[Cite as *Kaple v. Benchmark Materials*, 2004-Ohio-2620.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY

RONALD KAPLE, ET AL. **CASE NUMBER 13-03-60**

PLAINTIFFS-APPELLANTS

v. **O P I N I O N**

BENCHMARK MATERIALS, ET AL.

DEFENDANTS-APPELLEES

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment vacated and cause remanded.

DATE OF JUDGMENT ENTRY: May 24, 2004.

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SHAW, P.J.

{¶1} The plaintiffs-appellants, Ronald and Phyllis Kaple ("the Kaples"), appeal the August 26, 2003 judgment of the Common Pleas Court of Seneca County, Ohio, which found a valid settlement agreement was reached between the

Kaples and the defendants-appellees, France Stone Company, Hanson Aggregates Midwest, Inc., Northern Ohio Explosives, Inc., ETI Explosives Technologies International, Inc., and ETI Explosives Technologies International of Ohio, Inc. (collectively hereinafter "the appellees").

{¶2} On November 14, 2001, the Kaples filed a complaint for nuisance, trespass to property, strict liability in tort for property damage, and negligent damage to property, against, inter alia, the appellees due to the operation of a quarry that caused damage to their home, which is located adjacent to the quarry.[1] Thereafter, the matter was referred to a mediator, but mediation was unsuccessful. The matter was then set for trial. Prior to trial, the parties began negotiating a settlement. On March 6, 2003, at approximately 4:00 p.m. counsel for the Kaples, Daniel Morris, contacted the trial court to inform it that the parties had reached a settlement. However, sometime later that evening, Mr. Morris noticed what he considered a problem with the language in the easement portion of the agreement. He contacted counsel for Appellees France Stone Co. and Hanson Aggregates Midwest, Inc., Susan Nelson, who was negotiating on behalf of all the appellees,

[1] Each defendant in this case was a former owner and/or operator of the quarry or the current owner and operator.

about this problem, and she stated that she was not authorized by her clients to change the wording of the easement that Mr. Morris found problematic but that she thought her clients would more than likely agree to change the wording per his request. Mr. Morris then wrote a settlement memorandum, reflecting that the parties had reached a settlement agreement. However, the next morning, the Kaples decided that the settlement was not acceptable to them, and Mr. Morris notified counsel for the appellees and the trial court of this decision.

{¶3} On March 10, 2003, the appellees filed a motion to enforce the settlement agreement. A hearing on this matter was conducted before a different trial judge, the Honorable Michael Kelbley, due to the possibility that the original trial judge, the Honorable Steve Shuff, or a member of his staff might be called as a witness. Judge Kelbley concluded that an evidentiary hearing was necessary. This hearing was held on May 16, 2003, and July 18, 2003. At the conclusion of the hearing, the matter was taken under advisement, and the parties submitted proposed findings of fact and conclusions of law. On August 26, 2003, the trial court rendered its judgment, finding that a valid settlement had been reached between the parties and ordering that this agreement be enforced. This appeal followed, and the Kaples now assert one assignment of error.

THE TRIAL COURT ERRED IN CONCLUSION OF LAW NO. 16 WHEN IT FOUND AN ENFORCEABLE SETTLEMENT AGREEMENT WAS REACHED BY THE PARTIES BECAUSE AN ACCURATE "SETTLEMENT MEMORANDUM" HAD BEEN DRAFTED BY ONE OF THE PARTIES. THE TRIAL COURT SHOULD HAVE LOOKED FOR THE EXISTENCE OF ALL OF THE ELEMENTS OF A FORMAL CONTRACT INSTEAD OF THE EXISTENCE OF A MERE AGREEMENT TO MAKE A CONTRACT. ONE OR MORE ELEMENTS OF A FORMAL CONTRACT ARE MISSING FROM THE PROPOSED SETTLEMENT AGREEMENT; THEREFORE NO ENFORCEABLE SETTLEMENT AGREEMENT WAS REACHED BETWEEN THE PARTIES.

{¶4} The standard of review to be applied to a ruling on a motion to enforce a settlement agreement depends primarily on the question presented. If the question is an evidentiary one, this Court will not overturn the trial court's finding if there was sufficient evidence to support such finding. *Chirchiglia v. Bur. of Workers' Comp.* (2000), 138 Ohio App.3d 676, 679. However, "[w]here the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, syllabus. If the dispute is a question of law, an appellate court must review the decision de novo to determine whether the trial

court's decision to enforce the settlement agreement is based upon an erroneous standard or a misconstruction of the law. *Continental W. Condominium Unit Owner's Assn. v. Howard E. Ferguson, Inc.* (1995), 74 Ohio St.3d 501, 502.

{¶5} In the present case, the Kaples do not contest the findings of fact of the trial court, but rather they contest the conclusion of law reached by the trial court based on these facts. Thus, we must review the decision de novo and determine whether the court's decision to enforce the settlement was based upon an erroneous standard or a misconstruction of the law.

{¶6} A settlement agreement is viewed as a particularized form of a contract. *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79. It is "a contract designed to terminate a claim by preventing or ending litigation and * * * such agreements are valid and enforceable by either party." *Continental*, 74 Ohio St.3d at 502, citing *Spercel v. Sterling Indus., Inc.* (1972), 31 Ohio St.2d 36, 38; 15 Ohio Jurisprudence 3d (1979) 511, 516, Compromise, Accord, and Release, Sections 1 and 3; *Bolen v. Young* (1982), 8 Ohio App.3d 36. "Further, settlement agreements are highly favored in the law." *Continental*, 74 Ohio St.3d at 502, citing *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194; *Spercel*, 31 Ohio St.2d at 38.

{¶7} While the preferred method is to memorialize a settlement in writing, "an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶ 15, citing *Spercel,* 31 Ohio St.2d at 39; *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794, 798-799. However, "the terms of the agreement must be reasonably certain and clear" to constitute a valid settlement agreement. *Rulli*, 79 Ohio St.3d at 376. "Terms of an oral contract may be determined from 'words, deed, acts, and silence of the parties.'" *Kostelnik* at ¶ 15, quoting *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, paragraph one of the syllabus. When there is uncertainty as to the terms, the trial court is then required to hold a hearing pursuant to *Rulli,* in order "to determine if an enforceable settlement exists." *Kostelnik* at ¶ 17, citing *Rulli,* 79 Ohio St.3d at 376. Although the terms of the settlement must be reasonably certain and clear for the agreement to be valid, the Ohio Supreme Court has acknowledged that "'[a]ll agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people

must be held to the promises they make.'" *Kostelnik* at ¶ 17, quoting 1 Corbin on Contracts (Perillo Rev. Ed. 1993) 530, Section 4.1.

{¶8} The elements necessary to form a contract include "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object of consideration. *Kostelnik* at ¶ 16. In addition, "[a] meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." Id. Notably, the Kaples do not challenge the elements of contractual capacity, consideration, or legality of consideration. Rather, they dispute the existence of the remaining elements.

{¶9} In the case sub judice, the trial court found the following facts concerning the settlement negotiations. After mediation between the parties failed on February 24, 2003, the trial of this case was set for March 10, 2003. Prior to the trial, various motions were made, including a motion to exclude the testimony of the Kaples' expert witness, Dr. Abdul Shakoor. A hearing was held on these motions on March 3, 2003, and each motion of the appellees was granted. That day, settlement negotiations resumed with Susan Nelson negotiating on behalf of all the appellees and Daniel Morris negotiating on behalf of the Kaples. On March

4, 2003, Ms. Nelson informed Mr. Morris that an easement would have to be part of the settlement, and she offered $18,500 for the easement and release from liability to settle the case. This offer was rejected, and Mr. Morris counter-offered with a demand of $27,500 for an easement and release.

{¶10} The settlement negotiations continued to March 5, 2003, with the two attorneys discussing their respective views of Ohio law regarding the quarry, including the future activity of the quarry owners/operators. In addition, Ms. Nelson expressed the position of her clients that the grant of an easement to her clients was critical. However, no discussion of the Kaples' right to later bring an action for injunctive relief occurred. Mr. Morris prepared some handwritten notes regarding Ohio's statutory and regulatory law regarding blasting and faxed them to Ms. Nelson, but these notes contained no reference to the right to seek an injunction nor were any references made in these notes regarding any sort of injunctive relief.

{¶11} Also on that day, Ms. Nelson drafted a proposed version of the easement and sent it to Mr. Morris along with an offer of $19,500 in exchange for the easement and release. Mr. Morris stated that he thought the easement would be satisfactory to his clients but that he had a breakdown in communications with

his clients and would try to get them "back to the table." The second clause of the eight clause easement was comprised of one sentence, consisting of eleven lines. This particular clause delineated the activities in which the quarry could engage as they related to the Kaples' property and also included the following provision:

> **and [the Kaples] release Hanson, its employees, agents, contractors, successors and assigns, from damages caused by same, subject only to the obligation that Hanson, its employees, agents, contractors, successors and assigns, conduct its/their operations in conformance with then applicable Ohio law.**

{¶12} Sometime after this draft was given to Mr. Morris, Ms. Nelson expressed her concerns to him as to whether the easement would be terminated in the event that a blast failed to comply with the statutory and regulatory law of Ohio. Therefore, she revised the language in the second clause of the easement. This revision included separating the clause into three sentences and included the following language:

> **and [the Kaples] release Hanson, its employees, agents, contractors, successors and assigns, from damages caused by same. Notwithstanding the foregoing, Hanson, its employees, agents, contractors, successors and assigns agree to conduct its/their operations in conformance with then applicable statutory and/or regulatory Ohio law. In the event Hanson, its employees, agents, contractors, successors and assigns fails to conduct its/their operations in conformity with the then applicable statutory and/or regulatory law of Ohio, Grantors'**

> **[the Kaples] claims for all rights and remedies under the applicable statutory and/or regulatory law of Ohio, as regards such conduct, shall not be precluded by this easement, and this easement shall not be terminated.**

After several calls and e-mails between the two attorneys on Thursday, March 6, 2003, Ms. Nelson increased her offer to settle to $20,000 and faxed the revised copy of the easement at approximately 3:24 p.m. to Mr. Morris. During the hearing, Mr. Morris admitted that he noticed the second clause had been changed from one sentence to three and that he read the revision because he knew Ms. Nelson changed it to include a provision that the easement would not terminate in the event of an improper blast. He then contacted his clients, specifically Mrs. Kaple, discussed the proposed settlement, and was given permission to settle on behalf of she and her husband.

{¶13} Around 4:00 p.m. on Thursday, Mr. Morris contacted Ms. Nelson and accepted her settlement offer. He then volunteered to contact the court to inform it of the settlement and to draft a settlement memorandum. Mr. Morris contacted the court as agreed and informed it that the case was settled, thus alleviating the need for a trial the following Monday. The court then prepared an entry of dismissal, and the trial judge signed it. However, the dismissal entry was

not filed that day. At no point during these conversations did Mr. Morris provide any indication that there was no adequate consideration or that any changes needed to be made to the revised easement.

{¶14} Sometime between 5:00-6:00 p.m. on that day, Mr. Morris began reading the easement more thoroughly. After reviewing the easement again, he contacted Ms. Nelson to object to some of the language, particularly the change to "then applicable statutory and/or regulatory law of Ohio." He requested that this language be changed to "then applicable law of Ohio" but did not indicate that this request was based on the Kaples' rights to seek an injunction nor did he convey that they did not have a settlement if the language was not changed or accuse her of engaging in any "unorthodox or extreme negotiating tactics." In response to his request to change the language, Ms. Nelson indicated that she did not have the authority to agree to that change but both seemed to believe this change could be made, and Mr. Morris, in his own words, "assumed the risk that the original easement language would be restored the next day."

{¶15} After this conversation, Mr. Morris prepared a settlement memorandum and faxed it to Ms. Nelson and the other two defense attorneys in the case, James Irmen and Daniel Marinik. On the cover page to the fax to Mr.

Irmen, Mr. Morris wrote: "THE COURT HAS PREPAED [*sic*] A 'SETTLED AND DISMISSED' ENTRY FOR TODAY. DAN IS PREPARING THE RELEASE, SUSAN IS PREPARING THE CHECK AND *HAS PREPARED THE EASEMENT*. MY CLIENTS WILL SIGN AND EXECUTE THE RELEASE AND EASEMENT WHEN THE CHECK IS DELIVERED TO THEM." (Emphasis added.) In addition, the settlement memorandum began by stating: "This is to commemorate that as of about 4:00 PM on March 6, 2003, a settlement was reached in the case of Kaple vs. Benchmark Materials, et al." The memorandum then stated:

> **The terms of the settlement are as follows:**
>
> **Damages paid to the Plaintiff: The Defendant shall pay, collectively or individually, the sum of twenty thousand and zero dollars to the Plaintiffs.**
>
> **Release from liability: The Plaintiffs shall, in return, give to the Defendants a release from all liability from their claims against the Defendants from this case from the date they purchased the house until the date of the release. This release shall be conditioned upon the full payment of all the Defendants to Dr. Abdul Shakoor for the costs of his deposition testimony.**
>
> **Grant of Easement: The Plaintiffs shall also grant an easement to the Defendant Hanson to conduct its various industrial enterprises on its own land without liability to the Plaintiffs. This easement shall run with the land. This easement**

shall not cover any conduct of Hanson, in its various enterprises, that is not in compliance with the then applicable law of Ohio.

{¶16} After faxing this memorandum to all three defense attorneys, Mr. Morris contacted the Kaples and left a message for them that the case was settled. However, the Kaples later told Mr. Morris that they changed their mind and were no longer interested in settling the case. Mr. Morris contacted the defense attorneys the morning of Friday, March 7, 2003, and told them that his clients were "reneging" on the settlement and wanted to go forward with the trial. The four lawyers then conducted a conference call with the trial court to inform the judge of this news. Mr. Morris told the judge that his clients wanted to "renege" on the settlement, and he apologized to the court. Mr. Morris never indicated that there was an ongoing dispute over the language of the easement nor did he mention his clients' right to seek an injunction during the conference call.

{¶17} Based on these facts, which were supported by the record, the trial court concluded that the appellees made an offer of $20,000 in return for the Kaples granting them an easement and executing a release of all claims. The court further found that this offer was accepted by the Kaples, via Mr. Morris who was authorized to settle on their behalf, on March 6, 2003, at 4:00 p.m. However, the

Kaples now assert that this did not constitute an offer and acceptance and that the terms of the easement at this point in time did not constitute a meeting of the minds because they were unaware of the revision to "then applicable statutory and/or regulatory law of Ohio." Rather, they contend that Mr. Morris' call to Ms. Nelson between 5:00-6:00 p.m. on March 6, 2003, wherein he objected to this language and requested that it be changed back to "then applicable Ohio law," was a counter-offer by them and that they withdrew it the following morning prior to the appellees' acceptance. In addition, they maintain that there was no mutual assent between the parties regarding the essential terms of the easement. The Kaples base these contentions upon their assertion that they did not agree to this change in the language, which they believe could preclude their right to seek injunctive relief in the future. We disagree.

{¶18} Mr. Morris admitted during his testimony that he did not thoroughly read through the second clause, electing to direct his attention to the language that the easement would not terminate, and that he was trying to do multiple things at one time. He also testified that he would not have agreed to the change in the language if he had noticed it prior to informing Ms. Nelson that the Kaples would accept the offer of $20,000 in exchange for the easement and release from liability

because it could possibly affect his clients' rights to future injunctive relief. Thus, he maintains that there was no acceptance of these terms and mutual assent thereto by him on behalf of the Kaples.

{¶19} While his testimony may have been accurate, as previously noted, "'[a]ll agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. *In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make*.'" (Emphasis added.) *Kostelnik*, 2002-Ohio-2985, at ¶ 17, quoting 1 Corbin on Contracts (Perillo Rev. Ed. 1993) 530, Section 4.1. When Mr. Morris accepted the settlement offer of $20,000, he was aware that the second clause of the easement had been changed. Although the Kaples contend that he was not focusing on that portion of the easement or pouring over every word therein, the language change now in dispute immediately preceded the termination language with which he claims to have been concerned at the time and was not hidden or otherwise difficult to find.

{¶20} Furthermore, the change *was actually contained in the same sentence*, to wit: "In the event Hanson * * * fails to conduct its/their operations in

conformity with the *then applicable statutory and/or regulatory law of Ohio*, Grantors' claims for all *rights and remedies under the applicable statutory and/or regulatory law of Ohio*, as regards such conduct, shall not be precluded by this easement, and this easement shall not be terminated." (Emphasis added.) Moreover, in order to understand the context of the termination portion, which appears at the end of the sentence, one must read the preceding portion of the sentence because it explains the termination language. In short, in order to discern the termination provision, one has to read this sentence in its entirety, including the disputed language. Therefore, the Kaples should be held to their acceptance of this language, which occurred at approximately 4:00 p.m. on Thursday, March 6, 2003.

{¶21} As for mutual assent, the Kaples assert that they specifically wanted to ensure their right to seek injunctive relief in the future. However, the circumstances surrounding the 4:00 p.m. acceptance show otherwise, as does the settlement memorandum written by Mr. Morris after his final conversation with Ms. Nelson on March 6, 2003. Once again, the language "then applicable statutory and/or regulatory law of Ohio" was readily evident in the last easement revision. In addition, the settlement memorandum did not mention injunctive

relief as it pertained to the phrase "then applicable Ohio law." To the contrary, this phrase was employed to describe, not a remedy, but the conduct of the appellees, to wit: "This easement shall not cover any *conduct* of Hanson, in its various enterprises, that is not in compliance with the then applicable law of Ohio." (Emphasis added.)

{¶22} Furthermore, Mr. Morris never indicated that the failure by the appellees to agree to change this language would result in no agreement between the parties nor did he indicate in any way to the appellees or Judge Shuff on Friday morning that there, in fact, had not been a settlement or that any elements necessary for a valid agreement were not present. Instead, he was apologetic and repeatedly stated that his clients were "reneging" on the agreement and that they no longer wanted to settle.

{¶23} Given the aforementioned evidence and law, the trial court was correct in determining that a valid settlement agreement had been reached because all the elements of a contract were present, including offer, acceptance, and mutual assent. However, the trial court then proceeded to "clarify" the terms of this settlement by changing the phrase "then applicable statutory and/or regulatory law" to "then applicable law of Ohio." In so doing, the trial court erred.

{¶24} The law prohibits courts from rewriting contracts when the words of a contract are unambiguous. *Foster Wheeler Enviresponse, Inc. v. Franklin Co. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361-362 (holding that "it is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result"). Here, the words employed as of 4:00 p.m. on March 6, 2003, were not ambiguous so as to necessitate interference by the court to rewrite a contractual term. Although the court attempted to make this change to "clarify" the easement, seemingly in an attempt to make the easement more equitable for the Kaples, such action was not warranted. Thus, the trial court was not permitted to order that this language be changed. Therefore, although the trial court correctly found that a valid settlement existed between the parties, its decision to change the terms of the easement, which were agreed upon by the parties at 4:00 p.m. on March 6, 2003, was in error.

{¶25} Accordingly, the assignment of error is overruled. However, for the aformentioned reasons, the judgment of the Common Pleas Court is vacated, and this matter is remanded to the trial court with instructions to enforce the settlement agreement between the parties with the terms of the easement as they were written as of 4:00 p.m. on March 6, 2003.

Judgment vacated
and cause remanded.

BRYANT and CUPP, JJ., concur.