

[Cite as *In re all Kelly & Ferraro Asbestos Cases*, 2005-Ohio-2608.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83348 & 83628

IN RE: ALL KELLEY & FERRARO	:	JOURNAL ENTRY
ASBESTOS CASES	:	
	:	and
	:	
	:	OPINION

DATE OF ANNOUNCEMENT OF DECISION:	May 26, 2005
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CHARACTER OF PROCEEDING:	Civil appeal from Court of Common Pleas Case No. SD-073958
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JUDGMENT:	REVERSED AND REMANDED
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DATE OF JOURNALIZATION:	_____
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APPEARANCES:

For Defendants-Appellants: (Amchem Products, Inc., et al.)	ERIC H. ZAGRANS The Zagrans Law Firm 5338 Meadow Lane Court Elyria, Ohio 44035 DAVID P. HUITEMA MICHAEL K. ISENMAN WILLIAM F. SHEEHAN RICHARD M. WYNER Shea & Gardner 1800 Massachusetts Ave., N.W. Washington, D.C. 20036 (C.E. Thurston & Sons)
	FRANK J. SANTORO Marcus, Santoro & Kozac, P.C. 1435 Crossways Boulevard, #300 Chesapeake, Virginia 23320

(Pfizer, Inc., et al.)

JEFFREY M. EMBLETON
ELI MANOS
SAMUEL R. MARTILLOTTA
RONALD B. RUBIN
Rubin & Rubin, Chartered
One Church Street, #301
Rockville, Maryland 20850

For Plaintiff-Appellee:
(Kelley & Ferraro)

MICHAEL V. KELLEY
THOMAS M. WILSON
Kelley & Ferraro, LLP
1300 East Ninth Street, #1901
Cleveland, Ohio 44114

ROBERT J. FOGARTY
ANDREW S. POLLIS
Hahn, Loeser & Parks
200 Public Square, #3300
Cleveland, Ohio 44114-2301

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} In this consolidated appeal, appellants, eleven companies that were former members of the Center for Claims Resolution (“the CCR members”),¹ appeal the trial court’s decision granting appellee, Kelley & Ferraro’s (“K&F”), ninth motion to enforce the settlement agreement. Finding merit to the appeal, we reverse.

{¶ 2} K&F represented 15,000 asbestos claimants who sued various asbestos manufacturers and distributors in several jurisdictions, including Cuyahoga County. In 1988, the asbestos producers and distributors created the CCR, a nonprofit organization, to handle all asbestos-related personal injury litigation. The rights and responsibilities of

¹The eleven companies include Amchem Products, Inc., C.E. Thurston & Sons, Inc., CertainTeed Corp., Dana Corp., I.U. North America, Inc., Maremont Corp., National Service Industries, Inc., Nosroc Corp., Pfizer Inc., Quigley Company, Inc., and Union Carbide Corp.

the CCR and its members were set forth in an agreement known as the CCR Producer Agreement, under which each member authorized the CCR to calculate its share of each settlement in accordance with the members' allocation arrangements.

{¶ 3} In July 1999, K&F, acting on behalf of their clients, entered into a Settlement Agreement ("Agreement") with the CCR to settle claims against the CCR member companies. Pursuant to the Agreement, each member company would pay its individual share of the settlement, in biannual installments between December 1999 and December 2004, to those claimants who qualified under the terms and conditions of the Agreement.

{¶ 4} Between the time the Agreement was executed and payments became due, various CCR member companies filed for bankruptcy and failed to pay their shares under the Agreement. As a result, K&F filed numerous motions seeking to enforce the Agreement and to hold the remaining solvent CCR member companies jointly and severally liable for the insolvent member companies' unpaid shares.

{¶ 5} In July 2003, the trial court granted K&F's ninth motion to enforce the settlement agreement, thereby holding all solvent CCR member companies jointly and severally liable for the unpaid shares. The CCR members appeal, raising four assignments of error.

Identity of Judgment Claimants

{¶ 6} In its third assignment of error, the CCR members argue that the trial court erred in failing to identify the claimants for whom it entered judgment.

{¶ 7} Written contract interpretation is a question of law; thus, we review this matter under the de novo standard. *Sherman R. Smoot Co. of Ohio v. Ohio Dept. of Adm. Serv.* (2000), 136 Ohio App.3d 166, 172, 736 N.E.2d 69.

{¶ 8} K&F's ninth motion to enforce the settlement agreement alleged that K&F had submitted 2,938 claims totaling \$14,283,535 to the CCR for the June 1, 2003 payment. The motion further provided that the CCR failed and refused to process 2,408 of those claims, totaling \$11,487,285, and that it had refused to pay any part of the \$9,622,500 payment due June 1, 2003. However, the CCR members opposed this motion, stating that only 438 claimants had qualified for payment, and the maximum amount they were eligible to receive was \$3,674,835, not the \$9,662,500 requested by K&F.

{¶ 9} The trial court conducted a hearing on the motion and the parties waived an evidentiary hearing on the matter and stipulated that K&F presented qualified claims in the amount of \$9,662,500. The trial court granted K&F's motion and rendered judgment "on behalf of plaintiffs in the sum of \$9,662,500 (the total value for the claimants who had provided all the required documentation)***."

{¶ 10} The CCR members appeal this judgment, claiming that the judgment is void because it does not identify the judgment claimants. However, we find the parties stipulated at the hearing that K&F presented qualified claims totaling \$9,622,500. In fact, the parties agreed that the stipulation eliminated the need for an evidentiary hearing. A stipulation is a voluntary agreement entered into between opposing parties concerning the disposition of some relevant point to avoid the necessity for proof on an issue. *Rice v. Rice* (Nov. 8, 2001), Cuyahoga App. No. 78682. Where parties choose to stipulate to facts in lieu of presenting evidence, they waive any error that may have occurred with respect to the trial court's deciding the matter without hearing evidence presented by the parties. *Id.* at p.9; *F. Fareydoon-Nezhad v. Kilgore* (Dec. 18, 1989), Lawrence App. No. 98 CA 3, citing

Peters Motors, Inc. v. Rodgers (1954), 161 Ohio St. 480, 120 N.E.2d 80, paragraph two of the syllabus.

{¶ 11} If the CCR members had any concerns or questions as to who the judgment claimants were, the CCR members should have raised the issue at the hearing. Instead, the parties waived their right to an evidentiary hearing and stipulated to the amount of qualified claims. Therefore, we find that the trial court did not err in failing to identify the claimants for whom it entered judgment.

{¶ 12} Accordingly, we overrule the CCR members' third assignment of error.

Joint and Several Liability

{¶ 13} In its second assignment of error, the CCR members argue that the trial court erred in holding the CCR members jointly and severally liable under the Settlement Agreement. We agree.

{¶ 14} In July 2003, this court considered this issue in *In Re: Kelley & Ferraro Asbestos Cases*, 153 Ohio App.3d 458, 2003-Ohio-3936, 794 N.E.2d 729 ("*Ferraro I*"). This court held that under the guise of fundamental fairness, all CCR members, whether solvent or insolvent, were jointly and severally liable for all amounts due to the claimants pursuant to the Agreement. *Id.* at 471.

{¶ 15} However, the Ohio Supreme Court recently reversed this court's decision in *Ferraro I* and held that the terms of the Agreement, specifically paragraph 13, "creates only several liability among the CCR members, and, therefore, each member is responsible only for its individual share of liability payments."² *In Re: All Kelley & Ferraro Asbestos Cases*,

² The first sentence of Paragraph 13 provides:

“[P]ayments to Plaintiff Counsel by the CCR under paragraph 5 of this Settlement

104 Ohio St.3d 605, 618, 2004-Ohio-7104, 821 N.E.2d 159. In so holding, the court stated that the language of paragraph 13 could

“only be interpreted as imposing several liability upon the CCR member companies and manifests the parties' intent that each member be responsible for only its individual share of the total settlement amount as calculated pursuant to the Producer Agreement. In other words, the first sentence of paragraph 13 shows that the members promised to pay limited amounts toward the biannual installments specified in the settlement agreement.” Id. at 614.

{¶ 16} Therefore, based upon the recent decision by the Ohio Supreme Court, we find that the trial court erred in holding the CCR members jointly and severally liable under the Settlement Agreement; each individual member company is only responsible for its individual share pursuant to the Producer Agreement.

{¶ 17} Accordingly, the CCR members' second assignment of error is sustained. Having sustained this assignment of error, we need not address the remaining assignments of error regarding misapplication of the law and jurisdiction. See, *Ferraro*, 104 Ohio St.3d at 618, holding the jurisdictional issue moot.

Judgment reversed and case remanded.

It is, therefore, considered that said appellants recover of said appellee the costs herein.

Agreement shall be funded by the CCR member companies in accordance with the terms of the Producer Agreement Concerning Center for Claims Resolution (as amended, effective February 1, 1994) and *each CCR member shall be liable under this Settlement Agreement only for its individual share of such payments as determined under that Producer Agreement.*” (Emphasis added).

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DIANE KARPINSKI, J. and

MARY EILEEN KILBANE, J. CONCUR

PRESIDING JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).