The Bullet Point: Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation. Written with both attorneys and businesspeople in mind, *The Bullet Point*:

1. Provides bullet points of knowledge to help executives and counsel do business better.
2. Interprets legal decisions to proffer critical commercial judgment.
3. Monitors the legal landscape to identify potential opportunities for industries to use the appellate process to advocate for businesses through amicus briefs.

If you have any questions or comments about any of these cases or how they can affect your business, please contact Richik Sarkar or James Sandy.

Harris v. TransAmerica Advisors Life Ins. Co., 6th Dist. Lucas No. L-15-1252, 2017-Ohio-341.
In this case, the plaintiffs claimed that an insurance company improperly calculated the death benefit following their mother's death. Plaintiffs sued the insurance company for bad faith and breach of contract but the trial court ultimately granted judgment in favor of the insurance company finding that the insurance company had performed as required under the contract. The plaintiffs appealed and the Sixth Appellate District agreed with the trial court. The Sixth Appellate District found that the insurance company was not at fault because it calculated the death benefit under the formula outlined in the contract which required it to "determine the variable insurance amount as of the date of the decedent's death, compare[] it to the face amount, and [pay] the higher of the two values." Because this language was clear and unambiguous, the court declined to consider documents outside of the contract itself to determine if the insurance company had properly performed.

The Bullet Point: Follow the terms and conditions in your contracts to a "T" because when those terms are clear, courts will not look outside the four corners of the contract to determine if the parties' performance as required under the contract.

Multibank 2009-1 CML-ADC Venture, LLC v. South Bass Island Resort, Ltd. et. al., 6th Dist. Erie No. E-15-061, 2017-Ohio-344.

This was an appeal of a bench trial which found that the defendant had personally guaranteed a 20+ million dollar loan. One issue on appeal was whether the defendant had waived his right to a jury trial. Contained within the loan guaranty was the following contract term: "[t]he Guarantor hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim arising out of or relating to any of the loan documents." The trial court found, and the Sixth Appellate District agreed, that this language was clear and unambiguous and that the defendant had waived his right to a jury by signing a waiver contained in a loan guarantee.

The Bullet Point: Parties can contract for many things, including the waiver of a right. Because of that, make sure you read what you sign or you just might have waived your rights!

Javorsky v. Javorsky, 8th Dist. Cuyahoga No. 103896, 2017-Ohio-285.

This was an appeal of a trial court's decision to grant a third party's motion to compel arbitration. The appellant argued that she did not sign the contract or arbitration provision and could not be required to arbitrate her claims. The Eighth Appellate District disagreed. The general rule is that a non-party to a contract containing an arbitration clause cannot be forced to arbitrate his or her claims. There are exceptions to this general rule, including under a theory of estoppel. This exception occurs when the non-signatory obtained some benefit from the contract that contains the arbitration clause such that acceptance of that benefit would also require acceptance of the contract obligations, including the arbitration clause. In this case, the Eighth Appellate District found that under a theory of estoppel, the appellant was bound by the arbitration clause because she expressly sought and obtained funds from the IRA account at issue. In other words, once the appellant accepted the funds placed in the account pursuant to the contract, she was bound by it and the arbitration clause contained in it.

The Bullet Point: Arbitration is favored by courts but they are typically hesitant to enforce such clauses against non-signors. However, an arbitration clause can cover a lawsuit by a non-signatory if the lawsuit relates to the subject matter of the contract and the non-signatory got some benefit from the contract that contains the arbitration clause.

Seyfried v. Patrick O'Brien Chevrolet, Inc., 8th Dist. Cuyahoga No. 104212, 2017-Ohio-286.

This case was an appeal of a trial court decision ordering the class-plaintiff to arbitrate his claims. The plaintiff claimed he did not agree to arbitrate because he left the signature line in the contract blank below the arbitration clause. The trial court and Eighth Appellate District disagreed. The appeals court noted that the "lack of a signature does not in itself show that a party has not consented to arbitration." Instead, the court noted that at around the

time the plaintiff signed the contract he had also signed a separate "Agreement to Binding Arbitration." The court noted that this separate document containing the arbitration clause, executed moments apart from the contract, was properly considered multiple documents of the same transaction and should be interpreted together.

The Bullet Point: It is always best to make sure the contract signed by the parties contain all of the essential terms and conditions of the contract. However, courts will still enforce a clause, like an arbitration provision, contained outside of the contract that exists in a document signed contemporaneously to the contract.

Whitson v. One Stop Rental Tool & Party, 12th Dist. Preble No. CA2016-03-004, 2017-Ohio-418.
This case was an appeal of a trial court decision to grant judgment to the defendant-appellee on a negligence claim from the rental of a bounce house gone awry. When the plaintiff had rented the bounce house he had signed a rental contract which contained a "hold harmless" clause. The clause advised the plaintiff that he assumed all risks for any damage or injury arising out of the defendant's negligence. Likewise, the contract contained a release provision where plaintiff agreed to release, indemnify, and hold harmless the defendant for any liability due to negligence. The trial court found that the plaintiff's complaint was barred by the hold harmless clauses and the Twelve Appellate District agreed.

The appeals court noted that while hold harmless clauses are permissible, they are not favored and "strictly construed." Because of this, to be enforceable, the hold harmless clause must be "clear and unequivocal." In this case, the appellate court found the hold harmless clause to be clear and unambiguous and agreed with the trial court that the defendant was entitled to judgment.

The Bullet Point: Courts do not like hold harmless provisions and will construe them in a strict manner. Because of this, hold harmless clauses must contain definite, clear, and unambiguous terms in order to be enforceable.

[Cite as *Harris v. Transamerica Advisors Life Ins. Co.*, 2017-Ohio-341.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Craig Harris, et al.	Court of Appeals No. L-15-1252
Appellants	Trial Court No. CI0201401624
v.	
Transamerica Advisors Life Insurance Company	**DECISION AND JUDGMENT**
Appellee	Decided: January 27, 2017

* * * * *

R. Ethan Davis and Zachary J. Murry, for appellants.

James F. Koehler and Timothy J. Fitzgerald, for appellee.

* * * *

JENSEN, P.J.

I. Introduction

{¶ 1} The plaintiffs-appellants are siblings, Craig Harris and Melanie Harris. They are beneficiaries of a life insurance policy purchased by their mother, Joanne Harris

(hereinafter "decedent"). Appellants allege that the defendant-appellee, Transamerica Advisors Life Insurance Company, improperly calculated the death benefit following their mother's death. They also claim that appellee acted in bad faith.

{¶ 2} Appellee moved for summary judgment, and appellants moved for partial summary judgment. On August 24, 2015, the Lucas County Court of Common Pleas granted appellee's motion and denied appellants'. Appellants appealed.

{¶ 3} For the reasons that follow, we find that appellee is entitled to judgment as a matter of law, and we affirm the trial court's judgment.

II. Statement of Facts and Procedural History

{¶ 4} The material facts are not in dispute. In 1987, the decedent purchased a life insurance policy from Monarch Life Insurance Company, a predecessor company to appellee. The single premium for the policy was $200,000. Decedent named her three children as beneficiaries, one of whom predeceased her, leaving Craig and Melanie as beneficiaries.

{¶ 5} Decedent died on March 24, 2012. According to appellee, it calculated the death benefit pursuant to the following provision:

> We will pay the death benefit proceeds to the beneficiary upon your death. * * * Death benefit proceeds are determined as follows:
>
> (1) We determine this policy's death benefit, which is the larger of the face amount and the Variable Insurance Amount. * * *
>
> The values above will be those as of the date of your death.

{¶ 6} The "face amount" of the policy at the time of decedent's death was $449,848. Thus, the death benefit proceed was the "larger" of the $449,848 face amount and the "variable insurance amount."

{¶ 7} The variable insurance amount is defined and calculated as follows:

> The Variable Insurance Amount on the policy date equals the cash value as of such date multiplied by the net single premium factor for your issue age. Thereafter, the Variable Insurance Amount will vary on each policy processing date based on the investment results and any additional payments made. The Variable Insurance Amount will be determined as of each policy processing date and will remain constant for the following policy processing period. It will be determined as follows:
>
> 1. We determine the cash value of the policy as of such date; and
>
> 2. We multiply (1) by the net single premium factor for your attained age as of such date. * * *
>
> The table of net single premium factors is shown in Policy Schedule.

{¶ 8} The policy processing date ("PPD") occurs "on the same day of the month as the policy date at the end of the successive 3 month period." In other words, appellee recalculates death benefits four times per year, once per quarter.

{¶ 9} Decedent's policy date was April 3, 1987, and the net single premium factor in the third quarter for decedent, given her age when she died, was 1.30032.

{¶ 10} Taking all of the above into account, appellee argues that the policy required it to calculate the death benefit payable under decedent's policy on the third day of each January, April, July and October that fell after the April 3, 1987 policy date.

{¶ 11} As appellee explains, it calculated the variable insurance amount as of January 3, 2012, the most recent PPD prior to decedent's death. It multiplied the cash value ($518,450) by the net single premium factor (1.30032) for a variable insurance amount of $674,151, as of the January 3, 2012. That amount "remained constant" until the next PPD, on April 3, 2012.

{¶ 12} Indeed, the quarterly statement sent to decedent on January 3, 2012 indicates that the net life insurance value as of that date was $674,151. Because the variable insurance amount was larger than the face amount, the death benefit was $674,171.

{¶ 13} Appellee learned of decedent's March 24, 2012 death on April 4, 2012. It mailed the respective death benefit checks to Melanie on April 27, 2012 and to Craig on May 11, 2012. Appellee sent each appellant a death benefit of $337,075.50, plus interest from decedent's date of death: $1,366.77 for Melanie and $1,883.93 for Craig.

{¶ 14} Appellants argue that appellee failed to pay the full death benefit "as it existed--- **at the date of her death---."** (Emphasis in original.) Appellants do not claim to know the precise value of the death benefit as of March 24, 2012. Instead, they claim that "the amount paid * * * differed by approximately $42,478 from the value of the

policy on the date of [decedent's] death, March 24, 2012." Appellants explain that $42,478 is the difference between the death benefit amount indicated in the January 3, 2012 quarterly statement and the April 3, 2012 quarterly statement.

{¶ 15} Appellants rely on quarterly statements to support their case. Statements sent to decedent between 1987 and early 1997 contained the following language: "The death benefit may increase or decrease *each day* depending on the investment results."[1] (Emphasis added.) Appellants also point to references in the quarterly statements encouraging decedent to contact appellee directly "the next time you need an update on your policy's values in between quarterly statements."

{¶ 16} Appellants maintain that the quarterly statements "actually became part of the contract between the parties." They argue that the intent of the parties "was that the policy's death benefit would be valued as of the date of her death, not as of the last quarterly statement sent by [appellee]."

{¶ 17} On June 6, 2014, appellants filed an amended complaint, asserting four claims of relief: breach of contract, breach of fiduciary duty, bad faith and unjust enrichment. Appellants sought compensatory and punitive damages and attorneys' fees. Appellants filed a motion for partial summary judgment, arguing that they were entitled to judgment as a matter of law as to their first and third claims.

[1] In October of 1997, appellee revised that language, such that it read: "The death benefit may increase or decrease *each policy processing date* depending on the investment results." (Emphasis added.)

{¶ 18} Appellee filed its own motion for summary judgment claiming that it was entitled to judgment as to each count. The trial court agreed with appellee. On August 24, 2015, the trial court granted appellee's motion and denied appellants'.

{¶ 19} Appellants appealed. Appellants challenge the trial court's decision as to their breach of contract and bad faith claims. They do not, however, challenge the dismissal of their breach of fiduciary duty or unjust enrichment claims, or their demand for punitive damages and attorneys' fees.

III. Appellants' Assignments of Error

1. The Trial Court erred by entering summary judgment in favor of the Defendant-Appellee, and denying Plaintiff-Appellants' Motion for Summary Judgment, where both the plain language of the insurance contract and extrinsic evidence require that Defendant-Appellee pay a death benefit equal to the value of the policy as of the date of decedent's death.

2. The Trial Court erred by entering summary judgment in favor of Defendant-Appellee, and denying Plaintiffs-Appellants' Motion for Summary Judgment, on Plaintiff-Appellants' insurance bad faith claim where said claim was supported by competent expert testimony that Defendant-Appellee's failure to properly handle Plaintiff-Appellants' claim and failure to pay the full death benefit due and owing under the decedent's insurance policy constituted bad faith.

IV. Standard of Review

{¶ 20} Appellate review of a summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In other words, we employ the same standard as the trial court, without deference to its decision. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 21} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the

applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999).

V. Breach of Contract Claim

{¶ 22} An insurance policy is a contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 9. To recover upon a breach of contract claim, a plaintiff must prove "the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 18 (10th Dist.).

{¶ 23} In order to prove a breach by the defendant, a plaintiff must show that the defendant "did not perform one or more of the terms of a contract." (Citations omitted.) *Id.* at ¶ 18.

{¶ 24} Included with appellee's motion for summary judgment was an affidavit from its claim manager who had personal knowledge of how decedent's claim was processed and benefits calculated. According to the claims manager, appellee calculated the death benefit according to the formula set forth in the policy. That is, appellee determined the variable insurance amount as of the date of decedent's death, compared it to the face amount, and paid the higher of the two values.

{¶ 25} Appellants point to the opinion of their own expert witness who stated in his affidavit that the language of the policy and the quarterly statements required appellee to calculate daily the death benefit, rather than just four days per year.

{¶ 26} Appellants' argument, that the policy required daily calculation, is contradicted by clear language in the policy. That is, the $674,151 variable insurance

amount calculated as of the January 3, 2012 policy processing date was "to remain constant for the following processing period." That period included decedent's March 24, 2012 date of death.

> When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. (Citations omitted.) *Westfield* at ¶ 11.

{¶ 27} We find that the insurance agreement, including the formula for calculating the variable insurance amount, is clear and unambiguous. We find no support for appellants' argument that the parties intended to be bound by an alternative method, including daily calculation.

{¶ 28} Moreover, we reject appellants' argument that the opinion of their expert witness created an issue of fact as to their breach of contract claim. The interpretation of a contract is an issue of law, not of fact, to be determined by the court. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). The parol evidence

that appellants rely upon, the quarterly statements and the affidavit of their expert witness, in an attempt to establish that appellee modified the policy cannot be considered as a means to establish that the insurance policy meant anything other than what it unambiguously said. *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992), syllabus.

{¶ 29} As a matter of law, we find that appellee was entitled to judgment as to the breach of contract claim. Appellants' first assignment of error is not well-taken.

VI. Bad Faith Claim

{¶ 30} In their second assignment of error, appellants argue that appellee acted in bad faith by "arbitrarily failing to pay the correct death benefit under [decedent's] policy and by failing to handle this claim in good faith." Appellants argue that the lower court erred in failing to consider the opinion of its expert witness who opined that appellee acted in bad faith by failing to pay "the full amount" of the death benefit. They suggest that the expert opinion, alone, is sufficient to create an issue of fact as to the bad faith claim.

{¶ 31} An insurer has the duty to act in good faith in the handling and payment of the claims of its insured. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), paragraph one of the syllabus. An insurer fails to exercise good faith where the circumstances do not furnish reasonable justification for its refusal to pay the claim. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), paragraph one of the syllabus. An insurer that improperly fails to pay a valid claim may be liable in tort for bad faith. *Hoskins* at 276; *Beever v. Cincinnati Life Ins. Co.*, 10th Dist. Franklin Nos. 10.

02 AP-543, 02 AP-544, 2003-Ohio-2942, ¶ 20. Even where a claim is ultimately paid, the insurer's "foot-dragging" in handling and evaluating the claim may support a bad-faith cause of action. *Drouard v. United Servs. Auto. Assn.,* 6th Dist. Lucas No. L-06-1275, 2007-Ohio-1049, ¶ 16.

{¶ 32} The evidence relied upon by appellants supports a case for improperly calculating the death benefit; it does not support a claim that appellee mishandled the claim or engaged in foot dragging. Thus, to the extent that their bad faith claim extends beyond merely paying the wrong amount, appellants' claim is conclusory and unsupported with any evidence.

{¶ 33} Therefore, because we find that appellee calculated and paid the death benefit pursuant to the unambiguous formula of the policy, appellants' bad faith claim fails as a matter of law. Appellants' second assignment of error is not well-taken.

VII. Conclusion

{¶ 34} Because appellee calculated and paid the death benefit according to the life insurance policy's unambiguous formula, there is no genuine issue of material fact in dispute and appellee is entitled to judgment as a matter of law as to the breach of contract claim. Similarly, because we find no breach of contract and no evidence that appellee mishandled the claim, appellants' bad faith claim also fails as a matter of law. Appellants' assignments of error are not well-taken. We affirm the judgment of the Lucas County Court of Common Pleas granting summary judgment to appellee and denying partial summary judgment to appellants.

{¶ 35} Pursuant to App.R. 24, costs are assessed to appellants.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE

[Cite as *Multibank 2009-1 CML-ADC Venture, L.L.C. v. S. Bass Island Resort, Ltd.*, 2017-Ohio-344.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Multibank 2009-1 CML-ADC Venture, LLC

Appellee

v.

South Bass Island Resort, Ltd., et al.

Defendants

[John C. Tomberlin—Appellant]

Court of Appeals No. E-15-061

Trial Court No. 2008-CV-0749

DECISION AND JUDGMENT

Decided: January 27, 2017

* * * * *

Martha S. Sullivan, Stephanie E. Niehaus and F. Maximilian Czernin, for appellee.

Geoffrey L. Oglesby, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Dr. John C. Tomberlin, appeals the judgment of the Erie County Court of Common Pleas, following a bench trial, which found that appellant personally guaranteed a loan from the Columbian Bank and Trust Company ("Columbian Bank") to

South Bass Island Resort, Ltd. ("SBIR"), and awarded judgment to appellee, Multibank 2009-1 CML-ADC Venture, LLC ("Multibank")—Columbian Bank's successor in interest—in the amount of $20,576,899.91 plus ongoing interest, taxes, assessments, insurance, attorney fees, and costs. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} Many of the underlying facts are undisputed. At the end of May 2006, Columbian Bank offered to loan up to $8.6 million to SBIR for a property development project. Included as one of the conditions of granting the loan contained in the loan commitment letter was that the loan "will be 100% joint and severally guaranteed by Cecil Weatherspoon; John C. Tomberlin; and 250 Centre, LTD."[1] Notably, this was the only loan being discussed by Columbian Bank and SBIR in June 2006.

{¶ 3} The timeframe to close the loan was very short, with an original target date of June 27, 2006. The timeframe was further cut shorter in an effort to close on June 15, 2006. On June 7, 2006, Guy Humphrey, the attorney for Columbian Bank,[2] sent several draft documents, including a draft of an "Unconditional Cognovit Guaranty" for appellant, to SBIR's attorney, Jeffrey Rengel. The draft had blanks for the date of the guaranty and the date of the corresponding loan agreement. Rengel purportedly amended the "Unconditional Cognovit Guaranty" to change the location of execution, and sent it to

[1] Cecil Weatherspoon was the principle of both SBIR and 250 Centre Ltd.

[2] Guy Humphrey is now a United States Bankruptcy Judge for the Southern District of Ohio. Thus, we will refer to him throughout as "Judge Humphrey."

appellant, who was in Alabama. As the closing date approached, and having not yet received the "Unconditional Cognovit Guaranty," on June 12, 2006, Judge Humphrey sent a second "Cognovit Unconditional Guaranty" to Rengel. The second guaranty listed June 14, 2006, as the date of execution of both the guaranty and the corresponding loan agreement.

{¶ 4} On June 15, 2006, Judge Humphrey emailed Rengel and stated that he had reviewed everything for the closing and was just waiting to receive a few more documents before the loan could be disbursed. Included in Judge Humphrey's review was the original draft of appellant's "Unconditional Cognovit Guaranty." Appellant had signed the draft, and his signature was notarized on June 8, 2006. Furthermore, June "8th," 2006, was handwritten in the blanks for the dates of the guaranty and the corresponding loan agreement. As for the additional documents that Judge Humphrey was waiting on, one of them was a U.S. "Patriot Act form" for appellant. The completed Patriot Act form and a copy of appellant's driver's license were received later that day, and the funds were disbursed by Columbian. The HUD Settlement Statement indicates that as part of the disbursement, $350,000 was paid to appellant.

{¶ 5} Relevant here, the details of the loan agreement itself are that it was to be a loan of up to $8.6 million, which was to be made in multiple advances as the property was developed. The loan agreement was dated June 14, 2006, and was for an 18-month term, with a maturity date of December 15, 2007. In addition, the loan agreement provided that

> The payment and performance of all of the Obligations shall also be secured and/or guaranteed by (i) the joint and several Cognovit Unconditional Guaranty (the "Guarantees") of Cecil Weatherspoon, John C. Tomberlin, and 250 Centre, Ltd. (the "Guarantors") of even date herewith to be executed and delivered at Closing by the Guarantors for the benefit of Lender * * *.

{¶ 6} It is undisputed that SBIR defaulted on the terms of the loan agreement, and as of the date of the trial, no payments had been made on the loan.

{¶ 7} On August 13, 2008, Columbian filed its complaint against SBIR, Cecil Weatherspoon, 250 Centre, Ltd., and appellant (the "defendants"). On March 26, 2009, the defendants filed their answer and asserted two counterclaims, one for fraud and one for breach of contract, based on Columbian's alleged misrepresentations regarding the disbursement of the funds, and its alleged failure to disburse the entire $8.6 million.

{¶ 8} After extensive litigation, the parties filed cross-motions for summary judgment. Weatherspoon, 250 Centre, Ltd., and appellant moved for partial summary judgment on appellee's claims, on the basis that the guaranties were unenforceable as a matter of law. Appellee, in turn, moved for summary judgment on its claims against all the defendants, as well as for summary judgment on the defendants' counterclaims.

{¶ 9} On November 16, 2011, the trial court entered its judgment denying Weatherspoon's, 250 Centre, Ltd.'s, and appellant's motion for summary judgment on appellee's claims. Likewise, the trial court granted appellee's motion for summary

judgment on its claims against SBIR, Weatherspoon, and 250 Centre Ltd. Thus, the court entered judgment against SBIR, Weatherspoon, and 250 Centre Ltd. in the principle amount of $7,849,093.30, plus interest, taxes, assessments and insurance, and costs. The court also granted summary judgment in favor of appellee on the defendants' counterclaims, and dismissed those counterclaims with prejudice. As to appellant, the trial court ruled that genuine issues of material fact precluded summary judgment on appellee's claims against him. Specifically, the court identified the issues as "whether there were two loans or one; the respective intent of the parties; and the details of the content of the Tomberlin Guaranty." The court ordered that the remaining issues related to appellant's guaranty would be set for a bench trial.

{¶ 10} After further litigation and numerous delays and continuances, the matter finally came before the court for a two-day bench trial held on March 18 and 19, 2014. At the trial, appellee called as its only two witnesses, Judge Humphrey, by a videotaped deposition, and Michael Yaffe, a senior vice president of one of appellee's subsidiaries. Appellant rested without calling any witnesses or submitting any evidence.

{¶ 11} Following the trial, on September 2, 2015, the court entered its judgment against appellant, finding by a preponderance of the evidence that appellant did guaranty the loan between Columbian Bank and SBIR. The court awarded appellee $20,576,899.91 plus ongoing interest, taxes, assessments, insurance, attorney fees, and costs.

II. Assignments of Error

{¶ 12} Appellant has timely appealed the trial court's September 2, 2015, and November 16, 2011 judgment entries, and now asserts three assignments of error for our review:

> I. The terms of a jury waiver has to be consistent with that which is waived, a trial court errs by granting plaintiff's Motion to Strike a Jury Demand when the document waiving the jury trial and the thing that was waived is at issue.
>
> II. The verdict was against the manifest weight of the evidence and the evidence was insufficient as a matter of law. The verdict was contrary to law.
>
> III. The trial court erred by granting summary judgment to the appellee against the appellants when there was a genuine issue of material fact as it related to the failed bank's breach of contract and other failures.

III. Analysis

A. Jury Demand

{¶ 13} In his first assignment of error, appellant challenges the trial court's decision on June 21, 2013, to grant appellee's motion to strike appellant's jury demand. The trial court granted the motion for the reason that appellant waived his right to a jury trial. Specifically, section No. 17 of the "Cognovit Unconditional Guaranty" signed by appellant states, "The Guarantor hereby irrevocably waives all right to trial by jury in any

action, proceeding or counterclaim arising out of or relating to any of the loan documents."

{¶ 14} In his assignment of error, appellant argues that at the time he signed the guaranty there were no loan documents in existence, and that the waiver could only apply to an action based on a loan that was made on June 8, 2006, not the one at issue made on June 14, 2006. We disagree.

{¶ 15} "Ohio courts have held contractual jury-waivers, in which the parties agree not to ask for a jury trial, are enforceable where the terms of the waiver are clear and unambiguous." *MidAm Bank v. Dolin*, 6th Dist. Lucas No. L-04-1033, 2005-Ohio-3353, ¶ 123. Here, appellant waived his right to a jury trial "in any action * * * arising out of or relating to any of the loan documents." While appellant asserts that there were no loan documents in existence at the time the waiver was executed, the record through summary judgment indicates that the documents were created contemporaneously. Furthermore, although the ultimate issue is whether the guaranty applies to the June 14, 2006 loan, it is beyond dispute that appellant's liability rises and falls on the guaranty; the same guaranty in which he waived his right to a jury trial. Therefore, we hold that the trial court did not err in striking appellant's jury demand and proceeding to hold a bench trial.

{¶ 16} Accordingly, appellant's first assignment of error is not well-taken.

B. Manifest Weight and Insufficiency

{¶ 17} In his second assignment of error, appellant challenges the trial court's judgment that he is liable under the June 8, 2006 guaranty as being against the manifest weight of the evidence, based on insufficient evidence, and contrary to law.

{¶ 18} An appellate court reviews judgments from the trial court following a bench trial under the manifest weight of the evidence standard. *Terry v. Kellstone, Inc.*, 6th Dist. Erie No. E-12-061, 2013-Ohio-4419, ¶ 12. The manifest weight standard is the same in a civil case as in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Thus, "[t]he [reviewing] court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Id.* at ¶ 20. "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶ 19} In this case, it is undisputed that appellant signed the June 8, 2006 guaranty, and that his signature was not the result of fraud or duress. Thus, the sole issue, as recognized by the trial court, is whether through the June 8, 2006 guaranty appellant guaranteed the loan from Columbian Bank to SBIR.

{¶ 20} In support of his argument, appellant asserts five sub-assignments of error:

1. A guarantor, is entitled to strict construction of his undertaking and cannot be held liable beyond the strict terms of his contract. A condition precedent cannot be found in reverse to reform a contract or change the terms.

2. Grounds for reformation of a contract are fraud and mutual mistake, a future event will not justify reformation. The trial court never made a finding that there was fraud, mutual mistake or mistake (sic) and as such the court could not find that the alleged guarantor guaranteed the loan based on reformation. Even if there was reformation the evidence was insufficient because at best the court found that the plaintiff proved their case by a preponderance of the evidence when the standard for reformation is clear and convincing.

3. Columbian Bank knew about the June 8th, 2006 guaranty prior to the loan being disbursed and did nothing by way of objecting.

4. Failure to affirmatively state that you are not going to guaranty a loan is not evidence that you will when you haven't guaranteed a loan.

5. Columbian Bank and Weatherspoon's commitment letter never requested a "Cognovit Unconditional Guarantee" but instead indicated that they wanted a "100% joint and several guaranty."

{¶ 21} Appellant's arguments can be summarized as follows. Appellant signed a guaranty that guaranteed a loan between Columbian Bank and SBIR to be executed on June 8, 2006. It is undisputed that the loan between Columbian Bank and SBIR was dated June 14, 2006, not June 8, 2006. Therefore, under the clear and unambiguous terms of the guaranty, appellant cannot be held to have guaranteed the loan at issue.

{¶ 22} "When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract." *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37. "In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id.* "'As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.'" *Id.*, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

{¶ 23} Appellant's conclusion relies on viewing the guaranty in isolation. However, "a writing, or writings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 678 N.E.2d 519 (1997), citing *Legler v. United States Fid. & Guar. Co.*, 88

Ohio St. 336, 103 N.E. 897 (1913). Here, when viewing the guaranty in conjunction with the loan commitment letter and the note, it is at least ambiguous whether appellant's guaranty is exclusively limited to a loan dated June 8, 2006. Therefore, we turn to extrinsic evidence to determine the parties' intent. *See Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987) ("A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.").

{¶ 24} In the trial to determine the parties' intent, appellee presented evidence in the form of the loan commitment letter and note, both of which required as a condition precedent that appellant guarantee the loan. Further, appellee presented Judge Humphrey's testimony and email correspondence with SBIR's attorney, which contemplated that there was ever only one loan and that appellant was guaranteeing the loan. In addition, appellee presented evidence indicating that appellant, by his actions, intended to guarantee the loan: namely, that appellant signed the "Unconditional Cognovit Guaranty" before the loan closing, and signed the U.S. Patriot Act form the day after the loan closing. Finally, appellee presented the HUD Settlement Statement, which listed that appellant financially benefited from the loan by receiving $350,000 of the loan proceeds. Appellant, in contrast, did not present any evidence demonstrating that he did not intend to guarantee the June 14, 2006 loan. Therefore, we hold that the trial court's

conclusion that appellant intended to guarantee the June 14, 2006 loan from Columbian Bank to SBIR is not against the manifest weight of the evidence.

{¶ 25} Advocating against this result, appellant, in his first sub-assignment of error, contends that the court misconstrued the law on condition precedent, and ignored the fact that Columbian Bank could have waived the requirement that he guarantee the loan. Appellant appears to argue that appellee did not present any testimony as to Columbian Bank's intent regarding the ineffective guaranty, and therefore has not shown that Columbian Bank did not waive the requirement of having the guaranty. We find appellant's argument to be without merit. In this case, appellee was obligated to prove that the parties intended that appellant would guarantee the loan. Appellee accomplished this by submitting, inter alia, the loan commitment letter and the note, both of which required that appellant guarantee the loan. Appellee was not obligated, however, to prove the inverse of appellant's theory that Columbian Bank waived the guaranty as a condition precedent. Therefore, appellant's first sub-assignment of error is not well-taken.

{¶ 26} In his second sub-assignment of error, appellant argues that the trial court erred in reforming the contract because there was no evidence of fraud or mutual mistake. However, the trial court did not reform the contract in this case, but instead interpreted an ambiguous provision. *See Gooslin v. B-Affordable Tree Serv.*, 6th Dist. Sandusky No. S-10-045, 2011-Ohio-4048, ¶ 19 ("[I]f the contract was ambiguous we could simply interpret the contract to comport with the parties' intent. It is precisely because the

contract is unambiguous that reformation is appropriate and necessary."). Therefore, appellant's second sub-assignment of error is not well-taken.

{¶ 27} In his third, fourth, and fifth sub-assignments of error, appellant argues that the evidence demonstrates that he did not intend to guarantee the June 14, 2006 loan. Specifically, in his third sub-assignment of error, appellant points to the fact that the guaranty is for a loan dated June 8, 2006, which he claims "is direct evidence Tomberlin *isn't guaranteeing a loan of June 14th, 2006*." (Emphasis sic.) Appellant also notes that he did not sign the second guaranty that was for the loan dated June 14, 2006. Likewise, in his fourth sub-assignment of error, appellant argues that his failure to affirmatively state that he *was not* going to guarantee the loan is not evidence that he *was* going to guarantee the loan where he did not sign the June 14, 2006 guaranty. Finally, in his fifth sub-assignment of error, appellant engages in a discussion of the differences between a "suretyship" and a "guaranty." Appellant then argues that the loan commitment letter sought a "suretyship" relationship, yet appellant executed a guaranty. Appellant claims that discrepancy may explain why Columbian Bank failed to act when it received his ineffective June 8, 2006 "Unconditional Cognovit Guaranty." Furthermore, one could infer from the bank's inaction that it did not intend that appellant would guarantee the June 14, 2006 loan.

{¶ 28} We find appellant's arguments to be without merit. While appellant contends that this evidence demonstrates his lack of intent to guarantee the loan, the trial court viewed all of the evidence and reached the opposite conclusion. As discussed

above, the trial court's decision is not against the manifest weight of the evidence. Therefore, appellant's third, fourth, and fifth sub-assignments of error are not well-taken.

{¶ 29} Accordingly, appellant's second assignment of error is not well-taken.

C. Summary Judgment

{¶ 30} In his third assignment of error, appellant argues that the trial court erred in granting summary judgment to appellee on the defendants' claims of fraud and breach of contract stemming from Columbian Bank's failure to disburse the entire $8.6 million loan amount.

{¶ 31} We review the grant of a motion for summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 32} In particular, appellant contends that a genuine issue of material fact exists regarding whether Columbian Bank had the financial ability to loan the remaining amount due under the loan, or whether there were "financial shenanigans" with Columbian Bank being desperate to make paper loans yet actually lend as little money as

possible, as stated in Rengel's affidavit in support of the defendants' motion for summary judgment. Notably, Rengel was also acting as trial counsel for the defendants at the time.

{¶ 33} In its November 16, 2011 judgment, the trial court determined that

> [T]his entire issue [is] a non-issue. This was a "bridge loan" for an amount not to exceed $8.6 million. Not all of the $8.6 million was to be initially released. Additional draws were clearly contingent, pursuant to the Loan Agreement, on the occurrence of certain events triggered by progress on the project and Columbian's approval (i.e. contingent on work on the property being completed and inspected.)

In his brief, appellant summarily responds, "That is clearly not the meaning."

{¶ 34} Here, section (A)(1)(b) of the loan states, "The Loan shall be made in multiple advances as the Borrower completes the development of the Property. The initial advance shall be an amount equal to $_____, and the balance of the Loan shall be advanced as work on the Property is completed and inspected in accordance with procedures developed by the lender." It is undisputed that Columbian Bank disbursed $7,849,093.30, and that the only hard construction completed was installation of the water line. Furthermore, appellant does not contest the court's conclusion that the failure to disburse the additional funds had no impact on the failure of the project as there was "no real evidence that Defendants requested additional draws on loan proceeds which weren't granted." Therefore, even if there was an issue of fact regarding whether

Columbian Bank sought to make paper loans, it is not a *material* issue of fact where the funds were disbursed in accordance with the loan agreement.

{¶ 35} Accordingly, appellant's third assignment of error is not well-taken.

IV. Conclusion

{¶ 36} For the foregoing reasons, we find that substantial justice has been done the party complaining, and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE

[Cite as *Javorsky v. Javorsky*, 2017-Ohio-285.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103896

THOMAS JAVORSKY

PLAINTIFF

vs.

JOAN M. JAVORSKY

DEFENDANT/CROSS-CLAIM
PLAINTIFF-APPELLANT

and

TD AMERITRADE, INC., ET AL.

DEFENDANT/CROSS-CLAIM
DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-830239

BEFORE: Keough, A.J., E.A. Gallagher, J., and McCormack, J.

RELEASED AND JOURNALIZED: January 26, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Appellant, Joan M. Javorsky ("Joan"), appeals the trial court's decision granting appellee, TD Ameritrade, Inc.'s ("TD Ameritrade"), motion to compel arbitration and stay proceedings. For the reasons that follow, we affirm.

{¶2} In October 2004, Andrew Javorsky ("Andrew") opened an IRA account with TD Ameritrade ("Account"). Andrew's son and Joan's stepson, Thomas Javorsky ("Thomas"), was originally designated as the beneficiary of the account. Joan, as Andrew's spouse, signed the requisite notice under the Agreement acknowledging that she was not named as the primary beneficiary to the Account. In 2007, Andrew changed his beneficiary designation naming Joan as the primary beneficiary. However, two years later in 2009, Andrew changed his beneficiary back to his son, Thomas. Again, Joan signed the requisite acknowledgment under the Agreement that she was not named as the primary beneficiary of the Account.

{¶3} Unfortunately, in March 2012, Andrew passed away. As a result of Andrew's passing, Joan had her financial advisor, Jeffrey Cirino, president of Alpha Planning and Financial Services, Inc. ("Alpha Planning"), request distribution of the funds in the Account. As a result, approximately $700,000 was transferred from the Account to Joan's TD Ameritrade account, which she subsequently liquidated.

{¶4} In July 2014, Thomas filed suit against Joan, alleging undue influence with respect to the Account and other assets of his father; he also asserted a claim for

intentional interference with expectancy of inheritance, fraud, and conversion. After discovering the 2009 change of beneficiary designation, Thomas amended his complaint to add TD Ameritrade as a defendant, seeking a declaratory judgment that he, and not Joan, was the proper beneficiary of the Account. He also asserted claims against TD Ameritrade for breach of contract, breach of fiduciary duty, and negligence.

{¶5} In her answer, Joan did not admit that Thomas was the proper beneficiary, but admitted that the Account assets were distributed to her in March 2012. Additionally, she asserted cross-claims against TD Ameritrade for promissory estoppel, negligence, declaratory judgment, and indemnification. She also asserted counter and third-party claims against Alpha Planning and Cirino for negligence, breach of fiduciary duty, breach of implied contract, unjust enrichment, promissory estoppel, and fraud.

{¶6} TD Ameritrade filed motions to compel arbitration of both Thomas's and Joan's claims, contending that the IRA Client Agreement ("Agreement") governing the Account provides that all claims relating to the Account must be arbitrated. The trial court agreed and granted both motions; only Joan has appealed that decision, contending in her sole assignment of error that the trial court erred by enforcing an arbitration provision in the Agreement against a nonsignatory to that Agreement.

{¶7} The appropriate standard of review on judgments pertaining to the enforceability of an arbitration agreement depends on the questions raised in challenging the applicability of the arbitration provision. *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. In this case, we apply a de novo

standard of review to questions of contract interpretation; specifically whether a party has agreed to be subject to an arbitration provision. *See JJ Connor Co. v. Reginella Constr. Co.*, 7th Dist. Mahoning Nos. 13 MA 75 and 13 MA 77, 2014-Ohio-3873, ¶ 11 (whether or not an arbitration provision applies to a nonsignatory or nonparty involves a question of law).

{¶8} In this case, no argument has been set forth challenging the validity of the arbitration provision contained in the Agreement. The Agreement requires that all controversies "arising out of and relating" to the Account be submitted to arbitration. *See* Section 10 of the Agreement. Additionally, the Agreement expressly states that the arbitration provision is binding upon Andrew's "heirs, executors, administrators, successors, and assigns." *Id*. Joan, as Andrew's surviving spouse, is Andrew's heir under the law. Therefore, based on the Agreement, the arbitration provision applies to Joan. Nevertheless, Joan contends that the provision does not apply to her because she is a nonsignatory of the Agreement and, thus, cannot be bound to arbitrate her claims.

{¶9} The enforceability of contractual arbitration provisions is governed by the laws of contract interpretation. Generally, parties who have not agreed to arbitrate their disputes cannot be forced to forego judicial remedies. *Cleveland-Akron-Canton Advertising Coop. v. Physician's Weight Loss Ctrs. of Am.*, 184 Ohio App.3d 805, 2009-Ohio-5699, 922 N.E.2d 1012, ¶ 14 (8th Dist.), citing *Moore v. Houses on the Move, Inc.*, 177 Ohio App.3d 585, 2008-Ohio-3552, 895 N.E.2d 579 (8th Dist.). There are instances, however, "where equity demands that parties who have not agreed to arbitrate

their disputes may be forced to do so when 'ordinary principles of contract and agency' require." *Physician's Weight Loss* at *id*., quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir.1980).

{¶10} One such instance where a nonsignatory will be bound to an arbitration agreement is under an estoppel theory. *See Thomson-CSF, S.A. v. Am. Arbitration Assn*., 64 F.3d 773 (2d Cir.1995). Estoppel applies where "a nonsignatory who knowingly accepts the benefits of an agreement is estopped from denying a corresponding obligation to arbitrate." *I Sports v. IMG Worldwide, Inc*., 157 Ohio App.3d 593, 2004-Ohio-3631, 813 N.E.2d 4, ¶ 13 (8th Dist.), citing *Thomson-CSF* at 778 (estoppel analysis depends on whether the nonsignatory derived a direct benefit from the contract containing the arbitration clause such that acceptance of the benefit would also require acceptance of a contractual obligation). "This doctrine 'precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations.'" *Physician's Weight Loss* at ¶ 15, quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Dist.2003). In *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, 769 N.E.2d 381, the Ohio Supreme Court held that a signatory to a contract could enforce an arbitration provision against a nonsignatory who sought the benefit of rights under the contract.

{¶11} Moreover, Ohio courts have also recognized that a third-party beneficiary, although a nonsignatory to contract, may be bound to an arbitration agreement. *Physician's Weight Loss* at ¶ 18, citing *Houses on the Move* at ¶ 31, quoting *Peters v. Columbus Steel Castings Co.*, 10th Dist. Franklin No. 05AP-308, 2006-Ohio-382, ¶ 13;

Fawn v. Heritage Mut. Ins. Co., 10th Dist. Franklin No. 96APE12-1678, 1997 Ohio App. LEXIS 2882 (June 30, 1997) (by accepting the benefits of the contract, the third-party beneficiary also assumes the attendant burdens). Once the third-party beneficiary has accepted the benefit of the contract, it can receive no greater rights from the contract than those possessed by the signatories. *Ohio Savs. Bank v. H.L. Vokes Co.*, 54 Ohio App.3d 68, 71, 560 N.E.2d 1328 (8th Dist.1989).

{¶12} In this case, Joan knowingly accepted a direct benefit conferred by the Agreement — she expressly sought and voluntarily received the funds in the Account. In fact, Joan continues to benefit by retaining the Account funds and claiming she is the proper Account beneficiary under the Agreement. As the claimed proper third-party beneficiary to the Account, she is also bound by the Agreement's burdens or obligations, including the arbitration provision. Based upon Joan's own actions and legal claims, she has subjected herself to the arbitration provision in the Agreement. Therefore, under either an estoppel or third-party beneficiary theory, the arbitration provision is enforceable against Joan's claims.

{¶13} Finally, we reject Joan's contention that she cannot be bound to the arbitration agreement because her claims arise out of tort and not contract. A party cannot avoid arbitration by casting contract claims as torts. *Jankovsky v. Grana-Morris*, 2d Dist. Miami No. 2000-CA-62, 2001 Ohio App. LEXIS 3938, 14 (Sept. 7, 2001). Here, Joan's claims against TD Ameritrade are essentially contingent on Thomas's claims against TD Ameritrade. Each of the claims in her cross-claim begin with "[i]f the 2009

Beneficiary Designation is found to control, then * * * ." Thus, Joan's claims do not arise unless Thomas is successful on his claims against TD Ameritrade, and it is determined that Thomas is the proper beneficiary under the Account. Thomas's claims were submitted to arbitration pursuant to the Agreement. Therefore, because Thomas's and Joan's claims are intertwined, and Joan's claims against TD Ameritrade are contingent on Thomas's claims, it would defeat the strong public policy supporting arbitration and its purpose as an expeditious and economical means of a resolving a dispute to find that Joan's claims are not subject to arbitration. *See Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992).

{¶14} Based on the foregoing analysis, the trial court did not err in granting TD Ameritrade's motion to compel arbitration and stay proceedings pending arbitration. Joan's assignment of error is overruled.

{¶15} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
TIM McCORMACK, J., CONCUR

[Cite as *Seyfried v. O'Brien*, 2017-Ohio-286.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104212

JAMES SEYFRIED

PLAINTIFF-APPELLANT

vs.

PATRICK O'BRIEN, JR., CHEVROLET, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-753162

BEFORE: McCormack, P.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: January 26, 2017

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TIM McCORMACK, P.J.:

{¶1} James Seyfried's estate ("appellant" hereafter) appeals from a judgment of the Cuyahoga County Court of Common Pleas that granted a motion to stay pending arbitration in a consumer complaint. The trial court found James Seyfried signed a valid and enforceable arbitration agreement regarding his purchase of a Chevrolet Cobalt. We affirm.

Substantive Facts and Procedural History

{¶2} Seven years ago, on June 11, 2009, Seyfried went to a Chevrolet dealership to purchase a used automobile. With the help of a salesman, James Stewart, he selected a used 2009 Chevrolet Cobalt. Stewart prepared a handwritten "Buyer's Order" for the Cobalt, which Seyfried signed. To be allowed to take immediate possession of the vehicle before he secured financing, Seyfried also signed a "Conditional Delivery Agreement." That agreement allowed him to cancel his purchase if third-party financing could not be obtained within three days. Seyfried also signed a Used Vehicle Customer Satisfaction Guarantee, which allowed him to cancel the deal within three days or 150 miles, if he was dissatisfied with the vehicle for any reason.

{¶3} The next day, on June 12, 2009, Seyfried executed several more documents in connection with his purchase of the Cobalt. He signed an Agreement to Binding Arbitration ("the arbitration agreement"). The agreement stated that "Binding arbitration shall include all disputes * * * arising out of or in any way related to this consumer transaction. Binding arbitration shall be used to resolve all claims arising

from the purchase * * * of the vehicle * * * or any document or relationship established in this transaction or related transaction regardless of whether the transactions were consummated." Before the signature line, there was a bolded warning in a larger font and in capital letters: "READ BEFORE SIGNING. DO NOT SIGN THIS DOCUMENT BEFORE YOU HAVE READ IT AND UNDERSTAND ITS CONTENTS. ARBITRATION IS NOT REQUIRED FOR THE PURCHASE OR FINANCING OF YOUR VEHICLE."

{¶4} Raymond Cieslak, the dealership's finance representative, testified that he reviewed the arbitration agreement with Seyfried and explained that if there was any dispute between him and the dealership, the dispute would go through a third-party arbitrator as opposed to the courts. Seyfried gave no indication he did not understand the arbitration agreement, expressed no objection, and signed the agreement voluntarily.

{¶5} Seyfried then signed a purchase contract for the Cobalt.[1] Paragraph 14 of the purchase contract stated: "If this vehicle is being delivered prior to finance approval, buyer shall have 72 hours in which to secure or meet finance approval. Buyer will assume full responsibility for all wear, tear and/or damage during this period and will return vehicle in same condition at the end of the 72 hours, if finance approval is not met."

---

[1]Under the purchase contract, the total balance for the used Cobalt was $16,902. It included a sale price of $13,500, $399 in theft protection, service contract fee of $1,010, "GAP" care fee of $595, and other miscellaneous charges, offset by a trade-in credit of $750.

{¶6} There was a two-sentence clause regarding arbitration in the purchase contract and below the clause was a separate signature line. The sentence stated, "I agree that any dispute from this transaction will go to arbitration and I have executed a detailed arbitration agreement which is fully incorporated herein. Arbitration is not required for the purchase or financing of your vehicle." The signature line was left blank in the purchase contract (and in subsequent purchase contracts signed by Seyfried relating to his purchase of the Cobalt).

{¶7} On June 12, 2009, Seyfried also signed a loan agreement with Firefighters Community Credit Union to finance the purchase of the vehicle. Seyfried, however, failed to be approved for financing from the credit union. He did not cancel the transaction within three days, but instead kept the vehicle. To help him obtain financing from First Merit, Chevrolet's financing company, Chevrolet increased the value for his trade-in vehicle to $1,950 (but also increased the "GAP" care fees) and reduced the total unpaid balance, and Seyfried signed another purchase contract on June 26, 2009, with the reduced balance.[2]

{¶8} On April 13, 2011, Seyfried filed the instant class action complaint. The complaint named as defendants four Patrick O'Brien Chevrolet entities (Patrick O'Brien Jr. Chevrolet, Inc., Patrick O'Brien, Jr. Chevrolet II, Inc., Patrick O'Brien, Jr. Chevrolet III, Inc., Patrick O'Brien, Jr. Chevrolet IV, Inc.), Patrick O'Brien, Jr., and Patrick O'Brien

[2]Seyfried signed another purchase contract on July 2, 2009, backdated to June 26, with a further reduced balance of $15,058.36.

Sr. (collectively as "Chevrolet" hereafter), and First Merit (who was subsequently dismissed from the lawsuit). The complaint alleged the defendants failed to disclose to buyers of a used vehicle that the vehicle had been used as a rental vehicle, in violation of the Consumer Sales Practices Act, R.C. 1345.02. Seyfried passed away in 2012, and his estate was substituted as plaintiff. Apparently, the only asset in the estate is an interest in the instant lawsuit.

{¶9} Chevrolet moved to stay the proceeding pending arbitration pursuant to R.C. 2711.02. The trial court granted plaintiff's request for discovery regarding the validity of the arbitration agreement. On November 17, 2015, the trial court held a hearing on Chevrolet's motion. James Stewart, the sales person involved in the subject transaction, Raymond Cieslak, the finance representative, and Debbie Kidwell, Seyfried's former fiancée, testified at the hearing. After the hearing, appellant submitted a brief opposing the motion to stay, advancing two arguments: (1) the purchase contract was fully integrated and it did not incorporate the arbitration agreement, and (2) the arbitration agreement was substantively and procedurally unconscionable.

{¶10} The trial court found, as a factual matter, that Seyfried signed a binding arbitration agreement and it granted Chevrolet's motion to stay pending arbitration. The court's judgment entry stated:

> The parties conducted discovery on the issue of whether a valid arbitration agreement exists between the parties and on 11/17/2015 a hearing was held.
>
> The court has duly considered the evidence admitted at the hearing as well

as the arguments and post hearing briefs submitted by the parties. As a factual matter, the court finds that on 6/12/2009 plaintiff James Seyfried signed an agreement to binding arbitration. The court further finds that agreement entered to be valid and enforceable.

Appeal

{¶11} Appellant raises one assignment of error, which states:

The trial court erred in finding the stand-alone arbitration agreement valid and enforceable in light of Ohio law requiring that all terms of a motor vehicle contract to be contained in one writing, in light of Ohio contract law that a separate agreement is unenforceable when a contract is a fully self-integrated document with a merger clause and its own unsigned arbitration provision, and where the purported arbitration agreement is unconscionable.

{¶12} Appellant argues, for the first time on appeal, that the June 12, 2009 arbitration agreement was not valid because R.C. 4517.26 requires a sale of a motor vehicle "be preceded by a written instrument or contract that shall contain all of the agreements of the parties and shall be signed by the buyer and the seller." Appellant claims that, under the statute, the arbitration agreement must be part of a single document in order to be enforceable.

{¶13} "A party may not change its theory of the case and present new arguments for the first time on appeal." *Tokles v. Black Swamp Customs, L.L.C.*, 6th Dist. Lucas

No. L-14-1105, 2015-Ohio-1870, citing *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992). "[A]rguments raised for the first time on appeal will not be considered by an appellate court." *Gardi v. Bd. of Edn.*, 8th Dist. Cuyahoga No. 99414, 2013-Ohio-3436, ¶ 27, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997).

{¶14} Appellant had ample opportunity to raise the argument based on R.C. 4517.26 before the trial court, but it did not. We decline to review an issue raised for the first time on appeal.

{¶15} Rather, the main question we answer in this appeal is whether, as the trial court found, Seyfried consented to arbitration regarding his purchase of the Cobalt. Although it is undisputed that Seyfried signed an arbitration agreement, appellant argues the executed arbitration agreement had no legal effect.

{¶16} As in all appeals concerning arbitration, we begin our review with the recognition that both the Ohio General Assembly and the courts have expressed a strong public policy favoring arbitration. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. Arbitration is favored because it provides the parties "with a relatively expeditious and economical means of resolving a dispute." *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992).

{¶17} Under R.C. 2711.02, a court may stay trial of an action upon application of a party "if (1) the action is brought upon any issue referable to arbitration under a written agreement for arbitration, and (2) the court is satisfied the issue is referable to arbitration

under the written agreement." *Austin v. Squire*, 118 Ohio App.3d 35, 37, 691 N.E.2d 1085 (9th Dist.1997), citing *Jones v. Honchell*, 14 Ohio App.3d 120, 122, 470 N.E.2d 219 (12th Dist.1984).

{¶18} Varying standards of review have been applied in arbitration matters. As this court observed, "'[w]hen addressing whether a trial court has properly granted a motion to stay litigation pending arbitration, this court applies an abuse of discretion standard.'" *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7, quoting *U.S. Bank, N.A. v. Wilkens*, 8th Dist. Cuyahoga No. 96617, 2012-Ohio-263, ¶ 13. *See also Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212; *Butcher v. Bally Total Fitness Corp.*, 8th Dist. Cuyahoga No. 81593, 2003-Ohio-1734, ¶ 23 (generally the standard of review of whether a trial court properly grants a motion to stay pursuant to R.C. 2711.02 is an abuse of discretion); *Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co.*, 126 Ohio App.3d 251, 254, 710 N.E.2d 299 (3d Dist.1998); *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App.3d 406, 410, 701 N.E.2d 1040 (3d Dist.1997). On the other hand, when reviewing the scope of an arbitration agreement, that is, whether a party has agreed to submit a certain issue to arbitration, a de novo standard applies. *McCaskey* at ¶ 7, citing *Shumaker v. Saks Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist.). Similarly, a de novo standard applies in a claim of unconscionability of an arbitration clause. *McCaskey* at ¶ 8, citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12. Under either standard of review, when

a trial court makes factual findings surrounding the making of an arbitration agreement, the factual finding should be accorded appropriate deference. *Taylor Bldg.* at ¶ 2, 37.

Whether Seyfried Agreed to Arbitration

{¶19} To determine whether a party has agreed to arbitrate, the courts apply ordinary principles that govern the formation of contracts. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In order for a valid contract to exist, there must be mutual assent on the essential terms of the agreement, which is usually demonstrated by an offer, acceptance of the offer, and consideration. *Reedy v. The Cincinnati Bengals, Inc.*, 143 Ohio App.3d 516, 521, 758 N.E.2d 678 (1st Dist.2001). "[Q]uestions of contract formation and intent remain factual issues to be resolved by the fact finder after careful review of the evidence." *One Hundred Forty Realty Co. v. England*, 2d Dist. Montgomery No. 10189, 1987 Ohio App. LEXIS 10263 (Dec. 23, 1987), citing *Mead Corp. v. McNally-Pittsburgh Mfg. Corp.*, 654 F.2d 1197, 1206 (C.A.6 1981). Specifically, the question of whether the parties agreed to arbitrate their disputes is a matter of contract and the terms of a contract are a question of fact. *Palumbo v. Select Mgt. Holdings, Inc.*, 8th Dist. Cuyahoga No. 82900, 2003-Ohio-6045, ¶ 18.

{¶20} Here, Seyfried signed an agreement to binding arbitration on June 12, 2009. That agreement identified the vehicle by its reference to the June 11, 2009 Buyer's Order. The agreement stated, in unambiguous terms, that the consumer agreed to arbitrate all disputes "arising out of or in any way related to this consumer transaction"

and "all claims arising from the purchase * * * of the vehicle * * * or any documents * * * in this transaction or related transaction * * *." Cieslak testified he reviewed the arbitration agreement with Seyfried and explained the nature of arbitration, and Seyfried signed the agreement voluntarily. Appellant, however, claims Seyfried did not consent to arbitration because in the purchase contract Seyfried left the signature line blank below the two-sentence arbitration clause that acknowledged an execution of a separate arbitration agreement.

{¶21} Appellant essentially claims that Seyfried executed an agreement to arbitration and immediately revoked his consent, a claim supported only by a lack of signature acknowledging the separately executed arbitration agreement. In finding that Seyfried had agreed to arbitration, the trial court did not consider Seyfried's omission of an acknowledgment of executing a separate arbitration agreement moments earlier fatal to his consent to arbitration. The trial court recognized the incongruity of appellant's claim and gave effect to the arbitration agreement after an evidentiary ruling. We will give deference to the finding.[3]

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[3]Appellant relies heavily on the lack of signature under the arbitration clause in the purchase agreement in its claim that Seyfried did not consent to arbitration. We note that although the presence of a signature evinces consent to arbitration, the lack of a signature does not in itself show that a party has not consented to arbitration. The courts have long observed that for an arbitration agreement to be enforceable, R.C. Chapter 2711 requires only that the arbitration agreement be in writing, because there are no provisions in the chapter requiring the written agreement to be signed. Rather, the courts have applied ordinary contract principles to determine if a party is bound by an arbitration agreement absent a signature. *Brumm v. McDonald & Co. Sec., Inc.*, 78 Ohio App.3d 96, 102-103, 603 N.E.2d 1141 (4th Dist.1992). *See also Ross v. Bridgewater Constr., Inc.*, 6th Dist. Lucas No. L-03-1029, 2003-Ohio-6199.

Integration

{¶22} Appellant argues that because the purchase contract had a merger clause, it was a fully integrated document and it superseded the separately executed arbitration agreement.

{¶23} The courts have long recognized whether a contract is integrated is not dependent upon the existence of an integration clause; "'[t]he presence of an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms into the writing.'" *Bellman v. Am. Internatl. Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, 865 N.E.2d 853, ¶ 11, quoting *Galmish v. Cicchini*, 90 Ohio St.3d 22, 28, 734 N.E.2d 782 (2000).

{¶24} Appellant alleges that Seyfried signed the purchase contract after he signed the arbitration agreement and attributes great significance to that temporal sequence. However, by all accounts, the two documents were executed moments apart, not separated by any meaningful lapse of time. Therefore, the two documents should be more appropriately considered as multiple documents executed as part of a transaction. "As a general rule of construction, a court may construe multiple documents together if they concern the same transaction." *Ctr. Ridge Ganley, Inc. v. Stinn*, 31 Ohio St.3d 310, 314, 511 N.E.2d 106 (1987). "[A]ll writings that are a part of the same transaction should be interpreted together, and effect should be given to every provision of every writing." *Prudential Ins. Co. of Am. v. Corporate Circle*, 103 Ohio App.3d 93, 98, 658 N.E.2d 1066 (8th Dist.1995), citing *Abram & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 623

N.E.2d 704 (10th Dist.1993). "[W]ritings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 678 N.E.2d 519 (1997).

{¶25} The contemporaneous nature of Seyfried's execution on June 12, 2009, of the arbitration agreement and the purchase contract reflects they were documents executed in the same transaction. The purchase agreement was supplemented by the arbitration agreement. The arbitration agreement executed by Seyfried would be completely meaningless if it is not construed as such. When the two documents are read together, the purchase contract did not supersede the contemporaneously executed arbitration agreement despite the merger clause.

Whether the Arbitration Agreement Governs Subsequent Purchase Contract

{¶26} Appellant also argues the arbitration agreement signed in conjunction with the purchase contract on June 12, 2009, did not bind Seyfried to arbitration because the earlier purchase contract had "expired" and Seyfried entered into a new transaction on June 26, 2009, without executing another arbitration agreement on that occasion.

{¶27} Appellant's claim lacks merit. The June 12 and June 26 purchase contracts concerned the same vehicle transaction — they were substantially similar except for the higher trade-in value of Seyfried's old vehicle and higher "GAP" care fees in the latter contract. Appellant claims in its brief on appeal that the June 11, 2009 purchase contract was contingent and it was "not binding unless accepted by seller and credit is approved,"

pointing us to paragraph 14 of the purchase agreement. Our review of paragraph 14 shows that it stated only that if the buyer did not obtain financing within three days, the buyer was to return the vehicle to the dealership. Although Seyfried *could* return the Cobalt and cancel the transaction when he was unable to obtain the financing within three days, he did not cancel the transaction — he retained the Cobalt despite his inability to obtain financing. Therefore, the June 26, 2009 purchase contract did not relate to a *new* transaction. It modified slightly the previous contractual terms, raising the trade-in value and the "GAP" care fees but was otherwise substantially similar to the June 12, 2009 purchase agreement. These documents related to the same vehicle transaction. By the clear terms of the arbitration agreement Seyfried executed on June 12, 2009, Seyfried consented to arbitration for all claims arising out of his purchase of the Cobalt.

Unconscionability

{¶28} Seyfried also claims the arbitration agreement was both substantively and procedurally unconscionable, citing this court's en banc opinion in *Devito v. Autos Direct Online, Inc.*, 2015-Ohio-3336, 37 N.E.3d 194 (8th Dist.).

{¶29} Unconscionability embodies two separate concepts: (1) substantive unconscionability, referring to "unfair and unreasonable_contract terms," and (2) procedural unconscionability, referring to "individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible." *Collins v. Click Camera & Video*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993).

{¶30} In *Devito,* the arbitration agreement contained a loser-pay provision that required the nonprevailing party to pay the prevailing party's arbitration costs and expenses, including attorney fees. Its shifting of the financial burden to the consumer sharply departed from the established consumer-related arbitration procedure. A majority of this court, recognizing that arbitration is the preferred forum, held that the arbitration agreement was valid and enforceable once the loser-pay provision was excised from the arbitration agreement.[4] The instant arbitration agreement did not contain a cost-shifting loser-pay provision. *DeVito* is distinguishable.

{¶31} Appellant also claims the arbitration agreement is unconscionable because it does not contain information about the consumer's "loss of appeal rights," citing *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga Nos. 86990 and 86991, 2006-Ohio-4500. *Felix*, however, does not stand for the proposition that a lack of information about a consumer's "loss of appeal rights" rendered an arbitration agreement unconscionable. *Felix* involved a one-paragraph arbitration provision embedded in a purchase contract.[5] This court found the one-paragraph provision substantively

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[4]The majority was split however regarding whether the inclusion of the loser-pay provision rendered the arbitration agreement substantively and procedurally unconscionable. Only three of the seven judges forming the majority concluded that the loser-pay provision rendered the arbitration agreement substantively and procedurally unconscionable.

[5]The arbitration in *Felix* states, in its entirety "Arbitration — Any dispute between you and dealer (seller) will be resolved by binding arbitration. You give up your right to go to court to assert your rights in this sales transaction (except for any claim in small claims court). Your rights will be determined by a neutral arbitrator, not a judge or jury. You are entitled to a fair hearing, but arbitration procedures are simpler and more limited than rules applicable in court. Arbitrator decisions are as enforceable as any court order and are subject to a very limited review by a court. See general

unconscionable because it did not divulge any details about the arbitration process. In *Wilkens*, 8th Dist. Cuyahoga No. 96617, 2012-Ohio-1038, this court distinguished *Felix*, finding the one-page separate arbitration agreement in that case valid because it contained significantly more information than the short arbitration clause in *Felix*. *Id.* at ¶ 23-26.

{¶32} Similarly here, we distinguish *Felix*. Chevrolet's arbitration agreement was in a separate document clearly identified in bold print and capital letters as "AGREEMENT TO BINDING ARBITRATION" and it provided much more information about the arbitration process than the short arbitration clause in *Felix*. The arbitration agreement here stated that the purchaser agreed to voluntarily "waive any right to a trial in any state or federal court to resolve any dispute and will submit any dispute to binding arbitration." It warned the consumer that "[n]o claim submitted to arbitration is heard by a jury and no claim may be brought as a class action * * *." Unlike the arbitration clause in *Felix* that directed any questions about the arbitration process to the "general manager," the agreement here stated the arbitration will be governed by the American Arbitration Association and provided information about the arbitration procedure. It also stated in bold print and in capital letters immediately before the signature line: "READ BEFORE SIGNING. DO NOT SIGN THIS DOCUMENT BEFORE YOU HAVE READ IT AND UNDERSTAND ITS CONTENTS. ARBITRATION IS NOT REQUIRED FOR THS PURCHASE OR FINANCING OF YOUR VEHICLE." *Felix* is distinguishable.

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manager for information regarding arbitration process."

{¶33} Finally, appellant makes a vague claim regarding the unconscionability of the cost provision in the instant arbitration agreement. The arbitration agreement stated: "This dealership will pay for the purchaser's portion of the arbitrator's compensation up to $125, beyond this amount the purchaser is responsible for any additional arbitration fees, costs and expenses." Unlike *DeVito*, this provision does not require the consumer to pay should the consumer lose.[6] "Courts have consistently recognized that given the strong public policy in favor of arbitration, a court shall not deem an arbitration clause unconscionable simply because it imposes higher fees than filing a complaint in the trial court." *Sikes v. Ganley Pontiac Honda, Inc.*, 8th Dist. Cuyahoga No. 82889, 2004-Ohio-155, ¶ 21, citing *Dunn v. L&M Bldg.*, 8th Dist. Cuyahoga No. 77399, 2000 Ohio App. LEXIS 4954 (Oct. 26, 2001). Appellant argues in a cursory manner that the arbitration cost imposed here has a chilling effect of deterring appellant from bringing a claim, yet presented no authenticated document or sworn testimonial evidence to substantiate its claim. As such, the claim is without merit.

{¶34} Under the circumstances of this case, the trial court properly granted appellee's motion to stay the matter pending arbitration. Appellant's assignment of error lacks merit.

{¶35} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

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[6]In *DeVito*, the loser-pay provision stated, "The non-prevailing party shall pay, and the arbitrators shall award the prevailing party's arbitration costs and expenses, including reasonable attorney's fees."

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

TIM McCORMACK, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Whitson v. One Stop Rental Tool & Party*, 2017-Ohio-418.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

RICHARD E. WHITSON, et al.,	:	
		CASE NO. CA2016-03-004
Plaintiffs-Appellants,	:	
		O P I N I O N
	:	2/6/2017
- vs -		
	:	
ONE STOP RENTAL TOOL AND PARTY, et al.,	:	
	:	
Defendants-Appellees.		
	:	

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 14-CV-30237

Elk & Elk Co., Ltd., William P. Campbell and Ryan M. Harrell, 6105 Parkland Boulevard, Suite 200, Mayfield Heights, Ohio 44124, for plaintiffs-appellants

Reminger Co., L.P.A., Michael J. Valentine and Melvin J. Davis, 200 Civic Center Drive, Suite 800, Columbus, Ohio 43215, for defendants-appellees

M. POWELL, P.J.

{¶ 1} Plaintiffs-appellants, Richard and Cynthia Whitson, appeal a decision of the Preble County Court of Common Pleas granting summary judgment to defendant-appellee, One Stop Rental Tool and Party ("One Stop"), in a negligence action.

{¶ 2} One Stop is a company that primarily rents tools and equipment. In 2006, One

Stop expanded into event/party rental, including bounce house rental, as a way to diversify its business. In the spring of 2012, the Whitsons rented an inflatable bounce house from One Stop. They had rented the same bounce house from One Stop two years earlier. The bounce house weighs approximately 400-450 pounds and comes packed in a vinyl bag that is approximately four feet in diameter and six and one-half feet long. The bag has a strap on the bottom and a cinch strap at the top to keep the bag closed. On April 27, 2012, Richard went to One Stop to pick up the bounce house. Richard watched three One Stop employees load the bounce house into the back of his truck.

{¶ 3} As relevant to this appeal, Richard signed two documents in connection with the rental of the bounce house from One Stop, to wit: a Rental Contract and a Rental Agreement, Release, and Acknowledgment of Risks. Included within the terms and conditions of the Rental Contract was the following "Hold Harmless Clause:"

> HOLD HARMLESS AGREEMENT. Customer agrees to assume the risks of, and hold Dealer harmless for, property damage and personal injuries, including death and dismemberment, caused by the equipment and/or arising out of Dealer's negligence.

{¶ 4} In turn, the Rental Agreement, Release, and Acknowledgment of Risks ("Release") provided, in relevant part, that

> I understand and acknowledge that the activity to be engaged in through my rental of an inflatable, interactive amusement device, brings with it both known and unanticipated risks to guests, my invitees, and myself. Those risks include, but are not limited to fallings, slipping, crashing, and colliding and could result in injury, illness, disease, emotional distress, death and/or property damage to myself or my guests and invitees.
>
> I voluntarily release, indemnify, hold harmless and discharge One Stop Tool Rental, Inc. from any and all liability claims, demands, actions or rights of actions, whether personal to me or to a third party which are related to[,] arise out of or are in any way connected with my rental of the unit, including those allegedly attribute[d] to negligent acts or omissions. I agree to reimburse any reasonable attorney's fees and costs which may be incurred by One Stop Rental Tool Rental, Inc. in the defense

of any such liability claim, demand, action or right of action.

Although afforded the opportunity, Richard did not read either document before signing them. Deposition testimony indicates that the Rental Contract, which includes the Hold Harmless Clause, is the standard contract One Stop uses whenever a customer rents tools, equipment, or a bounce house, whereas the Release is used solely for the rental of bounce houses.

{¶ 5} Upon arriving home, Richard undertook to unload the bounce house from his truck by himself, even though there were several adults at his house to assist him. Richard first unsuccessfully tried to push the bounce house out of the bed of his truck. He then attempted to unload the house by pulling the bottom strap of the bag. While doing so, the strap broke and Richard fell out of the back of his truck onto the ground. Richard sustained serious injuries incident to the fall.

{¶ 6} On April 14, 2014, Richard and his wife, Cynthia, filed a complaint against One Stop alleging claims of negligence and loss of consortium. The complaint also sought an award of punitive damages for One Stop's alleged malicious conduct in disregarding the probability Richard would be injured in the manner detailed above. One Stop moved for summary judgment, arguing the Whitsons' claims were barred by the Hold Harmless Clause and Release. One Stop further argued Richard was not entitled to an award of punitive damages because One Stop did not act with actual malice. The Whitsons filed a memorandum in opposition to One Stop's motion for summary judgment.

{¶ 7} On March 18, 2016, the trial court granted summary judgment to One Stop on the negligence and punitive damages claims but denied the motion with regard to Cynthia's loss of consortium claim. Regarding Richard's negligence claim, the trial court found that although there was a genuine issue of material fact as to whether One Stop was negligent in failing to notice a problem with the condition of the bag and straps, the claim was barred by the Hold Harmless Clause and Release:

> The evidence before the Court clearly establishes that [Richard] voluntarily executed the releases and, even though he did not read them, that he had ample opportunity to read same.
>
> When the Court examines the language of the releases, the Court finds that they are clear and unambiguous. As stated above, in one of the releases the customer agrees to assume the risks of, and hold One Stop harmless for, any damage or injury caused by the equipment and/or arising out of One Stop's negligence.
>
> Further, [Richard] acknowledged that rental of such equipment brings with it both known and unanticipated risks to guests and to himself (the customer). The release again is clear and unambiguous, and is broad enough to include the risks involved in moving the bag and bounce house, removing same from the bag, inflation of the house, and the use thereof and the steps necessary in deflating it and returning it to the dealer.

{¶ 8} The Whitsons now appeal, raising two assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS/APPELLEES ON THE BASIS OF THE ENFORCEABILITY OF THE PURPORTED LIABILITY RELEASES.

{¶ 11} The Whitsons argue that the trial court erred in granting summary judgment to One Stop on the negligence claim on the basis of the Hold Harmless Clause and Release. The Whitsons generally assert that both releases are unenforceable because they are ambiguous and there exists a genuine issue of material fact regarding the parties' intentions in executing the releases.

{¶ 12} An appellate court reviews a trial court's decision on a motion for summary judgment de novo, independently and without deference to the decision of the trial court. *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶ 9 (12th Dist.). Summary judgment is proper when no genuine issue as to any material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion

adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 13} The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once this burden is met, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts showing there is some genuine issue of material fact yet remaining for the trial court to resolve. *Id.*; Civ.R. 56(E). Summary judgment is proper if the nonmoving party fails to set forth such facts. *Puhl v. U.S. Bank, N.A.*, 12th Dist. Butler No. CA2014-08-171, 2015-Ohio-2083, ¶ 13. In determining whether a genuine issue of material fact exists, the court must answer the following inquiry: "Does the evidence present a sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law?" *Wilson v. Maple*, 12th Dist. Clermont No. CA2005-08-075, 2006-Ohio-3536, ¶ 18.

{¶ 14} Contract clauses that relieve a party from its own negligence, while generally upheld, are not favored by the law and are to be strictly construed. *Hague v. Summit Acres Skilled Nursing & Rehab.*, 7th Dist. Noble No. 09 NO 364, 2010-Ohio-6404, ¶ 20; *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44, 46-47 (1987). Consequently, in order to be enforceable, exculpatory clauses must be expressed in terms that are clear and unequivocal. *Swartzentruber v. Wee-K Corp.*, 117 Ohio App.3d 420, 424 (4th Dist.1997). When the language of the exculpatory clause is ambiguous or too general, the intent of the parties is a factual matter for the jury. *Hague* at ¶ 21.

{¶ 15} In determining whether an exculpatory clause clearly and unequivocally releases a party from liability for negligence, "[t]he pivotal inquiry is whether it is clear from the general terms of the entire contract, considered in light of what an ordinary prudent and knowledgeable party of the same class would understand, that the proprietor is to be relieved

from liability for its own negligence." *Swartzentruber* at 425; *Hague* at ¶ 22. Courts generally enforce releases of future tort liability where "the intent of the parties, with regard to exactly what kind of liability and what person and/or entities are being released, is stated in clear and unambiguous terms." *Hague* at ¶ 20; *Geczi v. Lifetime Fitness*, 10th Dist. Franklin No. 11AP-950, 2012-Ohio-2948, ¶ 18.

{¶ 16} Initially, we note that the Hold Harmless Clause and the Release are contained in separate documents and are independent clauses. On appeal, the Whitsons argue the trial court erred in granting summary judgment to One Stop on the basis of the Hold Harmless Clause because the latter is not a release from liability and is instead an indemnification clause. One Stop asserts that the Whitsons failed to raise these arguments in the trial court, and therefore, have waived these arguments for purposes of appeal.

{¶ 17} It is well-settled that a party may not raise for the first time on appeal any issue or error that the party could have called to the trial court's attention at a time when the trial court could have ruled on the issue, or corrected the error, or avoided the error altogether. *Webster v. G & J Kartway*, 12th Dist. Preble No. CA2005-06-011, 2006-Ohio-881, ¶ 24. This principle applies to summary judgment proceedings. *Id.* Although application of this principle does not alleviate the moving party from carrying its burden on summary judgment, it does prohibit the party in appealing the judgment from advancing new theories or raising new issues in order to secure reversal. *Id.* at ¶ 25.

{¶ 18} We have reviewed the record and find that the Whitsons did not raise these arguments in their memorandum in opposition to One Stop's motion for summary judgment. In fact, the Whitsons did not make *any* argument regarding the Hold Harmless Clause in the summary judgment proceedings. Because the Whitsons did not raise in the trial court the arguments they are now raising on appeal regarding the Hold Harmless Clause, they have waived these arguments for purposes of appeal. *Webster* at ¶ 26. Appellate courts review

summary judgment decisions de novo but the parties are not given a second chance to raise arguments that they should have raised below. *Estes v. Robbins Lumber, L.L.C.*, 12th Dist. Clermont No. CA2016-02-011, 2016-Ohio-8231, ¶ 24.

{¶ 19} Upon reviewing the evidence submitted by the parties, we find that One Stop met its initial burden of demonstrating there is no genuine issue of material fact as to whether Richard's negligence claim is barred by the Hold Harmless Clause.

{¶ 20} The Hold Harmless Clause provides that Richard agreed to hold One Stop harmless for "personal injuries * * * caused by the equipment and/or arising out of [One Stop's] negligence." The Hold Harmless Clause does not restrict its application as to person, and there is no reason why it should not apply to Richard and his injuries. The Hold Harmless Clause is phrased in simple, straightforward language and unambiguously identifies the liability (i.e., negligence) and entity (i.e., One Stop) included within its scope. Because the Hold Harmless Clause is separate and independent from the Release, the Whitsons' argument that the contextual language surrounding the Release renders the Release ambiguous, does not apply to the Hold Harmless Clause. As stated above, the Whitsons did not make any argument or submit any evidence in their memorandum in opposition to One Stop's motion for summary judgment relating to the Hold Harmless Clause, and therefore failed to meet their reciprocal burden. The trial court, therefore, did not err in granting summary judgment to One Stop on the negligence claim on the basis of the Hold Harmless Clause. Civ.R. 56(E); *Puhl*, 2015-Ohio-2083.

{¶ 21} The Whitsons also argue the trial court erred in granting summary judgment to One Stop on the basis of the Release. The trial court's conclusion regarding the Release simply provided an alternative basis for the trial court's grant of summary judgment. We, therefore, need not address this issue given our prior conclusion that the trial court properly granted summary judgment to One Stop on the basis of the Hold Harmless Clause. The trial

court's ultimate decision to grant summary judgment to One Stop with regard to Richard's negligence claim was correct.

{¶ 22} The Whitsons' first assignment of error is overruled.

{¶ 23} Assignment of Error No. 2:

{¶ 24} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS/APPELLEES ON PLAINTIFFS/APPELLANTS' CLAIM FOR PUNITIVE DAMAGES.

{¶ 25} The Whitsons argue the trial court erred in granting summary judgment to One Stop on the issue of punitive damages. The trial court granted summary judgment to One Stop, finding there was no evidence of actual malice: "There is no evidence from which a finder of fact could find a state of mind characterized by hatred, ill will or a spirit of revenge, or a conscious disregard for the rights and safety of others." The Whitsons assert that based upon the deposition testimony of One Stop employees that they were aware of the high risk of harm that a failure to inspect the bag could create, that they were aware of the risk of injury from using the bottom strap when attempting to move or unload the bounce house, and that no warnings or instructions were given to customers as to how to move or unload the house, a question of material fact exists as to whether One Stop acted with a conscious disregard when it "failed to reasonably [inspect] the bag for a known hazard and knowingly rented a bag that had not undergone reasonable inspection."

{¶ 26} In Ohio, an award of punitive damages is available only upon a finding of actual malice. *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473 (1991). Actual malice for these purposes is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Murty*, 32 Ohio St.3d 334, 335 (1987). Something more than mere negligence is

always required before an award of punitive damages may be made. *Id.* at 335. A possibility or even probability of harm is not enough as that requirement would place the act in the realm of negligence. *Id.* at 336. Before submitting the issue of punitive damages to a jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm. *Id.* Furthermore, the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety. *Id.*

{¶ 27} We find that the trial court did not err in granting summary judgment to One Stop on the issue of punitive damages. In his deposition, Richard testified he had no evidence that One Stop knew or was aware there was a defect or any type of problem regarding the bottom strap when he picked up the bounce house. In their depositions, One Stop employees testified that before the April 27, 2012 incident, they did not notice any problem with the bottom strap, they never experienced any problems with the strap at issue and did not experience problems with straps in general, they never received customer complaints regarding straps in the seven years One Stop has been renting bounce houses, and One Stop inspections of the bag did not uncover problems with its straps.

{¶ 28} The trial court therefore did not err in finding there was no genuine issue of material fact as to whether One Stop acted with actual malice when it rented the bounce house to the Whitsons. One Stop's general acknowledgment of a risk of injury from using the bottom strap to move or unload the bounce house does not create a genuine issue of material fact that it acted with a conscious disregard for the rights and safety of Richard resulting in a great probability of causing substantial harm. *Preston*, 32 Ohio St.3d at 336.

{¶ 29} The Whitsons' second assignment of error is overruled.

{¶ 30} Judgment affirmed.

S. POWELL and RINGLAND, JJ., concur.