 00.

5. VEHICLE:

A 1994 BMW, 325I convertible automobile, being California License No. 3EYV337, subject to a forty-eight (48) month lease with monthly payments being approximately \$653.32 per month. Approximate value of \$30,000 00 less encumbrance of \$28,000.00, resulting in an approximate value of ELLEN's equity being \$2,000.00.

6. DEBTS/OBLIGATIONS:

A. Deed of Trust on Laguna Niguel property in the approximate amount of \$380,000.00.

B. One-half (1/2) (\$200,000.00 x 1/2) Mortgage of North Carolina beach house in the approximate amount of \$100,000 00.

C. Secured debt on BMW automobile (43 months at \$653 32) in the approximate amount of \$28,000.00

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARKCOUNTY

1997 Ohio App LEXIS 3900

August 11, 1997, DATE OF JUDGMENT ENTRY

PRIOR HISTORY [*1] CHARACTER OF PROCEEDING Civil Appeal from the Court of Common Pleas Case No 1995CV00066

DISPOSITION JUDGMENT Affirmed

CASE SUMMARY

PROCEDURAL POSTURE Appellant employer sought review of a judgment of the Stark County Court of Common Pleas (Ohio) that held that the indemnity clause in the contract between appellant and appellee contractor was void per *Ohio Rev Code Ann. § 2305 31*. An employee of appellant had been injured by the negligent building of a sump pump by appellee. Appellant sought to obtain from appellee the workers' compensation benefits appellant had paid to its injured employee.

OVERVIEW An employee of appellant employer was injured by the negligent construction of an area on the employer's property. The construction was being performed by appellee contractor at the time of the accident. The employee filed an action against appellee, and appellant intervened to recover from appellee the workers' compensation benefits that appellant had paid to the employee. The trial court granted summary judgment to appellee. Appellant sought review from the court. The court affirmed the judgment below. The court ruled that for appellant to recover damages a legal duty had to exist between appellant and appellee and that the legal duty could only exist based on contract or warranty. The court found that the warranty in the agreement between appellant and appellee was only for the finished sump pump containment area, and the employee's injury was the result of temporary grating. The court also found that the indemnification contract between appellant and appellee was void under *Ohio Rev Code Ann. § 2305 31* because it was against public policy in that it required a contractor to indemnify a property owner for damages caused by the owner's sole or concurrent negligence.

OUTCOME Ruling against appellant employer and in favor of appellee contractor, the court affirmed the trial court's summary judgment. The court ruled that the

applicable Ohio statute had been held as a matter of public policy to absolutely void an entire indemnity agreement that required a contractor to indemnify a property owner for damages caused by the property owner's sole or concurrent negligence.

LexisNexis(R) Headnotes

Civil Procedure Summary Judgment Evidence
Civil Procedure Summary Judgment Time Limitations
Evidence Documentary Evidence Writings General Overview

[HN1] Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Ohio R Civ P 56* provides in pertinent part that summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made such party being entitled to have the evidence or stipulation construed most strongly in his favor.

Civil Procedure Summary Judgment Burdens of Production & Proof General Overview

[HN2] Pursuant to *Ohio R Civ P 56*, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the moving party cannot support its claim. If the moving

party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial

Contracts Law Breach General Overview
Contracts Law Remedies Compensatory Damages General Overview

Contracts Law Third Parties General Overview
[HN3] Where a third party negligently injures an employer's employee and such injury is a direct result of a breach of contract that the third party had with employee's employer, and, as a direct result of such breach, the employer suffers damages, such damages are recoverable by the employer against the third party in an action for breach of contract

Contracts Law Third Parties General Overview
Workers' Compensation & SSDI Benefit Determinations Medical Benefits General Overview
Workers' Compensation & SSDI Third Party Actions Third Party Liability

[HN4] A self-insured employer that pays medical expenses and other related workers' compensation benefits or a state fund employer that incurs increased workers' compensation premiums because of an injury suffered by an employee may not recover damages against the third party that negligently caused the injury to the employee in the absence of any legal relationship based on contract or warranty between the employer and the third party

Workers' Compensation & SSDI Third Party Actions Third Party Liability

[HN5] In order for an employer to recover damages, a legal duty must exist by the third-party tortfeasor to the injured employee's employer

Contracts Law Contract Conditions & Provisions Indemnity
[HN6] See *Ohio Rev Code Ann* § 2305 31

Torts Damages Compensatory Damages Property Damage General Overview

Torts Negligence Defenses Exculpatory Clauses Interpretation

Torts Procedure Multiple Defendants Indemnity Contractual Indemnity

[HN7] *Ohio Rev Code Ann* § 2305 31 absolutely voids an entire indemnity agreement that requires a contractor to indemnify a property owner for damages caused by the property owner's sole or concurrent negligence

Civil Procedure Federal & State Interrelationships Choice of Law General Overview

[HN8] Where the law of the chosen state sought to be applied is concededly repugnant to, and in violation of, the public policy of Ohio, the law of Ohio will only be applied when it can be shown that Ohio has a materially greater interest than the chosen state in the determination of the particular issue

Civil Procedure Federal & State Interrelationships Choice of Law General Overview

[HN9] The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless (1) the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice or (2) application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties

COUNSEL APPEARANCES

For Plaintiff-Appellant ROBERT F LINTON, MATTHEW W OBY, KATHLEEN L KUHLMAN, RODERICK, MYERS & LINTON, 1500 One Cascade Plaza, Akron, Ohio 44308

For Defendant-Appellee JOHN A MURPHY, JR, DAY, KETTERER, RALEY, WRIGHT & RYBOLT, LTD, 800 William R. Day Building, 121 Cleveland Avenue South, Canton, Ohio 44702

JUDGES Hon W Scott Gwin, P J, Hon Sheila G Farmer, J, Hon John W Wise, J, Gwin, P J, and Farmer, J, concur

OPINIONBY John W Wise

OPINION
OPINION

Wise, J

Plaintiffs Erwin and Janet Brendle filed a complaint, in the Stark County Court of Common Pleas, alleging that Erwin Brendle was injured during his employment with Appellant J&L Specialty Products Corporation ("J&L"). The complaint further alleged that Mr Brendle's injuries were proximately caused by Appellee Hammond Construction, Inc 's ("Hammond") negligent construction of a sump pump containment area on J&L's property

In November of 1995, J&L filed a motion to intervene seeking to recover from Hammond the amount of workers' compensation benefits[*2] that J&L paid to Mr Brendle. The trial court permitted J&L's motion to

intervene J&L filed an answer, counterclaim and cross claim In January of 1996, the Brendles filed a motion to strike J&L's counterclaim for recovery of workers' compensation expenses and to bifurcate the trial The trial court granted the Brendle's motion to bifurcate

In July of 1996, Hammond filed its motion for summary judgment against J&L claiming the indemnity clause contained in the contract between J&L and Hammond was void under Ohio law The trial court subsequently granted Hammond's motion for summary judgment J&L timely filed its notice of appeal and sets forth the following assignments of error for our consideration

I THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS HAMMOND CONSTRUCTION, INC,

A THE TRIAL COURT'S PREMISE THAT THE EXPRESS WARRANTY MERELY RESTATED WARRANTIES AVAILABLE AT COMMON LAW AND THEREFORE IS NOT AN EXPRESS WARRANTY IS INCORRECT AS A MATTER OF LAW

B THE TRIAL COURT'S INTERPRETATION OF THE EXPRESS WARRANTY AS WARRANTING ONLY THE FINISHED PRODUCT AND NOT THE CONSTRUCTION SERVICES REQUIRED TO CONSTRUCT THE FINISHED PRODUCT IS INCORRECT[*3] AS A MATTER OF LAW

C THE TRIAL COURT ERRED IN HOLDING THAT J&L SPECIALTY WAIVED THE APPLICATION OF PENNSYLVANIA LAW TO THE CONTRACTUAL RELATIONSHIP BETWEEN HAMMOND CONSTRUCTION, INC AND J&L SPECIALTY PRODUCTS CORPORATION

Standard of Review

[HN1] Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court *Smuddy v The Wedding Party, Inc (1987), 30 Ohio St 3d 35, 36, 506 NE 2d 212* As such, we must refer to *Civ R. 56* which provides, in pertinent part

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * * A summary

judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such[*4] party being entitled to have the evidence or stipulation construed most strongly in his favor

[HN2] Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case The moving party must specifically point to some evidence which demonstrates the moving party cannot support its claim If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial *Vahila v Hall (1997), 77 Ohio St 3d 421, 429, 674 NE 2d 1164*, citing *Dresher v Burt (1996), 75 Ohio St 3d 280, 662 NE 2d 264*

It is based upon this standard that we review J&L's assignment of error

I

J&L argues that the trial court improperly granted summary judgment, on behalf of Hammond because the contract contained an express warranty, [*5] which did not only cover the finished product J&L also argues that Pennsylvania law should apply to the contractual relationship between Hammond and J&L

In addressing Hammond's motion for summary judgment, the trial court relied upon two cases *Ledex, Inc v Heatbath Corporation (1984), 10 Ohio St 3d 126, 461 NE 2d 1299* and *Cincinnati Bell Tel Co v Straley (1988), 40 Ohio St 3d 372, 533 NE 2d 764* In the *Ledex* case, the Ohio Supreme Court referred to the language contained in *Midvale Coal Co v Cardox Corp (1949), 152 Ohio St 437, 89 NE 2d 673*, wherein the Court stated

[HN3]

where a third party negligently injures an employer's employee and such injury is a direct result of a breach of contract which the third party had with employee's employer, and as a direct result of such breach the employer suffers damages, such damages are recoverable by the employer against the third party in an action for breach of contract *Ledex* at 128, citing *Midvale* at paragraph three of the syllabus

The Court in *Straley* again addressed this issue and held

[HN4]

[a] self-insured employer which has paid medical expenses and other related workers' compensation benefits, or a state fund employer which has incurred [*6] increased workers' compensation premiums due to an injury suffered by an employee, may not recover damages against the third party who negligently caused the injury to the employee in the absence of any legal relationship based upon contract or warranty between the employer and the third party *Straley* at paragraph one of the syllabus

Thus, based upon the above two cases, [HN5] in order for an employer to recover damages, a legal duty must exist by the third-party tortfeasor to the injured employee's employer. Id. The legal duty can only exist based upon contract or warranty. Id.

In the case sub judice, J&L argues that "any faulty workmanship on the part of Hammond breaches the express warranty provision in the contract. By improperly installing the grate over the sump pump containment area, Hammond breached its duty to J&L." J&L's brief in opposition to Hammond's motion for summary judgment, p. 5. J&L relies upon three paragraphs of the purchase order agreement to support its contention that a legal duty existed.

8 WARRANTY - In addition to any other warranties of Seller [Hammond] Seller [Hammond] expressly warrants that all goods and services covered by this [*7] Purchase Order will conform to the specifications, drawings, plans, instructions, samples or other description furnished or adopted by the buyer [J&L], if any, will be merchantable, fit and sufficient for the purpose intended, including any special requirements of Buyer which have been disclosed to Seller [Hammond], and shall be free from defects, whether latent or patent, in material and workmanship. Such warranties and the remedies provided herein shall not be deemed waived either by reason of acceptance of or payment for or use or consumption of the goods and shall be in addition to those implied by or available at law.

13 PERSONAL INJURY, DEATH AND PROPERTY DAMAGE - Seller [Hammond] expressly agrees to defend, indemnify and save harmless Buyer [J&L] * * * for any loss or damage to property or injuries to persons, including death, sustained by Buyer [J&L], its employees, or by any other party arising out of the performance of any work * * * by Seller [Hammond] * * * Seller [Hammond] further expressly agrees that it is the intent hereof that Seller [Hammond] shall assume all risk

of such loss, damage or injuries, and shall absolve and indemnify Buyer [J&L] [*8] therefrom whether or not such loss, damage, or injuries are due to the sole or joint negligence of Buyer [J&L] or its employees.

25 CHOICE OF LAW - This Purchase Order shall be governed in all respects by the laws of the Commonwealth of Pennsylvania, without giving effect to the principles of conflicts of laws thereof.

We agree with the trial court's analysis that paragraph 8 provides an express warranty only for the finished sump pump containment area. Brendle's injury was the result of temporary grating used by Hammond, during the construction of the sump pump containment area. The injury did not occur after the completion of the project, which pursuant to paragraph 8, required that the sump pump containment area be free from defects and sufficient for its intended purpose.

Finally, J&L argues the trial court erred when it determined that it waived the application of Pennsylvania law to the contractual relationship between it and Hammond. We disagree. J&L attempts to rely upon paragraph 25 in support of its argument that Pennsylvania law should apply to the indemnity provision provided for in paragraph 13. J&L seeks the application of Pennsylvania law because Ohio [*9] law, *R.C. 2305.31*, prohibits such an indemnity agreement.

This statute provides as follows:

[HN6]

A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees have hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employee, or indemnities against liability for damages arising out of bodily injury to person or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnities is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the State of Ohio for his own protection or from purchasing a construction bond.

In interpreting this statute, [*10] the Ohio Supreme Court held that [HN7] *R.C. 2305.31* absolutely voids the entire indemnity agreement that requires a contractor to

indemnify a property owner for damages caused by the property owner's sole or concurrent negligence *Kendall v US Dismantling Co (1985)*, 20 Ohio St 3d 61, 485 NE 2d 1047, paragraph one of the syllabus

In addition to finding paragraph 25 against Ohio public policy, we also find the trial court correctly determined that Ohio law is applicable under the case of *Jarvis v Ashland Oil, Inc (1985)*, 17 Ohio St 3d 189, 478 NE 2d 786, wherein the Court held that

[HN8]

where the law of the chosen state sought to be applied is concededly repugnant to and in violation of the public policy of the state, the law of Ohio will only be applied when it can be shown that this state has a materially greater interest than the chosen state in the determination of the particular issue. *Id* at paragraph two of the syllabus, citing *Schulke Radio Productions, Ltd v Midwestern Broadcasting Co (1983)*, 6 Ohio St 3d 436, 453 NE 2d 683, syllabus

The Court further stated in *Jarvis*, that [HN9] the law of the state chosen by the parties to govern their contractual rights and duties will be applied unless

[*11] 1 Either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

2 Application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in

the absence of a choice by the parties 17 Ohio St 3d at 191

Although under the first prong of *Jarvis*, Pennsylvania has a substantial relationship to the parties and transaction, we find the second prong of *Jarvis* controlling in this matter. The application of Pennsylvania law to the case sub judice is contrary to the fundamental law of Ohio as Ohio voids an indemnity agreement that requires a contractor to indemnify a property owner for damages caused by the property owner's sole or concurrent negligence.

Based upon the above, we find the trial court properly granted summary judgment on behalf of Hammond.

Appellant's assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By Wise, J

Gwin, [*12] P J, and

Farmer, J, concur

JUDGES

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, GALLIACOUNTY

1993 Ohio App LEXIS 1344

March 2, 1993, Entered

DISPOSITION [*1]

The judgment of the trial court is affirmed

CASE SUMMARY

PROCEDURAL POSTURE Appellant equipment lessor challenged a judgment of the Common Pleas Court of Gallia County (Ohio), which refused to apply the New York choice of law clause in its lease contract with appellee equipment lessee in order to award the lessor its attorney fees in its action for return of the equipment and a deficiency judgment

OVERVIEW The lessee leased from the lessor equipment made in Ohio and sent its lease payments to New York The lessee, the manufacturer, and the equipment were all located in Ohio The contract was executed in Ohio, and the equipment was used to farm Ohio land The contract contained a choice of law clause specifying that New York law would apply The contract permitted an award of attorney fees in a suit on the contract The lessee defaulted on its payments, and the lessor brought suit The witnesses, counsel, and lessee were located in Ohio rather than in New York On appeal, the court held the trial court properly refused to apply New York law to award attorney fees to the lessor The court noted that no evidence was presented to show that New York had any substantial relationship with the subject of the action or the parties The court also noted that Ohio had a materially greater interest in the contract than did New York and that the lessor chose to avail itself of the Ohio courts Further, the court noted that Ohio normally did not award attorney fees The court remarked that it appeared the lessor was improperly trying to circumvent the Ohio rule against awards of attorney fees

OUTCOME The court affirmed the trial court's judgment, which refused to apply New York law to award attorney fees to the lessor in its suit against the lessee The court awarded attorney fees on appeal to the lessee and ordered that a special mandate issue directing the trial court to carry the judgment into execution

LexisNexis(R) Headnotes

Civil Procedure Federal & State Interrelationships
Choice of Law General Overview
Contracts Law Contract Conditions & Provisions
Forum Selection Clauses

[HN1] The law of the state chosen by the parties to a contract to govern their contractual rights and duties will be applied unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties

Contracts Law Contract Conditions & Provisions
Forum Selection Clauses

[HN2] Factors to consider when determining whether a forum selection clause in a contract is reasonable include where the contract was executed, where witnesses and parties to litigation are located, and whether the selected forum is inconvenient for the parties

Commercial Law (UCC) Secured Transactions (Article 9) Perfection Methods Filings General Overview

[HN3] Where machinery is located in Ohio, is serviced in Ohio and is purchased for the purpose of farming land and raising crops in Ohio, under U C C art 9, the owner of that machinery would have to file a security statement in Ohio to protect its interest

Civil Procedure Remedies Costs & Attorney Fees
General Overview

[HN4] Ohio does not ordinarily award attorney fees, whereas New York frequently allows them to be paid An attempt to circumvent Ohio's rule against attorney fees is repugnant to Ohio law

COUNSEL For APPELLANT Richard M Lewis,
Joseph D Kirby, OCHSENBEIN, COLE & LEWIS, 295
Pearl Street, Jackson, Ohio 45640

For APPELLEE Warren F Sheets, 19 Locust Street,
P O Box 325, Gallipolis, Ohio 45631 Mark Keisling,
2665 Sawbury Road, Columbus, Ohio 43235

JUDGES GREY, HARSHA, STEPHENSON

OPINIONBY FOR THE COURT, LAWRENCE GREY

OPINION DECISION AND JUDGMENT ENTRY

GREY, J

This is an appeal from the Common Pleas Court of
Gallia County The trial court refused to apply New
York law on the question of attorney fees as specified in
a lease agreement We affirm

In November 1988, P J T Farms, Inc purchased a
Deutz-Allis Gleaner Combine and a Deutz-Allis 4 row,
30 inch corn head from North Star Farming Implements
Before delivery, P J T agreed to sell the machinery to
Telmark, located in Syracuse, New York for \$57,500
Telmark, in turn, agreed to lease the equipment to P J T
for a period of five years with semi-annual payments of \$
7,750 At the conclusion of the lease, P J T could either
return the machinery to Telmark, continue leasing the
machinery for a sixth year at a reduced rate or purchase
the machinery from Telmark[*2] for the residual value of
\$5,750

P J T made the first payment in November 1988 In
May 1989, when the second payment came due, P J T
made a late, partial payment of \$3,000 They then paid
\$1,395 for a contract modification and subsequently paid
the balance of the second payment They did not pay the
November 1989 payment or the May 1990 payment

In August 1990, P J T told Telmark to pick up the
equipment In October 1990, Telmark sent Voluntary
Repossession Statements to P J T, which were signed
and returned Instead of repossessing the equipment
promptly, Telmark waited until May 1992 and brought
suit for replevin asserting that the equipment was
wrongfully retained by P J T and was worth \$50,000

The court granted the action in replevin and Telmark
had North Star pick up the equipment, refurbish it and
prepare it for sale North Star added some of their own
parts to facilitate the sale The equipment was sold
privately rather than by public sale and brought \$35,000
Of that amount, \$5,000 was retained by North Star to
offset repairs and selling costs Telmark's suit asked for

\$74,040 plus attorney fees and costs In the alternative,
Telmark asked for return[*3] of the equipment, attorney
fees and costs and \$24,040 as a deficiency

The court granted a deficiency judgment of \$24,040
but refused to apply New York law as specified in the
lease contract which would permit Telmark to collect
attorney fees Telmark appeals, assigning the following
errors

FIRST ASSIGNMENT OF ERROR

"The trial court erred by not applying New York law as
agreed upon by the parties to the lease agreement "

SECOND ASSIGNMENT OF ERROR

"The trial court erred by applying Ohio Law and by not
awarding attorney fees pursuant to the lease agreement "

Telmark argues that the court was obligated to use
New York law as specified in the "choice of laws" clause
in the lease contract Since both assignments of error
advance a similar proposition, we address them together

Both parties cite *Schulke Radio Productions, Ltd v
Midwestern Broadcasting Co (1983)*, 6 Ohio St 3d 436,
453 NE 2d 683, to support their positions The Schulke
court held

[HN1] "The law of the state chosen by the parties to
govern their contractual rights and duties will be applied
unless either the chosen state has no substantial
relationship to the parties or the transaction[*4] and there
is no other reasonable basis for the parties' choice, or
application of the law of the chosen state would be
contrary to the fundamental policy of a state having a
greater material interest in the issue than the chosen state
and such state would be the state of the applicable law in
the absence of a choice by the parties "

The first requirement is that the chosen state must have
a substantial relationship to the parties or the transaction,
or that there be some reasonable basis for the parties'
choice The second requirement is that the application of
the law of the chosen state must not violate the
fundamental policy of the state which (1) has a greater
material interest in the determination of the issue, and (2)
is the state whose law would be applied in the absence of
a choice by the parties In other words, the application of
New York law here must not violate the public policy of
Ohio, but only if Ohio has a materially greater interest
than New York and only if Ohio law would have
governed the agreement if the parties had not specified
otherwise *Sekeres v Arbaugh (1987)*, 31 Ohio St 3d 24,
508 NE 2d 941, *Jarvis v Ashland Oil, Inc (1985)*, 17
Ohio St 3d[*5] 189, 478 NE 2d 786

[HN2] Factors to consider when determining whether the forum selection is reasonable include where the contract was executed, where witnesses and parties to litigation are located, and whether the selected forum is inconvenient for the parties. *Barrett v Picker Internatl, Inc* (1990), 68 Ohio App 3d 820, 589 N E 2d 1372

The record shows that both P J T and North Star are located in Ohio [HN3] The machinery, which is the subject of the suit, was located in Ohio, was serviced in Ohio and was never inspected by any of the New York parties. It was purchased for the purpose of farming land and raising crops in Ohio. Under Article 9 of the Uniform Commercial Code (U C C), Telmark would have to file a security statement in Ohio to protect its interest. We also note Telmark chose to avail itself of the Ohio judicial system. All counsel is located in Ohio. P J T's only contact with New York was for payment purposes. Ohio's relationship to the parties and the transaction is substantially greater than that of New York.

[HN4] Ohio does not ordinarily award attorney fees, whereas New York frequently allows them to be paid. There is nothing in the record to show that [*6]the selection of New York under the "choice of laws" clause was for any purpose other than to assure collection of attorney fees. Under these facts we can only conclude Telmark is attempting to circumvent Ohio's rule against attorney fees. This, in and of itself, is repugnant to Ohio law.

The record shows the contract was executed in Ohio, the witnesses and parties are located in Ohio and Ohio is a convenient forum. There is nothing to show that New York has a substantial relationship to the parties or the subject of the suit. There is no apparent basis for the parties' choice of New York law except that the plaintiff will collect attorney fees, which is contrary to Ohio law. *Schulke, supra*

Telmark's assignments of error are not well-taken and are overruled. The judgment of the trial court is affirmed.

JUDGMENT ENTRY

It is ordered that the judgment of the Gallia County Court of Common Pleas is affirmed. Appellee shall recover of appellant 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 Gallia County Court of Common Pleas to carry this judgment into[*7] execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

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

HARSHA, P J CONCURS IN JUDGMENT ONLY, with attached opinion, STEPHENSON, J DISSENTS, with attached opinion.

FOR THE COURT

By Lawrence Grey, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

CONCURBY HARHSA

CONCUR Harsha, J, Concurring

I concur in judgment only and do so largely on the rationale set forth in Justice Brown's dissenting opinion in *Sekeres, supra*. Implicit in my decision is the conclusion that Ohio does have a materially greater interest than New York in the particular issues of this case, i e, replevin of personal property located in Ohio and held by an Ohio resident, application of the New York law on attorney's fees violates fundamental public policy of this state.

DISSENTBY STEPHENSON

DISSENT Stephenson, J, Dissenting

I respectfully dissent. I do not believe it can[*8] be said in the case sub judice that Ohio has a materially greater interest in the determination of the issue.

While it is true that the agreement was signed by P J T in Ohio and that P J T is an Ohio corporation, the act which ultimately created the contract took place in New York when Telmark approved it. Telmark's state of incorporation and principal place of business is New York. While the machinery is located in and used in Ohio, P J T sent payments to Telmark at its New York office.

I would also note that North Star is not a party to the contract, see *Jarvis, supra*, at 191-192, and that Barrett dealt with a forum selection clause, rather than a choice of law clause

Accordingly, I would sustain appellant's assignments of error and remand this cause to the trial court