[Cite as *Burns v. Burns Iron & Metal Co., Inc.*, 2013-Ohio-2024.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Thomas P. Burns, et al.	Court of Appeals No. S-12-024
Appellants	Trial Court No. 10-CV-1217
v.	
Burns Iron & Metal Co., Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 17, 2013

* * * * *

John A. Coppeler, for appellants.

Margaret G. Beck, R. Ethan Davis, and Anthony Chudzinski, for appellees, Burns Iron & Metal Co., Joseph A. Burns, and David Richard Burns

Denise M. Hasbrook and Emily Ciecka Wilcheck, for appellee, Sarah J. Hicks, Executor of the Estate of Joyce M. Burns

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, Thomas Burns and Brian Burns, appeal the judgment of the Sandusky County Court of Common Pleas, awarding summary judgment in favor of

appellees, Burns Iron & Metal Co., Inc. (BIMCO), Joyce Burns, Joseph Burns, and David Burns. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} This case involves a dispute over appellees' obligation to pay for the expenses incurred by appellants in settling a lawsuit filed against them by the United States Environmental Protection Agency (EPA). The genesis of this dispute dates back to 1988. In that year, the EPA filed formal charges against BIMCO after identifying it as a "potentially responsible party" (PRP) for cleanup at a Superfund site. At the time, BIMCO was owned by three shareholders: (1) Bill Burns; (2) Thomas Burns; and (3) David Burns. The shareholders each received their ownership interest in BIMCO from their father, Robert Burns.

{¶ 3} In 1996, the shareholders decided to sell their stock to BIMCO as a way to fund their retirement. Consequently, the three brothers executed a stock redemption agreement on December 31, 1996. Pursuant to the agreement, the brothers sold all of their shares save two shares apiece, generating in excess of $600,000 for each brother's retirement. Each of the remaining six shares was to be passed to the brothers' children. When Thomas and Bill retired, Thomas gifted his two shares of BIMCO stock to his son, Brian. Bill gifted one share each to his children, Joyce and Joseph. David retained his shares because he was not ready to retire.

{¶ 4} Following the transfer of ownership, Brian became president, Joyce became secretary/treasurer, and David became vice president. However, in 2001, Brian decided

to step away from the family business as a result of persistent disagreements with his cousins. Accordingly, Brian entered into an agreement with BIMCO wherein he sold his two shares to BIMCO for $150,000. The arrangement permitted BIMCO to pay the $150,000 over a period of time in installments.

{¶ 5} That same year, Brian formed a competing business named Progressive Iron & Metal. As a result of Brian's efforts to compete with BIMCO, BIMCO filed suit against Brian and Progressive Iron & Metal, alleging breach of fiduciary duty, theft of trade secrets, and tortious interference with business relationships. Brian filed a counterclaim for the unpaid balance of funds he was owed under the stock purchase agreement.

{¶ 6} All the while, the litigation between the EPA and BIMCO was still in progress. At some point, the EPA discovered the existence of the stock redemption agreement. Viewing the agreement as an attempt to illegally divest BIMCO of sufficient funds to pay for the cleanup, the EPA pursued potential claims against BIMCO's current and former shareholders under the Fair Debt Collection Procedures Act, 28 U.S.C. 3301-3308, and the Federal Debt Priority Statute, 31 U.S.C. 3713 (FDPS).

{¶ 7} In December 2002, appellees executed a limited power of attorney authorizing attorney Stephen Haughey to sign a tolling agreement in order to facilitate settlement with the EPA. Thomas also signed the power of attorney, assuming that it would entitle him to receive the benefit of any eventual settlement. Brian refused to execute the power of attorney, despite being given an opportunity to do so.

{¶ 8} After the tolling agreement was signed, Joyce asked Thomas to speak with Brian and persuade him to dismiss his counterclaim against BIMCO. She informed Thomas that he and Brian would be excluded from the settlement if Brian did not dismiss the counterclaim. After speaking with Brian, Thomas called Joyce and explained that Brian refused to dismiss the counterclaim, at which point Joyce ended the phone call. In light of his efforts to persuade Brian, Thomas assumed he would be included in the settlement, even though he was never specifically told that he would be included in the settlement. Notably, Thomas never followed-up with appellees in order to verify his participation in the settlement. Further, he never spoke with Haughey or received any correspondence regarding a potential settlement.

{¶ 9} Following extensive negotiations, appellees successfully reached a settlement with the EPA in the amount of $49,500. Much to their dismay, Thomas and Brian were not included in the settlement. Upon coming to that realization, appellants engaged the EPA in their own settlement negotiations, resulting in a separate settlement in the amount of $100,000.

{¶ 10} On November 8, 2010, appellants filed suit against appellees, seeking reimbursement for the expenses they were forced to pay to the EPA pursuant to the settlement. In their complaint, appellants allege that appellees breached a fiduciary duty owed to them by settling the claims without notifying them. Additionally, appellants request contribution and indemnification from appellees for a portion of the $100,000 they paid to the EPA in order to settle the suit.

{¶ 11} On May 2, 2011, appellees filed a joint motion for summary judgment, which was opposed by appellants. The trial court heard oral arguments on the motion on November 28, 2011. On December 20, 2011, the trial court granted appellees' motion for summary judgment, dismissing all of appellants' claims except the claims asserted by Thomas against BIMCO. Subsequently, the trial court granted BIMCO's renewed motion for summary judgment, dismissing Thomas' outstanding claim and fully resolving the case. The trial court issued each of its decisions granting appellees' motions for summary judgment without opinion.

B. Assignment of Error

{¶ 12} Appellants have timely appealed, assigning the following error for our review:

> I. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS OF DEFENDANTS-APPELLEES FOR SUMMARY JUDGMENT ON THE CLAIMS OF PLAINTIFFS-APPELLANTS FOR BREACH OF FIDUCIARY DUTY, CONTRIBUTION AND INDEMNIFICATION WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT WHICH EXISTED AND DEFENDANTS-APPELLEES WERE NOT ENTITLED TO JUDGMENT IN THEIR FAVOR AS A MATTER OF LAW.

II. Standard of Review

{¶ 13} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 14} In reviewing a grant of summary judgment, the appellate court reviews the entire record in the light most favorable to the party opposing the motion. *Engel v. Corrigan*, 12 Ohio App.3d 34, 465 N.E.2d 932 (8th Dist.1983), paragraph one of the syllabus. Further, any doubt must be resolved in favor of the nonmoving party. *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982).

III. Analysis

{¶ 15} In their sole assignment of error, appellants contend that the trial court erred in granting appellees' motions for summary judgment. Appellants argue that the trial

court's decision was erroneous for three reasons: (1) appellees breached fiduciary duties owed to appellants in negotiating and settling liabilities arising out of the stock redemption agreement; (2) appellants have a viable claim for indemnification based upon their payment of $100,000 to the EPA; and (3) appellants have a viable claim for contribution since their liability and appellees' liability arose from a common duty or debt. We will address these arguments in turn.

A. Breach of Fiduciary Duty

{¶ 16} First, appellants argue that appellees breached a fiduciary duty owed to them as a result of their status as former BIMCO shareholders. Appellees counter by arguing that any fiduciary duties owed to appellants were extinguished when appellants sold their BIMCO stock.

{¶ 17} In order to succeed on a breach-of-fiduciary-duty claim, a plaintiff must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately therefrom. *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988), citing *Stamper v. Parr-Ruckman Home Town Motor Sales*, 25 Ohio St.2d 1, 3, 265 N.E.2d 785 (1971). One does not owe fiduciary duties to another absent the showing of a fiduciary relationship, out of which the duties arise. *In re Termination of Employment of Pratt*, 40 Ohio St.2d 107, 115, 321 N.E.2d 603 (1974). 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." *Id.* "A fiduciary relationship may be

created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed." *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank*, 75 Ohio St.3d 433, 442, 662 N.E.2d 1074 (1996), quoting *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St.2d 282, 390 N.E.2d 320 (1979), paragraph one of the syllabus.

{¶ 18} It is well-settled that shareholders in a closely held corporation "owe one another a fiduciary duty to act in good faith and refrain from self-dealing." *Heaton v. Rohl*, 193 Ohio App.3d 770, 954 N.E.2d 165, 2011-Ohio-2090, ¶ 54 (11th Dist.); *Herbert v. Porter*, 165 Ohio App.3d 217, 845 N.E.2d 574, 2006-Ohio-355, ¶ 12 (3d Dist.).

{¶ 19} Here, appellants argue that they have a formal fiduciary relationship with appellees by virtue of their status as shareholders. However, appellants acknowledge that they are actually *former* shareholders. Indeed, appellants sold their BIMCO stock long before appellees entered into their settlement agreement with the EPA. Nevertheless, appellants note that they were shareholders at the time the stock redemption agreement was signed. Relying upon *Thompson v. Cent. Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 639 N.E.2d 462 (8th Dist.1994), appellants argue that a fiduciary relationship applies since they were shareholders when the transaction giving rise to their liability to the EPA took place (i.e., the execution of the stock redemption agreement).

{¶ 20} In *Thompson*, the plaintiff filed suit against Ohio Cellular, alleging that Ohio Cellular breached a fiduciary duty owed to him as a former shareholder. Thompson's claim was based on a tax election Ohio Cellular made after Thompson sold his shares to the company, which increased Thompson's tax burden for that year. *Id.* at

533. Although the court recognized the general rule that the sale of one's stock terminates the fiduciary relationship that exists between the shareholder and the company, it held that "[t]ermination of the fiduciary relationship does not shield the fiduciary from its duties or obligations concerning transactions which have their inception before the termination of the relationship." *Id.* at 542.

{¶ 21} Appellants cite *Thompson* to support their position that appellees owed them a fiduciary duty. However, *Thompson* is distinguishable from this case. While it is true that the lawsuit filed by the EPA alleges fraud in the execution of the stock redemption agreement, that transaction does not form the basis of appellants' breach-of-fiduciary-duty claim. Instead, the basis of appellants' claim is the alleged misconduct involving appellees' efforts to settle the subsequent lawsuit. Thus, the transaction giving rise to the alleged breach of fiduciary duty did not have its inception in 1996, when appellants were BIMCO shareholders, but rather, had its inception in 2002, when appellants were no longer shareholders. Therefore, *Thompson* is inapposite.

{¶ 22} Further, the evidence belies appellants' contention that an informal fiduciary relationship existed. In order for such a relationship to exist, *both* parties must be aware that a special trust or confidence has been reposed. *Scott, supra*, 58 Ohio St.2d at paragraph one of the syllabus, 390 N.E.2d 320. Here, Thomas' own deposition demonstrates that there was almost no communication whatsoever between appellees and appellants during the settlement negotiations, short of Joyce's attempts to persuade Brian to dismiss his counterclaim against BIMCO. Additionally, Thomas stated that neither he

nor Brian ever spoke with appellees' counsel concerning the progress of the negotiations. Without any evidence demonstrating that appellees were aware that a special trust or confidence had been reposed by appellants, we conclude that no fiduciary relationship existed. Therefore, the trial court properly granted summary judgment in favor of appellees on the breach-of-fiduciary-duty claim.

B. Indemnification Claim

{¶ 23} Appellants next argue that the evidence, when construed in a light most favorable to them, precludes summary judgment on their claim for indemnification.

{¶ 24} In *Reynolds v. Physicians Ins. Co. of Ohio*, 68 Ohio St.3d 14, 16, 623 N.E.2d 30 (1993), the Supreme Court of Ohio explained the law of indemnity as follows:

{¶ 25} The rule of indemnity provides that "where a person is chargeable with another's wrongful act and pays damages to the injured party as a result thereof, he has a right of indemnity from the person committing the wrongful act, the party paying the damages being only secondarily liable; whereas, the person committing the wrongful act is primarily liable." *Travelers Indemn. Co. v. Trowbridge*, [41 Ohio St.2d 11, 14, 321 N.E.2d 787 (1975)]. When a person is secondarily liable due to his relationship to the other party, and is compelled to pay damages to an injured party, he may recoup his loss for the entire amount of damages paid from the one who is actually at fault, and who, in fact, caused the injuries. See *Globe Indemn. Co. v. Schmitt*, [142 Ohio St. 595, 603, 53 N.E.2d 790 (1944)].

{¶ 26} An implied contract of indemnity should be recognized in situations involving related tortfeasors, where the one committing the wrong is so related to a secondary party as to make the secondary party liable for the wrongs committed solely by the other. See *Losito v. Kruse*, [136 Ohio St. 183, 185, 24 N.E.2d 705 (1940)]. Relationships which have been found to meet this standard are the wholesaler/retailer, abutting property owner/ municipality, independent contractor/employer, and master/servant. *Id.* at 185-186. Indemnification is not allowed when the two parties are joint or concurrent tortfeasors and are both chargeable with actual negligence. [*Schmitt* at 599].

{¶ 27} In support of their claim for indemnification, appellants state that they "arguably satisfied an obligation of the other Burns family members, at least in part, if the government's intention * * * was to obtain a total of $149,500 * * * and it agreed to accept $49,500 from the other Burns family members knowing it would still be able to pursue Tom and Brian for additional money." Assuming appellants' assertions are correct, the facts clearly show that appellees were not *solely* liable for the FDPS claims brought by the EPA. Rather, appellants, as active participants in the negotiation and execution of the stock redemption agreement, were joint tortfeasors[1] in the underlying EPA suit. As joint tortfeasors, appellants are precluded from bringing a claim against

[1] A joint tortfeasor is defined as "one who actively participates, cooperates in, requests, aids, encourages, ratifies, or adopts a wrongdoer's actions in pursuance of a common plan or design to commit a tortious act." *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist.*, 90 Ohio App.3d 215, 628 N.E.2d 143 (8th Dist.1993), citing Prosser, *Law of Torts*, Section 46, 292 (4th Ed.1978).

appellees for indemnification. *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391, 394, 653 N.E.2d 235 (1995), citing *Reynolds*, *supra*, at 16.

{¶ 28} Accordingly, we conclude that the trial court properly granted appellees summary judgment on appellants' indemnification claim.

C. Contribution Claim

{¶ 29} Finally, appellants argue that the trial court erroneously granted summary judgment on their contribution claim. In support of their argument, appellants focus on the fact that their liability and appellees' liability arose from a common duty or debt (i.e. the stock redemption agreement). However, appellants' focus is misplaced.

{¶ 30} Even assuming, arguendo, that they are otherwise entitled to contribution, R.C. 2307.28 precludes it. R.C. 2307.28 states, in pertinent part:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same injury or loss to person or property or the same wrongful death, both of the following apply:
>
> * * *
>
> (B) The release or covenant discharges the person to whom it is given from all liability for contribution to any other tortfeasor.

{¶ 31} Here, appellants acknowledge that their settlement addressed the same injury giving rise to appellees' settlement. Further, they do not argue that appellees' settlement was made in bad faith. Consequently, R.C. 2307.28(B) precludes appellants'

contribution claim. *See Mahathiraj v. Columbia Gas of Ohio, Inc.*, 84 Ohio App.3d 554, 617 N.E.2d 737 (10th Dist.1992) (affirming the trial court's grant of summary judgment on plaintiffs' contribution claim where plaintiffs' claim was barred by a prior version of R.C. 2307.28(B)).

{¶ 32} In light of the foregoing, we conclude that the trial court did not err in granting appellees' motions for summary judgment. Accordingly, appellants' sole assignment of error is not well-taken.

IV. Conclusion

{¶ 33} Based on the foregoing, the judgment of the Sandusky County Court of Common Pleas is hereby affirmed. Costs are assessed to appellants in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE