[Cite as *Allen v. Bennett*, 2011-Ohio-1210.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ROY K. ALLEN, et al. Appellees/Cross-Appellants v. T. B. BENNETT, et al. Appellants/Cross-Appellees	C. A. No. 25252 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2005 01 0036

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

WHITMORE, Judge.

{¶1} Appellant/Cross-Appellees, Buckeye Corrugated, Inc. ("BCI"), T.B. Bennett, Paul Carleton, C. Michael Reardon, Carl Smeller, and James Snider (collectively "the Directors"), appeal from the judgment of the Summit County Court of Common Pleas. Appellee/Cross-Appellants, Roy Allen and G&A Investments, LLC (collectively "Allen"), also appeal from the court's judgment. This Court affirms in part and reverses in part.

I

{¶2} This appeal marks the parties' fourth appearance before this Court and the sixth year of their post-settlement litigation. See *Allen v. Bennett, et al.* ("*Allen I*"), 9th Dist. Nos. 23570, 23573, & 23576, 2007-Ohio-5411; *Allen v. Bennett, et al.* ("*Allen II*"), 9th Dist. No. 24124, 2008-Ohio-4554; *Allen v. v. Bennett, et al.* ("*Allen III*"), 9th Dist. Nos. 24629 & 24649, 2009-Ohio-6076. After Allen's separation from BCI, Allen, BCI, and the Directors became entangled in litigation regarding Allen's departure from BCI. On May 8, 2006, the parties

informed the trial court, on the record, that they had reached a settlement. The settlement provided that BCI would redeem Allen's BCI shares for the price of $10.2 million. BCI would pay ten percent of the purchase price immediately and the other ninety percent in bi-annual installment payments, pursuant to a ten-year promissory note. BCI also agreed to pay interest to Allen, and Allen agreed to sign a commercially reasonable subordination agreement, subrogating his promissory note to BCI's bank lenders. The agreement that the parties signed constituted an enforceable settlement agreement. *Allen I* at ¶14.

{¶3} Problems arose when the parties disagreed about whether the subordination agreements presented to Allen were commercially reasonable. *Allen II* revolved around this dispute and resulted in a remand to the trial court "for a determination of whether the subordination agreement proposed by BCI and its bank lenders is 'commercially reasonable' as that term is used in the parties' settlement agreement." *Allen II* at ¶10, quoting *Allen I* at ¶19. Our remand instructed the trial court to decide the issue "based on the record before the trial court at the time of our remand in *Allen I*." *Allen II* at ¶10.

{¶4} Subsequently, the trial court determined that the subordination agreement BCI presented to Allen on May 6, 2006 was commercially reasonable and another appeal ensued. The trial court also determined the amount of damages BCI owed Allen, but not until after BCI filed an appeal with this Court regarding the subordination agreement. The third appeal resulted in a dismissal of the trial court's first judgment entry, which decided the issue of commercial reasonableness but not damages, and a vacation of the court's subsequent judgment entry, which the court lacked jurisdiction to issue. *Allen III* at ¶8-14. Once again, the parties found themselves back before the trial court.

{¶5} The parties filed multiple motions before the trial court after this Court's dismissal and vacation. On February 5, 2010, the trial court issued another judgment entry. The trial court determined that the subordination agreement BCI proposed on October 5, 2006 was commercially reasonable. The court further concluded that the parties settled their dispute on May 8, 2006 and, as a result, assessed prejudgment interest against BCI pursuant to R.C. 1343.03(A). The court applied statutory interest rates from the date of settlement, May 8, 2006, until the date of closing, but held that the parties' agreement would govern the interest rate from the date of closing forward. Finally, the court's judgment entry provided that:

> "Allen is ordered to execute [the October 5, 2006] subordination agreement within 10 days of the filing of this judgment entry. Should he fail or refuse to do so, the subordination agreement shall be deemed to have been executed by Allen as of February 15, 2010. The parties should thereafter proceed to close the settlement agreement according to the terms thereof."

Allen did not sign the subordination agreement.

{¶6} BCI, the Directors, and Allen now appeal from the trial court's February 5, 2010 judgment entry. For ease of analysis, we first address Allen's cross-assignment of error and rearrange BCI's assignments of error.

II

Cross-Assignment of Error

> "THE TRIAL COURT'S FINDING THAT BCI NEITHER WAIVED NOR IS ESTOPPED FROM ASSERTING THE REQUIREMENT THAT ALLEN SIGN A SUBORDINATION AGREEMENT WAS UNSUPPORTED BY THE EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his sole cross-assignment of error, Allen argues that the trial court erred by refusing to find that the doctrines of either waiver or estoppel prevent BCI from arguing that Allen is required to sign a subordination agreement as a condition of payment under the

separation agreement. Specifically, Allen argues that, by redeeming his stock in June 2006, BCI waived, or should be deemed to have waived, the condition that Allen sign a subordination agreement.

{¶8} In reviewing a manifest weight challenge, this Court will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case[.]" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court's factual findings are correct and that while "[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶9} Although the parties agree that BCI redeemed Allen's stock on June 23, 2006, they disagree as to the effect of that redemption and whether certain arguments have been waived because of it. Allen argues that, by redeeming his stock in the absence of a signed subordination agreement, BCI waived the condition that Allen sign any subordination agreement. BCI argues that Allen can no longer argue waiver/estoppel because he failed to raise those arguments in the prior appeals. Allen counters by arguing that he could not raise waiver/estoppel at an earlier point because BCI lied about the redemption for an extended period of time. The trial court considered Allen's waiver/estoppel argument and ultimately rejected it on the merits.

{¶10} It appears from the record in this matter that the duration and complexity of this case is due, in large part, to the inability of any of the parties involved to accurately portray the

facts or consistently present arguments to either the trial court or this Court. As an example, on December 15, 2008, Allen made the following statements in a filing with the trial court:

> "It was not until seven days before the Court of Appeals rendered its decision on October 10, 2007 in *Allen I*, that Allen discovered BCI had closed the purchase of Allen's stock and obtained all of its bargained-for consideration under the settlement agreement. For over fifteen months, BCI intentionally hid this fact[.]"

In his brief on appeal in this case, Allen argues that BCI "hid the fact that they had redeemed Allen's shares until after *Allen I* had been briefed and argued to this Court." Later in the same brief, Allen asserts that he was not required to argue the issues of waiver or estoppel in *Allen I* because the facts that might have supported those issues "were not known by Allen when *Allen I* was pending[.]" Allen's own brief is internally inconsistent with respect to the time frames during which he claims to have discovered the redemption. Moreover, the record belies all of his assertions. Allen filed his brief in *Allen I* on May 7, 2007. *Allen I* was argued on August 2, 2007. On April 5, 2007, well before Allen's brief and oral argument in *Allen I*, BCI filed a motion in opposition[1] in the trial court that contained the following statements: "Allen's stock and all of the other shareholder's stock has been retired and [BCI] is now 100% ESOP owned. This occurred during the time this Court's dismissal order was in effect." The record, therefore, reflects that BCI disclosed the redemption well before October 3, 2007 and *Allen I's* resolution.

{¶11} Allen failed to take any action after BCI acknowledged that it had redeemed his stock. Had Allen raised the issue of BCI's redemption with this Court and filed a motion for a remand, see App.R. 15, Allen would have had the opportunity to file a Civ.R. 60(B) motion to address the issue of waiver or estoppel. See, e.g., *Unrue v. Unrue*, 9th Dist. No. 22752, 2006-

[1] BCI's motion for opposition responded to a motion from Allen, requesting that the court hold BCI in contempt for failing to honor his shareholder rights.

Ohio-1303, at ¶4 (noting that this Court had granted an appellant's motion to stay the appeal and remand the matter to the trial court for the determination of a Civ.R. 60(B) motion). Rather than do so, Allen waited for this Court to issue its decision in *Allen I*. The requirement that Allen sign a commercially reasonable subordination agreement as a part of the parties' settlement agreement was an issue squarely before this Court in the parties' first appeal. *Allen I* resulted in this Court concluding that: (1) the parties had an enforceable settlement agreement; and (2) one term of that agreement was that Allen would sign a commercially reasonable subordination agreement. *Allen I* at ¶13-14. This Court specifically remanded the matter "for a determination of whether the subordination agreement proposed by BCI and its bank lenders [was] 'commercially reasonable' as that term is used in the parties' settlement agreement." Id. at ¶19. Allen's argument that no subordination agreement is required due to either waiver or estoppel wholly conflicts with this Court's decision in *Allen I*. The time for Allen's waiver or estoppel argument has long since passed.

{¶12} "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, paragraph one of the syllabus.

> "[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *** [T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. In pursuit of these goals, the doctrine functions to compel trial courts to follow the mandates of reviewing courts. *** [T]he trial court is without authority to extend or vary the mandate given." (Internal citations omitted.) Id. at 3-4.

After *Allen I*, this Court's conclusion that the settlement agreement between the parties required Allen to sign a commercially reasonable subordination agreement became the law of the case.

See id. Allen asked the trial court, several months after our remand in *Allen I*, to conclude that he was not required to sign a subordination agreement as a term of the settlement. Allen's argument runs afoul of the law of the case doctrine, and the trial court lacked the authority to entertain it. See id.

{¶13} The trial court ultimately rejected Allen's waiver/estoppel argument. Thus, the court reached the correct result, albeit on other grounds. This Court has held that "[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial." *In re Estate of Baker*, 9th Dist. No. 07CA009113, 2007-Ohio-6549, at ¶15. Allen failed to present his waiver/estoppel argument in a timely manner, and this Court's decision in *Allen I* became the law of the case. Because the fact of BCI's redemption appeared in the record well before *Allen I's* issuance, we do not consider this case to be an instance of an "extraordinary circumstance" where the law of the case doctrine would not apply. See *Nolan*, 11 Ohio St.3d at paragraph one of the syllabus. Allen's sole cross-assignment of error is overruled.

Assignment of Error Number Three

> "THE TRIAL COURT ERRED IN HOLDING THAT THE REVISED SUBORDINATION AGREEMENT CAN BE DEEMED SIGNED AS OF FEBRUARY 15, 2010."

{¶14} In their third assignment of error, BCI and the Directors argue that the trial court erred by deeming Allen to have signed the subordination agreement as of February 15, 2010.

{¶15} The specific portion of the trial court's judgment entry at issue in this assignment of error reads as follows:

> "The subordination agreement prepared by BCI in October 2006 is 'commercially reasonable.' Roy K. Allen is ordered to execute said subordination agreement within 10 days of the filing of this judgment entry. Should he fail or refuse to do so, the subordination agreement shall be deemed to have been executed by Allen

> as of February 15, 2010. The parties should thereafter proceed to close the settlement agreement according to the terms thereof."

The trial court did not cite to any particular authority in the foregoing portion of its ruling, but both parties present arguments based on the assumption that the court relied upon Civ.R. 70. Both parties concede and the filings in the record confirm that Allen did not sign the subordination agreement.

{¶16} Civ.R. 70 provides, in relevant part, as follows:

> "If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. *** The court may also in proper cases adjudge the party in contempt."

"Civ.R. 70 grants the court authority to enforce a previous court order to have a specific act performed." *Tessler v. Ayer* (1995), 108 Ohio App.3d 47, 52.

{¶17} As further explanation for the age and unnecessary complexity of this matter, the record reflects the following. BCI and the Directors argue on appeal that the trial court had no authority to deem their subordination agreement as having been executed by Allen. Further, they argue that Civ.R. 70 does not apply here. On October 5, 2006, however, BCI made the following statements in its motion to enforce before the trial court:

> "[T]he Court has the authority to enforce the [settlement agreement] by compelling Allen to sign the Revised Subordination Agreement or to deem the Revised Subordination Agreement to be signed[.] *** BCI requests this Court to enforce the terms of the Settlement Agreement and order Allen to execute the Revised Subordination Agreement and in the event that Allen refuses, to order that the Revised Subordination Agreement *be deemed to have been executed by him in accordance with Civ.R. 70 and applicable law*." (Emphasis added.)

BCI now attempts to back-pedal and insists that it "has been clear since the time of the first appeal that [BCI] did not seek the trial court to 'deem' Allen to have signed the subordination

agreement."[2] That clarity is lost on this Court, however, as BCI specifically requested in its appellate brief in *Allen II* that this Court "remand [the matter] with instructions for the trial court to enforce the Settlement Agreement as written by compelling Allen to sign [the] revised subordination agreement or *deeming the subordination agreement signed by Allen as a matter of law*." (Emphasis added.) Meanwhile, Allen, who refused to sign the subordination agreement and has not even challenged its commercial reasonableness on appeal, argues that it was proper for the trial court to deem the subordination agreement as having been signed by him.

{¶18} "Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *Mann v. Mendez*, 9th Dist. No. 04CA008562, 2005-Ohio-3114, at ¶25, quoting *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. Contrary to its argument on appeal, the record reflects that BCI asked that the subordination agreement be deemed signed by Allen on multiple occasions. Indeed, BCI specifically asked that the subordination agreement be deemed signed pursuant to Civ.R. 70. Now that the trial court has honored BCI's request, BCI argues that it was error for the court to do so. We must conclude that the invited-error doctrine prohibits BCI from assigning error to the very action it repeatedly invited the trial court to take. See *Mann* at ¶25. It is not entirely clear whether the trial court relied upon Civ.R. 70 or ordered specific performance as a function of equity, as the court incorporated reasoning from a prior decision that included specific performance case law. Either way, however, the invited-error doctrine prohibits BCI from arguing that the court lacked authority to deem the subordination agreement as having been signed by Allen.

[2] In fact, BCI goes so far as to say that after October 5, 2006 "BCI did not make this argument with respect to the Revised Subordination Agreement."

{¶19} In spite of the foregoing, we are mindful that the subordination agreement at issue still does not bear a physical signature and that this fact may create difficulties for third parties, such as BCI's lenders. The trial court merely deemed the agreement signed rather than "direct[ing] the act to be done at the cost of [Allen] by some other person appointed by the court[.]" Civ.R. 70. Accordingly, we remand the matter for the court to do so. In remanding this matter, we caution all involved that: (1) the parties have an enforceable settlement agreement; (2) Allen agreed as a term of that agreement to be bound to a commercially reasonable subordination agreement; (3) BCI's October 2006 subordination agreement is a commercially reasonable subordination agreement; and (4) Allen is bound to all the terms of the October 2006 subordination agreement, consistent with the trial court's February 5, 2010 judgment entry. Our remand with regard to this assignment of error is solely for the ministerial purpose of obtaining a physical signature on the October 2006 subordination agreement for the benefit of outside parties. It is not to permit the exhaustive re-litigation of these issues. BCI and the Directors' third assignment of error is overruled in part and sustained in part, to the extent that we remand this matter for the foregoing purpose.

Assignment of Error Number One

"THE TRIAL COURT ERRED IN AWARDING ALLEN PRE-JUDGMENT INTEREST."

{¶20} In their first assignment of error, BCI and the Directors argue that the trial court erred by awarding Allen pre-judgment interest pursuant to R.C. 1343.03(A). Specifically, they argue that the settlement payments under the parties' agreement never became "due and payable" because Allen never signed a subordination agreement, a condition precedent to payment. BCI and the Directors also argue that it is inequitable to award Allen pre-judgment interest when he was the party who caused the delay in this matter by refusing to perform.

{¶21} This Court applies a de novo standard of review to an appeal from a trial court's interpretation and application of a statute. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶4.

{¶22} R.C. 1343.03(A) provides, in relevant part, as follows:

> "[W]hen money becomes due and payable upon any *** settlement between parties, *** the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."

"At the point of settlement, a settlement debt is created, and [a] plaintiff becomes a creditor entitled to the settlement proceeds. Thus, the plaintiff is entitled to be compensated for the lapse of time between accrual of that right (the date of settlement) and payment." *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, at ¶11. "An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment, legitimate claims." *Royal Electric Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 116-17.

{¶23} The trial court determined that the parties' settlement became due and payable on May 8, 2006 because that is the date they told the trial court they had resolved their dispute. By the plain language of the parties' settlement agreement, however, Allen's settlement payments did not become due and payable upon their entering into the agreement. According to its plain language, the settlement agreement could not close and the money was not due until Allen signed a commercially reasonable subordination agreement. Allen never did so.

{¶24} The problem here is that the parties' settlement agreement did not contemplate what might happen if there was a delay because Allen refused to sign a subordination agreement. Arguably, Allen could have refused to sign any subordination agreement (under the guise of challenging commercial reasonableness) for an extended period of time with the hopes of obtaining interest on the entire settlement debt for that time period at the higher statutory rate. BCI essentially adopts this logic by arguing that Allen should be charged with the delay in this matter because he has refused to sign BCI's commercially reasonable subordination agreement since October 2006. Yet, Allen cannot be said to have unreasonably delayed the settlement agreement by choosing to litigate the issue of commercial reasonableness if he, in good faith, believed that BCI never tendered such an agreement. Only after years of litigation and with the benefit of hindsight do we now have a definitive ruling that BCI's October 2006 subordination agreement was commercially reasonable.

{¶25} Moreover, BCI does not deny that it redeemed Allen's stock on June 23, 2006 without informing him that it had done so. Per the parties' settlement agreement, Allen was to have transferred his stock to BCI and all of BCI's payments to Allen were "to be allocated to the redemption of his BCI stock." BCI did not wait for Allen to transfer his stock. BCI retired the stock on its own initiative after the trial court dismissed the parties' claims (due to the settlement) and released BCI from the temporary orders, which were in place to protect Allen's shareholder rights. To the extent BCI argues that equity does not favor Allen's position, equity hardly bodes in favor of BCI.

{¶26} The Supreme Court has recognized that, between settling parties, the date of settlement and the due and payable date on that settlement may be different. *Layne v. Progressive Preferred Ins. Co.*, 104 Ohio St.3d 509, 2004-Ohio-6597, at ¶13. We must conclude

that this case constitutes an instance where those two dates are different. According to the parties' settlement agreement, Allen's execution of a commercially reasonable subordination agreement was a prerequisite to his receiving payments from BCI. Without a binding subordination agreement, the settlement was not due and payable. Additionally, the settlement agreement contains several other prerequisites to payment, including an exchange of mutual general releases and BCI's execution of a promissory note. The trial court's order recognizes that items remain outstanding, as it provides that: "[t]he subordination agreement shall be deemed to have been executed by Allen as of February 15, 2010. *The parties should thereafter proceed to close the settlement agreement according to the terms thereof*." (Emphasis added.) Although Allen has been deemed to have executed the subordination agreement as of February 15, 2010,[3] the settlement debt is still not due and payable as the plain language of the parties' settlement agreement requires that additional steps be taken on their parts. Because the parties' settlement has not yet become due and payable, Allen is not entitled to prejudgment interest under R.C. 1343.03(A). The assignment of error, therefore, is sustained on that basis.

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN CALCULATING PRE-JUDGMENT AND POST-JUDGMENT INTEREST[.]"

{¶27} In their second assignment of error, BCI and the Directors argue that the trial court erred in calculating Allen's prejudgment and postjudgment interest awards. To the extent this assignment of error relates to the court's prejudgment interest calculations, those arguments are moot based on this Court's resolution of BCI and the Directors' first assignment of error and

[3] We recognize the subordination agreement currently bears no signature and that we have remanded this matter for the purpose of having the agreement signed by an individual appointed by the trial court. See Civ.R. 70. We reiterate, however, that the signature is for the benefit of

we will not address them. See App.R. 12(A)(1)(c). We only address BCI and the Directors' argument as it relates to postjudgment interest.

{¶28} R.C. 1343.03(A) governs postjudgment interest awards as well as prejudgment interest awards. While prejudgment interest awards encourage prompt settlements, "[t]he purpose of [a] postjudgment interest award[] is to guarantee a successful plaintiff that the judgment will be paid promptly, and to prevent a judgment debtor from profiting by withholding money belonging to the plaintiff." *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 147. As with prejudgment interest, however, a judgment or settlement must be "due and payable" before any postjudgment interest can begin to accrue. R.C. 1343.03(A). Because the settlement debt is still not due and payable, see discussion, supra, Allen is not entitled to postjudgment interest either. Accordingly, BCI and the Directors' second assignment of error is sustained on that basis.

III

{¶29} BCI and the Directors' first and second assignments of error are sustained. Their third assignment of error is overruled in part and sustained in part, consistent with the foregoing opinion. Allen's cross-assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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third parties and has no effect on our conclusion that Allen is bound, as a matter of law, to the terms of the October 2006 subordination agreement as of February 15, 2010.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.

BETH WHITMORE
FOR THE COURT

MOORE, J.
CONCURS

CARR, P.J.
DISSENTS, SAYING:

{¶30} I respectfully dissent, as I would sustain Allen's cross-assignment of error.

{¶31} First, I do not agree that our conclusion in *Allen I* that the parties' settlement agreement required Allen to sign a commercially reasonable subordination agreement constitutes law of the case. The parties' agreement contemplated a contemporaneous redemption of shares by BCI and Allen's signing of the subordination agreement. Allen did not discover that BCI redeemed the shares until the appeal in *Allen I* was pending. The majority suggests that Allen's

recourse in light of this newly discovered evidence was to move this Court for remand pursuant to App.R. 15 and then file a motion to vacate the judgment pursuant to Civ.R. 60(B). Allen necessarily would have had to have filed his Civ.R. 60(B) motion prior to moving this Court for remand for the limited purpose of having the trial court rule on that motion. This Court is not obligated, however, to remand a matter to the trial court for disposition of a pending Civ.R. 60(B) motion. Moreover, the majority cites no authority, and I have found none, to indicate that Allen was obligated to file a motion to vacate the trial court judgment pursuant to Civ.R. 60(B) during the pendency of an appeal only to preserve any issues which might otherwise be raised thereby. I find no authority to indicate that he would be foreclosed from filing such a motion at a later date should he fail to do so during the pendency of the appeal. Accordingly, I do not agree that this Court's decision that the parties had an enforceable settlement agreement which required Allen to sign a commercially reasonable subordination agreement is law of the case.

{¶32} Second, I would reverse the trial court's order finding that BCI did not waive the requirement that Allen sign a subordination agreement as a condition of payment under the settlement agreement. Again, the parties contemplated a contemporaneous redemption of shares and execution of the subordination agreement. By secretly redeeming the shares without securing Allen's executed subordination agreement, BCI waived a condition precedent to the terms of the parties' settlement agreement. Accordingly, Allen's performance, i.e., the signing of a commercially reasonable subordination agreement, is excused. Allen cannot be held to the requirement that he sign a subordination agreement when BCI failed to fulfill its own requirement not to redeem the shares prior to the execution of the subordination agreement.

{¶33} For the foregoing reasons, I would sustain Allen's cross-assignment of error. Accordingly, I would conclude that the settlement debt is currently due and payable because of

BCI's waiver of the condition precedent. Therefore, I would overrule BCI's first and second assignments of error. I would not address BCI's third assignment of error because it would be rendered moot.

APPEARANCES:

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