[Cite as *State ex rel. Rogers v. Republic Environmental Sys., Inc.*, 2010-Ohio-5523.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO, ex rel., NANCY ROGERS :

Plaintiff-Appellee :C.A. CASE NOS. 23513, 23644, 23723

v. :

T.C. NO. 98CV3449

REPUBLIC ENVIRONMENTAL SYSTEMS INC., et al. :

(Civil appeal from Common Pleas Court)

Third Party Defendants-Appellees :

and :

McCABE CORPORATION, et al. :

Defendants-Appellants :

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O P I N I O N

Rendered on the 12th day of November, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellants McCabe Corporation, Edward McCabe, and McCabe Engineering Corporation (hereinafter "McCabe"), appeal from several orders issued by the Montgomery Court of Common Pleas, General Division. The instant case consists of three separate appeals, CA-23513, CA-23644, and CA-23723, which have been consolidated from Case No. 1998-CV-3499.

I

{¶ 2} On December 17, 1997, defendant-appellees Republic Environmental Systems, Inc. and BRAC, Inc. (hereinafter "Republic") entered into an agreement to sell the Ecolotec Facility to McCabe which had formerly been used as a hazardous waste recycling facility located at 636 N. Irwin Street in Dayton, Ohio. While the sale of the facility was pending, Republic began negotiations with the Ohio Environmental Protection Agency (hereinafter "EPA") regarding an approved closure and clean-up plan for the facility. The EPA wanted to close the facility down because it had been a source of numerous complaints from the city of Dayton for its handling of hazardous materials.

{¶ 3} The sale of the facility was completed on June 29, 1998, and McCabe took possession of the property. On September 18, 1998, the EPA and Republic entered into the Consent Order which detailed a plan for the closure of the facility. The purchase agreement signed by McCabe and Republic contained an addendum which established that McCabe took possession of the facility pursuant to the terms of the Consent Order.

{¶ 4} In late 1998, McCabe allegedly discovered the presence of hazardous materials at the facility which were not disclosed by Republic prior to the sale of the property. McCabe made the discovery while attempting to prepare the facility for closure pursuant to the Consent Order. Despite the alleged discovery, on January 5, 2000, McCabe Engineering Corporation transferred ownership of the facility to McCabe Corporation, the current owner of the facility. We also note that Republic, in conjunction with the EPA, created a trust fund designed to disburse money to cover the cost of closure of the facility. On February 8, 2002, Republic released an interest in the closure trust fund for the benefit of McCabe who had been tasked with shutting the facility down, as well as cleanup of the surrounding property. Republic asserts that McCabe was reimbursed from the trust fund for a portion of the sums which were spent in pursuit of the closure plan.

{¶ 5} On July 20, 2007, plaintiff-appellee State of Ohio filed a motion to show cause why they should not be held in contempt against Republic and McCabe. In its contempt motion, the State argued that Republic and McCabe failed to comply with the terms of the 1998 Consent Order regarding the closure of the facility. On August 3, 2007, McCabe filed a motion to dismiss the State's motion to show cause, or in the alternative, to clarify the record. In its motion to dismiss, McCabe argued that it was not a proper party to the suit, and civil contempt was not an appropriate remedy against it. The trial court held hearings on McCabe's motion on November 27, 2007, April 29 and 30, 2008. On June 23, 2008, the trial court overruled McCabe's motion to dismiss and motion to clarify.

{¶ 6} On July 7, 2008, McCabe filed an answer and cross-claim against Republic in the instant case. On September 17, 2008, McCabe filed an amended answer and

cross-claim, as well as a third-party complaint against individual officers and employees of Republic. McCabe's initial third-party complaint alleged claims for fraud, fraudulent inducement, and/or misrepresentation in regards to Republic's failure to disclose the presence of hazardous waste at the facility.

{¶ 7} On February 13, 2009, the trial court issued its findings of fact and conclusions of law in which it held both Republic and McCabe to be in civil contempt for their failure to comply with the terms of the Consent Order as it pertained to the cleanup and closure of the hazardous waste facility.

{¶ 8} On March 11, 2009, McCabe filed an amended third-party complaint after the trial court ordered McCabe to cure pleading deficiencies in the original third-party complaint which included the failure to plead its allegations of fraud with specificity. Republic filed a motion to dismiss McCabe's amended third party-complaint on March 20, 2009. On May 29, 2009, the trial court granted Republic's motion to dismiss McCabe's amended third-party complaint. The trial court reasoned that McCabe failed to plead its fraud and fraudulent inducement claims with sufficient particularity. Moreover, the court held that based on the allegations made by McCabe in its amended third-party complaint, its claims for fraud and fraudulent inducement were barred by the four-year statute of limitations on those claims.

{¶ 9} On June 8, 2009, Republic filed a motion for judgment on the pleadings in which it requested that McCabe's cross-claim be dismissed. On June 17, 2009, McCabe filed a brief in opposition to Republic's motion for judgment on the pleadings, as well as a motion for leave to amend its answer and cross-claim. In a written decision filed on August

31, 2009, the trial court granted Republic's motion for judgment on the pleadings, finding that McCabe's cross-claim alleging fraud was barred by the statute of limitations. Additionally, the court held that McCabe's cross-claim for breach of contract had no merit. Shortly thereafter, on October 9, 2009, the trial court held that McCabe and Republic were jointly and severally liable to the State for the stipulated penalties accrued as a result of their failure to comply with the terms of the 1998 Consent Order.

{¶ 10} It from these judgments that McCabe now appeals.

II

A. CA-23513 (One assignment of error)

{¶ 11} McCabe's first assignment of error is as follows:

{¶ 12} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING MCCABE'S AMENDED THIRD-PARTY COMPLAINTS."

{¶ 13} In its sole assignment of error in this section of the consolidated appeal, McCabe contends that the trial court erred when it sustained Republic's motion to dismiss McCabe's amended third-party complaint. Specifically, McCabe argues that it cannot be ascertained from the face of the complaint when McCabe became aware of the alleged fraudulent conduct committed by Republic and the EPA. Thus, McCabe asserts that the court erred when it held that McCabe's claims for fraud and fraudulent inducement were barred by the statute of limitations.

{¶ 14} In deciding if a complaint should be dismissed for failure to state a claim, a trial court:

{¶ 15} "must presume that all factual allegations of the complaint are true

and make all reasonable inferences in favor of the non-moving party. * * * Then, before * * * [the court] may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶ 16} Our review of such decisions is *de novo*. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936. *De novo* review requires an "independent review of the trial court decision, without any deference to the trial court's determination." *State ex rel. AFSCME v. Taft,* 156 Ohio App.3d 37, 2004-Ohio-493, at ¶27.

{¶ 17} McCabe does not dispute that its third-party complaint sounds in fraud. Specifically, McCabe asserts that the third-party defendants "knew their representations as to the scope of contaminant in the subject site were false when made and that they knew, in fact intended, that McCabe rely on those representations in agreeing to enter into the real estate purchase agreement."

{¶ 18} R.C. 2305.09(C) provides a four-year statute of limitations for fraud actions, and the action must be initiated within four years after the misrepresentation should have been discovered. *Snell v. Salem Ave. Assoc.* (1996), 111 Ohio App.3d 23, 42. The law with respect to discovery is as follows:

{¶ 19} " 'No more than a reasonable opportunity to discover the misrepresentation is required to start the period of limitations. Information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence.' " Id. (citations omitted).

{¶ 20} McCabe argues that it is not apparent from the face of its third-party

complaint when it became aware of the alleged fraudulent conduct on the part of Republic and its principals. McCabe's assertion in this regard is undermined by specific language in the amended third-party complaint which states that the misrepresentations regarding the presence of additional hazardous contaminants occurred "prior to the fall of 1997." The amended third-party complaint also essentially states that McCabe became aware of said misrepresentations at some point "between November 1998 and January 1999." It was during that time that McCabe discovered evidence at the facility which provided it with actual knowledge that the condition of the facility was different than had originally been represented at the time of the purchase of the facility from Republic.

{¶ 21} McCabe had actual knowledge of the alleged fraudulent behavior on the part of Republic and its representatives in January of 1999, at the latest, which triggered the running of the applicable statute of limitations for fraud pursuant to R.C. 2305.09(C). Had McCabe acted with due diligence, the claims for fraud and fraudulent inducement would have been filed no later than January of 2003. McCabe, however, did not file its initial third-party complaint against Republic and its representatives until September 17, 2008, well outside the four-year statute of limitations. Thus, the trial court did not err when it granted Republic's motion to dismiss McCabe's amended third-party complaint since its claims for fraud and fraudulent inducement were filed well beyond the applicable statute of limitations for claims of that nature.

{¶ 22} McCabe's sole assignment of error in CA-23513 is overruled.

B. CA-23644 (Two assignments of error)

{¶ 23} McCabe's first assignment of error is as follows:

{¶ 24} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING APPELLANT-MCCABE'S CROSS-CLAIM."

{¶ 25} In its first assignment of error in this section of the consolidated appeal, McCabe contends that the trial court erred when it sustained Republic's motion for judgment on the pleadings and dismissed McCabe's cross-claim.

{¶ 26} A motion for judgment on the pleadings pursuant to Civ. R. 12(C) presents only questions of law. *Compton v. 7-Up Bottling Co./Brooks Beverage Mgt.* (1997), 119 Ohio App.3d 490, 492. Determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the complaint. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165. Dismissal is appropriate under Civ. R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. Thus, giving full deference to McCabe, we must review the claims contained in its complaint in order to decide whether it is entitled to any relief.

{¶ 27} Under the notice pleading requirements of Civ. R. 8(A)(1), the plaintiff or cross-claimant only need to plead sufficient, operative facts to support recovery under his claims. *Doe v. Robinson*, Lucas App. No. L-07-1051, 2007-Ohio-5746. To constitute fair notice to the opposing party, however, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and

may not simply state legal conclusions. *Clemens v. Katz*, Lucas App. No. L-08-1274, 2009-Ohio-1461.

{¶ 28} McCabe argues that the trial court erred when it dismissed McCabe's cross-claim alleging fraud and fraudulent inducement in light of the court's holding that the statute of limitations had expired on those claims. Specifically, McCabe asserts that since the pleadings were silent regarding the date on which McCabe discovered Republic's alleged fraud, the court had no basis to determine the date that McCabe discovered the alleged fraud perpetrated by Republic.

{¶ 29} In its amended answer and cross-claim, however, McCabe states Republic allegedly committed fraud against it "on or about March 19, 1999." No date, other than the date of March 19, 1999, was mentioned in McCabe's cross-claim. Thus, the pleadings are clearly not silent regarding the date that McCabe became aware of Republic's alleged fraudulent acts. Moreover, since McCabe discovered Republic's fraud on March 19, 1999, McCabe was required pursuant to R.C. 2305.09(C) to bring the fraud action within four years, or by March 19, 2003. McCabe did not file his initial cross-claim complaint against Republic until July 7, 2008, well outside the four-year statute of limitations for actions sounding in fraud. Thus, the trial court did not err when it dismissed McCabe's cross-claim for fraud.

{¶ 30} McCabe's first assignment of error is overruled.

{¶ 31} McCabe's second assignment of error is as follows:

{¶ 32} "THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT-MCCABE'S MOTION FOR LEAVE TO AMEND THEIR

CROSS-CLAIM."

{¶ 33} In its second assignment in this section of the consolidated appeal, McCabe argues that the trial court abused its discretion when it overruled McCabe's motion for leave to amend its cross-claim.

{¶ 34} The trial court should construe motions to amend in favor of the movant to allow the plaintiff to save the cause of action, and the granting of leave should not be withheld absent good reason. *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115. This liberal construction is supported by the language in Civ.R. 15(A):

{¶ 35} "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

{¶ 36} Despite the liberal policy in granting motions to amend, the appellate review of a trial court's decision regarding a motion to amend consists of determining whether the trial judge's decision was an abuse of discretion, not whether it was the same decision we might have made. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.* (1991), 60 Ohio St.3d 120, 122, citing *State ex rel. Wargo v. Price* (1978), 56 Ohio St.2d 65. This appellate review has narrow limits. Id. at 122. "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair*

Surgeon, Inc. (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 37} A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

{¶ 38} Despite the trial court's failure to iterate reasons why it had effectively denied McCabe's motion to amend, we find that the motion did not comply with Civ.R. 15(A), because it was untimely. McCabe filed its original answer and cross-claim on July 7, 2008. On September 17, 2008, McCabe filed its first amended answer and cross-claim. It was not until nine months later on June 17, 2009, after which McCabe was confronted with a Civ.R. 12(C) motion for judgment on the pleadings that leave was sought to amend its cross-claim a second time. On these facts, we cannot find that the trial court abused its discretion in refusing to allow McCabe leave to file a second amended complaint.

{¶ 39} McCabe's second and final assignment of error in CA-23644 is overruled.

C. CA-23723 (Three assignments of error)

{¶ 40} McCabe's first assignment of error is as follows:

{¶ 41} "THE TRIAL COURT ERRED IN FINDING THE MCCABE DEFENDANTS IN CONTEMPT."

{¶ 42} In its first assignment in this portion of the consolidated appeal, McCabe argues that the trial court erred when it held that McCabe, a nonparty, could be held in contempt for failure to comply with the terms of the 1998 Consent Order. McCabe also contends that the trial court violated its right to due process when the court failed to rule on McCabe's affirmative defenses of laches, waiver, and estoppel. McCabe asserts that the court ignored its defenses of fraud and breach of contract when it found McCabe in contempt. Additionally, McCabe argues that the court erred by finding it in contempt because McCabe argues that no privity existed between it and Republic such that McCabe could be held in contempt for failure to comply with the Consent Order that Republic negotiated with the State.

1. McCabe's status as a nonparty does not shield it from a finding of civil contempt in the instant case.

{¶ 43} In *State v. Chavez-Juarez*, 185 Ohio App.3d 189, 2009-Ohio-6130, we recently discussed the concept of civil and criminal contempt, as well as the ability of a trial court to hold a nonparty in contempt.

{¶ 44} "Contempt is defined in general terms as disobedience of a court order. ' "It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." ' * * * Contempt proceedings are often classified as sui generis, neither civil nor criminal. * * * However, most courts distinguish between civil and criminal contempt proceedings. The distinction is usually based on the purpose to be served by the sanction. * * * Thus, in determining whether a contempt is civil or criminal,

the pertinent test is 'what does the court primarily seek to accomplish by imposing sentence?' * * *

{¶ 45} "Civil contempt sanctions are designed for remedial or coercive purposes and are often employed to compel obedience to a court order. * * * Criminal contempt sanctions, however, are punitive in nature and are designed to vindicate the authority of the court. * * * Thus, civil contempts are characterized as violations against the party for whose benefit the order was made, whereas criminal contempts are most often described as offenses against the dignity or process of the court." Id., at ¶s 24-25, citing *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554-555, 2001-Ohio-15.

{¶ 46} "Common pleas courts have 'both inherent and statutory power to punish contempts.' *Burt v. Dodge* (1992), 65 Ohio St.3d 34, 35, citing *Zakany v. Zakany* (1984), 9 Ohio St.3d 192. 'Under the proper circumstances, courts can find nonparties guilty of contempt.' *Scarnecchia v. Rebhan*, Mahoning App. No. 05 MA 213, 2006-Ohio-7053, at ¶9.

{¶ 47} "For example, in *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, the Supreme Court of Ohio considered whether picketers who were not parties to an action between Planned Parenthood and certain anti-abortion groups could be held in contempt for violating terms of a preliminary injunction that had been issued. The court concluded that the non-parties were bound by the terms of the injunction, because they were ' "persons in active concert or participation with [the parties to the action]." ' Id. at 61. This was based on the theory that '[n]onparties are bound by an injunction to

ensure "that defendants [do] not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." ' Id. The non-parties must have had actual notice of the injunction, however, in order to be bound. Id.

{¶ 48} "After reviewing the record, the Supreme Court of Ohio concluded that the picketers had actual knowledge of the injunction, and that the trial court did not abuse its discretion in holding them in contempt. Id. See, also, *Citicasters Co. v. Stop 26-Riverbend, Inc.,* 147 Ohio App.3d 531, 2002-Ohio-2286, at ¶65-92 (holding attorney in contempt for failing to ensure client's compliance with a temporary restraining order), and *Adkins v. Hansen*, Ashland App. No. 01COA01437, 2002-Ohio-2676 (noting that the trial court would have had jurisdiction for purposes of indirect civil contempt over a non-party insurance company, to the extent that the insurance company represented the interests of the defendants in the action)." *Chavez-Juarezz,* at ¶s 35-37.

{¶ 49} In the instant case, McCabe purchased the facility and the property on which it was located pursuant to the Consent Order entered into by Republic and the State. Under the explicit terms contained in the addendum McCabe was required to do the following:

{¶ 50} "assume all of [Republic]'s responsibilities and liabilities to complete closure and other remedial requirements at the [facility], all as detailed in [Republic]'s closure plan for the facility (the 'Closure Plan') and any consent agreements with governmental authorities (the 'Consent Agreements'). [McCabe] further agrees to perform all required closure and remedial activities in accordance

with the requirements of the Closure Plan and Consent Agreements and any timetable applicable thereto. *** [McCabe] acknowledges that [McCabe] has received a copy of the Closure Plan and Consent Agreements."

{¶ 51} Similar to the non-party picketers who were found by the Ohio Supreme Court to be bound by the terms of the injunction in *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, McCabe was "in active concert or participation with [the parties to the action]." Moreover, the real estate agreement between Republic and McCabe clearly evinces an intent on the part of McCabe to be bound by the terms of the Consent Order regarding the subsequent closure and cleanup of the facility. Thus, the trial court did not err when it found that McCabe, a non-party, could be held in contempt for failure to comply with the terms of the Consent Order.

2. The trial court did not err when it failed to rule on McCabe's affirmative defenses of laches, waiver, and estoppel since those defenses were insufficient as a matter of law when applied against a governmental entity.

{¶ 52} "Courts have 'been loathe to apply doctrines of waiver, laches, or estoppel to governmental entities or arms thereof.'" *State v. Tri-State Group*, Belmont App. No. 03 BE 61, 2004-Ohio-4441, quoting *Gold Coast Realty, Inc. v. Bd. of Zoning Appeals of Cleveland* (1971), 26 Ohio St.2d 37, 39.

{¶ 53} Waiver is a concept which applies to an individual who freely waives his own rights and privileges. *Campbell v. Campbell* (1993), 87 Ohio App.3d 48, 50. Public rights, however, are by definition not individual rights, and no individual may

waive public interests by his or her action or inaction. Id. Courts will not allow "the public to suffer due to the actions or inactions of public officials." *State v. Tri-State Group, Inc.*, 2004-Ohio-4441, supra.

{¶ 54} Additionally, the defenses of laches and estoppel are generally unavailable to those bringing suit against the government. *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143. The elements of a laches defense are "1) unreasonable delay or lapse of time in asserting a right, 2) absence of an excuse for the delay, 3) knowledge, actual or constructive, of the injury or wrong, and 4) prejudice to the other party." *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections* (1995), 74 Ohio St.3d 143, 145. "The principle that laches is not imputable to the government is based upon the public policy in enforcement of the law and protection of the public interest. *** To impute laches to the government would be to erroneously impede it in the exercise of its duty to enforce the law and protect the public interest." *Campbell*, 87 Ohio App.3d 48, 50. Likewise, "if a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interests in all citizens in obedience to the rule of law is undermined. *** To hold otherwise would be to grant defendants a right to violate the law." *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d at 146.

{¶ 55} We note that on December 17, 2007, the State filed a motion to strike Republic's affirmative defenses of failure to state a claim pursuant to Civ. R. 12(B)(6), laches, waiver, and estoppel. On February 27, 2008, the trial court filed a decision in which it granted the State's motion to strike in part and denied the

motion in part. Specifically, the trial court refused to strike Republic's affirmative defense of failure to state a claim under Civ. R. 12(B)(6). The court, however, granted the State's motion to strike Republic's defenses of laches, waiver, and estoppel. In its decision, the court advanced the same rationale which we find to be persuasive against McCabe, namely, that the defenses of waiver, laches, and estoppel cannot be applied in a suit against a governmental agency. This is especially true in the instant case which involves the closure and cleanup of a hazardous waste facility. "By bringing this action, the State is trying to protect both the environment and the health of its citizens. The public should not be injured merely because the government agents in charge of protecting those interests have been slow to do so." *State v. Tri-State Group, Inc.*, 2004-Ohio-4441. Thus, the trial court did not violate McCabe's due process rights when it refused to rule on McCabe's affirmative defenses of waiver, laches, and estoppel.

3. McCabe's due process rights were not violated by the trial court's failure to address its affirmative defenses of fraud and breach of contract against the State.

{¶ 56} In this portion of the assignment, McCabe argues that Republic and its principals fraudulently induced McCabe into purchasing the facility and the real estate on which it was located without first disclosing the presence of specific contaminants on the property. McCabe also argues in its appellate brief that Republic breached the real estate contract for the sale of the facility by 1) failing to disclose the subsurface contamination arising from the 1995 spill; 2) failing to provide McCabe full access to all Republic's books and records relating to the

facility; and 3) failing to pay for remediation costs in excess of the contractually agreed upon maximum amount to be expended by McCabe to close down the facility.

{¶ 57} In its amended answer filed on September 17, 2008, McCabe's fourth and fifth affirmative defenses were stated as follows:

{¶ 58} "FOURTH AFFIRMATIVE DEFENSE

{¶ 59} "108. Plaintiff's claims are barred because Plaintiff participated in the Fraudulent Inducing of the McCabe Defendants to enter into a contract with the non-McCabe Defendants to the detriment of the McCabe Defendants.

{¶ 60} "FIFTH AFFIRMATIVE DEFENSE

{¶ 61} "109. Plaintiff's claims are barred because Plaintiff participated in the wrongful, and/or negligent, and/or fraudulent misrepresentation of the costs required to perform the work required to complete the provisions of the Closure Plan."

{¶ 62} The affirmative defenses presented in the amended answer contain allegations against the State and its involvement in the alleged fraud and breach of contract against McCabe. The argument advanced in support of this portion of the assignment of error discusses McCabe's allegations of fraud and breach of contract solely against Republic, not the State. Simply put, the argument advanced in McCabe's appellate brief in support of this assignment of error is mostly unrelated to the object of the actual assignment; to wit: the State's alleged involvement in the fraudulent inducement of McCabe to purchase the facility as pled in the affirmative defenses in the amended answer.

{¶ 63} McCabe does argue briefly that the Ohio EPA, acting in conjunction with Republic, failed to disclose hazardous conditions that it was allegedly aware of at the facility. The record, however, does not support McCabe's bare assertion in this regard. The record establishes that there were no communications between McCabe and the Ohio EPA regarding the facility until after McCabe purchased the facility from Republic. Further, the evidence presented at the hearing before the trial court establish that the Ohio EPA did not even know of McCabe's involvement with the facility until well after the Consent Order had been finalized and filed. Thus, no evidence exists which supports McCabe's affirmative defense that the State participated in any way with Republic to fraudulently induce McCabe to purchase the facility. Additionally, McCabe has failed to argue or provide any evidence which supports his remaining affirmative defense that the State breached a contract with McCabe, as no contract existed between the State and McCabe. Thus, we find no merit to this portion of McCabe's assignment of error.

{¶ 64} We note that McCabe filed a third-party complaint against two employees of the Ohio EPA, Tina Jennings and Elizabeth Rothschild, as well as numerous employees of Republic on September 17, 2008. On October 14, 2008, the State filed a motion to dismiss McCabe's third-party complaint as against Jennings and Rothschild pursuant to Civ. R. 12(B)(1) and (6). The trial court sustained the State's motion to dismiss Jennings and Rothschild in a decision filed on February 12, 2009. Pursuant to the Civ. R. 54(B) final appealable order language inserted at the end of the trial court's decision, McCabe had thirty days to file a notice of appeal with this Court. The record establishes that McCabe did not

file a notice of appeal regarding the trial court's decision to dismiss Jennings and Rothschild from the third-party complaint. We further note that McCabe's cross-claim did not contain any claims against the State or the Ohio EPA. The cross-claim only contained allegations against Republic.

4. Since privity existed between McCabe and Republic, the trial court did not err when it held McCabe in contempt for failure to comply with the terms of the 1998 Consent Order.

{¶ 65} "Generally, one is in privity with another if he succeeds to an estate or an interest formerly held by the other, because privity is a succession of interest or relationship to the same thing. 32 Ohio Jurisprudence 2d 476 (rev.ed.), Judgments, Section 248." *City of Columbus v. Union Cemetery Assoc.* (1976), 45 Ohio St.2d 47, 51.

{¶ 66} In the instant case, it is clear that McCabe was in privity with Republic such that McCabe could be held in contempt along with Republic for failing to comply with the terms of the Consent Order. As previously stated, the real estate purchase agreement between McCabe and Republic contained the following provision:

{¶ 67} "For valuable consideration, Purchaser [McCabe] *hereby assumes all of Seller's* [Republic's] *responsibilities and liabilities to complete closure and other remedial requirements at the Premises*, all as detailed in the Seller's closure plan for the facility (the 'Closure Plan') and any consent agreements with governmental authorities (the 'Consent Agreements'). Purchaser further agrees to perform all required closure and remedial activities in accordance with the requirements of the

Closure Plan and Consent Agreements and any timetable applicable thereto. *** *Purchaser acknowledges that Purchaser has received a copy of the Closure Plan and Consent Agreements*."

{¶ 68} A plain reading of the express terms of the real estate purchase agreement establishes that McCabe and Republic were in privity with each other after McCabe became a successor-in-interest to the facility and the real property on which it was located. By purchasing the facility, McCabe agreed to be bound by the Consent Order which mandated closure of the facility pursuant to guidelines set forth by the Ohio EPA. We also note that on February 8, 2002, a portion of the funds being held in the closure trust fund were released to McCabe in order to reimburse McCabe for monies it spent to close down the facility. By accepting reimbursement from the trust fund, McCabe "succeeded to a valuable interest formerly held by" Republic. Although the Consent Order had not been filed with the trial court at the time McCabe purchased the facility, it is undisputed that McCabe was provided a copy of the Consent Order and was aware that it took possession of the facility pursuant to the terms and requirements of the Consent Order. Simply put, the record establishes that McCabe and Republic were in privity by virtue of the real estate purchase agreement for the facility such that McCabe could be held in contempt for failure to comply with the Consent Order that Republic negotiated with the State.

{¶ 69} McCabe's second assignment of error is as follows:

{¶ 70} "THE TRIAL COURT ERRED IN EXCLUDING THE MCCABE DEFENDANTS' EVIDENCE."

{¶ 71} In its second assignment, McCabe contends that the trial court abused its discretion when it refused to admit three trial exhibits proffered by McCabe. Specifically, McCabe attempted to introduce Exhibit 6, a settlement document from the State to Republic; Exhibit 7, a settlement document from Republic to the State; and Exhibit 10, a settlement document from Republic to the State. The State objected to the introduction of the exhibits, and the trial court held that all three documents were confidential mediation settlement documents and were inadmissible pursuant to Evid. R. 408.

{¶ 72} McCabe argues that while Republic did not voluntarily provide the three documents, Republic waived any privilege regarding the documents. McCabe asserts that the real estate purchase agreement required Republic to provide McCabe access to any documents which contained information regarding hazardous conditions at the facility. McCabe also argues that the documents he seeks to have admitted are public records and are, therefore, admissible pursuant to Evid. R. 803.

{¶ 73} The admission or exclusion of evidence rests soundly within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, ¶ 2 of the syllabus. The trial court's decision concerning the admission or exclusion of evidence will not be reversed absent an abuse of that discretion. Id. at 182.

{¶ 74} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than

decisions that are unconscionable or arbitrary.

{¶ 75} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161.

{¶ 76} Evid.R. 408 provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

{¶ 77} Evid.R. 408 encourages parties to settle disputes by making offers to compromise based on factors besides potential liability. *Schafer*, 138 Ohio App.3d at 295. This rule, however, makes exceptions when evidence of parties' settlement negotiations or compromise is offered for purposes other than proving liability or invalidity. Id. For example, this court has sustained a trial court's

admission of settlement discussions offered to demonstrate the defendants' motives. See id. at 295-96. See, also, *Krysa v. Sieber* (1996), 113 Ohio App.3d 572, 578 (approving the admission of evidence to show that a mathematical error had occurred in the calculations of property division).

{¶ 78} In regards to the exhibits McCabe sought to have admitted into evidence, the trial court properly held that they were privileged settlement documents protected by Evid. R. 408. The documents were, therefore, inadmissible for the purpose of establishing that Republic was liable for McCabe's fraudulent inducement and breach of contract claims. Moreover, McCabe has failed to demonstrate that any of the exhibits were offered for another purpose, "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Evid. R. 408. McCabe's assertions that the exhibits somehow constitute public records or that the real estate purchase contract renders the settlement documents admissible are also without merit. Thus, we find that the trial court did not abuse its discretion when it held that Exhibits 6, 7, and 10 were settlement documents, and therefore, inadmissible under Evid. R. 408.

{¶ 79} McCabe's third and final assignment of error is as follows:

{¶ 80} "THE TRIAL COURT'S DECISION, ORDER AND ENTRY HOLDING THE MCCABE DEFENDANTS IN CONTEMPT AND GRANTING JUDGMENT TO PLAINTIFF FOR STIPULATED PENALTIES IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND/OR IS ARBITRARY AND CAPRICIOUS."

{¶ 81} In its final assignment, McCabe argues that the trial court's decision

finding it in contempt for failure to comply with the Consent Order and granting judgment to the State for the stipulated penalties is against the manifest weight of the evidence and, essentially, an abuse of discretion.

{¶ 82} The test for determining whether a judgment is against the manifest weight of the evidence is set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175, as follows:

{¶ 83} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Cited approvingly in *State v. Thompkins* (1997), 78 Ohio St.3d 380, at 387.

{¶ 84} After a thorough review of the record in this case, we cannot say that the trial court, in making the finding upon which it relied, lost its way and created such a manifest miscarriage of justice that the result must be overturned. McCabe has failed to argue any specific basis upon which to find that the court's decision was against the manifest weight of the evidence, or otherwise unreasonable. Based upon the rationale as set forth in our analysis of McCabe's previous assignments of error, we hold that the trial court did not err when it held McCabe in contempt for failure to comply with the Consent Order and found it jointly and severally liable for the stipulated penalties.

III

{¶ 85} All of McCabe's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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