[Cite as *Kelley v. Ferraro*, 2010-Ohio-4179.]

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

LYNN ARKO KELLEY

Plaintiff-Appellant/Cross-Appellee

COA NO. 92446

LOWER COURT NO. CP CV-589040

COMMON PLEAS COURT

-vs-

JAMES FERRARO, ET AL.

Defendants-Appellees/Cross-Appellants

MOTION NO. 435185

Date August 24, 2010

Journal Entry

{¶ 1} Defendants-appellees/cross-appellants James Ferraro and Kelley & Ferraro, LLP ("K&F") have moved this court for consideration en banc of the decision announced June 17, 2010. We are obligated to resolve legitimate conflicts on a point of law within our district through en banc proceedings should the court determine such a conflict exists. *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672; Loc.App.R.26. Having reviewed K&F's motion and finding no legitimate conflict on a question of law, K&F's motion for consideration en banc is denied.

{¶ 2} K&F contends that this court erred in reversing the trial court's denial of Kelley's motion for summary judgment because an appellate court cannot review a trial court's denial of a motion for summary judgment where the matter has gone to trial. But K&F did not raise the argument that a denial of summary

judgment is not reviewable on appeal in its merit brief on appeal, despite Kelley's assignment of error that the trial court erred in denying her motion. Thus K&F's en banc request appears to be an after-the-fact attempt to bootstrap an argument that was never before presented to the court for consideration, and for this reason alone, its en banc request should be denied.

{¶ 3} With respect to the merits of K&F's en banc request, *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 642 N.E.2d 615, is the seminal case on the issue. *Continental* holds that when a motion for summary judgment is denied because the trial court found that there were material issues of fact, an ensuing trial will moot (or render harmless) any error in that decision. What K&F fails to mention in its motion is that *Continental* also holds that when a summary judgment is erroneously denied, and the issue is a *matter of law*, an ensuing trial does not render the error harmless, and the ruling is reviewable.

{¶ 4} K&F claims that the decision announced June 17, 2010, reversing the trial court's denial of Kelley's motion for summary judgment conflicts with two Eighth District cases: *McNulty v. PLS Acquisition Corp.*, 8th Dist. Nos. 79025, 79125, and 79195, 2002-Ohio-7220, and *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 2008-Ohio-3662, 895 N.E.2d 217.

{¶ 5} The *MuNulty* court stated, "the record shows that the parties presented sharply conflicting theories and evidence in their cross-motions for summary judgment to support their version of the relevant events. Thus, we find

that these matters involved *disputed issues of fact* which were properly submitted to a jury." Id. at ¶95. (Emphasis added.) Accordingly, the principle of harmless error applied.

{¶ 6} In *Thomas*, this court found that "both parties filed motions for summary judgment on the coverage question. The trial court denied both motions because '[w]hether plaintiff can rebut the presumption of prejudice that was created when the subrogation issues of the defendant were destroyed is a *material issue of fact* to be determined by the trier of fact.'" Id. at ¶6. (Emphasis added.)

{¶ 7} Both cases cited by K&F in its allegation of conflict involved summary judgments that were denied because there were material issues of fact. But in this case, the panel held that summary judgment was improperly denied *upon an issue of law.*[1] This is in accord with *Continental* and has no relevance whatsoever to the holdings in either *McNulty* or *Thomas*.

{¶ 8} There is further argument in K&F's brief over the panel's holdings concerning whether the Partnership Agreement contained a "death provision," whether non-equity partners were "Partners" for purposes of the Agreement, and

[1]Specifically, this court found that the language of the Partnership Agreement regarding Ferraro's duty to treat Michael Kelley's death as an event triggering the dissolution and winding up of the K&F partnership was plain and unambiguous. If a contract is clear and unambiguous, its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Ind. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 323, 474 N.E.2d 271.

whether the Estate could be a "Non-continuing Partner" under the Agreement. There were no material issues of fact involved in the decision regarding these issues; they were all decided as matters of law.

{¶ 9} Finally, K&F raises the doctrine of "invited error" apropos of Kelley's expert testifying on cross-examination that, in his opinion, an attorney not licensed to practice in Ohio cannot be a partner in an Ohio legal partnership. This opinion was not contained in any expert report submitted by Kelley, nor was it elicited upon direct examination by Kelley. Significantly, it is not an accurate statement of the law.

{¶ 10} K&F argues that somehow Kelley is "bound" by this statement elicited on cross-examination, or that since it was Kelley's witness who made the statement, she cannot be heard to argue that this is legally untrue. K&F cites no authority for this proposition, but casts it argument rather as "invited error."

{¶ 11} Professor Ruben was not introduced as an "expert on the law." There is only one expert on the law in any trial, and that is the judge presiding over it. He or she is the sole arbiter of what the law is. While Ruben opined that Ferraro's lack of Ohio licensure prohibited him from being part of an Ohio LLP, whether that was the law was a determination that could only be made by the trial judge.

{¶ 12} Under the doctrine of invited error, a party will not be allowed to take advantage of an error that he himself has invited or induced the trial court to

make. *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 700 N.E.2d 1256. Neither the Estate nor Lynn Kelley induced or invited this error. They did not present this proposition to the court; Professor Ruben did, not in a report, not on direct examination, but only upon cross-examination by K&F.

{¶ 13} After Professor Ruben made this statement, had the *plaintiff* then dismissed her claim under the contract or moved to have her claim "converted" to one in quasi contract, and then proceeded to cite the court's granting of dismissal or conversion as error in the Court of Appeals, we would have had invited error.

{¶ 14} But that is not what happened. The *trial court* converted the contract claim into one of quasi contract in the following colloquy regarding both parties' motions for directed verdict at the conclusion of the evidence:

{¶ 15} "THE COURT: I'll make the following series of rulings: pursuant to the testimony of the plaintiff's expert witness, Miles Ruben, this is no longer a contract case and the jury will be told that. All of the contract claims are hereby dismissed.

{¶ 16} "Count one, dissolution of Kelley & Ferraro; count two, winding up of the affairs of Kelley & Ferraro; count three, the accounting; count four, the breach of the Kelley & Ferraro partnership agreement, all of those are hereby dismissed. This is a quasi contract case and the jury will be informed of this." (Tr. 2581-2582).

{¶ 17} The court then proceeded to dismiss all other claims, the gravamen

of which are not at issue in this allegation of invited error. Finally, the court concluded at Tr. 2591: "Are there any other issues that we need to deal with at this point? *I will note the plaintiff's objection for the record.*" (Emphasis added.)

{¶ 18} Plaintiff did not request dismissal of the contract claims, nor did she move for "conversion" of the contract claim into a claim under quasi contract. All of this was done by the judge, and objected to by the plaintiff. This is not a matter of "invited error."

{¶ 19} Motion for consideration en banc is denied.

CHRISTINE T. McMONAGLE, JUDGE

CONCURRING:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.
COLLEEN CONWAY COONEY, J.,
LARRY A. JONES, J.,
KENNETH A. ROCCO., J.,
MELODY J. STEWART, J.

CONCURRING IN JUDGMENT ONLY:

MARY EILEEN KILBANE, J.

RECUSED:

FRANK D. CELEBREZZE, JR., J.
ANN DYKE, J.,
SEAN C. GALLAGHER, A.J.,
JAMES J. SWEENEY, J.