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 commercial intelligence 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.

***Altercare of Mayfield Village, Inc. v. Berner*, 8th Dist. Cuyahoga Nos. 104259 and 104306, 2017-Ohio-958.**
This case involved an appeal of a trial court's decision to refuse to instruct a jury that a violation of Ohio's Nursing Home Residents Bill of Rights did not constitute negligence per se, and a decision denying a request for payment of attorneys' fees. Regarding the finding that a violation of the statute is not negligence per se, the Eighth Appellate District noted that such a finding requires the imposition of a specific duty on an individual for the safety or protection of others. Further, when compliance with a statute requires "human judgment or decision-making" to comply, there can be no automatic negligence for an alleged violation of the statute.

Regarding the denial of attorneys' fees, the Eighth Appellate District noted that Ohio rules allow for an award of attorneys' fees as a form of sanctions for discovery abuses or frivolous actions. The court noted that whether attorneys' fees should be awarded requires a factual determination that either the party did not have a good faith basis to make the discovery responses he did, or that the party engaged in conduct solely to harass or injure the opposing party or took actions not warranted under existing law. Despite this, the court cautioned that conduct is not frivolous simply because the claim is not "well-grounded in facts or lacks evidentiary support" or that the legal claim or defense ultimately fails. In light of this, and given that the trial court was in the best position to determine

if sanctions were warranted, the Eighth Appellate District declined to sanction the party for "zealous" advocacy even though the arguments were unsuccessful.

The Bullet Point: A law or statute can make you automatically liable for negligence but only if it imposes a specific duty or requirement on you. Likewise, attorneys' fees can be awarded for sanctionable conduct in the discovery process or by advancing frivolous arguments. However, courts are loath to award sanctions just because a party advanced an argument that did not succeed.

***Carrington Mtge. Srvs., LLC v. Shepherd*, 5th Dist. Tuscarawas No. 2016 AP 07 0038, 2017-Ohio-868.**

This was an appeal of a trial court's decision to grant summary judgment in a foreclosure action and deny the borrower's motion to strike the lender's summary judgment affidavit. The borrower argued that the lender's summary judgment evidence was insufficient to entitle it to judgment because it provided two "different" copies of the promissory note to the court. The Fifth Appellate Disagreed, finding that the lender provided summary judgment evidence to explain the discrepancy between the two notes and, notably, the borrower never presented any evidence to contest that explanation. Regarding the borrower's motion to strike, the Fifth Appellate District found that the lender's summary judgment affiant adequately laid the business records foundation to testify to the records attached to her affidavit and explained the personal knowledge she had to testify to those records. The court also found that the lender could testify to its predecessors records under the "adoptive business records exception" because it incorporated those records into its own records and relied upon them.

The Bullet Point: A litigant must explain discrepancies in records presented to a trial court in order to obtain judgment. Otherwise, an issue of fact for trial could exist. Likewise, a litigant can only rely on the records it obtained from a predecessor if it incorporated the records into its own systems and relied upon those records.

***Madfan, Inc. v. Makris, et. al.*, 8th Dist. Cuyahoga No. 103655, 2017-Ohio-979.**

This was an appeal of a jury award of damages in excess of $300,000 against an individual for fraud related to a restaurant deal gone wrong. At trial, the jury found that the appellant and its shareholders were entitled to $300,000 personally against the individual. The Eighth Appellate District disagreed. As the court noted, Ohio law does not permit recovery for speculative damages, regardless of the wrongdoing committed. In other words, even if the individual committed a wrong against the company and shareholders, they were entitled to $300,000 only if they proved that amount of damages arose from the wrongdoing. Here, no evidence was presented to support the damages amount, nor did the company and shareholders' attorney even establish a method for calculating damages. Because the company and shareholders could not prove damages, an essential element of the fraud claim, the Eighth Appellate District reversed the jury's verdict.

The Bullet Point: Damages must actually be proven at trial and cannot simply be assumed, no matter how bad the defendant's conduct may be. If damages are not proven, then a judgment cannot stand.

***Wright State University v. Fraternal Order of Police*, 2d Dist. Greene No. 2016-CA-35, 2017-Ohio-854.**
This was an appeal of a trial court's order agreeing with an arbitrator's award to modify a disciplinary sentence against a police office. The university claimed the arbitrator exceeded his authority and his award violated public policy. The Second Appellate District disagreed. In finding that the arbitrator did not exceed his authority, the court looked to the terms of the collective bargaining agreement finding that nothing in the collective bargaining agreement precluded the arbitrator from reviewing the appropriateness of the discipline against the officer. The court also disagreed that the arbitrator's award violated public policy, noting that while an award could be vacated if the contract itself violates public policy, there is not authority to set aside an award as against public policy.

The Bullet Point: Arbitrators are granted broad authority to issue awards and courts are hesitant to overturn their decisions unless the award is against the express language of the collective bargaining agreement or the agreement itself violates public policy.

***Zook v. JP Morgan Chase Bank*, 10th Dist. Franklin No. 15AP-750, 2017-Ohio-838.**
This was an appeal of a summary judgment decision in favor of a institutional trustee on claims for negligence and breach of fiduciary duty. The beneficiaries to a trust brought suit against the institutional trustee, claiming that its actions resulted in the significant loss in value to the trust assets. The Tenth Appellate District affirmed the trial court's decision to grant the institutional trustee summary judgment based on a release the beneficiaries signed.

In so ruling, the court noted that under applicable law, a trust is not liable to a beneficiary for a breach of trust when the beneficiary signed a release unless it was induced by improper conduct, the beneficiary did not know his or her rights, or the beneficiary did not know the material facts related to the breach. The court found that none of the exceptions applied here. Specifically, the court noted that the beneficiaries were sophisticated individuals who voluntarily signed the release. The court also found that once a valid release was presented, the beneficiaries bore the burden to prove an exception to its validity and failed to prove one existed in this case. The court found in this case that the institutional trustee presented constructive knowledge that the beneficiaries were aware of any material facts related to a breach and affirmed summary judgment on the grounds that the release prevented recovery.

The Bullet Point: A trustee can avoid liability for mismanaging a trust if a valid release is entered into and if the beneficiaries were aware of the material facts related to breach of trust at the time of the release. That knowledge includes "constructive knowledge" which is knowledge of information that the beneficiary had "reason to know" of related to the breach.

[Cite as *Aftercare of Mayfield Village, Inc. v. Berner*, 2017-Ohio-958.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104259 and 104306

ALTERCARE OF MAYFIELD VILLAGE, INC.

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

SARAH BERNER, ET AL.

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-825602

BEFORE: McCormack, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 9, 2017

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant/cross-appellee Sarah Berner and new party defendant-appellant Betty J. Miller, Executor of the estate of Charles Stumpf, Sr., appeal from the judgment of the trial court in favor of plaintiff-appellee/cross-appellant Altercare of Mayfield Village, Inc. ("Altercare"). In its cross-appeal, which has been consolidated herein, Altercare appeals the trial court's denial of its motions for attorney fees. For the reasons that follow, we affirm the judgment regarding Berner's and Miller's claims, as well as the court's denial of attorney fees.

Procedural History

{¶2} On April 21, 2014, Altercare filed a complaint against Sarah Berner for breach of contract and personal guarantee of payment. Altercare's complaint stems from a personal guarantee of payment executed by Berner regarding services rendered to Berner's father, Charles Stumpf, Sr., while he was a resident at Altercare's nursing home facility. Altercare sought damages in the amount of $19,074.

{¶3} Berner filed an answer and counterclaim. Berner denied personal responsibility for payment for services rendered to her father. Additionally, Berner asserted affirmative defenses to Altercare's complaint, including failure of consideration, Altercare's own negligence, breach of Altercare's duty of care under the nursing home residents' bill of rights, deceptive trade practices, and breach of contract. In her counterclaim, Berner alleged that Altercare was negligent in providing medical care to

her father and such negligence resulted in her father's wrongful death. She also claimed deceptive trade practices and breach of contract.

{¶4} Thereafter, Berner filed a motion to join her sister, Betty J. Miller, as Executor of the estate of their father, Mr. Stumpf, which the trial court granted. On August 12, 2014, Berner and Miller, on behalf of the estate, filed an amended answer and asserted amended counterclaims against Altercare. The counterclaims of Berner and the estate, which were all based upon the services rendered to Mr. Stumpf, included medical negligence, wrongful death, deceptive trade practices, breach of nursing home bill of rights, and breach of contract.

{¶5} On February 10, 2016, the matter proceeded to a jury trial. After opening statements, the trial court directed a verdict for Altercare on Berner's counterclaims, finding that Berner did not have standing to bring the claims that belonged to the estate. After Berner rested, Altercare moved for a directed verdict on its claim against Berner for breach of personal guarantee and it agreed to dismiss its claim for breach of contract against Berner. The trial court granted Altercare's motion regarding the personal guarantee. The estate then withdrew its claim of deceptive trade practices against Altercare.

{¶6} Thereafter, Altercare moved for a directed verdict on the estate's claim of breach of contract against Altercare. Finding that claim is actually a medical negligence claim, the trial court granted Altercare's motion with respect to the estate's breach of contract claim. Altercare also moved for a directed verdict on the estate's remaining

claims, including conscious pain and suffering, violation of the nursing home bill of rights, and medical negligence, which the trial court denied.

{¶7} The jury returned a verdict in favor of Altercare with respect to the remaining claims made by the estate. Altercare then filed two motions for attorney fees, both of which the trial court denied.

{¶8} This appeal and cross-appeal now follow. Berner and Miller appeal, assigning the following errors for our review:

> I. The trial court erred as a matter of law by refusing to instruct the jury that a violation of Ohio's Nursing Home Residents' Bill of Rights (R.C. 3721.13) constitutes negligence per se.
>
> II. The trial court erred as a matter of law by precluding defendant-appellant, a surety, from asserting defenses to plaintiff-appellee's complaint available to her principal on the grounds that her principal was deceased and thus erred in directing a verdict for the plaintiff-appellee on its complaint.

In its cross-appeal, Altercare assigns two errors for our review:

> I. The trial court erred in denying [its] motion for attorney fees and expenses related to frivolous claims for medicare billing fraud and lack of standing.
>
> II. The trial court erred in denying [its] motion for attorney fees and expenses related to prosecuting [Altercare's] claim for breach of guarantee, which became necessary only after Sarah Berner's assertion of frivolous defenses and improper responses to requests for admissions.

Jury Instruction

{¶9} In their first assignment of error, Berner and Miller (hereinafter "appellants") contend that Altercare violated Ohio's Nursing Home Residents' Bill of Rights, as outlined in R.C. 3721.13. These rights include: the right to a safe and clean living environment; the right to adequate and appropriate medical treatment and nursing care; the right to participate in decisions that affect the resident's life; the right to be fully informed of the cost of services provided; the right of the resident and the person paying for the care to examine the bill; and the right to have any significant change in the resident's health status reported to the resident's sponsor. R.C. 3721.13(A).

{¶10} Appellants further contend that the purported violations of the foregoing statute constituted negligence per se. Thus, they contend that the trial court erred in failing to instruct the jury on negligence per se.

{¶11} Negligence per se applies where a legislative enactment imposes a specific duty upon an individual for the safety and protection of others and that individual failed to observe his or her duty. *Jaworowski v. Med. Radiation Consultants*, 71 Ohio App.3d 320, 329, 594 N.E.2d 9 (2d Dist.1991). "Where there exists a legislative enactment commanding or prohibiting for the safety of others the doing of a specific act and there is a violation of such enactment solely by one whose duty it is to obey it, such violation constitutes negligence per se." *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 370, 119 N.E.2d 440 (1954), paragraph three of the syllabus. However, "where there exists a legislative enactment expressing for the safety of others, in general or abstract terms, a

rule of conduct, negligence per se has no application and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Id.*

{¶12} Thus, a rule that requires the "intervention of human judgment or decision-making in order to comply with it" does not trigger an application of negligence per se. *Zimmerman v. St. Peter's Catholic Church*, 87 Ohio App.3d 752, 762, 622 N.E.2d 1184 (2d Dist.1993). Moreover, "if the violation has to be proved through expert testimony, it is obvious that human reasoning and judgment are involved in testing the condition against the rule." *Id.*; *Jung v. Davies*, 2d Dist. Montgomery No. 24046, 2011-Ohio-1134, ¶ 35 (finding regulations requiring expert testimony to prove a violation are too general to form the basis of negligence per se).

{¶13} According to appellants, Altercare violated the decedent's rights as outlined above and, therefore, they are entitled to an instruction that Altercare was negligent per se. In support of their argument, the appellants rely on *Slagle v. Parkview Manor, Inc.*, 5th Dist. Stark Nos. CA-6155 and CA-6159, 1983 Ohio App. LEXIS 13143 (Oct. 7, 1983), and *Sprosty v. Pearlview, Inc.*, 106 Ohio App.3d 679, 666 N.E.2d 1180 (8th Dist.1995).

{¶14} In *Slagle*, the Fifth District Court of Appeals, in addressing whether R.C. 3721.17(I) altered the common-law standard for awarding punitive damages, determined that the statute "gives 'any residents whose rights * * * are violated * * * ' a cause of action for which the court award actual and punitive damages for violation of the rights."

Slagle at 9, quoting R.C. 3721.17(I). The court found the plain language of the statute dictated that "the right to punitive damages flows directly and simply from the failure to furnish 'adequate and appropriate care.'" *Id.; see also Sprosty* at 683 (following *Slagle* and finding that R.C. 3721.17(I) "expressly provides that a violation of the rights found in R.C. 3721.10 to 3721.17 forms the basis of punitive damages" and "requires nothing more than a violation of the rights encompassed" within the statute).

{¶15} However, as correctly noted by Altercare, the Fifth District's decision in *Slagle* in 1983 relied upon a prior version of R.C. 3721.17(I), effective April 9, 1979, which provided as follows:

> Any resident whose rights under [R.C. 3721.10 to 3721.17] are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by his sponsor on his behalf. The court may award actual and punitive damages for violation of the rights. The court may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed.

Am. Sub. H.B. No. 600, 137 Ohio Laws, Part II, 3081-3082.

{¶16} On November 7, 2002, the General Assembly amended the statute as follows:

> (I)(1)(a) Any resident whose rights under [R.C. 3721.10 to 3721.17] are violated has a cause of action against any person or home committing the violation.
>
> * * *

> (I)(2)(a) The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property.

R.C. 3721.17(I)(1)(a) and (2)(a).

{¶17} The amended statute includes changes that are reflected in the current statute. The current statute provides that in order for a plaintiff to recover compensatory damages under R.C. 3721.17, the plaintiff must demonstrate that the violation of the resident's rights "resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury [or] death." Because the statute itself requires negligent conduct — human judgment or decision-making — in order to recover compensatory damages, negligence per se does not apply "and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Eisenhuth*, 161 Ohio St. 367, 370, 119 N.E.2d 440 (1954), at paragraph three of the syllabus; *Zimmerman*, 87 Ohio App.3d 752, 762, 622 N.E.2d 1184 (2d Dist.1993).

{¶18} A trial court is required to instruct a jury with a correct and complete statement of the law. *Sharp v. Norfolk & W. Ry.*, 72 Ohio St.3d 307, 312, 649 N.E.2d

1219 (1995). "A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson*, 19 Ohio St.3d 10, 12, 482 N.E.2d 583 (1985).

{¶19} Here, the trial court instructed the jury as follows:

> Now you are also instructed that the Ohio Revised Code imposes requirements on nursing homes in Ohio known as the Nursing Home Residents' Bill of Rights. Altercare was required to comply with these requirements at all times relevant to this case.
>
> The estate of Charles Stumpf may recover compensatory damages based upon a showing * * * that the violation of the resident's rights resulted from a negligent act or omission of the person or home, and that the violation was a proximate cause of the resident's injury, death, or loss to person or property.

{¶20} The court's above instruction contains language nearly identical to the language of R.C. 3721.17(I)(2)(a). The court's instruction was therefore a correct statement of the law. Accordingly, the trial court did not err in so instructing the jury.

{¶21} Appellants' first assignment of error is overruled.

Motion for Directed Verdict

{¶22} In the second assignment of error, Berner contends that the trial court erred by directing a verdict in Altercare's favor on Altercare's claim for Berner's breach of guarantee. Specifically, Berner claims that the trial court failed to permit Berner from asserting available defenses, such as meeting of the minds, failure of consideration, and

breach of the Nursing Home Residents' Bill of Rights. According to Berner, the court's directed verdict deprived the jury of hearing the evidence that supports her defenses.

{¶23} In response, Altercare submits that substantial, competent evidence did not exist to support Berner's alleged defenses. In addition, Altercare provides that the jury did, in fact, hear all the evidence on Berner's defense that Altercare breached its contract by providing negligent care and services, and it found Altercare not negligent.

{¶24} Under Civ.R. 50(A)(4), a motion for directed verdict shall be granted when "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." Where, however, there is "'substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions,'" directed verdict should be denied. *Integrated Payment Sys. v. A&M 87th Inc.*, 8th Dist. Cuyahoga Nos. 91454 and 91473, 2009-Ohio-2715, ¶ 39, quoting *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998).

{¶25} In considering whether the trial court properly granted a motion for directed verdict, the trial court considers, as a matter of law, the sufficiency of the evidence to present to the jury. *Siebert v. Lalich*, 8th Dist. Cuyahoga No. 87272, 2006-Ohio-6274, ¶ 14. Thus, the court necessarily "examines the materiality of the evidence, as opposed

to_the conclusions to be drawn from the evidence." *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68-69, 430 N.E.2d 935 (1982).

{¶26} We review a trial court's granting or denial of a motion for directed verdict de novo. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph three of the syllabus.

{¶27} Berner contends that the trial court's directed verdict on Altercare's claim for relief under the personal guarantee denied her the opportunity to defend her actions on the basis of the lack of meeting of the minds, the failure of consideration, and the negligent services allegedly provided by Altercare in violation of the nursing home bill of rights. In support, Berner claims that the evidence shows she was not involved in the arrangements to transfer her father from the hospital to Altercare, she was not presented with the agreement and the guarantee until two weeks after Altercare accepted her father as a resident, and she was led to believe that her father's expenses would be covered by Medicare and his Medicare supplement. She also claims that she was asked to sign the guarantee in a hurried manner, without receiving any time to review or any explanations of the document.

{¶28} Courts construe guarantee agreements in the same manner as they interpret contracts. *G.F. Business Equip. v. Liston*, 7 Ohio App. 3d 223, 224, 454 N.E.2d 1358

(10th Dist.1982). A contract is defined as a promise, or a set of promises, that is actionable upon breach. *Fine Line Communications, Inc. v. I. Schumann & Co.*, 8th Dist. Cuyahoga No. 93512, 2010-Ohio-1438, ¶ 17; *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Kostelnik* at ¶ 16. A meeting of the minds occurs where "'a reasonable person would find that the parties manifested a present intention to be bound to an agreement.'" *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 2008-Ohio-5642, 900 N.E.2d 231, ¶ 12 (2d Dist.), quoting *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, 846 N.E.2d 68, ¶ 12 (9th Dist.). Thus, courts will only consider objective manifestations of intent. *Nilavar v. Osborn*, 127 Ohio App.3d 1, 12, 711 N.E.2d 726 (2d Dist.1998). Moreover, the parties must have a "distinct and common intention" that is communicated by each party to the other. *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 (8th Dist.1993).

{¶29} A lack of a meeting of the minds can occur where there was a mutual mistake as to a material part of the contract. *Home S. & L. Co. v. Norfolk S. Ry.*, 8th Dist. Cuyahoga No. 96878, 2012-Ohio-1634, ¶ 14; *Robert's Auto Ctr., Inc. v. Helmick*, 9th Dist. Summit No. 21073, 2003-Ohio-640, ¶ 31, fn. 1. In such a case, the presence of a mutual mistake "'calls into question the very existence of the contract.'" *Home S. & L. Co.*, citing *Reitz v. West*, 9th Dist. Summit No. 19865, 2000 Ohio App. LEXIS 3913, 16 (Aug. 30, 2000). Additionally, the existence of fraud or ambiguity may also give rise to

a lack of a meeting of the minds. *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 552 N.E.2d 207 (1990) (finding fraud precludes a meeting of the minds concerning the nature or character of an agreement).

{¶30} Failure of consideration is an affirmative defense under Civ. R. 8(C). "[The] failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed." *Rhodes v. Rhodes Indus., Inc.*, 71 Ohio App.3d 797, 807, 595 N.E.2d 441 (8th Dist.1991). More specifically, the failure of consideration will exist "'whenever one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that performance.'" *Franklin v. Lick*, 8th Dist. Cuyahoga Nos. 37770 and 37963, 1979 Ohio App. LEXIS 9490, 7 (Apr. 19, 1979), quoting Williston, *Contracts* Section 814 (3d Ed.1962). Where a failure of consideration exists, the other party is excused from further performance. *Rhodes*.

{¶31} Here, Berner does not allege fraud or mutual mistake, or that the terms of the guarantee were ambiguous. She also concedes that she was not forced to sign any documents. Rather, she contends that she was presented with the agreement and the guarantee two weeks after Altercare accepted her father as a resident and she was led to believe that her father's expenses would be covered by Medicare and his Medicare supplement. She further claims that she signed the guarantee in a rushed manner, where Altercare's employee quickly pointed to places on the document requiring her signature.

{¶32} We are mindful, however, that every person is obligated to read a contract before signing it, and "'in the absence of fraud or mistake, or some other reason requiring equitable relief, [that individual] will be held to the terms of the contract signed.'" *Brown v. Picciano*, 8th Dist. Cuyahoga No. 48371, 1984 Ohio App. LEXIS 12087, 3 (Dec. 20, 1984), quoting *Hughes v. Cardinal Fed. S. & L. Assn.*, 566 F.Supp. 834, 844, (S.D.Ohio 1983). Where the parties have signed an agreement, it is presumed that their minds have met. *Parklawn Manor, Inc. v. Jennings-Lawrence Co.*, 119 Ohio App. 151, 156, 197 N.E.2d 390 (10th Dist.1962). "'If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs.'" *Haller*, 50 Ohio St.3d 10, 552 N.E.2d 207, at 14, quoting *Dice v. Akron, Canton & Youngstown RR. Co.*, 155 Ohio St. 185, 191, 98 N.E.2d 301 (1951).

{¶33} In this case, the evidence demonstrated that Berner did, in fact, sign the guarantee that stated: (1) the guarantor voluntarily guarantees payment to the facility for all services and supplies that have been provided or will be provided in the future to the resident; (2) the guarantor agrees to be jointly and severally liable for the resident's financial obligations; (3) the guarantor understands that he or she is not required by law or by Altercare to personally guarantee payment, and (4) the guarantor is agreeing to be liable along with and in addition to the resident for all charges incurred by the resident at facility on a voluntary basis.

{¶34} Additionally, the evidence demonstrated that Berner was aware, as guarantor, that she would be responsible for the payment of services rendered to Mr.

Stumpf should Medicare or Medicaid deny payment. The residency agreement, that Berner acknowledged signing, stated: (1) you agree to apply promptly for any applicable Medicare benefits; (2) Altercare makes no guarantee that resident will be covered by Medicare, or if initially covered, will continue to be covered; and (3) you are required to pay Altercare at the private pay rate for all charges incurred by the resident in the event that a resident's application for Medicare coverage is denied or if the resident's eligibility for Medicare coverage expires. Further, Berner admitted at trial that she was informed that Medicare benefits would cease on January 15, 2013; that either she or the family or her father would be required to pay for care after that date; and that she was aware that she had signed a personal guarantee of payment. Finally, there is no evidence of fraud, mutual mistake, or ambiguity in the contract. Consequently, after construing the evidence most strongly in favor of Berner, we conclude that reasonable minds could only conclude that there was a meeting of the minds when Berner executed the personal guarantee such that she was liable to Altercare on the guarantee.

{¶35} Berner also asserts that she was denied the opportunity to present a defense based upon the failure of consideration and Altercare's material breach of the residency agreement. Specifically, Berner alleges that Altercare was negligent and it breached the duty of care under the nursing home residents' bill of rights. Thus, as Berner contends, there was a failure of consideration for the agreement and the agreement was materially breached. However, even if Berner had been denied the opportunity to present such

defenses by the court's directed verdict, we find the error is harmless, because there was a full and fair consideration by the jury of the issues presented by the appellants.

{¶36} Berner alleges that Altercare's negligence, as demonstrated in the implementation of the bowel and bladder plan to prevent falls, the charting and documentation of care, and whether the charted amount of physical therapy was actually provided, resulted in a material breach of its duty to Mr. Stumpf. At trial, the appellants presented the testimony of Danielle Musleve, Altercare's interim director of nursing. Musleve testified concerning physical therapy, charting, the assessment of Mr. Stumpf's risk of falls, and the circumstances surrounding each of Mr. Stumpf's falls. Musleve also testified regarding Altercare's obligations under the nursing home residents' bill of rights. For example, Musleve agreed that Altercare was obligated to report any significant change in a resident's health status. She stated that although the staff did not "check the box," new safety interventions such as reevaluating Mr. Stumpf's bowel and bladder pattern were implemented. Additionally, Berner testified concerning the circumstances surrounding her signing the residency agreement and her understanding of how Altercare would receive payment for services to her father, as well as the circumstances regarding her father's falls.

{¶37} At the close of all the evidence, the issue of Altercare's alleged negligence was submitted to the jury and the jury found Altercare not negligent in rendering care to Mr. Stumpf. As the transcript reveals, the issues Berner claims she was deprived of presenting in defense of her claim of the breach of the guarantee (and the residency

agreement) were the very issues presented by the estate at trial, and the jury found no merit to those claims. And in a trial, judgment is rendered after the evidence is more completely presented and the parties have been cross-examined, as opposed to the limited factual evidence presented at the time a motion for directed verdict is made. Any error by the trial court in granting a directed verdict in Altercare's favor was therefore rendered harmless, as the error, if any, was corrected by the jury's verdict. *See Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 642 N.E.2d 615 (1994); *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 2008-Ohio-3662, 895 N.E.2d 217 (8th Dist.); *see also Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, ¶ 9 (the standards applicable to motions for summary judgment and a directed verdict are the same).

{¶38} Appellants' second assignment of error is overruled.

Attorney Fees

{¶39} In its cross-appeal, Altercare contends, in two cross-assignments of error, that the trial court erred in denying its motions for attorney fees. We address the cross-assignments of error together.

{¶40} Altercare filed two motions for attorney fees. In its first motion, Altercare requested an order for attorney fees against Berner and Miller under Civ.R. 37(C) and R.C. 2323.51 for expenses associated with the appellants' claims of Medicare billing fraud and lack of staffing. Altercare's second motion requested attorney fees for its expenses relating to its claim of a breach of the guarantee. Altercare contends that the

appellants' claims and their defenses to Altercare's claim were frivolous. In its order denying Altercare's first motion, the trial court determined that Altercare never propounded requests for admissions to Miller and it failed to present competent and credible evidence of the appellants' frivolous conduct. In denying the second motion, the trial court found that Berner's denial of requests for admission were made in good faith and with sufficient basis and Altercare failed to present competent and credible evidence of frivolous conduct associated with Berner's asserted defenses.

{¶41} Both Civ.R. 37(C) and R.C. 2323.51 allow an award of attorney fees as a form of sanctions. *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 51 (9th Dist.); *Mills v. Westlake*, 8th Dist. Cuyahoga No. 103643, 2016-Ohio-5836, ¶ 49.

{¶42} Civ.R. 37(C) provides:

> If a party, after being served with a request for admission under Rule 36, fails to admit * * * the truth of any matter as requested, and if the party requesting the admissions thereafter proves * * * the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making the proof, including reasonable attorney's fees. Unless the request has been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

{¶43} Thus, where a party has denied a request for admission, but the proof at trial contradicts the denial, the court must award sanctions unless (1) the request was held objectionable; (2) there was good reason for the denial; or (3) the issue was not of substantial importance. *Tanio v. Ultimate Wash*, 8th Dist. Cuyahoga No. 98826, 2013-Ohio-939, ¶ 26, citing *Salem Med. Arts & Dev. Corp. v. Columbiana Cty. Bd. of Revision*, 82 Ohio St.3d 193, 195-196, 694 N.E.2d 1324 (1998). The responding party bears the burden of proving that a good reason existed for failing to admit to the matter requested. *Itskin v. Restaurant Food Supply Co.*, 7 Ohio App.3d 127, 130, 454 N.E.2d 583, 587 (10th Dist.1982). The determination of whether a good reason for failing to admit exists is within the discretion of the trial court. *Id.*

{¶44} Additionally, this court noted:

> "When the responding party justifiably believes that the matter requested to be admitted is a disputable issue, the responding party's only option is to deny the matter on that basis. Even if the requesting party is then able to prove the matter requested to be admitted, the responding party should not be charged for the cost of proving that issue under Civ.R. 37(C) since his denial based on a belief that the matter was disputable was a good reason for not admitting the matter."

Davis v. D&T Limousine Serv., 8th Dist. Cuyahoga Nos. 65683, 66027, 1994 Ohio App. LEXIS 2615, 12-13 (June 16, 1994), quoting *Youssef v. Jones* , 77 Ohio App.3d 500, 509, 602 N.E.2d 1176 (6th Dist.1991).

{¶45} In accordance with R.C. 2323.51, a party adversely affected by frivolous conduct in a civil action may file a motion for an award of attorney fees. R.C. 2323.51(A)(2)(a) defines "frivolous conduct," as any of the following:

> (I) It obviously serves merely to harass or maliciously injure another party to the civil action * * * or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶46} What constitutes frivolous conduct is a factual determination where the moving party alleges, for example, that a party engaged in conduct to harass or maliciously injure the moving party; however, where the moving party alleges, for example, that the claim is not warranted under existing law, it is a legal determination. *Orbit Elecs., Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, ¶ 47 (8th Dist.).

{¶47} In determining whether the claim itself is frivolous, the test is whether no reasonable lawyer would have brought the action in light of the existing law. *The James Lumber Co. v. Nottrodt*, 8th Dist. Cuyahoga No. 97288, 2012-Ohio-1746, ¶ 25, citing *Orbit* at ¶ 49. Conduct is not frivolous "merely because a claim is not well-grounded in fact or lacks evidentiary support." *Cleveland v. Abrams*, 8th Dist. Cuyahoga No. 97814, 2012-Ohio-3957, ¶ 19. Additionally, the fact that a legal claim (or defense) was

unsuccessful does not, in and of itself, warrant sanctions. *Halliwell v. Bruner*, 8th Dist. Cuyahoga Nos. 76933 and 77487, 2000 Ohio App. LEXIS 5896, 24 (Dec. 14, 2000); *Miller v. Miller*, 5th Dist. Holmes No. 11CA020, 2012-Ohio-2905, ¶ 18 ("R.C. 2323.51 does not purport to punish a party for raising an unsuccessful claim").

{¶48} The decision to impose sanctions under Civ.R. 37 is within the discretion of the trial court. *In re I.A.G.*, 8th Dist. Cuyahoga No. 103656, 2016-Ohio-3326, ¶ 38. We will therefore not reverse the trial court's decision absent an abuse of discretion. *Id.* So, too, the ultimate decision whether to impose sanctions under R.C. 2323.51, including an award of reasonable attorney fees, rests in the sound discretion of the trial court. *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶ 10, citing R.C. 2323.51(B)(1). We will therefore not reverse the trial court's decision denying sanctions under R.C. 2323.51 absent an abuse of discretion. *Id.* The trial court is in the best position to appraise the conduct of the parties, and we must defer to the trial court's ruling on a motion for sanctions. *First Place Bank v. Stamper*, 8th Dist. Cuyahoga No. 80259, 2002-Ohio-3109, ¶ 17. An abuse of discretion occurs when a trial court's decision is unreasonable, arbitrary, or unconscionable and is more than an error in law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶49} Ordinarily, a trial court is not required to hold a hearing before denying a motion for sanctions "'when the court determines, upon consideration of the motion and in its discretion, that [the motion] lacks merit.'" *Lakeview Holding (OH), L.L.C. v.*

Haddad, 8th Dist. Cuyahoga No. 98744, 2013-Ohio-1796, ¶ 14, quoting *Pisani v. Pisani*, 101 Ohio App.3d 83, 88, 654 N.E.2d 1355 (8th Dist.1995); *CM Newspapers, Inc. v. Dawson*, 10th Dist. Franklin No. 91AP-1067, 1992 Ohio App. LEXIS 344, 7 (Jan. 28, 1992) ("the specific language of R.C. 2323.51 does not require the trial court to conduct a hearing before denying a motion for sanctions thereunder"). "[W]here the court has sufficient knowledge of the circumstances for the denial of the requested relief and the hearing would be perfunctory, meaningless, or redundant," a hearing is unnecessary. *Pisani*. Courts, however, have found that a trial court abuses its discretion when it arbitrarily denies a motion for sanctions. *Bikkani v. Lee*, 8th Dist. Cuyahoga No. 89312, 2008-Ohio-3130, ¶ 31. This court has held that an arbitrary denial occurs when "the record clearly evidences frivolous conduct" and "the trial court nonetheless denies a motion for attorney fees without holding a hearing." *Id.*

{¶50} We note, initially, that the record in this case reflects that the trial court had sufficient knowledge of the circumstances in this case, the matter was fully briefed by the parties, and the court thoroughly considered the issues presented prior to denying Altercare's motions. Furthermore, the trial court found the record lacked competent and credible evidence of frivolous conduct. Accordingly, a hearing was not required on Altercare's motions for attorney fees.

{¶51} Secondly, the trial court found that Altercare never propounded a request for admission upon Miller, as executor of the estate. Therefore, sanctions pursuant to Civ.R. 37(C) were properly denied as the motion relates to Miller.

{¶52} Altercare contends that Berner and Miller asserted frivolous claims for billing fraud and lack of staffing. Specifically, Altercare argues that the appellants' claims were not supported by any factual evidence, as evidenced by the trial court's granting of Altercare's motion in limine regarding these claims. Altercare also contends that Berner asserted frivolous defenses to Altercare's claim of breach of guarantee and she submitted improper responses to Altercare's request for admission. Altercare claims that Berner presented no evidence to support her defenses of lack of meeting of the minds, Altercare's deceptive trade practices, and Altercare's breach of contract.

{¶53} The appellants argue that their claims and defenses were asserted in good faith and were supported by legal and factual bases at the time they were presented at trial. Toward that end, they argue that throughout the proceedings, Altercare placed issues concerning the personal guarantee and its nonperformance under the terms of the underlying residency agreement in dispute. According to appellants, these issues included whether Altercare provided all of the services it claimed to have provided and whether Altercare violated Ohio's Nursing Home Residents' Bill of Rights. Appellants also point out that their claims were supported by an affidavit of merit required under Civ.R. 10(D) and expert testimony at trial. Additionally, they assert that when it became apparent that their deceptive trade practices claim lacked evidentiary support, they voluntarily withdrew it.

{¶54} We are mindful of the chilling effect applying the sanction remedy can have upon zealous advocacy. *Carr v. Riddle*, 136 Ohio App.3d 700, 706, 737 N.E.2d 976

(8th Dist.2000). As the trial judge presided over this matter throughout the extensive litigation, we defer to the trial judge for the determination that attorney fees are not warranted in this case.

{¶55} Given that appellants' claims were supported by expert testimony, and given the trial court's conclusion that there was no competent or credible evidence establishing that the appellants' claims were frivolous, we cannot conclude that the trial court's decision was unreasonable, arbitrary, or unconscionable. Thus, the trial court did not abuse its discretion in denying Altercare's request for sanctions.

{¶56} Altercare's cross-assignments of error in its cross-appeal are overruled.

{¶57} Judgment affirmed.

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

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
ANITA LASTER MAYS, J., CONCUR

[Cite as *Carrington Mtge. Servs., L.L.C. v. Shepherd*, 2017-Ohio-868.]

carringCOURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
CARRINGTON MORTGAGE SERVICES, LLC	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 2016 AP 07 0038
	:	
BRUCE R. SHEPHERD, ET AL	:	
	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2015 CF 08 0487
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 8, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON WHITACRE Law Office of John D. Clunk 4500 Courthouse Blvd. Suite 400 Stow, OH 44224	BRIAN FLICK The Dann Law Firm P.O. Box 6031040 Cleveland, OH 44103

Gwin, P.J.

{¶1} Appellant appeals the June 9, 2016 judgment entries of the Tuscarawas County Court of Common Pleas granting summary judgment in favor of appellee and denying appellant's motion to strike.

Facts & Procedural History

{¶2} On August 18, 2015, appellee Carrington Mortgage Services, LLC filed a foreclosure complaint against appellant Bruce Shepherd. The complaint alleged appellee is a person entitled to enforce the note dated July 23, 2008, attached as Exhibit A, that designated the Lender as Taylor, Bean & Whitaker Mortgage Corp. ("Taylor"). Appellee further averred in the complaint that the parties entered into an amended and restated note that increased the principal balance on the promissory note. The amended and restated note is attached to the complaint as Exhibit B and Bank of America, N.A. is designated as the Lender.

{¶3} The complaint also alleged appellant is in default in payment on the note and the mortgage. The mortgage, dated July 23, 2008 and attached as Exhibit C, secures the property located at 8021 Middle Run Rd. Dr. N.W., in Dover, Ohio. The Lender is listed on the mortgage as Taylor with Mortgage Electronic Registration Systems ("MERS") as the mortgagee and nominee for Lender and Lender's successors and assigns. A mortgage assignment dated September 29, 2011, assigns the mortgage to Bank of America. N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP ("Bank of America"). The original lender listed on the assignment is Taylor and the assignment is signed by MERS. A second assignment of mortgage, dated November 18, 2014, assigns the mortgage from Bank of America to

appellee. Exhibit F to the complaint is a copy of a loan modification agreement, dated June 14, 2013, increasing the loan amount of the mortgage. Both Bank of America and appellant signed the loan modification agreement.

{¶4} Appellant filed an answer to the complaint on November 4, 2015. On April 6, 2016, appellee filed a notice of filing of amended Exhibit B to its complaint. The amended and restated note is identical to the amended and restated note attached to the complaint, but includes a blank endorsement from Bank of America that was not contained in the copy attached to the original complaint.

{¶5} Appellee filed a motion for summary judgment. Attached to the motion for summary judgment was the affidavit of Elizabeth Ostermann ("Ostermann"), an employee of appellee. Ostermann attached copies of the note, amended and restated note, mortgage, two assignments of the mortgage, the loan modification agreement, and payment history to her affidavit.

{¶6} Appellant filed a response to appellee's motion for summary judgment and argued: the affidavit of Ostermann was insufficient because it is not based upon personal knowledge as she did not testify to any familiarity with procedures for creating business records within Carrington; the affidavit of Ostermann was insufficient because no document entitled "Amended and Reinstated Note" exists; and the affidavit is insufficient because the note attached to the motion for summary judgment contains a blank endorsement from Bank of America that was not found in the original note attached to the complaint. Appellant also filed a motion to strike Ostermann's affidavit, arguing she lacked personal knowledge and the affidavit was ineffective to authenticate the amended and restated note.

{¶7} Appellee filed a reply to their motion for summary judgment and an opposition to appellant's motion to strike. Attached to the opposition to strike the motion was the affidavit of Rachel Valli ("Valli"), the document custodian of counsel for appellee, which provided she was able to testify the original promissory note was received from appellee at the law offices on December 1, 2015 and placed in a secure cabinet. Further, that the note and amended and restated note remain in a secured cabinet at the law offices and she has personally pulled the notes from the cabinet and compared the original with the copies attached as Exhibit A and they are true and accurate copies of the notes in the cabinet.

{¶8} The parties filed a joint stipulation that the pleadings entitled appellant's response to appellee's motion for summary judgment and appellant's motion to strike affidavit shall be considered responsive pleadings to appellee's motion for summary judgment.

{¶9} On June 9, 2016, the trial court issued a judgment entry denying appellant's motion to strike Ostermann's affidavit. The same day, the trial court also issued a judgment entry granting appellee's motion for summary judgment.

{¶10} Appellant appeals the June 9, 2016 judgment entries of the Tuscarawas County Court of Common Pleas and assigns the following as error:

{¶11} "I. THE TRIAL COURT ERRED IN FINDING THE APPELLEE PROVIDED ADMISSIBLE EVIDENCE OF AN ENFORCEABLE INTEREST IN THE AMENDED AND RESTATED NOTE.

{¶12} "II. THE TRIAL COURT ERRED IN ADMITTING SOME, IF NOT ALL, OF THE AFFIDAVIT OF ELIZABETH OSTERMANN."

Summary Judgment Standard

{¶13} Civil Rule 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶14} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d

271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶16} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist. 1991).

I.

{¶17} In his first assignment of error, appellant argues the trial court erred in finding appellee provided admissible evidence of an enforceable interest in the amended and restated note. Appellant contends appellee's evidence was not sufficient to show it was in possession of and entitled to enforce the amended and restated note.

Ostermann's Affidavit

{¶18} Appellant first argues since there is no document entitled "amended and reinstated note" and this is what Ostermann avers in her affidavit that she reviewed, there is a factual and legal question as to whether she reviewed Exhibit B and thus summary judgment is inappropriate. We disagree. In her affidavit, Ostermann states, "a true and accurate copy of the amended and reinstated note which increased the principle balance due upon the promissory note to $180,229.83 and fixed interest rate at 4.000% is attached hereto as Exhibit [B]." While Ostermann misspelled "restated" as "reinstated," she referenced the attached Exhibit B, which is a copy of the amended and restated note.

{¶19} Further, Ostermann also averred in her affidavit that "a true and accurate copy of the Modification Agreement executed by Defendant, Bruce R. Sheperd, is attached hereto and incorporated herein as Exhibit [F]. The Modification Agreement increased the original loan amount of the mortgage to $180,229.83." The modified terms contained within the amended and restated note are also contained in the loan modification agreement executed by appellant. Appellant admits in his answer he executed both the amended and restated note along with the loan modification agreement. Accordingly, we find no issues of material fact as to Ostermann's affidavit.

Two Versions of the Amended and Restated Note

{¶20} Appellant next contends that, even if Exhibit B to Ostermann's affidavit is admissible and can be used as evidence in support of appellee's motion for summary judgment, summary judgment is inappropriate because the copy of the note filed with the complaint differs from the copy of the note attached to Ostermann's affidavit in support of the motion for summary judgment. The copy of the amended and restated note attached

to the complaint did not contain an endorsement. However, in April of 2016, appellee filed a notice of filing of amended Exhibit B. The amended and restated note is identical to the amended and restated note attached to the complaint, but includes a blank endorsement from Bank of America. The copy of the amended and restated note with the blank endorsement is also attached to Ostermann's affidavit in support of appellee's motion for summary judgment.

{¶21} Appellant cites two cases in support of his argument: *FV-I, Inc. v. Lackey*, 10th Dist. Franklin No. 13AP-983, 2014-Ohio-4944 and *U.S. Bank, N.A. v. George*, 10th Dist. Franklin No. 14AP-817, 2015-Ohio-4957. However, we find the instant case distinguishable from the cases cited by appellant. In *Lackey* and *George*, there was no information introduced to explain the inconsistencies between the note attached to the complaint and the note attached to the affidavit in support of the motion for summary judgment. The Tenth District held, "absent any explanation for the discrepancy between the two versions of the Note, and construing the evidence in favor of appellant as the party opposing summary judgment, it appears that there is a genuine issue of material fact as to whether appellee was entitled to enforce the Note." *Id.* In this case, Ostermann, in her affidavit, stated the "copy of the amended and restated note attached to the complaint as Exhibit [B] was a copy from Defendant's Loan file from origination and prior to the endorsement." Appellant offered no facts or evidence contradicting the explanation provided. Accordingly, the existence of both the endorsed note and unendorsed note in the record did not create a genuine issue of material fact. See *Deutsche Bank Nat'l Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657.

Enforceable Interest

{¶22} The current holder of the note and mortgage is the real party in interest in a foreclosure action and an entity must prove that it was the holder of the note and mortgage on the date that the foreclosure complaint was filed. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484. However, the Ohio Supreme Court has held that "proof of standing may be submitted subsequent to filing the complaint." *Id.* In this case, though the copy of the amended and restated note attached to the complaint did not contain the blank endorsement by Bank of America, the amended Exhibit B, filed in the case and later attached to Ostermann's affidavit, contained the endorsement.

{¶23} Here, the documents submitted with appellee's motion for summary judgment, a copy of the amended and restated note endorsed in blank and Ostermann's affidavit authenticating the amended and restated note and establishing that appellee had been in possession of the endorsed amended and restated note since the date the complaint was filed, demonstrate that appellee was the holder of the amended and restated note at the time it filed the complaint.

{¶24} Finally, while appellant focuses his argument on Ostermann's affidavit, appellee also submitted the affidavit of Valli, a document custodian employed by appellee's attorney. In Valli's affidavit, she stated she compared the original of both the note and the amended and restated note to the copies attached to her affidavit and they are true and accurate copies of the note and the amended and restated note. Further, that both the note and the amended and restated note are in a secure cabinet at the law office of appellee's counsel.

{¶25} Appellant provides no evidence to rebut the information contained in either Ostermann or Valli's affidavit. Based on the foregoing, we find the trial court did not err in finding appellee provided admissible evidence sufficient to show it was in possession of and entitle to enforce the amended and restated note. Appellant's first assignment of error is overruled.

II.

{¶26} In his second assignment of error, appellant contends the trial court erred in overruling his motion to strike Ostermann's affidavit. A trial court's decision to grant or deny a motion to strike will not be overturned on appeal absent a showing of an abuse of discretion. *Bank of America, N.A. v. Valentine*, 5th Dist. Delaware No. 14 CAE 07 0042, 2015-Ohio-1107. An abuse of discretion means the decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Crawford v. Cleveland*, 103 Ohio St.3d 196, 814 N.E.2d 1218 (2004).

{¶27} Appellant again argues Ostermann's testimony was inadmissible because she testified to reviewing an "Amended and Reinstated Note," rather than an amended and restated note. As discussed fully in appellant's first assignment of error, we find this argument to be not well-taken.

{¶28} Appellant also argues in his assignment of error that Ostermann's affidavit should be stricken because she lacked personal knowledge. Specifically, appellant argues Ostermann's affidavit should be stricken because she failed to demonstrate some personal knowledge that appellee boarded the records in the ordinary course of business or that she has knowledge the records had been boarded properly.

{¶29} Evidence Rule 803(6) provides that records of regularly conducted business activity are admissible, as an exception to the rules of hearsay, if shown to be such "by the testimony of the custodian or other qualified witness." The question of what may lay a foundation for the admissibility of business records as a custodian or other qualified witness must be answered broadly. *Citimortgage v. Cathcart*, 5th Dist. Stark No. 2013CA00179, 2014-Ohio-620. It is not a requirement that the witness have firsthand knowledge of the transaction giving rise to the business record. *Id.* "Rather, it must be demonstrated that: the witness is sufficiently familiar with operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Rule 803(6)." *Id.*

{¶30} Civil Rule 56(E) provides an affidavit must "be made on personal knowledge [and] set forth such facts as would be admissible in evidence." Civil Rule 56(E). A mere assertion of personal knowledge satisfies Civil Rule 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. *JPMorgan Chase v. Snedeker*, 5th Dist. Licking No. 13-CA-98, 2014-Ohio-1593.

{¶31} Ostermann is a Vice-President of appellee. In her affidavit, she avers that, in the regular performance on her job functions, she is familiar with business records maintained by Carrington for the purpose of servicing mortgage loans, including appellant's loan. Further, that these records are made at or near the time by persons with direct knowledge of the activity and transactions and are kept in the course of its regularly-

conducted business activity. Ostermann avers it is the regular practice of the mortgage servicing function to make the records and she has personally examined these business records reflecting data and information as of the date of the affidavit.

{¶32} Ostermann further stated in her affidavit that, to the extent the business records of the loan were created by a prior servicer, the prior servicer's records for the loan were integrated and boarded into Carrington's systems, such that the prior servicer's records concerning the loan are now part of Carrington's business records. Additionally, that Carrington maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records and it is the regular business practice of Carrington to integrate prior servicers' records into Carrington's business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions. Ostermann avers her review of the records indicates Carrington assumed the responsibility for servicing this loan from Bank of America on August 1, 2014 and, at the time of the transfer, the business records of the prior servicing agent were incorporated into the records of Carrington, which now relies upon the records in the ordinary course of its business.

{¶33} Ostermann stated that: Carrington had possession of appellant's promissory note; Carrington was in possession of that note at the time the complaint was filed; and the original note was sent to counsel for Carrington. Ostermann also averred that the copy of the amended and restated note attached to Carrington's complaint was a copy from appellant's loan file from origination and prior to endorsement. Further, the modification agreement increased the original loan amount. Ostermann stated Carrington

is the assignee of the mortgage. Additionally, Ostermann averred Carrington is owed $172,194.34 with interest accruing at the rate of 4% per annum from March 1, 2015.

{¶34} Ostermann specifically stated she had personal knowledge of the account. Further, from her position and her statement that she reviewed the loan records in the instant case, it may be reasonably inferred Ostermann has personal knowledge to qualify the documents as an exception to the hearsay rule as a business document. See *Freedom Mtge. Corp. v. Vitale*, 5th Dist. Tuscarawas No. 2013 AP 08 0037, 2014-Ohio-1549. The affidavit is properly admissible as Civil Rule 56 evidence and appellant fails to submit any Civil Rule 56 evidence to contradict the affidavit.

{¶35} Appellant argues Ostermann's averments that refer to the content and authenticity of records that were created and maintained by other entities before appellee became the servicer were inadmissible. Appellant is essentially arguing Ostermann did not have sufficient personal knowledge to authenticate the records. However, there is competent authority that a loan servicing agent may properly authenticate copies of business records and the affidavit of the bank's loan servicing agent provides a sufficient foundation for the admissibility of the relevant loan documents as business records under Evid.R. 803(6). *Wells Fargo v. Dawson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202; *Deutsche Bank Nat'l. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657; *Regions Bank v. Seimer*, 10th Dist. Franklin No. 13AP-542, 2014-Ohio-95.

{¶36} Further, the First District found that a successor entity can authenticate the business records of a predecessor so long as those records were: incorporated into the records of the testifying entity; relied upon by the testifying entity; so long as the other requirements of Evid.R. 803(6) are met; and the circumstances indicate that the records

are trustworthy. *Great Seneca Financial v. Felty*, 1st Dist. Hamilton No. C-050929, 2006-Ohio-6618. This Court adopted that logic in *U.S. Bank, N.A. v. Lawson*, 5th Dist. Delaware No. 13CAE030021, 2014-Ohio-463. Here, Ostermann stated the records at issue had been integrated and boarded into Carrington's systems and that Carrington maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. Further, that it is the regular business practice of Carrington to integrate these prior records and to rely upon these records. Appellant offered no facts or evidence contradicting these assertions or to indicate the records or the information in them lacked trustworthiness.

{¶37} Accordingly, we find the trial court did not abuse its discretion in denying appellant's motion to strike Ostermann's affidavit.

{¶38} Based upon the foregoing, appellant's assignments of error are overruled. The June 9, 2016 judgment entries of the Tuscarawas County Court of Common Pleas are affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, John J., concur

[Cite as *MADFAN, Inc. v. Makris*, 2017-Ohio-979.]

[Please see vacated opinion at 2016-Ohio-7395.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103655

MADFAN, INC., ET AL.

PLAINTIFFS-APPELLEES

vs.

DINO MAKRIS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-749225

BEFORE: S. Gallagher, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: March 9, 2017

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ON RECONSIDERATION[1]

SEAN C. GALLAGHER, J.:

{¶1} Michael Westerhaus appeals the $300,000 judgment entered against him after a jury trial, had upon MADFAN, Inc. ("MADFAN"), Fred Cieslik, Andrew Peloza, Alexander Stewart, and Michael Allen's complaint for fraud and conspiracy to commit the fraud. The four individuals will be referred to as "the shareholders" for the sake of simplicity, although several of the shareholders were directors of the corporation at one time or another. For the following reasons, we reverse and vacate the judgment with the added caveat that neither MADFAN nor the shareholders filed an appellate brief. Pursuant to App.R. 18(C), we accept Westerhaus's statements of facts and issues in his brief as correct and reverse the judgment because appellant's brief reasonably appears to sustain such action based on the trial record.

{¶2} In 2002, Dino Makris and the shareholders created MADFAN, the name of the corporation derived from an amalgamation of the founders' names. Westerhaus, an Ohio licensed attorney, provided the start-up and continuing legal services, and facilitated the filing of the articles of incorporation. By May 2004, the corporation issued shares to the shareholders and to Makris based on their respective initial contributions. The 348 shares were split evenly between the shareholders, who received 174 shares as a group,

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[1]The original announcement of decision, *MADFAN, Inc. v. Makris*, 8th Dist. Cuyahoga No. 103655, 2016-Ohio-7395, released October 20, 2016, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

and Makris, who received the remaining 174 shares. Makris owned another corporation, Olympic Investment Limited, Inc. ("Olympic Investment"). Makris's 174 shares in MADFAN were titled to Olympic Investment. The shareholders' prevailing theme was that Westerhaus testified to knowing that Makris titled his shares of MADFAN to Olympic Investment because other creditors were pursuing claims against Makris at the time MADFAN was incorporated.

{¶3} Most of the shareholders served as officers of MADFAN at one time or another. Allen served as the treasurer, and Stewart served as secretary until 2007. Peloza took over for Stewart in 2007. Makris served as the president of the corporation from the beginning and took over the responsibilities of treasurer in 2007, two years after the restaurant business began operating. Peloza served as the vice president from the beginning and also became the assistant treasurer in 2007. Peloza worked in the day-to-day operations of the establishment, claiming to have worked between 80-100 hours a week. He anticipated and was actually paid a salary, although the amount of the salary and what he received was not introduced. Tr. 107:13-15.

{¶4} MADFAN was incorporated to operate a restaurant, which opened for business in 2005. In 2004, each share of MADFAN exhibited a declared value of $500. There was no evidence as to the present value. Further, in 2007, all the shareholders agreed to loan MADFAN $106,500, with Olympic Investment providing $65,000 of that amount. Other than the interest to accrue, the terms of those loans are not in the record.

The business venture was initially successful, with the shareholders claiming decent revenues in one of the earlier years, but the restaurant finally closed in 2010.

{¶5} At the trial, the jury awarded the shareholders and MADFAN $300,000 against Westerhaus personally. Westerhaus moved for a directed verdict and a judgment notwithstanding the verdict, in pertinent part claiming insufficient evidence demonstrating damages. The trial court denied Westerhaus's motions.

{¶6} We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or judgment notwithstanding the verdict. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. A motion for directed verdict is properly granted if "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4). In other words, we must review whether the evidence was legally sufficient to sustain the jury's verdict. *Link v. FirstEnergy Corp.*, 147 Ohio St.3d 285, 2016-Ohio-5083, 64 N.E.3d 965, ¶ 22. If a jury award exceeds the damages sought at trial, although not always dispositive, it is safe to assume that something went awry. *See, e.g., J. Norman Stark Co., L.P.A. v. Santora*, 8th Dist. Cuyahoga No. 81543, 2004-Ohio-5960, ¶ 45, fn. 3 (jury's award exceeded the itemized damages, and therefore, the jury's verdict cannot be afforded any deference); *Bokar v. Lax*, 8th Dist. Cuyahoga No. 75929, 2000 Ohio App.

LEXIS 1654, *13-14 (Apr. 13, 2000) (without any evidence of itemized damages for the associated injury, the jury's verdict must be presumed to be speculative).

{¶7} "In order to prevail on a claim of conspiracy to defraud, the asserting party must prove both the elements of conspiracy and fraud." *GM Acceptance Corp. v. Hern Oldsmobile-GMC Truck*, 8th Dist. Cuyahoga No. 67921, 1995 Ohio App. LEXIS 3897, *27 (Sept. 7, 1995). Fraud, in turn, requires proof of six elements:

> (1) a representation or, where there is a duty to disclose, omission of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Stancik v. Deutsche Natl. Bank, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 51, citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984). Our focus in the current appeal is solely on the evidence demonstrating the final element, the actual injury proximately caused by the fraudulent acts.

{¶8} In doing so, we must bear in mind that in "Ohio, a tort recovery may not be had for damages which are speculative." *Johnson v. Univ. Hosps. of Cleveland*, 44 Ohio St.3d 49, 58, 540 N.E.2d 1370 (1989); *Carey v. Down River Specialties, Inc.*, 8th Dist. Cuyahoga No. 103595, 2016-Ohio-4864, ¶ 29. "'Ohio courts have generally followed, whether specifically noted or not, the principles set forth in the Restatement (Second) of Torts when discerning the propriety and amount of damages in fraud cases.'" *Northpoint Props. v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 32,

quoting *Auto Chem Laboratories, Inc. v. Turtle Wax, Inc.*, S.D.Ohio No. 3:07cv156, 2010 U.S. Dist. LEXIS 100677 (Sept. 24, 2010). The applicable provisions provide that one may recover for fraud, including in the concealment or omission, the difference in the value of what was actually received as compared against the purchase price or other value given. Restatement of the Law 2d, Torts, Section 549 (1977).

{¶9} As much emphasis as the shareholders placed on Westerhaus's alleged wrongdoing, none of that matters with respect to measuring damages for the alleged wrongful acts of the defendant. This appeal solely hinges on whether the shareholders presented sufficient evidence to sustain the $300,000 judgment entered in their favor.

{¶10} The only evidence of damages presented to the jury was the shareholders' initial purchase of the MADFAN shares totaling $87,000 and the $41,500 the shareholders loaned to the corporation pursuant to the meeting of the directors (the directors included three of the shareholders) on May 21, 2007. The jury's award of $300,000 in damages, therefore, was demonstrably speculative.

{¶11} There is no other evidence supporting that award, further punctuated by the fact that plaintiffs' counsel could not even offer a number or method of calculating damages during closing argument. *Carey v. Down River Specialties, Inc.*, 8th Dist. Cuyahoga No. 103595, 2016-Ohio-4864, ¶ 29; *Kinetico, Inc. v. Indep. Ohio Nail Co.*, 19 Ohio App.3d 26, 30, 482 N.E.2d 1345 (8th Dist.1984). The shareholders' claims for (1) lost profits (2) unpaid salaries, (3) $65,000 in rent arrearage paid by MADFAN, (4) Makris's purchases of food under MADFAN's accounts for other business ventures, and

(5) Makris's self-paid consulting fees were discussed at trial, but the shareholders failed to provide the jury a reasonable guide to computing an itemized value for those damages. The jury was left to speculate what the profits should have been or what salaries should have been paid.

{¶12} Further demonstrating the speculative nature of the final judgment, the shareholders' trial counsel invited the jury to award an indeterminate amount of damages to cover future debts should an unknown creditor ever seek repayment from the shareholders for unsubstantiated debts of MADFAN. *Fisher v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 14AP-188, 2015-Ohio-3592, ¶ 22 (future damages cannot be based on a mere guess or speculation; there must be some data on which a reasonable estimate of future expenses can be derived).

{¶13} Irrespective of that invitation to speculate, the only damages evidence of itemized or quantified damages introduced at trial was incomplete. As the jury was unambiguously instructed, the damages sought upon the fraud and civil conspiracy claims were "the actual damage directly caused by the fraud. The measure of damages in this case is the difference between the represented value and the actual value at the time of the transaction." Tr. 258:2-5, 260:11-14. "Actual damages" are not to be confused with a measure of those damages. Actual damages are defined as compensation for actual and real loss or injury. *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 18. The measure of damages, on the other hand, is the mechanism the jury uses to calculate the actual damages.

{¶14} With respect to the value of the corporate worth, there is no evidence of any ascertainable damages even if we assume that the shareholders individually had the right to recover for diminution of corporate worth caused by the fraudulent acts. *Adair v. Wozniak*, 23 Ohio St.3d 174, 178, 492 N.E.2d 426 (1986) (wrongdoing of a defendant damaging the corporate worth, demonstrated through the diminution in value of stock, accrues to the corporation and not to the shareholders individually). It should be noted that the shareholders did not tender the stock certificates — the subscription agreement and investment letter recording the transactions indicated the securities were not registered for the purposes of the Ohio Securities Act (R.C. Chapter 1707) — for the full amount paid pursuant to R.C. 1707.43. Purchasers of securities have the right to seek the full amount paid for a stock transaction from any person aiding the seller, based on the allegations of fraud in procuring the investment, within five years of the transaction. R.C. 1707.43. Rescission, or voiding the purchase of the 2004 stock transaction, to seek a return of the full value of the investment may not have been a remedy even available at the time the shareholders filed the complaint. *Kondrat v. Morris*, 118 Ohio App.3d 198, 205, 692 N.E.2d 246 (8th Dist.1997) (claims for fraudulent sale of unregistered securities are covered by the five-year statute of limitations found in R.C. 1707.43); *Metz v. Unizan Bank*, 649 F.3d 492, 499 (6th Cir.2011) (if the claim implicates securities fraud, which includes the fraudulent sale of shares of stock in a corporation under R.C. 1707.01(B), the five-year statute of limitations under R.C. 1707.43(B) applies). Regardless, the

shareholders limited their measure of damages at trial to the difference between the represented value of the purchased stock and its actual value.

> **{¶15}** Using the initial investments as a measure of damages necessarily implicates the value of the shares the shareholders received in consideration for the initial investment. In order to demonstrate injury, the shareholders had to demonstrate that the consideration received in exchange for the investment was worth less than anticipated because of the fraudulent misrepresentation. Restatement of the Law 2d, Torts, Section 549 (1977). Although the shares were initially valued at $500 per share in 2004, the shareholders failed to demonstrate the actual value of those shares in order to determine the damage caused by the fraudulent misrepresentation. This is fatal to the damages award. If, notwithstanding the falsity of the representation, the thing that the plaintiff acquires through the fraudulent transaction is of equal or greater value than the price paid and he has suffered no harm through using it in reliance upon its being as represented, he has suffered no loss and can recover nothing under the rule stated in this Clause.

Restatement of the Law 2d of Torts, Section 549, Comment on Clause (1)(a). In order to claim damages to their investments, the actual value of those shares must be determinable from the evidence so the jury could determine the difference between the actual value and

the $500 represented value of each share. Otherwise, the claim for damages is speculative.

{¶16} We acknowledge the possibility that the actual value of the shares could be derived from the valuation of the corporate worth. The shareholders only testified that the restaurant ceased operations; however, that evidence alone does not support an inference that the shares in the parent corporation are worthless so as to entitle the shareholders to full recovery of their stock purchase. To reach a conclusion as to the ending value of the shares, one would impermissibly be required to stack an inference — that MADFAN disposed of every asset after ceasing the restaurant's operations, which directly impacts the value of the shares — on top of another inference — that the sale of those assets was insufficient to cover all outstanding liabilities and buy out the dissatisfied shareholders. *Bier v. Am. Biltrite*, 8th Dist. Cuyahoga No. 97085, 2012-Ohio-1195, ¶ 22 (Ohio law precludes the stacking of inferences to prove a claim); *Mercer v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 13AP-447, 2013-Ohio-5607, ¶ 20 (drawing an inference from a deduction that itself is purely speculative and unsupported by established fact violates Ohio law).

{¶17} Moreover, we cannot presume that MADFAN's assets were entirely disposed of after the restaurant ceased operations. Ceasing business operations is not the same as liquidating a corporation's assets for the purpose of evaluating the value of the shareholders' remaining interest in the corporation. The diminution in value of the stock as a measure of damages to the corporate worth (among other measures of damages, such

as reduced earnings or accumulation of personal debt and liabilities from the company's financial decline) cannot be demonstrated through the value of the initial stock purchase alone. Determining the value of the shares requires a comprehensive inquiry into the corporation's assets, liabilities, and receivables. *See, e.g., Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 406, 513 N.E.2d 776 (1987) (the "fair cash value" a shareholder is entitled to receive for shares is the intrinsic value of the shares determined from the assets and liabilities of the corporation and consideration of every other factor bearing on value); R.C. 1701.01(N) (liquidation price is the "amount or portion of assets required to be distributed to the holders of shares of any class upon dissolution, liquidation, merger, or consolidation of the corporation, or upon sale of all or substantially all of its assets").

{¶18} Any damages caused by the alleged fraud and based on the value of the stock are impossible to determine and cannot be deduced from the fact that the restaurant ceased operations. Future business is but one factor to consider in determining the value of an investment into a corporate entity. In allowing the jury to consider a conclusion on the damages stemming from the shareholders' initial investment, the jury was required to speculate as to the value of those shares at the time of trial with no evidence of corporate assets, liabilities, or receivables. The evidence of damages from diminution in the value of the shares owned by the shareholders was not ascertainable based on the evidence in the record.

{¶19} Without evidence demonstrating damages, the plaintiffs were unable to establish each element of their claims at trial. Even if we assume that plaintiffs proved

every other element of the fraud and conspiracy to commit fraud claims, Westerhaus was entitled to a defense judgment as a matter of law on the damages issue alone. The trial court erred in not granting a directed verdict or judgment notwithstanding the verdict in favor of Westerhaus on the two alleged tort claims. The judgment against Westerhaus is reversed and vacated. Final judgment is entered in favor of Westerhaus.

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

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
EILEEN T. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION

EILEEN T. GALLAGHER, J., DISSENTING:

{¶20} I respectfully dissent because I believe there was sufficient evidence to support a modified damages award.

{¶21} The majority argues appellees limited their measure of damages to the difference between the represented value of their shares in MADFAN at the time of their purchase and its actual value. However, appellees did not allege securities fraud claim

pursuant to R.C. 1707.43, in which case damages might be limited to a difference in stock value at the time of the transaction. Indeed, the complaint does not mention R.C. 1707.43. Rather, appellees alleged that Westerhaus conspired with Makris to fleece the corporation over a period of time after the business had started making money.

{¶22} The majority acknowledges that damages could be determined from the valuation of corporate worth, but concludes there was insufficient evidence establishing a diminution in the value of corporate stocks as a result of Westerhaus's fraud and conspiracy to commit fraud because there was no evidence regarding the value of corporate assets, liabilities, or receivables. I believe there was sufficient evidence on which the jury could determine to a reasonable degree of certainty that the corporation was insolvent and, as a result, appellees' shares were worthless.

{¶23} There was evidence that (1) Andrew, who worked approximately 80 hours per week was not getting paid his salary "most of the time"; (2) none of the shareholders were receiving their share of the profits; (3) Olympic Investment was charging back rent for a two-year arrearage, pursuant to a lease that was executed without appellees' knowledge; (4) Makris was paying himself "consulting fees"; and (5) Makris was caught purchasing food for one of his other restaurants on MADFAN's account. There was also evidence that creditors were suing MADFAN and individual shareholders for unpaid bills, and the state of Ohio revoked its liquor license because MADFAN had not paid taxes. Indeed, Andrew testified "there was no money in the business." (Tr. 99.) Even

the building, which was owned by Olympic Investments, was subject to foreclosure proceedings.

{¶24} The assessment of damages is a matter within the province of the jury. *Wilburn v. Cleveland Elec. Illum. Co.*, 74 Ohio App.3d 401, 599 N.E.2d 301 (8th Dist.1991). Based on the evidence in the record, I would not disturb the jury's conclusion that MADFAN shares had no value. As noted by the majority, appellees initially invested $87,000 to purchase shares in MADFAN and later loaned $41,500 to the corporation for a total investment of $128,500. The jury reasonably concluded that appellees lost the entire amount of their investment in MADFAN as a result of Westerhaus's conspiracy to commit fraud with Makris. Therefore, I believe there was sufficient evidence to support a damages award in the amount of $128,500.

{¶25} I agree with the majority that not all of the jury's $300,000 damage award was supported by sufficient evidence. However, an appellate court has "the same power and control of verdicts and judgments as the trial court and may exercise [its] independent judgment on questions of excess damages if no passion or prejudice is apparent on the record." *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, ¶ 45 (8th Dist.), citing *Duracote Corp. v. Goodyear Tire & Rubber Co.*, 2 Ohio St.3d 160, 443 N.E.2d 184 (1983). Although a portion of the jury's $300,000 was excessive, the excess was based on speculation and there was no evidence of passion or prejudice. Therefore, I would modify and affirm the trial court's judgment by ordering a remittitur of $171,500,

which represents the difference between the jury's award of $300,000 and the $128,500 in damages supported by the evidence, in accordance with *Berry*.

[Cite as *Wright State Univ. v. Fraternal Order of Police*, 2017-Ohio-854.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

WRIGHT STATE UNIVERSITY	:	
	:	Appellate Case No. 2016-CA-35
Plaintiff-Appellant	:	
	:	Trial Court Case No. 16-CV-36
v.	:	
	:	(Civil appeal from Greene
FRATERNAL ORDER OF POLICE,	:	County Common Pleas Court)
OHIO LABOR COUNCIL, INC.,	:	
POLICE OFFICERS AND POLICE	:	
SERGEANTS	:	
Defendants-Appellees		

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O P I N I O N

Rendered on the 10th day of March, 2017.

. . . . . .

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TUCKER, J.

{¶ 1} Plaintiff-appellant, Wright State University ("WSU"), appeals from a decision of the Greene County Court of Common Pleas denying its application to vacate an arbitrator's decision that modified the discipline imposed by WSU upon the grievant, University Police Officer Marcus Wyatt. WSU challenges the court's finding that the arbitrator did not exceed his authority under the terms of the collective bargaining agreement between it and the police union. WSU further challenges the court's decision, claiming that reinstatement of the officer violates public policy.

{¶ 2} We conclude that the court did not err in finding that the arbitrator did not exceed his authority. Thus, we conclude that the court did not err in denying the application to vacate. We further conclude that the arbitrator's award does not violate public policy. Accordingly, the judgment of the common pleas court is affirmed.

I. Facts and Procedural History

{¶ 3} WSU maintains a campus police department providing law enforcement services to its entire campus. The university employs campus police officers and police sergeants. Both groups of officers share the same Collective Bargaining Agreement ("CBA"). The Fraternal Order of Police/Ohio Labor Council ("FOP") represents both the officers and the sergeants.

{¶ 4} WSU hired Marcus Wyatt in 1997. He was promoted to sergeant in 2004. On December 6, 2014, Wyatt was scheduled to work during two events at a WSU venue. The first event was scheduled to begin at 3:00 p.m., with the second event set to start five hours later. When Wyatt arrived for a briefing prior to the first event, he was asked if he

had seen another officer, Stefan Kempf, who was also scheduled to work during both events. Wyatt indicated that he had not. He then called Kempf, who stated that he did not realize he was scheduled to work at the earlier event, and that he would report for duty as quickly as possible.

{¶ 5} Wyatt then called Lieutenant Jon Cross, and told him that Kempf was having vehicle problems, but that he was on his way to work. When Kempf arrived, he informed Cross that he did not have vehicle issues, but rather, had failed to read an email regarding his work schedule.

{¶ 6} Cross informed WSU Police Chief David Finnie about the incident. Wyatt was placed on administrative leave pending an investigation. Wyatt readily admitted that he had provided incorrect information to Cross regarding Kempf's late arrival to work. Finnie determined that Wyatt had violated WSU Police Department polices. These policies included requirements of honesty, truthfulness, reporting information properly, conduct becoming an officer, and satisfactory performance.

{¶ 7} A due process meeting was held in January 2015, following which Wyatt's employment was terminated. Wyatt and the FOP challenged his termination, and the matter was submitted to binding arbitration in accordance with the CBA. The parties submitted the following as their issue for determination by the arbitrator, "[d]id the University have just cause to terminate [Wyatt], and if not, what shall be the remedy?" A hearing was conducted in August 2015.

{¶ 8} Of relevance to this appeal, the CBA contains the following provisions that were relied upon by the parties and the arbitrator:

Article 3 – Management Rights

Unless expressly provided to the contrary by a specific provision of this Agreement, the University reserves and retains solely and exclusively all of its rights to manage the operation of the Police Department.

These rights shall include, but are not limited to, the right of the University to:

* * *

G. suspend, discipline, demote, or discharge for just cause * * *.

* * *

The University is not required to bargain over its management decisions or on subjects reserved to management except as provided by the provisions of ORC 4117. The Union may raise a legitimate complaint or file a grievance based on the Collective Bargaining Agreement.

Article 11 – Grievance and Arbitration Procedure

Section 5 – Arbitration Decision

* * *

Only disputes involving the interpretation or application of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add or subtract from or modify any of the terms of this Agreement, nor shall the arbitrator substitute the arbitrator's discretion for that of the University or impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

Article 17 – Corrective Action

Section 1 – Representation. The University shall not discipline a non-probationary employee without just cause. Employees shall be entitled to union representation at any level of the discipline process. * * *

Section 2 – Offenses. Administering discipline is a management right. The University's decision to administer a certain level of discipline for a given offense shall be based on the facts and circumstances of each situation. * * *

Examples (list not inclusive) of minor offenses best addressed by progressive discipline include poor performance, chronic absenteeism, disregard for instructions and/or work procedures, absence from an assigned work area without significant reason, extended break or meal periods that constitute an absence from the employee's assigned work area, late arrivals and/or early quits, minor insubordination, minor negligent damage to University equipment and/or property, and other similar types of offenses.

Examples (list not inclusive) of major offenses best addressed by accelerated discipline include cases of the use, sale, or possession of controlled substances on the job, arriving for work intoxicated or otherwise impaired by substance abuse or ingestion, theft, fraud, verbal and/or physical threat to another person, serious and/or chronic disregard for safety policies, instructions and/or work procedures, ethnic intimidation, major intentional damage to University equipment and/or property, sleeping

on the job, gross insubordination, or similar serious offenses.

Section 3 – Progressive Discipline. Discipline is cumulative. Any written form of discipline for any matter is considered in determining a greater level of discipline for any subsequent offenses. Discipline shall take into account the nature of the violation, the employee's work record, the employee's disciplinary record and his length of service with the department. * * *

* * *

Section 5 – Potential Levels of Discipline. The University will administer a system of discipline based on its assessment of the circumstances. Discipline may include: (1) verbal warning; (2) written warning; (3) suspension or demotion (reassignment); and (4) termination of employment; depending on the nature and seriousness of any infraction.

Section 6 – Arbitration. With respect to discipline under this Article, only suspensions, demotions and terminations of employment are arbitrable.

{¶ 9} Following the hearing, the arbitrator determined that WSU had just cause to discipline Wyatt for making an untruthful statement, but that it lacked just cause to terminate his employment. The arbitrator modified the discipline to a written warning and ordered that Wyatt be reinstated with full benefits.

{¶ 10} WSU filed an application to vacate the arbitrator's award with the Greene County Court of Common Pleas. The court found that the arbitrator's award was appropriate and denied the application to vacate. This appeal follows.

II. A Court's Scope of Review of an Arbitrator's Award is Narrow.

{¶ 11} "Public policy favors arbitration." *Cincinnati v. Queen City Lodge No. 69, Fraternal Order of Police*, 164 Ohio App.3d 408, 2005-Ohio-6225, 842 N.E.2d 588, ¶ 14 (1st Dist.), quoting *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 742 N.E.2d 630 (2001). "Arbitration 'provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.' " *Cleveland v. Cleveland Police Patrolmen's Assn.*, 2016-Ohio-702, 47 N.E.3d 904, ¶ 21 (8th Dist.), *appeal not allowed*, 146 Ohio St.3d 1430, 2016-Ohio-4606, 52 N.E.3d 1204, quoting *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83, 488 N.E.2d 872 (1986).

{¶ 12} "Judicial review of arbitration awards is limited in order to encourage parties to resolve their disputes in arbitration." *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, ¶ 16 (2d Dist.). The vacation of an arbitrator's award is permitted when the court finds that one of the conditions set forth in R.C. 2711.10 exists. *Id.* at ¶ 19. Pursuant to R.C. 2711.10(D), the court of common pleas may vacate an award if it finds that the arbitrator exceeded his or her powers. In order to determine whether an arbitrator has exceeded his or her authority, a court must look to whether the award "draws its essence" from the CBA. *Queen City Lodge No. 69, Fraternal Order of Police*, 164 Ohio App.3d 408, 2005-Ohio-6225, 842 N.E.2d 588, ¶ 17 (1st Dist.). An award satisfies this requirement when there is a rational nexus between the CBA and the award. *Id.* at ¶ 18.

{¶ 13} Further, "[t]he comments to R.C. 2711.10, the statute governing judicial

vacation [of arbitration awards,] explain, [that] '[t]he arbitrators are the sole judges of the law and of the evidence[,] and no vacation of an award will be had because of their misconstruction of the facts or of the law." *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, ¶ 18 (2d Dist.). "It is because arbitration is a creature of private contract that courts must ignore errors of fact or law." *Id.* "Critically then, in reviewing an arbitrator's award, the court must distinguish between an arbitrator's act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate; the latter is not." *Id.*

III. The Arbitrator did not Exceed his Authority.

{¶ 14} The first Assignment of Error set forth by WSU states as follows:

> OHIO LAW MANDATES THAT THE COURT VACATE AN ARBITRATION AWARD WHEN AN ARBITRATOR EXCEEDS THE AUTHORITY GRANTED TO HIM BY THE PARTIES UNDER THEIR COLLECTIVE BARGAINING AGREEMENT.

{¶ 15} WSU contends that the arbitrator's award must be vacated because the arbitrator exceeded his authority when he modified the discipline imposed by the university. In support, the university argues that once there is a finding of just cause to discipline, the CBA does not permit the arbitrator to substitute his judgment regarding the type of discipline imposed. The university also contends that the award must be vacated because the arbitrator limited the testimony of one witness, and refused to hear the testimony of a proposed expert.

{¶ 16} Pursuant to the CBA executed by the parties, WSU may discipline an

employee only upon a finding of "just cause." However, the agreement does not define "just cause." Without such a definition or limitation, the arbitrator must make two determinations in deciding whether an employer has disciplined and discharged an employee for just cause: "(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances." *Cleveland Police Patrolmen's Assn.*, 2016-Ohio-702 at ¶ 28. Thus, whether WSU had just cause to terminate Wyatt is a factual determination for the arbitrator to make in accordance with the terms of the CBA. *Id.*

{¶ 17} WSU contends that once the arbitrator determined there was just cause to find that Wyatt committed an offense, his inquiry ended. However, "[a]bsent language in a collective-bargaining agreement that restricts the arbitrator's power to review, if the arbitrator determines that there was just cause to discipline an employee, the arbitrator is not required to defer to the employer as to the type of discipline imposed." *Queen City Lodge No. 69, Fraternal Order of Police*, 2005-Ohio-6225, ¶ 21. We are cognizant that "[t]he fact that an arbitrator may review the appropriateness of the type of discipline imposed after determining that just cause exists for discipline does not mean, however, that the arbitrator can issue an arbitration award, modifying the discipline imposed, that conflicts with the express terms of the agreement. Where the collective bargaining agreement sets forth 'predetermined' levels of discipline or otherwise limits the authority of the arbitrator to review the discipline imposed, those limitations will be enforced." *Cleveland Police Patrolmen's Assn.* at ¶ 28.

{¶ 18} In this case, we find nothing in the CBA to prevent the arbitrator from reviewing the appropriateness of the discipline imposed. The CBA does not set forth a

predetermined level of discipline nor a matrix to follow when determining what discipline is required. The only restrictions imposed thereon are found in Article 11, Section 5, which prohibits an arbitrator from adding to, subtracting from or modifying the language of the CBA, and prevents the arbitrator from substituting his discretion for that of the university.

{¶ 19} WSU is correct that the CBA provides it with the exclusive right to manage discipline as set forth in Article 3 and Article 17, Section 2 of the CBA. It is also correct that the CBA states that the arbitrator cannot substitute his discretion for that of the university. However, these restrictions are necessarily modified by the fact that the CBA provides that discipline is subject to a determination of just cause, which as discussed above is, in this case, a factual determination for the arbitrator. Also, the CBA invites review of the level of discipline by providing that the level and type of discipline must be determined by the facts and circumstances of each situation, including the nature and seriousness of the offense, as well as consideration of the employee's work record, disciplinary record, and length of service. Arcticle 17, Sections 2, 3 and 5.

{¶ 20} WSU further argues that the modification of the discipline is not warranted by the terms of the CBA because Wyatt has been the subject of two prior disciplinary actions, one of which involved a suspension. WSU notes that its progressive discipline language requires that Wyatt not receive less discipline than meted out in his prior case. We note there is nothing in this record regarding any prior discipline other than the arbitrator's finding that he was subject to two minor disciplinary actions. Nor is there any competent evidence to indicate the level of discipline imposed. Even if the university is correct regarding the level of the prior discipline, any error is one of fact, and is not

reviewable.

{¶ 21} The CBA provides examples of minor offenses that are subject to progressive discipline. It also gives examples of major offenses subject to accelerated discipline. The offense at issue here is not expressly provided for in either category. There is no definition of accelerated discipline set forth in the CBA, and the definition of progressive discipline indicates that the facts and circumstances must be considered in determining discipline. Further, the level of discipline that can be imposed ranges from a verbal warning to termination, and under the terms of the CBA is dependent upon an assessment of the nature and seriousness of the infraction. Again, this is a factual determination for the arbitrator.

{¶ 22} WSU could have negotiated with the FOP for the inclusion in the CBA of a specific definition of just cause, a more limited review of its disciplinary actions, or for the absolute right to terminate an employee for any action involving dishonesty. It did not. Thus, in the absence of such an express provision, the arbitrator was entitled to determine the meaning of just cause as well as the penalty imposed for any infraction.

{¶ 23} We conclude that the arbitrator was entitled to review the level of discipline imposed in this case and to determine whether WSU had just cause for the level it chose. Since the arbitrator had that power, and since he utilized a level of discipline permitted by the CBA, we conclude his decision drew from the essence of the CBA. Thus, we conclude that the common pleas court did not err in finding that the arbitrator did not exceed his authority. This conclusion is consistent with the parties' statement regarding the issue for determination by the arbitrator, with this issue being, "[d]id the University have just cause to terminate [Wyatt], and if not, what shall be the remedy?"

{¶ 24} We next turn to the claim that the award must be vacated because the arbitrator did not permit WSU to present certain testimony. Specifically, WSU argues that the arbitrator refused to permit Kempf to testify as to the impact Wyatt's offense had on him, and refused to permit the testimony of an expert witness on the importance of police officer honesty and the effect of dishonesty as it pertains to the WSU police department's duty to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). WSU cites *Bordonaro v. Merrill Lynch, Pierce, Fenner & Smith*, 156 Ohio App.3d 358, 2004-Ohio-741, 805 N.E.2d 1138, ¶ 7 (8th Dist.) for the proposition that an arbitration award should be vacated if an expert witness is not permitted to testify.

{¶ 25} Generally, the rules of evidence are more relaxed during arbitration hearings, and an arbitrator has wide discretion regarding evidence. *Bordonaro*, at ¶ 7. "However, if the exclusion or admission of evidence during an arbitration results in a gross procedural impropriety, vacating the award is then required." *Id.*

{¶ 26} We begin by noting that we find *Bordonaro* distinguishable from the facts at hand. *Bordonaro* involved an action similar to malpractice over a claim that the defendants had mishandled, and given negligent advice on, the plaintiff's securities accounts. *Id.* at ¶ 2. The arbitrators did not permit expert testimony on "industry customs and practices and the applicable standard of care in this case." *Id.* at ¶ 9. The court of appeals found that this error required vacation of the award because, absent testimony on the standard of care, there was no means for determining how the arbitrator reached its decision finding no liability. *Id.* at ¶ 27. While expert testimony would be necessary in a securities case, or for example in a medical malpractice case, here there

is no issue of an applicable standard of care.

{¶ 27} We cannot disagree with the arbitrator's decision not to allow Kempf's testimony on the issue of how Wyatt's actions personally affected Kempf. The arbitrator did not allow Kempf's testimony based upon the conclusion such testimony was not relevant. This was a legal determination solely within the arbitrator's purview. Such a determination cannot be the basis for vacation of an arbitration award. Further, such information was set forth as an exhibit to the post-brief that WSU was permitted to file.

{¶ 28} With regard to the expert's testimony regarding *Brady* issues raised by Wyatt's actons, we agree with the FOP that this constituted a matter of legal interpretation that was capable of being, and actually was, briefed by WSU. Further, it is not clear from our record whether the arbitrator completely rejected the expert's testimony, or whether he merely ordered that it be included in the post-trial brief. Indeed, the university dedicated numerous pages of the post-trial brief to a discussion of *Brady* as it relates to officer dishonesty.

{¶ 29} Based upon our review of the record, we cannot conclude that the arbitrator exceeded his authority. We further cannot conclude that the failure to permit Kempf and the expert to testify as to the effect of Wyatt's offense requires vacation of the award. Thus, we conclude that the common pleas court did not err by denying WSU's application to vacate the arbitration award.

{¶ 30} Accordingly, the first Assignment of Error is overruled.

IV. Wyatt's Reinstatement Does Not Violate Public Policy.

{¶ 31} WSU's second Assignment of Error provides as follows:

THE AWARD MUST BE VACATED BECAUSE REINSTATEMENT OF THE GRIEVANT, A DISHONEST POLICE OFFICER WHO LIED TO HIS LIEUTENANT WHILE ON DUTY, WOULD VIOLATE WELL ESTABLISHED OHIO PUBLIC POLICY.

{¶ 32} WSU contends that the common pleas court was required to vacate the arbitration award because the reinstatement of Wyatt violates Ohio public policy which mandates that police officers are held to a higher standard of conduct than the general public, especially regarding issues of honesty.

{¶ 33} "The Ohio Supreme Court has recognized that, if an arbitrator's interpretation of a CBA violates public policy, the resulting award is unenforceable." *Fraternal Order of Police Lodge 8 v. Cleveland*, 8th Dist. Cuyahoga No. 102565, 2015-Ohio-4188, ¶ 25, *appeal not allowed*, 145 Ohio St.3d 1409, 2016-Ohio-899, 46 N.E.3d 703, citing *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627,* 91 Ohio St.3d 108, 112, 742 N.E.2d 630 (2001), citing *W.R. Grace & Co. v. Local Union 759, Internatl. Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). The public policy "must be well[-]defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *W.R. Grace & Co.* at 766.

{¶ 34} However, the issue is not whether the officer's conduct violated some public policy, but whether the arbitrator's reinstatement order did so. *Dayton v. AFSCME, Ohio Council 8*, 2d Dist. Montgomery No. 21092, 2005–Ohio–6392, ¶ 23, citing *Southwest Ohio Regional Transit Auth.* at 112–113, 742 N.E.2d 630; *see also Cleveland Police*

Patrolmen's Assn., 2016-Ohio-702, 47 N.E.3d 904, ¶ 44 (8th Dist.). "A court may refuse to enforce an [arbitration] award when specific terms in the contract would violate public policy, but there is no broad power to set aside an arbitration award as against public policy." *AFSCME, Ohio Council 8*, at ¶ 23, quoting *Board of County Comm'rs v. L. Robert Kimball and Assoc.*, 860 F.2d 683, 686 (6th Cir. 1988).

{¶ 35} "Public policy, however, does not demand that the [university] have unbridled authority to terminate its employees for their misconduct. In its collective bargaining agreement with the FOP, the [university] bargained for the right to terminate or otherwise discipline police officers for just cause and to have an arbitrator review the propriety of its actions if other efforts to resolve disputes between the [university] and the FOP failed. There is nothing against public policy about enforcing this agreement." *City of Dayton v. Fraternal Order of Police*, 2d Dist. Montgomery No. 18158, 2000 WL 706829, * 5 (June 2, 2000).

{¶ 36} We do not question that officer honesty and integrity are vital. And we certainly do not condone Wyatt's actions. However, WSU does not cite, and we cannot find, any public policy that renders unlawful an arbitration award reinstating an officer in this type of situation. Accordingly, the second Assignment of Error is overruled.

V. Conclusion

{¶ 37} Both of the Assignments of Error set forth by WSU are overruled, and the judgment of the common pleas court is Affirmed.

. . . . . .

DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

Michael DeWine
David S. Kessler
Kay E. Cremeans
Paul L. Cox
Hon. Stephen Wolaver

[Cite as *Zook v. JPMorgan Chase Bank*, 2017-Ohio-838.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jeffrey Zook et al.,	:	
Plaintiffs-Appellees,	:	
OhioHealth Foundation, Inc. et al.,	:	No. 15AP-750 (C.P.C. No. 13CV-6033)
[Involuntary] Plaintiffs-Appellants,	:	(REGULAR CALENDAR)
v.	:	
JPMorgan Chase Bank National Association,	:	
Defendant-Appellee.	:	
Jeffrey Zook et al.,	:	
Plaintiffs-Appellants,	:	
OhioHealth Foundation, Inc. et al.,	:	No. 15AP-751 (C.P.C. No. 13CV-6033)
[Involuntary] Plaintiffs-Appellees,	:	(REGULAR CALENDAR)
v.	:	
JPMorgan Chase Bank National Association,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 9, 2017

On brief: *Robert Gray Palmer Co., LPA*, and *Robert G. Palmer*; *Paul A. Bodycombe*, for Jeffrey Zook, Karla

Hindman, Kimberly Heath-Goodman, Cynthia Wolfe, Sean Zook, and Jason Zook. **Argued:** *Robert G. Palmer*.

On brief: *Dreyfuss Williams & Associates Co., L.P.A.*, *John F. Garswood*, *Nicholas J. Kopcho*, and *Michael T. Williams*, for OhioHealth Foundation, Inc. and Columbus Museum of Art.

On brief: *Carpenter Lipps & Leland LLP*, *Jeffrey A. Lipps*, and *Angela Paul Whitfield*, for JPMorgan Chase Bank, N.A. **Argued:** *Jeffrey A. Lipps*.

APPEALS from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} This is an action by beneficiaries of a trust bringing claims against the institutional trustee for negligence and breach of fiduciary duty. Plaintiffs-appellants Jeffrey Zook, Karla Hindman, Kimberly Heath-Goodman, Cynthia Wolfe, Sean Zook, and Jason Zook (the "Zook plaintiffs") appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, JPMorgan Chase Bank, N.A. ("Chase"). Involuntary plaintiffs-appellants, OhioHealth Foundation, Inc. and Columbus Museum of Art ("involuntary plaintiffs") together filed a separate notice of appeal from the same judgment. This court has consolidated the two appeals for argument and determination.

{¶ 2} On October 10, 1990, John D. Zook ("John Zook Sr.") executed a last will and testament and created the John D. Zook Trust. John Zook Sr. named his wife, Sharon Zook, as income beneficiary of the trust, and selected Chase's corporate predecessor, Bank One, as successor trustee of the trust upon his death. The remainder beneficiaries of the trust at inception were the five adult children of John Zook Sr. by a previous marriage, John Zook Jr., Jeffrey, Karla, Kimberly, and Cynthia, as well as predecessor entities for the two charities that have become involuntary plaintiffs in the case. Under Article VII of the trust instrument, the trust would terminate upon the death of Sharon and distribute all remaining assets to the remainder beneficiaries.

{¶ 3} On November 26, 1995, John Zook Sr. died and Chase became successor trustee of the trust. At that time, the greater part of trust assets were comprised of a

controlling interest in Zook Advertising, Inc. ("Zook Advertising") a business founded and operated by John Zook Sr.

{¶ 4} Article X of the trust instrument states in part:

> Being aware of the fact that the duties the Trustee has been requested to assume with respect to the business interests may considerably enlarge and increase the Trustee's usual responsibilities, duties, and work as Trustee, it is agreed that the Trustee shall be entitled to such additional reasonable compensation as is commensurate with the time, effort, and responsibility involved in the Trustee's performance of services rendered to the business may be paid by the Trustee from the business or from other assets, or from both, as the Trustee in the Trustee's discretion may determine to be advisable.
>
> Upon the death of the Grantor, the Grantor's spouse, SHARON G. ZOOK, shall have the right to either operate and manage any business and/or real estate (whether corporate, partnership, or proprietary in form) in which the Grantor had an interest at the time of Grantor's death which becomes a part of this trust, or designate any third party acceptable to the Trustee to operate and manage any such business, but subject to a management contract that either SHARON G. ZOOK or her designee must enter into with the Trustee.

{¶ 5} After John Zook Sr. died, Sharon immediately took over operation and control of Zook Advertising although she and Chase never entered into the management agreement required by Article X. When John Zook Sr.'s majority ownership interest, comprising 148 shares out of 150 issued and transferred to the trust in January 1997, Zook Advertising had an appraised value of $1,036,000.00 on the trust accounts and probate inventory. The balance of other trust assets at that time amounted to $258,904.69.

{¶ 6} The business thereafter went into a rapid decline under Sharon's management. The shares of Zook Advertising remained an asset of the trust until 2003, at which time Chase considered that the business was not only worthless but presented a significant risk of liability that could compromise the other assets still held by the trust. Chase then sold the trust's 148 shares to Sharon for the nominal figure of $5 per share, or $740.00 total. Shortly thereafter, Zook Advertising ceased business entirely.

{¶ 7} In 2010, Sharon died. Her death triggered termination and distribution of the trust under Article VII of the trust instrument. Due to the intervening death of John Zook Jr. in 2003, two grandchildren of John Zook Sr., Jason and Sean Zook, had become remainder beneficiaries by this time under Article VII(1)(a), alongside the four surviving children and the charities.

{¶ 8} David Curry, a Chase employee, sent a letter to each remainder beneficiary, advising that Chase would provide a "Receipt, Release and Refunding Agreement" for signature by each beneficiary so that Chase could close the trust and distribute the corpus. In his letter to the beneficiaries, Curry summed up the terms of the release agreement: "These agreements basically state that you acknowledge receipt of the assets, agree to release the Bank for the administration of the trust and also to refund any funds distributed out should additional taxes, bills or expenses be owed after we have released the funds."

{¶ 9} Each of the Zook plaintiffs and involuntary plaintiffs eventually signed such a release, which states in pertinent part as follows:

> NOW, THEREFORE, in order to induce the Trustee to terminate the Trusts without seeking formal court approval of its accounting, and to distribute all of the Trusts' assets to Jeffrey A. Zook, Karla L. Zook, Kimberly A. Heath, Cynthia A. Wolfe, Jason Zook, Sean Zook, OhioHealth Foundation, and Columbus Museum of Art, and in consideration of the premises and other good and valuable consideration, receipt of which is hereby acknowledged, the undersigned, Jeffrey A. Zook, Karla L. Zook, Kimberly A. Heath, Cynthia A. Wolfe, Jason Zook, Sean Zook, OhioHealth Foundation, and Columbus Museum of Art remainder beneficiaries of the Trust (hereafter called the "Beneficiaries"), for themselves and their descendants, spouse, heirs, successors, assigns and legal representatives, agree and covenant as follows:
>
> That the accounting of receipts, disbursements and transactions of JPMorgan Chase Bank, National Association as Trustee from the inception of the Trusts to the date hereof are correct and approved, and all of the acts, doings, administration, and omissions of JPMorgan Chase Bank, National Association with respect to the Trusts are hereby ratified, affirmed and approved;

> That JPMorgan Chase Bank, National Association, as soon as is practicable, shall deliver the assets of the Trusts, including principal and any accrued or unpaid income to the Beneficiaries in the percentages specified as follows: Jeffrey A. Zook 8%, Karla L. Zook 8%, Kimberly A. Heath 8%, Cynthia A. Wolfe 8%; Jason Zook 4%, Sean Zook 4%, OhioHealth Foundation 50%, and Columbus Museum of Art 10%;
>
> That effective immediately, JPMorgan Chase Bank, National Association is released and discharged for having acted as Trustee of the Trusts and the Trusts are considered terminated;
>
> That Jeffrey A. Zook, Karla L. Zook, Kimberly A. Heath, Cynthia A. Wolfe, Jason Zook, Sean Zook, OhioHealth Foundation, and Columbus Museum of Art, remainder beneficiaries of the Trust, hereby agree to release, indemnify, defend and hold harmless JPMorgan Chase Bank, National Association, both as a Trustee of the Trusts and in its individual capacity, its affiliates and their respective officers, directors, employees, stockholders, successors, predecessors, assigns and representatives, against any and all action, inaction, grounds for complaint, and any causes of action, in law or in equity, suits, debts, liens, contracts, promises, taxes, interest, penalties, liabilities, losses, claims, expenses (including legal and other professional fees), costs or other demands which it may incur or which may be charged against it by reason of its acting as Trustee of the Trusts * * *.

(Emphasis sic.)

{¶ 10} Chase began distributing the remaining trust assets to beneficiaries in June 2011. On May 31, 2013, the Zook plaintiffs filed a complaint against Chase stating claims for breach of fiduciary duty and negligence, and adding a demand for an accounting and audit. These claims rested on the loss to trust corpus that resulted from the decline in value of Zook Advertising shares during Chase's oversight of the trust. The Columbus Museum of Art and the OhioHealth Foundation, Inc. were named as involuntary plaintiffs based on their status as remainder beneficiaries.

{¶ 11} On August 30, 2013, Chase filed a motion for judgment on the pleadings. On September 4, 2013, Chase filed an answer, counterclaim, and third-party complaint. The counterclaim alleged claims for breach and declaratory judgment against the Zook

plaintiffs. The third-party complaint sought indemnification from the estate of Sharon Zook. On September 23, 2013, the involuntary plaintiffs filed an answer to the Zook plaintiffs' complaint. On October 16, 2013, the Zook plaintiffs filed a memorandum contra Chase's motion for judgment on the pleadings.

{¶ 12} By entry filed March 24, 2014, the trial court granted in part and denied in part Chase's motion for judgment on the pleadings. Specifically, the court found that the involuntary plaintiffs had conceded that their claims against Chase were barred by the terms of a release and that Chase was entitled to judgment on the pleadings as to these parties. The court further agreed with Chase's contention that the Zook plaintiffs' claims for an accounting and audit were remedies and not separate causes of action. Accordingly, the court found Chase was entitled to judgment on the pleadings on that issue. The trial court denied Chase's motion for judgment on the pleadings as to the remaining claims by the Zook plaintiffs.

{¶ 13} On April 23, 2014, the involuntary plaintiffs filed a notice of appeal from the trial court's entry granting in part Chase's motion for judgment on the pleadings. On April 25, 2014, the Zook plaintiffs filed an amended complaint. On May 12, 2014, Chase filed an answer to the amended complaint, restating the prior counterclaims but not addressing its previous third-party claims against the estate of Sharon Zook.

{¶ 14} On May 15, 2014, the involuntary plaintiffs filed a motion for reconsideration with the trial court requesting the court reconsider its entry granting judgment on the pleadings in favor of Chase as to the involuntary plaintiffs. On June 3, 2014, Chase filed a response to the involuntary plaintiffs' motion for reconsideration. On June 9, 2014, the Zook plaintiffs filed a reply to Chase's counterclaim. By entry filed June 18, 2014, the trial court granted the involuntary plaintiffs' motion for reconsideration and vacated the judgment on the pleadings previously entered against them. As a result, the involuntary plaintiffs dismissed their first appeal to this court from the trial court's entry granting in part Chase's motion for judgment on the pleadings. *Zook v. JPMorgan Chase Bank, N.A.*, 10th Dist. No. 14AP-342 (June 16, 2014 journal entry of dismissal).

{¶ 15} On September 16, 2014, the Zook plaintiffs filed a second amended complaint restating their claims for negligence and breach of fiduciary duty. This is now

the operative complaint in the matter. On October 1, 2014, Chase filed an answer to the second amended complaint. This pleading does not modify the prior counterclaim against the Zook plaintiffs. On October 31, 2014, the involuntary plaintiffs filed separate answers to the second amended complaint.

{¶ 16} On April 30, 2015, Chase filed a motion for summary judgment asserting that the beneficiaries' claims were barred by the releases and barred by the two-year statute of limitations imposed by R.C. 5810.05 on actions against a trustee. Chase also argued that the beneficiaries could not commence the action without tendering back the sums they had received upon distribution, and that the negligence claim was duplicative of the breach of fiduciary duty claim. On May 12, 2015, the involuntary plaintiffs filed a response to Chase's motion for summary judgment. On May 22, 2015, the Zook plaintiffs filed a memorandum contra Chase's motion for summary judgment.

{¶ 17} On July 1, 2015, the trial court conducted an oral hearing on the summary judgment motion. The court then rendered a decision from the bench granting summary judgment on the basis that the releases barred any breach of fiduciary duty claim and the negligence claim was subsumed into a breach claim and similarly barred. The court expressly rejected Chase's statute of limitations and tender arguments. By entry filed July 7, 2015, the trial court journalized its decision and granted summary judgment in favor of Chase on all claims in the second amended complaint. The entry did not dispose of Chase's counterclaims. On August 5, 2015, the trial court entered a nunc pro tunc order to add Civ.R. 54(B) language and allow an immediate appeal without disposing of Chase's counterclaims and third-party complaint.

{¶ 18} On appeal, the Zook plaintiffs set forth the following assignment of error for this court's review:

> THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS ZOOKS IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE JPMORGAN CHASE BANK, N.A.

{¶ 19} The involuntary plaintiffs set forth the following assignment of error for this court's review:

> The trial court erred in finding that the burden of proving the invalidity of a release that releases a trustee from liability to a trust beneficiary is on the beneficiary and not on the trustee.

{¶ 20} We initially note that the trial court decided this matter by summary judgment which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support each element of the stated claims. *Id.* "A plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses." *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, syllabus.

{¶ 21} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular,* 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank,* 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 22} The Zook plaintiffs and involuntary plaintiffs concede on appeal that, as the case is now postured, the underlying substantive claims against Chase for negligence and breach of fiduciary duty are not before the court. The sole issue on appeal is whether the trial court correctly found there remained no genuine issue of material fact on those claims solely because all plaintiff beneficiaries had executed releases barring subsequent claims against Chase for its administration of the trust. Otherwise stated, the only issues for determination here are the validity and preclusive effect of those releases.

{¶ 23} Ohio law provides for two alternative mechanisms by which a trustee may conclude its role as trustee and finally settle all questions of responsibility with respect to the trustee's actions. The first option is a judicial proceeding under R.C. 5802.01 and

2721.05. As an alternative to such judicial proceedings, the trustee may obtain a release from beneficiaries under R.C. 5810.09, 5808.17(C), and 5808.02(B)(4).

{¶ 24} R.C. 5810.09 provides in pertinent part as follows: "A trustee is not liable to a beneficiary for breach of trust if the beneficiary * * * released the trustee from liability for the breach. This section applies regardless of whether the conduct being * * * released * * * constitutes one or more breaches of fiduciary duty, violates one or more provisions of the Revised Code, or is taken without required court approval." Under R.C. 5808.17(C), a release is valid unless it (1) "was induced by improper conduct of the trustee," (2) the beneficiary "did not know of the beneficiary's rights," or (3) the beneficiary "did not know of the material facts relating to the breach" when the beneficiary signed the release.

{¶ 25} The evidence before the trial court consisted of depositions taken from the six individual beneficiaries, trust administration documents, probate documents, and depositions of certain bank employees. In granting summary judgment in favor of Chase, the trial court considered whether the Zook plaintiffs and involuntary plaintiffs had evidence supporting the application of any of the exceptions to invalidating a release. The court first determined that the Zook plaintiffs and involuntary plaintiffs had not shown any improper conduct or overreaching by Chase in obtaining the releases from the beneficiaries. The court noted in part: "We had pretty sophisticated beneficiaries. They're all fairly well educated. They knew about their father's business." (Tr. at 53.) The court also found the second exception inapplicable because the beneficiaries had not presented evidence to establish that they did not know of their rights. The court found that all beneficiaries "knew they were signing a release. They knew that they were releasing all claims against the bank. They may not have consulted counsel, but they could have." (Tr. at 54.)

{¶ 26} The court finally considered the third exception: whether the beneficiaries did not know of the material facts relating to the breach. The court found the knowledge standard under the statute to be "an objective constructive standard." (Tr. at 55.) The court held in pertinent part:

> Facts in the record, undisputed. The Zook children knew about the business. They knew they were signing a release -- at the point that they were asked to sign a release and got notice in 2011, they knew they were beneficiaries to a trust. Whether they knew before or not, again, and whether [Chase]

should have notified them all what was going on before, I tend to agree with Mr. Palmer.

Again, I think [Chase] didn't live up to what it was supposed to do here, but the Zook kids signed a release. I think they had constructive knowledge, at that point, of all the material facts relating to the breach.

You're going to sign a release; the business wasn't listed, and it had been listed before.

When their dad died, they did sign off on the right to go to hearings and those kind of things. A document was produced, a certified copy. They could have found out there was a trust way back when.

I find it hard to believe -- and, again, maybe this is not facts in the record, but I guess -- I find it hard to believe that kids, when they have a stepmom -- or not even a stepmom, but a third wife, and their father dies, lay people -- I mean, this is starting more fights in the law than anything in the entire world, except for drugs and sex, which I deal with in the criminal cases every day.

But money and remarriages, kids are going to go find out. Hey, dad died. I hope he didn't leave everything to her. You know, it's human nature. Let's be real.

At a minimum, they should have gone and checked. They also had the records. I don't think there's any dispute that, at least in the depositions, some of the documents were produced by Jeff Zook.

So they had these records. Whether they knew what they were or not, they had them. They certainly could have said, Hey, wait a minute. We're being asked to sign a release. [Chase] is getting off the hook. We thought dad had a lot more money, and that business had to be worth [a] lot. And we're signing off on this?

Commonsense says that they should have investigated, and they did have the information.

Again, you know, listen, we -- all judges come from a background. We're not free from our own products of where we came from. Nobody will find a judge that doesn't try to protect the little person as much as humanly possible, within

> the confines of the law. But I do believe the release here compels dismissal of this case, and that's the only ground upon which I'm dismissing the case.

(Tr. at 55-57.)

{¶ 27} On appeal, the Zook plaintiffs and involuntary plaintiffs do not contest the trial court's findings that the first two exceptions to a valid R.C. 5808.17(C) release do not apply. They argue under the third exception that, at the time they executed their respective releases, they were unaware of certain material facts concerning Chase's actions as trustee: the failure to comply with the trust terms due to the lack of a management agreement between the trustee and Sharon, the nature of the subsequent devaluation of Zook Advertising under Sharon's management and Chase's stewardship, and the extent of the consequent loss of most of the value of the trust corpus. They then argue that the trial court improperly placed the burden of proof on the Zook plaintiffs and involuntary plaintiffs to establish the invalidity of the releases, and that instead it must be Chase that bears the burden as trustee to establish that the releases are valid.

{¶ 28} Chase maintains on appeal that the trial court correctly placed the burden of proof on the beneficiaries to invalidate the releases. Chase then argues that the trial court correctly concluded there remains no genuine issue of material fact regarding the beneficiaries' knowledge of all pertinent facts regarding the loss of value in trust corpus due to the decline and demise of Zook Advertising. In connection with this knowledge of facts attributed to the beneficiaries, Chase argues that the beneficiaries are charged not only with actual knowledge, but with constructive knowledge of public records, or of material facts that would be ascertainable by reasonable inquiry or through examination of private documents readily available to the beneficiaries.

{¶ 29} The first issue placed before us, therefore, is which party bore the burden of proof with respect to the validity of the releases. The second issue concerns the extent to which the remainder beneficiaries, prior to executing the release presented to them by Chase, knew, should have known, or were held to investigate for themselves the conditions and events occurring during Chase's trusteeship.

{¶ 30} With respect to the burden of proof, we first note that in the summary judgment context this presents a different aspect than it would at trial. It is the essential nature of summary judgment proceedings that the parties merely bear a burden of

production, not a burden of proof. The parties here respectively asserted a valid release on one hand and an exception to the validity on the other. The preponderance of the evidence is not at issue, but merely the quantum of evidence necessary to maintain a genuine issue of material fact regarding the validity of the release. That quantum does not vary with the burden of proof that may be borne in subsequent proceedings before a trier of fact.

{¶ 31} With that caveat, we agree with the trial court that once the trustee presents an executed release, the burden shifts to the beneficiaries to demonstrate that an R.C. 5808.17(C) exception applies to invalidate the release. The only Ohio authority on point, the case of *Cundall v. U.S. Bank, N.A.*, 174 Ohio App.3d 421, 2007-Ohio-7067 (1st Dist.), *rev'd on other grounds*, 122 Ohio St.3d 188, 2009-Ohio-2523, seems to hold otherwise and place the burden on the trustee to establish both the existence of a release and the validity thereof, but for several reasons we find *Cundall* neither controlling nor persuasive.

{¶ 32} *Cundall* involved self-dealing by a trustee and beneficiary who allegedly coerced other beneficiaries to sell him their shares in a closely held corporation for a low price. The plaintiff beneficiaries alleged that this deprived them of the full benefit of the later sale of the business by the trustee to a third party for a much higher price. The trial court granted judgment on the pleadings in favor of the trustee's estate, in part because the plaintiff beneficiaries had executed releases in favor of the trustee. The First District reversed on this and other issues, holding that the high duty of loyalty owed by a fiduciary meant that the trustee bore the burden of proving that he acted "solely in the [beneficiaries'] best interests concerning both the signing of the releases and the sales of * * * stock." *Id*. at ¶ 30. The court further posited, under the prominent heading "Releases Are Highly Suspect," that "documents that purport to release a fiduciary from liability concerning a transaction * * * where the fiduciary has gained some benefit, are highly suspect." *Id*. at ¶ 34.

{¶ 33} The first reason to approach the First District's opinion in *Cundall* with some caution, obviously, is that the pertinent rulings in the case, while not explicitly reversed, were rendered inoperative after further appeal. The Supreme Court of Ohio chose to reinstate the judgment of the trial court on the sole basis that the complaint fell

outside the statute of limitations, reversing the court of appeals' determination on that issue only. While the Supreme Court decision did not expressly pass on the validity of the releases, neither did it reflect any approval of the First District's decision on this point.

{¶ 34} Second, the First District's opinion itself expressly notes that the operative facts of *Cundall* pre-date enactment of the statutes governing releases in our case, and the current law may not apply: "[E]ven though the new Ohio Trust Code mandates that a trustee is not liable for breach of trust if the beneficiary has consented to the conduct, [R.C. 5810.09], that provision does not apply if the consent is procured by improper conduct of the trustee, a fact that [the plaintiff] alleged. Furthermore, the transaction in question took place in 1984, long before the 2007 Ohio Trust Code was enacted." *Id*. at ¶ 29.

{¶ 35} Third, because Cundall was a self-dealing case alleging fraud by the trustee, the discussion on any given point, including validity of the releases, is interwoven with references to the trustee's self-dealing as an aggravating factor undermining the releases:

> " '[Any] acquisition of the shares of the beneficiaries by one of the fiduciaries must be dealt with as presumptively void unless affirmative proof is made by the fiduciaries that their dealings with each beneficiary was in every instance aboveboard and fully informative. The fiduciaries in such circumstances have the obligation to show affirmatively not only that they acted in good faith but that they volunteered to the beneficiaries every bit of information which personal inquiry by the beneficiaries would have disclosed.' If the *releases and stock sales* are to be proved valid in this case, the burden is on the fiduciaries to show that they acted with the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries, placed the beneficiaries' interests before their own, did not use the advantage of their trustee positions to gain any benefit at the beneficiaries' expense, and did not place themselves in a position in which their interests might have conflicted with their fiduciary obligations."

(Emphasis added.) *Id*. at ¶ 37-38, quoting *Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416-17 (N.Y.App.1986), quoting *In re Rees' Estate*, 72 N.Y.S.2d 598, 599 (N.Y.Surr.Ct.1947). This determination to conflate the execution of the release as part and parcel of the underlying self-dealing fraud in *Cundall* makes it difficult to determine whether the same standard would apply in cases not involving alleged fraud by the trustee.

{¶ 36} Fourth and finally, we consider that *Cundall*'s expressed aversion to releases in fiduciary cases simply does not comport with the manifest intent of the legislature to allow such releases as a means of terminating a trust. R.C. 5810.09, 5808.17(C), and 5808.02(B)(4) all contemplate the use of releases as routine in trust matters. Releases, perhaps, should remain highly scrutinized in self-dealing cases like *Cundall*, but we do not have such a case before us. On the facts here, we conclude that once the beneficiaries admit that they executed a release, the burden shifts to the party seeking to invalidate it.

{¶ 37} We now consider whether the beneficiaries presented evidence to create a genuine issue of material fact regarding their lack of knowledge of material facts relating to the alleged breach of fiduciary duty by Chase.

{¶ 38} R.C. 5801.03(A) provides a general definition regarding "knowledge" with respect to trust matters, and states as follows:

> Subject to division (B) of this section, a person has knowledge of a fact if any of the following apply:
>
> (1) The person has actual knowledge of the fact.
>
> (2) The person has received notice or notification of the fact.
>
> (3) From all the facts and circumstances known to the person at the time in question, the person has reason to know the fact.

{¶ 39} Chase asserts, and the trial court agreed, that when assessing the validity of a release executed under R.C. 5810.09(C), all beneficiaries must be charged with constructive knowledge of not only matters of which they have actual knowledge, but facts that they would have "reason to know," R.C. 5801.03(A)(1), from the perspective of an objective, reasonable person, including all matters that are of public record.

{¶ 40} We find that the applicable standard, and the law clearly does not limit "knowledge" to "actual knowledge." Admittedly, in Ohio, a trustee has a high legal duty to act solely in the interest of the beneficiaries, "and the duty to exercise reasonable care and skill in administering the trust and preserving trust property." *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, ¶ 28. This includes a duty to keep the beneficiaries informed. R.C. 5808.13. In the present case, however, while the Zook

plaintiffs argue that Chase did not inform them of material facts that would give them the required knowledge of an alleged breach of the above standard, the Zook plaintiffs do not allege that Chase hid or refused to provide any requested information. *Schwab v. Huntington Natl. Bank*, 516 Fed.Appx. 545 (6th Cir.2013).

{¶ 41} Constructive knowledge may be imputed from matters freely available in the public record. *See generally Lawyers Title Ins. Corp. v. MHD Corp*., 6th Dist. No. E-10-007, 2010-Ohio-5174, ¶ 25. Charging beneficiaries with knowledge of publicly available information or information obtained through minimum investigation prevents them from "bury[ing] their head in the sand" with matters affecting an inheritance or expectancy. *Gracetech Inc. v. Perez*, 8th Dist. No. 96913, 2012-Ohio-700, ¶ 16, fn. 3; *see also Thompson v. Butler*, 2d Dist. No. 25408, 2013-Ohio-1075, ¶ 18.

{¶ 42} We first note that the deposition evidence indicates varying degrees of specific information known or available to certain Zook plaintiffs. Jeffrey and Kimberly acknowledged in their depositions that they specifically knew at the time of John Zook Sr.'s death that Zook Advertising became an asset of the trust. Karla learned this sometime later, when she examined a copy of the will out of curiosity. After Sharon's death, Cynthia, Karla, and Kimberly had full access to all records relating to the company, which were stored in boxes in Sharon's vacant home as they prepared it for sale. We do not consider these additional facts known only to some beneficiaries because there is no reason to impute to all Zook beneficiaries knowledge held by only some. The trial court did not consider the beneficiaries individually with regard to the degree of their knowledge of facts regarding the alleged breach by Chase. We therefore consider only the facts actually known or imputable to all Zook plaintiffs.

{¶ 43} Under this standard, the evidence on summary judgment was uncontroverted that the probate of John Zook Sr.'s will was a matter of public record, disclosing that the total value of the estate was $1.47 million, and that the single largest asset was Zook Advertising, inventoried at more than $1 million. At the time John Zook Sr. passed away, his five children received, or waived the right to receive, notice of the probate proceedings. The will expressly referenced the trust, which would include Zook Advertising. All of the Zook plaintiffs knew, at least in a general sense, that Zook Advertising had thereafter failed and was closed. After Sharon's death, the Zook plaintiffs

received periodic trust statements indicating that the company was not a trust asset. At the time the Zook plaintiffs executed their respective releases in favor of Chase, none sought additional information regarding the estate, trust, or Zook Advertising. We agree with the trial court that this evidence establishes constructive knowledge on the part of all Zook plaintiffs regarding the facts concerning the alleged breach of fiduciary duty. There remains no genuine issue of material fact to support the Zook plaintiffs' attempt to invalidate their releases under R.C. 5808.17(C). The sole assignment of error of the Zook plaintiffs is overruled.

{¶ 44} With respect to the involuntary plaintiffs, Chase argues that the involuntary plaintiffs did not contest Chase's earlier motion for judgment on the pleadings and have judicially admitted the validity of the releases; Chase fails to cite any authority for this proposition. To the contrary, this court has stated that a judicial admission must be a distinct and unequivocal statement: " 'A judicial admission is a distinct and unequivocal statement, made by a party or a party's counsel during a judicial proceeding, which acts as a substitute for evidence at trial.' " *Benchmark Contrs., Inc. v. Southgate Mgt. LLC*, 10th Dist. No. 13AP-390, 2014-Ohio-1254, ¶ 46, quoting *In re Regency Village Certificate of Need Application*, 10th Dist. No. 11AP-41, 2011-Ohio-5059, ¶ 32, citing *Haney v. Law*, 1st Dist. No. C-070313, 2008-Ohio-1843, ¶ 7.

{¶ 45} Nonetheless, the involuntary plaintiffs executed the releases and bear the burden of invalidating them under one of the grounds set forth in R.C. 5810.09. To avoid summary judgment, the involuntary plaintiffs bore the corresponding burden of production of evidence that would create a genuine issue of material fact regarding the validity of the releases. The involuntary plaintiffs did not submit or point to such evidence in their memorandum opposing summary judgment, limiting their argument to the assertion that "Defendant has failed to present evidence to establish that OhioHealth or CMA knew that Zook Advertising was an asset of the trust." (May 22, 2015 Memo Contra, at 6.)

{¶ 46} While nothing in the record indicates that the involuntary plaintiffs knew of the existence of Zook Advertising, let alone the circumstances under which the business failed and Chase's alleged failure to act in accordance with its fiduciary duties, the record is equally devoid of evidence that the involuntary plaintiffs lacked such knowledge

regarding the alleged breach. The involuntary plaintiffs have therefore failed to present evidence establishing that their remains a genuine issue of material fact regarding the validity of their releases, and their assignment of error is overruled.

{¶ 47} In summary, the assignment of error of the Zook plaintiffs is overruled and the assignment of error of the involuntary plaintiffs is overruled. The judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of Chase as to the claims brought by the Zook plaintiffs and involuntary plaintiffs is affirmed. The matter is remanded to that court for disposition of the remaining claims in the case.

Judgment affirmed and cause remanded.

KLATT and BRUNNER, JJ., concur.

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