

[Cite as *Walsh v. Patitucci*, 2009-Ohio-6829.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93717**

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**KENNETH J. WALSH**

PLAINTIFF-APPELLANT

vs.

**EUGENE A. PATITUCCI**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CV-373037

**BEFORE:** Sweeney, J., Rocco, P.J., and Celebrezze, J.

**RELEASED:** December 24, 2009

**JOURNALIZED:**

**FOR APPELLANT**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Kenneth J. Walsh (“Walsh”), appeals pro se from the trial court’s decision that denied his motion to revive judgment against defendant-appellee, Eugene A. Patitucci (“Patitucci”), following an evidentiary hearing held pursuant to this Court’s decision in *Walsh v. Patitucci*, Cuyahoga App. No. 91936, 2009-Ohio-496 (“*Walsh I*”). For the reasons that follow, we affirm.

{¶ 2} The following was derived from the record: In 1998, Walsh and his wife, through an attorney, filed a lawsuit against Patitucci alleging five causes of action. The gravamen of the claims was that Patitucci had assaulted Walsh and caused him serious personal injuries. In February 1999, Walsh and his wife obtained new counsel. The following year, that attorney withdrew and a third attorney began representing the couple. Later that year, Attorney Wexler filed a notice of his substitution of counsel for them. In October 2001, the trial court determined that Patitucci intentionally caused Walsh’s injuries and, therefore, declared “there is no coverage under [Patitucci’s Anthem insurance policy] \* \* \*.” Anthem was further relieved of any duty to defend Patitucci in the matter.

{¶ 3} On November 8, 2002, the trial court issued a judgment entry whereby it memorialized the “agreement of the parties” as follows:

{¶ 4} “1. Defendant confesses judgment upon allegations set forth in Plaintiffs’ Complaint, and further confesses judgment in the amount of damages as may be determined by the Court.

{¶ 5} “2. The extent and amount of damages shall be determined by the judge after presentation of evidence.

{¶ 6} “3. Defendant shall pay Plaintiffs the sum of Twenty-Five Thousand Dollars (\$25,000.00) and assign to Plaintiffs any and all rights (memorialized as “Agreement and Assignment of Rights”) as to any and all causes of actions, claims, and/or rights Defendant may have as against any person, company, corporation, or legal entity arising out of the subject-matter of this lawsuit, including but not limited to: claims, causes of action, rights to damages for bad faith, legal malpractice claims, contractual rights under insurance policies, claims for breaches of duty(s) of good faith and/or fair dealing, tort claims, all applicable interest, costs, and attorney fees. Defendant foregoes any and all rights to or interest in any and all causes of action assigned to Plaintiffs as set forth and caused to be transferred herein.

{¶ 7} “4. Should Defendant fail to pay Plaintiffs the sum of \$25,000.00, pursuant to the terms and conditions set forth in this Judgment Entry and the Agreement and Assignment of Rights, or fail to cooperate in any further action(s) brought by Plaintiffs as a result of said Agreement and Assignment of Rights, then and in such event, Plaintiffs shall have the right to file a Motion to Enforce Settlement, and/or file a separate lawsuit against Defendant for damages resulting from said breach(es.) Defendant agrees that the only defense he may assert in such an action is that he is not in breach.

{¶ 8} “5. Plaintiffs and Defendants agree that the within action against the Defendant is hereby resolved by this Judgment Entry and execution of the Agreement and Assignment of Rights, which is fully incorporated in and made a part of this Judgment Entry.

{¶ 9} “6. All parties rely on and are hereby bound by all terms and conditions of this Judgment Entry and the Agreement and Assignment of Rights.

{¶ 10} “7. In exchange for Defendant’s agreement to and compliance with the terms of this Judgment Entry and the Agreement and Assignment of Rights, Plaintiffs will forgo collection of any sum from Defendant beyond the amount of \$25,000.00.”

{¶ 11} In accordance with the terms of the parties’ above-quoted settlement agreement, the trial court assessed damages in the amount of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000). The Agreement and Assignment of Rights contained in the record as defendant’s Ex. 1 is dated December 17, 2002 and signed by Walsh, Walsh’s wife, and Patitucci and was notarized by Patitucci’s counsel (the “Agreement”).

{¶ 12} Paragraph 4 of the Agreement provides:

{¶ 13} “The Defendant, Eugene Patitucci, will make payment to Plaintiffs of \$5,000.00 on or before December 31, 2002 and an additional payment of \$5,000.00 on or before February 1, 2003.”

{¶ 14} Paragraph 6 of the Agreement provides:

{¶ 15} “In consideration of this Assignment, Assignees agree to refrain from any execution of collection proceedings against Assignor and forego collection of any sum from the Defendant Eugene Patitucci beyond \$25,000.00 as set forth above so long as all terms and conditions of this agreement are met by Defendant Eugene Patitucci.”

{¶ 16} Paragraph 7 of the Agreement provides:

{¶ 17} “In the event that Defendant Eugene Patitucci fails to make the payments as required, or fails to cooperate with the Plaintiffs as required, \* \* \* Assignees, shall have the right to file a motion to enforce the settlement and/or file a separate lawsuit against the Defendant for damages resulting from such breach(es). \* \* \*.”

{¶ 18} The Agreement is silent as to when or in what amounts the balance of the \$25,000 would be paid by Patitucci.

{¶ 19} In March 2008, Walsh filed a “Petition to Revive Judgment” pro se. A hearing was scheduled on the petition. The trial court dismissed the petition for want of prosecution, which Walsh appealed to this Court. In *Walsh I*, we reversed and remanded with instructions to address the merits of the petition “as well as the allegations concerning the conduct of attorney Ilan Wexler.”

{¶ 20} On May 13, 2009, Walsh and Patitucci’s attorney appeared at court for a hearing on the petition. At this time, Walsh complained that Patitucci had made payments to Wexler and not to him directly. When the court suggested that Patitucci may be able to document that he made the payments referenced in

the judgment entry, Walsh replied, "I'm sure he can." Later, Walsh conceded that Patitucci made payments. His complaint was that he "wanted the \$25,000 paid in full at the beginning." Walsh repeatedly insisted that despite the judgment entry of the court, there was "no meeting of the minds"; but in doing so, he relied entirely upon documents that post-dated the November 2002 judgment entry. Because Patitucci's attorney was unsure as to whether he knew of the hearing, the trial court re-set the hearing.

{¶ 21} On July 8, 2009, the court conducted a full evidentiary hearing on Walsh's petition to revive judgment. The sole witness to testify at the hearing was Attorney Ilan Wexler. Wexler stated that he had, at times, represented both Walsh and Patituci in this matter. This dual representation related to "any and all claims \* \* \* arising out of matters set forth in [the Agreement and Assignment of Rights entered by the parties in December 2002] \* \* \*."<sup>1</sup> Walsh and his wife authorized Wexler to represent Patitucci on the terms contained in a "Fee Agreement and Authority to Represent" that they signed on May 13, 2003. The terms thereof included a waiver of any conflict of interest and also a provision, among others, that Walsh and his wife "will not consider the undersigned Eugene A. Patitucci to be currently in breach of the prior Agreement and will forego any interest that may be presently due and payable by Patitucci and to [the Walshes] to date \* \* \*."

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<sup>1</sup>As reflected in the "Fee Agreement and Authority to Represent" contained in the record as Ex. E.

{¶ 22} From the record it appears that Wexler then filed claims against Shelby Casualty Insurance as well as a law firm. A settlement was ultimately obtained, which proceeds were paid to Walsh and his wife. The itemization is contained in the record as Ex. F and is dated June 28, 2004. Walsh and his wife, by their signatures on this document, approved the distribution, and acknowledged receipt of \$17,011.54 from Wexler's firm.

{¶ 23} Wexler testified that both he and Walsh intended for Patitucci to satisfy the \$25,000 by making two payments by February 1, 2003. The amounts were left blank to allow Patitucci's counsel to designate the split. However, Patitucci and his counsel understood the payments differently, which is reflected in the signed Agreement, which provides for two payments of \$5,000; one to be made on or before December 31, 2002, and another to be paid on or before February 1, 2003. The misunderstanding is documented in the record in the correspondence between counsel contained in Exs. C and D. Whatever confusion may have existed, the record clearly establishes that Walsh ultimately received and accepted the two \$5,000 payments.

{¶ 24} Wexler also prepared an itemization of additional payments Patitucci made to him towards paying off the amount owed to Walsh between 2006 through March 26, 2008. This document is contained in the record as Ex. H. Further evidence included copies of the checks written on Patitucci's bank account compiled in Ex. I. Wexler stated he placed the amounts totaling about



\$12,200 into his IOLTA account, where they reportedly remained at the time of the hearing.

{¶ 25} Wexler attempted to remit the payments to Walsh, who refused them. Walsh further instructed Wexler to stop accepting payments from Patitucci, which he did.

{¶ 26} The trial court denied Walsh's petition to revive judgment finding it was not dormant as a matter of law. The court further found that Patitucci had complied with the Agreement and the Fee Agreement and Authority to Represent.

Based on the evidence, the court found Patitucci had "paid substantially all the agreed upon settlement amount and is prepared to make full payment; however, plaintiff has prevented defendant from fully complying with their agreement by rejecting funds tendered, which remain in an IOLTA account of plaintiff's former attorney. Finally, plaintiff cannot prevail upon this motion because he has failed to pursue any remedies for purported breach that he had under the settlement agreement." R. 81.

{¶ 27} Walsh appeals pro se and there is no appellee brief.

{¶ 28} While Walsh assigns five alleged errors for our review, he fails to argue the assigned errors separately in the brief as required by App.R. 16(A).<sup>2</sup> Instead, Walsh makes a generalized argument that certain agreements he signed were not valid, binding, or legal because, he contends, there was "no meeting of the minds." He also complains about the dual representation by his attorney

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<sup>2</sup>The assigned errors are set forth in the Appendix.

despite his signed authorization allowing it and his receipt of settlement proceeds from it. Finally, Walsh asserts that his attorney's receipt of payments from Patitucci and deposit of same into his IOLTA account was collusive and a "crime."

{¶ 29} This appeal is before us on Walsh's motion to revive a judgment. Walsh appears to be challenging the validity of the judgment, while at the same time attempting to enforce payment of the entire amount against Patitucci. Not only is this contrary to the terms of the judgment he seeks to enforce, but such claims cannot be asserted in a revivor proceeding.<sup>3</sup> See, generally, *Heselden Plumbing Co. v. Justice* (Mar. 13, 1986), Franklin App. No. 85AP-733 ("It is a settled rule of law that, if a court had jurisdiction of the person and subject matter, any defense which preceded the entry of judgment, including that the judgment was procured by fraud, cannot be asserted in a revivor proceeding"), citing *Lathrem v. Foreman* (Ohio App.1954), 145 N.E.2d 837; *McAllister v. The Schlemmer & Graber Co.* (1930), 39 Ohio App. 434; *Jackson v. Marshall* (1947), 80 Ohio App. 280; and *Nestlerode v. Foster* (1893), 8 Ohio C.C. 70.

{¶ 30} The agreements that Walsh contends are "invalid" were made a part of the judgment which Walsh seeks to "revive." In any case, the evidence in the record demonstrates that the documents **both signed by Walsh** constitute a meeting of the minds and satisfy all requirements of a contract.

{¶ 31} The Judgment essentially required from Patitucci that he pay Walsh \$25,000 (within no specified time) and that he assign his rights to any claims

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<sup>3</sup>This applies equally to Walsh's allegations concerning his former attorney.

arising out of the subject matter of the lawsuit. The record reflects that Patitucci fully cooperated in assigning said rights and that he made payments toward the amounts owed to Walsh. Patitucci's payments only stopped because Walsh demanded it. A fact he freely admits in the court below and on appeal.<sup>4</sup> In addition, Walsh failed to comply with the terms contained in the judgment entry in the event of an alleged breach. Notwithstanding, "a party who prevents performance on his own part or on the part of the adverse party cannot take advantage of such noncompliance or nonperformance by the party obligated to perform under the contract." *Gary Crim, Inc. v. Rios* (1996), 114 Ohio App.3d 433, 436, citing *Suter v. Farmers' Fertilizer Co.* (1919), 100 Ohio St. 403, 126 N.E. 304. To the extent any amounts were or are still owed by Patitucci under the terms of the judgment entry, Walsh frustrated and prevented Patitucci's ability to complete the performance. Walsh cannot revive a judgment, nor can he claim breach of the settlement, when he has prevented the satisfaction of it.

{¶ 32} The appeal is without merit and the assignments of error are overruled. See App.R. 12(A)(2).

Judgment affirmed.

**It is ordered that appellee recover from appellant his costs herein taxed.**

**The court finds there were reasonable grounds for this appeal.**

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<sup>4</sup>Walsh accuses Wexler of "stealing" his money; however, the record reflects that Wexler attempted to remit the payments to Walsh. Walsh refused the payments, which remain in an IOLTA account.

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

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

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JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR

Appendix

“I. The trial court erred by finding that the appellee complied with the terms of the agreement and assignments of rights.

“II. The trial court erred by finding that the appellee paid all the agreed upon [sic] settlement amount.

“III. The trial court erred by [finding] that the appellant prevented the appellee from fully complying with the agreement.

“IV. The trial court erred by finding that the appellant failed to pursue remedies for breach under [sic] agreement.

“V. The trial court erred by not complying with an order of the Sixth District Court of Appeals.”