# **CHAPTER 16 AGENCY**

Qui facit per alium facit per se: Latin: He who acts for another, acts for himself.

# 16.1 INTRODUCTION

An agency relationship is established when one party (agent) is authorized by another party (principal) to act on his/her behalf. Such relationships are initiated when one party desires to extend his/her activities beyond his/her present limits or capacity. In modern life, it would be virtually impossible for a business to function efficiently without agents; for example, corporations must hire agents to work for them since a corporation is an artificial person. Agency relationships occur frequently in the course of business and include hiring employees or retaining the services of other parties such as an attorney or a design professional. An agent has the potential to form contracts on behalf of the principal and in doing so, will bind the principal. As a result, the agency relationship is one of trust and confidence and an agent must perform his/her activities in a capable and conscientious manner.

# The Formation Of The Agency Relationship.

An agency relationship is formed by the mutual, manifested agreement (often by a contract<sup>1</sup>) between two parties that establishes that one party shall perform one or more acts on behalf of the other. The term "manifested" is used because an objective test is employed to determine the existence of an agency relationship. That is, if the behavior of the parties and the specific circumstances indicate that the parties have agreed that one of them will act for the other, then an agency relationship will be found by the court. Accordingly, it is immaterial whether the parties have expressly formed such a relationship, know that is exists, or even desire that it exists. Further, the parties even may have stated expressly that such a relationship does NOT exist. However, once the court has established the existence of an agency relationship, agency law is introduced to determine the rights and obligations of the parties.

Some agency relationships arise as a result of other agreements, such as an employment contract and a partnership agreement. marriage, by itself, generally does not create an agency relationship, although husband or wife can act as the agent for the other. Not all duties, obligations, or actions can be delegated through an agency; for example, an agent cannot substitute for a principal when voting in a public election, signing a will, or making a statement under oath. As noted in Chapter 13 (Contracts), a personal services contract cannot be delegated when the performance by the original (contracting) promisor is crucial to the actual performance of the duty.

# 16.2 THE AGENT'S DUTY TO THE PRINCIPAL

Since most agency relationships are established by contract, the agent's duties/obligations largely are defined by the terms of the contract but additional duties generally are established by agency law, unless the contract specifically excludes or modifies them. These duties arise from the trust and confidence that forms the foundation of an agency relationship and are termed fiduciary duties. They are owed by the agent to his/her principal. Fiduciary duties can arise even if the agent is not compensated (i.e. a gratuitous agent). Under most circumstances, the gratuitous agent is not required to act for the principal but is required to perform when he/she causes the principal to reasonably rely on the agent and refrains from undertaking a particular act as a result of that reliance.

The following are duties of the agent:

<sup>1.</sup> Agency relationships need not be in the form of a written contract except in a few instances, such as when an agent is retained to sell real estate. Accordingly, the standard requirements of a valid contract apply (offer, acceptance, consideration, capacity, legality) etc.

# Loyalty.

A duty of loyalty occurs because the agency relationship exists for the benefit of the principal and the agent must endeavor to use his/her best efforts to advance and support the principal's interests. Thus, the agent must avoid frustrating the principal's interests and undertaking activities that conflict with the interests of the principal. Generally, the agent is forbidden to "deal with himself" when conducting the affairs of his/her principal. For example, selling the principal's property to himself/herself or undertaking transactions (on behalf of the principal with his/her relatives or businesses in which he/she has an interest) represent potential conflicts of interests and require the informed consent of the principal after all relevant facts have been disclosed.

The agent also is forbidden to compete with the principal; for example by bidding against the principal or by soliciting the customers of the principal for his/her own business (while still employed). Further, the agent is forbidden to act on another's behalf in a transaction with the principal unless both of the principals consent to the agent's dual role. In some situations the agent is a middleman whose role is to form associations between parties but is not required to advise the parties or negotiate for them.

Finally, the agent has a duty not to disclose or use confidential information (the requirement of confidentiality) that is obtained during the agency relationship. Such information might include business plans, detail of financial health, discoveries pertaining to technology or natural resources, customer files, etc. Unless there is an agreement to the contrary, upon the termination of the relationship an agent has the right to compete with the principal and may use general knowledge and skill acquired during the relationship. The agent does NOT have the right to use or disclose confidential information (See Chapter 15 - trade secrets).

# **Duty To Obey Instructions.**

Because the agent is required to act for the principal's benefit and under his/her control, the agent must obey all reasonable instructions. However, an instruction which requires an illegal or unethical act (such as misrepresenting the quality of the principal's property) does not need to be obeyed, An agent is obligated to seek clarification when the principal's instructions are ambiguous, unclear, or otherwise misleading. While it is the agent's duty to seek clarification about the instructions, if there is any doubt the agent can use his her judgement if the principal cannot be reached. Under some conditions, the reasonable judgement of the agent also can be used to justify the agent following a course of action that contradicts the principal's instructions particularly when following the instructions would cause greater injury to the principal.

#### **Duty To Act With Skill And Care.**

An agent is required to perform his/her duties with the same level of skill and care as a similarly situated (geographically) person performing the same (or similar) activities. Generally a gratuitous agent will be held to a lower standard than a paid agent. This may not be true for a professional services contract/agency relationship, where the same standard is usually required. A higher standard also is required if the agent has represented to the principal that he/she possesses a higher standard of skill and that this was a factor in the formation of the relationship. The standard or degree of care can be increased or decreased by contractual agreement and the agent may even warrant (expressly or impliedly) that his/her performance will be satisfactory to the principal. If a warranty (either express or implied) is not provided, then the principal assumes the risk of failure.

#### **Duty To Notify.**

One of the responsibilities of the agent is to promptly notify the principal of important matters that pertain to or reasonably might be associated with the subject matter of the principal's business; a responsibility that is exacerbated by the fact that the agent's knowledge can be imputed to the principal. There is no duty to notify when the information is either privileged or confidential with respect to another party.

# **Duty To Account.**

As the agent of the principal and unless otherwise agreed, the agent must conduct all moneys, property, or incidental benefits received during the course of the agency relationship, to the principal's account. Incidental benefits include profits or bribes that arise from the agent's breach of loyalty to the principal, gifts from third parties etc., tips, entertainment and so on. In addition, the agent is required to keep accurate records of the principal's business transactions and to make them available to the principal. The principal's funds/assets must be kept separate (not commingled) from the agent's accounts.

#### REMEDIES OF THE PRINCIPAL.

If the agent breaches a duty, either established in the contract or a fiduciary duty described above, the following remedies may be available to the principal:

- a. If the relationship was created by contract, the principal may recover damages fro breach of contract.
- b. Injunctive relief may be obtained if the agent discloses, or threatens to disclose confidential information or appropriates (or threatens to appropriate) the property of the principal.
- c. The agency contract may be rescinded if the agent represents two principals with the potential for conflicting interests without disclosing relevant facts.
- d. If money or property are retained by the agent when they are due to the principal, the agent is liable for the full amount of unjust enrichment.
- e. Various tort actions also can provide relief, allowing recovery for negligent actions (such as failing to notify the principal or follow instructions) or misappropriating the principal's property (conversion) by theft, transfer, or destruction.

# 16.3 THE PRINCIPAL'S DUTIES TO THE AGENT.

Agency law establishes that the principal has several duties to the agent, most of which can be modified or eliminated by agreement between the parties:

#### **Duty to Compensate**

Generally, the compensation due to the agent is established in the contract. However, when there is no provision, the circumstances surrounding the agency relationship determines the level of compensation. At such times, compensation will be based on the market value or customary price of the services provided by the agent. In the absence of a contractual provision, the principal may not be liable for acts that are not requested or consented to. If the agent has materially breached the contract or committed a serious violation of the fiduciary duty, then the principal generally will not be obliged to compensate the agent.

Under some conditions, the agent's compensation may be contingent on achieving a specified result (e.g. some attorneys work on a contingent fee basis, as do real estate agents). Generally, the agent is only entitled to compensation if the result is achieved within a specified period of time (regardless of whether the principal benefits from the agent's efforts), or a reasonable period of time if no period is specified. Compensation on a contingent fee basis generally is independent of the expenditures of the agent and the principal must cooperate with, and not frustrate the agent's activities, otherwise compensation is due regardless of the failure to achieve the specified result.

# **Duty of Reimbursement and Indemnity.**

Unless the agent is retained on a contingent fee basis, or otherwise agreed, an agent is entitled to reimbursement of expenditures incurred on behalf of a principal. Such expenditures should be the result of a direct request by the principal or reasonably should be inferred from the services requested by the principal.

A related duty is that of indemnity. Under agency law, a principal impliedly promises to indemnify the agent for any

losses that are incurred while the agent is undertaking activities that are authorized by the principal. These losses are usually legal liabilities that arise when the agent becomes liable on a contract undertaken for the principal (but not including liabilities for actions that the agent knew, or should have known were illegal).

# Remedies of the Agent.

Generally, the principal's breach of duties is contractual and the remedies available for contract disputes are available except for specific performance (which might exacerbate the problems in the relationship between principal and agent).

#### TERMINATION OF THE AGENCY RELATIONSHIP.

The agency relationship can be terminated by the acts of the parties or by operation of law. In the first instance, the agency relationship can be terminated by conditions/terms in the contract, such as the happening of a specific event, the passing of a period of time, or achieving a specified result. The relationship also can be terminated by mutual agreement, by revocation by the principal, or if the agent renounces it. The agency relationship can be revoked or renounced even if it violates the agency agreement, but such action is not a right. This means that the party who terminates the contract may be liable for damages to the other party unless such action is justified by the other party's breach of a fiduciary duty.

The agency relationship also may be terminated by events that are beyond the control of the parties (by operation of law). These events include.

- a. Death of loss of capacity after the formation of the agency relationship of either party. 1
- b. Changes in business conditions.
- c. Changes in the value of the subject matter of the agency.
- d. Loss of destruction of the subject matter of the agency, or termination of the principal's interest therein.
- e. Legal changes which make the business of the agency illegal.
- f. Bankruptcy of the principal or agent.
- g. Impossibility of the agent performing his/her duties
- h. The agent seriously breaches his/her fiduciary duties.

# 16.4 CONTRACT LIABILITY.

An agent with actual or apparent authority has the ability to form contracts with third parties, and by virtue of the agency relationship, bind the principal to them. Actual authority occurs when the principal manifests his/her consent to the agency relationship by communicating consent to the agent. Apparent authority occurs when the principal manifests his/her consent to the relationship by communicating it to a third party.

#### **Actual Authority.**

For actual authority, authority can be express or implied. Express authority requires a complete and precise statement (either written or oral) by the principal of what the agent has the power to do. Implied authority (or incidental authority) occurs because it may be either impossible or impractical to fully specify the agent's duties and authority. The actual extent of the agent's authority is determined from the express statements of the principal (if they exist), usages/standards of the trade, the nature of the agency agreement, etc. Most agreements of implied authority give the agent the authority to perform such duties as are customarily undertaken, or are reasonably necessary the conduct of the business, but duties cannot be implied so as to conflict with the express statements of the principal which are intended to limit the agent's authority. The scope of implied authority may be determined partially by whether the agent is employed to provide a continuous service involving a series of transactions (a general agent) or a single transaction (a special agent).<sup>2</sup>

<sup>1.</sup> An agent who becomes insane or otherwise incapacitated can still bind the principal to contracts with third parties.

# **Apparent Authority.**

If a principal's behavior is interpreted by a third party to lead him/her to reasonably believe that the agent is authorized by the principal to act, then the agent has apparent authority. Such authority is manifested in the apparent consent (as viewed by the third party) of the principal to the agent's actions. Thus, communication between the principal and agent is irrelevant in determining the existence of an agency relationship, except in so far as the communication becomes known to the third party or affects the agent's behavior as it is seen by the third party. Direct statements by the principal to the third party and trade or business practices can establish apparent authority. An agent by himself/herself cannot create apparent authority even though an agent may endeavor to create the appearance of authority. However, if the principal has permitted the agent to exercise powers that have been expressly limited, and such permission is known to a third party, then apparent authority will exist. An apparent agent has the potential to bind the principal to contracts with a third party even though the principal did not appoint the agent with the power/authority to form contracts.

#### Misrepresentation.

As a general rule, a principal is liable for the misrepresentations of an agent if he/she intended that the agent make the misrepresentation. In some courts, intention on the part of the principal is not required and mere negligence will suffice. If the agent has express, implied, or apparent authority, and the principal is blameless, liability may still result for true statements.

The use of exculpatory clauses in the principal-agent contract may help to reduce the principal's liability both in tort and contract by stating that the agent does not have the authority to make representations or form contracts not expressly contained in the contract. However, clauses of this type will not be useful when the principal knows of past misrepresentations by the agent.

#### Termination and Ratification.

Apparent authority may persist even after the agency relationship ceases. To terminate apparent authority, third parties must receive notice of the termination either by express statement or by the conveyance of information to the third party that reasonably indicates the termination of the relationship.

A principal can bind himself/herself to an agent's unauthorized act(s) or to the act of a person purporting to be his/her agent by ratification. The process of ratification creates a situation as if the agent had authority at the time a specific contract was formed and/or an act undertaken. The express statement or other behavior of the principal must exhibit an intention for the agent's unauthorized actions to be treated as authorized. Implied ratification occurs if the behavior of the principal gives evidence of an intent to ratify and may occur even if the principal undertakes partial performance of his/her contractual obligations or accepts the agent's acts by receiving benefits. In some situations, the principal's silence, acquiescence, or failure to repudiate an agent's actions may be sufficient to show intent and constitute ratification.

# 16.5 NOTICE AND KNOWLEDGE.

The giving of notice of facts by the agent and the agent's knowledge of facts can influence the rights and obligations of the principal. Notification is the act of communicating certain information to other parties that affects the legal rights of the parties. For example, accepting an offer to enter into a contract is notification. Thus, if an agent receives notification of acceptance from a third party (and the agent has the necessary authority to receive notification) then the principal will be bound as if he/she had partially received the acceptance. In addition, it is not even necessary for the principal to be informed of the acceptance by the agent. Similarly, the agent can give notification to a third party, and assuming authority exists, will bind the principal. \(^1\) In some situations, the agent's knowledge of certain facts can be

<sup>2.</sup> The separation of an agent in general or special categories is not always easy and in many cases the distinctions may be blurred.

<sup>1.</sup> These rules do not hold when the third party knows that the agent is not acting in accordance with the interests of the principal.

imputed to the principal (as if the principal also had such knowledge) and his his/her rights and obligations are affected accordingly. Such situations include circumstances when the knowledge is relevant to the authorized activities of the agent and when the agent has a duty to disclose the knowledge to the principal. Exceptions include when the information is privileged information known to the agent or when the agent is acting adversely to the interests of the principal.

# 16.6 CONTRACT LIABILITY.

In some situations, the agent, as well as the principal, may be liable on a contract that is formed by the agent on behalf of the principal.

# **Disclosed Principal.**

If the agent has disclosed the principal to the third party, or if the third party has reason to know that the agent is acting for a principal and the identity of the principal, then the principal is termed a disclosed principal and the agent generally is not bound to contracts that are formed. One exception is if the agent expressly agrees to become contractually liable - by using his/her own name on the contract, becoming a joint obligor on the contract, or undertaking the role of guarantor. Liability can be avoided by the agent by identifying the principal as the party to be bound by the agreement and signing the contract for the principal (e.g. Smith, for ACME Company).

If an agent is not authorized to bind the principal and discloses the principal to the third party, then to avoid losses to the third party, courts will find that the agent has implicitly warranted that he/she has authority and will hold the agent liable for the contract. Exceptions to this rule include situations where the third party knows that the agent does not have authority, if the agent gives direct notification to the third party that he/she does not warrant his authority to contract, and when the principal ratifies the contract.

# Partially Disclosed Principal.

A partially disclosed principal is one whose identity is unknown by the third party, but who knows, or has reason to know that the agent is acting for a principal. This is a situation that is typical of many real estate agency relationships). Because the third party relies on the agent's integrity, the agent is contractually liable. If the agent has authority, the third party can sue either, or both the principal and the agent.

# **Undisclosed Principal.**

If the third party neither knows, or has reason to know the principal's identity, or even that the principal exists, the principal is undisclosed. In the case, the third party must assume that the agent is the principal and the agent is fully liable for contracts formed with the third party. If the agent is authorized, the principal is bound to the contract and also will be liable and if the third party learns of the principal's existence and identity, the third party may choose to recognize the principal, or hold the agent liable.

#### 16.7 TORT LIABILITY.

Principals may be liable for the tortious activities of their agents. This liability may be direct or imputed and depends on the nature of the relationship between principal and agent.

#### **Direct Liability.**

If the principal directed the conduct of the agent and intended that such conduct occur, then the principal is directly

<sup>1.</sup> If the agent is uncertain about the scope of authority, he/she is advised to fully disclose the principal as the source of authority, thereby transferring the potential for error to the third party.

liable for the torts that may arise as a result of the agent's conduct. For example, if the principal directs the agent to engage in ultra-hazardous activity or to behave negligently, then the principal will be liable for the agent's conduct. In addition, a principal also is directly liable to third parties for his/her own negligent conduct, including the failure to appropriately regulate the agent's acts, providing improper/unclear instructions, employment of people who are unsuitable (including insolvency, or lack of sufficient funds in some situations), unsatisfactory/careless supervision, and providing equipment and materials that are substandard.

# Imputed Liability.

The nature of the agency relationship is an important factor when tortious liability is imputed to the principal because of the existence of an agency relationship. That is, the agent can be an employee or an independent contractor. An employee is a person hired by a principal who controls (or has the right to control) the agent's physical performance of the work. By contrast, the independent contractor is contracted to provide a service or undertake a task but is not controlled by the principal. When the role of the agent is not clearly distinct (between an employee and independent contractor) the court looks at:

- a. the extent of control which, by the agreement, the master may exercise over the work
- b. whether or not the one employed is engaged in a distinct occupation or business.
- c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- d. the skill required in the particular occupation.
- e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- f. the length of the time for which the person is employed.
- g. the method of payment, whether by time or by the job.
- h. whether or not the work is a part of the regular business of the employer.
- i. whether or not the parties believe they are creating the relation of master and servant.
- j. whether the principal is or is not in business. (Restatement (Second) of Agency, Section 220(2).)

#### Employees.

The doctrine of respondeat superior (let the master answer) establishes the liability of an employer for the torts (both intentional torts and negligence) of employees while performing within the scope of their employment. That is, liability is imputed to the employer by virtue of the relationship (of control) with the employee who was negligent or whose behavior was at fault. There are several reasons underlying the application of this rule:

- a. The employer is in the position to control and therefore should assume responsibility for his/her employees.
- b. The cost of managing such risks can be covered through insurance etc. and can be passed on to the customers of the business.
- c. There is an incentive for the employer to exercise caution in hiring, to undertake training, and to provide effective supervision.

Because the employer's liability is limited to those instances in which the employee's act was within the scope of employment, a court must determine what scope (and conduct) is applicable. The test that is applied is both flexible and ambiguous. Several factors are considered:

- a. Is the conduct of the *kind* that the employee was hired to perform. To meet this test, the conduct needs to be of the same general nature as that which is authorized, or incidental to it. That an employer has expressly forbidden an act does not remove it from the scope of employment (to do so would allow employers to avoid respondeat superior liability). Similarly, under some conditions, criminal acts may be within the scope of employment (e.g. speeding while on a rush-delivery job).
- b. Did the conduct occur substantially during the time period that was authorized by the employer (i.e. not on his/her own time). Generally, the time is the authorized working hours of the employee, but these

- may be extended; for example, if the employee is on the way to/from employment.
- c. Did the conduct occur substantially at or within the location authorized by the employer. The boundaries of the location are determined from the character of the employment and the relative size of the authorized area.
- d. Was the conduct of the employee partially motivated for the good of serving the employer. if the motivation is "to any appreciable extent", then the employer will be liable, even if the personal motivation (on the part of the employee) played a major role.

In the case of an employee who is loaned from one employer to another party (who acts as an employer), liability generally is transferred to the second employer.

#### Independent Contractors.

As a general rule the principal is not liable for the tortious acts of his/her independent contractors. However, there some exceptions.

- A principal may be directly liable when the retention of an independent contractor involves tortious behavior.
- b. When an independent contractor fails to perform a non-delegable duty (a duty that cannot be delegated see Chapter 13) the principal may be vicariously liable.
- c. If the independent contractor fails to take adequate precautions for activities that are either highly dangerous or inherently dangerous (e.g. excavation or demolition that is close to a public area).

For the agent/independent contractor, there is liability for torts, even though the agent may have acted in response to a command from the principal. Thus, an agent is unable to assert that he/she is not liable because he/she was acting as agent for another party. Exceptions include when the agent was exercising a privilege that belonged to the principal (that is, a right to undertake an act), then if the agent does not exceed the privilege, he/she will not be liable. This includes situations where the principal has the right to defend person or property and the agent is properly authorized. The agent is not liable if third parties are injured by defective equipment (tools and instrumentalities) furnished by the principal if the agent did not know or have reason to know of the defects. Finally, if the agent makes misrepresentations, liability will not occur unless the agent knew, or had reason to know that the statements were false.

In many situations, both agent and principal can be jointly and separately liable for torts. That is, they may be joined or separately sued and recovery can be made against either or both of them (but only to the total amount of the judgement authorized by the court).

#### SUBAGENTS.

A subagent is an agent who is appointed by the agent of the principal. To do so, the first agent must have the authority to make the appointment of the second agent, and such appointment is to undertake the principal's business. The subagent's ability to make the principal liable in tort or contract is similar to that of the agent and is governed by the same tests. In addition, the same is true for the liability of the agent for acts of the subagent. The fiduciary duties that exist between principal and agent are also found between the agent and subagent and the principal-subagent.

# Dunn et al., d.b.a. Dunn & Wendel Architects, Appellees, v. Westlake, Appellant, et al.

# **Supreme Court of Ohio**

61 Ohio St. 3d 102; 573 N.E.2d 84; 1991

# April 16, 1991, Submitted July 10, 1991, Decided

PRIOR HISTORY: Appeal from the Court of Appeals for Hamilton County, No. C-880422.

JUDGES: Douglas, J. Moyer, C.J., Sweeney, Holmes, Wright, H. Brown and Resnick, JJ., concur.

OPINION BY: DOUGLAS

The first issue presented by this appeal is whether appellant Westlake may be held personally liable for the services performed by Dunn & Wendel Architects. For the reasons which follow, we hold that Westlake can be held personally liable for the services rendered.

It is well-settled in the law of agency that an agent who discloses neither the existence of the agency nor the identity of the principal is personally liable in his or her contractual dealings with third parties. See, e.g., 1 Mechem, The Law of Agency (2 Ed.1914) 1039-1041, Section 1410. See, generally, Davis v. Harness (1882), 38 Ohio St. 397; and James G. Smith & Assoc., Inc. v. Everett (1981), 1 Ohio App.3d 118, 120-121, 1 OBR 424, 427, 439 N.E.2d 932, 935 (where the existence of the agency and the identity of the principal are unknown to the third party, the dealing is held to be between the agent and the third party and the agent is liable). The reason for this rule is simple. The third party who deals with an agent while unaware of the existence of the principal and the agency relationship intends to deal with the agent, and relies upon the agent's ability to perform. See id.

In the case at bar, Wendel, on behalf of Dunn & Wendel Architects, met with Shepherd and Westlake regarding the Village in the Woods project. Dunn & Wendel Architects had previous dealings with Shepherd and Westlake and, on those occasions, had always received payment for its services. As such, Dunn & Wendel Architects eventually entered into a contract to perform work on the Village in the Woods project believing that it was dealing with Shepherd and Westlake in their individual capacities. However, without the knowledge of Dunn & Wendel Architects, Westlake had formed Shelter Concepts as the entity responsible for developing the Village in the Woods project. Dunn & Wendel Architects performed services and looked to Westlake for payment in his individual capacity. Westlake now claims that as an agent for Shelter Concepts, he had no part in the contract negotiations and that, therefore, the debt owed to Dunn & Wendel Architects is either a corporate debt or solely Shepherd's responsibility as the actual negotiator. We disagree.

We find that Dunn & Wendel Architects had reason to rely on Westlake to provide payment for the architectural services. Westlake had personal dealings with Dunn & Wendel Architects leading to the formation of the contract. Westlake also had personal contact with Dunn & Wendel Architects while the services were being performed and, in fact, he assured Dunn & Wendel Architects that it would be paid for its services. Because Westlake failed to disclose the existence of Shelter Concepts and his representative capacity, Westlake is personally liable to Dunn & Wendel Architects as a matter of well-established agency law.

Westlake also argues that he is not liable on the contract because, according to Westlake, payment on the contract was contingent upon the successful closing on a loan for the South Carolina property, a condition which did not occur. Thus, Westlake contends that he was discharged from any obligation to perform under the terms of the agreement. We reject this contention.

The contract language at issue herein is as follows: "As in the past, we [Dunn & Wendel Architects] would defer payment, if necessary, until closing." The court of appeals held, and we agree, that the unambiguous terms of the contract

provided Westlake the opportunity to defer payment until the time of closing, but that when it was apparent that the anticipated closing would not occur, payment under the contract became due. We find nothing in the parties' past practices which would persuade us to reach a different conclusion. Having established Westlake's personal liability for the services rendered by Dunn & Wendel Architects, we now turn our attention to the second (and more important) issue presented by this appeal. Namely, we are asked to determine whether a party who prevails at trial but is, nonetheless, dissatisfied with the result, must move for a new trial in the trial court as a condition precedent to pursuing a crossappeal in the court of appeals.

In the case now before us, the court of appeals held that Dunn & Wendel Architects could properly pursue its crossappeal challenging the amount of damages awarded by the trial court even though Dunn & Wendel Architects prevailed on its claim for breach of contract, and even though Dunn & Wendel Architects never filed a motion for a new trial. In so holding, the court of appeals overruled two of its previous cases (Patrick Media Group, Inc. v. Schneider [Nov. 8, 1989], Hamilton App. No. C-880386, unreported, 1989 WL 133512, and Henry v. Serey [1989], 46 Ohio App.3d 93, 546 N.E.2d 474) which held that a party who prevails at trial cannot pursue a cross-appeal without first filing, in the trial court, a Civ.R. 59 motion for a new trial. The rule established in Patrick Media Group and Serey was an extension of a rule established in a series of cases from Hamilton County holding that the merits of an appeal filed by a party who prevailed at trial could not be addressed by the court of appeals unless the party had moved for a new trial pursuant to Civ.R. 59. See Brogan v. Hagan (1986), 26 Ohio App.3d 81, 26 OBR 255, 498 N.E.2d 234; Fuller v. Cincinnati Gas & Elec. Co. (Dec. 28, 1988), Hamilton App. No. C-870837, unreported, 1988 WL 138791; Smith v. Grinker & Sudman (Nov. 10, 1987), Hamilton App. No. C-870064, unreported; Krailler v. Carey (Nov. 26, 1986), Hamilton App. No. C-860013, unreported, and McHale v. Jenkins (June 29, 1983), Hamilton App. No. C-820705, unreported, 1983 WL 8922. 1 n4 In the case at bar, the court of appeals determined that application of its rule requiring a prevailing party to move for a new trial in order to preserve alleged errors for appeal was "inappropriate" in cases involving crossappeals by prevailing parties. We agree that the application of the rule is inappropriate -- but not just for prevailing party cross-appellants. For the following reasons, we find that the filing of a Civ.R. 59 motion for a new trial is not a necessary precondition for any party to obtain appellate review whether the review is sought by way of appeal or by way of cross-appeal filed in response to an appeal by an adverse party.

R.C. 2505.02 defines "final orders." Final orders are appealable. R.C. 2505.03. Nowhere in R.C. 2505.02 or 2505.03 is the appealability of an order conditioned upon the filing of a Civ.R. 59 motion for a new trial. Furthermore, appeals from final orders are governed by the Rules of Appellate Procedure, where applicable. R.C. 2505.03(C). Nowhere in the Rules of Appellate Procedure is the filing of a notice of appeal or cross-appeal conditioned upon a party first filing a motion for a new trial. See, specifically, App.R. 3 and 4(A). Indeed, even Civ.R. 59 contains no such requirement.

Simply put, we can find no persuasive authority in the law and rules of appellate practice which would support the proposition, now adhered to by a very limited number of appellate jurisdictions, that a party who obtains judgment in the trial court must first file a motion for a new trial in order to preserve alleged errors for appeal or cross-appeal. We hold that the filing of a Civ.R. 59 motion for a new trial is not a condition precedent to the filing of a notice of appeal or cross-appeal from an order which is final and appealable. As such, we specifically disapprove of Brogan, supra, and Serey, supra, to the extent that these cases are inconsistent with our holding herein. Westlake cites In re Guard-

<sup>1.</sup> See, also, Ramos v. Long (June 29, 1990), Portage App. No. 89-P-2103, unreported, 1990 WL 94881; Kennedy v. Keaton (Feb. 16, 1990), Lucas App. No. L-89-102, unreported, 1990 WL 12734; Woodson v. Woodson (Mar. 9, 1990), Lucas App. No. L-89-121, unreported, 1990 WL 21762; and Straka v. Gedeon (May 5, 1989), Lake App. No. 13-012, unreported, 1989 WL 47887.

2. App.R. 3(A) provides, in part, that:

<sup>&</sup>quot;An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4...."
App.R. 4(A) provides, in part, that:

<sup>&</sup>quot;In a civil case, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. If service of the notice of judgment and its entry is not made on a party within the three-day period provided for in Civ.R. 58(B), then that party shall file the notice of appeal within thirty days of the date of service. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires."

ianship of Love (1969), 19 Ohio St.2d 111, 48 O.O.2d 107, 249 N.E.2d 794, and Clevenger v. Huling (1964), 4 Ohio App.2d 45, 33 O.O.2d 61, 211 N.E.2d 84, affirmed (1965), 3 Ohio St.2d 200, 32 O.O.2d 188, 209 N.E.2d 434, to support the proposition that a motion for new trial is a prerequisite to obtain appellate review. Neither of these cases supports Westlake's proposition. The court in In re Guardianship of Love held that the guardian of the person and estate of an incompetent has no right to appeal from an order terminating the guardianship where there is no showing that the guardian and the ward are adverse parties. Id. at syllabus. The court in Clevenger recognized the ability of a prevailing party to claim prejudice as to the amount of damages awarded. Id. at paragraph one of the syllabus. Furthermore, neither In re Guardianship of Love nor Clevenger dealt with the question at issue herein.

With respect to Dunn & Wendel Architects' cross-appeal, the court of appeals determined that the amount of damages awarded by the trial court was against the manifest weight of the evidence. The court of appeals remanded the cause for a redetermination of the damages Dunn & Wendel Architects is entitled to receive from Westlake. Westlake claims no error in this regard other than the court of appeals' addressing the cross-appeal in the first instance. Accordingly, we affirm the judgment of the court of appeals and this cause is remanded to the trial court for proceedings not inconsistent with this opinion.

Judgment affirmed and cause remanded.

Moyer, C.J., Sweeney, Holmes, Wright, H. Brown and Resnick, JJ., concur.