[Cite as *Walsh v. Marsh Bldg. Prods., Inc.*, 2010-Ohio-729.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

PATRICK J. WALSH, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-10-130
	:	O P I N I O N
- vs -		3/1/2010
	:	
MARSH BUILDING PRODUCTS, INC., et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV73808

Hemmer Pangburn DeFrank PLLC, Scott R. Thomas, Matthew D. Hemmer, 250 Grandview Drive, Suite 200, Ft. Mitchell, Kentucky 41017, for plaintiffs-appellants

Coolidge Wall Co., L.P.A., Laura L. Wilson, C. Mark Kingseed, 33 West First Street, Suite 600, Dayton, Ohio 45402, for defendant-appellee, Marvin Lumber and Cedar Co.

BRESSLER, P.J.

{¶1} Plaintiffs-appellants, Patrick J. Walsh and Bonnie A. Walsh (collectively the Walshes), appeal the Warren County Court of Common Pleas' decision granting summary judgment to defendant-appellee, Marvin Lumber and Cedar Company (Marvin).[1] We reverse the trial court's decision.

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this case from the accelerated calendar and placed it on the regular calendar for purposes of issuing this opinion.

{¶2} In 1989, the Walshes purchased windows manufactured by Marvin, via their distributor Marsh Building Products, Inc. (Marsh). The windows subsequently rotted and/or decayed. In 1999, the Walshes replaced the windows with another set of Marvin-manufactured products. The following year, the Walshes brought an action to recover damages arising from the failure of the 1989 windows. The parties settled the lawsuit in 2002 and entered into a settlement agreement (Agreement), which included a general release, a covenant not to sue and indemnification.

{¶3} In 2008, the Walshes discovered the replacement windows, which they installed in 1999, were rotting and/or decaying. The Walshes filed a complaint, in March of 2009, against Marvin and Marsh alleging: the replacement windows were defective, negligence by Marvin, and a breach of express warranty by Marvin and Marsh.[2] In its answer, Marvin asserted that the Walshes' claims were barred by the Agreement. Marvin also filed a counterclaim against the Walshes alleging breach of contract with regard to the covenant not to sue contained within the Agreement.

{¶4} Both parties filed motions for summary judgment. The Walshes argued the Agreement only released Marvin's liability regarding the 1989 windows. Marvin, in turn, maintained the Agreement released them from liability for both the 1989 windows and the 1999 replacement windows. The trial court found the Agreement contained a clause which "enlarge[d] the scope of the release since the 1999 windows were * * * [installed in the Walshes' home] when the Settlement Agreement was signed in 2002." In addition, the trial court noted the Agreement mentioned a release of all obligations and contained a general release of "additional, separate or other injuries, damages, loss or detriment." Relying on these provisions, the trial court concluded the Agreement

2. Although Marsh was a party to the proceedings before the trial court, it is not a party to the instant appeal.

included the 1999 replacement windows. As a result, the trial court denied the Walshes' motion for summary judgment and granted Marvin's cross-motions for summary judgment. The Walshes filed an appeal, alleging a single assignment of error.

{¶5} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARVIN."

{¶6} In their sole assignment of error, the Walshes maintain that summary judgment was inappropriate because there was ambiguity within the contract's terms as to whether the Agreement included the 1999 replacement windows. We agree.

{¶7} An appellate court considers a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Therefore, a reviewing court must "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. We also examine a trial court's decision regarding summary judgment independently, without any deference to the trial court's judgment. *Bravard* at ¶9, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶8} Summary judgment is proper where: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to one conclusion, which is adverse to the nonmoving party. Civ. R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of demonstrating that no genuine issue of material fact exists with regards to the essential elements of the claim(s) of the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. A material fact is one which would affect the outcome of the suit under the

applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505.

{¶9} The nonmoving party must then present evidence showing that there is some issue of material fact which remains yet to be resolved. *Dresher* at 293. The nonmoving party may not rely on mere allegations or denials in his pleading, but instead must respond with specificity to show a genuine issue of material fact. Civ. R. 56(E); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. The nonmoving party is, however, entitled to have any doubts resolved and evidence construed most strongly in his favor. *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. Nevertheless, summary judgment is appropriate where a nonmoving party fails to produce evidence essential to his claim. Id.

{¶10} "It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation * * *." *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158, citing *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36, 38. "In construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ." *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶29, citing *Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, at ¶9. "Where the terms are clear and unambiguous, a court need not go beyond the plain language of the agreement to determine the rights and obligations of the parties." *In re All Kelley* at ¶29, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53.

{¶11} Where a contract is clear and unambiguous summary judgment is appropriate, as its interpretation is a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322-24. "Contractual

language is 'ambiguous' only where its meaning cannot be determined from * * * the agreement or where the language is susceptible of two or more reasonable interpretations." *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 55, citing *Potti v. Duramed Pharmaceuticals, Inc.* (C.A.6, 1991), 938 F.2d 641, 647. If an ambiguity exists, the interpretation of the parties' intent is a question to be determined by the trier of fact. See *Amstutz v. Prudential Ins. Co.* (1940), 136 Ohio St. 404, 408. Therefore, where a contract is ambiguous, unclear, and/or subject to more than one interpretation, summary judgment should not be granted. See, e.g., *Crowninshield/Old Town Community Urban Redev. Corp. v. Campeon Roofing & Waterproofing, Inc.* (1998), 129 Ohio App.3d 819, 823; *Lewis v. Mathes*, 161 Ohio App.3d 1, 2005-Ohio-1975, ¶25; *Metz v. Am. Elec. Power Co.*, 172 Ohio App.3d 800, 2007-Ohio-3520, ¶38; *MJ Kelly, Ohio, Inc. v. Innatech, LLC*, Butler App. No. CA2004-07-176, 2005-Ohio-3446, ¶11-12, 19.

{¶12} After a careful perusal of the Agreement, we believe that there is a question of fact as to whether the Agreement was intended to encompass both the 1989 windows and the 1999 replacement windows. In particular, we note the following pertinent portions of the Agreement:

{¶13} "WHEREAS, *in or about 1989, the Releasing Parties acquired and installed in the premises various Marvin products*;

{¶14} "WHEREAS, the Releasing Parties have alleged defects *in these Marvin products*, have made various claims against, *inter alia*, Marvin on account of *these alleged defects* and have further initiated an action * * * (hereinafter "Civil Action");

{¶15} "WHEREAS, the Releasing Parties and Marvin *by this document intend to* fully and finally (and without further resort to litigation) *settle all past, present and future claims which have arisen or may in future arise and which relate in any manner to the*

Marvin products installed at the premises;

{¶16} "WHEREAS, it is the intention of Marvin and the Releasing Parties hereto to release, waive and/or extinguish to the greatest extent permitted by law all legal, equitable and other obligations between them other than those obligations set forth herein.

{¶17} "* * *

{¶18} "Marvin agrees to pay the Releasing parties the sum of $14,000.00 in full *settlement of all claims the Releasing Parties had, has or will have against Marvin*.

{¶19} "* * *

{¶20} "Releasing Parties Agree: [ ] To, and by execution of this document hereby do, release Marvin to the fullest extent permitted by law for all *past, present and/or future claims of any nature whatsoever*.

{¶21} "* * *

{¶22} "The Releasing Parties by execution of this document hereby release and forever discharge Marvin from *any and all past, present and future claims, demands obligations or causes of action, of whatsoever kind or nature, which have or may in the future arise out of any of the Marvin products described above*, including but not limited to all claims that were or could in the future have arisen in the Civil Action. It is the express intention of the Releasing Parties, by execution of this document, to release Marvin to the fullest extent permitted by law. The Releasing Parties hereby acknowledge the risk that, after executing this document, they may *incur or suffer additional, separate or other injuries, damages, loss or detriment, which may be claimed to be caused by or related to the Marvin products referenced above* but which are presently unknown, unanticipated or merely speculative and that there is a further risk that damages or detriment presently known may be or become more serious than the

Releasing Parties now expect or anticipate. Nonetheless, the Releasing parties hereby assume all such risks and agree that *this Settlement Agreement applies to all unknown or unanticipated results of the Marvin products described above*, in addition to known and anticipated results. Upon advice of legal counsel, the Releasing Parties do hereby waive all right to recover from Marvin on account of any such injuries, damage, or other detriment.

{¶23} "* * *

{¶24} "*This Settlement Agreement contains the entire agreement* between the Releasing Parties and Marvin and the terms of this Agreement are contractual and not mere recital.

{¶25} "* * *

{¶26} "The Releasing parties will *never commence, aid in any way or in any manner prosecute against Marvin any legal action or proceeding, based in whole or in part upon any of the Marvin products described above* and will to the fullest extent permitted by law indemnify Marvin, including for attorneys' fees and other costs of litigation, against any claims and/or causes of action *arising out of or relating in any manner to the Marvin products referenced above*." (Emphasis added.)

{¶27} In its decision, the trial court focused on the fact the Agreement contained an accord to "settle all past, present and future claims which have arisen or may in future arise and which relate in any manner to the Marvin products installed at the premises." It appears the trial court reasoned that because the replacement windows were "installed" at the time the Agreement was signed; the contract was intended to encompass both the 1989 windows as well as the 1999 replacement windows. The fact that the 1999 replacement windows were installed at the time the Agreement was signed, could reasonably lead to the conclusion that they were intended to be included

within the parameters of the Agreement.

{¶28} However, we find other language that does not necessarily contemplate the 1999 replacement windows' inclusion within the Agreement. First, the Agreement begins with a clause identifying the subject of the Agreement as the "various Marvin products" which were "acquired and installed in the premises" by the Walshes "*in or about 1989*." (Emphasis added.) There is, however, no reference in the Agreement to any windows which were installed or acquired by the Walshes in or about 1999. Second, in the following clause, the Agreement makes reference to defects specifically in "*these* Marvin products." (Emphasis added.) This appears to be a reference to the preceding clause identifying the products as those acquired and installed in 1989. Finally, the Agreement contains language to indicate the Marvin products covered by the agreement are "described" or "referenced" in the preceding clause(s). On one hand, these phrases may refer to the products acquired or installed in 1989, per the initial clause in the Agreement. However, the terms could also be a reference to the products which were "installed at the premises" when the Agreement was signed. Thus, it is clear that the Agreement is subject to more than one reasonable interpretation.

{¶29} While the Agreement, by its language, clearly includes the 1989 windows, we do not believe the agreement is quite so apparent with regard to the 1999 replacement windows. There is clearly an ambiguity with regard to identity of the Marvin products covered by the Agreement, and the intent of the parties. As such, resolution of this ambiguity is the responsibility of the trier of fact. See *Amstutz*, 136 Ohio St. at 408. Therefore, the trial court was incorrect in granting summary judgment to Marvin as a matter of law.

{¶30} The Walshes' sole assignment of error is sustained, and this matter is reversed and remanded to the trial court for a trial on the merits.

{¶31} Judgment reversed and remanded.

RINGLAND and HENDRICKSON, JJ., concur.