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

ELLEN TURNER	:	**Case No. DR05000131**
Plaintiff	:	**File No.**
-vs-	:	**Judge Panioto** **Magistrate Theile**
JON ENTINE	:	**MEMORANDUM OF PLAINTIFF, ELLEN TURNER, REGARDING**
Defendant	:	**WHICH STATE LAW TO APPLY – CALIFORNIA OR OHIO – FOR**
	:	**DETERMINATION OF VALIDITY AND ENFORCEMENT OF**
	:	**PREMARITAL AGREEMENT**

FILED 2006 JUN 15 P 3:30
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY, OH

PROCEDURAL POSTURE

Suit was filed in this matter on January 21, 2005 A 75N Order was issued March 9, 2005 and, subsequent thereto, a discovery deadline of July 29, 2005 was established. The issue of parenting was resolved through a Shared Parenting Plan and Order entered with this Court on December 6, 2005 Property hearings were scheduled for February 7, 8 and 10, 2006 Mark Patt, an attorney from Los Angeles, California, Ellen Turner's parents and Ellen Turner testified on direct Her cross- examination started on February 10,2006 and was not concluded This matter was then continued to June 14, 15, and 16 for completion However, on May 26, 2006, Jon Entine filed a Motion to Bifurcate this matter and continue the property hearings This court granted that motion on June 2, 2006 and after two phone conferences with counsel and a meeting with counsel on June 14, 2006, the following has been established Both parties shall submit Memoranda to this court on which state law should be applied to determine the validity and

enforcement of the premarital agreement, California or Ohio, on or before June 15, 2006 This Court will render its decision and then hearings will be held on September 13, 15, 19, 21, and October 4, 2006 to determine the validity and enforcement of the premarital agreement. Discovery is stayed pending further order of the Court.

FACTS

Ellen Turner and Jon Entine were married on May 15, 1994 in New York They had previously signed and entered into a pre-marital agreement on May 11, 1994 Each party had an attorney Jon Entine was represented by Joan S Bauman and Ellen Turner was represented by Henry Friedman The attorneys signed certifications and also signed the premarital agreement Said agreement and attorneys certification has been marked as Plaintiff's Exhibit 1

In Paragraph G of the recitals of the premarital agreement, "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 " Paragraph 2 acknowledges that each party was represented by separate and independent counsel Paragraph 3 further states that the parties were "aware of and [understood] the contents, legal effect and consequences" of the agreement and entered into it "voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind." Paragraph 4 sets forth the Property and Financial Disclosure which references attached Exhibits A and B setting forth each party's assets and debts Paragraph 5 states the Rights Incident to Parties Non-Marital Relationship Within the Paragraph it states The parties acknowledge that they have each been advised by their respective counsel on California law respecting non-marital relationship, and they agree that neither has any rights and /or obligations arising out of their non-marital relationship with each other "

Separate Property Interests in Premarital and Post Martial Assets and Acquisitions is set forth in Paragraph 6 Paragraphs 7 and 8 contractually set out the Community Efforts in Managing Each Party's and the Other Party's Separate Property Interests Paragraphs 9 and 10 address Separate Property Earnings and Interests Property Transfers between Parties is addressed in Paragraph 11 Paragraph 12 is entitled Management and Control of Separate Property Interests Debt Obligations are stated in Paragraphs 13 and 14. Support Liability is set forth in Paragraph 15. The impact of California law is addressed and indicates that the Laws of the State of California will determine and govern the obligations of the parties as to support The Parties and Persons Bound is the subject of Paragraph 16 As defined under California law, Paragraph 17 discusses Voluntary Arms' Length Negotiations. Execution Formalities is set forth in Paragraph 18. Paragraph 19 addresses Applicable Law. It states in its entirety

"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."

Paragraphs 20, 21 and 22 address Entire Agreement, Modification, Revocation and Invalidity and Severability respectively

The premarital agreement was executed in California and the Attorney's Certification signed by each attorney indicates that "this attorney has advised and consulted with [Ellen Turner/Jon Entine] in connection with [his/her] property rights and has fully explained to [Ellen Turner/Jon Entine] the legal effect of the foregoing Agreement and the effect it has upon her rights otherwise obtaining as a matter of law, that said party after being fully advised by the undersigned, acknowledges to the undersigned that [Ellen Turner/Jon Entine] understood the legal effect of the foregoing Agreement and executed the same freely and voluntarily."

The parties understood that the premarital agreement that they signed was to be governed and controlled by California law The laws of California were explained to the parties and the effects of those laws define their rights under the premarital agreement signed by the parties This is the law that must govern the determination of the validity and enforcement of this premarital agreement

LEGAL ARGUMENT

The law of contracts applies to the interpretation and ruling this court will make on the premarital agreement executed by Ellen Turner and Jon Entine "An antenuptial agreement is a contract entered into in contemplation of a couple's future marriage whereby the property rights and economic interest of the parties are determined and set forth " In re Taris, 2005-Ohio-1516 (10th District Ct of Appeals) at 2, citing Rowland v Rowland (1991), 74 Ohio App 3d 415, 419, In re Taris continues with the following

> The Ohio Supreme Court has found that antenuptial agreements are contracts and that the law of contracts will generally apply to their application and interpretation See Fletcher, at 467. This is a matter of law to be determined by the courts. See Latina v Woodpath Development Co (1991), 57 Ohio St 3d 212,214. .. A court should interpret a contract to carry out the intent of the parties as manifested by the language of the contract Skivolocki v East Ohio Gas Co (1974), 38 Ohio St 2d 244, paragraph one of the syllabus When the terms of the contract are clear and unambiguous, courts may not create a new contract by finding intent not expressed by the terms. Alexander v Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241,245-246. In analyzing an unambiguous contract, words must be given their plain and ordinary meaning Forstner v Forstner (1990), 68 Ohio App 3d 367, 372. In Re Taris, 2005-Ohio –1516(11110th District Ct of App) at 3.

The Seventh District Court of Appeals in Beverly v. Parilla explained further regarding the application of the law of contracts to a premarital agreement

> When the language of the written instrument is clear and unambiguous, the interpretation of the instrument is a matter of law, and the court must determine the intent of the parties through only the language employed Davis V Loopco Indus Inc (1993), 66 Ohio St 3d 64, 66 (if a contract is clear and unambiguous,

then its interpretation is a matter if law and there is no issue of fact to be determined). In such case, the court cannot resort to extrinsic or parol evidence In other words, when a written instrument is unambiguous, intentions not expressed by writing in the contract are deemed to have no existence and cannot be shown by parol evidence TRINOVA Corp v Pilkington Bros , P L C (1994), 70 Ohio St 3d 271, 275. Beverly V. Parilla, 2006-Ohio-1286 at 4 See in accord, Avent v. Avent, 2006-Ohio-1861 (6th District Ct. of Appeals).

In Reams v Reams, 2005-Ohio –5264 (6th District Court of Appeals), the court again recognized the principle set out in Fletcher v Fletcher (1993), 68 Ohio St 3d 464,467, that a valid antenuptial agreement is interpreted under the rules of contract law The court went on to state, "The purpose of contract construction is to discover and effectuate the intent of the parties Musca Props., L L C v Delallo Fine Italian Foods, Inc , 8th Dist No. 84857, 2005-Ohio–1193, at Par 15 The intent of the parties is presumed to reside in the language they chose to use in their agreement 'Id " at 3. It is clear from this case and those cited above that the fundamentals of contract law apply to the interpretation of an antenuptial/premarital agreement and must be applied to the case at bar

Which state law to apply to the interpretation is set forth in the Premarital agreement itself in Paragraph 19. The parties provided in their antenuptial /premarital agreement that California law would control The agreement was executed in that state even though they were to be married in New York. It was the law that was explained to them by their respective attorneys and in fact, by their own agreement would control support per Paragraph 15 Neither party knew, anticipated or projected, that they would live in Cincinnati, Ohio in 2005 and be filing for divorce. That is purely happenstance They knew the consequences and legal effect of the forum they selected when they signed the premarital agreement before their wedding and that forum was California

Section 187 of the Restatement of the Law 2d, Conflict of Laws (1971) states in part, "The parties choice of law is binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law " The Restatement has been adopted by many opinions of courts of this state See for example Foster v. Motorists Ins Co , 2004-Ohio-1049 (3d District Ct of Appeals)

While the law of Ohio may govern the procedural matter, the law of California in this case will determine the property matters based on the contractual agreement of the parties

> The Supreme Court of Ohio has held 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 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 Schulke Radio Productions Ltd v Midwestern Broadcasting Co (1983), 6 Ohio St 3d 436, syllabus . Hanlin-Rainaldi Construction Corp v Jeepers, Inc , 2004-Ohio – 6250 (10th District Ct of App) at 3

The court in Hanlin-Rainaldi Construction Corp clearly recognizes the basic principle that the parties can, by contract, select a forum state to govern their contractual rights It violates no fundamental policy to follow California law and further, Ohio has no greater material interest than California in this issue. Ellen Turner and Jon Entine contractually agreed that California would be the state for the interpretation of their premarital agreement and their contractual choice must be recognized by this court

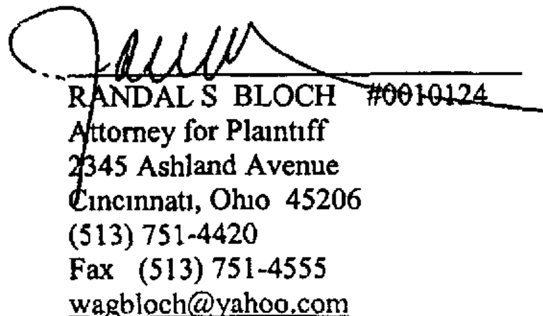
Ellen Turner and Jon Entine contracted in California for their premarital agreement They were represented by counsel who explained the law to them Ellen Turner and Jon Entine knew the law to which they were subjecting themselves at that time and for the future Who knew they would ever be in Ohio? There are references in the contract itself that California law

was controllıng vanous terms and condıtıons of theır contract Specıfically Paragraph 19 states Calıfornıa state law would be the applıcable law for ınterpretatıon ın the future Even though they were gettıng marned ın New York, they selected the law to apply for the ınterpretatıon of theır contract They legally could select a forum to govern theır contract and they chose Calıfornıa, the state where they entered ınto theır contract and where they were then lıvıng. It ıs the law that must govern now. They chose Calıfornıa law to apply and thıs Court must by case law and the Restatement of Laws honor theır premarıtal contract and apply Calıfornıa law to the valıdıty and enforcement of theır premarıtal/antenuptıal agreement

CONCLUSION

Wherefore, for the above-noted reason, Ėllen Turner respectfully requests that thıs Court apply Calıfornıa law for the determınatıon of the valıdıty and enforcement of the premarıtal agreement

Respectfully submıtted,



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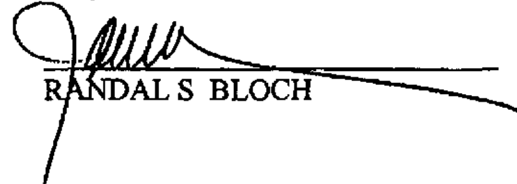
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been served by ordinary mail upon Gloria S Haffer and Robert J Meyers, Attorneys for Defendant, 105 E. Fourth Street, Suite 300, Cincinnati, Ohio 45202, this 15th day of June, 2006



RANDAL S BLOCH

PLAINTIFF'S
EXHIBIT
#1

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 <u>Community Efforts in Managing Each Party's Own Separate Property Interests</u>:

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 <u>Community Efforts in Managing the Other Party's Separate Property Interests</u>:

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

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. <u>Voluntary Arms' Length Negotiations</u>:

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 <u>Execution Formalities</u>:

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 <u>Applicable Law</u>:

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.

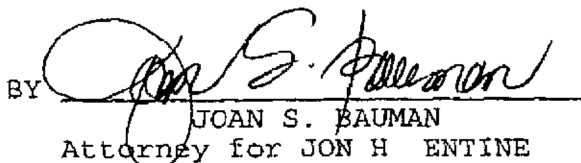
JON H. ENTINE

Dated: 5/11/94

ELLEN TURNER

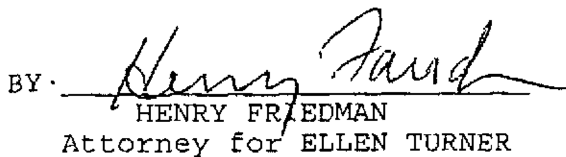
Dated: 5/11/94

PHILLIPS & BAUMAN

BY 
JOAN S. BAUMAN
Attorney for JON H ENTINE

Dated. 5/3/94

LAW OFFICES OF HENRY FRIEDMAN

BY: 
HENRY FRIEDMAN
Attorney for ELLEN TURNER

Dated 5/4/94

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

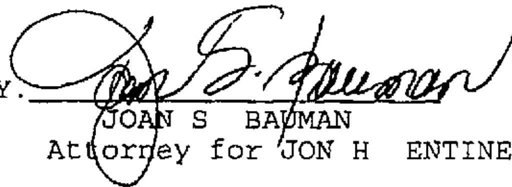
WITNESS my hand and official seal

____ (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

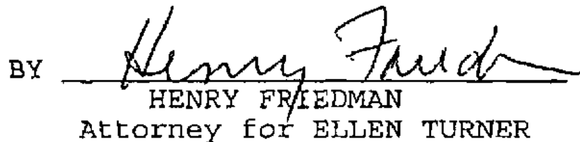
BY 
HENRY FRIEDMAN
Attorney for ELLEN TURNER

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 Account No. 192-38-8388

B ABC Stock 401K, pre-tax mutual fund, with an estimated balance of $7,818.99, being Account No. 192-38-8388

C IRA-Vanguard Gold and Precious Metals Portfolio, pre-tax IRA, mutual fund, with an estimated balance of $23,500.00, being Account No. 9881667197.

D. IRA-Vanguard Health Care Portfolio, with an estimated balance of $11,780.00, being Account No 9881667197.

E. IRA-Vanguard Energy Portfolio, IRA rollover, mutual fund, with an estimated balance of $39,780 00, being Account No 9881607197.

F. Keogh-Vanguard Trustees Equity Fund/International Portfolio, money purchase, mutual fund, with an estimated balance of $2,211.90, being Account No. 9876263470.

G Keogh-Vanguard Explorer Fund, profit sharing, mutual fund, with an estimated balance of $5,299 00, being Account No 9876263425.

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

2005-Ohio-1516; In re Taris; 05-LW-1332 (10th)

2005-Ohio-1516

[Cite as In re Taris, 2005-Ohio-1516]

In the Matter of the Estate of Joseph E Taris, (Blanche Cotton, Appellant)

No 04AP-1264

10th District Court of Appeals of Ohio, Franklin County
Decided on March 31, 2005

(P C No 495175)

Betzel & Kauffman, LPA, and David E. Kauffman, for appellee

Carlile Patchen & Murphy, LLP, H Ritchey Hollenbaugh, David M Karr, and Stephanie M. Rawlings, for appellant

APPEAL from the Franklin County Probate Court

OPINION

BROWN, P J

{¶1} Blanche Cotton-Taris, appellant, appeals from a judgment of the Franklin County Probate Court, in which the court granted the motion filed by Edward L Taris, executor of the estate of Joseph E. Taris ("Taris"), appellee, to establish the validity of an antenuptial agreement executed by appellant and Taris and to set aside appellant's spousal election to take against the will

{¶2} On January 14, 2000, Taris and appellant executed an antenuptial agreement. In executing the agreement, appellant was represented by counsel, who drafted the agreement, and Taris was not On January 21, 2000, Taris and appellant married On March 10, 2003, Taris died testate and was survived by appellant and his four children Taris's will was submitted to probate on May 8, 2003, and his son was appointed as executor for Taris's estate

{¶3} On August 27, 2003, appellant filed an election of surviving spouse to take against the will, and, on October 8, 2003, she filed exceptions to the inventory. On November 17, 2003, the executor filed a motion to quash appellant's request for spousal allowance and a motion to establish the validity of antenuptial agreement and set aside appellant's spousal election On January 14, 2004, a hearing was conducted before a magistrate on the executor's motion to establish the validity of the antenuptial agreement. On February 23, 2004, the magistrate issued a decision, in which he found that the antenuptial agreement was valid and the agreement contained "strong and unmistakable language," pursuant to *Troha v Sneller* (1959), 169 Ohio St 397, to deprive appellant of her statutory spousal rights Therefore, the magistrate set aside appellant's election to take against the will, and the exceptions to the inventory were dismissed

{¶4} Appellant filed objections to the magistrate's decision on March 8, 2004. On April 8, 2004, the court issued an entry, in which it overruled appellant's objections and adopted the magistrate's decision, finding there existed strong and unmistakable language in the agreement to set aside appellant's statutory spousal rights The court filed another entry journalizing the April 8, 2004 entry on November 15, 2004 Appellant appeals the judgment of the trial court, asserting the following assignments of error

I THE TRIAL COURT ERRED IN PREVENTING THE SURVIVING SPOUSE FROM ELECTING TO

TAKE AGAINST THE WILL AND TO RECEIVE A FAMILY ALLOWANCE, WHICH CONFLICTED WITH BOTH THE EXPRESS TERMS OF THE ANTENUPTIAL AGREEMENT AND THE WEIGHT OF AUTHORITY

II THE TRIAL COURT ERRED BY LOOKING AT THE "BIG PICTURE" AND FACTORS OUTSIDE OF THE FOUR CORNERS OF THE ANTENUPTIAL AGREEMENT IN ORDER TO ATTEMPT TO ASCERTAIN THE INTENT OF THE PARTIES

III THE TRIAL COURT ERRED BY FINDING THAT STRONG AND UNMISTAKABLE LANGUAGE IS CONTAINED IN THE ANTENUPTIAL AGREEMENT DEPRIVING APPELLANT OF HER SPOUSAL RIGHTS, WHEN NO SUCH LANGUAGE EXISTS IN THE ANTENUPTIAL AGREEMENT

IV THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT THE ANTENUPTIAL AGREEMENT PREVENTS THE SURVIVING SPOUSE FROM EXERCISING HER SPOUSAL RIGHTS.

{¶5} We first note that appellant lists the above four assignments of error but fails to present a separate argument containing her contentions with respect to each assignment of error, in contravention of App R 16(A)(7) This court may disregard an assignment of error presented for review if the party raising it fails to argue the assignment separately in the brief See App R 12(A)(2). Further, appellant includes additional contentions in the argument section of her brief that do not clearly correspond to the contentions in any of the listed assignments of error Pursuant to App R 12(A)(1)(b), this court is required to determine the appeal based upon the assignments of error set forth in the briefs under App R 16 This is procedurally necessary, as we are permitted to sustain or overrule only assignments of error and not mere arguments

{¶6} Nevertheless, despite these briefing inadequacies, this court will address the merits of the case However, consistent with the mandates of App R 12(A)(1)(b), we will determine the merits of appellant's appeal based upon the assignments of error as listed In doing so, we will attempt to match the contentions contained in the argument section of the brief with the listed assignments of error Further, we will not address any additional contentions in the argument section of the brief that do not plainly fall under one of the listed assignments of error

{¶7} Appellant's first and fourth assignments of error are basically the same and merely present general arguments that are dependent upon the more specific arguments in the other assignments of error. Appellant argues in her first assignment of error that the trial court erred in preventing her from electing to take against the will and to receive a family allowance, which conflicted with both the express terms of the antenuptial agreement and the weight of authority Appellant argues in her fourth assignment of error that the trial court committed reversible error when it held that the antenuptial agreement prevents the surviving spouse from exercising her spousal rights As these assignments of error cannot be resolved until the other assignments of error are addressed, we must first address appellant's second and third assignments of error

{¶8} We will address appellant's second and third assignments of error together, as they involve overlapping issues Appellant argues in her second assignment of error that the trial court erred by looking at the "big picture" and factors outside of the four corners of the antenuptial agreement in attempting to ascertain the intent of the parties Appellant argues in her third assignment of error that the trial court erred by finding that "strong and unmistakable" language is contained in the antenuptial agreement depriving appellant of her spousal rights, when no such language exists in the agreement

{¶9} An antenuptial agreement is a contract entered into in contemplation of a couple's future marriage whereby the property rights and economic interests of the parties are determined and set forth. *Rowland v Rowland* (1991), 74 Ohio App 3d 415, 419. In Ohio, "public policy allows the enforcement of prenuptial agreements " *Fletcher v Fletcher* (1994), 68 Ohio St 3d 464, 466. Further, under Ohio law, parties to a prenuptial agreement are permitted to cut one another off

entirely from any participation in the other's estate *Hook v Hook* (1982), 69 Ohio St 2d 234, 235, *Daniels v Daniels*, Franklin App No 01AP-1146, 2002-Ohio-2767 Thus, it is well-settled law in Ohio that antenuptial agreements are enforceable so long as certain conditions are met See *Fletcher*, at 466, *Kelm v Kelm* (1993), 68 Ohio St 3d 26, 28 In the present case, we need not address whether such conditions were met because both parties agree that the antenuptial agreement is valid and binding on them Rather, this court must construe and apply the terms of that agreement to the present facts and circumstances

{¶10} The Ohio Supreme Court has found that antenuptial agreements are contracts and that the law of contracts will generally apply to their application and interpretation See *Fletcher*, at 467 This is a matter of law to be determined by the courts See *Latina v Woodpath Development Co* (1991), 57 Ohio St 3d 212, 214 The trial court's resolution of a legal issue is reviewed de novo on appeal, without any deference afforded to the result that was reached below. See *Graham v Drydock Coal Co* (1996), 76 Ohio St 3d 311, 313

{¶11} A court should interpret a contract to carry out the intent of the parties as manifested by the language of the contract *Skivolocki v East Ohio Gas Co* (1974), 38 Ohio St 2d 244, paragraph one of the syllabus When the terms of the contract are clear and unambiguous, courts may not create a new contract by finding intent not expressed by the terms *Alexander v Buckeye Pipe Line Co* (1978), 53 Ohio St 2d 241, 245-246 In analyzing an unambiguous contract, words must be given their plain and ordinary meaning *Forstner v Forstner* (1990), 68 Ohio App 3d 367, 372 With these principles in mind, we turn to the construction and application of the antenuptial agreement at issue in the present case

{¶12} Appellant contends in this assignment of error that the trial court erred in finding that the antenuptial agreement contained "strong and unmistakable" language, pursuant to *Troha*, supra, to deprive her of her statutory spousal rights In *Troha*, the Ohio Supreme Court found that "strong and unmistakable language in a prenuptial agreement is necessary to deprive a surviving spouse, and particularly a widow, of the special benefits conferred by statute " Id at 402 The "strong and unmistakable" language that the court primarily relied upon in *Troha* was "the said second party * * * covenants and agrees to relinquish * * * any and all rights or claims in or to the estate of the said first party which may arise or accrue by virtue of said marriage " Id. at 399-400. The court found that this phrase was all inclusive and was intended to release every right accruing to or conferred upon the surviving wife by law in and to the property of her deceased husband upon his death after the marriage was consummated Id at 402. The court concluded that the agreement was designed and intended to deprive the surviving spouse of the special benefits conferred by statute, and that it was the plain intention of the parties to accomplish that object. Id.

{¶13} In the present case, both parties agree that the sole issue is whether Taris's will contained the requisite "strong and unmistakable" language pursuant to *Troha* In finding that the language contained in the agreement was strong and unmistakable, the magistrate found.

> A thorough review of the entire agreement reveals that the parties to this Antenuptial Agreement clearly intended to address all of their respective marital obligations to each other during their lifetimes and to pass their individual assets to their respective heirs at their deaths They each intended to give up their spousal right to receive property from the deceased spouse's estate. Any other interpretation of this document is in opposition to what the parties intended and what the whole of the Agreement reveals. Sections (1), (3) (A), (3) (C), (8), (11), and (15) * * * all support this conclusion

{¶14} The trial court agreed that there existed strong and unmistakable language in the antenuptial agreement, citing portions of Sections (1), (3)(A), and (3)(C).

{¶15} Section (1) of the agreement, entitled "Background," provides, in pertinent part: * * * Each owns individually various assets and property, real and personal, tangible and intangible, and the parties intend that each shall retain any such property free and clear of any claim by the other, as though each were remaining single, subject only to the provisions set forth herein

{¶16} Subsections (A) and (C) of Section (3) of the agreement, entitled "Recitals," provide

> (A) The parties anticipate that each will retain sole and exclusive control, enjoyment, and use of all property (of any nature whatsoever) which they each brought to the marriage, as identified in Exhibits A and B They further anticipate that they will share the benefits that flow from their respective investments in any manner they may agree, so long as they remain married to each other and continue to reside together Should either party decide not to remain in the marriage, the individual parties would have sole and exclusive control and possession of all individual assets brought individually to the marriage They further anticipate that they both will be free to dispose of their own property in any manner they so choose, either during their lifetime by way of sale or gift, or upon death * * * (C) The parties agree that Ms Cotton will assert no claim of interest of any kind or type in the real property belonging to Mr Taris, and more fully described in Exhibit A, attached hereto and incorporated herein Ms. Cotton will execute a Quit Claim Deed and Release of Dower immediately after entering into the state of matrimony with Mr Taris In the event of Mr Taris's death, Ms Cotton would vacate the premises of the property described in Exhibit A within twelve (12) months of Mr Taris's demise During that twelve month period, Ms Cotton would pay any utilities, taxes, or other expenses arising from her occupancy of the premises This twelve month provision shall apply not only to Mr Taris's presently owned real estate property, but to any real estate property he may acquire individually in the future However, should the parties jointly purchase and own real estate in the future, this provision would not apply to such jointly owned real estate In the event that the parties jointly purchase and own real estate in the future, the party surviving the other will have full possession, use, and enjoyment of such real estate for a) so long as he or she may live, or b) so long as he or she may desire to continue residing therein For such jointly held real estate, the parties may bequeath their respective interest as they so desire

{¶17} Section (8) of the agreement, entitled "Additional instruments," provides

> Mr Taris and Ms Cotton shall, from time to time, upon the other's request, execute, acknowledge, and deliver any and all instruments of release or conveyance which may be necessary or desirable to enable the other to dispose of any and all property belonging to such other, whether now owned or subsequently acquired, free and clear of any right of dower or other spousal rights, and such further instruments as may reasonably be requested by the other Upon the death of either party, the survivor shall furnish to decedent's personal representative, and to his/her heirs or assigns, such instruments as may be requested in order to evidence and carry into effect the releases and waivers provided for herein

{¶18} Section (11) of the agreement, entitled "Partial invalidity; survival," provides

> This Agreement is effective during the lifetime of each of the parties and shall survive the death of each In the event that any portion hereof is found to be contrary to law by a court of competent jurisdiction, then the other provisions hereof shall nevertheless remain in full force and effect and, as to the portions deemed contrary to law, such language and provisions shall be substituted therefor as shall effectuate the parties' intentions as expressed herein

{¶19} Section (15) of the agreement, entitled "Binding effect," provides.

> This Agreement shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators and successors of the parties

{¶20} Appellant claims that the agreement, including the above-quoted portions, does not contain the same or similar "all inclusive" language found to be strong and unmistakable in *Troha* As explained above, the "strong and unmistakable" language that the court primarily relied upon in *Troha* was "the said second party * * * covenants and agrees to relinquish * * * any and all rights or claims in or to the estate of the said first party which may arise or accrue by virtue of said

marriage " Id at 399-400 Although there is no language in the present agreement that is identical to the language in *Troha*, we believe it is sufficiently "all inclusive" so as to be strong and unmistakable

{¶21} As for Section (1), quoted above, the initial language "the parties intend that each shall retain any such property free and clear of any claim by the other, as though each were remaining single" is all inclusive Although it does not delineate specific time periods or property, it is its generality that makes it all encompassing to include the parties' desire to retain separately all property, free and clear of any claims by the other, either in their lives or upon their deaths However, the closing phrase "subject only to the provisions set forth herein" removes the all-encompassing tone of the previous section and essentially renders the degree of inclusiveness contingent upon the rest of agreement Therefore, the actual comprehensiveness of Section (1) cannot be determined until the remainder of the provisions are examined

{¶22} Section (3) provides the strongest all-inclusive passages Subsection (A) provides that "[t]he parties anticipate that each will retain sole and exclusive control, enjoyment, and use of all property (of any nature whatsoever) which they each brought to the marriage " Subsection (A) also provides that the parties also anticipate "that they both will be free to dispose of their own property in any manner they so choose, either during their lifetime by way of sale or gift, or upon death " These two passages clearly grant unlimited control over the parties' individual property to each party under any and all circumstances Further, despite appellant's claim that Section (1) and (3) merely provide for what shall occur during the lives of the parties, the exclusivity of control accorded to the parties in Sections (1) and (3)(A) is implicitly of unlimited temporal duration and that accorded in Section (3)(A) explicitly extends to "upon death " Therefore, we find Section (3) includes all-inclusive language that is strong and unmistakable pursuant to *Troha*

{¶23} With regard to Section (8), the pertinent parts of that section state that the parties must execute any instruments of release or conveyance to allow the other party to dispose of any individual property "free and clear of any right of dower or other spousal rights," and also that "[u]pon the death of either party, the survivor shall furnish to decedent's personal representative * * * such instruments as may be requested in order to evidence and carry into effect the releases and waivers provided for herein " Reading these two parts together, it is evident that the agreement permitted the parties to dispose of any property free and clear of any spousal rights of the other at any time, including upon their deaths We believe this section also contains strong and unmistakable language evincing that the agreement was designed and intended to deprive the surviving spouse of the special benefits conferred by statute

{¶24} Appellant claims the language in Section (8) of the agreement is a boilerplate provision and not intended to be the substance of the agreement. However, appellant fails to explain why this section should be considered "boilerplate," outside of asserting that it is standard language in these types of documents Merely because certain provisions are typically included in contracts of a certain nature alone does not render such provisions insignificant boilerplate. Appellant cites no authority that this particular provision should be considered mere boilerplate, apart from pointing out that it is identical to a form provided in a popular legal treatise However, a review of the record reveals that appellant has attempted to introduce evidence of this treatise for the first time on appeal by attaching it to her appellate brief This court cannot consider exhibits or other matters attached for the first time to an appellate brief that were not properly certified as part of the trial court's original record See *Isbell v Kaiser Found Health Plan* (1993), 85 Ohio App 3d 313, 318, *In re Strong*, Franklin App No. 01AP-1418, 2002-Ohio-2247 Nevertheless, that the drafter of the document tracked a sample form from a treatise to draft the provision does not necessarily render it a boilerplate provision of little substantive import With no evidence to the contrary, we can only find that this provision was deliberately included in the agreement, and the parties meant what they said therein.

{¶25} As for Sections (11) and (15), they are general provisions that indicate the agreement remains effective after the deaths of the parties and is binding upon the parties' heirs and executors Although the language in these provisions is conclusive as to how the deaths of the parties affect the agreement, we do not believe they provide strong and unmistakable language to support or refute whether the agreement was designed to preclude appellant from exercising her statutory spousal rights upon the death of Taris.

{¶26} Accordingly, after reviewing the above sections, we believe Sections (3) and (8) provide the requisite strong and

unmistakable language necessary to deprive appellant of the special benefits conferred by statute, pursuant to *Troha*.

{¶27} However, appellant contends that the second sentence in Section (4) of the agreement demonstrates that she did not relinquish her right to exercise her statutory spousal right to election upon the death of Taris. Appellant asserts that the other language in the agreement cannot be "strong and unmistakable" because of this second sentence of Section (4) Section (4), entitled "Division of estates of the parties," provides

> The parties may each make such wills and bequests as they each determine Neither party shall surrender any rights as they might exist at the time of the death of the other party

{¶28} In addressing Section (4), the magistrate found

> * * * It is only the second sentence in Section (4), which appears to permit Mrs Cotton-Taris to retain her spousal rights in her husband's estate But [t]his sentence is in direct opposition to the sentence that precedes it as well as the rest of the Agreement * * *
>
> * * *
>
> The first sentence of Section (4) of the agreement is consistent with all the remaining Sections of the agreement It is only the second sentence that makes this Section of the agreement ambiguous.
>
> It was Mrs Cotton-Taris who had the advice of her own counsel before she executed this document She chose Beverly Farlow to advise her with regards to this document No evidence was presented that would lead to a finding that she did not understand what she was giving up by signing this agreement In fact her counsel acknowledged that she had advised Mrs Cotton-Taris concerning the contents of the Antenuptial Agreement The language contained therein is "strong and unmistakable" as required by the Supreme Court in *Troha* Therefore this document must be construed in the favor of Mr Taris and his estate given these facts and circumstances Therefore the only possible conclusion upon review of this matter is that Blanche Cotton-Taris gave up her spousal rights in the Antenuptial Agreement * * *

{¶29} In adopting the decision of the magistrate, the trial court held, with respect to Section (4):

> * * * This is the phrase creating the issue in this case It is not clear from the language in Section (4) itself as to the intent of the parties to the Agreement, therefore the Court must look at the document as a whole to make that determination. Ms Cotton interprets Section (4) to mean that she is entitled to exercise her right to take the spousal election However, the executor of the estate of Mr Taris, while admitting that the wording of Section (4) is confusing, interprets the intent of Section (4) to be that each party to the Agreement may execute a will and leave his/her property to whoever they wish, including the surviving spouse, if they so choose The intent of the parties is best interpreted by looking at the "big picture," i e., look at the circumstances surrounding the execution of the document and all the language of the document M. Cotton looks only at two (2) sentences in the document and makes a literal interpretation of those sentences Looking at the entire document, her interpretation of those sentences are in conflict with the big picture language which shows both parties to the Agreement intended to dispose of their property independent of the other

{¶30} Appellant contends that the second sentence in Section (4) references spousal rights and that such language was included to make clear that the parties were not giving up their spousal rights upon the death of the other party Appellee counters that a plain reading of Section (4) establishes that the parties were reserving their right to make wills or bequests to the other spouse and leave property to whomever they chose upon death Appellee points out that there is no specific reference to dower rights or spousal rights, as in other sections of the agreement

{¶31} Contract terms are ambiguous where the language is susceptible to two or more reasonable interpretations *United States Fid & Guar Co v St Elizabeth Med Ctr* (1998), 129 Ohio App 3d 45 In the present case, we find the interpretations offered by both appellant and appellee to be reasonable Therefore, we agree with both the trial court and the magistrate that the second sentence in Section (4) is ambiguous

{¶32} Where there is an ambiguity, courts must resort to principles of contract construction *Shifrin v Forest City Ent, Inc* (1992), 64 Ohio St 3d 635, 638 "All the provisions of a contract must be construed together in determining the meaning and intention of any particular clause or provision therein " *Legler v United States Fid & Guar Co* (1913), 88 Ohio St 336 Thus, courts will seek to harmonize the meaning of an ambiguous provision with the meaning of the agreement as a whole *Barton v Aydin* (Nov 25, 1981), Cuyahoga App No. 43453 The intention of the parties to the agreement is paramount, and contracts should be interpreted to carry out that intent insofar as it can be ascertained *Skivolocki*, at 244

{¶33} When examining contract language that is ambiguous, a court must first examine parol evidence to determine the parties' intent *Cline v Rose* (1994), 96 Ohio App 3d 611, 615. Such extrinsic evidence may include (1) the circumstances surrounding the parties at the time the contract was made, (2) the objectives the parties intended to accomplish by entering into the contract, and (3) any acts by the parties that demonstrate the construction they gave to their agreement *Blosser v Carter* (1990), 67 Ohio App 3d 215, 219 However, when parol evidence cannot elucidate the parties' intent, a court must apply the secondary rule of contract construction whereby the ambiguous language is strictly construed against the drafter *Reida v Thermal Seal, Inc*, Franklin App No. 02AP-308, 2002-Ohio-6968

{¶34} In the present case, the trial court cited extrinsic evidence in arriving at its decision The trial court indicated that it considered the "surrounding circumstances" of the parties, although it did not specify these circumstances in its conclusions However, some such surrounding circumstances as cited in the court's factual summary that are supportive of the parties' intent to prohibit either of them from participating in the other's estate upon death were that the parties had both been previously married, they were of advanced age, they had adult children from their previous marriages, and Taris executed a will and living trust that made no provisions for appellant It has been recognized that parties to antenuptial agreements often have previously been married, are of advanced age, and have children from the prior marriage and, because so, desire to distribute their individual property to those other than the most recent spouse See *Gross v Gross* (1984), 11 Ohio St.3d 99, 102-103, see, also, *Hawkins v Hawkins* (1962), 185 N E 2d 89, 89 Ohio Law Abs 161 (the desire to leave one's assets to those other than the most recent spouse is not at all unusual, particularly when the parties are of advanced age and neither had contributed to the accumulation of the assets prior to the marriage), *In re Mosier's Estate* (1954), 133 N E 2d 202, 72 Ohio Law Abs. 268 (in upholding validity of antenuptial agreement the court considered that the contracting parties were persons of advanced age with children by former marriages). We agree with the trial court that these surrounding circumstances support the conclusion that Taris and appellant desired to wholly exclude the other from participation in their respective estates upon death

{¶35} Even if this parol evidence did not reveal the parties' intent, we would apply the secondary rule of contract construction that requires strict construction against the drafter The magistrate noted that appellant's counsel drafted the agreement, Taris was not represented by counsel, appellant had advice from her counsel before executing the agreement, there was no evidence presented that would suggest she did not understand what she was giving up by signing the agreement, and appellant's counsel acknowledged that she had advised appellant concerning the contents of the agreement Under these circumstances, there is no reason to depart from the rule that the drafter of a contract should have the terms thereof construed strictly against her. Accordingly, as appellant was the drafter of the ambiguous provision, it should be construed against her.

{¶36} Consequently, under either rule of construction, we must construe the second sentence of Section (4) to mean that the parties were reserving their right to make wills or bequests to the other spouse and leave property to whomever they chose upon death Such a construction is consistent with the other provisions of the agreement, particularly Section (3), and harmonizes Section (4) with the intent of the agreement as a whole, which we found above was to preclude the surviving spouse from participating in the estate of the other party, including participation through statutory election See

Legler, supra, *Barton*, supra To interpret Section (4) in the manner appellant urges would be to completely contradict the intent of the rest of the agreement.

{¶37} However, even though we have construed Section (4) in such a way as to be consistent with the intent of the rest of the agreement to prohibit the parties from invoking their statutory rights upon the death of the other, the issue remains whether unambiguous provisions in an antenuptial agreement may still constitute strong and unmistakable language, pursuant to *Troha*, sufficient to demonstrate the intent of the parties to waive their statutory rights to election, despite the existence of a single provision within the agreement that has been found to be ambiguous In accord with the decisions of the magistrate and trial court, we answer this question in the affirmative and find that, despite the existence of one ambiguous provision, the remaining unambiguous provisions may still provide the strong and unmistakable language necessary to deprive a surviving spouse of the special benefits conferred by statute, as long as the ambiguous provision has been construed to be consistent with the unambiguous provisions

{¶38} Our research reveals no authority on point However, we see no reason why the ambiguous provision in Section (4), once construed pursuant to the rules of contract construction to be consistent with the remaining unambiguous provisions, should render otherwise strong and unmistakable language insufficient under *Troha* Once the ambiguous provision has been adjudicated to be consistent with the purpose of the whole, it has no less legally persuasive value than the other unambiguous provisions. At that point, all of the provisions would be deemed to be consistent with the intent to deprive the surviving spouse of his or her statutory rights Thus, as long as there exists strong and unmistakable language in other provisions, an ambiguous provision later adjudicated to be consistent with those provisions should not negate the strength and certainty of the other provisions

{¶39} Appellant points to *The Matter of the Estate of Mowery* (Dec. 8, 1982), Summit App No 10813, for the proposition that, even if an ambiguous clause in an antenuptial agreement is construed to bar the right of statutory election, it cannot constitute strong and unmistakable language pursuant to *Troha* However, *Mowery* is inapposite to the facts in the present case In *Mowery*, the entire antenuptial agreement was silent regarding the right of either party to share in a distributive portion of the other's estate To the contrary, in the present case, we have found that several unambiguous provisions in the antenuptial agreement provide strong and unmistakable language prohibiting the parties from invoking their statutory election right. Thus, unlike *Mowery*, we are not attempting to construe an entire ambiguous agreement to provide strong and unmistakable language. Further, it is debatable whether *Mowery* is even a case involving contractual ambiguity, as the agreement in that case contained no ambiguous provisions, but, rather, was totally lacking any provisions addressing the issue of spousal election. Considering such, *Mowery* appears to be a case involving the simple application of the included contractual terms

{¶40} For these reasons, we find the January 14, 2000 antenuptial agreement executed by appellant and Taris contained "strong and unmistakable" language consistent with *Troha* Specifically, Sections (3) and (8), and consequently (1), were all inclusive and intended to release every right accruing to or conferred upon appellant by law in and to the property of Taris upon his death Further, construing Section (4) as we have, it is consistent with the purpose of Sections (1), (3), and (8) Thus, we find the agreement as a whole was designed and intended to deprive the surviving spouse of the special benefits conferred by statute, and it was the plain intention of the parties to accomplish that object Therefore, appellant's assignments of error are overruled

{¶41} Accordingly, appellant's four assignments of error are overruled, and the judgment of the Franklin County Probate Court is affirmed

Judgment affirmed

LAZARUS and FRENCH, JJ , concur

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2006-Ohio-1286; Beverly v. Parilla;

2006-Ohio-1286

[Cite as Beverly v Parilla, 2006-Ohio-1286]

MABEL BEVERLY f k a MABEL BEVERLY PARILLA, PLAINTIFF-APPELLANT,
v
CHARLES PARILLA, DEFENDANT-APPELLEE.

CASE NO 04 CO 55

7th District Court of Appeals of Ohio, Columbiana County
Decided on March 17, 2006

Civil Appeal from Common Pleas Court, Case No 03DR186.

Hon Joseph J Vukovich Hon Gene Donofrio Hon. Cheryl L Waite

For Plaintiff-Appellant Attorney Nicholas Barborak Attorney Virginia Barborak 120 South Market Street Lisbon, Ohio 44432

For Defendant-Appellee Attorney Randil Rudloff 151 East Market Street P O Box 4270 Warren, Ohio 44482

OPINION

VUKOVICH, J

{¶1} Plaintiff-appellant Mabel Beverly appeals the decision of the Columbiana County Common Pleas Court which rejected her interpretation of a prenuptial agreement and refused to order spousal support against defendant-appellee Charles Parilla Appellant claims that the prenuptial agreement entitled her to a monthly payment from appellee's pension in an amount equal to the spousal support she forfeited from her ex-husband as a result of her marriage to appellee In the alternative, she urges that spousal support should have been awarded to her based upon the statutory considerations of R C 3105 18.

{¶2} For the following reasons, we hold that the prenuptial agreement does not entitle appellant to restoration of her position before marriage. However, ordinary spousal support was not prohibited by the agreement and thus should have been considered under R C 3105 18 Because the trial court erroneously found that spousal support was prohibited by the agreement, this case is reversed and remanded for consideration of whether spousal support is reasonable and appropriate based upon the statutory factors

STATEMENT OF THE CASE

{¶3} In 1995, appellant was divorced from her first husband. That decree entitled her to $500 per month in spousal support for fifteen years to terminate in the event of her death, remarriage or cohabitation She also received monthly Social Security benefits due to her former husband's employment.

{¶4} Appellant began dating appellee in 1996 They became engaged in late December 2000 Appellee testified that he disclosed to appellant that he needed to have a document drawn up to protect his assets for his four children from his prior marriage (07/01/04 Tr. 66, 81) A couple of months later, they set a wedding date of Saturday, April 28, 2001

{¶5} • Appellee contacted his attorney to draw up a prenuptial agreement. This attorney testified that appellee called him at the end of March 2001, that appellee brought in the requested information the next week, and that he then drafted the agreement for appellee's retrieval by the end of that week. (07/01/04 Tr. 36-37, 41, 49) Appellee testified that he provided this first draft to appellant two weeks before the wedding (07/01/04 Tr 81) At the first trial, appellant claimed that she was not given this first draft until the Wednesday before the wedding and that she did not read it until the next day (02/18/04 Tr 20). But, at the continued hearing, she stated that she received the document on the Tuesday before the wedding (07/01/04 Tr 106).

{¶6} Appellant was concerned that the prenuptial agreement failed to protect her She talked to her pastor about it, and he advised her to obtain an attorney When she voiced her concerns to appellee, he contacted his attorney and asked him to add a provision that would name appellant the sole beneficiary of his 401(k) for nine years (which would have been the latest date that she could have collected spousal support from her former husband)

{¶7} For purposes relevant to this appeal, the agreement may be summarized as follows Introductory paragraph two states that its purpose is to define their respective rights in the property of the other and to avoid those interests which either party might acquire in the property of the other incidental to the marital relationship Exhibits were attached noting each party's premarital property Article two provides that the property owned by either at the time of the marriage and listed on the exhibits shall constitute non-marital property and that each waives any right in the property of the other acquired before marriage, except as specifically set forth in the agreement And, the parties agreed that the appreciation of their pensions during marriage shall be treated as non-marital property

{¶8} Article three provides that each party waives all right to dower, inheritance and distributive shares in the estate of the other unless property is specifically bequeathed Article four states that the parties shall reside in appellant's residence and that the costs of operation of the household shall be paid by their joint incomes This article also states that if the marriage ends by divorce, appellant shall retain her interest in the residence and shall have the exclusive right to occupancy

{¶9} Article five, around which the present dispute centers, is entitled divorce, dissolution and annulment and reads

{¶10} "It is the intention of the parties that this Agreement shall govern even if the marriage shall end in divorce, dissolution or annulment, or if one of the parties should file an action for legal separation in a Court of competent jurisdiction.

{¶11} "It is the intention of the parties that upon divorce or dissolution or annulment that each party shall be entitled to have as their separate property the property listed on Exhibits `A' and `B' and are attached hereto The parties acknowledge that [appellant] will suffer a loss of Alimony and Social Security benefits as a result of this marriage Therefore, in the event the marriage should terminate, [appellant] shall be entitled to a QUALIFIED DOMESTIC RELATIONS ORDER in regard to [appellee's] pension right from his place of employment, i e R M I

{¶12} "Further, [appellant] shall be designated as the sole beneficiary of [appellee's] 401K for a period of not less than nine (9) years from the date of this Agreement "

{¶13} Article six states that the agreement can only be changed in writing. Article seven states that each party read and fully understands the terms of the agreement, that the agreement represents their entire understanding and that it was voluntarily signed Article nine notes that appellee was represented by an attorney and that appellant was advised to obtain counsel but she chose to execute the agreement without doing so.

{¶14} Appellee's attorney testified that the final draft was completed sometime between Tuesday April 17 and Thursday April 19 (07/01/04 Tr. 46-47). And, appellee testified that he gave this draft to appellant on Thursday or Friday of that week. (07/01/04 Tr. 76) He stated that it was not signed until a week later because appellant kept putting off

signing it. (07/01/04 Tr. 78) However, appellant claimed that she was not given the final draft until Thursday, April 26, two days before the Saturday, April 28 wedding (07/01/04 Tr 106)

{¶15} The prenuptial agreement was signed and notarized on Thursday, April 26, 2001 Although the agreement, appellee and the pastor all advised appellant to retain an attorney, she did not do so prior to signing She testified that she unsuccessfully tried to contact various attorneys for advice the day *after* she signed the agreement The wedding took place as scheduled on April 28, 2001

{¶16} Appellant quit her $8 per hour job just prior to marriage in order to help work on appellee's tree farm Appellee retired from his job at R.M.I a year after the marriage at appellant's urging

{¶17} On March 31, 2003, appellant filed for divorce and sought spousal support Appellee answered and attached the prenuptial agreement. Trials were held on February 18, 2004 and July 1, 2004 Post-trial memoranda were submitted in September 2004 The trial court entered a divorce decree on October 7, 2004

{¶18} Various stipulations were journalized The court then addressed the remaining issues As for the issues relevant herein, the court found that property division and spousal support were controlled by the agreement The court disagreed with appellant's interpretation of the agreement and found that there was no indication that she was contractually entitled to payments from the pension equal to that of the $500 per month spousal support award she forfeited by getting married Factually, the court found that the testimony of appellee and his attorney regarding dates was more credible The court concluded that the agreement entitled appellant to a QDRO over the marital portion of appellee's pension and to be named the sole beneficiary of his 401(k) until April 26, 2010.

{¶19} Appellant filed timely notice of appeal. The appeal was originally held in abeyance until the QDRO was entered Then, we remanded for the trial court to address a post-trial motion. Appellant filed her brief in November 2005

ASSIGNMENT OF ERROR NUMBER ONE

{¶20} Appellant's first assignment of error contends

{¶21} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT RESTORING PLAINTIFF TO HER PREMARITAL POSITION WITH RESPECT TO SPOUSAL SUPPORT IN LIGHT OF THE TERMS OF AN ANTENUPTIAL AGREEMENT "

{¶22} Generally, the law of contracts applies to prenuptial (or antenuptial) agreements. *Fletcher v Fletcher* (1994), 88 Ohio St 3d 464, 467 Some special rules have been added governing the enforceability of such agreements due to the confidential relationship between future spouses. Id. (burden of full disclosure).

{¶23} We should first note that the court's factual finding believing appellee's and his attorney's recollection of the dates involved in the first and final draft is supported by competent and credible evidence See id. at 468 The court was entitled to disbelieve appellant's inconsistent testimony that she received the first draft three days before the wedding and the final draft two days before the wedding See id Regardless, the text of this assignment of error set forth above deals only with the proper interpretation of the terms of the prenuptial agreement, not its enforceability or validity

{¶24} In construing any written instrument, the primary objective is to ascertain the party's intent *Aultman Hosp Assn v Hosp Care Corp* (1989), 46 Ohio St 3d 51, 53 The first step is to determine whether the disputed language of the instrument can be characterized as plain and unambiguous The language is unambiguous if from reading only the four corners of the instrument, such language is clear, definite and subject to only one interpretation The language is ambiguous if it is unclear, indefinite and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning

{¶25} When the language of the written instrument is clear and unambiguous, the interpretation of the instrument is a matter of law, and the court must determine the intent of the parties through only the language employed *Davis v Loopco Indus , Inc* (1993), 66 Ohio St 3d 64, 66 (if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined) In such case, the court cannot resort to extrinsic or parol evidence In other words, when a written instrument is unambiguous, intentions not expressed by writing in the contract are deemed to have no existence and cannot be shown by parol evidence *TRINOVA Corp v Pilkington Bros , P L C* (1994), 70 Ohio St 3d 271, 275.

{¶26} Where the language is ambiguous, there arises a factual question whereby the court can view extrinsic or parol evidence to ascertain the intent behind the language *Davis*, 66 Ohio St 3d at 66 Where the court finds ambiguity and is permitted to resort to extrinsic evidence to determine intent, intent becomes a factual question subject to the evaluation of the trier of fact

{¶27} Here, article five provides that the pre-agreed upon separate property will remain separate and that appellant will be entitled to a QDRO over appellee's pension. Merely because the contract provides for a right, a QDRO over the pension, that she would have been entitled had there been no contract does not make this QDRO provision somehow indicative of an intent to restore her to her premarital position collecting the same amount previously paid by her former husband Rather, it represents his intent for her to maintain her share of the marital portion of his pension even though the pension was listed in the agreement's exhibit as property agreed to be kept separate

{¶28} The contract does not specify that appellant shall be restored to her prior position of receiving $500 per month in spousal support Article five's acknowledgement and mention that appellant would suffer a loss of alimony and Social Security benefits as a result of the marriage does not mean that she is entitled to receive that same alimony from appellant's pension in the form of a QDRO if the marriage ended in divorce Nor does recognition of her loss create an ambiguity

{¶29} And, contrary to appellant's suggestion, placing the 401(k) beneficiary designation paragraph under the divorce, dissolution or annulment heading did not make the contract ambiguous just because the designation involves death She is entitled to this beneficiary designation for nine years, even if the marriage ends in divorce, dissolution or annulment Thus, placement under this heading does not make an otherwise plain agreement ambiguous

{¶30} Even assuming arguendo that the language in question is ambiguous, the trial court could validly hold that the parties' intent was contrary to the interpretation now claimed by appellant. The general rule of construing an ambiguous contract against the drafter does not mean automatically holding in favor of the other party in a case such as this See *Fletcher*, 88 Ohio St 3d at 466 (for contrast compare majority with dissent) Rather, this rule of construction is merely a guiding principle the court uses in determining the parties' intent after viewing the extrinsic evidence presented by the parties. Otherwise, extrinsic evidence would be irrelevant.

{¶31} The trial judge was the fact-finder who presided at trial and viewed the witnesses' gestures, demeanor and voice inflections See *Seasons Coal Co v Cleveland* (1984), 10 Ohio St 3d 77, 79-80. See, also, *Fletcher* at 468. The trial court was entitled to find that the parties' intent did not involve providing appellant with $500 per month from appellee's pension to compensate her for losing spousal support from her former husband Thus, even if resort to extrinsic evidence to determine an ambiguity were necessary, the court's decision would still be upheld This assignment of error is overruled

ASSIGNMENT OF ERROR NUMBER TWO

{¶32} Appellant's second assignment of error provides

{¶33} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN NOT

AWARDING SPOUSAL SUPPORT TO PLAINTIFF "

{¶34} Here, appellant cites R C 3105 18 and urges that she is entitled to spousal support under the statutory factors relevant herein She notes that she receives approximately $600 per month in Social Security and can barely pay her bills She claims that she has no job prospects since she always held manual jobs and now has health problems such as asthma and an injured heel She points out that she quit her full-time job with benefits because appellee asked her to work on his tree farm (It is noted that he paid off her nearly $9,000 residential mortgage in return for her assistance) She has no education or job training And, she was sixty-six years old at the time of the divorce

{¶35} She contrasts her situation with appellee's noting that he has numerous income sources such as a pension of almost $1,400 per month after taxes, approximately $1,400 per month in Social Security, and $1,800 per month in rental income (minus utilities and expenses) from his several properties She also notes that he owns a tree farm with a $600 mortgage (02/12/04 Tr 103-108) And, she opines that this farm has income potential

{¶36} A court can grant spousal support upon request. R C 3105 18(B) The court shall consider the factors in R C 3105 18(C) and award only an amount which is reasonable and appropriate Id The factors listed in R C 3105 18(C)(A) are as follows·

{¶37} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105 171 of the Revised Code,

{¶38} "(b) The relative earning abilities of the parties,

{¶39} "(c) The ages and the physical, mental, and emotional conditions of the parties,

{¶40} "(d) The retirement benefits of the parties,

{¶41} "(e) The duration of the marriage,

{¶42} "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home,

{¶43} "(g) The standard of living of the parties established during the marriage,

{¶44} "(h) The relative extent of education of the parties,

{¶45} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties,

{¶46} "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party,

{¶47} "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought,

{¶48} "(l) The tax consequences, for each party, of an award of spousal support,

{¶49} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities,

{¶50} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶51} Need can be considered in determining whether an award is reasonable and appropriate, but need is not the sole consideration or the threshold test *Olenik v Olenik* (Sept 18, 1998), 7th Dist No 94CA139. Appellant's acts of providing appellee with a residence, quitting her job and working on his tree farm are considerations Her health and job potential are relevant as is her age The diversity in income and assets is of consequence The short duration of the marriage is of negative significance to appellant. However, her forfeiture of spousal support and a year's worth of Social Security from her prior husband in order to marry appellee can be considered

{¶52} Generally, we review a trial court's decision on spousal support only for an abuse of discretion *Corradi v Corradi*, 7th Dist No 01CA22, 2002-Ohio-3011, at ¶51. *But, here there was no discretion utilized*

{¶53} Rather, the trial court opined that issues of property division *and issues of spousal support* were governed by the prenuptial agreement See J E. at 3, 7 However, the agreement's introductory paragraph two specifically provides

{¶54} "The purpose of this Agreement is for the parties to define their respective rights in the property of the other It is further the purpose of this Agreement to avoid those interests which either party might acquire in the property of the other as incidents of the marriage relationship, but for the operation of this Agreement "

{¶55} Protection of interests in the property is not a concept related to spousal support Instead, it is related only to property division.

{¶56} Furthermore, there is absolutely no reference to spousal support in the agreement Nowhere does it state that appellant waives her right to court-ordered spousal support or maintenance in the case of a divorce See article five Failure to mention spousal support in an agreement dealing with preservation of separate property is not an agreement that spousal support shall never be awarded as permitted by statute

{¶57} Thus, the court was legally incorrect when it held that issues of statutory spousal support were controlled by the agreement Although appellant's claimed right to a $500 per month QDRO over appellee's separate property portion of his pension was controlled by the prenuptial agreement, the general statutory right to have spousal support considered was not

{¶58} For the foregoing reasons, the judgment of the trial court is hereby reversed and this case is remanded with instructions to thoroughly review the record, apply the spousal support factors in R C 3105.18 and determine if any amount of spousal support would be reasonable and appropriate.

Donofrio, P J , concurs Waite, J , concurs

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2006-Ohio-1861; Avent v. Avent;

2006-Ohio-1861

[Cite as Avent v. Avent, **2006-Ohio-1861**]

Billy R Avent, Sr Appellee
v
Elizabeth A Avent Appellant

Court of Appeals No L-05-1140

6th District Court of Appeals of Ohio, Lucas County
Decided on April 14, 2006

Trial Court No DR-2003-1404

Martin E Mohler and Heather J Fournier, for appellee

M Susan Swanson, for appellant

DECISION AND JUDGMENT ENTRY

SKOW, J

{¶ 1} This appeal comes to us from a judgment issued by the Lucas County Court of Common Pleas, Domestic Relations Division, which determined the marital property division in a final divorce decree Because we conclude that the trial court erred in its determinations, we reverse

{¶ 2} Appellant, Elizabeth A. Avent ("wife"), and appellee, Billy R Avent, Sr ("husband"), were married in 1978, and executed a prenuptial agreement which stated that the parties desired to keep each of their financial estates separate and that any property owned by them prior to or acquired after the marriage would remain their separate properties Each waived any claims against the other arising "by force of the contemplated marriage "

{¶ 3} Husband filed for divorce in December 2003 At the time of trial in December 2004, husband was 86 years old, wife was 81, and both were retired The trial court found that the parties were unable to remember many important facts about their earned income over the years or their present assets The following summarizes the court's factual findings or other undisputed facts presented at trial.

{¶ 4} Husband retired in 1983, after 43 years employment with the same company He received $141,274 as a lump sum retirement distribution from that employment which was placed in "separate IRA accounts " His yearly income included $14,628 from Social Security plus $9,118 from his IRA, for a total of $23,746

{¶ 5} Wife retired in 1986, after working for 11 years as a cafeteria worker Her yearly income totaled $12,814, which included $461 per month from Social Security, $169 per month from SERS, and $4,000-$5,000 per year in withdrawals from "her present assets."

{¶ 6} Husband's grandson, a financial consultant, testified regarding the present value of assets in husband's name, which the court valued at $129,078 He stated that he had been handling his grandfather's finances since 1997 Wife's assets were valued as follows During the pendency of the divorce action, wife's assets were placed in two trusts the Avent Irrevocable Trust and the Elizabeth A. Avent Living Trust The Avent Irrevocable Trust consisted of wife's home

and 278 bonds. Wife's accountant said the bonds had a cost basis of $99,175, with a future value of $245,852 The court stated that interest income on the bonds until maturity was projected to be $155,677 The court also valued wife's marital portion of appreciation on her house at $30,000

{¶ 7} The court valued wife's Living Trust ("Revocable Trust") at $188,049, which included cash gifts made to her daughter and various bank accounts which were all solely in wife's name The court declared that the appreciation on the wife's house was marital, awarding her the $30,000 appreciation of that property, and an additional $60,000 "in consideration of her share of husband's separate pension, the fact that there will be no spousal support, and assets she claims and accountant deemed to be inherited."

{¶ 8} The court determined that all of wife's bank accounts, bonds, or other cash assets held in her own name were marital because she had failed to adequately trace her "separate property" owned prior to the marriage to her present assets The court stated that husband had traced his property sufficiently, awarding him the $129,078 of assets in his name In addition, the court ordered wife to transfer to husband one-half of her bonds placed in the Irrevocable Trust, and to pay husband an additional $64,045, one-half of the remaining assets in wife's name ($188,089 minus $60,000 equals $128, 089 divided by two)

{¶ 9} Neither spouse was awarded spousal support, each was ordered to pay their own attorney fees, and court costs were to be split equally between the parties.

{¶ 10} Wife now appeals from that decision, arguing the following three assignments of error

{¶ 11} "I The Trial Court erred to the prejudice of the Appellant by requiring the tracing of separate assets that had not been found to have been commingled

{¶ 12} "II. The Court abused its discretion in finding that Appellant had failed to prove her financial accounts to be separate property by a preponderance of the evidence

{¶ 13} "III The Court abused its discretion and committed prejudicial error in making a distributive award from Appellant's separate property without considering all of the factors set forth in R C 3105 171(F)(1) through (9) "

I

{¶ 14} In her first assignment of error, wife argues that the trial court erred in requiring her to trace assets which were never commingled with her husband's funds and that the appreciation of her home should have been deemed separate property We agree.

{¶ 15} In a divorce action, the domestic relations court is required to determine whether property is separate or marital and to divide both marital and separate property equitably R C 3105 171(B) Marital property generally includes all property acquired by either party during the marriage as well as the appreciation of separate property due to the labor, monetary, or in-kind contributions of either party during the marriage R C 3105 171(A)(3)(a)(i) and (iii) Marital property is to be divided equally in general, and each spouse is considered to have contributed equally to the acquisition of marital property R C. 3105.171(C)(1) and (2) However, marital property does not include separate property R C 3105 171(A)(3)(b) Under R C. 3105.171(A)(6)(a)(v), separate property includes any real or personal property that is excluded by a valid antenuptial agreement Thus, Ohio law specifically allows for property that would normally be considered marital to be excluded from a division of marital property by a valid antenuptial agreement *Todd v Todd* (May 4, 2000), 10th Dist No 99AP-659

{¶ 16} An antenuptial agreement is a contract entered into between a man and a woman in contemplation, and in consideration, of their future marriage whereby the property rights and economic interests of either the prospective wife or

husband, are determined and set forth in a written instrument. *Gross v Gross* (1984), 11 Ohio St 3d 99, 102 The law of contracts applies to the interpretation and application of antenuptial agreements *Fletcher v Fletcher* (1994), 68 Ohio St 3d 464, 467 The interpretation of a contract that is clear and unambiguous is a question of law, and no issue of fact exists to be determined *State ex rel Parsons v Fleming* (1994), 68 Ohio St 3d 509, 511, *Davis v Loopco Industries, Inc* (1993), 66 Ohio St 3d 64, 66 On appeal, questions of law are reviewed de novo *Wiltberger v Davis* (1996), 110 Ohio App.3d 46, 51-52

{¶ 17} In Ohio, antenuptial agreements are valid and enforceable "(1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property, and (3) if the terms do not promote or encourage divorce or profiteering by divorce " *Gross*, supra, at paragraph two of the syllabus See also *Fletcher*, supra, at 466 If parties have freely entered into a prenuptial agreement, a court should not substitute its judgment and amend the contract *Gross*, supra, at 109

{¶ 18} In the present case, the parties entered into a "prenuptial agreement" which clearly expressed that "it is mutually desired and agreed by the parties that the estate of each of the parties shall remain separate, as well after as previous to the solemnization" of their marriage The agreement states further, in pertinent part, that the husband's estate "shall remain and be his separate property, subject entirely to his individual control and use, *the same as if he were unmarried*, and that the second party [wife] shall not acquire *by force of the contemplated marriage* for herself, her heirs, assigns or creditors any interests *in his property* or estate, or right to the control thereof, and the second party shall and *does hereby waive, release, and relinquish*, and shall by these presents be barred from any and all claim or rights of dower, year's support, right to live in the mansion house, property exempt from administration, distributive share or intestate share of the other's estate, from any and all claims or rights as widow, heir, distributee, survivor, or next of kin, and *any and all other claims, to the property of the first party now owned or hereafter acquired* " (Emphasis added)

{¶ 19} In the following paragraph, the agreement sets forth the same language with reference to wife's estate and control, with husband waiving all rights to any property owned or acquired by wife In other words, the agreement indicates the parties' intent to keep separate, not only the property owned at the time of the marriage, but also any increase in value or additional property each might separately acquire during the marriage

{¶ 20} In this case, the record shows that the parties never commingled their funds in joint bank accounts and never owned real estate together All bank accounts and stocks were maintained in each party's separate name prior to and after the marriage Husband's retirement distribution was placed in his own separate account Likewise, any funds or inheritance monies received by wife were placed in her own accounts Since the antenuptial agreement specifically provided that each party waived any rights to each other's property acquired prior to or after the marriage, any funds or assets separately owned by the parties, which had never been commingled, remained their separate properties No evidence was presented that any of wife's funds were ever commingled with or taken from husband's funds Therefore, wife's accounts, which had always been separately maintained, remained her own separate property, and no tracing was required.

{¶ 21} In addition, although husband testified that he paid for certain expenses related to wife's home over the years, the antenuptial agreement specifically states that husband agreed to waive any claim to after acquired property or arising "by force of" the marriage, i e., a claim for a contribution to the appreciation of the home where the parties resided Moreover, there was nothing in the record to indicate the exact amounts of his alleged payments or other contributions, or that they significantly affected the appreciation of the property value beyond what would have naturally occurred We also note that at the time of the marriage, husband owned two homes, which he no longer owned at the time of the divorce Presumably, by virtue of his living in wife's home, he was able to sell or otherwise dispose of those properties to his advantage, with no accounting or credit to wife Consequently, under the terms of the antenuptial agreement, any appreciation on wife's home was separate property Therefore, under the facts of this case, we conclude that the trial court erred in failing to designate the assets owned by each party as their separate property, not subject to division as marital property

{¶ 22} Accordingly, appellant's first assignment of error is well-taken In light of our disposition of the first assignment of error, appellant's second assignment of error is moot

II

{¶ 23} In her third assignment of error, wife asserts that the trial court failed to properly consider the factors set forth in R C 3105 171(F), and erred in distributing her separate property to appellee Again, we agree

{¶ 24} As we previously determined, the court erroneously ruled that wife's accounts were marital because she had not adequately traced the funds In making the property division, the court then erroneously divided and awarded a portion of wife's assets to husband. The court stated that wife acted "contrary to Court Order" by "diverting" funds to the two trust accounts and to her daughter and by her failure to amend and update the initial asset list filed with her answer Nothing in the record, however, demonstrates that wife, who relied on her daughter and financial consultants to advise her, attempted to hide or dissipate assets by placing them in trust In addition, wife executed the trusts when no divorce proceedings were pending, at the advice of an attorney and financial consultant, and in consideration of wife's age (fn1)

{¶ 25} Furthermore, although noting that the frequent moving of wife's funds made it "very difficult to exactly trace the past and present assets," the court never made an actual finding of misconduct or dissipation of marital assets In fact, the court recognized that both parties were elderly and had trouble remembering many financial details spanning their 25 year marriage Thus, since appellant's assets were, in fact, her separate property and within her sole control, her decision to give away money or to place some of her money and property in trust was not improper

{¶ 26} The trial court further stated that it had considered the factors in R C 3105 171(F) and awarded an inequitable distribution of "marital assets held by Wife" solely because she could not trace her assets Nothing in the final judgment indicates that the court awarded these assets on the basis of any other factor in R C. 3105 171(F) Again, since we determined that tracing of assets held solely in appellant's name was not required and there was no misconduct by appellant regarding her assets, the trial court erred in distributing a portion of wife's assets to husband

{¶ 27} Accordingly, appellant's third assignment of error is well-taken

{¶ 28} Pursuant to App.R. 12(B), this court hereby renders the judgment that should have been rendered by the trial court and therefore modifies paragraphs two through seven of page seven of the trial court's divorce decree judgment entry as follows:

{¶ 29} "WHEREFORE, IT IS ORDERED·

{¶ 30} "* * *

{¶ 31} "2 For the purpose of making a division of marital property, the period of time "during the marriage" was from the date of the marriage through the day of the trial The parties are bound by the terms of a valid antenuptial agreement which provided that each waived any claim or rights to the other's property owned prior to or acquired after the marriage After considering that the parties at all times conducted their financial affairs separately and that no evidence of commingling of funds was presented, we conclude that, under the language of the antenuptial agreement, there is no marital property to divide

{¶ 32} "3 Wife shall keep, as her separate property, the real estate at 2332 Dana Street and any appreciation in its value Wife shall further keep all assets, including bank accounts and stocks which are solely owned by her or in her name Wife shall also keep her personal property to which the parties stipulated

{¶ 33} "4 Husband shall keep, as his separate property, all funds and accounts relating to his retirement distribution,

and any other assets, including bank accounts, stocks, or other funds, which are solely owned by him or in his name Husband shall also keep his personal property to which the parties stipulated.

{¶ 34} "5 Pursuant to the parties' agreement, neither shall pay spousal support to the other and the Court does not retain jurisdiction over the issue of spousal support.

{¶ 35} "6 Each party shall pay his/her outstanding debts, attorney fees and costs After application of the initial filing fee(s), the parties shall equally pay the remaining court costs

{¶ 36} "IT IS SO ORDERED "

{¶ 37} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is reversed and modified as designated in this decision. Appellee is ordered to pay the costs of this appeal pursuant to App R 24 Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED

A certified copy of this entry shall constitute the mandate pursuant to App.R 27. See, also, 6th Dist Loc App R 4, amended 1/1/98

Peter M Handwork, J

Mark L Pietrykowski, J

William J Skow, J CONCUR

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Footnotes

1 Wife testified that the trusts were set up prior to husband's filing of divorce complaint on December 9, 2003

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2005-Ohio-5264; Reams v. Reams;

2005-Ohio-5264

[Cite as Reams v. Reams, 2005-Ohio-5264]

Edward Reams Appellant
v.
Andrea Putman Reams Appellee

Court of Appeals Nos L-04-1329 L-04-1276

6th District Court of Appeals of Ohio, Lucas County
Decided on September 30, 2005

Trial Court Nos CI-04-2925 DR-2002-0087

Ron L Rimelspach, for appellee

John F. Potts, for appellant.

DECISION AND JUDGMENT ENTRY

SKOW, J

{¶ 1} This case involves two consolidated appeals the first involves an appeal of a decision and judgment entry by the Lucas County Court of Common Pleas, Domestic Relations Division, which granted a divorce between appellant, Edward Reams, and appellee, Andrea Putman Reams(fn1), and divided marital property pursuant to the terms of the parties' antenuptial agreement (Case No DR02-0087); the second involves an appeal of an opinion and judgment entry by the Lucas County Common Pleas, General Division, which granted appellee's motion to dismiss appellant's complaint for an accounting (Case No CI04-2925) For the following reasons, we affirm the judgment entries of both courts

{¶ 2} Appellant and appellee were married on November 21, 1984 Shortly before their marriage, they entered into a valid antenuptial agreement that set forth rules governing the division of their property

{¶ 3} On January 23, 2002, appellee filed a complaint for legal separation in the domestic relations division of the court of common pleas On May 9, 2002, she amended the complaint to a complaint for divorce

{¶ 4} The divorce case was litigated in the domestic relations division for over two years following the filing of the complaint for divorce Eventually, through mediation and a consent judgment entry issued just before trial, the parties were able to resolve custody and visitation issues involving the couple's three children No such agreement could be reached with respect to the division of property, however

{¶ 5} On April 30, 2004, just weeks before trial in the divorce action, appellant filed a "complaint for accounting" in the general division of the court of common pleas seeking "the equal division of dividends, interest, rents, profits and appreciation in increments of value thereupon to which he is entitled under Paragraph 4 of the Antenuptial Agreement "

{¶ 6} Trial on the divorce action was held before Judge Lewandowski on June 4, 2004. At trial, the judge heard testimony by the parties and arguments by the parties' respective counsel. In addition, appellant's trial counsel proffered various exhibits relating to interpretation of the antenuptial agreement, the division of property, and other related issues

{¶ 7} In a written decision, dated August 6, 2004, Judge Lewandowski considered the terms of the antenuptial

agreement in determining the division of assets between the parties Finding that the contract was "complete and unambiguous," "clear on its face," and "the complete agreement of the parties," he specifically excluded extrinsic evidence about the interpretation of the contract

{¶ 8} According to Judge Lewandowski, the agreement clearly and unambiguously provided that (1) any pre-marital property would go to the title holder; (2) any property acquired during the marriage (whether by gift, inheritance or under circumstances that would make it marital) would go to the nominal title holder, (3) any jointly owned property would be governed by the terms of the deed or instrument creating the parties' interests, and (4) neither party would have a claim for alimony (now spousal support), for a property settlement, or for marital property as against an asset held in only one spouse's name

{¶ 9} In making this determination, Judge Lewandowski conducted a paragraph by paragraph examination of the entire agreement and found that paragraphs 1 and 2 dealt with the rights of the parties upon death, paragraphs 3 and 4 addressed the rights of the parties during the marriage, and paragraphs 5, 6, and 7 dealt with the rights of the parties in the event of a divorce

{¶ 10} Although appellant specifically sought enforcement of paragraph 4 -- which provided for the equal division of dividends, interest, rents, profits, and all increments in value on all property -- Judge Lewandowski declined grant that remedy, on grounds that it would lead to an "absurd result".

{¶ 11} The final judgment entry of divorce was filed on August 24, 2004

{¶ 12} After journalization of Judge Lewandowski's decision, Judge Foley granted appellee's motion to dismiss the complaint for accounting In an opinion and judgment entry dated October 13, 2004, Judge Foley found that the matter before him had been fully litigated by the domestic relations division and that he lacked subject matter jurisdiction It is from these entries that appellant appeals, raising the following assignments of error

{¶ 13} "I IT CONSTITUED ERROR FOR THE DOMESTIC RELATIONS DIVISION TO HOLD THAT ENFORCEMENT OF PARAGRAPH 4 OF THE ANTENUPTIAL AGREEMENT WOULD LEAD TO AN ABSURD RESULT

{¶ 14} "II APPELLANT WAS DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS RIGHTS UNDER PARAGRAPH 4 OF THE ANTENUPTIAL AGREEMENT IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION

{¶ 15} "III THE DOMESTIC RELATIONS DIVISION LACKED JURISDICTION TO ADJUDICATE PARAGRAPH 4 OF THE ANTEMUPTIAL AGREEMENT

{¶ 16} "IV THE JUDGMENT OF THE DOMESTIC RELATIONS DIVISION REGARDING PARAGRAPH 4 OF THE ANTENUPTIAL AGREEMENT WAS NOT ENTITLED TO COLLATERAL ESTOPPEL OR RES JUDICATA EFFECT

{¶ 17} "V IT CONSTITUED ERROR FOR THE GENERAL DIVISION TO DISMISS APPELLANT'S COMPLAINT FOR AN ACCOUNTING "

{¶ 18} We begin with an examination of appellant's claim, under the first assignment of error, that the domestic relations division erred when it held that enforcement of paragraph 4 of the antenuptial agreement would lead to an absurd result

{¶ 19} Appellate courts apply a de novo review of a lower court's interpretation and construction of a written contract, *Continental W Condominium Unit Owners Assn v Howard E Ferguson, Inc* (1996), 74 Ohio St 3d 501, 502 And, in general, we interpret valid antenuptial agreements under the same rules of construction that apply to any other contract See, *Fletcher v Fletcher* (1993), 68 Ohio St 3d 464, 467

{¶ 20} "The purpose of contract construction is to discover and effectuate the intent of the parties " *Musca Props , L L C v Delallo Fine Italian Foods, Inc* , 8th Dist No 84857, 2005-Ohio-1193, at ¶15 "The intent of the parties is presumed to reside in the language they chose to use in their agreement " Id.

{¶ 21} Judge Lewandowski properly found that the agreement in this case was complete, clear on its face, and unambiguous Where a contract is clear and unambiguous, its interpretation is a matter of law, *Inland Refuse Transfer Co v Browning-Ferris Industries of Ohio, Inc* (1984), 15 Ohio St 3d 321, 322, and a court need not go beyond the plain language of the agreement to determine the rights and obligations of the parties. *Seringetti Constr Co v Cincinnati* (1988), 51 Ohio App 3d 1,

{¶ 22} In determining the meaning of the contract, a court must consider all of its parts, and no provision should be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible *State Auto Ins v Childress* (Jan 15, 1997), 1st Dist. No C-960376 "Construction of the contract should attempt to harmonize all of the provisions rather than create conflicts in them," and the court "must determine whether the contract can be interpreted giving reasonable, lawful, effective meaning to all terms." Id

{¶ 23} Paragraph 4 of the antenuptial agreement relevantly states.

{¶ 24} "After the proposed marriage and during said marriage, all dividends, interest, rents or profits on all property, real or personal (as defined in subparagraphs a, b, and c of paragraph 3 hereof), and all increments in value thereon, which Edward R Reams and Andrea Putman each own before said proposed marriage or which each may thereafter separately acquire, shall be divided equally between them "

{¶ 25} Thus, paragraph 4 provides for the sharing of certain property acquired during the marriage A potentially contradictory provision exists at paragraph 7 of the same agreement Paragraph 7, which deals with the division of property upon termination of the marriage, reads as follows.

{¶ 26} "In the event of the termination of the contemplated marriage between the parties, either by divorce, dissolution, or other legal process, it is mutually agreed between said parties that they both hereby release and surrender any and all rights to receive any property settlement from the other "

{¶ 27} Under paragraph 7, the parties expressly agree that, upon divorce, they relinquish their rights to obtain any property held by the other

{¶ 28} Reading paragraphs 4 and 7 in conjunction with one another, it becomes clear that enforcement of paragraph 4 within the context of a divorce proceeding leads to an irresolvable conflict with the express language of paragraph 7

{¶ 29} Judge Lewandowski reconciled this inconsistency by refusing to enforce paragraph 4, on the grounds that to do so would lead to two absurd results (1) it would result in appellee's owing appellant much more than the total value of the marital assets, and (2) it would negate the other paragraphs of the contract, leading to an illogical and absurd meaning to paragraph 4

{¶ 30} Our analysis of the contract focuses on the fact that paragraphs 4 and 7 each call for a different and discrepant division of property Following the mandate that we attempt to harmonize all of the provisions of the antenuptial agreement and give reasonable, lawful, and effective meaning to all of its terms, we conclude that paragraph 4 governs

initially, taking precedence over paragraph 7 during the course of the marriage Upon the initiation of divorce proceedings, paragraph 7 becomes applicable and, by logical necessity, supersedes and, in effect, nullifies paragraph 4 and its terms Stated otherwise, paragraphs 4 and 7 can be serially, but not simultaneously, enforced.

{¶ 31} Because we generally agree with Judge Lewandowski's second basis for refusing to enforce paragraph 4 (inasmuch as we find that paragraph 4 is inapplicable in the context of a divorce proceeding), we need not reach the merits of his first, dealing with the amount of money that might be owed under that paragraph And because we find that Judge Lewandowski did not err in refusing to enforce paragraph 4, we find appellant's first assignment of error not well-taken

{¶ 32} Appellant argues in his second assignment of error that he was denied a full and fair opportunity to litigate his rights under paragraph 4, in violation of his constitutional rights. By this argument, appellant addresses Judge Lewandowski's initial grounds for refusing to enforce paragraph 4, i e., that enforcement of paragraph 4 would result in appellee's owing appellant much more than the total value of the marital assets

{¶ 33} As indicated above, paragraph 4 was found inapplicable to a determination of property rights in this case. Obviously, appellant has no right to litigate claims arising from an inapplicable and, therefore, irrelevant, paragraph Appellant's second assignment of error is therefore found not well-taken

{¶ 34} In his third assignment of error, appellant claims that the domestic relations division lacked jurisdiction to adjudicate paragraph 4 of the antenuptial agreement

{¶ 35} R.C 3105.011 relevantly provides that "[t]he court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." In addition, R C 3105.171 provides

{¶ 36} "(B) In divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section. *For purposes of this section, the court has jurisdiction over all property in which one or both spouses have an interest* " (Emphasis added)

{¶ 37} The law thus establishes that during proceedings for divorce or separation, the domestic relations division has plenary jurisdiction to determine an equitable division of property between spouses See *Diemer v Diemer* (1994), 99 Ohio App 3d 54, 62

{¶ 38} On the basis of the foregoing, we conclude that the domestic relations division had jurisdiction to interpret the entirety of the antenuptial agreement in formulating an equitable division of property between appellant and appellee in their divorce case Accordingly, we find appellant's third assignment of error not well-taken

{¶ 39} Appellant asserts in his fourth assignment of error that the judgment of the domestic relations division regarding paragraph 4 of the antenuptial agreement was not entitled to collateral estoppel or res judicata effect

{¶ 40} Judge Foley, in dismissing the complaint for accounting which appellant had filed in the general division, held as follows in his October 12, 2004 opinion and judgment entry·

{¶ 41} "Here, the Court finds that the Domestic Relations Division issued a Judgment Entry which held that the terms of paragraph four contained in the antenuptial agreement were clear and unambiguous and required no extrinsic evidence on this issue. Accordingly, this Court holds that this issue has been fully litigated by the Domestic Relations Division and that this Court lacks subject matter jurisdiction Therefore, this Court finds that defendant's motion should be granted "

{¶ 42} Appellant reads this holding to mean that Judge Foley applied principles of res judicata and collateral estoppel in barring appellant's claim Appellee reads the holding differently, understanding it to mean that appellant's action was dismissed for lack of subject matter jurisdiction. Because we find the basis of the holding to be somewhat unclear, we consider the positions asserted by both parties

{¶ 43} Appellant argues that because the domestic relations division lacked subject matter jurisdiction to adjudicate the rights and liabilities of the parties under paragraph 4 of the antenuptial agreement, the decision by the domestic relations division did not constitute res judicata and, therefore, could not have had collateral estoppel effect upon the appellant's complaint for accounting before the general division This argument is without merit, however, because, as we indicated in our discussion of appellant's third assignment of error, the domestic relations division did have subject matter jurisdiction to determine the applicability of paragraph 4 and its effect on the parties in the context of the action for divorce

{¶ 44} Appellant next argues that it was error for the general division to give res judicata effect to the decision of the domestic relations division because the domestic relations division did not afford him a full and fair opportunity to litigate the proper application of paragraph 4 Again, as indicated above, in our discussion of appellant's second assignment of error, appellant had a full and fair opportunity to litigate his rights concerning the agreement as a whole Because paragraph 4 was appropriately determined to be inapplicable upon the filing of the parties' action for divorce, appellant had no right to litigate the substance of any claims arising out of that paragraph We, therefore, reject appellant's argument to the contrary as meritless.

{¶ 45} We next consider appellee's view that Judge Foley's dismissal was based on a determination that he lacked subject matter jurisdiction over the action. Subject matter jurisdiction gives a court the authority to hear and decide a case on its merits *Nalesnik v Nalesnik* (Apr 5, 1990), 8th Dist No 56614. A court of common pleas has the power to determine its own subject matter jurisdiction in an action before it, subject to a right of appeal Id Judge Foley exercised his authority and determined that the antenuptial agreement was within the jurisdiction of the domestic relations division

{¶ 46} In Ohio, as between courts of concurrent jurisdiction, the tribunal whose power is first invoked acquires jurisdiction to adjudicate upon the whole issue and to settle the rights of the parties to the exclusion of all other tribunals *John Weenink & Sons Co v Court of Common Pleas* (1948), 150 Ohio St 349, 355, see also, *Price v Privce* (1984), 16 Ohio App.3d 93, 95-96. This priority doctrine has been specifically found to apply in divorce actions *Miller v Court of Common Pleas* (1944), 143 Ohio St. 68, 70

{¶ 47} Here, the domestic relations division was the first to exercise jurisdiction and, therefore, had exclusive subject matter jurisdiction over the entirety of the action. The general division was correct in dismissing appellant's case for lack of subject matter jurisdiction Appellant's fourth assignment of error is therefore found not well-taken.

{¶ 48} Lastly, we address appellant's fifth assignment of error, wherein he claims that it was error for the general division to dismiss appellant's complaint for an accounting for the reasons previously stated in Assignments of Error Nos II (alleging denial of a full and fair opportunity to litigate rights under paragraph 4), III (alleging a lack of jurisdiction on the part of the domestic relations division to adjudicate paragraph 4), and IV (alleging that the domestic relations division's judgment was precluded from having collateral estoppel or res judicata effect due to the alleged constitutional and jurisdictional deficiencies) Those reasons have all been demonstrated herein as being without merit in fact, appellant did have a full and fair opportunity to adjudicate his rights under the agreement, the domestic relations division did have jurisdiction to adjudicate paragraph 4 of the agreement; and the domestic division's judgment regarding paragraph 4 was not precluded as a result of any alleged deficiency from having collateral estoppel and res judicata effect Accordingly, appellant's fifth assignment of error is found not well-taken

{¶ 49} Because all five of appellant's assignments of error are found not welltaken, the judgments of the Lucas County Court of Common Pleas, Domestic Relations Division, and the Lucas County Court of Common Pleas, General Division,

are affirmed Appellant is ordered to pay the costs of this appeal pursuant to App R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App R 27 See, also, 6th Dist Loc App R 4, amended 1/1/98.

Mark L Pietrykowski, J

Arlene Singer, P J.

William J Skow, J CONCUR

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

Footnotes

1 Although appellee has been repeatedly referred to in the proceedings as Andrea Putnam-Reams or Andrea Putnam Reams, it appears from the record that her name is actually Andrea Putman Reams

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2004-Ohio-1049; Foster v. Motorists Ins. Co.; 04-LW-0838 (3rd)

2004-Ohio-1049

[Cite as Foster v Motorists Ins Co , 2004-Ohio-1049]

BARBARA FOSTER, PLAINTIFF-APPELLEE
v
MOTORISTS INSURANCE CO., DEFENDANT-APPELLEE
AND
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, DEFENDANT-APPELLANT

CASE NO 10-03-07
3rd District Court of Appeals of Ohio, Mercer County
Decided on March 8, 2004

CHARACTER OF PROCEEDINGS Civil Appeal from Common Pleas Court

JUDGMENT Judgment Reversed and Cause Remanded

MICHAEL L CLOSE, Attorney at Law, Reg #0008586, 300 Spruce Street, Floor One, Columbus, Ohio 43215-1173, For Appellant, National Union Fire Insurance Company of Pittsburgh, PA

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STEPHEN C FINDLEY, Attorney at Law, Reg #0010715, One Dayton Centre, Suite 1800, 1 South Main Street, Dayton, Ohio 45402, For Appellee, Motorists Insurance Company

CRAIG A GOTTSCHALK, Attorney at Law, Reg #0068512, 127-129 North Pierce Street, P O Box 546, Lima, Ohio 45802-0546, For Appellee, Barbara Foster

OPINION

CUPP, J

{¶1} Defendant-appellant, National Union Fire Insurance Company of Pittsburgh, PA (hereinafter, "National Union"), appeals the March 5, 2003, judgment of the Mercer County Court of Common Pleas, denying National Union's motion for summary judgment

{¶2} The procedural history and facts pertinent to the case at bar follow

{¶3} On January 27, 2000, plaintiff-appellee, Barbara Foster (hereinafter, "Foster") was injured in an automobile accident in Mercer County, Ohio The accident was caused by the negligence of Jeremy Hilton ("Hilton") When the accident occurred, Foster had a personal auto policy of insurance in effect with Motorists Insurance Company ("Motorist") The Motorist personal auto policy listed Foster's 1994 Grand Am, the car she was operating at the time of the accident, as the only "covered auto" under the policy The personal auto policy provides Foster with up to $100,000 of uninsured/underinsured ("UM/UIM") coverage The tortfeasor, Hilton, had in effect a personal automobile liability policy issued by American Select Insurance Company with policy limits of $25,000 Pursuant to Hilton's policy limits, Foster settled her bodily injury claim against Hilton for $25,000

{¶4} At the time the accident occurred, Foster was employed by Miller House Assisted Living ("Miller House") However, Foster makes no allegation that she was acting within the scope of her employment when the accident occurred Miller House is owned by Assisted Living Concepts, Inc ("Assisted Living") Assisted Living had in effect and was listed as the "named insured" under a commercial auto policy of insurance issued by National Union with UM/UIM policy limits of one million dollars ($1,000,000)

{¶5} Foster filed a complaint in the Mercer County Court of Common Pleas on April 26, 2001, seeking recovery for her uncompensated injuries under both Assisted Living's National Union commercial auto policy and her personal auto policy of insurance with Motorist On December 20, 2001, both National Union and Motorist filed motions for summary judgment National Union argued that the commercial auto policy it issued to Assisted Living was not subject to Ohio law, or in the alternative, if Ohio law applied, Foster was not occupying a covered auto at the time of the accident

{¶6} In its motion for summary judgment, Motorist argued that even though the personal auto policy expressly provided Foster with UM/UIM coverage, National Union's commercial auto policy provided primary UM/UIM coverage to Foster and, therefore, argued that its liability should be reduced on a pro-rata basis to reflect National Union's liability

{¶7} On March 5, 2003, the trial court found the following (1) the language of the National Union policy defining "who is an insured" is ambiguous and, therefore, pursuant to *Scott-Pontzer v Liberty Fire Ins Co* (1999), 85 Ohio St 3d 660, National Union's commercial auto policy issued to Assisted Living provides UM/UIM motorist coverage to Foster by operation of law with policy limits of one million dollars ($1,000,000) per accident, (2), the National Union commercial auto policy is governed by Ohio law because it provides for other than Texas automobiles and "specifically" includes Ohio automobiles, and; (3) the National Union policy and the Motorist personal auto policy should be applied on a pro rata basis such that Motorist is liable for one-eleventh (1/11) and National Union is liable for ten-elevenths (10/11) of Foster's damages

{¶8} Accordingly, the trial court granted Motorist's motion for summary judgment as to National Union's pro rata liability and denied National Union's motion for summary judgment A final judgment entry was filed by the trial court on April 8, 2003

{¶9} National Union now appeals the March 5, 2003 judgment of the trial court denying its motion for summary judgment and sets forth one assignment of error for our review

ASSIGNMENT OF ERROR NO. I

The trial court erred in denying the motion for summary judgment of National Union Fire Insurance Company of Pittsburgh, PA.

{¶10} An appellate court reviews a grant of summary judgment de novo *Lorain Natl. Bank v Saratoga Apts* (1989), 61 Ohio App.3d 127, 129 Summary judgment is proper if the evidence filed in a case shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law Civ R 56(C) Furthermore, summary judgment should be granted if "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 "

Civ R 56(C)

{¶11} National Union asserts that the trial court erred in finding that the commercial auto policy issued to Assisted Living is subject to Ohio law. Rather, National Union contends Texas law is applicable to the commercial auto policy in question Contrarily, Foster maintains that Ohio law applies to the National Union policy and that she was entitled to UM/UIM coverage pursuant to the Ohio Supreme Court's holding in *Scott-Pontzer v Liberty Mut Fire Ins Co* (1999), 85

Ohio St 3d 660 (fn1)

{¶12} In order to determine choice of law issues in regards to application of insurance contracts, we look to *Ohayon v Safeco Ins Co of Illinois* (2001), 91 Ohio St 3d 474. In *Ohayon*, the Ohio Supreme Court held that an action by an insured against his or her insurance carrier for payment of UM/UIM coverage is a cause of action sounding in contract, rather than tort *Ohayon*, supra, at paragraph one of the syllabus Courts must, therefore, determine questions involving the nature and extent of the parties' rights and duties under an insurance contract's UIM provision by applying the rules in Sections 187 and 188 of the Restatement of the Law 2d, Conflict of Laws (1971) Id , at paragraph two of the syllabus.

{¶13} Section 187 of the Restatement provides that, subject to very limited exceptions, the law of the state chosen by the parties to a contract will govern their contractual rights and duties Id , at 477. A review of the record in the case sub judice indicates that the parties made no such express choice of law Consequently, pursuant to Section 188 of the Restatement, the parties' rights and duties under the contract are determined by the law of the state that has "the most significant relationship to the transaction and the parties " *Ohayon*, 91 Ohio St 3d at 477, (citation omitted) Section 188 (2) of the Restatement provides that in making this determination, courts should consider·

(1) the place of contracting;

(2) the place of negotiation;

(3) the place of performance;

(4) the location of the subject matter, and;

(5) the domicile, residence, nationality, place of incorporation, and place of business of the parties

Id The Ohio Supreme Court has further stated that the focus on these factors "will often correspond with the Restatement's view that the rights created by an insurance contract should be determined 'by the law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless * * * some other state has a more significant relationship to the transaction and the parties '" Id , at 479, quoting Restatement 188

{¶14} Foster argues that she is entitled to UM/UIM coverage by virtue of an "omnibus named insured" endorsement (#003) to the National Union commercial auto policy which provides that "the named insured includes any and all past, present or hereinafter formed or acquired subsidiary companies, corporations * * * which are owned * * * or for which you are obligated to provide insurance." We acknowledge that by virtue of this endorsement, the commercial auto policy is modified to include Miller House as a named insured under the contract This alone, however, is not determinative of whether Ohio or Texas law is applicable to the enforcement of the policy We must further examine the policy and determine whether the *Ohayon* factors favor the application of Texas or Ohio law See *Reidling v Meacham*,148 Ohio App 3d 86, 2002-Ohio-528 at ¶ 15

{¶15} In applying the *Ohayon* factors to the case sub judice, the record provides the following facts: (1) the contract was formed in Texas, (2) the commercial auto policy was negotiated in Texas, (3) the policy is comprised of Texas forms and was filed in the Texas Department of Insurance; (4) the policy lists only three automobiles as covered autos, all of which are listed as being located and principally garaged in Texas (a 1990 Cadillac, Deville, McKinney Texas, a 1992 Cadillac, Seville, Plano, Texas, and, a 1999 Dodge, Caravan, Nacogdoches, Texas);(fn2) (5) the declarations page of the commercial auto policy lists "Assisted Living Concepts" as the "named insured" and lists Assisted Living's address as 3404 SW 5th Street, Plainview, Texas, and, (6) Assisted Living's principal place of business is Texas

{¶16} Under these circumstances, we find that the connection to Texas represents the "more significant relationship to the transaction and the parties " *Humbert v United Ohio Ins Co*, (2003) 154 Ohio App 3d 540, 2003-Ohio-4356, at ¶ 12

Pursuant to *Ohayon*, we will, therefore, utilize Texas law to interpret the existence and extent of coverage provided by the National Union policy (fn3) See, also, *Humbert*, supra

{¶17} Section "A" of the UM/UIM endorsement to the National Union commercial auto policy provides that

[National Union] will pay damages which an insured is legally

entitled to recover from the owner or operator of an uninsured

motor vehicle because of bodily injury sustained by an insured,

or property damage caused by an accident. The owner's or

operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle

Section C of the UM/UIM endorsement to the National Union business auto policy defines "who is an insured" as

1. **You and any "designated person" and any "family member" of either.**

2. **Any other person "occupying" a "covered auto".**

3. **Any person or organization for damages that person or organization is entitled to recover because of "bodily injury" sustained by a person described in 1 or 2 above.**

The business auto coverage form in the commercial auto policy provides that throughout the policy the words "you" and "your" refer to the "named insured shown in the declarations " "Assisted Living Concepts" is listed as the "named insured" in the declarations page

{¶18} *Webster v United States Fire Ins Co* (1994), 882 S W 2d 569, a decision of the First District Court of Appeals of Texas, is the applicable Texas law to the case sub judice. In *Webster*, the court determined that an insurance policy is not ambiguous merely because it contains a corporate entity as a named insured and held that employees of a corporate named insured are not entitled to UM/UIM coverage for motor vehicle accidents that occur while acting outside the scope of their employment *Webster*, 882 S.W 2d 569, 573 Simply stated, there is no *Scott-Pontzer* equivalent in Texas

{¶19} In the case sub judice, because Foster is not listed as a named insured and was not driving a covered automobile as listed in the business auto policy, she does not meet the definition of "who is an insured" for purposes of UM/UIM coverage under the National Union commercial auto policy Furthermore, Foster has not alleged anywhere in the record, including her complaint, answer to National Union's motion for summary judgment, or her appellate brief, that she was acting within the scope of her employment when the accident occurred. Accordingly, pursuant to Texas law, Foster is not provided with UM/UIM coverage under National Union's commercial auto policy

{¶20} Moreover, National Union maintains if the only covered autos under a policy of insurance are registered or principally garaged in states other than Ohio, as is the case sub judice, Ohio R C 3937 18 is inapplicable to the policy of insurance

{¶21} R C. 3937 18(fn4) provides that.

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of

'the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy * * * :

(1) Uninsured motorist * * *.

(2) Underinsured motorist coverage * * *.

{¶22} Because National Union's commercial auto policy was not delivered, or issued for delivery, in Ohio *and* because the policy does not cover vehicles registered or principally garaged in Ohio, R.C 3937.18 is inapplicable to the National Union policy National Union was not, therefore, required to offer UM/UIM coverage in accordance with R C 3937 18, and UM/UIM insurance does not arise by operation of law to extend coverage to Foster in the case sub judice See *Henderson v Lincoln Natl. Specialty Ins Co* ,68 Ohio St 3d 303, 1994-Ohio-100, *De Uzhca v Derham*, 2nd Dist App No 19106, 2002-Ohio-1814

{¶23} We, therefore, find that the trial court erred by denying National Union's motion for summary judgment, and National Union's assignment of error is sustained In addition, because Foster is not entitled to UM/UIM coverage under the National Union commercial auto policy, National Union is not liable to share in the damages with Motorist on a pro rata basis Accordingly, the trial court's grant of summary judgment to Motorist is vacated

{¶24} Having found error prejudicial to the appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion

Judgment reversed and cause remanded.

SHAW, P.J , and BRYANT, J., concur.

Footnotes

1. The Ohio Supreme Court, in *Westfield Ins Co v Galatis*, 100 Ohio St 3d 216, 2003-Ohio-5849, modified and limited its previous holding in *Scott-Pontzer*, supra, and held that "[a]bsent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation *only if the loss occurs within the course and scope of employment* " *Galatis*, supra, at paragraph two of the syllabus, emphasis added Neither party to this appeal, however, has raised the issue of whether Foster was acting within the course and scope of her employment when the accident occurred.

2. We note that National Union maintains that the commercial auto policy includes four covered auto by virtue of a "Fleet Schedule Endorsement" which lists a 1994 Ford Van principally garaged in Paris, Texas This "Fleet Endorsement," however, has not been attached to the National Union commercial auto policy in the records submitted to this court and does not appear to be included in the policy However, in reviewing the commercial auto policy in question, we find that the trial court erred in finding that the policy provides coverage "for other than Texas automobiles, and specifically include[es] Ohio automobiles " The commercial auto policy could only be construed to provide coverage for Ohio automobiles if Ohio law and *Scott-Pontzer*, supra, applied to create an ambiguity to extend coverage to the employees of Assisted Living and Miller House, discussed infra

3 Based upon this conclusion, it is not necessary for this court to consider the other arguments raised by National Union

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2004-Ohio-6250; Hanlin-Rainaldi Construction Corp. v. Jeepers, Inc.; 04-LW-5266 (10th)

2004-Ohio-6250

[Cite as Hanlin-Rainaldi Construction Corp v Jeepers, Inc , 2004-Ohio-6250]

Hanlin-Rainaldi Construction Corp , Plaintiff-Appellant,
v
Jeepers, Inc , Defendant-Appellee

No 03AP-851

10th District Court of Appeals of Ohio, Franklin County
Decided on November 23, 2004

(C P C. No 02CVH-5622)

Bricker & Eckler, LLP, and James J. Hughes, III, for appellant

Porter, Wright, Morris & Arthur, LLP, Jack R Pigman, Jay A Yurkiw and Bryan R Faller, for appellee

APPEAL From the Franklin County Court of Common Pleas

OPINION

PETREE, J

{¶1} Plaintiff-appellant, Hanlin-Rainaldi Construction Corporation ("Hanlin-Rainaldi"), appeals from a judgment of the Franklin County Court of Common Pleas that granted partial summary judgment in favor of defendant-appellee, Jeepers[1], Inc ("Jeepers"). For the following reasons, we affirm

{¶2} Jeepers owns and operates indoor animated theme parks that are designed to serve families with children who are 12 years old or younger Within these indoor animated theme parks are amusement park rides, soft play areas, skill games, and family dining

{¶3} In August 1999, Jeepers and Concord Mills Limited Partnership ("Concord Mills") entered into a ten-year lease agreement with the intention that Jeepers would operate a business establishment at a leasehold in Concord Mills Mall in Concord, North Carolina Under this agreement, after Jeepers satisfied conditions precedent, Concord Mills apparently agreed to pay Jeepers an allowance for construction improvements

{¶4} In August 1999, Jeepers also entered into an agreement with Hanlin-Rainaldi, an Ohio corporation that Jeepers apparently had retained on several previous occasions for other construction projects According to this agreement, Jeepers agreed to pay $1,100,000 to Hanlin-Rainaldi for upfitting the leasehold at Concord Mills Mall

{¶5} Effective August 1999, Jeepers also contracted with Win & Associates, Inc. ("Win & Associates"), a general contractor in North Carolina According to this agreement, Jeepers appointed Win & Associates to be the general contractor for the Concord Mills Mall project and directed them to use Hanlin-Rainaldi as the major prime contractor for the Concord Mills Mall project. The project agreement between Jeepers and Win & Associates also required, among other things, that Jeepers (1) assign its agreement with Hanlin-Rainaldi to Win & Associates for the purpose of satisfying North Carolina licensing and permit requirements, (2) pay the contract sum as provided in its agreement with Hanlin-Rainaldi directly to Hanlin-Rainaldi, and (3) pay a management fee to Win & Associates

{¶6} Jeepers, however, failed to pay Hanlin-Rainaldi for services rendered, thereby breaching its agreement with Hanlin-Rainaldi To perfect its interest, Hainlin-Rainaldi filed a lien in North Carolina against the leasehold

{¶7} In May 2000, desiring to settle any and all claims resulting from the construction project that the parties had against each other, Jeepers and Hanlin-Rainaldi entered into a settlement agreement,(fn1) wherein Jeepers acknowledged it owed $708,084 to Hanlin-Rainaldi. Pursuant to this agreement, Jeepers promised to pay $440,000 upon execution of the agreement, with the remaining balance to be paid by (1) a promissory note in the amount of $160,000 ("Note 1"), and (2) a cognovit note in the amount of $108,084 In exchange, Hanlin-Rainaldi agreed to release the lien against the leasehold at Concord Mills Mall (fn2)

{¶8} Jeepers failed to pay the $440,000 that it promised to pay upon execution of the May 2000 settlement agreement Thereafter, Hanlin-Rainaldi sued Jeepers, Concord Mills, and Win & Associates in a North Carolina court

{¶9} Additionally, although Jeepers made payments towards satisfying its obligation under Note 1, which continued until 2002,(fn3) Jeepers ultimately failed to totally satisfy its obligation under Note 1 Jeepers did, however, satisfy the cognovit note

{¶10} In August 2001, Hanlin-Rainaldi, Jeepers, and Concord Mills entered into a settlement agreement to resolve disputed claims Concurrent with the execution of this settlement agreement, Jeepers executed two promissory notes to Hanlin-Rainaldi in the amount of $165,000 ("Note 2") and $75,000 ("Note 3"), respectively Additionally, concurrent with the execution of the second agreement, Concord Mills agreed to put $75,000 in escrow for the benefit of Jeepers to be disbursed to Hanlin-Rainaldi after it released its lien and dismissed its lawsuit Hanlin-Rainaldi acknowledges that it received the $75,000 that was held in escrow, however, according to Hanlin-Rainaldi, Jeepers defaulted on Notes 2 and 3

{¶11} On May 20, 2002, Hanlin-Rainaldi sued Jeepers in the Franklin County Court of Common Pleas, asserting five causes of action, that Jeepers (1) wrongfully withheld payment under Note 1 and was liable for all amounts due under this note, (2) wrongfully withheld payment under Note 2 and was liable for all amounts due under this note, (3) wrongfully withheld payment under Note 3 and was liable for all amounts due under this note; (4) materially breached the agreement of August 2001 and was liable for the balances due under Notes 2 and 3, and (5) had been unjustly enriched and was liable in an amount equal to the outstanding balances that were due under Notes 1, 2, and 3 Jeepers answered the complaint, wherein it admitted to executing the notes but generally denied other allegations in the complaint

{¶12} Hanlin-Rainaldi later moved for summary judgment as to all claims Jeepers opposed this motion

{¶13} Later, Jeepers moved for summary judgment concerning Hanlin-Rainaldi's claims that arose under the August 2001 agreement and Notes 2 and 3, claiming that the agreement and Notes 2 and 3 were executed under economic duress In the alternative, Jeepers sought judgment relating to Note 1, claiming that the agreement discharged Jeepers of this debt Hanlin-Rainaldi opposed Jeepers' motion for summary judgment

{¶14} On April 1, 2003, the trial court rendered a decision, wherein it granted in part and denied in part Hanlin-Rainaldi's motion for summary judgment and granted Jeepers' motion for summary judgment, however, this decision was later vacated Pursuant to Civ R. 53 and local rule, the trial court later referred the matter to a magistrate for a mediation conference After reaching an impasse, the matter was referred for further motion practice and trial preparation.

{¶15} On July 24, 2003, the trial court rendered judgment wherein it granted in part and denied in part both Hanlin-Rainaldi's and Jeepers' motions for summary judgment. In its judgment, the trial court found in favor of Hanlin-Rainaldi concerning its claims that Jeepers breached the August 2001 agreement and was liable to Hanlin-Rainaldi under Notes 2 and 3 However, the trial court found in favor of Jeepers as to Hanlin-Rainaldi's claims that Jeepers failed to satisfy its obligation under Note 1 and Jeepers was unjustly enriched From this judgment, Hanlin-Rainaldi appeals and asserts a single assignment of error

"The trial court erred as a matter of law in applying the parol evidence rule to bar evidence of Appellee's subsequent conduct

{¶16} In its reply brief, Hanlin-Rainaldi alternatively asserts The trial court erred as a matter of law by failing to considerevidence of Appellee's subsequent payments on the note toshow intent and meaning, including whether such conductconstituted a modification or waiver of the terms of the releaselanguage in the settlement agreement.

{¶17} We will first address which substantive law and procedural law apply to this cause.

{¶18} The Supreme Court of Ohio has held: 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 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 *Schulke Radio Productions, Ltd v Midwestern Broadcasting Co* (1983), 6 Ohio St 3d 436, syllabus; see, also, *Jarvis v Ashland Oil, Inc* (1985), 17 Ohio St 3d 189, syllabus, Restatement of the Law 2d, Conflict of Laws (1971) 561, Section 187. Accord *Torres v McClain* (2000), 140 N C App 238, 241, quoting *Behr v Behr* (1980), 46 N C.App 694, 696, 266 S E 2d 393, citing Restatement of the Law 2d, Conflict of Laws (1971) 561, Section 187 (stating that "[t]he parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law ")

{¶19} Section 9f of Hanlin-Rainaldi, Jeepers, and Concord Mills' August 2001 agreement provides that "This Agreement shall be governed by the laws of the State of North Carolina " In this case, North Carolina is the locus of Jeepers' leasehold and the construction project, and we find it is the forum with the most significant contacts to the case Accordingly, we conclude North Carolina has a substantial relationship to the settlement agreement, and there exists a reasonable basis for the parties' choice of law provision in their contract Furthermore, based upon our review of the record, we cannot conclude that Ohio would have a greater material interest than North Carolina in the outcome of this case Accordingly, we conclude North Carolina substantive law applies to the August 2001 agreement

{¶20} Furthermore, because traditional choice of law principles provide that the law of the forum state governs on procedural matters, *Keeton v Hustler Magazine, Inc* (1984), 465 U S 770, 778, fn 10, 104 S.Ct. 1473, *Lawson v Valve-Trol Co* (1991), 81 Ohio App 3d 1, 4, jurisdictional motion overruled, 61 Ohio St 3d 1422, Restatement of the Law 2d, Conflict of Laws (1971) 350, Section 122, we conclude Ohio procedural law applies to this cause.

{¶21} In its reply brief, Hanlin-Rainaldi has asserted an alternative assignment of error, namely, that the August 2001 agreement was modified or, alternatively, that release language in this agreement was waived

{¶22} "[A] reply brief is merely an opportunity to reply to the brief of appellee * * * A reply brief may not raise new assignments, which were omitted from appellant's original brief, especially where leave to file a new assignment was not sought from this court " *Calex Corp v United Steelworkers of America* (2000), 137 Ohio App 3d 74, 80, dismissed, appeal not allowed, 89 Ohio St.3d 1465, see, also, *Trout v Ohio Dept of Edn* , Franklin App No 02AP-783, 2003-Ohio-987, at ¶26, *Belcher v Ohio State Racing Comm* , Franklin App. No. 03AP-786, 2004-Ohio-1278, at ¶18, appeal not allowed, 103 Ohio St 3d 1405, *Julian v Creekside Health Ctr* , Mahoning App No 03MA21, 2004-Ohio-3197, at ¶81, *Tipp City v Watson*, Miami App. No 02CA43, 2003-Ohio-4836, at ¶28; *Brouse v Old Phoenix Natl Bank of Medina* (1985), 25 Ohio App 3d 9, 10, fn 1, *Sheppard v Mack* (1980), 68 Ohio App.2d 95, 97, fn. 1. See, also, App R 16(A)(3) and (C)

{¶23} Additionally, "[i]ssues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on review " *Republic Steel Corp v Cuyahoga Cty Bd of Revision* (1963), 175 Ohio St 179, syllabus, see, also, *State ex rel*

Gutierrez v Trumbull Cty Bd of Elections (1992), 65 Ohio St 3d 175, 177 (observing that "[a]ppellant cannot change the theory of his case and present these new arguments for the first time on appeal"), *Shaffer v OhioHealth Corp* , Franklin App No. 03AP-102, 2004-Ohio-63, at ¶13, *State ex rel Phillips v Capots* (Sept 22, 1994), Franklin App No 94APE04-499, citing *Miller v Wikel Mfg Co , Inc* (1989), 46 Ohio St.3d 76, 78.

{¶24} In the instant case, although this court granted Hanlin-Rainaldi's motion for leave to file a reply brief, Hanlin-Rainaldi did not seek leave to assert an alternative assignment of error in its reply brief Additionally, before the trial court, Hanlin-Rainaldi did not raise whether Jeepers' payments on Note 1 following the August 2001 agreement constituted a modification or waiver of the release language in the settlement agreement Accordingly, we conclude that Hanlin-Rainaldi's alternative assignment of error as asserted in its reply brief is improperly raised. Therefore, finding that Hanlin-Rainaldi's alternative assignment of error is improperly raised, we decline to address it

{¶25} Appellate review of a lower court's granting of summary judgment is de novo *Mitnaul v Fairmount Presbyterian Church*, 149 Ohio App 3d 769, 2002-Ohio-5833, at ¶27 " '*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial ' " Id , quoting *Brewer v Cleveland Bd of Edn* (1997), 122 Ohio App 3d 378, citing *Dupler v Mansfield Journal Co , Inc* (1980), 64 Ohio St 2d 116, 119-120, certiorari denied (1981), 452 U S. 962, 101 S.Ct 3111

{¶26} Summary judgment is proper when a movant for summary judgment demonstrates (1) no genuine issue of material fact exists, (2) the movant is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor Civ.R. 56; *State ex rel Grady v State Emp Relations Bd* (1997), 78 Ohio St 3d 181, 183

{¶27} Under Civ R. 56(C), a movant bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact *Dresher v Burt* (1996), 75 Ohio St 3d 280, 293. Once a movant discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ R 56, with specific facts showing that a genuine issue exists for trial Id., *Vahila v Hall* (1997), 77 Ohio St 3d 421, 430; Civ.R 56(E)

{¶28} In its assignment of error, Hanlin-Rainaldi asserts the trial court erred when it applied the parol evidence rule to bar Jeepers' subsequent conduct when determining that the August 2001 agreement released Jeepers of its obligations under Note 1

{¶29} " 'The parol evidence rule is not a rule of evidence but of substantive law It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement ' " *Thompson v First Citizens Bank & Trust Co* (2002), 151 N C App 704, 708-709, 567 S E 2d 184, quoting *Harrell v First Union Natl Bank* (1985), 76 N C App 666, 667, 334 S.E.2d 109, 110, affirmed (1986), 316 N C 191, 340 S E 2d 111 Accord *Ed Schory & Sons, Inc v Society Natl Bank* (1996), 75 Ohio St 3d 433, 440, *Natl City Bank, Akron v Donaldson* (1994), 95 Ohio App.3d 241, 244-245 " 'Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract.' " *Thompson*, supra, at 709, quoting *Hansen v DHL Laboratories* (1994), 316 S C 505, 508, 450 S E.2d 624, affirmed (1995), 319 S C 79, 459 S E 2d 850. Accord *Citicasters Co v Bricker & Eckler, L L P* , 149 Ohio App 3d 705, 2002-Ohio-5814, at ¶7

{¶30} Based upon our review, we find that the trial court did not expressly apply the parol evidence rule when it construed the August 2001 agreement Therefore, we find Hanlin-Rainaldi's contention that the trial court improperly applied the parol evidence rule is misplaced

{¶31} However, to the extent that Hanlin-Rainaldi asserts that the trial court misconstrued or misapplied, or both, the

agreement, as between Hanlin-Rainaldi and Jeepers, we review de novo the trial court's determination

{¶32} "Under North Carolina law, '[w]hen the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court[,] and the court cannot look beyond the terms of the contract to determine the intentions of the parties ' " *Financial Services of Raleigh, Inc v Barefoot* (2004), 163 N.C App 387, 594 S E 2d 37, 42, quoting *Piedmont Bank & Trust Co v Stevenson* (1986), 79 N C App 236, 240, 339 S E 2d 49, (internal citations omitted), affirmed per curiam, 317 N C 330, 344 S E 2d 788, see, also, *Helms v Schultze* (2003), 161 N C App 404, 409, 588 S E 2d 524 Therefore, " '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean ' " *Barefoot*, at 43, quoting *Hartford Acc & Indem Co v Hood* (1946), 226 N.C 706, 710, 40 S.E 2d 198 (internal citations omitted)

{¶33} According to section 5a of the August 2001 agreement Hanlin, and its parent, subsidiary, and affiliate corporations, and their respective shareholders, partners, directors, officers, employees, insurers, representatives, and agents, and their respective heirs, successors, and assigns, hereby release and discharge Jeepers and Concord Mills, and each of their parent, subsidiary, and affiliate corporations, and their respective shareholders, partners, directors, officers, employees, insurers, representatives, subcontractors, suppliers, and agents, and their respective heirs, successors, and assigns, and from any and all obligations, liabilities, damages, claims, costs, expenses, and attorneys' fees (whether known or unknown) arising out of or relating in any manner to the upfit of the Jeepers' facilities in the Concord Mills Mall and in Southfield, Michigan.

{¶34} Furthermore, pursuant to section 9c of the agreement· "This Agreement represents the entire agreement between the Parties with respect to the settlement of the dispute between them, and it supersedes all prior discussions, representations, and/or negotiations This Agreement shall not be amended except in a writing signed by both of the Parties "

{¶35} Thus, applying the plain language of the agreement, we must determine whether Jeepers' obligation under Note 1 is an obligation, liability, claim, or cost that arises out of or relates in any manner to the upfit of Jeepers' facility in the Concord Mills Mall

{¶36} Jeepers' obligation under Note 1 arose pursuant to a May 2000 agreement Under this agreement, Hanlin-Rainaldi and Jeepers expressly desired to settle any and all claims against each other that resulted from the construction project in Concord, North Carolina Pursuant to this agreement, Jeepers executed Note 1.

{¶37} Accordingly, we conclude that Jeepers' obligation under Note 1 relates to the upfit of Jeepers' facility in the Concord Mills Mall, and it is an obligation that arises out of or relates to the upfit of the construction project in the Concord Mills Mall

{¶38} Because Jeepers' obligation under Note 1 arises out of or relates to the upfit of the construction project in the Concord Mills Mall, we further conclude, as a matter of law, that section 5a of the August 2001 agreement applies and releases Jeepers from its obligation under Note 1. See, generally, *Barefoot*, supra, at 42, citing *Chemimetals Processing, Inc v Schrimsher* (2000), 140 N C.App. 135, 138, 535 S E 2d 594 (applying principles governing interpretation of contracts when construing a release), *Adder v Holman & Moody, Inc* (1975), 288 N C. 484, 492, 219 S E.2d 190

{¶39} Nevertheless, Hanlin-Rainaldi asserts that it was not the parties' intention that Jeepers' obligation under Note 1 would be discharged by the August 2001 agreement

{¶40} Under North Carolina law, "[w]here the provisions of a contract are plainly set out, the court is not free to disregard them and a party may not contend for a different interpretation on the ground that it does not truly express the intent of the parties " *Dixon, Odom & Co v Sledge* (1982), 59 N C App 280, 284, 296 S.E 2d 512, citing *Taylor v Gibbs* (1966), 268 N C 363, 150 S E.2d 506

{¶41} Here, section 5a. of the August 2001 agreement plainly and unambiguously discharges Jeepers' obligation under Note 1 Finding that this provision of the contract is plainly set out, we are not free to disregard it on the grounds that it does not truly express the parties' intent

{¶42} Accordingly, Hanlin-Rainaldi's argument that it was not the parties' intention that Jeepers' obligation under Note 1 would be discharged by the August 2001 agreement is unpersuasive.

{¶43} Therefore, having concluded that Hanlin-Rainaldi's contention that the trial court erred when it applied the parol evidence rule to bar Jeepers' subsequent conduct is misplaced and having concluded that section 5a of the August 2001 agreement plainly and unambiguously applies to discharge Jeepers' obligation under Note 1, we therefore overrule Hanlin-Rainaldi's sole assignment of error

{¶44} Accordingly, having overruled Hanlin-Rainaldi's sole assignment of error, and having found that Hanlin-Rainaldi's alternative assignment of error in its reply brief was improperly raised, we therefore affirm the judgment of the Franklin County Court of Common Pleas

Judgment affirmed

KLATT and WRIGHT, JJ , concur

WRIGHT, J , retired of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution

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Footnotes

1 Jeepers has correctly observed that the copy of the May 2000 agreement in the record was not signed or dated by Hanlin-Rainaldi and lacked some exhibits that were referenced in the settlement agreement (Jeepers' Reply Memorandum in Support of Its Motion for Summary Judgment, at 4.) Nevertheless, before the trial court, Jeepers did not affirmatively deny that it was a party to this settlement agreement, nor did it move to strike this copy of the purported settlement agreement See, generally, *Churchwell v Red Roof Inns, Inc* (Mar 24, 1998), Franklin App No. 97APE08-1125, at fn 1

2 According to Jeepers, Hanlin-Rainaldi did not remove its lien until after Hanlin-Rainaldi filed suit in North Carolina and another settlement agreement in August 2001 was executed (Jeepers' Reply Memorandum in Support of Its Motion for Summary Judgment, at 4, fn. 3)

3 According to Hanlin-Rainaldi, Jeepers failed to make a monthly payment on April 15, 2002, and then failed to make any subsequent payments. (Affidavit of Kristy Krull, Comptroller of Hanlin-Rainaldi, dated October 30, 2002, at ¶7) Jeepers admits it made payments in January and February 2002 (Reply Memorandum of Defendant Jeepers[1], Inc in Support of its Motion For Summary Judgment, at 7, fn. 8)

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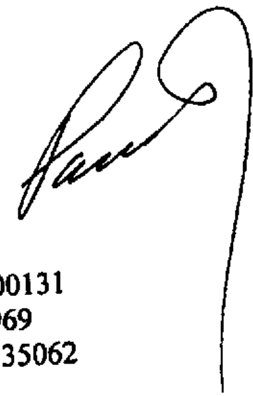
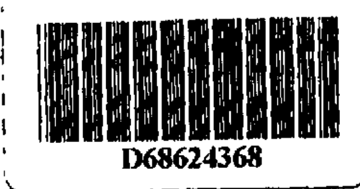


COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO

Ellen L. Turner

Plaintiff



-vs-

Jon H. Entine

Defendant

Case No DR0500131
File No E233969
CSEA 7053135062

MAGISTRATE'S ORDER
Judge Panioto
Magistrate Theile

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 May 26, 2006 on Plaintiff/Wife's Motion To Quash and Defendant/Husband's Motion To Continue Property Trial and to Bifurcate.

Wife was present and represented by Sallee M Fry, Esquire The Husband was present and represented by Gloria S. Haffer, Esquire

Based upon the evidence presented at the hearing and upon due consideration of the applicable law, the Order of the Magistrate is as follows:

Wife's Motion To Quash is denied The subpoena she seeks to quash is directed to a third party She does not have standing to quash the subpoena

Husband's Motion To Continue and Bifurcate is well taken. The currently scheduled property trial shall be utilized for the purposes of determining the validity and application of the parties' pre-nuptial agreement The issue of the pre-nuptial agreement shall be determined prior to a continuation of the trial on the property and support issues As a result of this determination, discovery shall be permitted on the pre-marital agreement issues up to the first scheduled hearing date

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 05/30/2006

Copies sent by Clerk of Courts to:

Sallee M Fry, Esquire, Attorney For Plaintiff

Gloria S Haffer, Esquire, Attorney For Defendant