COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ANTHONY KELCH, ET AL.	:	
Plaintiffs	:	**CASE NO. 2015 CVH 00945**
vs.	:	**Judge McBride**
ROUNDPOINT MORTGAGE SERVICING CORP., ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Terry L. Lewis Co., L.P.A., Terry L. Lewis, counsel for the plaintiffs Anthony Kelch and Cherie Kelch, 10 West Second Street, Suite 1100, Dayton, Ohio 45402;

McGlinchey Stafford, PLLC, Bryan T. Kostura and James W. Sandy, counsel for the defendant RoundPoint Mortgage Servicing Corporation, 25550 Chagrin Boulevard, Suite 406, Beachwood, Ohio, 44122.

This cause is before the court for consideration of (1) the motion for summary judgment filed by the plaintiffs Anthony Kelch and Cherie Kelch on January 28, 2016 and (2) the motion for summary judgment filed by the defendant RoundPoint Mortgage Servicing Corporation's motion for summary judgment filed on January 29, 2016.

The court established a briefing and hearing schedule as part of the case management order which was issued on October 19, 2015. Pursuant to that order, the

last brief was filed with respect to the motions on April 14, 2016. Neither side requested the scheduling of oral arguments, and the motions were taken under advisement on April 20, 2016.

Upon consideration of the motions, the evidence presented for the court's review, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case stems a dispute regarding insurance settlement funds. The plaintiff Anthony Kelch received a loan from First Place Bank which was secured by a mortgage on his property located at 1543 East Meadowbrook Drive, Loveland, Ohio 45140.[1] The mortgage is now serviced by the defendant RoundPoint Mortgage Servicing Corporation as the attorney-in-fact (hereinafter referred to as "RoundPoint").[2] The plaintiff Cherie Kelch is the wife of Anthony Kelch, and she is not a borrower under the note.[3]

The mortgage provides, in relevant part:

> "**4. Fire, Flood and Other Hazard Insurance.** Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. The insurance shall be maintained in the amount and for the periods that Lender

[1] Pls. Ex. 1, A. Kelch Aff., ¶ 1; Pls. Ex. 2, C. Kelch Aff., ¶ 2; Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 2; Defs. Ex. A-1 to Mot. for Summ. J. First Place Bank has since assigned its mortgage to First Guaranty Mortgage Company. *See* Defs. Ex. A-3 to Mot. for Summ. J.
[2] Pls. Ex. 1, A. Kelch Aff., ¶¶ 1-3; Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 1; Defs. Ex. A-4 to Mot. for Summ. J.
[3] Pls. Ex. 1, A. Kelch Aff., ¶ 4; Pls. Ex. 2, C. Kelch Aff., ¶ 2; Defs. Ex. A-1 to Mot. for Summ. J.

> requires. * * * The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.
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> In the event of loss, Borrow shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order of the indebtedness in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Notes and this Security Instrument shall be paid to the entity legally entitled thereto. * * *[4]

On October 6, 2013, the plaintiffs' home at 1543 Meadowbrook Drive caught fire.[5] The plaintiffs had an insurance policy on their home through Allstate Property and Casualty Company (hereinafter referred to as "Allstate").[6] The policy provided, in pertinent part:

> "A covered loss will be payable to the Mortgagee(s) named on the Policy Declarations, to the extent of their interest and in the order of precedence. All provisions of Section I of this policy will apply to these mortgages.
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> We will:
>
> a) protect the mortgagee's interest in a covered building structure in the event of an increase in hazard, intentional or criminal acts of, or direct by, an insured person, failure by any insured person to take all reasonable steps to save and preserve property after a loss, a change in ownership, or

[4] Defs. Ex. A-2 to Mot. for Summ. J.
[5] Pls. Ex. 1, A. Kelch Aff., ¶ 6; Pls. Ex. 2, C. Kelch Aff., ¶ 5.
[6] Pls. Ex. 1, A. Kelch Aff., ¶ 8; Defs. Ex. B-1 to Mot. for Summ. J. Of note, both plaintiffs are listed as insureds under the insurance policy. *See* Defs. Ex. B-1 to Mot. for Summ. J.

> foreclosure if the mortgagee has no knowledge of these conditions; and
>
> b) give the mortgagee at least 10 days notice if we cancel this policy.
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> The mortgagee will:
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> a) furnish proof of loss within 60 days after notice of the loss if an insured person fails to do so;
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> b) pay upon demand any premium due if an insured person fails to do so;
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> c) notify us in writing of any change or any increase in hazard of which the mortgagee has knowledge;
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> d) give us the mortgagee's right of recovery against any party liable for loss; and
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> e) after a loss, and at our option, permit us to satisfy the mortgage requirements and receive full transfer of the mortgage.
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> This mortgagee interest provision shall apply to any trustee or loss payee or other secured party."[7]

The defendant RoundPoint maintains that it never received immediate, written notice of the October 6, 2013 fire.[8] In this regard, the plaintiff Anthony Kelch avers that on October 11, 2013 he informed RoundPoint by telephone that a fire occurred in the plaintiffs' home.[9] He also claims, and RoundPoint agrees, that on November 8, 2013 he spoke to a RoundPoint representative and informed the representative of the fire.[10]

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[7] Defs. Ex. B-1 to Mot. for Summ. J., pg. 21.
[8] Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 7.
[9] Pls. Ex. 1, A. Kelch Aff., ¶ 8; Pls. Ex. 2, C. Kelch Aff., ¶ 6. In RoundPoint's responses to the plaintiffs' first requests for admissions, RoundPoint admits that between October 6, 2013 and February 1, 2015 the plaintiffs orally notified RoundPoint of the fire. *See* Pls. Ex. 2 to Pls. Ex. 1, A. Kelch Aff.
[10] Pls. Ex. 1, A. Kelch Aff., ¶ 7; Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 7.

The plaintiffs additionally claim that the representative informed Anthony Kelch that he need not notify RoundPoint of the fire in writing.[11] As to this claim, the defendant RoundPoint claims that its employees would not have waived this requirement, and its records do not show that any employee did so.[12]

When the plaintiffs' insurance claims had not been satisfied, the plaintiffs on March 27, 2014 filed suit against Allstate, among other defendants, and asserted claims of bad faith, breach of contract, and violations of the Ohio Consumer Sales Practices Act in *Anthony Kelch, et al. v. Allstate Insurance Company, et al.*, No. 2014CVH00409.[13] RoundPoint was not a party to the underlying action.[14]

On March 7, 2014, t he plaintiffs and Allstate entered into a settlement and release in *Anthony Kelch, et al. v. Allstate Insurance Company, et al.*, No. 2014CVH00409.[15] Allstate agreed to pay the plaintiffs $52,500, and in exchange the plaintiffs released Allstate "from any and all liability, claims, demands, controversies, damages, actions, and causes of action, * * * and any and all other loss or damage of every kind and nature, whether at law or in equity, which the undersigned * * * can, shall or may have by reason of or in any way resulting from a fire loss which occurred on or about October 6, 2013 at 1543 East Meadowbrook Drive, Loveland, Ohio 45140 * * *."[16]

The plaintiffs aver that the settlement pertains to issues that were unrelated to the damage to their home and its repair.[17] The plaintiffs further allege that they did not

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[11] Pls. Ex. 1, A. Kelch Aff., ¶ 7.
[12] Defs. Ex. 1 to Resp. to Mot. for Summ. J., S. Johnson Aff., ¶ 7; Defs. Ex. A-2 to Resp. to Mot. for Summ. J.
[13] Pls. Ex. 1, A. Kelch Aff., ¶ 9; Ex. B to Allstate's Am. Answer.
[14] Ex. B to Allstate's Am. Answer.
[15] Pls. Ex. 1, A. Kelch Aff., ¶ 11; Pls. Ex. 2, C. Kelch Aff., ¶ 10; Ex. 2 to Pls. Compl.
[16] Ex. 2 to Pls. Compl.
[17] Pls. Ex. 1, A. Kelch Aff., ¶ 24; Pls. Ex. 2, C. Kelch Aff., ¶ 22.

intend to make RoundPoint into a beneficiary of their insurance policy.[18] The defendant RoundPoint has submitted evidence that Allstate, however, intended for the $52,500 settlement fund to be derived from the insurance policy, specifically $45,000 under the policy's dwelling coverage and $7,500 under the policy's unscheduled personal property coverage.[19]

Allstate issued a check for $52,500 to both of the plaintiffs and the defendant RoundPoint jointly.[20] In April 2015, counsel for the plaintiffs contacted RoundPoint regarding the check.[21] The plaintiffs have not endorsed the $52,500 check,[22] and it has never been cashed.[23]

On July 20, 2016, the plaintiffs filed suit against the defendants RoundPoint and Allstate.[24] The plaintiff seeks a declaratory judgment determining (1) whether RoundPoint has a right to be a payee to the settlement check, (2) whether RoundPoint has a right to impose requirements on the plaintiffs before endorsing the check, (3) the right of RoundPoint to take actions to prevent the plaintiffs from obtaining access to the funds, and (4) the right of a mortgagee to receive compensation derived from a multiple count complaint where it was not a named party nor any intervenor.[25]

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[18] Pls. Ex. 1, A. Kelch Aff., ¶ 22.
[19] Defs. Ex. 2. to Resp. to Pls. Mot. for Summ. J, Aff. of Allstate, ¶ 5.
[20] Pls. Ex. 1, A. Kelch Aff., ¶ 11; Ex. 1 to Pls. Compl.
[21] Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 8.
[22] Defs. Ex. A to Mot. for Summ. J., S. Johnson Aff., ¶ 9.
[23] Defs. Ex. 2. to Resp. to Pls. Mot. for Summ. J, Aff. of Allstate, ¶ 6.
[24] The defendant Allstate has since been voluntarily dismissed from this action. It has deposited the $52,500 with the clerk of courts.
[25] The plaintiffs' complaint also includes a request for a declaratory judgment as to the rights of Allstate, however, Allstate has been dismissed from this action. Moreover, the complaint also includes causes of action against Allstate for breach of contract and unjust enrichment, which have now been dismissed.

The defendant RoundPoint counterclaimed, seeking a declaratory judgment and pursuing a breach of contract claim. The request for a declaratory judgment seeks an order (1) declaring that under the note and mortgage the plaintiffs shall endorse the insurance check to RoundPoint, which will then disburse its funds in accordance with the note and mortgage, and (2) declaring the rights and obligations of the parties under the note and mortgage. The breach of contract claim alleges that the plaintiffs breached their note and mortgage by failing to endorse the check and failing to notify RoundPoint of the October 2013 fire immediately by mail.

On January 28, 2016 the plaintiffs moved for summary judgment on their claim seeking a declaratory judgment, as well as judgment on RoundPoint's claim for breach of contract. On January 29, 2016, RoundPoint moved for summary judgment on its claim seeking a declaratory judgment and for breach of contract, as well as on the plaintiffs' claim seeking a declaratory judgment. Both parties filed responses, but not replies. The parties did not request oral argument on this matter.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

> "(1) No 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 the party opposing the motion."[26]

The court must view the evidence in a light most favorable to the nonmoving party.[27] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[28] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[29]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[30] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[31]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[32] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

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[26] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[27] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[28] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[29] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[30] Id. at 251-52.
[31] Id. at 250.
[32] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond."[33] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[34]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[35] The duty of the nonmoving party is more than that of resisting the motion's allegations.[36] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[37] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[38] It may not rely on the pleadings or unsupported allegations.[39]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[40] The trial court maintains the sound discretion to admit or exclude relevant evidence.[41] When a document falls outside the enumerated

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[33] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[34] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[35] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[36] *Wells Fargo*, 2013-Ohio-855at ¶ 25.
[37] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[38] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[39] Id.
[40] *See Wells Fargo*, 2013-Ohio-855at ¶ 15 citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[41] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18 quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[42]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[43] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[44] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[45] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[46]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[47] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[48]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus,

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[42] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[43] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[44] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[45] Id. citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[46] Id.
[47] Id. quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[48] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

documents referenced in the affidavit "must be attached to the affidavit."[49] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[50]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[51] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[52]

LEGAL ANALYSIS

(I) DECLARATORY JUDGMENT

Declaratory judgments are made available pursuant to R.C. 2721.03, under which "any person interested under a * * * written contract * * * may have determined any question of construction or validity arising under the * * * contract * * * and obtain a declaration of rights, status, or other legal relations under it."[53] When an action for a declaratory judgment "involves a determination of an issue of fact, that issue may be

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[49] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[50] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[51] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[52] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[53] R.C. 2721.03.

tried and determined in the same manner as issues of fact are tried and determined in other civil actions * * *."[54]

Parties are properly involved in a declaratory judgment suit when they are "legally affected" by the judgment.[55] "A party is legally affected by a cause of action if the party has a legal interest in rights that are the subject matter of the cause of action."[56] In turn, a "legal interest" is "'[a]n interest recognized by law,' and we have defined it as an interest that is 'legally protectable,' i.e., protected by law."[57]

"A trial court may dismiss a complaint for declaratory judgment when no real controversy or justiciable interest exists, or if the declaratory judgment will not terminate the uncertainty or controversy."[58] Although courts can use a declaratory judgment to resolve current disputes, they cannot "issue advisory opinions to prevent future disputes."[59] "A real, justiciable controversy is a 'genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"[60]

In the present case, the court finds that the requirements for issuing a declaratory judgment under R.C. 2721.03 are satisfied. A real controversy exists between the plaintiffs and the defendant RoundPoint as to their rights to the settlement funds paid by

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[54] R.C. 2721.10.
[55] *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 14, quoting *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273, 71 O.O.2d 247, 328 N.E.2d 395 (1975).
[56] *Rumpke Sanitary Landfill*, 2010-Ohio-6037 at ¶ 14.
[57] Id., q uoting Black's Law Dictionary (9th Ed.2009) 886.
[58] *Reinbolt v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845, 816 N.E.2d 1083, ¶ 13, citing *Fioresi v. State Farm Mut. Auto Ins. Co.*, 26 Ohio App.3d 203, 499 N.E.2d 5, 26 O.B.R. 424 (1985).
[59] *Reinbolt*, 2004-Ohio-4845 at ¶ 13.
[60] Id. at ¶ 14, quoting *Wagner v. Cleveland*, 62 Ohio App.3d 8, 13, 574 N.E.2d 533 (1988). *See Wilburn v. Ohio Dept. of Rehabilitation and Correction*, 10th Dist. Franklin No. 01AP-198, 2001 WL 1497170, *2 (Nov. 27, 2001) ("A justiciable issue requires the existence of a legal interest or a right.").

Allstate, which are adverse to one another. Their rights derive from the interpretation of the plaintiffs' mortgage serviced by the defendant RoundPoint and their insurance policy with Allstate. A declaratory judgment stating the parties' rights to the disputed funds will settle this controversy.

A contract is "generally defined as a promise, or set of promises, actionable upon breach."[61] The construction of contracts is a matter of law.[62] If a contract's language and terms are unambiguous, then its interpretation presents no issues of fact for the jury's determination.[63] "However, if the contract is ambiguous or a term cannot be determined from its four corners, summary judgment is inappropriate because a question of fact as to intent or reasonableness exists."[64] Accordingly, when a contract is ambiguous or unclear, "summary judgment should not be granted."[65]

The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."[66] When confronted with an issue of contract

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[61] *Artisan Mechanical, Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶ 25.

[62] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, 7 O.O.3d 403, paragraph one of the syllabus (1978).

[63] *Waterfield Mortg. v. Buckeye State Mut. Ins. Co.*, 2d Dist. Miami No. 93-CA-3, 1994 WL 527594, *5 (Sept. 30, 1994).

[64] *Waterfield Mortg.*, 1994 WL 527594 at *5, citing *Inland Refuse Transfer Co. v. Browning-Feris Industries of Ohio, Inc.*, 15 Ohio St.3d 321 (1984). *See Walsh v. Marsh Bldg. Prods., Inc.*, 12th Dist. Warren No. CA2009-10-130, 2010-Ohio-729, ¶ 11 ("If an ambiguity exists, the interpretation of the parties' intent is a question to be determined by the trier of fact.").

[65] *Walsh*, 2010-Ohio-729 at 11.

[66] *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren Nos. CA2015-11-107, CA2015-11-108, 2016-Ohio-3222, ¶ 14, citing *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 60. *See Lopez v. Citizens Auto Fin.*, 8th Dist. Cuyahoga No. 91184, 2009-Ohio-1082, ¶ 15, citing *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App. 3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 20 (10th Dist.) (holding same).

interpretation, courts examine the contract as a whole.[67] Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.[68]

Courts use the "plain and ordinary meaning" of the language in the contract unless a different meaning "is clearly apparent" from the contract.[69] If the language is clear, then the court is confined to the writing in the contract itself to discern the parties' intent.[70]

"As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."[71] However, the failure to "define a term" in a contract does not "automatically render" it ambiguous, as long as an "ordinary meaning of the term exists."[72] By contrast, a "contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations."[73]

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[67] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 38. *See Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 22 (Citations omitted.) ("Often the intended meaning of a word or phrase may be clear when that word or phrase is considered in the context of other words or phrases in the contract. * * * Thus, the intended meaning of any part of the parties' contract should be determined in light of the whole contract.").

[68] *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). *See Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 14, citing *Towne Dev. Grp., Ltd. V. Hutsenpiller Contrs.*, 12th Dist. Butler No. CA2012-09-081, 2013-Ohio-4326, ¶ 17 (holding same).

[69] *Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37.

[70] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37. *See Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, quoting *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2012-07-061, 2010-Ohio-5186, ¶ 12 (a clear and unambiguous contract "requires no interpretation or construction and will be given effect for by the plain language of the contract.").

[71] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

[72] (Citations omitted.) *Fahlnush v. Crum-Jones*, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16 (1st Dist.). *See City of Mansfield v. Select Insurance Co.*, 5th Dist. Richland No. CA-2253, 1984 WL 7531, *2 (Oct. 22, 1984) ("The rule is well established that words used in a contract of insurance are to be given their natural and usual meaning unless otherwise defined in the contract.").

[73] *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, citing *Cooper*, 2010-Ohio-5186 at ¶ 12. *See Santana v. Auto Owners Ins. Co.*, 91 Ohio App.3d 490, 494, 632 N.E.2d 1308 (6th Dist. 1993) (Citation omitted.) ("In applying these general contract principles, it is important to emphasize the relationship between the usual meaning of the language used in the contract and

"[T]he same rules of interpretation and the same framework of analysis which apply to contracts generally" apply to mortgages as well.[74] Accordingly, a mortgage should be analyzed by examining its "language expressed in the note and the security instrument."[75]

As with mortgages, the laws applicable to contracts likewise govern insurance contracts.[76] For insurance contracts in particular, when the language "is doubtful, uncertain, or ambiguous, the language will be construed strictly against the insurer and liberally in favor of the insured."[77] However, when words in an insurance contract "have a plain and ordinary meaning, it is neither necessary nor permissible to resort to construction unless the plain meaning would lead to an absurd result."[78] In the "absence of ambiguity, therefore, the terms of the policy must simply be applied * * * according to its terms without engaging in construction."[79]

The plaintiffs argue that RoundPoint does not have a right to the proceeds from their settlement with Allstate. The plaintiffs posit that the settlement fund is not "insurance proceeds" within the purview of the mortgage or insurance policy, but is instead "settlement proceeds." They assert that the fund represents a settlement of claims for alleged violations of the Ohio Consumer Sales Practices Act, bad faith, and

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the factual situation to which that meaning is to be applied. On the one hand, we must be careful not to find ambiguity merely because the factual situation presents difficulty in applying the common meaning of a word or term used in a contract. 'The fact that contractual language may, on occasion, pose difficult factual applications does not make that language ambiguous.'").

[74] *Ogan v. Ogan*, 122 Ohio App.3d 580, 584, 702 N.E.2d 472 (12th Dist. 1997),quoting *First Fed. S. & L. Assn. of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 143. 11 O.B.R. 215, 463 N.E.2d 636 (6th Dist. 1983).

[75] *Perry's Landing, Inc.*, 11 Ohio App.3d at 584, citing *In re Dunn*, 101 Ohio App.3d 1, 7-8, 654 N.E.2d 1303 (12th Dist. 1995).

[76] *Ohio Farmers' Ins. Co.*, 104 Ohio St. at 433.

[77] *Blohm v. Cincinnati Ins. Co.*, 39 Ohio St.3d 63, 66, 529 N.E.2d 433 (1988).

[78] Id. quoting *Olmstead v. Lumbermens Mut. Uns. Co.*, 22 Ohio St.2d 212, 216, 51 O.O.2d 285, 259 N.E.2d 123 (1970).

[79] (Citation omitted.) *Santana*, 91 Ohio App.3d at 494.

breach of contract. To support this contention the plaintiffs cite to the complaint filed in *Anthony Kelch, et al. v. Allstate Insurance Company, et al.*, No. 2014 CVH 00409.

The defendant RoundPoint counters that the $52,500 is insurance proceeds because it was derived from the insurance policy, which covered $45,000 under the policy's dwelling coverage and $7,500 under the policy's unscheduled personal property coverage. RoundPoint argues that the settlement funds were for the plaintiffs' property losses and that therefore the funds fall within the purview of the mortgage and insurance policy.

(A) THE PARTIES' RIGHTS UNDER THE MORTGAGE

The mortgage provides, in relevant part:

> "**4. Fire, Flood and Other Hazard Insurance.** Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. The insurance shall be maintained in the amount and for the periods that Lender requires. * * * The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.
>
> In the event of loss, Borrow shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order of the indebtedness in

> paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Notes and this Security Instrument shall be paid to the entity legally entitled thereto. * * *"[80]

The language in the mortgage states clearly that the defendant RoundPoint, as the lender, has a right to a payment by an insurance company for a "loss" to the insured property. It further gives RoundPoint a right to use the payment for the loss to either reduce the debt owed under the note and mortgage or to restore or repair the home.

The operative language likewise indicates that RoundPoint has an interest in any "insurance proceeds." The parties, however, disagree as to the meaning of "insurance proceeds." The mortgage and note do not define insurance proceeds. In construing "insurance proceeds," both parties have cited to non-controlling bankruptcy cases from federal courts.

In support of the plaintiffs' theory, they cite to *In re Fritzsch Custom Builders, LLC*, 474 B.R. 515 (Bankr.S.D.Ohio 2010). *Fritzsch* is a bankruptcy case that sought to resolve whether settlement funds were estate property. The funds were derived from a cause of action alleging that the insurer failed in its duty to defend the insured from any suit seeking property damages.[81] The court did not discuss the terms of the settlement agreement to determine which claims were settled. The court held that the settlement represented "the proceeds of the Debtor's cause of action for breach of duty to defend. This is distinguishable from any duty to pay insurance proceeds that [the insurer] may

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[80] (Emphasis added.) Defs. Ex. A-2 to Mot. for Summ. J.
[81] *In re Fritzsch Custom Builders, LLC*, 474 B.R. 515, 516-17 (Bankr.S.D.Ohio 2010).

have."[82] As such, the court found that the proceeds from the settled cause of action were not "insurance proceeds" but were "proceeds of the Debtor's settlement of the adversary proceeding brought by the trustee to recover on a contractual cause of action."[83]

Even if the $52,500 is deemed settlement proceeds, the defendant RoundPoint argues that it still has a right to those settlement proceeds as "insurance proceeds." Like the plaintiffs, it also cites to a non-controlling case in support of this proposition. In the bankruptcy proceedings of *In re Hill*, Bankr.S.D.Tex. No. 08-36267, 2011 WL 6936357 (Dec. 30, 2011), the debtors previously filed suit against their insurer to recover money needed to repair their home, which had been damaged in a hurricane.[84] The parties reached a settlement with the insurer, and the court found that the proceeds were exempt from the bankruptcy.[85]

Even so, the court held that under the deed, the mortgagee had been assigned an interest in the proceeds and therefore controlled how they were to be used.[86] Like the instant case, the mortgage provided that the debtors were required to obtain an insurance policy that included a standard mortgage clause.[87] However, unlike the case at bar, the mortgage had also assigned the mortgagee a right in "miscellaneous proceeds," which was defined to specifically include settlement proceeds.[88]

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[82] Id. at 520.
[83] Id. at 521.
[84] *In re Hill*, Bankr.S.D.Tex. No. 08-36267, 2011 WL 6936357, *2 (Dec. 30, 2011).
[85] Id. at *10-11.
[86] Id. at *11.
[87] Id., fn 19.
[88] Id., fn 20. RoundPoint also cites to a Texas state case from 1934, *Superior Fire Ins. Co. v. Leal*, 73 S.W.2d 584, (Tex.Civ.App. 1934), which involved a loss payable provision in favor of the mortgagee in the insurance contract. Id. at 584-85. (Loss payable clauses are discussed further below in Section (I)(B).) The court found that the mortgagee's rights to payment could

Neither *In re Fritzsch Custom Builders, LLC*, nor *In re Hill* is particularly helpful in the instant matter.[89] First, both are decided in the context of a federal bankruptcy, which is very different from the context of the present case. As to *In re Fritzsch Custom Builders*, the court did not examine the settlement agreement to identify what claims the settlement agreement actually released. Moreover, it's cited authorities were other bankruptcy cases from different federal jurisdictions, not Ohio law. As to *In re Hill*, the operative agreement specifically included a provision stating that the mortgagee was entitled to miscellaneous proceeds, which it defined as including settlement proceeds. The operative agreements in the instant case do not contain such language or definitions.

Nevertheless, courts use the "plain and ordinary meaning" of the language in a contract to determine the parties' intent unless a different meaning "is clearly apparent" from the contract.[90] As mentioned, there is no definition of "insurance proceeds" in the mortgage, so the court will examine the plain meaning. The Ohio Supreme Court defines an "insurance policy" as "a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils."[91] The term "proceeds" is defined as "the net amount received (as for a check or from an insurance settlement) after deduction of any

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not be affected by the debtor's settlement of his claims with the insurance company. The court does not find this particular case especially persuasive because it is an older case from a different jurisdiction that does not provide analysis as to the operative "mortgage clause."

[89] The court recognizes that there are very limited cases construing "insurance proceeds" and "settlement proceeds," and there are no directly on point Ohio cases examining these terms in contexts similar to this case.

[90] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37.

[91] *Ohio Farmers' Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537, 20 Ohio Law Rep. 16, 20 Ohio Law Rep. 17 (1922), at the syllabus.

discount or charges."[92] Thus, insurance proceeds are the net amount received from an insurance company for a loss.

This meaning is also consistent with the section in the mortgage that deals with "Fire, Flood and Other Hazard Insurance." Immediately before the provision discussing RoundPoint's options on how to apply the "insurance proceeds," the mortgage provides that insurers are "directed to make payment for such loss directly to Lender." In sum, the mortgage entitles RoundPoint to the money the plaintiffs receive from an insurance company for a property loss.

To determine whether the Allstate settlement fund is money received from an insurance company for a loss, the court turns to the settlement agreement and release between Allstate and the plaintiffs. Allstate agreed to pay the plaintiffs $52,500, and in exchange the plaintiffs released Allstate "from any and all liability, claims, demands, controversies, damages, actions, and causes of action, * * * and any and all other loss or damage of every kind and nature, whether at law or in equity, which the undersigned * * * can, shall or may have by reason of or in any way resulting from a fire loss which occurred on or about October 6, 2013 at 1543 East Meadowbrook Drive, Loveland, Ohio 45140 * * *."[93]

The plaintiffs assert that the settlement strictly applies to the claims they brought in the underlying suit, namely breach of contract, bad faith, and violations of the Ohio Consumer Sales Practices Act. RoundPoint counters that the settlement is for a property loss, and Allstate intended for the settlement fund to be derived from the

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[92] *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/proceeds (accessed June 16, 2016). Of note, the term "proceeds" has been characterized as "a commonly understood word in the English language. *See U.S. v. Haun*, 90 F.3d 1096, 1101, 45 Fed. R. Evid, Serv. 195, 1996 Fed.App. 0221P (1996).
[93] Ex. 2 to Pls. Compl.

insurance policy. The defendant submitted an affidavit from Allstate averring that the settlement is comprised of $45,000 under the policy's dwelling coverage and $7,500 under the policy's unscheduled personal property coverage.[94]

The above language in the settlement agreement, however, demonstrates that Allstate's settlement fund was intended to settle all claims and losses resulting from the fire. Thus, the settlement fund encompasses the plaintiffs' claims of breach of contract, bad faith, and violations of the Ohio Consumer Sales Practices Act, as well as any property loss to their dwelling and personal property. Based on the mortgage, RoundPoint is only entitled to the portion of the settlement that represents the amount received from Allstate for the plaintiffs' property losses, and not the amount received from Allstate to settle non-loss claims (e.g. bad faith). The settlement agreement does not apportion the funds based on different causes of action or losses. Thus, there exists a genuine issue of material fact as to what portion of the settlement funds represents the plaintiffs' losses to their property.

In summary, the mortgage is clear that RoundPoint has an interest in any insurance payment that the plaintiffs receive for a loss to their property. The settlement fund represents both insurance proceeds for property loss, as well as a settlement of other claims. The trier of fact will determine what portion of the settlement fund represents the plaintiffs' property loss. The defendant RoundPoint is entitled to that portion of the settlement fund, and may either apply it (a) to the reduction of the indebtedness under the note and mortgage, or (b) to the restoration or repair of the damaged property. Any excess settlement funds shall go to the plaintiffs. Additionally,

[94] Defs. Ex. 2. to Resp. to Pls. Mot. for Summ. J, Aff. of Allstate, ¶ 5.

the plaintiffs are entitled to the portion of the settlement fund that does not represent their property losses.

(B) THE PARTIES' RIGHTS UNDER THE INSURANCE POLICY

In addition to the mortgage clause discussed above, the insurance policy the plaintiffs maintained with Allstate also included a loss payable provision. The loss payable provision is significant because only the plaintiff Anthony Kelch, and not the plaintiff Cherie Kelch, was a party to the mortgage agreement. Hence, the plaintiffs argue that even if the mortgage does entitle RoundPoint to a portion of the settlement funds, RoundPoint is not entitled to Cherie Kelch's portion of the settlement fund. However, the plaintiff Cherie Kelch was a party to the insurance contract with Allstate. The defendant RoundPoint argues that it is immaterial that Cherie Kelch is not a party to the mortgage because she is a party to the insurance contract, under which she agreed to include a loss payable provision.

The plaintiffs' insurance policy with Allstate provides, in pertinent part:

> "A covered loss will be payable to the Mortgagee(s) named on the Policy Declarations, to the extent of their interest and in the order of precedence. All provisions of Section I of this policy will apply to these mortgages.
>
> We will:
>
> a) protect the mortgagee's interest in a covered building structure in the event of an increase in hazard, intentional or criminal acts of, or direct by, an insured person, failure by any insured person to take all reasonable steps to save and preserve property after a loss, a change in ownership, or foreclosure if the mortgagee has no knowledge of these conditions; and

> b) give the mortgagee at least 10 days notice if we cancel this policy.
>
> The mortgagee will:
>
> a) furnish proof of loss within 60 days after notice of the loss if an insured person fails to do so;
>
> b) pay upon demand any premium due if an insured person fails to do so;
>
> c) notify us in writing of any change or any increase in hazard of which the mortgagee has knowledge;
>
> d) give us the mortgagee's right of recovery against any party liable for loss; and
>
> e) after a loss, and at our option, permit us to satisfy the mortgage requirements and receive full transfer of the mortgage.
>
> This mortgagee interest provision shall apply to any trustee or loss payee or other secured party."[95]

In an insurance policy, there are typically two types of loss payable clauses-standard mortgage clauses and simple mortgage clauses.[96] A standard mortgage clause stipulates "in addition to the simple losspayable [*sic*] clause, that in case the loss is directed to be payable to a mortgagee, the interest of the mortgagee in the proceeds of the policy shall not be invalidated by the act or neglect of the mortgagor or owner of the insured property."[97] One of the "hallmarks" of a standard mortgage clause is the

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[95] (Emphasis added.) Defs. Ex. B-1 to Mot. for Summ. J., pg. 21.
[96] *Pittsburgh Natl. Bank v. Motorists Muts. Ins. Co.*, 87 Ohio App.3d 82, 85, 621 N.E.2d 875 (9th Dist. 1993).
[97] *Barwick v. State Farm Fire & Cas. Ins. Co.*, 2d Dist. Montgomery No. 24526, 2011-Ohio-5689, ¶ 18, citing *Savings Society Commercial Bank v. Michigan Mut. Liab. Co.*, 118 Ohio App.297, 301, 194 N.E.2d 435 (1963).

mortgagee's "obligation to pay premiums."[98] A standard mortgage clause creates "a contractual relation between the mortgagee and insurer."[99] Hence, it serves as a separate contract between the insurer and mortgagee.[100]

In contrast, a simple mortgage clause "typically states that the proceeds of the policy shall be paid first to the mortgagee as his interest may appear."[101] Instead of a contractual relation, under a simple mortgage clause "the mortgagee is simply an appointee of the insured, and its right of recovery is only as great as that of the insured."[102] For a simple mortgage clause, "anything that would void the policy in the hands of the mortgagor likewise voids it as to the mortgagee."[103]

The difference between the two types of clauses is that, under a standard mortgage clause, the "mortgagee may become liable to pay the premium to the insurer – in return it is freed from policy defenses which the company may have against the mortgagor. In the * * * [simple] form, the mortgagee stands in the mortgagor's shoes, and is usually considered subject to the same defenses."[104] "[I]n cases of doubt, a clause providing for payment of proceeds to a mortgagee is construed as a standard mortgage clause."[105]

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[98] *Barwick*, 2011-Ohio-5689 at ¶ 30.
[99] Id. at ¶ 18. *See Savings Soc. Commercial Bank v. Michigan Mut. Liability Co.*, 118 Ohio App. 297, 194 N.E.2d 435, 98 A.L.R.2d 1312, 25 O.O.2d 143 (2d 1963) (explaining that a standard mortgage clause "is generally recognized as creating a contractual relationship between the mortgagee and the insurer.").
[100] *Pittsburgh Natl. Bank.*, 87 Ohio App.3d at 85. *See Waterfield Mortg.*, 1994 WL 527594.
[101] *Barwick*, 2011-Ohio-5689 at ¶ 18, citing 10A Couch on Insurance 2d (Rev. Ed. 1982) 724, Section 42:682.
[102] *Barwick*, 2011-Ohio-5689 at ¶ 18.
[103] Id. quoting *Pittsburgh Natl. Bank*, 87 Ohio App.3d at 85, 621.
[104] *Barwick*, 2011-Ohio-5689 at ¶ 20, citing *Pittsburgh Natl. Bank.*, 87 Ohio App.3d at 85.
[105] *Barwick*, 2011-Ohio-5689 at ¶ 30, citing 4 Couch on Insurance § 65:10 (3rd Ed. 2006).

The court finds that the insurance provision at issue in the plaintiffs' policy is a standard mortgage clause, as opposed to a simple mortgage clause. The clause provides that the policy will not be invalidated by the plaintiffs' acts or neglect and obligates RoundPoint to pay the premiums if the plaintiffs do not. Because the insurance policy contains a standard mortgage clause, RoundPoint has "a contractual relation" with Allstate,[106] which serves as a separate contract between the Allstate and RoundPoint.[107]

Therefore, as under the mortgage, RoundPoint has an enforceable right to receive an insurance payment for the plaintiffs' "covered loss." Accordingly, the rights that RoundPoint has in the settlement fund, as discussed here and in Section (I)(A), are not changed by the fact that the plaintiff Cherie Kelch was not a party to the mortgage, because she was a party to the insurance contract. For the reasons discussed in Section (I)(A), there remains a genuine issue of material fact as to what portion of the settlement fund represents a "covered loss."

(II) BREACH OF CONTRACT

To prevail on a breach of contract claim, the plaintiff must prove: "(1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred

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[106] *Barwick*, 2011-Ohio-5689 at ¶ 18. *See Savings Soc. Commercial Bank*, 118 Ohio App. 297.
[107] *Pittsburgh Natl. Bank.*, 87 Ohio App.3d at 85. *See Waterfield Mortg.*, 1994 WL 527594.

damages as a result."[108] A plaintiff proves that a party has breached a contract by showing the party "did not perform one or more of the terms of the contract."[109] After the plaintiff shows the breach of contract, then the burden shifts to the breaching party to assert a defense."[110] When the facts are undisputed, it is a question of law as to whether they "constitute performance or a breach of the contract."[111]

A contract is not considered breached when a party "substantially performed" its contractual obligations.[112] The doctrine of substantial performance prescribes that "'if one party's performance is a constructive condition of the other party's duty, only "substantial" performance is required of the first party before he can recover under the contract.'"[113] As with other contracts, the doctrine of substantial performance applies to mortgages.[114]

Moreover, "[s]ubstantial performance of a contract is interpreted to mean that the mere nominal, trifling, or technical departures are not sufficient to break a contract, and that slight departures, omissions and inadvertences should be disregarded."[115] When a party "makes an honest effort" to perform under the contract, "and there is no willful

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[108] *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.

[109] *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

[110] *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.*, 8th Dist. Cuyahoga No. 73002, 1998 WL 355846, *3 (July 2, 1998).

[111] *Stonehenge Land Co*, 2008-Ohio-148 at ¶ 24, quoting *Luhtz v. Stern*, 135 Ohio St. 225, 237, 20 N.E.2d 241, 1939).

[112] *Hansel v. Creative Concrete & Masonry Constr. Co.*,148 Ohio App.3d 53, 2002-Ohio-198, 772 N.E.2d 138, ¶ 12 (10th Dist.).

[113] (Citation omitted.) *Kaufman v. Byers*, 159 Ohio App.3d 238, 2004-Ohio-6346, 823 N.E.2d 530, ¶ 31 (11th Dist.).

[114] *U.S. Bank, N.A. v. Stewart*, 2d Dist. Montgomery No. 21775, 2007-Ohio-5669, ¶ 42.

[115] *Words, Inc. v. Tens Pain Management, Inc.*, 12th Dist. Warren No. CA92-01-007, 1992 WL 193659, *3, quoting *Kicheler's Inc. v. Persinger*, 24 Ohio App.2d 124, 126 (1st Dist. 1970).

omission on its part, substantial performance is all that is required * * *."[116] In order for the court to find that a party substantially performed, "the part unperformed must not destroy the value or purpose of the contract."[117]

In *Ohio Farmers' Insurance Company v. Cochran*, 104 Ohio St. 427, 135 N.E. 537, 20 Ohio Law Rep. 16, 20 Ohio Law Rep. 17 (1922), an insured brought an action against his insurance company to recover for a loss by fire. The issue involved was whether the insurer waived the requirement that its insured provide a 60-day proof of loss.[118] The insurance contract proved that:

> "In case of loss, the insured shall give immediate notice thereof in writing to this company * * * and within sixty days after the loss unless such time is extended in writing by this company, shall deliver to this company at its officer in Leroy, Ohio, a statement signed and sworn to [*sic*] by the insured, stating the time, origin, and circumstance of the fire, the interest of the insured and of all others in the property."[119]

The insured claimed he performed all duties under the insurance policy, although he admitted he did not give notice within 60 days of the fire.[120] However, the insured argued that the insurer waived this requirement.[121] The insurance company had notice of the fire and loss, as it was involved in directing the state fire marshal and in investigating the fire.[122] The court explained that there is substantial performance by one party "when such performance does not result in any wrongful substantial injury to

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[116] *Words, Inc.*, 1992 WL 193659 at *2, quoting *Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc.*, 64 Ohio App.3d 639, 644 (8th Dist. 1989).
[117] *Stonehenge Land Co.*, 2008-Ohio-148 at ¶ 24 quoting *Hansel*, 2002-Ohio-198 at ¶ 12.
[118] *Ohio Farmers' Ins. Co.*, 104 Ohio St. at 431.
[119] Id. at 430-31.
[120] Id. at 434.
[121] Id. at 431.
[122] Id. at 431.

the other side."[123] The appellate court affirmed the jury's finding in favor of the insured, finding that the insured had substantially performed, and the insurer was not substantially harmed.[124]

If a party satisfactorily demonstrates a breach of the contract, then "damages should place the injured party in as good a position as it would have been absent the breach."[125] To do so, the plaintiff "must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty."[126]

RoundPoint alleges that the plaintiffs breached their mortgage contract by failing to mail immediate notice of the fire to RoundPoint and by withholding proceeds.[127] The plaintiffs argue that the defendant has not shown that it has been damaged as a result of the alleged breaches. More particularly, the plaintiffs argue that the notice that the defendant RoundPoint received of the fire by phone was soon enough after the fire such that there are no damages.

It is undisputed that the plaintiffs did not send RoundPoint notice of the October 6, 2013 fire immediately by mail. The parties dispute whether the plaintiff Anthony Kelch verbally informed a RoundPoint representative on October 11, 2013 of the fire by phone. They also dispute whether, on November 8, 2013, a RoundPoint representative told Anthony Kelch that he did not need to mail notice to RoundPoint. If Anthony Kelch

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[123] Id. at 434.
[124] Id.
[125] *Garfalo v. Chicago Title Ins. Co.*, 104 App.3d 95, 108, 661 N.E.2d 218 (8th Dist. 1995).
[126] *James v. Sky Bank*, 11th Dist. Trumbull No. 2010-T-0116, 2012-Ohio-3883, ¶ 33, quoting *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 WL 222160 (Apr. 11, 1995). *See Hansel*, 2002-Ohio-198 at ¶ 13, citing *Spitzer v. Forrester*, 2d Montgomery No. 7087, 1981 WL 2572 (Oct. 19, 1981) (generally, "substantial compliance will support a recovery of the contract price less the allowance for defects in performance or damages for failure to strictly comply with the contract.").
[127] Defs. Mot. for Summ. J., pg. 6.

did inform RoundPoint of the fire by phone on October 11th, and/or if a RoundPoint representative waived the requirement for the plaintiffs to send notice by mail, then it is possible that the plaintiffs substantially complied with the mortgage contract.[128] This is, however, a genuine issue of material fact for the trier of fact to determine.

As to the second alleged breach, RoundPoint contends that the plaintiffs breached the mortgage by preventing it from collecting the $52,500 insurance proceeds. RoundPoint has not sufficiently demonstrated that reasonable minds could only conclude that the plaintiffs breached the mortgage by failing to endorse the insurance check. The mortgage provides that the "Borrower shall insure all improvements on the Property," which the plaintiffs did. [129] It additionally requires that the "insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender."[130] Indeed, the insurance policy did include a loss payable clause.

The mortgage then provides that "[e]ach insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly."[131] Although the mortgage authorizes and directs the insurance companies to direct the payment directly to RoundPoint, it does not place an obligation on the plaintiffs. The plaintiffs are not the party that issued the insurance settlement check. Finally, the mortgage states that "[a]ll or any part of the

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[128] *See Ohio Farmers' Insurance Company*, 104 Ohio St. 427; *Words, Inc.*, 1992 WL 193659 at 3, quoting *Kicheler's Inc.*, 24 Ohio App.2d at 126 (holding that "[s]ubstantial performance of a contract is interpreted to mean that the mere nominal, trifling, or technical departures are not sufficient to break a contract, and that slight departures, omissions and inadvertences should be disregarded.").
[129] Defs. Ex. A-2 to Mot. for Summ. J.
[130] Defs. Ex. A-2 to Mot. for Summ. J.
[131] Defs. Ex. A-2 to Mot. for Summ. J.

insurance proceeds may be applied by Lender, at its option * * *."[132] As to this clause, the plaintiffs may have breached it by preventing RoundPoint from exercising its contractually provided discretion. However, as mentioned in Section (I)(A), there is a question of material fact as to whether what portion of the settlement funds are "insurance proceeds." The answer to that question will affect whether the plaintiffs have breached the mortgage. Therefore, there is yet another genuine issue of material fact still in dispute regarding RoundPoint's breach of contract claim.

CONCLUSION

For the aforementioned reasons, the court declares that under the mortgage and insurance contracts for 1543 East Meadowbrook Drive, Loveland, Ohio 45140, the defendant RoundPoint has an interest in any insurance payment that the plaintiffs receive for a loss to their property.

RoundPoint may use such portion of the settlement fund (a) to the reduction of the plaintiffs' indebtedness under the note and mortgage, or (b) to the restoration or repair of the damaged property. RoundPoint shall remit excess insurance proceeds to the plaintiffs. Additionally, the plaintiffs are entitled to the portion of the settlement fund that does not represent their property loss (e.g. portions of the settlement that represent the claims for bad faith, breach of contract, and violations of the Ohio Consumer Sales Practices Act). There remain genuine issues of material fact regarding apportionment of the settlement funds. The trier of fact shall determine how much of the $52,500

[132] Defs. Ex. A-2 to Mot. for Summ. J.

represents recompense for the plaintiffs' property loss and how much represents other claims.

Because there remain genuine issues of material fact, both parties' motions for summary judgment on RoundPoint's breach of contract claim are not well-taken and are hereby denied.

Counsel shall conference and call the Assignment Commissioner (513-732-7104) within three business days of the date of issuance of this Decision in order to schedule a case management/trial setting conference. This conference must be scheduled within 30 days of the date of this Decision.

IT IS SO ORDERED.

DATED: 6-24-16

Judge Jerry R. McBride