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IN THE
COURT OF APPEALS OF INDIANA

SUPERIOR MORTGAGE FUNDING, LLC,)
JEREMIE SHENEMAN, MICHAEL)
SHENEMAN and ANDREW BEAM,¹)

Appellants-Defendants,)

vs.)

No. 71A05-1007-PL-432

GLADYS ZOLEKO and)
PAUL DAVIES,)

Appellees-Plaintiffs.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts Manier, Judge
Cause No. 71D05-0607-PL-274

June 14, 2011

¹ Superior Mortgage Funding and Andrew Beam do not challenge the trial court’s judgment. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court shall be a party on appeal.

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants-Defendants Michael Sheneman and Jeremie Sheneman appeal following the trial court's denial of their Motion to Set Aside Judgement enforcing their Settlement Agreement with Appellees-Plaintiffs Gladys Zoleko and Paul Davies. In addition, Michael challenges the trial court's denial of his Motion to Disqualify the Plaintiffs' Counsel, Lee Korzan. Upon appeal, the Shenemans claim that the Settlement Agreement has several unenforceable provisions, that it was reached by Korzan, who had an impermissible conflict of interest in the case, and that it was achieved without proper notice or authority. We affirm.

FACTS AND PROCEDURAL HISTORY²

In July of 2006, Zoleko filed an action, and in September 2006, Davis filed a separate action, against the Defendants, which the trial court subsequently consolidated under Cause Number 71D05-0607-PL-274 ("Cause No. 274"). The actions alleged mortgage fraud. Both Zoleko and Davis ("Plaintiffs") were represented by attorney Lee Korzan. The Shenemans, who were Defendants in the matter, were represented by Attorney Donald Wertheimer from approximately August 2006 until May 2010.

On November 12, 2008, in Cause Number 70D04-0811-PL-272 ("Cause No. 272"), Michael Sheneman filed a separate suit against Korzan for defamation, alleging

² Our review of this case is substantially impeded by the Appellants' failure to provide meaningful citations to relevant documents in the record. Many of the Appellants' record citations merely point to prior pleadings in which they alleged the same unsubstantiated facts, and certain other citations do not support the facts alleged.

that Korzan had wrongfully accused him of certain criminal acts. Michael's initial counsel in Cause No. 272 subsequently withdrew. On January 19, 2010, Attorney Susan McGinty filed her appearance in Cause No. 272. McGinty served notice of her appearance on Korzan. That day, Michael, by McGinty asked the court to remove Cause No. 272 from its Rule 41(E) docket.³ Korzan did not object, and the court ruled to retain the action on January 22, 2010.

Meanwhile, Korzan and Wertheimer engaged in settlement negotiations in Cause No. 274, the mortgage fraud action. On February 6, 2010, the Plaintiffs, by Korzan, submitted a proposed settlement offer to Wertheimer. One term of the offer required that Michael Sheneman dismiss with prejudice his action against Korzan in Cause No. 272. McGinty, who by this time represented Michael in Cause No. 272, was not informed about this proposed term, nor was her review a term of the offer. Another proposed term was that the Shenemans would not attempt to have any of the financial obligations imposed pursuant to the Settlement Agreement discharged in bankruptcy proceedings.

On February 7, 2010, Wertheimer faxed to Korzan a copy of Korzan's settlement offer, which Wertheimer signed, with the word "ACCEPTED" handwritten at the top. In addition, Wertheimer wrote "Maybe 1 comprehensive agreement instead of 2 separate will work. I'll talk to you tomorrow[.]"⁴ Plaintiff's Exh. B. That day, Korzan faxed a letter to Wertheimer acknowledging receipt of his "faxed acceptance of [the] settlement offer" and indicating that he would notify the court about the agreement by filing a CCS

³ Pursuant to Indiana Trial Rule 41(E), in cases where there has been no action for sixty days, the court shall order a hearing for the purposes of dismissing the case.

⁴ According to Wertheimer, the Shenemans did not wish to be included in any agreements with Superior Mortgage Funding, LLC, or Andrew Beam.

entry and draft the “release/settlement agreement and dismissal documents” for submission to Wertheimer. Plaintiff’s Exh. C. On February 8, 2010, the Plaintiffs, by Korzan, notified the court that they had reached a settlement agreement and that dismissal documents would follow.

Also on February 8, 2010, Korzan submitted a Mutual Release and Settlement Agreement containing the substantive terms in the settlement offer and certain “typical boilerplate” language. Tr. p. 5. On February 13, 2010, Wertheimer returned to Korzan two Mutual Release and Settlement Agreements (“the Wertheimer draft”), at the top of one of which he had written, “[P]lease review and get back to me. The clients are still reviewing.” Plaintiff’s Exh. E. Besides creating separate agreements between the Plaintiffs and the Shenemans and the Plaintiffs and Andrew Beam and Superior Mortgage, Wertheimer had changed certain other terms. Plaintiff’s Exh. E. The provision requiring dismissal of Cause No. 272 remained.

On February 15, 2010, Wertheimer faxed the following message to Korzan:

Lee, the clients have approved what I faxed you two days ago except that there will need to be one more paragraph. I am not sure how to draft it but, to the extent that Zoleko, Davies, and/or you disseminated any adverse information about the defendants, that information needs to be deleted or withdrawn. I will get a handle on perhaps more appropriate language soon and will advise.

Appellee’s App. p. 40.

In Korzan’s view, this version of the Mutual Release and Settlement Agreement represented a substantial change of the terms. On February 16, 2010, Korzan wrote a letter to Wertheimer regarding these changed terms. Korzan indicated that he was willing

to negotiate on certain terms and stated that if the matter could not be resolved, he would move to enforce the February 8 agreement.

On February 19, 2010, Korzan filed a Motion to Enforce Settlement Agreement seeking to enforce the February 8 agreement. A hearing on the matter was held March 3, 2010, and on March 9, 2010, the trial court granted the motion.

On March 12, 2010, Korzan sent McGinty a letter requesting that she sign a stipulation regarding dismissal of Cause No. 272 pursuant to the Settlement Agreement enforced by the trial court. This was the first McGinty had heard of the Settlement Agreement or the dismissal of Cause No. 272. McGinty contacted Michael, who said that Wertheimer had not had the authority to settle the case on his behalf, especially with regard to the dismissal of Cause No. 272. On April 21, 2010, McGinty faxed a letter to Korzan indicating that Michael had not agreed to settle the case and was not aware that a settlement had been finalized.

On April 19, 2010, Michael filed a *pro se* Motion to Set Aside the Settlement Agreement pursuant to Trial Rules 60(B)(1) and 60(B)(6). In his motion, Michael alleged that he had never agreed to a settlement, that Wertheimer had failed to tell him about the March 3 hearing to enforce the Settlement Agreement, and that the agreement contained provisions which he had never before seen. Wertheimer withdrew from Michael's case in May of 2010. On May 17, 2010, the Plaintiffs, by Korzan, filed a Motion for Entry of Judgments contending that the Defendants had failed to comply with

the terms of the Settlement Agreement and therefore owed the Plaintiffs \$52,500 pursuant to certain terms of the Agreement.⁵

On May 28, 2010, Michael, by McGinty, moved to disqualify Korzan on conflict-of-interest grounds from any matters relating to Cause No. 274. On June 2, 2010, Michael, by McGinty, filed an amended Trial Rule 60(B) Motion to Set Aside the Judgment Enforcing the Settlement Agreement and the Settlement Agreement itself. That day, Jeremie, by Attorney Andrea Ciobanu, similarly filed a Trial Rule 60(B) motion to set aside the agreement.

Following a June 11, 2010 hearing, the trial court denied the Defendants' motions to set aside the judgment and Michael's motion to disqualify Korzan, and it granted the Plaintiffs' motion for entry of judgments, awarding them \$52,500 plus interest. In its findings and conclusions, the trial court determined that Wertheimer's February 7 fax with the word "ACCEPTED" constituted an acceptance of Korzan's Settlement Agreement and that the changes in the Wertheimer Draft did not differ materially from the terms of Korzan's February 8 Settlement Agreement. The trial court additionally found that Wertheimer's February 15 fax, in which Wertheimer indicated that the Shenemans had approved his draft, established Wertheimer's authority to enter into settlement terms which were materially equivalent to those in the Settlement Agreement, including the term dismissing Cause No. 272. Significantly, the trial court

⁵ The Settlement Agreement provided that the Defendants would pay a total sum of \$15,000 to the Plaintiffs in two installment payments of \$7500 each. If the first installment payment were not received within a certain time period, the Defendants would owe the Plaintiffs \$60,000. If the second installment payment were not received within a later time period, the Defendants would owe the Plaintiffs \$52,500.

found certain assertions by Wertheimer in an affidavit not to be credible, including that he did not have the Shenemans' permission to accept the Settlement Agreement without McGinty's review. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

A. Rule 60(B) Motions to Set Aside Judgment

The decision whether to grant or deny a Trial Rule 60(B) motion for relief from judgment is within the sound, equitable discretion of the trial court. *Stonger v. Sorrell*, 776 N.E.2d 353, 358 (Ind. 2002). We will not reverse a denial of a motion for relief from judgment in the absence of an abuse of discretion. *Id.* Moreover, where as here, the trial court enters special findings and conclusions pursuant to Indiana Trial Rule 52(A), our standard of review is two-tiered. *Id.* First, we determine whether the evidence supports the findings, and second whether the findings support the judgment. *Id.* The trial court's findings and conclusions will be set aside only if they are clearly erroneous. *Id.* In reviewing the trial court's entry of special findings, we neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.* Rather we must accept the ultimate facts as stated by the trial court if there is evidence to sustain them. *Id.*

B. Disqualification

A trial court may disqualify an attorney for a violation of the Indiana Rules of Professional Conduct ("IRPC"). *Reed v. Hoosier Health Sys., Inc.*, 825 N.E.2d 408, 411 (Ind. Ct. App. 2005) (citing *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 154 (Ind. 1999)). The trial court's decision to disqualify an attorney is reviewed for an abuse of

discretion. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it or if it has misinterpreted the law. *Id.*

II. Analysis

A. Waiver

1. Bankruptcy

The Shenemans allege that the trial court erred in denying their motion for relief from judgment because the Settlement Agreement contains certain unenforcible provisions, including that obligations imposed by the agreement could not be discharged in bankruptcy proceedings. According to the Shenemans, debtors may not contract away their right to discharge under bankruptcy.

This argument has been waived. The Shenemans made no mention of this challenged bankruptcy clause at the hearing on their motion to set aside judgment, and the only mention of it in their motion was a footnote claiming such clauses “have been held to be void, based on public policy and against the United States Constitution.” Appellant’s App. p. 473. This single broad footnoted statement, without additional authority or argument, is inadequate to preserve the Shenemans’ multi-page, multi-part, case-intensive challenge to the bankruptcy provision on appeal.⁶ *See Monschein v. LaLonde*, 701 N.E.2d 1275, 1277 (Ind. Ct. App. 1998) (“To preserve a constitutional argument for appeal, the party must at least cite to the portion of the constitution

⁶ In concluding that the argument was preserved, the dissent points to two cases, both of which involve a party acknowledging, at the trial court level, the very argument it later claimed was waived. Here, there is no showing that Korzan or the Plaintiffs acknowledged or understood that the allegedly void bankruptcy provision was part of the basis for the Shenemans’ motion to set aside judgment.

allegedly offended.”); *see also Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000) (observing that a party may not raise an issue for the first time on appeal). To the extent the Shenemans raise the separate argument that the agreement’s provisions regarding certain real property violates automatic stay principles in bankruptcy proceedings, this argument is similarly made for the first time on appeal and has also been waived. *See id.*

2. Liquidated Damages

The Shenemans also contend that relief from judgment is justified on the basis that the term in the Settlement Agreement providing for \$52,500 in the event of default constituted an unenforcible liquidated damages provision. As with their bankruptcy challenge, the Shenemans failed to raise this ground before the trial court. It is also waived. *See id.*

B. Conflict of Interest

The Shenemans further allege trial court error on the grounds that the Settlement Agreement, which contains a term dismissing Cause No. 272, is the product of Korzan’s impermissible conflict of interest. In declining to award relief on the basis of conflict of interest in this case, the trial court concluded that any conflict was between Korzan and the Plaintiffs, that the Plaintiffs had waived any such conflict, and that the conflict did not adversely impact the Defendants.

The Shenemans challenge the validity of the conflict waiver credited by the trial court by claiming that it was in violation of certain rules of evidence and was not properly in writing pursuant to certain rules of professional conduct. The Shenemans additionally contend that the trial court improperly limited the extent of their questioning

at the hearing. The Shenemans made no objection on any of these grounds at the hearing. Accordingly, their challenges on these grounds are waived. *See id.*

The Shenemans further contend that the trial court's conclusion that the conflict was limited to Korzan and his clients was erroneous. But the Shenemans' argument in this regard is based upon another attorney's allegations, and their own speculation, regarding Korzan's motivations, which is essentially an invitation to reweigh the evidence. We decline to do so.

Perhaps most importantly, the Shenemans' argument largely presumes that, contrary to the trial court's findings and conclusions, any conflict of interest which existed could not be waived pursuant to Indiana Rule of Professional Conduct 1.7, which generally provides for such waiver in cases where a client gives informed consent. The Shenemans point to Indiana Rule of Professional Conduct 1.8(i), which prohibits a lawyer from acquiring a "proprietary interest" in his client's cause of action, and Rule 3.7, which prohibits a lawyer from acting as an advocate at a trial for which he is a likely necessary witness. There was no trial here, so the trial court cannot be said to have committed clear error on Rule 3.7 grounds. Further, the Shenemans' Rule 1.8(i) "proprietary interest" claim rests upon Korzan's allegation that his defamation defense in Cause No. 272 would essentially require a trial of the mortgage fraud alleged in Cause No. 274. By observing the Plaintiffs' waiver of any conflict, the trial court implicitly rejected the Shenemans' contention that Korzan's interest in having his case dismissed in Cause No. 272 constituted a "proprietary," or ownership interest, in Cause No. 274. The Shenemans provide no authority in their brief suggesting that this interpretation of the

Rule is an error of law. Accordingly, we find no clear error. For this same reason, we similarly find no clear error in the trial court's denial of the Plaintiffs' motion to disqualify Korzan as counsel.

C. Alleged Misconduct

The Shenemans allege that Korzan's failure to contact counsel McGinty in Cause No. 272 prior to reaching, and seeking enforcement of, the Settlement Agreement constitutes misconduct which warrants setting aside the enforcement judgment. In rejecting the motion to set aside judgment on this ground, the trial court stated as follows:

22. While the question of whether Korzan should have contacted McGinty as a part of the settlement discussions is a viable question, as it was she whom Defendant Michael Sheneman retained to represent him in the Korzan litigation, it is the consent of Defendant Michael Sheneman to the agreement to dismiss the Korzan Litigation that is at issue. . . . Defendant Michael Sheneman was actively represented by counsel in connection with the settlement. Wertheimer was aware of McGinty's representation of Defendant Michael Sheneman in the Korzan matter, was allegedly under orders from his client that her consent to settlement of this case was necessary, failed to contact her, and yet represented to Korzan in both the Acceptance and the Wertheimer Draft that his clients consented to the dismissal of the Korzan Litigation.

25. Under these circumstances, the court does not believe that any failure on the part of Korzan to confer with McGinty about the settlement was misconduct of a kind requiring that the Court vacate its Order dated March 9, 2010.

Appellant's App. p. 552.

Indiana Trial Rule 60(B)(3) enables a court to grant relief from an otherwise final judgment for "fraud, misrepresentation, or misconduct" of an adverse party. *See Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). The Indiana Supreme Court has held that "misconduct" under Indiana's Rule 60(B)(3) can be based on a

violation of the Code of Professional Responsibility, even if the conduct at issue does not violate the rules of civil procedure. *Id.*

The Shenemans claim that Korzan's failure to contact McGinty constituted misconduct, but they cite no specific rules of Professional Responsibility in support of this claim. Further, as the trial court observed, Michael was actively represented by Wertheimer at the time of the settlement, and Wertheimer would have been fully aware that Michael was entering into a term forfeiting his rights in a separate action. Without any alleged violation by Korzan of a specific rule of professional responsibility, especially in light of the fact that Wertheimer stood in a more obvious position to counsel Michael and perhaps notify McGinty, the Shenemans have failed to demonstrate clear error on this ground.

D. Authority

The Shenemans further contest the trial court's conclusion, in rejecting their motion to set aside judgment enforcing the Settlement Agreement, that Wertheimer had the authority to settle on their behalf. With respect to Wertheimer's authority to enter into the Settlement Agreement, the trial court found, *inter alia*, the following:

16. The February 15, 2010 Fax conveyed that Wertheimer had his client's actual authority to tender a settlement proposal materially equivalent to the Mutual Release and Settlement Agreement that included dismissal of the Korzan litigation.

23. Apparent authority "refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent." *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675. The Wertheimer Draft, February 125 [sic], 2010 Fax and comments of Wertheimer at the March 3, 2010 hearing reasonably manifest

Defendant Sheneman's assent to the terms of the Offer/Acceptance and Wertheimer's apparent authority to so bind his clients.

24. Wertheimer acted with apparent authority when he signed the Acceptance and with what appears to be actual authority in connection [sic] his issuance of the Wertheimer Draft and February 15, 2010 Fax. Just as Korzan knew of McGinty's status, Wertheimer did as well. Wertheimer never raised McGinty's approval as a condition of the Acceptance or the Wertheimer Draft.

Appellant's App. pp. 549, 552.

In addition, the trial court considered Wertheimer's affidavit, in which he indicated that McGinty's consent was required before he had the authority to agree to dismiss Cause No. 272. The trial court found this provision of Wertheimer's affidavit not to be credible.

Upon challenging the trial court's judgment, the Shenemans argue that the trial court erroneously looked to representations by the agent Wertheimer, rather than by the Shenemans, in finding the existence of apparent authority.

"Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." RESTATEMENT (SECOND) OF AGENCY § 7 (1958). Authority can be express or implied and may be conferred by words or other conduct, including acquiescence. *Id.* at cmt. c. Implied authority can arise from words used, from customs, or from the relations of the parties. *Id.* The agent is authorized if the agent is reasonable in drawing an inference from the principal's actions that the principal intended to confer authority. *Id.* at cmt. b.¹ . . .

As a general proposition an attorney's implied authority does not extend to settling the very business that is committed to the attorney's care without the client's consent. . . .

Apparent authority is the authority that a third person reasonably believes an agent possesses because of some manifestation from the principal. *Pepkowski v. Life of Ind. Ins. Co.*, 535 N.E.2d 1164, 1166 (Ind. 1989). Some form of communication, direct or indirect, from the principal, must instill a reasonable belief in the mind of the third party. *Id.* at 1167. A communication of authority by the agent is insufficient to create an

apparent agency relationship. *Jarvis Drilling, Inc. v. Midwest Oil Producing Co.*, 626 N.E.2d 821, 826 (Ind. Ct. App. 1993). Like implied authority, apparent authority to settle is not conferred simply by the retention of an attorney though of course it may be conferred by other actions of the client.

Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1302, 1304 (Ind. 1998) (footnote omitted).

At issue here is whether the Shenemans gave Wertheimer their consent to settle on their behalf. The trial court specifically credited the evidence establishing the Shenemans' expressions to Wertheimer of their agreement to the term dismissing Cause No. 272, and the court specifically discredited Wertheimer's later representations in his affidavit that he did not have permission to agree to the term on their behalf. While the Shenemans point to certain contrary evidence in contesting that finding, we will not reassess the trial court's credibility findings. Given the Shenemans' agreement to the settlement term, and Wertheimer's representation of them in the matter being settled, we find no clear error in the trial court's refusal to grant relief from judgment on the basis that Wertheimer somehow exceeded his authority in agreeing to the term on their behalf. The Shenemans point to no authority, and we find none, suggesting that parties and their authorized attorneys in a particular matter may only agree to settlement terms which do not involve other pending litigation.

The judgment of the trial court is affirmed.

BAKER, J., concurs.

MAY, J., dissents with opinion.

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SUPERIOR MORTGAGE FUNDING, LLC,)	
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)	
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)	

MAY, Judge, dissenting

The majority disposes of at least three of the issues the Shenemans raise on appeal by determining they were waived because they were not raised below. I would decline to so hold with regard to one of those issues, and must therefore respectfully dissent.

On appeal, the Shenemans argue the settlement agreement contains an unenforceable provision that prohibits the agreement’s obligations from being discharged in bankruptcy. The majority holds that argument was waived. I believe that issue was preserved below.

In their motion for relief from judgment, the Shenemans asserted Jeremie Sheneman expressed to his mother that the “bankruptcy clause” in paragraph six should be deleted from the proposed agreement, and his mother conveyed that information to attorney Wertheimer. (Appellants’ App. at 10.) Just after that statement, the Shenemans’

motion included a footnote that asserted such clauses are void: “This concern is outline [sic] in Jeremie Sheneman’s affidavit, marked as Exhibit 6. Furthermore, ‘no bankruptcy clauses’ have been held to be void, based on public policy and against the United States Constitution.” (*Id.* at 10 n.23.) I believe those assertions in the Shenemans’ motion were adequate to preserve the issue of the “no bankruptcy clause” for appeal, and we should address it on the merits.

In *Ansert by & through Ansert v. Indiana Farmers Mut. Ins. Co.*, 659 N.E.2d 614 (Ind. Ct. App. 1995), *reh’g denied, trans. dismissed*, Ansert argued a policy provision was ambiguous. Farmers argued Ansert did not offer that argument on summary judgment and thus waived it for appeal. We determined Farmers had raised the ambiguity issue in its motion for summary judgment because, in its motion, Farmers argued the dispute was “simply a matter of contract interpretation.” *Id.* at 617. It then quoted the allegedly ambiguous “amount payable” provision and concluded the provision was unambiguous. Specifically, Farmers stated, “[t]hese unambiguous set-off provisions are valid and enforceable in Indiana.” *Id.* As Farmers raised the issue of ambiguity in its own motion for summary judgment, it “had notice of the issue and cannot argue on appeal that the issue has been waived.” *Id.* We considered Ansert’s argument that the “amounts payable” provision of the insurance policy was ambiguous because “where an opposing party has unequivocal notice of an issue, that issue may be considered on appeal.” *Id.* at 617-18.

In *Fox v. Rice*, 936 N.E.2d 316 (Ind. Ct. App. 2010), *clarified on reh’g*, 942 N.E.2d 167 (Ind. Ct. App. 2011), Fox argued he was “incapacitated” for purposes of

filing a tort claim, and Rice argued Fox had waived that claim by not raising it before the trial court. We noted:

Fox did not raise the issue of his incapacitation in either of his responsive motions to [Rice's] motions for summary judgment. However, [Rice], in [his] motion for summary judgment as to Fox's state law claims, stated simply and without elaboration, "[Fox] was not incapacitated nor denied access to the courts during this time." App. of Appellant at 118 (citation omitted). This is unequivocal notice of the existence of the issue. *See, e.g., [Ansert]* ("When a party raises a[] [particular] issue . . . in its own motion for summary judgment, that party had notice of the issue and cannot argue on appeal that the issue has been waived."). Therefore, Fox has not waived this argument on appeal.

Id. at 323.

The Shenemans similarly gave Zoleko "unequivocal notice" of the issue of the validity of the "no bankruptcy" provision, and we should not now find it is waived. I would address that issue, and must therefore respectfully dissent.