[Cite as *Miller v. Med. Mut. of Ohio*, 2016-Ohio-482.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ELISE MILLER, ET AL.

Plaintiffs-Appellants

-vs-

MEDICAL MUTUAL OF OHIO

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2015CA0007

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Court of Common Pleas, Case No. 2012-CI-0138
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 4, 2016

APPEARANCES:

For Plaintiffs-Appellants

RICHARD T. ROBOL
ROBERT T. ROBOL
Robol Law Office, LLC
433 West Sixth Avenue
Columbus, Ohio 43201

For Defendant-Appellee

CHRISTOPHER S. WILLIAMS
MAURA L. HUGHES
KIRSTY MCNAMARA
Calfee, Halter & Griswold LLP
The Calfee Bldg.
1405 East Sixth St.
Cleveland, Ohio 44114

And

STEVE J. SHROCK
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street
Wooster, Ohio 44691

Hoffman, J.

{¶1} Plaintiff-appellant Pharmaceutical Alternatives Inc. ("PAI") appeals the June 5, 2015 Judgment Entry entered by the Coshocton County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee Medical Mutual of Ohio ("MMO").

STATEMENT OF THE FACTS AND CASE

{¶2} PAI operated a "closed-door pharmacy" located in Coshocton, Ohio. Elise Miller was the sole owner of PAI. In 2000, PAI and MMO, a provider of health insurance, entered into an agreement which provided for reimbursement to PAI for certain services and medications PAI would provide to MMO's insureds (the "Participation Agreement"), as well as two additional agreements, which provided for reimbursement to PAI on an in-network basis (the "Provider Agreements") (collectively, the "Agreements").

{¶3} During the course of the relationship between PAI and MMO, several disputes arose with regard to the Agreements. One such dispute resulted in a lawsuit filed on July 11, 2006, captioned *Pharmaceutical Alternatives, Inc. v. Medical Mutual of Ohio,* Case No. 06–CIV–525 ("the Cardinal Litigation"), which remains pending in the Coshocton County Court of Common Pleas, Coshocton County, Ohio.

{¶4} Miller and PAI entered into negotiations for the sale of PAI to Weinberg & Bell Group sometime in 2007, and 2008. PAI claimed MMO interfered with the potential transaction, disparaged PAI, and withheld payments from PAI with the intent of interfering with PAI's contract.

{¶5} On or about November 5, 2008, PAI filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division. The Chapter 11 bankruptcy was converted to a Chapter 7 proceeding on March 18, 2009. The Bankruptcy Court appointed William B. Logan as the Chapter 7 Trustee ("Bankruptcy Trustee"). On September 24, 2010, the Bankruptcy Court issued an agreed order, authorizing the Bankruptcy Trustee to sell to third-party creditor Cardinal Health 113 LLC ("Cardinal") any and all rights, title and interest to claims and litigation held by PAI against MMO free and clear of any liens and encumbrances. Consistent with the sale, Cardinal stepped into the shoes of PAI in the Cardinal Litigation, and filed a Second Amended Complaint in that proceeding on May 17, 2011. The Bankruptcy Trustee filed a Final Account and Distribution Report on December 8, 2011, which noted the receipt of $60,000, from the "Sale of MMO Litigation" to Cardinal.

{¶6} On or about March 29, 2012, PAI and Miller filed their Complaint against MMO in the Coshocton Court of Common Pleas. The Complaint included claims for breach of written contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, conversion, tortious interference with contractual relations and with prospective business relations, negligent and intentional misrepresentation/fraud, "destruction of business through bad faith in processing and paying insurance and guaranteed claims", and civil conspiracy.

{¶7} On May 25, 2012, MMO filed a motion to dismiss all claims for failure to state a claim under Civ.R. 12(B)(6). PAI and Miller filed a memorandum in opposition. On October 4, 2012, the trial court granted the motion to dismiss.

{¶8} PAI and Miller filed a timely appeal of the trial court's dismissal to this Court, arguing, in part, the trial court erred in granting MMO's motion to dismiss all of PAI's claims based upon the September 24, 2010 Order of the U.S. Bankruptcy Court for the Southern District of Ohio. This Court reversed the trial court's decision to dismiss the Complaint, finding the trial court was precluded from taking judicial notice of the bankruptcy proceedings as such involved the consideration of evidence outside the Complaint. *Miller v. Medical Mut. of Ohio*, Coshocton App. No. 2012CA0020, 2013-Ohio-3179, at paras. 30-31. This Court affirmed the trial court's determination the Complaint failed to state claims of relief for tortious interference, promissory estoppel, intentional and/or negligent misrepresentation, and civil conspiracy as to Miller only. *Id.* at paras. 36, 41, 48, and 54. This Court also affirmed the trial court's decision not to grant PAI and Miller leave to amend the Complaint. *Id.* at para. 60.

{¶9} Upon remand, PAI filed its First Amended Complaint on February 19, 2014.[1] MMO filed a motion for summary judgment on April 30, 2014. In support of its motion, MMO included the September 24, 2010 Bankruptcy Order, which authorized the sale of all of PAI's claims against MMO to Cardinal as well as the Affidavit of the Bankruptcy Trustee, who averred all of PAI's claims against MMO were, in fact, sold to Cardinal. PAI filed a memorandum in opposition, in which it claimed Cardinal transferred some claims

[1] Although Miller was listed as a plaintiff in the caption of the First Amended Complaint, she was not individually named in the claims asserted therein.

against MMO back to PAI following the sale. PAI offered the affidavit of Dana Campbell, PAI's Vice President for Finanace and Accounting,[2] in support of its position. In his affidavit, Campbell averred, during a conversation he and Miller had with Elliot Good, the attorney representing Cardinal in its claims against MMO, Attorney Good informed Campbell and Miller Cardinal was transferring certain tort claims back to PAI in order for PAI to pursue those claims. PAI also moved to strike the affidavit of the Bankruptcy Trustee.

{¶10} Upon MMO's request, the trial court stayed the proceedings to provide MMO with an opportunity to move the Bankruptcy Court to enforce the 2012 order authorizing the sale of PAI's claims against MMO to Cardinal ("Cardinal Sale Order"). MMO filed its motion with the Bankruptcy Court on September 2, 2014, seeking to enforce the Cardinal Sale Order as well as an order finding the principles of bankruptcy estoppel would prohibit a transfer back to PAI of the claims from Cardinal without court supervision. Via Order dated November 17, 2014, the Bankruptcy Court denied MMO's motion, finding it lacked jurisdiction to determine whether Cardinal assigned any claims to PAI. The Bankruptcy Court further found any claims acquired by PAI from Cardinal were not the property of the bankruptcy estate.

{¶11} Upon MMO's motion, the trial court lifted the bankruptcy stay on January 22, 2015. MMO filed a reply brief in support of its motion for summary judgment on February 20, 2015.

{¶12} Via Judgment Entry filed June 5, 2015, the trial court granted summary judgment in favor of MMO, finding Cardinal purchased PAI's claims against MMO from

[2] Dana Campbell is Elise Miller's husband.

the Bankruptcy Trustee, and did not transfer any of the claims back to PAI; therefore, Cardinal is the sole owner of the claims asserted by PAI. The trial court also denied PAI's motion to strike paragraphs 5 and 6 of the affidavit of the Bankruptcy Trustee[3] and granted MMO's motion to strike the affidavit of Dana Campbell.

{¶13} It is from this judgment entry PAI appeals, raising the following assignments of error:

{¶14} "I. THE DECISION BELOW ERRS IN FAILING TO APPLY THE LEGAL STANDARD FOR GRANTING SUMMARY JUDGMENT UNDER CIV. R. 56, REQUIRING THE TRIAL COURT TO EVALUATE WHETHER THERE IS GENUINE ISSUE OF MATERIAL FACT.

{¶15} "II. THE DECISION BELOW ERRS IN FAILING TO APPLY THE LEGAL STANDARD FOR GRANTING SUMMARY JUDGMENT UNDER CIV. R. 56, REQUIRING THAT ANY DOUBTS BE RESOLVED IN FAVOR OF THE NON-MOVING PARTY.

{¶16} "III. THE DECISION BELOW ERRS IN FAILING TO APPLY THE VERBAL ACTS DOCTRINE AND STRIKING THE AFFIDAVIT OF PHARMACEUTICAL ALTERNATIVES' VICE PRESIDENT OF FINANCE AND ACCOUNTING AS HEARSAY.

---

[3] Paragraphs 5 and 6 of the Bankruptcy Trustee's affidavit read:

5. After the entry of the Agreed Order, I caused the sale of the assets listed in the Agreed Order to Cardinal Health 113 LLC, in strict compliance with the terms of the Agreed Order.

6. On or about December 8, 2011, I filed with the Bankruptcy Court the Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to Be Discharged (TDR) ("Final Report", found at Docket Number 510 of the Case), a true copy of which is attached hereto as Exhibit B. In the Final Report, I noted in Exhibit 1, Gross Receipts, the receipt of $60,000 for the "Sale of MMO Litigation," which was a reference to the sale of the claims against MMO to Cardinal Health. I also noted in Exhibit 8, the Individual Estate Property Record and Report, the Estate's receipt of $60,000 from Cardinal Health in exchange for the purchase of the MMO Litigation. *See* Exhibit B hereto, at pp. 3, 20 (Item 6).

{¶17} "IV. THE DECISION BELOW ERRS IN DISREGARDING THE GENUINE ISSUES OF MATERIAL FACT FROM THE NOVEMBER 4, 2014 TESTIMONY OF PHARMACEUTICAL ALTERNATIVES' VICE PRESIDENT OF FINANCE AND ACCOUNTING AND THE BANKRUPTCY PROCEEDING."

I, II

{¶18} Because PAI's first and second assignments of error both address with the propriety of the trial court's decision to grant summary judgment to MMO, we shall address said assignments of error together. In the first assignment of error, PAI contends the trial court erred in granting summary judgment as the court failed to apply the legal standard for granting summary judgment under Civ. R. 56, which requires it to evaluate whether a genuine dispute of material fact exists. In the second assignment of error, PAI asserts the trial court erred in granting summary judgment as the court failed to apply the legal standards for granting summary judgment under Civ. R. 56, which requires it to resolve any doubts in favor of the non-moving party.

{¶19} Civ. R. 56 states, in pertinent part:

{¶20} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶21} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, 424 N.E.2d 311. The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 474 N.E. 2d 271. A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999) 135 Ohio App.3d 301, 733 N.E.2d 1186.

{¶22} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212. This means we review the matter de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E.2d 1243.

{¶23} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Once the moving party meets its initial burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.*

The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 600 N.E.2d 791.

{¶24} PAI presumes the trial court did not apply the correct standard based upon the trail court's choice of words in its June 5, 2015 Judgment Entry. Specifically, PAI points to the trial court's statement: "The Court's reasoning is simple. The full transcript of PAI's bankruptcy court proceeding * * * makes it clear that Cardinal Health purchased PAI's claims from the bankruptcy trustee, and that Cardinal Health did not transfer any of those claims back to PAI", as proof the trial court "affirmatively applied" the wrong legal standard. We disagree. Although the trial court did not use the express language of Civ. R. 56, which it is not required to do, we find implicit in the trial court's language is its determination no genuine dispute(s) of material fact exist; therefore, reasonable minds could only come to one conclusion, and MMO was entitled to judgment as a matter of law. We do not find the judgment entry affirmatively demonstrates the trial court applied the wrong standard under Civ. R. 56.

{¶25} We now determine whether summary judgment was appropriate in this case. As set forth, supra, this Court reviews the trial court's ruling on a motion for summary judgment de novo. De novo review means this Court uses the same standard the trial court should have used, and we examine the evidence to determine whether, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, 701 N.E.2d 1023, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119–20, 413 N.E.2d 1187. Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Powell v. Rion,*

2012–Ohio–2665, 972 N.E.2d 159, ¶ 6, citing *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153.

{¶26} Upon review of the record, we find no genuine issue of material fact exists. The evidence establishes Cardinal purchased all of PAI's claims against MMO from the Bankruptcy Trustee. PAI offered the affidavit of Dana Campbell to show Cardinal transferred some of the claims back to PAI. In his affidavit, Campbell recounts a conversation he and Miller had with Elliot Good, the attorney representing Cardinal in the Cardinal Litigation, during which Attorney Good advised Campbell and Miller Cardinal was transferring certain tort claims back to PAI in order for PAI to "sue and pursue those claims in its own name and for its own benefit." Affidavit of Dana Campbell at para. 7. The trial court struck the Campbell affidavit. Assuming, arguendo, the affidavit had been admitted, we find such does not prove Cardinal did, in fact, transfer some claims back to PAI. The conversation to which Campbell refers did not effectuate a transfer, it was merely a conversation about doing so. PAI failed to present any evidence the transfer actually occurred. Further, there is no evidence Attorney Good had authority to contractually bind Cardinal.

{¶27} Courts cannot presume an agent's or a lawyer's authority to bind a principal to an oral contract unless there is evidence that the principal extended or cloaked the lawyer with authority to settle. *Prime Properties, Ltd. Partnership v. Badah Ents.,* 8th Dist. Cuyahoga No. 99827, 2014–Ohio–206 at para. 18 (Citation omitted). "Absent specific authorization, an attorney has no implied or apparent authority to compromise and settle his client's claims." *Id.* (Citations omitted). A party's retention of an attorney, in and of itself, is not authorization for the attorney to settle the matter. *Id.*

{¶28} More important, under an apparent-authority analysis, it is the client's acts that must create the apparent authority, not the acts of the attorney. The Ohio Supreme Court has stated: "Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority." *Ohio State Bar Assn. v. Martin,* 118 Ohio St.3d 119, 2008–Ohio–1809 at 41.

{¶29} We find the only evidence in the record is the sale to Cardinal from the Bankruptcy Trustee of "any and all rights, title and interest to claims and litigation" held by PAI against MMO free and clear of any liens and encumbrances.

{¶30} PAI's first and second assignments of error are overruled.

III, IV

{¶31} Because PAI's third and fourth assignments of error are interrelated, we shall address them together. In the third assignment of error, PAI maintains the trial court erred in failing to apply the verbal acts doctrine when striking the affidavit of Dana Campbell. In the fourth assignment of error, PAI claims the trial court erred in disregarding Dana Campbell's testimony given during the November 4, 2014 Bankruptcy Hearing. We disagree with both assertions.

{¶32} The trial court struck Campbell's affidavit, finding it was "replete with hearsay". Campbell's testimony at the November 4, 2014 Bankruptcy Hearing reiterated the crux his affidavit, i.e., Cardinal consented to PAI's pursuing the claims in the instant action. PAI explains the statements made by Attorney Good which Campbell recites in his affidavit and to which he testified "are not offered to prove the truth of the matter

asserted", but rather, "they are offered under the verbal acts doctrines to prove that Mr. Good made the statements in question, as part of the transaction creating the agreement and promises by Cardinal with PAI." Brief of Appellant at 17.

{¶33} Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). "Since Evid.R. 802 expressly states that 'hearsay is not admissible,' a trial court's decision to admit hearsay is not governed by the test of abuse of discretion. Instead, errors relating to the trial court's admission of hearsay must be reviewed in light of Evid.R. 103(A) and Crim.R. 52(A), which provide that such errors are harmless unless the record demonstrates that the errors affected a substantial right of the party." *State v. Sapp,* 10th Dist. No. 94APA10–1524 (Aug.15, 1995) quoting *State v. Sorrels,* 71 Ohio App.3d 162, 165, 593 N.E.2d 313 (1st Dist.1991).

{¶34} Not all out-of-court statements are impermissible hearsay. Some statements are verbal acts and may be admitted to explain an actor's conduct. *State v. Cunningham* (July 25, 1991), Franklin App. No. 90AP–427. Statements are verbal acts when such are offered for the fact they were said, not for the truth of the matter asserted. See, *Rex v. Univ. of Cincinnati College of Medicine,* 10th Dist. No. 13AP–397, 2013–Ohio–5110, ¶ 14. Verbal acts have independent legal significance and are relevant without regard to their truth. *Kelly v. May Assoc. Fed. Credit Union,* 9th Dist. No. 23423, 2008–Ohio–1507, citing 1 Glen Weissenberger, *Ohio Evidence,* Section 801.6 (1995).

{¶35} We must examine the averments in Campbell's affidavit to determine if they are hearsay or proof of a verbal act.

{¶36} In his affidavit, Campbell averred:

3. In approximately February, 2011, my wife, Elise Miller, and I had a meeting with Cardinal's counsel, Elliott Good, Esq. During the meeting, we discussed the legal proceedings involving Medical Mutual of Ohio ("MMO"), Cardinal Health, PAI, and various others.

4. Elliot stated that he was the legal representative for Cardinal Health and would be handling communications with us; that Cardinal Health had bought certain claims of PAI in the bankruptcy proceeding in Columbus; and that he/Cardinal Health desired our assistance and cooperation in pursing claims against MMO.

5. Elliott indicated that the Cardinal Health lawsuit was not asserting or making certain types of claims on behalf of PAI, and that Cardinal Health's claims in the litigation were limited to collecting payment for the specific accounts that had not been paid. Elliott indicated that Cardinal Health claims were limited to claims for direct damages for breach of contract and for "unjust enrichment".

6. Elliott said that Cardinal Health's lawsuit did not cover any claims PAI had for torts by MMO, such as tortious interference with contractual and business relations. He also indicated that Cardinal Health's lawsuit did not cover any claims PAI had for the indirect consequences or indirect harms to PAI from MMO's breach of contract. Instead, Cardinal Health's claims were focused solely on the direct claim to recover the amount of the accounts that were owing.

7. My wife and I were upset and immediately stated our strong belief that all PAI's claims should be protected, * * * Elliott replied that PAI could pursue these in its own name and that, even if it was assumed that Cardinal Health had bought or received such claims through the bankruptcy proceeding, it was transferring those to PAI so that PAI could sue and pursue those claims in its own name and for the its own benefit.

8. Elliott reiterated his position that Cardinal Health was acting in good faith and cooperatively in allowing PAI to pursue those claims, and that he expected PAI, Elise, and me to cooperate with Cardinal Health in its claims against MMO in return. * * *

9. Based on this and other communications with Elliott, to the best of my knowledge and belief (a) Cardinal Health was transferring to PAI all claims against MMO for torts and for indirect, consequential damages to PAI for MMO's failure to perform its contract and that PAI, and (b) PAI, Elise and I had a reciprocal duty of cooperating and providing assistance to Cardinal Health.

{¶37} We find Campbell's references to what Attorney Good represented to Campbell and Miller were hearsay as such were offered to prove the truth of the matter asserted, i.e., Cardinal transferred claims back to PAI. Accordingly, we find the trial court did not err in striking Campbell's affidavit or not considering Campbell's testimony.

{¶38} PAI's third and fourth assignments of error are overruled.

{¶39} The judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur