[Cite as *Saxe v. Dlusky*, 2010-Ohio-5323.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Donna Saxe, Executor of the Estate of Ronald Saxe, Deceased et al., | : | |
| Plaintiffs-Appellants, | : | |
| v. | : | No. 09AP-673 (C.P.C. No. 04CVH-10-10919) |
| Thomas P. Dlusky, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on November 2, 2010

*Johrendt, Cook & Eberhart*, and *Michael J. Johrendt*, for appellants.

*Newhouse, Prophater, Letcher & Moots, LLC*, and *Christopher E. Hogan*; *Jon M. Cope, Attorney at Law LLC*, and *Jon M. Cope*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

**{¶1}** Plaintiffs-appellants, Donna Saxe, individually and as executor of the estate of Ronald Saxe, deceased ("appellants," collectively), appeal the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Thomas P. Dlusky ("appellee"), on appellants' claims alleging breach of fiduciary duty, breach of contract, conversion, constructive fraud, fraud, and an accounting. For the following reasons, we affirm the judgment of the trial court.

**{¶2}** Donna Saxe ("Mrs. Saxe," individually), is the widow of Ronald Saxe, who died on December 29, 1997. Ronald Saxe and appellee were friends and business partners for many years. Ronald Saxe and appellee were business partners in the accounting firm of Pritchett, Dlusky & Saxe ("PDS Accounting"). Ronald Saxe owned a 45 percent interest in that firm, while appellee owned the remaining 55 percent. The two men were also involved in the investment and financial planning firm of PDS Planning, Inc. ("PDS Planning"), a closely held Ohio corporation. Ronald Saxe owned a 25 percent interest in PDS Planning. Appellee also owned a 25 percent interest. The remaining 50 percent interest was owned by a third individual, Robert Hamilton ("Hamilton").

**{¶3}** A Partnership Agreement ("Agreement") was entered into between Ronald Saxe and appellee on March 28, 1987, regarding PDS Accounting. Among other things, the Agreement governed the disposition of interests in PDS Accounting in the event of the death of one of the partners. Pursuant to this buy-sell provision, upon the death of a partner, the Agreement required the remaining partner to purchase the interest of the deceased partner within 90 days of the death of the deceased partner at a value computed as 110 percent of the annual gross income, minus existing liabilities. No similar agreement was ever executed with respect to PDS Planning.

**{¶4}** As the executor of her husband's estate, Mrs. Saxe began assembling and liquidating Ronald Saxe's assets. In accordance with the formula contained in the Agreement, appellee paid Mrs. Saxe $309,973 for the estate's 45 percent interest in PDS Accounting. In order to cover the purchase of the estate's interest in PDS Accounting, appellee applied a $300,000 life insurance policy owned by Ronald Saxe and also paid an additional $9,973 to Mrs. Saxe.

**{¶5}** Because there was no agreement regarding the disposition of PDS Planning upon the death of a shareholder, appellee and Hamilton were not obligated to purchase the estate's interest in the firm. Furthermore, there were no provisions for valuing the shares of PDS Planning. Nevertheless, appellee approached Mrs. Saxe in early 1998 and offered to buy the estate's 25 percent interest in PDS Planning. Appellee valued the estate's shares at $30,000, based upon a "rule of thumb" valuation of four and one-half times the previous year's profits. Neither party sought to have the shares appraised. In June 1998, Mrs. Saxe agreed to sell the shares to appellee for $30,000. An attorney for the estate put the agreement in writing and the transaction was completed on November 23, 1999 and approved by the probate court. Pursuant to this agreement, appellee paid Mrs. Saxe $30,000 in November 1999.

**{¶6}** In 2000, Hamilton, who was president of PDS Planning, approached appellee and offered him $250,000 for his 50 percent interest in PDS Planning. Appellee accepted the offer and agreed to stay on with PDS Planning as a consultant (in his capacity as a Certified Public Accountant and a Certified Financial Planner) in order to assist with the transition of his clients to Hamilton. While the documents memoralizing this transaction are dated January 1, 2000, appellee avers the documents were backdated and that Hamilton did not approach him about the transaction until July 2000.

**{¶7}** On January 3, 2003, appellants filed a federal lawsuit against appellee in the United States District Court for the Southern District of Ohio, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, as well as six state law claims for breach of fiduciary duty, conversion, breach of contract, fraud, constructive fraud, and an accounting.

**{¶8}** On September 16, 2004, the district court granted summary judgment in favor of appellee, finding appellants failed to establish that appellee made any material misrepresentations or omissions in connection with his purchase of Ronald Saxe's 25 percent interest in PDS Planning. The district court also declined to exercise supplemental jurisdiction over any of the state law claims and dismissed them without prejudice.[1] Therefore, on October 18, 2004, appellants filed a complaint in the Franklin County Court of Common Pleas against appellee, alleging the same six state law claims.

**{¶9}** In the complaint, appellants assert appellee owed appellants a fiduciary duty, which was breached. Appellants further assert claims for conversion, breach of contract, fraud, and constructive fraud. Specifically, appellants contend appellee made various omissions and misrepresentations and concealed material information. Appellants submit appellee misappropriated life insurance proceeds from a policy owned by Ronald Saxe to satisfy $300,000 of his obligation under the Agreement to buy the estate's interest in PDS Accounting. Appellants allege Mrs. Saxe is the actual beneficiary of the life insurance policy and that appellee falsely claimed entitlement to the proceeds. Appellants also allege appellee's purchase of Ronald Saxe's 25 percent ownership interest in PDS Planning was based upon false representations, concealment, and failure to disclose material facts regarding the closely held corporation, such as the value of its shares, its financial condition, and its future sale at a value that was much higher than what was represented to Mrs. Saxe.

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[1] On January 6, 2006, the United States Court of Appeals for the Sixth Circuit reversed the district court's September 16, 2004 grant of summary judgment, concluding that court had erred in granting summary judgment sua sponte on the materiality of the misrepresentations or omissions under Section 10(b) and Rule 10b-5. See *Saxe v. Dlusky* (C.A.6, 2006), 162 F.Appx. 430. On remand, the district court again granted summary judgment in favor of appellee, finding appellants failed to establish appellee made material misrepresentations or omissions. See *Saxe v. Dlusky* (Feb. 6, 2007), S.D. OH. No. 2:03-CV-00018. The Sixth Circuit affirmed. See *Saxe v. Dlusky* (C.A.6, 2008), 268 F.Appx. 438.

**{¶10}** On May 2, 2009, appellee filed a motion for summary judgment, arguing appellants' claims for breach of fiduciary duty, fraud, and constructive fraud with respect to PDS Planning were barred by the doctrines of res judicata and collateral estoppel, due to the resolution of the securities lawsuit filed in federal court. Appellee also argued that he and Ronald Saxe had purchased cross life insurance policies in the amount of $300,000, naming each other as the primary beneficiaries, and naming their wives as contingent beneficiaries. Appellee alleged that such policies were purchased in order to fund the buy-sell requirement set forth in the Agreement in the event of the death of one of the partners. Appellee argued he waived his right to the $300,000 proceeds and signed them over to Mrs. Saxe to be used towards the purchase of the estate's shares in PDS Accounting, and that his actions did not constitute a breach of contract or conversion. Consequently, appellee moved the court to grant summary judgment in his favor.

**{¶11}** Although appellants opposed the motion, the trial court issued a decision granting summary judgment in appellee's favor on May 26, 2009. A judgment entry reflecting this decision was filed on June 10, 2009. Appellants then filed this timely appeal, asserting four assignments of error for our review:

> ASSIGNMENT OF ERROR NO. 1: THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION ON THE GROUNDS THAT PLAINTIFF'S FIDUCIARY DUTY CLAIM WAS BARRED BY THE DOCTRINE OF RES JUDICATA/COLLATERAL ESTOPPEL.
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> ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION ON THE GROUNDS THAT PLAINTIFF'S FRAUD AND CONSTRUCTIVE FRAUD CLAIMS WERE BARRED BY THE DOCTRINE OF RES JUDICATA/COLLATERAL ESTOPPEL.

> ASSIGNMENT OF ERROR NO. 3: THE TRIAL COURT ERRED IN GRANTING DEFENDANT SUMMARY JUDGMENT ON THE CONVERSION CLAIM.
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> ASSIGNMENT OF ERROR NO. 4: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM.

**{¶12}** Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

**{¶13}** Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party 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 that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

**{¶14}** When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving

party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

**{¶15}** In their first assignment of error, appellants make several arguments asserting the doctrine of res judicata and collateral estoppel does not preclude their state claims of breach of fiduciary duty.

**{¶16}** First, with respect to their breach of fiduciary duty claim, appellants argue appellee has failed to meet the necessary prerequisites to invoke the doctrine. Appellants contend the doctrine is not applicable because the issues governing the breach of fiduciary duty claim were never actually litigated in the federal case, since that claim was dismissed without prejudice. Appellants further argue the federal court judgment was limited to only the federal securities claim and was based solely on that court's conclusion that there were no material misrepresentations or omissions sufficient to support the securities claim. While the primary issue in the federal action was whether there was a material misrepresentation, appellants argue that a material misrepresentation is not an element of a breach of fiduciary duty claim under Ohio law. Since the elements of a federal securities claim are different from the elements of a breach of fiduciary duty claim, appellants submit there is not an exact identity of issues which were actually and directly

decided by the court and essential to the court's determination, and therefore, application of the doctrine of res judicata and collateral estoppel is improper.

**{¶17}** Second, although the district court found appellee acted in accordance with his shareholder and fiduciary obligations with respect to the federal securities claim, appellants assert this is merely dicta, which cannot be relied upon to grant summary judgment in state court on completely different claims with no common elements.

**{¶18}** Third, although there is a general rule prohibiting claims splitting, appellants contend several exceptions to that rule are applicable here and are summarized in the Restatement (Second) of Judgments. Appellants argue appellee failed to object to splitting the claims. Appellants further argue the district court expressly reserved appellants' right to maintain the action in common pleas court. Appellants also assert that in the breach of fiduciary duty claim (as opposed to the federal securities action), the burden upon appellee has shifted and/or is significantly heavier, since this claim involves appellee's obligations as a fiduciary. Consequently, appellants argue this places a higher burden on appellee to demonstrate that his actions were fair. See *Yackel v. Kay* (1994), 95 Ohio App.3d 472.

**{¶19}** The doctrine of res judicata involves two concepts: claim preclusion, which is historically known as estoppel by judgment, and issue preclusion, which is traditionally known as collateral estoppel. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331. Under claim preclusion, a valid, final judgment rendered on the merits acts as a complete bar to all subsequent action based upon any claim which arises out of the transaction or occurrence that was the subject matter of the previous action. Id. at 382.

**{¶20}** Under the doctrine of issue preclusion (or collateral estoppel), an issue of fact that was "actually and directly at issue in a previous action, and was passed upon

and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, *whether the cause of action in the two actions be identical or different*." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435. (Emphasis added.) See also *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 2002-Ohio-6322, ¶16. Therefore, collateral estoppel prevents parties from relitigating in a subsequent case facts and issues which were fully litigated in a previous case. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 64, 2002-Ohio-1627.

**{¶21}** Here, the causes of action at issue in these two matters — a federal cause of action for an alleged securities claim, and a state cause of action for breach of fiduciary duty — are different. However, under the doctrine of collateral estoppel, the causes of action themselves need not necessarily be identical if the required elements, as set forth above, are met.

**{¶22}** In order to prevail on a securities fraud claim under Section 10(b)(5) and Rule 10b-5, a plaintiff must establish the following elements: "(1) a misrepresentation or omission, (2) of a material fact, (3) made with scienter, (4) justifiably relied on by plaintiffs, and (5) proximately causing them injury." *Helwig v. Vencor, Inc.* (C.A.6, 2001), 251 F.3d 540, 554.

**{¶23}** In contrast, to prove a claim for breach of fiduciary duty under Ohio law, the following elements must be established: " '(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.' " *Wells Fargo Bank, N.A. v. Sessley*, 10th Dist. No. 09AP-178, 2010-Ohio-2902, ¶36, quoting *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490,

¶19, quoting *Thomas v. Fletcher*, 3d Dist. No. 17-05-31, 2006-Ohio-6685, ¶13, quoting *Werthmann v. DONet*, 2d Dist. No. 20814, 2005-Ohio-3185, ¶42.

**{¶24}** A claim for breach of fiduciary duty is basically a claim for negligence that requires a higher standard of care. *Strock v. Pressnell* (1988), 38 Ohio St.3d 207; *Hamblin v. Daugherty*, 9th Dist. No. 06CA0109-M, 2007-Ohio-5893; *Lombardo v. Mahoney*, 8th Dist. No. 92608, 2009-Ohio-5826; *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc.*

**{¶25}** When addressing the duty that is owed between shareholders in a closely held corporation, the Supreme Court of Ohio has held that a majority or controlling shareholder owes a fiduciary duty to a minority shareholder. *Crosby v. Beam* (1989), 47 Ohio St.3d 105. The majority of cases addressing fiduciary duties in a closely held corporation involve factual situations where a majority shareholder exercises control over a minority shareholder. However, we have also imposed this heightened fiduciary duty in cases where the parties are equal shareholders in a closely held corporation. See *McLaughlin v. Beeghly* (1992), 84 Ohio App.3d 502, and *Morrison v. Gugle* (2001), 142 Ohio App.3d 244. In addition, some courts have generally found that all shareholders of a close corporation owe each other a duty arising from a fiduciary relationship. See *Werthmann* at ¶42, citing *Crosby* at 108. "Essentially, shareholders in a close corporation owe each other a fiduciary duty to deal in utmost good faith." *Hickerson v. Hickerson*, 3d Dist. No. 5-10-08, 2010-Ohio-4070, ¶25, citing *Herbert v. Porter*, 165 Ohio App.3d 217, 2006-Ohio-355, ¶12.

**{¶26}** " 'A "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *State v. Massien*, 125

Ohio St.3d 204, 2010-Ohio-1864, ¶35, quoting *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, quoting *In re Termination of Emp. of Pratt*, (1974), 40 Ohio St.2d 107, 115. Those in a fiduciary relationship owe a fiduciary duty to one another. *Seminatore v. Climaco, Climaco, Lefkowitz & Garofoli Co., LPA* (Dec. 7, 2000), 8th Dist. No. 76658. The fiduciary duty is the same whether the relationship is one of shareholders in a close corporation or parties who are engaged in a partnership. The duty is one of "utmost good faith and loyalty." *DiPasquale v. Costas*, 186 Ohio App.3d 121, 2010-Ohio-832, ¶133, quoting *Crosby* at 108.

**{¶27}** "A party involved in a business transaction with another with whom he is in a fiduciary relationship is bound to make full disclosure of material facts known to him but not to the other." *Isroff v. The Westhall Co.* (Nov. 27, 1991), 9th Dist. No. 15063 (*Isroff II*), quoting *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 101; *Binsack v. Hipp* (June 5, 1998), 6th Dist. No. H-97-029. "The common-law fiduciary duty to disclose is not boundless." *Isroff II*. "[I]t is generally held that the duty to disclose is limited to present, material information that would reasonably affect the complainant's decision to enter the transaction[.]" *Isroff v. The Westhall Co.* (Feb. 21, 1990), 9th Dist. No. 14184 (*Isroff I*).

**{¶28}** Appellants submit that the underlying basis for the federal court's decision on the securities claim was the lack of material misrepresentations or omissions. In contrast, appellants argue a breach of fiduciary duty claim does not involve material misrepresentations or omissions. Consequently, appellants contend the identical issue was not actually and necessarily litigated, thereby preventing the application of the doctrine of collateral estoppel. We disagree.

**{¶29}** The first element required to be shown in a breach of fiduciary duty claim is the existence of a duty arising from a fiduciary relationship. As stated in *Isroff* II, an

individual who is involved in a business transaction with a party with whom he has a fiduciary relationship, as is the case here, must make full disclosure of material facts which are known to him but not to the other party. Thus, while the standard elements of a breach of fiduciary duty claim may not specifically delineate a requirement to show a material misrepresentation or omission in order to prove the claim, the very nature of a fiduciary relationship requires one to make full disclosure of material facts if such facts are unknown to the other party. Therefore, appellants' assertion that the element of materiality in the federal securities claim operates to bar the application of the collateral estoppel doctrine because such element is lacking in a breach of fiduciary duty claim is unavailing.[2]

**{¶30}** Furthermore, while the securities fraud claim was the only claim that was actually decided by the federal court, that court did make certain factual determinations based upon the asserted misrepresentations raised by appellants. The asserted misrepresentations raised in the securities fraud case are the same allegations raised in the instant state case which form the basis of appellants' cause of action for breach of fiduciary duty, as noted by the Franklin County Court of Common Pleas in its decision.

**{¶31}** In their complaint in the instant case, appellants assert that appellee, as a shareholder in the closely held corporation of PDS Planning, breached his fiduciary duties by: (1) misrepresenting the profitability of PDS Planning, claiming it "never made much money;" (2) misrepresenting the value of the 25 percent interest in PDS Planning, which

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[2] Citing to *Estate of Schroer v. Stamco Supply, Inc.* (1984), 19 Ohio App.3d 34, 38, appellants contend that Ohio caselaw on claims for breach of fiduciary duty state that a fiduciary has a duty to "make disclosure of all essential information." (Appellants' brief, at 16.) On this basis, appellants contend the breach of fiduciary duty claim is distinguishable from the federal securities claim, which requires a material misrepresentation or omission. However, a close reading of this case shows the court in *Schroer* was analyzing state trends regarding the duty to disclose in close corporations and simply noted the principle adopted in Indiana was one of "disclosure of all essential information." *Schroer* at 38.

he valued at $30,000; (3) informing Mrs. Saxe that, because she did not hold professional licenses for providing financial planning or investment advice, she could not possess an ownership interest in PDS Planning; (4) failing to disclose certain financial information; (5) financially profiting from his dealings with appellants; and (6) failing to disclose the future sale of the shares to the remaining shareholder.

**{¶32}** Regarding the allegation that appellee misrepresented the profitability of PDS Planning by claiming it "never made much money," the district court found that statement was vague and subjective (as well as not material). The district court further found appellants failed to produce substantial and/or admissible evidence to demonstrate that such a statement was false. Thus, the district court, in essence found that appellants failed to meet their burden to show that such a statement was incorrect or a misrepresentation. Therefore, the trial court properly determined this allegation could not be re-litigated.

**{¶33}** As to the allegation that appellee misrepresented the value of the estate's 25 percent interest in PDS Planning, the district court found appellants' only "proof" that the value was higher than the $30,000 received by appellants is their argument that appellee later sold that 25 percent interest, plus his own 25 percent interest, to the remaining, majority shareholder (who would then become the sole shareholder) for $250,000 nearly two years after the deal with appellants was first brokered.[3] Appellants offered no evidence challenging the "rule of thumb" calculation used by appellee to arrive at the $30,000 value and did not argue that the value was unreasonable or inaccurate.

[3] Despite appellants' contention that the sale to Hamilton occurred only six weeks after appellee's purchase of appellants' shares in November 1999, the federal district court and the federal court of appeals specifically found more than two years had passed between the two transactions. Thus, this point has already been litigated and determined.

The district court went on to find, as a matter of law, that merely selling the 50 percent interest in PDS Planning to the remaining shareholder for $250,000 does not, by itself, support the inference that appellee misrepresented the value of appellants' 25 percent share. Additionally, the Sixth Circuit noted: the transactions occurred in two distinct contexts; appellee continued to work at PDS Planning and to facilitate the transition of clients to Hamilton; and the transaction made Hamilton the sole owner of PDS Planning. Thus, the federal court determined that appellants failed to produce evidence to establish that appellee misrepresented the value of the estate's interest in PDS Planning. This determination on this issue bars appellants from making this very same assertion here in state court.

**{¶34}** Next, appellants argue that appellee misrepresented to Mrs. Saxe that she lacked the professional credentials to possess an ownership interest in PDS Planning. The district court found that appellants failed to provide any evidence that this alleged representation was false or material. The Franklin County Court of Common Pleas agreed and we agree with this analysis as well. Appellants have not produced evidence demonstrating that this is untrue, given the practical reality of the circumstances. As the Sixth Circuit further found, appellee did acknowledge that Mrs. Saxe would not technically need to be professionally licensed to own shares of PDS Planning. However, the court recognized that practically, such a person would receive very little benefit from that ownership because he or she would be unable to offer professional services. Because compensation was based upon one's ability to generate business and offer services, the Sixth Circuit found that Mrs. Saxe's lack of professional licensing was significant, and therefore appellee's statement was not a material misrepresentation. Thus, this issue has already been litigated and determined.

**{¶35}** Appellants also allege appellee failed to disclose the future sale of the shares to the remaining shareholder and that he financially profited from these dealings. The district court found no evidence to demonstrate that appellee knew of the future sale to Hamilton at the time he negotiated to purchase appellants' shares some two years earlier. As a result, the court determined there was nothing that required him to disclose any information about this to appellants. Logically, he could not disclose a sale or his potential to see a profit when he had no knowledge of the possibility of a sale because he had not even been approached about selling the shares at that point in time. Thus, there was nothing to disclose. Because this issue was fully litigated in federal court, the trial court properly found appellants could not relitigate this issue again here.

**{¶36}** Appellants also argue that certain statements made by the federal court are merely unnecessary dicta which cannot be given preclusive effect because the language was not essential to the court's judgment. Specifically, appellants argue the statement that appellee did not violate a fiduciary duty to appellants or make a material misrepresentation or omission with respect to the buying and selling of the estate's 25 percent interest in PDS Planning is simply dicta that was not essential to the court's judgment.

**{¶37}** Appellants have correctly argued that a determination in a prior federal action which was not essential to the judgment will not foreclose consideration of the issue in a subsequent state proceeding involving a different claim. See *Kelly v. Georgia-Pacific Corp*. (1989), 46 Ohio St.3d 134, paragraph one of the syllabus. However, we believe these references were essential to the federal court's judgment. The fact that the federal court did not specifically litigate the breach of fiduciary duty claim and instead simply dismissed it without prejudice does not alter this. This is because in pursuing their

federal securities claim, appellants argued, pursuant to one of their asserted misrepresentations, that appellee owed them a fiduciary duty with respect to the purchase and re-sale of the PDS Planning shares. Thus, the federal district court considered this argument as it related to the securities claim and made a determination.

**{¶38}** Finally, despite appellants' contention that there are applicable exceptions which prevent application of the doctrine of res judicata and collateral estoppel, we find the exceptions to be inapplicable here.

**{¶39}** First, appellee did not "waive" the defense of res judicata. In fact, appellants did not "split" the claims but instead filed in state court after their state law claims were dismissed by the district court. Furthermore, appellee pled res judicata and collateral estoppel in his answer. Appellee's concurrence with the agreed order staying the proceedings in the state court case while the federal litigation was pending did not waive his assertion of this affirmative defense. Second, the district court's notation that the state court proceedings were stayed pending a decision in the federal case did not expressly reserve appellants' right to maintain the second action in state court. And finally, as to appellee's burden as a fiduciary to demonstrate the fairness of the transactions at issue, it has been determined that appellee has not breached his obligations as a fiduciary, thereby establishing the necessary fairness.

**{¶40}** Because we find the trial court properly applied the doctrine of res judicata and collateral estoppel to appellants' claim of breach of fiduciary duty, we overrule appellants' first assignment of error.

**{¶41}** In their second assignment of error, appellants argue the trial court erred in granting summary judgment on their fraud and constructive fraud claims on the grounds that the claims were barred by collateral estoppel. Appellants allege the same

misrepresentations with respect to the fraud and constructive fraud claims as they alleged with respect to their breach of fiduciary duty claim as set forth above.

**{¶42}** Appellants argue collateral estoppel does not apply here because the definition of "material" under Ohio law with respect to a fraud claim differs from the definition of "material" in the context of a federal securities claim. Appellants contend the trial court improperly expanded the collateral estoppel doctrine by applying it to issues which are not identical.

**{¶43}** Appellants assert that in the context of a federal securities claim, a "material" omission or misrepresentation is based upon the objective standard of a "reasonable investor." On the other hand, in the context of a fraud claim under Ohio law, appellants argue a "material" fact is one which is likely to affect the conduct of a reasonable person with respect to the transaction in question. Citing to *Van Camp v. Bradford* (1993), 63 Ohio Misc.2d 245, appellants submit this is an objective test with subjective considerations. Because Mrs. Saxe submitted an affidavit indicating she relied upon appellee's statements to her, including his promises to protect her interests, and would not have otherwise sold her husband's shares, she claims there remain genuine issues of fact as to whether appellee's statements were material in the context of Ohio law.

**{¶44}** We find appellants' efforts to distinguish the definitions of "material" under these circumstances to be without merit, as the subjective considerations are not applicable here.

**{¶45}** As previously stated, in a securities fraud claim under Section 10(b)(5) and Rule 10b-5, the following elements must be established: "(1) a misrepresentation or

omission, (2) of a material fact, (3) made with scienter, (4) justifiably relied on by plaintiffs, and (5) proximately causing them injury." *Helwig* at 554.

**{¶46}** In *Basic Inc. v. Levinson* (1988), 485 U.S. 224, 108 S.Ct. 978, the United States Supreme Court expressly adopted the standard of materiality set forth in *TSC Industries, Inc. v. Northway, Inc.* (1976), 426 U.S. 438, 96 S.Ct. 2126, for the Section 10(b) and Rule 10b-5 context. Under this standard, in order to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Id. at 449.

**{¶47}** Under Ohio law, common law fraud requires proof of the following elements: "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49.

**{¶48}** In a fraud context, a misrepresentation of fact is material when, under the circumstances, it would likely affect the conduct of a reasonable person in determining whether to enter into the transaction at issue. *Brannon v. Mueller Realty & Notaries* (Oct. 24, 1984), 1st Dist. No. C-830876. "The standard is, by its terms, an objective one that generally precludes, quite properly as we see it, the consideration of any idiosyncratic qualities a party might bring to a particular transaction." Id.

**{¶49}** In *State ex rel. Goodwin v. Indus. Comm.*, 124 Ohio St.3d 334, 2010-Ohio-166, the Supreme Court of Ohio, in referencing a "material misrepresentation," defined

"material" facts as those "facts that might affect the outcome of the suit under the governing law." Id., citing *Turner v. Turner* , 67 Ohio St.3d 337, 340, 1993-Ohio-176. See also *Yancey v. Allstate Ins. Co*. (Apr. 10, 1986), 8th Dist. No. 50360, citing *Cousineau v. Walker* (1980), 613 P.2d 608 (a material fact is one that could reasonably be expected to influence someone's judgment or conduct in a transaction).

**{¶50}** In *Brannon*, the First District went on to find that there is an exception to the general rule of objectivity if the person responsible for the misrepresentation is aware that the other individual is "peculiarly disposed to attach importance to a particular subject in such an instance, [then] the misrepresentation should be deemed material, regardless of its significance to a reasonable person under similar circumstances." *Brannon*. See also Restatement (Second) of Torts (1977), Section 538(b) ("[t]he matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.") See generally, Dan B. Dobbs, *The Law of Torts*, §476, 1363 (2001).

**{¶51}** Here the subjective consideration exception is not applicable, as appellants have introduced no evidence to support knowledge on the part of appellee. Thus, the objective standard of materiality applies. Under this standard, this definition of materiality in a fraud claim is essentially the same as the definition used for materiality in a federal securities claim. Therefore, appellants' argument against application of the principles of res judicata and collateral estoppel to the fraud claim fails.

**{¶52}** As to the constructive fraud claim, we find the elements of this claim are very similar to the elements in a breach of fiduciary duty claim. Constructive fraud is

defined as " 'a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.' " *Camp St. Mary's Assn. of the W. Ohio Conf. of the United Methodist Church, Inc.* at ¶22, quoting *Cohen v. Estate of Cohen* (1986), 23 Ohio St.3d 90, 91-92; *L&N Partnership v. Lakeside Forest Assn.*, 183 Ohio App.3d 125, 2009-Ohio-2987.

**{¶53}** Constructive fraud is different from actual fraud. Actual fraud requires an "affirmative misrepresentation," while constructive fraud "results from the 'failure to disclose facts of a material nature where there exists a duty to speak.' " *Camp St. Mary's Assn. of the W. Ohio Conf. of the United Methodist Church, Inc.* at ¶43, quoting *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, ¶12, quoting *Layman v. Binns* (1988), 35 Ohio St.3d 176, 178. Constructive fraud typically exists where the parties to an agreement have a special confidential or fiduciary relationship. *Cohen* at 92.

**{¶54}** Because we found the trial court properly applied the principle of res judicata and collateral estoppel to the breach of fiduciary duty claim, we make the same finding here with respect to the constructive fraud claim.

**{¶55}** Furthermore, as we previously found in our analysis of appellants' assignment of error regarding the breach of fiduciary duty claim, appellants have failed to meet their burden in establishing that the alleged misrepresentations were in fact incorrect or constituted "misrepresentations." The statement regarding the profitability of PDS Planning was vague, subjective, and not material. The allegation that the value of the 25 percent stock interest was misrepresented was not supported by the evidence introduced by appellants, as the district court found merely selling the 50 percent interest

to the remaining shareholder for $250,000 did not sufficiently support the inference that there was a misrepresentation. As for the allegation that appellee failed to disclose the future sale of the shares, again, appellee could not disclose any information when he did not know that Hamilton was going to approach him and make him an offer several months later. Finally, the practical reality is that Mrs. Saxe would have gained little to no financial benefit from retaining the 25 percent interest in PDS Planning, given that compensation was based upon work generated and performed and she would have been unable to do either, given her lack of professional licensing.

**{¶56}** Accordingly, we find the trial court properly dismissed appellants' fraud claims on the grounds of res judicata and thus overrule appellants' second assignment of error.

**{¶57}** In their third assignment of error, appellants contend the trial court erred in granting summary judgment on the conversion and accounting claims because appellee failed to mention these claims in his motion for summary judgment. Additionally, to the extent the trial court granted summary judgment on these claims on the grounds of collateral estoppel, appellants argue this would be improper, as these claims were never litigated or decided in the federal court action and they have no elements in common with a federal securities violation.

**{¶58}** We disagree with appellants' assertion that the trial court may have granted summary judgment on these claims on the grounds of collateral estoppel. The trial court's decision clearly states "First, res judicata/collateral estoppel applies to the claims for breach of fiduciary duty, fraud, and constructive fraud as to PDS Planning." (Trial court's May 26, 2009 Decision Granting Defendant's Motion for Summary Judgment, at 6.) Later in the decision, the trial court found "Second, [appellee] is entitled to summary

judgment on the claims (breach of contract, conversion) regarding PDS Accounting." (Trial court's May 26, 2009 Decision Granting Defendant's Motion for Summary Judgment, at 11.) The trial court clearly conducted its analysis on the conversion claim by applying the summary judgment standard, not a res judicata/collateral estoppel application.

**{¶59}** Additionally, we disagree with appellants' contention that appellee failed to move for summary judgment on the conversion claim. Consistent with appellants' complaint, appellee moved for summary judgment on the conversion claim as it related to appellee's purchase of the estate's shares in PDS Accounting using the proceeds of the life insurance policy. Appellee's motion for summary judgment set forth facts and arguments applicable to PDS Accounting and the life insurance polices and specifically requested summary judgment in his favor as to "all claims regarding PDS accounting." (Defendant Thomas P. Dlusky's Motion for Summary Judgment, R. 49 at 8.) Because the conversion claim falls under the allegations involving the purchase of the PDS Accounting shares and the use of the life insurance policy proceeds in making that purchase, appellee clearly moved for summary judgment with respect to the conversion claim. Furthermore, appellee met his burden of identifying the specific basis for his request with respect to this claim.

**{¶60}** As for the accounting claim, the trial court properly granted summary judgment on this claim as well. Appellants have cited to no authority — neither a statute nor a provision in the Agreement — which provides for an accounting under these circumstances where a former shareholder has sued another former shareholder. Furthermore, because the accounting claim is tied to the breach of fiduciary duty, fraud, and conversion claims, which the trial court properly rejected, it was also proper for the

trial court to reject the accounting claim, which it did by granting summary judgment on all claims. See generally, *Kleemann v. Carriage Trace, Inc.*, 2d Dist. No. 21873, 2007-Ohio-4209.

**{¶61}** Therefore, we overrule appellants' third assignment of error.

**{¶62}** In their fourth assignment of error, appellants submit the trial court erred in granting summary judgment on the breach of contract claim. Appellants make several arguments in support of this contention.

**{¶63}** First, appellants argue the issues surrounding the breach of contract claim involve a question of fact, due to the alleged dispute over the true beneficiary of the proceeds of the $300,000 insurance policy owned by Ronald Saxe, which must be determined by the trier of fact alone, and therefore summary judgment is not appropriate. Appellants assert appellee breached his contractual obligations under the partnership agreement when he claimed life insurance proceeds that were not his and used them to satisfy his buy-out obligation. Because the Agreement makes no reference to the existence of a life insurance policy to be used for the purpose of funding the buy-out, appellants argue this creates a genuine issue of material fact to be determined by the trier of fact.

**{¶64}** Next, appellants appear to submit that Mrs. Saxe, who received the insurance proceeds directly from Midland Life Insurance Company, was in fact the primary beneficiary of the $300,000 insurance policy, as evidenced by IRS Form 712, which documented her ownership and beneficial interest, and by the written disclaimer signed by appellee. Appellants argue appellee improperly took credit for those insurance proceeds in order to satisfy his personal obligation to purchase Ronald Saxe's partnership interest.

**{¶65}** Additionally, appellants contend the trial court improperly made credibility determinations with respect to appellee's affidavit, which addressed the buy-out provisions of the Agreement and the alleged intention of the parties to use the life insurance policy proceeds to fund the buy-out, and his contradictory, previously provided deposition testimony. In his deposition, appellee initially testified he was entitled to take credit for the life insurance proceeds pursuant to the terms of the Agreement, but later admitted the Agreement did not require or mention use of a life insurance policy to fund the buy-out. In a subsequent affidavit, appellee indicated the parties had intended to use the life insurance proceeds to fund the buy-out. Appellants argue various statements within appellee's affidavit were not based upon his personal knowledge and also included hearsay and conclusory legal statements, and therefore were inadmissible. Appellants further submit appellee's efforts to present "his understanding" of the Agreement are an impermissible attempt to present parole evidence and that the trial court improperly rewrote the terms of the Agreement and/or read into the Agreement language or terms which the parties themselves did not include.

**{¶66}** We find all of appellants' arguments regarding the breach of contract claim to be without merit.

**{¶67}** First, appellants' focus upon whether or not the Agreement referred to a life insurance policy that was to be used to fund the buy-out is misplaced. The fact that the Agreement does not explicitly refer to a life insurance policy to be used for these purposes is not dispositive, as that is not the issue here.[4] Instead, the real issue is

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[4] As a side note, we point out that it is unnecessary for the Agreement to state how the buy-out is to be funded, although it is apparent that, due to a much quicker pay-out period (90 days in the event of a death instead of 60 months in the event of withdrawal of a partner for any reason other than death), the Agreement did anticipate some other way of funding the buy-out in the event of a death, such as the use of a life insurance policy.

whether appellee wrongfully claimed to be the primary beneficiary of the insurance policy. On this basis, we find the trial court properly concluded appellee met his burden of proof in demonstrating that reasonable minds could only conclude that appellee was the primary beneficiary of the insurance policy.

**{¶68}** Contrary to appellants' assertions, IRS Form 712 alone does not prove that Mrs. Saxe was the intended primary beneficiary of the insurance policy. What the form does prove is that Mrs. Saxe was ultimately paid the proceeds of the policy and that she properly filed this tax form as a result of having received these proceeds. On the other hand, appellee produced competent testimony regarding the purpose of the cross-insurance policies purchased by appellee and Ronald Saxe, as well as additional information regarding the policies.

**{¶69}** The life insurance policy application, the screen print-out, and the copy of the policy owned by appellee, which listed Ronald Saxe as his primary beneficiary and appellee's wife as his contingent beneficiary, along with the certified documents from the insurer attesting to the purpose behind the policies and to appellee's status as the primary beneficiary mean there is simply no genuine issue of material fact as to whether or not appellee was indeed the primary beneficiary of the life insurance policy owned by Ronald Saxe. Appellants failed to meet their burden of producing evidence which affirmatively shows Mrs. Saxe was the intended primary beneficiary of the policy. Instead, the evidence demonstrates that appellee was the primary beneficiary of the policy. However, rather than collecting on the policy and using the proceeds to pay appellants on the buy-out provision, appellee chose to waive his right to the proceeds so that the proceeds would go directly to Mrs. Saxe as payment for the buy-out.

**{¶70}** Although appellants argue that the evidence produced by appellee is contradictory and relies upon inadmissible hearsay and conclusory legal statements, we disagree. As the trial court found, appellee's affidavit did not contradict his previously provided deposition testimony, but instead supplemented or clarified appellee's testimony regarding the Agreement as to whether or not it anticipated the use of life insurance to fund a buy-out in the event of the death of a partner, and also as to the intent of the parties in purchasing the life insurance policies. See generally, *Byrd v. Smith* (2006), 110 Ohio St.3d 24, paragraph one of the syllabus. This evidence does not contradict the Agreement, as the Agreement is not contrary to appellee's asserted intent. Instead the Agreement simply fails to explicitly cite to a life insurance policy or describe exactly how the buy-out is to be funded. However, it does not prohibit the use of life insurance proceeds to fund the buy-out. Moreover, we note that appellants did not move to strike these statements.

**{¶71}** Furthermore, the parole evidence rule does not bar evidence that the life insurance proceeds were to be applied towards the buy-out requirement. As the trial court noted, this evidence neither contradicts the terms of the Agreement nor the terms of the insurance policies. Additionally, the evidence is not being used to construe the Agreement or the policies themselves, but is instead offered to demonstrate the intended use of the life insurance policies.

**{¶72}** Finally, with respect to appellee's references to and/or reliance upon the alleged hearsay statements of the deceased insurance agent contained within the policy application documents, we find such references do not warrant reversal. These statements are likely permissible under a hearsay exception, such as an exception for

records of regularly conducted activity. Even if that is not the case, appellee has introduced significant evidence outside of these statements to meet its burden.

**{¶73}** Because we find the trial court properly granted summary judgment on the breach of contract claim, we overrule appellants' fourth assignment of error.

**{¶74}** In conclusion, we overrule appellants' first, second, third, and fourth assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed*.

BROWN and FRENCH, JJ., concur.

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