[Cite as *Zele v. Ohio Bell Tel. Co.*, 2023-Ohio-2875.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CHRISTINE ZELE,	:	
Plaintiff-Appellant,	:	No. 111957
v.	:	
THE OHIO BELL TELEPHONE COMPANY,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: August 17, 2023

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-21-956985

Appearances:

Mary Jo Hanson LLC and Mary Jo Hanson, *for appellant*.

Littler Mendelson, P.C., Amy Ryder Wentz and Jennifer B. Orr, *for appellee*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Christine Zele appeals from the trial court's decision granting defendant-appellee The Ohio Bell Telephone Company's ("Ohio Bell") motion to enforce an alleged settlement agreement that resolved employment-related claims Zele had filed against Ohio Bell. Zele contends that the

trial court erred in determining that there was an enforceable settlement agreement between Zele and Ohio Bell and awarding attorney fees to Ohio Bell. Zele also contends that the trial court abused its discretion in refusing to extend discovery deadlines after she changed counsel and in striking her timely, but inappropriately filed, expert report.

{¶ 2} For the reasons that follow, we reverse and remand for an evidentiary hearing on the motion to enforce settlement agreement.

Procedural and Factual Background

{¶ 3} On December 10, 2021, Zele filed a complaint in the Cuyahoga County Court of Common Pleas asserting claims of sexual harassment, failure to provide a reasonable accommodation, sex discrimination, age discrimination, retaliation, declaratory judgment and unjust enrichment against Ohio Bell following the termination of her employment as a telecommunications specialist after more than 23 years of employment with the company. In February 2022, the trial court issued orders establishing a case schedule, including a nonexpert discovery deadline of May 2, 2022,[1] a May 4, 2022 settlement conference, a deadline of May 6, 2022 for plaintiff to "complete and exchange expert reports" and a June 27, 2022 trial date.

{¶ 4} On April 19, 2022, the parties and their counsel participated in a private mediation in an attempt to resolve the parties' dispute. At the mediation, Ohio Bell was represented by attorney Amy Ryder Wentz ("Attorney Wentz" or

[1] On March 22, 2022, the trial court granted Zele's motion to extend the nonexpert discovery deadline from May 2, 2022 to May 13, 2022. However, subsequent journal entries still listed a nonexpert discovery deadline of May 2, 2022.

"Ohio Bell's counsel"); Zele was represented by attorneys Mark Biggerman ("Attorney Biggerman") and Sheldon Starke ("Attorney Starke"). The parties dispute what happened next. Ohio Bell contends that "[a]fter more than 11 hours of mediation, Zele proposed settling her claims for a stated sum and, to avoid the cost and uncertainty of trial, Ohio Bell agreed to her demand." Zele agrees that "the mediation lasted about twelve (12) hours," but contends that "there was no settlement." Zele did not sign any writing acknowledging a settlement at the conclusion of the mediation.

{¶ 5} At 9:12 p.m. on April 19, 2022, Ohio Bell's counsel sent an email to Attorney Biggerman, copying the mediator, "to confirm the key terms of the Parties' settlement agreement." In her email, Ohio Bell's counsel set forth the following "key terms" of the settlement agreement (the "term sheet"):

> Ohio Bell agrees to pay Ms. Zele $[redacted] in exchange for a full release of claims and covenant not to sue; indemnification of taxes; confidentiality and a liquidated damages agreement of $[redacted] per breach plus attorney's fees for having to enforce the confidentiality provision; unilateral non-disparagement as to Ms. Zele; no re-employment (although the settlement agreement will specify that the agreement does not disturb her vested benefits, if any); an agreement to arbitrate future claims, including enforcement of the agreement; and other standard terms to be agreed on in writing, including the return of all Company property (e.g., documents and records) in Ms. Zele's possession. In addition, the Company agrees to provide a neutral employment verification for Ms. Zele through the Work Number. The Company also agrees to disburse the settlement payment in three checks — one check to counsel for attorneys' fees and costs, one check to Ms. Zele for lost wages, and one check to Ms. Zele for emotional distress damages. The checks made payable to Ms. Zele will be split 50/50 after the deduction of attorneys' fees. The settlement payment will be reported to the tax authorities as required by law.

{¶ 6} At 9:20 p.m., Attorney Biggerman responded to the email, copying the mediator: "Confirmed by Christine Zele and counsel."

{¶ 7} The following day, April 20, 2022, Ohio Bell's counsel emailed Attorney Biggerman and requested that he provide "the amount of attorney's fees/costs and to whom that check should be made payable." She stated that she could then "finish up the draft settlement agreement and get it to [Attorney Biggerman] for review." Attorney Biggerman responded and provided the requested information.

{¶ 8} On April 20, 2022, the mediator sent a letter, forwarding her invoice, to counsel for the parties. She thanked counsel for the opportunity to mediate the case and indicated that she was "very happy that you were able to come to a settlement."

{¶ 9} On April 26, 2022, Ohio Bell's counsel sent Attorney Biggerman a proposed written settlement agreement "memorializing the parties' agreement" for review, along with tax forms. On April 27, 2022, Attorney Biggerman, copying Attorney Starke, responded that he had received the proposed written settlement agreement and had forwarded it to Zele for review.

{¶ 10} On May 4, 2022, the trial court issued a journal entry that stated: "Settlement conference held. Case did not settle. All dates and orders remain in effect."

{¶ 11} On May 5, 2022, Attorney Biggerman filed a motion for leave to withdraw as counsel for Zele, pursuant to Prof. Cond. R. 1.16(b)(4) and Loc.R. 10 of

the Local Rules of the Court of Common Pleas of Cuyahoga County, General Division ("Loc.R. 10"), asserting that he had had "a fundamental disagreement" with Zele and that he believed it had "become impossible for him to continue representing Ms. Zele in this matter." Attorney Starke filed a similar motion, asserting that, after representing Zele at the May 4, 2022 settlement conference, she had asked him to withdraw as her counsel. The trial court granted the motions and indicated that "[a]ll dates and orders remain as set." The following day, new counsel, Mary Jo Hanson ("Attorney Hanson"), entered an appearance for Zele.

Zele's Expert Report and Request for Extension of Discovery Deadlines

{¶ 12} On May 6, 2022, Zele filed a motion for extension of time, requesting a seven-day extension, until May 13, 2022, to submit plaintiff's expert report because the expert had "obligations that require additional time." The trial court granted the motion, in part, permitting Zele to submit her expert report by May 11, 2022. On May 11, 2022, Zele filed a "motion to expand discovery period of non expert witnesses" to allow her to take the depositions of Ohio Bell supervisors and/or a company official, asserting that "fairness" dictated that she be permitted to depose "the necessary parties prior to trial" because these depositions "were not taken prior to the mediation and are necessary for Plaintiff's case." Zele did not identify the length of time for which she was requesting an extension. The trial court denied the motion.

{¶ 13} On May 12, 2022, Zele filed a "notice of submission of expert report instanter," attaching a copy of her expert's report. In the notice, Zele asserted that her expert report had been filed the previous day but "was rejected due to an e-filing problem."[2] Zele asserted that she "learned of the rejection from a docket check" and requested that the trial court "accept the expert report instanter." On May 13, 2022, the trial court issued a journal entry ordering the clerk "to strike [Zele's] notice of submission of expert report," noting that the expert report had been filed "along with [the] notice of submission." The trial court also ordered that the "report [be] redacted." On May 25, 2022, the trial court issued a further judgment entry that stated: "The court did not grant leave to plaintiff for late filing of expert report. Therefore plaintiff[']s 'notice' sending same to expert [sic] is stricken. The expert report will not be permitted as evidence as plaintiff did not comply with the court[']s orders regarding production of the expert report."

[2] It is unclear from the record whether a copy of Zele's expert report was provided to Ohio Bell on May 11, 2022 or whether Ohio Bell first received a copy of the expert report through the court's electronic-filing system on May 12, 2022.

Ohio Bell's Motion to Dismiss and Enforce Settlement Agreement and for Attorney Fees

{¶ 14} On May 11, 2022, Ohio Bell's counsel emailed Attorney Hanson, attaching a copy of the term sheet and the proposed written settlement agreement she had previously forwarded to Attorney Biggerman. Attorney Hanson responded that she was "operating under the Judge's entry that states case did not settle" and indicated that she was "eager to work" with Ohio Bell's counsel "to reach a settlement [Zele] would agree to" but that Zele had "clearly informed" her that "this settlement she is not in agreement with." Attorney Hanson sent additional emails to Ohio Bell's counsel on May 11, 2022, indicating that she was "finishing the discussion with our expert," that she would be "delivering the expert report today," that her paralegal would "attempt to schedule * * * depositions in this matter" and that she would be "happy also to submit Ms. Zele's demand." Attorney Hanson stated that Zele was "very easy so far to work with, and [Zele] wants to put this matter behind her, however, she wants to be treated fairly."

{¶ 15} On May 17, 2022, at the request of Ohio Bell's counsel, the mediator sent an email to Ohio Bell's counsel confirming that a mediation was held in the case on April 19, 2022, that the parties had been represented by counsel at the mediation and that "a settlement was reached at mediation."

{¶ 16} On May 19, 2022, Ohio Bell's counsel sent an email to Attorney Hanson, "follow[ing] up" on telephone conversations they had had on May 9 and 13, 2022 "regarding [Zele's] attempt to renege on her settlement agreement with Ohio

Bell." In her email, Ohio Bell's counsel asserted that, at the mediation, Zele had made a "'last and final' settlement proposal" to Ohio Bell, and, "to avoid further litigation costs," Ohio Bell had accepted her "proposal." Ohio Bell's counsel detailed the efforts that had been made, unsuccessfully, to finalize the "formalized settlement agreement" with Zele. Ohio Bell's counsel asserted that Zele could not "renege on her contractual obligations because she changed her mind" and attached a copy of a motion to dismiss and enforce settlement and motion for fees Ohio Bell intended to file unless Zele executed a formal settlement agreement and voluntarily dismissed her lawsuit with prejudice. Zele did not execute a settlement agreement and did not voluntarily dismiss her lawsuit with prejudice.

{¶ 17} On May 20, 2022, Ohio Bell filed a motion for leave to file a "forthcoming" motion to dismiss and enforce settlement agreement and supporting documentation under seal because it would contain details relating to an alleged settlement between the parties, the terms of which the parties had agreed to "keep confidential." The trial court denied the motion, stating: "The defendant[']s motion states the case is settled, however the court has never received any such notice and the case remains pending and dates and orders remain as set. Since the parties have not filed a dismissal with the court, the court will not hear a motion to enforce or review any such pleadings."

{¶ 18} On May 24, 2022, Ohio Bell filed a "motion to dismiss and enforce settlement agreement, motion for fees, and motion for expedited briefing schedule." Ohio Bell claimed that a settlement had been reached at the mediation, evidenced

by the written term sheet and subsequent email correspondence between Ohio Bell's counsel and Zele's former counsel, and that Zele had "renege[d]" on the settlement by continuing to litigate her claims. Ohio Bell requested that the trial court enforce the parties' settlement agreement, dismiss Zele's lawsuit with prejudice and order Zele to pay Ohio Bell's attorney fees incurred in enforcing the parties' settlement agreement.

{¶ 19} In support of its motion, Ohio Bell submitted an affidavit from Attorney Wentz, setting forth Ohio Bell's version of the events as described above, along with copies of the term sheet, the proposed written settlement agreement Attorney Wentz had sent to Attorney Biggerman, the April 20, 2022 and May 17, 2022 correspondence from the mediator and the emails exchanged between counsel relating to the alleged settlement.

{¶ 20} The following day, the trial court denied the motion, stating:

> Motion to dismiss is denied. The parties did not notify the court of any settlement and dismissal with prejudice. Per the pleading of the defendant, emails between the parties were exchanged and no private mediation agreement signed. Also per the pleadings, the parties agreed that if the mediation was memorialized any disputes were to be addressed by an arbitrator. Further, the defendant's pleadings state that the mediation and emails were with plaintiff[']s prior counsel, not current counsel. Therefore, the court has no jurisdiction to grant a motion to dismiss.

{¶ 21} The parties continued to litigate the case. On June 13, 2022, the trial court held a pretrial conference at which it granted Ohio Bell leave to refile its motion to dismiss and enforce settlement agreement. As directed by the trial court, Ohio Bell refiled its motion. The trial court continued the trial to August 22, 2022.

{¶ 22} On June 21, 2022, Zele filed a response in which she argued that there was no enforceable settlement agreement because there was "no conclusive meeting of the minds," the "settlement lacked the clarity and certainty required by law" and Zele was "under duress," was "not in the room" at the end of the mediation when the alleged settlement was reached and did not sign any settlement agreement or term sheet. Zele stated that she "believed the amount that she was agreeing to was just for her damages, and that attorney fees and other damages were expected," that, "at all times, she was discussing with her attorneys that any settlement she would agree to would also have to have other terms and conditions set forth, including pension money lost, patent damages, lost wages, attorney fees, costs, and expert fees that were paid in excess of the [alleged settlement amount]" and that she "was not in agreement to that number at the end of mediation without all of her terms and conditions being met, in addition to the damages numbers." With respect to Ohio Bell's request for attorney fees, Zele asserted that she should not be ordered to pay Ohio Bell's attorney fees because she "never agreed to something that was lower than what she had advanced in total," "did not sign anything" and "does not have a settlement [that] includes all terms and conditions negotiated." Zele requested that the trial court schedule an evidentiary hearing on Ohio Bell's motion.

{¶ 23} In support of her response, Zele submitted an affidavit, in which she averred, in relevant part:

> 3. I do not believe there was a settlement of this specific number, without many other terms and conditions related to:

Confidential Clause, Attorney fees, expert fees, costs of the court, pension and retirement fees, lost wages, and more.

4. I simply was exhausted at the end of the day, and believed my attorneys had my back, and were negotiating what I was discussing with them.

5. I believe they thought it was in addition, because [Attorney Wentz] herself says, in addition to a separate check for attorney fees.

6. When the settlement agreement arrived, I could not believe the missing terms and conditions that I believed were part of the settlement.

7. I believed that my attorney could not do the trial because he had another trial in Florida.

8. Also, I would not have agreed to a number lower than what I had advanced already in attorney fees and expert fees and costs as the total number.

9. I ask for a hearing on this matter.

10. I further would settle this matter, if all the terms and conditions are included in this settlement agreement that I believed I had agreed to.

{¶ 24} The trial court did not hold an evidentiary hearing on Ohio Bell's motion to dismiss and enforce settlement agreement. On June 27, 2022, the trial court issued a journal entry in which it stated: "The court having reviewed the motion to dismiss and to enforce settlement, finds that Ohio law requires that [Ohio Bell's] motions be granted." The trial court indicated that the case was to be dismissed with prejudice, ordered Zele to "comply with the terms of the settlement agreement previously reached in mediation," ordered Zele to pay "attorney fees

incurred by [Ohio Bell] for the filing of the enforcement action" and scheduled a hearing to determine the amount of attorney fees to be awarded to Ohio Bell.

{¶ 25} On July 19, 2022, Zele filed a motion to continue the hearing on attorney fees because she was ill and unable to participate in the hearing. The trial court granted the motion. The parties thereafter agreed to waive a hearing on attorney fees and "submit evidence by brief."

{¶ 26} On July 22, 2022, Ohio Bell filed its "evidence of attorney fees and motion for judgment entry permitting to defendant to deduct attorney's fees from settlement payment." In support of its attorney fee request, Ohio Bell submitted an affidavit from Attorney Wentz. Ohio Bell also submitted, for in camera review, invoices its counsel's firm prepared documenting the fees charged to Ohio Bell and the specific work performed.[3] There is no evidence in the record that Zele objected to this procedure or requested a redacted copy of the invoices Ohio Bell submitted to the trial court in support of its requested attorney fee award.

{¶ 27} In her affidavit, Attorney Wentz asserted that Ohio Bell had incurred a total of $35,389.18 in attorney fees for 93.4 hours of work — i.e., $6,058.88 in attorney fees for 15.1 hours of work for "services related to attempting to enforce the parties' settlement agreement," $6,305.66 in attorney fees for 17.1 hours of work for "services related to preparing Defendant's Motion to Enforce Settlement" and

[3] The documents Ohio Bell submitted to the trial court for in camera review were not included in the record forwarded to this court on appeal.

$23,024.64 in attorney fees for 61.2 hours of work for "services related to trial preparation caused by Plaintiff's refusal to abide by the settlement agreement."

{¶ 28} In her affidavit, Wentz further identified her hourly rates and the rates of three associates and a research librarian who worked on the case, identified the time entries related to Ohio Bell's efforts to enforce the settlement agreement and the trial preparation costs Ohio Bell was "forced to incur" as a result of Zele's breach of the settlement agreement and averred that this work was "reasonable and necessary" "based upon the issues present in the litigation and the Court's pre-trial schedule."

{¶ 29} Zele filed a response to Ohio's Bell "evidence of attorney fees and amount" along with a request that the trial court reconsider enforcement of the settlement agreement. Zele argued that she "should not have to pay for any fees" because (1) she "did not agree to any fees," (2) a legitimate dispute existed between the parties as to the existence of a settlement agreement, (3) the amount of fees charged by Ohio Bell's attorneys was "exceptional" for "a sole individual-Plaintiff who is just trying to get her day in court," (4) she had not "acted frivolously or with any type of reckless disregard" in challenging the existence of the settlement agreement and (5) she "should not have to pay these huge fees, to be able to argue that a settlement does not exist." Zele did not make any specific challenges to the reasonableness of any of the attorney fees claimed by Ohio Bell.

{¶ 30} With respect to her motion for reconsideration, Zele argued, once again, that there were factual issues as to whether an enforceable settlement

agreement existed that warranted an evidentiary hearing, i.e., that (1) she had not settled the case "in her eyes or in her mind," (2) "the settlement number provided [did] not even cover the attorney fees she had already paid," (3) she had not "authorized the settlement with Ohio Bell," (4) she "was not in the room when it was settled," (5) she had not signed any document settling the case, (6) she "believed that a settlement agreement would be drafted, including all of her terms and conditions that her attorneys knew were of issue" and (7) her attorneys "wanted it settled, which created the major breakdown," because no depositions had been taken on Zele's behalf, the parties had been told that there would be no continuance of the trial date and one of her attorneys had told her he had to be in Florida for another trial on the scheduled trial date.

{¶ 31} Upon consideration of the parties' briefs, the trial court entered a journal entry stating that "[d]efense counsel has requested approximately $40,969 in fees,"[4] ordering Zele to pay $25,000 "as and for reasonable attorney fees" and stating that Ohio Bell could deduct that amount from the settlement amount upon which the parties had previously agreed. The trial court did not otherwise explain the basis for its fee award or how it calculated the amount of fees awarded. The trial court denied Zele's motion for reconsideration.

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[4] It is unclear from the record what the trial court relied upon for its statement that "[d]efense counsel has requested approximately $40,969" in attorney fees. According to the affidavit of Attorney Wentz, which Ohio Bell submitted "as proof of the fees incurred by Ohio Bell resulting from Zele's refusal to comply with the Parties' settlement agreement," Ohio Bell incurred a total of $35,389.18 in attorney fees "that could have been avoided but for Zele's refusal to comply with the Parties' settlement agreement."

{¶ 32} Zele appealed, raising the following three assignments of error for review:

First Assignment of Error

The Court abused its discretion by ruling that there was a settlement and attorney fees owed to the Defendant by the Plaintiff, because there was no settlement agreement and Ms. Zele did not sign the agreement or sign a term sheet. Further, there was an additional settlement conference held by the [trial judge], at which Ms. Zele had to submit her proposal for settlement and then there was a conference. Additionally, prior to Attorney Hanson arriving on the case, there is a Judgement entry where the Judge declared there was no settlement after meeting with counsel. This had been ruled upon prior to the final ruling several times, and after settlement conference, the Judge erred by asking and permitting the Defense to refile a motion she had already denied, to enforce settlement. It was almost as if it were a punishment to Ms. Zele. Plaintiff Ms. Zele had not agreed, nor were there any agreements to terms and conditions of any settlement offer. The initial settlement conference with a mediator went 12 hours or so, and this did not provide any clarity for Ms. Zele as to terms and conditions. Although Defense states that there was a term sheet, Ms. Zele never signed a term sheet. Her former counsel may have, but not with her permission, as the terms and conditions were missing. Further, after this, there was a hearing at the court, where it was indicated that there was no settlement achieved. Then, an additional settlement conference was scheduled, and the parties appeared before the [trial judge], and the requirements were laid out as to what had to be supplied. It was after this conference that the Judge asked for the Defendant to file her motion again. Ms. Zele again asked for reconsideration and addressed the attorney fees, only to be denied her right to a fair process of the court having a trial on her employment case. This was an abuse of discretion.

Second Assignment of Error

The Cuyahoga County Court of Common Pleas abused its discretion by ruling that Ms. Zele could not have any additional time for discovery upon a change of counsel with regards to depositions. Ms. Zele although had paid an enormous amount of funds for litigation, had taken no deposition of anyone at this juncture, it was not unreasonable to ask for some time to do this. The fairness would be that Ms. Zele provided her testimony under oath, but the company did not have to

appear. It was not unreasonable in the time frame of the case to ask for this continuance.

Third Assignment of Error

The Cuyahoga County Court of Common Pleas abused its discretion by ruling that her expert report could not be admitted, although filed timely, was not filed appropriately, so a least restrictive result could be to correct. Therefore, Plaintiff should be able to use her expert report.

Law and Analysis

Motion to Enforce Settlement Agreement

Requirements for an Enforceable Settlement Agreement

{¶ 33} A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). Like any other contract, it requires an offer, acceptance, consideration and mutual assent between two or more parties with the legal capacity to act. *See, e.g., Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16; *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997). For a settlement agreement to be enforceable, there must be a "meeting of the minds" as to the essential terms of the agreement. *Kostelnik* at ¶ 16-17. The essential terms of the agreement must be "'reasonably certain and clear'" and mutually understood by the parties. *Id.*, quoting *Rulli* at 376. As the Ohio Supreme Court explained in *Rulli*:

> "A court cannot enforce a contract unless it can determine what it is. * * * [The parties] must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are."

Rulli at 376, quoting 1 *Corbin on Contracts*, Section 4.1, at 525 (Rev.Ed.1993).

{¶ 34} An oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract. *Kostelnik* at ¶ 15; *see also Wilson v. Pride*, 8th Dist. Cuyahoga No. 107793, 2019-Ohio-3513, ¶ 31-33 ("A settlement agreement may also be enforced regardless of whether it has been reduced to writing so as long as the terms of the agreement can be established by clear and convincing evidence."), citing *Carkido v. Sweeney*, 8th Dist. Cuyahoga No. 107383, 2019-Ohio-460, ¶ 15.

{¶ 35} "Once a settlement offer has been accepted, the settlement agreement is mutually binding; the settlement agreement cannot be set aside simply because one of the parties later changes its mind." *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel*, 2019-Ohio-3756, 142 N.E.3d 1267, ¶ 68 (8th Dist.); *Turoczy Bonding Co. v. Mitchell*, 8th Dist. Cuyahoga No. 106494, 2018-Ohio-3173, ¶ 18 ("Once there is * * * a meeting of the minds, one cannot refuse to proceed with settlement due to a mere change of mind."), citing *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36-37, 470 N.E.2d 902 (1984); *Clark v. Corwin*, 9th Dist. Summit No. 28455, 2018-Ohio-1169, ¶ 13 ("'[W]hen the parties agree to a settlement offer, [the] agreement cannot be repudiated by either party, and the court has the authority to sign a journal entry reflecting the agreement and to enforce the settlement.'"), quoting *Shetler v. Shetler*, 9th Dist. Wayne No. 00CA0070, 2001 Ohio App. LEXIS 2289, 4-5 (May 23, 2001); *Kostelnik* at ¶ 17 ("'[A]ll agreements

have some degree of indefiniteness and some degree of uncertainty'"; however, "'people must be held to the promises they make.'"), quoting 1 *Corbin on Contracts*, Section 4.1 at 530 (Perillo Rev.Ed.1993). The burden of establishing the existence and terms of a settlement agreement lies with the party who claims the agreement exists. *Turoczy* at ¶ 19.

{¶ 36} It is only where the parties intend that there will be no contract until the agreement is fully reduced to writing and executed that no settlement exists unless the final, written settlement agreement is signed by all the parties. *PNC Mtge. v. Guenther*, 2d Dist. Montgomery No. 25385, 2013-Ohio-3044, ¶ 15; *see also Gouveia v. Cvengros*, 11th Dist. Trumbull No. 2022-T-0074, 2023-Ohio-1325, ¶ 35 ("When an agreement encompasses "'further action toward formalization * * *, so that either party may refuse to agree, there is no contract. In other words, as long as both parties contemplate that something remains to be done to establish a contractual relationship, there is not binding contact.'""), quoting *Hopes v. Barry*, 11th Dist. Ashtabula No. 2010-A-0042, 2011-Ohio-6688, ¶ 41, quoting *Weston, Inc. v. Brush Wellman, Inc.*, 8th Dist. Cuyahoga No. 65793, 1994 Ohio App. LEXIS 3349, 14 (July 28, 1994).

{¶ 37} If a client authorizes its attorney to negotiate a settlement and the attorney negotiates a settlement within the scope of that authority, the client is bound by it. *See, e.g., Bromley v. Seme*, 2013-Ohio-4751, 3 N.E.3d 1254, ¶ 25 (11th Dist.) ("'It is well-recognized that a party may be bound by the conduct of his or her attorney in reaching a settlement.'"), quoting *Saylor v. Wilde*, 11th Dist. Portage No.

2006-P-0114, 2007-Ohio-4631, ¶ 12. However, whether a party authorized his or her attorney to settle a case on certain terms is generally a question of fact. *See, e.g., Schalmo Builders, Inc. v. Zama*, 8th Dist. Cuyahoga No. 90782, 2008-Ohio-5879, ¶ 17; *PNC Mtge.* at ¶ 12.

Evidentiary Hearing to Determine the Existence of an Enforceable Settlement Agreement

{¶ 38} In her first assignment of error, Zele contends that, due to unresolved factual issues, the trial court erred in finding that the parties entered into an enforceable settlement agreement without first conducting an evidentiary hearing.

{¶ 39} Ohio Bell responds that the trial court did not err in enforcing the settlement agreement because "[t]he undisputed record before the trial court" demonstrated that "a settlement was reached at mediation" — i.e., that the evidence established that "the parties, through their counsel, confirmed its terms" — and there was, therefore, "no need for an evidentiary hearing." We disagree.

{¶ 40} We recognize that "[s]ettlement agreements are generally favored in the law." *Turoczy*, 2018-Ohio-3173, at ¶ 16; *see also Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972) ("'The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. * * * The resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole.'"), quoting 15 American Jurisprudence 2d, Compromise and

Settlement, Section 4 at 938; *Ortiz v. United States Fid. & Guar. Co.*, 8th Dist. Cuyahoga No. 85966, 2005-Ohio-5982, ¶ 21 ("[P]ublic policy favors settlements. Without such, it would be difficult for parties to attempt the amicable adjustment or compromise of disputes. Moreover, when parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket. Perhaps the most salubrious aspect of settlement is its finality; the conflict is resolved and the appellate process is avoided.").

{¶ 41} However, "it is not within the province of the trial judge to enforce a purported settlement agreement when the substance or the existence of that agreement is legitimately disputed." *Rulli*, 79 Ohio St.3d at 376, 683 N.E.2d 337. "Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli* at 377. The purpose of such an evidentiary hearing is "to address ambiguities about the terms or the existence of a settlement agreement." *Gouveia*, 2023-Ohio-1325, at ¶ 34.

{¶ 42} In *Rulli*, during a hearing on pending motions, counsel for the parties informed the trial court that the parties had reached a settlement purporting to resolve all disputed matters. *Rulli* at 374. The terms of the agreement were then read into the record. *Id.* Upon questioning by the trial court, the parties indicated that they understood the parameters of the settlement agreement and agreed to be bound to it. *Id.* The trial court indicated that the case would be marked as settled

and dismissed, directed the parties to submit a separate judgment entry regarding the settlement and issued a judgment entry to that effect. *Id.* at 374-375. The parties, however, never filed the separate judgment entry or executed a written settlement agreement. *Id.* at 375.

{¶ 43} Instead, the defendants filed a motion to enforce the agreement. *Id.* The plaintiff contested the defendants' interpretation of the terms that had been read into the record, contended that no final agreement had been reached and filed a motion to vacate the trial court's prior judgment entry. In support of his motion, the plaintiff attempted to introduce an unsigned settlement agreement and an affidavit by counsel setting forth his inability to conclude the agreement. *Id.* The trial court heard oral argument on the motions but did not consider the evidence the plaintiff had attempted to introduce in support of his position. *Id.* The trial court concluded that the parties had reached a settlement at the prior hearing and then entered judgment consistent with the defendants' interpretation of the agreement. On appeal, the court of appeals affirmed but modified the relief awarded. *Id.* at 375.

{¶ 44} The Ohio Supreme Court accepted the plaintiff's discretionary appeal to consider "whether a trial court abuses its discretion by ordering the enforcement of a disputed settlement agreement without first conducting an evidentiary hearing." *Id.* at 376. The court reversed the judgment in favor of the defendants and remanded the matter for the trial court to conduct an evidentiary hearing. *Id.* at 377. The court stated that "[t]hough upon first examination, the settlement terms as read into the record * * * appear reasonably clear, the parties were subsequently

unable to agree upon the meaning and effect of those terms" and "disputed nearly every major element of the purported agreement." *Id.* at 376-377. "Given the lack of finality and the dispute that evolved subsequent to the initial settlement hearing," the court held that the trial court "should have conducted an evidentiary hearing to resolve the parties' dispute about the existence of an agreement or the meaning of its terms as read into the record at the hearing, before reducing the matter to judgment." *Id.* at 377.

{¶ 45} The court cautioned:

> [C]ourts should be particularly reluctant to enforce ambiguous or incomplete contracts that aim to memorialize a settlement agreement between adversarial litigants. Though we encourage the resolution of disputes through means other than litigation, parties are bound when a settlement is reduced to final judgment. Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that the parties agree on the meaning of those terms.
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> * * *
>
> Where parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties. To do so would be to deny the parties' right to control the litigation, and to implicitly adopt (or explicitly * * *) the interpretation of one party, rather than enter judgment based upon a mutual agreement. * * *
>
> Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment.

Rulli at 376-377.

{¶ 46} Here, the trial court issued a journal entry on May 4, 2022 that stated: "Settlement conference. Case did not settle. All dates and orders remain in effect." There is no transcript of that conference in the record. It is unknown what information was provided to the trial court at that conference that led it to conclude that, as of May 4, 2022 — two weeks after the April 19, 2022 mediation — the case had not settled. Ohio Bell did not file a motion to correct or challenge that journal entry.

{¶ 47} Since that time, Zele has consistently maintained that there was no settlement agreement and that she did not agree, and would not have agreed, to settle the case on the terms identified by Ohio Bell. Zele also repeatedly requested an evidentiary hearing on Ohio Bell's motion to enforce settlement. Although Zele submitted a response to Ohio Bell's motion to enforce settlement, supported by her affidavit, in which she denied the existence of a settlement agreement, the trial court made no mention of having considered that response or her affidavit in ruling on Ohio Bell's motion to dismiss and enforce settlement. In its June 27, 2022 journal entry granting Ohio Bell's motion to dismiss and enforce settlement, the trial court simply stated: "The court having reviewed the motion to dismiss and to enforce settlement, finds that Ohio law requires that [Ohio Bell's] motions be granted." The trial court likewise did not address its prior, contrary statement (made in the May 4, 2022 journal entry) that the case had not settled.

{¶ 48} Following a thorough review of the record, including the conflicting journal entries issued by the trial court as to whether a settlement had been reached

following the April 19, 2022 mediation and Zele's claim (supported by facts in her affidavit) that no settlement had been reached at the mediation and she did not otherwise agree to settle the case on the terms set forth by Ohio Bell, we find that the trial court erred in granting Ohio Bell's motion to dismiss and enforce settlement without conducting an evidentiary hearing.

{¶ 49} The cases cited by Ohio Bell in support of its position do not compel a different result. In *Kostelnik*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶ 7, *Rayco Mfg.*, 2019-Ohio-3756, 142 N.E.3d 1267, at ¶ 53-59, *Moton v. Schafer*, 6th Dist. Lucas No. L-21-1214, 2022-Ohio-3505, ¶ 3-6, 15, *R&L Carriers, Inc. v. Emergency Response & Training Sols., Inc.*, 12th Dist. Clinton No. CA2018-11-021, 2019-Ohio-3539, ¶ 18-20, 34, *Clark*, 2018-Ohio-1169, at ¶ 9, *PNC Mtge.*, 2013-Ohio-3044, at ¶ 1, 5, *Spero v. Project Lighting, LLC*, 11th Dist. Portage 2012-P-0031, 2013-Ohio-1294, ¶ 8, 28, 32, *Allen v. Bennett*, 9th Dist. Summit Nos. 23570, 23573 and 23576, 2007-Ohio-5411, ¶ 8, 16, 18, *Lepole v. Long John Silver's*, 11th Dist. Portage No. 2003-P-0020, 2003-Ohio-7198, ¶ 6, and *Brinkr, Inc. v. United Riggers, Inc.*, 5th Dist. Stark No. 1999CA00179, 2000 Ohio App. LEXIS 678, 3-4, 8 (Feb. 22, 2000), the trial court in each case held an evidentiary hearing before ruling on the motion to enforce settlement.[5]

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[5] *Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 390, 474 N.E.2d 328 (1984), and *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), involved motions for relief from judgment under Civ.R. 60(B) rather than motions to enforce a settlement agreement. However, it appears that hearings were held prior to the trial court's rulings in those cases too. *See Argo Plastic Prods. Co. v. Cleveland*, 8th Dist. Cuyahoga No. 46664, 1983 Ohio App. LEXIS 12755, 4 (Nov. 23, 1983), *rev'd.*, 15 Ohio St.3d at 389, 474 N.E.2d 328; *GTE* at 147.

{¶ 50} In *Mack,* 14 Ohio St.3d at 36-37, 470 N.E.2d 902, *820 Co. v. A&M Fin. Group*, 8th Dist. Cuyahoga No. 81306, 2003-Ohio-1723, ¶ 16-17, and *Hopes*, 2011-Ohio-6688, at ¶ 33, the appellants made no request for an evidentiary hearing prior to the trial court's ruling on the appellees' motions to enforce settlement.

{¶ 51} *Shelter Growth v. Rucci*, 7th Dist. Mahoning 17 MA 0016, 2017-Ohio-9073, ¶ 15-16, involved the legal effect of unambiguous language in the appellant's "payoff letter." *Schraff v. Ripich*, 8th Dist. Cuyahoga No. 84959, 2005-Ohio-1312, ¶ 2-6, 8, involved an appellant's attempt to unilaterally modify a settlement agreement he had drafted that both parties had signed. *Associated Estates Realty Corp. v. Roselle*, 10th Dist. Franklin No. 98AP-1133, 1999 Ohio App. LEXIS 2831, 3, 6-7 (June 22, 1999), involved a dispute over a settlement that was negotiated in the presence of the magistrate, who confirmed that appellant had given his attorney telephone authorization to sign the settlement agreement on his behalf. In *Briceland v. Briceland*, 7th Dist. Columbiana No. 20 CO 0027, 2021-Ohio-3161, ¶ 2-8, 23, the terms of the parties' settlement agreement were read into the record before the magistrate and the parties were placed under oath and testified that they agreed to the settlement and that its terms were fair and equitable. And *Hicks v. Washington*, 8th Dist. Cuyahoga No. 52915, 1987 Ohio App. LEXIS 7912 (July 16, 1987), involved a motion to stay proceedings and for clarification of judgment filed 11 months after a consent judgment was entered that allegedly incorrectly included the appellant. The court held that the motion was a nullity because it did not comply with the Rules of Civil Procedure. It further held that because the judgment was not

timely appealed and no Civ.R. 60(B) motion to vacate judgment was filed, the court lacked jurisdiction to hear the appeal. *Id.* at 2-3.

{¶ 52} As detailed above, this case is different. The record reflects that factual disputes exist as to what, if anything, Zele agreed to with respect to settlement and what, if any, authority Zele's counsel had to negotiate and/or agree to a settlement on her behalf. The record further reflects that Zele repeatedly requested that the trial court conduct an evidentiary hearing to resolve the parties' dispute regarding the existence of a settlement. Because factual disputes existed as to whether the parties had reached a settlement and, if so, whether the documents submitted by Ohio Bell accurately reflected the terms of the parties' agreement, the trial court erred in granting Ohio Bell's motion to dismiss and enforce settlement without first conducting an evidentiary hearing. *Rulli*, 79 Ohio St.3d at 376-377, 683 N.E.2d 337; *see also Ivanicky v. Pickus*, 8th Dist. Cuyahoga No. 91690, 2009-Ohio-37, ¶ 4-5, 8, 11-13 (reversing trial court's decision granting appellee's motion to enforce settlement without an evidentiary hearing — notwithstanding that appellant's counsel advised the trial court that the parties had settled the matter — reasoning that "[b]ecause [appellant] disputes the existence of a settlement agreement, the trial court must hold a hearing"); *Myatt v. Myatt*, 9th Dist. Summit No. 24606, 2009-Ohio-5796, ¶ 12-13 (holding that "case must be remanded to the trial court for an evidentiary hearing" where the facts indicated that a dispute existed regarding whether the parties reached a settlement and, if so, whether the settlement documents accurately reflected the terms of their agreement); *Adkins v.*

Estate of Place, 180 Ohio App.3d 747, 2009-Ohio-526, 907 N.E.2d 354, ¶ 1-2, 39 (2d Dist.) (trial court erred in granting motion to enforce settlement agreement without conducting an evidentiary hearing where there were factual issues regarding whether attorney had authority to enter into settlement agreement on behalf of appellants); *Wertzbaugher v. Goodell*, 6th Dist. Lucas No. L-08-1204, 2008-Ohio-6172, ¶ 13 ("trial court was bound by *Rulli* to hold an evidentiary hearing" on appellees' motion to enforce settlement agreement where appellant filed a response contending that a valid settlement agreement did not exist because appellees added material terms to the written settlement agreement that were not part of the parties' oral agreement in court).

{¶ 53} Zele's first assignment of error is sustained to the extent that she contends the trial court erred in failing to conduct an evidentiary hearing prior to granting Ohio Bell's motion to dismiss and enforce settlement agreement. Based on our resolution of Zele's first assignment of error, her second and third assignments of error are not ripe for review.

{¶ 54} Judgment reversed; case remanded for an evidentiary hearing on Ohio Bell's motion to dismiss and enforce settlement agreement.

It is ordered that appellant recover from appellee the costs herein taxed.

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.

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EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY EILEEN KILBANE, J., CONCUR