[Cite as *Promotional Prods. Group, Inc. v. Sunset Golf, L.L.C.*, 2010-Ohio-3806.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

PROMOTIONAL PRODUCTS GROUP, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0041**
- vs -	:	
SUNSET GOLF, LLC, et al.,	:	
Defendants,	:	
GERALD E. STEPHENS, et al.,	:	
Third Party Plaintiffs-Appellees,	:	
- vs -	:	
TIMOTHY E. DEIGHAN,	:	
Third Party Defendant-Appellant.		

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2006 CV 0305.

Judgment: Affirmed in part and reversed in part.

Joseph R. Spoonster, Fortney & Klingshirn, 4040 Embassy Parkway, #280, Akron, OH 44333 and *Michael T. Callahan*, Callahan, Greven, Riley & Sinn, L.L.C., 137 South Main Street, #300, Akron, OH 44308 (For Plaintiff-Appellee Promotional Products Group, Inc.).

Nicholas Swyrydenko, 137 South Main Street, #206, Akron, OH 44308 (For Appellees Gerald E. Stephens and William H. Hartung).

David P. Bertsch, Buckingham, Doolittle & Burroughs, L.L.P., 3800 Embassy Parkway, #300, Akron, OH 44333 (For Appellants Timothy E. Deighan and Dorothy Jean Deighan).

DIANE V. GRENDELL, J.

{¶1} Appellants, Timothy and Dorothy Jean Deighan, appeal the Order and Journal Entry of the Portage County Court of Common Pleas, adopting the Magistrate Decision and holding them bound by the Settlement Agreement. For the following reasons we affirm in part, and reverse in part the decision of the court below.

{¶2} On March 15, 2006, appellee, Promotional Products Group, Inc., filed a Complaint against Sunset Golf, Sunset Golf, LLC, and Sunset Golf, LLC dba Raindrop Advertising, seeking to recover monies owed under an account receivable.

{¶3} On May 22, 2006, the Sunset Golf entities filed their Answer and Counterclaim, alleging that Promotional Products owed money for unpaid invoices.

{¶4} On November 16, 2007, the Sunset Golf entities filed an Amended Answer and Counterclaim, adding appellees, Gerald E. Stephens and William H. Hartung, Jr., as new-party defendants. The Amended Counterclaim alleged that Stephens and Hartung were the alter ego of Promotional Products and liable under theories of civil conspiracy and interference with a business relationship.

{¶5} On August 25, 2008, Stephens and Hartung filed Crossclaims against the Sunset entities, Timothy Deighan, and Daniel Deighan for abuse of process and frivolous conduct in violation of R.C. 2323.51 and Civil Rule 11. Stephens and Hartung also filed Third-Party Complaints against Highlander Logo Products, LLC, Timothy Deighan, and Daniel Deighan, alleging contribution and indemnification, fraud, and alter ego liability.

{¶6} On October 1, 2008, trial began before a magistrate of the Portage County Court of Common Pleas. The proceedings were suspended while the parties attempted to negotiate a settlement agreement.

{¶7} At the beginning of the proceedings on October 2, 2008, Attorney Leland Cole, representing the Sunset entities and the Deighans, presented the terms of a settlement agreement. As presented by Cole, the settlement encompassed the present case as well as "all other pending cases involving the parties in this matter." Sunset Golf and the other defendants would execute a cognovit-promissory note in the amount of $150,000 to Promotional Products. The note would be deemed satisfied upon the payment of $75,000, however, if that sum were paid "on a timely basis." Otherwise, the full $150,000 would become due.

{¶8} Thereupon, a recess was taken, during which the terms of the settlement were renegotiated.

{¶9} After the recess, Attorney Gregory Moore, representing Stephens and Hartung, set forth the terms of the settlement. As presented by Moore, the cognovit-promissory note would be executed by the Sunset entities, Timothy and Daniel Deighan, and their wives, Dorothy Jean and Roseann respectively. These parties would be committed to making timely payments for a total amount of $95,000. The failure to do so would result in the full amount of the note, $150,000, being confessed. As a part of the agreement, the following cases would be dismissed with prejudice: *Promotional Prods. Group, Inc. v. Sunset Golf, LLC*, Portage C.P. No. 2006 CV 00305; *Promotional Prods. Group, Inc. v. Highlander Logoed Prods.*, Portage C.P. No. 2006 CV 00144; *Deighan v. Hartung*, Portage C.P. No. 2006 CV 00671; and *Promotional Prods. Group, Inc. v. Deighan*, Summit C.P. No. CV-2007-06-4555. Additionally, the parties would execute a "mutual cognovit not-to-sue."

{¶10} Thereupon, the settlement agreement was affirmed by Attorney Moore on behalf of Stephens and Hartung, and by Attorney Joseph Spoonster on behalf of Promotional Products Group, Inc.

{¶11} The following colloquy took place between Magistrate Robert W. Berger, Attorney Cole, Attorney Michelle DiBartolo (co-counsel for Cole), Attorney Moore, and Daniel Deighan. At this point, Timothy Deighan is not present in court.

{¶12} Magistrate Berger: So you're representing for the Deighans that you do represent their spouses and Sunset Golf LLC and that this is a settlement agreement?

{¶13} Attorney Cole: By understanding of the parties, yes.

{¶14} Magistrate Berger: We have one Mr. Deighan here. Is that your understanding, too?

{¶15} Daniel Deighan: Yes, your Honor.

{¶16} Magistrate Berger: You can represent that on behalf of Sunset Golf LLC?

{¶17} Daniel Deighan: Yes, your Honor.

{¶18} Magistrate Berger: Is there anything else? Yes?

{¶19} Attorney Moore: Just for the record, I wanted to ensure that Mr. Deighan has authority in reference to these two other individuals; Dorothy Deighan and Roseann Deighan.

{¶20} Magistrate Berger: Mr. Deighan, have you had contact with those other individuals?

{¶21} Daniel Deighan: Not directly. Michelle talked with Tim's wife [Dorothy Jean], and I do know my wife will sign.

{¶22} Attorney DiBartolo: Michelle DiBartolo on behalf of Sunset Golf and the Deighans. I spoke with Tim Deighan. He had a family situation come up. He and his wife have represented this is their agreement.

{¶23} Magistrate Berger: And you have authority to represent that to the Court and represent them in this agreement?

{¶24} Attorney DiBartolo: I do.

{¶25} On November 5, 2008, Promotional Products filed a Motion for an Order Enforcing Settlement Agreement, Declaring Default, and Entering Judgment for Plaintiff. Promotional claimed that the Sunset entities and the Deighans breached the settlement agreement by failing to sign the cognovit note and/or make payments.

{¶26} On December 10, 2008, a hearing was held on Promotional Products' Motion. Timothy Deighan testified at this hearing that he was represented by Attorneys Cole and DiBartolo during the settlement proceedings. He was present in court on October 2, 2008, but left between 9:00 and 9:30 a.m. to attend to his father's wake. At this time, he had authorized Cole to settle for $75,000 in actual payments and for a "global settlement" of all related, pending litigation. Timothy testified that he did not authorize Cole or DiBartolo to renegotiate the terms of the settlement agreement. He did not learn of the new terms until receiving the note in mid-October.

{¶27} Timothy testified that he never spoke with Dorothy Jean (his wife) about signing the cognovit-promissory note. After leaving court on October 2, 2008, he received a call from Attorney DiBartolo, who asked if Dorothy Jean would agree to the settlement. Timothy replied: "I cannot guarantee you she would sign it. She probably would, but it's been from our experiences [sic] she needs to read the documents. But if the documents are what we just agreed on, I do not think she'll have a problem with that, but she needs to read the documents." Timothy denied advising Cole or DiBartolo that Dorothy Jean would agree to the settlement.

{¶28} On December 15, 2008, Attorney David P. Bertsch filed a Notice of Appearance and Request for Substitution of Counsel, seeking the court's leave to replace Cole and DiBartolo as counsel for "the Defendants."

{¶29} On January 23, 2009, a second hearing was held on Promotional Products' Motion. Attorney Cole testified that he did not speak personally with Timothy regarding the terms of the renegotiated settlement. He believed he was authorized to settle and agree to the new terms after having consulted with co-counsel, Attorney DiBartolo, who had contacted Timothy.

{¶30} Attorney Cole testified that he did not represent Dorothy Jean in the present litigation and that she was not a party. He did represent her in the related case of *Deighan v. Hartung*, Portage C.P. No. 2006 CV 00671, in which Dorothy Jean, as plaintiff, sought the appointment of a receiver for Promotional Products. Cole believed that he had authority to settle on behalf of Dorothy Jean based on representations made by Timothy. Cole testified: "In our prior dealings with regard to both Dan and Tim *** when we talked about what we *** were going to do, it was my understanding that would be something that his wife would agree to do also. So, I assumed that he was saying when they told me that, that meant their wives were approving (*sic*)."

{¶31} Attorney DiBartolo testified that she spoke by phone regarding the new settlement terms with Timothy after he left the court on October 2, 2008:

{¶32} I called Tim to tell him that the original settlement that we thought we had was no longer the settlement -- or the agreement -- and that the terms had changed; the dollar amount, you know, went up; that they now wanted his wife to sign the promissory note; um, and that the claims that they split -- what they called the corporate claims and the personal claims -- that the personal claims were no longer included; that Mr. Stephens' AMX case that we've called in Summit County wasn't included; and Tim's case against Mr. Stephens arising out of his employment agreement wasn't included. *** [Dorothy Jean's personal claim] was never discussed as part of any settlement in this case to my knowledge ever. The only case Dorothy was ever involved in was what we called the receiver case, which is the other one pending here in Portage County, and that case was about -- it's a derivative shareholder litigation case. Um, but as far as her having a personal claim against the company or Mr. Stephens or any other party, it wasn't pending to my knowledge; at least not with our office. And it was never asked that she relinquish any claim; just that the wives would sign the promissory note.

{¶33} Attorney DiBartolo further testified that Timothy told her: "I just want to get this done. I want to get this over with. You know, whatever Danny wants to do, you know, fine." With respect to Dorothy Jean, DiBartolo testified: "Tim indicated *** she would sign it, but she wanted *** to make sure that she had an opportunity to read it and to sit down with me and/or Mr. Cole in our office and understand it, *** but she would sign it."

{¶34} Timothy testified for a second time. He denied being advised that the settlement "numbers" had changed.

{¶35} Dorothy Jean testified that she was never asked to agree to a settlement and never told Timothy that he had authority to settle on her behalf. When asked if Timothy "had authority to enter into a settlement as to any pending suits that might affect you," Dorothy Jean answered: "I guess I would say, yeah, because [he and Daniel] were handling everything."

{¶36} On March 4, 2009, a Magistrate Decision was issued. The magistrate ruled that Timothy and Dorothy Jean were parties to the settlement agreement and bound by the cognovit promissory note. "[B]y implication" as a party to the settlement agreement, Dorothy Jean was included in the covenant not to sue. "The magistrate specifically finds that Attorneys Cole and DiBartolo and Daniel Deighan had apparent and actual authority to enter the Settlement Agreement and the specific terms of the Settlement Agreement read into the record on October 2, 2008, on behalf of Timothy Deighan, Dorothy Deighan, and Roseanne Deighan." Finally, the magistrate, "[a]fter listening to testimony, observing, and witnessing the demeanor of Timothy Deighan, *** finds his testimony is not credible."

{¶37} On the same date, the magistrate entered an Order allowing Attorneys Cole and DiBartolo to withdraw as counsel for the Sunset entities and the Deighans.

{¶38} On March 18, 2009, Timothy and Dorothy Jean filed Objections to the Magistrate Decision, arguing, inter alia, that they had not consented to the settlement agreement.

{¶39} On June 10, 2009, the trial court issued an Order and Journal Entry Adopting Magistrate Decision.

{¶40} On July 10, 2009, Timothy and Dorothy Jean filed their Notice of Appeal. On appeal, they raise the following assignments of error:

{¶41} "[1.] It was prejudicial error as a matter of law to hold that defendant Timothy Deighan and Dorothy Jean Deighan were bound to the revised settlement terms on the basis that the terms were agreed to by the parties in the presence of the court, given that Timothy and Dorothy Jean Deighan never agreed to the terms in the presence of the court."

{¶42} "[2.] It was prejudicial error to impose the burden of proof upon defendant Timothy Deighan and Dorothy Jean Deighan to establish that they had not given actual or apparent authority for counsel to consent to the revised settlement terms on their behalf."

{¶43} "[3.] It was prejudicial error to hold that defendant Timothy Deighan and Dorothy Jean had given actual or apparent authority for counsel to consent to the revised settlement terms on behalf of either of them contrary to the manifest weight of the evidence."

{¶44} "[4.] It was prejudicial error as a matter of law to hold that Dorothy Jean Deighan had given actual or apparent authority for anybody to consent to the revised

settlement terms on her behalf where the evidence was undisputed that she never had any discussion with anybody about any settlement of this action to which she was not even a party."

{¶45} While "it is generally within the discretion of the trial judge to promote and encourage settlements to prevent litigation ***[,] [a] trial judge cannot *** force parties into settlement." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376 (citation omitted). "Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that the parties agree on the meaning of those terms." Id.

{¶46} "It is well-recognized that a party may be bound by the conduct of his or her attorney in reaching a settlement." *Saylor v. Wilde*, 11th Dist. No. 2006-P-0114, 2007-Ohio-4631, at ¶12. However, "[a]n attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action." *Morr v. Crouch* (1969), 19 Ohio St.2d 24, at paragraph two of the syllabus; *Adkins v. Estate of Place*, 180 Ohio App.3d 747, 2009-Ohio-526, at ¶26.[1] "Whether a party authorized the attorney to settle the case on certain terms is a question of fact, the resolution of which by the trial court shall not be disturbed on appeal if supported by some competent, credible evidence." *Schalmo Builders, Inc. v. Zama*, 8th Dist. No. 90782, 2008-Ohio-5879, at ¶17 (citation omitted); cf. *Mentor v. Lagoons Point Land Co.*, 11th Dist. No. 98-L-190, 1999 Ohio App. LEXIS 6127, at *11 ("[i]t is within the sound discretion of the trial court to enforce a settlement agreement, and its judgment will not be reversed where the record contains

1. *Adkins*, 2009-Ohio-526, at ¶2 (Fain, J.): "One might think that an attorney retained to represent a client in connection with a matter in litigation would have apparent authority to settle that matter on behalf of the client, but the rule in Ohio is clearly otherwise."

some competent, credible evidence to support its findings regarding the settlement") (citation omitted).

{¶47} The Deighans' assignments of error will be considered out of order.

{¶48} In their second assignment of error, the Deighans claim the magistrate erred "by improperly imposing the burden of proof upon Timothy and Dorothy Jean Deighan to establish that they had not given actual or apparent authority for defense counsel to enter into the revised settlement terms on their behalf." *Irving Leasing Corp. v. M & H Tire Co.* (1984), 16 Ohio App.3d 191, 195 ("burden of proving [express or implied] agency exists rests upon the party asserting the agency").

{¶49} The magistrate did not improperly place the burden of proof upon the Deighans to disprove their attorneys' authority to settle on their behalf. A prima facie showing that Attorneys Cole and DiBartolo had actual authority to settle on behalf of the Deighans was established by the transcript of the October 2, 2008 proceedings. At this hearing, DiBartolo represented that she had authority from Timothy and Dorothy Jean to settle according to the terms of the agreement presented to the court. DiBartolo's representation shifted the burden of proof on the issue of authorization to the Deighans, thus requiring them to rebut it by contradictory evidence.

{¶50} The second assignment of error is without merit.

{¶51} In the first assignment of error, the Deighans argue that the magistrate erred, as a matter of law, by holding them bound by the terms of the settlement agreement where they never consented to the terms of the agreement in court. They claim Attorney DiBartolo's representation at the October 2, 2008 hearing "cannot serve as the basis for the court's determination that counsel *** had actual or apparent

authority to represent and consent to the revised terms of the new settlement proposal." We disagree.

{¶52} The Ohio Supreme Court has held that an attorney requires "special authorization," as opposed to implied or apparent authority, to settle his or her client's claims. *Morr*, 19 Ohio St.2d 24, at paragraph two of the syllabus. The Deighans have cited to no authority, nor are we aware of any, that prohibits this authorization from being given orally and/or outside the presence of the court. Cf. *Sheet Metal Workers Local 98 v. Whitehurst*, 5th Dist. No. 03 CA 29, 2004-Ohio-191, at ¶26 ("[a]n agency may be conferred orally and may be proven by any competent evidence written or oral, direct or circumstantial") (citation omitted); *Spengler v. Sonnenberg* (1913), 88 Ohio St. 192, 199 ("the weight of authority seems to sustain the proposition that special authority to an agent to enter into a written contract may be verbally conferred").

{¶53} The Deighans' reliance on *Adkins v. Estate of Place*, 2009-Ohio-526, for the proposition that "a settlement is not binding where an attorney mistakenly believes he has the client's authority to settle the action," is misplaced. In *Adkins*, an attorney was conducting settlement negotiations just prior to the deposition of the defendant. Id. at ¶6. In the course of the deposition, the attorney received a voice message from his clients, stating that we "'would like to go ahead with it,' or 'we would like you to go ahead with it,' or words to that effect." The attorney interpreted the message to mean they wanted to settle the case and proceeded to settle. Thereafter, the clients claimed that they wished "to go ahead" with the deposition and trial, rather than the settlement. Id. at ¶7. The trial court subsequently granted the defendant's motion to enforce the settlement, without hearing. Id. at ¶12.

{¶54} The court of appeals reversed the trial court on the grounds that a dispute existed "whether the [clients] gave their attorney actual authority to settle this litigation," and remanded the matter with instructions "for the trial court to hold an evidentiary hearing *** to determine whether [the attorney] had actual authority from his clients to enter into the settlement agreement on their behalf." Id. at ¶39. Thus, the court in *Adkins* left open the possibility that the attorney did, in fact, have authorization to settle the claims. In the present case, an evidentiary hearing was held and the trial court concluded that Attorneys Cole and DiBartolo had actual authority to settle according to the terms of the revised agreement. The *Adkins* decision supports, rather than undermines, the proceedings in the court below. Cf. the following decisions of this court, enforcing settlement agreements based on evidence the attorneys had actual authority to settle: *Thirion v. Neumann*, 11th Dist. No. 2004-A-0032, 2005-Ohio-4486, at ¶22; *Lepole v. Long John Silver's*, 11th Dist. No. 2003-P-0020, 2003-Ohio-7198, at ¶16; *Mollis v. Rox Constr. Co.*, 11th Dist. No. 92-T-4688, 1992 Ohio App. LEXIS 6083, at *9; and *Phillips v. Yellow Freight Sys., Inc.*, 11th Dist. No. 89-T-4217, 1991 Ohio App. LEXIS 244, at *4.[2]

{¶55} The first assignment of error is without merit.

{¶56} In their third assignment or error, the Deighans argue that the finding that Attorneys Cole and DiBartolo had actual authority to settle based on the revised terms was against the manifest weight of the evidence, i.e., not supported by competent,

2. Since we affirm the enforceability of the settlement agreement relative to Timothy based on Attorney Cole and DiBartolo's actual authority to settle, rather than their apparent authority, we do not rely on any statements contained in these cases regarding an attorney's apparent authority to settle a client's claims or actions.

credible evidence. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, citing *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, at syllabus.[3]

{¶57} In the present case, Attorney DiBartolo testified that she advised Timothy of changes in the terms of the settlement agreement after his departure from court on October 2, 2008, including the change from $75,000 to $95,000, although she was not "positive" about this point. She also testified that Timothy told her that he just wanted it "done" and "over with" and that whatever Daniel agreed to was "fine." Timothy denied being advised of any changes.

{¶58} Guided by the presumption that the magistrate's findings of fact on this disputed issue were correct, we find no error in the magistrate's decision to credit Attorney DiBartolo's testimony as opposed to Timothy's testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80 ("[t]he underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony").

{¶59} The third assignment of error is without merit.

{¶60} In their fourth and final assignment of error, the Deighans argue the trial court erred by enforcing the revised settlement agreement against Dorothy Jean when she never gave her consent to settle and was not a party to the proceedings. We agree.

---

3. Promotional Products asserts that the Deighans have waived this issue, in that they "failed to object to the Magistrate's determination that Appellant Timothy Deighan's testimony simply was not credible." On the contrary, in his Objections to the Magistrate Decision, Timothy claimed "he was never advised, nor agreed to these less favorable settlement terms," that "Attorney DiBartolo's testimony was not credible," and that the magistrate's findings "in this regard were clearly erroneous and against the manifest weight of the evidence."

{¶61} "[A] trial court is without jurisdiction to render a judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings," and "[a] person against whom such judgment and findings are made is entitled to have the judgment vacated." *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, 184. "In order for a judgment to be rendered against a defendant when he is not served with process, there must be a showing upon the record that the defendant has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157.

{¶62} In the present case, there is nothing in the record to demonstrate that Dorothy Jean "voluntarily submitted [her]self to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense." Attorney Cole testified that she was not party to this case and that he did not represent her, although he served as counsel for her in other litigation. Cole claimed his only authority to settle on behalf of Dorothy Jean was that conferred by her husband, Timothy, to Attorney DiBartolo. There is no evidence that DiBartolo represented Dorothy Jean in this or any other legal matter.

{¶63} Attorney DiBartolo testified that she never spoke personally with Dorothy Jean. According to DiBartolo, Timothy "indicated" that Dorothy Jean would sign the agreement, "but she wanted *** to make sure that she had an opportunity to read it and to sit down with me and/or Mr. Cole in our office and understand it." On this point, the testimony of DiBartolo and Timothy is in accord. He testified that Dorothy Jean "probably would" agree to the settlement, "but she needs to read the documents." Dorothy Jean testified that she never discussed a settlement with Cole, DiBartolo, or

Timothy and never agreed to a settlement. At best, this "consent" is merely conditional, based on a circumstance, i.e. the reading of the documents, that never occurred.

{¶64} This evidence is not sufficient to confer the trial court with personal jurisdiction over Dorothy Jean. Assuming, arguendo, that she has voluntarily submitted herself to the court's jurisdiction, this evidence does not support a finding that she gave Attorney Cole or DiBartolo special authorization to settle her claim in the receivership action or to agree to the cognovit-promissory note as part of the settlement of the present case.

{¶65} Promotional Products claims that Dorothy Jean gave Timothy actual authority to settle on her behalf, based on her testimony that he and Daniel "were handling everything." We disagree. Dorothy Jean's testimony demonstrates an implied consent, based on her deference as "his wife." It does not alter the fact that, when the settlement was reached on October 2, 2008, Dorothy Jean was not a party to this action, had taken no part in these proceedings, and was wholly unaware that an agreement was being reached whereby she would be required to relinquish her legal claims in a separate action and agree to a $95,000 promissory-cognovit note. Cf. *Living Waters Fellowship Inc. v. Ross*, 4th Dist. No. 00 CA 2714, 2000-Ohio-1973, 2000 Ohio App. LEXIS 5004, at *16 ("the general decision to leave one's business affairs 'up to' one's spouse is not the same as manifesting an assent to the sale of real property").

{¶66} The fourth assignment of error is with merit.

{¶67} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, binding Dorothy Jean to the terms of the settlement agreement entered into on October 2, 2008, is reversed and vacated. In all other respects, the judgment of the lower court is affirmed. Costs to be taxed against the parties equally.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, P.J., concurs in part, dissents in part with a Dissenting Opinion.

MARY JANE TRAPP, P.J., concurs in part, dissents in part with a Dissenting Opinion.

{¶68} I agree with the majority's analysis regarding the first, second, and third assignments of error. For the following reasons, I respectfully dissent from the majority's disposition of the fourth assignment of error. The issue presented in the fourth assignment of error concerns whether the trial court had the authority to issue a judgment enforcing a settlement agreement binding Dorothy Deighan, who, although a party to another related litigation, is not a party to the underlying complaint.

{¶69} It should first be noted that this issue was never raised by Mrs. Deighan throughout the proceedings below. She raises the issue for the first time on appeal, but only in a most cursory manner. In her objections to the magistrate's decision, as well as in the appeal before us, her argument focuses on the lack of authority by her counsel to consent to the revised settlement terms.

{¶70} The question presented by the unique set of circumstances in this case is whether the court has the authority to enter a judgment enforcing a settlement agreement against an individual who was not named as a third-party defendant but whose counsel actively participated in negotiations leading to a global settlement intended to resolve all related litigations among all parties including the "nonparty."

{¶71} I recognize that in resolving this issue we are to be guided by the fundamental principle that due process requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Armstrong v. Manzo* (1965), 380 U.S. 545, 550.

{¶72} In *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, the trial court rendered a judgment in a civil case against a person who was not served with summons, did not appear, *and* was not a party in the court proceedings. The Supreme Court of Ohio held that "a trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings." Id. at paragraph one of syllabus.

{¶73} The *Ballard* court pointed out that "[t]he record does not indicate that Ballard was served with summons, *ever appeared before the trial court*, or was joined as a defendant in the court proceedings." (Emphasis added.) Id. at 182. The court explained that "[i]f the act sought to be compelled -- the vacation of judgment *where there was no jurisdiction over the person* -- falls within judicial discretion, it is difficult to conceive of any act that would not." (Emphasis added.) Id. at 184.

{¶74} Applying the analysis given by the *Ballard* court, I believe the issue of whether the court had the authority to issue a judgment enforcing the settlement agreement binding Mrs. Deighan is one of jurisdiction.

{¶75} "It is well-established that before a trial court can enter judgment against a defendant, it must first have personal jurisdiction over the defendant." *Cappellino v. Marcheskie*, 11th Dist. No. 2008-T-0016, 2008-Ohio-5322, ¶12, citing *Sweeney v. Smythe, Cramer, Co.*, 11th Dist. Nos. 2002-G-2422 and 2002-G-2448, 2003 Ohio 4032, ¶12.

{¶76} A court obtains personal jurisdiction over a defendant by service of process, or by the defendant's voluntary appearance or actions. *In re S.H*., 2d Dist. No. 23382, 2009-Ohio-6592, ¶34, citing *In re Burton S.* (1999), 136 Ohio App.3d 386, 391. "It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156.

{¶77} In *State ex rel. Ragozine v. Shaker* (Dec. 28, 2001), 11th Dist. No. 2001-T-0122, 2001 Ohio App. LEXIS 6005, this court reiterated the principle that "a trial court has acquired jurisdiction over the defendant's person when one of the following three events has occurred: (1) the defendant has been served with process; (2) the defendant has made a voluntary appearance in the case; or (3) the defendant has committed certain acts which constitute an involuntary submission to the jurisdiction of the court." Id. at *21-22, citing *Maryhew* at 156. "In relation to the second of these events, the Supreme Court has also indicated that the voluntary appearance can be made by either the defendant or his legal representative." Id. at *22, citing *Maryhew*. This court explained that "our review of the precedent on this issue shows that the Supreme Court's holding as to the effect of an entry of appearance *** is predicated upon the basic principles of due process." Id.

{¶78} As this court stated in *Mollis v. Rox Constr. Co.* (Dec. 4, 1992), 11th Dist. No. 92-T-4688, 1992 Ohio App. LEXIS 6083, *10, when a party files a motion to enforce a settlement agreement which has not been incorporated into a judgment entry, the trial

court is actually adjudicating a new claim. Thus, the better vehicle for Promotional Products' efforts to enforce the settlement agreement would have been to file a separate action to enforce the settlement. Promotional Products, however, filed a motion to enforce the settlement agreement in the same trial court case, a case in which Mrs. Deighan had not been formally joined as a third-party defendant or filed a formal entry of appearance.

{¶79} The record reflects, however, that although the parties disagree as to whether Mrs. Deighan gave her counsel authority to settle the litigation for the amount of $95,000, it is undisputed her counsel actively negotiated a "global" settlement on her behalf, as well as on her husband's behalf.

{¶80} The record shows that the settlement negotiations which began at the October 1, 2008 hearing were intended by all parties as a "global" settlement to resolve all pending litigation among the parties, including Mrs. Deighan, who had filed a related lawsuit against Mr. Hartung, one of the principals of Promotional Products. Mrs. Deighan was also represented by Attorneys Cole and DiBartolo in that case. The magistrate's finding that she was a party to the settlement agreement is supported by the evidence in the record, as Attorneys Cole and DiBartolo repeatedly assured the court that they represented Timothy Deighan, as well as Dorothy Deighan, in the settlement negotiations and that they were authorized to act on her behalf.

{¶81} Therefore, although Mrs. Deighan did not file a formal entry of appearance, she did enter the case voluntarily, through her counsel's active participation in the global settlement which had been intended to encompass her own lawsuit. Her "appearance" in the case is also reflected in the certificate of service for the Deighan's objections to the magistrate's decision, which stated: "the foregoing

Objections of *Defendants, Timothy and Dorothy Jean Deighan* to Magistrate decision was (sic) sent this 17th Day of March, 2009." (Emphasis added.) Thus, the court acquired personal jurisdiction over Dorothy Deighan through the "voluntary appearance and submission of the defendant or [her] legal representative." *Maryhew* at 156. See, also, *Expert Elec., Inc. v. Levine* (C.A.2, 1977), 554 F.2d 1227, 1233 ("[g]enerally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation").

{¶82} Furthermore, in contrast to subject matter jurisdiction, which cannot be waived, a party may waive personal jurisdiction. *Qualchoice, Inc. v. Nieciecki*, 11th Dist. No. 2002-P-0100, 2003-Ohio-6966, fn.1. "[T]he requirement that a court have personal jurisdiction over a party is a waivable right and there are a variety of legal arrangements whereby litigants may consent to the personal jurisdiction of a particular court system." *Preferred Capital, Inc. v. Power Eng'g Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, ¶6, citing *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St.3d 173, 175.

{¶83} "[U]nlike subject matter jurisdiction which can be raised by the trial court sua sponte at any time during the proceedings, personal jurisdiction is waivable and need not be raised by the trial court sua sponte." *Snyder Computer Sys. v. Sayas Auto Sales*, 7th Dist. No. 09-JE-6, 2009-Ohio-6759, ¶15, citing *Snyder Computer Sys. v. Stives*, 175 Ohio App.3d 653, 2008-Ohio-1192, ¶17; *NetJets, Inc. v. Binning*, 10th Dist. No. 04AP-1257, 2005-Ohio-3934, ¶4; and *Weiss, Inc. v. Pascal*, 8th Dist. No. 82565, 2003-Ohio-5824, ¶7.

{¶84} "If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Grammenos v. Lemos* (C.A.2, 1972), 457 F.2d 1067, 1070 (citations omitted).

{¶85} Here, as the record reflects, Mrs. Deighan's counsel never raised the claim that she had not been named as a party in the instant lawsuit, either at the hearing where the parties began the settlement discussion, or at the hearings on the motion to enforce the settlement. After Promotional Products moved the court to enforce the settlement agreement, Sunset and the Deighans' counsel challenged the settlement agreement on the ground that the terms were an inaccurate reflection of the agreement that was read into the record -- in the "Opposition to PPG's Motion for an Order Enforcing Covenant not to sue" filed on December 5, 2008, Sunset and the Deighans' counsel alleged "[a]t no point in the settlement entered before this Court was it agreed that the wives of Daniel Deighan or Timothy Deighan were to sign the covenant not to sue. *The wives were only to sign the promissory note*." (Emphasis added.) Mrs. Deighan did *not* claim that she should not be bound because she was not a "party" to the action.

{¶86} Furthermore, in the Deighan's objections to the magistrate's decision, they raised the following grounds of objections: Timothy Deighan did not consent to the settlement agreement; Attorney DiBartolo did not have authority to alter the terms of the settlement agreement on behalf of Timothy Deighan; and Dorothy Deighan did not agree to the settlement agreement. Mrs. Deighan in particular alleged that she was not advised of the settlement agreement, or approved of the terms; that Attorney DiBartolo never had a conversation with her about the settlement terms; and that Timothy

Deighan indicated to Attorney DiBartolo his wife would consent to the agreement but she would have to read the documents. Again, there was no jurisdictional argument raised in the objections.

{¶87} Thus, Mrs. Deighan waived the personal jurisdiction requirement. She "entered" the case through counsel's active participation in the settlement negotiations. Her counsel requested the court to approve of the settlement on her behalf. She never challenged the court's personal jurisdiction on the multiple occasions she came before the court to dispute the settlement terms. See *Snowberger v. Wesley*, 9th Dist. No. 21866, 2004-Ohio-4587, ¶13 (while counsel attended a settlement conference and did not limit his appearance to contesting jurisdiction, appellee waived any claim that the trial court lacked personal jurisdiction).

{¶88} Because Mrs. Deighan's interests were represented by counsel, who were vested with authority, Mrs. Deighan is bound by the settlement agreement even though she was not a party to the underlying trial court case through which the "global" settlement was reached. *Ballard* stands for the proposition that "a trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, *and* was not a party in the court proceedings." (Emphasis added.) The prohibition involves a *conjunctive* test. Here, Mrs. Deighan, through counsel, voluntarily appeared in the proceedings and actively participated in the negotiations which led to the settlement agreement. This is not the type of circumstance contemplated by *Ballard*.

{¶89} Therefore, I believe the trial court had the authority to enforce the settlement agreement against Mrs. Deighan under the unique circumstances presented in this case. The instant action was but one of the multiple, related lawsuits the parties

had filed against each other. The settlement that took place on October 2, 2008, was contemplated by all parties to be a "global" settlement to resolve all litigation at once. Mrs. Deighan's appearance and participation at the settlement discussions, through counsel, was a waiver of her due process rights to be formally named as a third-party defendant and served with process.

{¶90} For the foregoing reasons, I respectfully dissent from the majority's decision regarding the fourth assignment of error.