

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Heather Tejada-Hercules et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 08AP-150
State Automobile Insurance Company	:	(C.P.C. No. 04CVC06-6593)
et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
	:	

O P I N I O N

Rendered on September 30, 2008

Smith, Phillips & Assoc., and *Scott Elliott Smith*, for appellees.

Caborn & Butauski Co., LPA, and *David A. Caborn*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} State Automobile Insurance Company (individually "State Auto") and Dorene Enlow, defendants-appellants, appeal from a judgment of the Franklin County Court of Common Pleas, in which the court granted in part and denied in part the motion for summary judgment filed by appellants, and granted in part and denied in part the motion for judgment on the pleadings or, in the alternative, motion for summary judgment filed by Heather and Gilberto Tejada-Hercules, plaintiffs-appellees.

{¶2} Appellees maintained automobile insurance with Grange Insurance ("Grange"). On November 3, 2002, appellees were injured in a car accident caused by a driver insured by State Auto. Appellees incurred medical expenses, which were paid for by Grange, pursuant to the terms of their insurance policy. Appellees agreed to settle their claims against the tortfeasor. Pursuant to the agreement, State Auto was to deliver two checks: one in the amount of \$9,086.77, which was to be issued to appellees, and one in the amount of \$6,913.23, which was to be issued to both appellees and Grange. The \$6,913.23 check was to be issued to both appellees and Grange because the two parties disputed the amount owed to Grange based upon the subrogation clause for medical expenses incurred. Although State Auto issued the \$9,086.77 check to appellees, State Auto's employee, Enlow, issued the \$6,913.23 check to Grange only.

{¶3} On June 24, 2004, appellees filed an action against appellants, alleging appellants had breached their settlement agreement, appellants' acts were negligent, and appellants' acts constituted fraudulent misrepresentation. On October 14, 2005, appellants filed a motion for summary judgment. On October 17, 2005, appellees filed a motion for judgment on the pleadings or, in the alternative, motion for summary judgment.

{¶4} On June 28, 2006, the trial court filed a decision granting in part and denying in part appellees' motion for judgment on the pleadings or, in the alternative, motion for summary judgment, and granting in part and denying in part appellants' motion for summary judgment. The court found that appellants were entitled to summary judgment on the negligence and fraudulent misrepresentation claims, and appellees were entitled to partial summary judgment on the breach of contract claims. The court found that appellees did not suffer any actual damages related to the breach of the settlement

agreement because appellees were required, pursuant to the terms of their insurance contract, to reimburse Grange 100 percent of the medical expenses paid by Grange, and Grange would not have accepted a lesser amount. Nevertheless, the court found appellees were still entitled to attorney fees incurred in bringing the action pursuant to *Shanker v. Columbus Warehouse Ltd. Partnership* (June 6, 2000), Franklin App. No. 99AP-772 ("*Shanker*"). The trial court referred the issue of attorney fees to a magistrate. On May 16, 2007, the magistrate issued a decision, ordering appellants to pay appellees \$10,000 in attorney fees. Appellants filed objections to the magistrate's decision, which the trial court overruled on February 14, 2008. Appellants appeal the judgment of the trial court, asserting the following three assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AS IT RELATES TO THE BREACH OF CONTRACT CLAIM.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS IT RELATES TO THE BREACH OF CONTRACT CLAIM.

III. THE TRIAL COURT ERRED IN DETERMINING PLAINTIFFS WERE ENTITLED TO ATTORNEY FEES, COURT COSTS AND POST-JUDGMENT INTEREST.

{¶5} Appellants addressed their assignments together, and we will likewise consider them together. In their first assignment of error, appellants argue the trial court erred when it granted appellees' motion for summary judgment as it related to the breach of contract claim. In their second assignment of error, appellants argue the trial court erred when it denied their motion for summary judgment as it related to the breach of contract claim. Appellants argue in their third assignment of error that the trial court erred

when it determined appellees were entitled to attorney fees, court costs, and post-judgment interest. All of appellants' assignments of error relate to the trial court's granting of attorney fees to appellees.

{¶6} When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks, supra*.

{¶7} Appellants argue that *Shanker* is not applicable to the present case, and the trial court erred when it relied upon *Shanker*. In *Shanker*, the plaintiffs filed an action against the defendant to recover monies loaned to the defendant. After the action was filed on March 5, 1995, the parties entered into an oral settlement agreement on April 18, 1996. However, on August 9, 1996, in the course of drafting the settlement documents, the plaintiffs attempted to insert new language into the agreement. Consequently, the defendant refused to pay the plaintiffs the amount owed under the settlement agreement. Pursuant to a motion to enforce the original oral settlement agreement, the trial court found the parties had entered into a valid oral agreement, which this court affirmed on

appeal in *Shanker v. Columbus Warehouse Ltd. Partnership* (Mar. 31, 1997), Franklin App. No. 96APE09-1269.

{¶8} After the defendant later refused to pay the amount owed under the oral settlement agreement, the plaintiffs filed another action on April 13, 1998, alleging the defendant had breached the settlement agreement, and the defendant filed a counterclaim, alleging the plaintiffs breached the settlement agreement by continuing to litigate the matter. The trial court ultimately decided that both parties had breached the settlement agreement but not in any material manner. The court further concluded the defendant was entitled to reasonable attorney fees arising out of the plaintiffs' breach, and awarded defendant attorney fees as compensatory damages incurred from August 9, 1996, until March 31, 1997. Both parties appealed.

{¶9} As pertinent to the issues in the present case, in *Shanker*, we noted that, pursuant to the "American rule," attorney fees are generally not recoverable in contract actions. However, we acknowledged a distinction between cases in which attorney fees are awarded as costs and those in which the fees are awarded as part of the aggrieved party's damages. We then concluded in *Shanker* that the attorney fees that the defendant incurred were the direct result of plaintiffs' breach of the settlement agreement and were sought as compensatory damages, not simply as costs of the action. Thus, we held in *Shanker*:

* * * When a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim. Because defendant's attorney fees are attributable to and were incurred as the result of plaintiffs' breach of the settlement agreement, defendant is entitled to recover those

fees in order to make whole and compensate him for losses caused by plaintiffs' breach. * * *

{¶10} In the present case, the trial court applied *Shanker* and concluded that appellees were entitled to attorney fees as compensatory damages, even though no actual damages were awarded under the breach of contract claim. Appellants claim *Shanker* is not applicable to the present case because it is distinguishable in numerous respects. Appellants first assert the defendant in *Shanker* could not avoid the attorney fees because the action was commenced by the plaintiffs, thus "forcing" the defendant to incur attorney fees. Appellants point out that, in the present case, it was appellees who filed the action; thus, appellees were not "forced" to incur attorney fees like the defendant in *Shanker*. However, appellants' reasoning is misguided. The award in *Shanker* reflected attorney fees incurred after the time of the breach on August 9, 1996. Thus, the import of *Shanker* is that a party may receive attorney fees resulting from the other party's breach of the settlement agreement as a form of compensatory damages. We did not base our decision in *Shanker* upon who filed the original action or even mention this fact in our analysis, as the only pertinent issue to address was what damages were directly caused by breach of the settlement agreement. Because the breach in *Shanker* occurred after the filing of the action, who filed the action and why were irrelevant to the determination of compensatory damages for the breach. In the present case, however, the breach occurred prior to the filing of the action; thus, any fees incurred after the breach of the settlement agreement were relevant to the determination of compensatory damages, including those fees appellees were "forced" to incur by filing the action. Thus, we find appellants' argument, in this respect, unavailing.

{¶11} Appellants also argue that, in *Shanker*, the plaintiffs' breach in continuing litigation was the very action the defendant sought to avoid by the settlement agreement. To the contrary, here, appellants argue appellees chose to incur attorney fees by filing the action. However, we find appellants' characterization of appellees' legal action flawed. Appellees did not "choose" to incur attorney fees in the present case. The attorney fees incurred were necessitated by appellants' breach of the settlement agreement. Without having filed the present action, appellees would have had no other recourse. Therefore, this argument is without merit.

{¶12} Appellants next argue that *Shanker* applies only to settlement agreements arrived at in order to end litigation, and not settlement agreements reached prior to the filing of a suit, such as in the present case. In support, appellants cite our decision in *Dehoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, Franklin App. No. 02AP-454, 2003-Ohio-3334, in which we indicated that "the holding in *Shanker* is limited to circumstances involving settlement agreements entered to end litigation." *Id.*, at ¶136. However, we find the facts in *Dehoff* are distinguishable from those here; thus, *Shanker* is still applicable to the current case.

{¶13} In *Dehoff*, two veterinarians sought to end their joint business interests. One veterinarian filed a complaint for judicial dissolution, and the trial court eventually ordered the judicial dissolution of the two corporations. The court designated the veterinarians to handle the liquidation and winding up of the corporations, during which time one of the veterinarians submitted a written offer to purchase certain assets of one of the corporations.

{¶14} The two veterinarians met in December 1993 to discuss the offer and to discuss the winding up of the corporations. The primary dispute in *Dehoff* involved whether the parties reached an agreement on that date. After the meeting, one party sent the other a draft of an agreement reflecting the deal reached at the meeting. Several months later, one of the veterinarians filed a verified claim, alleging that the other veterinarian had breached the December 1993 agreement and seeking compensatory damages as well as attorney fees. Eventually, the trial court found that the parties had entered into an agreement in December 1993, found the agreement had been breached, awarded damages, and awarded attorney fees as compensatory damages for the breach of the agreement, among other things.

{¶15} On appeal, in addressing whether the trial court erred in awarding attorney fees as compensatory damages for the breach of the agreement, this court addressed *Shanker*, which the trial court had relied upon to award the attorney fees. We found in *Dehoff* that *Shanker* is limited to circumstances involving settlement agreements entered to end litigation. *Dehoff*, at ¶136. In finding the facts in *Dehoff* were distinguishable from those in *Shanker*, we agreed that *Shanker* involved a settlement agreement entered by the parties with the intention of resolving all litigation among the parties, while *Dehoff* did not involve a settlement agreement designed to dismiss the underlying dissolution action.

{¶16} In the present case, the circumstances are more comparable to those in *Shanker* than those in *Dehoff*. In *Dehoff*, the settlement agreement regarded a side issue unrelated to the underlying cause of action, the dissolution, which the trial court had already ordered as of the time of the settlement agreement. The settlement agreement related to the purchase of the corporate assets by one of the parties, not to the merits of

the underlying dissolution action. Thus, if the settlement agreement would have been carried out by the parties at the time it was entered into, it would not have ended the entire dissolution proceedings. In other words, the settlement agreement in *Dehoff* did not end the litigation, unlike the settlement agreement in *Shanker*. The purpose of the settlement agreement in *Dehoff* was independent of the future continuation of the dissolution litigation.

{¶17} Contrary to the circumstances in *Dehoff*, in the present case, the settlement agreement reached by the parties prevented litigation of a future personal injury claim. The settlement included a full release, under which appellees waived their right to any future causes of action against the tortfeasor for injuries and damages resulting from the incident. Thus, the settlement agreement would have fully ended any possibility of litigation. As explained above, in *Dehoff*, the settlement agreement would not have prevented any future litigation or ended the dissolution action; it merely regarded the purchase of certain corporate assets. Accordingly, we find *Dehoff* distinguishable from the present case and find its holding does not preclude the application of *Shanker* to the current circumstances.

{¶18} Furthermore, it is well-established that " '[t]he law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation.' " *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 38, quoting 15 American Jurisprudence 2d 938, Compromise and Settlement, Section 4. The Ohio Supreme Court has further explained that " '[t]he resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in

turn, to government as a whole.' " *Id.* Here, appellants' contention that *Shanker* should apply only to settlement agreements entered into with the purpose of ending the litigation, but not settlement agreements reached prior to the filing of a suit, is directly contrary to this laudable tenet. Appellants' contention would encourage a party to file an action before entering into a settlement agreement to assure the possibility of recovering attorney fees if the other party breaches the agreement. Such a result is inconsistent with the encouragement of settlement and compromise. For these reasons, we find appellants' argument, in this respect, is without merit.

{¶19} Appellants next assert that, in *Shanker*, the defendant had sustained actual damages; thus, the defendant was entitled to recover attorney fees "in order to make whole and compensate him for losses caused by plaintiffs' breach." *Shanker*, supra. To the contrary, here, appellants contend, the court found appellees suffered no actual damages as a result of appellants' breach. However, we disagree with appellants' interpretation of the above-quoted excerpt from *Shanker*.

{¶20} The "losses" caused by the plaintiffs' breach referenced in the above-quoted excerpt were the attorney fees that were necessitated by the breach of the settlement agreement, not the "actual damages" that were based upon the amounts due under the terms of the settlement agreement. The reference to "losses" was in the midst of our discussion of the attorney fees expended in bringing the action to enforce the settlement agreement and how they were necessary to compensate and make the defendant whole. Putting the above quote in full context, this court in *Shanker* actually held that, "[b]ecause defendant's attorney fees are attributable to and were incurred as the result of plaintiffs' breach of the settlement agreement, defendant is entitled to recover

those fees in order to make whole and compensate him for losses caused by plaintiffs' breach." *Id.* Prior to this holding, we had stated "courts have allowed the recovery of attorney fees as compensatory damages where a party's wrongful breach has led to legal fees being incurred in a suit with a third party." *Id.*, citing *S&D Mech. Contrs., Inc. v. Enting Water Conditioning Sys., Inc.* (1991), 71 Ohio App.3d 228. This court in *Shanker* never held that "actual damages" under the breach of contract claim were necessary to recover attorney fees as compensatory damages for the breach of the settlement agreement. Therefore, appellants' contention is unpersuasive.

{¶21} Appellants next claim that the trial court's interpretation of *Shanker* is inconsistent with *Dalessio v. Williams* (1996), 111 Ohio App.3d 192, in which the court held that a breach of contract was a necessary prerequisite to an award of attorney fees. We disagree with appellants' application of *Dalessio*. Here, the attorney fees were incurred as the direct result of appellants' breach. Although appellants claim that there was no breach of contract here, the trial court, in fact, found appellants had breached the settlement agreement by failing to perform as required by the agreement. The present situation is much different than the circumstances in *Dalessio*, in which the trial court never made any judicial determination regarding any elements of the breach of contract claim prior to dismissal of the suit. *Id.*, at 196. Here, the merits were decided, and both the magistrate and the trial court found appellants had breached their duty under the settlement agreement. Although appellants claim that, in order to be eligible to receive attorney fees under *Shanker*, the damages element of the breach of contract claim must be met, they cite no case law to support their contention, and neither *Dalessio* nor *Shanker* hold such. Therefore, we find this argument to be without merit.

{¶22} Appellants also argue that the trial court's judgment is against public policy because it will encourage parties to file breach of settlement contract actions every time the opposing party breaches the settlement agreement, no matter how minor and no matter if damages are actually incurred, because attorney fees would be automatically awarded by merely asserting the action. Appellants' logic is perplexing. Initially, we note that, as explained above, it is appellants' view, not the trial court's determination that would tend to encourage litigation. Further, appellants' argument suggests that a party aggrieved by the breach of a settlement agreement should be discouraged from filing a breach of contract claim when only a "minor" breach occurs or when there is the possibility that the aggrieved party may not be able to prove damages. To follow appellants' reasoning would encourage parties to renege on settlement agreements when the monetary stakes are low or when they believe that the opposing party may not be able to prove damages at trial. The trial court's judgment here, as well as the holding in *Shanker*, encourages parties to comply with the terms of their settlement agreements, lest they put themselves at risk of paying the non-breaching parties' attorney fees incurred in filing a breach of contract action. Although appellants envision that the trial court's determination herein will promote frivolous actions that have no possibility of success because the filing party will know attorney fees will be "automatically" granted, trial courts would still retain the discretion to reject a claim for attorney fees. Thus, we must reject appellants' argument, in this respect.

{¶23} For all of the above reasons, we find the trial court did not err when it applied *Shanker* and awarded appellees attorney fees based upon appellants' breach of

the settlement agreement. Therefore, appellants' first, second, and third assignments of error are overruled.

{¶24} Accordingly, appellants' three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McGRATH, P.J., concurs.
FRENCH, J., concurs in judgment only.
