

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

SUPERINTENDENT, OHIO DEPARTMENT :
OF INSURANCE,

Plaintiff, :

v. :

Case No. 03CVH09-10020

A DAY IN THE COUNTRY, et al., :

Judge Schneider

Defendants. :

**DECISION (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED AUGUST 16, 2004;**

**(2) GRANTING IN PART AND DENYING IN PART DEFENDANT
R.B. THOMAS ELECTRIC, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED JUNE 18, 2004;**

**(3) GRANTING IN PART AND DENYING IN PART DEFENDANT TEWEL CORP.'S
MOTION FOR SUMMARY JUDGMENT, FILED JUNE 18, 2004;**

**(4) DENYING DEFENDANT TEWEL CORP.'S MOTION TO DISMISS OR
ALTERNATIVELY FOR SUMMARY JUDGMENT, FILED JUNE 21, 2004;**

**(5) DENYING DEFENDANT ORTHOPAEDIC ASSOCIATES OF ZANESVILLE,
INC.'S MOTION TO DISMISS, FILED JULY 12, 2004;**

**(6) DENYING DEFENDANT BLACKBURN'S MOTION FOR SUMMARY JUDGMENT,
FILED JUNE 25, 2004;**

**(7) DENYING DEFENDANT BLACKBURN'S MOTION FOR SUMMARY JUDGMENT,
FILED JUNE 28, 2004;**

**(8) GRANTING IN PART AND DENYING IN PART DEFENDANT
THE KLINGSTEDT BROTHERS CO.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 13, 2004;**

**(9) GRANTING IN PART AND DENYING IN PART DEFENDANT
SGE MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 13, 2004;**

**(10) DENYING DEFENDANT BENNETT/DOVER HOME REMODELERS, INC.'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 13, 2004;**

**(11) DENYING DEFENDANT BENNETT/DOVER HOME REMODELERS, INC.'S
MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM,
FILED AUGUST 13, 2004;**

**(12) DENYING DEFENDANT GAYMONT NURSING HOME'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 13, 2004;**

**(13) DENYING DEFENDANT ZEIGER INDUSTRIES'
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 13, 2004;**

**(14) DENYING DEFENDANT TREEMEN INDUSTRIES'
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 13, 2004;**

(15) GRANTING IN PART AND DENYING IN PART DEFENDANTS

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2005 MAY 19 PM 1:53
CLERK OF COURTS

WEST BRANCH NURSING HOME'S AND PLEASANT VIEW NURSING HOME'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 13, 2004;
(16) GRANTING IN PART AND DENYING IN PART DEFENDANT
ROSE RUN DRILLING, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(17) GRANTING IN PART AND DENYING IN PART DEFENDANT
ZIEGLER TIRE AND SUPPLY CO.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(18) GRANTING IN PART AND DENYING IN PART DEFENDANT
W.T. PETTIT & SONS, CO.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(19) GRANTING IN PART AND DENYING IN PART DEFENDANT
COLUMBIANA SERVICE, LLC'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(20) DENYING DEFENDANT CALLOS PROFESSIONAL EMPLOYMENT, LLC'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 16, 2004;
(21) DENYING DEFENDANT WESTERN RESERVE RACQUET AND FITNESS
CLUB'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 16, 2004;
(22) DENYING DEFENDANT THERM-O-LINK, INC.'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 16, 2004;
(23) GRANTING IN PART AND DENYING IN PART DEFENDANT
POLAND CONCRETE PRODUCTS, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(24) GRANTING IN PART AND DENYING IN PART DEFENDANT
AUTUMN HILLS CARE CENTER, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(25) GRANTING IN PART AND DENYING IN PART DEFENDANT
NECOR PLASTICS CORP.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(26) GRANTING IN PART AND DENYING IN PART DEFENDANT
MICHAEL DAY ENTERPRISE, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 16, 2004;
(27) GRANTING IN PART AND DENYING IN PART DEFENDANT
BOLLIN & SONS, INC. (DBA BOLLIN LABEL SYSTEMS)'S
MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 18, 2004;
(28) DENYING DEFENDANT WISE CHEVROLET, INC.'S MOTION FOR
SUMMARY JUDGMENT, FILED AUGUST 19, 2004;
(29) GRANTING IN PART AND DENYING IN PART DEFENDANT
UNIVERSAL TIRE MOLDS, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 19, 2004;
(30) GRANTING IN PART AND DENYING IN PART DEFENDANT
GAUER SERVICE & SUPPLY CO.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 19, 2004;
(31) GRANTING IN PART AND DENYING IN PART DEFENDANT
ROGERS INDUSTRIAL PRODUCTS' MOTION FOR SUMMARY JUDGMENT,

- FILED AUGUST 19, 2004;
(32) GRANTING IN PART AND DENYING IN PART DEFENDANT
CUSTOM POLY BAG, INC.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 19, 2004;
(33) GRANTING IN PART AND DENYING IN PART DEFENDANT
ESTERLE MOLD & MACHINE CO.'S MOTION FOR SUMMARY JUDGMENT,
FILED AUGUST 19, 2004;
(34) GRANTING IN PART AND DENYING IN PART DEFENDANT
LAWYERS PROPERTY DEVELOPMENT CORP.'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, FILED AUGUST 19, 2004;
(35) GRANTING PLAINTIFF'S MOTION TO DISMISS
DEFENDANTS' COUNTERCLAIM, FILED JUNE 7, 2004;
(36) GRANTING DEFENDANT THERM-O-LINK, INC.'S MOTION FOR
DEFAULT JUDGMENT ON CROSS-CLAIM, FILED AUGUST 4, 2004
(37) GRANTING DEFENDANT ROSE RUN DRILLING, INC.'S
MOTION TO STRIKE, FILED SEPTEMBER 29, 2004;
(38) DENYING DEFENDANT ZIEGLER TIRE AND SUPPLY CO.'S
MOTION TO STRIKE, FILED SEPTEMBER 29, 2004;
(39) DENYING DEFENDANT'S MOTION TO COMPEL DISCOVERY,
FILED SEPTEMBER 30, 2004; AND
(40) GRANTING DEFENDANT'S MOTION TO EXTEND TIME,
FILED OCTOBER 12, 2004;
(Case Not Terminated)

Rendered this 19th day of May, 2005.

Schneider, C., J.

I. Summary Judgment

A party seeking summary judgment must demonstrate that

(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Welco Indus., Inc. v. Applied Cos. (1993), 67 Ohio St. 3d 344, 346 (brackets in original)
(quoting Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327); see Hicks v.
Leffler (Franklin 1997), 119 Ohio App. 3d 424, 427 (citing Bastic v. Connor (1988), 37

Ohio St. 3d 144). In this regard, "the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case." Dresher v. Burt (1996), 75 Ohio St. 3d 280, 292 (emphasis in original); see Hicks, 119 Ohio App. 3d at 427 (citing Dresher, 75 Ohio St. 3d at 293).

Civ. R. 56(E) provides in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See Mathis v. Cleveland Public Library (1984), 9 Ohio St. 3d 199; Hoffman v. Davidson (1987), 31 Ohio St. 3d 60. Moreover, "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which it bears the burden of production at trial." Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108, 111. Additionally, the factual dispute must be "material." Buckeye Union Ins., 68 Ohio App. 3d at 22 (citing Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242) ("If one's case is supported by only a 'scintilla' of evidence, or if his evidence is 'merely colorable' or not 'significantly probative,' summary judgment should be entered."). However, "a moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove his case. The assertion must be backed by some evidence . . ." Dresher, 75 Ohio St. 3d at 293 (emphasis in original) (distinguishing Celotex Corp. v. Catrett (1986), 477 U.S. 317).

II. Discussion

On August 16, 2004, plaintiff filed her Motion "for Partial Summary Judgment as to Employer-Members' Liability for Assessments under R.C. § 1739.15." A number of defendants have filed cross-motions for summary judgment.

The Superintendent of Insurance's powers as Liquidator or Rehabilitator are described as follows:

R.C. 3901.011 sets forth the general powers and duties of the superintendent of insurance, and states in part:

The superintendent of insurance shall be the chief executive officer and director of the department of insurance and shall have all the powers and perform all the duties vested in and imposed upon the department of insurance. The superintendent of insurance shall see that the laws relating to insurance are executed and enforced. * * *

Pursuant to the above provision, the superintendent of insurance "is granted wide latitude and authority in overseeing insurance companies. It is his [or her] mandatory duty to execute and enforce the laws relating to insurance." *Strack v. Westfield Companies* (1986), 33 Ohio App.3d 336, 338, 515 N.E.2d 1005.

In addition, the superintendent of insurance is authorized to institute actions to rehabilitate or liquidate insurance companies under R.C. Chapter 3903. The legislature enacted R.C. Chapter 3903 "for the specific purpose of protecting 'the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers.'" *Fabe v. Prompt Finance, Inc.* (1994), 69 Ohio St.3d 268, 273, 1994 Ohio 323, 631 N.E.2d 614, quoting R.C. 3903.02(D).

As rehabilitator, the superintendent "may take such action as he considers necessary or appropriate to reform and revitalize the insurer." R.C. 3903.14(B). If it appears that there has been criminal or tortious conduct, the rehabilitator may "pursue all appropriate legal remedies on behalf of the insurer." R.C. 3903.14(C). Upon determining that "reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate," the rehabilitator shall prepare a plan to effect such changes. R.C. 3903.14(D).

Covington v. Sawicz (Franklin App., Nov. 18, 2004), No. 03AP-1080, 2004 Ohio App. LEXIS 5556, at *6-8 (brackets in original); see Benjamin v. Pipoly (Franklin 2003), 155 Ohio App. 3d 171, 179-80 ("Ohio's statutory insurance liquidation scheme is abounding

in features designed to vest within the liquidator broad and largely unfettered powers, under the supervision of the courts, to maximize the assets available to her in discharging her duties to claimants, shareholders and creditors of the insolvent insurance company. The statutes require us to liberally construe them in favor of their stated purpose.”) (citing O.R.C. 3903.02(C)).

O.R.C. Chapter 1739 concerns multiple-employer welfare arrangements (MEWA). O.R.C. Chapter 1739 states that a MEWA must do the following:

(1) possess a certificate of authority from the Superintendent of Insurance (O.R.C. 1739.02(D) & 1739.03(A));

(2) have a minimum enrollment of three hundred employees of two or more employers, three hundred self-employed individuals, or a combination of three hundred employees or self-employed individuals (O.R.C. 1739.05(A));

(3) comply with all laws applicable to self-funded programs (O.R.C. 1739.05(B));

(4) solicit enrollments only through licensed agents or solicitors (O.R.C. 1739.05(C));

(5) “provide benefits only to individuals who are members, employees of members, or the dependents of members or employees, or are eligible for continuation of coverage under” O.R.C. 1751.53 or 3923.38 or COBRA, 29 U.S.C. §1161 (O.R.C. 1739.05(D));

(6) file a certificate of compliance with the Superintendent of Insurance that a standardized identification card or electronic technology used in submitting prescription-drug claims contains required information and must issue a new card or electronic technology if the information changes (O.R.C. 1739.061);

(7) "be operated by a board of trustees chosen by a majority of the participating members of the arrangement." (O.R.C. 1739.08(A));

(8) file an annual report with the Superintendent of Insurance (O.R.C. 1739.09(A));

(9) pay Department of Insurance's expenses for inspections (O.R.C. 1739.10);

(10) file excess-loss funding program with the Superintendent of Insurance, "purchase individual stop-loss insurance," and notify the Superintendent of any cancellation (O.R.C. 1739.12);

(11) comply with requirements for minimum surplus and assets at least equal to amount of minimum surplus, unearned premiums, reserves for losses, and other liabilities, as well as comply with restrictions of types of investments (O.R.C. 1739.13);

(12) make payments to members' employees out of the fund for employee welfare benefits (O.R.C. 1739.14(C));

(13) determine any dividends or assessments to be paid to or levied against participating members (O.R.C. 1739.14(D));

(14) enter into a written agreement for any contract with a third-party administrator who is not the arrangement's employee, file agreement and any amendments with the Superintendent of Insurance, and provide a copy of the agreement and any amendments to a member upon request (O.R.C. 1739.16); and

(15) comply with requirements for third-party administrator (O.R.C. 1739.18).

Some relevant terms are defined as follows:

(A) "Agreement" means a written agreement executed by members of a multiple employer welfare arrangement that establishes an arrangement, provides for its operation, and through which each member agrees to assume and discharge all liability under sections 1739.01 to

1739.22 of the Revised Code relating to or arising out of the operation of the arrangement in proportion to the ratio of the total number of covered employees employed by the member at the time the liability arose to the total number of covered employees employed by all members of the arrangement at the time the liability arose.

(E) "Member" means an individual or an employer that is a member of an organization sponsoring a multiple employer welfare arrangement.

(F) "Multiple employer welfare arrangement" means an employee welfare benefit plan, trust, or any other arrangement, whether such plan, trust, or arrangement is subject to the "Employee Retirement Income Security Act of 1974," 88 Stat. 829, 29 U.S.C.A. 1001, as amended, that is established or maintained for the purpose of offering or providing, through group insurance or group self-insurance programs, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, or death, to the employees, and their dependents, of two or more employers, or to two or more self-employed individuals and their dependents.

O.R.C. 1739.01(A), (E), & (F).

An employer's liability under a MEWA is set forth as follows:

(A) A member of a multiple employer welfare arrangement operating a group self-insurance program is liable for all legal obligations of the arrangement, including any obligations of the arrangement to pay claims against it arising out of any occurrence, incident, or accident covered under sections 1739.01 to 1739.22 of the Revised Code, in proportion to the ratio of the total number of covered employees employed by the member on the first day of the month that the obligation arose to the total number of covered employees employed by all members of the arrangement at the time the obligation arose.

O.R.C. 1739.15(A); see O.R.C. 1739.14(D) ("A board of the multiple employer welfare arrangement operating a group self-insurance program shall determine whether any dividends or assessments shall be paid to or levied against participating members.").

In this regard, plaintiff has the authority to levy assessments against defendants for the deficits in the Builders & Contractors Employee Benefit Trust (BCEBT).

First, the Builders and Contractors Employee Benefit Association Trust

(BCEBAT) is a “multiple-employer welfare arrangement” under O.R.C. 1739.01(F); see also O.R.C. 1739.02(A) (“A trade association, industry association, or professional association that has been organized and maintained in good faith for a continuous period of one year or more for purposes other than obtaining insurance may establish, maintain, or operate a group self-insurance program under a multiple employer welfare arrangement that is chartered and created in this state under sections 1739.01 to 1739.22 of the Revised Code.”).

Second, O.R.C. 1739.01(E) defines “member” as “an individual or an employer that is a member of an organization sponsoring a multiple employer welfare arrangement.” The Manufacturers Employee Benefit Association, the Wholesale and Retail Employee Benefit Association, and the Builders and Contractors Employee Benefit Association offered health-benefits coverage through the BCEBAT. As such, a defendant which signed a Master Agreement to become a member of one of these associations meets the definition of a “member” of the BCEBAT under O.R.C. 1739.01(E).

Third, termination of a Master Agreement or membership in the BCEBAT does not bar the Superintendent of Insurance from subsequently levying assessments against defendants.

A number of defendants argue that they have terminated their membership in the associations and so should not be liable for assessments which were levied after the termination date. For example, defendant Bennett/Dover Home Remodelers, Inc. argues that because the definition of “member” as used in O.R.C. 1739.15 “only refers to employers who are presently (at the time the assessment is levied) members of an

organization sponsoring a multiple employer welfare arrangement, employers who have terminated their membership are excluded.” Defendant Tewel Corp. argues that it had paid all premiums and assessments at the time it terminated its participation in the BCEBAT and that plaintiff cannot modify the contract or pursue “alleged contractual obligations between this Defendant and BCEBAT which are represented by the Plaintiff to have occurred long after the parties had terminated [their] relationship.” Defendant Stanford Trucking, LLC argues that it “terminated its agreement with Plaintiff in September 2002” and so should not “be held responsible for assessments which were incurred after the termination date.” [Defendant Bollin & Sons argues that it cancelled its coverage July 31, 2002, and never received notice of deficiencies in payments or special assessments prior to the filing of the complaint.]

However, O.R.C. 1739.01(E) and O.R.C. 1739.15 do not contain language which restricts assessments to employers which are members “at the time the assessment is levied” or which otherwise permits an employer to avoid an assessment by terminating its membership before the assessment can be made. Rather, O.R.C. 1739.15(A) states,

“A member of a multiple employer welfare arrangement operating a group self-insurance program is liable for all legal obligations of the arrangement, including any obligations of the arrangement to pay claims against it arising out of any occurrence, incident, or accident covered under sections 1739.01 to 1739.22 of the Revised Code, in proportion to the ratio of the total number of covered employees employed by the member on the first day of the month that the obligation arose to the total number of covered employees employed by all members of the arrangement at the time the obligation arose.”

(Emphasis added.) As such, the time when an “obligation” of a MEWA to pay claims arose is unrelated to the issues of whether or when an employer terminated its

membership, as long as the MEWA's "obligation" arose while the employer was a "member."

In contrast, defendants cite no legal authority which has held that a MEWA's "member" is not liable for assessments after it ceases membership in a MEWA, even regarding obligations which the MEWA incurred while the employer was a "member." Indeed, such a holding would undermine the financial stability of MEWAs by encouraging employers and employees to reap the benefits of a MEWA but terminate their memberships once deficiencies were reported or suspected and before the Superintendent of Insurance could study a MEWA's financial information, determine the deficiency, calculate the assessments, and provide notice of assessments. Also, O.R.C. 1739.07's language that a member which terminates its membership "shall remain liable for all obligations of the arrangement incurred during its membership" does not bar levying assessments after an employer terminates its membership but specifically holds an employer liable for assessments after its membership is terminated regarding obligations incurred while it was a member.

Fourth, defendants cannot avoid liability for the assessments on the ground that they did not sign or see a written "agreement" which established the MEWA or provided for its operation.

The Master Agreements state that the "Employer desires to become a member in the Association to obtain all of the benefits of such membership" and that "[t]he undersigned Employer requests approval to participate in the Trust established by the Association for the provision of health benefits to employees of member Employers and agrees to be bound by the terms of the Trust Agreement, Plan Document, and any

amendments thereto, the terms of which are specifically incorporated in this Master Agreement by reference.” As such, the Master Agreements explicitly mention the “Trust,” the “Trust Agreement,” and “Plan Document”; explicitly incorporate those documents; and declare that defendant employers are bound by those documents.

In contrast, defendants cite no legal authority which has held that a document such as a Master Agreement may not incorporate a MEWA’s terms by referring to the MEWA.

One court has discussed incorporating contract terms as follows:

Documents that are incorporated by reference into a contract are to be read as though they are restated in the contract. Cf. *Christe v. GMS Mgt. Co.* (1997), 124 Ohio App. 3d 84, 88, 705 N.E.2d 691 (holding that “where one instrument incorporates another by reference, both must be read together”). See also *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App. 3d 170, 173-75, 517 N.E.2d 559 (holding that contract between parties incorporated arbitration clause of another contract by reference).

Blanchard Valley Farmers Coop., Inc. v. Carl Niese & Sons Farms, Inc. (Hancock 2001), 143 Ohio App. 3d 795, 802; see Marcinko v. Palm Harbor Homes, Inc. (Pike App., June 21, 2002), No. 01CA677, 2002 Ohio App. LEXIS 3336, at *6 (“When a contract incorporates a prior agreement by reference, that prior agreement is to be read as though it had been restated in the contract.”) (citing Blanchard Valley Farmers Coop., Inc. v. Rossman (Hancock 2001), 145 Ohio App. 3d 132, 140; Carl Niese & Sons Farms, 143 Ohio App. 3d at 802); Heifner v. Heifner (Allen App., Nov. 28, 1989), No. 1-88-32, 1989 Ohio App. LEXIS 4452, at *7 (“Fundamental principles of contract interpretation require that, in construing a contract which expressly incorporates another contract by reference, the provisions of the two contracts be read together.”) (citing Higgins v. Drucker (Cuyahoga 1901), 12 Ohio C.D. 220; 18 O. Jur. Contracts § 152

(1980)); C.E. Morris Co. v. Concrete Constr. Co. (Franklin App., Jan. 15, 1985), No. 83AP-659, 1985 Ohio App. LEXIS 5405, at *27-28 (“When construing a contract which expressly incorporates another agreement by reference the general rules of construction require that the two contracts must be read together.”) (citing 18 O. Jur. 3d Contracts § 152; American Fed. of Labor v. Western Union Tel. Co. (C.A. 6, 1950), 179 F. 2d 535); see also Noble v. Johnson (Warren App., July 27, 1983), No. 61, 1983 Ohio App. LEXIS 15927, at *8 (real-estate sale did not violate the Statute of Frauds because “the second contract was incorporated by reference into the first contract and . . . the appellants waived their right to formally sign the second contract).

Fifth, contrary to their arguments, defendants cannot avoid liability for the assessments on the ground that the Master Agreements do not meet the requirements of O.R.C. 1739.01(A). O.R.C. 1739.01(A) is a definitional section and does not set forth the requirements for creating a MEWA or for imposing liability on employers for a MEWA’s liabilities. Likewise, O.R.C. 1739.01(F) defines a “multiple-employer welfare arrangement” but also does not set forth such requirements.

Additionally, O.R.C. 1739.01(A)’s definition of “agreement” does not provide for invalidating the creation of a MEWA or for relieving employers of their obligations, including liability for assessments, under the MEWA statute. Nowhere in Ohio’s MEWA statute is a declaration that assessments or other obligations under a “multiple-employer welfare arrangement” are not binding on an employer in the absence of an “agreement” as defined by O.R.C. 1739.01(A). Defendants also cite no legal authority which has held that an employer is relieved from its obligations under a MEWA or may not be held liable for a MEWA’s funding deficiencies or that a MEWA is deemed to

have never existed if a document does not possess all the elements of an “agreement” as defined by O.R.C. 1739.01(A). Thus, the issue of whether a Master Agreement is an “agreement” as defined by O.R.C. 1739.01(A) is not determinative as to the creation and existence of a MEWA or as to an employer’s liability for assessments for a MEWA’s under-funding.

In any event, defendants’ Master Agreements and the BCEBAT documents were sufficient to meet the requirements purportedly imposed by O.R.C. 1739.01(A). Defendants argue that O.R.C. 1739.01(A) requires a (1) written agreement, (2) executed by members, (3) which establishes the arrangement and provides for its operation, and (4) through which each member agrees to assume and discharge all liability under O.R.C. 1739.01 to 1739.22. In this regard, (1) both the Master Agreements and the BCEBAT’s Trust Agreement and Plan Document are in writing, and the terms of the Trust Agreement and Plan Document “are specifically incorporated” in the Master Agreements “by reference”; (2) under the Master Agreements, defendants were members of MEWA-sponsoring organizations under O.R.C. 1739.01(E); (3) BCEBT’s Trust Agreement and Plan Document establish and provide for the operation of the MEWA at issue in this case; and (4) defendants agreed “to be bound by the terms of the Trust Agreement, Plan Document, and any amendments thereto, the terms of which are specifically incorporated in this Master Agreement by reference,” and are liable for assessments under O.R.C. 1739.15(A) and O.R.C. 1739.14(D). Defendants have also failed to present any legal authority which has held that O.R.C. 1739.01(A)’s purported requirements cannot be fulfilled by having a Master Agreement or similar document make reference to a MEWA’s trust agreement and plan document.

As such, defendants cannot avoid summary judgment on the ground that O.R.C. 1739.01(A) enumerates the requirements to form a MEWA but that the Master Agreements and BCEBAT documents fail to meet these requirements.

Sixth, nowhere in Ohio's MEWA statute is a requirement that an employer's Master Agreement or other document for membership in a trade, industry, or professional association which offers a MEWA must itself mention the MEWA, use terms such as "assessment" or "group self-insured program" which specifically refer to a MEWA, or explicitly refer to a MEWA's bylaws in order for an employer to be liable for assessments under the MEWA statute. Similarly, defendants fail to present any legal authority which has held that the Master Agreement itself was required to explicitly state that the insurance was being provided by a MEWA or to explicitly use terms which would specifically pertain to a MEWA, such as "multiple-employer welfare arrangement," "O.R.C. Chapter 1739," and "assessments" or which has held that a failure to use such language constitutes misrepresentation. Defendants also fail to cite any legal authority which has held that a Master Agreement's use of language used in "normal" insurance policies constitutes misrepresentation. In any event, the Master Agreements do use words indicating that health-benefits coverage was being provided by something other than a "normal" insurance policy in that the Master Agreements do not state that coverage is provided under insurance policies which are offered by insurers but specifically state that the employer is seeking to "participate in the Trust" which the industry/trade association "established . . . for the provisions of health benefits" and that the employer agrees to be bound by the "Trust Agreement, Plan Document, and any amendments thereto."

Likewise, defendants cite no legal authority which has held that the Master Agreements were required to mention the MEWA or contain MEWA-specific terms if the Master Agreements could have done so or if a subsequent Master Agreement contained such language. Defendants have also failed to present legal authority which would have required that defendants be orally informed that the health-benefits coverage was provided by a MEWA.

The Ohio Supreme Court has discussed representations concerning a contract as follows:

A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation, "The fraud relates not to the nature or purport of the [contract], but to the facts inducing its execution * * *." *Haller v. Borrer Corp.* (1990), 50 Ohio St. 3d 10, 14, 552 N.E.2d 207, 210. In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment. *Beer v. Griffith* (1980), 61 Ohio St. 2d 119, 123, 15 Ohio Op. 3d 157, 160, 399 N.E.2d 1227, 1231.

.....
The law does not require that each aspect of a contract be explained orally to a party prior to signing. The contract Woods signed contained about six sentences, comprising less than a quarter of a page. The provisions at issue were not in fine print, and are part of an industry standard. The provisions were neither hidden nor out of the ordinary, and Maust did not misrepresent their nature.

A classic claim of fraudulent inducement asserts that a misrepresentation of facts outside the contract or other wrongful conduct induced a party to enter into the contract: Examples include a party to a release misrepresenting the economic value of the released claim, or one party employing coercion or duress to cause the other party to sign an agreement. *Haller* 50 Ohio St. 3d at 14, 552 N.E.2d at 211. In this case, Woods makes no allegations about misrepresentations of facts outside the contract; she alleges only that Maust failed to tell her what was *in* the contract. At the center of Woods's allegation of fraudulent inducement is the naked truth that she did not read the contract. It drives a stake into the heart of her claim. A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he

signed." *McAdams v. McAdams*, (1909) 80 Ohio St. 232, 240-241, 88 N.E. 542, 544. See, also, *Upton v. Tribilcock* (1875), 91 U.S. 45, 50, 23 L. Ed. 203, 205 ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written."). The legal and common-sensical axiom that one must read what one signs survives this case. . . .

ABM Farms, Inc. v. Woods (1998), 81 Ohio St. 3d 498, 502-03 (italics and brackets in original); see Hadden Co., L.P.A. v. Del Spina (Franklin App., Aug. 26, 2003), No. 03AP-37, 2003 Ohio App. LEXIS 3989, at *9-10 ("One of the most celebrated tenets of the law of contracts is that a document should be read before being signed, and the corollary to this rule is that a party to the contract is presumed to have read what he signed and cannot defeat the contract by claiming he did not read it."). See also Carnahan v. SCI Ohio Funeral Servs. (Franklin App., March 13, 2001), No. 00AP-490, 2001 Ohio App. LEXIS 1106, at *28 ("In an arm's length business transaction, sophisticated contracting parties, represented by counsel, 'are presumed to be aware of the contract's language and are properly bound by it.") (citing Mon-Rite Constr. Co. v. Northeast Ohio Regional Sewer Dist. (Cuyahoga 1984), 20 Ohio App. 3d 255, 259).

As previously discussed, the Master Agreements "specifically incorporated" the terms of the "Trust Agreement, Plan Document, and any amendments thereto." As such, defendants which entered into Master Agreements were on notice that other documents were incorporated by reference into the Master Agreements and were binding on defendants. Defendants also fail to present any evidence that they were barred from examining the BCEBAT documents themselves before signing the Master Agreements or even before the Superintendent of Insurance levied the assessments. Also, because the

Trust Agreement and Plan Documents were explicitly incorporated into the Master Agreements and defendants are responsible for reading contracts into which they have entered, affidavits' statements that defendants would not have entered into the Master Agreements or obtained coverage from a MEWA if defendants had actually known coverage was being provided by a MEWA are immaterial.

Likewise, a defendant's lack of awareness of O.R.C. Chapter 1739 would not excuse its liability under that statute. See Burdick v. Nevel (Franklin App., April 20, 1999), No. 98AP-697, 1999 Ohio App. LEXIS 1800, at *17 ("it is a fundamental legal principal that ignorance of the law is no excuse, and Ohio courts have consistently reiterated this principal").

Seventh, defendants' argument that contracts are construed against the drafter is immaterial because the Master Agreements and incorporated Trust Agreement and Plan Document are not ambiguous.

The Tenth District Court of Appeals has discussed contract interpretation as follows:

The interpretation of a contract that is clear and unambiguous is a question of law, and no issue of fact exists to be determined. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St. 3d 509, 511, 628 N.E.2d 1377; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64, 66, 609 N.E.2d 144. Questions of law are reviewed *de novo*. *Wiltberger v. Davis* (1996), 110 Ohio App. 3d 46, 51-52, 673 N.E.2d 628. A court may make a factual determination of intent or reasonableness to supply a missing contract term only when a term cannot be determined from the four corners of a contract. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321, 322, 474 N.E.2d 271. When reviewing contract language, courts are required to give plain language its ordinary meaning and may not read language or terms into a contract. *Miller v. Marrocco* (1986), 28 Ohio St. 3d 438, 439, 504 N.E.2d 67; *Herder v. Herder* (1972), 32 Ohio App. 2d 75, 76-77, 288 N.E.2d 213.

Gray-Jones v. Jones (Franklin 2000), 137 Ohio App. 3d 93, 104-05.

Also, courts are not to find ambiguity when none exists or to change a contract using the pretext of ambiguity.

Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus. Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. *Kelly, supra*, at 132, 31 OBR at 291, 509 N.E.2d at 413. When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 7 O.O.3d 403, 406, 374 N.E.2d 146, 150.

Shifrin v. Forest City Ent. (1992), 64 Ohio St. 3d 635, 638.

As such, defendants cannot avoid liability under the Master Agreements and O.R.C. Chapter 1739 under the guise of ambiguity. The Master Agreements made clear references to the "Trust," and neither the lack of a specific reference to the MEWA statute nor the possibility that the Master Agreements could have included MEWA-specific terms required the Master Agreements to specifically include these terms or rendered the Master Agreements ambiguous if these terms were not included.

Eighth, defendants' subjective belief that they were unaware that they were participating in a MEWA or that they were covered by "normal" insurance is insufficient to demonstrate misrepresentation. Also, as previously discussed, the references to the "Trust" and "Trust Agreement" provide indications that the Master Agreement concerns matters other than a "normal" insurance policy and point employers to those documents

whose examination would reveal that the benefits were being provided by a MEWA.

Furthermore, even if defendants were unaware that they were participating in a MEWA, such a lack of awareness does not bar the statutorily-authorized assessments against them for the BCEBAT's under-funding. Likewise, defendants' subjective beliefs about their non-liability for assessments or BCEBAT's financial condition do not constitute evidence that the MEWA made misrepresentations as to defendants' liability for assessments or the BCEBAT's financial condition.

As such, affidavits' statements that defendants were not told they were joining a MEWA or would be liable for assessments, that defendants were not told about BCEBAT's financial condition, that defendants were unaware they could be liable for assessments, that defendants thought they were purchasing traditional insurance, that defendants believed their only obligation was to pay premiums or believed BCEBT was solvent, that defendants were "allowed" to hold erroneous beliefs, that defendants did not sign a MEWA agreement and/or only signed the Master Agreement, and that defendants were not given or did not see the Trust Agreement or Plan Document are insufficient to create a "genuine issue of material fact" so as to bar partial summary judgment for plaintiff. It is also noted that conclusory statements that misrepresentations were made, without a statement of the underlying facts, do not meet Civ. R. 56(E)'s requirements and so do not constitute evidence that misrepresentations were actually made.

Ninth, defendants cannot avoid liability for the assessments on the ground that the BCEBAT plan-documents improperly used words often used in the "insurance" business. For example, defendants Defendants West Branch Nursing Home, Pleasant

View Nursing Home, Treemen Industries, Zeiger Industries, and Gaymont Nursing Home (“West Branch”) argue that the BCEBAT documents violated O.R.C. 1739.19 by using words such as “insurance.” Similarly, defendant E.L. Stone Co. argues that the Master Agreement used “words and phrases that sound like normal health insurance” constitutes misrepresentation or bars the operation of state law.

However, defendants have failed to provide any legal authority which has held that using terms which are also used in traditional insurance policies constitutes misrepresentation or bars the operation of state law regarding assessments.

Also, Ohio’s MEWA statute discusses the use of insurance terms as follows:

(A) For the purpose of determining whether a multiple employer welfare arrangement operating a group self-insurance program has violated any provision of the Revised Code or any rule adopted by the superintendent of insurance, a member or its employees are deemed “insureds” or “policyholders” as used in Title XXXIX [39] of the Revised Code.

(C) Except for the purpose of describing any sickness and accident or excess insurance or stop-loss insurance policy to which a multiple employer welfare arrangement operating a group self-insurance program is a party, no such arrangement shall use in its name, contracts, literature, advertising in any medium, or any other printed matter the words “insurance,” “casualty,” “surety,” “mutual,” or any other words descriptive of the insurance business or deceptively similar to the name or description of any insurer doing business in the state.

O.R.C. 1739.19(A)&(C) (brackets in original).

As such, O.R.C. 1739.19(C) does not bar a MEWA from any use of the term “insurance.” Rather, O.R.C. 1739.19(C) prohibits a MEWA from using words which describe the insurance business “[e]xcept for the purpose of describing any sickness and accident or excess insurance or stop-loss insurance policy to which a multiple employer welfare arrangement operating a group self-insurance program is a party.”

Indeed, the text of O.R.C. 1739.19 shows that this statutory provision is not a prohibition against any use, in any context, of the term “insurance” in a MEWA document in that O.R.C. 1739.19(A) itself refers to “a multiple employer welfare arrangement operating a group self-insurance program.” Also, contrary to West Branch’s argument, the trust-plan document’s mention of “[r]einsurance agreements” did not violate the statute because it referred to insurance to which the MEWA was entitled to be a party, and this mention of “reinsurance” did not concern the trust itself and so would not lead a reasonable business to believe that the trust was not a MEWA. Additionally, the word “co-insurance” was used in the context of an employee’s deductible and payment of benefits.

Defendants also cite no legal authority which has held that a violation of O.R.C. 1739.19 releases an employer from liability for assessments. Furthermore, as previously discussed, the Master Agreements explicitly state that they incorporate by reference the Trust Agreement and Plan Document, which specifically discuss the coverage as provided by the MEWA, and state that the employers seek to “participate in the Trust established by the Association for the provisions of health benefits” and agree to be bound by the terms of the “Trust Agreement, Plan Document, and any amendments thereto.” In any event, defendants present no evidence that they were actually misled by the use of words such as “insurance” or “co-insurance” in the introduction to the BCEBAT “Plan Document,” plan descriptions, or renewal forms.

Tenth, the assessments do not constitute revisions of the Master Agreements or violations of the Master Agreements’ guaranteed rates. The contracts were required to conform with state law, which authorizes the assessments. Defendants also fail to cite

any legal authority which has held that the Superintendent of Insurance may not use the statutory authority to levy assessments while seeking to hold employers to their contractual obligations or that levying assessments constitutes an improper modification of a contract.

Likewise, although a number of defendants argue that they were told that they only needed to pay premiums to maintain coverage, these alleged statements do not concern employers' statutory liability for assessments for a MEWA's under-funding, let alone a denial that assessments for deficiencies might occur, and so do not constitute misrepresentations or estop plaintiff from levying the assessments. Premiums for health-benefits coverage are not identical to assessments for deficiencies. E.g., compare O.R.C. 1739.14(A) ("Each member shall pay to the multiple employer welfare arrangement operating a group self-insurance program a premium") with O.R.C. 1739.14(D) ("A board of the multiple employer welfare arrangement operating a group self-insurance program shall determine whether any dividends or assessments shall be paid to or levied against participating members."). See also Ohio State Bd. of Pharmacy v. Frantz (1990), 51 Ohio St. 3d 143, 145-46 ("It is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function.") (citing Sekerak v. Fairhill Mental Health Ctr. (1986), 25 Ohio St. 3d 38, 39; Besl Corp. v. Public Util. Comm'n (1976), 45 Ohio St. 2d 146, 150); Brown v. State Racing Comm'n (Geauga App., June 27, 1997), 1997 Ohio App. LEXIS 2805 , at *7 (citing Erantz, 51 Ohio St. 3d at 145-46); Lutheran Mut. Life Ins. Co. v. Robinson (Franklin 1962), 117 Ohio App. 9, 11 ("no estoppel can be recognized nor may it be asserted against the state of Ohio" for Superintendent of

Insurance's alleged acquiescence in nonpayment of total amount of taxes due).

Eleventh, defendants which were provided health-benefits coverage by BCEBAT received benefits from the BCEBAT, and disallowing the assessments would force those with unpaid claims to bear the burden of the BCEBAT's under-funding. As such, the assessments are supported by equitable principles, as well as statutory provisions and contractual terms. This conclusion applies to both defendants who signed Master Agreements and those who did not sign Master Agreements but nonetheless obtained coverage from the BCEBAT.

A number of defendants argue that equity does not support the assessments because defendants' conduct did not bring about the deficiency. However, equitable principles are not limited to situations in which both a wrongdoer and an innocent party are present but also apply to situations in which both parties are innocent. One court has held as follows:

It is a long-standing rule of equity that "when one of two innocent persons must suffer from the fraud of a third, the one who made it possible for the fraud to be perpetrated must bear the loss." *Hardware Mut. Cas. Co. v. Gall* (1968), 15 Ohio St. 2d 261, 267, 240 N.E.2d 502; see also *Roland v. Gundy* (1831) 5 Ohio 202, 203. As the Supreme Court of Ohio has stated, "Ideally, the thief is held accountable. The unfortunate reality is that the loss is often shifted to the innocent party whose conduct or relationship with the [wrongdoer] most facilitated the risk of loss." *Ed Stinn Chevrolet, Inc. v. National City Bank* (1986), 28 Ohio St. 3d 221, 226, 503 N.E.2d 524, modified (1987), 31 Ohio St. 3d 150, 509 N.E.2d 945.

Dayton Area School E.F.C.U. v. Nath (Montgomery App., Sept. 4, 1998), No. 16956; 1998 Ohio App. LEXIS 4141, at *20 (brackets in original).

Thus, defendants' innocence would not bar the application of equitable principles in light of the innocence of defendants' employees, whose benefit payments would be

put at risk by the MEWA's under-funding. Defendants made the decisions as to the means of obtaining health-benefit coverage and chose to enter into the Master Agreements or otherwise obtain coverage from the BCEBAT, whereas defendants' individual employees did not make the decisions to obtain health-benefit coverage in this manner. Also, a number of defendants have indicated their intention to seek restitution from BCEBAT's trustees or other parties whose conduct allegedly resulted in the deficiency and may be in a better position to seek recovery from the responsible parties than defendants' individual employees are. As such, both Ohio law and equitable principles support defendants' liability for the assessments.

Cf. In re. Int'l Forum of Fla. Health Ben. Trust (Fla. Dist. Ct. App. 1992), 607 So. 2d 432, 437 ("because the assessment provisions are designed, in part, to protect employees, the court's equitable decision to assess the employers is supported by the long-established equitable principle recognizing that if two innocent parties are injured by a third, either by negligence or fraud, the one who made the loss possible must bear legal responsibility") (internal footnote omitted) (discussing assessments against employers under Fla. Stat. 624.446, which authorizes the Department of Insurance to supervise the liquidation of a MEWA).

Defendants have attempted to distinguish Int'l Forum from the present case. For example, defendant E.L. Stone Co. argues that "the Int'l Forum court expressly recognized that the defense of lack of actual notice could be raised by employers as a defense to assessment." However, Int'l Forum held that, as to Florida statutes then in effect, Fla. Stat. § 624.4415 "provid[ed] that MEWAs would be authorized to assess employer/participants for shortfalls in funds if the arrangement's balance of funds

showed a deficit,” that Fla. Stat. § 624.4415(2) required that MEWAs (such as the one at issue in Int’l Forum) with a valid certificate of authority before § 624.4415’s effective date “shall comply with this section and s. 624.4414,” that “Section 624.4414(3) requires each policy to contain a statement of the assessment liability,” and that “[i]n reading the statutes together, it appears that the MEWA was required by law to inform the employers of their assessment liability” and so “was required to give actual notice to the employers.” Int’l Forum, 607 So. 2d at 435, 438.

In contrast, no issue exists as to the effective date of the MEWA statute and its application in the present case, and Ohio law differs from the Florida law at issue in Int’l Forum. Defendants have failed to identify a corresponding provision in Ohio law which requires a “statement of assessment liability” in a policy. Rather, O.R.C. 1739.14(D) merely states that a MEWA board “shall determine whether any . . . assessments shall be . . . levied against participating members,” and O.R.C. 1739.15(A) states that a MEWA member “is liable for all legal obligations of the arrangement.”

Also, Ohio’s MEWA statute does not state that delinquency proceedings regarding a MEWA are “in equity.” See Int’l Forum, 607 So. 2d at 437 n.3 (Fla. Stat. § 631.021(1) declared that “[a]ny delinquency proceeding in this chapter is in equity”); see also Chase Bank of Tex. Nat’l Ass’n v. Dep’t of Ins. (Fla. Dist. Ct. App. 2003), 860 So. 2d 472, 476-77 (Fla. Stat. § 631.021(1) did not deprive circuit court of jurisdiction over third-party claims in the context of insurance liquidation because “the Florida courts have abolished the distinction between law and equity”) (citing Fla. R. Civ. P. 1.040). Thus, although equitable principles support the assessments against defendants, the assessments are explicitly authorized by O.R.C. 1739.15(A) and 1739.14(D) and are

not merely an equitable remedy.

Defendants West Branch, et al. argue that equity does not support holding them liable for the MEWA's unpaid obligations because "Plaintiff employed language prohibited by Section 1739.19 to mislead the Defendants" and "failed to comply with" O.R.C. 1739.01 "by failing to inform the above Defendants that they might be subject to additional assessments beyond regular premiums" and because defendants did not create the deficiency. However, as previously discussed, defendants were on notice that they were agreeing to "participate" in a "Trust" which was "established . . . for the provisions of health benefits" and to be bound by the incorporated "Trust Agreement, Plan Document, and any amendments thereto," an examination of which would have revealed that coverage was being provided by a MEWA. Also, as previously discussed, defendants present no legal authority which has held that a violation of O.R.C. 1739.19 releases an employer from liability for assessments and present no evidence that they were actually misled by the use of words such as "insurance" or "co-insurance" in violation of O.R.C. 1739.19.

Like a number of other defendants, defendants Ziegler Tire and Supply Co. and Rose Run Drilling, Inc. argue that "Plaintiff should seek recovery from the trustees, the plan administrator, and their agents" and Int'l Forum "reversed the lower court's order finding members liable for the assessment because there was no evidence before the trier of fact to support the contention that the employees would be liable" and that in the present case "Plaintiff has not brought forward any evidence that service providers will seek recovery from employees."

However, defendants cite no legal authority which requires the Superintendent of

Insurance to pursue claims against a MEWA's trustees or plan administrator prior to or instead of levying assessments against employers, which bars assessments if the unpaid obligations resulted from the trustees' or plan administrator's mismanagement or misconduct, which bars assessments if recovery might be possible from other sources, or which requires evidence that service providers will seek payment from employees before the Superintendent of Insurance can levy assessments for a MEWA's under-funding. Also, as previously discussed, the assessments against defendants are not based merely on equitable principles but are expressly authorized by O.R.C. 1739.15(A) and 1739.14(D).

Likewise, defendant Tewel Corp. cites no legal authority for the argument (raised in its reply brief) that "it is arguable that Plaintiff, as the controller of the alleged trust in 2002, may be liable for the mismanagement of the alleged MEWA in 2002." In any event, plaintiff's motion for partial summary judgment concerns the Superintendent of Insurance's authority to levy assessments and not the ability of an employer to recover those sums from others who engaged in mismanagement or misconduct.

A number of defendants argue that it would be inequitable to permit plaintiff to hold them liable for the assessments at this point in time. For example, defendant Bollin & Sons, Inc. (dba Bollin Label Systems) argues that it "never received any notice with respect to the 2000 and 2002 special assessments" and "[e]quity demands, therefore, that Plaintiff cannot be allowed to retroactively seek reimbursement for those assessments." Defendant Dominic's Landscaping and Garden Center argues that it paid the 2001 assessment but never received notice of other assessments and so plaintiff waived any rights to enforce the assessments now. Defendant Bennett/Dover

argues that in August and October 2002, “the Trust, through Ms. Lopez, informed Bennett/Dover that in order for Bennett/Dover to continue its coverage with the Trust through October, 2002[,] Bennett/Dover would only have to pay the September and October, 2002 premiums and one third (1/3) of the September, 2002 assessment” and so “voluntarily relinquished its right to request any other amounts from Bennett/Dover.”

However, as previously discussed, the assessments are authorized under statutory and contractual authority and not purely on equitable principles. Also, defendants cite no applicable legal authority which would bar collection of the assessments on equitable grounds. Additionally, the argument that Int'l Forum, 607 So. 2d at 438, held that “all employers [are] entitled to receive actual notice of assessment before court could impose liability for such assessments and lack of notice is valid defense at summary judgment stage” is misplaced for the reasons previously discussed and because Int'l Forum did not bar “retroactive” assessments or hold that assessments could not later be imposed once notice was given.

In addition, any representations that maintaining coverage required the payment of premiums and/or outstanding assessments or that a defendant would not be required to pay additional premiums or assessments to terminate its BCEBAT membership does not constitute a representation that defendants would never be liable for future assessments or that the Superintendent of Insurance was waiving the collection of all or part of any future assessments.

In any event, Int'l Forum is not binding authority on this Court but expresses the general, equitable principle that “that if two innocent parties are injured by a third, either by negligence or fraud, the one who made the loss possible must bear legal

responsibility.” Int’l Forum, 607 So. 2d at 437. As previously discussed, defendants in the present case made the decisions to enter into the Master Agreements or otherwise to obtain coverage from the BCEBAT. It is also noted that some defendants have indicated their intention to pursue claims which they might have against BCEBAT’s trustees or plan administrators and that such action has the possibility of mitigating the cost of the assessments.

Twelfth, contrary to defendant Ziegler Tire’s arguments, the assessments are not invalid on the ground that the sponsoring organizations of BCEBAT might not have offered benefits other than insurance. Although O.R.C. 1739.02 states that a trade, industry, or professional association which has been organized and maintained “for purposes other than obtaining insurance” may establish and operate “a group self-insurance program under a multiple employer welfare arrangement,” defendant does not cite any statute or other legal authority which would permit defendants to avoid liability for the assessments on the grounds that plaintiff has not presented evidence that the association did not offer benefits other than insurance or that associational memberships might have required enrollment in the insurance program to obtain the other benefits.

Defendant also fails to cite any legal authority for its argument that O.R.C. 1739.01(A)’s language that “each member agrees to assume liability’ . . . alone contemplates that a member of a trade organization may or may not be a participant in a MEWA insurance benefit offered by a trade organization.” Also, as previously discussed, the Master Agreement explicitly states that the “Employer desires to become a member in the Association to obtain all of the benefits of such membership” and that

“[t]he undersigned Employer requests approval to participate in the Trust established by the Association for the provision of health benefits to employees of member Employers and agrees to be bound by the terms of the Trust Agreement, Plan Document, and any amendments thereto, the terms of which are specifically incorporated in this Master Agreement by reference.” (Emphasis added.) Likewise, the argument that defendants did not receive a “special” tax benefit by obtaining health-benefits coverage from BCEBAT is misplaced in that a benefit can be obtained, whether or not it is deemed “special.”

Thirteenth, plaintiff’s motion for partial summary judgment is not barred on the grounds that plaintiff has not given an accounting of the amounts owed, that plaintiff’s motion does not allege specific amounts to be owed by particular defendants, that defendants may not owe money for assessments or were not properly credited with assessment payments already made, or that assessments are being levied for time periods when a defendant was not receiving coverage from the BCEBAT. Plaintiff’s motion for partial summary judgment only concerns plaintiff’s authority to levy the assessments. In contrast, the amounts sought in plaintiff’s notices of assessment, the time-period for which a defendant is liable, and any amounts to be credited toward a defendant’s assessment liability concern factual issues as to the sums owed by the respective defendants.

Fourteenth, to the extent that defendants are liable for the assessments under express, written or oral contracts, plaintiff is not entitled to summary judgment on the implied-contract or unjust-enrichment claims. Conversely, to the extent that a defendant received health-coverage benefits from the BCEBAT in the absence of an express contract, plaintiff is entitled to summary judgment on the implied-contract or

unjust-enrichment claims.

The Tenth District Court of Appeals has discussed unjust enrichment as follows:

In order to prove unjust enrichment, a plaintiff must establish a benefit conferred by the plaintiff upon a defendant, the defendant's knowledge of the benefit, and the defendant's retention of the benefit under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298. However, where damages may be available for breach of contract or in tort, the party cannot also invoke the equitable remedy of unjust enrichment. *Saraf v. Maronda Homes, Inc.*, Franklin App. No. 02AP-461, 2002 Ohio 6741, at P12, quoting *Banks v. Nationwide Mut. Fire Ins. Co.* (Nov. 28, 2000), Franklin App. No. 99AP-1413, 2000 Ohio App. LEXIS 5504.

Kitson v. Berryman (Franklin App., May 22, 2003), No. 02AP-827, 2003 Ohio App. LEXIS 2396, at *8-9.

In this regard, some defendants have raised arguments regarding their specific situations.

Defendant Ziegler Tire argues that "Plaintiff has failed to present any evidence that Ziegler Tire was a member of an organization sponsoring a MEWA." However, attached to Ziegler Tire's summary-judgment motion are the affidavit of William C. Ziegler, who states that the company joined the Wholesale Retail Employee Benefit Association (WREBA), and a copy of the Master Agreement with WREBA. As such, evidence which supports Ziegler Tire's membership in WREBA exists.

Defendant Lois Blackburn argues that she only signed an insurance application but did not sign a Master Agreement. However, plaintiff's complaint not only asserts claims for breach of express contract but also asserts claims for breach of implied contract, unjust enrichment, and breach of statutory duty. Also, plaintiff's motion for partial summary judgment concerns the authority to levy assessments and not the

amount, if any, of the assessments against particular defendants.

Defendant Combi Packaging Systems, LLC argues that “[t]he Deputy Rehabilitation assigned to the BCEBAAT agreed to release Combi from any liability for the legal obligations of the BCEBAT arising after the payment in full of 2000 Assessment and 2001 Assessment” and that “[e]ven if this Court were to find that the release of Combi by the BCEBAT does not preclude judgment as a matter of law . . . , Plaintiff is only entitled to a judgment finding that a member of the BCEBAT is liable for the legal obligations of the arrangement to the extent calculated under Ohio Revised Code § 1739.15(A), which provides that a member[] is liable for all legal obligations of the arrangement in proportion to the ratio of the total number of covered employees employed by the member on the first day of the month that the obligation arose to the total number of covered employees employed by all members of the arrangement at the time the obligation arose.” Similarly, defendant Bennett/Dover presents an affidavit which states that “[t]he Trust represented to Bennett/Dover that the July, 2001 assessment would be the only assessment levied by the Trust and that this assessment would eventually be returned to Bennett/Dover.”

However, any alleged representations that defendants would not have to pay future assessments do not concern the specific issue of plaintiff’s legal and contractual authority to levy assessments in the first place. Rather, such alleged representations concern the amount, if any, of defendants’ liability for the assessments.

Defendant Columbiana Service, LLC argues that it “was never a member of BCEBA, the BCEBA Trust and/or the MEWA” and “was not even in existence in 2001 and 2002—the period of time for which the assessments apply.” However, in her

memorandum contra defendant's summary-judgment motion, plaintiff argues that defendant's predecessor, Reichard Industries, Inc., signed a Master Agreement and provides copies of defendant's checks to MEBA. As such, plaintiff's motion for partial summary judgment would not be barred as to this defendant on the ground that it is not liable for the assessments. In any event, this decision is only deciding whether plaintiff has the authority to levy the assessments in the first place, not the amount, if any, for which defendant is liable.

Thus, plaintiff's motion for partial summary judgment is warranted as to plaintiff's statutory and contractual authority to levy assessments under O.R.C. 1739.14 & 1739.15 against defendants for BCEBAT's funding deficiencies. Plaintiff's motion is unwarranted to the extent that the unjust-enrichment and implied-contract claims are based on express contracts. The amount, if any, of assessments against particular defendants and the amount of the deficiency are not at issue in plaintiff's motion for partial summary judgment and have not been determined.

III. Defendants' Motions

A number of defendants have filed motions for summary judgment. As to the defendants who signed Master Agreements, plaintiff states that the claim for implied contract is moot because the Master Agreements are express contracts.

As previously discussed, plaintiff has the authority to levy the assessments, although no determination has been made as to the validity of the amounts.

In addition, a number of defendants have raised arguments regarding their specific situations.

Regarding its counterclaim, defendant Bennett/Dover argues that when the

BCEBAT denied claims for services provided in October 2002, "Bennett/Dover either made the payments directly to the medical providers or reimbursed its employees for bills which those employees had already paid" and that "Bennett/Dover is entitled to judgment as a matter of law in the amount of \$1,211.13, the amount which Bennett/Dover paid for the claims which should have properly been paid by the Trust."

In his affidavit, James C. Orr states as follows:

In January, 2003 Bennett/Dover received notification from the Trust indicating that a balance of \$1,211.13 was owed as well as additional amounts for the September, 2002 assessment. Bennett/Dover responded to the January, 2003 notification from the Trust with a letter dated February 5, 2003 in which it disputed that any additional amounts were due to the Trust and once again reminded Ms. Lopez of the representations of the Trust, which Bennett/Dover relied on, that Bennett/Dover would only have to pay the September and October, 2002 premiums and an additional \$2,442.44.

(Orr affidavit, para. 14.)

Similarly, defendant Lawyers Property Development Corp. argues "that LPDC was guaranteed a fixed premium rate for the first year of coverage in the Master Agreement contract and another fixed premium rate upon renewal of that contract following the first year's term of coverage."

However, as previously discussed, contractual premiums and statutorily-authorized assessments are not identical, and statements regarding the amount of premiums do not constitute representations that a defendant would never have to pay assessments or a waiver of the statutory authority to levy assessments. Also, defendants have failed to show that they are entitled to summary judgment as a matter of law when the facts are construed in plaintiff's favor.

Defendant Gaymont Nursing Home argues that Association Plan Administrators

sent a letter which stated that a “one time additional monthly premium” was being assessed and that defendant paid that assessment. However, that statement recognizes that an assessment is not a regularly-scheduled premium but is not necessarily a representation that no future assessments will be levied. When the facts are construed in plaintiff’s favor, a “genuine issue of material fact” exists. Also, defendant cites no legal authority which has held that the Superintendent of Insurance would be barred from levying statutorily-authorized assessments if a MEWA’s plan administrator or other representative made a previous representation to the contrary. As previously discussed, defendant is responsible for knowledge of the applicable statute. Thus, defendant’s motion is unwarranted.

Defendant West Branch Nursing Home argues that it “never executed a Master Agreement to be a member of the BCEBAT,” that “[t]he Request for Coverage was signed by a representative of Damascus Health Care,” and that “West Branch Nursing Home and Damascus Health Care are separate entities.” In response, plaintiff argues that Damascus Health Care is the predecessor of West Branch Nursing Home. When the evidence is construed in plaintiff’s favor, “genuine issues of material fact” exist as to the nature of the relationship between West Branch Nursing Home and Damascus Health Care and any benefits which defendant received from the BCEBAT. Thus, defendant is not entitled to summary judgment.

Defendant Therm-O-Link, Inc. argues that plaintiff violated O.R.C. 1739.19(C) by “using the language of insurance” to “mislead Defendant, Therm-O-Link, into believing it had ‘fully insured group medical coverage.’” However, defendant cannot avoid liability for the assessments on the ground that documents pertaining to the BCEBAT used

words often used in the “insurance” business. As previously discussed, O.R.C. 1739.19(C) does not bar a MEWA from any use of the term “insurance” but makes an exception “for the purpose of describing any sickness and accident or excess insurance or stop-loss insurance policy to which a multiple employer welfare arrangement operating a group self-insurance program is a party.” Also, defendant cites no legal authority which has held that describing a MEWA as a “fully-insured” plan constitutes a representation that an employer is not liable for statutorily-authorized assessments or that a violation of O.R.C. 1739.19(C) releases an employer from liability for assessments. Furthermore, as previously discussed, the Master Agreements specifically state that they incorporate by reference the Trust Agreement and Plan Document, which explicitly discuss the coverage as provided by the MEWA, and that the employers seek to “participate in the Trust established by the Association for the provisions of health benefits” and agree to be bound by the terms of the “Trust Agreement, Plan Document, and any amendments thereto.” Thus, defendant is not entitled to summary judgment.

On August 19, 2004, defendant Wise Chevrolet, Inc. filed its motion for summary judgment. Defendant argues, “On May 25, 2004, Wise’s Motion to Vacate the Default Judgment was granted. On or about July 20, 2004, Wise received a Decision Denying Defendant’s Motion for Relief from Judgment Filed May 4, 2004. Wise believes its Motion to Vacate was initially granted in May 2004.”

However, the May 25, 2004 entry did not vacate the default judgment against defendant Wise Chevrolet but gave plaintiff an extension of time to respond to defendant’s motion to vacate the default judgment. Because default judgment has

already been granted against defendant and because the July 20, 2004 decision denied defendant's motion to vacate, defendant is neither permitted to file its summary-judgment motion nor to be granted judgment on its motion.

Some defendants have raised the argument that they were not parties in the litigation in which the rehabilitation order was entered (Case No. 02CVH02-2010). However, defendants have not cited any legal authority which has held that an employer's absence as a party in the litigation in which the Superintendent of Insurance obtains a rehabilitation order bars the Superintendent of Insurance from levying an assessment against that employer.

Additionally, some defendants argue that plaintiff did not attach copies of the Master Agreements to the amended complaint. However, plaintiff's authority to levy assessments is set forth in Ohio's statutes and is not a contractual creation. In any event, a motion for more definite statement and not dismissal of a plaintiff's complaint is the remedy for a violation of Civ. R. 10(C). See Yeung v. Neumeier (Van Wert App., Nov. 5, 2002), No. 15-02-04, 2002 Ohio App. LEXIS 5842, at *2-3 ("The proper procedure for curing an insufficient attachment to a pleading would be for the defendant to file a motion for a more definite statement under Civ.R. 12(E) not a Civ.R. 12(B)(6) motion. . . . 'A defendant who fails to file a Civ.R.12(E) motion before filing his answer has been held to have waived his right to assert Civ.R.10(D) as a basis for dismissing the plaintiff's complaint.'" (citing Pyle v. Hamm (Highland App., Sept. 14, 1990), No. 745, 1990 Ohio App. LEXIS 4155 at *3; Point Rental Co. v. Posani, (Franklin 1976), 52 Ohio App. 2d 183; quoting Lorain Music Co. v. Eidt (Crawford App., Nov. 21, 2000), No. 3-2000-17, 2000 Ohio 1799 at *5).

In its motion to dismiss, defendant Orthopaedic Associates of Zanesville, Inc. argues that plaintiff is impermissible attempting to modify the parties' contract and states that it "incorporates" the arguments in defendant R.B. Thomas Electric's summary-judgment motion. Defendant Tewel Corp.'s motion to dismiss or alternatively for summary judgment similarly argues that plaintiff is improperly attempting to modify the contract while attempting to enforce contractual provisions. For the reasons previously discussed in the context of defendants' summary-judgment motions, defendant Orthopaedic Associates' motion to dismiss and defendant Tewel Corp.'s motion to dismiss or alternatively for summary judgment are unwarranted. It is also noted that a motion to dismiss does not consider evidence outside the pleadings, so the evidence submitted in support of defendant Orthopaedic Associates' motion to dismiss is inadmissible.

In conclusion:

(1) For the reasons previously discussed in the context of plaintiff's motion for partial summary judgment, plaintiff has the authority under Ohio's MEWA statute to levy the assessments for BCEBT's deficiencies. Also, the Master Agreements constitute express contracts, so the defendants which signed Master Agreements are entitled to summary judgment on the implied-contract and unjust-enrichment claims. Thus, the summary-judgment motions of defendants R.B. Thomas Electric, Inc.; Tewel Corp.; The Klingstedt Brothers Co.; SGF Management, Inc.; Gaymont Nursing Home; Zeiger Industries; Treemen Industries; West Branch Nursing Home and Pleasant View Nursing Home; Rose Run Drilling, Inc.; Ziegler Tire and Supply Co.; W.T. Pettit & Sons, Co.; Columbiana Service, LLC; Therm-O-Link, Inc.; Poland Concrete Products, Inc.; Autumn

Hills Care Center, Inc.; Nescor Plastics Corp.; Michael Day Enterprise, Inc.; Bollin & Sons, Inc. (dba Bollin Label Systems); Universal Tire Molds, Inc.; Gauer Service & Supply Co.; Rogers Industrial Products; Custom Poly Bag, Inc.; Esterle Mold & Machine, Co.; and Lawyers Property Development Corp. are GRANTED as to the claims for breach of implied contract and unjust enrichment to the extent that these claims are based on express contracts and are DENIED as to the claims for breach of statutory duty and breach of express contract.

(2) Conversely, to the extent that a defendant argues that it did not sign a Master Agreement or that plaintiff has not presented admissible evidence that it signed a Master Agreement, a defendant is not entitled to judgment on the implied-contract and unjust-enrichment claims. A defendant would also not be entitled to summary judgment on the express-contract claim in the absence of uncontroverted evidence that a written or oral contract did not exist. As such, even an affidavit which states that a defendant did not sign a Master Agreement or did not become a party or beneficiary of the BCEBAT does not preclude the existence of an oral contract or of defendant's actually receiving health-benefits coverage from the BCEBAT. Thus, the summary-judgment motions of defendants Lois Blackburn; Callos Professional Employment, LLC; and Western Reserve Racquet and Fitness Club are DENIED.

(3) Defendant Orthopaedic Associates of Zanesville, Inc.'s motion to dismiss and defendant Tewel Corp.'s motion to dismiss or alternatively for summary judgment are DENIED.

(4) Defendant Bennett/Dover's motion for summary judgment on plaintiff's amended complaint and motion for summary judgment on its counterclaim are

DENIED.

(5) Defendant Wise Chevrolet, Inc.'s motion for summary judgment is DENIED.

IV. Motion to Dismiss Counterclaim

On June 7, 2004, plaintiff filed her motion to dismiss the counterclaim of American Tool and Mfg. Co., Cleveland Express, Distribution Results, Inc., E&E Nameplates, Hill-T-Farm, Inc., Holmes Trucking, Houston Plumbing and Heating, International Equipment, KBZ Electric, Inc., KLYN Nurseries, Lawn & Order, Michael's Mobile Meals, Pinnacle Technology, Pohl Transportation/Harold J. Pohl, Smith's Classic Machine, Superior Quality Mfg., The Rhiel Supply Co., Trumbull County Dry Kiln, Wells, Inc., Osgar's Rustproofing, Glen's Surplus, Inc., and F.M. Machine Co. Plaintiff argues that the Superintendent of Insurance's status as Rehabilitator "does not make the Department of Insurance a party in a suit brought by the Rehabilitator on behalf of the Trust," that defendants have failed to plead any of the elements of a RICO violation, that "the proper forum to challenge the Superintendent's performance in her capacity as Rehabilitator can only exist before the Judge presiding over the Rehabilitation case," and that "Defendants' demand for monetary relief against the 'Department of Insurance' brings the matter solely within the exclusive jurisdiction of the Ohio Court of Claims."

In response, defendants argue that they were not required to plead "operative facts . . . with particularity" or "legal theory of recovery," that they are seeking leave to amend their counterclaim, and that "they shall file a petition for removal of their claims against the state to the Court of Claims."

In this regard, plaintiff's motion to dismiss defendants' counterclaim is warranted.

First, a decision filed August 19, 2004, sua sponte struck defendants' amended

counterclaim and denied defendants' alternative motion to amend their counterclaim.

Second, RICO claims must be pled with specificity. One court has noted

the elements required to establish a RICO violation: (1) conduct of the defendant which involves the commission of two or more of specifically prohibited state or federal criminal offenses; (2) the prohibited criminal conduct of the defendant constitutes a pattern of corrupt activity; and (3) the defendant has participated in the affairs of an enterprise or has acquired and maintained an interest in or control of an enterprise. *Sedima S.P.R.L. v. Imrex Co.* (1985), 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346. We hold that the failure of a plaintiff to plead any of the elements necessary to establish a RICO violation results in a defective complaint which cannot withstand a motion to dismiss as based upon a failure to state a claim upon which relief can be granted. Cf. *Van Dorn Co. Cent. States Can. Co. v. Howington* (N.D. Ohio 1985), 623 F.Supp. 1548.

Count one of the plaintiffs' complaint fails to disclose that the elements of a corrupt activity, a pattern of corrupt activity and the existence of an enterprise through which FLX acted were pled with specificity. In order to state a claim upon which relief can be granted and further withstand a motion to dismiss, the plaintiffs were required to plead specifically that (1) FLX was involved in some "corrupt activity" as defined by R.C. 2923.31(l) (*Palmer v. Nationwide Mut. Ins. Co.* [C.A.6, 1991], 945 F.2d 1371; *State v. Cummings* [Apr. 21, 1992], Franklin App. No. 90AP-1144, unreported, 1992 Ohio App. LEXIS 2139, 1992 WL 82783; *State v. Wolfe* [Aug. 10, 1988], 51 Ohio App.3d 215, 555 N.E.2d 689; (2) FLX was involved in a pattern of corrupt activity which consisted of two or more incidents of corrupt activity as prohibited by R.C. 2923.31(l) (*H.J., Inc. v. Northwestern Bell Tel. Co.* [1989], 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195; *Sedima S.P.R.L. v. Imrex Co.*, *supra*); and (3) that an enterprise existed separate and apart from FLX through which FLX acted (*Fleischhauer v. Feltner* [C.A.6, 1989], 879 F.2d 1290; *Puckett v. Tennessee Eastman Co.* [C.A.6, 1989], 889 F.2d 1481; *Criswell v. Prod. Credit Assn.* [S.D. Ohio 1985], 660 F.Supp. 14). The failure of the plaintiffs to plead these three elements with specificity mandated that the trial court dismiss the claimed RICO violation as to FLX.

Universal Coach, Inc. v. New York City Transit Auth., Inc. (Cuyahoga 1993), 90 Ohio App. 3d 284, 291; see *Tinsler v. Nafziger* (C.A. 6, 2001), 22 Fed. Appx. 600, 601-02 (affirming summary judgment for defendants when plaintiffs "did not meet their burden of establishing any of the elements necessary prevail on a federal RICO claim . . . or an

Ohio RICO claim,” “did not state with any particularity the circumstances constituting the basis of their claim that the defendants committed a fraud against them,” and “have not identified the specific statutes that the defendants allegedly violated, and they have not established that any such statutes provide a private cause of action”) (citing Sedima S.P.R.L. v. Imrex Co. (1985), 473 U.S. 479, 496; Universal Coach, 90 Ohio App. 3d 284; Advocacy Org. for Patients & Providers v. Auto Club Ins. (C.A. 6, 1999), 176 F.3d 315, 322).

Third, the petition for removal was dismissed by the Court of Claims in an entry filed November 10, 2004.

V. Motion for Default Judgment

On August 4, 2004, defendant Therm-O-Link, Inc. filed its motion for default judgment on its cross-claim against defendant Association Plan Administrators, Inc. Upon review of the record it appears that defendant Association Plan Administrators has failed to plead or otherwise defend as provided by the Civil Rules. Thus, this motion is warranted.

VI. Motions to Strike

On September 29, 2004, defendants Rose Run Drilling and Ziegler Tire and Supply filed their respective motions to strike the copies of the signed Master Agreements which are attached to plaintiff's memorandum contra defendants' summary-judgment motions on the ground that those copies were not properly authenticated under Civ. R. 56(C). However, Ziegler Tire and Supply attached a copy of its signed Master Agreement to its summary-judgment motion, and William C. Ziegler's affidavit states that the company signed the Master Agreement. Thus, the Court declines to strike the copy of

Ziegler Tire and Supply's Master Agreement.

The copy of Rose Run Drilling's signed Master Agreement does not appear to have been properly authenticated and is different than the unsigned copy attached to defendant's motion. Although this provides a basis for striking this exhibit, the Court declines to grant judgment for defendant on this ground. Martha Zilch's August 10, 2004 affidavit states that "[t]he Company does not have a signed copy of this Master Agreement nor does it have a recollection as to whether the Master Agreement was ever signed by the Company or, for that matter, signed by the BCEBA." (Zilch affidavit dated Aug. 10, 2004, para. 5.) This statement does not constitute evidence that Rose Run Drilling actually did not sign the agreement. In light of the discovery stay and the absence of evidence that defendant actually did not sign the Master Agreement or that plaintiff will be unable to properly verify the signed copy, the Court declines to grant summary judgment on this ground.

It is also noted that defendant Rose Run Drilling has provided evidence that it obtained health-benefits coverage. In the affidavit attached to defendant's summary-judgment motion, Zilch states that she "dealt with Associated Plan Administrators for the insurance coverage," and in an affidavit attached to defendant's memorandum contra plaintiff's summary-judgment motion, Zilch states that "[f]rom the time the Company cancelled its health insurance coverage through Builders & Contractors Employee Benefit Association (BCEBA), I have taken the lead role in securing and maintaining health insurance coverage for the Company's employees." (Zilch affidavit dated Aug. 10, 2004, para. 2; Zilch affidavit dated Sept. 13, 2004, para. 3.) When the evidence is construed in plaintiff's favor, "genuine issues of material fact" as to defendant's participation in and

benefits from the BCEBT precludes judgment on all claims against defendant.

VII. Motion to Compel Discovery

On September 30, 2004, defendant Combi Packaging Systems, LLC filed its motion to compel discovery. However, the Court's July 19, 2004 entry explicitly states that "[a]s of the date of this Order, all discovery . . . [is] hereby stayed" and that "[t]he stay will be automatically lifted 30 days after the Court's ruling on the Motions for Summary Judgment." Thus, defendant's motion is unwarranted.

VIII. Motion to Extend Time

On October 12, 2004, defendant R.H. Little Co. filed its motion for a 30-day extension of time to respond to plaintiff's motion for partial summary judgment. For good cause shown, this motion is warranted.

IX. Conclusion

Therefore:

(1) Plaintiff's motion for partial summary judgment is GRANTED as to plaintiff's statutory and contractual authority to levy assessments under O.R.C. 1739.14 & 1739.15 against defendants for BCEBT's funding deficiencies but is DENIED to the extent that the unjust-enrichment and implied-contract claims are based on express contracts.

(2) The summary-judgment motions of defendants R.B. Thomas Electric, Inc.; Tewel Corp.; The Klingstedt Brothers Co.; SGF Management, Inc.; Gaymont Nursing Home; Zeiger Industries; Treemen Industries; West Branch Nursing Home and Pleasant View Nursing Home; Rose Run Drilling, Inc.; Ziegler Tire and Supply Co.; W.T. Pettit & Sons, Co.; Columbiana Service, LLC; Therm-O-Link, Inc.; Poland Concrete Products,

Inc.; Autumn Hills Care Center, Inc.; Nescor Plastics Corp.; Michael Day Enterprise, Inc.; Bollin & Sons, Inc. (dba Bollin Label Systems); Universal Tire Molds, Inc.; Gauer Service & Supply Co.; Rogers Industrial Products; Custom Poly Bag, Inc.; Esterle Mold & Machine, Co.; and Lawyers Property Development Corp. are GRANTED as to the claims for breach of implied contract and unjust enrichment to the extent that these claims are based on express contracts and are DENIED as to the claims for breach of statutory duty and breach of express contract.

(3) The summary-judgment motions of defendants Lois Blackburn; Callos Professional Employment, LLC; and Western Reserve Racquet and Fitness Club are DENIED.

(4) Defendant Orthopaedic Associates of Zanesville, Inc.'s motion to dismiss and defendant Tewel Corp.'s motion to dismiss or alternatively for summary judgment are DENIED.

(5) Defendant Bennett/Dover's motion for summary judgment on plaintiff's amended complaint and motion for summary judgment on its counterclaim are DENIED.

(6) Defendant Wise Chevrolet, Inc.'s motion for summary judgment is DENIED.

(7) Plaintiff's motion to dismiss the counterclaim of American Tool and Mfg. Co.; Cleveland Express, Distribution Results, Inc.; E&E Nameplates, Hill-T-Farm, Inc.; Holmes Trucking; Houston Plumbing and Heating; International Equipment; KBZ Electric, Inc.; KLYN Nurseries; Lawn & Order; Michael's Mobile Meals; Pinnacle Technology; Pohl Transportation/Harold J. Pohl; Smith's Classic Machine; Superior Quality Mfg.; The Rhiel Supply Co.; Trumbull County Dry Kiln; Wells, Inc.; Osgar's

Rustproofing; Glen's Surplus, Inc.; and F.M. Machine Co. is GRANTED.

(8) Defendant Therm-O-Link, Inc.'s motion for default judgment on its cross-claim against defendant Association Plan Administrators, Inc. is GRANTED.

(9) Defendant Rose Run Drilling, Inc.'s motion to strike is GRANTED, and Ziegler Tire and Supply Co.'s motion to strike is DENIED.

(10) Defendant Combi Packaging Systems, LLC's motion to compel discovery is DENIED.

(11) Defendant R.H. Little Co.'s motion to extend time is GRANTED.

Counsel for plaintiff shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

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